

No. 47883-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Pierce County Cause No. 14-2-09107-4

ROBERT REGINALD COMENOUT SR.,

Petitioner/Appellant

v.

WASHINGTON STATE LIQUOR CONTROL BOARD;

Respondent/Appellee.

BY  DEPUTY
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Employees of the Washington State Liquor Control Board, on July 25, 2008, trespassed onto Edward A. Comenout Jr.'s Indian Trust Allotment. It is designated as Public Domain Allotment Number 130-1027 by the U.S. Department of Interior. The Trust Allotment is located at Puyallup, Washington completely off any Indian reservation. It is about 120 miles from the Quinault Indian reservation. In 2008, it was majority owned by Edward A. Comenout Jr., a fully enrolled Quinault Indian. The State seized 376,852 packs of commercial cigarettes from his convenience store operated on his allotment. The State also charged Edward A. Comenout Jr.; his brother, Robert R. Comenout Sr., a Tulalip Indian; and his nephew, Robert R. Comenout Jr., a Yakama Indian and the son of Robert R. Comenout Sr., with the alleged crime of selling cigarettes without Washington State tax stamps glued to the packages. The criminal charges were all dismissed on the State's own ex parte motions that ordered all property to be returned. In this proceeding, the State obtained an order to destroy the cigarettes, therefore, they cannot be returned even though the statute, RCW § 82.24.135(5), mandates prompt return if lawful possession is proven. Edward A. Comenout

Jr. died June 4, 2010. His estate seeks the return or the fair market value of the cigarettes seized.

I.

ASSIGNMENTS OF ERROR

One

The Washington State Liquor Control Board, the Pierce County courts and this Court have no subject matter or personal jurisdiction of Edward A. Comenout Jr.'s activity carried on by him on his majority owned Trust Allotment. It is exclusively controlled by Congress and the U.S. Department of Interior.

Two

Do Washington Courts have authority to issue State search warrants to seize goods from Indian owners located on Indian Trust allotments?

Three

A public domain allotment, for State tax purposes, has the same status as a recognized Indian reservation. The State has no jurisdiction to tax Indians whose activities take place on the Public Domain Allotment defined in 18 U.S.C. § 1151(c).

Four

The 1995 Washington State Cigarette Tax Law, RCW Ch. 82.24, is not mandatory on Edward A. Comenout Jr. as he was a fully enrolled Indian excepted from the law pursuant to RCW § 82.24.080(2). As an Indian, he was not required to comply with the law and:

. . .if an Indian retailer ever found itself facing a State collection effort for the retailer's non-payment of the tax, the retailer would be shielded from civil or criminal liability, except in the instance where the Indian retailer has failed to transmit the tax paid by the consumer and collected by the retailer.

Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire, 658 F.3d 1078, 1087-8 (9th Cir. 2011).

Five

Edward A. Comenout Jr., as an enrolled Indian, cannot be taxed by the State. The cigarettes seized were not sold to a consumer. The cigarette tax incidence is on the consumer, not Edward A. Comenout Jr. They were not inherent contraband or contraband per se; they must be returned.

II.

SUMMARY OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The basic issues in this case are:

1. Is the allotment where the activity took place Indian Country?
2. Does the State have authority to go onto Indian Country to seize an allottee's property?
3. Does the 2011 *Yakama Indian Nation v. Gregoire* case, 658 F.3d 1078 (9th Cir. 2011) shield Edward A. Comenout Jr. from civil and criminal liability for State cigarette taxes?
4. Can the State seize cigarettes owned by an Indian and not yet sold to a taxable consumer and destroy them before the case was decided?
5. In this state tax case, does federal law preempt state law?
6. Should summary judgment have been granted when the material facts were in dispute?

III.

STATEMENT OF THE CASE

Edward A. Comenout Jr. was an enrolled member of the Quinault Indian Nation. AR 374. He was charged with the crime of selling cigarettes that did not have the Washington State cigarette tax stamps affixed on them, Case No. 8-1-04681-0, Pierce County Superior Court, Puyallup, Washington. AR 374. At the time the cigarettes were seized, the Quinault Indian Tribe and the state of Washington had a cigarette tax contract in force. AR 395-

413. The proceedings in this case commenced on May 29, 2013, before Administrative Judge Terry Schuh, who found for the State by summary judgment. AR 774-787. It was appealed to the Liquor Control Board on September 16, 2013. AR 788, 797. The Liquor Control Board affirmed. AR 825. The Petition to Pierce County was filed May 28, 2014. Edward A. Comenout Jr. had a business license issued by the Quinault Nation. AR 393. Also charged with selling cigarettes without state of Washington cigarette tax stamps affixed to the packages were Robert R. Comenout Sr. and Robert R. Comenout Jr. Robert R. Comenout Jr.'s case was dismissed by the State's own Motion on August 23, 2012. AR 386-7. Robert R. Comenout Sr.'s case was also dismissed on August 23, 2012. AR 390-391. Edward A. Comenout Jr.'s case was dismissed due to his death on June 4, 2010. The land at Puyallup where the seizure occurred was purchased by Edward Comenout Jr.'s father in 1926. The allotment was purchased with Trust funds and is a Public Domain Indian Trust Allotment. AR 581, 606, 608. The Quinault Indian Nation/State of Washington Cigarette Compact delegated all the duty to require tribal members to be licensed to the Quinault Indian tribe. AR 581. The state of Washington had no authority to license Edward A. Comenout Jr. as the compact terms required that the Quinault tribe had exclusive authority.

AR 581, AR 400, 401. In July of 2008, no tobacco license requirement was contained in the Quinault Nation's tobacco code. AR 581. RCW § 82.24.010(6) adopts the definition of Indian Country "as set forth in 18 U.S.C. Sec. 1151." 18 U.S.C. § 1151(c) defines the property as it is a trust allotment. AR 581. When the State seized the cigarettes, a 2008 business license issued by the Quinault tribe was in force. AR 580. Edward A. Comenout Jr. obtained all possible licenses from the Quinault Indian Nation allowing him to sell cigarettes on the Puyallup Trust Allotment property all during 2008. AR 580. The Quinault Indian Nation code in force at the time of seizure did not require Quinault cigarette taxes to be collected for sales on the allotment as the Quinault Nation tobacco code only applied to businesses selling cigarettes within the boundaries of the Quinault Indian reservation. AR 581, AR 417. The State retroceded from its cigarette tax during the time the compact was in effect. AR 401.

Enrolled American Indians can possess commercial cigarettes on or off a reservation without violating state law. AR 580. Tribal Indians do not have to obtain state licenses. AR 580. Unstamped cigarettes can be sold to Indians. AR 580. An Indian purchasing for resale can possess unstamped cigarettes. AR 580.

The criminal case against Edward A. Comenout Jr. was voluntarily dismissed after his death. None of the statements of the Liquor Control Board, Department of Revenue or Puyallup Police Department stated that anyone bought cigarettes from any of the defendants, including Edward A. Comenout Jr. AR 584. The property where the cigarettes were seized at 908/920 River Road in Puyallup, Washington is a public domain trust allotment. AR 578, 606, 608. The search warrant was issued by State Superior Court Pierce County Judge James Orlando. AR 868. The State officers seized the property from the allotment. AR 869.

IV.

THE DECISIONS BELOW

The proceedings in this case commenced on May 29, 2013, before Administrative Judge Terry Schuh, who found for the State. AR 774-787. It was appealed to the Liquor Control Board on September 16, 2013. The Liquor Control Board affirmed. The Petition to Pierce County was filed May 28, 2014, No. 14-2-09107-4, before the Honorable G. Helen Whitener, Judge, Pierce County Superior Court.

Judge Whitener found as a fact that the Comenout store “is on trust allotment land.” (Page 5.) CP 1230-1239. Judge Whitener erred by

concluding at page 5 of her written opinion, CP 1230-1239, that “Washington State cigarette law is not preempted by Federal law and both the Washington State cigarette law and the Quinault Indian Nation tribal laws are applicable to the Comenout property and Indian Country store.” She erred, at pages 3-5, by applying Public Law 280 to authorize State taxes. P.L. 280 did not address state taxation of Indians. *Cohen’s Handbook of Federal Law*, § 604[3][b][ii], page 580 (Nell Jessup Newton Ed. 2012) states:

The Federal Grant of Jurisdiction to the states under Public Law 280 excludes significant subject areas, particularly in the regulatory and tax fields. The act expressly precludes state taxing and certain other exercises of jurisdiction over trust and restricted Indian property, as well as jurisdiction over federally protected Indian hunting and fishing rights.

Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), “. . . s 4(b) certainly does not expressly authorize all other state taxation.” *Id.* at 391. Quoting 28 U.S.C. § 1360(a) and (b), *id.* at 378. She did not apply RCW § 43.06.455(14)(b)(iii) quoted at page 7 of her opinion to Edward A. Comenout Jr., an enrolled Indian operating on his own trust land. He needed no license from any government to sell cigarettes. *Moe v. Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480 (1976), holds that an enrolled Indian doing business in Indian country doesn’t need a State tobacco license. Although cited, quoted and strongly relied on as a

key case to prohibit arrest on civil liability of an Indian doing business in Indian country for not collecting State cigarette tax, *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087-8 (9th Cir. 2011), was never mentioned in Judge Whitener's opinion.

The basic rules of summary judgment, CR 56(c), were violated as there was a genuine issue of material fact on whether Edward A. Comenout Jr. had to apply and obtain a tobacco license. The Declaration of Randy Brown, AR 578, 580, 584, states that Edward Comenout Jr. had all necessary licenses from the Quinault Nation and that there was no evidence that anyone bought cigarettes from Edward Comenout Jr. The three affidavits of Raymond Dodge Jr., AR 467-469, 509-10, 759-761, stated that a new resolution on licensing was adopted and could have been picked up at the record's office at Taholah, 120 miles away. What license law Comenout knew about was in complete dispute. Judge Whitener's opinion, CP 1230-1239, page 9, held that the Quinault tribe stamp had to be affixed. She disregarded the affidavits (page 9). Whether the Quinault tribe licensed Indian Country was a material issue, the case should have been tried. See *Nickell v. Southview Homeowners Association*, 167 Wash.App. 42, 271 P.3d 973, 978, 982 (Div. II, 2012). The Motion of the Estate of Edward A.

Comenout Jr. was denied by order of July 27, 2015. CP 1230-1239. The case was appealed to this Court on August 14, 2015. CP 1.

V.

ARGUMENT

A. **Brief review of attempts to impose State Tax on Indians living in Indian Country.**

Colorful writer, Justice Hale, in *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968), summed up the reason that an Indian was not subject to State tax when he wrote at 685:

Although the natural dignity of the American Indian as a person and a citizen, his valor as a warrior, and his contributions to this country, military and civil, cannot and ought not be denied, one wonders, as he reads the case law on Indian matters, whether the law has not conferred upon tribal Indians and their descendants what amounts to titles of nobility, with all that entails, in contravention of Article 1, s 9, of the United States Constitution prohibiting such titles. But this is a question beyond our jurisdiction. That the Makahs will, while receiving most of the benefits of taxpayers and citizenship, escape some of the correlative responsibilities of citizenship is a problem for the Congress and the President to solve. (Underlining added.)

This State case epitomizes the ultimate reason this case should be reversed. Congress exclusively governs Indian country, including the Comenout allotment.

In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164,

93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) the state of Arizona withheld State Income tax on Rosalind McClanahan, an enrolled Navajo Indian, who lived on her reservation. The income was derived from on reservation sources. The unanimous Supreme Court, in a first impression decision, held: “The tax is unlawful as applied to reservation Indians with income derived wholly from reservation sources.” *Id.* at 165. The Court, *id.* at 175, relied on the earlier case of *Warren Trading Post v. Arizona*, 380 U.S. 685 at 687, 690, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965)

Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 691, f. 18, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), adopted the holding of *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 334, 361 P.2d 950, 955-956 (N.M. 1961), a case denying a municipal sales tax on store sales of a retail store that was on an Indian Reservation within the city. *Warren Trading Post, supra* at 691, n. 18, stated:

Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona’s, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Art. 1, s 8, has undertaken to regulate reservation trading in such a comprehensive way (sic) that there is no room for the States to legislate on the subject.

Your Food Stores, supra at 330, has the same provision. It's enabling act and same constitutional provision as Washington give Congress exclusive jurisdiction of Indian country. Wash. Const. art. 26, Second, Enabling Act. § 4, Second. Vol. 1, State Committee Print, page 17.

The State cigarette tax law, RCW § 82.24.900, states in full “The provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.”

The Washington Constitution Art. 26, Second, states that all lands, lying within the limits of the state, owned by Indians “shall remain under the absolute jurisdiction and control of the Congress of the United States.” 25 U.S.C. § 465, the statute that authorizes off reservation Indian restricted allotments states in part, “such lands or rights shall be exempt from State and Local taxation.” The law governing the allotment 25 U.S.C. § 349 states that until freed of restrictions the allotment “shall be subject to the exclusive jurisdiction of the United States.”

There is no longer a requirement that Indians in Indian Country collect cigarette tax. *Washington v. Confederated Bands of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)

imposed a “minimum” burden on Indian retailers in Indian Country to collect the Washington cigarette tax. “The state may validly require the tribal smokeshops to affix tax stamps purchased from the state to individual packages prior to the time of sale to non members of the Tribe.” (Underline added.) *Id.* at 158. Footnote 9, *id.* at 183, states that the incidence of tax is on the non Indian purchaser as the Indian seller is not taxable. Footnote 8, *Ibid.* at 183, reaffirmed that P.L. 280 did not grant authority to tax reservation Indians, citing *Bryan v. Itasca County*. The court only imposed the minimum burden to collect the tax from non Indian purchasers. *Id.* at 151 and fn. 26. “We struck down the tax as applied to Indians (citing *Moe*, 425 U.S. at 475-581).” We now fast forward to 2008. Since 1995, Indians, including the Comenouts, are not *required* to collect Washington State cigarette tax. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011). The 2011 case carefully reviewed the entire 1995 State cigarette tax law and held that an Indian retailer was an exempt person as defined in RCW § 82.24.080(2). *Id.* at 1087. The case throughly reviewed the present State cigarette tax law and held that an Indian retailer does not have to collect cigarette tax from sales to non Indians because “the act does not *require* it.” *Require* is italicized. The 1980

Colville case on this point (*Colville*, 447 U.S. at 159) “may require” has no application to the present law. Collection is an “economic choice left to the Indian retailers.” *Yakama*, *supra* at 1087. The case also held that incidence of tax is on the consumer. *Id.* at 1089.

The text in *Yakama*, 658 F.3d at 1087, leaves no doubt:

The language also indicates that if an Indian retailer ever found itself facing a State collection effort for the retailer’s non-payment of the tax, the retailer would be shielded from civil or criminal liability, except in the instance where the Indian retailer has failed to transmit the tax paid by the consumer and collected by the retailer.

The law has never taxed exempt Indians on mere possession of unstamped cigarettes in Indian Country. The cigarettes were seized prior to sale, hence, did not need stamps. The arrest of Edward Comenout Jr. did not charge failure to collect tax from non Indian sellers, which is the only issue that has ever been in controversy. The obvious reason is that cigarette stamps are applied to cigarettes up the chain of distribution. It is never collected from the consumer. No retailer ever collected cigarette tax from the consumer. Therefore, no law was broken by Ed Comenout Jr. and the others. The State’s action in dismissing the case on their own motion verifies inability to convict.

The current case of *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), also applies current law to off reservation allotments holding that Thurston County could not apply personal property tax to a water slide business located off the reservation. The Court correctly applied the statute 25 U.S.C. § 465, a statute that also applies to trust allotments.

25 U.S.C. § 465 allows the Department of Interior to create trust allotments anywhere, anytime to any public domain property “within or without existing reservations. . .including restricted allotments. . .for Indians. . . . such lands or rights shall be exempt from state and local taxation.”

Indians not residing on reservations may own allotments. 25 U.S.C. § 334.

B. *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), applies federal law to off reservation property and rejects county personal property tax.

The *Chehalis* case (724 F.3d at 1157) rejects Judge Whitener’s statement of State preemption. The County argued that the State definition of personal property applied. The cigarette tax is a similar excise tax. The argument was rejected by citation to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). “The Grand Mound

Property at issue here is owned by the United States and held in trust pursuant to § 465. . .Thurston County’s property taxes on the Grand Mound property are therefore invalid under § 465.” *Id.* at 1157. Judge Whitener’s State preemption of federal law is pivotal to the reason this case must be reversed. All of the law verifies that Indian preemption is a federal question. *Cabazon v. Smith*, 388 F.3d 691 (9th Cir. 2004), struck down a state statute applying only to off reservation travel of Indian emergency vehicles. The statute was precluded by “the preemptive force of federal Indian law.” *Id.* at 701. “The question of where the legal incidence of tax falls is decided by federal law.” *Coeur d’Alene Tribe of Idaho v. Hammond*. 384 F.3d 674, 681 (9th Cir. 2004), the case involving state gas tax on Indian reservations.

C. The *Comenout* case was not tried or final; it cannot be any precedent.

The decision in *State v. Comenout*, 173 Wash.2d 235 (Wash. 2011) has no application as the State dismissed the case. The case was never tried and was dismissed ex parte. It is not binding. *U.S. v. Real Property*, 545 F.3d. 1134 (9th Cir. 2008), *Pueblo of Santa Ana v. Nash*, 972 F.Supp.2d 1254 (N.M. 2013). Both hold that voluntary dismissal cannot be precedent. “The effect of the filing is to leave the parties as though no action had been brought.” *U.S. Real Property, supra* at 1145 (internal quotes omitted). The

case also assumed that the Quinault Indian Nation had jurisdiction. When the land is not on a reservation a tribe has no jurisdiction. See *Miami Tribe of Oklahoma v. U.S.*, 656 F.3d 1129 (10th Cir. 2011). Further, the Supreme Court never mentioned the *Yakama* case, 658 F.3d 1078, or had the benefit of the later decided *Chehalis* case. *Confederated Tribes of the Chehalis Reservation v. Thurston County*, 724 F.3d 1153 (9th Cir. 2013). There was no opportunity to review the affidavit of Randy Brown, as in this appeal, or the facts or lack of enforcement of the Quinault Nation. The Supreme Court also assumed that Public Law 280 included a delegation by Congress for state taxation of Indians.

The *Comenout* opinion concluded that Congress delegated state jurisdiction except for lands and Indians within the boundaries of Indian reservations. Therefore, the retrocession did not apply to lands outside the reservation. 173 Wash.2d at 240. This conclusion is disputed by an often cited law review by Carole E. Goldberg, *Pub.L.280: The Limits of State Jurisdiction over Reservation Indians*. 22 U.C.L.A. L.Rev. 535, 557 (1975) stating:

The fourth alternative utilized by the states to minimize the financial hardship of PL-280—assumption of jurisdiction only over taxable non-trust lands within the reservation—is a unique feature of Washington’s 1963 law accepting PL-280

jurisdiction. Since there is no pattern to the distribution of trust and non-trust lands on a reservation, Washington has created a jurisdictional labyrinth by mandating that on non-trust land state jurisdiction encompasses every subject matter, while on trust land, it applies only to certain enumerated subject matters unless the tribe asks for full state jurisdiction under PL-280. (Underlining supplied.)

RCW § 37.12.010, the statute in question, applied jurisdiction to all lands within a reservation, but made special mention of “tribal lands” and lands “subject to a restriction on alienation.” These trust lands granted jurisdiction only over the subject matter of school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children and motor vehicles driven on public roads. RCW § 37.12.010 applied to trust lands within a reservation, but the federal law, 25 U.S.C. § 465, applies to lands “within or without existing reservations.” The State Supreme Court assumed that the Quinault Nation could retrocede off reservation allotments created by 25 U.S.C. 465. The Quinault Nation, or any other tribe, cannot remove any public domain allotment restrictions.

D. The land where the activity took place is a Restricted Trust Allotment and clearly Indian Country. The State has no adjudicative jurisdiction to tax Indian owner activity on the property.

25 U.S.C. § 2201(4)(I) defines the allotment, “trust or restricted

lands' means lands . . . or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.” 25 U.S.C. § 2201(4)(ii) also defines an interest in the land. The statute, 25 U.S.C. § 2201(2), defines Indian as any member of a tribe or is an owner (as of October 27, 2004) of a trust or restricted interest in land. The Comenout deed, AR 608, states: “the same shall not be alienated or encumbered without the consent of the Secretary of the Interior.” 25 U.S.C. § 349 states in part: “no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. . . the Secretary of the Interior. . . whenever he shall be satisfied that any Indian allottee is competent.” A patent shall be issued. “. . . and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.” 25 U.S.C. § 349. The restrictions continue until otherwise directed by Congress. 25 U.S.C. § 462. The site has been determined to be a federal instrumentality. 25 U.S.C. § 412a. *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D.Wn. 1974).

E. The site is defined as Indian Country and part of the same statute that defines Indian reservations.

Indian Country is defined in 18 U.S.C. § 1151. It has three parts. “(a) all lands within the limits of any Indian reservation. . . (b) all dependent Indian communities and (c) all Indian allotments.” (c) applies. The deed states

Allotment Tract No. 1027, Code 130. The State cigarette tax law, RCW § 82.24.010(6) adopts 18 U.S.C. § 1151. “For purposes of this chapter, ‘Indian Country’ is defined in the manner set forth in 18 U.S.C. § 1151.”

In *Boisclair v. Superior Court*, 51 Cal.3d 1140, 801 P.2d 305 (S.C. Cal. 1990), a non Indian business sought a right of easement over trust land. At least part of the land was off reservation trust land. The Court cited 25 U.S.C. §§ 345, 346 and 28 U.S.C. § 1360(b) concluding “As long as the Indian party to the litigation claims that the property is Indian trust or allotted land, the dispute may be characterized as one concerning ownership and possession of Indian land, and is therefore barred from state court jurisdiction.” *Id.* at 314. 25 U.S.C. § 345 confers U.S. District Court federal jurisdiction to an allottee to defend his rights.

Armstrong v. Maple Leaf Apartments, Ltd, 508 F.2d 518 (10th Cir. 1974), involved restricted land owned by an Indian descendant of an allottee of the land. The land was restricted trust land, but neither Armstrong or her attorney was aware of the restriction. *Id.* at 521. The land was sold and resold and an apartment was built on the property. About nine years later, an action was filed in the state probate court to retroactively approve the conveyance. However, a suit was brought in federal court to stop the action

of the probate court. The federal court preempted the state court “If the state court were to act over the objection of Mrs. Armstrong, it would be acting outside the law and without jurisdiction.” *Id.* at 525.

18 U.S.C. § 1151(c) was directly at issue in *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013). Magnan argued that his crime occurred on an off reservation allotment defined in 1151(c) and exclusive jurisdiction of the crime was in federal court, not state courts. *Id.* at 1163. The Court agreed and Magnan, who had been sentenced to death by a state court, was released. The conviction was dismissed for lack of jurisdiction. The deed had a restriction that the land was subject to a condition that no “contract to sell,” and “other liens and encumbrances” “shall be of any force and effect, unless approved by the Secretary of Interior.” *Id.* at 1165. The court defined Indian Country to include Indian allotments. *Id.* at 1167.

Ex parte Van Moore, 221 F. 954 (D.C.S.D. 1915), applies. Van Moore was an Indian charged in state court with murder. The place of the crime was an Indian allotment that was not part of any Indian reservation. *Id.* at 963. The court dismissed the state charge and freed Van Moore, who had been imprisoned for thirteen years. *Id.* at 956. The Opinion states “It is manifest that Indian lands, or the lands of an Indian within a reservation or

on the public domain, all come in the same category, all such lands are equally Indian country.” *Id.* at 970. *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), involved the issue of allotted lands outside an Indian reservation. All the parties to that case agreed that the state courts have no jurisdiction of acts by Indians on the lands that were within the 18 U.S.C. § 1151 definition of Indian country. *Id.* at 428. The Court stated: “It is common ground here that Indian conduct occurring on the trust allotments is beyond the State’s jurisdiction, being instead the proper concern of tribal or federal authorities.” *Ibid.* at 427. In a footnote [footnote 2 at page 427], the court explained the law:

On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are ‘Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.’ 18 U.S.C. § 1151(c). Even within ‘Indian country,’ a State may have jurisdiction over some persons or types of conduct, but this jurisdiction is quite limited. See, e.g., *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129; *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251; *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483. While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. *McClanahan v. Arizona State Tax Comm’n*, *supra*, 411 U.S., at 177-178, n. 17, 93 S.Ct. at 1265; *Kennerly v. District Court of Montana*, 400 U.S. 423,

424, n. 1, 91 S.Ct. 480, 481, 27 L.Ed.2d 507; *Williams v. Lee*, supra, 358 U.S., at 220-222, nn. 5, 6, and 10, 79 S.Ct. at 270. (Underlining added).

The court, at footnote 3, page 429, made the following additional comment:

We note, however, that § 1151(c) contemplates that isolated tracts of ‘Indian country’ may be scattered checkerboard fashion over a territory otherwise under state jurisdiction. In such a situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory.

Solem v. Bartlett, 465 U.S. 463, 467, n. 8, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), held that the state had no jurisdiction to charge an Indian with a crime occurring in Indian country. “Regardless of whether the original reservation was diminished, Federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. See 18 U.S.C. § 1151(c).”

Approximately 11 million acres of land in the United States is held as allotments. *Cohen’s Handbook of Federal Indian Law*, § 16.03[4][b], page 1079 (Nell Jessup Newton ed. 2012).

In *Cravatt v. State*, 825 P.2d 277 (Okla. Cr. 1992), a murder occurred on a restricted allotment that was not part of a reservation. 1151(c) applied.

Id. at 278. The Court held that the state murder conviction was conducted without state jurisdiction. The state conviction was dismissed.

In *Petition of Carmen*, 165 F.Supp. 942 (N.D. Cal. 1958), another state murder conviction was dismissed because it occurred on a public domain allotment, a small tract of land in Madera County, Oklahoma.

In affirming the lower court, the Ninth Circuit in *Dickson v. Carmen*, 270 F.2d 809 (9th Cir. 1959), stated:

The petitioner is an Indian. In 1950 he was convicted by a California Superior Court of the murder of one Dan McSwain, also an Indian. The crime was committed on land which was at the time allotted to Indians from the public domain and held in trust for the Indians by the federal government.

The exhaustive opinion of Judge Goodman leaves nothing to be added, and his judgment is affirmed. D.C. Cal., 165 F.Supp. 942.

This Court is bound by *Wesley v. Schneckloth*, 55 Wash.2d 90, 94, 346 P.2d 658 (1959), a case that follows *Petition of Carmen*, 165 F.Supp. 942, 950 (D.C. Cal. 1958), and aligns with all the 18 U.S.C. § 1151 definitions. In *Schneckloth*, a Yakama Indian was charged with grand larceny, but his Indian status and the fact that the crime occurred at Toppenish within the Yakama reservation was never brought to the state court's attention. Habeas corpus proceedings were filed. The Court released

the Defendant stating: “A constitutional court cannot acquire jurisdiction by agreement on stipulation. Either it has or has not jurisdiction. If it does not have jurisdiction, any judgment entered is void *ab initio* and is, in legal effect no judgment at all.” *Id.* at 93-4. The defendant was released. The dissent in *Schneckloth*, *id.* at 104, observes that Congress, not the courts, should solve the problem. *State v. Condon*, 79 Wash. 97, 139 P. 871 (Wash. 1914), holds the same way. A state charge of horse stealing by an enrolled Indian from an Indian on an allotment on the diminished reservation was dismissed.

In *Application of Carmen*, 48 Cal.2d 851, 853, 313 P.2d 817 (Cal. 1957), the court granted the Writ of Habeas Corpus and dismissed the case as the state court had no jurisdiction of the case. The court noted that 1151(c) was included in the statute in 1948, on the authority of *U.S. v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914).

State v. Klindt, 782 P.2d 401 (Okla. Cr. 1989), was not a major crime. It was a state charge of assault that occurred at an Indian smoke shop. The land was leased by the tribe from an Indian allottee. The court held “we have examined the record and find the trial court did not abuse its discretion in finding that the lands in question are Indian country as defined by 18 U.S.C. § 1151(c).” *Id.* at 404. The case was sent back to determine whether the

defendant was an Indian. If he was, the case would be dismissed.

In *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997), the crimes were kidnaping and assault. The county where the assault took place was not on a reservation. The case held that the crime took place in Indian country as defined in 18 U.S.C. § 1151(c). An allotment is “owned by an Indian subject to a restriction on alienation in favor of the United States or its officials (‘restricted fee’ allotment).” *Id.* at 1572. “. . .they remain Indian country today unless their Indian titles have been extinguished.” *Ibid.* at 1572. The crime was within federal court jurisdiction. It is noted that the history of the General Allotment Act passed in 1887 was to assimilate Indians into mainstream society. See *Cohens Handbook of Federal Indian Law*: § 16.03[2][a] and [b] pages 1072-3. (New Jessup Newton ed. 2012). 25 U.S.C. § 349 provides that an Indian allottee can receive an unrestricted fee simple deed to the land from the Secretary of Interior “whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs.” The statute provides the reason that no retrocession of the allotment could occur by action of the Quinault Nation; it also depicts the irony of the lower court decision. Ed Comenout Jr., did not satisfy the BIA that he was competent to manage his affairs. Even though the State tax restrictions were

still in place, he couldn't be self sufficient if the State kept raiding his store. This oxymoron cannot continue as it is beyond the power of this Court to ignore the federal law that applies to Comenout and 11,000 allotments in the United States.

In *U.S. v. Jewett*, 438 F.2d 495 (8th Cir. 1971), the same type evidence of allotments was provided by BIA records that the land was an allotment and was within the definition of Indian country, 18 U.S.C. § 1151(c). The land involved in *U.S. v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996), was an allotment outside of the Navajo Indian Reservation and was Indian country as defined in 18 U.S.C. § 1151(c). *Id.* at 1039 and footnote 1. In *U.S. v. Sands*, 968 F.2d 1058 (10th Cir. 1992), the court held that the state had no jurisdiction over an Indian defendant for a crime on an allotment. It was held to be within the definition of 18 U.S.C. § 1151(c). The state argued that it should have jurisdiction over “checkerboard” allotments as the state has jurisdiction over adjoining land. *Id.* at 1062. The argument was rejected.

F. The State cannot govern the allotment. It has no jurisdiction to seize the Indian owner's property.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), decided before the 1995 State cigarette tax revision, did not allow the Department of Revenue to go

onto Indian land to seize cigarettes. In *Colville*, the state contended that they legally could do what they did here, go into Indian country and seize and sell the cigarettes. *Colville, supra*, at 162, the Court would not decide this issue as it “is not properly before us.” *Ibid.* at 162. Immunity from state tax “applies to all Indian country and not just formal reservations.” *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 125, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993), “the intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments.” *Id.* at 125. In *Sac and Fox*, the state argued that the *Colville* case, 447 U.S. 134, did not apply to allotments. The court rejected this argument, stating: “Absent explicit congressional direction of the contrary, we presume against a State’s having the jurisdiction to tax, whether the particular territory consists of a formal or informal reservation, allotted lands or dependent Indian communities.” *Id.* at 128.

G. The Land is Indian Country; State Search Warrants to seize Indian personal property are void.

State search warrants issued to search Indian country are not valid unless issued pursuant to Federal Rule of Criminal Procedure 41 and

requested by a federal prosecutor. *United States v. Peltier*, 344 F.Supp.2d 539, 546 (D.C.E.D. Mich. 2004), invalidated a state warrant and suppressed all evidence as the state police had no authority to obtain a warrant from a state court judge. *Id.* at 542. The state contended that the extent of Indian country was unclear, “that the resulting confusion requires that law enforcement personnel pursue their investigations, make their arrests, and sort out questions of jurisdiction later.” *Id.* at 546. This argument was rejected by the court. “The crucial element in due process claims is police overreacting.” *Id.* at 548.

In *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990), the arrest of a tribal Indian on trust land by a state sheriff was constitutionally invalid.

In *U.S. v. Baker*, 894 F.2d 1144 (10th Cir. 1990), a state search warrant obtained by a state deputy sheriff was void. The search was to investigate alleged methamphetamine on the property that was within Indian country. *Id.* at 1146. The federal conviction was reversed as the warrant was issued by “an unauthorized state tribunal.” *U.S. v. Anderson*, 857 F.Supp. 52 (D.C.S.D. 1994), granted a motion to suppress evidence by state parole officers who conducted a warrantless search of his home. The defendant was an Indian and the home was in Indian country. *Cohen’s Handbook of Federal Indian*

Law [9.08] at page 775 (Nell Jessup Newton ed. 2012) states, “it remains clear that state officers have no authority to investigate crime involving Indians occurring within Indian country.”

H. As an enrolled Indian, Edward A. Comenout Jr. could possess unstamped cigarettes.

Indians have additional rights to possess unstamped cigarettes. Cigarettes are not contraband per se. Millions are smoked daily. Logic must prevail. 17% of the adult population smokes. Indian tribe purchasers from Puyallup smokeshops and military persons, who buy from the many military bases, transport cigarettes in their cars. Cigarettes are not enriched plutonium.

Even if the State cigarette tax applied, the Comenouts are exempt purchasers within RCW § 82.24.080(2) as the first taxable event is the sale to a non qualified purchaser. Seventeen tribes have compacts with the state of Washington. The various tribal stamped cigarettes do not have State cigarette stamps on them. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011), held that an Indian is exempt as a taxable person citing RCW § 82.24.080 and other portions of the cigarette tax law and stating: “There is no dispute between the parties that as between an Indian retailer and a non-Indian purchaser, the latter is the *first*

taxable person.” *Id.* at 1087. The case holds, like many other cases, that the incidence of tax is on the retailer purchaser and the intent of the State cigarette tax law is for: “consumers to be legally obligated to pay the cigarette tax.” *Id.* at 1089.

I. None of the property seized is contraband.

The transportation of cigarettes would not allow confiscation as the automobile is not contraband per se. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965), settled the issue in 1965 by holding that an automobile is “not intrinsically illegal in character.” *Id.* at 700. “There is nothing even remotely criminal in possessing an automobile.” *Id.* at 699. The case held that an auto carrying illegal liquor could not be forfeited. See also *State v. Alaway*, 64 Wash.App. 796, 828 P.2d 591, 593 (Div. II, 1992). The result is also buttressed by the cigarette tax law of Washington. RCW § 82.24.250(9), a statute requiring an Indian transporter to give notice to the state or the transportation is “deemed contraband.” RCW § 82.24.250(4). Cigarettes do flash off or on like a flashlight depending on whether notice is given. In fact no Indian has to give notice. Cigarettes are not inherent contraband. According to the State’s 1995 study, there are 15 military bases in Washington whose government

controlled stores sell cigarettes without tax stamps to 285,000 military persons. Seventeen Indian tribes sell cigarettes to non Indians without State tax stamps on them, a large percentage of commercial cigarettes sold at retail in Washington. In 1995, the State estimated that the proportion was 20%. If an item is sold legally, one fifth of the time it is not contraband. In this case, the State could have sold the cigarettes and escrowed the proceeds. It made the unilateral decision to keep them until stale and destroy them. The action by the State prevented taxable sales and return of actual non tax cost of the goods to Comenout. *U.S. v. Clarke*, 445 U.S. 253, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980), applies. Inverse compensation occurs when the government takes without compensation.

J. No crime occurs in cigarette taxation cases until a consumer purchases the cigarettes.

The cigarettes seized were taken by the State before sale. *Harder's Express v. State Tax Commission*, 402 N.Y.S.2d 721 (N.Y. 1978), holds that cigarettes seized en route by theft without tax stamps did not incur a tax as no sale occurred. Non Indian cases, including *Neeld v. Giroux*, 131 A.2d 508 (N.J. 1957) and *State v. 483 Cases, More or Less, of Assorted Brands of Cigarettes*, 96 A.2d 568 (N.H. 1953), hold that possession is not illegal. The cited case has a statute like Washington's. It did not impose cigarette taxes

on transporters prohibited by the Federal Constitution. *Id.* at 182. The cigarettes were seized before stamps were affixed. They were transported within the state by the owner into the owner's farmhouse. *Pfeiffer v. State*, 295 S.W.2d 365 (Ark. 1956), is also applicable. The owner was transporting 173 cases of cigarettes and would have sold them if he made a 3% profit. The court cited "Article 1, Section 8, Clause 3 of the Constitution." *Id.* at 367. It reversed the conviction stating: "The state has no authority to levy a tax on property while it is being transported in interstate commerce."

Galesburg Eby-Brown Co. v. Department of Revenue, 497 N.E.2d 874 (Ill. 1986); *Homier Distributing v. City of Albany*, 90 N.Y.2d 153 (Ct.App.N.Y. 1997) and *Paul ex rel. Paul v. State, Dept. of Revenue*, 110 Wn.App. 387, 392-3, 40 P.3d 1203 (Div. I, 2002), all hold that until sale at retail, cigarettes in transport are not subject to cigarette tax.

K. The site is not governed by any Indian tribe.

Cohen's Handbook of Federal Indian Law (Strickland ed. 1982),

Chapter 5 § B2, page 278 states:

Some small Indian reservations have been established for Indians lacking a functioning social organization at the time, and in most instances the residents have been able to organize a governmental structure. As a result, most areas of Indian country are subject to tribal authority.

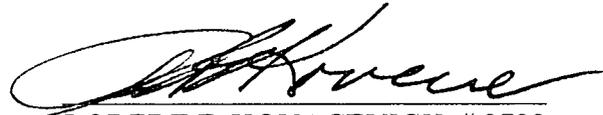
The principal exception is certain Indian allotments outside reservations. The majority of off-reservation allotments are governed by functioning tribal governments but a substantial minority are not. The latter are statutory Indian country and are subject to applicable federal statutes, which preempt state laws. (Underlining added.)

VI.

CONCLUSION

The State Courts had no authority to issue a search warrant for State employees to go into Indian country and seize an allottee's goods. The Trust Allotment is defined as Indian Country and has the same status as an Indian reservation. The 1995 State Cigarette Tax Law is not mandatory on Indians who own an allotment. Federal Law controls. The case should be reversed.

DATED this 5th day of November, 2015.



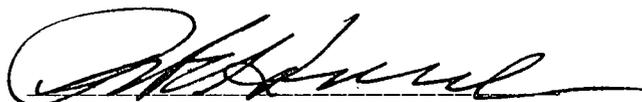
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CERTIFICATE OF SERVICE

This is to certify that a copy of the Opening Brief was served on Counsel for Respondent by emailing and mailing the same by First Class mail on November 5th, 2015, in a postage-paid wrapper addressed as follows:

Ms. Jennifer Elias
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DATED this 5th day of November, 2015.



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Attorney for Appellant

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