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DIVISION II COURT OF APPEALS

STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT	NO. 44886-6-II
V	APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS
DENNIS DARREL DEPOE, APPELLANT	

I. IDENTITY OF PARTIES

COMES NOW, APPELLANT, DENNIS DARREL DEPOE AND FILES THIS STATEMENT OF ADDITIONAL GROUNDS PURSUANT TO RAP 10.10

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II. Additional Grounds

A. Ground One

The trial court erred when it failed to dismiss Mr. Depoe's case for lack of subject-matter jurisdiction.

B. Ground Two

The trial court erred when it failed to dismiss Mr. Depoe's charge of Driving Under the Influence (DUI) and related charges for insufficiency of the evidence.

C. Ground Three

Mr. Depoe challenges RCW 37.12.010 - State Jurisdiction in Indian Country as overbroad and unconstitutionally vague as applied to this case.

D. Ground Four

Mr. Depoe challenges RCW 46.61.502 Driving Under The Influence as overbroad and unconstitutionally vague as applied to Mr. Depoe's case.

E. Ground Five

Ineffective Assistance of Trial Counsel

III. Issues Related to Additional Grounds

1) Where an Indian, recognized by his registration to a federally recognized tribe in the State of Washington, is arrested by Tribal Police on Indian land and prosecuted by the State of Washington pursuant to one of the exceptions under RCW 37.12.010:

A. Does the status and characteristics of the land prior to its acquisition by an Indian trust remain intact after acquisition by the trust? In other words, does a 'State Road', if it ever was a 'State Road', before it became Indian trust land, retain its status and/or characteristics as a 'Road' after the trust acquires it, develops it and maintains it, even where NO State agency maintains it, and it has all the characteristics of 'Private Property' altered, maintained and managed as such?

B. Should Tribal Police and the Tribal Court have retained jurisdiction once Mr. Depoe's identity and status as a registered member of an Indian tribe was discovered

C. NOTWITHSTANDING MR. DEPOE'S CLAIM OF INSUFFICIENCY OF THE EVIDENCE, IF A 'ROAD', 'PATH', 'ALLEY', 'EASEMENT', 'DRIVEWAY', ETC..., DOES NOT EXCEED THE BOUNDARIES OF TRIBAL TRUST LAND, DOES IT CONSTITUTE A 'PUBLIC ROAD' EVEN WHERE GENERAL MEMBERS OF THE PUBLIC UTILIZE IT TO PATRONIZE A TRIBAL BUSINESS, AND WHERE THAT BUSINESS CAN AND DOES BAN CERTAIN MEMBERS OF THE PUBLIC FROM ALL POINTS WITHIN THOSE BOUNDARIES?

2) SHOULD THE TRIAL COURT HAVE DISMISSED MR. DEPOE'S CASE FOR INSUFFICIENCY OF THE EVIDENCE WHERE:

A. MR. DEPOE WAS NEVER IDENTIFIED BY ANYONE WITH FIRST HAND KNOWLEDGE OF BEING BEHIND THE WHEEL OF OR IN CONTROL OF THE SUBJECT VEHICLE IN THIS CASE WITH OR WITHOUT HIS MEETING THE STATE ESTABLISHED SCIENTIFIC THRESHOLD OF .08 B.A.C. WHICH WAS NEVER ESTABLISHED.

B. TIME-LINES OF ANY SURVIELLANCE VIDEO INTRODUCED AT TRIAL WERE NEVER CERTIFIED AS ACCURATE OR CALIBRATED.

C. AMOUNT OF ALCOHOL ALLEGEDLY CONSUMED BY MR. DEPOE WAS NEVER ASCERTAINED BY ANYONE OR INTRODUCED AT TRIAL.

D. THE I-5 EMERALD QUEEN CASINO SURVIELLANCE VIDEO INTRODUCED AT TRIAL WAS INADMISSABLE AS A MATTER OF LAW

E. THE ONLY PLACE MR. DEROIE WAS ASSUMED TO HAVE BEEN IN CONTROL OR CONTROLLING THE SUBJECT VEHICLE WAS IN THE BONA FIDE PARKING LOT

3) IS RCW 37.12.010 OVERBROAD AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE WHEN:

A. IT ALLOWS THE STATE TO CLASSIFY ROADS SPECIFICALLY SITUATED ON INDIAN TRUST LAND FOR PRIVATE USE AS A "PUBLIC ROAD" TO ASSERT JURISDICTION EVEN WHEN THE ROAD IN QUESTION IS CLEARLY USED FOR INGRESS AND EGRESS TO, AND WHOLLY WITHIN, THE BOUNDARIES CONSTITUTING PARKING ACCESS

B. WHERE THE STATE IS ALLOWED TO ASSERT JURISDICTION ON THAT BASIS.

4) IS RCW 46.61.502 - DRIVING UNDER THE INFLUENCE, OVERBROAD AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE WHERE:

A. THE LEGISLATURE HAS ESTABLISHED A SCIENTIFIC DETERMINATION, THAT IS, BREATH OR BLOOD ALCOHOL CONTENT (BAC) OF .08 OR HIGHER IN ORDER TO ESTABLISH THAT A PERSON, WHO HAS CONSUMED ALCOHOL AND DRIVING A MOTOR VEHICLE IS DRIVING UNDER THE INFLUENCE AND NO SUCH DATA IS AVAILABLE WHERE STATE AND TRIBAL JURISDICTION IS IN DISPUTE

B. THE PERSON ALLEGED TO HAVE BEEN DUI WAS CONTACTED BY LAW ENFORCEMENT WHILE NOT IN CONTROL OF SUBJECT VEHICLE

C. THE SUBJECT VEHICLE WAS SAFELY IN A PARKING STALL WHEN LAW ENFORCEMENT CONTACT WITH MR. DEROR OCCURED

D. THE EVENT OCCURED ON PRIVATE PROPERTY

E. THE EVENT OCCURED WHOLLY WITHIN INDIAN TRIBAL TRUST LAND AND FACTS ABOUT HOW, WHEN AND WHERE PARTICULAR EVENTS OCCURED REMAIN IN DISPUTE

5) WAS MR. DEROR'S TRIAL COUNSEL INEFFECTIVE IN HIS REPRESENTATION WHEN:

A. WHEN COUNSEL FAILED TO ASSERT THE "TWO-HOUR" RULE AND REQUEST THE SAME JURY INSTRUCTION

B. WHEN COUNSEL FAILED TO REQUEST THE JURY INSTRUCTION FOR THE LESSER-INCLUDED OFFENSE OF

- PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE - RCW 46.61.564

IV. STATEMENT OF THE CASE

MR. DEPOE WAS CHARGED WITH ONE COUNT OF FELONY DUI, ONE COUNT OF DRIVING WHILE LICENSE SUSPENDED IN THE FIRST DEGREE, ONE COUNT OF DRIVING WITHOUT IGNITION INTERLOCK DEVICE AND ONE COUNT OF MAKING FALSE STATEMENT TO A PUBLIC SERVANT.

AFTER A TRIAL BY JURY HE WAS FOUND GUILTY AND CONVICTED ON ALL COUNTS

PRIOR TO AND THROUGHOUT TRIAL, DEFENSE COUNSEL MAINTAINED THAT THE TRIAL COURT SHOULD HAVE REFUSED JURISDICTION AND DISMISSED THE CASE.

ADDITIONALLY, THE TRIAL COURT SHOULD HAVE DISMISSED THE DUI ~~BASED ON~~ AND THE RELATED CHARGES BASED ON INSUFFICIENCY OF THE EVIDENCE.

DEFENDANT'S MOTION AND HEARING FOR LACK OF JURISDICTION

THE DEFENSE ASSERTED THAT THE STATE LACKED JURISDICTION TO PROSECUTE BECAUSE THIS CASE DOES NOT INVOLVE OPERATION OF A MOTOR

VEHICLE UPON THE PUBLIC STREETS, ALLEYS, ROADS, HIGHWAYS, THE DEFENDANT IS AN ENROLLED TRIBAL MEMBER, AND THE SITUS OF THE ALLEGED OFFENSE IS TRIBAL TRUST LAND.

THE ENTIRE INCIDENT RELATED TO MR. DEPOE'S CHARGES OCCURED WHOLLY WITHIN THE BOUNDARIES OF TRIBAL TRUST LAND. (SEE EXHIBIT 1-4) MR. DEPOE IS A REGISTERED MEMBER OF A FEDERALLY RECOGNIZED TRIBE AND IS THEREFORE AN INDIAN. RP(4-16-2013) 9-10

THE STATE WAS THEN REQUIRED AS A MATTER OF LAW TO ESTABLISH JURISDICTION. RP(4-16-2013) 11 AT 10-14 THE STATE TURNED TO OFFICER RYAN SALES OF THE PUYALLUP TRIBE OF INDIANS, POLICE DEPARTMENT IN AN EFFORT TO ESTABLISH JURISDICTION. RP(4-16-2013) 12. OFFICER SALES' TESTIMONY CONFIRMED THAT HIS ENTIRE INTERACTION WITH MR. DEPOE TOOK PLACE IN THE PARKING LOT ON TRIBAL TRUST LAND. RP(4-16-2013) 41

THE CRUX OF THE STATE'S ARGUMENT WAS THAT MR. DEPOE WAS SEEN IN A VIDEO "DRIVING" ON "PUBLIC STREET" PRIOR TO ANY CONTACT WITH LAW ENFORCEMENT AND THE "PUBLIC STREET IN QUESTION WAS NAMED 'SALES STREET' RP(4-16-2013) 22.

HOWEVER, THERE WAS SOME DISCREPANCY AROUND THE ACTUAL NAME OF THE "STREET" IN

QUESTION. IT WAS APPARENTLY REFERENCED BY SEVERAL DIFFERENT NAMES I.E. SALES, SALI, EAST BAY, ETC... RP (4-16-2013) 57 AT 8-11

FINALLY, THE TRIAL COURT'S DECISION TO RETAIN JURISDICTION WAS PREDICATED ON TWO FACTS: (1) SALI STREET EXISTED PRIOR TO THE CASINO AND PARKING LOT BEING CONSTRUCTED ON THE SITE; AND (2) SALI STREET IS AN OPEN THOROUGHFARE THAT CONNECTS EAST 29TH AND EAST 32ND" RP (4-17-2013) 22

THESE FACTS ARE DISPUTED IN THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW (FFC 5-10-2013) 3

ADDITIONALLY, THE DEFENSE INQUIRED OF THE COURT:

MR. CLARK: [I]S THE COURT MAKING A FINDING THAT THE ROAD IS PUBLICLY MAINTAINED?

THE COURT: I'M MAKING A FINDING THAT IT FALLS WITHIN THE PURVIEW OF THE STATUTE.

RP (4-17-2013) 23 AT 17-20

PRIOR TO COMMENCEMENT OF THE TRIAL, THE COURT HELD A 3.5 HEARING TO DETERMINE ADMISSIBILITY OF MR. DEPOE'S STATEMENTS.

IMMEDIATELY PRECEDING THAT HEARING, THE DEFENSE RENEWED ITS MOTION FOR A CONTINUANCE IN ORDER TO SUPPLEMENT THE

RECORD WITH THE B.I.A. [BUREAU OF INDIAN AFFAIRS] ROAD REPORT IN SUPPORT OF THE STREET IN QUESTION NOT BEING A "PUBLIC ROAD" OR A "ROAD" AT ALL. RP (4-18-2013) 6-7; AND ASKING THE COURT TO RECONSIDER JURISDICTION:

THE COURT: OKAY. BUT JUDGE LEE HAS RULED ON THIS; IS THAT CORRECT?

MR. CLARK: I UNDERSTAND.

THE COURT: I DON'T GET TO OVERTURN HER DECISIONS. I'M NOT THE APPELLATE JUDGE. I HAVE NO AUTHORITY TO CHANGE HER DECISION.

RP (4-18-2013) 7 AT 18

THEREAFTER, DURING THE 3.5 HEARING AND THE STATE'S DIRECT EXAMINATION THE FOLLOWING EXCHANGE TOOK PLACE WITH STATE'S WITNESS OFFICER SCRIVNER:

A. HE TOLD ME THAT HE WAS A MEMBER OF THE SIOUX SWADDLE TRIBE.

Q. DID THAT AFFECT YOUR INVESTIGATION AT THAT POINT?

A. IF I COULD CONFIRM THAT HE WAS AN ENROLLED MEMBER OF A FEDERALLY RECOGNIZED NATIVE AMERICAN TRIBE, THEN HE WOULD HAVE COME UNDER THE JURISDICTION OF THE PUYALLUP TRIBAL COURT.
RP (4-18-2013) 41

TRIAL COMMENCED AFTER THAT AND DURING TRIAL BOTH WITNESS OFFICERS, SALES AND SCRIVNER, CONFIRMED THAT THIER FIRST, ONLY AND CONTINUING CONTACT WITH MR. DEPOE OCCURED IN THE PARKING LOT WITH MR. DEPOE WALKING AWAY FROM THE SUBJECT VEHICLE IN QUESTION. OFFICER SALES FIRST CONTACT ORDERED MR. DEPOE TO RETURN TO HIM, WHICH HE DID. RP (4-23-2013) 97-98

THE ENTIRE INCIDENT INVESTIGATION AND INTERACTION WITH MR. DEPOE TOOK PLACE WHILE MR. DEPOE WAS LOCATED IN A PARKING SPACE, IN THE PARKING LOT OF THE I-5 EMERALD QUEEN CASINO.

V. SUMMARY OF THE ARGUMENT

THE STATE DID NOT HAVE JURISDICTION TO PROSECUTE MR. DEPOE FOR DRIVING UNDER THE INFLUENCE (DUI) AND ALL CHARGES STEMMING

FROM IT BECAUSE MR. DEPOE IS AN ENROLLED MEMBER OF THE SAUK-SUIATTLE INDIAN TRIBE, A FEDERALLY RECOGNIZED NATIVE AMERICAN TRIBE AND THE INCIDENT OCCURED ON PRIVATE PROPERTY WHOLLY WITHIN THE BOUNDARIES OF TRIBAL TRUST LAND.

FURTHERMORE, THE JURISDICTIONAL CHALLENGE NOTWITHSTANDING, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF DUI BASED ON INTER ALIA, THE VIDEO INTRODUCED BY THE STATE WAS INADMISSIBLE AS A MATTER OF LAW; EVEN ASSUMING ARGUENDO THE VIDEO WAS ADMISSIBLE, THE FLAWS RELATED TO ITS USE WERE MORE PREJUDICIAL THAN ITS PROBATIVE VALUE TO MR. DEPOE'S CASE; CORPUS DELECTI CHALLENGE, NO WITNESS WHO TESTIFIED AT TRIAL HAD ANY PERSONAL KNOWLEDGE THAT MR. DEPOE DROVE, THE VEHICLE MR. DEPOE PURPORTEDLY DROVE WAS NOT REGISTERED TO HIM, THE KEYS WERE NOT IN THE IGNITION OF THE SUBJECT VEHICLE AND THE ENTIRE INCIDENT OCCURED ON "PRIVATE PROPERTY" AND TRIBAL TRUST LAND.

FINALLY, IF MR. DEPOE'S JURISDICTIONAL ARGUMENT FAILS, HE CHALLENGE RCW 37.12.010 AND RCW 46.61.502 AS OVERBROAD AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE.

VI. ARGUMENT

JURISDICTION

A. THIS INCIDENT OCCURED WHOLLY ON AND WITHIN THE BOUNDARIES OF TRIBAL TRUST LAND. MR. DEPOE IS A REGISTERED MEMBER OF THE SAUK-SUIATTLE TRIBE OF INDIANS AND THEREFORE AN INDIAN. THUS THE STATE LACKED SUBJECT-MATTER JURISDICTION TO PROSECUTE HIM.

1) STANDARD OF REVIEW

JURISDICTION IS A QUESTION OF LAW REVIEWED DE NOVO. STATE V DANIELS, 104 WN APP. 271, 275 (2001) CITING STATE V SQUALLY, 132 WN 2d 333, 340 (1997); RCW 9A.04.030

THE ACTS OCCURRING THAT COMPRISE THIS ENTIRE CASE ON WHICH MR. DEPOE WAS PROSECUTED AND SUBSEQUENTLY CONVICTED, OCCURRED WHOLLY ON AND WITHIN THE BOUNDARIES OF THE I-5 EMERALD QUEEN CASINO, OWNED AND OPERATED BY THE PUYALLUP TRIBE OF INDIANS, WHICH ADDRESS IS 2204 EAST 29TH STREET, TACOMA, WA 98404, AND SPECIFICALLY THE PARKING LOT AND EASEMENTS THEREIN. THE ADDRESS IS NOT 1234 SALES STREET, OR 1234 SALI STREET OR 1234 EAST BAY STREET OR ANY OTHER MONIKER ONE MIGHT ATTACH TO IT.

MOREOVER, THERE IS A VALET STAND SPECIFICALLY SITUATED ON THE 'STREET' IN QUESTION RP(4-23-2013) 169 AT 15 AND ESTABLISHES ITS DUAL-USE AS BOTH A FULL AND SELF-SERVICE PARKING LOT. (EXHIBIT 1-4)

THE STATE ASSERTED THAT MR. DEPOE WAS PURPORTED TO HAVE DRIVEN ON THE ROAD PASSING DIRECTLY IN FRONT OF THE ENTRANCES TO THE CASINO, SUBSEQUENTLY FOUND A PARKING SPACE, JUMPED THE PARKING BARRIER AND MADE CONTACT WITH THE FENCE ALL WHILE UNDER THE INFLUENCE OF ALCOHOL.

EVEN ASSUMING ARGUENDO THAT THE FACTS ARE CORRECT, THE BOUNDARIES WHERE THE EVENT OCCURRED ARE WHOLLY WITHIN TRIBAL TRUST LAND AND HAVE ALL OF THE CHARACTERISTICS OF PRIVATE PROPERTY, NAMELY A "PARKING LOT" THAT IS OPEN TO THE PUBLIC PATRONS OF THE ESTABLISHMENT.

A PARKING LOT BY ITS DEFINITION IS NOT A "PUBLIC STREET", "ALLEY", "ROAD" OR "HIGHWAY" AS REQUIRED UNDER RCW 37.12.010 TO GIVE THE STATE JURISDICTION. ADDITIONALLY, ACCESS POINTS INTO AND OUT OF THE PARKING LOT DO NOT QUALIFY AS A PUBLIC STREET, ALLEY, ROAD OR HIGHWAY UNDER THE STATUTE.

"A PRIVATELY OWNED PAVED PARKING LOT ON A MAJOR INTERSECTION WITH EASY ACCESS TO BOTH ADJOINING STREETS IS WITHIN THE DEFINITION OF 'WAY OPEN TO THE PUBLIC.'" CITY OF SEATTLE V TOLLIVER, 31 WN APP. 299, 302 (1982) "[A]NY PARKING LOT WITHOUT VALET PARKING COULD BE CONSTRUED AS A SELF-SERVICE OPERATION..." IWAI V STATE, 129 WN 2d 84, 100 (1996)

THE EMERALD QUEEN CASINO PARKING LOT WHICH HAS BOTH A VALET STAND AND AN ACCESS ROAD THAT CONNECTS ADJOINING STREETS MEETS THE CHARACTERISTICS OF A PARKING LOT AND "WAY OPEN TO THE PUBLIC" BUT IS NOT STATE OWNED, OPERATED OR MAINTAINED TO NEGATE TRIBAL JURISDICTION.

"IN ESSENCE, BUDGET'S ADMINISTRATIVE LOT IS NO DIFFERENT FROM THE PARKING LOTS OF THOUSANDS OF OTHER WASHINGTON BUSINESSES." KIM V BUDGET RENT A CAR SYSTEMS, INC., 143 WN 2d 190, 198. LIKEWISE, AS IN THE INSTANT CASE, NEITHER IS THE EMERALD QUEEN CASINO'S PARKING LOT.

"WE THINK IT IS TRUE THAT THE HIGHWAY DID NOT CEASE TO BE SUCH IN THE SENSE THAT THE PUBLIC EASEMENT WAS EXTINGUISHED OR THAT IT WAS ABANDONED BY THE PUBLIC OR THE

MUNICIPALITY OR THE COUNTY OR STATE LOST OR SURRENDERED JURISDICTION OVER IT. IF A CRIME PENALIZED BY STATUTE OR ORDINANCE HAD BEEN COMMITTED IN THE ENCLOSED AREA, THE STATE OR CITY STILL HAD THE RIGHT TO TRY AND PUNISH THE OFFENDER." BENNET V CITY OF SEATTLE, 22 WN 2d 455, 458 (1945)

IN CONTRAST, IN THE INSTANT CASE, THE WHOLE OF THE ENTIRE PLATT OF LAND THAT IS THE I-5 EMERALD QUEEN CASINO IS TRIBAL TRUST LAND. NO STATE, CITY, COUNTY OR PUBLIC AGENCY OWNS OR MAINTAINS ANY PORTION OF IT EITHER TEMPORARILY OR PERMANENTLY. ALL RIGHTS AND JURISDICTION EXTEND WHOLLY TO THE B.I.A. AND THE PUYALLUP TRIBE OF INDIANS.

"THE ROADWAYS ON McCLELLAN AIR FORCE BASE ARE WAYS OR PLACES USED FOR PURPOSES OF VEHICULAR TRAVEL. THEY ARE PUBLICLY MAINTAINED, BEING MAINTAINED BY THE SOLE SOVEREIGN WHICH HAS JURISDICTION OVER THE AREA, NAMELY, THE UNITED STATES. THEY ARE OPEN TO THE PUBLIC, SUBJECT ONLY TO REASONABLE RESTRICTIONS AND REGULATIONS. CERTAIN MEMBERS OF THE GENERAL ~~PUBLIC~~ BODY OF THE PEOPLE OF THE STATE OF CALIFORNIA, WHO HAVE NO BUSINESS UPON THE BASE MAY BARRED FROM USING THE ROADWAYS IN THE

INDUSTRIAL PORTION OF THE BASE." US v KILIZ, 694 F. 2d 628, 630-31 CITING UNITED STATES v BARNER, 195 F. SUPP. 103 (N.D. CAL. 1961).

AS IN THE INSTANT CASE THE PUYALLUP TRIBE OF INDIANS AND THE BIA HAVE SOLE SOVEREIGN OVER THE WHOLE OF THE TRIBAL TRUST LAND, TRUST TRACT 115-T 1035 AND THEY CAN AT ANY TIME RESTRICT ITS USE TO MEMBERS OF THE PUBLIC. HOWEVER, THE TRIAL COURT FOUND THAT EQC IMPOSED RESTRICTIONS UPON THE PUBLIC, NAMELY 'TRESPASSED' PERSONS AND TRUCK PARKING IRRELEVANT TO THE ISSUE.

NIETHER IS THE "ROAD" OR "EASEMENT" IN QUESTION MAINTAINED AS A "PUBLIC ROAD" BY THE STATE NOR LISTED AS AN OFFICIAL ROAD BY THE BIA UNDER ITS ROAD INVENTORY PROGRAM.

THUS, THE STATE OF WASHINGTON LACKED JURISDICTION TO PROSECUTE MR. DEPOE.

B. EVIDENCE WAS INSUFFICIENT TO PROSECUTE MR. DEPOE FOR DUI AND ALL CHARGES STEMMING FROM THE INCIDENT

THE STATE'S LACK OF JURISDICTION NOTWITHSTANDING, THE EVIDENCE PRESENTED

BY THE STATE WAS INSUFFICIENT TO ESTABLISH THAT MR. DEPOE, AMONG OTHER THINGS WAS DRIVING.

MR. DEPOE CHALLENGES THE CORPUS DELECTI OF THE DUI AND THE ADMISSIBILITY OF THE EMERALD QUEEN SURVEILLANCE VIDEO UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AS DETERMINATIVE OF: (1) HIS BEING THE PERSON IN CONTROL OF OR DRIVING THE VEHICLE AT ISSUE; (2) ASSUMING ARGUENDO, HIM BEING UNDER THE INFLUENCE OF ALCOHOL WHILE IN CONTROL OF THE VEHICLE AT ISSUE; (3) THE TIME STAMP ON SAID VIDEO BEING CERTIFIED CALIBRATED AND ACCURATE; AND (4) THE VEHICLE AT ISSUE BEING DRIVEN ON ANY PUBLIC STREET, ALLEY, ROAD OR HIGHWAY AS DESIGNATED BY STATUTE BY MR. DEPOE.

ESSENTIALLY, THE STATE DID NOT PRODUCE ANY EVIDENCE AT TRIAL THAT WOULD ESTABLISH FIRST-HAND KNOWLEDGE THAT MR. DEPOE DID ANY ACT CONSISTENT WITH DUI.

OFFICER SALES MADE FIRST CONTACT WITH MR. DEPOE ORDERING HIM TO RETURN TO THE AREA INDICATING THAT MR. DEPOE WAS NOT FREE TO LEAVE. OFFICER SCRIVNER WAS THE SECONDARY OFFICER ON SCENE AND THE LEAD DUI INVESTIGATOR. THE DUI INVESTIGATION OCCURED AT THE PARKING STALL.

OFFICER SCRIVNER TESTIFIED THAT HE HAD "APPROXIMATELY 500 OR MORE DUI ARRESTS." RP (4-23-2013) 145 AT 12 YET, THROUGHOUT THE REST OF HIS TESTIMONY HIS OBSERVATIONS AND RECORDINGS DO NOT REFLECT MR. DEROE'S ACTIONS AS CONSISTENT WITH SOMEONE OVERLY IMPAIRED. RP (4-23-2013) 143-202 AND CERTAINLY DO NOT MEET THE THRESHOLD FOR ESTABLISHING DUI.

"PROOF THAT A CAR RAN OFF THE ROAD, CAUSED AN ACCIDENT OR STOPPED IN A TRAVELING LANE DOES NOT ESTABLISH THAT AN ELEMENT OF THE OFFENSE WAS COMMITTED. LIKEWISE, PROOF THAT SOMEONE WAS INTOXICATED DOES NOT PROVE THAT THE PERSON DROVE OR WAS IN CONTROL OF THE CAR. INHERENT IN THE OFFENSE IS THE REQUIREMENT THAT THE INTOXICATED PERSON WAS THE DRIVER OR WAS IN CONTROL." CITY OF BREMERTON V CORBETT, 106 WN 2d 569, 574 (1986) CITING STATE V HAMRICK, 19 WASH. APP. 417, 419 (1978)

"TO BE GUILTY OF DRIVING WHILE INTOXICATED, A DRIVER MUST BE IN PHYSICAL CONTROL AND ALSO MUST HAVE HAD THE VEHICLE IN MOTION AT THE TIME IN QUESTION." STATE V BECK, 42 WN APP. 805 (1985)

MOREOVER, NOTWITHSTANDING THE INADMISSIBILITY OF THE STATE'S VIDEO EXHIBIT PURSUANT TO THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, THE STATE'S WITNESS, MARTIN HUGHES WAS NOT THE INDIVIDUAL THAT OPERATED THE EQC SURVEILLANCE SYSTEM ON THE NIGHT IN QUESTION, WAS NOT THE INDIVIDUAL WHO PRODUCED THE VIDEO FOR THE POLICE NOR DID THE STATE PROVIDE ANY GOVERNING STATUTES OR SCIENTIFIC CERTIFICATION THAT THE TIME STAMP ON THE VIDEO FOOTAGE WAS CALIBRATED OR ACCURATE. TIME OF DRIVING, IF ALCOHOL IS INVOLVED, IS CRITICAL TO DETERMINE WHEN AND IF SOMEONE WAS INTOXICATED BEYOND THE STATUTORY LIMITS WHILE OPERATING A MOTOR VEHICLE.

"THE CENTRAL CONCERN OF THE CONFRONTATION CLAUSE IS TO ENSURE THE RELIABILITY OF THE EVIDENCE AGAINST A CRIMINAL DEFENDANT BY SUBJECTING IT TO RIGOROUS TESTING IN THE CONTEXT OF AN ADVERSARY PROCEEDING BEFORE THE TRIER OF FACT. (PER JUSTICE STEVENS WITH THREE JUSTICES CONCURRING IN JUDGMENT)." LILY V VIRGINIA, 527 U.S. 116, 124 (1999).

THUS, IN THE INSTANT CASE THE EVIDENCE IS INSUFFICIENT TO SUPPORT A DUI OR ASSOCIATED CHARGES AND MUST BE DISMISSED.

C. IF MR. DEROE'S JURISDICTIONAL CHALLENGE FAILS HE CHALLENGES RCW 37.12.010 AS OVERBROAD AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE.

IF RCW 37.12.010 SURVIVES APPELLATE SCRUTINY, WHICH IT SHOULD NOT, IT ALLOWS THE STATE TO ASSERT JURISDICTION OVER PRIVATELY HELD TRIBAL TRUST LAND BY CREATING AND ASSIGNING DESIGNATION OF PUBLIC ROAD WHERE NONE EXISTS. ESPECIALLY WHERE HISTORIC DATA, ACCURATE OR NOT IDENTIFIES A "PUBLIC ROAD" WITHIN TRIBAL TRUST LAND PRIOR TO TRIBAL ACQUISITION AND WHERE IT MAY ARGUABLY HAVE THE APPEARANCE OF A PUBLIC ROAD BUT THE CHARACTERISTICS OF PRIVATE PROPERTY. IN THE INSTANT CASE THE "ROAD" IN QUESTION, WHILE PROVIDING THE PUBLIC A "WAY THROUGH" ITS PARKING LOT, HAS A VALET STAND AND DOES NOT EXTEND BEYOND THE BARRIERS OF TRIBAL TRUST LAND.

1) STANDARD OF REVIEW

"THE CONSTRUCTION OF A STATUTE IS A QUESTION OF LAW THAT THIS COURT REVIEWS DENOVO." FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564 v GRAND AERIE OF FRATERNAL ORDER OF EAGLES. (2002)

RCW 37.12.010 IN RELEVANT PART STATES:
THE STATE OF WASHINGTON HEREBY OBLIGATES AND BINDS ITSELF TO ASSUME CRIMINAL AND CIVIL JURISDICTION OVER INDIANS AND INDIAN TERRITORY, RESERVATIONS, COUNTRY, AND LANDS WITHIN THIS STATE IN ACCORDANCE WITH THE CONSENT OF THE UNITED STATES GIVEN BY THE ACT OF AUGUST 15, 1953 (PUBLIC LAW 28, 83RD CONGRESS, 1ST SESSION), BUT SUCH ASSUMPTION OF JURISDICTION SHALL NOT APPLY TO INDIANS WHEN ON THEIR TRIBAL LANDS OR ALLOTTED LANDS WITHIN AN ESTABLISHED INDIAN RESERVATION AND HELD IN TRUST BY THE UNITED STATES OR SUBJECT TO A RESTRICTION AGAINST ALIENATION IMPOSED BY THE UNITED STATES, UNLESS THE PROVISIONS OF RCW. 37.12.021 HAVE BEEN INVOKED, EXCEPT FOR THE FOLLOWING:

• • • •

(8) OPERATION OF MOTOR VEHICLES UPON THE PUBLIC STREETS, ALLEYS, ROADS AND HIGHWAY: PROVIDED FURTHER, THAT INDIAN TRIBES THAT PETITIONED FOR, WERE GRANTED AND BECAME SUBJECT TO STATE JURISDICTION PURSUANT TO THIS CHAPTER ON OR BEFORE MARCH 13, 1963 SHALL REMAIN SUBJECT TO STATE CIVIL AND CRIMINAL JURISDICTION AS IF CHAPTER 36 LAWS OF 1963 HAD NOT BEEN ENACTED.

"AT THE OUTSET, THE COURT SHOULD INTERPRET THE WORD PUBLIC TO MODIFY ALL THE PROCEEDING NOUNS IN THIS SENTENCE. THEREFORE, RCW 37.12.010 [IS OVERBROAD AND UNCONSTITUTIONALLY VAGUE] UNLESS THE COURT CAN SAY THAT THE ALLEGED OFFENSE WAS COMMITTED IN ONE OF THESE PUBLIC AREAS.

THE TERMS USED IN RCW 37.12.010 HAVE BEEN DEFINED UNDER WASHINGTON LAW. RCW 46.04.197 DEFINES "HIGHWAY" AS 'THE ENTIRE WIDTH BETWEEN THE BOUNDARY LINES OF EVERY WAY PUBLICLY MAINTAINED WHEN ANY PART THEREOF IS OPEN TO THE USE OF THE PUBLIC FOR PURPOSES OF VEHICULAR TRAVEL.'

OUR SUPREME COURT INTERPRETED THIS STATUTE AND HELD THAT AN ADMINISTRATIVE PARKING LOT OF A RENTAL COMPANY DID NOT FALL WITHIN THE DEFINITION OF 'HIGHWAY' BECAUSE THE PROPERTY WAS NOT 'PUBLICLY MAINTAINED.' KIM V BUDGET RENT A CAR SYSTEMS, INC. 143 WN 2d 190 (2007)" MEMORANDUM OF DEFENDANT (4-8-2013) 5

THESE DEFINITIONS AND THE STATUTE SHOULD BE STRICTLY CONSTRUED IN FAVOR OF MR. DEPOE PURSUANT TO THE RULE OF LENITY.

THIS CASE ORIGINATED WHOLLY WITHIN THE BOUNDARIES OF TRIBAL TRUST LAND AND ON CLEARLY DEFINED PRIVATE PROPERTY. THUS ANY AMBIGUITY FOUND IN THE APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE SHOULD BE FOUND IN FAVOR OF MR. DEPOE AND THE CONVICTION VACATED AND DISMISSED WITH PREJUDICE.

D. IF MR. DEPOE'S JURISDICTIONAL CHALLENGE FAILS, HE CHALLENGES RCW 46.61.502 DRIVING UNDER THE INFLUENCE AS OVERBROAD AND UNCONSTITUTIONALLY VAGUE AS APPLIED TO THIS CASE.

1) STANDARD OF REVIEW

"THE CONSTRUCTION OF A STATUTE IS A QUESTION OF LAW THAT THIS COURT REVIEWS DE NOVO." FRATERNAL ORDER OF EAGLES, TENINO AERIE NO. 564 v GRAND AERIE OF FRATERNAL ORDER OF EAGLES (2002)

WASHINGTON STATE HAS DETERMINED UNDER LAW THAT DRIVING UNDER THE INFLUENCE (DUI) OCCURS WITHIN A SPECIFIED TOLERANCE OF BLOOD ALCOHOL CONTENT (BAC), WHICH IS .08. THAT MEANS THAT BAC LEVELS COULD BE IN RANGES

THAT INCLUDE .00 - .07. NO EVIDENCE WAS PRODUCED AT TRIAL ESTABLISHING MR. DEPOE'S BAC LEVELS, ONLY THAT MR. DEPOE HAD BEEN DRINKING AND REFUSED TO SUBMIT TO TESTING. THE AMOUNT OF ALCOHOL CONSUMED AND THE TIME OF CONSUMPTION WAS COMPLETELY UNKNOWN AND BAC WAS NEVER ESTABLISHED.

MR. DEPOE WAS CONVICTED ON PURELY SUBJECTIVE GROUNDS WHERE THERE ARE CLEARLY ESTABLISHED SCIENTIFIC MEASUREMENTS THAT QUANTIFY AND MEET THE ELEMENTS OF THE CRIME RENDERING RCW 46.61.502 OVERBROAD AND UNCONSTITUTIONAL ON FIRST AMENDMENT GROUNDS.

"[T]HERE MUST BE A NEXUS BETWEEN THE RESULTS OF A DEFENDANT'S BLOOD ALCOHOL TEST AND THE DEFENDANT'S BLOOD ALCOHOL LEVEL WHEN ACTUALLY DRIVING." STATE V ROBBINS, 138 WN2d 486, 488 (1999)

"A STATUTE DOES NOT CREATE AN UNCONSTITUTIONAL PRESUMPTION UNLESS IT REQUIRES A TRIER OF FACT TO PRESUME FROM THE STATE'S PROOF OF ONE FACT SOME OTHER FACT THAT CONSTITUTES A NECESSARY ELEMENT OF THE CRIME.' STATE V CREDIFORD, 130 WN2d 747, 757 (1996). A MANDATORY PRESUMPTION TELLS THE TRIER OF FACT THAT IT MUST FIND THE ELEMENTAL

FACT UPON PROOF OF THE BASIC FACT UNLESS THE DEFENDANT HAS COME FORWARD WITH A CERTAIN QUANTUM OF EVIDENCE TO REBUT THE PRESUMED CONNECTION BETWEEN THE TWO FACTS. STATE V SAVAGE, 94 WN 2d 569, 573 (1980). MANDATORY PRESUMPTIONS CREATE PROBLEMS OF CONSTITUTIONAL SCOPE BECAUSE OF THIER POTENTIAL FOR CIRCUMVENTING THE STATE'S BURDEN TO PROVE ALL ELEMENTS OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT. STATE V BRUNSON, 128 WN 2d 98, 105 (1995)" STATE V MERTENS, 109 WN APP. 291, 297 (2001)

AT TRIAL, THE JURY AND THE COURT PRESUMED MR. DEPOE WAS DUI BASED ON UNSCIENTIFIC FACTS, INTER ALIA, THAT MR. DEPOE HAD BEEN DRINKING, WAS WAVERING IN HIS WALKING, HIGH-CENTERED THE SUBJECT VEHICLE IN A PARKING SPACE AND REFUSED TO SUBMIT TO TESTING. THUS REACHING AN UNCONSTITUTIONAL MANDATORY CONCLUSION THAT MR. DEPOE'S BAC MET OR EXCEEDED THE STATUTORY LIMIT OF .08 AND CONVICTED HIM ON THAT BASIS.

SIGNIFICANTLY, IT SHOULD BE NOTED THAT NOT EVEN A BASIC FIELD SOBRIETY TEST WAS ADMINISTERED TO MR. DEPOE. THEREFORE THE STATUTE SHOULD

BE DEEMED UNCONSTITUTIONAL AND ANY AMBIGUITY FOUND IN THE APPLICATION OF THE STATUTE TO THE FACTS OF THIS CASE SHOULD BE RESOLVED IN FAVOR OF MR. DEPOE PURSUANT TO THE RULE OF LENITY, THE CONVICTION VACATED AND DISMISSED WITH PREJUDICE.

E. MR. DEPOE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER U.S. CONST. AMEND.'S VI AND XIV AND WASHINGTON CONST. ARTICLE 1 SECTIONS 3 AND 22

TRIAL COUNSEL FAILED TO ASSERT THE "TWO-HOUR" RULE AND FAILED TO REQUEST JURY INSTRUCTIONS FOR BOTH THE "TWO-HOUR" RULE AND LESSER INCLUDED OFFENSE OF PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE RCW 46.61.564

1) STANDARD OF REVIEW

CONSTITUTIONAL VIOLATIONS ARE REVIEWED DENOVO. STATE V LYNCH, 87882-0, 2013 WL 5310164 ___ WN 2d ___ (2013). A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT MAY BE RAISED FOR THE FIRST TIME ON REVIEW. RAP 2.5(a)(3); STATE V KERWIN, 165 WN 2d 818, 823 (2009)

"TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL, A PETITIONER MUST ESTABLISH THAT (1) COUNSEL'S PERFORMANCE WAS DEFICIENT AND (2) THE DEFICIENT PERFORMANCE ACTUALLY PREJUDICED THE DEFENDANT." IN RE MORRIS, 176 WN 2d 157, 166 (2012) CITING ORANGE, 152 WN 2d 795 AT 814; SMITH V ROBBINS, 528 U.S. 259, 285 (2000)

"[P]ERFORMANCE IS DEFICIENT IF IT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS 1)" Id. AT 167, CITING STATE V GRIER, 171 WN 2d 17, 33 (2011) (QUOTING STRICKLAND V WASHINGTON, 466 U.S. 668, 688 (1984)

IT WAS NOT REASONABLE FOR MR. DEPOE'S TRIAL COUNSEL TO FAIL TO ASSERT THE "TWO-HOUR" RULE IN LIGHT OF THE INHERENT FLAWS RELATED TO THE SURVEILLANCE VIDEO, THE LOCATION OF THE INCIDENT AND LACK OF ANY FIRST HAND KNOWLEDGE ESTABLISHING THAT MR. DEPOE ACTUALLY DROVE OR WAS INTOXICATED AT THE TIME OF ANY DRIVING. AND BASED ON THOSE SAME ISSUES AMONG OTHER THINGS IT WAS ERROR AND NOT REASONABLE THAT MR. DEPOE'S TRIAL COUNSEL FAILED TO REQUEST JURY INSTRUCTIONS ON BOTH THE "TWO-HOUR RULE" AND THE LESSER INCLUDED OFFENSE OF PHYSICAL CONTROL OF A VEHICLE UNDER THE INFLUENCE RCW 46.61.564,

WHICH IF FOUND GUILTY OF AS OPPOSED TO DUI, WOULD HAVE NEGATED AND RENDERED THE STATE'S PROSECUTION INVALID FOR LACK OF SUBJECT-MATTER JURISDICTION.

MR. DEPOE WAS THEREFORE PREJUDICED BY COUNSEL'S INACTION AND HIS CONVICTION MUST BE REVERSED.

VII. CONCLUSION

FOR ALL THE FOREGOING REASONS THE APPELLANT, MR. DEPOE'S CONVICTION SHOULD BE VACATED AND HIS CASE DISMISSED WITH PREJUDICE.

RESPECTFULLY SUBMITTED THIS 16TH DAY OF NOVEMBER, 2013

Dennis D. DePoe
DENNIS DARREL DEPOE

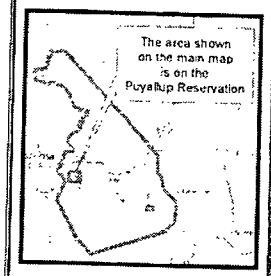
EXHIBITS

1-4

AERIAL VIEWS OF
I-5 EMERALD QUEEN
CASINO AND PARKING AREAS

GIS Department

Location of the Emerald Queen I-5 Casino



:873 Survey

Lot Lines
(COT Plat_Data dwg Polyline)

Roads (Pierce County)

Parcels (Pierce Co)

BIA Trust Tract
115- T1035

Puyallup Tribal Lands

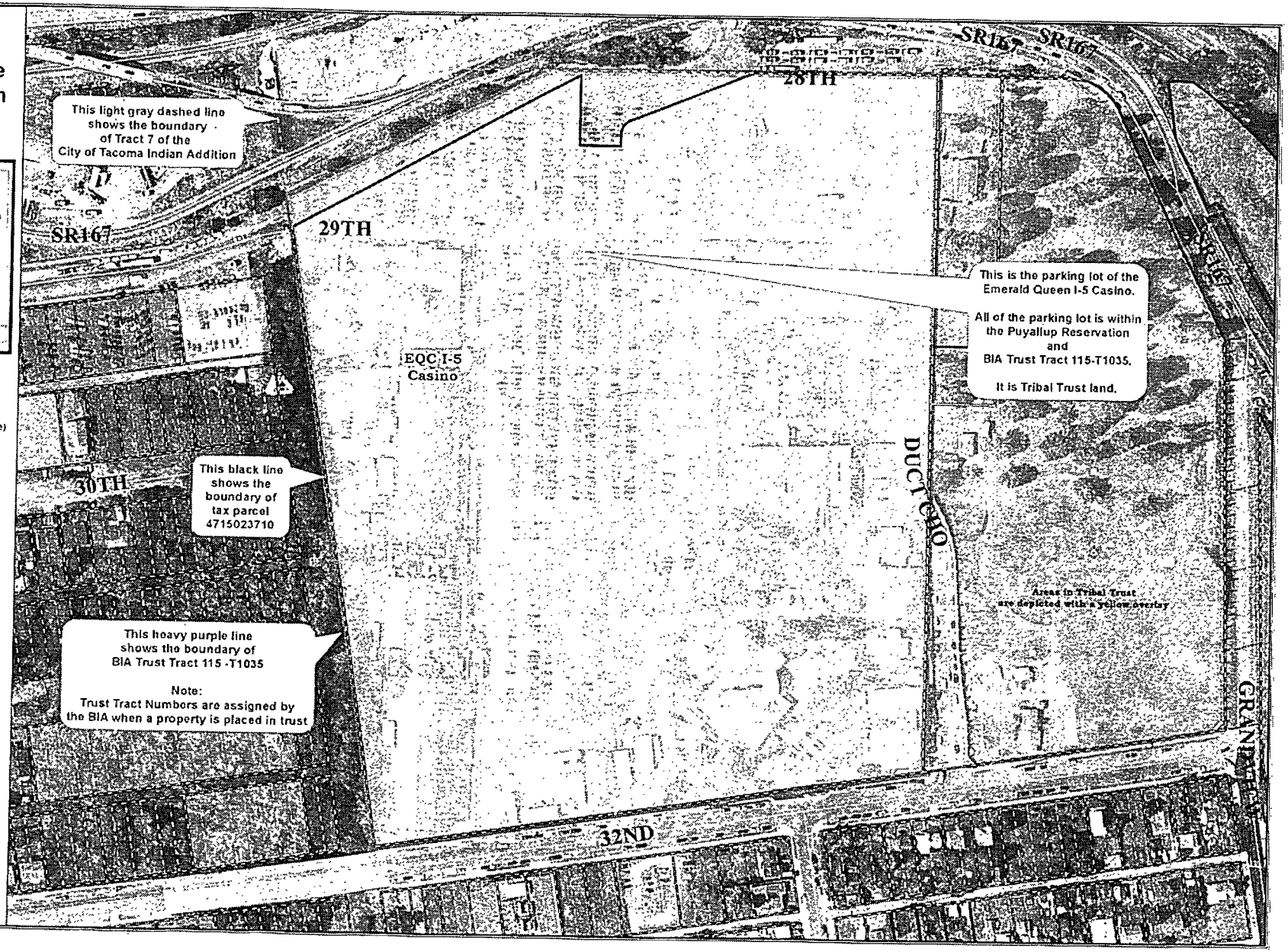
Trust Status

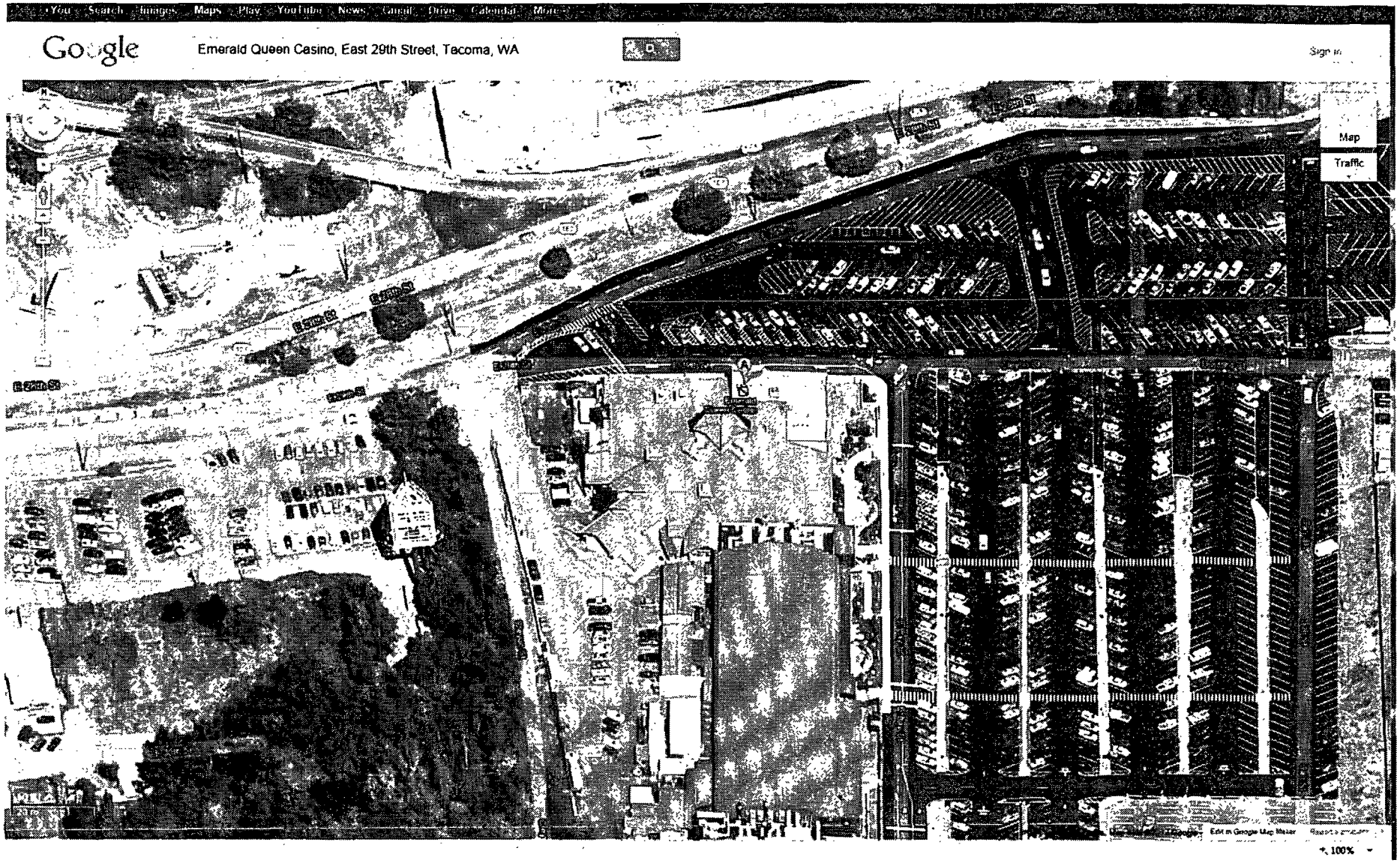
In Fee

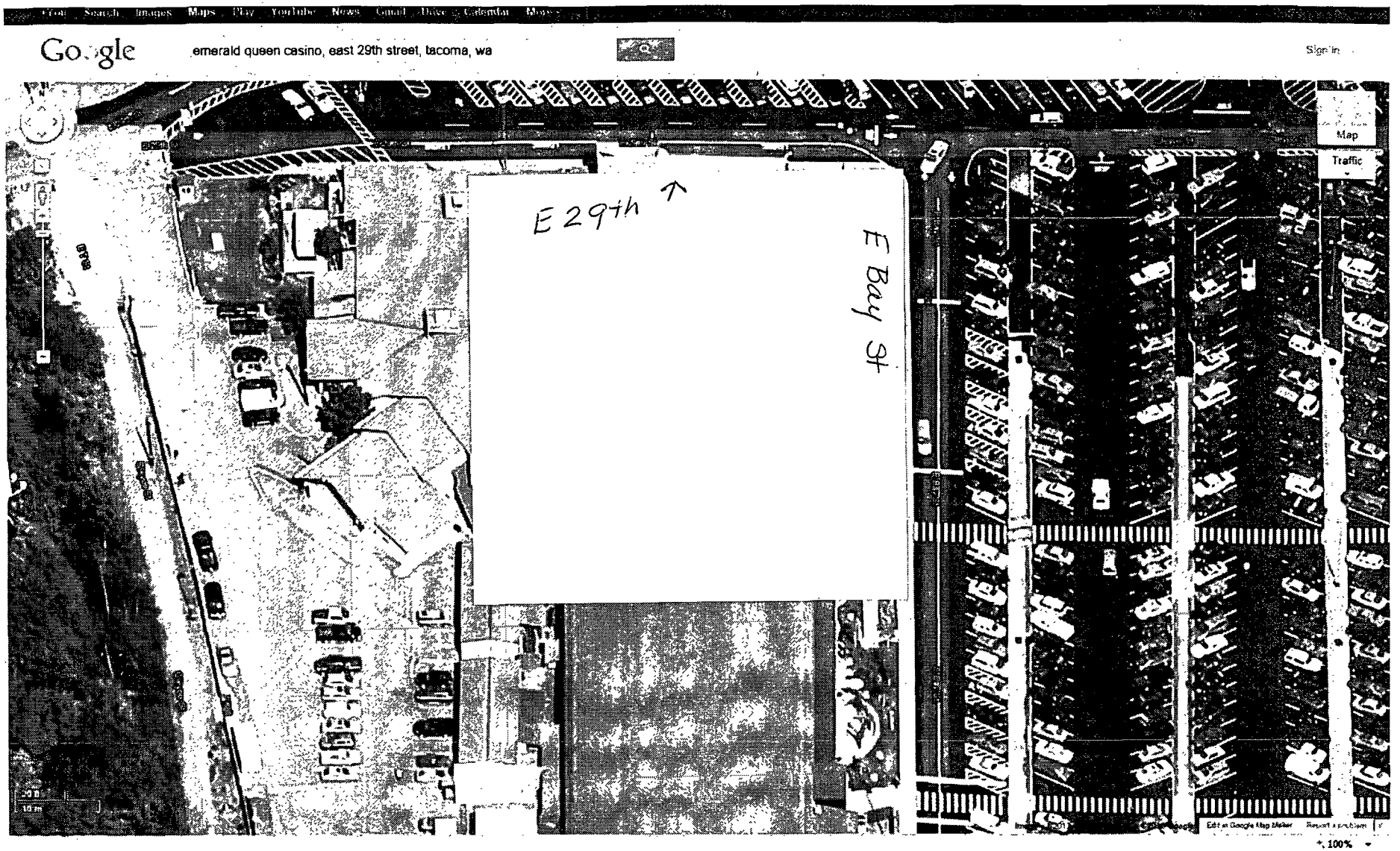
Member Trust

Tribal Trust

Note:
The Boundary of the Puyallup Indian Reservation is approximate but correct to the 1873 Survey Area




Google
Emerald Queen Casino, East 29th Street, Tacoma, WA
Map
Traffic


Google
emerald queen casino, east 29th street, tacoma, wa
Sign in
Map
Traffic
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