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10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF WASHINGTON

12 THE CONFEDERATED TRIBES AND  
13 BANDS OF THE YAKAMA INDIAN  
14 NATION; and THE YAKAMA  
15 NATION COMMERCE  
16 ASSOCIATION,

17 Plaintiffs,

18 v.

19 CHRISTINE GREGOIRE, Governor of  
20 the State of Washington; CINDI  
21 HOLMSTROM, Director of the  
22 Washington State Department of  
23 Revenue; LESLIE CUSHMAN, Deputy  
24 Director of the Washington State  
25 Department of Revenue; STUART  
26 THRONSON, Assistant Director of  
Special Programs of the Washington State  
Department of Revenue, and PAT  
PARMER, Chief of Enforcement and  
Education Division, Washington State  
Liquor Control Board,

Defendants.

No.

MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING  
ORDER AND INJUNCTIVE  
RELIEF

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1                   **INTRODUCTION AND NEED FOR IMMEDIATE RELIEF**

2           The Washington State Liquor Control Board (the “Board”) and the Washington  
 3 State Department of Revenue (the “DOR”), and their respective agents (collectively  
 4 referred to herein as “Defendants”) are causing immediate and irreparable harm to the  
 5 Confederated Tribes and Bands of The Yakama Indian Nation (the “Yakama Nation”)  
 6 and members of the Yakama Nation Commerce Association (the “Association”).  
 7 Defendants are threatening members of the Yakama Nation with civil and criminal  
 8 penalties if they possess or sell any cigarettes without the Washington State cigarette  
 9 tax stamp—even Indian-to-Indian sales occurring on reservation. The Defendants  
 10 have taken the position that not a single pack of cigarettes can be transported onto the  
 11 reservation, possessed on reservation, nor sold on reservation *without a Washington*  
 12 *State tax stamp*. Defendants have taken the position that members of the Yakama  
 13 Nation, and those doing business with tobacco retailers, are in possession of  
 14 “contraband” if they are affixed with the Yakama Nation tax stamp despite such  
 15 product having been purchased pursuant to the now terminated 2004 Cigarette Tax  
 16 Agreement between the State of Washington Department of Revenue and the Yakama  
 17 Nation.

18           Defendants’ threats of criminal and civil sanctions pursuant to RCW 82.24  
 19 violates United States Supreme Court decisional law related to the “incidence of the  
 20 tax” and “minimal burdens”; violates Plaintiffs’ rights under the Yakama Nation  
 21 Treaty of 1855 and Ninth Circuit law interpreting Plaintiffs’ rights to take goods to  
 22 market free of restriction, violates rights of the Yakama Nation as its own sovereign to  
 23 issue its own tax stamp; and violates the statutory language itself of RCW 82.24 as to  
 24 what is and is not lawful under the statute. Defendants’ threats and conduct should be  
 25 found further baseless in law because the Yakama Nation is not considered “in the  
 26

1 State” for purposes of enforcement of RCW 82.24, nor do the Defendants have  
2 jurisdiction under RCW 37.12.010 regarding cigarette taxation. Finally, the  
3 immediate and irreparable harm being suffered by members of the Yakama Nation,  
4 including but not limited to Defendants’ threats in violation of ex post facto laws,  
5 must be immediately enjoined pending resolution of the litigation.

6 Plaintiffs are entitled to a temporary restraining order enjoining Defendants  
7 from:

8 A. Enforcing and collecting, or attempting to enforce and collect, State taxes  
9 on Indian-to-Indian sales of cigarettes on the Yakama Reservation;

10 B. Threatening or taking any enforcement action against cigarette  
11 wholesalers or distributors who sell or delivers cigarette that do not bear a Washington  
12 State cigarette stamp (“unstamped cigarettes”) to tribally-licensed retailers or  
13 wholesalers on the Yakama Reservation, including but not limited to seizure of such  
14 cigarettes or other action designed to prevent the wholesalers/distributors’ sale and  
15 delivery of such cigarettes to the Yakama Reservation;

16 C. Threatening or taking any enforcement action against Plaintiffs and  
17 Yakama Nation tobacco wholesalers or retailers for the acquisition, sale, possession,  
18 delivery or transportation of cigarettes that bear a Yakama Nation tax stamp and/or do  
19 not bear a Washington State tax stamp, including seizure of such cigarettes, or other  
20 action designed to prevent the acquisition, sale, possession, delivery or transportation  
21 of such product;

22 D. Threatening or taking any enforcement action against the Yakama Nation  
23 for the possession or use of the Yakama Nation tax cigarette tax stamp;



1 E. Enforcing or attempting to enforce the provisions of RCW Chapter 84.24  
2 against Plaintiffs and its tobacco retailers and wholesalers in violation of federal treaty  
3 rights;

4 F. Threatening or taking any enforcement action against the Yakama  
5 Nation, tribally-licensed entities or members of the Yakama Nation who possess  
6 unstamped cigarettes or sell or deliver unstamped cigarettes to members of the  
7 Yakama Nation, including seizure of such cigarettes or other action designed to  
8 prevent the possession of such cigarettes by the Yakama Nation, tribally-licensed  
9 entities or members of the Yakama Nation, or designed to prevent the sale, delivery,  
10 or transportation of such cigarettes to members of the Yakama Nation.

11 Plaintiff respectfully submits that the facts and supporting evidence as set forth  
12 in the Statement of Facts filed herewith, and the legal authority cited herein provide a  
13 basis for this Court to immediately issue a temporary restraining order and preliminary  
14 injunctive relief pending the litigation.

### 15 LAW AND ARGUMENT

16 A temporary restraining order is proper upon a showing of immediate and  
17 irreparable injury, loss or damage that will result to the Plaintiffs unless Defendants  
18 are enjoined. Fed. R. Civ. Proc., Rule 65. This standard is met under the facts and  
19 circumstances of this case as set forth below, and as expressly set forth in the  
20 Declarations of Athena Sanchey, Theresa Keyes, Kip Ramsey, Delbert Wheeler, Ty  
21 Young, Bill Hoptowit, and Harvey Davis, Sr. Because of the immediate and  
22 continuing nature of the harm and threats of additional irreparable harm, only oral  
23 notice of this motion was provided to Defendants as a courtesy. Notice to the  
24 opposing party is not required because immediate and irreparable harm will continue  
25 to result if the opposing party is afforded the time to respond allowed under the rules.

(Keyes Decl. at ¶¶13-14 and Sanchey Decl. at ¶¶13-14) This Court should enter a temporary restraining order in the immediate and a preliminary injunction pending the outcome of the litigation.

Under Ninth Circuit case law, there are two sets of criteria for preliminary injunctive relief. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1158 (9<sup>th</sup> Cir. 2006). The traditional criteria requires: (A) a strong likelihood of success on the merits, (B) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (C) a balance of hardships favoring the plaintiff, and (D) advancement of the public interest (in certain cases). *Id.* at 1158. The alternative test requires a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the plaintiff's favor. *Taylor v. Westly*, 448 F.3d 1197, 1200 (9<sup>th</sup> Cir. 2007). These are extremes along the same continuum, where the required degree of irreparable harm increases as the probability of success decreases. *Taylor*, 448 F.3d at 1200; *Lands Council v. Martin*, 479 F.3d 636, 639 (9<sup>th</sup> Cir. 2007). Based upon either criteria, Plaintiffs here have met their burden of showing a strong likelihood of success on the merits, and the irreparable injury they would face is severe enough to tip the scales in their favor, entitling them to preliminary injunctive relief.

# **I. STATE TAXATION OF INDIAN TO INDIAN SALES IS UNLAWFUL AND SHOULD BE IMMEDIATELY ENJOINED**

Absent congressional authorization or other federal statutes permitting it, states are without power to tax reservation land and reservation Indians. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214 (1995); *County of Yakima v. Confederated Tribes of the Yakima Indian Nation*, 502 U.S. 251, 258, 112 S. Ct. 683 (1992) (Pursuant to the General Allotment Act, the county was authorized to impose an ad valorem tax on reservation land patented pursuant to the



1 Act, but was not authorized to impose an excise tax on the sale of land); see also  
2 *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-102, 126 S. Ct. 676  
3 (2005) (States are categorically barred from placing the legal incidence of an excise  
4 tax on a tribe or on tribal members for sales made inside Indian country without  
5 congressional authorization); *Moe v. Confederated Salish and Kootenai Tribes*, 425  
6 U.S. 463, 476, 481, 96 S. Ct. 1634 (1976) (States did not have the power to impose  
7 personal property tax on property located in the reservation, to impose vendor license  
8 fee on reservation Indian, or to collect cigarette sales taxes on reservation sales by  
9 Indians to Indians.

10 In order for Congress to authorize state taxation of Indians, it must have made  
11 its intention to do so unmistakably clear. *County of Yakima*, 502 U.S. at 258, 112 S.  
12 Ct. 683. Here, there is simply no congressional authorization for the state taxation of  
13 cigarettes sold on reservation for Indian to Indian sales. For Defendants to declare  
14 that state-licensed wholesalers may only sell cigarettes to retailers on the Yakama  
15 Reservation that bear a Washington State tax stamp is unlawfully requiring those  
16 wholesalers to pre-collect the state tax on *all* cigarettes being sold on the Yakama  
17 Reservation—even cigarettes being sold Indian to Indian. (See Keyes Decl., Exhibits  
18 C and E) The Defendants' conduct is expressly prohibited by federal law.

19 Moreover, the State of Washington's own laws prohibit such a tax. For  
20 example, WAC 458-20-192(1)(a) provides that "under federal law the state may not  
21 tax Indians or Indian tribes in Indian country." It further provides "[i]n some instances  
22 the state's authority to impose tax on a nonmember doing business in Indian country  
23 with an Indian or an Indian tribe is also preempted by federal law." *Id.* Washington  
24 further emphasizes that the rules of construction in analyzing the application of tax  
25 laws to Indians and nonmembers doing business with Indians are as follows:

26

- (i) Treaties are to be construed in the sense in which they would naturally have been understood by the Indians; and
- (ii) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. WAC 458-20-192(1)(b)(i)(ii).

Here, there is no clear congressional authorization to allow the State of Washington's taxation of cigarette sales on-reservation. Nonetheless, Defendants are currently imposing a tax on Indian to Indian sales of cigarettes by prohibiting the distribution of all cigarettes not bearing a Washington State tax stamp to Indian wholesalers and retailers on reservation. This conduct should immediately be enjoined.

## **II. RCW 82.24 IS UNENFORCEABLE AGAINST MEMBERS OF THE YAKAMA NATION AND DEFENDANTS' THREATS OF CRIMINAL AND CIVIL SANCTIONS SHOULD BE ENJOINED**

The State of Washington's Cigarette Tax Act (RCW 82.24) is unenforceable against members of the Yakama Nation for at least five reasons: (1) it unlawfully places the incidence of the tax on the Indian; (2) it unlawfully places impermissible burdens on the Indians to collect and enforce state taxation; (3) it unlawfully violates the Yakama Nation Treaty of 1855 by imposing undue restrictions that interfere with the right to take goods to market free of restriction; (4) it is inapplicable to conduct occurring on-reservation because the Yakama Nation is not "in the state;" and (5) it is inapplicable because cigarette taxation on reservation does not fall under the jurisdictional authority of the State of Washington pursuant to RCW 37.12.010.

1           **A. RCW 82.24 is unenforceable because the “legal incidence” of the tax**  
 2           **unlawfully falls squarely upon Yakama Indian retailers.**

3           It is a fundamental principle of tribal sovereignty that no state—Washington or  
 4 otherwise—has the authority to impose taxes on Indians doing business in Indian  
 5 County. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59, 115 S.  
 6 Ct. 2214 (1995). In assessing whether a state taxation scheme impermissibly imposes  
 7 a tax on Indians, the relevant inquiry is whether the “incidence of the tax” falls on the  
 8 Indian, or instead whether it falls on a non-Indian. *Id.* at 459. When the incidence of  
 9 the tax falls upon the Indian, the tax categorically violates federal law and the statute  
 10 cannot survive absent congressional authorization. *Id.* Even if the incidence of the  
 11 tax does not fall on the Indian, though, the taxing scheme nonetheless fails when it  
 12 places more than “minimal burdens” on Indian commerce. *Id.*; see also *Wagnon*, 546  
 13 U.S. at 101-02, 126 S. Ct. 676. The question of where the legal incidence of a tax lies  
 14 is decided by federal law. *Coeur d’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674,  
 15 681 (9th Cir. 2004).

16           In two recent federal cases, the Ninth Circuit Court of Appeals and the U.S.  
 17 District Court for the Western District of Washington analyzed the “legal incidence”  
 18 of fuel taxation statutory regimes of Idaho and Washington, respectively. See  
 19 *Hammond*, 384 F.3d 674 ; *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250  
 20 (W.D. Wash. 2005). Both courts concluded that the statutory fuel taxation schemes  
 21 were prohibited under federal law because the tribal retailers in those cases ultimately  
 22 bore the “legal incidence” of the fuel tax. The reasoning of both courts applies with  
 23 powerful force to the statutory provisions of the Washington Cigarette Tax Act (RCW  
 24 82.24) as applied to the members of the Yakama Nation and compels the conclusion  
 25 that the statute is also unenforceable.  
 26

1. For the same reasons the Ninth Circuit *Hammond* Court struck down the Idaho fuel tax statute, this Court should find RCW 82.24 unenforceable for unlawfully placing the legal incidence of the tax on the Indian.

*United States v. Hammond* involved a challenge by the Coeur d'Alene, Nez Perce, and Shoshone Bannock Tribes to Idaho's fuel taxation statute. As *Hammond* observed, the question of who bears the "legal incidence" of a state tax requires the reviewing court to conduct "a fair interpretation of the taxing statute as written and applied." *Hammond*, 384 F.3d at 681 (citing *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11, 106 S. Ct. 289 (1985) (*per curiam*)). The end goal in such an analysis is to "'ascertain [ ] the legal obligations imposed upon the concerned parties,' and this inquiry 'does not extend to divining the legislature's 'true' economic object.'" *Hammond*, 384 F.3d at 681 (citing *Chickasaw*, 515 U.S. at 460, 115 S. Ct. 2214).

In holding Idaho's fuel tax statute invalid because it imposed a tax on the tribes, *Hammond* found four aspects of that statute to be instructive: (1) Idaho's statute required the non-tribal distributor to pass on and to collect the tax from the retailer and then remit the tax to the State, thereby imposing the tax on the retailer and not the distributor or consumer, *Hammond*, 384 F.3d at 685; (2) The distributor received tax credits for collecting and remitting the tax to the State, *id.* at 686; (3) The State provided tax credits to the distributor for taxes the distributor paid but could not collect from the retailer, the result of which was that the distributor was no more than a mere "transmittal agent", *id.* at 687; and (4) retailers were not entitled to refunds for taxes they could not collect from consumers, even where the fuel was never sold, and nor were they compensated for their tax collection efforts, indicating that the "tax buck" stopped at the retailer. *Id.* at 687-88. Based upon these factors, the court held

1 that the legal incidence of the tax rested impermissibly on tribal retailers and not on  
 2 non-tribal distributors. *Id.* at 688. Here, the same problems that rendered Idaho's fuel  
 3 tax invalid in *Hammond* are present in the Washington Cigarette Tax Act.

- 4 a. Just like the unenforceable tax statute in *Hammond*, RCW 82.24  
 5 likewise requires the non-tribal wholesaler to pass on and collect  
 6 the tax from the Indian retailer.

7 Under, RCW 82.24.010 *et. seq.* and WAC 458-20-186; 458-20-190, licensed  
 8 cigarette wholesalers purchase the State tax stamps from authorized banks and then  
 9 affix the stamps to the cigarettes. The wholesalers are compensated for affixing the  
 10 stamps at the rate of \$6.00 per thousand stamps affixed (the "stamping allowance").  
 11 WAC 458-20-186(301)(b). Wholesalers are expressly required to "precollect" the tax  
 12 from the Indian retailer for sales of cigarettes to non-members by Indians or Indian  
 13 tribes. WAC 458-20-192(9)(a)(i). The statute defines a "precollection obligation" as  
 14 "the obligation of a seller otherwise exempt from the tax imposed by this chapter to  
 15 collect the tax from that seller's buyer." RCW 82.24.010(4).

16 Wholesalers are, in fact, effectively exempt from the cigarette tax because they  
 17 must pass payment of that tax (all but one-half mill per cigarette of which wholesalers  
 18 are allowed to absorb) on to their purchasers, *i.e.* the Indian retailer, to avoid violating  
 19 the statute. See RCW 82.24.020(4) ("Wholesalers subject to the payment of this tax  
 20 may, if they wish, absorb one-half mill per cigarette of the tax and not pass it on to  
 21 purchasers without being in violation of this section or any other act relating to the  
 22 sale or taxation of cigarettes"). Washington retailers, in turn, may not possess  
 23 unstamped cigarettes and must obtain their cigarettes from wholesalers in accordance  
 24 with RCW 82.24, thereby forcing retailers to pay the tax the wholesalers are required  
 25 to pass through to them. RCW 82.24.050.

26 The Indian retailers have three options for purchasing cigarettes: Indian or



1 tribal sellers making sales to non-Indian customers must (A) purchase a stock of  
 2 cigarettes with Washington state cigarette tax stamps affixed for the purpose of  
 3 making such sales or (B) they may make purchases of cigarettes from licensed  
 4 cigarette distributors for resale to 'qualified purchasers' [*i.e.* an Indian purchasing for  
 5 resale within Indian country to other Indians or an Indian purchasing solely for his or  
 6 her use other than for resale] or (C) may purchase a stock of untaxed unstamped  
 7 cigarettes for resale to qualified purchasers if the tribal seller gives advance notice to  
 8 the DOR pursuant to RCW 82.24.250. WAC 458-20-192.

9 Non-Indians are not "qualified purchasers" and, thus, as subsection (A) implies,  
 10 the wholesaler is "precollecting" the tax on Indian retailers' sales to non-Indians by  
 11 passing the cost of the Washington tax stamps onto the retailers. Similar to the Idaho  
 12 law in *Hammond*, wholesalers must submit to the DOR a complete record of sales of  
 13 cigarettes to the state monthly (WAC 458-20-186(702)(a))—no doubt to enable the  
 14 DOR to ensure that the appropriate cigarette taxes are charged to the retailer. *Cf.*  
 15 *Hammond*, 384 F.3d at 686 (Idaho Admin. Code required that all invoices for sales by  
 16 distributors to retailers must show that the state fuel tax was charged to the retailer).

17 Accordingly, just like the statute at issue in *Hammond*, Washington's cigarette  
 18 tax scheme requires the non-tribal wholesaler to "precollect" the state tax from the  
 19 Indian retailer. This factor weighs against the enforceability of RCW 82.24 and its  
 20 related regulations against members of the Yakama Nation.

21 b. Just like the unenforceable tax statute in *Hammond*, RCW 82.24  
 22 effectively provides a "tax credit" to the non-Indian wholesaler for  
 23 acting as the state tax collector.

24 In *Hammond*, the court found that the Idaho statute provided "tax credits to the  
 25 distributor for 'collecting and remitting' the tax on behalf of the State." *Hammond*,  
 26 384 F.3d at 686. Although the statute in this case does not state that a wholesaler is

1 receiving a "tax credit" *per se*, the statute essentially operates in the same way  
2 because the wholesaler is paid for affixing the stamps to the cigarette packaging.

3 The WAC states that "[l]icensed wholesalers are compensated for affixing the  
4 stamps at the rate of \$6.00 per thousand stamps affixed ('stamping allowance')." WAC 458-20-186 (301)(b). In fact, the Department's "worksheet" for Washington  
5 cigarette wholesalers indicates that their "stamping allowance" is "netted out of the  
6 stamp purchase price." (Keyes Decl. Exhibit L) The effect of this is that when  
7 wholesalers go to the bank to purchase the stamps, they are effectively given a  
8 "credit" on their cost of purchasing the stamps.  
9

10 Just like the distributor received a tax credit in *Hammond* for collecting and  
11 remitting the tax to the state, so too does the Washington cigarette wholesaler when it  
12 receives a credit on the purchase price of the stamps themselves as payment for  
13 actually making sure the tax stamp is placed on the cigarette products. Here,  
14 Defendants are requiring the wholesalers to put the Washington State tax stamp on the  
15 products before the distributor can even sell it to businesses on the Yakama  
16 reservation (Keyes Decl. Exhibits C and E) In other words, the Washington State  
17 licensed distributors must collect the tax up front from the Yakama Nation retailer  
18 before the distributor is even allowed to sell the inventory. This factor weighs against  
19 the enforceability of RCW 82.24 and its related regulations against members of the  
20 Yakama Nation who are bearing the legal incidence of the tax.

21 c. Just like the unenforceable statute in *Hammond* that provided a tax  
22 credit to the non-tribal fuel distributor for fuel it was unable to sell,  
23 RCW 82.24 provides a "tax credit" to the non-tribal wholesaler  
that is unable to sell cigarettes that have already been stamped.

24 The tax statute at issue in *Hammond* gave "tax credits to the distributor for fuel  
25 taxes that the distributor has paid but cannot then collect from the retailer."  
26

1 *Hammond*, 384 F.3d at 687. For example, as explained by the court, “if the distributor  
 2 receives one hundred gallons of motor fuel and sells only seventy gallons, the  
 3 distributor receives a tax credit for the thirty unsold gallons.” *Id.* This “tax credit”  
 4 feature—illustrating that the distributor is simply a transmittal agent for the state—  
 5 further underscored “the ‘tax and remit’ feature of the statute, which places the legal  
 6 incidence on the retailers, not the distributors.” *Id.* Washington’s law is similar  
 7 because a wholesaler may likewise receive a refund of the cost of the stamps for  
 8 cigarettes it has purchased but unable to sell. RCW 82.24.210 expressly provides that:

9           A distributor or wholesaler that has lawfully affixed stamps  
 10          to cigarettes, and subsequently is unable to sell those  
 11          cigarettes lawfully because the cigarettes are removed from  
 12          the directory created pursuant to RCW 70.158.030(2), *may*  
 13          *apply to the department for a refund of the cost of the*  
              *stamps.* (emphasis supplied).

14 Thus, just like the statute in *Hammond*, the statute in this case allows wholesalers to  
 15 obtain a tax refund for the cost of the stamp for cigarettes that the wholesaler is unable  
 16 to sell, which further illustrates that the legal incidence of this tax falls on the retailers  
 17 and not the wholesalers. Here, because there is no provision that a retailer, let alone a  
 18 Yakama Nation retailer, has an ability to get a refund for the price of the stamps on  
 19 unsold cigarettes underscores the legal incidence of the tax impermissibly falling on  
 20 the Indian.

21           d. Just like the unenforceable statute in *Hammond*, RCW 82.24 does  
 22          not allow retailers a refund for taxes uncollected from the  
              consumer.

23           The fourth *Hammond* factor is also present. In *Hammond*, retailers were not  
 24 entitled to refunds for taxes they could not collect from consumers, even where the  
 25 fuel was never sold, and nor were they compensated for their tax collection efforts,  
 26

1 indicating that the “tax buck” stopped at the retailer. *Id.* at 687-88. Likewise,  
 2 Washington’s law contains no provision allowing Indian retailers to offset their  
 3 liability when they are unable to collect the applicable tax from the non-Indian  
 4 consumer. *See* WAC 458-20-186(303)(a) (allowing Indian retailers to obtain refunds  
 5 for taxes on Indian-to-Indian sales upon approval by the DOR). Nor are the Indian  
 6 retailers compensated for their tax collection efforts. *See id.* Further, Washington’s  
 7 law imposes the cigarette tax whether or not the cigarettes are ever sold to the Indian  
 8 retailers’ customers. This is not a pass-through scheme that allows Indian retailers to  
 9 collect the state tax from their customers and remit it to the State on the backend.<sup>1</sup>

10 Washington’s law requires Indian retailers to pay the Washington State tax  
 11 upfront at the time of purchase of the state stamped cigarettes from the wholesalers  
 12 carrying out their “precollection” obligations. Once the Indian retailer pays that tax  
 13 via purchase from the wholesalers, the retailers’ inventory could, for example, be  
 14 subsequently stolen or destroyed and the law allows no means for the retailers to  
 15 recoup the cost of the tax that has already been paid on those cigarettes. That cost will  
 16 never be recovered from consumers. Moreover, unlike wholesalers who are  
 17 reimbursed the cost of affixing the stamps, the retailers are not compensated in any  
 18 manner for collecting the tax from consumers. As in *Hammond*, it is plain that the  
 19 “tax buck” stops with the Indian retailers.

- 20 2. For the same reasons the *Squaxin Island* District Court struck  
 21 down the enforceability of the Washington fuel tax statute, this  
 22 Court should find RCW 82.24 unenforceable for unlawfully  
placing the legal incidence of the tax on the Indian.

23 In *Squaxin Island*, the Western District of Washington, relying on *Hammond*,

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24  
 25 <sup>1</sup> Plaintiffs do not contend or imply that such a statutory scheme would be valid as  
 26 against the Yakamas.

1 held that Washington's fuel taxation scheme was likewise invalid as against the Indian  
 2 tribes. *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d, 1250, 1262 (W.D. Wash.  
 3 2005). In ruling that the legal incidence of the Washington fuel tax statute  
 4 impermissibly fell on the tribes (as opposed to the consumer), *Squaxin Island*  
 5 analyzed the following aspects of the statute: (1) the intent of the legislature; (2)  
 6 whether the statute required the retailers to pass the fuel tax on to consumers; (3)  
 7 whether the statute allowed the tribal retailers to obtain refunds for uncollected taxes;  
 8 (4) whether the statute allowed for reimbursement for collection of the tax; and (5)  
 9 whether a consumer's liability to pay the tax is anything more than "theoretical." *Id.*  
 10 at 1257-60. An analysis of these same factors under Washington's cigarette tax  
 11 statute and regulations compels the conclusion that RCW Chapter 82.24 cannot be  
 12 applied to the Yakama Nation or its retailers doing business on the Yakama  
 13 Reservation. *Id.* at 1257-60.

- 14  
 15 a. As to the first *Squaxin* factor, the alleged "intent" of a  
 16 statute is not dispositive of whether the legal incidence of  
 17 the tax still nonetheless impermissibly falls on the Indian  
 under the operative sections of the statute as applied.

18 RCW 82.24.080 declares that it is the intent of the Legislature that the tax fall  
 19 on the first taxable event and upon the first taxable person within the state—that is to  
 20 collect the tax from the person who first sells, uses, consumes, handles, possesses or  
 21 distributes cigarettes in the state. But as explained in the foregoing, RCW Chapter  
 22 82.24 and WAC 458-20-192(9) make clear that the tax is actually collected from the  
 23 Indian retailers—not the wholesalers or the non-Indian consumers. The Legislature's  
 24 purported intent has no bearing upon the ultimate federal question of where the  
 25 incidence of the tax lies because to hold otherwise would permit states to abrogate the  
 26 sovereignty and threaten the existence of the Indian nations. *Hammond*, 384 F.3d at



1 683-84.

2 As observed by the *Squaxin Island* court, “[w]hile there is no question that the  
3 Washington State Legislature intended to place the ultimate responsibility for payment  
4 of the fuel taxes on consumers, its statement of intent is not dispositive.” See *Squaxin*  
5 *Island*, 400 F. Supp. 2d at 1258. Instead, “federal law requires courts to acknowledge  
6 a legislature’s statement of intent as one factor among many in determining where the  
7 legal incidence of a tax falls, with additional consideration given to the operative  
8 effect of the tax statutes.” *Id.* at 1258. In looking at the operative effect of the  
9 cigarette taxation statute, it is clear the legal incidence of the tax falls on the Yakama  
10 tribe and its retailers.

11 Although the legislature crafted new language in RCW 82.24.080 related  
12 specifically to the Yakama Nation that purports to cure any unlawful taxation, this  
13 change is nothing more than a red herring since the legislature did nothing to actually  
14 cure the problem of impermissibly placing the tax on the Indian. The legislature  
15 amended the intent section of the statute related specifically to the Yakama Nation in  
16 March 2008—which was the same time the 2004 Agreement was in mediation and  
17 the subject of the Tribal Court action. The conclusory and self-serving “intent”  
18 language in the statute is the same type of amended language that was found to be  
19 ineffective in *Hammond*. 384 F.3d at 685. The legislature here did the same thing  
20 that the Idaho legislature did and which the *Hammond* rejected. Here, the legislation  
21 amended the intent section to include all the legal “buzz words” to protect the State,  
22 but failed to materially alter the mechanics of the statute of where the tax burden falls.  
23 Therefore, the state legislature’s declaration of intent in RCW 82.24.080 as it relates  
24 to the Yakama Nation must likewise be rejected and is not dispositive of where the  
25 legal incidence of the tax falls.

b. The remaining *Squaxin* factors as applied to RCW 82.24 also shows that the legal incidence of the tax impermissibly falls on the Indians.

With respect to *Squaxin Island's* second factor, while wholesalers are required to pass the cost of the tax onto their purchasers (RCW 82.24.020(4)), there is no requirement in the Washington cigarette tax statute that the Indian retailers collect the tax from their non-Indian customers. As noted, wholesalers are required to submit "complete" records of its sales to retailers setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes. WAC 458-20-186(702). Such records necessarily evidence whether the retailer has paid the tax. Furthermore, every wholesaler and retailer is required to "keep and preserve for a period of five years an accurate set of records [showing] all transactions relating to the purchase and sale of any of the articles taxed under this chapter and show[ing] all physical inventories performed on those articles, all invoices, and a record of all stamps purchased." RCW 82.24.090. All such records and stock of cigarettes are subject to inspection by the DOR at anytime. *Id.* There are no comparable requirements on consumers that require them to keep records of taxes paid. *See id.*

Furthermore, like the statute in *Squaxin Island*, RCW Chapter 84.24 requires every person who acquires cigarettes to pay the tax if it has not yet been paid. RCW 84.24.080 ("Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event."). As the *Squaxin Island* court explained, while such a requirement applies to both retailers and consumers, "the practical effect is that only retailers can be audited for compliance because consumers need not maintain records of taxes paid." 400 F. Supp. 2d at 1258; see also *Squaxin Island Tribe v. Stephens*, No. C03-3951Z, 2006 U.S. Dist. LEXIS

1 18504 (W.D. Wash. Mar. 2, 2006) (noting that while the statute at issue did not  
 2 specifically require records of taxes paid, requiring detailed data on the sales indicates  
 3 that retailers can be audited). As it operates, the statutory scheme requires that the  
 4 cigarette taxes be passed from wholesaler to retailer but not from retailer to consumer.  
 5 Just as in *Hammond*, this factor indicates that the “tax buck” stops at the retail level.  
 6 *Squaxin Island*, 400 F. Supp. 2d at 1258.

7 The third and fourth *Squaxin Island* factors also weigh in favor of finding the  
 8 legal incidence of the tax falls on retailers. As explained previously, the cigarette tax  
 9 statute does not allow Indian retailers to obtain reimbursement for taxes it is unable to  
 10 collect from consumers or to obtain reimbursement for collection of the tax from  
 11 consumers. The *Squaxin Island* court found the State’s contentions that retailers are  
 12 unlikely to have accounts receivable for consumers, and that retailers can and do  
 13 insure against other losses such as theft—even if true—“unpersuasive.” 400 F. Supp.  
 14 2d at 1259. Moreover, the fact that the wholesalers may bear some costs under the  
 15 Washington State system does not lead to the conclusion that the legal incidence falls  
 16 on consumers. *See id.*

17 The fifth factor likewise weighs in Plaintiffs’ favor. Although consumers are  
 18 “theoretically” liable to pay the tax if it has not been paid upstream (WAC 458-20-  
 19 186(702)(g)), the practical reality is that this liability is not enforced. Instead,  
 20 enforcement is aimed at the Indian retailers who are allegedly prohibited from  
 21 possessing unstamped cigarettes, which can be seized and forfeited as contraband.  
 22 RCW 82.24.050; 82.24.130.<sup>2</sup> It is difficult to conceive of any effective enforcement

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23  
 24 <sup>2</sup> It should be noted that although the Defendants’ appear to take the position that it is  
 25 unlawful in the state of Washington for Indian retailers to possess unstamped  
 26 cigarettes, the very statute the Defendants aim to enforce against members of the

1 against consumers, because they are not required to keep records of cigarette taxes  
2 paid. See RCW 82.24.090 (record keeping requirements applicable to wholesalers and  
3 retailers only). Although consumers in Washington State may find the tax imbedded  
4 in the price of cigarettes, the U.S. Supreme Court explicitly cautioned against using  
5 “economic reality” as a basis for answering the legal incidence question. *Squaxin*  
6 *Island*, 400 F. Supp. 2d at 1261 (quoting *Chickasaw Nation*, 515 U.S. at 459-60, 115  
7 S. Ct. 2214). Accordingly, the statutory scheme is designed to ensure that the Indian  
8 retailers pay the tax upfront while relieving the State from having to enforce the tax  
9 liability against non-Indian consumers purchasing from those Indian retailers—  
10 making that liability merely theoretical.

11 In sum, just like the tax in *Squaxin Island* fell impermissibly upon the tribe, so  
12 too, does the cigarette tax embodied in RCW 82.24.

13 Finally, the *Colville* case dealt with a similar issue related to incidence of the  
14 tax, but a materially different statutory scheme than is now before the Court. See  
15 *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp.  
16 1339 (E.D. Wash. 1978). When the district court decided *Colville*, the 1974 RCW  
17 82.24 and the 1975 supplement did not contain the onerous burdens that RCW 82.24  
18 currently imposes on the Yakamas. For example, the statute in *Colville* allowed an  
19 Indian tribal organization to have unstamped cigarettes in their stores. (See Keyes  
20 Decl. Exhibit O at RCW 82.24.050, 1974.) If an Indian tribal organization then sold  
21 unstamped cigarettes to non-Indian members, the Indian retailer would then collect the  
22 tax from the buyer and remit the same to the Department of Revenue. (Id. At 1975  
23 Statutory Supplement to RCW 82.24.260.)

24  
25 Yakama Nation actually does not prohibit this conduct as applied to the Indian  
26 retailer.

Here, the State is requiring the retailer to pay the Washington State tax upfront before ever being able to obtain the inventory and disregarding whether or not the sale is Indian to Indian. The current version of RCW 82.24 has been amended numerous times since *Colville* and now places impermissible burdens and taxes the members of the Yakama Nation. Additionally, the prior statute and *Colville* decision pre-dates *Chickasaw Nation*, 515 U.S. 450; *Hammond*, 384 F.3d 674; *Squaxin Island*, 400 F. Supp. 2d 1250; and *Smiskin*, 487 F.3d 1260 (9th Cir. 2007).

**B. Even if this Court finds the “legal incidence” of the cigarette tax does not impermissibly fall on members of the Yakama nation, RCW 82.24 nonetheless imposes more than “minimal burdens” and is unenforceable.**

Even if the legal incidence of a state tax does not fall on the Yakamas (which it does), Washington State can only place minimal burdens on the Indian collecting the state tax, and only if the prerequisite balancing test of “federal, state and tribal interests” favors the state’s collection of the tax through the tribe. *Chickasaw*, 515 U.S. at 458-59, 115 S. Ct. 2214. Here, those interests do not balance in favor of the state’s collection scheme because RCW Chapter 82.24 places unprecedented burdens on the Yakamas doing business on the Yakama Reservation.

First and foremost among those burdens is the requirement that wholesalers “precollect” the tax from the Indian retailer for sales of cigarettes to non-Indians. WAC 458-20-192(9)(a)(i). In other words, the Indian retailer is required to pay the taxes up-front at the time of purchase from the wholesaler without regard to whether the Indian retailer ultimately collects the taxes from its non-Indian customers. The system essentially amounts to a temporary tax on Indians until they are able to recoup the cost of the tax from their non-Indian consumers. The tax becomes permanent on the Indian retailer if the cost is never recouped (*i.e.* the tribal retailer’s inventory is



1 lost, destroyed or otherwise never sold). At a minimum, the system imposes a  
 2 significant financial undertaking on Indian retailers who must essentially front the cost  
 3 of the tax for their non-Indian consumers.<sup>3</sup> See Declarations of Ramsey at ¶¶6, 8, 9;  
 4 Wheeler at ¶¶7-8; Young at ¶¶5-6; Hoptowit at ¶¶5-6.

5 Second, the record-keeping requirements imposed on the Indian retailers under  
 6 RCW 82.24.090 are onerous. Indian retailers' records must show all transactions  
 7 relating to the purchase and sale of any of the taxed cigarettes and show all physical  
 8 inventories performed on those cigarettes, all invoices, and a record of all stamps  
 9 purchased. Further, all such records and all stock of taxable cigarettes on hand must  
 10 be open to inspection at all reasonable times by the department of revenue or its duly  
 11 authorized agent. RCW 82.24.090. The requirements impose considerable time-  
 12 consuming and costly administrative burdens on the Indian retailers. See Ramsey  
 13 Decl. at ¶¶12-13.

14 Third, the State's "allotment" procedure to distinguish between taxed and  
 15 exempt sales places undue burdens on the Indian retailers. Under WAC 458-20-192,  
 16 Indian retailers can seek tax exemption on Indian-to-Indian sales by two methods: 1)  
 17 by purchasing exempt stamped untaxed cigarettes from licensed wholesalers for resale  
 18 to other Indians or the tribe within Indian country or 2) purchasing a stock of untaxed  
 19 unstamped cigarettes for resale to Indians or the tribe within Indian country, but only  
 20 if the tribal seller gives advance notice to the DOR.

21 \_\_\_\_\_  
 22 <sup>3</sup> Additionally, given Defendants' recent letters, which prohibit the purchase and sale  
 23 of exempt stamped untaxed cigarette, the Indian retailers are also fronting the tax on  
 24 Indian-to-Indian sales. As noted *supra*, Defendants' actions violate the statutory  
 25 scheme which expressly allows an allotment procedure to avoid taxation of Indian-to-  
 26 Indian sales.

1 As to the first method, the wholesaler cannot make any delivery or sale of  
2 exempt stamped cigarettes to Indians or tribal sellers for resale to Indians within  
3 Indian country unless the specific quantity is pre-approved by the DOR. The DOR  
4 issues its approval only upon:

5 evidence of a valid purchase order of a quantity reasonably  
6 related to the probable demand of qualified purchasers in the  
7 trade territory of the seller. Evidence submitted may also consist  
8 of verified record of previous sales to qualified purchasers, the  
9 probable demand as indicated by average cigarette consumption  
10 for the number of qualified purchasers within a reasonable  
11 distance of the seller's place of business, records indicating the  
12 percentage of such trade that has historically been realized by  
13 the seller, or such other statistical evidence submitted in support  
14 of the proposed transaction. In the absence of such evidence the  
15 department may restrict total deliveries of stamped exempt  
16 cigarettes to Indian country or to any Indian or tribal seller  
17 thereon to a quantity reasonably equal to the national average  
18 cigarette consumption per capita, as compiled for the most  
19 recently completed calendar or fiscal year, multiplied by the  
20 resident membership of the affected tribe.

21 WAC 458-20-192(9)(ii).

22 Thus, the DOR has broad discretion to restrict Indian retailers' sales to Indians  
23 or the tribe within Indian country by controlling the quantity of exempt stamped  
24 cigarettes the retailer is able to purchase from the wholesaler. The burden is on the  
25 Yakamas to demonstrate, with each purchase, specific evidence of their entitlement to  
26 a specific quantity of these cigarettes. This rigid "pre-approval" system not only  
places additional administrative burdens on the Yakamas, but also fails to allow any  
flexibility for the commercial realities of the Indian retailers' businesses.

For example, under the current law, an Indian retailer who is expecting a  
shipment of a certain quantity of exempt stamped cigarettes from a wholesaler, but is  
in urgent need of a greater quantity given unexpectedly low inventory, cannot simply  
call the wholesaler and ask the wholesaler to sell and ship an additional quantity of  
exempt stamped cigarettes with the current order. Instead, the retailer must wait

1 approval of the additional quantity from the DOR and meanwhile lose out on revenue  
2 from Indian-to-Indian cigarette sales because its inventory was insufficient.<sup>4</sup>

3 If the Indian retailer exercises the second method by obtaining unstamped  
4 cigarettes for resale to Indians or the tribe within Indian country, there are various  
5 other burdens. First, the DOR must be given advance notice pursuant to RCW  
6 82.24.250 and WAC 458-20-1856(502). Moreover, when transporting unstamped  
7 cigarettes, the Indian retailer must ensure that the transporter has invoices or delivery  
8 tickets for such cigarettes, which show the true name and address of the consignor or  
9 seller, the true name and address of the consignee or purchaser, and the quantity and  
10 brands of the cigarettes so transported. RCW 82.24.250. Not only was the pre-  
11 notification requirement held to violate the Yakamas' Treaty right of travel in *Smiskin*,  
12 but these requirements also impose burdens that violate the Yakama Nation's  
13 sovereignty to be free from state laws that impose more than minimal burdens to  
14 enforce state taxes. *Chikasaw*, 515 U.S. at 458-59.

15 As the foregoing demonstrates, the Indian retailers are subject to numerous and  
16 burdensome requirements simply to collect the State's tax on Indian-to-non-Indian  
17 sales, while purportedly exempting Indian-to-Indian sales under its onerous allotment  
18 procedure. Therefore, even if RCW Chapter 82.24 and its related regulations do not  
19 place the legal incidence of the cigarette tax on the Yakamas (which they do), the  
20 taxation scheme imposes significant burdens to collect the tax through the tribe and its

21 \_\_\_\_\_  
22 <sup>4</sup> Equally concerning is that the law unfairly discriminates against the Indian  
23 wholesalers' rights, for example, to sell whatever quantity or volume of untaxed  
24 cigarettes downstream in interstate commerce. The Indian wholesalers' ability to  
25 compete in the marketplace is limited because volume is based upon a percentage of  
26 Indians on reservation.

1 members doing business on the Yakama reservation. On that basis, RCW Chapter  
 2 82.24 should be declared unenforceable as against the Yakamas and Defendants  
 3 should be enjoined from enforcing the state cigarette taxation scheme against the tribe,  
 4 its members or its tribally-licensed entities.

5 **C. RCW 82.24 is unenforceable against members of the Yakama Nation**  
 6 **because its notification and regulatory requirements violate the**  
 7 **Yakama Nation Treaty of 1855.**

8 The statutory requirements of RCW 82.24 and related regulations are  
 9 unenforceable because they violate Yakama Nation members' treaty rights to trade  
 10 and travel by placing undue restrictions that interfere with the right to take goods to  
 11 market free of restriction as prohibited in *United States v. Smiskin*, 487 F.3d 1260,  
 12 1266 (9th Cir. 2007); *see, e.g.*, RCW 82.24.250 (requiring advance notice prior to  
 13 shipment of unstamped cigarettes); WAC 458-20-186(502) (same); WAC 458-20-  
 14 192(303) (requiring pre-approval from the DOR for purchase of exempt stamped  
 15 cigarettes from wholesalers); WAC 458-20-192(9)(a)(ii) (same); RCW 84.24.090  
 16 (requiring record-keeping with records and taxed inventory subject to DOR  
 17 inspection); WAC 458-20-186(701) (requiring maintenance of records of all  
 18 transactions related to the purchase, sale or distribution of cigarettes per RCW  
 19 82.24.090); WAC 458-20-186(702)(a) (completion and return of tax forms setting  
 20 forth sales, inventory, and other data required by the DOR to maintain control over  
 21 trade in cigarettes); WAC 458-20(702)(b) (requiring transmission to the DOR a copy  
 22 of the invoice for each exempt sale of cigarettes to Indian tribes or Indian retailers  
 23 prior to shipment).

24 In *Smiskin*, two enrolled members of the Confederated Tribes and Bands of the  
 25 Yakama Nation ("Yakama Nation") were indicted on charges of violating the federal  
 26 Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §2341 et seq. 2007 WL

1 1452928. Under the CCTA, it is unlawful for any person knowingly to ship,  
 2 transport, receive, possess, sell, distribute, or purchase contraband cigarettes. 18  
 3 U.S.C. §2342(a). “Contraband cigarettes” are defined as “a quantity in excess of  
 4 10,000 cigarettes, which bear no evidence of the payment of applicable State or local  
 5 cigarette taxes in the State or locality where such cigarettes are found” and which are  
 6 in the possession of a person not otherwise authorized by the state to possess such  
 7 cigarettes. 18 U.S.C. §2341(2). Thus, the question of whether a person has violated  
 8 the CCTA actually turns on state law related to the taxing and stamping of cigarettes –  
 9 and *Smiskin* dealt with Washington state law.

10 Federal laws of general applicability are presumed to apply with equal force to  
 11 Indians. *United States v. Baker*, 63 F.3d 1478, 1484 (9<sup>th</sup> Cir. 1995); See also *United*  
 12 *States v. Farris*, 624 F.2d 890, 893 (9<sup>th</sup> Cir. 1980). Three exceptions to this general  
 13 rule were set forth in *Farris*, only one of which was applicable and discussed in  
 14 *Smiskin*. The applicable exception states that “a federal statute of general applicability  
 15 that is silent on the issue of applicability to Indian tribes will not apply to them if the  
 16 application of the law to the tribe would abrogate rights guaranteed by Indian  
 17 treaties.”

18 The bulk of the discussion in the *Smiskin* opinion focuses on the question of  
 19 whether Washington’s pre-notification requirements impinged on a right guaranteed  
 20 to the Yakama in the Yakama Treaty of 1855. The first step in the court’s analysis  
 21 was determining whether the right to travel is guaranteed by the Yakama Treaty. The  
 22 court reaffirmed the decision in *Cree v. Flores* 157 F.3d 762, 769 (9<sup>th</sup> Cir. 1998);  
 23 (also sometimes referred to as *Cree II*), which, based on a lengthy examination of the  
 24 text of the Yakama Treaty, the intent of its signatories and the history and  
 25 circumstances surrounding its adoption, held that the “right to travel” in Article III of  
 26



1 the Yakama Treaty also guarantees the Yakamas the right to transport goods to market  
2 for trade and other purposes. This right may not be encumbered by the imposition of  
3 fees (as in *Cree II*) or other type of requirement/condition (as in *Smiskin*).

4 The *Smiskin* opinion goes on to state that “in resolving conflicts between state  
5 laws and Indian treaties, the Supreme Court has provided a narrow exception to the  
6 inviolability of treaty rights, holding that “pure regulations”- restrictions imposed for a  
7 public purpose unrelated to revenue generation- may be validly applied to tribal  
8 members, treaty rights notwithstanding.” 487 F.3d at 1269. An example of such a  
9 “pure regulation” is a regulation that concerns the time and manner of fishing outside  
10 a reservation. *Tulee v. Washington*, 315 U.S. 681, 684, 62 S. Ct. 862 (1942). The  
11 *Smiskin* court held that Washington’s pre-notification regulations were not “pure”  
12 because the State’s purpose for requiring cigarette stamps, and also for requiring  
13 notice before unstamped cigarettes were transported within the state, was to enforce  
14 the collection of taxes. 487 F.3d at 1269. “A restriction must be purely regulatory to  
15 supersede an Indian treaty right. *Id.* at 1270. Based on this analysis, the *Smiskin* court  
16 held that enforcement of the Washington pre-notification provisions would directly  
17 abrogate the Yakama’s right to travel and therefore they could not be enforced.  
18 Consequently, the CCTA claims which were predicated on violation of the  
19 Washington provisions were also not valid.

20 Here, *Smiskin* provides the authority that the issues presented as it relates to the  
21 pre-notification and other similar requirements in RCW 82.24 are in direct violation of  
22 the Yakama Treaty of 1855. The statutory requirements as previously set forth are  
23 solely for the purpose of revenue generation and as a means and method to account for  
24 the tax revenue. The Department of Revenue would be hard-pressed to argue a  
25 purpose other than such provisions being revenue based. This is not allowed under  
26

1 *Smiskin* as applied to members of the Yakama Nation, and as such, RCW 82.24 is  
2 unenforceable.

3  
4 **D. RCW 82.24 is unenforceable against members of the Yakama Nation**  
5 **because the Statute rises and falls on conduct taking place “in the**  
6 **State.”**

7 In general, RCW 82.24 precludes wholesalers and retailers “in this state” from  
8 possessing cigarettes that do not have a Washington tax stamp. That tax scheme is  
9 unenforceable on the Yakama Reservation since the tax only applies to retailers and  
10 wholesalers “in the State” of Washington. See RCW 82.24.035-050. The Yakama  
11 Nation is its own sovereign nation and falls outside the scope of RCW 82.24.

12 Repeated references are made all throughout the statute for conduct occurring  
13 “in the state.” *Id.* And likewise, repeated references are made all throughout the  
14 Treaty Folio notes that the Yakama Nation is independent of the states and territories.  
15 (See Fidelia Decl. at ¶¶ 7 – 10) Any statute or tax imposed on the Yakama Nation  
16 simply because it happens to be within the geographical boundaries of the State of  
17 Washington is in direct contradiction to the terms of the Treaty and the Folio Notes.  
18 (See Fidelia Decl. Exhibits C and D at pp. 19-21, 32, 34, 35, 42, 50, 70, 89, 97, 102,  
19 106, 107.)<sup>5</sup>

20 Article 1 of the Treaty specifically states that the confederated tribes cede,  
21 relinquish, and convey to the United States the *country* occupied by them. The tribes

22 <sup>5</sup> Further, in negotiations leading up to the Treaty, General Palmer acknowledged that  
23 the Indians and White Men cannot live together in peace. (Fidelia Decl. Exh. C, Folio  
24 Notes at p. 38.) He said that “there should be a line of distinction drawn so that the  
25 Indians may know where their land is and the white man where his land is.” (*Id.* Folio  
26 Notes at pp. 32-35.)

1 thereafter reserved from their *country*, the Yakama Reservation, and specifically  
2 precluded all white people from entering the Reservation. (See Fidelia Decl. Exh. C  
3 at Treaty Art. 2.) “The text of a treaty must be construed as the Indians would  
4 naturally have understood it at the time of the treaty, with doubtful or ambiguous  
5 expressions resolved in the Indians favor.” *Smiskin*, 487 F.3d at 1264, citing  
6 *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 200, 119 S.  
7 Ct. 1187 (1999); (see also *Id.* at Exh. D, Folio at pp. 29, 42.)

8 The term “country” is defined as “a nation or political state or the territory of  
9 such a nation or state.” (Black’s Law Dictionary 8th ed. 2004.) A nation is defined as  
10 “a community of people inhabiting a defined territory and organized under an  
11 independent government and is a sovereign political state.” *Id.* Under both its plain  
12 meaning and its legal definition, the Yakama Nation is separate and distinct from the  
13 State of Washington. As such, Washington’s cigarette tax scheme is inapplicable on  
14 the Reservation since it only precludes untaxed cigarettes “in the state” of  
15 Washington.

16 A recent 10<sup>th</sup> Circuit case further supports this argument by holding that an  
17 Indian reservation can be excluded from being “in the state” if the tribe reserved its  
18 land from the boundaries of the state by treaty. *Sac and Fox Nation of Missouri v.*  
19 *Pierce*, 213 F.3d 566, 577 (2000). That case concerned a Kansas motor fuel tax that  
20 exempted the tax when the fuel was being taken out of the state. *Id.* at 570. The 10<sup>th</sup>  
21 Circuit relied on a Kansas Supreme Court decision that had already decided the issue  
22 and held that all territory not previously exempted from boundaries of Kansas by  
23 treaty between the United States and an Indian tribe was included within the State of  
24 Kansas. *Id.* It therefore upheld the tax based on the Kansas Supreme Court’s prior  
25 treaty interpretation related to the land. *Id.*

26 Unlike the tribe in that case, the Yakama treaty here does specifically exclude

1 the Yakama reservation from the Territory of Washington (Fidelia Decl. Exh C.) In  
2 both Article I and II of the Treaty, the Yakama Nation gave the United States land for  
3 its country and reserved their own Indian country. As previously cited, the repeated  
4 references made to the Yakamas being a separate country in the Folio Notes is further  
5 evidence of the intent of both the Yakama Nation and the United States to exclude the  
6 Reservation from the boundaries of the State of Washington.

7 The Yakama Reservation is not "in the state" as that term is used in RCW  
8 82.24, and therefore, the State has no jurisdiction to tax cigarette sales on the  
9 Reservation.

10 **III. THE ACQUISITION AND POSSESSION OF UNSTAMPED**  
11 **CIGARETTES BY MEMBERS OF THE YAKAMA NATION IS NOT**  
12 **PROHIBITED UNDER RCW 82.24.**

13 As set forth previously, Indian-to-Indian sales within Indian country are  
14 exempted under RCW Chapter 82.24 and the related regulations from the state  
15 cigarette tax. Under WAC 458-20-192(9)(a)(i), Indian retailers may purchase  
16 unstamped cigarettes if the requirements of pre-notification prior to transport under  
17 RCW 842.24.050 and WAC 458-20-186 are met. And, because the pre-notification  
18 requirements are invalid under *Smiskin*, members of the Yakama Nation can acquire  
19 and possess unstamped cigarettes even without the pre-notification to the Defendants.  
20 Accordingly, there is no legal prohibition on the Yakamas' possession of unstamped  
21 cigarettes purchased by Indian retailers or purchased in an Indian-to-Indian sale on the  
22 Yakama Reservation. Additionally, the express language of RCW 82.24 shows that  
23 by statutory definition, Indians and Indian retailers and wholesalers can acquire and  
24 possess unstamped cigarettes.

25 RCW 82.24 defines Indian retailers and wholesalers as Indian Tribal  
26 organizations, however, these organizations are not prohibited from possessing

1 unstamped cigarettes. See RCW 82.24.040-050. Indian Tribal Organizations are  
 2 defined as a federally recognized Indian tribe, and includes an Indian wholesaler or  
 3 retailer conducting business under tribal license or tribal approval within Indian  
 4 country. RCW 82.24.010(3). Indian country is further defined as all land within any  
 5 Indian reservation and all dependent Indian communities within the borders of the  
 6 United States whether within or without the limits of a state. *Id.*, citing 18 U.S.C. §  
 7 1151(a)(b).

8 RCW 82.24 also defines "person" as defined in RCW 82.04.030, which  
 9 provides:

10 "Person" or "company", herein used interchangeably, means any  
 11 individual, receiver, administrator, executor, assignee, trustee in  
 12 bankruptcy, trust, estate, firm, copartnership, joint venture, club,  
 13 company, joint stock company, business trust, municipal  
 14 corporation, political subdivision of the state of Washington,  
 15 corporation, limited liability company, association, society, or any  
 group of individuals acting as a unit, whether mutual, cooperative,  
 fraternal, nonprofit, or otherwise and the United States or any  
 instrumentality thereof.

16 Indian Tribal Organizations are not "persons" as that term is used in  
 17 Washington's cigarette tax statute. "It is an elementary rule that where the Legislature  
 18 uses certain statutory language in one instance, and different language in another,  
 19 there is a difference in legislative intent." *Spain v. Employment Security Dept.*, 185  
 20 P.3d 1188, 1192 (2008). Under the well-established canon of statutory interpretation,  
 21 the use of different words or terms within a statute demonstrates that the Legislature  
 22 intended to convey different meanings for those words. *Spencer Enterprises, Inc. v.*  
*United States*, 345 F.3d 683, 689 (9<sup>th</sup> Cir. 2003).

23 Here, the Legislature did not prohibit Indian tribal organizations from  
 24 possessing unstamped cigarettes. Addressing retailers first, RCW 82.24.050 provides  
 25 that "no retailer in this state may possess unstamped cigarettes..." Nowhere in that  
 26



1 section or the entire tax scheme does it say that an Indian tribal organization, which  
2 includes Indian retailers, cannot possess unstamped cigarettes. Following the  
3 elementary rule of statutory interpretation, the Legislature would have included Indian  
4 tribal organizations or Indian retailers in 82.24.050 if it wanted to prohibit such  
5 Indians from possessing unstamped cigarettes. Because the Legislature specifically  
6 defined Indian tribal organizations and did not include them in this section, it did not  
7 intend to prohibit them from possessing unstamped cigarettes on the reservation.

8 The Washington State Legislature used similar language in 82.24.040, which  
9 prohibits persons and wholesalers from possessing unstamped cigarettes. Again, the  
10 term Indian tribal organization is not included in this section. The Legislature used  
11 the terms person and wholesaler, which were both defined in 82.24.010(8)(9),  
12 "Wholesaler means every person who purchases, sells, or distributes any one or more  
13 of the articles taxed herein to retailers for the purpose of resale only." 82.24.010(8).  
14 Again the Legislature does not include Indians or Indian tribal organizations in its  
15 definition of "persons" or "wholesalers." Therefore, the Legislature did not intend to  
16 prohibit Indian tribal organizations, which include Indians personally and Indian  
17 wholesalers, from possessing unstamped cigarettes.

18 Concrete evidence of this intent can be found in RCW 82.24.250. The  
19 Legislature in that section, which relates to the transportation of unstamped cigarettes,  
20 did include the term Indian tribal organization. For the purpose of that section alone,  
21 the Legislature, in defining who a person was, stated, "[A]ny person, including an  
22 Indian tribal organization..." Because the Legislature was giving a different meaning  
23 to the term "person", it specifically defined what that term meant. However, the  
24 statute is very clear that the meaning of "person" in that section only applies to that  
25 section. 82.24.250(7). Therefore, Indian tribal organizations are included in the  
26

1 section on transporting unstamped cigarettes, but are not precluded from possessing  
2 unstamped cigarettes under RCW 82.24.040 and .050.

3 Under RCW 82.24, Indian retailers and wholesalers are not "persons". Since  
4 RCW 82.24 only prohibits persons, wholesalers, and retailers from possessing  
5 unstamped cigarettes, Indian tribal organizations, such as Yakama retailers and  
6 wholesalers, are not prohibited from possessing unstamped cigarettes on the Yakama  
7 Reservation.

8 **IV. IT IS UNLAWFUL FOR THE STATE OF WASHINGTON TO**  
9 **PROHIBIT THE YAKAMA NATION FROM ISSUING ITS OWN TAX**  
10 **STAMP.**

11 In a series of letters beginning July 7, 2008, the State of Washington terminated  
12 the cigarette compact with the Yakama Nation and prohibited the Yakama Nation  
13 from using its Yakama Nation tax stamp. (Keyes Decl. Exhibits B & D) Subsequent  
14 letters sent to the Yakama Nation and Washington wholesalers prohibited the sale of  
15 cigarettes without a Washington State tax stamp and reiterated their position that  
16 cigarettes bearing a Yakama Nation tax stamp are contraband subject to the  
17 enforcement provisions in RCW 82.24. (See Keyes Decl. Exhibits C & E) The State  
18 has gone beyond requiring a Washington State tax stamp to be on cigarettes, it  
19 prohibits the Yakama Nation from placing its own tax on cigarettes sold on the  
20 reservation. This is an entirely different issue than simply requiring Washington State  
21 tax stamps be placed on cigarettes sold on the reservation. The Yakama Nation is now  
22 no longer able to place its own tax stamp on cigarettes sold on reservation.

23 **A. The Yakama Nation is a Sovereign With the Power to Decide**  
24 **Whether the Yakama Nation Cigarette Tax Stamp is Valid.**

25 The Yakama Nation, as its own sovereign government, has the authority to pass  
26 laws to impose a tribal tax on the sale of cigarettes on the Reservation and it may

1 decide to enforce that tax by requiring that the Yakama Nation stamp be affixed to  
 2 each such pack of cigarettes. It is the right of the Yakama Nation as a self regulating  
 3 and governing body—not the state—to decide whether the tribe will tax goods traded  
 4 within the borders of its Reservation and how it will enforce that tax through the use  
 5 of stamps or otherwise.

6 “The policy of leaving Indians free from state jurisdiction and control is deeply  
 7 rooted in the Nation’s history.” *McClanahan v. State Tax Commission of Arizona*,  
 8 411 U.S. 164, 168, 93 S. Ct. 1257 (1973); *County of Yakima*, 502 U.S. at 257, 112 S.  
 9 Ct. 683 . This policy was expressed over 150 years ago when Chief Justice Marshall  
 10 held that “Indian nations were distinct political communities, having territorial  
 11 boundaries, within which their authority is exclusive and having a right to all the lands  
 12 within those boundaries, which is not only acknowledged, but guaranteed by the  
 13 United States.” *McClanahan*, 411 at 168, 93 S. Ct. 1257. From the very first days of  
 14 our government, the Federal Government has allowed the Indians to govern  
 15 themselves, free from state interference. *Id.* at 170, 93 S. Ct. 1257. The State of  
 16 Washington has never had the authority to regulate or control activity within Indian  
 17 reservations. The State’s prohibition on the Yakamas implementation of its own tax  
 18 on cigarettes is an unlawful attempt to exercise control over the Yakama Nation.  
 19 Therefore, Defendants have no authority to declare that cigarettes affixed with a  
 20 Yakama Nation stamp are “contraband.” That is a wholly different issue than whether  
 21 or not that product *also* has to bear the Washington state tax stamp.

22 **B. The State of Washington has no Jurisdiction over the Yakama Nation**  
 23 **and Cannot Prohibit it from Issuing Tax Stamps.**

24 Public Law 83-280 (commonly referred to as Public Law 280) mandated some  
 25 states, and permitted other states, to acquire jurisdiction over certain crimes by or  
 26 against Indians and civil suits to which Indians are parties arising on Indian land. 18

1 U.S.C. § 1162; 18 U.S.C. § 1360. Washington was not among the states with  
2 mandatory jurisdiction. *See id.* Public Law 280 allowed states, like Washington, that  
3 did not have such jurisdiction to assume jurisdiction *with the consent of the Indian*  
4 *tribe*. 25 U.S.C. § 1321; 25 U.S.C. § 1322.

5 Enacted pursuant to Public Law 280, RCW 37.12.010 provides that Washington  
6 has assumed civil and criminal jurisdiction over Indians on their tribal lands in eight  
7 specific categories not applicable here. *Id.* (those areas are: compulsory school  
8 attendance; public assistance; domestic relations; mental illness; juvenile delinquency;  
9 adoption proceedings; dependent children and motor vehicles). The statute provides  
10 that the State does not assume jurisdiction over Indians on their tribal lands unless the  
11 provisions of RCW 37.12.021 are invoked.

12 Under RCW 37.12.021, the State may assume civil and criminal jurisdiction  
13 over Indians on Indian land in other areas to the same extent as the State exercises  
14 jurisdiction elsewhere in the State only when:

15 the governor of this state shall receive from the majority of any  
16 tribe or the tribal council or other governing body...a resolution  
17 expressing [the tribe's] desire that its people and lands be subject  
to the criminal and civil jurisdiction to the full extent authorized  
by federal law. RCW 37.12.021.

18 Thus, the State's own laws demonstrate that before attempting to enforce  
19 cigarette tax laws and subjecting Plaintiffs and other tribal members to criminal  
20 prosecution or other liability related to cigarette taxes, Defendants must receive a  
21 valid resolution from the Tribe expressing its desire to be subject to the State's  
22 jurisdiction in this area. The Yakama Nation has never done such a thing and has  
23 affirmatively voted to have all taxing authority, including cigarettes, to be placed with  
24 the Law and Order Committee within the Yakama Nation. Therefore, the State has no  
25 jurisdiction over the Tribe's taxation of cigarettes on the reservation and certainly  
26

1 does not have jurisdiction to prohibit the use of the Yakama Nation tax stamp.

2  
3 **V. IMMEDIATE AND IRREPARABLE HARM WILL CONTINUE TO BE**  
4 **SUFFERED BY MEMBERS OF THE YAKAMA NATION IF THE**  
5 **COURT DOES NOT ENTER A TEMPORARY RESTRAINING ORDER**  
6 **AND PRELIMINARY INJUNCTION.**

7 Defendants' unilateral declaration on July 7, 2008 suddenly made cigarettes  
8 stamped with the Yakama Nation stamp "contraband." Cigarettes bearing the Yakama  
9 Nation stamp could be legally possessed, sold, delivered and transported on the  
10 Yakama Reservation under the 2004 Agreement. Without any notice, tribally-licensed  
11 retailers suddenly had "contraband" in their inventory, which had been purchased  
12 legally and which the day before was perfectly legal to possess and sell. Defendants'  
13 conduct is unlawful because they did not allow for any phase-out of the previously-  
14 legal inventory which violates the 2004 Agreement, language in RCW 43.06.455,  
15 RCW 82.24.580, and ex post facto laws. (See Keyes Decl. at Exhibit M:  
16 Correspondence with the State of Washington Attorney General's Office.) Many  
17 Indian retailers still have goods bearing the Yakama Nation tax stamp that were  
18 purchased before the State "terminated" the Agreement. (See Declarations of Ramsey,  
19 Wheeler, Young, and Hoptowit.)

20 **A. Effective Termination of the 2004 Agreement Requires a "phase-out"**  
21 **of Inventory Before Defendants Can Immediately Threaten Criminal**  
22 **Enforcement and Deem Inventory "Contraband."**

23 Serious questions remain whether the 2004 Agreement has effectively been  
24 terminated according to its own terms, and whether the cigarette taxes imposed by  
25 RCW 82.24 even apply to the Yakamas at this time. (See RCW 82.24.580.) Under the  
26 2004 Agreement, the parties must follow certain procedures and time frames before  
the agreement can be terminated, thereby arguably triggering RCW 82.24. (Keyes



Decl. Exhibit A Part X.) Defendant Holmstrom sent a letter to Plaintiffs giving notice of the State's termination of the Agreement on July 7, 2008, but then immediately threatened enforcement action pursuant to RCW 82.24. (Keyes Decl. Exhibits B, C, and D)

In accordance with the termination process in the 2004 Agreement, Defendants allege that a July 3, 2008 fact-finding and opinion was issued by the mediator, however, Defendants have provided no copy of this despite requests. (Keyes Decl. Exhibits M and N) After a mediator's ruling, the parties then have 180 days to reach an agreement or correct the For Cause Violation before the Agreement shall be terminated. (*Id.* Exhibit A, Part X, ¶ 7.) Therefore, the State of Washington's threats of enforcement action based on Washington law or the inventory being considered contraband, could not begin at least until six months after the July 7, 2008 Notice of Termination; i.e. January 2009. Any threats of enforcement or enforcement itself are against the 2004 Agreement and RCW 82.24.580. Nonetheless, not only do the threats loom, members of the Yakama Nation are being prohibited from selling the goods or acquiring new inventory without the Washington State tax stamp. (Keyes Decl. Exhibits B, C, D, E, and K)

**B. The Defendants' threats to treat inventory with the Yakama Nation Tax Stamp as Contraband Violates Ex Post Facto Laws and Continues to Harm Yakama Nation Retailers.**

The Defendants' threats to treat the inventory as "contraband" constitutes an *ex post facto* violation. Threats of criminal enforcement based on RCW 82.24; (or the federal equivalent under the CCTA that relies on application of RCW 82.2.4) is prohibited by the Ex Post Facto Clauses. *See* U.S. Const. Art I, § 9-10; Wash. Const.

1 Art. I, § 23. Summarily, if the Defendants or any federal agent uses the RCW 82.24  
2 or the CCTA to raid, for example, and causes forfeiture of product purchased during  
3 and in compliance with the 2004 Agreement, then the Defendants and their agents  
4 would be criminalizing an act that was legal when committed—an effect strictly  
5 prohibited by the Constitution of the United States and the Constitution of the State of  
6 Washington. *See* U.S. Const. Art I, § 9-10; Wash. Const. Art. I, § 23; *Beazell v. Ohio*,  
7 269 U.S. 167, 169-170 (1925) (“Any statute which punishes as a crime an act  
8 previously committed, which was innocent when done ... is prohibited as ex post  
9 facto.”)  
10  
11  
12

13 Three elements must be present for a law to be classified as ex post facto: first,  
14 it must be penal in nature; second, it must be retrospectively applied; and, third, it  
15 must disadvantage the individuals affected. *See Weaver v. Graham*, 450 U.S. 24, 29  
16 (1981); *Calder v. Bull*, 3 U.S. 386, 390 (1798). The CCTA and RCW 82.24, as  
17 applied to wholesalers and distributors with current possession of Yakama Nation  
18 stamps, satisfy all three elements of an ex post facto law. Furthermore, the ex post  
19 facto clauses were created by the architects of our Constitution to ensure that Federal  
20 and State Legislature enactments provide fair warning of their effect, thus permitting  
21 individuals to rely on their meaning until explicitly changed. *See* U.S. Const. Art I, §  
22 9-10; Wash. Const. Art. I, § 23; *Carmell v. Texas*, 529 U.S. 513, 531  
23  
24  
25  
26

1 n.21 (2000). The 2004 Agreement authorized the legal sale and possession of  
 2 Yakama Nation stamps and inventory –and some of which inventory takes months to  
 3 deplete. (See Ramsey Declaration) The continued threats and enforcement continue  
 4 to unlawfully harm Plaintiffs and should be enjoined.  
 5

6 **C. Irreparable Financial Harm to the Yakama Nation and Harm to**  
 7 **Reputation.**

8 The Indian retailers are already being harmed financially by having to pay  
 9 upfront the costs of State taxation pursuant to Defendants' correspondences. This is  
 10 despite the fact that these retailers do not even know if they will be able to sell the  
 11 product due to the fact that the customers are afraid to purchase any product from the  
 12 retailers for fear of retaliation by the State. The retailers feel constantly threatened by  
 13 the Defendants with possible enforcement action for what the retailers believe is legal  
 14 conduct on their part. This enforcement action may include raids on the retail shops  
 15 and seizure of product and money. This constant threat has placed a stigma on the  
 16 retailers which has been heightened by the press coverage and is wrongfully affecting  
 17 their businesses. (See Declarations of Ramsey, Wheeler, Hoptowit, Young, and Davis)

18 Finally, the Yakama Nation is being wrongfully harmed by being prohibited  
 19 from issuing its own tax stamp for sales even on-reservation to its own people. This  
 20 funding goes to essential services. There is no law that would prohibit the Yakama  
 21 Nation to issue its own tax stamp – the question is whether or not product also has to  
 22 bear the Washington State stamp related to the non-Indian sale. This issue is now  
 23 currently being litigated. This financial loss is impacting and effecting Yakama  
 24 Nation essential services that have been funded by the Yakama Nation tax stamps.  
 25 (See Sanchey Declaration at ¶¶8 - 13.)  
 26

1 Despite the financial harm that is occurring to the Yakama Nation and its  
2 members, the State of Washington is not being harmed if the state tax is not collected  
3 pending the outcome of this litigation. The State of Washington has not been  
4 collecting any cigarette tax funds under the 2004 Agreement, nor can it be said that it  
5 was contemplated that it would begin to do so either after the expiration of the  
6 Agreement in 2012. It was never a tax revenue sharing Agreement. (Keyes Decl. Exh.  
7 A) As such, the State of Washington will not suffer harm if the requested Temporary  
8 Restraining Order is granted.

9 **VI. CONCLUSION**

10 For all of the foregoing reasons, Plaintiffs have no adequate remedy at law and  
11 are entitled to a temporary restraining order and injunctive relief prohibiting  
12 Defendants from taking the actions complained of herein.

13 DATED this 2nd day of September, 2008.

14 K&L GATES LLP

15  
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