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SUPREME COURT
STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

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ROBERT REGINALD COMENOUT, SR.,
ROBERT REGINALD COMENOUT, JR.;

Appellants,

v.

STATE OF WASHINGTON;

Respondent.

**APPELLANTS' ANSWER TO BRIEF OF AMICI STATE OF
WASHINGTON DEPARTMENT OF REVENUE AND LIQUOR
CONTROL BOARD**

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Appellants, criminal Defendants, respond to the Amicus Brief of the State of Washington dated May 27, 2011, as follows:

INTRODUCTION AND UPDATE

The Declaration of Probable Cause in this case admitted that Defendant Edward Comenout Jr., who was living at the time, was a Quinault Indian and the land was held in trust by the United States Government.

Edward Comenout Jr., one of the original Defendants, died on June 4, 2010. An Indian probate was commenced in his estate by the United States Department of the Interior, Case No. P000086947IP. At the probate hearing held on March 31, 2011, Federal Administrative Judge Thomas F. Gordon stated, "when an individual dies, there has to be a special federal probate proceeding. . .so that I could make a decision on who's to inherit the Indian trust property." The probate proceeding confirms that the federal courts have jurisdiction of the Indian trust land.

In his February 8, 2010 ruling granting review, Division II Commissioner Eric Schmidt states at page 9, "The Comenouts contend that they qualify as a tribal retailer and so are exempt under RCW 82.24.295(1). They appear to be correct."

In its argument at pages 1 and 2 of its brief, the Amici states:

The Comenouts' interpretation is contrary to the ordinary meaning of the language in RCW 82.24.295, contrary to the statutory scheme set forth in RCW 82.24 and the cigarette contract statutes, RCW 43.06, 45-460, and contrary to explicit statements of legislative intent and the policies supporting the concept of tribal-state cigarette tax contracts.

ARGUMENT

A. RCW 82.24.295(1) Is Plain, Simple, Unambiguous and Not Subject to Interpretation.

The statute states, "The taxes imposed by this chapter 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."

The Amici, at pages 2 through 7 of its brief, ignores the facts of this case. It is a criminal prosecution of enrolled American Indians for activity on land that is held in trust for them by the United States Government. Congress, by the Enabling Act of February 22, 1889, 25 U.S. Statutes at Large c 180 p. 676, Vol O, RCW page 17, Statute Law Committee, required lands held in trust by tribal Indians to "remain under the absolute jurisdiction and control of the Congress of the United States." The State's Constitution,

Art. 26 Second, ratified that the control of tribal Indians would remain with the United States.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct 1257, 36 L.Ed.2d 129 (1973) holds that tribal Indians do not have to pay state taxes.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) and *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 371, 128 S.Ct 989, 169 L.Ed.2d 933 (2008) also confirm federal preemption.

The Amici at pages 3-5, attempts to apply *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980) but fails to recognize that *Colville* is a civil regulatory case decided eight years earlier than the *Cabazon, supra* case. The case declined to adjudicate the State's power to go onto non-reservation trust land stating, "We therefore express no opinion on the matter." *Colville* does not apply here because the State went onto the Indian land arrested the Comenouts and seized the cigarette inventory.

The answer to the argument of Amici is that the meaning of the statute is that if a state tribal cigarette contract is in existence with the Indian

retailer's Tribe, the Washington State Cigarette Excise Tax, Chapter 82.24 RCW, does not apply to an Indian retailer. An Indian retailer is defined in RCW 43.06.455(14)(b)(iii) and includes "a business owned and operated by the Indian person or persons in whose name the land is held in trust." The conclusion is a perfect syllogism. The Comenouts did not have to pay the state cigarette tax. The application is not contrary to any statutory scheme.

The Department of Revenue case, *Agrilink Foods Inc. v. Department of Revenue*, 153 Wash.2d 392, 396, 103 P.3d 1226 (2005) rejected the same argument that the Amici now presents, stating:

Where statutory language is plain and ambiguous courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. . . .A statute is ambiguous if 'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.' . . .Finally, we take note that '[i]f any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.' (Citations omitted).

B. The Contract Was Not Based on Compliance. It Was to Prevent Conflict and to Promote Tribal Independence.

The contract with tribes was intended to promote economic development of the tribes and "reduce conflict." RCW 43.06.450 allows

tribes to make money. RCW 43.06.455(d)(8) affirms the tribe's right to enact a tribal cigarette tax. RCW 43.06.455.

The conduct of the Amici, State of Washington, totally ignores the statutory scheme as it removes the tribe's power to tax its members. The Amici tries to rewrite the contract. The State did not negotiate an agreement allowing it to prosecute Indians. The argument is totally contrary to the expressed intent and to RCW 82.24.080(4) relied on by the Amici as that intent expressed in that statute is in "the absence of a cigarette tax contract." The Amici has not revoked the Quinault contract.

C. This Action Should Be Dismissed as the Quinault Tribe Is Now Involved.

The Amici's argument at page 11, begs the question by wrongly defining the issue as "interpretation." The issue is whether the State had the jurisdiction to charge the crimes. The Amici presumes it has jurisdiction of trust land. The recitation of RCW 82.24.080(4) is that if a contract is in existence, the State's cigarette tax, Chapter 82.24 is not applicable. The reason is the Quinault/State contract is in effect. The compact defines Indian Country (page 3 of 19) as including all lands held in trust. It is up to the Quinault Tribe to enforce the compact, which it is now doing. *The Quinault*

Indian Nation v. Comenout, et al, Case No. 10-cv-05345-BHS, United States District Court for the Western District Washington.

The trial court, Judge Katherine M. Stolz, at the oral argument in this case, No. 08-1-04681-1, held on June 9, 2009:

Now, I grant you there is, certainly, an argument to be made that the Quinault Nation could assume jurisdiction in this since it's, apparently, being deprived of substantial revenue by the Comenouts. . .so if the Quinault Nation wants to exert jurisdiction and file a case in the tribal courts, then I'll dismiss this one. . .

The case has been filed by the Quinault Tribe, hence this case should be dismissed.

D. The Compact Between the State and the Quinault Tribe Contradicts the Amici's Argument. The Exemption in RCW 82.24.295(1) Was Not Contingent on Any Condition.

The compact clearly spells out that the Tribe has the duty to make sure their members are in compliance. Part III (c), page 6 of 19. Instead of mediation as called for by Part X, 13 of 19, the State arrested the tribal members. Obviously, the State treats the agreement as a unilateral contract.

The citation of intent as stated in RCW 82.24.080(4) does not apply as the Quinault Tribe agreed to monitor its members and is now doing so. The Amici once again assumes that the Comenouts interpret the statutes incorrectly. At page 16, the Amici indulges in mind reading. "The Comenouts

apparently believe. . .” This briefing tactic is especially egregious where the Defendants have a Sixth Amendment right to refuse to testify and a right to an instruction that this right shall not be used against them. The Comenouts were not parties to the State/Quinault contract and cannot be held to a misquoted intent. The argument, if it has validity, should be directed to the Quinault Tribe, not these criminal Defendants who are subject to federal, not state, criminal law. The Amici’s argument at page 13 on conditional retrocession, should also have been directed at the Quinault Tribe. The contract gives no permission to the State to prosecute tribal retailers.

The Amici itself violates the contract as it states at page 9 of 19, Part V 5:

State Agreement Regarding Compliance with State and Federal Law

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

Again, at page 13, the Amici states what the “Comenouts assume” and speak of contract negotiations. In its brief at pages 14-15, the Amici, contrary to the agreement, insist that federal law is violated despite the

Amici's agreement that they will not assert that any such transaction violates state law.

In this case, the Information charged a state crime of possession within the state in violation of RCW 82.24.110(2). (Information, page 2, Declaration of Probable Cause, pages 1-2). It states "transport" but without facts as to who transported or whether federal law was violated. If federal law was violated, there would be a federal arrest. The "possession" alleged was on land held in trust for Edward A. Comenout by the United States Government. RCW 82.24.260(c) allows Indian to Indian sales.

The Amici, State of Washington, in its brief argues at page 13 that retrocession is only conditioned on compliance by an Indian retailer, a non-signer to the compact. At the same page, the State accuses the Comenouts of a "false assumption" if they think they are exempt from state taxes as an Indian retailer. The Amici fails to recognize that unless the federal government delegates the state criminal authority to prosecute Indians on Indian trust land, the State has no criminal authority on the trust land. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct 1083, 94 L.Ed.2d 244 (1987) also defines Indian Country under the criminal federal statute, 18 U.S.C. § 1151 and held that "criminal prohibitory civil

regulatory distinction is the test.” If a statute is criminal prohibitory the State may have jurisdiction, if not, the Tribe has jurisdiction. If a state absolutely forbids the activity, then the state has criminal jurisdiction. *Confederated Tribes of Colville Reservation v. State of Washington*, 938 F.2d 146, 147 (9th Cir. 1991); *State v. Schmuck*, 121 Wash.2d 373, 381, 850 P.2d 1332 (1993). This state does not forbid commercial cigarette sales or taxation. Anyone who enters an office building in this state knows that cigarette smoking and cigarette sales are legal in this state, hence cigarette tax laws are civil regulatory and the State has no jurisdiction.

State v. Yallup, 160 Wash.App 500, 507, 248 P.3d 1095 (Div. III 2011) also explains the criminal prohibitory distinction and points out that the Quinault Indian was not within state jurisdiction in *State v. Pink*, 144 Wash.App 945, 185 P.3d 634 (2008) stating, “the charges were dismissed because the State lacked authority to prosecute a crime since it did not involve the operation of a motor vehicle on a public highway.” “If Washington had a broad grant of general criminal jurisdiction, as appears to be the case in California, the issue would not have even arisen.” *Id.* at 1099. The law applying in Washington is that unless control and sales of cigarettes is expressly delegated to the state, the federal courts have jurisdiction.

Yallup, Id. at 505 also adopts the federal definition of Indian Country. The State's citation of *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010) is easily distinguishable as Congress decreed that the land was not subject to any tribe and that Washington had jurisdiction. Since Congress did not authorize the state to handle cigarette smoking or regulation, state laws do not apply. *Cabazon*, 480 U.S. at 221. Cigarette smoking is not within the eight specified jurisdictional areas. RCW 37.12.010.

The Department of Revenue's concern about tax collection and criminal enforcement in the future has no relevance to this case as Public Law 280 and therefore the application of RCW 37.12.010 is all changed due to the federal legislation effective after July 29, 2010.

The Tribal Law and Order Act of 2010 (July 29, 2010, Pub.L 111-211, Title II § 221(b), 124 Stat. 2272) changed Public Law 280 by adding a new section (d). The new law states:

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General - -

- (1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and
- (2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and where applicable, tribal governments.

The sections cited 18 U.S.C. § 1152 and 1153, refer to Indian Country crimes.

E. The State Contradicts its own Agreement by Attempting to Apply Federal Law.

The Amici cites and attempt to apply its state statutes that *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct 1083, 94 L.Ed.2d 244 (1987) totally preempts. The Amici attempts to apply a civil case on federal interstate traffic, *U.S. v. Funds From Regional Bank Account Held in the Name of R.K. Company, Inc.*, 639 F.Supp.2d 1203 (W.D.Wn 2009). The *R.K.* case involved an interstate shipment from a non-trust land bank located off any Indian land in Washington. The cigarettes were delivered via common carrier. *Id.* at 1208.

The case also failed to quote the Swinomish contract. Here, the Quinault contract page 3 of 19, defines Indian Country under 18 U.S.C. § 1151 and also states that “this compact does not expand or limit the jurisdiction of either the Tribe or the State.” It also does not mention the recitation 17 of 19 at 3, “no third party shall have any rights or obligations under this compact.” The Amici at page 14, infers that the Comenouts are “affected persons” and are obliged under the contract. This argument

contradicts the plain language of the contract. Since the Comenouts were not parties to the compact, they are obviously third parties.

If the State wanted to enforce its cigarette tax if the Quinault Tribe did not enforce their cigarette tax, the contract should have so stated. If the State wants relief, they should have negotiated a guaranty. The State now wants its taxes and so does the Quinault Tribe. They want the Comenouts to pay double tax. The Amici's attempt to apply the civil tax contract to the Comenouts who are criminal Defendants and third parties, is meritless.

R.K. at page 1208, cites *Robertson v. Washington State Liquor Control Board*, 102 Wash.App 848, 10 P.3d 1079, 1084 (2000) as authority for pre-notification. This case is no longer the law as it was changed by *Rowe v. New Hampshire Motor Transport Assn*, 552 U.S. 364, 373, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008). *Rowe* affirmed the lower court decision at 448 F.3d 66, that cited *Robinson* and distinguished it on the issue of a common carrier examining cargo to comply with state law. *R.K.*'s goods were transported by common carrier. *RK* at 1208. *Robertson, supra*, held that the state law had no more than an indirect remote and tenuous relationship with the federal law. The district court decision *New Hampshire*, 377 F.Supp.2d 197, 215, fn. 84, quotes the law that imposes constructive knowledge was held to preempt

state law as it has a direct connection to constructive knowledge, i.e., to look into the packages. *New Hampshire*, 552 U.S. at 376. Since an advance call is required on unstamped deliveries, the requirement by a common carrier to examine inside cases and cartons that are not labeled stamped or unstamped is void. Common carriers now deliver cigarettes to Indian reservations. The *R.K.* case on this critical issue is abrogated.

Ward v. New York, 291 F.Supp.2d 188, 211 (W.D.N.Y. 2003) enjoins state regulation of shipments by wholesalers to tribal members. It applies here because only tribal member possession is alleged in the information. The Comenout Information does not allege facts of transportation.

The Amici attempts to stretch the civil tax collection to a criminal information that contains no out of state facts or compact violation to construe an unequivocal statute. RCW 82.24.295(1).

The State and Amici are attempting to read facts into the information and add language to the statutes. *U.S. v. Tohono O'Odham Nation*, 131 S.Ct. 1723, 1730 (2011) states "Courts should not render statutes negatory through construction."

“If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.” *Cerrillo v. Esparza*, 158 Wash.2d 194, 201, 142 P.3d 155 (2006).

In a criminal case, courts may not interpret a statute simply because different interpretations are conceivable. If a statute is plain and unambiguous, its meaning must be derived from the statute itself. *State v. Keller*, 143 Wash.2d 267, 276, 19 P.3d 1030 (2001).

In re Estate of Blessing, 160 Wash.App 847, 248 P.3d 1107 (Div. III 2011) applies statutes as written.

Grider v. Cavazos, 911 F.2d 1158, 1163 (5th Cir. 1990) states the following on statutory construction, “the highest form of judicial restraint is resistance of the temptation to cure inartfully drafted legislation by indulging in ‘judicial legislation’ absent ambiguity, we must not tinker.”

CONCLUSION

The trial court held that this case should be dismissed if the Quinault Tribe brought an action against the Defendants. The suit is pending in federal court. This case should be dismissed as the trial court order stipulated dismissal if the Quinault Tribe took action. The Amici’s brief on intent has

no relevance as the statute, RCW 82.24.295 is a model of clarity. The decision should be reversed.

DATED this 16th day of June, 2011.



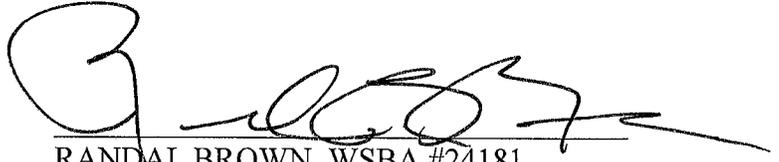
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CERTIFICATE OF SERVICE

This is to certify that a copy of the Appellants' Answer to Brief of Amici State of Washington was served on Counsel for Respondents by U.S. regular mail addressed as follows:

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