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I. INTRODUCTION

This case is about the Liquor Control Board's¹ seizure of contraband cigarettes, and the failure of Edward Comenout, Jr.² to demonstrate at an administrative forfeiture hearing that he had a lawful right to possess the seized cigarettes. Comenout raises various arguments regarding the ability of the state or the Quinault tribe to tax cigarettes on his land. Many of the arguments are not relevant to the questions presented here. The only issue before the Board in the administrative proceeding was whether Comenout had a lawful right to own or possess unstamped cigarettes. The remaining arguments have either been expressly rejected by the Washington Supreme Court or are otherwise determined by well-settled law regarding jurisdiction in Indian country. Neither Quinault Tribal Law nor state law permit Comenout to lawfully own or possess unstamped cigarettes.

¹ The legislature changed the name of the Liquor Control Board to the Liquor and Cannabis Board in July 2015. RCW. 66.08.012. At the time of the seizure and administrative hearing, the agency was known as the Liquor Control Board (hereinafter "the Board").

² The appellant in this proceeding is Edward Comenout, Jr., who passed away in June 2010. The Estate of Edward Comenout, Jr. substituted in to represent his interests. Hereinafter, Edward Comenout, Jr. and his Estate are referred to as "Comenout." No disrespect is intended by this form of reference.

The other claimant in the administrative proceeding, Robert Reginald Comenout, Sr., did not timely petition for judicial review, and is therefore not a party to this action. Although the case caption in superior court was entitled Robert Reginald Comenout, Sr., this was in error. Robert Comenout, Sr. is referred to by his full name.

Comenout contends that the Board, the state superior courts and this Court have no subject matter or personal jurisdiction over this case. This contention is without merit. In fact, federal, state and tribal law all contradict Comenout's claim. This Court should soundly reject Comenout's attempt to avoid the application of relevant legal authority to its case.

Finally, Comenout fails to meet his burden of establishing the invalidity of the Board's Final Order under the Administrative Procedure Act (APA). Comenout completely ignores this burden and fails to even reference the APA, let alone present arguments based on its application to the facts in this case. As Comenout has failed to establish that he is entitled to relief under the APA, the Board's Final Order granting summary judgment should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Board properly reject Comenout's claims to the seized cigarettes when he failed to demonstrate a legal right to possess or own the cigarettes as required by RCW 82.24.135(5)?
2. Did the Board properly exercise personal and subject matter jurisdiction under state and federal law?

3. Did the Board properly forfeit the untaxed and unstamped cigarettes, where no provision of RCW 82.24 or Quinault Tribal Law would permit the lawful ownership or possession of untaxed and unstamped cigarettes by a Quinault tribal member who operates a retail cigarette business on trust land in Indian country outside of the Quinault Indian Reservation?
4. Should the Final Order be affirmed where Comenout has failed to demonstrate any basis under the Administrative Procedures Act upon which this court can grant relief?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Statement

In July of 2008, Board enforcement officers obtained a warrant to search the Indian Country Store located, in Puyallup, Washington. Clerk's Papers (CP) 613-655. The Board's enforcement officers, assisted by Puyallup Police officers and Quinault Tribal officers, searched the property and seized approximately 376,852 packs of cigarettes. CP 627. None of the cigarettes had valid Washington or Quinault Indian Nation tobacco stamps affixed. *Id.* At the time of the search and seizure, the late Edward Comenout, Jr. was an enrolled member of the Quinault Indian Nation. CP 552 at ¶ 4. The Indian Country Store operates on land held in trust for Comenout. His trust land is not within a federally recognized Indian reservation. CP 551-52 at ¶ 3. This land is considered Indian country. CP 866. Comenout ran the store with his brother, Robert R. Comenout, Jr.

The Quinault Indian Nation Department of Revenue had previously issued Edward Comenout, Jr. a business license to operate the Indian Country Store on his trust land in Puyallup, Washington. CP 477. The license authorized Comenout to transact business pursuant to Quinault Title 40, and required him to comply with all Quinault laws and regulations. *Id.* The license did not authorize the sale of tobacco products. CP 553 at ¶ 12.

Additionally, Indian Country Store never held a license to sell cigarettes as a retailer or wholesaler issued by the State of Washington. CP 539-40 at ¶ 3. In 2008, the Board received no notifications of the transport of unstamped cigarettes, known as “prenotifications” required by RCW 82.24.250(1) for any shipments of unstamped cigarettes to the Indian Country Store. CP 549-50 at ¶ 3.

B. Procedural History

Once property is seized, an individual may file notice of a claim to the seized property with the Board. RCW 82.24.135. RCW 82.24.135(5) allows a claimant to request an administrative hearing to seek the return of the seized property. Both Comenout and Robert R. Comenout, Sr. filed claims seeking the return of the seized unstamped cigarettes. CP 210-211. The administrative hearing was initially continued based on then-pending felony criminal charges against the

Comenouts in Pierce County Superior Court. CP 226-28. The criminal matter was dismissed without prejudice on August 23, 2012. CP 378-79.

After dismissal of the criminal charges, both the Comenouts and the Board enforcement staff (Enforcement) moved for summary judgment in the administrative forfeiture proceeding. CP 457-532 (Comenout); CP 605-655 (Enforcement).

The administrative law judge issued an initial order granting Enforcement's motion and denying Comenout's motion. CP 858-871. In the initial order, the judge held that the claimants had failed to demonstrate by a preponderance of the evidence that they were the lawful owners or had a lawful right to possess the seized cigarettes. CP 866 at ¶ 5.36. The administrative law judge rejected the claimants' arguments that they were not subject to state or Quinault laws and held that Comenout's trust land was in Indian country as defined by state and Quinault tribal law and the Cigarette Tax Compact between the State of Washington and the Quinault Indian Nation. CP 864-866. The Board issued a Final Order affirming and adopting the Initial Order, and holding that the claimants failed to demonstrate that they could lawfully own or

possess the cigarettes. CP 909-914. On November 6, 2014, the Board issued an Order on Destruction of the Cigarettes.³ CP 1082-85.

Comenout alone petitioned for judicial review in Pierce County Superior Court. CP 1-75. He moved for summary judgment in the superior court proceeding. CP 1215-1226. However, the APA does not provide for summary judgment on judicial review, and on July 27, 2015, the superior court denied Comenout's motion and affirmed the Board's Final Order. CP 1230-1239. Comenout timely appealed the superior court decision. CP 1240-1251.

IV. STANDARD OF REVIEW

Judicial review of an agency order is governed by the APA. RCW 34.05.570. The party asserting the invalidity of the agency's action has the burden of demonstrating such invalidity based on the grounds outlined in RCW 34.05.570(3). RCW 34.05.570(1)(a). Here, Comenout must demonstrate that the Final Order violates a constitutional provision, that the Final Order is outside the Board's statutory authority or jurisdiction, or that the Final Order erroneously applies the law. RCW 34.05.570(3)(a),(b), and (d). Under the "error of law" standard contained in RCW 34.05.570(3)(a), (b), (c), and (d), the court engages in

³ In its Final Order, the Board requested that the parties brief the disposal of the cigarettes. CP 912. The Order on Destruction of Cigarettes was issued after the parties submitted briefing on the issue. However, the seized cigarettes remain in storage pending resolution of this appeal.

de novo review of the agency's legal conclusions. *Dep't of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 201-02, 286 P.3d 417 (2012), *review denied*, 177 Wn.2d 1002 (2013). Appellate courts assess the validity of agency action in accordance with the standards of RCW 34.05.570 and a court shall grant relief only if it determines that the person seeking judicial review has been substantially prejudiced by the agency action. RCW 34.05.570(1).

The appellate court sits in the same position as the superior court when reviewing agency action. *Dodge City Saloon v. Liquor Control Board*, 168 Wn. App. 388, 395, 288 P.3d 343 (2012). The appellate court reviews the record before the administrative agency that issued the final order, and the superior court record is not considered. *Id.*

Motions for summary judgment are reviewed *de novo*. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Summary judgment is appropriate only where "the undisputed facts entitle the moving party to judgment as a matter of law." *Verizon Northwest, Inc v. Wash. Emp't. Sec. Dep't*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008) (citing *Alpine Lakes Prot. Soc'y v. Dep't of Natural Resources*, 102 Wn. App. 1, 14, 979 P.2d 929 (1999)). In an APA review, the court evaluates the facts contained in the administrative record *de novo* under the error of law standard contained in RCW 34.05.570(3)(d). *Id.*

V. ARGUMENT

A. The Issue In The Administrative Action Below Was Comenout's Right To Lawfully Possess The Property Seized Under RCW 82.24.135(5)

In a forfeiture proceeding conducted pursuant to RCW 82.24.135(5), the issue before the Board is whether the person seeking the return of the property has demonstrated a lawful right to possession of the seized items.⁴ The forfeiture action, and any subsequent appeal, is governed by the APA. RCW 82.24.135(5). If the aggregate value of the seized items is more than five hundred dollars, a claimant may bring an action in superior court for return of the property. *Id.*

The burden of proof in a forfeiture case is on the claimant, who must demonstrate by a preponderance of the evidence that the claimant is the lawful owner or is lawfully entitled to possess the seized items. *Id.* The Board is obligated to promptly return seized items upon a determination that the claimant has the lawful right to possess the items or is the lawful owner. *Id.*

In the instant case, the forfeiture action was brought under RCW 82.24.135(5) for return of the seized unstamped cigarettes. CP 210-211. The case proceeded before an administrative tribunal and was

⁴ A claimant bears the burden of demonstrating that they are the lawful owner of the items seized and then that they have a lawful right to possession of the items. Here there is no dispute that the items were under the possession of Comenout at the time of the seizure.

governed by the APA, as Comenout did not bring an action for return of the cigarettes in superior court. CP 210-211.

In the administrative proceeding, the tribunal fully explored the issue before it, which was Comenout's claimed right to lawfully possess the unstamped cigarettes seized under RCW 82.24.135(5), and the arguments and evidence Comenout advanced in support of that claimed right. CP 858-68. Comenout attempts to raise arguments on appeal that were not fully addressed at the administrative level, and that have no bearing on the issue of whether he could lawfully possess the cigarettes.⁵ Contrary to Comenout's current assertions, the administrative law judge properly held that Comenout failed to prove by a preponderance of the evidence that he had a lawful possessory right. *Id.*

⁵ For example, Comenout's arguments below regarding the validity of the search warrant were limited to assertions that a lack of jurisdiction or exemptions from state tax laws rendered the search invalid. He did not contest the validity of the search warrant itself. In his Opening Brief, he now contends that the state court could not issue a valid search warrant. Comenout Brief at 28. Even if Comenout had raised this argument below, it is without merit. In *State v. Clark*, 178 Wn.2d 19, 24, 308 P.3d 590 (2013), the Washington State Supreme Court upheld the authority of a warrant issued by Okanogan District Court. Clark argued that evidence from the search should be suppressed because the district court lacked authority to issue a warrant for search of his residence, which was on tribal land inside the reservation. *Clark*, 178 Wn.2d at 33. The Court held that neither tribal sovereignty nor federal preemption inhibited the State's ability to serve a warrant on a reservation residence of a tribal member. *Id.* In the present case, the warrant was issued by the superior court and executed by Board enforcement officers, and Quinault tribal officers. CP 614-655.

B. The Liquor Control Board Had Jurisdiction To Render Its Final Order In The Forfeiture Action

- 1. The Washington Supreme Court has already upheld the exercise of personal and subject matter jurisdiction over Comenout and the Indian Country Store.**

The Washington Supreme Court previously examined and rejected jurisdictional arguments in the criminal case that arose from the seizure of the same cigarettes at issue in this case. *State v. Comenout*, 173 Wn.2d 235, 240, 267 P.3d 355 (2011).⁶ In *Comenout*, the Washington Supreme Court examined the issue of “whether the State of Washington had jurisdiction over members of Indian Tribes who sell unstamped cigarettes without a license at a store that is located on trust or allotment land that is outside the boundaries of an Indian Reservation.” *Comenout*, 173 Wn.2d at 236. The Court in *Comenout* examined the application of RCW 37.12.010 to Comenout and his trust land and determined that state civil and criminal jurisdiction would apply. *Comenout*, 173 Wn.2d at 239-40. Under RCW 37.12.010, Washington assumed full nonconsensual civil and criminal jurisdiction over Indian country outside of an established Indian

⁶ The Petitioner has consistently contested state jurisdiction to enforce laws on the property where Indian Country Store is located since the early seventies. See *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D. Wash. 1974); *Comenout v. Washington*, 722 F.2d 574 (9th Cir. 1983); *State v. Comenout*, 85 Wn. App. 1099 (1997). In *Matheson*, Comenout sought unsuccessfully to enjoin the Washington State Department of Revenue from searching the River Road property and seizing unstamped cigarettes based on the assertion that his property was exempt from state excise tax under federal law. *Matheson*, 393 F.Supp. at 1028. Petitioner’s efforts here are equally unsuccessful in light of *State v. Cooper*, 130 Wn.2d 770, 775-76, 928 P.2d 406 (1996) and *Comenout*.

Reservation. *Comenout*, 173 Wn.2d 238; *State v. Cooper*, 130 Wn.2d 770, 775-76, 928 P.2d 406 (1996); RCW 37.12.010.

In its examination of jurisdiction, the Court found that the facts related to the Comenouts were similar to those in *State v. Cooper*, where the Court upheld the conviction of a member of a recognized Indian tribe for a crime committed on allotted or trust land outside of the boundaries of an Indian reservation. *Comenout*, 173 Wn.2d. at 238; *Cooper*, 130 Wn.2d at 776. In *Comenout*, the Court held that *Cooper* controlled the outcome because, like in *Cooper*, the criminal activity at issue in *Comenout* occurred outside of an established Indian reservation on trust land. *Id.*

The Washington Supreme Court rejected the Comenouts' attempts to distinguish *Cooper* by arguing that *State v. Sohappy* or *State v. Pink* applied instead. *Comenout*, 173 Wn.2d at 239 (citing *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988); *State v. Pink*, 144 Wn. App. 945, 185 P.3d 634 (2008)). In both *Pink* and *Sohappy*, the crimes occurred within the boundaries of an Indian reservation, whereas the conduct in *Comenout* occurred on trust land outside of an established Indian reservation. *Id.* The Court found this distinction dispositive, holding that in regard to criminal jurisdiction, "allotted or trust lands are not excluded from full nonconsensual jurisdiction unless they are within an established Indian reservation." *Comenout*, 173 Wn.2d at 239.

In his brief, Comenout contends that the *Comenout* decision is not binding on this Court because after that decision, the case was remanded back to superior court and the prosecuting attorney dismissed the criminal charges without prejudice. *Comenout Br.* at 16. In support of his argument, Comenout relies on *United States v. 475 Martin Lane*, 545 F.3d 1134 (9th Cir. 2008), for the proposition that a case that is voluntarily dismissed cannot become binding precedent.⁷ To the contrary, in that case, the Ninth Circuit Court of Appeals upheld the exercise of jurisdiction in an *in rem* action after the government's civil forfeiture action was dismissed. *475 Martin Lane*, 545 F.3d at 1144. The Ninth Circuit held that not only did the district court retain jurisdiction, it had a duty to resolve the parties' claims to the property. *475 Martin Lane*, 545 F.3d at 1145.

The criminal prosecution in *Comenout* was ultimately dismissed without prejudice, but the decision remains precedential authority for its two primary holdings: (1) the state of Washington may exercise criminal jurisdiction over members of Indian tribes who sell unstamped cigarettes without a license at a store that is located on trust allotment land that is

⁷ *Comenout* also relies on *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (D. N.M. 2013) for the same proposition. That case involved a wrongful death action, the Indian Gaming Regulatory Act and the shifting of jurisdiction to tribal court, issues neither relevant nor applicable to this case. Additionally, *Pueblo of Santa Ana* is a federal case from the District Court of New Mexico and therefore the decision is not binding.

outside the boundaries of any Indian reservation, and (2) the Comenouts are not exempt from Washington's cigarette tax under RCW 82.24.110 and .500, and cannot be considered "Indian retailers." *Comenout*, 173 Wn.2d at 238-41. Comenout's attempts to avoid the application of *Comenout* to this case have no merit.

C. Comenout Could Not Have Lawfully Owned Or Possessed The Seized Cigarettes Because Washington And Quinault Tribal Law Prohibit Possession Of Unstamped and Untaxed Cigarettes

- 1. The Compact between the Quinault Indian Nation and State of Washington and Quinault Tobacco Code Title 86 require that all cigarettes bear Quinault or Washington State Tribal Compact Stamps.**

In 2001, the Washington Legislature authorized the Governor to enter into tax contracts with some tribes, allowing those tribes to impose their own tax on cigarettes and use the tax revenue for essential government services. RCW 43.06.450. The contracts provide for a tribal tax in lieu of a state tax and require that the tribes collect one-hundred percent of the state tax. RCW 43.06.455(3); RCW 43.06.460(1).

Washington entered into a tax contract with the Quinault Indian Nation in January of 2005. Under that contract, referred to as the Cigarette Compact between the Quinault Nation and the State of Washington (Compact), "all cigarettes sold by tribal retailers shall bear either a Washington State Tribal Compact Stamp or a Quinault Nation

stamp.” Compact, Part V, 1(a) at CP 486. Through the Compact, the State of Washington retroceded from its taxing authority to the Quinault Indian Nation, and the Compact allows the Quinault Indian Nation to retain one-hundred percent of the state excise tax on cigarettes. CP 552 at ¶¶ 5, 6.

In May of 2006, the Quinault Indian Nation promulgated Title 86, Tobacco Control. CP at 552 (Cigarette Sales and Tax Code), ¶ 7. Title 86 provides for the assessment of taxes on sales of cigarettes to both tribal member and non-tribal members. CP at 552 ¶ 7; Section 86.05.010(a) at CP at 579 (Cigarette Tax – Levy). Although the Compact permits member-owned smokeshops, the Quinault Cigarette Sales and Tax Code only authorizes retail outlets that are wholly-owned by the Tribe. Section 86.03.010(w) at CP 578 (Definitions); CP at 552-553, ¶ 10. Notwithstanding the prohibition of member-owned smokeshops in Title 86, the Compact obligates any potential member-owned smokeshop to operate in compliance with the Compact and to be licensed by the Tribe. Compact Part III (1)(c), CP 484.

Under Quinault law, tribal retailers impose tax on all sales of cigarettes in Indian country. Compact Part V (2) CP 562. Title 86 and the Compact define Indian country consistent with the federal definition under 18 U.S.C § 1151, as “a) all land within the limits of the Quinault Indian

Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running the reservation, and b) all Indian allotments or other lands held in trust for a Quinault Indian Nation member or the Nation, the Indian Titles which have not been extinguished.” Section 86.03.010(i)(a) and (b) at CP 577; Compact Part I (8)(a) and (c) at CP 481. Title 86 and the Compact apply to trust and allotment lands in Indian country which are located outside the boundaries of the Quinault Reservation. Compact Part II, (2) at CP 483; Section 86.02.010 (Scope) at CP 576. In addition, any tribal member or person who resides in or conducts business on land under the jurisdiction of the Quinault Indian Nation is deemed to have consented to and is bound by the terms of Title 86. Section 86.02.010(c)(1) at CP 577.

Comenout’s trust land was Indian country as defined in Title 86 and the Compact consistent with 25 U.S.C. §1151. CP 864-65 at ¶¶ 5.17, 5.18. Comenout was an enrolled member of the Quinault Indian Nation, which had jurisdiction over his land. Further, Comenout operated under the jurisdiction of the Tribe because he sought and was issued a license by the Tribe. CP 477. The business license required him abide by all laws and regulations of the Tribe. *Id.*

Comenout cannot lawfully own or possess unstamped cigarettes under the Compact or Quinault Title 86. Comenout was a member of the

Quinault Tribe, he operated a retail business on trust land outside of the Quinault Reservation and he possessed a Quinault Business License. CP 477; 551-52. Comenout's reliance on that business license for the proposition that it could lawfully possess or own the seized cigarettes fails, however, because that Quinault business license did not provide for the sale of tobacco products. Raymond Dodge, Attorney General for the Quinault Indian Nation confirmed that the business license did not authorize the sale of cigarettes. CP 553 at ¶ 12.

Although Comenout contends he obtained "all possible licenses" from the Quinault Indian Nation that allowed it to sell cigarettes on Comenout's trust allotment, Comenout possessed no license authorizing him to sell tobacco products. *See* Comenout's Br. at 6. Accordingly, Comenout's ability to lawfully possess or own unstamped cigarettes was controlled by the Compact and Title 86, which limit retail cigarettes sales to smokeshops that are wholly owned by the Quinault Indian Nation. The Indian Country Store was not wholly owned by the Quinault Indian Nation. CP 552-53 at ¶ 10. Thus, Comenout did not and could not lawfully own or possess unstamped cigarettes under the Compact, Quinault Title 86 or state law.

2. **Washington's Tobacco Laws prohibit Comenout's possession or ownership of unstamped cigarettes at the Indian Country Store.**

a. **All cigarette retailers in Washington are prohibited from possessing unstamped cigarettes.**

The State of Washington imposes an excise tax on cigarettes sold, used, consumed, handled, possessed or distributed within its borders. RCW 82.24.020; .027(1); .028. Washington cigarette retailers, whether Indian or non-Indian, may not legally possess or sell unstamped cigarettes. RCW 82.24.030(1); Compact, Part V, 1(a) at CP 562. The State collects this tax through the sale of cigarette stamps, which must be affixed to all packages of cigarettes possessed within the state that have not been preapproved for tax exemption. RCW 82.24.030. In order to enforce collection of tax on all cigarettes sold, used, or distributed in Washington, all cigarettes must bear some stamp so that the Department of Revenue may readily ascertain by inspection whether the tax has been paid or whether an exemption from tax applies. RCW 82.24.030(1). Even tax-exempt cigarettes must bear a stamp indicating that they are exempt. *Id.*

Wholesalers and certain retailers must maintain records showing "all transactions" relating to the purchase and sale of cigarettes, and showing "all physical inventories performed on those articles, all invoices, and a record of all stamps imposed." RCW 82.24.090. Only Washington-

licensed wholesalers may possess unstamped cigarettes, and then only under specified circumstances. RCW 82.24.040(2).

One of the most important mechanisms the Legislature put in place to ensure that only eligible persons receive the exemption is the notice requirement for the transportation of unstamped cigarettes, RCW 82.24.250, which requires notice to the Board. This statute sets forth all the conditions for transportation of unstamped cigarettes. Wholesalers licensed in Washington and persons who have given notice to the Board may transport unstamped cigarettes, RCW 82.24.250(1), but anyone transporting unstamped cigarettes in violation of the requirements renders those cigarettes to be deemed contraband and subject to seizure. RCW 82.24.250(3).

A final exception to the notice, stamping and cigarette tax requirements is the exception for cigarettes subject to lawful transactions covered by cigarette tax contracts between specified Indian Tribes and the State under RCW 43.06.455. *See* RCW 82.24.030(5) (exception to stamping requirement); RCW 82.24.250(8) (transportation of unstamped cigarettes); RCW 82.24.260(4) (selling unstamped cigarettes); RCW 82.24.295 (sales by Indian retailer under cigarette tax contract). As discussed above, the Quinault Indian Nation entered into such a compact in 2005. CP 555-573.

Moreover, the legislature determined that collection and enforcement measures contained in RCW 82.24 are reasonably necessary to prevent fraudulent transactions and place a minimum burden on the Indian tribal organization consistent with the United States Supreme Court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980). See RCW 82.24.080(4).

In short, cigarettes sold under either the Compact or RCW 82.24 must have cigarette tax stamps affixed. Despite Comenout's arguments to the contrary, there is no provision under either Quinault Tribal Law or state law, outside of transport by a licensed wholesaler, which would allow a tribal member without a state or tribal license to legally possess unstamped cigarettes. Under Quinault Tribal Law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. See Compact, Part XIII, Sec. 9 (in pertinent part) at CP 572; see also definition of Tribal retailer under the Compact Part I, Sec. 23 at CP 559. Comenout was not permitted to make retail cigarettes sales within Indian country unless licensed by the Tribe, and Comenout was not licensed by the Tribe. Even if Comenout was a licensed wholesaler who had not yet had a reasonable opportunity to apply tax stamps to the seized cigarettes, Comenout never provided notice under RCW 82.24.250 to the Board of

any such shipment. CP 549-50 at ¶ 3. Because Comenout possessed no tribal or state license that would enable even the brief possession of the seized, unstamped cigarettes, the Board's rejection of the Comenout's claim was proper.

b. The Final Order correctly rejected Comenout's assertion that he may lawfully possess unstamped cigarettes as an Indian retailer under RCW 82.24.295.

The provisions of RCW 82.24.295 do not permit Comenout to lawfully own or possess unstamped cigarettes as an "Indian retailer." The Washington Supreme Court previously rejected this exact claim by this same party, when it rejected Comenout's claim that he was exempt from the state cigarette tax as an Indian retailer. *Comenout*, 173 Wn.2d at 240-41. RCW 82.24.295(1) provides that taxes imposed by RCW 82.24 do not apply to the "sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax contract subject to RCW 43.06.455." An Indian retailer means a retailer "wholly owned and operated by an Indian Tribe, a business wholly owned and operated by a tribal member and licensed by the tribe, or a business owned and operated by the Indian person or persons whose name the land is held in trust." RCW 43.06.455(14)(b); *Comenout*, 173 Wn.2d at 240. The Compact defines a Tribal retailer as "a cigarette retailer

wholly owned by the Quinault Nation and located in Indian Country or a member-owned smokeshop located in Indian Country and licensed by the Tribe.” Compact Part I (23) at CP 483 (emphasis added).

The Washington Supreme Court rejected arguments that Indian Country Store or the Comenouts met the definition of Indian retailer because the Compact’s definition of Tribal retailer was more limited than the statutory definition of Indian retailer under RCW 43.06.455(14)(b). *Comenout*, 173 Wn.2d at 240. The Court noted that if the State “enters into a cigarette tax contract or agreement with a federally recognized Indian tribe . . . , the terms of the contract or agreement take precedence over any conflicting provisions of this chapter while the contract or agreement is in effect.” *Comenout*, 173 Wn.2d at 240. Thus, since the Compact defined “Tribal retailer” more narrowly than RCW 82.24.295, the terms of the Compact controlled, and the Comenouts could not be considered Indian retailers for the purposes of RCW 82.24.295(1) because they were not licensed by the Tribe. *Id.* The same holding applies here.

Comenout was not an “Indian retailer,” therefore the exemption under RCW 82.24.295(1) did not permit Comenout to possess the unstamped cigarettes. Because Comenout fails to show by a preponderance of the evidence that he could lawfully own or possess the

seized cigarettes, he fails to meet his burden of showing that the Board's Final Order was invalid.

c. Neither Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire nor Moe v. Confederated Salish and Kootenai Tribes allow Comenout to legally possess unstamped cigarettes.

Comenout next claims he was legally entitled to possess unstamped cigarettes under *Confederated Tribes and Bands of the Yakama Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011). Comenout Br. at 30. However, despite Comenout's assertion to the contrary, this case does not authorize Comenout to possess the unstamped cigarettes. In *Yakama Nation*, the Ninth Circuit examined Washington's cigarette excise tax and held that precollection of taxes by Indian retailers even on the reservation itself was permitted and did not contravene established principles of Indian tax immunity. *Yakama Nation*, 658 F.3d at 1089. After the compact between the State and the Yakama Nation was terminated in 2004, the Tribe sought a determination that RCW 82.24 was unenforceable against the Tribe. On appeal, the circuit court examined whether the legal incidence of tax fell on the tribe or on tribal members for sales made inside Indian country. *Yakama Nation*, 658 F.3d at 1084. The legal incidence of an excise tax "refers to determining which entity or person bears the ultimate legal obligation to pay the tax to the taxing

authority.” *Id.* (citing *Colville*, 447 U.S. at 150-51.) Consistent with the *Colville* decision, the court held that precollection of tax is a minimal burden on the tribe and their retailers that did not contravene established principles of Indian Tax immunity. *Id.* at 1089. Nothing in *Yakama Nation* can be construed as permitting Comenout to possess unstamped cigarettes. The administrative action below assessed Comenout’s ability to legally possess unstamped cigarettes and did not reach the tax implications of such ownership. Comenout’s reliance on *Yakama Nation* is misplaced.

Similarly, Comenout argues that under *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480, 96 S.Ct 1634 (1976), the claimants were legally able to sell cigarettes without a license. Comenout Br. at 8. In *Moe*, the Court held that the State of Montana could not impose a personal property tax on personal property located within the reservation, and Montana could not require a reservation Indian to pay fees associated with a vendor license to sell cigarettes on the reservation itself. *Moe*, 425 U.S. at 480. The administrative action under review here is unrelated to the imposition of a licensing fee or personal property taxes. Instead, the matter examined whether the claimants had met their burden of demonstrating a lawful right to possess seized unstamped cigarettes. *Moe* is wholly unrelated to that inquiry.

d. *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, and other cases involving property taxes are inapplicable to state and tribal laws concerning cigarette possession.

Finally, Comenout tries to shoe-horn his facts into federal cases that deal with a state's ability to impose land and personal property taxes. Such cases are inapplicable to the issue of whether Comenout can legally own or possess unstamped and untaxed cigarettes. As with Comenout's other arguments, this argument should also be rejected as lacking merit.

In *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), the Ninth Circuit held that Thurston County could not impose a property tax on permanent improvements on leased property held by the Chehalis Tribe outside of the reservation. *Chehalis Reservation* does not permit Comenout to legally possess or own unstamped cigarettes simply because Indian Country Store is in Indian country. The Ninth Circuit's holding in *Chehalis Reservation* prohibits the taxation of the land itself, a matter that was not at issue in the administrative action.

VI. CONCLUSION

Comenout's challenges to the Board's Final Order should be rejected by this Court. Comenout fails to articulate any grounds under the APA which would allow this Court to grant relief. Comenout fails to

overcome his burden or demonstrate any deficiencies in the Final Order.
Accordingly, the Board respectfully requests that the Court affirm the
Board's Final Order.

RESPECTFULLY SUBMITTED this 7th day of December, 2015.

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DIVISION II

2015 DEC -8 PM 6:50

STATE OF WASHINGTON

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DEPUTY

NO. 47883-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ROBERT REGINALD COMENOUT
SR.,

Appellant,

v.

WASHINGTON STATE LIQUOR
CONTROL BOARD,

Respondents.

DECLARATION OF
SERVICE

I certify that on December 7, 2015, I served a true and correct copy of the *Brief of Respondent* and this *Declaration of Service* by e-mail and by placing same in the U.S. mail, postage prepaid, to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of December, 2015 at Olympia, Washington.


DARLA AUMILLER, Legal Assistant