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USDC EDWA CR-04-2127-RHW-1

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

PETER MAHONEY, Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Washington

APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
I. STATEMENT OF JURISDICTION	1
A. JURISDICTION OF THE DISTRICT COURT	1
B. JURISDICTION OF THE UNITED STATES COURT OF APPEALS .	1
C. TIMELINESS OF APPEAL	1
D. FINAL ORDER AND BAIL STATUS	1
II. ISSUES PRESENTED FOR REVIEW	2
III. STATEMENT OF THE CASE	2
A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS	2
B. STATEMENT OF FACT	3
IV. SUMMARY OF ARGUMENT	8
A. The CCTA applies to Indian sales	8
B. There is no treaty language to exempt the Defendant from liability	8
C. The CCTA only requires a knowing mens rea	8
D. The proposed jury instruction for money laundering was sufficient	8
E. Thirty-three month sentence was reasonable	9
F. An equal protection argument was not preserved	9
V. ARGUMENT	10
A. STANDARDS OF REVIEW	10
1. Challenges to an Indictment	10
2. Jury Instructions	10
3. Sentencing	10
4. Waiver of Issue for Appeal	11

B.	CCTA STATUTES AND CASE LAW	11
1.	Statutory Provisions	11
2.	Significant Federal CCTA Case Law	12
C.	BAKER IS THE LAW OF THIS CIRCUIT AND CORRECTLY APPLIES 18 U.S.C. § 2342 TO THE DEFENDANT'S ACTS .	14
D.	THERE IS NO COEUR D'ALENE TREATY LANGUAGE TO FAVORABLY INTERPRET	18
E.	THE CCTA DOES NOT REQUIRE A SPECIFIC INTENT INSTRUCTION	19
F.	THE DISTRICT COURT'S PROPOSED JURY INSTRUCTION ON GENERAL KNOWLEDGE ADEQUATELY DISTINGUISHED MONEY LAUNDERING AND CONDUCTING FINANCIAL TRANSACTIONS .	21
G.	THE 33 MONTH SENTENCE IMPOSED WAS REASONABLE . . .	23
H.	THE EQUAL PROTECTION CLAIM WAS NOT PRESERVED FOR APPEAL	27
VI.	CONCLUSION	30
VII.	STATEMENT OF RELATED CASES	31
VIII.	CERTIFICATE OF SERVICE	32
ADDENDUM		
	R.C.W. 82.24.030	i
	R.C.W. 82.24.250	ii-iii
	Washington Administrative Code 458-20-186	iv-vii

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<i>Antoine v. Washington</i> , 420 U.S. 194 (1975)	19
<i>Gall v. United States</i> , 128 S.Ct. 586 (2007)	23
<i>McClanahan v. Arizona State Tax Commission</i> , 411 U.S. 164 (1973)	17
<i>Moe v. Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	12, 18, 19
<i>Nevada v. Hicks</i> , 533 U.S. 353 (2001)	15, 16
<i>New York v. Milhelm Attea & Brothers, Inc.</i> , 512 U.S. 61 (1994)	12, 18, 19
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946)	26
<i>Village of Willowbrook v. Olech</i> , 528 U.S. 562 (2000)	29
<i>Washington v. Confederated Tribes of the Colville Indian Reservation (Colville)</i> , 447 U.S. 134 (1979)	12, 14, 16, 18-20

CIRCUIT COURT OF APPEALS CASES

<i>Cree v. Flores</i> , 157 F.3d 762 (9th Cir. 1998)	18
<i>Donovan v. Coeur d'Alene Tribal Farm</i> , 751 F.2d 1113 (9th Cir. 1985)	18, 29
<i>Gobin v. Snohomish County</i> , 304 F.3d 909 (9th Cir. 2002)	17

<i>Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes</i> , 282 F.3d 1175 (9th Cir. 2002)	15
<i>Malabed v. North Slope Borough</i> , 335 F.3d 864 (9th Cir. 2003)	17
<i>United States v. Alghazouli</i> , - F.3d -, 2008 WL 564986 (9th Cir. 2008)	10, 23, 24
<i>United States v. Baker</i> , 63 F.3d 1478 (9th Cir. 1995), cert. denied, 516 U.S. 1097 (1996)	13-14, 16, 19-20
<i>United States v. Buckley</i> , 689 F.2d 893 (9th Cir. 1982), cert. denied, 460 U.S. 1086 (1983)	10
<i>United States v. Bynum</i> , 362 F.3d 574 (9th Cir. 2004)	11, 28
<i>United States v. Cantrell</i> , 433 F.3d 1269 (9th Cir. 2006)	10
<i>United States v. Elshenawy</i> , 801 F.2d 856 (6th Cir. 1986), cert. denied, 479 U.S. 1094 (1987)	20
<i>United States v. Garcia</i> , 497 F.3d 964 (9th Cir. 2007)	26
<i>United States v. Golb</i> , 69 F.3d 1417 (9th Cir. 1995)	21
<i>United States v. Gord</i> , 77 F.3d 1192 (9th Cir. 1996)	15
<i>United States v. Heredia</i> , 483 F.3d 913 (9th Cir.), cert. denied, 128 S.Ct. 804 (2007)	10
<i>United States v. Knapp</i> , 120 F.3d 928 (9th Cir.), cert. denied, 522 U.S. 968 (1997)	22
<i>United States v. McConney</i> , 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984)	10

<i>United States v. Smiskin</i> , 487 F.3d 1260 (9th Cir. 2007)	2, 7-9, 13-14, 18-19, 29
<i>United States v. Staufer</i> , 38 F.3d 1103 (9th Cir. 1994)	27
<i>United States v. Stein</i> , 37 F.3d 1407 (9th Cir. 1994), cert. denied 513 U.S. 1181 (1995)	21, 22
<i>United States v. Steward</i> , 16 F.3d 317 (9th Cir. 1994)	27
<i>United States v. Stuart</i> , 923 F.2d 607 (8th Cir. 1991)	27
<i>Yakama Indian Nation v. Washington</i> , 176 F.3d 1241 (9th Cir. 1999)	13

STATUTES

18 U.S.C. § 371	1
18 U.S.C. § 1956(a)	1
18 U.S.C. § 1956(h)	1
18 U.S.C. § 1957	1
18 U.S.C. § 2341	11, 12, 14, 17, 26
18 U.S.C. § 2342	1, 11, 14
18 U.S.C. § 3231	1
18 U.S.C. § 3553(a)	9, 23, 27
25 U.S.C. § 4301	18, 19
28 U.S.C. § 1291	1

OTHER AUTHORITIES

1978 U.S.S.C.A.N. (P.L. 95-575) 5518, 5519	14, 15
Fed.R.App.P. 4(b)(1)(A)	1
Fed.R.Crim.P. 11(a)(2)	1, 28
Revised Code of Washington [RCW] 82.24.030	11
Revised Code of Washington [RCW] 82.24.250	11, 12
Washington Administrative Code 458-20-186(4)(c)	11
Yakama Treaty of 1855	13, 18

I.

STATEMENT OF JURISDICTION

A. JURISDICTION OF THE DISTRICT COURT

Jurisdiction existed in the district court by virtue of 18 U.S.C. § 3231 and an Indictment charging the Defendant, Peter Mahoney, with violations of 18 U.S.C. §§ 371; 1956(a); 1956(h); 1957; and 2342. Excerpts of Record¹ 256-58.

B. JURISDICTION OF THE UNITED STATES COURT OF APPEALS

Jurisdiction exists in the Court of Appeals of the Ninth Circuit by virtue of 28 U.S.C. § 1291 and the defendant's guilty pleas to violations of 18 U.S.C. §§ 371 and 1956(h). ER 110-11.----

C. TIMELINESS OF APPEAL

The district court Judgment and Sentence was filed on October 29, 2007. ER 277. The Defendant filed a notice of appeal on October 31, 2007. ER 277. This notice is timely under Fed.R.App.P. 4(b)(1)(A) (defendant has 10 days within which to file an appeal).

D. FINAL ORDER AND BAIL STATUS

The Defendant's plea was conditional pursuant to Fed.R.Crim.P. 11(a)(2) and permits appeal of certain issues. ER 108-12. The Defendant is serving a 33 month sentence of incarceration. ER 277.

¹Hereinafter the Excerpts of Record shall be designated by ER.

II.

ISSUES PRESENTED FOR REVIEW

- A. Does the Contraband Cigarette Trafficking Act apply to Indians where Indians are not expressly exempted by the statutory language?
- B. Where there is no treaty, is the Defendant's reliance on *United States v. Smiskin* misplaced?
- C. Does the mens rea of the Contraband Cigarette Trafficking Act require specific intent when the statute only refers to a knowing violation?
- D. Does the district court's proposed jury instruction adequately distinguish the mens rea elements applicable to the various charges?
- E. Was a Guideline sentence of 33 months reasonable?
- F. Can the Defendant raise an equal protection claim which has not been preserved for appeal?

III.

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

An Indictment charging the Defendant with conspiracy to violate the Contraband Cigarette Trafficking Act [hereinafter CCTA]; Conspiracy to Launder Money; CCTA violations and Money Laundering was filed on September 22, 2004. ER 258. The Defendant raised numerous challenges to the Indictment during

pretrial practice. ER 260 (Discriminatory Enforcement; Excessively Burdensome Tax); 261 (CCTA Not Applicable to Indians; Sales Authorized by Tribal Laws); 264 (Void for Vagueness); 265 (Treaty Violations). The Defendant plead guilty to the CCTA conspiracy and money laundering conspiracy charges on October 3, 2006. ER 275. A sentencing hearing was held on October 18-19, 2007. ER 277. The Judgement was filed on October 29, 2007, imposing 33 months of imprisonment. ER 277.

B. STATEMENT OF FACT

The following stipulated facts appear in the Plea Agreement:

Peter Mahoney and Peggy Mahoney are husband and wife and operate the Warpath Convenience Store/Smoke Shop/gas station in Plummer, Idaho. Within the same complex is the Pemnican Inn [a restaurant], Mahoney Petroleum and an espresso stand. Off site, about 15 miles north in Worley, Idaho, Peter and Peggy Mahoney operate a smoke shop, Cheap Smokes. One of the objects of the Warpath is the sale of cigarettes.

Washington State requires that each pack of cigarettes sold within the state bear either a tax paid stamp or a tax exempt stamp. The tax exempt stamped cigarettes may only be sold on a military base or an Indian reservation. When sold on a reservation, the cigarettes are intended to be only sold to members of that tribe.

Because of the reporting and taxing requirements imposed by Washington State on wholesalers licensed to do business in Washington, some Indian reservation smoke shops in Washington have been obtaining cigarettes from tribal vendors in Idaho. Idaho does not require the collection of state cigarette taxes for any cigarettes sold on a reservation by tribal vendors. Peter and Peggy Mahoney are two such vendors. During the period covered by the Indictment, untaxed and unstamped cigarettes could be transported in Washington, either by a Washington State licensed wholesaler or by a person who had notified the State prior to the intended shipment. From September, 2002, through June, 2003, Washington State authorities did not received notice of shipments of untaxed and unstamped cigarettes by the Warpath, Peter Mahoney or Peggy Mahoney. Further, the Warpath, Peter Mahoney and Peggy Mahoney are not wholesalers licensed by the State of Washington.

In early 2003, Washington State Liquor Control Board officers observed a rental van making deliveries to Indian Smoke Shop [owner David Bean]; Lyle's Smoke Shop [owner Lyle W. Conway] and Lyle's II [owner Lyle Shawn Conway], all in the Fife, Washington area, on the Puyallup Indian Reservation. The deliveries appeared to involve more than 60,000 cigarettes for each occurrence. Further investigation revealed that Mark Van't Hul [Peggy Mahoney's brother] was renting vans in Spokane,

Washington, driving to Plummer, Idaho, loading the van with cigarettes and delivering the same to the afore-mentioned smoke shops. Subpoenaed records from two of the rental companies show that Van't Hul rented the vans at least twenty-one times; twenty times using a Mahoney Petroleum Visa. The mileage on sixteen of the rental forms was consistent with a trip from Spokane to Plummer to Tacoma and back. The mileage was inconsistent with a detour from Plummer to Oregon to Tacoma, which would avoid transiting the Eastern District of Washington.

Bank records from the Bank of Fairfield showed a substantial number of checks from Indian Smoke Shop, Lyle's Smoke Shop and Lyle's II being deposited into a Mahoney owned account. For the period of September, 2002 to July, 2003, the Mahoney's deposited 45 checks from David Bean, doing business as Indian Smoke Shop, totaling \$2,092,723.52; 24 checks from Lyle W. Conway totaling \$545,166.98; and 10 checks from Lyle Shawn Conway totaling \$213,173.05. Records obtained from searches of the three smoke shops and the Warpath complex and Mahoney residence support the inference that these purchases were for the most part related to cigarettes. A very small portion of the Bean checks, less than \$5000, was attributable to other tobacco products. The amounts of the checks would equate to the transportation of more than 60,000 cigarettes for each check. The funds were deposited into a Warpath bank account from which checks were written during the

period of at least October 18, 2002 to April 25, 2003, to cigarette wholesalers, in amounts totaling to \$2,953,795.40. These monetary transactions to wholesalers were funds which were derived in part from sales of cigarettes to Washington retailers.

Mark Van't Hul has plead guilty to conspiracy to violate the CCTA and has agreed to cooperate. Mr. Van't Hul would testify that Peter Mahoney told Van't Hul if Van't Hul was stopped by law enforcement while transporting cigarettes in Washington State, the State would take the cigarettes and let Van't Hul go with only a citation.

Andrea Kozlowsky, a representative of cigarette manufacturer Phillip Morris, Inc., would testify that she has had conversations with Peter Mahoney. Ms. Kozlowsky would testify that she made it clear to Mr. Mahoney that it was illegal to ship cigarettes into Washington from Idaho.

David Bean has plead guilty to conspiracy to transport and possess contraband cigarettes and a money laundering conspiracy. David Bean has agreed to testify on behalf of the government and relates that he purchased contraband cigarettes from Peter and Peggy Mahoney. Copies of faxed invoices obtained from Bean's accountant match up with approximately 29 of the Indian Smoke Shop checks deposited into the Mahoney bank account. Several of the invoices have notations similar to "Thanks for the order,

Peggy" typed on them. Each invoice detailed the delivery of more than 60,000 cigarettes.

David Bean related that from at least October, 2002 to May 20, 2003, Mark Van't hul would make deliveries of cigarettes to Indian Smoke Shop and return with checks for the merchandise. The bank records show the checks were then deposited into Warpath accounts in Rockford, in the Eastern District of Washington, from which Peter Mahoney and Peggy Mahoney paid their suppliers. . . . Supplemental Excerpts of Record 5-9.² The Defendant agreed that these facts are accurate. SER 5.

The Defendant preserved certain issues for appeal. ER 108-____ 12. At no time did the Defendant argue that the holding in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), raised an equal protection issue when enforcing the CCTA. ER 276-77.

Prior to sentencing, a Washington retailer codefendant received a sentence of probation for this violation of the CCTA. ER 74-75. During sentencing, the government presented 13 witnesses, the Defendant presented two witnesses. Evidence of contraband cigarette sales on January 14, 2004 and September 28, 2007, was presented to the court. Defense Brief 50; ER 25-26. When imposing a 33 month sentence of imprisonment, the district court found that the Defendant's wholesale contraband cigarette

²Hereinafter the Supplemental Excerpts of Record shall be designated by SER.

trafficking into Washington was not the same as the Washington retailer's purchases of contraband cigarettes. ER 24.

IV.

SUMMARY OF ARGUMENT

A. The CCTA applies to Indian sales.

The CCTA is a statute of general applicability thus applies equally to Indians. Although the legislative history indicates that the statute was not meant to impede lawful untaxed sales by Indians, the Circuit has determined that such sales must be in compliance with applicable state laws.

B. There is no treaty language to exempt the Defendant from liability.

In order to assert the *Smiskin* defense, i.e., a specific treaty right, there must be specific treaty language preserving the right. In this case there is no such language as the Defendant's tribe did not enter into a treaty.

C. The CCTA only requires a knowing mens rea.

Conviction for a violation of the CCTA requires proof that the Defendant acted knowingly. This Circuit does not require specific intent, i.e., a showing that the Defendant knew that his actions violated the law.

D. The proposed jury instruction for money laundering was sufficient.

The district court issued a proposed jury instruction for "knowingly". That instruction adequately differentiated between

the general knowledge requirement and the specific intent as applied to portions of the money laundering statutes. The proposed instruction would not have confused a jury.

E. Thirty-three month sentence was reasonable.

The Supreme Court has declared that a district court must consider 18 U.S.C. § 3553(a) factors along with the applicable Guideline range. The district court was well aware of those factors and explained why the Defendant's sentence was different from others being sentence for CCTA violations. Therefore, the sentence of 33 months was reasonable and not an abuse of discretion.

F. t preserved.

When entering a conditional guilty plea, only those issues preserved by the plea agreement may be raised on appeal. In this case, the Defendant did not raise an equal protection claim in the lower court, therefore the claim is waived. Even if not waived, there is no equal protection issue where the Defendant is not similarly situated to *Smiskin*. The different outcome is based upon treaty language and not race.

V.

ARGUMENT

A. STANDARDS OF REVIEW

1. Challenges to an Indictment

This court reviews *de novo* whether an indictment is sufficient to withstand a motion to dismiss. *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); see *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Allegations of the indictment are presumed to be true. *Buckley*, 689 F.2d at 897.

2. Jury Instructions

This court also reviews *de novo* whether a jury instruction correctly describes the elements of a crime. *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir.), *cert. denied*, 128 S.Ct. 804 (2007).

3. Sentencing

This Court reviews "the district court's interpretation of the Sentencing Guidelines *de novo*, the district court's application of the Sentencing Guidelines to the facts of [a] case for abuse of discretion, and the district court's factual findings for clear error." *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) (citation omitted)." *United States v. Alghazouli*, - F.3d -, 2008 WL 564986 (9th Cir. 2008).

4. Waiver of Issue for Appeal

Whether the Defendant has waived his right to appeal is a question of law that is reviewed de novo. *United States v. Bynum*, 362 F.3d 574, 583 (9th Cir. 2004).

B. CCTA STATUTES AND CASE LAW

1. Statutory Provisions

Under 18 U.S.C. § 2342, the CCTA, it is illegal to "ship, transport, receive, possess, sell, distribute or purchase contraband cigarettes." Contraband cigarettes are defined in 18 U.S.C. § 2341 as unstamped cigarettes which are 1) found in a state requiring stamps on cigarettes; and 2) are in the possession of a person not authorized to possess unstamped cigarettes in that state. Washington State requires either a tax paid or a tax exempt stamp on cigarette packages prior to the sale of the cigarettes. Revised Code of Washington [RCW] 82.24.030 (1990), Addendum i; Washington Administrative Code 458-20-186(4)(c), Addendum iv-vii. An Indian³ may possess unstamped cigarettes if notice is given to Washington State prior to transporting the cigarettes within the state. RCW 82.24.250, Addendum ii-iii. Absent stamps or compliance with RCW 82.24.250,

³Although licensed wholesalers and non-Indians may also under certain circumstances, not relevant here, possess unstamped cigarettes, because the Defendant's argument is based upon his status as an Indian, this brief shall only refer to those situations where an Indian possesses unstamped cigarettes.

the cigarettes are contraband. 18 U.S.C. § 2341(2); RCW 82.24.250, Addendum ii-iii.

2. Significant Federal CCTA Case Law

In 1976, the Supreme Court in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 466 (1976) considered the taxing power of the State of Montana for on-reservation sales of cigarettes by Indians to non-Indians. The Court upheld the state "requirement that the Indian tribal seller collect a tax validly imposed on non-Indians." *Id.* at 483.

In 1980, the Supreme Court in *Washington v. Confederated Tribes of the Colville Indian Reservation (Colville)*, 447 U.S. 134, 150-51 (1980) reiterated *Moe*, the right of a state to "impose and enforce a tax on cigarettes sold by Indians to nontribal members." *Colville* specifically addressed Washington State's taxation of cigarette sales on Indian reservations. *Colville* approved

Washington's taxes [which] are designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservation.

Id. at 157. *Colville* also stands for the proposition that the state may tax the on-reservation sales of cigarettes to Indians who are not tribal members. *Id.* at 161. In *New York v. Milhelm Attea & Brothers, Inc.*, 512 U.S. 61 (1994), the Supreme Court explained that the Indian Trader Statutes did not preclude state

regulations necessary for application of state taxes to non-tax exempt reservation sales.

In *United States v. Baker*, 63 F.3d 1478, 1487 (9th Cir. 1995), cert. denied, 516 U.S. 1097 (1996), this Court validated Washington State's pre-approval requirements for shipments of unstamped cigarettes. See also, *Yakama Indian Nation v. Washington*, 176 F.3d 1241 (9th Cir. 1999) ("[a]lthough Indians are permitted to buy unstamped, tax-exempt cigarettes on Indian reservations located within the State of Washington, all deliveries of unstamped cigarettes to Indian reservations in Washington must be preapproved by [the Department of Revenue].") (quoting *Baker*, 63 F.3d at 1483). "In the absence of such notice, any unstamped cigarettes are considered contraband." *Id.*

In *United States v. Smiskin*, 487 F.3d 1260, 1263 (9th Cir. 2007), this Court affirmed that unstamped cigarettes are contraband under the CCTA when transported into Washington without prenotifying the state. However, this Court found that the Yakama Treaty of 1855 travel provision precludes imposition of the prenotification requirement on Yakama members. *Id.* at 1266. Thus, failure to prenotify will not support a CCTA prosecution of a Yakama member. *Id.* at 1272. However, this holding does not impact the state's taxing authority, as the *Smiskin* panel acknowledged the state's right to "tax on-

reservation sales [of cigarettes] to non-Indians." *Id.* at 1263 n. 4 (citing *Colville*, 447 U.S. at 160-61). In essence, *Smiskin* restricts the permissible factual underpinnings of a CCTA case involving Yakama tribal members but not the authority under *Colville* to prosecute contraband cigarette trafficking cases.

C. BAKER IS THE LAW OF THIS CIRCUIT AND CORRECTLY APPLIES 18 U.S.C. § 2342 TO THE DEFENDANT'S ACTS

The Defendant claims that his actions are not controlled by 18 U.S.C. § 2342 because of the legislative history of that statute. This argument is foreclosed by *Baker*, 63 F.3d 1478.

The Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341, et seq., was enacted in 1978. The statute was passed to assist states with the significant problem of cigarette bootlegging from states with low cigarette taxes into states with high cigarette taxes. 1978 U.S.S.C.A.N. (P.L. 95-575) 5518, 5519. The legislative history notes the act was intended as "a joint Federal-State interdiction effort which is focused upon the major violators and the organized crime groups." *Id.* Footnote 1 of the CCTA history reads:

Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free of State taxation. The phrase "applicable State cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights.

The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe. Similarly, other commercial cigarette sales exempted by law from State taxation (for example, military post exchanges) are not affected by this legislation.

1978 U.S.S.C.A.N. at 5538. In *Baker*, the defendants argued that this footnote in the legislative history evidenced congressional intent to exempt Indians from the reach of the CCTA. This Court rejected the argument noting that

[a] fair reading of the footnote indicates Congress merely intended not to preempt rights granted to Indians by the states to transport and distribute untaxed cigarettes. (footnote omitted) It accomplished this goal by using the phrase "applicable State cigarette taxes" in the statute. Thus, to the extent the states exempt Indians from having to pay cigarette taxes, so does the CCTA.

Id. at 1486. This holding was affirmed in both *United States v. Gord*, 77 F.3d 1192, 1193-94 (9th Cir. 1996) and *Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175, 1177 (9th Cir. 2002). Further, if Congress had intended that the CCTA not apply to Indians, certainly it could have added language to that effect when it amended the act in 1983, 1986, 2002 and 2006.

The Defendant extends his argument by claiming that Washington state cigarette laws do not apply to his activities because state laws do not apply on tribal land. Defense Brief at 26. However, the case of *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001), explains:

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 (1832)," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." *U.S. Dept. of Interior, Federal Indian Law* 510, and n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

In light of *Hicks*, the Defendant's challenge to the CCTA cannot stand.

Even if the Defendant should show that the CCTA was not meant to apply to Indians, there is another limitation to that exception. As explained in *Baker*, the proof must show "Congress intended [the law] not to apply to Indians on **their** reservations." *Baker*, 63 F.3d at 1485 (emphasis added). In this case, the Defendant transported contraband cigarettes off the Coeur d'Alene Reservation, in Idaho, to Washington reservations by crossing through the Eastern District of Washington. SER 7-8. Thus, any Coeur d'Alene Tribe exemption, should it exist, would not apply to cigarettes transported to a non-Coeur d'Alene reservation. See also, *Colville*, 447 U.S. at 661 (Indian tax exemption only applies to members of the specific tribe).

Citing *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Defendant also argues "when faced with two reasonable constructions of congressional intent, the matter is resolved in the Indians' favor." Defense Brief 26. However, the Defendant goes too far, *McClanahan* explains that "doubtful expressions" in treaties are to be interpreted in an Indian-friendly manner. *McClanahan*, 411 U.S. at 174-75. *McClanahan* does not refer to legislative history. Section 2341, et seq., of Title 18 contains no negotiated treaty language. Further, even if this statutory language were subject to similar interpretive rules, Section 2341 contains no ambiguous language which would ---- benefit the Defendant. In point of fact, the favorable interpretation doctrine "does not license courts to rely on ambiguities that do not exist." *Malabed v. North Slope Borough*, 335 F.3d 864, 871 (9th Cir. 2003).

The Defendant's citation to *Gobin v. Snohomish County*, 304 F.3d 909 (9th Cir. 2002), is similarly flawed. *Gobin* involved a Tulalip Indian challenging the state's application of state regulations over her fee land on the reservation. *Id.* Thus, *Gobin* involved the state asserting authority over tribal lands. *Id.* This case involves the transportation of contraband cigarettes across Washington State to tribal lands in the Western District of Washington. SER PA 7-8. This is activity that the

Supreme Court has conclusively permitted the state to regulate. *Moe*, 425 U.S. 463; *Colville*, 447 U.S. 337; and *Milhelm*, 512 U.S. 61.

D. THERE IS NO COEUR D'ALENE TREATY LANGUAGE TO FAVORABLY INTERPRET

The Defendant is claiming a treaty right to transport contraband cigarettes. Defense Brief 30. Because there is no treaty to interpret, the argument must fail.

The Defendant's treaty argument relies on *Smiskin*, 487 F.3d 1260, and the case is easily distinguished. In *Smiskin*, the Court found that the right to travel in the Yakama Treaty of 1855 extended to the transportation of contraband cigarettes. *Id.* at 1263. The *Smiskin* holding relies on specific treaty language. *Id.* This Circuit has concluded that "[o]nly the treaties with the Yakamas and Nez Perce contained highway clauses" upon which the *Smiskin* decision rests. *Cree v. Flores*, 157 F.3d 762, 772 (9th Cir. 1998). Never has the Defendant pointed to any language, much less treaty language, which would support the *Smiskin* holding. According to this Circuit, "there is no treaty between the Coeur d'Alene Tribe and the United States government." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1117 (9th Cir. 1985). Thus the treaty language argument has no merit.

The Defendant also claims Title 25, United States Code, Section 4301 protects his activities. Defense Brief 32-33.

Subsection 4 of 4301 provides that "Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights." However, the Defendant is not a tribe. Also, the case cited by the Defendant, *Antoine v. Washington*, 420 U.S. 194, 199 (1975), provides no support. In *Antoine*, the Supreme Court explained that "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." The statute cited by the Defendant, § 4301, consist of findings and purposes, none of which ratify agreements made with the Coeur d'Alene Tribe.

The Defendant goes on to claim "inherent sovereign powers." Defense Brief 34. The Defendant is correct that *Smiskin* refers to these inherent powers in note 16, but fails to include the rest of the quotation: "state laws that impose only minimal burdens on [those inherent] rights may be permissible." *Smiskin*, 63 F.3d at 1270 n. 16. In fact, the Supreme Court has specifically approved the minimal burdens at issue in this case. See *Colville*, 447 U.S. at 151; *Moe*, 425 U.S. at 483; *Milhelm*, 512 U.S. at 71-72.

E. THE CCTA DOES NOT REQUIRE A SPECIFIC INTENT INSTRUCTION

The Defendant claims that the mens rea of the CCTA is knowledge of violating the law. Defense Brief 38. *Baker* clearly rejects this theory.

In *Baker*, the defendants claimed the government was required to prove that the defendants acted "with specific intent to violate the law." *Baker*, 63 F.3d 1491. This Court rejected the argument. *Id.* Washington's statutory scheme was found to not be so complex that it would have "the potential of trapping unwary merchants." *Id.* at 1492. As explained in the case cited by *Baker*, *United States v. Elshenawy*, 801 F.2d 856, 859 (6th Cir. 1986), cert. denied, 479 U.S. 1094 (1987):

In regard to very large quantities of cigarettes, "the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." See *International Minerals*, 402 U.S. at 565, 91 S.Ct. at 1701, 1702.

Clearly, cigarettes are highly regulated and a person in possession of more than 60,000 cigarettes can be presumed to have knowledge of the taxing requirements. *Baker*, 63 F.3d at 1492.

The argument that Indian to Indian sales are not taxable is simply incorrect. Defense Brief 42. As explained in *Colville*, only members of the same tribe may sell cigarettes without collecting the state tax. 447 U.S. 161. Also the argument "that cigarettes are not generally known to be regulated" cannot be supported. Defense Brief 41. Certainly, the Defendant cannot say that he is ignorant of the taxing, i.e. regulating, of cigarettes. The Defendant as a peddler of cigarettes knows that his own Tribe highly regulates cigarette sales. ER 246-255 (Tribal tobacco licenses).

F. THE DISTRICT COURT'S PROPOSED JURY INSTRUCTION ON GENERAL KNOWLEDGE ADEQUATELY DISTINGUISHED MONEY LAUNDERING AND CONDUCTING FINANCIAL TRANSACTIONS

The Defendant claims that the proposed instruction on knowledge was conflicting and would have been too confusing for the jury. Defense Brief 44. To the contrary, the district court carefully delineated to which crimes the general intent instruction would apply. ER 133.

In *United States v. Stein*, this Circuit reversed convictions for money laundering. 37 F.3d 1407, 1410 (9th Cir. 1994), cert. denied 513 U.S. 1181 (1995), distinguished on other grounds recognized in *United States v. Golb*, 69 F.3d 1417 (9th Cir. 1995). For money laundering the *Stein* district court correctly instructed the jury that the government must prove "the defendant knew that the property represented the proceeds of securities fraud, mail fraud or wire fraud." *Id.* However,

[i]n a later general instruction the district court instructed the jury that "[a]n act is done knowingly if the defendant s aware of the act and doesn't act through ignorance, mistake or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful."

Id. This Court determined that the later instruction conflicted with the specific instruction and resulted in omitting the knowledge element for money laundering. *Id.* The error was found to be fatal and the money laundering convictions reversed. *Id.* at 1411.

In a later case, the Court distinguished *Stein* where the district court defined "knowingly" as

An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake or accident. *As to money laundering*, the government is not required to prove that the defendant knew that his acts or omissions were unlawful. (emphasis added).

United States v. Knapp, 120 F.3d 928, 931 (9th Cir.), cert. denied, 522 U.S. 968 (1997). This Court held that the emphasized phrase distinguished *Stein* because it made sufficiently clear that the corresponding sentence applied only to the crime itself. *Id.* at 932.

In this case, the district court applied the lesson of *Knapp* and included the emphasized language:

. . . The Government must prove Defendant acted "knowingly" for Counts 2-56, 1, and 74. An act is done knowingly if the Defendant is aware of the act and does not act through ignorance, mistake, or accident. *As to conspiracy, contraband cigarette trafficking, and money laundering*, the Government is not required to prove that the Defendant knew that his acts or omissions were unlawful.

However, the instructions regarding money laundering, (Counts 183-238) and conducting a financial transaction to promote unlawful activities (Counts 75-134, 146-182) also include specific instructions regarding Defendant's knowledge about the property involved in the transaction. You are instructed not to apply this general "knowingly" instruction to the elements of conducting a financial transaction to promote unlawful activities (Instruction No. 4) and money laundering (Instruction No. 5) that require the Government prove specific knowledge.

ER 133 (emphasis added). Thus, the Defendant's fear that a jury would be confused is not well founded.

The Defendant claims that the district court judge was so concerned that the jury may be confused about the knowledge element that the court suggested the government drop the money laundering charges. Defense Brief 45. However, the court only made the suggestion to simplify the trial, not that instructing the jury would be impossible. ER 118 ("I've instructed the jury all the time it's admissible on one count and not another"). Therefore, the proposed jury instruction sufficiently stated the law as it relates to the knowledge elements of the crimes charged.

G. THE 33 MONTH SENTENCE IMPOSED WAS REASONABLE

The Defendant claims that the Guideline sentence imposed was unreasonable. Defense Brief 46. Because the district court fully considered the Guidelines and was aware of the 3553 factors, ER 96-98; SER 75, the sentence imposed was reasonable.

In *Gall v. United States*, 128 S.Ct. 586, 597 (2007), the Supreme Court explained "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." *Id.* In *Alghazouli*, this Court addressed the reasonableness of a sentence imposed. 2008 WL 564986. The district court in *Alghazouli* considered the § 3553(a) factors and the evidence presented at trial.

Alghazouli, at *13. The *Alghazouli* court found "that the guideline range reflects a reasonable range for sentencing in your case." *Id.* The district court then imposed the low end of the guideline range. *Id.* In upholding the sentence, this Court noted:

Recent decisions support the conclusion that the court's sentencing decision was reasonable. See *Gall v. United States*, --- U.S. ----, ----, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007) ("[C]ourts of appeals must review all sentences-whether inside, just outside, or significantly outside the Guidelines range-under a deferential abuse-of-discretion standard."); *Rita v. United States*, --- U.S. ----, ----, 127 S.Ct. 2456, 2468, 168 L.Ed.2d 203 (2007) ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation."); *United States v. Mix*, 457 F.3d 906, 912 (9th Cir.2006); *United States v. Menyweather*, 447 F.3d 625, 634-35 (9th Cir.2006); *United States v. Knows His Gun*, 438 F.3d 913, 918 (9th Cir.2006).

Id.

In this case, the district court held a sentencing hearing over two days. ER 277. Fourteen witnesses were presented. SER 50-52. When announcing the sentence, the district court noted:

-the Defendant's sale of cigarettes to Puyallup tribal members was different than other wholesalers. ER 24.

-although the Defendant could have believed his conduct was legal, there were "a lot of indications that [the Defendant] knew it wasn't." ER 24.

-the Defendant attempted to hide the sales of cigarettes to Washington retailers. ER 24.

-the Defendant did not know how serious his conduct was but did know there were consequences and "took that risk." ER 24; SER 91 (Defendant knew he was violating the law").

-the Defendant's activity was for business financial reasons and not based upon tribal sovereignty issues. ER 24.

-the district court disbelieved the Defendant's statement that he thought his activities were legal. ER 25.

-the district court could not justify the Defendant's wholesale transactions which occurred after the search warrant in 2003, after the indictment in 2004 and the final incident after the change of plea in 2007. ER 25-26.

The district court was concerned that use of tax loss to determine the sentence was artificial. ER 27. However, in this case, the court found the calculations to be justified because they did not include a leader enhancement and granted acceptance of responsibility where the Defendant continued the criminal conduct after he was charged and his operation searched. ER 27. The district court found that the Guideline calculations "approximate[d] the scope of the business transactions that [the Defendant] had, the size of [his] business, the number of occurrences in Washington, and a number of those occurrences obviously weren't included because there's evidence of other smoke shops that aren't included in [the] calculations." ER 28. The court concluded that the range simply was not too harsh. ER 28. Thus, under that deferential standard of review, the Guideline sentence is reasonable.

The Defendant claims that the two incidents which occurred after the search were not illegal. Defense Brief 49. The court

found to the contrary. ER 25-26. The defendant claims the September 28, 2007 transaction was under the CCTA threshold. Defense Brief 50. However, 255 cartons were sold. ER 21. As there are 200 cigarettes per carton, that would equate to 51,000 cigarettes. ER 152 (listing number of cartons and cigarettes on various deliveries). Clearly this was in violation of the 10,000 cigarette limit applicable under the current version of the CCTA. 18 U.S.C. § 2341(2).

The Defendant also objects to his conspirator liability which includes all cigarettes listed in the Indictment. Defense Brief 50. Pursuant to *Pinkerton v. United States*, 328 U.S. 640 (1946), a defendant can be held "criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy." *United States v. Garcia*, 497 F.3d 964, 967 (9th Cir. 2007) (citation omitted). Sales of large numbers of cigarettes to Washington retailers are in furtherance of the conspiracy to circumvent Washington cigarette regulations, thus liability accrues to the Defendant. SER 6.

The Defendant attempts to liken his activities to those of his Washington retailing customers. Defense Brief 51. The Defendant delivered wholesale amounts of cigarettes to Puyallup retailers. SER 5-8. There is a difference between wholesalers and retailers. ER 24. The Defendant also claims that Washington

State charges similar conduct as gross misdemeanors. Defense Brief 52. There is no evidence of such in this record, only the unsupported dicta in the district court's sentencing memorandum in different cases. ER 83.

Similarly, his claim of sentencing entrapment must fail. "Sentencing entrapment or 'sentence factor manipulation' occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment.'" *United States v. Staufer*, 38 F.3d 1103, 1106 (9th Cir. 1994) (quoting *United States v. Stuart*, 923 F.2d 607, 614 (8th Cir. 1991). The Defendant bears the burden of showing sentencing entrapment. *United States v. Steward*, 16 F.3d 317, 322 (9th Cir. 1994). In this case the Defendant only complains he was not arrested sooner, not that the government induced him to sell amounts of cigarettes beyond his capabilities. Defense Brief 53. Thus, the Defendant has not carried his burden of proof.

The Defendant also claims the district court did not take into consideration the § 3553 factors. The defendant clearly presented § 3553(a) factors for the district court's consideration. ER 93-98; SER 73.

H. THE EQUAL PROTECTION CLAIM WAS NOT PRESERVED FOR APPEAL

The Defendant claims his equal protection rights were violated. Defense Brief 53. The Defendant has not preserved this

issue for appeal and therefore the argument should be rejected.

The Defendant entered a conditional guilty plea pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedures. Rule 11(a)(2) provides: "With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." However, issues not preserved for appeal cannot be raised. *Bynum*, 362 F.3d at 583. *Bynum* explained:

Plea agreements are contractual in nature and measured in accordance with general principles of contract law. See *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002). We enforce the literal terms of plea agreements, but construe ambiguities in the defendant's favor. *Id.*

Bynum, 362 F.3d at 583.

In *Bynum*, the defendant filed a suppression motion claiming the "knock and announce" rule was violated. *Bynum*, 362 F.3d at 577. Orally, during the suppression hearing, the Defendant raised a "plain view" argument, which the district court declined to entertain. *Id.* at 583. Thereafter, *Bynum* entered a guilty plea and did not preserve the "plain view" issue. *Id.* This Court held that *Bynum* "validly waived his right to appeal all grounds not addressed in that order." *Id.* Similarly, here the Defendant did not raise the equal protection issue and thus has not preserved it for appeal. To hold otherwise would permit the

Defendant to arbitrarily expand the bargain struck with the government.

Further, in this case, the Defendant was precise as to the issues he was preserving for appeal. ER 108-12. At no time after the entry of the plea and before sentencing did the Defendant attempt to amend the plea agreement or withdraw his guilty plea in order to preserve the equal protection argument. ER 275-77. The Defendant has been well aware of the basis for the *Smiskin* holding, arguing in this very brief that the district court holding should apply equally to him. Defense Brief 30. The Defendant simply failed to raise this argument in a timely manner.

Even if the issue could be raised at this late date, the argument has no merit. The Defendant must show that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (citation omitted). The Defendant is not similarly situated, the Defendant's tribe does not have a treaty to interpret, much less the treaty language found determinative in *Smiskin*. *Donovan*, 751 F.2d at 1117. Followed to its logical conclusion, all treaty provisions in all treaties would be able to be asserted by all United States citizens. The unpreserved argument simply goes too far.

VI.

CONCLUSION

The Defendant's challenges to the Indictment are without merit and the sentence imposed was reasonable, thus this appeal should be rejected and the sentence affirmed.

DATED this 31st day of March, 2008.

Respectfully submitted,

JAMES A. McDEVITT
United States Attorney


JANE KIRK
Assistant United States Attorney

VII.


STATEMENT OF RELATED CASES

The government is aware of *United States v. Christine Mahoney-Meyer*, CA 07-30430; and *United States v. Roger Fiander*, CA 07-30251; both cases have some similarity of facts and issues as those addressed herein.

DATED this 31st day of March, 2008.

Respectfully submitted,

JAMES A. McDEVITT
United States Attorney



JANE KIRK
Assistant United States Attorney

VIII.

CERTIFICATE OF SERVICE

It is hereby certified that on the 31st day of
March, 2008, two copies of the Appellee's Brief and one copy of
the Appellee's Supplemental Excerpts of Record were mailed to:

Mark E. Vovos, Esq.
West 1309 Dean Avenue, Suite 100
Spokane, WA 99201



JANE KIRK
Assistant United States Attorney

82.24.030. Stamps

(1) In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department. The stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid or whether an exemption from the tax applies.

(2) Except as otherwise provided in this chapter, every person shall cause to be affixed on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt--- before he or she sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: PROVIDED, That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

CREDIT(S)

2000 Main Volume

[1995 c 278 § 2; 1990 c 216 § 1; 1975 1st ex.s. c 278 § 61; 1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

82.24.250. Transportation of unstamped
cigarettes--Invoices and delivery tickets
required--Stop and inspect

(1) No person other than: (a) A licensed wholesaler in the wholesaler's own vehicle; or (b) a person who has given notice to the board in advance of the commencement of transportation shall transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.

(2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.

(3) If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(4) In the absence of the notice of transportation required by this section or in the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not a person authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

(5) Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

(6) In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any

vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

(7) For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" means:

(a) A wholesaler or retailer, licensed under Washington state law;

(b) The United States or an agency thereof; and

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with RCW 82.24.030 or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

458-20-186. Tax on cigarettes.

(1) **Introduction.** This section explains the tax liabilities of persons who sell, use, consume, handle, possess or distribute **cigarettes** in this state. It addresses only those taxes which apply exclusively to **cigarettes**. See WAC 458-20-185 for tax liabilities associated with tobacco products other than **cigarettes**.

(2) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses or distributes the **cigarettes** in this state.

(a) For purposes of this rule, a possessor is anyone who personally or through an agent, employee, or designee has possession of **cigarettes** in this state.

(b) Payment is made through the purchase of stamps from banks authorized by the department of revenue to sell the stamps.

(3) **Rates.** The Washington state cigarette tax is imposed on a per cigarette basis. The rate of tax is a combination of statutory rates found in RCW 82.24.020 and 82.24.027. Charts with current rates are available from the special programs division at the department of revenue.

(4) **Exemptions.** To qualify for exemptions from the tax, certain procedures must be followed. Exemptions and their procedures are as follows:

(a) The cigarette tax does not apply to **cigarettes** sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the **cigarettes** to such a buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to such a buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales (see WAC 458-20-193 and 458-20-193C) or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax which would be affixed to the **cigarettes** that are set aside for the conduct of such business without affixing cigarette tax stamps. Such unstamped stock must be kept separate and apart from any stamped stock.

(b) The cigarette tax does not apply to **cigarettes** in the possession of a person authorized to purchase **cigarettes** at a military facility when purchased for their own consumption.

(c) The cigarette tax does not apply to **cigarettes** sold at an outlet on an enrolled Native American tribal member's tribal reservation to an enrolled Native American tribal member for personal consumption. **Cigarettes** sold to an enrolled tribal member must be stamped, but are untaxed due to the exempt nature of the sale. However, sales made by a Native American cigarette outlet to nontribal members are subject to the tax. These **cigarettes** are both stamped and taxed.

(5) **Liability, collection and stamps.** Every person unlawfully in possession of unstamped **cigarettes** in this state shall be liable for the cigarette tax provided for herein.

(a) Ordinarily, the tax obligation is imposed and collected on the first possessor of such unstamped **cigarettes**. However, failure by the first possessor to pay such tax does not excuse any subsequent possessor of unstamped **cigarettes**.

(b) Stamps indicating the payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession or distribution for all **cigarettes** other than those mentioned in (4)(a) of this section. The stamp must be applied to the smallest container or package, unless the department determines that it is impractical to do so.

(c) Every licensed stamping wholesaler shall stamp those **cigarettes** that require stamping within 72 hours after receipt, but in any event, on or before sale or transfer to another party. Stamps shall be of the type authorized by the department which at present is the heat applied 'fuson' type. The use of meter stamping machines for use in imprinting packages, in lieu of attaching stamps, is not authorized by the department. The use of water 'decalcomania' type stamps by such vendors is not authorized.

(d) Persons other than licensed stamping wholesalers must file with the department of revenue, prior to receipt, a notice of intent to possess unstamped **cigarettes** in the state of Washington. A copy of this notice, validated by an agent of the department of revenue, must be in the possession of any such person who is in possession of unstamped **cigarettes** in this state.

(e) Persons who have filed the notice must bring the **cigarettes** to a department office for payment of the tax within 72 hours of receipt, but in any event, on or before sale or transfer to another party. Failure to file this notice will subject the person in possession of such **cigarettes** to criminal sanctions as set forth in subsections (9) and (10) of this section.

(f) Any unstamped or untaxed **cigarettes** in the possession of persons (other than licensed stamping wholesalers) who have failed to file a notice of intent to possess unstamped **cigarettes** in the state of Washington or who have failed to affix stamps and/or who have failed to pay the tax as required herein, will be deemed contraband and subject to seizure and forfeiture under the provisions of RCW 82.24.130.

(g) State approved cigarette stamps are available from authorized banks. Payment for stamps may be made either at the time of purchase of the stamps from the banks, or deferred until later, although the latter form of payment is available only to vendors who meet the requirements of the department and who have furnished a surety bond equal to the proposed total monthly credit limit. In addition, purchases on a deferred

payment plan may be made only by the cigarette seller or by an agent authorized by the cigarette seller to do so. This authorization may be in the form of a signature card, filed with the bank, from which stamps are usually obtained, and kept current by the vendor. Payments under a deferred plan are due within 30 days following the purchase, and are to be paid at the outlet from which the stamps were obtained, and may be paid by check payable to the department of revenue. Cigarette wholesalers who purchase stamps under either plan are allowed a discount of \$4.00 per thousand stamps affixed, which is offset against the purchase price.

(h) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed **cigarettes** after the rate increase is liable for the additional tax. Failure by the first person to pay the additional tax arising from the first taxable event does not relieve subsequent individuals of tax liability arising from a subsequent taxable event.

(6) **Books and records.** An accurate set of records showing all transactions had with reference to the purchase, sale or distribution of **cigarettes** must be retained.

(a) These records may be combined with those required in connection with the tobacco products tax, by WAC 458-20-185, provided there is a segregation therein of the amount involved. All such records must be preserved for five years from the date of the transaction.

(b) Persons shipping or delivering any **cigarettes** to a point outside of this state shall transmit to the special programs division, not later than the 15th of the following calendar month, a true duplicate invoice showing full and complete details of the interstate sale or delivery.

(7) **Reports and returns.** The department of revenue may require any person dealing with **cigarettes**, in this state, to complete and return forms, as furnished, setting forth sales, inventory and other data required by the department to maintain control over trade in **cigarettes**.

Manufacturers and wholesalers selling stamped, unstamped or untaxed **cigarettes** shall, before the 15th day of each month, transmit to the special programs division a complete record of sales of **cigarettes** in this state during the preceding month.

(8) **Refunds.** Any person may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department. Documentation supporting the claim must be provided at the time the claim for refund is made.

(a) Refunds for stamped untaxed **cigarettes** sold to Native American individuals or tribes (see subsection (4)(c) of this section) will include the stamping allowance and will be approved by an agent of the department.

(b) Refunds for stamped **cigarettes** will not include the stamping allowance if the

stamps are:

(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor.

(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improper removal from the stamp roll.

(c) The claim for refund must be filed on a form which is provided by the department, Form REV 37-2063. An affidavit or a certificate from the manufacturer claiming refund, or by the agent of the department verifying the voiding of stamps and authorizing the refund, shall accompany the form.

(9) Criminal provisions. RCW 82.24.110(1) prohibits certain specified criminal activities with respect to **cigarettes** and makes such activities gross misdemeanors. Also, RCW 82.24.100 and 82.24.110(2) prohibit alteration or fabrication of stamps and transportation and/or possession of 300 or more cartons of unstamped **cigarettes** and makes those activities felonies. Persons commercially handling **cigarettes** in this state must refer to these statutes.

(10) Search, seizure and forfeiture. The department of revenue may search for, seize and subsequently dispose of unstamped cigarette packages and containers, vehicles of all kinds utilized for the transportation thereof, and vending machines utilized for the sale thereof. Persons handling unstamped **cigarettes** in this state must refer to RCW 82.24.130 and subsequent sections for provisions relating to search, seizure and forfeiture of such property, for possible redemption thereof, and for treatment of such property in the absence of redemption.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1**

Case No. 07-30429

I certify that: (check appropriate options)

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The court granted permission to exceed the length limitations set forth at Fed. R. App. P. 32(a)(7) by an order dated _____

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Jane Kirk, Assistant United States Attorney