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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

CAUSE NO. 39741-2-II

BEFORE THE COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

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

DEFENDANTS/APPELLANTS,

v.

STATE OF WASHINGTON,

PLAINTIFF/RESPONDENT.

NOTICE FOR DISCRETIONARY REVIEW
PURSUANT TO R.P.C. 5.1(c)

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1. IDENTITY OF MOVING PARTY

Robert Reginald Comenout Sr., Edward Comenout, and Robert Reginald Comenout Jr., are the moving parties. They are criminal defendants in a matter currently pending in the Pierce County Superior Court. The defendant/appellants are also all enrolled members of federally-recognized Indian tribes. Defendant Edward Comenout is a fully enrolled member of the Quinault Indian Nation; Robert Reginald Comenout, Sr., is a fully-enrolled member of the Tulalip Indian Tribe; and Robert Reginald Comenout, Jr., is a fully-enrolled member of the Yakama Indian Nation. Their appeal before this honorable court has been consolidated and docketed as Cause No. 39741-2-II. Their cases are docketed in the Superior Court of Pierce County as Case Nos. 08-1-04682-8 (Robert Reginald Comenout, Sr.), 08-1-04681-0 (Edward A. Comenout, Sr.), and 08-1-04680-1 (Robert Reginald Comenout, Jr.).

2. DECISION BELOW

The Defendants moved to dismiss the information charging them with violating RCW 82.24 (Appendix 1) by transporting commercial cigarettes in the state of Washington without state tax stamps affixed to the packages. On August 27, 2009, the Honorable Katherine M. Stolz, Superior Court Judge, denied the motion and entered findings. (Appendix 2). This appeal is timely.

3. STATEMENT OF RELIEF SOUGHT

These Defendants have a pending felony criminal trial in the Superior Court of Washington for Pierce County. They request this court review whether or not there is subject matter or personal jurisdiction in the state court below. Defendants would respectfully submit that jurisdiction of this matter rests with the Quinault Tribal Court, consistent with this Court's holding in *State v Pink*, 144 Wash.App. 945, 185 P.3d 634 (Div. II 2008), as well as the Quinault Tribe's compact with the State of Washington (Copy attached as Appendix 3). This appeal is requested pursuant to RAP 2.3.

4. ISSUES PRESENTED FOR REVIEW

1. Whether the jurisdictional question allows discretionary review pursuant to RAP 2.3?
2. Whether *State v Pink*, 144 Wash.App 945, 185 P.3d 634 (Div. II 2008), prevents jurisdiction in the Washington Superior Court for Pierce County?

5. FACTS RELEVANT TO MOTION

All acts complained of occurred on Quinault Tribal trust land as stated. Defendant Edward A. Comenout, Jr., is an enrolled, full-blooded member of the Quinault Indian Tribe. The other defendants are also enrolled members of federally-recognized Indian tribes. The trial court did not grant defendants' motion to dismiss. The Court, without citation to any statutory authority, held that the Quinault Indian Tribe "... has given the power to enforce violations of RCW 82.24 to the State of Washington.

STATEMENT OF THE CASE

A. INDIAN STATUS OF DEFENDANTS.

Defendant, Edward A. Comenout Jr., was born August 16, 1928. His father, Edward Comenout, Sr., was a full-blooded member of the Quinault Indian Nation. His mother was Anna Jack, an enrolled member of the Tulalip Tribe of Indians. Defendant Edward A. Comenout, Jr., is an enrolled member of the Quinault Indian Nation (Member Number 0325), a federally recognized Indian tribe established by the Quinault Treaty of July 1, 1855. 12 Stat 97. The other defendants are also enrolled tribal members of other federally recognized Indian tribes. 25 U.S.C. § 1301(2), as amended in 1991, gives an Indian tribe criminal authority over all Indians regardless of tribal affiliation for alleged crimes committed on an Indian tribe's reservation and trust lands.

I.

THE TRUST STATUS OF THE LAND WHERE THE ALLEGED CRIME OCCURRED PREVENTS STATE JURISDICTION.

A. THE LAND HAS BEEN CONTINUOUSLY HELD IN TRUST SINCE 1926.

Defendant Edward A. Comenout, Jr., is majority owner and occupies the described parcel of trust land as a residence. At all times he has operated a business from this trust land, which is addressed as 908 River Road in Puyallup, Washington 98371. All the crimes charged are alleged as occurring on this trust land. The State in its Declaration of Probable Cause (Appendix 3 attached) admits that the land in question is Indian trust land.¹ The

¹ It was part of a larger amount of land. Written inscriptions on the deed state "BIA Allotment Tract 1027, Code 130." The Bureau of Indian Affairs, Department of Interior on August 17, 1932 awarded a ½ interest in the land to Edward Comenout and the other ½ to his mother, Anna Jack Comenout Harris, who died November 30, 1987. Edward A. Comenout, Jr., inherited at least 3/27 of his mother's ½ interest in the described property.

operation and occupation by Edward A. Comenout, Jr., as a business and residence has continued from at least March 23, 1977, to the present time. The area of land is about one half acre.

Defendant's father, Edward Comenout, Sr., died on May 11, 1929, without a will. The land was acquired by his father, on September 10, 1926. Edward A. Comenout, Jr., now owns at least a 5/9 undivided interest in this property. A summary report on heirs dated September 20, 1932, indicates that the land was purchased with trust funds. Since 1926, the land has been held in trust by the Bureau of Indian Affairs as a federal instrumentality, Tract No. 1027.

B. THE STATE HAS NO IN PERSONAM JURISDICTION TO PROSECUTE EDWARD A. COMENOUT, JR.; AN ENROLLED INDIAN, FOR TRANSACTIONS ON TRUST LAND.

Assistant Prosecuting Attorney Tom L. Moore, in his Declaration for Determination of Probable Cause, dated September 26, 2008 (Appendix 4) stated:

The land occupied by the Indian Country Store is held in trust for Edward A. Comenout by the United States government for the benefit of Edward A. Comenout. The land is not within the confines of any recognized reservation of any federally recognized Indian tribe (specifically the Puyallup or Quinault Tribes). The Puyallup Reservation is the closest reservation but the land is not within the confines of the Puyallup Reservation. Edward Comenout is a registered member of the Quinault Tribe but the Quinault Reservation is approximately 250 miles to the West. The land is categorized as "purchased land" not "allotted land" and therefore, bears no attributes of tribal government.

The land has been the focus of multiple state and federal legal decisions. These decisions date from 1975 through 1997, and, in each of the decisions it has been clear that (1) the land is outside of the boundaries of any formal reservation and (2) the state has jurisdiction over trust land outside of the boundaries of any

formal reservation. The land is not exempt from the State of Washington's excise tax on cigarettes.

All of the defendants are charged with selling commercially packaged cigarettes without Washington State cigarette license required by RCW 82.24.500. They are also accused of a violation of possession or transportation of unstamped cigarettes by failing to give proper notice required by RCW 82.24.250; Theft in the first degree in violation of RCW 9A.56.020(1)(b) and 9A.56.030(1)(a).

This case should be heard on appeal because the State admits that the activity occurred on trust land held in trust by the federal Bureau of Indian Affairs for defendant Edward A. Comenout. The state also admits that "Edward Comenout is a registered member of the Quinault Tribe." Moreover, all acts complained of occurred on trust land. Therefore, jurisdiction in this matter is only with the Quinault Tribe, and not with the State.

Recently, the United States Supreme Court, in the path marking case of *Ashcroft v Iqbal*, 129 S.Ct 1937, 1945, 173 L.Ed.2d 868 (2009), included a denial of a motion to dismiss within the cases that are immediately appealable stating:

The orders within this narrow category are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" Ibid. (quoting *Cohen v Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct 1221, 93 L.Ed. 1528 (1949)).

A district-court decision denying a Government officer's claim of qualified immunity can fall within the narrow class of appealable orders despite "the absence of a final judgment." *Mitchell v Forsyth*, 472 U.S. 511, 530, 105 S.Ct 2806, 86 L.Ed.2d 411 (1985). This is so because qualified immunity which shields Government officials "from liability for civil damages insofar as

their conduct does not violate clearly established statutory or constitutional rights,” *Harlow v Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct 2727, 73 L.Ed.2d 396 (1982) is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation.” *Mitchell*, *supra*, 472 U.S. at 526, 105 S.Ct 2806. Provided it “turns on an issue of law,” *id.*, at 530, 105 S.Ct. 2806, a district court order denying qualified immunity “conclusively determines” that the defendant must bear the burdens of discovery; is “conceptually distinct from the merits of the plaintiff’s claim”; and would prove “effectively unreviewable on appeal from a final judgment.” *Id.*, at 527-528 (citing *Cohen*, *supra* at 546, 69 S.Ct 1221).

The reasoning of *Cayuga Nation of New York v Gould*, 884 N.Y.S. 2d 510 (N.Y.A.D. 2009) is also applicable. The Indian Tribe sought a declaratory judgment in state court even though a criminal proceeding was pending against the tribe for not paying state cigarette tax on sales from a store located on a former reservation.

The legal authorities contained in this memorandum clearly point out that any land held in trust, whether within or without exterior boundaries of an Indian reservation, is Indian country defined by federal law, 18 U.S.C. § 1151. Enrolled resident Indians doing business on trust land, as held by a 32 year old United States Supreme Court case, *Moe v Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 486, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980) do not have to obtain a state cigarette license. Enrolled Indians can possess unstamped cigarettes. *Moe*, 425 U.S. at 480, RCW 82.24.080.

The state constitution, Article 26 Second, grants exclusive jurisdiction to Indians in Indian country to the federal government. “Indian lands shall remain under absolute jurisdiction and control of the Congress.” The federal constitution, Art. 1, Section 8, cl. 3, retains exclusive jurisdiction of Indians who reside on trust lands to Congress. Judge Stolz’s order violates both constitutions.

The Declaration of Thomas L. Moore, Deputy Prosecutor, is wrong in at least the following particulars:

1. The State has no jurisdiction on land held in trust for an Indian regardless of where it is located.
2. An enrolled Indian doing business on trust land is exempt from state business licensing.
3. A tribal Indian can possess unstamped cigarettes.
4. Defendant Edward A. Comenout, Jr., is a Quinault Indian who is regulated by the Quinault Tribe. The State has agreed not to require Quinault retailers to pay state cigarette tax.

II. LEGAL ANALYSIS

A. RAP 2.3(B)(4) APPLIES.

“A party may seek discretionary review of any act of the superior court may appealable as a matter of right.” RAP 2.3(a). Discretionary review may be accepted when “[t]he superior court has certified . . . that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” RAP 2.3(b)(4).

Also applicable is RAP (b)(1). The Superior Court has committed an obvious error by concluding that state courts have criminal jurisdiction of tribal Indians for alleged offenses taking place on lands held in trust by the federal government.

B. THE PINK CASE CONTROLS THIS CASE.

State v Pink, 144 Wash.App 945, 185 P.3d 634 (Div. II 2008) is binding on the trial court and should have been followed. It holds that the state cannot prosecute a Quinault Indian for offenses occurring on trust or allotted land. *Pink*, 144 Wn.App. at 952 states:

But in 1965, the Quinault Tribe petitioned for retrocession of state jurisdiction and, in 1969, the United States accepted the Quinault Tribe's request. *See Comenout v Burdman*, 84 Wash.2d 192, 197-88, 525 P.2d 217 (1974) (detailing the history of state jurisdiction over the Quinault Tribe; jurisdiction exercised by the State over the Quinault Tribe under RCW 37.12.010-060 was excepted from the retrocession of jurisdiction to the United States), dismissed, 420 U.S. 915, 95 S.Ct 1108, 43 L.Ed.2d 387 (1975); see also 25 U.S.C. § 1323 (the United States Secretary of the Interior is authorized to accept a retrocession by any state of all or any measure of the criminal jurisdiction acquired by a state). Under these laws, except for the enumerated categories listed in RCW 37.12.010, the State lacks criminal jurisdiction over members of the Quinault Tribe while on tribal lands within the reservation. RCW 37.12.010; *State v Cooper*, 130 Wash.2d 770, 774, 928 P.2d 406 (1996).

The enumerated categories of RCW 37.12.010 do not include state taxes or cigarette use. The conviction of the state charge was reversed by Division II. The last paragraph of the opinion notes that Pub.L 280 is a consent of Indian tribe statute. This case achieves the same jurisdictional result as *Confederated Tribes of Washington v State*, 938 F.2d 146 (9th Cir. 1991). The infraction was speeding. The court held that civil regulatory laws cannot be criminally enforced stating at 149:

Concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory-civil regulatory test. *United States v Dakota*, 796 F.2d 186, 188 (6th Cir. 1986). That concern leads us to resolve any doubts about the statute's purpose in favor of the Indians. *See Bryan*, 426 U.S. at 392, 96 S.Ct at 2112. Indian sovereignty and the state's interest in discouraging speeding are

both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations. The Tribes are willing and able to enforce their own traffic laws against speeding drives and even to commission Washington state patrol officers to assist them. We conclude RCW Ch. 46.63 should be characterized as a civil, regulatory law. Under it, the state may not assert jurisdiction over tribal members on the Colville reservation.

The Quinault Indian Reservation was established in 1856. Federal statutes on Public Law 280 that also support the *Pink* decision are 18 U.S.C. § 1162(a) stating that 280 shall not authorize criminal jurisdiction taxation of any personal property on land “held in trust” and 28 U.S.C. § 1360(b) containing the language that the state has no criminal jurisdiction to tax “personal property . . . belonging to any Indian. . . that is held in trust.”

Cooper, supra, also fails to take into account the civil regulatory criminal prohibitory distinction of *California v Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct 1083, 94 L.Ed.2d 244 (1987) as applied in *Washington Confederated Tribes v State of Washington*, 938 F.2d 146 (9th Cir. 1991). *State v Lasley*, 705 N.W.2d 481 (Iowa 2005) applies. It holds that sales of cigarettes to minors is criminal prohibitory because cigarette taxes are civil regulatory.

Another recent case, *Morgan v 2000 Volkswagens*, 754 N.W.2d 587, 593 (2009) held that forfeiture by the state on an Indian reservation land was unenforceable in state court.

The opinion states:

Plainly, the ownership of vehicles is generally permitted conduct, subject to regulation, leading us to conclude that the vehicle-forfeiture statute is civil regulatory statute, and the state does not have authority under Public Law 280 to enforce it against Indian owned vehicles for conduct occurring on the owner’s reservation.

C. THE STATE LAW, RCW 82.24.295, RELIEVES DEFENDANT FROM WASHINGTON'S CIGARETTE EXCISE TAXES.

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 (Appendix 3) 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 smoke shops “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. 18 U.S.C. § 1151 is construed in the same way. Defendant Edward A. Comenout, Jr.'s land is within the specific definition. 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 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).

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).

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.

Oklahoma Tax Commission v Citizen Band Pottawatomie 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).

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 Potawatomis 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 Potawatomis. 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).

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 defendant Edward A. Comenout, Jr., 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 A. Comenout, Jr., and the other defendants are within the Compact's definition of tribal retailer. (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 retro cedes from its tax and that enforcement shall be by the Compact terms. Page 7 of 19.

The State contends that "the Comenouts may not invoke the terms of a compact to which they are not a party" and "the Quinault Tribe is given the authority to enforce the Compact against persons who have never been part of the Compact." "The Compact gives enforcement authority to the Washington State Liquor Control Board." The Compact, however, states the opposite. As previously stated, the Quinault Tribe must enforce the Compact against the Indian retailer. Part III 1(c) page 6 of 19. Contrary to the State's

assertion 1(b), page 6 of 19 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, not Quinault cigarette taxes. 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, Edward A. Comenout, Jr., and the other Defendants. *Marceau v Blackfeet Housing Authority*, 455 F.3d 974 (9th Cir. 2006), *cert den* 2009 WL 1361563 (May 18, 2009). 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.

If the State tries to collect tribal cigarette taxes, it's employee loses immunity and have no search and seizure rights. This is the holding of *Wilbur v Locke*, 423 F.3d 1101, 1111 (9 Cir. 2005) and *Franchise Tax Board of California v Hyatt*, 538 U.S. 488, 123 S.Ct 1683, 155 L. Ed.2d 702 (2003). *Matheson v Washington State Liquor Board*, 132 Wn.App 280, 130 P.3d 897 (Div. III 2000) repeatedly cited by the State involved a non-compact civil seizure for not complying with transportation. It helps Edward A. Comenout, Jr., and the other defendant/appellants herein, as it states, "The State may not tax Indians. . . in Indian country."

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 Piate 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 advertiser, 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.

The State relies on *State v Cooper*, 130 Wn.2d 770 (1996). This case was superceded by *State v Buchanan*, 138 Wn.2d 186, 207, 978 P.2d 1070 (1999), a case holding that treaty rights can include non-reservation land. *Cooper*, 130 Wn.2d at 781, holds that the Nooksack Reservation was formed in 1968 after Public Law 280 was enacted in 1953 or 1963.

D. THE COMPACT HAS TO BE ENFORCED BY FEDERAL, NOT STATE COURTS.

In *Seneca-Cayuga Tribe of Oklahoma v Edmondson*, 2009 WL 484247, (slip copy) (U.S.D.C. N.D. Oklahoma 2009), the Tribe alleged that its sovereignty prevented any payments to a state Master Settlement Act escrow. The court held that the Tribe, at least at the pleading stage, alleged a case within federal court jurisdiction. The Quinault Tribe in its cigarette tax agreement with the State of Washington agreed to pay into the state escrow. (Page 17 of 19, Part XIII (5). Thus, federal, not state jurisdiction applies.

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. In the motion argument of this case on June 9, 2009 (transcript attached Appendix 5) in response to a question by Robert Comenout's attorney, Aaron Lowe, the Superior Court Judge, the Honorable 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.

The Quinault Court has exclusive and complete jurisdiction of this case as tribal tax, not state tax, is the issue. These cases should be dismissed.

CONCLUSION

Federal and state constitutions and federal statutes 28 U.S.C. § 1162(b), 28 U.S.C. § 1360(b) mandate an Indian court or federal jurisdiction when state taxation of sales on trust property by Indians is the issue. *Pink*, 144 Wn.App 945 (Div. II, 2008) applies. The Quinault Tribe's retro ceded from P.L. 280. Federal treaty law preempts the state cigarette tax law.

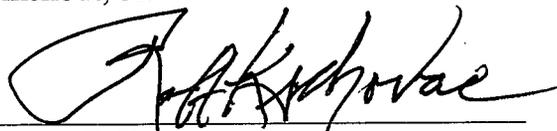
The Quinault compact is in force and is to be enforced by the Tribe and not the State. The state cigarette tax law no longer applies due to the compact.

Federal law and jurisdiction preempts the state law when activity by Indians on trust land owned by the Defendants is the locality of the alleged crime. The Pierce County Superior Court has no jurisdiction. The case should be reversed and dismissed.

DATED this 17th day of November, 2009.



AARON L. LOWE
Attorney for Appellant Robert R.
Comenout, Sr.



ROBERT E. KOVACEVICH
Attorney for Appellant Edward A.
Comenout, Jr.



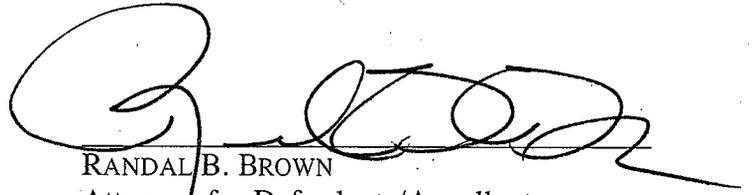
RANDAL B. BROWN
Attorney for Appellant Robert R.
Comenout, Jr.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Notice for Discretionary Review was served on
Counsel for Plaintiff by hand delivery addressed as follows: _____

TOM L. MOORE, Deputy Prosecutor
Pierce County Prosecuting Attorney
County-City Building
930 Tacoma Avenue South, Rm. 946
Tacoma, Washington 98402-2171

Dated this 17th day of November, 2009.


RANDAL B. BROWN
Attorney for Defendants/Appellants

FILED
COURT OF APPEALS
DIVISION II
09 NOV 17 PM 12:45
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX 1

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-04681-0

vs.

EDWARD A COMENOUT,

INFORMATION

Defendant.

DOB: 8/16/1928
PCN#:

SEX : MALE
SID#: UNKNOWN

RACE: AMER INDIAN/ALASKAN
DOL#: UNKNOWN

CO-DEF: ROBERT REGINALD COMENOUT 08-1-04680-1
CO-DEF: ROBERT REGINALD COMENOUT, SR 08-1-04682-8

COUNT IV

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDWARD A COMENOUT of the crime of ENGAGING IN BUSINESS OF CIGARETTE PURCHASE, SALE, CONSIGNMENT OR DISTRIBUTION WITHOUT LICENSE, committed as follows:

That EDWARD A COMENOUT, acting as a principal or an accomplice, in the State of Washington, on or about the 25th day of July, 2008, engage in the business of purchasing, selling, consigning, or distributing cigarettes in this state without a license issued pursuant to RCW 82.24, contrary to RCW 82.24.500, and against the peace and dignity of the State of Washington.

COUNT V

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDWARD A COMENOUT of the crime of UNLAWFUL POSSESSION OR TRANSPORTATION OF UNSTAMPED CIGARETTES, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time,

1 place and occasion that it would be difficult to separate proof of one charge from proof of the others,
2 committed as follows:

3 That EDWARD A COMENOUT, acting as a principal or an accomplice, in the State of
4 Washington, on or about the 25th day of July, 2008, did unlawfully, feloniously, and knowingly or
5 intentionally possess or transport in the State of Washington a quantity in excess of ten thousand
6 cigarettes without the proper stamps affixed as required by RCW Chapter 82.24 and (i) where defendant
7 did fail to give proper notice as required by RCW 82.24.250 prior to transporting the stamps; and (ii)
8 where defendant during the transport of such cigarettes did not actually possess invoices or delivery
9 tickets showing the true name and address of the consignor or the seller, the true name and address of the
consignee or purchaser, and the quantity and brand of the cigarettes so transported; and (iii) where the
cigarettes were not consigned to or purchased by any person authorized by RCW Chapter 82.24 to
possess unstamped cigarettes in this State, contrary to RCW 82.24.110(2), and against the peace and
dignity of the State of Washington.

10 COUNT VI

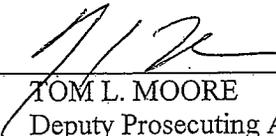
11 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
12 authority of the State of Washington, do accuse EDWARD A COMENOUT of the crime of THEFT IN
13 THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same
14 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
one charge from proof of the others, committed as follows:

15 That EDWARD A COMENOUT, acting as a principal or an accomplice in the State of
16 Washington, on or about the 25th day of July, 2008, did unlawfully and feloniously obtain control over
17 property and/or services other than a firearm or a motor vehicle, belonging to another, of a value
18 exceeding \$1,500, by color or aid of deception with intent to deprive said owner of such property and/or
services, contrary to RCW 9A.56.020(1)(b) and 9A.56.030(1)(a), and against the peace and dignity of the
State of Washington.

19 DATED this 26th day of September, 2008.

20 WA ST LIQ CNTRL BOARD
21 WA0WSLC

GERALD A. HORNE
Pierce County Prosecuting Attorney

22
23 By: 
TOM L. MOORE
Deputy Prosecuting Attorney
WSB#: 17542

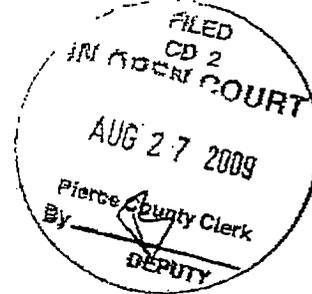
APPENDIX 2

3954 8/28/2009 82516



08-1-04680-1 32727543 FNFL 08-28-09

Case Number: 08-1-04680-1 Date: September 3, 2009
SerialID: 80F1244E-F20F-6452-D3CCDC1D7E42A2C5
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-04681-0

vs.

EDWARD A. COMENOUT,

FINDINGS AND CONCLUSIONS ON
MOTION TO DISMISS/SUPPRESS

Defendant.

THIS MATTER having come on before the Honorable Katherine M. Stolz on the 9th day of June, 2009, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions.

THE UNDISPUTED FACTS

1) On 7/25/08 officers from the Washington State Liquor Control Board pursuant to a search warrant entered the premises of the Comenout's, The Indian Country Store, 908/920 River Road, Puyallup, Washington, and seized 37,000 cartons of unstamped cigarettes.

2) Washington law, RCW 82.24.030, requires that all cigarette packages have a tax stamp affixed prior to handling or distributing to enforce the collection of the State Cigarette Excise Tax.

3) Between April of 2007 and 7/25/09 officers of the Washington State Liquor Control Board made numerous purchases of cigarettes, both cartons and single packs, from the Indian

3264 B/23/2889 28817

Case Number: 08-1-04680-1 Date: September 3, 2009
SerialID: 80F1244E-F20F-6452-D3CCDC1D7E42A2C5
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Country Store that did not bear a Washington tax stamp or any stamp from a recognized Indian Tribe in the State of Washington.

4) On 9/26/08 the State of Washington filed charges on EDWARD A. COMENOUT, ROBERT R. COMENOUT, Sr., and ROBERT R. COMENOUT, Jr.. All three men were charged as accomplices with Engaging In Business of Cigarette Purchase, Sale, Consignment, or Distribution Without a License; Unlawful Possession or Transportation of Unstamped Cigarettes; and Theft in the First Degree.

5) The Comenout's property at 908/920 River Road Puyallup is Indian Trust Land, however, the land is not within the borders of any established Indian reservation.

6) EDWARD A. COMENOUT is an enrolled member of the Quinault Indian Tribe. The Quinault Reservation is located 60 miles to the West on the Coast of Washington.

7) The Quinault Tribe and the State of Washington entered into a Cigarette Compact on 1/3/05 that is still in effect. The Compact requires "tribal retailers" to be licensed by the tribe. The Compact requires that all cigarettes sold by "tribal retailers" shall bear either a Washington State Tribal Compact Stamp or a Quinault Nation Stamp.

8) The defendants filed a Motion to Suppress or Dismiss for three reasons:

- 1) The State lacks jurisdiction on Indian Trust Lands.
- 2) The Compact prevents the State from taxing "tribal retailers".
- 3) Federal law preempts Washington law regarding cigarette taxes.

THE DISPUTED FACTS

1) The Comenouts assert that under the terms of the Cigarette Compact they qualify as a "tribal retailer" and therefore, jurisdiction is properly with the Quinault Indian Tribe or the Federal Government.

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1 2) The State asserts that the Comenouts have rejected the Compact. The Comenouts are
2 not licensed by the Quinault Tribe as required by the Compact. The Comenouts have not paid the
3 taxes that are required by the Compact, as evidenced by the lack of stamps on the 37,000 cartons
4 of cigarettes seized. The Compact gives enforcement authority for violations of RCW 82.24 to
5 the Washington State Liquor Control Board

6
7 FINDINGS AS TO DISPUTED FACTS

8 1) The Court finds that the Cigarette Compact between the State of Washington and the
9 Quinault Indian Tribe is an agreement between two sovereign entities.

10 2) The Court finds that the Quinault Indian Tribe has concurrent jurisdiction with the
11 State of Washington over the Comenouts possession and sale of cigarettes.

12 3) The Court finds that the Quinault Indian Tribe has given the power to enforce
13 violations of RCW 82.24 to the State of Washington.

14
15 CONCLUSIONS OF LAW

16 1) The Court concludes that the State of Washington per RCW 32.12.010 has jurisdiction
17 over the Comenout's property at 908/920 River Road Puyallup Washington.

18 2) The Court concludes that the State of Washington and the Quinault Indian Tribe have
19 concurrent jurisdiction over the Comenout's possession and sale of cigarettes.

20 3) The Court concludes that the Comenouts owe the taxes on the 37,000 cartons of
21 cigarettes to either the State of Washington or the Quinault Indian Tribe.

22 4) The Court concludes that the Quinault Indian Tribe has deferred enforcement authority
23 in this matter to the State of Washington.
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5) The court denies the defendant's Motion to Dismiss/Suppress.

DONE IN OPEN COURT this 28th day of August, 2009.

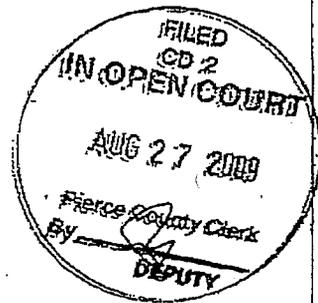
Katherine M. Stolz
Katherine M. Stolz, Judge

Presented by:

TLM
TOM L. MOORE
Deputy Prosecuting Attorney
WSB # 17542

Approved as to Form:

Robert E. Kovacevich
Robert E. Kovacevich
Attorney for Defendant
WSB # 2723



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APPENDIX 3

CIGARETTE TAX COMPACT

between

THE QUINAULT NATION

and

THE STATE OF WASHINGTON

PREAMBLE

WHEREAS, the Quinault Nation ("Tribe") is a federally recognized Indian tribe, possessed of the full inherent sovereign powers of a government;

WHEREAS, the State of Washington ("State") is a state within the United States of America, possessed of full powers of state government;

WHEREAS, the body of Federal Indian law and policy recognizes the right and the importance of self-determination for Indian tribes, the authority of a tribe to tax certain activities, and the need for economic development in Indian country by Indian tribes;

WHEREAS, the State has committed, through the Centennial Accord and Millennium Agreement, to the political integrity of the federally recognized Indian tribes within the State of Washington and has formally recognized that the sovereignty of each tribe provides paramount authority for the tribe to exist and to govern;

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over, and the taxation of, the sale and distribution of cigarettes;

WHEREAS, the State and Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of this Cigarette Tax Compact;

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Compact will enable, taxation being an essential attribute of sovereignty and a tool of self-sufficiency;

WHEREAS, the State and Tribe will also benefit by the exercise of the attributes of tribal sovereignty and from the improved well-being of members of the Tribe that will result from economic development by the Tribe and its members;

WHEREAS, both the Tribe and the State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis;

WHEREAS, the mutual interests of the Tribe and the State brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, this Compact is authorized, on the part of the State, by legislation, including House Bill 5372, enacted by the 2001 Regular Session of the 57th Legislature and signed by the Governor, effective July 22nd, 2001, and House Bill 2553, enacted by the 2002 Regular Session of the 57th Legislature and signed by the Governor, effective June 13, 2002, as codified in

Revised Code of Washington (RCW) 43.06.450, RCW 43.06.455, RCW 43.06.460, and RCW 82.24.295; and on the part of the Tribe, by the Tribal Council and signed by the Tribal Chairman.

NOW THEREFORE, the Tribe by and through its Tribal Council; and the State by and through its Governor, do hereby enter into this Compact for the mutual benefit of the Tribe and the State.
To wit:

PART I - DEFINITIONS

1. "Auditor" means an independent third party auditor selected pursuant to Part VIII of this Compact.
2. "Allocation" means the number of cigarettes available to be sold to Indians free of all state cigarette and sales taxes. It is based on a formula that includes consumption data and tribal service area population.
3. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
4. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.
5. "Compact" means this agreement entered into by the State and the Tribe.
6. "Department" means the Washington State Department of Revenue.
7. "Essential government services" means services provided by the Tribe including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
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.

9. "Quinault Reservation" or "Reservation" means the area recognized as the Quinault Reservation by the United States Department of the Interior.
10. "Liquor Control Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.
11. "Local retail sales tax" means the combined Washington local retail sales and use taxes applicable in the area.
12. "Non-Indian" means an individual who is neither a Quinault tribal member nor a nonmember Indian.
13. "Nonmember Indian" means an enrolled member of a federally recognized Indian tribe other than the Quinault Nation.
14. "Parties to the agreement" or "parties" means the Tribe and the State.
15. "Retail selling price" means the price paid by the consumer for each package or carton of cigarettes, which price includes the tribal cigarette tax.
16. "Self-certified tribal wholesaler" means a wholesaler who is a federally recognized Indian tribe or a member of such a tribe.
17. "State Cigarette Tax" means the state tax imposed on each cigarette, which is expressed in cents per cigarette.
18. "State and Local Retail Sales and Use Taxes" means taxes levied by the State or by local units of government and expressed as a percentage of the sales price (which includes the State Cigarette Tax) of a unit of cigarettes.
19. "State Taxes" in this compact only, means a combination of the "State Cigarette Tax," and the "state and local retail sales and use taxes."
20. "State" means the State of Washington.
21. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco products" does not include cigarettes.

22. "Tribal member" means an enrolled member of the Quinault Nation.
23. "Tribal retailer" means a cigarette retailer wholly owned by the Quinault Nation and located in Indian country or a member-owned smokeshop located in Indian country and licensed by the Tribe.
24. "Tribal cigarette tax" means the tax or taxes enacted as a provision of Tribal law on the units of cigarettes sold and on the purchase of cigarettes by retail buyers.
25. "Tribal tax stamp" means the stamp or stamps that indicate the taxes imposed under this Compact have been paid or that identify those cigarettes with respect to which no tax or another tribal tax is imposed.
26. "Tribe" or "tribal" means or refers to the Quinault Nation, a federally recognized tribe.
27. "Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale.

PART II – APPLICABILITY OF THE COMPACT

1. Execution of Compact

This Compact shall become effective when approved by both the Tribal Council as indicated by the signature of the tribal Chairman, and by the State when signed by the Governor. This Compact shall be executed in duplicate originals, with each party retaining one fully executed duplicate original of the Compact.

2. Application

From its execution, and contingent upon the imposition of the tribal cigarette tax pursuant to a tribal law meeting the terms of Part III of this Compact, this Compact shall apply to the retail sale of cigarettes by tribal retailers. Sales subject to the tribal Cigarette Tax imposed pursuant to this Compact are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Tribe desires to pursue mail order and/or internet sales of Cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.

3. Scope Limited

This Compact does not apply to: (a) cigarettes sold at retail by non-Indians or nonmember Indians; (b) tobacco products as that term is defined in Part I of this compact; or (c) cigarettes manufactured by the Tribe or its enterprises within Indian country.

PART III – IMPOSITION OF TRIBAL CIGARETTE TAXES

1. Tribal Retailers
- a. The Tribe agrees to inform the Department regarding the startup of cigarette sales by any tribal retailer who begins selling cigarettes after the effective date of this Compact. At the time of the execution of this Compact, the Tribe makes sales of cigarettes at its Taholah Store, its Queets Store, and at the Quinault Beach Resort and Casino.
 - b. The Tribe agrees that any cigarette retailer wholly owned by Tribe is subject to this Compact.
 - c. The Tribe agrees that it will require any member-owned smokeshop located in Indian country to be in compliance with the terms of this Compact. In addition the Tribe agrees that it will maintain and enforce a requirement that any such member-owned smokeshop obtain a license from the Tribe and that a condition of such license is access of the Department to observe sales pursuant to section 1 of Part X of this Compact. 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.
 - d. The Tribe agrees to enact ordinances regarding Auditor access to records of tribal members selling cigarettes in Indian Country, should the Tribe elect to allow retail sales of cigarettes by its members.

2. Tax Imposed on Sales by Tribal Retailers

The Tribe, by law and in accord with the requirements of this Part, shall impose taxes on all sales by tribal retailers of cigarettes to purchasers within Indian country. The Tribe may allow for an exemption from such taxes for Tribal members, under Part V section 1 of this Compact.

Beginning no sooner than the date this compact is signed by both parties, and subject to enactment or revision of a tribal law authorizing the imposition of a tax on cigarettes, the Tribe shall impose and maintain in effect a tax on retail sales of cigarettes equal to 80% of the state taxes.

No later than 36 months after the initial imposition of a tax under this Compact and subject to the phase-in reduction under this part, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equal to 100% of the state taxes.

If during any quarter, the number of cartons of cigarettes, excluding those manufactured by the Tribe or its enterprises, that are sold at retail exceeds by at least 10 percent the quarterly average sales of the twelve month period, as specified in this section 2, the 36 month period noted above shall be reduced by three months. The Auditor shall determine the quarterly average sales baseline. The baseline shall be calculated using sales for the six months immediately preceding the imposition of tax. The Auditor shall notify the Tribe and the Department when the retail sales for any quarter exceed the baseline by at least ten percent. These reductions will be cumulative. For purposes of this provision:

- (a) "Quarter" means a three-month period, each quarter immediately succeeding the next. The first quarter begins the first day of the first month the Tribal cigarette tax is imposed, if the imposition of the tax is on or before the 15th of the month, or begins

the first day of the second month the Tribal cigarette tax is imposed, if the imposition of the tax is after the 15th of the month; and

- (b) The "quarterly average sales" means the sum of the retail sales made during the two quarters divided by two.

During the term of this Compact and upon any future increase in the state cigarette tax, the tribal tax on cigarettes shall increase by no less than 100 percent of the increase in the combined state taxes. Notwithstanding the foregoing sentence, so long as the Tribe is entitled to apply the 80 percent formula set forth above to cigarette sales, the increase in State taxes shall trigger an increase in the corresponding Tribal cigarette tax of 80 percent of the increased amount.

Upon any future decrease in the state cigarette tax, the tribal tax on cigarettes may decrease to a minimum of no less than 100 percent of the combined State taxes.

The State will notify the Tribe at least thirty (30) days prior to the effective date, in writing, of any increases or decreases in the cigarette tax or the combined state sales and use tax.

Pursuant to RCW 43.06.455(3) and RCW 82.24.295, the State retrocedes from its tax during the time this Compact is in effect, subject to the imposition of a Tribal tax. In addition, the State agrees that enforcement of this Compact shall be done in accordance with the conditions set forth in this Compact.

PART IV – PURCHASE OF CIGARETTES BY TRIBAL RETAILERS

1. Wholesale Purchases- Requirements

The Tribe agrees to add to tribal law, and maintain in effect, a requirement that the tribal retailers purchase cigarettes only from:

- (a) Wholesalers or manufacturers licensed to do business in the State;
- (b) Self-certified tribal wholesalers who meet the requirements of Part VI section 3 of this Compact; or
- (c) The Tribe or its enterprises as a tribal manufacturer or wholesaler.

2. Delivery of Cigarettes to the Tribal Retailer Outside of Indian Country

Cigarettes bearing the tax stamp required by this Compact or cigarettes purchased by the Tribe for stamping may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a tribal retailer, subject to meeting any notification requirements of this Compact. Commercial carriers may make deliveries. Invoices identifying the delivery as cigarettes for the Quinault Nation must accompany such cigarettes.

PART V - TAX STAMPS

1. Tax Stamp Required

- (a) All cigarettes sold by tribal retailers shall bear either a Washington State Tribal Compact Stamp or a Quinault Nation tax stamp.
- (b) The Tribe may allow for an exemption from this tax for enrolled members who are over the age of 18 years. If the Tribe chooses to exempt its members from tax, the Tribe agrees to keep exact records of such sales, under section (2) of this part. The expectation of both Parties is that if the Tribe chooses to tax its members that the allocation allowance described in WAC 458-20-192 will be used as an approximation of sales to members and the Tribe will not be required to keep exact records of such sales. This allocation figure will be used to distinguish funds subject to the requirements of Part XIII section 8, from funds that are not.

2. Creation and Supply of Tax Stamps

- (a) The Tribe will use either Washington State Tribal Compact tax stamps, which are provided by the State through its stamp vendor, or tribal tax stamps. If the Tribe elects to institute its own stamp, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the use of such stamps.
- (b) If the Tribe elects to use the state tribal compact tax stamps it will purchase cigarettes with the stamp affixed after the effective date of the tribal cigarette tax, until such time as the Tribe arranges for the use of a tribal stamp. If the Tribe makes this election, the wholesaler shall obtain the stamps from the State's stamp vendor. The wholesaler shall affix the stamps to the cigarettes, sell the cigarettes to the Tribe without tax included in the price, and the Tribe in turn shall institute an accounting and pricing protocol that assures the cigarette tax is included in the price of the cigarettes. The State and the Tribe may agree to an alternative method of obtaining the stamps and accounting for tax revenue, such method to be agreed to by both parties and memorialized in writing.
- (c) If the Tribe elects to use the tribal tax stamps, the stamps will have a serial number or some other discrete identification. The Tribe agrees to purchase stamps from a nationally recognized stamp manufacturer.
- (d) The Tribe may contract with a bank or other stamp vendor to distribute tribal tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal cigarette tax by the wholesaler or Tribal retailer, and remit the collected taxes to the Tribe. The contract shall provide that the stamp vendor shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service or some other third-party stamp vendor satisfactory to both parties. The Tribe shall require the stamp vendor to remit to the Tribe all revenue collected from the Tribal cigarette tax. The Tribe shall require that the stamp vendor provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department. The Tribe's contract with the stamp

... vendor shall specify a process by which the Tribe is assured that all wholesalers who sell cigarettes to Tribal retailers are paying the applicable Tribal taxes, unless the Tribal retailer has prepaid the tax to the stamp vendor. This process may include a requirement that wholesalers agree to provide documentation such as invoices of sales to verify to the Tribe that the Tribal taxes were paid. In the alternative, the Tribe may elect to act as its own stamp vendor. Should it so desire, it must enter into a memorandum of agreement with the Department, setting forth protocols regarding security and audit. The Department agrees to not unreasonably refuse entry into said memorandum of agreement.

3. Requirements for Affixation of Stamps by Wholesalers

Wholesalers or the Tribe shall be responsible for affixing the tax stamps to the smallest container of cigarettes that will be sold or distributed by the tribal retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp. Stamps shall be affixed so that they may be readily viewed by inspection.

Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale or to ship to the Tribe. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Compact. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.

4. Wholesaler Obligation Under State Law

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Compact (in the case of self-certified tribal wholesalers), and compliance with other requirements in this Compact, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

5. State Agreement Regarding Compliance with State and Federal Law

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

PART VI - WHOLESALERS

1. Wholesalers Licensed by the State

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to state tax and which cigarettes are subject to the tribal cigarette tax.

2. Self-Certified Tribal Wholesalers

Tribal wholesalers who are not licensed to do business within the State or any other state, and who are not required by state law to be licensed, must, prior to doing business with the

Tribe, have entered into a memorandum of agreement with the Department regarding their activities as a wholesaler in regard to (a) meeting the terms of cigarette compacts and (b) the interests of the state of Washington regarding the cigarette trade in general.

The Tribe shall require compliance with this Compact in its agreements with any such tribal wholesalers and shall provide copies of such agreements to the Auditor for its review. The contract between the Tribe and the tribal wholesaler will also include a requirement that:

- (a) Invoices detailing the quantity and brand of cigarettes destined for the Tribe will accompany the cigarettes transported in the State. Such invoices shall provide an order number that matches the order number provided under Part VII section 2 of this Compact and shall identify the seller of the cigarettes as well as the buyer of the cigarettes; and
- (b) The wholesaler will allow the Auditor access to its records for the purpose of determining whether the tax stamps for the Tribe's cigarettes are properly affixed to the cigarette containers.

A tribal wholesaler who has a memorandum of agreement with the State and who has an agreement with the Tribe, in which agreement the wholesaler agrees to abide by the terms of this Compact, shall be referred to as a "self-certified tribal wholesaler."

3. Tribe as Wholesaler

This Compact contemplates that the Tribe may, at some future date, act as its own wholesaler. In the event that the Quinault Nation decides to act as its own wholesaler in regards to sales to the tribal retailers, it agrees to first enter into a memorandum of agreement with the Department regarding this activity. The Department agrees to not unreasonably refuse entry into said memorandum of agreement. The memorandum of agreement shall reference any applicable requirements of this Compact. If the Tribe, by itself or through a tribal enterprise, manufactures and wholesales to the tribal retailers, that wholesale activity does not require a memorandum of agreement under this subsection.

4. Self-Certified Wholesalers

Should the Tribe decide it wants the option of purchasing cigarettes from a self-certified wholesaler, as that term is used in RCW 43.06.455 (5)(b), it must first enter into a memorandum of agreement with the Department of Revenue governing this activity. The Department agrees to not unreasonably refuse entry into said memorandum of agreement.

PART VII - ENFORCEMENT AUTHORITY AND RESPONSIBILITY OF THE LIQUOR CONTROL BOARD

1. Intent

The State authorizing legislation for this Compact states that it is the intent of the Legislature that the Liquor Control Board and the Department continue the division of duties and shared authority under Chapter 82.24 RCW and therefore the Liquor Control Board is responsible for enforcement activities that come under the terms of Chapter 82.24 RCW.

2. Notification

The Tribe or its designee shall notify the Department seventy-two (72) hours in advance of all shipments of unstamped cigarettes to the Tribe or tribal retailers if such shipments will occur outside the reservation boundaries. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the cigarettes to seizure.

3. Commercial Carriers

The State recognizes that shipments of cigarettes both from in state and from out-of-state wholesalers, who meet the requirements of this Compact, may be made by commercial carrier. Such shipments must be accompanied by documents as required under this Compact and subject to advance notice requirements.

PART VIII - INDEPENDENT THIRD PARTY AUDITOR

1. General

The Tribe wishes to provide assurance that all parties to this Compact and persons named in this Compact are in compliance with the spirit and terms of this Compact. The purpose of this Part is to provide a process for regular verification of the requirements in this Compact. The verification process is intended to reconcile data from all sources that make up the stamping, selling, and taxing activities under this Compact.

2. Tribe to Contract with Third Party Auditor

The Tribe and the State agree that, for the purposes of verifying compliance with this Compact, the Tribe will contract with an independent third party auditor. The Tribe will retain the Auditor and the Tribe shall bear the costs of the auditing services. The Tribe shall be entitled to freely communicate with the Auditor. The Auditor must be a certified public accountant licensed by the State of Washington and in good standing, such good standing subject to confirmation by the licensing board through which the auditor is licensed. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified.

3. Audit Protocol

To ensure compliance with this Compact, the Auditor must adhere to the following protocol:

Period under review: To verify the requirements of this Compact, the Auditor must review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Compact only as necessary for an internal reconciliation of the entity's books. In situations where the Auditor is responsible for verifying records on less than an annual basis, the period under review shall not include years previously reviewed by the Auditor, except when a violation is alleged to have occurred during the period previously reviewed.

Records to be examined: To verify the requirements of this Compact, the Auditor must review at a minimum the records specified below. In all situations, the Auditor is not responsible for examining records that do not relate to the stamping, selling, or taxing activities of the Tribe, unless a review of the records is necessary for an internal reconciliation of the books:

- (a) Self-certified tribal wholesaler: records and invoices of stamp purchases, records and invoices of sales of stamped cigarettes, stamp inventory, and the stamping process;
- (b) Tribal retailers: financial statements or purchase invoices of cigarettes purchased from licensed wholesalers, self-certified tribal wholesalers and manufacturers, financial statements or sales invoices relating to sales of stamped cigarettes, sales of exempt cigarettes, cigarette inventory, records to verify whether Tribal cigarette and sales taxes were remitted to the Tribe for deposit into Tribal accounts, and records to verify that the retail selling price included the applicable tribal taxes.
- (c) Tribe: records such as account records and contract invoices necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services described in Part XIII, section 8 of this Compact.

4. Audit Report Format

The Auditor shall provide the Department with a certified statement that, after each audit, the Auditor finds the Tribe to be in compliance with the terms of this Compact. The Department may view the audit report at the tribal Offices, but may not copy the same.

5. Initial Review

The first required review must cover the period starting on the effective date of the tax and ending December 31, 2005, and the Auditor must report its findings to the Tribe by April 1, 2006. This initial review shall include all of the activities covered by the protocol.

Thereafter, reviews shall take place on the regular audit period with an audit report submitted within three months of each audit. The audit cycle for this compact is on a calendar year basis. The Tribe and the Department may by prior joint agreement select or vary the audit cycle depending on the on-going audit activity of the Tribe, in order to be efficient and effective in the use of auditor resources.

6. Self-Certified tribal Wholesalers

The Auditor will be responsible for reviewing the records, identified in subsection 3(a) of this Part, of all self-certified tribal wholesalers that sell cigarettes to a tribal retailer to verify that the tribal cigarette tax was paid by the wholesaler, unless paid to the stamp vendor by the tribal retailer, and that the stamps were correctly affixed to containers of cigarettes.

The Auditor must review the records, identified in subsection 3(a) of this Part, of all self-certified tribal wholesalers that sell cigarettes to a tribal retailer, no less than once every four years. If a wholesaler that previously sold cigarettes to a tribal retailer stops making such sales, the Auditor must review the records of that wholesaler during the next regularly scheduled annual audit.

7. Tribal Retailer

The Auditor will be responsible for reviewing the records, identified in subsection 3(b) of this Part, of the tribal retailer to certify that the tribal taxes were collected, that all cigarettes are properly stamped, that cigarettes were obtained from wholesalers authorized under this Compact, that any exemptions from tax are documented, and that revenue from the tribal tax under this Compact are not used to subsidize the tribal retailer.

8. Joint Audit Implementation and Review

The Tribe and the State shall confer prior to the beginning of the initial audit cycle. The purpose will be to discuss the objectives of the upcoming audit, the expectations of both the Tribe and the State, the audit standards to be used in such audit, and any issues regarding detail of the audit, records pertinent to the review, or substance of the Auditor's report. Subsequent audit meetings will be held as required.

If warranted by the findings in the report, the Tribe and the State shall meet jointly with the Auditor to review the report and discuss any issues of concern. For the purposes of this section, "audit cycle" refers to the reoccurring scheduled audit of an entity.

9. Dispute Resolution In the event that either the Tribe or the Department disagrees with the Auditor's final report, either party may notify the other of the disagreement and follow the procedures for resolution of the disagreement in Part IX section 5 of this Compact.

PART IX - DISPUTE RESOLUTION

The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.

As used in this Part "days" means calendar days, unless otherwise specified.

1. Notification of Violation

If either party believes a violation of the agreement has occurred, it shall notify the other party in writing. The notice shall state the nature of the alleged violation and any proposed corrective action or remedy. The parties agree to meet within 14 days of receipt of the notice, unless the parties agree to a different date. The purpose of the meeting will be to attempt to resolve between them the issues raised by the notice of possible violation, and provide an opportunity to implement any agreed corrective action.

2. Mediation

If the parties are unable to resolve the disputed issues through joint discussions under section 1 of this Part, either party may request mediation by giving a written mediation demand to the other party. The parties shall first attempt to agree on a mediator. If the parties cannot agree on a mediator within 30 days of written demand, a three person mediation panel shall be used and shall be selected as follows: each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator.

The parties shall share equally the costs of mediation.

3. Remedies

Whenever an issue is submitted to mediation under this section, the mediators may recommend corrective action to remedy any violation that has occurred. In no case shall a mediator render an independent recommendation or decision on any issue on which the parties reach agreement. Remedies may include: audit of relevant tribal records, interpretation of Compact terms, changes in reporting, record keeping, enforcement practices, business practices, or similar actions. Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Compact.

4. Termination of Compact

If, after no more than eight months from the initial Notice of Violation or notice of other disagreement, the parties are unable to resolve the disagreement or alleged violation and/or the appropriate corrective action using the dispute resolution methods authorized in this section, or if a party continues to violate a Compact term after the completion of the mediation process authorized in this section, this Compact may be terminated. The parties may, after no less than six (6) months following any such termination, enter into a new Compact.

5. Disagreements Regarding Reports of the Auditor

Should either party have a concern about a report from the Auditor, which cannot be resolved through the joint audit review process described in Part VIII of this Compact, that party may choose to resolve the concern through the use of a mediator chosen under the provisions of Part IX, paragraph 2. Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Compact. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

6. Notification of For Cause Termination

Either party may terminate the Compact for cause. For the purposes of this section, "for-cause" shall mean only the following violations:

- (a) Retail sales of unstamped cigarettes during the effective period of a tribal cigarette tax;
- (b) Failure to submit to mediation as required by this Part IX;
- (c) A breach of the confidentiality provisions of Part XII of this Compact;
- (d) Failure of the Tribe to enforce the terms of this Compact in regards to member retailers; or
- (e) Use of tax proceeds in violation of the terms of this Compact.

The party seeking the termination for cause shall notify the other party and the mediator selected under Part IX, Section 2 of this Compact, who shall review the facts upon which the for-cause termination notice is based. The party making the allegation must provide a written recitation of the facts with the notice of termination. The responding party has ten days to provide its facts to the mediator. If the mediator determines that the alleged event has occurred, the Compact is terminated, however the party making the allegation may choose to go through the regular dispute resolution process in regard to the issue.

If the parties fail to reach agreement, or the For Cause Violation is not corrected, within one hundred eighty (180) days from the date of giving the Termination Notice, the Compact shall be terminated. If the parties reach agreement, or the for-cause violation is corrected during the notice period, the Compact shall not be terminated.

7. Notification of Sales to Minors Violation

The Department shall immediately notify the Tribe if an allegation is made that the Tribe has made sales to minors in violation of this Compact. Upon such notification, the Tribe shall take enforcement action according to the provisions of tribal law. Upon the third or subsequent violation within any rolling one-year period of the sales to minors provisions of this Compact the provisions of section 1 of this Part shall apply.

8. Notice Requirements

For the purposes of this Compact, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile or e-mail. Notice shall be deemed effective on the date of actual receipt. Notice shall be given as follows:

To the Department:

Director

Washington State Department of Revenue

P O Box 47454

Olympia, WA 98504-7454

To the Tribe:

Tribal Chair

P.O. Box 189

Taholah, WA 98587

9. **Sovereign Immunity**

Nothing in this Compact shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

PART X - RESPONSIBILITIES OF THE QUINAULT NATION, THE DEPARTMENT OF REVENUE, AND THE LIQUOR CONTROL BOARD

1. Quinault Nation

The Quinault Nation is responsible for both enforcement of the terms of this Compact and administration of the Compact, audit procedures and record keeping, and dispute resolution. The Quinault Nation agrees to allow the Department entry into retail stores, the purpose of such entry being limited to (a) visual observation of the retail sales taking place at the stores and (b) the purchase of cigarettes by the Department.

2. Liquor Control Board

This agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW.

3. Department of Revenue

The Department is responsible for the administration of the Compact, audit procedures and record keeping, and dispute resolution, as well as negotiation of its terms, on behalf of the Governor of the state of Washington.

PART XI - TERM OF THIS COMPACT - AMENDMENT

1. This Compact shall remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions under Part IX of this Compact. The Compact shall be automatically renewed for successive periods of eight years, unless either party objects in writing at least thirty (30) days prior to the expiration date. Amendments to the Compact shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Compact shall be subject to the dispute resolution process in Part IX of this Compact.

2. In the event that the State negotiates a contract, compact, or other agreement with another Tribe on terms more favorable than those included in this Compact, the State shall disclose to the Tribe the more favorable terms within thirty days of the Contract containing those terms becoming effective. The Tribe may initiate discussions with the State to amend this Compact to incorporate more favorable terms if so desired by the Tribe.

PART XII - CONFIDENTIALITY

All information under the terms of this Compact received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330; the tax information "secrecy clause." All other information that is subject to review by the Auditor or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

PART XIII - MISCELLANEOUS PROVISIONS

1. **Tribe Does Not Submit to State Jurisdiction**

By entering into this Compact, the Tribe does not concede that the laws of the state of Washington, including its tax and tax collection provisions, apply to the Tribe, its members or agents regarding activities and conduct within or without Indian country.

2. **State Does Not Concede Tribal Immunity**

By entering into this Compact, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

3. **Compact Does Not Create any Third Party Beneficiaries**

No third party shall have any rights or obligations under this Compact.

4. **Land Status**

The Tribe shall provide information to the Department regarding the status of land upon which any new tribal retailer is located.

5. **Tobacco Master Settlement Agreement**

This Compact is not intended to impact the State's share of proceeds under the master settlement agreement entered into by the State on November 23, 1998.

The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the master settlement agreement. The Tribe agrees to not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters.

Nothing in this Compact supercedes or replaces chapter 70.157 RCW.

6. **Periodic Review of Compact Status**

Appropriate representatives of the Tribe and of the Department shall hold periodic meetings to review the status of this Compact and any issues that have arisen under the Compact. Those meetings shall be held no less frequently than once every twelve (12) months, but may be held more frequently.

7. **Sales to Minors**

The Tribe or a tribal retailer shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.

8. Essential Government Services

a. Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall certify the use of revenue under the process set forth in Part VIII of this Compact.

b. Tribal cigarette tax revenue may not be used to subsidize tribal cigarette and food retailers. "Subsidize" means that proceeds from the tribal cigarette tax cannot be expended on the direct business activities of the Tribal retail cigarette business. In addition, where the cigarette business is collocated with a retail food business, the proceeds cannot be expended on the direct business activities of the tribal retail cigarette business.

c. The following definitions shall apply to this Part:

i. "Direct business activities" include paying wages, benefits, bonuses, or expenses, related to the maintenance and operation of the retail facility or typically considered to be part of a business's operating expenses and overhead;

ii. "Essential governmental services" include, but is not limited to government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering the Tribal cigarette tax stamp program under this Compact, including all deductions and exemptions similar to those available to retailers, wholesalers, and others under state law, further including transportation vehicles and related costs; Tribal administration activities such as tax functions, contracting for health benefits, economic development, natural resources, and the provision of job services; and distribution of moneys related to trust funds, education, general assistance, such activities as land and building acquisitions, and building development and construction.

9. Other Retail Sales within Indian Country by Tribal Members

Under Quinault Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Compact.

10. Rule 192 - Application

This Compact is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

11. Subsequent State Legislative Enactments

Should the Legislature enact a law that provides more favorable terms for the Tribe, the parties shall amend the Compact to reflect such terms.

12. Jurisdiction

This Compact does not expand or limit the jurisdiction of either the Tribe or the State.

13. Severability

If any provision of this Compact or its application to any person or circumstance is held invalid, the remainder of the Compact is not affected.

THUS AGREED THIS 3rd day of January, 2005

QUINULT NATION

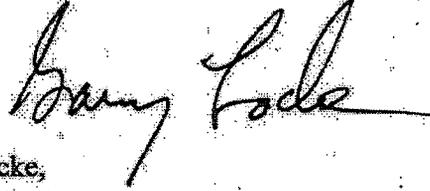
STATE OF WASHINGTON

By:



Pearl Capoman-Baller
Tribal Chair

By:



Gary Locke,
Governor

APPENDIX 4

1 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

2 STATE OF WASHINGTON,

3 Plaintiff,

CAUSE NO. 08-1-04681-0

4 vs.

5 EDWARD A COMENOUT,

DECLARATION FOR DETERMINATION OF
PROBABLE CAUSE

6
7 Defendant.

8 TOM L. MOORE, declares under penalty of perjury:

9 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the WA ST LIQ CNTRL BOARD, incident number 5E7107A;

10 That the police report and/or investigation provided me the following information;

11 That in Pierce County, Washington, , the defendants, ROBERT REGINALD COMENOUT, Jr.
EDWARD A. COMENOUT, and ROBERT REGINALD COMENOUT, Sr. did commit the crimes of
12 ENGAGING IN THE BUSINESS OF PURCHASING; SELLING, CONSIGNING, OR DISTRIBUTING
CIGARETTES WITHOUT A LICENSE; POSSESSING OR TRANSPORTING IN EXCESS OF 10,000
CIGARETTES WITHOUT THE REQUIRED TAX STAMPS; and THEFT IN THE FIRST DEGREE.

13 EDWARD A. COMENOUT is the owner of the Indian Country Store located at 908/920 River
Road, Puyallup, Washington. The Indian Country Store sells cigarettes, other tobacco products, and
14 miscellaneous gifts. ROBERT REGINALD COMENOUT, Sr. and ROBERT REGINALD COMENOUT,
Jr. are engaged in the daily business of running the store. Neither the Indian Country Store nor any of the
15 individuals named in this affidavit are licensed by an Indian Tribe or the State of Washington to sell
cigarettes. RCW 82.24.500 requires that any business in the State of Washington that sells cigarettes be
16 licensed under chapter 82.24. COUNTS I, IV, and VII.

17 The land occupied by the Indian Country Store is held in trust for EDWARD A. COMENOUT by
the United States government for the benefit of EDWARD A. COMENOUT. The land is not within the
18 confines of any recognized reservation of any federally recognized Indian Tribe (specifically the Puyallup
or Quinault Tribes). The Puyallup Reservation is the closest reservation but the land is not within the
19 confines of the Puyallup Reservation. EDWARD COMENOUT is a registered member of the Quinault
Tribe but the Quinault Reservation is approximately 250 miles to the West. The land is categorized as
"purchased land" not "allotted land" and therefore, bears no attributes of tribal government.

20 The land has been the focus of multiple state and federal legal decisions. These decisions date
from 1975 through 1997, and, in each of the decisions it has been clear that (1) the land is outside of the
21 boundaries of any formal reservation and (2) the state has jurisdiction over trust land outside of the
boundaries of any formal reservation. The land is not exempt from the State of Washington's excise tax
on cigarettes.

22 RCW 82.24.110(2) provides that is unlawful (a felony) for any person to knowingly or
intentionally to possess or transport within the state a quantity in excess of 10,000 cigarettes unless the
23 proper stamps are affixed to the cigarettes. In other words, it is illegal to possess in excess of 10,000
cigarettes unless the taxes have been paid on those cigarettes.

24 In September of 2006 the Washington State Liquor Control Board began receiving complaints
about the sale of untaxed cigarettes from The Indian Country Store. The WSLCB began to investigate and

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 determined that in the last ten years to the present date no taxes were paid or stamps purchased by The
2 Indian Country Store or any of the COMENOUTS. Between April of 2007 and the present, WSLCB
3 officers have made numerous purchases of cigarettes, both cartons and single packs of cigarettes. The
4 cigarettes purchased in each instance did not have the proper stamps attached. Two of the packs of
5 cigarettes did have Couer d' Alene Tribal stamps attached, not the proper Washington State stamps. The
6 WSLCB officers also observed cases of unstamped cigarettes being delivered to The Indian Country
7 Store. It is easy to spot unstamped cigarettes because a case must be split in half in order to stamp the
8 cigarettes. If the case has not been split then the cigarettes have not been stamped.

9 On 7/25/08 the WSLCB officers in an effort to enforce the Washington State cigarette tax served
10 a search warrant on The Indian Country Store. The agents contacted ROBERT R. COMENOUT, Sr.
11 inside the business. ROBERT R. COMENOUT, Sr. appeared to be in charge of the business. ROBERT R.
12 COMENOUT Sr. opened the safe and then closed it for the agents and was generally the person who
13 answered the agent's questions about the business. ROBERT R. COMENOUT, Jr. was contacted in the
14 back of a pickup truck located in front of the business. ROBERT R. COMENOUT, Jr. refused to
15 cooperate with the tax agents. Several employees of the business were contacted in and around the
16 premises. At least two of the employees indicated that they worked at the store for "BOB" COMENOUT.

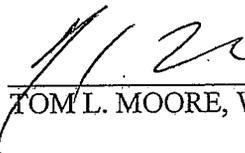
17 The WSLCB tax agents seized 37, 000 cartons of cigarettes from the grounds of The Indian
18 Country Store. The cigarettes were seized because the authorized tax stamps were not attached. The
19 cigarettes must have attached to each pack either a tax stamp or a tax exempt stamp. Some of the seized
20 cigarettes did have Idaho Tribal stamps attached. Idaho Tribal stamps are not authorized in the State of
21 Washington.

22 The number of cigarettes in 37,000 cartons is approximately 7.4 million cigarettes. This is well in
23 excess of the 10,000 cigarettes that it is felony to possess unless the required tax stamps are attached.
24 COUNTS II, V, AND VIII.

The Washington State cigarette excise tax is \$20.25 per carton of cigarettes. The tax on 37,000
cartons is \$750,000. These are taxes that must be paid at the time the cigarettes are purchased by a retail
or a wholesale business. This is lost revenue to the State of Washington. COUNTS III, VI, and IX.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: September 26, 2008
PLACE: TACOMA, WA



TOM L. MOORE, WSB# 17542

APPENDIX 5

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Proceedings of June 9, 2009

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1 BE IT REMEMBERED that on Tuesday, the 9th
2 day of June, 2009, the above-captioned cause came
3 on duly for hearing before THE HONORABLE KATHERINE
4 M. STOLZ, Judge of the Superior Court in and for
5 the county of Pierce, state of Washington; the
6 following proceedings were had, to wit:

7
8 <<<<<< >>>>>>

9
10 (The defendants were personally present,
11 together with counsel.)

12 THE COURT: All right. This is State of
13 Washington vs. Edward Amos Comenout; Robert
14 Reginald Comenout; and Robert Reginald Comenout,
15 Senior. The cause numbers are 08-1-04681-0,
16 08-1-04680-1 and 08-1-04682-8.

17 The matters are noted on the calendar this
18 morning regarding a motion to dismiss. The Court
19 read the briefing; and, Counsel, if you would all
20 identify yourselves, particularly the ones who are
21 visiting us.

22 MR. LOWE: Your Honor, Aaron Lowe from
23 Spokane. I represent Robert, Senior, who is
24 present.

25 THE COURT: Okay.

1 MR. BROWN: Randal Brown, Your Honor. I
2 represent Robert Comenout, Junior.

3 MR. KOVACEVICH: Bob Kovacevich, Your
4 Honor. I represent Ed Comenout, who is in the
5 wheelchair, Your Honor.

6 THE COURT: All right.

7 MR. MOORE: Tom Moore, Your Honor,
8 representing the State.

9 THE COURT: All right. All right.
10 Counsel, who wishes to lead off? The one who
11 filed the most briefing?

12 MR. KOVACEVICH: Your Honor, I'm the author
13 of most of that, so they're going to let me lead
14 off. Does the Court want me to argue from the bar
15 or from the bench?

16 THE COURT: Whatever is more comfortable
17 for you. I mean --

18 MR. KOVACEVICH: If I could argue from
19 here, Your Honor, I would appreciate it.

20 THE COURT: That's fine. If you need to
21 sit down, go ahead. Now, remember, we only have
22 an hour, gentlemen.

23 MR. KOVACEVICH: Thank you, Your Honor. If
24 I may, I'll sit down.

25 / / /

1 DEFENDANT EDWARD COMENOUT'S ORAL ARGUMENT

2 MR. KOVACEVICH: Your Honor, there are
3 three independent reasons that this case should be
4 dismissed, and I'll attempt to give -- stay with
5 the big picture here because I know the briefing
6 is pretty detailed.

7 The first is that the tax does not apply.
8 We're talking about this Washington State
9 cigarette excise tax. When a cigarette tax
10 compact applies -- and it does apply in this case
11 because the Quinaults -- and, of course, Ed
12 Comenout is an enrolled Quinault; and the statute,
13 which I'll get into, says there's no state
14 cigarette tax when the Compact is in force. -- It's
15 in force here, as I'll get into in some more
16 detail.

17 The second reason is that the -- this case
18 is in the wrong court. It should either be in the
19 tribal court or the federal court because the
20 allegations -- and the admission, of course, is
21 made by the State -- that the land is Indian trust
22 land that's in trust and has been in trust since
23 1926 and, therefore, it's controlled by the Bureau
24 of Indian Affairs; and it's federally preempted.
25 The Government, in this case, is federally

1 preempted by the fact it's on trust land and has
2 been trust land since 1926.

3 The third reason is that the -- even if
4 those two aren't applicable, the Washington State
5 cigarette tax law, as it's been amended since 1995
6 and as the Supreme Court cases interpret it,
7 places the incidence of tax -- and incidence is
8 anyone along the chain of distribution who is
9 personally liable for the tax -- places the
10 incidence tax on an Indian; and the State has
11 admitted, of course, that Mr. Comenout is an
12 enrolled Quinault Indian; and then if it's placed
13 directly on the tribal Indian, it voids the tax,
14 the cigarette tax, as to them, the theory of
15 federal preemption and the constitution, state --
16 both state and federal that the Indian matters are
17 left to the Congress and, therefore, are
18 preempted.

19 The charges here, the first charge is
20 engaging in business without a -- without a
21 license, a violation of 82.24.500 and then, also,
22 charges unlawful possession under RCW 82.24.250.
23 Then there's a charge of theft in the first
24 degree. I don't think this applies because the
25 allegations are made that the -- Ed Comenout owns

1 the cigarettes; and, of course, he can't steal
2 from himself. There's no victim mentioned as far
3 as theft.

4 So back to the state license, the Moe case,
5 as I've cited at Part III, pages 25 and 30 in my
6 brief, opening brief -- in our opening brief, 425
7 U.S. 463, on page 486, holds that tribal Indians
8 are not required to have a state cigarette
9 license. I submit on that count, Mr. Comenout
10 does not have to have a state cigarette license;
11 and the Class C felony that's alleged goes away
12 because licensing isn't necessary.

13 The principal reason that possession,
14 which, also, Mr. Comenout is charged with, doesn't
15 apply is that under RCW 82.24.080, persons exempt
16 from tax do not have -- can possess unstamped
17 cigarettes, and 82.24.260 states that an Indian
18 retailer doesn't have to stamp taxes on sales to
19 enroll tribal Indians and that -- since
20 Mr. Comenout is, directly, exempt, he can possess
21 unstamped cigarettes, even if the state cigarette
22 tax law applies.

23 The right court, as far as the tribal
24 Indian is concerned, is either the Quinault tribal
25 court -- and the State alleges that the tribal

1 cigarette tax is violated. Well, if it is -- and
2 we, certainly, don't admit that; but even the
3 allegations that the tribal tax is violated,
4 that's a tribal -- Quinault tribal court matter.
5 They have sophisticated -- a sophisticated tribal
6 court with rules and tribal code and so forth, and
7 so it's not a -- it's an internal tribal matter if
8 there's some violation there. If there is a
9 violation of the cigarette tax law, and there's an
10 allegation here of transportation, that's in
11 federal court. There's a federal statute; and as
12 a matter of fact, last week, Roger Fiander, who is
13 a Yakima tribal Indian, had been charged with that
14 crime; and he was acquitted last week in the
15 Eastern District of Washington on that federal
16 charge; so, again, they're in the wrong court; and
17 even if some of these state tax laws apply, they
18 don't apply to Mr. Comenout.

19 The trial -- the Court is -- rarely does
20 anyone come in to state court when they are
21 talking about cigarette sales on -- by a tribal
22 Indian. They come into federal court, as I just
23 admitted; and occasionally, they come -- the State
24 comes in and takes the cigarettes. They have done
25 that in this case; but to my knowledge, they

1 rarely charge a crime; and this is, kind of, the
2 open area that the famous Colville case did not
3 decide; so we get into the question: Should we be
4 here?

5 Now, I want to reemphasize why the
6 Compact -- and I read from 82.24.295. It
7 states -- it's very simple -- the taxes imposed by
8 this chapter do not apply to the sale, use,
9 consumption, handling, possession, or distribution
10 of cigarettes by an Indian retailer during the
11 effective period of a cigarette tax contract -- of
12 a cigarette tax contract subject to RCW 43.06.455.

13 In the briefs in this case, we treat
14 this -- I believe it's Part III -- we think,
15 fairly exhaustively and put the statute -- the
16 State has attached the Quinault Compact to its
17 brief, and it's clearly -- it was entered into in
18 2005; and it, clearly, is enforced at this time.
19 I want to reemphasize that it merely says by an
20 Indian retailer. The statute does not say where
21 the Indian retailer has to be. There is a big
22 issue on trust land in this case. It merely says
23 it doesn't apply to an Indian retailer.

24 The State alleges that the Indian retailer,
25 my client, doesn't have a license to sell

1 cigarettes from the Quinaults. It doesn't say a
2 licensed Indian retailer. It's a very broad
3 statute. It says when we have a compact, again,
4 it's a state law. The cigarette tax in the state
5 of Washington does not apply, and all of the
6 elements that are -- make that -- this statute
7 effective are admitted by the State in this case
8 because they said -- they agree that Ed's a
9 Quinault Indian, that -- they allege that he's a
10 cigarette retailer, and they attach the Quinault
11 Compact; so that, alone, is a cogent reason that
12 this case should be dismissed.

13 If more is needed, we get into the
14 independent reason of the Comenout's land --
15 which, again, as I mentioned, the land had been
16 governed by the federal government since 1926. In
17 the brief, I allege the Quinault Treaty, and it
18 refers to the treaty in Omaha; and it allows for
19 an allotment off the reservation. That's what was
20 done. The attachments to this brief show that the
21 BIA has had that land in trust, again, for years
22 and years. Also, they have governed that as far
23 as probates and land divides; and so the land on
24 which all these allegations are alleged to have
25 taken place is in trust which is controlled by the

1 federal government, and there's no argument about
2 the fact that it's trust land.

3 Then we come to the Shivwits/Pink argument,
4 and the Pink -- it's been cited in the answering
5 brief of the three of us. Pink says that the --
6 it throws out the Cooper case that the State
7 relies on and says that the Quinalts have
8 retroceded from any public law to any application.
9 Pink is very recent, 2008; and the State says that
10 you cannot prosecute a Quinalt Indian for
11 offenses occurring on trust land; so Pink trumps,
12 if you will, the argument on Cooper; and there's
13 an additional case that I cited there, Buchanan,
14 miscited. It's 135 Wn.2d. There's some other
15 cases, too, that I cite, Shivwits Trust Lands.
16 They are within federal jurisdiction, and it's a
17 case on regulation of signs on land in trust;
18 though, it was not on a reservation; so the
19 statute, the federal statute, 1151, and the
20 Quinalt definition of Indian retailer, refers to
21 1151; and 1151 states, clearly, that reservation
22 land is part of Indian country and, also, trust
23 land or allotment land; and those other two, as
24 I've argued in the brief, wouldn't be in there if
25 it wasn't necessary to show the trust land and

1 where it's situated is subject to the control of
2 the federal government and not the State.

3 The Terry Stop and Pink and Colville -- the
4 Colville case, which is not as famous, 938 F.2d
5 146, also, states that trust land, or land within
6 a reservation, cannot be civilly regulated by the
7 State of Washington. Another case that I've cited
8 is State vs. Ambro, 123 P.3d 710, and holds the
9 same way. State vs. Madsen, which is a new case
10 that I did not cite, 760 N.W.2d 320, South Dakota,
11 2009, applies, Fourth Amendments to search and
12 seizure. We cited a State vs. Lasley case in Part
13 II of the brief, pages three to five; and it holds
14 that cigarette tax laws are civil and regulatory
15 and not criminally -- criminal/prohibitory.

16 And then I, mainly for history, cite the
17 Mohegan case, 266 years ago, which gives the
18 history of demarcation. The English courts held
19 that the colonies did not have control of the
20 resident Indians, and that was reserved to the
21 crown; and that's, of course, the present day.
22 It's been shown that the control of Indian people
23 is in the federal government.

24 At pages 9 to 12 and Part III, we rebut all
25 the prior cases involved in Comenout that the

1 State has argued and really the -- when it comes
2 to whether or not the cigarette tax of Washington
3 applies, the Chickasaw case at 508 U.S. 114 says
4 that if taxes are directly on the Indians, state
5 cigarette or gas taxes, they are void as to
6 those -- as to that Indian person; so I'd submit
7 to the Court that there's three reasons this case
8 should not be in this court and urge the Court to
9 dismiss all three counts as to my client.

10 THE COURT: Gentlemen, do you wish to
11 concur?

12 MR. LOWE: Your Honor, I'm going to attempt
13 to do the reply argument after Mr. Moore.

14 THE COURT: All right. And, Counsel,
15 your --

16 MR. BROWN: Just briefly, Your Honor. I'm
17 going to speak, primarily, to Robert, Junior's,
18 situation.

19 THE COURT: Okay.

20 DEFENDANT ROBERT COMENOUT, JUNIOR'S, ORAL ARGUMENT

21 MR. BROWN: I would incorporate and ask the
22 Court to accept what Mr. Kovacevich has argued. I
23 think that he's correct and has articulated quite
24 fully his brief of the standard as it applies to
25 all three; but with respect to Robert, Junior, a

1 distinction can be made in that with all the
2 surveillance that was used in the probable cause
3 in this case and everything else, there's no
4 showing that Robert, Junior, was involved. He's
5 not an owner or a manager of the business. He's
6 related to the other two defendants. There's no
7 dispute of that. He is enrolled -- there's a
8 decision. He's enrolled with the Yakima Nation
9 rather than the Quinault Tribe; but in addition,
10 he's an employee of the operations. Specifically,
11 he works as a janitor, maintenance person. He's
12 not engaged or involved in the sale of the
13 cigarettes in any way or the operations.

14 To the extent that the Court finds it's
15 not -- that that's not a sufficient basis to
16 dismiss him, I would argue that the arguments made
17 by Mr. Kovacevich, both here and in his brief,
18 apply to Mr. Comenout; although, I feel quite
19 strongly that given his status as an employee of
20 the operation that it's not appropriate for him to
21 have been named in the complaint at all; and I
22 would, also, argue that the distinctions and the
23 acknowledgments by the State that this is trust
24 land does not, as the State has argued, separate
25 it or somehow make it distinct from reservation

1 land. It's in the relevant case law. It's one
2 and the same, as if this was inside the
3 reservation. This was a business practice that,
4 as Mr. Kovacevich has indicated, is governed by
5 the operations of and oversight responsibilities
6 of the Quinault Tribe, not the State of
7 Washington; and to the extent that it's not
8 appropriate or that the Quinault Tribe is not
9 interested, the extent that there is a concern,
10 then it's within the federal court's jurisdiction
11 and the Bureau of Indian Affairs from the
12 Department of Interior to assume responsibility
13 for that. Thank you.

14 THE COURT: Response, then.

15 PLAINTIFF'S ORAL ARGUMENT

16 MR. MOORE: Thank you, Your Honor. For the
17 record, Tom Moore, representing the State. First
18 of all, I'm going to say Cooper is good law.
19 Cooper is a Washington Supreme Court decision.
20 It's at 130 Wn.2d 770, 928 P.2d 406. It's a 1996
21 decision; and in Cooper, they talked about RCW
22 37.12.010. That RCW was passed in 1963. That RCW
23 gave -- the State of Washington took -- actually,
24 the State of Washington took jurisdiction over all
25 Indian lands outside of the reservation and even

1 some Indian lands inside of the reservation; and
2 that was pursuant to Public Law 280 which was
3 passed in 1953. That was a federal law that gave
4 Washington permission to take jurisdiction if they
5 wished, which they did in 1963; and that RCW,
6 37.12.010, was reviewed by the United States
7 Supreme Court in 1979; and the Supreme Court found
8 that RCW 37.12.010, in fact, gave the State of
9 Washington jurisdiction, that that was what was
10 needed to get jurisdiction. That was all that was
11 needed. It was a passage by the Legislature of
12 some law taking jurisdiction. They did not need
13 to amend their constitution; and State vs. Pink, a
14 Division Two decision, would not overturn Cooper
15 in any case. Pink can be distinguished in any
16 case because Pink happened inside the Quinault
17 reservation. It was a road going through the
18 Quinault reservation. They had granted an
19 easement rather than selling the land outright; so
20 the Court found that since it was an easement, it
21 was inside the reservation. It was still Indian
22 land. That is the jurisdictional argument. The
23 State does have jurisdiction pursuant to Cooper
24 and RCW 37.12.010.

25 The Compact argument the State finds a

1 little bit disingenuous since the Comenouts have
2 never availed themselves of the Compact. They're
3 not licensed. If they had a license, they'd bring
4 it in. They have no contract. They did not stamp
5 their cigarettes. We seized 37,000 cartons of
6 cigarettes with no stamps, with no Quinault stamps
7 on any of them.

8 They have no contract with the Quinaults.
9 The Quinaults cannot enforce a contract that the
10 Comenouts are not a member of. The Washington
11 State Liquor Control Board can -- and, in fact,
12 the Compact gives the Liquor Control Board the
13 authority to enforce activities under RCW 82.24
14 which is the cigarette excise tax.

15 An Indian retailer has to be licensed in
16 Indian country, as defined by Counsel, except he
17 left out the last part, has provided -- except as
18 provided by law; and the State of Washington has
19 passed a law. They passed RCW 37.12.010 to take
20 jurisdiction over all lands outside of the
21 reservation, so they cannot avail themselves of
22 the Compact.

23 Lastly, I believe that Counsel is arguing
24 that somehow, federal law preempts state law; and
25 there's several decisions on that, one of which he

1 talked about was U.S. vs. Fiander, which is 401
2 F.2d 1136. It's 2005. Basically, the federal
3 system -- they have a Contraband Cigarette
4 Trafficking Act. The Contraband Cigarette
5 Trafficking Act uses state law in order to
6 determine what's contraband, and they use
7 Washington law. They cite to Washington law
8 continually. In Fiander, there was a decision
9 that the Yakimas must notify of a delivery. This
10 was in response to Smiskin, which is another
11 federal decision that's at 487 F.3d 1260. It's a
12 9th Circuit in 2007. In Smiskin, they found that
13 the Yakima Treaty, the right to travel in that
14 treaty, gave the Yakimas authority not to notify
15 the State. That's all. They didn't have to
16 notify the State of transportation. They did have
17 to notify it upon delivery which is what Fiander
18 held.

19 There's, also -- Counsel talked about U.S.
20 vs. Baker, also, and that -- and it's a 9th
21 Circuit decision in 1995. It's 63 F.3d 1478; and
22 that found that Washington excise tax applies to
23 Indians, didn't violate equal protection; and
24 possession of unstamped cigarettes violates the
25 law.

1 That -- I would give one response to
2 Mr. Brown's argument that Robert Comenout, Junior,
3 should be dismissed out of this. The State
4 charged this as an accomplice. They charged this
5 under an accomplice theory. There's accomplice
6 language in our charging Information. I believe
7 that that's a decision left to the jury; so for
8 those reasons, the State's asking this Court to
9 reject their motion to dismiss at this time.

10 Thank you.

11 THE COURT: Response, Counsel?

12 DEFENDANT ROBERT COMENOUT, SENIOR'S, ORAL ARGUMENT

13 MR. LOWE: Your Honor, Aaron Lowe for
14 Mr. Robert Comenout, Senior. Like Mr. Brown, I'm
15 going to distinguish a little bit on the facts for
16 Mr. Robert Comenout, Senior, because he's
17 different than the other two. He was an employee.
18 He is a part owner of this property, the land,
19 itself, in that there are, I think, 20 some
20 fractional members over the years after this
21 property had gone through various probates through
22 the BIA system where there's a number of
23 family-related people that own a fractional
24 interest in the real estate itself. It's held in
25 trust.

1 I really don't quite understand the
2 Government's argument with regards to the number
3 of different issues. First of all, in order to
4 accept the Government's view of what the
5 Compact -- how it acts, you have to, essentially,
6 add language to the reading of the Compact. You
7 have to add words that are not there, and these --
8 the Compact has to be read, at least at this stage
9 of the proceedings, in favor of the defendant in
10 terms of how broad it is, or how broad it is not,
11 or how narrow it is; and as stated within the
12 Compact, there's no question -- and I didn't hear
13 anything out of the Government's arguments -- I
14 think it's all admitted that this property is held
15 in trust which raises some interesting issues.
16 Essentially, what -- if the Court did not dismiss
17 this, the ruling would, then, have the effect if
18 there was a similar sort of Quinault member on the
19 reservation -- because it's, essentially, the same
20 property or same type of trust property being held
21 on the Quinault Tribe or on the Quinault
22 reservation. If there was a similar sort of
23 person -- tribal member there, this Court would,
24 then, say, yes, that county could, then, go
25 primitively against that person, you know, under a

1 similar factual situation which there's nothing
2 within the case law that says anybody has that
3 ability; and I was a little bit confused about the
4 federal statute, the Indian cigarette authority or
5 taxing issue. I've had that issue for 20 plus
6 years in various federal courts, primarily across
7 the northwest, but the key is: It's a federal
8 statute that's being charged in federal court. We
9 would agree with the State. If we were there,
10 that statute would apply; and that's, essentially,
11 what we're saying here. This should be in federal
12 court. They're, primarily, in federal court.
13 Once in a while, they're in a state tribal court;
14 but this court, with all due respect to Your
15 Honor, has no jurisdiction and should be
16 dismissed, basically, on jurisdictional grounds.

17 So to repeat myself, Your Honor, there is
18 no question this is trust ground. The State
19 doesn't even argue or attempt to argue that it's
20 not trust ground. The next question in the
21 analysis is: What's the language of the Compact,
22 and how does it apply? The Compact, basically,
23 says it is the entire -- the Quinault Tribe is the
24 entire authority to control the tax and its
25 members of retail cigarettes. There's no other

1 language there. It doesn't say but for -- you
2 know, except for trust ground outside of the
3 reservation, it doesn't say but for if you get a
4 license. It doesn't say anything like the
5 language that the Government wants here. You have
6 to add in all that language before it, really,
7 does not apply; and as stated in Mr. Kovacevich's
8 reply brief on page five, there's no question in
9 Part III, pages 6 of 19, that says the Compact
10 must be enforced by the Quinault Tribe. That's
11 the language. There's no way around that.

12 Your Honor, and finally with regards to
13 Pink, I think, you know, that there's -- if you
14 look at the history of this thing, it's kind of
15 been -- primarily over the last 20 years, there's
16 been a lot of case authority cited across the
17 United States with regards to taxation of Indians
18 on trust property or trust ground. The great
19 majority of that comes from federal court. Why?
20 Because that's where the jurisdiction law is; and
21 Pink, basically, says that; and Pink, basically,
22 says if it's occurring on trust or allotted land,
23 that's where you're supposed to be.

24 And that's all I have, Your Honor.
25 Mr. Kovacevich or Mr. Brown might have something

1 differently.

2 THE COURT: Anything else, gentlemen?

3 MR. KOVACEVICH: I don't think I can add
4 anything, Your Honor.

5 MR. BROWN: I have nothing further.

6 THE COURT'S RULING

7 THE COURT: All right. Well, when I was
8 reading through all of this yesterday -- and I did
9 read through the Compact. That seems to be the
10 governing document; and when you read through the
11 preambles to the Compact, it talks about two
12 sovereign entities. One is the Quinault Nation,
13 and the other is the State of Washington; and both
14 of those entities, realizing that the taxing vice,
15 in this case cigarettes, can generate a great deal
16 of money -- and neither the Quinault Nation nor
17 the State of Washington want to see cigarettes
18 going anywhere without somebody, one or the other
19 of them, getting those cigarettes properly taxed
20 so that they have revenue; and in fact, it talks
21 about the fact that the Quinault Nation, this is a
22 way to generate money; and what we have is 37,000
23 cartons of cigarettes which are unstamped either
24 by the Quinault Nation or by the State of
25 Washington; and at this point in time, the

1 Comenouts are not sovereign entities in and of
2 themselves.

3 Now, I grant you there is, certainly, an
4 argument to be made that the Quinault Nation could
5 assume jurisdiction in this since it's,
6 apparently, being deprived of substantial revenue
7 by the Comenouts; and granted, their land is
8 Indian country in the definition of this contract;
9 but the Quinault Nation, also, deferred in that
10 compact to allow the State to monitor and regulate
11 sales; and the Tribe, also, guaranteed that all
12 tribal retailers will have proper licenses from
13 the Tribe, which, apparently, the Comenouts do not
14 have and that all stamps are going to have either
15 a Washington State Tribal Compact stamp or a
16 Quinault Nation tax stamp; so at this point, I'm
17 going to deny the motions to dismiss; and if the
18 Quinault Nation decides it wants to exert
19 jurisdiction in this matter, then it may be
20 appropriate, at that time, to dismiss if they file
21 criminal charges regarding their lack and loss of
22 revenue since, you know, they are a government;
23 and they want their money so that they can support
24 tribal programs, and one of the ways they do it is
25 by taxing cigarettes; so they've got to pay

1 somebody, rendering onto Caesar that which is
2 Caesar. You've got two Caesars. You've either
3 got the State of Washington, or you've got the
4 Quinault Nation; but you don't have the Comenouts,
5 in and of themselves; so at the moment, I haven't
6 seen anything that indicates that the Tribe wishes
7 to exert jurisdiction in this matter; but they do
8 have a valid argument that the Comenouts are
9 stealing money from the Tribe by not having their
10 cigarettes properly licensed; so if the Quinault
11 Nation wants to exert jurisdiction and file a case
12 in the tribal courts, then I'll dismiss this one;
13 but until they do so, then it's going to continue
14 to pend here because, apparently, the tribal tax
15 is the same as the State of Washington's tax on
16 these valuable little items; and it sounds like a
17 sizable amount of money that should have been paid
18 by the Comenouts to either the Quinault Nation or
19 the State of Washington. Anything else?

20 MR. MOORE: Thank you, Your Honor. The
21 State will prepare findings and conclusions.

22 THE COURT: All right. If you could go
23 ahead and circulate those.

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

25 THE COURT: Sir?

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

3 THE COURT: Yes, I am.

4 MR. LOWE: Okay.

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

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

22 THE COURT: All right. Court will be at
23 recess.

24 MR. KOVACEVICH: Thank you, Your Honor.

25 (Proceedings concluded.)

1
2 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
3 IN AND FOR THE COUNTY OF PIERCE

4 STATE OF WASHINGTON,)
5)
6 Plaintiff,)
7) No. 08-1-04681-0
8 vs.)
9)
10 EDWARD AMOS COMENOUT,)
11)
12 Defendant.)

13
14 REPORTER'S CERTIFICATE
15

16 STATE OF WASHINGTON)
17) ss.
18 COUNTY OF PIERCE)

19 I, Kimberly A. O'Neill, Court Reporter in
20 the state of Washington, county of Pierce, do
21 hereby certify that the foregoing transcript is a
22 full, true, and accurate transcript of the
23 proceedings and testimony taken in the matter of
24 the above-entitled cause.
25

DATED this 24th day of June, 2009.

23 _____
24 KIMBERLY A. O'NEILL, CCR
25 License No. 1954