

No. 39741-2-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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

Defendants/Appellants,

v.

STATE OF WASHINGTON;

Plaintiff/Respondent.

EX-101  
STATE OF WASHINGTON  
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**REPLY BRIEF OF REMAINING APPELLANTS**

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## INTRODUCTION

Edward A. Comenout died on June 4, 2010. The State's motion to dismiss him as a defendant was granted by the Appellate Court Commissioner, Eric B. Schmit, on June 30, 2010. The lower court case, No. 08-1-04681-0, will likewise be dismissed on remand. The remaining Defendants, pursuant to RAP 10.2(d), submit this reply brief to Respondent's (hereafter "the State") Response which was received June 21, 2010. Clerk's Papers, for uniformity, remain as designated on Edward Comenout's appeal. Parallel tables are in Appellant's Opening Brief.

## OBJECTIONS

### **A. Objection to the State's Characterization of Assignments of Error.**

The State is misleading in repeatedly stating at page 1 of their response brief that the Defendants were "off-reservation" and that the Defendants were "transporting cigarettes at an off-reservation location." All alleged acts took place on trust land majority owned by Ed Comenout, an enrolled member of the Quinault Indian Tribe. There are no allegations, or facts in cases cited below, where alleged acts took place somewhere other than on trust land restricted by the federal Bureau of Indian Affairs. The Information in this case (CP 1-3) charges transportation but does not allege

any specific facts regarding transportation. The State's Declaration of Probable Cause (CP 4-5) also fails to allege that Defendants were the transporters or that they did not carry proper invoices. The State has no knowledge regarding any of these facts and can't assume facts. The Information simply alleges "being delivered" but doesn't say who delivered the cigarettes or when. Although speculation, if the deliveries by third parties were not on trust land, they would have been stopped before delivery like the *Matheson*, 132 Wn.App 280, 130 P.3d 897 (2006), and *Paul*, 110 Wn.App 387, 40 P.3d 1203 (2002) cases.

The Information and Declaration of Probable Cause (CP 1-3, CP 4-5) admits that all the facts alleged occurred on trust land. No facts are alleged of any conduct of Defendants outside of the trust land. Accordingly, even the State concurs that all alleged acts occurred on trust land.

The state cigarette tax statute on transportation, RCW 82.24.250, allows any person to transport unstamped cigarettes if the person has "given notice to the Board in advance of the commencement of transportation." The Information also fails to allege that Defendants, if in fact transporters, did not give notice. Since the Compact was in force, the Quinault Tribe is supposed to give notice to the State. CP 355-384, Part VII, 2, page 11 of 19. The

Information merely recites the statute on notice. It does not indicate where, nor who, transported without invoices. Notice is also undefined so in any event, the transportation statute is vague and unenforceable as it fails to inform persons of reasonable understanding of how the notice is to be given whether verbal, email, telephone, letter, text message, during the Board's business hours, etc. As such, the statute is void even if the Information alleged that Defendants transported, which it does not.

In *Seattle v. Rice*, 93 Wash.2d 728, 793, 612 P.2d 792 (1980) the Supreme Court affirmed a dismissal of a criminal case where the statute did not inform persons of what conduct was required. *Skilling v. United States*, \_\_\_ 130 S.Ct. \_\_\_, 2010 WL 2518587, page 37 of 69 (U.S., June 24, 2010) held a criminal statute unconstitutional that was "hopelessly unclear" on the basis that it was void for vagueness.

The Information fails to allege that the State cannot tax sales to Quinault Indians. *Oklahoma v. Brooks*, 763 P.2d 707 (Okla. 1988) dismissed a state criminal Information against two Indian persons for selling cigarettes at a cigarette store on another reservation for failure to allege that Indian consumers could not be taxed. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 468, 96 S.Ct 1634, 48 L.Ed.2d 96 (1976) prevents state tax

on Indian to Indian sales. *Harder's Express*, 402 N.Y.S.2d 721 (N.Y. 1978) allows transportation without tax as the incidence of tax is only on sale at retail. A transfer subject to tax occurs only at point of sale.

The isolated activity on the trust land rebuts the authority cited by the State throughout its brief. The reason is that the oft quoted case (7, 8, 9, 11) by the State of *Matheson v. Washington State Liquor Board*, 132 Wn.App 280, 130 P.3d 897, 899 (2006) is a civil seizure case that took place near Ellensburg in Kittitas County, Washington. The activity was not on an Indian reservation nor did it occur on trust land owned by Matheson or anyone else. The statute, RCW 82.24.250 is cited and the opinion, 132 Wn.App at 289 states, "Mr. Matheson did not give any notice." As previously stated, no lack of notice or off-trust land conduct was alleged in the Information in this case. *Matheson* is not precedent where isolated trust land activity is the subject of the prosecution.

The State also relies on *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980), but fails to note that the *Colville* opinion, 447 U.S. at 161 and 162, is confined to (*off-reservation, non-trust land in transit*). The opinion states, "Washington further contends that it may enter onto the reservations, seize

stocks of cigarettes which are intended for sale to non-members and sell these stocks in order to obtain payment of the taxes due. However this question, which is obviously different from the preceding one, is not properly before us. . .we therefore express no opinion on the matter.” Obviously, this case is confined to the jurisdiction of the state to prosecute Indian members doing business on trust land. Any case precedent must be reviewed by the measurement of state taxation of Indians on trust land.

**B. Objection to the State’s Statement of the Case.**

At page 4 of its response brief, the State allegedly adds to the information stating that “The daily activities of the business are the responsibility of Robert Comenout Sr. Robert Comenout Jr. is an employee of the business.” The Information (CP 1-3) does not allege such facts nor does the probable cause statement (CP 4-5) even though it is not an information, state any possible reason for these assumptions. The statement also states that “the primary purpose of the business is the retail sale of tobacco products.” There is also no basis for this assumption. Buying cigarettes by state agents could not possibly establish these facts. This case posture is an appeal from a motion to dismiss the Information. No trial has occurred. No inference of facts is possible. The State is limited to its

information, without additions, during this appeal.

## ARGUMENT

### **A. The Land Where the Alleged Crime Occurred is not Within State Criminal Jurisdiction of Tax Crimes.**

At page 6 of its response brief, the State cites RCW 37.06.010 and *State v. Cooper*, 130 Wn.2d 770, 775-776, 928 P.2d 406 (1966) as authority for the statement that “Washington has assumed full non-consensual and criminal jurisdiction over all Indian country outside of an established Indian reservation. Allotted or trust lands are not excluded unless they are within the boundaries of an established Indian reservation.”

RCW 37.06.010 is apparently a miscitation. It is assumed that the reference is to RCW 37.12.010. Washington is not a “non-consensual” state when other than the eight listed categories are at issue. The statute includes an “or” provision separate from the clause referring to trust lands stating “or subject to a restriction against alienation imposed by the United States.” The eight categories do not include state taxation. 37.12.010 also states “unless the provisions of RCW 37.12.021 have been invoked, except for the following” (listing the eight categories).

RCW 37.12.021 states that the Governor must receive a resolution from . . . a tribe . . . expressing that its people and lands be subject to the

criminal jurisdiction.” The statute then states, “PROVIDED that jurisdiction assumed pursuant this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.” RCW 37.12.060 states that “nothing shall authorize. . .taxation of any real or personal property . . .belonging to any Indian . . .that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.”

*Ratzlaf v. United States*, 510 U.S. 135, 140-141 (1994) states judges should hesitate to so treat (i.e., disregard) statutory terms in any setting.” *State v. Cooper*, 130 Wn.2d 770, 773, 928 P.2d 406 (1996) notes the tribal consent statute. RCW 37.12.021. The crime in *Cooper* was child molestation. This is within the category (7) dependent children of the eight non-consensual categories. The statement in the State’s brief at most applies to the eight categories when non-consensual jurisdiction is given to the State. For any other jurisdiction, tribal consent must be given. The Appellants amended brief at pages 16-17 states that Washington was not granted full non-consensual jurisdiction. It was an optional state over only certain offenses. Tax crimes were not included. Regardless of these arguments, the special 280 status of the Quinault Tribe prevents this prosecution as set forth in *State v. Pink*, 144 Wn.App 945, 185 P.3d 634 (Div. II, 2008). The

argument of the State is incorrect when it attempts to be applied to tax crimes because the Quinault never agreed to state assumption of tax crimes by enrolled Indians. Further, the Comenout's land is restricted from alienation. 25 U.S.C. § 379 states "all such conveyances shall be subject to the approval of the Secretary of the Interior."

*Cohen's, Handbook of Federal Indian Law* § 15.03, pages 968-9, (Nell Jessup Newton et al eds, 3d ed. 2005), states that, "The (trust) land may be located within or outside the boundaries of a reservation." Edward Comenout's father had authority to obtain the allotment even though it was not within the reservation as allowed by 25 U.S.C. § 334.

*Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1421-22 (10<sup>th</sup> Cir. 1990) is instructive as it reviews the history of Indian reservations and termination and concludes "subsections 1151(b) and (c) allows checkerboard jurisdiction outside reservation boundaries."

In trust land, the United States is the guardian and the Indian is the ward. Allotments and restricted lands are treated as identical. *United States v. Ramsey*, 271 U.S. 467, 472, 46 S.Ct 559, 70 L.Ed 1039 (1926). A state legislature has no authority to legislate methods of conveyance of restricted lands. *Molone v. Wamsley*, 195 Pac. 484 (Okla. 1921).

A state has no jurisdiction over even a condemnation proceeding against an Indian allotment. *U.S. v. Tacoma, Washington*, 332 F.3d 574, (9<sup>th</sup> Cir. 2003). BIA approval is necessary, 25 U.S.C. § 379. *Tacoma, supra*, also holds that allotments and restricted property are treated the same. 332 F.3d at 580. The statement of RCW 37.12.021 and 37.12.060 reconciles with the federal law, as the federal statutes allow non-reservation allotments and lands where sales must be approved by the BIA. These off-reservation lands also are not within state criminal jurisdiction over enrolled Indians. The federal criminal law, 25 U.S.C. § 1301 gives the tribes and federal court jurisdiction over all Indians in Indian country regardless of tribe of enrollment. Appellants are all enrolled Indians. 25 U.S.C. §§ 334, 379; 18 U.S.C. § 1151 define Indian country. The statement in RCW 37.12.010 “within” describes only one area. The “or” provision adds allocated land and restricted lands wherever located. In any event, the preemption by the state legislature deferring to federal law reconciles any doubt.

**B. Jurisdiction of a Non-Member Indian for Alleged Crimes on Trust Land is in Tribal or Federal Court.**

The State at page 8, contends that it may tax non-member Indians citing WAC 458-20-192(2)(a). The immediately succeeding subsection, WAC 458-20-192(2)(b) defines Indian country the same as 18 U.S.C. §

1151(c) which includes allotments. Hence, the federal definition applies and the State has no criminal jurisdiction of Indians committing crimes on trust land regardless of whether they are members or non-members of a particular tribe. The Response misses the point as the regulation does not recognize the amendment to 25 U.S.C. §§ 1301-1303, 18 U.S.C. § 1153. This enactment is a criminal statute that requires that the tribal courts have criminal jurisdiction of all **Indians**, regardless of what tribe of membership, for crimes occurring in Indian country. This amendment changed the holding of *Duro v. Reina*, 495 U.S. 676, 110 S.Ct 2053, 109 L.Ed.2d 693 (1990).

The *Duro, supra*, case held that tribal courts could not prosecute non-member Indians for crimes occurring in Indian country. The amendment to the Indian Civil Rights Act reversed the *Duro* case. The rule now is that tribal courts have authority to prosecute non-member Indians. See Cohen's *Handbook of Federal Indian Law* § 9.05 - criminal jurisdiction - page 761 (Nell Jessup Newton et al eds, 3d. Ed 2005) and *United States v. Lara*, 541 U.S. 193, 210, 124 S.Ct 1628, 158 L.Ed.2d 420 (2004). *Lara* states:

For these reasons, we hold, with the reservations set forth in Part III, *supra*, that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute non-member Indians. We hold that Congress exercised that authority in writing this statute. That being so, the Spirit Lake Tribe's prosecution of Lara did not amount to

an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign.

Accordingly, the State has no jurisdiction against these defendants, who are all enrolled Indians.

**C. The Defendants are Classified as Tribal Retailers and Exempt from the State Cigarette Tax by RCW 82.24.295 as the Quinault Compact was in Force at the Time of Arrest.**

The State at page 10 of its response brief attempts to read into the exemption statute. The separation of powers doctrine prevents the court from legislation or delegation to a law enforcement agency. *State v. Ramos*, 149 Wn.App 266, 276, 202 P.3d 383 (2009); *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994); *State v. Elmore*, 154 Wn.App 885, 905, 228 P.3d 760 (2010). *Jepson v. Dept. of Labor and Industries*, 89 Wn.2d 394, 573 P.2d 10 (1977) holds. . . “we are not authorized to read into those things we conceive the legislature may have left out unintentionally . . .we must assume the legislature meant what it said.”

The State also tries to attribute exclusionary language to RCW 82.24.020(3) that defines an Indian business conducted under tribal approval “or similar tribal approval “within Indian Country.” Indian country is defined in 82.24.020(3) and the manner set forth in 18 U.S.C. § 1151. 1151(c) includes non-reservation lands. 82.24.020(3) is inconsistent with the reading

the State wants to urge on the off-reservation argument at page 6 of its Response. The definition statute, 82.24.020(3) refers to 18 U.S.C. § 1151 that includes off-reservation. If RCW 37.12.010 applies to only on-reservation allotments, the two statutes are inconsistent when read together.

The posture of State/Indian tribe cigarette compacts, Quinault tribal tobacco laws and the inconsistent treatment between the State's regulations on who is an Indian and attempt to eradicate off-reservation Indian restricted land also mandates dismissal on the basis of uncertain treatment of the law. Precedent is found in *Cayuga Indian Nation of New York v. Gould*, 884 N.Y.S.2d 510, 517 (N.Y.S.C. 2009) and *City of New York v. Golden Feather Smoke Shop, Inc.*, 597 F.3d 115, 122 (2<sup>nd</sup> Cir. 2009). *Golden Feather* states, "New York has a somewhat labored history as it concerns taxing sales of cigarettes on Native American reservation lands." The federal court certified the cigarette tax issue to New York state courts as the law on cigarette sales by Indians is still uncertain in 2010. These cases mandated dismissal of criminal complaints for selling cigarettes on Indian lands. *See U.S. v. Critzer*, 498 F.2d 1160 (4<sup>th</sup> Cir. 1974).

**D. The Quinault Tribal Code does not Require a Cigarette License.**

Conclusive of all attempts by the State to argue the assumption that the Comenouts were not licensed by the Quinault Tribe is mooted by RCW 82.24.295 that simply states that if a compact is in force, an “Indian retailer” is exempted from the entire state cigarette tax. The terminology used is “Indian retailer” and does not refer to the definition of Indian tribal organization. Indian retailer is not defined nor is license mentioned. The words are used in their ordinary sense, therefore all the Comenouts are excepted from the state cigarette tax. The Quinault Tobacco Control Ordinance does not contain any provision for tobacco business licenses. It only punishes persons who do not pay its cigarette tax. Quinault Tribal Code 86.03.010; 86.04.010(m). There is no wholesale or retail license necessary if no tax is required. Further, the State’s Information alleges no license information. The license facts cannot be assumed. The definition states “includes” and does not limit Indian retailers to licensed retailers or those with similar approval. The Quinault Tribe has sole inherent power to criminally prosecute the license violation if in fact a license was not issued to Defendant. *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct 1628, 158 L.Ed.2d 420 (2004); *Means v. Navajo Nation*, 432 F.3d 924, 931 (9<sup>th</sup> Cir. 2005).

On May 14, 2010, the Quinault Tribe brought suit for damages against the Defendants and others in the Western District United States District Court at Tacoma, Cause No. 10-CV-05345-BHS. The action is pending. A copy of the Complaint is attached. It notes that the Quinault Tribe has a cigarette tax compact. It seeks 30 million dollars in damages and seeks the Quinault cigarette tax. The trial court judge, Katherine M. Stolz, promised to dismiss the case if the Quinault Tribal Court took jurisdiction. Defendants' Opening Brief, p. 24. This case should now be dismissed based upon Judge Stolz's ruling.

*Van Mechelen v. State Department of Revenue*, Docket No. 08-011, Board of Tax Appeals for the State of Washington, holds that an Indian allottee who took delivery of a vehicle on his allotment does not have to pay the state sales tax. This decision can be accessed by website to [bta.state.wa.us](http://bta.state.wa.us). Search decisions by docket number. A copy is attached for convenience. This case disposes of the State's argument here at page 9 that *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 139, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980) applies. *Van Mechelen*, page 12, rejects the application on the basis that Colville does not apply to individual Indian allottees as they are per se exempt from state taxation and

that the state has no interest over an allottee or the allotment, where the incidence of tax occurred, even though the van was conveyed off-reservation to the allotment.

*Van Mechelen*, at page 23, holds “the term ‘territory’ encompasses all Indian country including Indian allotments whether or not the allotments are on a reservation.” The court construed 25 U.S.C. § 348 stating that all allottees are “subject to the exclusive jurisdiction of the United States.” 25 U.S.C. § 349 also contains the exclusive jurisdiction language. The Board of Tax Appeals also relied on *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 124-5, 113 S.Ct 1985, 124 L.Ed.2d 30 (1985), that rejected state license taxes on allotments where no reservation existed. The court stated, 508 U.S. at 128, “Absent explicit congressional direction to the contrary, we presume against a State’s having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.”

The case also held that exemptions from tax when Indians are the subject is exactly the opposite of the normal rule that exemptions must be clearly expressed stating (508 U.S. at 124):

Although “exemptions from tax laws should, as a general rule, be clearly expressed,” *McClanahan*, 411 U.S. at 176, 93

S.Ct. at 1264, the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members living and working on land set aside for those members.

**E. The Questions of Indian Jurisdiction and Jurisdiction over Indians Who Are Not Quinault Tribal Members Is Governed by Federal Law.**

At page 7 of its Response, the State argues that Indian jurisdiction is a question of state law. This argument is contrary to the law on the subject. The State cites the Washington Constitution Art. IV § 6 but it excepts “proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” The argument ignores the other State Constitution Art 26 Second stating that “until title shall have been extinguished Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.”

RCW 37.12.060 states that the use of land belonging to an Indian “held in trust” shall not authorize taxation of the “use in a manner” inconsistent with any treaty agreement or federal statute. The Quinault Compact, (CP 355-384) contrary to the State’s argument that state law controls states at Part I 8(c), page 3 of 19 that “Indian country” is consistent with the meaning given in 18 U.S.C. § 1151 and includes all Indian lands held in trust.

*Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-9, 115 S.Ct 2214, 137 L.Ed.2d 400 (1995) states:

The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.

“The question of where the legal incidence of a tax lies is decided by federal law.” *Coeur d’Alene Tribe v. Hammond*, 384 F.3d 674, 681 (9<sup>th</sup> Cir. 2003).

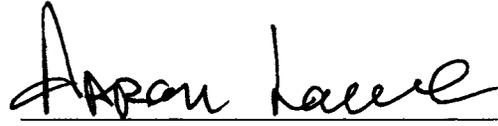
The Compact reserves all right to the Quinault Tribe to determine who can sell cigarettes in Indian country. Part III, 1.C, page 6 of 19. The Quinault Tribal Ordinance does not require a tribal license. The fault lies with the Tribe, not the Comenouts, as no license is required by the Quinault Tobacco Code Section 86. *Cabazon v. Smith*, 388 F.3d 691, 701 (9<sup>th</sup> Cir. 2004) supplies the standard. Conflicting state laws on Indian matters, whether on or off a reservation, are preempted by “federal Indian law.”

#### **Conclusion.**

The State has no jurisdiction of the place of the alleged state tax crime as it is in federal jurisdiction. Since a compact was in force, no tax was due to the State. It also had no jurisdiction of the enrolled Indians whose activity

was on trust land. The case should be dismissed.

DATED this 13<sup>th</sup> day of July 2010.



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the Reply Brief of Remaining Appellants was served on Counsel for Plaintiff/Appellee by hand delivery addressed as follows:

Tom Moore  
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DATED this 16<sup>th</sup> day of July, 2010.

  
RANDAL BROWN  
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**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON**

THE QUINAULT INDIAN  
NATION,

Plaintiff,

vs.

CAUSE NO.

EDWARD A. COMENOUT,  
ROBERT R. COMENOUT, SR.,  
ROBERT R. COMENOUT, JR.,  
DENNIS JACK HARRIS, JR.,  
JAMES HARRIS, FLOURNOY  
HARRIS, VERNON HARRIS,  
CAROL ANN HARRIS, ELISIE A.  
WAHSISE AND JOHN DOES 1-20,  
AND JANE DOES 1-20.

COMPLAINT FOR DAMAGES

Defendant.

COMES NOW the Quinault Indian Nation, by and through its Office of Reservation Attorney and Naomi Stacy and Raymond G. Dodge, Jr. and for claims of relief against the defendants, Edward A. Comenout, Robert R. Comenout, Sr., Robert R Comenout, Jr., Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon Harris, Carol Ann Harris, Elisie A. Wahsise and John Does 1-20 and Jane Does 1-20 complain and allege as follows:

**I. FACTS PERTAINING TO THE QUIUNALT INDIAN NATION**

1.1 The Quinault Indian Nation is a federally recognized Indian Tribe. 74 FR 40218, Aug. 1, 2009.

1 1.2 The Quinault Indian Reservation was established by Executive Order in 1873 pursuant  
2 to the Treaty of Olympia, 12 Stat. 971.

3 1.3 The Quinault Indian Nation adopted its Constitution on March 22, 1975.

4 1.4 Under the Constitution, Article I, Section 1, the Quinault Indian Nation has jurisdiction  
5 and governmental power over all lands held in trust by the United States for the use and benefit  
6 of any member of the Quinault Tribe and all members of the Quinault Nation that are within  
7 the boundaries of the United States.

8 1.5 Under the Constitution, Article V, the power to govern the Quinault people is vested in  
9 the Business Committee.

10 1.6 In the 2001 legislative session Washington passed RCW 43.06.450 which allows for  
11 compacts between the State and Tribal governments for the handling of cigarette taxes.

12 1.7 On January 3, 2005, the Quinault Indian Nation (Nation) and the State of Washington  
13 (State) entered into a "Cigarette Tax Compact" (Compact).

14 1.8 Under the terms of the Compact, the State of Washington retroceded from its tax and  
15 granted its taxing authority to the Nation which allows the Nation to retain one hundred  
16 percent (100%) of the state excise taxes assessed on cigarettes.

17 1.9 In keeping with the intent of the enabling legislation allowing for entry into the  
18 Compact, enforcement through the seizure provisions of Chapter 82.24 RCW was granted to  
19 the Washington State Liquor Control Board.

20 1.10 In addition, under the terms of the compact, the Nation agreed "that it would require  
21 any member-owned smokeshop located in Indian country to be in compliance."

22 1.11 On May 8, 2006 the Nation enacted "Title 86 - Cigarette Sales and Tax Code" (Code)  
23 implementing the compact and assessing not only the state cigarette tax on non-Tribal  
24 members, but also an equivalent tax on Tribal members.

## 25 **II. FACTS PERTAINING TO EDWARD A. COMENOUT**

26 2.1 Defendant, Edward A. Comenout, is the owner of Indian Country Store ("enterprise").  
The enterprise is located at 908/920 River Road in Puyallup, Pierce County, Washington. The  
land upon which the enterprise is located is held in trust by the United States government for

1 the benefit of the Defendant. The land was Public Domain land purchased with funds from the  
 2 Estate of Edward Comenout, Defendant's father. The land is not within the exterior  
 3 boundaries of any federally recognized Indian Reservation. The Puyallup Tribe of Indians  
 4 Reservation is the closest reservation. However, the land is not located within its borders.

5 2.2 Defendant, Edward A. Comenout, is an enrolled member of the Quinault Indian Nation.  
 6 The Quinault Indian Reservation is located approximately 120 miles west of the enterprise.  
 7 Defendant has, on at least one prior occasion, requested that the Quinault Indian Nation  
 8 exercise sovereignty over the land upon which the enterprise located.<sup>1</sup>

9 2.3 Defendant, Edward A. Comenout, and the enterprise property have previously been the  
 10 subject of both state and federal legal actions. Beginning sometime in 1971, Defendant,  
 11 Edward Comenout, commenced operating the enterprise. The business of the enterprise  
 12 consists, in large part, of the retail sale of unstamped (untaxed) cigarettes and tobacco products  
 13 to Indians and non-Indians alike. Since 1977, agents of the Washington State Department of  
 14 Revenue and the Liquor Control Board have periodically seized and sold unstamped (untaxed)  
 15 cigarettes and tobacco products found on the premises as contraband under the provisions of  
 16 RCW 82.24.130 et seq. *Department of Revenue v. Comenout*, No. 259241 (Pierce County  
 17 Superior Court, April 27, 1977). Mr. Comenout's appeal was dismissed as frivolous.  
 18 *Department of Revenue v. Comenout*, No. 4080-II (Ct.App., June 23, 1980).

19 2.4 On March 23, 1977, the Washington State Department of Revenue and Defendant,  
 20 Edward A. Comenout, entered into a closing agreement which was intended to compromise  
 21 and finally settle the dispute and all claims amongst the parties. Under the terms of the  
 22 agreement, Edward A. Comenout, agreed to not only register with the Department of Revenue,  
 23 but also to collect, remit and pay all state excise taxes arising out of the business conducted at  
 24 the enterprise, the same as any other business in the State of Washington.

25 2.5 Prior to that, Edward A. Comenout had sought to enjoin the searches and seizures as  
 26 illegal on the ground that the 2 1/2 acre tract in question, and the cigarette sales business

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<sup>1</sup> Edward A. Comenout requested the assistance of the Quinault Indian Nation in connection with signage located on the land upon which the enterprise is located. In addition, during oral argument before the Pierce County Superior Court on Mr. Comenout's motion to have the criminal charges recently filed against him dismissed, his attorney, Robert E. Kovacevich, argued that only the Nation had jurisdiction over the enterprise and Mr. Comenout.

1 conducted thereon, were exempt from a state excise tax as federal instrumentalities pursuant to  
2 25 U.S.C. § 412a. That argument was rejected. The court ruled that while trust land could not  
3 be subject to tax, businesses operated thereon were subject to taxation *Matheson, e. al. v.*  
4 *Kinnear, et al.*, 393 F. Supp. 1025 (W. D. Wash. 1974).

5 2.5 On October 28, 1981, Edward A. Comenout filed a civil rights action against the State  
6 of Washington alleging that enforcement of the Washington liquor and cigarette tax laws on  
7 Indian trust land was illegal and that state agents and local police had made unconstitutional  
8 arrests and searches and seizures. The district court on September 10, 1982 granted summary  
9 judgment in favor of the defendants on the grounds that the Tax Injunction Act, 28 U.S.C. §  
10 1341, barred the action. The Ninth Circuit Court of Appeals upheld the lower court ruling.  
11 *Comenout v. State of Washington*, 722 F.2d 574 (1983). However, Edward A. Comenout, or  
12 others acting with him or on his behalf, have continued to sell unstamped (untaxed) cigarettes  
13 and tobacco products to the general public through the Store. The Ninth Court of Appeals ruled  
14 against Mr. Comenout in his suit against the State of Washington resulting from its seizures of  
15 untaxed cigarettes. *Comenout v. State of Washington*, 722 F.2d 574 (9<sup>th</sup> Cir., 1983).

16 2.6 Subsequent to that date, Edward A. Comenout, or others acting with him or on his  
17 behalf, have continued to sell unstamped (untaxed) cigarettes and tobacco products to the  
18 general public through the enterprise. In addition, Edward A. Comenout has failed to register  
19 with the Department of Revenue. These actions are in violation of law and the express terms  
20 of the closing agreement. The Nation informed Mr. Comenout of his noncompliance and in  
21 fact offered options to assist in his coming into voluntary compliance. To date, Edward A  
22 Comenout has steadfastly refused to comply.

23 2.7 In September of 2006 the Washington Liquor Control Board (WLCB) began receiving  
24 complaints about the sale of untaxed cigarettes at the enterprise. Following its investigation,  
25 the WLCB determined that at least for the last ten years to the present, no taxes were collected  
26 or stamps purchased by the enterprise. The WLCB executed a search warrant on the enterprise  
and seized 37,000 cartons of unstamped (untaxed) cigarettes. Edward A. Comenout has been  
charged with the following by the Pierce County Prosecutor's Office:

- a. The unlawful possession or transportation of unstamped cigarettes;

- 1 b. Engaging in the business of purchasing, selling, consigning, or distributing  
2 cigarettes without a license; and  
3 c. Unlawfully and feloniously obtaining control over property belonging to another, of  
4 a value exceeding \$1,500, by color or aid of deception with intent to deprive the  
5 owner contrary to RCW9A.56.020(1)(b) and RCW 9A.56.030(1)(a).

6 **III. FACTS PERTAINING TO ROBERT COMENOUT, SR.  
7 AND ROBERT COMENOUT, JR.**

8 3.1 Robert Comenout, Sr. is in charge of the enterprise. He manages and oversees the daily  
9 operations of the enterprise.

10 3.2 Robert Comenout, Jr. provides assistance to Robert Comenout, Sr. in the management  
11 of the enterprise.

12 3.3 Following the seizure by the WSLCB, both Robert Comenout, Sr. and Robert  
13 Comenout, Jr. were charged with the following by the Pierce County Prosecutor's Office:

- 14 a. The unlawful possession or transportation of unstamped cigarettes;  
15 b. Engaging in the business of purchasing, selling, consigning, or distributing  
16 cigarettes without a license; and  
17 c. Unlawfully and feloniously obtaining control over property belonging to another, of  
18 a value exceeding \$1,500, by color or aid of deception with intent to deprive the  
19 owner contrary to RCW9A.56.020(1)(b) and RCW 9A.56.030(1)(a).

20 **IV. FACTS PERTAINING TO ROBERT COMENOUT, DENNIS JACK HARRIS,  
21 JR., JAMES HARRIS, FLOURNOY HARRIS, VERNON HARRIS, CAROL  
22 ANN HARRIS, ELISIE A. WAHSISE AND JOHN DOES 1-20, AND JANE  
23 DOES 1-20.**

24 4.1 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
25 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 are all listed as  
26 owners or the real property upon which the enterprise is located.

4.2 Under federal law, property which is held in trust by the federal government is used for  
commercial purposes by less than all of the owners, a lease agreement must be executed by the

1 parties and approved by the Bureau of Indian Affairs. The owners would then receive  
2 payments from the lessee.

3 4.3 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
4 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 have been receiving  
5 payments from the enterprise for its use of their property.

6 4.4 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
7 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 knew about the  
8 unlawful nature of the enterprise, allowed it to continue in operation and profited from the ill  
9 gotten gains of the enterprise.

## 10 V. FIRST CAUSE OF ACTION

11 5.1 Plaintiff realleges and incorporate by reference each and every other allegation  
12 contained in paragraphs I through IV as if set forth fully herein.

13 5.2 This cause of action is asserted against Edward A. Comenout, Robert R. Comenout, Sr.  
14 and Robert A. Comenout, Jr. and others unknown at this time and arises under 18 U.S.C. §§  
15 1962 (c) and (d).

16 5.3 At all times relevant to this complaint, all of the defendants, including Edward A.  
17 Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. was a "person" within the  
18 meaning of 18 U.S.C. § 1961 (3), as each of the defendants was "capable of holding a legal or  
19 beneficial interest in the property."

20 5.4 At all times relevant to this complaint, Indian Country Store constituted an "enterprise"  
21 within the meaning of 18 U.S.C. § 1961 (4). That enterprise's purpose and function was to  
22 defraud the Nation and the State of Washington of all taxes associated with and due on the sale  
23 of cigarettes and other tobacco products. That enterprise has engaged in and its activities have  
24 effected interstate commerce.

25 5.5 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. have  
26 been associated with the enterprise. Edward A. Comenout, Robert R. Comenout, Sr. and  
Robert A. Comenout, Jr. helped direct the enterprise's actions and manage its affairs. Edward  
A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. conducted or  
participated, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of

1 racketeering activity in violation of 18 U.S.C. § 1962 (c). Their pattern of racketeering dates  
2 from prior to January 2, 2005 and continues to the present, and threatens to continue in the  
3 future. Their multiple predicate acts of racketeering include:

4 a. Mail and wire fraud in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 1343.  
5 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. engaged  
6 in schemes to defraud the Nation and the State of Washington with respect to the taxes  
7 due on the sale of cigarettes and other tobacco products. Those schemes have involved  
8 failing to report and pay such taxes. Edward A. Comenout, Robert R. Comenout, Sr.  
9 and Robert A. Comenout, Jr. executed or attempted to execute such schemes through  
10 the use of the United States mails and through transmissions by wire and telephone  
11 communications in interstate commerce.

12 b. Engaging in interstate travel in aid of racketeering activities, in violation of 18  
13 U.S.C. § 1952.

14 c. Engaging in trafficking in contraband cigarettes which constitute racketeering  
15 activity in violation of 18 U.S.C. § 2342. Such contraband cigarettes consisted of a  
16 quantity in excess of 10,000 cigarettes, which bore no evidence of the payment of  
17 applicable taxes as required by the Nation and the State of Washington.

18 5.6 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. also  
19 conspired to violate 18 U.S.C. § 1962 (c), in violation of 18 U.S.C. § 1962 (d).

20 5.7 The Nation has been damaged in its business and property by reason of violations of 18  
21 U.S.C. §§ 1962 (c) and (d) by Edward A. Comenout, Robert R. Comenout, Sr. and Robert A.  
22 Comenout, Jr., as the Nation has been defrauded out of Thirty Million Dollars  
23 (\$30,000,000.00) of tax revenue lawfully due the Nation plus interest thereon. Under the  
24 provisions of 18 U.S.C. § 1964(c), the Nation is entitled to bring this action and to recover  
25 treble damages, the costs of bringing this suit, and reasonable attorney's fees.  
26

## VI. SECOND CAUSE OF ACTION

6.1 Plaintiff realleges and incorporate by reference each and every other allegation  
contained in paragraphs I through V as if set forth fully herein.

1 6.2 This cause of action is asserted against Edward A. Comenout, Robert R. Comenout, Sr.  
2 and Robert A. Comenout, Jr. and others unknown at this time and arises under 18 U.S.C. §§  
3 1962 (c) and (d).

4 6.3 At all times relevant to this complaint, all of the defendants, including Edward A.  
5 Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. was a “person” within the  
6 meaning of 18 U.S.C. § 1961 (3), as each of the defendants was “capable of holding a legal or  
beneficial interest in the property.”

7 6.4 At all times relevant to this complaint, Indian Country Store constituted an “enterprise”  
8 within the meaning of 18 U.S.C. § 1961 (4). That enterprise’s purpose and function was to and  
9 continues to defraud the Nation and the State of Washington of all taxes associated with and  
10 due on the sale of cigarettes and other tobacco products. That enterprise has engaged in and  
it’s activities have effected interstate commerce.

11 6.5 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. have  
12 engaged in a pattern of racketeering which dates from prior to January 2, 2005 and continues to  
13 the present, and threatens to continue in the future. Edward A. Comenout, Robert R.  
14 Comenout, Sr. and Robert A. Comenout, Jr.’s multiple predicate acts of racketeering are set  
15 forth in the First Cause of Action. These racketeering acts generated income for Edward A.  
16 Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. because they purposefully  
17 failed to pay the lawfully due taxes on the sale of cigarettes and other tobacco products.

18 6.6 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. have used  
19 or invested their illicit proceeds, generated through the pattern of racketeering activity, directly  
20 or indirectly, in the acquisition of an interest in, or the establishment or operation of the  
21 enterprise in violation of 18 U.S.C. § 1962 (a). Edward A. Comenout, Robert R. Comenout,  
22 Sr. and Robert A. Comenout, Jr. use and investment of these illicit proceeds in the enterprise is  
for the specific purpose of defrauding the Nation and the State of Washington of the taxes due  
23 on the sale of cigarettes and other tobacco products.

24 6.7 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. also  
25 conspired to violate 18 U.S.C. § 1962 (a), in violation of 18 U.S.C. § 1962 (d).

26 6.8 The Nation has been damaged in its business and property by reason of violations of 18  
U.S.C. §§ 1962 (a) and (d) by Edward A. Comenout, Robert R. Comenout, Sr. and Robert A.

1 Comenout, Jr., as the Nation has been defrauded out of Thirty Million Dollars  
2 (\$30,000,000.00) of tax revenue lawfully due the Nation plus interest thereon. Under the  
3 provisions of 18 U.S.C. § 1964(c), the Nation is entitled to bring this action and to recover  
4 treble damages, the costs of brining this suit, and reasonable attorney's fees.

5  
6 **VII THIRD CAUSE OF ACTION**

7 7.1 Plaintiff realleges and incorporate by reference each and every other allegation  
8 contained in paragraphs I through VI as if set forth fully herein.

9 7.2 This cause of action is asserted against Robert Comenout, Dennis Jack Harris, Jr.,  
10 James Harris, Flournoy Harris, Vernon Harris, Carol Ann Harris, Elsie A. Wahsise and John  
11 and Jane Does 1-20.

12 7.3 At all times relevant to this complaint, all of the defendants, including Robert  
13 Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon Harris, Carol Ann  
14 Harris, Elsie A. Wahsise and John and Jane Does 1-20 was a "person" within the meaning of  
15 18 U.S.C. § 1961 (3), as each of the defendants was "capable of holding a legal or beneficial  
16 interest in the property."

17 7.4 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
18 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 aided and a abetted  
19 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. in their violation  
20 of 18 U.S.C. §§ 1962 (c) and (d) as set forth above in the First Cause of Action.

21 7.5 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
22 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 knew of those  
23 violations by Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. and  
24 allowed them to continue on land upon which they were listed as owners and derived lease  
25 payments from those racketeering acts.

26 7.6 The Nation has been damaged in its business and property by reason of violations of 18  
U.S.C. §§ 1962 (c) and (d) by Edward A. Comenout, Robert R. Comenout, Sr. and Robert A.  
Comenout, Jr., as aided and abetted by Robert Comenout, Dennis Jack Harris, Jr., James  
Harris, Flournoy Harris, Vernon Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane  
Does 1-20 as the Nation has been defrauded out of Thirty Million Dollars (\$30,000,000.00) of

1 tax revenue lawfully due the Nation plus interest thereon. Under the provisions of 18 U.S.C. §  
 2 1964(c), the Nation is entitled to bring this action and to recover treble damages, the costs of  
 3 brining this suit, and reasonable attorney's fees.

#### 4 **VIII. FOURTH CAUSE OF ACTION**

5 8.1 Plaintiff realleges and incorporate by reference each and every other allegation  
 6 contained in paragraphs I through VII as if set forth fully herein.

7 8.2 This cause of action is asserted against Robert Comenout, Dennis Jack Harris, Jr.,  
 8 James Harris, Flournoy Harris, Vernon Harris, Carol Ann Harris, Elsie A. Wahsise and John  
 9 and Jane Does 1-20.

10 8.3 At all times relevant to this complaint, all of the defendants, including Robert  
 11 Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon Harris, Carol Ann  
 12 Harris, Elsie A. Wahsise and John and Jane Does 1-20 was a "person" within the meaning of  
 13 18 U.S.C. § 1961 (3), as each of the defendants was "capable of holding a legal or beneficial  
 14 interest in the property."

15 8.4 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
 16 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 aided and a abetted  
 17 Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. in their violation  
 18 of 18 U.S.C. §§ 1962 (a) and (d) as set forth above in the Second Cause of Action.

19 8.5 Robert Comenout, Dennis Jack Harris, Jr., James Harris, Flournoy Harris, Vernon  
 20 Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane Does 1-20 knew of those  
 21 violations by Edward A. Comenout, Robert R. Comenout, Sr. and Robert A. Comenout, Jr. and  
 22 allowed them to continue on land upon which they were listed as owners and derived lease  
 23 payments from those racketeering acts.

24 8.6 The Nation has been damaged in its business and property by reason of violations of 18  
 25 U.S.C. §§ 1962 (a) and (d) by Edward A. Comenout, Robert R. Comenout, Sr. and Robert A.  
 26 Comenout, Jr., as aided and abetted by Robert Comenout, Dennis Jack Harris, Jr., James  
 Harris, Flournoy Harris, Vernon Harris, Carol Ann Harris, Elsie A. Wahsise and John and Jane  
 Does 1-20 as the Nation has been defrauded out of Thirty Million Dollars (\$30,000,000.00) of  
 tax revenue lawfully due the Nation plus interest thereon. Under the provisions of 18 U.S.C. §

1 1964(c), the Nation is entitled to bring this action and to recover treble damages, the costs of  
2 brining this suit, and reasonable attorney's fees.

3  
4 **IX FIFTH CAUSE OF ACTION**

5 9.1 Plaintiff realleges and incorporate by reference each and every other allegation  
6 contained in paragraphs I through VIII as if set forth fully herein.

7 9.2 This cause of action is asserted against Edward A. Comenout.

8 9.3 On March 23, 1977, the Washington State Department of Revenue and Defendant,  
9 Edward A. Comenout, entered into a closing agreement which was intended to compromise  
10 and finally settle the dispute and all claims amongst the parties. Under the terms of the  
11 agreement, Edward A. Comenout, agreed to not only register with the Department of Revenue,  
12 but also to collect, remit and pay all state excise taxes arising out of the business conducted at  
the enterprise, the same as any other business in the State of Washington.

13 9.4 In the 2001 legislative session Washington passed RCW 43.06.450 which allows for  
14 compacts between the State and Tribal governments for the handling of cigarette taxes. On  
15 January 3, 2005, the Quinault Indian Nation (Nation) and the State of Washington (State)  
16 entered into a "Cigarette Tax Compact" (Compact). Under the terms of the Compact, the State  
17 of Washington retroceded from its tax and granted its taxing authority to the Nation which  
18 allows the Nation to retain one hundred percent (100%) of the state excise taxes assessed on  
19 cigarettes. The end result is that the Nation is the assignee of the contract under the terms of  
20 which Edward A. Comenout agreed to pay all applicable taxes assessed by the State of  
Washington on the sale of cigarettes.

21 9.5 Edward A. Comenout has failed to fulfill the terms of that contract. He is in material  
22 breach of that contract.

23 9.6 The Nation has been damaged in its business and property by reason of his breach and  
24 failure to pay the applicable taxes due in the amount of Thirty Million Dollars  
(\$30,000,000.00).

25 **WHEREFORE**, the Nation prays for the following relief:  
26

1           1.       Under the First, Second, Third and Fourth Causes of Action, Plaintiff prays for  
2 a judgment against Defendants in the amount of Thirty Million Dollars (\$30,000,000.00),  
3 interest thereon, treble damages of that amount, plus costs of suit and reasonable attorney's  
4 fees.

5           2.       Under the Fifth Cause of Action, Plaintiff prays for a judgment against Edward  
6 A. Comenout in the amount of Thirty Million Dollars (\$30,000,000.00), plus interest.

7           3.       Plaintiff prays for an Order from the Court directing Defendants to henceforth  
8 pay all applicable taxes due the Nation on their sales of cigarettes.

9           4.       For such other and further relief as the Court deems just and equitable under the  
10 circumstances.

DATED this 14<sup>th</sup> day of May, 2010.

OFFICE OF RESERVATION ATTORNEY

11  
12  
13           By s/ Naomi Stacy-  
14           NAOMI STACY  
15           WSBA # 29434  
16           nstacy@quinault.org

17           By s/ Raymond G. Dodge, Jr.  
18           RAYMOND G. DODGE, JR.  
19           WSBA #16020  
20           rdodge@quinault.org

21  
22  
23           ATTORNEYS FOR THE QUINAULT INDIAN NATION  
24  
25  
26

BEFORE THE BOARD OF TAX APPEALS  
STATE OF WASHINGTON

1  
2  
3 DAN VAN MECHELEN, )  
4 Appellant, ) Docket No. 08-011  
5 v. ) RE: Excise Tax Appeal  
6 )  
7 STATE OF WASHINGTON ) FINAL DECISION  
8 DEPARTMENT OF REVENUE, )  
9 Respondent. )

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10 This matter came before the Board of Tax Appeals (Board) on December 5, 2008, in a  
11 formal hearing pursuant to the rules and procedures set forth in chapter 456-09 WAC  
12 (Washington Administrative Code). Paul Neal, Attorney, represented Appellant, Dan Van  
13 Mechelen (Mr. Van Mechelen). David M. Hankins and Heidi A. Irvin, Assistant Attorneys  
14 General, represented Respondent, State of Washington Department of Revenue (Department).  
15 Mr. Van Mechelen testified and Doctor Stephen Dow Beckham appeared as a witness for Mr.  
16 Van Mechelen.

17 The Board heard the testimony, reviewed the evidence, and considered the arguments  
18 made on behalf of both parties. The Board now makes its decision as follows:

19 BACKGROUND

20 Slonim. Mr. Van Mechelen is an enrolled member of the Cowlitz Indian Tribe and  
21 resides in Olympia, Washington.<sup>1</sup> The Cowlitz Indian Tribe does not have a reservation. Mr.  
22 Van Mechelen owns a trust allotment of land within the perimeter of the Quinault Indian  
23 Reservation. On January 29, 2004, Mr. Van Mechelen ordered a 2004 Dodge Ram pick-up  
24 truck. The dealer informed him that he would not have to pay sales tax if the truck was  
25 delivered to him on his trust allotment land. After reviewing WAC 458-20-192 (Rule 192), Mr.  
Van Mechelen concluded that he was entitled to a sales tax exemption because this rule  
provides that federal law does not permit states to tax Indians in Indian country, and his trust

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<sup>1</sup> Exhibits R1-1; R2-1; R3-1; R6-2; R7-1; A8-1-2; A18.

1 allotment was in Indian country, as defined in Rule 192(2)(b)(iii). The pick-up truck was  
2 delivered to his trust allotment land. Claiming exemption under Rule 192, he did not pay the  
3 retail sales tax.<sup>2</sup>

4 On January 24, 2007, the Department assessed Mr. Van Mechelen for unpaid retail sales  
5 tax in the amount of \$ 3,635.83. Mr. Van Mechelen paid his retail sales tax liability in full on  
6 February 5, 2007, and sought a refund by pursuing an administrative appeal with the  
7 Department's Appeals Division. The Appeals Division issued a Determination denying the  
8 refund request, holding that, pursuant to Rule 192(2)(a), Indians who are not enrolled members  
9 of the Quinault Indian Nation do not qualify for the exemption from sales tax under the rule,  
10 even if they own trust allotments of land within the Quinault Indian Reservation.<sup>3</sup> Mr. Van  
11 Mechelen timely filed a Notice of Formal Appeal with the Board of Tax Appeals.

#### 12 DEPARTMENT'S MOTION IN LIMINE

13 The Department moved to preclude the testimony of Doctor Beckham, a substitute  
14 witness for the Appellant, on the grounds that the Department was not timely notified that he  
15 would be a witness, and that his anticipated testimony would be repetitious, unhelpful opinion  
16 and irrelevant. In response, Mr. Van Mechelen argued that the Department was given sufficient  
17 notice of Doctor Beckham's substitution for the government employee originally named to  
18 testify about the same matters, and that Doctor Beckham's testimony was relevant and necessary  
19 to fully explain and put in historical context some of the Appellant's exhibits. The Board  
20 overruled the Department's motion in limine, but cautioned Mr. Van Mechelen to limit Doctor  
21 Beckham's testimony to key factual issues, with the knowledge that the Board had read the  
22 historical perspective provided in the Appellant's Opening Brief. The Board also advised that  
23 Professor Beckham's potential testimony on the rights of a Cowlitz tribal member on the  
24 Quinault reservation would not be necessary.

#### 25 DEPARTMENT'S OBJECTIONS TO CERTAIN PROPOSED EXHIBITS

The Department objected to several exhibits. The grounds for the objection and the  
Board's rulings are as follows:

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<sup>2</sup> Exhibit A8-2.

<sup>3</sup> Exhibit R1.

- 1 • Ex. A-11 should not be considered to the extent it presents a legal conclusions; motion  
2 denied.
- 3 • Ex. A-14 is legal argument; motion denied.
- 4 • Ex. A-23 is hearsay and legal opinion; motion granted.
- 5 • Ex. A24 (treaty with the Omaha) is irrelevant; motion denied. The exhibit is permitted  
6 because it is cross-referenced in the treaty with the Quinault.
- 7 • Ex. A-29-35 (documents related to logging Indian timber, and tax settlement discussions)  
8 are not relevant; motion granted.  
9

#### 11 ISSUES

12 Did the Department properly assess retail sales tax on Mr. Van Mechelen's purchase of a  
13 2004 Dodge Ram pick-up truck when Mr. Van Mechelen, a member of the Cowlitz Tribe, had it  
14 delivered to his trust allotment land on the Quinault Indian reservation?

15 Answer: No, the State of Washington does not have jurisdiction to tax Mr. Van  
16 Mechelen on a transaction that occurs on his trust allotment land because the allotment is "Indian  
17 Country" pursuant to 18 U.S.C. § 1511(c), and as further defined in WAC 458-20-192(2)(b)(iii).  
18

#### 19 EVIDENCE AND ARGUMENT

##### 20 Mr. Van Mechelen:

##### 21 Evidence.

22 The essential facts, recited above, are undisputed. The parties have also stipulated that  
23 Rule 192 does not require that an Indian reside in Indian country in order to be exempt from  
24 sales tax. The Department also acknowledges that there is no dispute with the following facts  
25 presented in Mr. Van Mechelen's opening brief.

1 The Quinault reservation was originally set aside for the Quinault and Quileute in the  
2 treaty of 1855, often referred to as the "Treaty of Olympia."<sup>4</sup> The treaty authorized the President  
3 of the United States to consolidate the signatory tribes with "other friendly tribes" and provide  
4 for individual allotments for members of any of the consolidated tribes.<sup>5</sup> President Grant  
5 exercised that authority and expanded its size to approximately 200,000 acres.<sup>6</sup> He designated  
6 the additional 190,000 acres to be withdrawn from sale and set apart for the use of the Quinault,  
7 Quileute, Hoh, Quit, and other tribes of "fish-eating" Indians on the Pacific coast.<sup>7</sup> Those fish-  
eating tribes included the Cowlitz Tribe.<sup>8</sup>

8 In 1871, Congress passed the allotment act (Dawes Act) authorizing the President to  
9 make allotments to individual members of tribes on reservations.<sup>9</sup> The goal of the Dawes Act  
10 was to break up tribal groups and convert Indians from tribal hunter-gatherers to individual  
11 farmers.<sup>10</sup> The Act provided that allotted lands were held in trust by the United States  
12 Government for both the tribe and the individual allottee for at least 25 years. Then the Federal  
13 government could convey the land to the individual in fee simple.<sup>11</sup> In 1906, §6 of the Dawes  
14 Act was amended by the Burke Act, 34 Stat. 182 (1906). The Burke Act included provisions  
15 specifying the legal status of allottees and allotted land before and after transfer to the individual  
16 tribal member:

17 . . . the Secretary of the Interior may . . . cause to be issued to such allottee a  
18 patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or  
19 taxation of said land shall be removed. . . : *Provided further*, That until the  
20 issuance of fee-simple patents all allottees to whom trust patents shall hereafter  
21 be issued shall be subject to the exclusive jurisdiction of the United States.

22 25 U.S.C. 349.<sup>12</sup>

23 <sup>4</sup> The Quinault and Quileute ceded a large district to the United States and retained a reservation of about 10,000  
24 acres at the mouth of the Quinault River. *Halbert v. U.S.*, 283 U.S. 753, 756, 757, 51 S.Ct. 615, 75 L.Ed. 1389  
(1931). See 1855 Treaty, exhibit A13.

25 <sup>5</sup> 1855 Treaty §6, exhibit A13. ("The President may . . . consolidate them with other friendly tribes or bands . . . and  
he may further, at his discretion, cause the whole or any portion of the lands to be reserved . . . to be surveyed into  
lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege.")

<sup>6</sup> *Halbert, supra*, at 758.

<sup>7</sup> Executive Order of 1873, exhibit A15.

<sup>8</sup> *Halbert, supra*, at 760.

<sup>9</sup> Exhibit A25.

<sup>10</sup> Cohen, *Handbook of Federal Indian Law*, §1.04, p. 77, 78.

<sup>11</sup> Dawes Act, §5.

<sup>12</sup> Exhibit A26-2.

1 In 1911, Congress authorized the assignment of allotments on the Quinault reservation to  
2 all members of the Hoh, Quileute, Ozette, or other tribes of Indians in Washington who were  
3 affiliated with the Quinault and Quileute Tribes in the treaty of Olympia.<sup>13</sup> In 1913, Congress  
4 considered passing additional legislation specifically including the Cowlitz and other tribes. It  
5 decided the bill was unnecessary based on the statement from the Bureau of Indian Affairs (BIA)  
6 that "It is believed that the Indians referred to in the pending bill may be allotted on the Quinault  
Reservation and that further legislation is unnecessary."<sup>14</sup>

7 BIA officials in Washington still resisted providing allotments on the Quinault  
8 reservation to non-Quinault members. The dispute was settled by the United States Supreme  
9 Court in *Halbert*. The Court determined that the expanded Quinault reservation was set aside for  
10 all the fish-eating tribes in Southwest Washington, including the Cowlitz. That is, the Quinault  
11 reservation was created for the use of the Cowlitz tribe such that Cowlitz members were eligible  
for individual allotments under the Dawes Act.

12  
13 **Testimony of Dr. Stephen Dow Beckham, Pamplin Professor of History at Lewis &**  
14 **Clark College, Portland, Oregon:**

15 Dr. Beckham is an ethno-historian, specializing in Native American history of Oregon,  
16 Washington, and California. He has taught five seminars at the Lewis & Clark School of Law,  
17 including aspects of Indian law in Washington. He was an expert in litigation involving the  
18 Cowlitz and other "fish-eating tribes" of Washington, including *United States v. Washington* (the  
19 Boldt decision). He worked for the Cowlitz tribe in its application for acknowledgement by  
20 interpreting documents such as treaties and Congressional minutes in their historical context.  
21 Dr. Beckham testifies as an expert witness concerning the establishment and expansion of the  
Quinault reservation, and the connection between the Cowlitz tribe and individual non-Quinault  
allottees and the Quinault reservation.<sup>15</sup>

22  
23 <sup>13</sup> 36 Stat. 1345(1911). Exhibit A27.

<sup>14</sup> *Halbert, supra*, at 760.

<sup>15</sup> Mr. Van Mechelen asserts that applying the federal law here requires knowledge of the historical context.

24 In many ways the central issues of Indian law have not changed significantly since the days of Francisco de  
25 Victoria, George Washington, Seneca, Andrew Jackson, John Marshall, Samuel Worester, Lone Wolf, or Quannah  
Parker. Tribal nations, the United States, the Congress, the courts and the states still wrestle with questions  
relating to the nature of Indian property rights, the rights of individual Indians, and the power and jurisdiction of  
federal, tribal, and state governments in Indian country. Only with a full understanding of the relevant historical  
backdrop can a modern court place a contested transaction in a context appropriate for decision making.  
Cohen, *Handbook of Federal Indian Law*, §1.01, p. 8.

1 Dr. Beckham reviewed the historical context described above. He also described the  
2 new Indian policy President Roosevelt adopted as part of the New Deal. The Indian  
3 Reorganization Act, enacted in 1934, reversed the previous policy of giving trust allotments to  
4 Indians to break up tribes by providing that all trust allotments were extended indefinitely and no  
5 more land would be allotted. This Act also provided for confederated forms of government for  
6 tribes, and the Cowlitz voted to be confederated with the Quinault tribe. The Bureau of Indian  
7 Affairs, however, never acted on that vote. None of the tribes owns the Quinault reservation  
8 land; title is vested in the United States. The Colvilles are an example of a typical confederation  
9 of tribes organized under the Indian Reorganization Act. The Quinault situation is not typical of  
10 the confederated form of government found elsewhere in the West.

11 To the best of Dr. Beckham's knowledge, there are no Cowlitz allotments that are not on  
12 a reservation. Only 53 allotments had been made before the allotment program ended in 1934.  
13 Dr. Beckham also clarifies that land that is taken into trust for purposes such as providing land  
14 for gaming, which requires reservation status, is not an allotment. That land goes through a  
15 completely different process.

16 **Mr. Van Mechelen's testimony:**

17 Mr. Van Mechelen was born in 1928. He is a retired Boeing engineer living in Olympia.  
18 His great-grandmother was a plaintiff in the *Halbert* case. Shortly after the 1931 decision in  
19 *Halbert*, Mr. Van Mechelen's father applied for and received an allotment in five-year-old Dan  
20 Van Mechelen's name. In 1933, President Roosevelt granted him allotment number 2255, which  
21 was held "in trust for the sole use and benefit of said Indian."<sup>16</sup> Instead of the contiguous 80  
22 acres typically allotted to other Cowlitz tribal members, he was allotted a large parcel of 73.5  
23 acres and three smaller parcels. He took delivery of the truck on his large parcel. Mr. Van  
24 Mechelen states he has not received a fee patent for his allotment.

25 He explains that he obtained an allotment on the Quinault reservation without being a  
member of the Quinault tribe as follows: Before Steven's treaty negotiations, Stevens wanted to  
remove all tribes from the Columbia River. As the minutes of the treaty show, the Indians never  
ceded any property rights; instead they agreed to let the United States select a reservation for  
them all. The Quinault were given four square miles at the mouth of the Quinault River, and

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<sup>16</sup> See exhibit A16.

1 then the treaty negotiations broke up and the intended removal never took place. Instead of  
2 getting a reservation of their own, the tribes that did not sign a treaty got only the rights to  
3 allotments on the Quinault reservation, which was expanded to about 200,000 acres for that  
4 purpose. The *Halbert* decision established the Cowlitz Indian's rights to allotments as one of the  
5 "fish-eating tribes" referred to in the 1855 Treaty of Olympia. His great-grandmother received a  
6 letter from the Bureau of Indian Affairs stating that she and her children were eligible for  
7 allotments in the Quinault reservation. To this day, the Secretary of the Interior owns title to the  
8 allotment in his name. And his ownership of the allotment on the Quinault reservation also  
9 entitled him to a share of damages, based on the size of his allotment, paid to the fish-eating  
10 tribes who joined as an association that includes the Quinault tribe to sue the Federal government  
11 for the mismanagement of their resources.

12 Mr. Van Mechelen states that the three parcels held in trust are his Indian country and  
13 that, when he enters his allotment, he enters the exclusive jurisdiction of the United States. In  
14 addition to noting that Rule 192 provides that federal law prohibits the taxation of Indians in  
15 Indian country, Mr. Van Mechelen also notes that subsection (5) of Rule 192 provides that  
16 "Indian" includes only those "enrolled with the tribe upon whose territory the activity takes  
17 place." He states the use of the word "territory" also led him to believe that the sale should be  
18 exempt because in *Halbert* the United States Supreme Court had referred to the BIA  
19 Superintendent's designation of "territory" for the Cowlitz on the enlarged Quinault reservation.

20 Mr. Van Mechelen explains that the dealer who sold him the truck, filled out the Vehicle  
21 Buyer Order on his own initiative with "N/A" in the box for sales tax.<sup>17</sup> Mr. Van Mechelen has  
22 used the truck to go to Orcas Island and hunting at Colville and in the Olympia area. All other  
23 mileage is going to the coast for clam digging, which requires a 24-hour stay on the reservation  
24 in order to get a permit. He estimates that 3,500 of 10,000 miles driven have been on the  
25 Quinault reservation.

26 **Documentary Evidence.** Mr. Van Mechelen's documentary evidence includes the  
27 following exhibits:

- 28 • Exhibit A25. Excerpts from "The Dawes Act and the Allotment of Indians" by D.S. Otis,  
29 Appendix A:

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<sup>17</sup> Exhibit R-7.

1 Dawes Act, 1887—An act to provide for the allotment of lands in severalty to  
2 Indians on the various reservations, and to extend the protection of the laws of the  
3 United States and the Territories over the Indians, and for other purposes. . . Sec.  
4 5. That upon approval of the allotments provided for in this act by the Secretary  
5 of the Interior, he shall cause patents to issue therefor in the name of the allottees,  
6 which patents shall . . . declare that the United States does and will hold the land  
7 thus allotted . . . in trust for the sole use and benefit of the Indian to whom such  
8 allotment shall have been made.

- 9 • Exhibit 28—23-4. Report of the Committee on Public Lands regarding H.R. 734 and the  
10 litigation in the U.S. Court of Claims brought by the Quinault over 15,000 acres of land  
11 along the northern boundary of the Quinault reservation erroneously surveyed by the  
12 United States in which a question arose in this litigation, however, as to land rights of  
13 other tribes in that vicinity:

14 In defense of the action the United States contended . . . that the Indians of other  
15 tribes were entitled to interests in the reservation lands. . . . In an interlocutory  
16 decision . . . the [Court of Claims] further found that the Quinault Indians do not  
17 have exclusive rights in the reservation and that the ‘. . . and Cowlitz Tribes’  
18 were also entitled to an interest in the reservation. . . .

19 The treaty [of Olympia], Executive order [issued pursuant to the treaty],  
20 and act of Congress [authorizing allotments on the reservation to members of  
21 tribes who are affiliated with the Quinault in the treaty of Olympia] thus  
22 contemplated the consolidation with the Quinaults of the members of several  
23 other fish-eating tribes. As stated . . . in Halbert [citation omitted]: “[the  
24 Executive order] was a step toward consolidation. Other steps followed, one  
25 being that in 1905 the Indian bureau began making allotments to members of all  
these tribes. . . . It was altogether appropriate at that time to speak of these other  
tribes as affiliated with the Quinault and Quillehute under the treaty.’

. . . Collectively the Indians having an interest in that reservation,  
including those of the blood of other tribes consolidated with the Quinaults  
pursuant to the treaty, Executive order and act of Congress may be regarded as  
one tribe.

- Exhibit A16. Trust Patent granted to “Daniel Louis Van Mechelen, an Indian of the  
Quinault Reservation” by President Roosevelt on April 21, 1933.
- Exhibit A21. Letters from the Bureau of Indian Affairs dated October 4, 2007, and  
January 3, 2008, stating that all three of Mr. Van Mechelen’s parcels are in trust status.

#### Argument.

Mr. Van Mechelen contends that the Burke Act (25 U.S.C. 349) clarified the retention of  
exclusive Federal jurisdiction over allottees, such as himself. He further contends that the

1 Quinault reservation is Indian country for all of the tribes identified in *Halbert*, including the  
2 Cowlitz.

3 In support of these contentions, Mr. Van Mechelen asserts that whether a state has  
4 jurisdiction to tax an Indian is not a question of state law. Federal law requires that any  
5 ambiguities between Rule 192(2) and (5) must be resolved in favor of Mr. Van Mechelen, and  
6 that the rule of deference to an agency decision is not applicable where federal Indian law must  
7 be applied.

8 Mr. Van Mechelen asserts that the protection of Indians and Indian tribes in Indian  
9 country from state taxation is a cornerstone of federal Indian law.<sup>18</sup>

10 Mr. Van Mechelen contends that the test for determining jurisdiction is the “*per se*  
11 analysis”—who is the state taxing and where?<sup>19</sup> Mr. Van Mechelen notes that the very first  
12 sentence of Rule 192 sets forth the same analysis. WAC 458-20-192(1)(a) provides: “Under  
13 federal law the state may not tax Indians (the “who”) or Indian tribes in Indian country (the  
14 “where”). Accordingly, argues Mr. Mechelen, the *per se* rule applies—“In the special area of  
15 state taxation of Indian Tribes and tribal members we have adopted a *per se* rule. . . . On the  
16 narrow question of whether a state can tax Indian activity . . . the law is clear: when Congress  
17 does not instruct otherwise, a State’s excise tax is unenforceable if its legal incidence falls on a  
18 Tribe or its members for sales made within Indian Country.”<sup>20</sup>—and the Department must show  
19 that the United States has expressly allowed taxation.

20 Mr. Van Mechelen notes that 18 U.S.C. § 1151(c) provides that the term “Indian country  
21 means “all Indian allotments, the Indian titles to which have not been extinguished.” He then  
22 argues that allottees are outside Washington’s taxing jurisdiction on his or her allotment,  
23 pursuant to 25 U.S.C. §349: “That until the issuance of fee-simple patents all allottees to whom  
24 trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States.”  
25 Mr. Van Mechelen accordingly argues that, by reserving exclusive jurisdiction, Congress  
26 excluded individual allottees from State jurisdiction on their allotments. He then contends that

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<sup>18</sup> *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 455, 115 S. Ct. 2214, 132 L.Ed.2d 400 (1995)  
24 (“Indian Tribes and individuals generally are exempt from state taxation within their own territory.”) Mr. Van  
25 Mechelen notes the use of the term “territory,” which is echoed in Rule 192. That term encompasses all Indian  
country, including Indian allotments whether or not the allotments are on a reservation, see *Oklahoma v. Sac and  
Fox Nation*, 508 U.S. 114, 128, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993).

<sup>19</sup> See *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189 (9<sup>th</sup> Circuit, 2008), quoting *Wagnon v. Prairie  
Band Potawatomie Nation*, 546 U.S. 95, 101, 126 S.Ct. 676, 163 L.Ed.2d 429 (1995).

<sup>20</sup> *Chickasaw Nation*, *supra*, at 453.

1 the exclusive jurisdiction question relates to the individual, not the tribe: "This section has no  
2 application to a tribe of Indians, but is intended to cover the case of the Individual Indian who  
3 has taken up residence separate and apart from his tribe, and has adopted the habits of civilized  
4 life."<sup>21</sup> Thus, concludes Mr. Van Mechelen, in answer to the question of "who" the state seeks to  
5 tax, Mr. Van Mechelen is an Indian allottee who, when the incidence of tax is on his allotment, is  
6 *per se* outside of Washington's taxing jurisdiction.

7 Mr. Van Mechelen notes that the "where" of the jurisdictional question refers to the place  
8 of the legal incidence of the tax. Accordingly, he contends, if the legal incidence of the tax is  
9 Mr. Van Mechelen's Indian country then he is *per se* outside of the state's taxing jurisdiction.<sup>22</sup>  
10 Under Washington State law the incidence of sales tax is at the point of delivery;<sup>23</sup> sales tax is not  
11 imposed when a motor vehicle is delivered to an Indian or the tribe in Indian country.<sup>24</sup> Mr. Van  
12 Mechelen also refers the Board to *Squire v. Capoeman*, 351 U.S. 1, 8, 76 S.Ct. 611, 100 L.Ed.  
13 883 (1956), where the Supreme Court denied a tax levy where the incidence of the tax fell on the  
14 Indian's allotment on the Quinault reservation because section 6 of 25 U.S.C. 349 precludes  
15 jurisdiction to tax. ("The literal language of the proviso evinces a congressional intent to subject  
16 an Indian allotment to all taxes only after a patent fee is issued to the allottee. This, in turn,  
17 implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both  
18 those in being and those which might in future be enacted.")

19 Mr. Van Mechelen further contends that the exclusive jurisdiction of the Federal  
20 Government over Indians in Indian country applies to all Indian country, not just reservations. In  
21 fact, he notes, the Federal definition of Indian country, 18 U.S.C. 1151<sup>25</sup> incorporated verbatim in  
22 WAC 458-20-192(2)(b), includes reservations, dependent Indian communities, and Indian  
23 allotments. Accordingly, Mr. Van Mechelen contends that his allotment is included within  
24 Indian country regardless of what reservation it is on, or even if it had not been granted on a  
25 reservation. On this point, Mr. Van Mechelen refers the Board to a case where another state

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<sup>21</sup> *United State v. Boyd*, 83 F. 547, 555 (4<sup>th</sup> Cir. 1897). The section at issue in *Boyd* was section 6 of the Dawes act, later codified as 25 U.S.C. 349. See also *Great American Insurance Company v. Brown*, 86 N.M. 336, 524 P.2d 199, 201 (1974) (Federal retention of exclusive jurisdiction in 25 U.S.C. §349 applies only to the allottee and his heirs, it is not connected to the Tribe or the Tribe's jurisdiction.)

<sup>22</sup> *Chickasaw Nation, supra*, at 453.

<sup>23</sup> Rule 192(5)(a).

<sup>24</sup> Rule 192(8).

<sup>25</sup>Mr. Van Mechelen notes that, although this is a criminal statute, the definition is also controlling in civil cases. *Sac & Fox, supra*, at 123.

1 failed in its similar attempt to limit exclusive Federal jurisdiction to reservations. The Sac & Fox  
2 Tribe does not have a reservation, its members' only Indian country consists of allotments, and  
3 the state of Oklahoma claimed jurisdiction to tax on Indian allotments. The United States  
4 Supreme Court rejected Oklahoma's claimed jurisdiction: "Absent explicit congressional  
5 direction to the contrary, we presume against a State's having the jurisdiction to tax within  
6 Indian country, whether the particular territory consists of a formal or informal reservation,  
7 allotted lands, or dependent Indian Communities."<sup>26</sup>

8 In his case, argues Mr. Van Mechelen, the explicit congressional direction is that the state  
9 does not have jurisdiction, that is, that the United States has retained *exclusive* jurisdiction over  
10 allottees on their allotted lands, in accordance with 25 U.S.C. 349.

11 Mr. Van Mechelen also notes that in *Oklahoma v. Citizen Band of Potawatomi*, 498 U.S.  
12 505, 511, 111 S.Ct. 905, 908, 112 L.Ed.2d 1112 (1991), the Supreme Court had already rejected  
13 an attempt by Oklahoma to attempt to assert taxing jurisdiction over non-reservation trust land,  
14 and that this position has been consistently applied by the Federal judiciary.<sup>27</sup>

15 Thus, argues Mr. Van Mechelen, when he took delivery of a truck on his allotment (three  
16 parcels of land on the Quinault reservation held in trust for him by the Federal government) he  
17 was outside Washington's jurisdiction to assess sales tax, citing 25 U.S.C. §349.

18 Noting that the Department relies upon the *Bracker* balancing test as applied in  
19 *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 160, 100 S.Ct.  
20 2069, 65 L.Ed.2d 10 (1980) to extend its taxing jurisdiction to him, Mr. Van Mechelen then  
21 addresses the question of how to proceed if the *per se* rule should be found inapplicable. With  
22 respect to the applicability of the *per se* rule, Mr. Van Mechelen contends that the balancing test  
23 is used only when: 1) the incidence of taxation is in Indian country but does not fall on an Indian  
24 or an Indian tribe;<sup>28</sup> or 2) the incidence of taxation falls on an Indian or Indian tribe outside of the

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<sup>26</sup> *Sac and Fox Nation, supra*, at 128.

<sup>27</sup> See, e.g., *State v. Hicks*, 196 F.3d 1020, 1027 fn. 7 (9th cir. 1999) ("Trust allotments are 'Indian Country' and the equivalent of tribal land for jurisdictional purposes."); *Narragansett Ind Tribe of RI v. Narragansett Elec.*, 878 F.Supp. 349, 355 (D.R.I. 1995) ("The Supreme Court has made it clear that the term 'reservations' should be broadly construed to include all lands falling within the definition of 'Indian Country.'").

<sup>28</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Washington v. Colville, supra* (re: taxation of non-Indians purchasing cigarettes on the Colville Reservation); *Barona Band, supra*, at 1190.

1 individual's Indian country.<sup>29</sup> Mr. Van Mechelen also argues that the Department's reliance on  
2 the *Colville* case's balancing test is misplaced because: (a) *Colville* said nothing about allottees  
3 on their individual allotments, who are *per se* exempt from state taxing jurisdiction; (b) the non-  
4 *Colville* Indians had no treaty-based connection to the Reservation: Indians with such a  
5 connection are *per se* exempt from state taxing jurisdiction; and (c) even if the balancing test  
6 were appropriate, it favors Mr. Van Mechelen because of the lack of any State interest over an  
7 allottee on his allotment.

8 Mr. Van Mechelen notes that the Department seeks a bright line test, but that it argues for  
9 the application of the *Bracker* balancing test instead of the *per se* rule that relies on the  
10 determination of only two facts. Mr. Van Mechelen's bright line test is simply that the state  
11 cannot tax an Indian (i.e., fact number one: who?) in Indian country (fact number two: where?).

12 Mr. Van Mechelen notes the following holdings:

- 13 • “[S]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions  
14 interpreted to their benefit.”<sup>30</sup>
- 15 • The requirement of liberal construction of statutes applies with equal force to  
16 administrative rules.<sup>31</sup>
- 17 • Where the Indian law liberal construction canon conflicts with other principles of judicial  
18 construction, the Indian law canon takes precedence. The doctrine of deference to  
19 administrative decisions falls before the federal requirement of liberal construction in  
20 favor of Indians.<sup>32</sup>
- 21 • The Indian law liberal construction canon takes precedence over the general narrow  
22 construction of tax exemptions:

23 Indeed, the Court has held that although tax exemptions generally are to  
24 be construed narrowly, in the government's dealings with the Indians the  
25 rule is exactly the contrary. The construction, instead of being strict, is  
liberal.<sup>33</sup>

<sup>29</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), *Washington v. Colville*, *supra* (re: taxation of Indians from other Tribes purchasing cigarettes on the Colville Reservation).

<sup>30</sup> *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 269, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S. Ct. 239, 85 L. Ed. 2d 753 (1985).

<sup>31</sup> *Cannon v. DOL*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002).

<sup>32</sup> *Cobell v. Norton*, 240 F.3d 1081, 1103 (D.C. Cir. 2001).

<sup>33</sup> *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

1  
2 Mr. Van Mechelen maintains that Rule 192 is ambiguous and must be construed in his  
3 favor.

4 Rule 192 provides:

5 (2) **Definitions.** The following definitions apply throughout this rule:

6 (a) "Indian" means a person on the tribal rolls of an Indian tribe. A person on  
7 the tribal rolls is also known as an "enrolled member" or a "member" or an  
8 "enrolled person" or an "enrollee" or a "tribal member."

9 (b) "Indian country" has the same meaning as given in 18 U.S.C. 1151 and  
10 means:

11 (i) All land within the limits of any Indian reservation under the jurisdiction of  
12 the United States government, notwithstanding the issuance of any patent, and,  
13 including rights of way running through the reservation;

14 (ii) All dependent Indian communities within the borders of the United States  
15 whether within the original or subsequently acquired territory thereof, and  
16 whether within or without the limits of a state; and

17 (iii) All Indian allotments, the Indian titles to which have not been  
18 extinguished, including rights of way running through the same.

19 (c) "Indian tribe" means an Indian nation, tribe, band, community, or other  
20 entity recognized as an "Indian tribe" by the United States Department of the  
21 Interior. The phrase "federally recognized Indian tribe" and the term "tribe" have  
22 the same meaning as "Indian tribe."

23 (d) "Indian reservation" means all lands, notwithstanding the issuance of any  
24 patent, within the exterior boundaries of areas set aside by the United States  
25 for the use and occupancy of Indian tribes by treaty, law, or executive order and that  
are areas currently recognized as "Indian reservations" by the United States  
Department of the Interior. The term includes lands within the exterior boundaries  
of the reservation owned by non-Indians as well as land owned by Indians and  
Indian tribes and it includes any land that has been designated "reservation" by  
federal act.

(e) "Nonmember" means a person not on the tribal rolls of the Indian tribe.

...

26 (5) **Enrolled Indians in Indian country. Generally.** The state may not tax  
27 Indians or Indian tribes in Indian country. For the purposes of this rule, the term  
28 "Indian" includes only those persons who are enrolled with the tribe upon whose  
29 territory the activity takes place and does not include Indians who are members  
30 of other tribes. . . . This exclusion from tax includes all taxes (e.g., B&O tax,  
31 public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax  
32 falls on an Indian or a tribe, the tax is not imposed if the activity takes place in  
33 Indian country or . . . "Incidence" means upon whom the tax falls. For example,  
34 the incidence of the retail sales tax is on the buyer.

35 (a)(i) **Retail sales tax - tangible personal property - delivery threshold.**  
Retail sales tax is not imposed on sales to Indians if the tangible personal property  
is delivered to the member or tribe in Indian country or if the sale takes place in  
Indian country. For example, if the sale to the member takes place at a store  
located on a reservation, the transaction is automatically exempt from sales tax  
and there is no reason to establish "delivery."

1  
2 (8) **Motor vehicles, trailers, snowmobiles, etc.**, sold to Indians or Indian  
3 tribes. Sales tax is not imposed when a motor vehicle . . . is delivered to an Indian  
4 or the tribe in Indian country or if the sale is made in Indian country. Similarly,  
5 use tax is not imposed when such an item is acquired in Indian country by an  
6 Indian or the tribe for at least partial use in Indian country. For purposes of this  
7 rule, acquisition in Indian country creates a presumption that the property is  
8 acquired for partial use in Indian country.

9 (Emphasis added by Mr. Van Mechelen.)

10 Mr. Van Mechelen asserts that the rule clearly provides that the state may not tax Indians  
11 or Indian tribes in Indian country (458-20-192(5)), but is “twisted by the conflict between” the  
12 definitions of Indian and Indian country in subsections (2) and (5).

13 He agrees that the rule’s definitions are accurate: an Indian is an enrolled member of a  
14 federally recognized tribe, subsection (2)(a), and Indian country includes reservations,  
15 allotments, and dependent Indian communities, subsection (2)(b). He argues, however, that  
16 subsection (5) appears to contradict these definitions. It provides: “For the purposes of this rule,  
17 the term ‘Indian’ includes only those persons who are enrolled with the tribe upon whose  
18 territory the activity takes place and does not include Indians who are members of other tribes.”  
19 Thus, he argues that subsection (5) redefines ‘Indian’, and rather than using the defined terms  
20 “Indian country” or “reservation,” uses a new, undefined term, “territory.”

21 When the legislature uses certain language in one instance, and different language in  
22 another, there is a difference in legislative intent.<sup>34</sup> Mr. Van Mechelen contends that by using the  
23 term “territory,” the rule incorporates a broader meaning than the defined term “reservation” and  
24 that the liberal construction canon requires resolving the ambiguous term “territory” in his favor.  
25 In other words, “territory” includes any parcel of land upon which Mr. Van Mechelen has  
26 federally protected rights due to his status as an Indian; i.e., his “territory” includes his allotment.

27 Finally, Mr. Van Mechelen contends that Washington’s constitution disclaims any state  
28 jurisdiction to tax an Indian on his allotment, citing Washington State Constitution, art. 26, §2:

29 **That the people inhabiting this state do agree and declare that they forever**  
30 **disclaim all right and title** to the unappropriated public lands lying with the

31 <sup>34</sup> *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).

1 boundaries of this state, and to all lands lying within said limits owned or  
2 held by any Indian or Indian tribes; and that until the title thereto shall  
3 have been extinguished by the United States, the same shall be and remain  
4 subject to the disposition of the United States, and said Indian lands shall  
5 remain under the absolute jurisdiction and control of the congress of the  
6 United States and that the lands belonging to citizens of the United States  
7 residing without the limits of this state shall never be taxed at a higher rate than  
8 the lands belonging to residents thereof; and that no taxes shall be imposed by  
9 the state on lands or property therein, belonging to or which may be hereafter  
10 purchased by the United States or reserved for use: Provided, **That nothing in  
11 this ordinance shall preclude the state from taxing as other lands are taxed  
12 any lands owned or held by any Indian who has severed his tribal  
13 relations, and has obtained from the United States or from any person a  
14 title thereto by patent or other grant, save and except such lands as have  
15 been or may be granted to any Indian or Indians under any act of  
16 congress containing a provision exempting the lands thus granted from  
17 taxation, which exemption shall continue so long and to such an extent as  
18 such act of congress may prescribe.**

19 (Emphasis added by Mr. Van Mechelen.)

#### 20 Department of Revenue:

#### 21 Evidence.

22 The Department relies on the facts agreed to in the section of this decision above entitled  
23 "Background." The Department presented no witnesses.

#### 24 Arguments.

25 The Department notes that, guided by federal cases addressing the authority of states to  
tax Indians within the federal definition of "Indian country," the Department limits tax-exempt  
status to: a) Indians making purchases on a reservation of a tribe of which they are a member;  
and b) Indians who make purchases off-reservation, but who arrange to have the purchased item  
delivered to a location within a reservation of a tribe of which they are a member. Accordingly,  
the Department argues that Mr. Van Mechelen is liable for sales tax because the truck purchase  
does not fall into either of these categories; i.e., he made the purchase outside any reservation  
and had the pickup truck delivered to a reservation of a tribe of which he is not a member.

The Department refers the Board to WAC 458-20-192(5)(a)(i), which provides: "Retail  
sales tax is not imposed on sales to Indians if the tangible personal property is delivered to the  
member or tribe in Indian country."

1 The Department argues that the Federal law allowing states to tax Indians in Indian  
2 country in some instances only distinguishes between Indians who are members of the tribe on  
3 whose reservation taxable activity takes place and Indians who are not members of that tribe, but  
4 some other tribe.<sup>35</sup> The Department argues that, subsequent to *Colville*, multiple federal cases  
5 have affirmed and applied this member/non-member distinction for purposes of state tax  
6 jurisdiction.<sup>36</sup> The Department also notes that Washington courts continue to apply the *Colville*  
7 member/non-member distinction.<sup>37</sup>

8 Again noting that Rule 192 reflects the authority governing the taxation of Indians, the  
9 Department cites Rule 192(2)(a), which defines “Indian” as “a person on the tribal rolls of an  
10 Indian tribe. A person on the tribal rolls is also known as an ‘enrolled member’ or a ‘member’ or  
11 an ‘enrolled person’ or an ‘enrollee’ or a ‘tribal member.’” Rule 192(5) provides that enrolled  
12 Indians in Indian country are not subject to tax: “The state may not tax Indians or Indian tribes  
13 in Indian country. For the purposes of this rule, the Department contends that the term “Indian”  
14 includes only those persons who are enrolled with the tribe upon whose territory the activity  
15 takes place and does not include Indians who are members of other tribes.”

16 In addition to the general retail sales tax exemption referred to above that incorporated  
17 the federal holdings that tribal members are not subject to retail sales tax on personal property  
18 delivered in Indian country, the Department notes Rule 192(8), which specifically provides as  
19 follows for motor vehicle sales:

20 Sales tax is not imposed when a motor vehicle, trailer, snowmobile, off-road  
21 vehicle, or other such property is delivered to an Indian or the tribe in Indian  
22 country or if the sale is made in Indian country. Similarly, use tax is not  
23 imposed when such an item is acquired in Indian country by an Indian or the  
24 tribe for at least a partial use in Indian country. For purposes of this rule,  
25 acquisition in Indian country creates a presumption that the property is  
acquired for partial use in Indian country.

<sup>35</sup>*Confederated Tribes of the Colville Indian Reservation v. United States*, 447 U.S. 134, 100 S. Ct. 2069, 65 L.Ed.2d 10 (1980).

<sup>36</sup>*Duro v. Reina*, 495 U.S. 676, 686-87, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990); *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991); *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). See also *In Re Smith*, 158 B.R. 818 (Bankr. D. Ariz. 1993) (regarding a Navajo Indian living on the Hopi Reservation, the court concluded that the federal proscription against state taxation of individuals residing on a reservation is directly dependent on the taxpayer’s tribal status); *United States v. South Dakota*, 106 F. Supp. 2d 1166, 1173 (D. S.D. 2000) (holding only tribal members residing in Indian country governed by the tribe of which they are members are exempt from South Dakota’s motor vehicle excise tax).

<sup>37</sup>*Bercier v. Kiga*, 127 Wn. App. 809, 103 P.3d 232 (2004), review denied, 155 Wn. 2d 1015 (2005).

1 The Department argues that, because the term “Indian” in Rule 192 includes only “those  
2 persons who are enrolled with the tribe upon whose territory the activity takes place” and does  
3 not include members of other tribes, Mr. Van Mechelen does not qualify for the tax exemption  
4 on his pick-up truck purchase.<sup>38</sup>

5 The Department assumes the history of the Cowlitz and Quinault Tribes and their  
6 relationship with the federal government, as described in Mr. Van Mechelen’s Opening Brief, is  
7 correct. Thus, the Department will assume the Cowlitz Tribe is “affiliated” with the Quinault  
8 Tribe and is one of the “fish-eating tribes” for whom Congress authorized the assignment of  
9 allotments within the expanded Quinault reservation in 1911.

10 The Department also agrees with Mr. Van Mechelen that the term “Indian country”  
11 under federal law includes individual allotments.<sup>39</sup> The Department notes that, “[b]ecause Rule  
12 192 incorporates that definition by reference, ‘Indian country’ means the same under the  
13 Department’s interpretation,” and that, “In this brief, ‘Indian country’ will mean the term as  
14 defined in both 18 U.S.C. § 1151 and Rule 192, unless the context indicates otherwise.”

15 The Department characterizes the “fundamental difference” between the parties. The  
16 Department asks this Board to apply the law as it currently exists, barring state taxation of tribal  
17 members on their own tribe’s reservation and allowing state taxation of non-member Indians  
18 within another tribe’s reservation. In contrast, the Department characterizes Mr. Van  
19 Mechelen’s position as asking this Board to expand the scope of the state tax exemption to  
20 include non-member Indians who (a) have an allotment on another tribe’s reservation, or (b)  
21 belong to a tribe that is “affiliated” with a tribe with a reservation, or (c) both, even if the non-  
22 member Indian does not reside on the allotment or the other tribe’s reservation. The  
23 Department argues that Mr. Van Mechelen is asking this Board to decide this case based on law  
24 that does not currently exist, and that the Board should decline that invitation.<sup>40</sup>

25 The Department argues that Mr. Van Mechelen’s arguments in support of being tax  
exempt when he accepts delivery of items he purchases at his allotment are flawed because: (a)

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<sup>38</sup> Department’s Reply Brief at 3.

<sup>39</sup> 18 U.S.C. § 1151. The Board notes here that Rule 192 actually provides a definition of “Indian country” that is neither cited nor discussed in either of the Department’s briefs. See Rule 192 (2)(b): “Indian Country has the same meaning as given in 18 U.S.C. 1151 and means (1) all land within the limits of a reservation . . . , and (iii) All Indian allotments.”

<sup>40</sup> Department’s Reply Brief at 3.

1 nothing in the federal law providing for allotments, or in state law, bars the state from taxing  
2 Mr. Van Mechelen's purchase; and (b) Rule 192 is not ambiguous.

3 The Department agrees that *Colville* does not discuss allottees, but contends that the  
4 *Colville* Court held that federal law did not pre-empt the state's authority to impose sales tax on  
5 Indians not members of the tribe: "Federal statutes, even given the broadest reading to which  
6 they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its  
7 taxes on Indians not members of the tribe."<sup>41</sup> Therefore, concludes the Department, non-  
8 members are subject to the state sales tax, and Mr. Van Mechelen's reliance on the *per se* rule is  
misplaced.

9 Also, the Department notes that in *Barona Band of Mission Indians v. Yee*,<sup>42</sup> the Ninth  
10 Circuit recognized that the *per se* rule has "softened over time, and the modern Court has  
'acknowledged certain limitations on tribal sovereignty.'"<sup>43</sup>

11 Responding to Mr. Van Mechelen's argument that, even if *Colville* is applicable, the  
12 balancing test favors Mr. Van Mechelen because there is no state interest over an allottee on his  
13 allotment, the Department explains the balancing test as described in *Barona Band*:

14 [T]he Bracker balancing test, developed for those "difficult questions ... where, as  
15 here, a State asserts authority over the conduct of non-Indians engaging in activity  
16 on the reservation." *Bracker*, 448 U.S. at 144, 100 S.Ct. 2578. The test calls for  
17 careful attention to the factual setting, requiring a "particularized inquiry into the  
18 nature of the state, federal, and tribal interests at stake, an inquiry designed to  
19 determine whether, in the specific context, the exercise of state authority would  
20 violate federal law." *Id.*, at 145, 100 S.Ct. 2578. The factual sensitivity of the  
21 test means that "'no rigid rule' governs such an exercise of state authority." *Red  
22 Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1410 (9th Cir.1994).  
As an aid, however, "[t]he Supreme Court has identified a number of factors to be  
23 considered when determining whether a state tax borne by non-Indians is  
24 preempted, including: 'the degree of federal regulation involved, the respective  
25 governmental interests of the tribes and states (both regulatory and revenue  
raising), and the provision of tribal or state services to the party the state seeks to  
tax.'" *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734,  
736 (9th Cir.1995) (citation omitted).

528 F.3d at 1190.

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<sup>41</sup> *Colville*, *supra*, at 160.

<sup>42</sup> 528 F. 3d 1184 (9th Cir. 2008).

<sup>43</sup> *Id.* at 1188.

1 Applying these principles here, the Department concludes that Mr. Van Mechelen is  
2 subject to the state sales tax, even though the truck was delivered on his allotment, because his  
3 allotment is on a reservation where he is not a member of the tribe, and he is an enrolled member  
4 of a different tribe.

5 In response to Mr. Van Mechelen's principle arguments that (a) the state is *per se* barred  
6 from taxing him for his purchase because the United States has "exclusive jurisdiction" over  
7 allottees under 25 U.S.C. § 349, and (b) Washington recognizes the federal government's  
8 "exclusive jurisdiction" over allottees in the Washington Constitution, which disclaims state  
9 interest in land owned or held by Indians or Indian tribes, the Department contends that Mr. Van  
10 Mechelen misapplies both federal and state law in that: (a) the bar on taxing allotments applies  
11 only to taxes on the land (i.e., property taxes) or taxes directly related to use of the allotment  
12 land, and (b) there is no presumption against state taxation of Indians who do not reside in Indian  
13 country.

14 In support of the first proposition, the Department refers the Board to the following  
15 provisions of law pertaining to Congress's allotment of lands to Indians:

16 Upon the approval of the allotments provided for in this Act by the Secretary of the  
17 Interior, he shall cause patents to issue therefor in the name of the allottees, which  
18 patents shall be of the legal effect, and declare that the United States does and will  
19 hold the land thus allotted, for the period of twenty-five years, in trust for the sole  
20 use and benefit of the Indian to whom such allotment shall have been made, . . . and  
21 that at the expiration of said period the United States will convey the same by  
22 patent to said Indian, . . . in fee, discharged of said trust and free of all charge or  
23 incumbrance whatsoever: *Provided*, That the President of the United States may in  
24 any case in his discretion extend the period.

25 25 U.S.C. § 348 (originating as § 5 of the Allotment Act; emphasis added by the  
Department).

At the expiration of the trust period and when the lands have been conveyed to the  
Indians by patent in fee, . . . then each and every allottee shall have the benefit of  
and be subject to the laws, both civil and criminal, of the State or Territory in  
which they may reside; and no Territory shall pass or enforce any law denying any  
such Indian within its jurisdiction the equal protection of the law. . . . *Provided*  
*further*, That until the issuance of fee-simple patents all allottees to whom trust  
patents shall be issued shall be subject to the exclusive jurisdiction of the United  
States[.]

1 25 U.S.C. § 349 (originating as § 6 of the Allotment Act; emphasis added by the  
2 Department).<sup>44</sup>

3 The Department then argues that Mr. Van Mechelen's focus on the "exclusive  
4 jurisdiction" language in 25 U.S.C. § 349, that states have no authority to impose any taxes on  
5 allottees unless or until the federal government converts the trust into a patent in fee, is not  
6 supported by any federal cases to preclude state taxes. In support of its position, the Department  
7 contends that the few cases on the subject fail to show that the "exclusive jurisdiction" was  
8 intended to limit state taxing authority. In other words, instead of the exclusive federal  
9 jurisdiction relied on by Mr. Van Mechelen, these cases demonstrate that federal jurisdiction is  
10 actually limited and not exclusive because they "center on what jurisdiction Congress could  
11 legitimately exercise over these allotments and demonstrate."<sup>45</sup>

12 In support of its contention that the exclusive jurisdiction was actually limited and not  
13 exclusive, the Department cites the trust relationship between the United States and the Indians  
14 (i.e., relating to guardianship and protection of Indians), citing *U.S. v. Pelican*,<sup>46</sup> which involved  
15 the question of jurisdiction between a *tribe* and the federal government in a criminal matter.<sup>47</sup>

16 Although the lands were allotted in severalty, they were to be held in trust by the  
17 United States for twenty-five years for the sole use and benefit of the allottee, or  
18 his heirs, and during this period were to be held inalienable. That the lands, being  
19 so held, continued to be under the jurisdiction of Congress for all governmental  
20 purposes relating to the guardianship and protection of the Indians, is not open to  
21 controversy.

22 (Emphasis added by the Department.)

23 The Department notes that the *Pelican* Court also described the federal government's  
24 basis for exercising exclusive jurisdiction (over the tribe) in the area of criminal law as follows:  
25 "It must be remembered that the fundamental consideration is the protection of a dependent  
26 people. . . . 'These Indians are yet wards of the nation, and a condition of pupilage or  
27 dependency, and have not been discharged from that condition.'"<sup>48</sup> Quoting the "exclusive

<sup>44</sup> The original twenty-five year trust period has been indefinitely extended by statute, 25 U.S.C. § 462.

<sup>45</sup> Department's Reply Brief, at 8.

<sup>46</sup> 232 U.S. 442, 447, 34 S. Ct. 396, 58 L.Ed. 676 (1914).

<sup>47</sup> Emphasis added by the Board.

<sup>48</sup> 232 U.S., at 450 (quoting *U.S. v. Rickert*, 188 U.S. 432, 437, 23 S. Ct. 478, 47 L. Ed. 532 (1903)).

1 jurisdiction” proviso in 25 U.S.C. § 349, the Court stated it was clear “Congress had the power  
2 thus to continue the guardianship of the [federal] government.”<sup>49</sup>

3 The Department thus argues that the “exclusive jurisdiction” proviso in 25 U.S.C. § 349  
4 does not relate to the limitations on state taxing authority over an allotment. To the extent limits  
5 exist, contends the Department, they are derived from the language in the statute indicating that  
6 when the Secretary of the Interior exercised his discretion to issue a fee patent, it would remove  
7 “all restrictions as to sale, incumbrance, or taxation of said land.”<sup>50</sup> Accordingly, restrictions on  
8 taxation do not bar all state taxes on allottees. Instead, the limitation on state or federal taxation  
9 of allottees is tied to the allotment land; i.e., states cannot impose property taxes on allotment  
10 land or on income derived from an allottee’s use of the land.<sup>51</sup>

11 The Department then contends that the provision of the Washington Constitution relied  
12 upon by Mr. Van Mechelen that recognizes this federal law limitation focuses only on the  
13 allotment land. The Department cites article 26, § 2 of the Washington Constitution in part:

14 That the people inhabiting this state do agree and declare that they forever disclaim  
15 all right and title . . . to all lands lying with said limits owned or held by any Indian  
16 or Indian tribes; and that until title thereto shall have been extinguished by the  
17 United States, the same shall be and remain subject to the disposition of the United  
18 States, and said Indian lands shall remain under the absolute jurisdiction and  
19 control of the congress of the United States.

20 WA. Const. art. XXVI, § 2 (emphasis added by the Department).

21 In further support of the Department’s argument that the focus should be on the allotment  
22 land and use of it, the Department cites this holding in *Makah Indian Tribe v. Clallam County*:<sup>52</sup>

23 Trust lands, whether held in trust for the tribe as an entity or for tribal Indians  
24 individually, are not taxable by the state or its subdivisions. It follows that  
25 personality continuously held, kept, and used exclusively on the reservation is not  
26 taxable either unless Congress decides otherwise.

(Emphasis added by the Department.)

27 <sup>49</sup> *Pelican, supra*, at 451, 447-51 (discussing various cases in which the Court determined whether federal  
28 jurisdiction existed to pass laws impacting allottees or allotment lands). The status of Indian tribes and their  
29 members under federal law has changed considerably since these cases at the turn of the last century.

<sup>50</sup> 25 U.S.C. § 348.

30 <sup>51</sup> See *U.S. v. Ferry County*, 24 F. Supp. 399 (D. Wash. 1938) (all acts of county in assessing and levying taxes on  
31 allotment property were without authority); see also *Squire v. Capoeman*, 351 U.S. 1, 5-10, 76 S. Ct. 611, 100 L. Ed.  
32 883 (1956) (federal income tax precluded on proceeds from sale of timber on trust land within the Quinault  
33 reservation held by Quinault Indian under an allotment); *Stevens v. Comm’r of Internal Revenue*, 452 F.2d 741, 749  
34 (9<sup>th</sup> Cir. 1971) (income derived from an allottee’s farming and ranching activities on his allotted land subject to  
35 “implied exemption” from income taxation in the General Allotment Act).

<sup>52</sup> *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 683, 440 P.2d 442 (1968).

1 The Department concludes that the allotment law does not preclude assessing retail sales  
2 tax on Van Mechelen's purchase of a 2004 Dodge Ram pick-up truck because it is not a tax on  
3 Van Mechelen's allotment land and income he derives from use of the land, and not a tax on  
4 tangible personal property "continuously held, kept, and used exclusively on" Van Mechelen's  
5 allotment.

#### 6 ANALYSIS

7 There is no question that Federal law controls the right of states to tax Indians and  
8 activities in Indian country. It is equally clear that Federal law is unequivocal on what  
9 constitutes "Indian country:" 18 U.S.C. §1151(c) defines "Indian country" to include "all Indian  
10 allotments, the Indian titles to which have not been extinguished." Accordingly, it is clear that  
11 Mr. Van Mechelen's allotment on the Quinault is Indian country, and the "where" of the *per se*  
rule analysis is answered in favor of Mr. Van Mechelen.

12 It is also undisputed that Mr. Van Mechelen has not obtained a patent in fee for his  
13 allotment. Therefore, pursuant to 25 U.S.C. § 349, Mr. Van Mechelen, an allottee to whom trust  
14 patents have not been issued, "shall be subject to the exclusive jurisdiction of the United States."  
15 Therefore, the "who" part of the *per se* rule analysis is answered in favor of Mr. Van Mechelen.  
16 As the Ninth Circuit observed in *Barona*, the question of *who* bears the legal incidence of the tax  
17 is the initial and "frequently dispositive" question in Indian tax cases.<sup>53</sup> Instead of being instantly  
18 dispositive of this case, the Department erroneously seeks to make the question of "who" turn on  
19 whether Mr. Van Mechelen is a member of the tribe where his allotment happens to be situated.  
20 Mr. Van Mechelen does not need to be a member of the tribe where he has his allotment for  
21 under 25 U.S.C. § 349 to apply.

#### 22 FINDINGS OF FACT

- 23 1. The Board has subject matter jurisdiction of the dispute in issue.
- 24 2. At all relevant times, Mr. Van Mechelen was an enrolled member of the Cowlitz  
25 Indian Tribe.
3. At all relevant times, Mr. Van Mechelen was an allottee of land in Washington held in  
trust by the United States to whom trust patents have not been issued.

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<sup>53</sup> *Barona, supra*, at 1189.

- 1 4. Mr. Van Mechelen's allotment land is on the Quinault Indian Nation Reservation.
- 2 5. Mr. Van Mechelen is not an enrolled member of the Quinault Indian Nation.
- 3 6. Mr. Van Mechelen took delivery of his truck on his allotment land within the Quinault  
4 Indian Nation Reservation.
- 5 7. On January 24, 2007, the Department assessed Mr. Van Mechelen for unpaid retail  
6 sales tax in the amount of \$ 3,635.83.
- 7 8. Mr. Van Mechelen paid his retail sales tax liability in full on February 5, 2007, and  
8 sought a refund by pursuing an administrative appeal with the Department's Appeals  
9 Division.

10 Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as  
11 such.

12 From these findings, the Board comes to these

#### 13 CONCLUSIONS OF LAW

- 14 1. The Board has jurisdiction over this appeal (RCW 82.03.130).
- 15 2. There are no Washington State statutes that control taxation of Indians in Indian  
16 country; Federal law controls the taxation of Indians in Indian country.
- 17 3. Indian tribes and individuals generally are exempt from state taxation within their own  
18 territory. *Chickasaw Nation, supra.*
- 19 4. The term "territory" encompasses all Indian country, including Indian allotments  
20 whether or not the allotments are on a reservation. *Sac & Fox, supra*, at 128.
- 21 5. On the narrow question of whether a state can tax Indian activity: when Congress does  
22 not instruct otherwise, a state's excise tax is unenforceable if its legal incidence falls  
23 on a member of a tribe for sales made within Indian country. *Chickasaw Nation,*  
24 *supra*, at 1189.
- 25 6. 25 U.S.C. § 349 provides "until the issuance of fee-simple patents all allottees to  
whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the  
United States."

- 1 7. For the purpose of reserving exclusive jurisdiction over allottees, Congress does not  
2 distinguish between allottees with allotments on another tribe's reservation, allottees  
3 with allotments on their own tribe's reservation, and allottees with allotments not on a  
4 reservation at all.
- 5 8. For both criminal and civil purposes, 18 U.S.C. 1151 defines "Indian country" as  
6 including "all Indian allotments, the Indian titles to which have not been extinguished,  
7 including rights-of-way running through the same." *Sac & Fox, supra*, at 123.
- 8 9. Where the Indian law liberal construction canon conflicts with other principles of  
9 judicial construction, the Indian law canon takes precedence. The doctrine of  
10 deference to administrative decisions falls before the federal requirement of liberal  
11 construction in favor of Indians, *Cobell v. Norton, supra*.
- 12 10. WAC 458-20-192(1)(a) provides that, under "federal law the state may not tax Indians  
13 or Indian tribes in Indian country."
- 14 11. Rule 192 reflects the harmonizing of federal law, Washington state tax law, and the  
15 policies and objectives of the Centennial Accord and the Millennium Agreement, and  
16 it is consistent with the Department's mission to achieve equity and fairness in the  
17 application of the law. WAC 458-20-192(1)(c).
- 18 12. For purposes of Washington state taxation, "Indian country" has the same meaning as  
19 given in 18 U.S.C. 1151 and includes "all Indian allotments, the Indian titles to which  
20 have not been extinguished, including rights of way running through the same." WAC  
21 458-20-192(2)(b)(iii).
- 22 13. Mr. Van Mechelen's allotment land on the Quinault Indian Nation Reservation is  
23 "Indian country."
- 24 14. The *Bracker* balancing test does not apply because the question of the state's right to  
25 tax Mr. Van Mechelen is determined in accordance with the *per se* rule.
15. Mr. Van Mechelen is exempt from the imposition of sales tax on the truck delivered to  
him on his allotment land.
16. Mr. Van Mechelen has met his burden of proof.
17. The Department's assessment of retail sales tax is set aside.

1 Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as  
2 such.

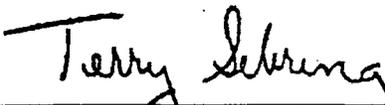
3 From these conclusions, this Board enters this

4 DECISION

5  
6 The Board sets aside the Department's Determination denying Mr. Van Mechelen a  
7 refund of the retail sales tax paid pursuant to the Department's January 24, 2007, assessment for  
8 unpaid retail sales tax in the amount of \$ 3,635.83, and orders the Department to refund the sales  
9 tax paid by Mr. Van Mechelen, together with applicable interest as provided by law.

10 DATED this 26 day of February, 2009.

11 BOARD OF TAX APPEALS

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14 TERRY SEBRING, Chair

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16 \_\_\_\_\_  
17 SHIRLEY J. WINSLEY, Vice Chair

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20 KAY S. SLONIM, Member  
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**Right of Reconsideration of a Final Decision**

Pursuant to WAC 456-09-955, you may file a petition for reconsideration of this Final Decision. You must file the petition for reconsideration with the Board of Tax Appeals within 10 business days of the date of mailing of the Final Decision. The petition must state the specific grounds upon which relief is requested. You must also serve a copy on all other parties and their representatives of record. The Board may deny the petition, modify its decision, or reopen the hearing.

*[Handwritten signature]*  
\* \* \* \* \*  
*[Handwritten initials]*

Please be advised that a party petitioning for judicial review of this Final Decision is responsible for the reasonable costs incurred by this agency in preparing the necessary copies of the record for transmittal to the superior court. Charges for the transcript are payable separately to the court reporter.