

No. 35067-0-II

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IN THE COURT OF APPEALS DIVISION II  
FOR THE STATE OF WASHINGTON

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PAUL M. MATHESON;

Appellant,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Control Board; THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; and CHAD R. WRIGHT, Cigarette Compact Department Administrator, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe;

Respondents.

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**REPLY BRIEF OF APPELLANT TO BRIEF  
OF STATE RESPONDENTS**

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**I. RESPONDENTS' COUNTERSTATEMENT OF THE FACTS IS GENERALIZED AND THEREBY MISLEADING.**

The State Respondents' statement of the case at III (A), pages 2 through 5, reviewing the state cigarette tax law is misleading. RCW 43.06.455(3) states that the tribal tax is in lieu of "all state cigarette taxes." Therefore, the state cigarette tax law is immaterial to this case. The Contract between the Puyallup Tribe and the State of Washington executed April 20, 2005 at Part VI(6), page 7, also provides that while the contract is in effect, state law is not violated. The provision also provides that the State will also assert that the federal Trafficking in Contraband Cigarettes and Smokeless Tobacco Act, 18 U.S.C. § 2341(2) is not violated. The federal law requires that cigarettes transported between states must have a state tax or "local" stamp affixed to the packages.

The Contract fails to cover smokeless tobacco which is also a violation of federal law. 18 U.S.C. § 2341(7). The State of Washington taxes cigarettes under RCW ch. 82.24 and smokeless tobacco under RCW ch. 82.26. These inclusions in

the State's brief again point out that Congress exclusively controls Indian commerce.

The remaining statement of facts on legislation (Part 2, pages 5-7) is argumentative, not a statement of the case as it advocates what the State wants the law to be, not what it is.

Appellant objects to the statements at page 8 that Matheson "objects" to the cigarette tax as it is an attempt to focus the Court's attention only on the contract. Matheson's Complaint is captioned as one for a declaratory judgment and injunction against price fixing, restraint of trade and conspiracy to fix prices. It also seeks to invalidate state statutes RCW 43.06.455(b)(c) and 400. These allegations are contained throughout the Complaint at CP 5, 8, 9, 17, 20, 21, 22, 37, 39-41. RCW 43.06.455(a)(c) and 460 are in conflict with RCW 37.12.00 and 060.

*Wilbur v. Locke*, 423 F.3d 1101, 1108 (9<sup>th</sup> Cir. 2005) a case construing a Washington State Indian Tribe cigarette tax compact, notes that the Indian retailer also sought to invalidate the same state statutes and more than the contract itself was

in question. Throughout both their briefs, the State and Tribe ignore the contract with non-Indians. The Tribe contracted to have non-Indian, State of Washington employees control their cigarette taxation in exchange for 30% of the “take.” Compact, Part IV, 3.

The trial court dismissed the entire complaint so every claim must be examined. If anyone states a claim for relief, this case must be remanded for further proceedings. *Wilbur v. Locke*, 423 F.3d 1101, 1109 (9<sup>th</sup> Cir. 2005). *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) holds that in construing the illegal effect of a contract, only fair notice is required by a complaint so that a decision on the merits may be obtained. The Opinion states:

The Respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a ‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.

The State Respondents again try to limit the scope of this appeal by urging this court to ignore the Second Supplemental Complaint (CP 175-208) and arguments in the brief in support of the Motion for Reconsideration. The Second Supplemental Complaint also supports Matheson's argument that Matheson reshaped the case as required by CR 19(b) by excising all relief sought against the Tribe and alleging facts subsequent to the original Complaint. The review on appeal is de novo. *Burton v. Lehman*, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005). Therefore, the only factual record are the two complaints. Briefs are not fact.

## **II. ARGUMENT**

### **A. Neither the State or the Tribe Could Make a Tax Agreement Without Consent of Congress.**

At page 8 of its brief, the State argues that Matheson's argument is that the State should not have contracted and at page 36 the State argues that the authority to enter into a State-Tribe tax contract is "indisputable." Matheson is able to frame his own contentions. The argument is that if the State

wants to contract with an Indian Tribe, they first must be delegated the authority from Congress. The conclusion of indisputability is wrong and a controlling reason why the case should be reversed.

U.S. Const., art. 1 § 8 cl 2 reserves exclusive control of Indian commerce to Congress. The State Constitution acknowledges exclusive control of reservation Indians, art. XXVI, Second. The federal constitution also prohibits one state from contracting with another state. U.S. Const. art. 1 § 10. In addition, the state law, RCW 37.12.060 prohibits the state from regulating property belonging to an Indian “in a manner inconsistent with any federal statute.”

Public Law 280 is codified in Washington as RCW 37.12.010, 060. Clearly, taxation jurisdiction is not specified. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) rejected state jurisdiction of Indians on the grounds that Congress did not authorize it. Treaty and constitutional law in the case mirrors the Treaty of Medicine Creek and Washington’s Enabling Act. *Williams*, 358 U.S. at 223, held

“Congress recognized the authority of the Navajos in the treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.”

Cohen’s Handbook of Federal Indian Law 2005 Edition, (Lexis Nexis 2005) § 605 states the rule:

Because of federal supremacy over Indian affairs, tribes and states may not make agreements altering the scope of their jurisdiction in Indian country absent congressional consent.

**B. The Puyallup Tribe is not Immune.**

The State Defendants, like the Tribe Defendants, ignore the allegations of extraterritorial activities (CP 30) and the allegation that the incidence of tax is on the retail purchaser and that the Tribe cannot tax the non Indian purchaser. (CP 32-33). They also assert tribal immunity even though it has been waived by ceding control to the State to regulate on-reservation tribal retailers. *Cordova v. Holwegner*, 93 Wash.App. 955, 966, 971 P.2d 531 (Div. 1999) holds that an Indian Tribe is not an indispensable party and also decided that the jurisdiction of the Court did not infringe on tribal

sovereignty. The *Cordova* Court reviewed *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) and held that “In the absence of express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non members exists only in limited circumstances.” The Court held a damage action against the supervisor of a tribal corporation was within the Supreme Court’s jurisdiction.

Both the State Defendants and the Tribe Defendants fail to recognize that jurisdiction determines immunity in this case. They also try to ignore the fact that the State is trying to control Matheson’s purchases and pricing by contract that applies to off-reservation activity.

The issue is also whether the Tribe has the power to tax non-Indians. L. Scott Gould, *Tough Love For Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NewEng.L.Rev 669 (2003) states, “Sovereignty, in other words, is not a matter of inherent power over territory, but of authority over those who consent to be governed. Subject to only two limited exceptions, *Montana* decided that tribes do not have inherent power over

nonmembers unless Congress delegates the power to them.” Matheson alleges in the Complaint that the incidence of tax is on the non-Indian retail purchaser who has no consensual relationship with the Tribe and who receives no services from the Tribe. (CP 32, 33). Since the facts are pled in the Complaint, this allegation alone survives a motion to dismiss. The potential that the facts may prove otherwise at trial is not before this court. The allegations prevent immunity at the pleading stage. The Tribe has no authority to contract with a state to impose the state’s laws on non-member retail purchasers.

The State Respondents improperly raise the immunity issue as the case was reshaped to request relief only against the State Respondents. The Complaint in this case states at page 16 (CP 19), “The tribal cigarette tax is imposed on consumers who have no consensual relationship with the buyer of the cigarettes. The buyer’s conduct does not threaten or have any direct effect on the political integrity, economic security or health and welfare of the Tribe or its members,

therefore, the tax is illegal.” The Complaint, (CP 32, 33), also states that the Puyallup Tribe has no immunity as it is taxing beyond its jurisdiction. The contract was entered into off-reservation. (CP 9, 10).

**C. The Puyallup Tribe’s Power to Tax Non-Indians is the Issue. It Has no Sovereign Immunity when the Extent of It’s Taxing Power is Questioned.**

The Puyallup Tribe cannot exert its authority as a sovereign unless the persons sought to be taxed are within the scope of the Tribe’s power. *Montana v. United States*, 450 U.S. 545, 547, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

The contemporary rule is that the Puyallup Tribe has no immunity when it has no jurisdiction to tax since Indians no longer have a right to govern persons other than themselves. *Montana v. United States*, 450 U.S. 544, 564-5, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) states the principle:

Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. (Underlining Supplied).

This statement alone is sufficient for a trial of this case as the Tribe has no immunity when it exceeds its authority and jurisdiction over non-Indians.

*Atkinson Trading v. Shirley*, 532 U.S. 645, 654, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) states that “the question which we are presented is whether this general rule applies to tribal attempts to tax non-member activity occurring on non-Indian fee land. . . .Because Congress has not authorized the Navajo Nation’s hotel occupancy tax through treaty or statute.”

*Atkinson* is the key case that requires reversal of this case. Congress did not authorize the Navajo hotel tax and non-members were taxed. Unless the non-members have a consensual relationship with the Tribe or a special benefit from the Tribe, the tax is void.

The *Atkinson* Court stated at 659:

Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory,” but their dependent status generally precludes extension of tribal civil authority beyond the limits. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). The Navajo Nation’s

imposition of a tax upon nonmembers on non-Indian fee land within the reservation is, therefore, presumptively invalid.

Cigarette taxes, like the hotel room tax in *Atkinson*, are imposed on the retail purchaser. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *California State Board of Equalization v. Chemeheuvi Indian Tribe*, 474 U.S. 9, 11, 106 S.Ct. 289, 88 L.Ed.2d 9 (1986).

**D. Tribal Immunity Does Not Apply Off-Reservation.**

*Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S.Ct. 676, 689, 163 L.Ed.2d 429 (2006) rejected tribal sovereignty on a state tax imposed on off-reservation wholesale purchasers. *Wagnon*, 126 S.Ct. at 679 states, “In such cases, ‘absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.’” *Wagnon*, 126 S.Ct. at 688 concludes, “For the foregoing reasons, we hold that the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation

transaction between non-Indians. Accordingly, the tax is valid and poses no affront to the nation's sovereignty." Here, the Puyallup Tribe went off the reservation to require Matheson to buy his inventory exclusively from wholesalers licensed by the State. The Tribe must go off-reservation to enforce its tax law against non-Indian wholesalers. The Tribe also agreed to raise its tax automatically when the state cigarette tax is raised. Contract at Part IV 2 c. No sovereign has immunity when it enforces taxation beyond its jurisdiction. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 497, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003).

*Wright v. Colville Tribal Enterprises Corp.*, 122 Wash.App 644, 111 P.3d 1244 (2005) *review granted*, 156 Wash.2d 1020, 132 P.3d 736 (2006) unequivocally holds that an Indian tribe has no immunity when it engages in off-reservation activity. *Wright* follows *Wagnon* and, if affirmed, will continue to be the law in this state.

*Dixon v. Picopa Construction Company*, 772 P.2d 1104 (Ariz. 1989) held that a company that engaged in off-

reservation activity and where management was vested in both Indians and non-Indians, an Indian tribe has no immunity.

*Powell v. Farris*, 94 Wash.2d 782, 787, 620 P.2d 525 (1980) also holds that a tribe has no off-reservation immunity stating:

The relief sought by appellant is simply a dissolution of the partnership established pursuant to the contract. Partnership dissolution is a common law form of action ordinarily heard in state courts of general jurisdiction. Moreover, it is not asserted that a tribe has an interest in regulating a contract made off the reservation. Under these circumstances, we cannot say that state court jurisdiction over this matter would infringe the sovereignty of the tribe.

*Maxa v. Yakima Petroleum*, 83 Wash.App 763, 924 P.2d 372 (Div. III 1996) follows *Powell* and also holds that there is no sovereignty off-reservation.

The above cases clearly establish that the Puyallup Tribe has granted primary joint control to the State, hence, it has no immunity.

**E. The Trial Court Erred by Not Following State Law on the CR 19 Issue.**

The State's attempt to distinguish Washington cases holding that an Indian tribe is not an indispensable party is futile. The State contends at page 21 of its brief, that a judgment cannot be rendered in the Tribe's absence. This argument fails to recognize that the Complaints, the only record in this case, isolates the relief that Matheson specifically requests exclusively from the Tribe. (CP 33-37). The Second Supplemental Complaint left the Tribe relief out and reshaped the relief only against the State. A declaratory judgment was requested against state statutes, including RCW 43.06.455 (5)(b) and (c); RCW 43.06.450; price fixing, and monopoly within RCW 19.86.030 and .050. (CP 7, 13, 38-39).

The Complaint also alleges that the State of Washington could not contract with the Puyallup Tribe. (CP 7-8, 15-16).

A price fixing conspiracy is alleged. Only one defendant needs to be sued to prove a price fixing conspiracy. *L.G. Balfour v. Federal Trade Commission*, 442 F.2d 1, 24 (7<sup>th</sup> Cir.

1971) states:

With respect to the order relating to the high school class ring market, petitioners contend that the Commission abused its discretion in order Balfour to cease and desist from use of term purchase agreements, when that device has been used by all major competitors for the past thirty years. The law is clear, however, that the Commission has the power to enter an order against one firm that is practicing an industry-wide illegal trade practice. *FTC v. Universal Rundel Corp.*, 387 U.S. 244, 87 S.Ct. 1622, 18 L.Ed.2d 749 (1967); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed 1371 (1949); *Moog Industries Inc v. FTC*, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958).

Indeed, there have been no instances where an order has been set aside simply because it was directed against a single violator in the face of industry-wide violations.

The Complaint also seeks an injunction applying reciprocal taxes. Only one state needs to be a defendant. *Baldwin v. Seelig*, 294 U.S. 511, 521, 55 S.C. 496, 79 L.Ed 1032 (1932); *West Lynn Creamery v. Healy*, 512 U.S. 186, 187, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

If one party has no ability to contract, the other party has no jurisdiction to question incapacity. The Tribe initially

was joined. If it wished to question any issue, the Tribe could have elected to stay in the case. It has submitted its own brief. The Tribe wants to remain an amicus curie. It is obviously aware of the suit. The State wants to hide behind the Tribe even though constitutionality of state statutes is among Matheson's requests for declaratory judgment and injunction.

Also, at page 21, the State cites possible state and federal prosecution of Puyallup tribal members. The Tribes have never protected its members in cigarette tax cases. *Tonasket v. Washington*, 79 Wash.2d 607, 488 P.2d 281 (1971), *vacated*, 411 U.S. 451, 93 S.Ct. 1941, 36 L.Ed.2d 385 (1973); *Paul v. Department of Revenue*, 110 Wash.App 387, 40 P.3d 1203 (Div I. 2002).

**F. The Complaint Sought a Declaratory Judgment and Injunctive Relief, Therefore it was Reversible Error to Hold that Chad Wright, a Tribal Official, had Immunity. He should not have been Dismissed.**

Appellee Chad Wright is alleged in the Complaint to be the Tribe's Tobacco Administrator. (CP 12). Injunctive relief is requested. The Complaint alleges that Chad Wright is a

department administrator in charge of the cigarette compact. (CP 12). The Complaint seeks an injunction against him as an employee of the Tribe. (CP 40).

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) holds that when an injunction and a declaratory judgment are sought, tribal officers are “not protected by the tribe’s immunity from suit.”

*Big Horn County Electric Cooperative Inc v. Adams*, 219 F.3d 944, 954 (2000) a case involving tribal tax states:

This court recognized in *Blackfeet Tribe*, in a part of the opinion not overruled by *State*, that suits for prospective injunction reliefs are permissible against tribal officers under the *Ex Parte Young* framework. See *Blackfeet Tribe*, 924 F.2d at 901 (“[T]ribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.”) As a result, the district court’s decision to permanently enjoin the defendants from applying RUTC to Big Horn’s utility property did not violate principles of sovereign immunity because, as stated above, the officials acted in violation of federal law in enforcing the tax.

An earlier case, *Arizona Public Service Commission v. Aspaas*, 77 F.3d 1128, 1133 (9<sup>th</sup> Cir. 1995) also states the rule as follows:

Tribal sovereign immunity however, does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. *Id.* Here, APS has alleged that certain Navajo officials violated federal law by acting beyond the scope of their authority. See *National Farmers*, 471 U.S. at 845, 105 S.Ct. at 2248 (noting that in all cases before the Supreme Court involving questions as to the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians, “the governing rule of decision has been provided by federal law”). That is essentially all that this case involves at the present stage. Injunctive relief is sought; damages are not.

*Comstock Oil and Gas, Inc v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5<sup>th</sup> Cir. 2001) unequivocally holds that tribal officials have no immunity when declaratory and injunctive relief is sought by Plaintiffs. The court opinion in this case carefully reviews all the pertinent law and followed *Puyallup Tribe Inc v. Department of Game of the State of Washington*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) to hold that tribal members, even when acting within the scope of their authority do not have sovereign immunity when a declaratory judgment or injunction is sought.

*TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680 (5<sup>th</sup> Cir.

1999) states:

In any event, *Santa Clara Pueblo* controls. Thus, while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its order dismissing the actions seeking declaratory and injunctive relief.

The doctrine of tribal sovereign immunity does not preclude declaratory and injunctive relief against tribal officers. It is the same as the doctrine of lack of immunity by state officials from declaratory and injunctive relief. This doctrine was applied to State of Washington officials in the cigarette tax contract case involving the Swinomish Indian Tribe's compact with the State of Washington.

Ninth Circuit Judge William Canby Jr., in the Fourth Edition of his Handbook, William C. Canby Jr., *American Indian Law in a Nutshell* states at pages 98-99:

If the official acts beyond his or her authority, or beyond the authority that the tribe had the power legally to confer, the official may be sued.....Thus a party claiming that a tribe had no power under federal law to impose a tax can sue tribal officials to enjoin enforcement, just as state taxpayers can

sue state officials under *Ex Parte Young*, 209 U.S. 123 (1908). *Big Horn County Elect. Coop., Inc v. Adams*, 219 F.3d 944, 954 (9<sup>th</sup> Cir. 2000).

*Wilbur v. Locke*, 423 F.3d 1101, 1111, holds that state officials have no immunity from a tribe member's suit challenging Washington State cigarette contracts. The above quote states that the same theory applies to Indian tribe officials.

Canby's Third Edition is cited as authority for Congressional approval in *Lara v. United States*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004).

The Puyallup Tribe's own case, *Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165, 172, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) holds that "the doctrine of sovereign immunity. . .does not immunize the individual members of the tribe."

The question of whether Appellee Chad Wright acted within or outside the scope of his authority is not material in this case, as the question is whether the Tribe acted beyond its authority in imposing a tax on non-Indians who do not deal

with the Tribe. The Tribe is exercising authority it does not possess. *Tenneco Oil v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10<sup>th</sup> Cir. 1984) holds that tribal officials are not immune from suit. The issue in *Tenneco* was that the tax was unconstitutional and declaratory and injunctive relief was requested. The opinion of the Court on this issue, stated on 574-5:

If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess.

**G. The Tribe is Neither A Necessary Party or Indispensable Party.**

The State Respondents at pages 17-18 of their brief, attempt to posture factors for determining application of CR 19. This is a waste as existing Washington laws hold that an Indian tribe is neither a necessary nor indispensable party. *Aungst v. Roberts Construction Co.*, 95 Wash.2d 439, 444, 625 P.2d 167 (1981) establishes the rule that if a plaintiff is not a

party to the contract, both parties to the contract need not be named. The case also clearly holds that the Washington law is that it is inequitable to deny relief of one party if an Indian tribe is dismissed. If it is possible that no remedy is available against the non-Indian defendant, the result is in equitable. Matheson is obviously not a party to the contract. *Aungst* carefully reviewed all of the four factors of CR 19(b) and held that the Indian Tribe was not an indispensable party. It states at page 444:

In actions involving contractual rights, all parties to the contract are indispensable. . . . Here, only appellants and the Port Susan Camping Club are parties to the membership contracts. Roberts was not. A judgment of rescission rendered in the absence of the club or the Tribe would obviously prejudice their rights under the membership contracts. . . . CR 19(a), however, directs the court to also consider the extent to which prejudice can be attenuated by the potential judgment and whether the plaintiffs will have an adequate remedy if the action is dismissed. In this instance, the federal courts may have no greater jurisdiction than the state courts, in which event appellants would have no remedy available to them if neither the state nor federal court will accept the case because the Tribe cannot be joined as a party.

As noted above, however, appellants allege violations by Roberts of the Consumer Protection Act and the Securities Act of Washington. Regardless of their status as contracting parties, we hold that neither the Tribe nor the camping club must be joined as parties under appellants' allegations. Thus, if the facts so warrant, it is possible in this case for the court to shape a judgment which would minimize any prejudice flowing to the Tribe or camping club from this litigation. After considering all the factors included in CR 19(b), we hold there is no reason in equity and good conscience to dismiss appellants' complaint. It follows that the Tribe and the camping club are not indispensable parties to this action.

*Cordova v. Holweger*, 93 Wash.App. 955, 960, 971 P.2d 531 (Div. III 1999) holds that an Indian Tribe is neither a necessary or indispensable part as separate suits against the Defendants were allowable. The same theory applies here as constitutional violations are alleged. Matheson's Complaint also alleges price fixing, antitrust and extraterritorial conduct. None of these remedies require joinder.

*Trans-Canada Enterprises Ltd v. King County*, 29 Wash.App 267, 628 P.2d 493 (Div. I, 1981), and other cases cited in Matheson's Opening Brief, all hold that the tribe need

not be joined. In *Trans-Canada*, Division One in its appellate opinion, drafted an exception to the judgment preserving the Indian tribe's rights. Matheson provided the shaping by the supplemental complaint but the trial court refused the remedy. All the Washington law at the subject holds that an Indian tribe is not an indispensable party. To hold otherwise would prevent remedies against other Defendants. A trial judge may not disagree with an appellate court that has jurisdiction of the appeal that has ruled on a controlling issue even if the trial court considers the rule unwise or incorrect. "Binding authority must be followed unless and until overruled by a body competent to do so." *Hart v. Massanari*, 1155, 1170 (9th Cir. 2001).

The consistent rule of the cases by the appellate courts in Washington is that Indian Tribes are not indispensable parties, is wise and equitable. It should be followed.

Its brief filed herein by the Puyallup Tribe, there is ample proof that it is represented. An Indian Tribe is not an indispensable party.

**Conclusion.**

Both the State and Tribe failed to obtain federal approval to enter into the tax contract, hence it is void.

The Tribe ceded control to the State to raise the taxes and allowed the State to dictate prices and who will sell to tribal retailers, therefore, the Tribe has no immunity. Since injunction and declaratory judgment is sought, the tribal officer, Chad Wright also has no immunity. The state statutes violate the commerce clause. The dismissal must be reversed.

DATED this 16<sup>th</sup> day of November, 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. Kovacevich', written over a horizontal line.

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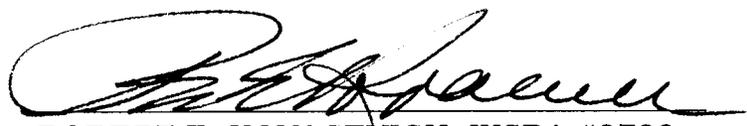
**CERTIFICATE OF SERVICE**

This is to certify that a copy of Reply Brief of Appellant to State Respondents was served on David M. Hankins and Heidi Irvin, Counsel for State Respondents, John Bell, Counsel for Tribe Respondents, by mailing the same by First Class mail on November 16, 2006, in a postage-paid wrapper addressed as follows:

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