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The Honorable Lonny R. Suko

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION, et al., Plaintiffs, v. CHRISTINE GREGOIRE, Governor of the State of Washington, et al., Defendants.	NO. CV-08-3056-LRS DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Hearing noted for: July 16, 2009, 2:30 p.m.

I. INTRODUCTION

Defendants Gregoire, Holmstrom, Cushman, Thronson and Parmer move for summary judgment on all claims in the Complaint of Plaintiffs, the Confederated Tribes and Bands of the Yakama Indian Nation ("Yakama Tribe") and the Yakama Nation Commerce Association ("Association"). Plaintiffs seek to: relitigate issues finally decided against them; evade tax collection and recordkeeping obligations the United States Supreme Court has said they must

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bear; and market a claimed exemption from state taxation designed to attract non-member customers who are either uninformed or willing to violate state law.

Federal law makes clear that the State is entitled to collect state cigarette and sales taxes from non-member customers who purchase cigarettes from tribal retailers. Moreover, in a case to which the Plaintiffs were parties, the United States Supreme Court held that tribes must bear the minimal burdens of collection and recordkeeping necessary to effectuate state taxation of such non-member sales, and that the State can seize shipments of unstamped cigarettes where necessary to enforce the payment and collection of these taxes.

Plaintiffs' effort to thwart the State's legitimate tax collection and enforcement activities is premised on a misunderstanding of both the law and the relevant facts. As demonstrated below, each of Plaintiffs' claims lack merit and should be dismissed. Accordingly, this Court should grant summary judgment to the Defendants.

II. SUMMARY OF ARGUMENT

In their prayer for relief, Plaintiffs ask the court to declare: (1) that it is unlawful for the State to tax "Indian to Indian" sales; (2) that the provisions of Wash. Rev. Code § 82.24 ("RCW 82.24") and related regulations are unenforceable and invalid against the Yakama Nation, its members and tribally-licensed entities; (3) that acquisition and possession of unstamped cigarettes by

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Indians, Indian retailers or Indian distributors and wholesalers is not contraband nor prohibited by the statutory language of RCW 82.24.010, .020(6), .040 and .050; (4) that it is unlawful for the State to prohibit the Yakama Nation from issuing its own stamp; (5) that state enforcement action against individuals who possess or sell cigarettes bearing a Yakama stamp, affixed while the 2004 Cigarette Tax Contract was in effect, "violates ex post facto laws;" and (6) that the State does not have criminal or civil jurisdiction over the taxation of cigarettes on reservation pursuant to RCW 37.12.010. Complaint at 22-23.

Plaintiffs also ask the court to enjoin efforts by the State to monitor and enforce state laws and regulations regarding the payment of state cigarette and excise taxes by nonmember customers and to order reimbursement of state taxes allegedly paid together with other equitable relief. Complaint at 23-24.

Defendants are entitled to summary judgment on each and every claim. In the landmark case of *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), to which these Plaintiffs were parties, the Court held that: (a) the State can impose its cigarette excise and sales taxes on on-reservation sales by tribal retailers to nonmembers, including nonmember Indians; (b) the State can impose at least "minimal" recordkeeping and collection burdens on tribal retailers in connection with these state taxes; and (c) the State can seize shipments of cigarettes in aid of the collection and

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enforcement of these state taxes. *Colville* disposes of most of Plaintiffs' claims related to RCW 82.24. *See* Part III.A.2 & A.3., *infra*.

Regarding the third request for relief, even the Ninth Circuit panel that authored the *Smiskin* decision on which Plaintiffs rely recognized that the cigarettes at issue there were "contraband cigarettes" under both state and federal law. The *Smiskin* panel, however, held that because of the treaty right to travel, the state's pre-notification requirement for transporting unstamped cigarettes could not be the predicate state law violation giving rise to the federal crime of trafficking in contraband cigarettes.

Smiskin does not alter the clear Supreme Court authority on these issues. Moreover, the Court need not reach the issue because Plaintiffs are barred from asserting treaty rights as a basis for challenging RCW 82.24 under the doctrine of res judicata. *See* Parts III.B. & C., *infra*.

Regarding the remaining requests for relief, Defendants do not dispute that the Yakama Nation has concurrent taxing jurisdiction on the reservation. With termination of the contract, however, the State's agreement to retrocede from the collection of applicable state taxes ended, and the tribal stamp approved for use with the 2004 Agreement was no longer valid. *See* Part III.A.3, *infra*. Regardless of whether the Yakama Nation chooses to impose a tribal tax going forward, the Plaintiffs are obligated to collect and remit the full amount of the state and local taxes owing on sales to nonmembers. Finally,

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neither the constitutional prohibitions on ex post facto laws nor RCW 37.12.010 have any bearing on the State's jurisdiction to tax cigarette sales to nonmembers on the Yakama Reservation. *See* Parts III.A.6 & III.D., *infra*.

III. ARGUMENT

For over thirty-five years, the Yakama Nation and various individual members have been litigating the question of the State's authority to tax cigarette sales on the reservation and to impose related responsibilities on cigarette retailers. Most of the theories Plaintiffs advance in this case to support their argument that reservation sales are entirely outside the reach of the State's jurisdiction have already been decided in the State's favor. The recent termination of a cigarette tax agreement between the Yakama Nation and the State provides an interesting factual backdrop to the case, but does not change the law applicable to Plaintiffs' claims.

The significant issues in this case are legal, not factual. In terms of evidence, Defendants rely primarily on the background facts they admitted when answering Plaintiffs' Complaint, along with some evidence provided in the declarations of Leslie Cushman and David M. Hankins. Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Matsushita Elec. Indus Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment is

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particularly appropriate where, as here, the disputed issues are purely legal. *See Hong Wang v. Chertoff,* 550 F. Supp. 2d 1253, 1255 (W.D. Wash. 2008).

A. Washington's Cigarette Taxing Scheme Protects The Rights Of Indians And Meets All Federal Requirements.

Washington cigarette tax statutes and related regulations have been relatively consistent in structure and procedure for several decades. More importantly, they have been declared consistent with federal law.

1. The State's cigarette tax statute, RCW 82.24, requires collection of the state tax from nonmembers who purchase cigarettes on reservations, but not from members of the tribe on whose reservation the purchase occurs.

The State of Washington imposes an excise tax on cigarettes sold, used, consumed, handled, possessed or distributed within its borders. RCW 82.24.020; .027(1); .028. The State collects this tax by selling cigarette stamps, which must be affixed to all packages of cigarettes possessed within the state that have not been preapproved for tax exemption. RCW 82.24.030. Only Washington-licensed wholesalers may possess unstamped cigarettes, and then only under specified circumstances. RCW 82.24.040(2). Cigarettes given away for advertising and other purposes are taxed in the same manner as cigarettes sold at retail. RCW 82.24.080(1). Wholesalers and certain retailers must maintain records showing "all transactions" relating to the purchase and sale of cigarettes, and showing "all physical inventories performed on those articles, all invoices, and a record of all stamps imposed." RCW 82.24.090.

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The Washington Legislature deemed a number of actions to be gross misdemeanors and punishable as such (*e.g.*, retailing cigarettes without stamps first being affixed, RCW 82.24.110(1)). Knowingly transporting in excess of 10,000 cigarettes without proper stamps is deemed a Class C felony unless notice is given to the State and other requirements are met. RCW 82.24.110(2)(a)(b). The Legislature also gave the Department of Revenue and the Liquor Control Board authority to impose monetary penalties for violations of RCW Ch. 82.24 and set forth procedures for seizure and forfeiture of contraband material and vehicles used for transport of the material. RCW 82.24.120-.180.

Transportation of unstamped cigarettes in Washington is generally prohibited, except as set forth in RCW 82.24.250, which requires notice to the Liquor Control Board. Certain persons are exempt from the requirement to prepay the cigarette tax or affix stamps to cigarettes, including:

> (a) A wholesaler required to be licensed under this chapter;
> (b) A federal instrumentality with respect to sales to authorized military personnel; or
> (c) An Indian tribal organization with *respect to sales to enrolled members of the tribe.*

RCW 82.24.260(1) (emphasis added); *see also* RCW 82.24.250(7)(c) (allowing an Indian tribal organization to possess unstamped cigarettes under specified circumstances); RCW 82.24.010(3) (defining "Indian tribal organization").

In other words, the statutory exemption for sales by Indian tribal organizations to its own enrolled members does not extend to sales by an Indian

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tribal organization to non-Indians or to Indians who are not members of that tribe. RCW 82.24.020(6). In addition, the cigarette tax statutes "shall not apply" if the State is prohibited from taxing under the federal or state constitutions or federal statutes. RCW 82.24.900.

A final exception to the notice, stamping, and cigarette tax requirements is the exception for cigarettes subject to lawful transactions covered by cigarette tax contracts between specified Indian Tribes and the State under RCW 43.06, under which Tribes are able to impose a tribal cigarette tax in lieu of the state tax. *See* RCW 82.24.020(7) (terms of contract under RCW 43.06 control over conflicting provisions of chapter 82.24 RCW); RCW 82.24.030(5) (exception to stamping requirement); RCW 82.24.250(8) (transportation of unstamped cigarettes); RCW 82.24.260(4) (selling unstamped cigarettes); RCW 82.24.295 (sales by Indian retailer under cigarette tax contract).

The Department of Revenue's rules provide further guidance for the assessment and collection of cigarette taxes sold by tribal retailers. An enrolled member of a tribe purchasing cigarettes within Indian country is exempt from the cigarette tax. WASH. ADMIN. CODE § 458-20-186(102)(c). If the incidence of the tax falls upon an Indian or tribe, the tax is not imposed. WASH. ADMIN. CODE § 458-20-192(5). However, tribal retailers making sales to nonmembers must collect the state's retail sales tax and cigarette tax. WASH. ADMIN. CODE § 458-20-192(5)(c). Hence, if a tribal retailer desires to sell cigarettes to

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nonmembers, the wholesaler is obligated to pre-collect the tax, and the tribal retailer must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed to the packages for such sales. The tribal retailer would then collect such amount from the nonmember customer. WASH. ADMIN. CODE § 458-20-192(9)(a)(i).

The statutes and administrative rules are clear that tribal members purchasing cigarettes from a tribal retailer in Indian country are exempt from the state's cigarette tax. If the tribal retailer sells to nonmembers, however, the state's retail sales tax and cigarette tax must be collected.

2. The Supreme Court approved Washington's statutory scheme nearly 30 years ago.

For decades, tribes in Washington, including the Yakama Nation, have operated or licensed the operation of tribal smokeshops selling cigarettes to customers who are not members of the respective tribes. The once vexing questions about if and when the State could tax these transactions, and what actions the State could take to enforce its taxes, were firmly laid to rest by the Supreme Court in a case to which the Yakama Tribe was a party and the Association was amicus.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court squarely addressed and resolved the very issues the Plaintiffs are now trying to re-litigate. In *Colville,* as here, the State sought to impose its cigarette and sales taxes on nonmember purchases of cigarettes

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from tribal retailers on reservation. Those cigarette taxes were administered and enforced then, just as they are now, through the distribution of state tax stamps and the requirement that they be affixed to all packs of cigarettes intended for sale to nonmembers. *Id.* at 141. Sales taxes were required to be collected from the nonmember purchaser by the tribal retailer. *Id.* at 141. And finally, the State enforced these tax collection requirements by seizing unstamped cigarette shipments bound for the reservations. *Id.* at 142.

Several Tribes claimed that Washington's cigarette and sales taxes were preempted or otherwise unenforceable with regard to on-reservation sales to nonmembers. The Court first referenced its decision four years earlier in *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), which involved a tribal challenge to a similar cigarette taxing scheme in Montana. *Colville,* 447 U.S. at 150. In *Moe,* the Court upheld Montana taxes on cigarette sales to non-Indians, finding that the incidence of the taxes was on the non-Indian customer. The court noted that the taxes were valid even though imposing and collecting the state tax denied the tribe the substantial economic advantage of marketing an "exemption" from such state tax to non-Indians willing to "flout [their] legal obligation to pay the tax." 425 U.S. at 482. The court in *Moe* also upheld the requirement that the Salish and Kootenai collect the tax on behalf of the State, finding the collection requirement was a

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"minimal burden" designed to aid the State in collecting its tax. *Moe*, 425 U.S. 475-481. The Court explained in *Colville*:

> *Moe* establishes several principles relevant to the present case. The State may sometimes impose a non-discriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians. And the State may impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax. There is no automatic bar, therefore to Washington's extending its tax and collection and recordkeeping requirements on to the reservation in the present case.

Colville, 447 U.S. at 150.

From these established principles, the Court in *Colville* went on to address four additional questions and the respective legal claims and arguments. *Id.* at 152. The first question was whether tribal "involvement in the operation and taxation of cigarette marketing on the reservation" and the existence of tribal taxing ordinances per se "ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops." *Id.* at 154-155. The tribal plaintiffs argued state taxes were: (1) preempted by a host of federal statutes regulating Indian affairs; (2) inconsistent with the principle of tribal self-government; and (3) invalid under the Indian Commerce Clause. *Id*. at 154.

Rejecting all of the tribal claims, the Court stated: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an

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exemption from state taxation to persons who would normally do their business elsewhere." *Id*. at 155.

The second question was whether the Tribes and their tribal retailers could be required to keep more detailed records of exempt and non-exempt cigarette sales, in addition to the requirement affirmed in *Moe*, that they collect the tax on behalf of the state. Reversing the burden of proof applied by the district court, the Court held that the plaintiff tribes had failed to demonstrate the State's recordkeeping requirements were not reasonably necessary as a means of preventing fraudulent transactions. *Id.* at 160.

The third question the Court addressed was whether the State could tax purchases by Indians who are not members of the reservation Tribes. This third question is directly relevant to a distinction the Plaintiffs tend to blur throughout their pleadings in this case. Those pleadings refer frequently to "Indian to Indian" sales. As will be discussed below, a distinction must be drawn between cigarette sales to members of the reservation Tribe, and sales to individuals who are Indians, but who are not members of the reservation Tribe or tribes where the cigarettes are sold. The State does not tax or claim to be able to tax on-reservation cigarette purchases by members of the Tribe. The law however, treats Indians who are not members of the Tribe the same as non-Indians for purposes of this inquiry. In *Colville*, the Court held that neither federal statutes ("even given the broadest reading to which they are reasonably

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susceptible"), nor the principle of tribal self-government can be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. *Colville*, 447 U.S. at 160-161.

The fourth and final question addressed in *Colville* was whether the State can make off-reservation seizures of unstamped cigarettes as contraband. The Court found that Washington's interest in enforcing its valid taxes is sufficient to justify off-reservation seizures of unstamped cigarettes, where the tribes had refused to fulfill collection and remittance obligations the State has validly imposed. *Id.* at 161-162.

The Supreme Court reaffirmed and enlarged its holdings in *Colville* in two subsequent cases. In *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe,* 498 U.S. 505 (1991), the Court held that Oklahoma could impose its state taxes on nonmember purchases. *Id.* at 509-10. The Court also noted that although the tribe itself was immune from a suit to enforce and collect state taxes, individual agents and officers of the tribe may be susceptible to suit, and the state could employ pre-collection obligations and seizure of goods in order to enforce the collection requirements. *Id.* at 512-13.

In *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), the Court upheld a New York law imposing a quota on the number of untaxed cigarettes that could be sold by a wholesaler to tribal smokeshops. The New York law limited the number of untaxed cigarettes

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based on an estimate of the number of cigarettes that would be consumed by the Tribes' membership. *Id*. at 66. The New York law also imposed recordkeeping requirements on both the wholesaler and the tribal retailers to ensure that the number of untaxed cigarettes did not exceed the quota. *Id*. at 67.

Following *Moe*, *Colville*, *Potawatomi*, and *Milhelm*, the rules could not be clearer. A state may: (1) validly impose its cigarette excise and sales taxes on any on-reservation sale to a nonmember (including nonmember Indians), (2) require the tribe and tribal retailers to collect, pre-collect or prepay the excise taxes when purchasing cigarettes from a wholesaler, (3) require the tribe and tribal retailer to keep detailed records of all cigarette sales, and (4) seize cigarette shipments as contraband as a means to enforce its tax and recordkeeping requirements.

3. Nothing in Washington's cigarette tax scheme violates the principles enunciated in *Colville* or later cases.

Plaintiffs allege that Washington's cigarette tax scheme violates federal law by imposing "impermissible burdens" on Indian retailers to collect the state tax and by unlawfully placing the legal incidence of the tax on Indians. *See* Complaint ¶¶ 18, 38, 40-42, 45, 55-56. Plaintiffs are incorrect as a matter of law.

a. The minimal burdens imposed on Indian cigarette retailers are well within federal limits.

The Supreme Court held in *Moe* that a "state's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal

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burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Moe*, 442 U.S. at 483. Likewise, Washington requirement that tribal retailers collect the cigarette tax from non-Indians and nonmembers was upheld in *Colville*. 447 U.S. at 152, 159 ("And the State may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax.") The statutory requirements in effect when the Court decided *Colville* have not changed. *See* RCW 82.24.080(2). According to *Moe* and *Colville*, Washington's requirement that tribal retailers collect the state cigarette and sales taxes from nonmembers is an acceptable minimal burden upon the tribal retailers selling to nonmembers.

The State's recordkeeping requirements likewise are no more than minimal burdens. In *Colville* the tribes challenged the recordkeeping requirements outlined in RCW 82.24.090, which have not substantially changed since then. Upholding the requirements "in toto," the Court held the State could require smokeshop operators to keep detailed records of both taxable and nontaxable transactions. *Colville*, 447 U.S. at 159-160. The only requirement not considered in *Colville* was the requirement of providing notice to the Liquor Control Board, if a Tribe or tribal retailers intend to bring or transport unstamped cigarettes into the state. RCW 82.24.250(7). However, even during 1970s, a tribal organization transporting unstamped cigarettes was required to

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possess invoices or delivery tickets for the cigarettes. RCW 82.24.250 (1972). This same provision remains today. RCW 82.24.250(2) (2008).

The United States Supreme Court later upheld similar recordkeeping and eligible buyer requirements imposed in New York, finding they were "no more demanding than the comparable measures we approved in *Colville*." *Dep't of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 76 (1994). The Ninth Circuit also has stated that Washington's recordkeeping and regulatory scheme is less burdensome than it was when *Colville* was decided. *United States v. Baker*, 63 F.3d 1478, 1489 (9th Cir. 1995) (Washington's cigarette tax scheme does not intrude upon rights of Indian sovereignty or violate the equal protection clause, nor is it preempted by federal law), *cert. denied*, 516 U.S. 1097, 516 U.S. 1117 (1996).

As a matter of law, the burdens the State imposes on tribal retailers are reasonable and minimal.

b. The legal incidence of the tax is on non-Yakama purchasers, not on Yakama members.

Plaintiffs allege that RCW Chapter 82.24 and its related regulations are unenforceable against members of the Yakama Nation because they place the legal incidence of the cigarette tax on the Yakama Nation. Complaint ¶ 40. They are incorrect.

In Washington, the first person who sells, uses, consumes, handles, possesses or distributes cigarettes must collect the cigarette tax. RCW

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82.24.080(1). Thus, a wholesaler selling cigarettes in the state must pay the cigarette tax, including if the wholesaler sells to tribal retailers. Tribal retailers have a "precollection obligation" to collect the tax from nonmembers:

> Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. A precollection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person, who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed.

RCW 82.24.080(2).

The legal incidence of the cigarette tax is not on Yakama retailers or purchasers, but on nonmembers. Under the state scheme, the tax falls upon the first event that may be constitutionally subjected to tax. In the case of a tribal retailer selling to a tribal member, the member is exempt from the tax, but in a sale from a tribal retailer to a nonmember, the cigarette tax must be collected from the purchaser.[1] This statutory scheme has been upheld in *Colville*, 447

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[1] Tribal Retailers may purchase untaxed cigarettes for resale to tribal members. WASH. ADMIN. CODE § 458-20-192(9)(a)(i)(C) and (ii). These cigarettes must be stamped as "exempt" cigarettes which do not include the state's cigarette tax for sale to members and must comply with WASH. ADMIN. CODE § 458-20-192(9)(a)(ii). This provision of the rule is known as the "allocation" provision. Pursuant to a formula in the rule, Tribes are allocated a number of exempt cigarettes for sales to their members. These cigarettes are

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U.S. at 142 n. 9, and in subsequent federal and state cases. *See Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *Potawatomi*, 498 U.S. at 512 (1991); *United States v. Smiskin*, 487 F.3d 1260, 1263 n. 4 (9th Cir. 2007); *Grey Poplars Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred Assorted Brands of Cigarettes*, 282 F.3d 1175, 1177-78 (9th Cir. 2002); *Baker*, 63 F.3d at 1485 n. 6; *Matheson v. Liquor Control Board*, 132 Wash. App. 280, 285, 130 P.3d 897, *review denied*, 158 Wash.2d 1023, 149 P.3d 308 (2006); *Bercier v. Kiga*, 127 Wash. App. 809, 819-20, 103 P.3d 232 (2004), *review denied*, 155 Wash.2d 1015 (2005).

The fact that the State requires the tribal retailer to collect the tax, by purchasing stamped cigarettes that include the state cigarette tax, does not indicate that the incidence of the tax falls upon the tribal retailer. The Ninth Circuit made this clear in *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004). The court addressed the legal incidence issue in relationship to fuel taxes. The court stated, "The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden." *Id.* at 681. The Court explained that "a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector." *Id.* (citation omitted).

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not subject to the state cigarette tax and are intended for sale to tribal members only.

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The question of legal incidence is where the legal obligations for the tax are imposed. For purposes of RCW 82.24, this has already been answered in *Colville* and subsequent cases holding that nonmembers purchasing cigarettes are responsible for payment of the cigarette and sales tax. The legal incidence of the cigarette tax does not fall on Tribal members making on-reservation purchases or Tribal retailers. Tribal retailers merely have an obligation to collect the tax from nonmembers through use of the tax stamps and to comply with the state's record keeping requirements. *Colville*, 447 U.S. at 159-160.

c. The Yakama Tribe's exercise of its own tax authority does not oust state tax jurisdiction over nonmembers or relieve Plaintiffs of collection and related obligations.

Plaintiffs allege that the State of Washington cannot prohibit the Yakama Nation from issuing its own tax stamp. Complaint at ¶ 69-70. Defendants agree as a general proposition that tribes have authority to impose tribal cigarette taxes on the sale of cigarettes on the reservation. The Court in *Colville* explicitly recognized the Tribes' authority to impose taxes on trust lands:

> This argument need not detain us. There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. . . . [T]he State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers. Hence, we perceive no conflict between state and tribal law warranting invalidation of the State's taxes.

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447 U.S. at 152-159.[2]

As a practical matter, tribes have not imposed their own tribal tax despite having concurrent tax jurisdiction, because the combined effect of both state and tribal taxes would result in uncompetitive prices, as the Court in *Colville* recognized. *Id.* at 154.

In an effort to resolve some of the taxation issues, the State and the Yakama Nation had entered into a cigarette tax contract in 2004, under which the State would not impose its tax, provided that the Yakama Nation imposed a tribal tax represented by a tribal stamp. Under the cigarette tax contract, sales of cigarettes with a Yakama Nation stamp were valid for sales to nonmembers. Unfortunately, the cigarette tax agreement was terminated because of the Nation's failure to comply with its terms. Once the cigarette tax agreement was terminated, cigarettes with only a Yakama Nation stamp were no longer valid for sales to nonmembers. As defendant Stuart Thronson indicated in his deposition, if a tribal retailer wanted to purchase cigarettes from a Washington licensed wholesaler, the cigarettes had to have a Washington cigarette tax stamp:

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[2] *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (state could continue to impose severance tax on oil and gas production by non-Indian lessees of wells located on Jicarilla Apache Tribe's reservation, even though Tribe also had power to impose severance tax for same production).

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> Q: (Ms. Keyes) So if a tribal retailer had wanted to do business five miles down the road to gain its product from a Washington licensed wholesaler, it couldn't have done that unless it had a Washington State stamp, correct"
> A: If it wanted to buy from a Washington licensed wholesaler, it would have to carry a Washington State tax stamp.

Thronson Deposition at 93, ll. 15-20. *See* David M. Hankins Declaration, Attachment E.

Although the Yakama Nation is free to continue imposing a cigarette tax on cigarettes sold on the reservation, its tax authority does not have the effect of ousting the State from exercising its own well-established authority to tax the sale of cigarettes on the reservation to nonmembers.

Plaintiffs also suggest a different sort of "ouster" argument, which is that the Yakama Nation is not "in the state," and therefore sales occurring on the reservation are not sales "in the state" for purposes of RCW 82.24. Complaint ¶¶ 10, 59-60 (Second Cause of Action), 67 (Third Cause of Action). Plaintiffs base this conclusion on the Yakama Nation's status as an entity with sovereign rights. Complaint ¶¶ 10, 59.

Plaintiffs' position does not square with federal law because Plaintiffs fail to give any weight to the State's corresponding sovereign interests. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

Chief Justice Marshall expressed the early view that state laws could have no force within reservation boundaries based on the notion that Indian

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tribes are distinct sovereign nations. *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L. Ed. 483 (1832); *discussed in Hicks*, 533 U.S. at 361; *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). By 1880, the Court no longer viewed Indian reservations as distinct nations. *Organized Village*, 369 U.S. at 72. Today, Indian reservations ordinarily are considered part of the territory of the state in which they are located. *Hicks*, 533 U.S. at 361-62.

Because Indian Tribes retain the right to make their own laws and be governed by them, states do not have the same regulatory authority within reservations as they do off-reservation. Instead, the limits of that authority are determined by balancing the interests of the Tribe and the federal government with those of the state. *Id.* at 362. For purposes of state cigarette taxes, that balancing of interests has already been done. In *Hicks*, the Court expressly affirmed Washington's regulatory authority regarding on-reservation cigarettes sales: "When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in [*Colville*]." *Id.*

This Court should decline Plaintiffs' invitation to set the clock back more than a century on federal law principles governing the relationships between states and Tribes. As a matter of law, cigarette sales on the Yakama Reservation are cigarette sales "in the state."

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4. Federal law does not bar state taxation of "Indian to Indian" sales, only state taxation of Tribal or tribal retailer to member sales.

Plaintiffs allege in their first cause of action that the State of Washington is engaged in an unlawful act by taxing "Indian to Indian" sales. *See* Complaint at 17. Plaintiffs fail to make the distinction between sales to members and sales to nonmember Indians, but the distinction must be recognized and applied. *See* Complaint ¶¶ 20, 29, 30-34, 38, 39, 48-53. The Court in *Colville* addressed the issue left unresolved in *Moe*, whether a "state can tax purchases by on-reservation Indians not members of the governing tribe." *Colville*, 447 U.S. at 152. The Supreme Court held: "Federal statues, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe." *Id.* at 160-61.

The State of Washington specifically recognizes that it may not impose its cigarette taxes on tribal members who purchase cigarettes on the reservation:

> The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term "Indian" includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. . .

WASH. ADMIN. CODE § 458-20-192-(5). Conversely, under *Colville* the State clearly has the power to collect its cigarette tax from both non-Indians and nonmember Indians.

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To the extent tribal retailers sold Washington-stamped cigarettes to tribal members after the 2004 Agreement was terminated (and before the TRO in this case went into effect), the tribal members who purchased those cigarettes would be entitled to a refund of the cigarette tax. WASH ADMIN. CODE § 458-20-186 (303) "Any person may request a refund of the face value of the stamps when the tax is not applicable. . . " *See also* Deposition of Lee Smith at 110, 123, 144-146; Fidelia Andy Deposition Exhibit 91 (Department offering a refund procedure when it first began implementing the 2004 cigarette tax agreement with the Yakama Nation). *See* Declaration of David M. Hankins, Attachment F; Declaration of Leslie Cushman, Attachment B. The state has no intention of precluding the Yakama Nation from exercising its concurrent authority to tax sales of cigarettes on the reservation, whether to member or nonmembers. The state is only seeking to impose its own taxes as allowed by federal and state law.

5. Defendants have not violated state law.

In addition to alleging a violation of federal law based on the incorrect assumption that the State was planning to tax all cigarette sales to Yakama members, plaintiffs also have alleged a violation of state law based on that same assumption. *See* Complaint ¶¶ 36-38, 44-45, 51 (First Cause of Action), 59 (Second Cause of Action), 63-66 (Third Cause of Action). For the same reasons discussed in the prior section, the Court should grant summary

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judgment to the Defendants on Plaintiffs allegations' that Defendants are or were intending to violate state law.

6. The State's authority to tax sales of cigarettes to nonmembers is neither derived from nor dependent upon Public Law 280 or RCW 37.12.010.

Plaintiffs claim that "[P]ursuant to RCW 37.12.010, the State of Washington has no criminal or civil jurisdiction over the taxation of cigarettes on reservation." Complaint ¶ 39; *see also id.* ¶¶ 44-45, 52, 61. With these allegations, Plaintiffs imply that the State has no ability to apply RCW 82.24 to sales on the Yakama Nation reservation because RCW 37.12.010 does not expressly allow it. Plaintiffs are mistaken. The State's authority to tax sales of cigarettes sold on reservations to nonmembers is not dependent upon RCW 37.12.010.

Congress enacted Public Law 83-280 in 1953 primarily to address law enforcement within Indian reservations. P.L. 83-280, 67 Stat. 588 (1953) ("Public Law 280"); *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976). Although the central focus of Public Law 280 was to provide for state criminal jurisdiction, the legislation also allowed for state jurisdiction over private civil litigation involving reservation Indians in state court. *Bryan*, 426 U.S. at 384-85. Public Law 280 directed some states to assume jurisdiction over Indian lands and authorized others to do the same voluntarily. Washington fell into the latter category and did voluntarily assume jurisdiction. Washington did so, however, in a particularly

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complicated way that has resulted in different rules for different parts of Indian country within the State. *See* RCW 37.12.010-.150.

Under RCW 37.12.010, the State has generally not asserted jurisdiction over activities on lands within an Indian reservation, unless a Tribe requests that the State exercise that jurisdiction. The statute, however, lists eight subject areas in which the State will exercise jurisdiction without the necessity of a tribal request. None of these eight areas concern excise taxes or cigarettes. From this, Plaintiffs apparently conclude that the State is without jurisdiction or authority to apply RCW 82.24 to on-reservation sales of cigarettes.

Plaintiffs' conclusion is incorrect. The specific details of Washington's assertion of civil or criminal jurisdiction under Public Law 280, including the wording of RCW 37.12.010, have no bearing on the question of a state's right to impose state taxes on on-reservation sales to nonmembers.

The Supreme Court put the issue to rest in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991). In that case, the Court held that Oklahoma could collect taxes on sales of cigarettes to nontribal members on tribal land, even though Oklahoma had not elected to assert jurisdiction under Public Law 280. *Potawatomi*, 498 U.S. at 513-14. The Court reversed the Tenth Circuit's conclusion that the Potawatomis were immune from any requirement of Oklahoma state tax law and emphasized:

> Neither *Moe* nor *Colville* depended upon the State's assertion of jurisdiction under Public Law 280. Those cases stand for the proposition that the doctrine of sovereign immunity does not prevent

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> a State from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe.

Id. at 513.

Potawatomi is clear: A state's authority to tax on-reservation sales of cigarettes to nonmembers is neither derived from nor dependent upon Public Law 280 or related state enactments, including RCW 37.12.010. To the extent Plaintiffs seek relief based on RCW 37.12.010, the Defendants are entitled to summary judgment as a matter of law.

B. Plaintiffs' Treaty Right Claim is Barred By The Doctrine Of Res Judicata.

Plaintiffs allege that RCW 82.24 is unenforceable against the Yakama Nation and its members because it violates the treaty rights of the Yakama Nation. Complaint ¶¶ 57, 58 (First Cause of Action). Plaintiffs seek declaratory relief and permanent injunctive relief precluding Defendants from ever enforcing RCW 82.24 against Plaintiffs, Yakama Nation wholesalers and retailers, or non-Yakama wholesalers or distributors who sell cigarettes to Yakama Nation wholesalers and retailers (including any seizures). *See* Complaint at 22-24 (Prayer for Relief).

Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 (9th Cir. 2005). The doctrine is considered essential to the purpose of civil courts – to

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conclusively resolve disputes within their jurisdiction. *Id.* at 1051-52. The claim that the Yakama Treaty preempts the State's right to tax sales of cigarettes to nonmembers on the Yakama Reservation and to require compliance by Yakama retailers with recordkeeping and related requirements is a claim that the Yakama Nation made in the *Colville* case and that the Supreme Court conclusively resolved in the State's favor. Accordingly, the claim should be barred in this case.

The elements necessary to establish res judicata are (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties. *Headwaters*, 399 F.3d at 1052; *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). All elements are present here.

Colville involved two consolidated cases originally filed in 1973, the first by the Confederated Tribes of the Colville Indian Reservation and the second by the United States on behalf of the Yakama Nation. *Colville*, 447 U.S. at 139. The Yakama Nation intervened as a plaintiff in its own right. *Id.* at 139 n.1. In both cases the plaintiffs contended, among other things, that the State's cigarette tax could not be lawfully applied to sales on the reservation. *Id.* at 139. They sought declaratory judgments to that effect, and they sought injunctions barring the State from enforcing the tax, including enjoining the State from seizing any untaxed cigarettes bound for the reservations as contraband. *Id.*

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Nothing but the passage of time separates the Yakama Nation's claims in *Colville* from those it alleges here. A common legal basis for the relief sought in each case is the Yakama Treaty. Thus, the claims are identical, and the first element is satisfied. Likewise, there can be no dispute regarding the second element. The Supreme Court did not devote much discussion to the argument, but it expressly rejected the notion that the Yakama Treaty (or the other treaties before it) had the effect of preempting Washington's sales and cigarette taxes. *Colville*, 447 U.S. at 155-56. Accordingly, the Yakama Nation received a final judgment on the merits of its Treaty-based claims in *Colville*.

Finally, the privity requirement related to the parties also is satisfied. In *Colville*, the Yakama Nation and the United States on behalf of the Yakama Nation sued the State of Washington. Here, the Yakama Nation sued Governor Gregoire and other state officials, *i.e.*, agents of the State, with "statutory, regulatory and/or enforcement authority related to cigarette taxation." Complaint ¶ 2.6. Because all necessary elements for claim preclusion are present, this Court should enter summary judgment for Defendants on Plaintiffs' claim that the Yakama Treaty precludes the State from taxing any on-reservation cigarette sales.

Plaintiffs may argue that the Treaty claim should not be precluded because the Supreme Court did not consider Article III of the Yakama Treaty, on which Plaintiffs rely for their asserted right to travel and conduct trade, free

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of state interference or regulation. It is true that the United States and the Yakama Nation brought several provisions of the Yakama Treaty to the Supreme Court's attention in their briefs, but did not mention Article III or a right to travel as a basis to prohibit state taxation of on-reservation cigarette sales. *See Brief for the United States* (on behalf of the Yakama Nation), 1979 WL 200127 at *27 (July 14, 1979) (discussing Yakama Treaty and citing Articles II, V, and VIII); *Brief of Appellee, Yakima Nation*, 1979 WL 200128 at *13-14, 19, 25, 34, 51 (July 6, 1979) (discussing Yakama Treaty and citing Article II). But the plaintiffs' failure to mention Article III in *Colville* is immaterial. The doctrine of res judicata "bar(s) all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action." *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982) (quoting *Ross v. IBEW*, 634 F.2d 453, 457 (9th Cir. 1980)). The Yakama Nation could have raised the Article III right to travel language in its arguments in *Colville*, but it did not. The claim is barred.

The fact that *Colville* was decided nearly thirty years ago also provides no basis for rejecting application of the doctrine of res judicata to Plaintiffs' Treaty-based claims. The passage of many years gave the Supreme Court no pause in a case concerning tribal, government, and private water rights to the Truckee River in Nevada. *Nevada v. United States*, 463 U.S. 110 (1983). The

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original case was filed in 1913 and finally concluded in 1944. *Id.* at 113. In 1973, the United States filed a new action on behalf of the Pyramid Lake Indian Reservation seeking additional water rights to the Truckee River, recasting the claim as one for water rights related to fish spawning grounds instead of for irrigation purposes. *Id.* at 118. The Court held the United States, the Pyramid Lake Paiute Tribe, and other parties were bound by the 1944 decree. *Id.* at 128-45. The Court made a point of noting its continued adherence to the policies supporting the doctrine of res judicata:

> [W]hat we said with respect to this doctrine more than eighty years ago is still true today; it ensures "the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals."

Id. at 129 (quoting *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897)).

The Supreme Court's decision in *Colville* in 1980 that the Yakama Treaty does not preempt the State from applying state cigarette and sales taxes to sales of cigarettes on the Yakama Reservation was conclusive. The judicial determination has been made by this Nation's highest court, and it should be honored. Allowing the Plaintiffs to relitigate the claim would undermine the policies the Supreme Court has been supporting since 1897. This Court should dismiss Plaintiffs' Treaty-based claims under the doctrine of res judicata.

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C. The Treaty Right to Travel on Public Roadways Does Not Preclude State Taxation of Nonmember Cigarette Purchases, Nor Preempt Other Requirements In RCW 82.24.

The Plaintiffs claim that Article III of the Treaty with the Yakama, Art. III, Stat. 951, 952-53 (1855), reserves to the Yakama Tribe and its members, "the right to sell goods to Indians and non-Indians, on and off the reservation, without regulation that restricts their right to take goods to market free of restriction." Complaint ¶ 58.

There is no dispute that the Yakama Tribe has a treaty "right to travel."[3] In relevant part, Article III secures to them "the right, in common with citizens of the United States, to travel upon all public highways." The genesis, as well as the limits, of this expressly reserved right were comprehensively discussed in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

Here, Plaintiffs ask this Court to expand and transform that expressly reserved "right to travel" into an implicit, illusive, and expansive "right to trade." Based on this newly contrived right to trade, Plaintiffs then ask this Court to enjoin the application of state laws to non-Indians and nonmembers

[3] Article III of the Treaty provides in relevant part:

> And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

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and relieve the plaintiffs of state cigarette tax collection and recordkeeping obligations the United States Supreme Court has said they must fulfill.

The Plaintiffs rely on *United States v. Smiskin*, 487 F.3d. 1260 (9th Cir. 2007). For reasons discussed below, the Defendants respectfully submit that *Smiskin* was wrongly decided and should ultimately be overturned. But even *Smiskin* does not support the far-reaching claims Plaintiffs are trying to advance here. *Smiskin* held that the state requirement to notify the Liquor Control Board prior to the transport of unstamped cigarettes was not enforceable against the Yakama Tribe and its members, and that a violation of that pre-notification requirement could not provide a valid basis for a prosecution of Yakama tribal members under the federal Contraband Cigarette Trafficking Act (CCTA), 18 U.S.C. § 2342. *Smiskin*, 487 F.3d at 1269, 1272. *Smiskin* did not hold that the "right to travel" somehow prevented the state from collecting its cigarette tax from nonmember customers, nor did it suggest that Plaintiffs should be relieved of their obligation to collect and remit state taxes on sales to nonmembers and to keep accurate records of such transactions.

1. In interpreting Article III of the Yakama Treaty, this Court should be guided by the decisions of the District and Ninth circuit courts in *Yakama Indian Nation v Flores* and *Cree v. Flores* rather than *Smiskin*.

In *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), the court was called upon to determine whether Article III, and more particularly the "right to travel," precludes the State from imposing license and

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permitting fees on logging trucks owned by the Yakama Tribe or its members. In that case, the plaintiffs argued that the treaty "right to travel" precluded the state from collecting the fees. *Id.* at 1232.

The district court in *Yakama Indian Nation* engaged in the same fact finding inquiry relevant here – to discern what the parties to the Treaty intended with regard to the language of Art. III, specifically, "the right, in common with citizens of the United States, to travel upon all public highways." *Yakama Indian Nation,* 955 F. Supp. at 1232; *Cree v. Waterbury,* 78 F.3d 1400, 1405 (9th Cir. 1996). Following a bench trial, the court reviewed the evidence of the treaty parties' intentions with regard to the right to travel. The court reviewed the language of the "Treaty With the Yakamas of 1855," the "Historical Context of the Treaty," the documents created at the time of the Treaty Negotiations at the Walla Walla Council, and the "Actions of the Parties Since [the] Treaty." *Yakama Indian Nation,* 955 F. Supp. at 1236-1247.

The district court made comprehensive findings of fact, including the following:

- Article III, paragraph 1, of the Treaty with the Yakamas, when viewed in its historical context, unambiguously reserves to the Yakamas the right to travel the public highways without restriction. Finding of Fact 21, *Id.* at 1262.

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- Article III, paragraph 1, of the Treaty provides the Yakama Indian Nation with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods. Finding of Fact 22, *Id*. at 1262.
- In the Yakama language, the term "in common with" would suggest public use or general use without restriction. Therefore, as the Yakamas understood this term, no impediment would be placed on their right to travel. The most the Indians would have understood, reading the Treaty as a whole and its interpretive Minutes, of the term "in common with" and "public" was that they would share the use of the roads with whites…" Finding of Fact 61, *Id*. at 1265.

Despite the expansive language of these and other findings of fact, the district court correctly recognized that the treaty right to travel was not without legal limitations. The court concluded that notwithstanding the right, "The Yakama Nation, its members, any Yakama-owned or operated corporations or business, and any nonmembers engaged in the exercise of the Yakama Nation's Treaty right to travel must comply with state regulations designed to preserve and maintain the public roads and highways to the extent those regulations do not impose a fee or surcharge on the Treaty right." *Id*. at 1260. Similarly, the "Yakama Nation … must comply with the state registration requirements solely

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for identification purposes to the extent that such requirements do not impose a fee or surcharge on the Treaty right." *Id*. at 1260.

The limitations on the "right to travel" that the district court recognized are born out of two separate but related principles. First, where necessary to protect a shared resource, the state may impose on Indians, equally with others, restrictions of a purely regulatory nature (such as time, place and manner restrictions) that are needed to protect and conserve the shared resource. *Id.* at 1255-57 (citing *Tulee v. Washington*, 315 U.S. 681, 683 (1942)). Second, the exercise of a treaty right (or tribal sovereignty per se) may be "minimally burdened" where necessary to assist the State in the regulation of its (non-Indian) citizens. *Id.* at 1260 (state can impose regulations related to identification); *see also Colville*, 447 U.S. at 159.

In short, the district court concluded that not all state regulation of the "right to travel" is precluded, but that the state could not charge or collect fees or taxes as a condition of tribal use of the highways. 955 F. Supp. at 1257, 1260 ("Although the court interprets the Treaty travel provision as allowing plaintiffs to travel the highways without paying licensing or permitting fees, the court emphasizes that in exercising its *nonexclusive* right, plaintiffs must still comply with regulations imposed by the state which are designed to preserve and maintain the condition of the roads.") Both the district court and the Ninth Circuit on review confirmed that what was preempted was the exaction of fees,

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not all forms of state regulation. *Yakama Indian Nation,* 955 F. Supp. at 1257; *Cree*, 157 F.3d at 769 (9th Cir. 1998).

Nothing in *Yakama Indian Nation* or *Cree* compels the relief Plaintiffs now seek in this case.

2. *Smiskin* was wrongly decided.

In this case Plaintiffs endeavor to bridge the gap between the narrowly tailored holdings in *Yakama Indian Nation* and *Cree* and their claims on back of the Ninth Circuit's decision in *United States v Smiskin*,487 F.3d 1260 (9th Cir. 2007). The Defendants respectfully submit that *Smiskin* was wrongly decided, but even as is, the Ninth Circuit's holding in *Smiskin* cannot sustain the Plaintiffs' claims here.

In *Smiskin,* the defendants, Harry and Kato Smiskin, were found in possession of 4,205 cartons of unstamped cigarettes, in violation of the CCTA. The unstamped cigarettes were found in the residence of one of the defendants. However, based on suspicion that the defendants, or one of them, had transported (*i.e.*, traveled with) the cigarettes, the court concluded that the treaty "right to travel" precluded application of federal law to these facts. *Smiskin* was wrongly decided for several reasons.

First, the panel's decision conflicts with the Ninth Circuit's prior decision in *United States v. Baker,* 63 F.3d 1478 (9th Cir. 1995), wherein neither an alleged treaty reserved "right to trade" nor notions of inherent sovereignty were found to preempt application of the CCTA to the tribal defendants. Second,

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even under the court's broad construction of the right to travel, not all forms of regulation or restriction on the right are prohibited. The pre-notification requirement that triggered application of the CCTA does not impose a fee on the Tribe or its members and thus is not, vis-à-vis the Tribe, a revenue generating law, and it does not impose more than a minimal burden. Consequently, it is a permissible form of regulation. Third, the panel erroneously employed a state law preemption analysis in analyzing whether the CCTA, a federal law, is preempted.

a. The Treaty "right to travel" cannot implicitly excuse what an explicit "right to trade" does not.

In *Baker*, the defendants were charged with violating the CCTA, the same law at issue in *Smiskin*. 63 F.3d at 1482. In their defense, the defendants asserted that the Medicine Creek Treaty reserved an implicit "right to trade," including a right to trade in cigarettes, that in turn precluded application of the CCTA to them. *Id.* at 1485.

Assuming the existence of the right to trade, the court in *Baker* nonetheless determined that the CCTA and its enforcement against the tribal members was not an impermissible restriction on the right to trade. "Even assuming the defendants are correct about the expectations of the signers of the Medicine Creek Treaty [fn omitted] the CCTA is not an impermissible restriction on a trading right guaranteed by the Treaty." *Baker*, 63 F.3d at 1485. The court understood the intent and purposes of the state cigarette tax scheme,

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which includes both revenue and regulatory components, and that it depended in part upon tribal businesses to assist in the enforcement and collection of state taxes on sales to nonmembers. Notwithstanding the assumed treaty right to trade, and the burdens associated with the state tax scheme, the court in *Baker* found both the state requirements and the CCTA to be enforceable against tribal members.[4]

b. The pre-notification requirement is a permissible form of regulation.

The decisions in *Yakama Indian Nation*, *Cree*, and even *Smiskin* all recognize that the "right to travel" does not preclude application of all regulations, restrictions or requirements that pertain to travel and the transportation of goods on the public highways. Were it otherwise, the Tribe and its members would not be subject to speed limits, driver licensing requirements, vehicle equipment requirements or other traffic safety laws and regulations. Similarly, the Tribe and its members could bypass agricultural pest inspection stations and disregard import restrictions designed to protect states

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[4] The court also rejected defendants' other assertions that the CCTA was preempted by the Tribe's inherent sovereignty and by the Indian Trader Act, holding that neither precluded application of the CCTA to the defendants. *Baker*, 63 F.3d at 1488-90.

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and citizens from the human and economic dangers of imported pests and diseases.

The *Smiskin* court tried to address this conundrum by acknowledging that the tribe and its members are subject to "purely regulatory" restrictions. *Smiskin*, 487 F.3d at 1270. The opinion concluded, however, that the regulations must be purely and exclusively regulatory – devoid of any revenue purpose. Having determined that the pre-notification requirement in RCW 82.24 was to assist in state revenue collection, the court determined that the purely regulatory exception did not apply. *Id.* at 1270.

Even if the court's purely regulatory test in *Smiskin* were correct, which is a conclusion directly at odds with *Baker* and *Colville*, the CCTA passes the test and meets the exception in two ways. First, the cases on which the court relies for its rendition of the test all involve situations where the fee was to be imposed on and paid by the Tribe or tribal member. Here, there is no fee or tax imposed on the Tribe or tribal member. The tax is imposed on the non-Indian retail customer. The Tribe is merely required to collect the tax and remit it to the State. As to the Tribe and its members, the law *is* purely regulatory. Second, the law at issue in *Smiskin* was the CCTA, not the underlying state laws. It is the purpose and intent of the CCTA that should have been the focus of this inquiry.

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The CCTA was "primarily concerned with large-scale cigarette bootlegging and the involvement of organized crime." *Baker*, 63 F.3d at 1478; *see* S. Rep. No. 962, 95th Cong., 2d Sess. 1,9, reprinted in 1978 U.S. Code and Cong. Admin. News 5518, 5523 ("the interstate aspect of the problem lends itself to a joint Federal-State interdiction effort which is focused upon the major violators and the organized crime groups.") The purpose and intent of the CCTA is not revenue related – it is related to criminal law enforcement. Accordingly, the exception should have applied in *Smiskin*.

c. Because the issue was whether a *federal law*, the CCTA, was preempted, the panel in *Smiskin* applied the wrong test.

The issue in *Smiskin* was whether a federal law, the CCTA, is preempted by the treaty right to travel. In analyzing that issue, the panel wrongly applied the test governing the preemption of state law.

As the Ninth Circuit pointed out in *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), the test applicable to the preemption of federal law is different from that applicable to state law. "The federal standard requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed." *Ramsey*, 302 F.3d at 1080.

In *Ramsey*, the court analyzed the exact same language in the Yakama Treaty that was the subject of *Yakama Indian Nation*, *Cree*, and this case. Ramsey argued that the Ninth Circuit's decision in *Cree* compelled the same

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outcome – that the treaty right to travel precluded application of federal fees, just as it did the application of state fees. In *Ramsey*, however, the court said that the preemption standards applicable to federal laws are different from those applicable to state laws because of the different relationships between the respective parties. "The different standards stem from the state and federal government's distinct relationships with Indian tribes. The federal government has plenary and exclusive power to deal with tribes." *Ramsey* at 1074 (citing *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976)).

Given its different relationship and plenary authority, Congress could have, but did not, expressly exempt Indian Tribes (with or without the right to travel) from the prohibitions contained in the CCTA. Absent such a clear statement of exemption, the federal law applies.

3. *Smiskin* does not support the Plaintiffs' expansive claims.

In the alternative, if *Smiskin* is applied, it must be narrowly construed to preempt only the pre-notification requirement in state law. The Ninth Circuit unwittingly opened Pandora's box in *Smiskin* by confusing one of the reasons why the "right to travel" was reserved with the right itself.

As the court found in *Yakama Indian Nation*, the Yakamas traveled extensively at and before treaty time, and they traveled for many different reasons, including fishing, hunting, gathering, trade, the maintenance of intermarriage cultural ties, and certainly for many other reasons as well.

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Yakama Indian Nation, 955 F. Supp. at 1263. The Plaintiffs do not have a *right* to engage in all of the activities for which they may have traveled at treaty time. The expressly reserved right that is and must be the focus of a preemption analysis is the "right to travel."

There is no express treaty-reserved "right to trade." Yet it is this alleged "right to trade" that Plaintiffs advance here as the legal basis for enjoining the application of state tax laws to nonmembers (ostensibly because the imposition of collection of state taxes on non-member customers chills or impedes the alleged "right to trade"). It is this alleged "right to trade" that prompts Plaintiffs to claim that they have "the right to sell goods to Indians and non-Indians, on and off the reservation, without regulation that restricts their right to take goods to market free of restriction." Complaint ¶ 58.

The act of transporting or traveling with goods or commodities does not somehow cloak those goods or the individuals transporting them with immunity from state or federal laws pertaining to the possession, sale or other use of the goods. Perhaps in recognition of the problems caused by its decision in *Smiskin*, the Ninth Circuit has hastened to clarify that the holding in *Smiskin* was only that the pre-notification requirement was preempted and could not serve as the basis for a CCTA conviction. The unstamped cigarettes transported in *Smiskin* were and are "contraband" within the meaning of state and federal

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law. *United States v. Fiander*, 547 F.3d 1036, 1039 (9th Cir. 2008) (citing *Smiskin*, 487 F.3d at 1263).

The *Smiskin* decision should be narrowly construed to forbid a criminal prosecution under the CCTA based on a violation of a state law requiring pre-notification to the State before unstamped cigarettes are transported. The *Smiskin* court found the pre-notification requirement to violate the treaty reserved right to travel on the public roadways in common with other citizens. A broader reading of *Smiskin* and of the underlying treaty right is (a) inconsistent with principles of treaty interpretation, (b) in conflict with other cases in this circuit, and (c) unsupportable. The Yakama Treaty does not enable Yakama members to market a state tax exemption to nonmembers or to trade in contraband cigarettes.

The court's admonition in *U.S. v. Farris* seems particularly apt:

> We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, viz. commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

U.S. v. Farris, 624 F.2d 890, 894 (9th Cir. 1980). This Court should decline Plaintiffs' invitation to expand the *Smiskin* decision beyond its actual holding.

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D. Re-Imposing State Cigarette And Sales Taxes On Nonmember Customers Does Not Violate The Prohibition Against Ex Post Facto Laws.

Plaintiffs' Fifth Cause of Action alleges that the State's threats of criminal enforcement following termination of the 2004 Agreement amount to a violation of both the federal and state constitutional prohibitions against ex post facto laws. Complaint at 22, ¶¶ 72-74; U.S. Const. Art. I § 10; Wash. Const. Art. I § 23. This is another claim that relates primarily to communications in the immediate aftermath of the termination. Plaintiffs argue that because the 2004 Agreement authorized legal possession and sale of cigarettes bearing the Yakama Nation stamp for sales to both Indians and non-Indians, it was improper for Defendants to treat that existing inventory as contraband and to preclude the sale of that inventory. Complaint ¶¶ 72-74.

Regardless of whether Defendants ever decided to take a specific enforcement action, Plaintiffs' ex post facto claim fails as a matter of law. The ex post facto clauses of the state and federal constitutions forbid the State from passing any "ex post facto law." U.S. Const. Art. I § 10; Wash. Const. Art. I § 23. The term had an established meaning at the time of the framing of the United States Constitution and has been interpreted as aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)); *see State v. Hennings*, 129 Wn.2d 512, 524-25, 919 P.2d 580 (1996).

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When it terminated the 2004 Agreement, the State passed no new laws. All it did was terminate a contract that was authorized by statute. Likewise, related correspondence from Defendants to various persons indicating the State's intent to begin enforcing existing state laws does not constitute passage of a law, either prospective or retrospective. The penalties for violating the requirements of RCW 82.24 were the same the day before the 2004 Agreement was terminated as they were the day after. The Yakama Nation and retailers were exempt from many of the requirements in RCW 82.24 before the 2004 Agreement was terminated because the terms of the 2004 Agreement preempted any contrary provisions in RCW 82.24 with the Agreement was "in effect." RCW 82.24.020(7). Upon termination, however, the 2004 Agreement was no longer "in effect" and RCW 82.24 became fully enforceable without any change in law.

Because there has been no legislation upon which to base a claim for violation of the ex post facto clauses of the federal and state constitutions, there is no reason to discuss the state or federal tests for determining whether a new law violates those clauses. Defendants are entitled to summary judgment as a matter of law on Plaintiffs' Fifth Cause of Action.

IV. CONCLUSION

The material facts regarding Plaintiffs' legal claims are not in dispute. For all the foregoing reasons, this Court should enter an order granting summary judgment to the Defendants.

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