

85067-4

FILED
COURT OF APPEALS
DIVISION II

No. 39741-2-II

10 MAY 19 AM 9:25

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II BY
STATE OF WASHINGTON

SW
DEPUTY

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

Defendants/Appellants,

v.

STATE OF WASHINGTON;

Plaintiff/Respondent.

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INTRODUCTION

American Indians, Edward A. Comenout, Robert Reginald Comenout Sr., and Robert Reginald Comenout Jr., joint Appellants herein, were charged in the Pierce County Superior Court with a conspiracy to violate the state cigarette tax law, RCW 82.24.500 and RCW 82.24.110(2). CP 139-141¹. The Prosecution acknowledges that all three are enrolled Indians and that the factual allegations occurred on trust land owned by Edward A. Comenout. CP 139-141. The land is held in trust for him by the United States. The appellate and superior court numbers of this case are: Edward A. Comenout, 39751-0-II, 08-1-04681-0, Robert Reginald Comenout Sr., 39761-7-II, 08-1-0462-8, Robert Reginald Comenout Jr., 39741-2-II, 08-1-4680-1. This Court consolidated all three cases under Cause No. 39741-2-II. In the trial court, all three Defendants moved to dismiss and suppress the information. The motion was heard by the Honorable Katherine M. Stolz on June 9, 2009. RP - separate cover. Judge Stolz denied the motion. Findings were entered August 27, 2009. CP 411-414. The Defendants timely filed their motions for discretionary review pursuant to R.P.C. 5.1(c). CP 440-442. It was granted

1

The page references are to Clerk's Papers of Edward Comenout. The page numbers are different in the Clerk's Papers of Robert Comenout Sr. And Robert Comenout Jr. A parallel table is included at page v.

by Court Commissioner Eric B. Schmidt on February 8, 2010. CP 457-467. Territorial jurisdiction is a question of law reviewed de novo. *State v. Pink*, 144 Wn.App 945, 950, 185 P.3d 634 (Div. II, 2008). Appellants' opening brief was due April 20, 2010. The brief was rejected. The amended brief is due May 20, 2010.

The Appellants seek a ruling from this Court dismissing the information.

I.

ASSIGNMENTS OF ERROR

One

The information should be dismissed for lack of jurisdiction as all the alleged violations took place on lands held in trust by the United States and owned by Edward A. Comenout, an enrolled Quinault Indian.

Two

The Washington State courts have no territorial jurisdiction to charge enrolled Indians for alleged criminal violations that occurred on land held in trust by the United States for the benefit of the enrolled Indians.

Three

The crime charged, failure to comply with the State of Washington

cigarette tax law, RCW 82.24, occurred during the time the State of Washington-Quinault Indian Tribe Cigarette Tax Compact was in force. A copy of the Compact is attached to the State's Memorandum in Opposition to Motion to Dismiss. CP 355-384, pages 365-384. RCW 82.24.295(1) provides that the state cigarette taxes do not apply during the period of the Compact. Therefore, the State of Washington has no criminal jurisdiction over the Defendants as no state cigarette tax crime could be committed by these Defendants.

Four

The crime charged is on trust land, therefore, Public Law 280 applies to eliminate the alleged crime from state jurisdiction as none of the eight enumerated subject areas apply to the alleged tax violations.

Five

Washington State has no jurisdiction of an alleged victimless state tax crime by enrolled Indians committed on federal trust land.

Six

The federal statutes, 18 U.S.C. § 1162(b), 25 U.S.C. § 1321(b), 1322(b), 18 U.S.C. § 1151, 28 U.S.C. § 1360(b) and 4 U.S.C. § 109 state that jurisdiction of the alleged state cigarette tax offense is preempted by federal

law.

Seven

The federal definition of Indian country, 18 U.S.C. § 1151(c) applies to Comenout's off-reservation trust land, thereby preventing state prosecution of a state tax crime.

Eight

The State has no taxing jurisdiction over enrolled Indians living on trust lands. The cases of *State v. Pink*, 144 Wn.App. 945, 85 P.3d 634 (Div. II, 2008) and *State v. Guidry*, 153 Wn.App. 774, 223 P.3d 533 (Div. II, 2009) mandate dismissal of this case.

Nine

Before and after Washington became a state, it had no jurisdiction to impose state taxes directly on Indians who resided in Indian country.

Ten

Criminal enforcement by the State on enrolled Indians living in Indian country are civil regulatory. The State has no jurisdiction to charge crimes for state tax violations under such conditions.

II. SUMMARY OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The basic issues in this case are:

1. Whether or not the State can criminally prosecute enrolled Indians for failing to pay Washington State cigarette tax on activity taking place on land held in trust by the United States.

2. Whether or not the state cigarette tax exemption of RCW 82.24.295 prevents prosecution of a Quinault tribal member and other Indians when a compact prohibiting the state cigarette tax is in force between the Tribe and the State.

III. STATEMENT OF THE CASE

The facts are largely undisputed. The facts are taken from the Declaration of Probable Cause, dated September 26, 2008, CP 142-143, and the Findings of Fact and Conclusions of Law on Motion to Dismiss/Suppress, CP 411-414.

Edward A. Comenout, Jr., 81 years old, is a full blooded Quinault Indian, Enrollment No. 0325. He is the son of Edward Comenout Sr., deceased. He owns and occupies the land at 908 River Road, Puyallup, Washington, 98371. The land is approximately ½ acre in area and improved by two buildings, Comenout's residence and a roadside business building

called Indian Country Store. The land has been held in trust by the federal Bureau of Indian Affairs (BIA) for Comenout since 1926. CP 457-467. Written inscriptions on the filed deed of record in Pierce County (Appendix 1) state, "BIA Allotment Tract 1027, Code 130." Comenout's mother, Anna Jack, survived his father. She died November 30, 1987, and left an interest to Edward Comenout Jr. He is the majority owner of the all Indian owned trust land at the 908 River Road address. The State admits that the land is held in trust by the United States Government for Edward A. Comenout. CP 142-143. All the activity alleged as a crime took place on the trust land. The land is not within the exterior boundaries of the Quinault Indian Reservation. CP 142-143. The Quinault Indian Nation entered into a treaty with the United States on July 1, 1855. 12 Stat. 971. Appendix 2. On August 30, 1969, the Quinault Indian Reservation retrocession from Public Law 280 was completed. Appendix 3. The Quinault Tribe also has a cigarette compact with the State in force since January 3, 2005. CP 355-384, pages 365-384.

The Information, CP 139-141, charges that on July 25, 2008, the Defendants possessed, or transported commercially packaged cigarettes, without state of Washington cigarette tax stamps affixed as required by Chapter 82.24 and without notice of delivery as required by RCW 82.24.250.

The alleged conduct violated RCW 82.24.110(2). It also alleges control of property or services owned by another. No explanation was furnished on this alleged crime.

During the arrests, the State of Washington seized 37,000 cartons of cigarettes from the property and other items. The seizure is contested in the Liquor Control Board Office of Administrative Hearings, Docket No. 2008-LCB-0035, Judge Charles Bryant, ALJ. The forfeiture case is postponed pending the resolution of this criminal case.

IV. ARGUMENT

- A. If These Alleged Acts Occurred Within the Quinault Reservation, the State Cigarette Law would not be Violated. Since these Acts would not Constitute a Crime on the Quinault Indian Reservation, these Acts are not a Crime on this Trust Land.**

The state cigarette tax law could not be violated by an Indian business on the Quinault Reservation. The reasons are that Comenout would qualify as a tribal wholesaler or retailer. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 96 S.Ct 1634, 48 L.Ed.2d 96 (1976) holds that a tribal Indian tobacco wholesaler or retailer is not required to obtain a state retail or wholesale tobacco license. Further, the case holds that the state tobacco tax, including tax on cigarettes does not

apply to reservation Indians. RCW 82.24.260(c) codifies this principle. The legislative intent of RCW 82.24.080(2) places the burden of tax on the first non-exempt purchaser, which would be a non-Indian retail purchaser. *Keweenaw Bay Co. v. Rising*, 477 F.3d 881, 890 (6th Cir. 2007).

The Information states that Comenout was in possession. CP 139-141. RCW 82.24.020(1). *Oklahoma v. Chickasaw Nation*, 515 U.S. 450, 459-60, 115 S.Ct 2214, 132 L.Ed.2d 400 (1995) flatly rejects state power over Indians on their reservation when legal incidence of the state cigarette tax is on the tribal Indian. This prohibition does not concern Public Law 280 but stems from the implied preemption that Indians on a reservation are not liable for state taxes when the incidence is on the tribal Indian. This has been the law since *Worcester v. Georgia*, 6 Pet 515, 557, 8 L.Ed 483 (1832), and probably has been the law since *Governor and Company of Connecticut v. Moheagan Indians*, 126 London 1769, July 30, 1743, was decided. Appendix 4. In *Moheagan, supra*, this 1743 case held that the Indians were not subject to the colonial courts of Connecticut. See Robert N. Clinton, "State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine," 26 S.D.L.Rev 434 (1981). Therefore, a tribal Indian can possess non-state tax paid cigarettes without violating state law.

The state cigarette tax law, RCW 82.24.010(3), in defining Indian Country, adopts the federal definition of 18 U.S.C. § 1151. 18 U.S.C. § 1151(c) defines Indian country to include "...all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." The Washington Constitution, Article 26(2) is totally conclusive as it disclaims "all right" to "all lands lying within said limits owned or held by any Indian. . .until the title thereto shall have been extinguished by the United States." The constitutional provision states that the jurisdiction of trust land lying within the state's boundaries "...shall remain under the absolute jurisdiction and control of the congress of the United States" and "that no taxes shall be imposed by the state on lands or property therein." (Underlining supplied). Cigarettes are property.

The Washington Administrative Code, WAC 458-20-192(2)(b) defines Indian country as "The same meaning as given in 18 U.S.C. § 1151." WAC 458-20-192(9)(a)(i) states, "for purposes of this rule 'qualified purchaser' means an Indian purchasing for resale in Indian country."

B. The State Cigarette Tax does not Apply if a Tribe has a State/Tribe Cigarette Tax Compact.

The State admits that the Quinault Tribe has a cigarette compact. The Compact was signed January 3, 2005, and is eight years in duration. (Page

16 of 19). It was in force at the time the information was filed in this case.

The statute 82.24.295 states: “**82.24.295 Exceptions—Sales by Indian retailer under cigarette tax contract.** (1) The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax contract subject to RCW 43.06.455.”

The Contract (CP 365-384) applies to a member owned retail smoke shop located in Indian country. (Page 5 of 19). It requires the Quinault Tribe, not the State, to enforce compliance of member owned smokeshops “located in Indian country.” (Page 6 of 19). Indian country is defined as the meaning in 18 U.S.C. § 1151 which includes “all lands placed in trust or restricted status and all allotments” for owned by member Indians. (Part 1, 8, 8(b) & (c), Page 3 of 19).

The Compact’s full definition is:

8. “Indian country,” consistent with the meaning given in 18 United States Code (U.S.C.) section 1151, includes:

(a) All land within the limits of the Quinault Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation.

(b) All lands placed in trust or restricted status for individual member Indians or for the Tribe, and such other lands as may

hereafter be added thereto under any law of the United States, except as otherwise provided by law.

(c) All Indian allotments or other lands held in trust for a tribal member or the Tribe, the Indian titles to which have not been extinguished, including rights of way running through the same.

Since 8(a) addresses all lands within the reservation and (b) and (c) do not, Indian country, for purposes of the Compact, include trust land and allotments wherever situated. These categories defining Indian country are more fully treated at page 25 of this brief.

RCW 82.24.295 unequivocally exempts an Indian retailer from all cigarette taxes during the period it is in force. RCW 43.06.455(2) applies to delivery and possession by a tribal retailer.

Part III 1(c) 6 of 19 of the Quinault Compact states, "The State agrees that it is entirely within the discretion of the Tribe as to whether it allows retail sales of cigarettes by its members." The Compact is clear and unequivocal. The Quinault Tribe, and not the State, has "entire" authority to control and tax its members in retail sale of cigarettes. Therefore, when cigarette taxes are the subject, the State cannot impose its cigarette tax laws on Edward Comenout and the other Defendants.

RCW 82.24.295 doesn't make any exceptions regarding whether Comenout pays Quinault cigarette tax or has a license. It is plain and simple, "the taxes imposed by this Chapter do not apply. . .to the sale, use, consumption and handling. . .by an Indian retailer during the effective period of a cigarette tax contract subject to RCW 43.06.055." RCW 43.06.055(3) provides for Indian tribe cigarette compacts. Edward Comenout is within the Compact's definition of tribal retailer. CP 368. (Part I, No. 23 of page 5 of 19). The Compact itself refers to RCW 43.06.455(3) and 82.24.295 and provides that the State retrocedes from its tax and that enforcement shall be by the Compact terms. Page 7 of 19. CP 372.

The State has contended that the Comenout's may not invoke the terms of a compact if they are not a party and that the Tribe is given the authority to enforce the Compact. The State has also argued that the Compact gives enforcement authority to the Washington State Liquor Control Board. The Compact, however, states the opposite. The Quinault Tribe, not the State, must enforce the Compact against the Indian retailer. Part III 1(c) page 6 of 19. CP 371. It states, "the Tribe shall impose taxes on all sales by tribal retailers of cigarettes to purchases within Indian country." (Part III, No. 2, page 6 of 19).

The State Liquor Board is only responsible for Washington state cigarette tax enforcement. The State has no jurisdiction to enforce the Compact against Indians. This case does not allege the violation of the Quinault Tribe cigarette tax or its enforcement. If it did, jurisdiction would be in the tribal court by the Tribe against its member, Ed Comenout and the other Defendants.

C. The Quinault Treaty Eliminates the State Cigarette Tax on Allotted Lands.

The Quinault Treaty of July 1, 1855 (Appendix 2) Article VI, 12 Stat. 971, 972, states that the President of the United States may remove the Indians from the reservation into allotments in the same manner as Article Sixth of the Treaty with the Omahas. The Treaty of the Omahas, March 16, 1854, 10 Stat. 1043 (Appendix 5), states that the land allotted shall not be subject to levy, sale or forfeiture. (Page 1045).

The Treaties are to be interpreted to give effect to the terms as the Indians themselves would have understood them. *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 524 (6th Cir. 2006). *United States v. Washington*, 645 F.2d 749, 756 (9th Cir. 1981) held that civil regulation of rights of Indians to buy state fishing vessels violated treaty rights and also discriminated against Indians because sport fishing persons could buy the

boats. Here, private military base concessions can ship and sell tax free cigarettes. RCW 82.24.260(b), 82.24.290. Further, an intent to allow state taxes on Indians must be clearly intended by express authority of Congress. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 171, 93 S.Ct 1257, 36 L.Ed.2d 129 (1973). In 1855, when the Quinault Treaty was signed it is doubtful that the Quinault Indians had any cash to pay any taxes. *Keweenaw Bay*, 452 F.3d at 527 notes that lack of money to pay taxes would lead to forfeiture and construes the Treaty the same way in modern times to deny state real property taxes. Washington's Constitution, Art. 26(2) reads to the same effect. All types of state taxes are still prohibited when the incidence is on the tribal Indian. In Washington State, tribal Indians were never subject to state taxes as the state could not enter the union if it intended to tax tribal Indians.

D. The State of Washington Never had Power to Assert Criminal Jurisdiction over Tribal Indians for Non-Payment of the State's Cigarette Tax for Sales on Trust Land.

Washington State is an optional Public Law 280 state. Public Law 280 grants Congressional authorization to expand state criminal jurisdiction for crimes that, prior to 280, had been exclusively the responsibility of the Tribes. Washington State had no jurisdiction of state tax crimes before and

also after the federal authorization.

1. Public Law 280 does not Confer Jurisdiction of State Tax on Indians.

The Enabling Act of Washington (25 Statutes at Large, c 180, p. 676, February 22, 1889 - Vol. O RCW Statute Law Committee Publication page 17 (2008 Ed.) sets forth conditions imposed by the U.S. Congress to allow statehood. It provided in its paragraph Second that “Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” This was consistent with U.S. Const. art. 1 § 8, cl. 3 (Congress retains this power to regulate Indian tribes) and the treaty clause, Art. II, cl. 2, (Congress has the retained power to make treaties). States cannot enter into treaties, U.S. Const. art 1 § 10. Federal preemption is also consistent with the tribes “inherent law enforcement authority” as “domestic dependent nations.” *U.S. v. Lara*, 541 U.S. 193, 203-4, 124 S.Ct 1628, 158 L.Ed.2d 420 (2004).

The state constitution, Art. 26 (2) retained the provision that Indian lands remain under the exclusive control of Congress. It is clear that absent the federal delegation of Public Law 280, the State of Washington had no criminal authority over Indians who committed state tax crimes on Indian reservations. The tax crime is a victimless crime. Washington never

designated tax crimes as a subject where it wanted jurisdiction. Public Law 280 was enacted in 1953 as Public Law 83-280, 67 Stat. 588 (August 15, 1955) codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 involved mandatory states (not Washington) and delegated optional states, including Washington, a degree of jurisdiction if the respective state chose to adopt criminal jurisdiction.

The modern day version enacted in 1968 is found in 25 U.S.C. §§ 1321 and 1322. 25 U.S.C. § 1321 states that “consent of the United States is hereby given to any state “to assume” “such offenses committed within Indian country.” RCW 37.12.010 states “such assumption of jurisdiction shall not apply except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

W. Canby, *American Indian Law in a Nutshell*, 277 (5th ed. 2009) states: "Other states assumed jurisdiction only over certain reservations, e.g., Mont.Code Ann. §§ 2-1-301 to 306, or over certain offenses or claims, Wash.Rev.Code § 37.12.010." Obviously, tax crimes were not included in RCW 37.12.010.

PL 280 was amended in 1968 as part of the Indian Civil Rights Act (IRCA), 25 U.S.C. §§ 1321-1326, P.L. 90-284, Title IV § 401 (1968), 82 Stat. 77. As amended, it is now codified as 25 U.S.C. §§ 1301-1303. The amendment required consent of the tribes to obtain criminal jurisdiction. 25 U.S.C. § 1321(a). The 1953 statute allowed the states to assume jurisdiction without consent of the tribes. Very important to this case is that Congress in 1968 also passed what is now 25 U.S.C. § 1323. Pub.L 90-284, § 403, April 11, 1968, 82 Stat. 79. The statute states in full:

(a) Acceptance by the United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

The Quinault Tribe retroceded from state criminal jurisdiction on August 30, 1969. (Appendix 3).

The Act, 25 U.S.C. § 1162(b) expressly exempts state taxing authority on trust lands stating “nothing in this section shall authorize. . .taxation of any real or personal property. . .belonging to any Indian held in trust by the United States or is subject to a restriction against alienation imposed by the United States.” The statutes contain no limiting provision to Indian reservations. It specifies trust land without any limitation. 4 U.S.C. § 109 also supports non-Indian taxation. It states, “Nothing shall be deemed to authorize the levy or collection of any tax on or from any Indian not taxed.”

The Comenouts submit to this court that the law applicable to this appeal is well summarized in Nell Newton Edition, *Cohen's Handbook of Federal Indian Law* § 6.04(3)(b)(ii), pages 546-548 (Lexis Nexis 2005 ed.) The text includes citations to *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct 2102, 48 L.Ed.2d 710 (1976) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct 1083, 94 L.Ed.2d 244 (1987). The text is

deemed to be worth quoting at length, with portions underlined by the

Comenouts:

[ii] – States Not Granted Regulatory and Taxing Jurisdiction

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. A possible inference from these exceptions and from the general terms of the Act was that all other jurisdiction is delegated by the Act. But in *Bryan v. Itasca County*, the Supreme Court rejected this construction and concluded that Public Law 280 did not confer on the states any new taxing jurisdiction over Indian country. It therefore invalidated a state property tax on unrestricted Indian property located in a reservation subject to Public Law 280. The Court's rationale also precluded new state regulatory jurisdiction generally. The Court reached this conclusion in *Bryan* after finding the language and legislative history of Public Law 280 ambiguous. In enacting the original statute, Congress's primary concern was with law and order in Indian country, and other civil jurisdiction was something of an afterthought. In view of these factors, the Indian law canons of construction, and the movement of federal Indian policy away from assimilation since 1953, the Court interpreted the scope of Public Law 280's delegation narrowly, treating the grant of civil jurisdiction as confined to private lawsuits such as those based on tort or contract claims.

Bryan's statements about the absence of state regulatory jurisdiction were confirmed when the Supreme Court decided *California v. Cabazon Band of Mission Indians* in 1987. *Cabazon* rejected California's effort to apply its laws regulating charitable bingo to an Indian nation. The Court drew a distinction between criminal laws that are

“prohibitory” and laws that are “regulatory,” holding that the latter are not included in Public Law 280's authorization of state jurisdiction. If a state law is fundamentally regulatory in nature, it may not be applied to Indians within Indian country even if it contains criminal penalties for violations. The Court explained that “if the intent of a state law is generally to prohibit “certain conduct,” it falls within Public Law 280's grant of state jurisdiction, but “if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory” and thus falls outside Public Law 280's grant of state jurisdiction.

State v. Guidry, 153 Wn.App 774 (Div. II 2009) and *State v. Pink*, 144 Wn.App 945, 185 P.3d 634 (Div. II 2008) *pet. den.*, 165 Wn.2d 1008, 198 P.3d 513 (2008) also rejected state jurisdiction over Indians even though neither case involves taxation.

Pink applies here as it held that the state has no personal jurisdiction to charge a Quinault Indian for felon in possession on the Quinault Reservation. The cogent reason is stated at 144 Wn.App at 640, fn. 10:

FN10. The State has not complied with federal statutes that might allow it to assume general criminal jurisdiction. The statutory method provides:

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, *with the consent of the Indian tribe* occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined

by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

25 U.S.C. § 1321(a)(emphasis added).

An additional reason why *Pink* applies is that the Quinault Tribe, the tribe of Edward A. Comenout's membership, has retroceded from the state's jurisdiction.

Guidry upholds treaty rights, 153 Wn.App at 283. The seminal case of *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) repeated the principle that state taxes cannot be collected from Indians protected by treaties, especially when states have no PL 280 authority and entered the union through enabling acts like Arizona and Washington.

In prior submissions to this court, the state has relied on *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996). The case is not applicable as treaty rights, pre-1963 tribal existence, criminal prohibitory/civil regulatory and elimination of state tax by compact were not issues in *Cooper*. RCW 82.24.295 materially distinguishes *Cooper*. Further, the state cigarette tax code, RCW 82.24.010(3) and state cigarette tax regulations WAC 458-20-

192(2)(b) adopt 18 U.S.C. § 1151 to define Indian country. *Cooper* did not have these definitions.

State v. Lasley, 705 N.W.2d 481, 489 (Iowa 2005) develops the same theories present here. It holds that jurisdiction of criminal cigarette selling offenses committed by Indians is dependent on the *Cabazon* (480 U.S. at 280) civil/regulatory criminal/prohibitory test. The opinion, 705 N.W.2d at 491-2, distinguishes between raising revenue and regulation of sale as opposed to strictly prohibiting the sale to underage persons.

In Washington, the cigarette tax law allows unstamped and untaxed cigarettes to be sold by military base stores. RCW 82.24.290. Samples may be given away without stamps. RCW 82.24.270. Persons who buy cigarettes in other states may legally smoke them in the state. Possession and smoking cigarettes in Washington is not prohibited. The revenue collection is civil/regulatory.

Barlindal v. City of Bonney Lake, 84 Wn.App. 135, 139, 925 P.2d 1289 (Div. II 1996) provides a good analogy. It holds that “firearms are not contraband because their possession, without more, does not constitute a crime.” Citing *State v. Alaway*, 64 Wn.App 796, 798, 828 P.2d 591 (Div. II, 1992). Cigarettes are not contraband. A large percentage of the public

smokes cigarettes.

Confederated Tribes of the Colville Reservation v. State of Washington, 938 F.2d 146, 149 (9th Cir. 1991) held that a tribal Indian auto driver could not be issued a speeding ticket by the state patrol for speeding on state roads within the Colville Indian Reservation. The court held that speeding was civil/regulatory and that any doubt must be resolved in favor of the Indians.

E. The State Criminal Prohibition Also Applies to Robert Reginald Comenout Sr. and Jr.

U.S. v. Lara, 541 U.S. 193, 208, 124 S.Ct 1628, 158 L.Ed.2d 420 (2004) reviews the “Duro fix” of 25 U.S.C. § 1301 that gives an Indian tribe exclusive jurisdiction to prosecute non-member Indians for crimes occurring in Indian country. The amendment changed the language to include “all Indians.” The cross reference in the statute refers to 18 U.S.C. § 1153(a) detailing crimes “within the *Indian country*.” Ironically, Comenout named his business “Indian Country.” The state agents did not believe the name.

All three Defendants, if they in fact committed any crime, would be subject to tribal jurisdiction for prosecution. Judge Stolz suggested removal. Transcript, pages 24-25.

In the motion argument of this case on June 9, 2009 (transcript filed under separate cover) in response to a question by Robert Comenout's attorney, Aaron Lowe, the Court, Katherine M. Stolz stated:

MR. LOWE: Your Honor, I have a question.

THE COURT: Sir?

MR. LOWE: So, essentially, the Court's ruling that there's dual jurisdiction here?

THE COURT: Yes, I am.

MR. LOWE: Okay.

THE COURT: And if the Quinault Nation chooses to file charges under their tribal laws regarding the fact that they have not paid the revenue, then I would entertain a motion to dismiss this case because the Quinault Nation has filed it; and there is dual jurisdiction under the Compact. By now, we only have the State exercising its authority which the Quinault Nation granted it; but if the Quinault Nation, having an interest, obviously, in the tax money, wants to file jurisdiction within their court, then I'll dismiss this action upon proof that they have filed in the Quinault Tribal Nation since they're in violation of the Quinault Nation's laws. Anything else?

MR. MOORE: Not from the State, Your Honor. Thank you.

THE COURT: All right, Court will be at recess.

Drumm v. Brown, 716 A.2d 50 (Conn. 1998) is also instructive. It held that a state court stay should be granted when a case is within tribal court jurisdiction. The Quinault Court has exclusive and complete jurisdiction of this case as tribal tax, not state tax, is the issue. At this time, no transfer has occurred.

Confederated Tribes of the Colville Reservation v. The State of Washington, 447 U.S. 134, 160, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980) held that the State had power to tax cigarette sales to Indians residing on the reservation but not enrolled in the governing tribe. This is no longer the law as 25 U.S.C. § 1301(2) was amended in 1991, after *Colville* was decided.

The statute states:

(2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.

Lara, supra, holds that the power is an inherent power. The other two persons charged are member Indians of other tribes. Exclusive criminal jurisdiction of the case is with the Quinault Tribe and not the State.

F. 18 U.S.C. § 1151(c) defines Indian Country to Include Off-Reservation Trust Lands.

25 U.S.C. § 465 authorizes the Bureau of Indian Affairs to acquire through purchase “any interest in lands within or without existing reservations.” The BIA purchased the trust land for Ed Comenout’s father in 1926. It was placed in trust for the family and has remained in trust ever since. *U.S. v. Nez Perce County, Idaho*, 50 F.Supp 966 (D.Idaho 1943) and

City of Tacoma v. Andrus, 457 F.Supp 342 (D.Colo 1978) illustrate that trust status for individual Indians prevent state taxation.

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) enjoined the state from collecting cigarette taxes from a tribe. The store was on trust land but not within the reservation. The court said at 498 U.S. 511:

Relying upon our decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.*, at 748-649, 98 S.Ct., at 2549; see also *United States v. McGowan*, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L.Ed. 410 (1938).

Edward Comenout's land is within the specific definition of the third categorical definition of Indian country. If only reservation lands were to be included, (b) and (c) would be unnecessary. The background is explained at Cohen's *Handbook of Federal Law* 2005, Nell Jessup Newton Ed. § 15.07,

page 1009-10 and § 3.04[2](c) page 195 as follows:

Since the Indian Reorganization Act of 1934 (IRA), Congress has supported the policy of protecting and increasing the Indian trust land base. The IRA was adopted as part of the repudiation of the allotment policy of the late nineteenth century, which had resulted in the large-scale transfer of land out the Indian ownership that “quickly proved disastrous for the Indians.” The first four sections of the IRA protect the existing Indian land base, repudiate the allotment policy indefinitely extend the trust status of Indian lands, authorize the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation, and prohibit transfers of restricted Indian lands. Section five is the capstone of the land-related provisions of the IRA. It authorizes the Secretary “in his discretion” to acquire “any interest in lands, water rights, or surface rights to lands within or without existing Indian reservations” through purchase, gift, or exchange “for the purpose of providing land for Indians.”

The IRA applies to all Indian tribes, whether recognized in 1934, or subsequently acknowledged by Congress or the executive. In addition to section 5 of the IRA, there are many other tribe-specific statutes that authorize trust land acquisitions. Taking land into trust shields the land from involuntary loss, and, if the land is located outside an existing Indian reservation, establishes it as Indian country with all the jurisdictional consequences attaching to that status. (Underlining Supplied).

Id. at page 195:

The final subsection of the Indian country statute includes in the definition “all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” In this subsection, unlike sections 1151(a) and (b), Indian country status is tied specifically to land title

except for rights-of-way. The term "Indian allotment" has a reasonably precise meaning, referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation. Most allotments were originally carved out of tribal lands held in common, and many remain within the present boundaries of reservations. The phrase "the Indian titles to which have not been extinguished" refers to the termination of ownership by an individual Indian rather than to whether or not tribal aboriginal title has been extinguished. When land is allotted in trust or fee, any tribal property interest in the allotted parcel is eliminated. Consequently, section 1151(c)'s major impact is on allotments not within a reservation or a dependent Indian community. (Underlining Supplied).

Official reservation status is not dispositive to determine whether a tribal member living on trust land is outside the state's taxing authority. *U.S. v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) holds that non-reservation trust land is Indian country.

Standing Rock Sioux Tribe v. Janklow, 103 F.Supp. 2d 1146, 1153 (D.C.S.D 2000) states:

The Supreme Court has explained that its cases "make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian Country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151." *Sac and Fox*, 508 U.S. at 123, 113 S.Ct. 1985. Therefore, the State has and had no more jurisdiction to impose the excise tax on tribal members residing in Indian country than it does or did to impose the

excise tax on tribal members residing on Indian reservations.

“Courts have long held that non-reservation trust lands are Indian country even though they are not specifically referenced in 25 U.S.C. § 1151 because they are validly set apart for the use of Indians and are under federal superintendence.” *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566 *34 (W.D.N.Y. 2008).

U.S. v. Pelican, 232 U.S. 442, 444-46, 34 S.Ct 396, 58 L.Ed. 676 (1914) held that federal criminal jurisdiction extended to a Colville tribal member’s non-reservation trust allotment.

Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 124, 113 S.Ct 1985, 124 L.Ed.2d 30 (1993) rejected a state motor vehicle excise tax on tribal Indians. The land occupied by the tribal members was on allotments on a disestablished reservation. The court held:

Nonetheless, in *Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Tribe of Okla.*, we rejected precisely the same argument and from precisely the same litigant. There the Commission contended that even if the State did not have jurisdiction to tax cigarette sales to tribal members on the reservation, it had jurisdiction to tax sales by a tribal convenience store located outside the reservation on land held in trust for the Potawatomi. 498 U.S. at 511, 111 S.Ct., at 910. We noted that we have never drawn the distinction Oklahoma urged. Instead, we ask only whether the land is Indian country. *Ibid.* Accord, F.Cohen, *Handbook of Federal Indian Law* 34 (1982 ed.) (“[T]he 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”); *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P.2d 6254, 629 (Okla. 1983) (same).

Cohen’s *Handbook of Federal Indian Law* § 702[1](a), page 599, 2005 Edition, Nell Jessup Newton Ed. states:

Tribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law. There is no general federal statute limiting tribal jurisdiction over tribal members, and federal law acknowledges this jurisdiction.

The statute, 18 U.S.C. 1151(b) also includes all dependent Indian communities. *Hydro Resources Inc. v. United States Environmental Protection Agency*, 562 F.3d 1249, 1255 (10th Cir. 2009) holds that a non-Indian company that owned land in fee outside of any Indian reservation was within the jurisdiction of the Navajo Indian Tribe as it was located near a dependent Indian community. The significance of this case is that 1151(b) applies outside of any Indian reservation.

In Cohen’s *Handbook of Federal Indian Law*, 2005 Edition Nell Jessup Newton Ed., § 5.02(4), page 401 states: “Congress can manage tribal and individual property which it holds in trust.” This is the epitome of federal preemption. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966

(10th Cir. 2005) is probably the most extreme example. The Indian tribe bought non-reservation land along a freeway, placed it in trust and leased it to a non-Indian, outdoor advertizer, for a billboard use within a year of purchase. The court held that since it was trust land it was Indian country and exempt from state and local regulation.

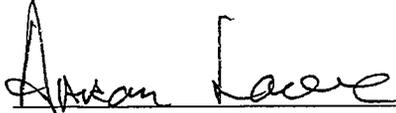
Shivwits, 428 F.3d 966, 978 (10th Cir. 2005) illustrates the application of 18 U.S.C. § 1151 to apply to trust land located off the reservation. The appellate court affirmed the trial court (185 F.Supp.2d 1245 (D.Ut 2002) holding that 18 U.S.C. § 1151 applied and that the State of Utah could not exercise its police power to regulate billboard signs on the recently acquired non-reservation land since it was held in trust.

Yankton Sioux Tribe v. Podhradsky, 577 F.3d 951, 963 (8th Cir. 2009) notes “reservation status is not the only way to qualify as Indian country.”

CONCLUSION.

The State has no jurisdiction of the tax crime subject matter of this case as jurisdiction is in other courts when the activity occurs on trust land and also a victimless state tax crime is charged against Indians.

DATED this 17th day of May, 2010.


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CERTIFICATE OF SERVICE

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

Tom Moore
Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Avenue S., Rm. 946
Tacoma, WA 98402-2171

DATED this 19th day of May, 2010.


RANDAL BROWN
Attorney for Defendants/Appellants

FILED
COURT OF APPEALS
DIVISION II
10 MAY 19 AM 9:25
STATE OF WASHINGTON
DEPUTY

APPENDIX 1

B.M. Allotment or Tract No. 1027 Co. 130

WARRANTY DEED
(Statutory Form)

The Grantor, William Attridge, a widower, of Puyallup, Pierce County, Washington, for and in consideration of the sum of Thirty Seven Hundred (\$3,700.00) Dollars, in hand paid, conveyance and warrants to Edward Comenour, noncompetent Quinalt Indian, the following described real property situated in the County of Pierce, and State of Washington, to-wit:

Commencing at a point 265.14 feet north of the southeast corner of Lot two (2) as the same is known and designated upon a certain plat entitled "George O. Kelly's 2nd Subdivision of part of the B.F. Wright D.L.C. No 39, in Sections 20, 21, 28, 29, Twp 20 N., R. 4 E.W.M." filed for record in the office of the Auditor of Pierce County, July 10th, 1903; thence running west 352.33 feet to a stake; thence North 345.47 feet to a stake on the bank of the Puyallup River; thence easterly along the meander line of said River 383.07 feet to the east line of Lot One (1) of said plat; thence South along the east line of said Subdivision 204.78 feet to the point of beginning, containing two and one-quarter acres, more or less; also a right of way for a road over the east twenty (20) feet of said lot two (2).

Also the following described real property situated in the County of Pierce, State of Washington, to-wit:

All that portion of the abandoned channel of the Puyallup River within the Government meander lines, between Government Lot three (3) and the B.F. Wright Donation Land Claim in Section twenty-one (21), Township twenty (20) North, Range Four (4) east of the Willamette Meridian, lying south of the South bank of the present channel of said River, and north of the east 352.33 feet of Tract one (1) of the George O. Kelly's 2nd Subdivision, an Addition to the Town of Puyallup, EXCEPTING therefrom a strip of land thirty (30) feet in width adjacent to said South bank, containing 38/100 acres, more or less.

Together with the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the remainder or remainders, reversion or reversions, rents, issues and profits thereof.

TO HAVE AND TO HOLD the above described real property to the said Edward Comenour, his heirs and assigns forever, UPON THE CONDITION that while the title thereto is in the grantee or heirs, the same shall not be alienated or encumbered without the consent of the Secretary of the Interior.

IN WITNESS WHEREOF, the said Grantor hath hereunto set his hand and seal this 10th day of September, A.D. 1926.
Signed, Sealed and Delivered in the presence of

William Attridge SEAL

Ray A. Avery

John Mills

APPENDIX 2

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: July 1, 1855.
January 25, 1856.

WHEREAS a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

Preamble.

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and superintendent of Indian affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.

Contracting parties.

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quinaiatl Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

Surrender of lands to the United States.

Boundaries.

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

Reservation within the Territory of Washington.

Whites not to reside thereon, unless, &c.

Indians to remove and settle there.

Roads may be made.

Rights and privileges secured to the Indians.

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands; *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

Payments by the United States.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

How to be applied.

Appropriation for removal, for clearing and fencing land, &c.

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Indians may be removed from the reservation, &c.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

Tribes and annuities may be consolidated.

Vol. x. p. 1044.

Annuities of tribes not to pay debts of individuals.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

The tribes to preserve friendly relations, &c.

ARTICLE VIII. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision.

to pay for depredations.

not to make war, except, &c.

and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in cases of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

To surrender offenders.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

Annuities to be withheld from those drinking &c. ardent spirits.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

The United States to establish an agricultural &c. school for the Indians

to employ mechanics, &c. a physician, &c.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

The tribes are to free all slaves and not acquire others:

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

not to trade out of the United States.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Foreign Indians not to reside on reservations. When treaty to take effect.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

Signatures. July 1, 1855. January 25, 1856.

ISAAC I. STEVENS, Governor and Sup't of Indian Affairs.

| | | |
|--|-------------|---------|
| TAH-HO-LAH, Head Chief Qui-nite-l tribe, | his x mark. | [L. S.] |
| HOW-YAT'L, Head Chief Quil-ley-yute tribe, | his x mark. | [L. S.] |
| KAL-LAPE, Sub-chief Quil-ley-hutes, | his x mark. | [L. S.] |
| TAH-AH-HA-WET'L, Sub-chief Quil-ley-hutes, | his x mark. | [L. S.] |
| LAY-LE-WHASE-ER, | his x mark. | [L. S.] |
| E-MAH-LAH-CUP, | his x mark. | [L. S.] |
| ASH-CHAK-A-WICK, | his x mark. | [L. S.] |
| AY-A-QUAN, | his x mark. | [L. S.] |
| YATS-SEE-O-KOP, | his x mark. | [L. S.] |
| KARTS-SO-PE-AH, | his x mark. | [L. S.] |
| QUAT-A-DE-TOT'L, | his x mark. | [L. S.] |
| NOW-AH-ISM, | his x mark. | [L. S.] |
| CLA-KISH-KA, | his x mark. | [L. S.] |
| KLER-WAY-SR-HUN, | his x mark. | [L. S.] |
| QUAR-TER-HEIT'L, | his x mark. | [L. S.] |
| HAY-NEE-SI-OOS, | his x mark. | [L. S.] |

974 TREATY WITH THE QUI-NAI-ELTS, &c. JULY 1, 1855. JAN. 25, 1856.

| | | |
|---|-------------|---------|
| HOO-E-YAS'LSEE, | his x mark. | [L. s.] |
| QUILT-LE-SE-MAH, | his x mark. | [L. s.] |
| QUA-LATS-KAIM, | his x mark. | [L. s.] |
| YAH-LE-HUM, | his x mark. | [L. s.] |
| JE-TAH-LET-SHIN, | his x mark. | [L. s.] |
| MA-TA-A-HA, | his x mark. | [L. s.] |
| WAH-KEE-NAH, <i>Sub-chief Qui-nite'l tribe,</i> | his x mark. | [L. s.] |
| YER-AY-LET'L, <i>Sub-chief;</i> | his x mark. | [L. s.] |
| SILLEY-MARK'L, | his x mark. | [L. s.] |
| CHER-LARK-TIN, | his x mark. | [L. s.] |
| HOW-YAT'L, | his x mark. | [L. s.] |
| KNE-SHE-GUARTSH, <i>Sub-chief,</i> | his x mark. | [L. s.] |
| KLAY-SUMETZ, | his x mark. | [L. s.] |
| KAPE, | his x mark. | [L. s.] |
| HAY-ET-LITE'L, or John, | his x mark. | [L. s.] |

Executed in the presence of us; the words "or tracts," in the II. article, and "next," in the IV. article, being interlined prior to execution.

M. T. SIMMONS, *Special Indian Agent.*

H. A. GOLDSBOROUGH, *Commissary, &c.*

B. F. SHAW, *Interpreter.*

JAMES TILTON, *Surveyor-General Washington Territory.*

F. KENNEDY.

J. Y. MILLER.

H. D. COCK.

Consent of Senate, March 8, 1859. And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:—

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians in Washington Territory, signed 1st day of July, 1855, and 25th day of January, 1856.

"Attest: "ASBURY DICKINS, *Secretary.*"

Proclamation, April 11, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March the eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:

LEWIS CASS, *Secretary of State.*

APPENDIX 3

INDIAN AFFAIRS: LAWS AND TREATIES

Vol. VII, Laws (Compiled from February 10, 1939 to January 13, 1971)

Washington : Government Printing Office

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QUINAULT INDIAN RESERVATION
Notice of Acceptance of Retrocession of Jurisdiction

| | |
|---------------------|-------|
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Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 (33 F.R. 17339), I hereby accept, as of 12:01 a.m., e.s.t., of the day following publication of this notice in the FEDERAL REGISTER, retrocession to the United States of all jurisdiction exercised by the State of Washington over the Quinault Indian Reservation, except as provided under Chapter 36, Laws of 1963 (RCW 37.12.010-37.12.060), as offered on

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August 15, 1968, by proclamation of the Governor of the State of Washington.

WALTER J. HICKEL,
Secretary of the Interior.

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APPENDIX 4

Saturday, July 30th 1743:

Present as above.

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Court opened according to adjournment.

The *counsel* for the said tenants, and also for the said *Mabegan* Indians were fully heard on the *aforsaid* plea to the jurisdiction, &c.

Court adjourned till next Monday morning at eight o'clock.

Monday, August 1st 1743.

Present as above.

Court opened according to adjournment.

The court were of opinion that the said plea to the jurisdiction should be *over-ruled*; and in favour of said opinion Mr. Commissioner Horsmanden offered his reasons in writing, and desired them to be entered on the minutes as follows:

As to the plea to the jurisdiction of this court, offered on behalf of those persons who have been summoned to appear here as tenants of the lands in controversy;

Mr. Commissioner Horsmanden gave his opinion thereupon in court as followeth:

The Indians, though living amongst the king's subjects in these countries, are a *separate and distinct people from them*; they are treated with as such, *they have a policy of their own*; they make peace and war with any nation of Indians when they think fit, *without control* from the English.

192 It is apparent the crown looks upon them not as subjects, *but as a distinct people*, for they are mentioned as *Indians* throughout queen Anne's and his present majesty's commission by which we now sit. And it is as plain, in my conception, that the crown looks upon the Indians as having the *property of the soil* of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a colony, thereby appropriated *to his subjects* till they have made *fast and bonest* purchases of the natives.

So that from hence I draw this consequence, that a matter of property in lands in dispute between the Indians a *distinct people* (for no act has been shown whereby they

they became *subjects*) and the English subjects, cannot be determined by the laws of our land, but by a law equal to both parties, which is the law of nature and nations; and upon this foundation, as I take it, these commissions have most properly issued.

And now to maintain that the tenants in possession of the land in controversy are not bound to answer the complaint before this court, is to endeavour to defeat the very end and design of our commission; for surely it would be a very lame and defective execution of it, to hear only the matter of complaint between the tribe of Indians and this government.

The complaint to the crown has been that this government and the members of it have unjustly dispossessed the Indians of some of their lands; and if this should come out to be the fact, what is the redress sought for? what the remedy intended? even nothing less than to be restored to the possession of those very lands.

And can any one maintain, that it is consonant to reason and equity that possession should be decreed to the Indians (in case, upon hearing, justice should require it) without holding the tenants of such lands to make their defence, or entering their default if they are contumacious, and will not when they may? 193

This is in my opinion a step absolutely necessary to be taken; it is a matter incidental to the cause, and does necessarily emerge out of it; without which we cannot determine the whole cause and strife, as the words of the commission are.

And in my opinion it would be the most absurd piece of management in the court to declare against it, and be deficient in a matter so obvious and apparent to common sense, and which in its consequence must tend to the utter defeat of the very design and intent of his majesty's commission.—Therefore I am clearly of opinion that this plea ought to be over-ruled.

Mr. President Golden dissenting, delivered and directed to be put on the minutes the reasons of his opinion, as follows: 194

I can in no manner consider the Mohegan Indians as a separate or sovereign state, or that either Ben Uncas or John Uncas are in any sense sovereign princes; such a position in this country, where the state and condition of Indians are known to everybody, would be exposing majesty and sovereignty to ridicule, it might be of dangerous consequence, and not to be suffered in any of his majesty's courts, could I imagine it could have any influence on the minds of the people who heard it advanced; both Ben Uncas and John Uncas, and every one of the Mohegan nation, are born under allegiance to the crown of Great Britain; and if any or all of them should make war upon the subjects of Great Britain, and afterwards be brought to justice, they must be adjudged traitors, and would as justly be hanged, drawn, and quartered, as any other the king's subjects could be in the like case.

Notwithstanding of this, I hope no man can think I do these Indians any injury in the present case before this court, when I allow them to be subjects of Great Britain, 194
enjoying

enjoying the benefit and protection of the English law, and all the privileges of British subjects.

When *special powers* out of the course of the common law are given to commissioners for particular purposes, those powers are strictly to be pursued, and can in no manner be enlarged by implication; for though it be said by a great English lawyer, *boni judicis est ampliare jurisdictionem*, this is to be understood as to jurisdiction by the *common law* only, and not to the extending jurisdictions which may have a tendency to the subversion of the *common law*. When any judges have attempted to enlarge such jurisdictions, I do not remember to have heard that any of them thereby established the character of *boni judices*, but that the contrary has more than once happened: since therefore there are no powers given to this court, by *express words*, to question or determine the right of freehold or inheritance of any *particular* persons, and to evict them out of the same, other than the governor and company of Connecticut, or the Sachem and tribe of the Mohegan Indians; I am of opinion that this court ought not and cannot assume such power.

The arguments for assuming such power drawn from the writ of *Scire facias*, after a judgment at common law affecting the land; are, in my opinion, all inconclusive in a court which proceeds on English bill.

195 If a man seeks remedy in any court for any injury, he must be contented with such remedy as that court has power to give; for in my opinion it will not be sufficient justification to that court to enlarge their power, because in their opinion they cannot otherwise give a remedy adequate to the injury; the prosecutor must blame himself for applying to a court who had not sufficient authority to redress.

The only parties in this suit, so far as it appears to me, either from the commission, or from the complaint of Oweneco recited in the commission, or from the judgment of Mr. Dudley and others, are the governor and company of Connecticut on the one side; and the Mohegan Indians on the other; the said governor and company only are charged to have done the injury, and against them only is the judgment given. In order therefore to subject the tenants to answer in this court and to the judgment of this court, it must appear either that they were charged, in the original complaint before the commissioners, to have been privies at least to the injury done to the Mohegan Indians by the governor and company, and their privity thereto set forth in that complaint, or that by bill now filed in this court they be in like manner charged with privity to the said injury before they can be put to answer; but as no such privity appears to me to be charged on them or any of them, either in this court or in the first court which gave judgment, I am of opinion that the tenants are no parties in this suit, and ought to be dismissed.

Mr. Smith, of counsel for the governor and company, offered reasons against further hearing the tenants, till upon hearing the defence of the governor and company it be found necessary; which were read and ordered to be put on the minutes, as follows:

Reasons humbly offered by the said governor and company, to shew why 196
this honourable court should not proceed further against the tenants summoned in this court, until, after hearing the defence of the said governor and company, it shall be found to be needful.

1st, For that the said governor and company, in defence against the said decree of Governor Dudley and others, have taken divers exceptions for matters apparent therein, any one of which being found good and sufficient will make void the said decree against the said governor and company, and all tenants of lands within this colony.

2dly, For that said governor and company in their defence aforesaid, among other matters insisted on by them as a full defence against the said decree, have alleged that the said Indians had sold or granted to the English subjects all their native or Indian right within this colony before the decree, which point being adjudged by this court to have been proved by the said governor and company, will decide the whole controversy, as stated in the commission to Governor Dudley and others, and make void the said decree against the said governor and company and all tenants of lands within this colony.

3dly, For that this court's proceeding to a hearing of the defence of the said governor and company, saving to said tenants their particular defences, cannot work any prejudice to the chief Sachem or Mohegan Indians.

4thly, For that the hearing the particular defences of the tenants summoned and appearing in this court will occasion a vast expence of time and money, which the said governor and company humbly hope, upon hearing their defence against the said decree, will appear altogether needless.

Wherefore and for all and singular other reasons contained in the defence of the said governor and company, and for that the defence of the said governor and company and the defence of the said tenants are really so far distinct, as that the said governor and company have nothing to do with any part of the particular defence of the said tenants, other than what are contained in the defence of the said governor and company; they pray that they may be *first heard*, before there be any further proceedings against the tenants summoned in this court. 197

WILLIAM SMITH,

Norwich,
1st Aug. 1743.

of counsel with the governor and company.

And the governor and company and the Mohegan Indians by their counsel agreed how to proceed, and sum up and enforce the evidence by them respectively given, and to debate such points of law and right as arise from the same.

Whereupon Mr. Smith, in behalf of the governor and company, began the debate on the merits of the cause.

Court adjourned to three o'clock in the afternoon.

Post Meridiem.

Present as above.

Court opened according to adjournment.

The debate on the same side continued by Mr. Smith and Mr. Fitch.

Court adjourned till nine o'clock to-morrow morning.

Tuesday, August 2d 1743.

Present as above.

Court opened according to adjournment.

The said debate on the same side further continued.

Court adjourned till three o'clock afternoon.

Post Meridiem.

Present as above.

Court opened.

The said debate on the part of the governor and company proceeded to a conclusion.

Court adjourned till nine o'clock to-morrow morning.

Wednesday, August 3d 1743.

Present as above.

Court opened according to adjournment.

Mr. Bollen in behalf of the Moheagan Indians began his argument on the merits.

Court adjourned till four o'clock afternoon.

Post Meridiem.

Present as above.

Court opened.

Mr. Bollen's argument continued.

Court adjourned till to-morrow morning at nine o'clock.

Thursday, August 4th 1743.

Present as above.

Court opened according to adjournment.

Mr. Bollen's argument further continued.

Court adjourned till three o'clock afternoon.

Post Meridiem.

Present as above.

Court opened.

Mr. Bollen proceeded to a conclusion of his argument.

Court adjourned till nine o'clock to-morrow morning.

Friday,

APPENDIX 5

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

March 16, 1854.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a Treaty was made and concluded at the City of Washington, on the sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, Commissioner on the part of the United States, and the Omaha tribe of Indians, which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded at the City of Washington this sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, as Commissioner on the part of the United States, and the following named Chiefs of the Omaha tribe of Indians, viz: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Tah-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; Soda-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe.

ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri river, and south of a line drawn due west from a point in the centre of the main channel of said Missouri river due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: *Provided, however,* that if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in counsel express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

Cession of
lands to the
United States.Reserve for the
Indians.

ARTICLE 2. The Omahas agree, that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to

Removal of
the Indians

Relinquish-
ment of former
claims.

exceed one year from its ratification, they will vacate the ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be.

ARTICLE 3. The Omahas relinquish to the United States all claims, for money or other thing, under former treaties, and likewise all claim which they may have heretofore, at any time, set up, to any land on the east side of the Missouri river: *Provided*, The Omahas shall still be entitled to and receive from the Government, the unpaid balance of the twenty-five thousand dollars appropriated for their use, by the act of thirtieth of August, 1851.

Payments to
the Indians.

ARTICLE 4. In consideration of and payment for the country herein ceded, and the relinquishments herein made, the United States agree to pay to the Omaha Indians the several sums of money following, to wit;

1st. Forty thousand dollars, per annum, for the term of three years, commencing on the first day of January, eighteen hundred and fifty-five.

2d. Thirty thousand dollars per annum, for the term of ten years, next succeeding the three years.

3d. Twenty thousand dollars per annum, for the term of fifteen years, next succeeding the ten years.

4th. Ten thousand dollars per annum, for the term of twelve years, next succeeding the fifteen years.

How made.

All which several sums of money shall be paid to the Omahas, or expended for their use and benefit, under the direction of the President of the United States, who may from time to time determine at his discretion, what proportion of the annual payments, in this article provided for, if any, shall be paid to them in money, and what proportion shall be applied to and expended, for their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, &c.; for clothing, provisions, and merchandise; for iron, steel, arms, and ammunition; for mechanics, and tools; and for medical purposes.

Further pay-
ment.

ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve.

Disposition of
the lands reserv-
ed.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt

from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

ARTICLE 7. Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed.

Protection from hostile tribes.

ARTICLE 8. The United States agree to erect for the Omahas at their new home, a grist and saw-mill, and keep the same in repair, and provide a miller for ten years; also to erect a good blacksmith shop, supply the same with tools, and keep it in repair for ten years; and provide a good blacksmith for a like period; and to employ an experienced farmer for the term of ten years, to instruct the Indians in agriculture.

Grist and saw-mill.

Blacksmith.

ARTICLE 9. The annuities of the Indians shall not be taken to pay the debts of individuals.

Annuities not to be taken for debts.

ARTICLE 10. The Omahas acknowledge their dependence on the government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Omahas commit any depredations on any other Indians, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens.

Conduct of the Indians.

ARTICLE 11. The Omahas acknowledge themselves indebted to Lewis Sounsosee, (a half breed,) for services, the sum of one thousand dollars; which debt they have not been able to pay, and the United States agree to pay the same.

Payment to Lewis Sounsosee.

ARTICLE 12. The Omahas are desirous to exclude from their country the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Omaha who is guilty of bringing liquor into their country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Provision against introduction of ardent spirits.

ARTICLE 13. The board of foreign missions of the Presbyterian church have on the lands of the Omahas a manual labor boarding-school, for the education of the Omaha, Otoe, and other Indian youth, which is now in successful operation, and as it will be some time before the neces-

Grant to the missions of the Presbyterian Church.

Construction
of roads.

sary buildings can be erected on the reservation, and [it is] desirable that the school should not be suspended, it is agreed that the said board shall have four adjoining quarter sections of land, so as to include as near as may be all the improvements heretofore made by them; and the President is authorized to issue to the proper authority of said board, a patent in fee simple for such quarter sections.

ARTICLE 14. The Omahas agree that all the necessary roads, highways, and railroads, which may be constructed, as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefor in money.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said George W. Manypenny, commissioner as aforesaid, and the undersigned chiefs, of the Omaha tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

GEORGE W. MANYPENNY, *Commissioner*. [L. s.]

SHON-GA-SKA, or Logan Fontenelle, his x mark. [L. s.]
 E-STA-MAH-ZA, or Joseph Le Flesche, his x mark. [L. s.]
 GRA-TAH-MAH-JE, or Standing Hawk, his x mark. [L. s.]
 GAH-HE-GA-GIN-GAH, or Little Chief, his x mark. [L. s.]
 TAH-WAH-GAH-HA, or Village Maker, his x mark. [L. s.]
 WAH-NO-KE-GA, or Noise, his x mark. [L. s.]
 SO-DA-NAH-ZE, or Yellow Smoke, his x mark. [L. s.]

Executed in the presence of us:

JAMES M. GATEWOOD, *Indian Agent*.
 JAMES GOSZLER.
 CHARLES CALVERT.
 JAMES D. KERR.
 HENRY BEARD.
 ALFRED CHAPMAN.
 LEWIS SAUNSOGI, *Interpreter*.

And whereas the said Treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the seventeenth day of April, one thousand eight hundred and fifty-four, amend the same by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

April 17th, 1854.

Approval of
the Senate.

Resolved, (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made, and concluded at the City of Washington this [the] sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny as Commissioner on the part of the United States, and the following named chiefs of the Omaha tribe of Indians, viz: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Tah-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; So-da-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe; with the following amendment, — Article 3, line 3, strike out "1851" and insert 1852.

Attest:

ASBURY DICKENS, *Secretary*.

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Now therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the seventeenth day of April, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty as amended.

In testimony whereof, I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-first day of June,
[L. s.] in the year of our Lord one thousand eight hundred and fifty-four, and of the independence of the United States the seventy-eighth.

FRANKLIN PIERCE.

By THE PRESIDENT:

W. L. MARCY, *Secretary of State.*