

NO. 79359-0

**THE SUPREME COURT
STATE OF WASHINGTON**

HOLLY M. FOXWORTHY, Appellant

vs.

PUYALLUP TRIBE OF INDIANS ASSOCIATION d/b/a
EMERALD QUEEN CASINO, et al., Respondent

APPELLANT'S BRIEF

CAROL J. COOPER, WSBA #26791
RICHARD H. BENEDETTI, WSBA#6380
Attorneys for Appellant
DAVIES PEARSON, P.C.
P.O. Box 1657
920 Fawcett Avenue
Tacoma, WA 98402
(253) 620-1500

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded that Congress did not abrogate tribal immunity from dram shop liability lawsuits when it authorized the sale of liquor in Indian country only if in conformance with state law.

2. The trial court erred when it granted the Puyallup Tribe's motion to dismiss based upon lack of subject matter jurisdiction.

II. STATEMENT OF THE ISSUES

1. Did Congress abrogate tribal immunity from dram shop liability lawsuits when it authorized the sale of liquor in Indian country only if in compliance with state law?

2. Did the trial court err when it granted the Puyallup Tribe's Motion to Dismiss?

III. STATEMENT OF THE CASE

Pursuant to federal statutes, it is a criminal offense to sell liquor of any kind on Indian land absent compliance with the laws of the State in which the transaction occurs. *See* 18 U.S.C. § 1154 and § 1161.¹ On December 24, 1996, the Emerald Queen Casino first obtained a Washington State liquor license so that it could lawfully sell liquor on the Puyallup Indian Reservation. Since then, the Casino has regularly renewed its Washington State liquor license. CP 54-62. As the holder of a Washington State liquor license, the Casino is subject to RCW 66.44.200(1) which prohibits the sale of liquor to

any person “apparently under the influence of liquor.”

According to liquor licensing documents produced by the Casino in discovery, there have been multiple complaints against the Casino related to the sale of liquor to apparently intoxicated persons. CP 64-69. In September of 2002, there was an alcohol-related incident at the Casino involving the defendant William Dewalt. The incident resulted in the tribal police arresting Mr. Dewalt and the Casino permanently barring him from its premises. CP 71-73.

Despite this incident, Mr. Dewalt went to a birthday party at the Emerald Queen Casino on the evening of March 15, 2003. Mr. DeWalt’s cousin, Malea A. Hartman, and her friend Marie Estroveto-Hoskins, were among the individuals who attended the birthday party at the Casino. Mr. Dewalt admitted to police investigators that he drank beer while at the Casino on the evening of March 15, 2003, or early morning of March 16, 2003. Ms. Hartman and Ms. Estroveto-Hoskins also reported to police investigators that they observed Mr. Dewalt drink beer while at the Casino. CP 75-93. The amount of beer that Mr. Dewalt actually consumed while at the Casino is not known at this time. Discovery in this case, however, has only just begun.

Mr. Dewalt left the Casino sometime between approximately 1:30 and

¹ Copies of the pertinent statutes are attached for the court’s reference as Appendix A.

2:00 a.m. on March 16, 2003. According to his criminal defense attorney's argument at his sentencing hearing, the Casino ejected an intoxicated Mr. Dewalt from the Casino based upon his behavior there.² *See* CP 104. Mr. Dewalt left the Casino in his vehicle and within minutes entered State Route 705 traveling southbound in the northbound lanes. At the same time, Ms. Foxworthy was traveling northbound in the northbound lanes of State Route 705.

Although Ms. Foxworthy attempted to avoid a collision, she was unable to do so. According to multiple witnesses at the scene of the accident, Mr. Dewalt did not have his headlights activated and was extremely intoxicated with a strong smell of alcohol. *See* CP 75 to 93. Ms. Foxworthy and her passenger Kerry Woodward, as well as Mr. Dewalt, were all transported by ambulance to a hospital. While at St. Joseph's Hospital, Mr. Dewalt's blood sample was taken and analyzed at approximately 4:10 a.m. His blood alcohol level was .16g/100ml, which is twice the legal limit in Washington. CP 111-113. Mr. Dewalt was charged and convicted of vehicular assault as a result of the accident.

On March 10, 2006, Ms. Foxworthy filed a complaint against Mr. DeWalt and against the Casino, alleging, among other things, that the Casino

² Discovery in this case has only begun and, thus, plaintiff has not yet had the opportunity to investigate this statement by defense counsel.

violated RCW 66.44.200(1). CP 1-10. The Casino filed a motion to dismiss for lack of subject matter jurisdiction. CP 11-20. The trial court granted the Casino's motion and entered findings pursuant to RAP 2.2(d) that there was no just reason to delay an appeal of its decision. CP 301-302, RP 28-31.

In granting the Casino's motion, the Honorable Judge Susan Keers Serko recognized that the issue presented in the Casino's summary judgment motion ultimately would be determined by a higher court. RP 27. Judge Serko, nonetheless, voiced her agreement with the policy arguments of Ms. Foxworthy stating as follows:

Something that's clear to everyone in the courtroom is that mine will not be the final word on this case. I struggled with this as I went through it and I will tell you quite frankly that the policy arguments made by the plaintiff are extremely persuasive. There is a quote from - - I think it's Filer, but it comes out of Kiowa Tribe, it says, In this economic context, immunity can harm those who are unaware that they are dealing with a Tribe. I might add to that even if they know they're dealing with a tribe, who do not know of tribal immunity or have no choice in the matter as in the case of tort victims.

And then the plaintiff goes on to suggest what the State clearly does have, which is they could deprive the Tribe of all revenue from alcohol sales which would be a far greater financial impact upon a Tribe than subjecting Tribes to potential civil liability in a dram shop lawsuit. I mean, these are all things that I highlighted as I went through. I definitely follow these policies and think that they are accurate. Interpreting 1161 as authorizing state courts to exercise civil jurisdiction over dram shop liability lawsuits involving tribal entities is less intrusive

on tribal self-government than criminal prosecution of tribal members in state courts or state regulatory actions.

I think I agree with everyone of those statements; however, I don't think it is my position to make the waiver, and I think that's indeed what I would be doing. I think it's up to Congress to do that. I don't think that a state trial court can infer a waiver in this case, and so I'm going to decline to do so even though I agree with most of the policy arguments made by the plaintiff. So for that reason, I'm going to grant the dismissal.

IV. ARGUMENT

A. STANDARD OF REVIEW

The issue of whether the trial court has subject matter jurisdiction to hear and decide this case is a pure question of law. *See Schoonover v. State*, 116 Wn. App. 171, 177, 64 P.2d 677 (2003); *Bour v. Johnson*, 80 Wn. App. 643, 647, 910 P.2d 548 (1996). Thus, for purposes of this appeal, this Court need not consider whether or not plaintiff presented sufficient admissible evidence to make out a prima facie case of dram shop liability against the Casino. Nor did the Casino base its motion to dismiss upon the lack of substantive evidence.

In any event, to the extent this Court considers the sufficiency of the substantive evidence, it should apply the same standard that the trial court was required to apply to a CR 12(b)6 motion to dismiss. In other words, dismissal of the claim based upon the substantive evidence was appropriate

only if there is no conceivable set of facts consistent with the complaint, that would entitle the plaintiff to relief. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn. 2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). Obviously, this is not the case here, and therefore, this appeal should focus solely upon the issue of whether or not Congress abrogated tribal sovereign immunity from dram shop liability lawsuits when it enacted 18 U.S.C. § 1161.

**B. CONGRESS ABROGATED TRIBAL IMMUNITY FROM
DRAM SHOP LIABILITY WHEN IT AUTHORIZED THE
SALE OF LIQUOR IN INDIAN COUNTRY ONLY IF IN
COMPLIANCE WITH STATE LAW**

**1. Congress Has Plenary Authority to Limit, Modify, or
Eliminate a Tribe's Power of Local Self-Government**

“Indian tribes are ‘distinct, independent, political communities, retaining their original natural rights’ *in matters of local self-government.*” *Santa Clara Pueblo et al., v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1675, 56 L. Ed.2d 106 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832)) (emphasis added). “Although no longer ‘possessed of the full attributes of sovereignty,’ they remain ‘a separate people, with the power of regulating their *internal and social relations.*’” *Martinez*, 436 U.S. at 56, 98 S.Ct. at 1675, (quoting *United States v. Kagama*, 118 U.S. 375, 381-382, 6 S.Ct. 1109, 1112-1113, 30 L.Ed.2d 228 (1886)) (emphasis added). They have

the power to make their own substantive law in *internal matters*, and to enforce that law in their own forums. *Martinez*, 436 U.S. at 56.

Congress, however, has plenary authority to limit, modify, or eliminate the power of self government which the tribes otherwise possess. *Martinez*, 436 U.S. at 56, 98 S.Ct. at 1675, (citing *Kagama*, 18 U.S. at 379-381, 6 S.Ct. at 1111-1114). “The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and *is subject to complete defeasance*.” *Rice v. Rehner*, 463 U.S. 713, 719, 103 S.Ct. 3291, 3296, 77 L.Ed.2d 961 (1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1986, 55 L.Ed.2d 303 (1978)) (emphasis added).

“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Martinez*, 436 U.S. at 58 (citing *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L. Ed.2d 291 (1919)). “This aspect of tribal sovereignty, *like all others, is subject to the superior and plenary control of Congress*.” *Martinez*, 436 U.S. at 58 (emphasis added). Thus, Indian tribes are subject to suit in state court if there is a clear waiver by the tribe *or if Congress abrogated the immunity of the tribe*. *Okla. Tax Comm’n v. Citizen Bank Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112

L.Ed.2d 1112, 1119 (1991) (emphasis added.)

2. Congress Has to a Substantial Degree Abrogated Tribal Sovereign Immunity with Respect to State Laws

“Congress has to a substantial degree opened the doors of reservations to state laws, . . .” *Organized Village of Kake v. Egan*, 369 U.S. 60, 74, 82 S.Ct 562, 570, 7 L. Ed.2d 573 (1952). State laws may be applied on Indian reservations “unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 35 L. Ed.2d 114 (1973).

Recent cases have established a “trend. . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance upon federal preemption analysis.” *Rice*, 463 U.S. at 718, 103 S.Ct. at 3295 (citing *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172, 93 S.Ct. 1257, 1262, 36 L. Ed.2d 129 (1973)). The goal of federal pre-emption inquiry is to determine the Congressional plan. *Rice*, 463 U.S. at 718, 103 S.Ct. at 3295 (citing *Pennsylvania v. Nelson*, 350 U.S. 497, 504, 76 S.Ct. 477, 481, 100 L. Ed.640 (1956)). The role of tribal sovereignty in pre-emption analysis varies in accordance with the particular “notions of sovereignty that have developed from historical traditions of tribal independence.” *Rice*, 463

U.S. at 719 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980)).

In conducting a federal preemption inquiry, the Supreme Court does not require that Congress *explicitly* pre-empt assertion of state authority. Rather, the Supreme Court recognizes that “any applicable regulatory interest of the State must be given weight” and “automatic exemptions” are unusual. *Rice*, 463 U.S. at 719, 103 S.Ct. at 3296 (quoting *Bracker*, 448 U.S. at 144, 1005 S.Ct. at 2584)).

3. **By Enacting 18 U.S.C. § 1161, Congress Authorized States to Regulate the Licensing and Distribution of Liquor on Tribal Lands**

In the 1983 case of *Rice v. Rehner*, the Supreme Court held that an *explicit* Congressional waiver of tribal sovereign immunity was not necessary to conclude that Congress authorized states to regulate the licensing and distribution of alcohol on tribal lands. Although 18 U.S.C. § 1161 contains no *express* waiver of tribal sovereign immunity, the Supreme Court concluded that it could *infer* such a Congressional intent because of the absence of a tradition of tribal self-determination in this narrow area and because of the strong interest of states in regulating alcohol on reservations.

In deciding this issue, the Supreme Court acknowledged that historical traditions of tribal independence reflect the accommodation between the

interests of tribes and the federal government on one hand, and those of the states on the other. *Rice*, 463 U.S. at 719, 103 S.Ct. at 3296 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L. Ed.2d 10 (1980)). When these traditions recognize sovereign immunity in favor of the Indians in some respect, the Supreme Court is reluctant to infer that Congress has authorized the assertion of state authority in that respect “except where Congress has expressly provided that State laws shall apply.” *Rice*, 463 U.S. at 719, 103 S.Ct. at 3296 (citing *McClanahan*, 411 U.S. at 1711). Repeal by implication of an *established tradition of immunity or self-government* is disfavored. *Rice*, 463 U.S. at 720, 103 S.Ct. at 3296 (citing *Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2113, 48 L. Ed.2d 710 (1976)).

If the Supreme Court, however, does not find a tradition of tribal independence, or if the Court determines that the balance of state, federal, and tribal interests so requires, the pre-emption analysis accords less weight to tribal sovereignty. *Rice*, 463 U.S. at 720 (citing *Confederated Tribes*, 447 U.S. at 154-159, 100 S.Ct. at 2081-2082, 2084, 103 S.Ct. at 3296). In the area of liquor licensing and distribution, there is no history or tradition of tribal independence whatsoever. In fact, the Supreme Court has characterized this area “as one of the most comprehensive [federal] activities in Indian

affairs . . .” *Rice*, 463 U.S. at 722, 103 S.Ct. at 3297.

“The colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802.” *Rice*, 436 U.S. at 722, 103 S.Ct. at 3297. “Congress imposed *complete* prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinance.” *Rice*, 436 U.S. at 722, 103 S.Ct. at 3297.

In Indian matters, Congress usually acts “upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.” *Rice*, 436 U.S. at 723 (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959)). *But this assumption does not apply in the narrow context of liquor regulation.* “In addition to the congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose regulations related to liquor transactions.” *Rice*, 436 U.S. at 723, 103 S.Ct. at 3298. The historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country is justified by the relevant state interests involved. *Rice*, 436 U.S. at 724, 103 S.Ct. at 3298 (citing *Confederated Tribes*, 447 U.S. at 156, 100 S.Ct. at 2082-2083).

4. **State Laws Prohibiting the Over Service of Alcohol Fall
Within Congress' Abrogation of Tribal Immunity**

The question of whether or not Washington's dram shop law falls within the implied Congressional abrogation of tribal immunity is an issue of first impression in Washington. State courts of appeal in Texas and Arizona have correctly held that these states' dram shop laws fall within the Congressional waiver of immunity implied by 18 U.S.C. § 1161.³ See, *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Ct. App of Tex. 1997) and *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (2006).

In the *Holguin* case, the Texas Court of Appeals recognized that in *Rice*, the Supreme Court determined that "no *explicit* waiver of [tribal] immunity was necessary for specific instances of state alcohol laws to conclude that Congress has allowed for state regulation of the use and distribution of alcohol." *Holguin*, 954 S.W.2d at 849 (emphasis added). The *Holguin* court also recognized that, in *Rice*, the Supreme Court "repudiated the theory that 18 U.S.C. § 1161 confers the 'right' of alcohol regulation on the states without conferring the 'remedy' of enforcement." *Holguin*, 954 S.W.2d at 850.

³ Based upon plaintiff's research, these appear to be the only two state appellate courts that have addressed this issue in a published opinion.

As the *Holguin* court stated, “[w]ith respect to alcohol policy, the Supreme Court has concluded that Indian tribes are preempted from asserting a regulatory interest. It is difficult to imagine a stronger expression of the states’ control over alcohol policy, or a stronger expression of the waiver of tribal immunity.” *Holguin*, 954 S.W.2d at 850. Accordingly, the *Holguin* court concluded that the dram shop liability law of Texas falls within this implied waiver of tribal sovereign immunity. *Holguin*, 954 S.W.2d at 854. Similarly, the *Filer* court concluded that the dram shop liability law of Arizona falls within the permissible scope of regulation by the State of Arizona. *Filer*, 129 P.3d at 82. Washington courts should follow this precedent and hold that RCW 66.44.200 also falls within Congress’ implied waiver of tribal immunity with respect to state regulation of liquor licensing and distribution.

5. The *Filer* and *Holguin* Cases Wrongly Decided that a State’s Interest in Enforcing Laws Prohibiting the Over Service of Alcohol Does Not Extend to State Court Jurisdiction Over Private Lawsuits for Money Damages

The *Holguin* court recognized that states have the authority to enforce laws that regulate alcohol on Indian reservations; but, it concluded that a state’s interest in enforcing such laws does not extend to state court

jurisdiction over private lawsuits for money damages. Its rationale was twofold: (1) “federal courts have not resolved whether actions for money damages brought to enforce alcohol-related laws fall within the waiver of immunity described by the United States Supreme Court in *Rice v. Rehner*,” and (2) “the police power of the state cannot be delegated to private persons.” *Holguin*, 954 S.W.2d at 854.

The *Filer* court also concluded that tribal sovereign immunity bars a private lawsuit as a means of enforcing Arizona’s dram shop liability law. It essentially relied upon the same rationale as the *Holguin* court, as well as the Supreme Court’s 1998 decision in *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S.Ct. 1700, 1703, 140 L. Ed.2d 981, 986 (1998). The *Filer* court did acknowledge, however, that its decision was a “close one” and hastened to add that its conclusion was “arguably . . . divorced from the realities of the modern world, in which on-reservation . . . alcohol sales have become commonplace.” *Filer*, 129 P.3d at 79, 84.

Because the Supreme Court in *Kiowa Tribe* chose to defer to Congress to abrogate tribal immunity in a *commercial* case, the *Filer* court felt constrained to do the same. *Filer*, 129 P.3d at 85. The *Filer* court’s reliance on *Kiowa Tribe*, however, is misplaced because *Kiowa Tribe* did not involve a personal injury lawsuit case, much less a case involving over service of

alcohol. For the reasons discussed below, this court, should not follow either the Texas or the Arizona courts of appeal on this particular issue.

The rationale adopted by the *Holguin* and *Filer* courts is not consistent with the pronouncements of the United States Supreme Court in *Rice v. Rehner* and *Kiowa Tribe*, or by the Ninth Circuit in *Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (1994).

6. ***Kiowa Tribe* Supports the Conclusion that Congress Intended to Waive Tribal Sovereign Immunity for Dram Shop Liability Lawsuits**

The *Kiowa Tribe* case involved a private company's lawsuit against a tribal entity to enforce a promissory note. According to the company, the tribe executed and delivered the note beyond the tribe's land, and the note obligated the tribe to make its payments beyond the tribe's lands. The company alleged that the tribe was subject to suit for breaches of contract involving off-reservation commercial conduct. The Supreme Court disagreed holding that "[t]ribes enjoy immunity from suits *on contracts*, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe*, 523 U.S. at 760, 118 S.Ct. at 1705. In so holding, the Supreme Court relied upon the fact that Congress had not abrogated tribal immunity as an "overarching rule."

The Supreme Court acknowledged, however, that the doctrine of tribal immunity “developed almost by accident” and did not originate in a reasoned statement of doctrine. *Kiowa Tribe*, 523 U.S. at 756-757, 118 S.Ct. at 1703-1704. In fact, the Supreme court commented that the case in which the doctrine originated provided no more than “a slender reed” of support for the doctrine. *Kiowa Tribe*, 523 U.S. at 757, 118 S.Ct. at 1704. The Court further recognized that although *Congress* can alter the bounds of tribal immunity through explicit legislation, the *Court* “has taken the lead in drawing the bounds of tribal immunity.” *Kiowa Tribe*, 523 U.S. at 759, 118 S.Ct. at 1705. The Supreme Court further stated:

There are reasons to doubt the wisdom of perpetuating the [tribal immunity] doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. That is evident when tribes take part in the Nation’s commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians ***In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or have no choice in the matter, as in the case of tort victims.***

Kiowa Tribe, 523 U.S. at 758, 118 S.Ct. at 1704 (emphasis added).

In *Kiowa Tribe*, ***unlike here***, there was no federal statute at issue from which the Supreme Court could infer that Congress intended to abrogate

immunity in a specific narrow area like alcohol regulation. Additionally, the *Kiowa Tribe* case involved a breach of contract action, which does not implicate the public safety concerns involved in a dram shop liability case. Thus, it is understandable why the Court did not accept the private company's invitation to confine immunity to transactions or activities involving solely on-reservation conduct. The above-quoted language of the *Kiowa Tribe* decision does, however, support the conclusion that the Casino is not immune from dram shop liability because Congress expressly authorized the sale of liquor in Indian country *only if in compliance with state law*, and Congress has pre-empted all tribal regulation in this area. *See Rice*, 463 U.S. at 719-722, 103 S.Ct. at 3296-3298.

Not only does the 6-3 majority opinion in *Kiowa Tribe* fail to support a finding a immunity in *this* case, the dissenting opinion is noteworthy as well. Justice Stevens, writing for the dissent with Justices Thomas and Ginsburg joining, states as follows:

[W]e have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quote wrong for the court to suggest that it is merely following precedent, for *we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the tribe's land or its sovereign*

*functions.*⁴

523 U.S. at 764; 118 S.Ct. at 1707. The dissent further stated:

...

In the absence of any congressional statute or treaty defining the Indian tribes' sovereign immunity, the creation of a federal common-law "default" rule of immunity might in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to Congress or exercising "caution" . . . rather, it is creating law. The Court fails to identify federal interests supporting its extension of sovereign immunity—indeed, it all but concedes that the present doctrine lacks such justification, . . . and completely ignores the State's interests. Its opinion is thus a far cry from the 'comprehensive pre-emption inquiry in the Indian context' described in *Three Affiliated Tribes*⁵ that calls for the examination of 'not only the congressional plan, but also the nature of the state, federal, and tribal interests at stake. . . . (citations omitted).

Second, the rule is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations? As a matter of national policy, the United States has waived its immunity from tort liability and from liability arising out of its commercial activities. . . . Congress has also decided in the Foreign Sovereign Immunities Act of 1976 that foreign states may be sued in federal and state courts for claims based upon commercial activities carried on in the United States, or such activities elsewhere that have a "direct effect in the United States." . . . And a State may be sued in the courts of another State. . . .(citations omitted).

⁴ Here, Ms. Foxworthy's lawsuit against the Casino has no meaningful nexus to the tribe's land or its sovereign functions.

⁵ *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed. 2d 881 (1986).

...
Third, the rule is unjust. *This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity*; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.

Kiowa Tribe, 523 U.S. at 765, 118 S.Ct. at 1708 (dissenting op.).

Not only is the *Kiowa Tribe* case distinguishable on its facts, both the majority and dissenting opinions indicate the Supreme Court's likely position if and when the issue before this court reaches it. As noted above, the majority opinion casts doubt on the wisdom of perpetuating the doctrine, particularly in the context where a tribal entity engages in commerce with far-reaching effects upon individuals like Ms. Foxworthy who "have no choice in the matter." See *Kiowa Tribe*, 523 U.S. at 758, 118 S.Ct. at 1704.

In any event, Ms. Foxworthy's position here is not that tribal immunity should be abrogated as an "overarching rule", but rather that, by enacting 18 U.S.C. §1161, Congress indicated its intent to abrogate tribal immunity for civil lawsuits brought to enforce state laws prohibiting the over service of alcohol.

7. ***Fort Belknap* Supports the Conclusion that Congress Intended to Waive Sovereign Immunity for Dram Shop Liability Lawsuits**

State courts *generally* have *no* criminal jurisdiction over Indians for criminal acts committed on Indian reservations. *Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428, 436 (1994). In a 1994 case of first impression, the Ninth Circuit held, however, that pursuant to 18 U.S.C. § 1161, Congress granted state courts criminal jurisdiction over Indians for violations of state liquor regulations.⁶ *Fort Belknap*, 43 F.3d at 432. In so holding, the Ninth Circuit stated: “All the reasoning of *Rice* indicates that states should have concurrent jurisdiction to bring criminal prosecutions in this *narrow context*.” *Fort Belknap*, 43 F.3d at 434 (emphasis added).

The Ninth Circuit acknowledged that giving states criminal jurisdiction would “concededly be an even more significant infringement on tribal self-government than mere regulation of liquor transactions.” Nonetheless, the Ninth Circuit concluded that, “[g]iven the unique context of liquor regulation and enforcement, it would *not* be a severe erosion of tribal sovereignty to *interpret* § 1161 as authorizing the prosecutions if Indians in

⁶ The *Fort Belknap* case involved the State of Montana’s prosecution of two Indians who possessed and sold liquor on the Fort Belknap Indian Reservation without a state license.

state court for liquor violations on reservations.”⁷ (emphasis added.) *Fort Belknap*, 43 F.3d at 434. “Although criminal enforcement is necessarily intrusive, it is *one method* by which Montana enforces its liquor laws.” *Fort Belknap*, 43 F.3d at 434-435 (emphasis added).

The Ninth Circuit acknowledged that the state of Montana has “an unquestionable interest in the liquor traffic that occurs within its borders.” If 18 U.S.C. § 1161 were to be interpreted as permitting only state licensing of liquor transactions on Indian reservations, but not the power to *enforce* the same, states would be *powerless* to effectuate the *intent* of Congress that such liquor transactions be in conformity with state law. *Fort Belknap*, 43 F.3d at 434. The Court further stated:

We find the district court’s attempt to limit *Rice* unpersuasive because its opinion gave § 1161 an unjustifiably narrow reading. The *Rice* Court broadly found that Indian Tribes have *no sovereignty interest and no self-government interest in liquor regulation*. The Court further found that Congress affirmatively authorized state regulation. The district court’s reading of *Rice* would give the states no power at all, but merely allow the federal government to enforce state law. This interpretation of § 1161 was rejected in *Rice*.

Fort Belknap, 43 F.3d at 435.

Arguably, interpreting § 1161 as authorizing state courts to exercise *civil* jurisdiction over dram shop liability lawsuits involving tribal entities is

⁷ Notably, the statutory language of 18 U.S.C. § 1161 makes no explicit referencing to

less intrusive on tribal self-government than criminal prosecutions of tribal members in state courts, *or* state regulatory actions. Thus, by analogy, the *Fort Belknap* decision supports Ms. Foxworthy's position that Congress intended for state courts to exercise civil jurisdiction over dram shop liability lawsuits. Without such civil jurisdiction, states will lack the necessary means to effectuate the intent of Congress that liquor sales be in conformity with state law. *See Fort Belknap*, 43 F. 3d at 424.

8. Federal Decisions Refusing to Find a Waiver of Tribal Immunity for Suits Brought by States to Collect Unpaid Sales Taxes Are Not Controlling

The *Holguin* and *Filer* courts rely upon federal decisions refusing to find a waiver of tribal sovereign immunity for counterclaims filed by various states in response to lawsuits filed by Indian tribes seeking an injunction against the assessment and collection of state sales tax on liquor or cigarettes. *See e.g., State of Oklahoma ex rel. Oklahoma Tax Commission*, 498 U.S. 505, 111 S.Ct. 905, 112 L. Ed.2d 1112 (1991); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715 (9th Cir. 1986); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985). These decisions, however, are not controlling of the issue here for the reasons

authorizing prosecution of Indians in state court for violating state liquor laws.

discussed below.

Federal law that creates Indian reservations preempts direct state taxation of tribal property or the income of reservation Indians. *Chemehuevi*, 757 F.2d at 1054 (citing *Bryan v. Itasca County*, 426 U.S. 373, 376-377, 96 S.Ct. 2102, 2105-2106, 48 L.Ed.2d 710 (1976)). Federal law does not, however, preempt state tax laws that require Indian tribes who sell alcohol and cigarettes to non-Indian purchasers to *collect* the state taxes on such items. See, e.g., *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 106 S. Ct. 289, 88 L. Ed.2d 9 (1985); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151, 100 S.Ct. 2069, 2080, 65 L. Ed.2d 10 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-482, 96 S.Ct. 1634, 1644-1646, 48 L. Ed.2d 96 (1976).

In the *Oklahoma Tax Commission* case, the Supreme Court held that tribes do not waive sovereign immunity merely by filing an action for injunctive relief from a state's efforts to assess and collect back taxes. See *Oklahoma ex rel. Oklahoma Tax Commission*, 498 U.S. at 509-510, 111 S.Ct. at 909-910. More importantly, however, the *Oklahoma Tax Commission* case did not hold that states lack the authority to tax tribal liquor sales to non-Indians. Nor has the Supreme Court held that states cannot require tribes to

collect such taxes. *Oklahoma Tax Commission*, 498 U.S. at 507, 512; 96 S. Ct. at 908, 911 (holding that state may not tax cigarette sales to Indians occurring on tribal land, but may require tribal sellers to *collect* taxes on such sales to nonmembers of the tribe); *Confederated Tribes of Colville Reservation*, 447 U.S. at 151; 100 S.Ct. at 2080, (doctrine of tribal sovereign immunity does not excuse a tribe from its obligation to assist in the *collection* of validly imposed states sales taxes); *Moe*, 425 U.S. at 483, 96 S.Ct. at 1646, (Indian retailers on an Indian reservation may be required to *collect* all state sales taxes applicable to sales to non-Indians; requiring the tribal seller to collect these taxes is a minimal burden justified in the state's interest in assuring payment of lawful taxes).

In the *Oklahoma Tax Commission* case, the Supreme Court found immunity from the State's counterclaim to collect *back* taxes, but found that the State did have authority to require the Tribe to collect the sales tax *prospectively*. In so holding, the Supreme Court did not find that tribes were immune from a lawsuit seeking equitable relief. *See Oklahoma Tax Commission*, 498 U.S. at 515, 111 S. Ct. 515-516 (Stevens, J. concurring). This makes sense because a counterclaim against the Tribe for *back* tax would impose the obligation to pay the tax upon the Tribe and not upon the individual purchasers. This would be contrary to federal law preempting

direct state taxation of tribal property or income.

The Supreme Court recognized that states have alternative remedies to enforce a tribe's obligation to *collect* the tax. For example, individual agents or officers of the tribe may be liable for damages. *Oklahoma Tax Commission*, 498 U.S. at 514, 111 S.Ct. at 112. States may collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of such taxes. *Oklahoma Tax Commission*, 498 U.S. at 514, 111 S.Ct. at 912.

State laws prohibiting the over service of alcohol are distinguishable from state taxes on alcohol and cigarettes in several important ways. Consequently, these cases are not controlling of the issue presented here. First, the legal obligation for *payment* of state sales taxes on alcohol and cigarettes is upon the purchaser of the alcohol or cigarettes, with the seller having only an obligation to *collect* the tax. *See Chemehuevi*, 474 U.S. at 11, 106 St.Ct. at 290. In contrast, the seller of alcohol has a clear legal obligation to comply with state laws prohibiting the over service of alcohol to apparently intoxicated persons. *See* RCW 66.44.200(1).

Second, federal law preempts a state from directly imposing state

sales taxes upon a tribe absent congressional consent; whereas federal law does not preempt states from regulating the distribution of alcohol on tribal lands. Compare *Bryan*, 426 U.S. at 376, 965 S.Ct. at 2105 with *Rice*, 463 U.S. 713, 103 S.Ct. 3291. In fact, federal law expressly *requires* tribal compliance with state alcohol regulations if a tribe chooses to allow the sale of alcohol on its land. See 18 U.S.C. §1161. State laws prohibiting the over service of alcohol are among those state alcohol regulations with which a tribe must comply.

Third, there is no history of tribal independence and self-governance with respect to the distribution of alcohol on tribal land. *Rice*, 463 U.S. at 719-722, 103 S.Ct. at 3296-3298. In contrast, the power to tax transactions occurring on tribal land and significantly involving a tribe or its members is a fundamental attribute of sovereignty, which the tribes retain unless divested of it by federal law. See *Colville*, 447 U.S. at 152; 100 S. Ct. at 2081 (citing *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed.2d 303 (1978)).

Fourth, states do not have adequate alternative means to enforce laws prohibiting the over service of alcohol other than by the threat of civil liability lawsuits brought by private individuals. It is well-established that such laws fall within the legitimate police power of states. See *Eiger v.*

Garrity, 246 U.S. 97, 38 S. Ct. 298, 62 L. Ed. 596 (1918) (holding that a dram shop statute permitting persons injured by an intoxicated person to sue the dram shop owner is a law passed under the legitimate police power of the state to regulate traffic in intoxicating liquors and to prevent their evil consequences).⁸

States simply do not have the same alternative means to enforce compliance with laws prohibiting the over service of alcohol as they do with state sales tax laws. See *Oklahoma Tax Commission*, 498 U.S. at 514, 111 S.Ct. at 912. Without the threat of civil liability, tribal entities selling liquor will simply not have adequate incentive to comply with RCW 66.44.200(1) and states will not have adequate means of enforcement.

In any event, state court jurisdiction over a civil liability lawsuit is much less intrusive into the affairs of an Indian tribe than if the states were to take the extraordinary measure of revoking the tribe's license to sell alcohol. Under this scenario, the state could deprive the tribe of all revenue from alcohol sales, which would have far greater financial impact upon a tribe than subjecting tribes to potential civil liability in a dram shop lawsuit.

⁸ See also, *Flaherty v. Murphy*, 126 N.E. 553 (Ill. 1920); *O'Connor v. Rathje*, 12 N.E.2d 878 (Ill. 1937); *Gibbons v. Cannaven*, 66 N.E.2d 370 (Ill. 1946); *Pierce v. Albanese*, 129 A.2d 606 (Conn. 1957); *Berge v. Harris*, 170 N.W.2d 621 (Ia. 1969); *Graham v. General U.S. Grant Post No.*, 239 N.E.2d 856 (Ill. 1968).

Lastly, and perhaps *most importantly*, a tribal entity's non-compliance with RCW 66.44.200 has potentially devastating and irreversible consequences to the safety of the citizens of the State of Washington that simply do not exist with respect to a tribal entity's non-compliance with tax laws. The clear distinction between laws requiring tribes to collect sales on the sale of alcohol and cigarettes and laws prohibiting tribes from serving alcohol to apparently intoxicated persons illustrates why the *Holguin* and *Filer* courts got it wrong when they concluded that the Congress did not abrogate tribal immunity with respect to civil lawsuits to enforce over service laws.

In 1983, the Supreme Court in *Rice v. Rehner* repudiated the notion that 18 U.S.C. § 1161 conferred the "right" of alcohol regulation on the states without conferring the "remedy" of enforcement. In 1998, the Supreme Court in *Kiowa Tribe* in a commercial case declined to abandon the doctrine of tribal sovereign immunity in a commercial case. Nonetheless, it seriously called into question the continuing validity of the doctrine. In particular, the Court acknowledged that, when Tribes take part in the Nation's commerce, "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have not choice in the matters, as in the case of tort victims." *Kiowa Tribe*, 523 U.S. at 758; 118 S.Ct. at

1704 (emphasis added).

The *Kiowa Tribe* case, of course did not involve a tort victim. However, this case involves precisely the situation that caused the Supreme Court to seriously question the validity of perpetuating the doctrine of tribal immunity. The Casino is involved in the Nation's commerce that has effects reaching far beyond the reservation. Ms. Foxworthy had no choice in the matter when the Casino served alcohol to Mr. Dewalt in violation of RCW 66.44.200(1).⁹ Therefore, it can be anticipated that if and when the issue before this court reaches the United States Supreme Court, the Court would conclude that Congress impliedly abrogated tribal sovereign immunity with respect to private lawsuits to enforce state laws prohibiting the over service of alcohol.

C. THE TRIBAL TORT CLAIMS ACT IS IRRELEVANT TO THE ISSUE OF WHETHER CONGRESS ABROGATED TRIBAL SOVEREIGN IMMUNITY FOR DRAM SHOP LIABILITY LAWSUITS

The Casino claims that Ms. Foxworthy simply pursued her lawsuit in the wrong forum alleging that she *could* have brought her lawsuit in tribal court. Notably, the Casino cites to a version of the Tribal Tort Claims Ordinance that was not in effect at the time of the subject accident. CP 298-

299. The Casino also fails to inform this Court that the Tribal Tort Claim Act that was in effect contains serious limitations and requires strict compliance with its procedures. CP 277-285. Among other limitations, it contains a 180 statute of limitation period, strict notice requirements, and seriously limits any award for pain and suffering. CP 279. In addition, its limits any judgment to the amount of a valid and collectible liability insurance policy and denies a claimant the right to a jury trial. CP 282-284.

More importantly, however, the existence of the Tribal Tort Claims Act is wholly irrelevant to the issue of whether Congress abrogated tribal sovereign immunity from lawsuits brought by private individuals to enforce state laws prohibiting the over service of alcohol. This point was acknowledged by the court at the hearing on the Tribe's motion to dismiss. RP 11-12, 23.

V. CONCLUSION


Based upon the foregoing, Ms. Foxworthy respectfully requests that this Court reverse the trial court's order granting the Casino's motion to dismiss. Congress has plenary authority to limit, modify, or eliminate a tribe's power of self-government. Congress has expressly divested tribes of

⁹ For purposes of this appeal, this Court can infer from the fact that Mr. Dewalt had a .16 g/l 100 ml blood alcohol level in the hospital at 4:10 a.m., that he was apparently under the influence when the Casino served alcohol to him minutes before the accident.

their authority to regulate in the area of alcohol licensing and distribution. In *Rice v. Rehner*, the United States Supreme Court held that, in granting states the authority to regulate in the area of alcohol regulation, Congress did not intend to confer the “right” of alcohol regulation without conferring the “remedy” of enforcement. The “remedy” of enforcement includes not only the revocation of a tribal entity’s license for non-compliance with its liquor laws and criminal prosecutions of tribal members who violate such laws, but also the state courts’ exercise of jurisdiction over lawsuits brought by private individuals against tribal entities who fail to comply with laws prohibiting the over service of alcohol. Without this remedy, states like Washington will not have adequate means of enforcing their liquor laws, and the victims of tribal non-compliance will not receive restitution.

DATED this 19th day of December, 2006.

DAVIES PEARSON, P.C.



RICHARD H. BENEDETTI, WSBA #6330
CAROL J. COOPER, WSBA #26791
Attorneys for Appellant

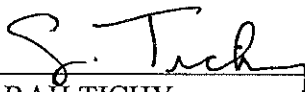
CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2006, I caused a copy of the original of **Appellant's Brief** to be delivered to the below listed at their respective addresses:

VIA LEGAL MESSENGER

Roy A. Umlauf	Attorneys for Respondent
Andrew G. Yates	
Forsberg & Umlauf	
900 Fourth Avenue, Suite 1700	
Seattle, WA 98164	

DATED this 20th day of December, 2006.



SARAH TICHY
Legal Assistant to Carol J. Cooper