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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE CONFEDERATED TRIBES
AND BANDS OF THE YAKAMA
NATION, *et al.*,

Plaintiffs,

v.

CHRISTINE GREGOIRE, Governor
of the State of Washington; CINDI
HOLMSTROM, Director of the
Washington State Department of
Revenue; *et al.*,

Defendants.

No. CV-08-3056-LRS

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
LAW AND ARGUMENT	2
I. <u>THE INCIDENCE OF THE WASHINGTON CIGARETTE TAX</u>	
 <u>FALLS ON TRIBAL RETAILERS IN VIOLATION OF FEDERAL</u>	
 <u>LAW.</u>.....	2
A. <u>Overview of the Relevant Parties and the Washington Cigarette</u>	
<u>Tax.</u>	2
B. <u>RCW 82.24 is Unenforceable Because The “Legal Incidence” of</u>	
<u>The Tax Falls Squarely Upon Yakama Indian Retailers and is,</u>	
<u>Therefore, a Per Se Violation of Federal Law.</u>	5
1. Just like the unenforceable statutes in <i>Hammond</i> and	
<i>Squaxin Island</i> , RCW 82.24 requires the non-Indian	
wholesaler to “pass on” and collect the tax from the Indian	
retailer.	6
a. <u>RCW 82.24 requires wholesalers to “pass on” the</u>	
<u>cigarette tax to retailers.</u>	7
b. <u>RCW 82.24 requires wholesalers and retailers to</u>	
<u>maintain detailed records to ensure the cigarette tax</u>	
<u>is “passed on.”</u>	8
2. Just as the unenforceable statute in <i>Squaxin Island</i> did not	
require the retailer to “pass on” the tax to the consumer or	
the consumer to keep records, RCW 82.24 lacks any such	
requirements as well.	9
3. Just like the impermissible statute in <i>Hammond</i> , RCW 82.24	
effectively provides a “tax credit” to the non-Indian	
wholesaler for acting as the state’s tax collector.	11

- 1 4. Even more so than the impermissible statutes in *Hammond*,
2 *Squaxin Island*, and *Chickasaw Nation*, RCW 82.24
3 provides generous “tax refunds” to the non-tribal wholesaler
4 but denies tribal retailers the right to obtain a refund for
5 unsellable or destroyed product. 12
- 6 5. Just as the impermissible statute in *Squaxin Island* lacked
7 practical consequences enforced against the consumer who
8 obtained untaxed fuel, RCW 82.24 contains similar
9 limitations. 15
- 10 6. Just as the legislative intent expressed in the statutes
11 involved in *Hammond* and *Squaxin Island* were not
12 “controlling”, the Washington Legislature’s stated “intent”
13 in RCW 82.24 is not controlling and is nebulous and
14 equivocal in any event. 16
- 15 7. Tribal retailers are also saddled with an “inventory tax” that
16 further underscores the impermissible nature of RCW 82.24 18

17 **II. THE STATE IS WITHOUT AUTHORITY TO ENFORCE RCW**
18 **82.24 ON THE YAKAMA RESERVATION.**..... 19

- 19 A. The U.S. Supreme Court Has Recognized the Jurisdictional Limits
20 of State Authority to Enforce Cigarette Tax Statutes on Indian
21 Reservations. 21
- 22 B. The State of Washington Concedes That It Does Not Have
23 Jurisdiction to Enforce RCW 82.24 Within the Boundaries of the
24 Yakama Reservation and Instead Has Focused on Enforcement
25 Against Non-Indians Outside the Reservation...... 24
- 26 1. State agents concede that their enforcement options are
 limited, consistent with federal Indian law and Supreme
 Court precedent..... 26

1	2.	The State of Washington has alternative methods for	
2		collecting its cigarette tax when a non-Indian consumer	
3		purchases cigarettes from an entity other than a Washington	
4		retailer and uses the product in Washington – the Plaintiffs	
5		want that method of collection to have equal application to	
6		its sales.....	28
7	3.	Defendants are prohibited from implementing specific	
8		enforcement provisions of RCW 82.24 because to do so	
9		would violate Federal law on Indian Country and would	
10		exceed defendants admitted lack of jurisdictional	
11		enforcement authority on the Yakama Reservation.	30
12	a.	<i>RCW 82.24 does not properly recognize state</i>	
13		<i>jurisdictional limits in Indian Country.....</i>	30
14	b.	<i>RCW 82.24’s penalty provisions are predicated on</i>	
15		<i>conduct occurring within Defendants’ jurisdictional</i>	
16		<i>boundaries – “in the state” – and therefore cannot be</i>	
17		<i>applied on the Yakama Reservation, a sovereign</i>	
18		<i>nation.....</i>	34
19	c.	<i>The Yakama Reservation is subject to the sovereign</i>	
20		<i>jurisdiction of the Yakama Nation and is not</i>	
21		<i>considered “in the state” of Washington for purposes</i>	
22		<i>of the State’s jurisdictional enforcement reach.</i>	35
23	4.	Yakama members are subject to regulation by tribal	
24		government under tribal law.....	38
25	III.	<u>The Court Should Order that Dr. Walker’s Conclusions Are Not</u>	
26		<u>Genuinely At Issue and Are Established for this Action.....</u>	39
	CONCLUSION		41

TABLE OF AUTHORITIES

Page

CASES

<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976).....	18, 26
<i>California v. Cabazon Band of Mission Indians</i> , 408 U.S. 202 (1987).....	18, 26
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	2
<i>Cherokee Nation v. Georgia</i> , 5 Pet. 1 (1831).....	25, 38
<i>Coeur d'Alene Tribe v. Hammond</i> , 384 F.3d 674 (9th Cir. 2004)	passim
<i>Crow Tribe of Indians v. Montana</i> , 819 F.2d 895 (9th Cir. 1987)	18
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974).....	23
<i>Ex Parte Young</i> , 209 U.S. 123 (1908).....	23
<i>Farrell Lines, Inc.</i> , 641 F.2d 765 (9th Cir. 1981)	39
<i>Goodman Oil Co. v. Idaho State Tax Comm'n</i> , 28 P.3d 996 (Idaho 2001)	18, 28
<i>IGT v. Alliance Gaming Corp.</i> , 2007 U.S. Dist. LEXIS 20668 (D. Nev. Mar. 22, 2007)	40
<i>Jackson v. Hayakawa</i> , 682 F.2d 1344 (9th Cir. 1982)	23
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973).....	18, 25
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973).....	22
<i>Moe v. Confederated Salish and Kootenai Tribes</i> , 425 U.S. 463 (1976).....	21, 22, 23

1	<i>Montana v. Blackfeet Tribe of Indians</i> ,	
2	471 U.S. 759 (1985).....	25
3	<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> ,	
4	515 U.S. 450 (1995).....	passim
5	<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe</i> ,	
6	498 U.S. 505 (1991).....	21, 22, 24, 28
7	<i>Pacific Ry. V. United States</i> ,	
8	227 U.S. 355 (1913).....	37
9	<i>Ramirez v. Olympic Health Mgmt. Sys., Inc.</i> ,	
10	2009 WL 1107243 (E.D. Wash. 2009).....	2
11	RCW § 82.24.080(4).....	31
12	<i>Reinecke v. Gardner</i> ,	
13	277 U.S. 239 (1928).....	18
14	<i>Robi v. Five Platters, Inc.</i> ,	
15	918 F.2d 1439 (9th Cir. 1990).....	40
16	<i>Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia</i> ,	
17	394 F.3d 40 (1st Cir. 2005).....	41
18	<i>Sac and Fox Nation of Missouri v. Pierce</i> ,	
19	213 F.3d 566 (10th Cir. 2000).....	37
20	<i>Squaxin Island Tribe v. Stephens</i> ,	
21	400 F. Supp. 2d 1250 (W.D. Wash. 2005).....	passim
22	<i>U.S. v. Winans</i> ,	
23	198 U.S. 371 (1905).....	35
24	<i>United States v. King Trailer Co., Inc.</i> ,	
25	350 F.2d 947 (9th Cir. 1965).....	18
26	<i>United States v. Lara</i> ,	
	541 U.S. 193 (2004).....	25, 38
	<i>United States v. Mazurie</i> ,	
	419 U.S. 544 (1975).....	37
	<i>United States v. Smiskin</i> ,	
	487 F.3d 1260 (2007).....	31, 36
	<i>Warren Trading Post Co. v. Arizona State Tax Comm'n</i> ,	
	380 U.S. 685 (1965).....	38

1	<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> ,	
2	447 U.S. 134 (1980).....	22, 23, 24, 31
3	<i>Washington v. Yakima Indian Nation</i> ,	
4	439 U.S. 463 (1979).....	38
5	<i>White Mountain Apache Tribe v. Bracker</i> ,	
6	448 U.S. 136 (1980).....	25
7	<i>Williams v. Lee</i> ,	
8	358 U.S. 217 (1959).....	25, 27, 38
9	<i>Worcester v. Georgia</i> ,	
10	6 Pet. 515 (1832).....	25, 38

STATUTES

11	FED. R. CIV. P. 56(c)	2
12	Fed. R. Civ. P. 56(d)	1, 2, 40, 41
13	Fed. R. Civ. P. 56(d)(1)	39, 40
14	RCW § 70.158.030	13
15	RCW § 70.158.030(2).....	13
16	RCW § 82.23.130	39
17	RCW § 82.24.010(4).....	7
18	RCW § 82.24.020	4, 17
19	RCW § 82.24.020(4).....	4
20	RCW § 82.24.040	34
21	RCW § 82.24.050	7, 34
22	RCW § 82.24.080	3, 10, 34, 35
23	RCW § 82.24.080(1).....	17
24	RCW § 82.24.080(2).....	17
25	RCW § 82.24.090	passim
26	RCW § 82.24.10	34, 35
	RCW § 82.24.103	21

1	RCW § 82.24.110	passim
2	RCW § 82.24.110(1)(a)	33
3	RCW § 82.24.110(1)(i)	33
4	RCW § 82.24.110(l)	33
5	RCW § 82.24.130	27, 29, 32, 33
6	RCW § 82.24.190	passim
7	RCW § 82.24.210	13, 14
8	RCW § 82.24.295	5, 11
9	RCW § 82.24.500	10
10	RCW § 84.24.110(i)-(j)	33
11	RCW § 9A.20.010(2)(a)	32, 33, 34
12	WAC § 458-20-185 (2007)	3, 30, 32
13	WAC § 458-20-186	3
14	WAC § 458-20-186(101)(b)	3
15	WAC § 458-20-186(301)(b)	12
16	WAC § 458-20-186(701)	8, 11
17	WAC § 458-20-186(702)(a)	8
18	WAC § 458-20-186(702)(g)	15, 28
19	WAC § 458-20-192	3
20	WAC § 458-20-192(9)(a)(i)	7
21	OTHER AUTHORITIES	
22	6 Moore's Federal Practice P 56.20(3.-2) (2d ed. 1976)	39
23	Act of Feb. 18, 2008, ch. 226 § 2, Laws of 2008	31
24	Act of Feb. 18, 2008, ch. 226 §§ 2, 4, Laws of 2008	31
25		
26		

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs are entitled to summary judgment for two independent and powerful reasons.

First, the Defendants take the position that the cigarette tax set forth in Wash. Rev. Code § 82.24 (“RCW”) and its accompanying regulations (the “Washington Cigarette Tax” or “RCW 82.24”) applies to all transactions occurring on the Yakama Nation Reservation between enrolled member cigarette retailers and non-member consumers. The Washington Cigarette Tax cannot be applied in this manner because to do so would force the Yakama Nation and its enrolled members to bear the “legal incidence” of this tax in violation of federal law. For this reason alone, Plaintiffs are entitled to judgment as a matter of law that the Washington Cigarette Tax cannot be applied to retail transactions occurring within the Yakama Reservation between enrolled members of the Yakama Nation and non-member consumers. Second, the State of Washington lacks jurisdiction to take enforcement action as outlined in RCW 82.24 against the Yakama Nation or any of its enrolled member cigarette retailers operating on the Yakama Reservation.

Accordingly, Plaintiffs are entitled to judgment as a matter of law and Defendants and their agents should be permanently enjoined from attempting to enforce the Washington Cigarette Tax on tribal retailers of the Yakama Nation.

Even if this Court finds there are questions of material fact precluding summary judgment in Plaintiffs’ favor, this Court should nevertheless find that the unrebutted expert report and undisputed conclusions provided by Dr. Deward Walker are not genuinely in dispute and are, therefore established for the remainder of the action pursuant to Fed. R. Civ. P. 56(d).

LAW AND ARGUMENT

Summary judgment is appropriate if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). “If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant the summary judgment motion.” *Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 2009 WL 1107243, *1 (E.D. Wash. 2009).

FED. R. CIV. P. 56(d) further provides that “[i]f summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue.” Once the court makes this determination, “[t]he facts so specified must be treated as established in the action.” *Id.*

I. THE INCIDENCE OF THE WASHINGTON CIGARETTE TAX FALLS ON TRIBAL RETAILERS IN VIOLATION OF FEDERAL LAW.

In order to illustrate how the “incidence of the tax” in RCW 82.24 impermissibly falls on tribal retailers, Plaintiffs provide the following overview of the relevant parties involved in the distribution and sale of cigarettes and the interplay of the relevant statutory and regulatory provisions of RCW 82.24.

A. Overview of the Relevant Parties and the Washington Cigarette Tax.

Cigarettes are sold in Washington State through a distribution chain comprised of essentially three parties: wholesalers, retailers, and consumers. In order to become a “licensed cigarette wholesaler” in Washington, an individual or company must first

1 obtain a business license, acquire a cigarette wholesaler's license, and complete a
2 criminal background check. (*See* LR 56 Statement ¶ 104) Cigarette wholesalers sell
3 cigarettes to "licensed cigarette retailers." In order to become a "licensed cigarette
4 retailer" in Washington, one must also obtain a business license and a cigarette
5 retailer's license for each retail location. WASH. ADMIN. CODE § 458-20-185
6 ("WAC"). Cigarette retailers purchase cigarettes from wholesalers and then resell the
7 cigarettes to consumers. Unlike wholesalers and retailers, consumers are not required
8 to be licensed or otherwise registered with the state before purchasing or consuming
9 cigarettes. (*See* LR 56 Statement ¶ 104)

10 Cigarettes are taxed in Washington pursuant to RCW 82.24 *et seq.*, WAC 458-
11 20-186, 458-20-192 (the "Washington Cigarette Tax" or "RCW 82.24"). The
12 Washington Legislature has indicated its intent to levy a tax on all cigarettes "sold,
13 used, consumed, handled, possessed, or distributed within this state and to collect the
14 tax from the person who first sells, uses, consumes, handles, possesses or distributes
15 in the state." RCW 82.24.080. To enforce the collection of the tax, the Department of
16 Revenue ("DOR") authorizes the sale of cigarette "tax stamps." WAC 458-20-
17 186(101)(b) (*see also* LR 56 Statement ¶ 65, 67, 68). Only licensed wholesalers may
18 obtain these tax stamps, which the wholesalers then affix to the individual cigarette
19 packs before selling those packs to a licensed retailer. (*See* LR 56 Statement ¶ 69)

20 The current cost for a single tax stamp (for one package of cigarettes) is \$2.025.
21 A wholesaler acquires the tax stamps from U.S. Bank. (*See* LR 56 Statement ¶ 70)
22 The wholesaler is not, however, required to provide immediate payment for the
23 stamps. Instead, wholesalers can elect to "defer" payment for up to 30 days.
24 According to Mr. Lee Smith (an Excise Tax Examiner, and 24 year veteran of the
25 DOR, who implements and enforces the Washington Cigarette Tax Law (*see* LR 56
26

1 Statement ¶¶ 65, 66)), most of the large wholesalers prefer this deferred payment
2 option because it allows them to sell the cigarettes to their retailers, collect the cost of
3 the stamps from the retailers, and then have that money within the 30 day timeframe.
4 (See LR 56 Statement ¶ 71)

5 Cigarette wholesalers are required by law to “pass on” the cigarette tax to the
6 retailer.¹ RCW 82.24.020. To aid the DOR in making sure the tax is “passed on,”
7 both the wholesaler and the retailer have stringent record-keeping requirements. For
8 example, the wholesaler must submit monthly sales reports to the DOR indicating
9 such things as: (i) the name of the retailer to whom the wholesaler has sold, (ii) the
10 volume of sales made to retailer; and (iii) whether the tax was paid by the retailer.
11 Further, both the wholesaler and the retailer must keep extensive records for five years
12 of all cigarette sales occurring between them. RCW 82.24.090.

13 In sharp contrast, retailers are *not* required to “pass on” the cigarette tax to the
14 consumer. Additionally, retailers are *not* required to keep any records of the sales
15 made by them to consumers. (See LR 56 Statement ¶ 78) Similarly, consumers are
16 not required to keep any records of their cigarette purchases from retailers. (See LR
17 56 Statement ¶ 79) Although non-Indian consumers are required to pay the cigarette
18 tax if they acquire cigarettes that are untaxed (from a tribal retailer, for example), the
19 state has limited ability to enforce the collection. (See LR 56 Statement ¶¶ 103, 104,
20 105, 108) Thus, the last party in the distribution chain against whom the tax
21 obligation can most effectively be enforced is the retailer. (See LR 56 Statement ¶ 77)
22
23

24 ¹ Wholesalers may absorb five one-hundredths cents per cigarette without being in
25 violation of RCW 82.24. RCW 82.24.020(4). This amount is negligible and equals
26 one penny per pack of cigarettes.

1 Cigarette wholesalers receive a variety of tax benefits that retailers are not
2 provided. For example, cigarette wholesalers receive the functional equivalent of a
3 “tax credit” for affixing the cigarette stamps; a “compensation for their services.”
4 RCW 82.24.295. Cigarette wholesalers are also provided with a “tax refund” when
5 they are unable to sell certain cigarettes in their possession or when cigarettes in their
6 possession are damaged or otherwise unfit for sale. (See LR 56 Statement ¶ 91) By
7 contrast, retailers have no statutory ability to obtain a refund from the DOR under any
8 scenario, even when they have paid the tax and are subsequently unable to sell their
9 inventory to a consumer. (See LR 56 Statement ¶¶ 97, 99, 100, 101, 102) Moreover,
10 retailers are saddled with paying an “inventory tax,” which is imposed on them
11 directly anytime there is a state cigarette tax increase. (See LR 56 Statement ¶¶ 111,
12 112) Over the last 72 years, the Washington Cigarette Tax has increased, on average,
13 every 4 years, with the last increase occurring in 2005. (See LR 56 Statement ¶ 110)
14 Thus, if past is prologue, a tax increase is in the offing, and retailers will bear the
15 brunt of having to pay this tax increase on their inventory.

16 **B. RCW 82.24 is Unenforceable Because The “Legal Incidence” of The**
17 **Tax Falls Squarely Upon Yakama Indian Retailers and is, Therefore,**
a Per Se Violation of Federal Law.

18 Absent clear congressional authority, “a State’s excise tax is unenforceable if its
19 legal incidence falls on a Tribe or its members for sales made within Indian country.”
20 *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). The person
21 or entity bearing the legal incidence of the tax is not necessarily the one bearing the
22 economic burden. *Id.* at 460. Rather, to discern where the legal incidence lies, the
23 Court needs to assess “the legal obligations imposed upon the concerned parties,” and
24 this inquiry “does not extend to divining the legislature’s ‘true’ economic object.”
25 *Coeur d’Alene Tribe v. Hammond*, 384 F.3d 674, 681 (9th Cir. 2004). Instead, the
26

1 Court must evaluate the law “in light of the state statutory scheme, an assessment of
2 its effects, and the total circumstances germane to incidence.” *Id.* at 685. The question
3 of where the legal incidence falls is decided by federal law and is not dictated by
4 legislative command. *Id.* at 681, 685.

5 The U.S. Supreme Court, and more recently the Ninth Circuit Court of Appeals,
6 and the U.S. District Court for the Western District of Washington have all thoroughly
7 analyzed the “legal incidence” of three fuel taxation regimes in Oklahoma, Idaho, and
8 Washington, respectively. *See Chickasaw Nation*, 515 U.S. 450; *Hammond*, 384 F.3d
9 674; *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005)
10 (collectively referred to herein as the “Legal Incidence Cases”). All three courts held
11 that those schemes violated federal law because the legal incidence of the tax fell on
12 tribal retailers operating within Indian Country. The rationale and reasoning of all
13 three courts apply with great force in this case. Here, as detailed below, the legal
14 incidence falls on Yakama Nation retailers doing business within the Yakama
15 Reservation. (*See* LR 56 Statement ¶ 64) As both written and applied, RCW 82.24
16 fails and, therefore, cannot be enforced against tribal retailers.

- 17 1. Just like the unenforceable statutes in *Hammond* and *Squaxin*
18 *Island*, RCW 82.24 requires the non-Indian wholesaler to “pass
on” and collect the tax from the Indian retailer.

19 In holding the legal incidence of Idaho’s fuel tax statute impermissibly fell on
20 tribal retailers, the *Hammond* Court found that the statute “requires the non-tribal
21 distributor who receives the motor fuel and sells it to the Indian tribes to pass on and
22 to collect the tax from the retailer, and then to remit the taxes to the State.” 384 F.3d
23 at 685-86. In order to ensure that this tax was collected “all invoices for sales by
24 distributors to retailers must show that the state fuel tax was charged to the retailer.”
25 *Id.* at 686. Likewise, in holding that the “tax buck stops” with the tribal retailers, the
26

1 *Squaxin Island* Court observed that “distributors were required by law to collect the
2 taxes from retailers and remit them to the State, but retailers were not legally required
3 to collect the taxes from consumers.” 400 F.Supp. 2d at 1258.

4 Here, the Washington Cigarette Tax law contains the same infirmities as the
5 statutes in *Hammond* and *Squaxin Island*.

6 a. *RCW 82.24 requires wholesalers to “pass on” the cigarette*
7 *tax to retailers.*

8 The Washington Cigarette Tax Law expressly states that wholesalers *must* pass
9 on the cigarette tax to retailers to whom they sell: “[s]ales of cigarettes to
10 nonmembers by Indians or Indian tribes are subject to the cigarette tax. *The*
11 *wholesaler is obligated to make precollection of the tax.*” WAC 458-20-192(9)(a)(i)
12 (emphasis supplied), *see also*, RCW 82.24.010(4) (noting that wholesalers may only
13 absorb five one-hundredths cents per cigarette of the tax and not pass it on to
14 purchasers without being in violation of the section or any other act relating to the sale
15 or taxation of cigarettes). A “precollection obligation” is “the obligation of a seller
16 otherwise exempt from the tax imposed by this chapter to collect the tax from that
17 seller’s buyer.” RCW 82.24.010(4). Retailers may not possess unstamped cigarettes
18 and must obtain their cigarettes from wholesalers in accordance with RCW 82.24,
19 thereby forcing retailers to pay the tax the wholesalers are required to collect from
20 them. RCW 82.24.050.

21 The practical effect of this “precollection obligation” is that retailers bear the
22 entire financial brunt of paying the tax. When cigarette stamps are “purchased” from
23 the bank by the cigarette wholesalers, the cigarette wholesalers are *not* required to pay
24 for them at that time. (*See* LR 56 Statement ¶ 71, 73) Instead wholesalers can defer
25 payment for 30 days. (*Id.*) In fact, as Defendants admit, “most of the large
26

1 wholesalers are on the deferred process” because they prefer not having to front any
 2 cash for the tax payment. (*Id.* at ¶ 71) Instead, the deferred option allows wholesalers
 3 to “sell the product, get paid, and then have the money by the time it’s taken out of
 4 [their] account.” (*Id.*)²

5 Thus, it is undisputed that wholesalers *must* pass on the cigarette tax to the
 6 retailers and the practical effect of the statute is that it is the retailers are the ones
 7 shouldering the burden of paying the tax.

8 *b. RCW 82.24 requires wholesalers and retailers to maintain*
 9 *detailed records to ensure the cigarette tax is “passed on.”*

10 Just as the statutes in *Hammond* and *Squaxin Island* imposed record keeping
 11 requirements on the wholesaler to ensure the tax was collected from the retailer, RCW
 12 82.24 contains even more stringent record-keeping requirements. For example, RCW
 13 82.24 requires both wholesalers *and* retailers to keep detailed records for five years
 14 that “must show all transactions relating to the purchase and sale of any of the articles
 15 taxed under this chapter and show all physical inventories performed on those articles,
 16 all invoices, and a record of all stamps purchased.” RCW 82.24.090. *See also*, WAC
 17 458-20-186(701). The DOR’s express purpose behind these requirements is to inspect
 18 the records to ensure compliance. (*See* LR 56 Statement ¶¶ 71 72, 80-85)

19 Additionally, cigarette wholesalers must also submit to the DOR on a monthly
 20 basis a complete record of wholesale transactions with retailers. *See* WAC 458-20-
 21 186(702)(a). Wholesalers’ monthly sales reports are submitted on a DOR-generated
 22 form called a “Schedule C Report.” (*See* LR 56 Statement ¶ 82) On the Schedule C,
 23 _____

24 ² By contrast, there is *no* statutory or regulatory authority that allows a retailer to
 25 “defer” payment of the tax to the wholesaler until they have sold their cigarettes to
 26 their consumers. (*See* LR 56 Statement ¶ 73)

1 the wholesaler must provide the following information for each sale to a retailer: the
2 type of sale, the “tax paid,” the name and address of the retail purchaser, the invoice
3 date and number, and the “number of packs” sold to the retailer. (*Id.*) The DOR
4 requires the wholesaler to indicate if the tax was paid so that it has “a better idea or the
5 actual idea of the details on the nature of the sale or the nature of was tax paid or was
6 tax not paid.” (*See* LR 56 Statement ¶ 84) The DOR also requires that the wholesaler
7 list the retailers to whom the wholesaler sold cigarettes because “[w]e want to follow
8 the cigarettes to make sure the tax is appropriately taken care of...so we definitely
9 need to know about who the purchaser is.” (*Id.*) (emphasis supplied).³

10 In sum, cigarette wholesalers must “pass on” the tax to retailers and RCW 82.24
11 requires both parties to that transaction to maintain extensive records so that the DOR
12 can “follow the cigarettes to make sure the tax is appropriately taken care of.” (*See* LR
13 56 Statement ¶ 84). The DOR requires wholesalers to maintain these specific records
14 of taxes charged to retailers to ensure that the appropriate taxes are charged to the
15 retailers, just as in *Hammond*. *Cf. Hammond*, 384 F.3d at 686 (Idaho law required
16 that all invoices for sales by distributors to retailers must show that the tax was
17 charged to the retailer). Just like the statutes at issue in the Legal Incidence Cases,
18 RCW 82.24 requires the wholesaler to “pass on” the tax from the retailer.

- 19 2. Just as the unenforceable statute in *Squaxin Island* did not require
20 the retailer to “pass on” the tax to the consumer or the consumer to
keep records, RCW 82.24 lacks these requirements as well.

21 Cigarette retailers under RCW 82.24 (just the like fuel retailers in *Squaxin*
22 *Island*) have no mandatory statutory or regulatory obligation to pass on the tax to
23 _____

24 ³ Wholesalers may secure a bond, allowing them to defer up-front payment until the
25 tax has been passed, as required, to the retailer. This option is for wholesalers only.
26 (*See* LR 56 Statement ¶ 73).

1 consumers. *See* RCW 82.24, (*see also* LR 56 Statement ¶¶ 74-76) The two statutes
2 share another important feature. In *Squaxin Island*, the consumer was liable to pay the
3 tax if the fuel was acquired and the “the tax has not yet been paid.” 400 F.Supp. 2d at
4 1258. So it is with the Washington Cigarette Tax. *See* RCW 84.24.080 (“Failure to
5 pay the tax with respect to a taxable event shall not prevent tax liability from arising
6 by reason of a subsequent taxable event.”) As the *Squaxin Island* Court observed, “the
7 practical effect is that only retailers can be audited for compliance because consumers
8 need not maintain records of taxes paid.” 400 F.Supp. 2d at 1258. Here, consumers
9 also need not maintain records of taxes paid, retailers need not maintain records of
10 taxes paid by consumers, and retailers need not issue any documentation to consumers
11 showing that the tax has been paid by them. (*See* LR 56 Statement ¶¶ 74-85, 103).
12 The fact that taxes must be passed from the distributor to the retailer but not from the
13 retailer to the consumer indicates that the “tax buck” stops at the retail level. (*Id.*)

14 Here, the Washington Cigarette Tax Law does not require retailers to “pass on”
15 the tax to consumers. Moreover, retailers are not required to keep records showing
16 whether the Washington Cigarette Tax was passed to consumers. (*See* LR 56
17 Statement ¶ 74, 80) Just like in *Squaxin Island*, retailers are not under any obligation
18 to issue a receipt to consumers showing whether any tax was paid. 400 F.Supp. 2d at
19 1253, 1259-60 (*see also* LR 56 Statement ¶¶ 75, 80). In fact, retailers are not required
20 by the Washington Cigarette Tax Law to provide any documentation whatsoever to
21 consumers showing the tax has been passed on. (*See* LR 56 Statement ¶¶ 75, 76, 80)

22 Likewise, the “practical effect” of Washington’s Cigarette Tax Law is that only
23 retailers and wholesalers can be audited for compliance. Only wholesalers and
24 retailers are required to be licensed with the state. RCW 82.24.500. There is no
25 requirement that a consumer become a “licensed consumer.” (*See* LR 56 Statement ¶
26

1 104) Only wholesalers and retailers are required to keep detailed records of all
2 transactions relating to the purchase and sale between the wholesaler and the retailer.
3 RCW 82.24.090, *see also* WAC 458-20-186(701). Consumers have no such
4 mandatory obligation to keep records regarding their purchases from retailers.
5 Wholesalers must submit Schedule C Reports on a monthly basis to the DOR
6 indicating detailed information regarding their transactions with retailers. Retailers
7 have no obligation to fill out and submit a Schedule C Report for their transactions
8 with consumers. In fact, as Mr. Smith testified retailers “don’t need to keep anything
9 special or unique specifically related to cigarette sales to consumers.” (See LR 56
10 Statement ¶ 83)

11 In sum, cigarette retailers are not required to pass on the cigarette tax to
12 consumers and the means of ensuring the tax is paid end at the retail level. As such, it
13 is undisputed that, as a matter of law, “the tax buck” stops with the tribal retailers.

14 3. Just like the impermissible statute in *Hammond*, RCW 82.24
15 effectively provides a “tax credit” to the non-Indian wholesaler for
acting as the State’s tax collector.

16 The *Hammond* Court further found the legal incidence fell on retailers because
17 the statute “provides tax credits to the distributor for ‘collecting and remitting’ the tax
18 on behalf of the State.” 384 F.3d at 686 (citing *Chickasaw Nation*, 515 U.S. at 462,
19 “[F]or their services as agent of the state for [tax] collection, distributors retain a small
20 portion of the taxes they collect.”)

21 Here, the Washington Cigarette Tax Law essentially provides a “tax credit” to
22 the wholesaler for acting as the state tax collector; they are allowed “compensation for
23 their services....” RCW 82.24.295 (*see also* LR 56 Statement ¶¶ 87, 88) Licensed
24 cigarette wholesalers purchase the tax stamps from authorized banks and then affix the
25 stamps to the cigarettes. The wholesalers are compensated for affixing the stamps at
26

1 the rate of \$6.00 per thousand stamps affixed. *Id.*, see also WAC 458-20-186(301)(b).
2 This so-called “stamping allowance” is netted out of the stamp purchase price.
3 Wholesalers fill out a form, which Mr. Smith succinctly described, “[i]t’s basically
4 how the cigarette wholesalers can apply for a refund of the stamping allowance on
5 stamps that they are issued for no charge.” (See LR 56 Statement ¶ 87) The
6 wholesaler’s role as a compensated “tax collector” for the state is even more
7 pronounced in light of the fact that most wholesalers obtain the stamps without
8 fronting any money and then collect the tax from the retailers so it can be remitted to
9 the state within 30 days. (See LR 56 Statement ¶ 71, 73)

10 Thus, when wholesalers purchase stamps from the bank, they are effectively
11 given a “refund” or “credit” on the purchase price of the stamps. (*Id.*)⁴

- 12 4. Even more so than the impermissible statutes in *Hammond*, *Squaxin Island*, and *Chickasaw Nation*, RCW 82.24 provides
13 generous “tax refunds” to the non-tribal wholesaler but denies the
14 tribal retailer any right to obtain a refund for unsellable or
destroyed product.

15 *Hammond*, *Squaxin Island*, and *Chickasaw Nation* all held that entities above
16 the retail level were mere “transmittal agents” because the statutes allowed
17 distributors to obtain refunds for uncollectible taxes, but “there was no indication that
18 the same rule applied to retailers.” *Squaxin Island*, 400 F.Supp. 2d at 1258-59 (citing
19 *Chickasaw Nation*, 515 U.S. at 461-62; *Hammond*, 684 F.3d at 687). That same
20 “transmittal agent” rationale applies with equal force here because RCW 82.24 allows
21 wholesalers to obtain refunds but does not provide the same benefit to retailers.
22 Indeed, Defendants “[a]dmit that retailers are not allowed a refund for the cost of the
23

24 ⁴ By contrast, retailers are not provided with any sort of stamping allowance or refund.
25 (See LR 56 Statement ¶¶ 89, 90).
26

1 Washington state cigarette tax stamp paid when purchasing cigarettes but which cost
2 could not later be collected from a consumer.” (See LR 56 Statement ¶ 97).

3 The respective statutes in *Hammond*, *Squaxin Island*, and *Chickasaw Nation*
4 each contained a single type of refund available to distributors that were not available
5 to retailers. See *Hammond*, 384 F.3d at 687-88; *Squaxin Island*, 400 F.Supp.2d at
6 1258-59; *Chickasaw Nation*, 515 U.S. 461-62. Here, RCW 82.24 goes even further
7 than the Legal Incidence Cases and provides two types of “tax refunds” to the
8 cigarette wholesaler—neither of which can be claimed by a cigarette retailer.

9 The first type of tax refund a wholesaler is entitled to recover is embodied in
10 RCW 82.24.210, which provides:

11 A distributor or wholesaler that has lawfully affixed stamps
12 to cigarettes, and subsequently is unable to sell those
13 cigarettes lawfully because the cigarettes are removed from
14 the directory created pursuant to RCW 70.158.030(2), *may*
apply to the department for a refund of the cost of the
stamps. (emphasis supplied).⁵

15 RCW 70.158 *et seq.* provides that the Attorney General must approve any brand of
16 cigarettes before they are sold in this state. RCW § 70.158.030. The Attorney General
17 maintains a “directory” of these approved brands. *Id.* The Attorney General can and
18 does remove certain brands from the directory for various reasons. *Id.* If a wholesaler
19 has already purchased and stamped its “approved brand” inventory, and that brand is
20 subsequently removed from the directory before the wholesaler has sold that inventory
21 to a retailer, RCW 82.24.210 expressly provides that the wholesaler “may apply to the
22

23 _____
24 ⁵ RCW 70.158 embodies Washington State’s legislation that compliments the Master
25 Settlement Agreement between various states and certain tobacco manufacturers that
26 resulted out of litigation related to health care costs.

1 department for a refund of the cost of the stamps.” (See LR 56 Statement ¶ 95), see
2 also RCW 82.24.210.

3 By contrast, if a retailer has purchased a brand of cigarettes that are
4 subsequently removed from the directory before the retailer has sold them, it has *no*
5 “statutory or regulatory” authority to obtain a refund. (See LR 56 Statement ¶ 103)
6 This “tax refund” that benefits only the wholesaler underscores “the ‘tax and remit’
7 feature of the statute, which places the legal incidence on the retailers, not the
8 distributors.” *Hammond*, 384 F.3d at 687.

9 The second type of refund is also only for wholesalers. This type of refund is
10 available when a wholesaler’s inventory has been “damaged” or is otherwise “unfit for
11 sale.” (See LR 56 Statement ¶ 91) In order to obtain this refund, the wholesaler must
12 fill out a form generated by the DOR. The only form available through the DOR is
13 entitled “Cigarette Tax Claim for Refund.” (See LR 56 Statement ¶¶ 92, 93, 98) RCW
14 82.24 mandates that refunds are only available on forms authorized by the DOR. (See
15 LR 56 Statement ¶ 93) Further, only wholesalers may use the Cigarette Tax Claim for
16 Refund form. (See LR 56 Statement ¶¶ 93, 98, 99) Therefore, only wholesalers may
17 take advantage of this refund.

18 There is no form available for a retailer to obtain a refund for any of its cig-
19 arette products that are damaged or otherwise unfit for sale. (See LR 56 Statement ¶
20 99, 100, 101) In fact, the DOR maintains a Cigarette Tax Manual (or “CTM”) that
21 contains a detailed procedure on how the DOR agents “process cigarette tax refunds.”
22 (See LR 56 Statement ¶ 94) The CTM is “the official processing procedure” that is
23 “followed by the Department of Revenue.” (*Id.*) Mr. Smith is responsible for updating
24 the section on tax refunds. (*Id.*) The CTM indicates that the DOR “processes several
25 types of refunds,” but not one of the types listed involves a refund to a retailer. (*Id.*)
26

1 Rather, all four types of refunds listed in the CTM are for refunds provided to either
2 the cigarette manufacture or the cigarette wholesaler/distributor. As Mr. Smith ad-
3 mitted in his deposition the word “retailer” is not even mentioned in the CTM. (*Id.*)⁶

4 In short, if the single “tax refund” schemes in *Chickasaw Nation, Hammond*,
5 and *Squaxin Island* tended to show that the legal incidence fell on the retailers in those
6 cases, then surely the generous, dual tax refund scheme provided to cigarette
7 wholesalers under RCW 82.24 provides powerful evidence that retailers bear the legal
8 incidence of the cigarette tax.

9 5. Just as the impermissible statute in *Squaxin Island* lacked practical
10 consequences enforced against the consumer who obtained
untaxed fuel, RCW 82.24 contains similar limitations.

11 Even though consumers were declared to be “liable for fuel taxes” under the
12 statute in *Squaxin Island*, the Court there found that because “consumer liability lacks
13 real consequences” the incidence of the tax still fell on the tribal retailers. 400 F.Supp.
14 2d at 1260. In this regard, the Court examined three aspects of the State’s statutory
15 scheme for imposing liability on consumers and found it lacked consequences
16 because: (i) there was “no legal requirement that retailers pass the fuel tax on to the
17 consumers;” (ii) “retailers need not keep records of taxes paid by the consumers and
18 consumers may or may not have the tax itemized on the bill;” and (iii) “there are no
19 enforcement efforts aimed at determining whether a motor vehicle fuel consumer in a
20 passenger vehicle has paid the tax.” *Id.* at 1259-60. These same factors apply here.

21 First, consumers are liable for the cigarette tax if it has not been paid by the
22 retailer. WAC 458-20-186(702)(g). However, just like the statute in *Squaxin Island*,
23 retailers are not required to pass the tax onto consumers. *Supra*, pgs. 13-15.

24
25 ⁶ Likewise, to Mr. Smith’s knowledge, in the history of the DOR, no consumer has
26 ever received a refund for cigarette tax stamps. (*See* LR 56 Statement ¶ 109)

1 Second, just like the retailers in *Squaxin Island* were not required to “keep
2 records of taxes paid by the consumers,” so it is with the statute in this case. *Squaxin*
3 at 1259. As Mr. Smith testified, retailers are not required to fill out Schedule C for
4 sales to consumers and retailers do not need to “keep anything special or unique
5 specifically related to cigarette sales to consumers.” (See LR 56 Statement ¶ 83)

6 Third, just as there were no “enforcement efforts” aimed at consumers in
7 *Squaxin Island*, the exact same can be said for the State’s “enforcement efforts” in this
8 case. Consumers need not be licensed to purchase cigarettes. (See LR 56 Statement ¶
9 104) Although the State sends “education letters” to consumers it believes have
10 purchased cigarettes from *out of state* without a Washington cigarette tax stamp
11 affixed to them, (See LR 56 Statement ¶ 105), the State has no practical way of
12 gaining information about *in-state* purchases of cigarettes that do not have a
13 Washington cigarette tax stamp affixed. (*Id.*) Instead, the State relies solely on
14 consumers’ self-reporting of purchases. This method is through use of the “Tax
15 Declaration for Cigarettes” form. (See LR 56 Statement ¶¶ 37, 106, 107) Mr. Smith
16 admitted in his deposition that, unless a police officer fortuitously pulls over a
17 consumer with “unstamped” cigarettes in plain view, the only means by which the
18 State can monitor consumers’ compliance with the tax statutes is through the self-
19 reporting Tax Declaration for Cigarettes form. (See LR 56 Statement ¶ 108)

20 6. Just as the legislative intent expressed in the statutes involved in
21 *Hammond* and *Squaxin Island* was not “controlling”, the
22 Washington Legislature’s stated “intent” in RCW 82.24 is not
controlling and is nebulous and equivocal in any event.

23 In *Hammond*, the Court noted the Idaho Legislature expressly stated its clear
24 intent to “impose the legal incidence of motor fuels taxes upon the *motor fuel*
25 *distributor* who receives the fuel in Idaho.” 384 F.3d at 680 (internal citations
26

omitted) (emphasis supplied). Similarly, in *Squaxin Island*, the Court observed the Washington Legislature expressly stated “[i]t is intended that the *ultimate liability for the tax* imposed under the chapter be upon the *motor vehicle fuel user*.” F.Supp. 2d at 1252. (internal citations omitted) (emphasis supplied). Despite these explicit and unambiguous legislative pronouncements, both courts held that these statements were not controlling on the issue of where the legal incidence falls. As explained by *Hammond*, “[a] state legislature’s declaration of intent cannot be viewed as alone controlling on the federal question whether the legal incidence of a state tax falls on a sovereign Indian nation.” 384 F.3d at 685. Instead, the Court must evaluate the incidence of the tax “in light of the state statutory scheme, an assessment of its effects, and the total circumstances germane to incidence.” *Id.*, see also *Squaxin Island*, 400 F.Supp. 2d at 1257-58. If the clear legislative intentions were not “controlling” on the issue of legal incidence in those cases, then the Washington Legislature’s expressed intent in RCW 82.24 cannot be controlling here.

The pertinent “legislative intent” provisions of the statute provide as follows:

It is the intent and purpose of this chapter to levy a tax on all of the articles taxed under this chapter, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. RCW 82.24.080(1)

It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state.

RCW 82.24.080(2). Unlike the statutes in both *Hammond* and *Squaxin Island*, the above-cited provisions do *not* single out a specific individual or entity within the distribution chain. Instead, the statute refers to a nebulous “first taxable person.”

1 Moreover, the statutes in both *Hammond* and *Squaxin* indicated a clear legislative
2 intent to impose the “legal incidence” and “ultimate liability” on the distributor and
3 motor fuel user, respectively. Here, the Washington legislature has simply indicated
4 its intent to impose the tax on this “first taxable person” without any explanation as to
5 whether this imposition was intended to be the “legal incidence” or the “ultimate
6 liability” of the tax.

7 In light of the equivocal and nebulous nature of the Washington Legislature’s
8 purported “intent,” it is of marginal utility and certainly cannot be deemed
9 “controlling” in any event. *Hammond*, 384 F.3d at 685, *see also Reinecke v. Gardner*,
10 277 U.S. 239, 255 (1928); *United States v. King Trailer Co., Inc.*, 350 F.2d 947, 948
11 (9th Cir. 1965) (statutes granting the right to tax are strictly construed against the
12 taxing authority in favor of the taxpayer with any ambiguities resolved in favor of the
13 taxpayer); *Goodman Oil Co. v. Idaho State Tax Comm’n*, 28 P.3d 996 (Idaho 2001),
14 cert. denied, 122 S.Ct. 1068 (U.S. Idaho Feb. 19, 2002) (No. 01-794) (citing
15 *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 174 (1973); *Bryan v. Itasca*
16 *County*, 426 U.S. 373, 393 (1976)) (Tax statutes imposed against Indian Tribes must
17 be construed liberally in favor of Indians with ambiguities resolved in their favor);
18 *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901 (9th Cir. 1987) (citing
19 *California v. Cabazon Band of Mission Indians*, 408 U.S. 202 (1987)) (“[T]he federal
20 tradition of Indian immunity from state taxation is very strong and ... the state interest
21 in taxation is correspondingly weak.”)

22 7. Tribal retailers are also saddled with an “inventory tax” that further
23 underscores the impermissible nature of RCW 82.24.

24 Another aspect of the Washington Cigarette Tax underscores that it is the
25 retailers that bear the legal incidence. As Mr. Smith testified, “[w]hen the State
26

1 cigarette tax is increased, there's a provision in [sic] statute that as of that date,
2 whoever holds cigarettes for *sale is liable for that tax increase.*" (See LR 56
3 Statement ¶¶ 111, 112) (emphasis supplied). This is referred to as an "inventory tax."
4 (*Id.*) The inventory tax is imposed on a retailer that possesses cigarettes as of the
5 effective date of the tax increase. (See LR 56 Statement ¶ 112) The retailer must fill
6 out and submit the "Cigarette Floor Stock Tax Return" and submit it to the DOR and
7 pay the tax within 30 days of the tax increase. (*Id.*) Otherwise, penalties can range up
8 to 25% of the amount of the tax owed. *Id.* On average, the state cigarette tax rate
9 increases every four years, with the most recent increase occurring in 2005. (See LR
10 56 Statement ¶ 110) Thus, if past performance is indicative of future results, an
11 increase in the cigarette tax is looming—and retailers will be "liable for that tax
12 increase" as they have been in the past. (See LR 56 Statement ¶¶ 110, 112)

13 For all of these reasons, this Court should find the tribal retailers bear the "legal
14 incidence" of the tax under RCW 82.24 and order that it cannot be enforced against
15 tribal retailers operating within the Yakama Nation.

16 **II. THE STATE IS WITHOUT AUTHORITY TO ENFORCE RCW 82.24**
17 **ON THE YAKAMA RESERVATION.**

18 This lawsuit was prompted by the threats of the State and its agents, after the
19 State's termination of a cigarette tax compact with the Yakama Nation in July 2008, to
20 take immediate civil or criminal enforcement action under RCW 82.24 against
21 members of the Yakama Nation for non-compliance with the statute. (See LR 56.1
22 Statement ¶¶ 27-30, 56-58; *see also* Complaint for Declaratory and Permanent
23 Injunctive Relief ¶¶ 30-33 and exhibits thereto (September 2, 2008)) There has never
24 been any indication that Defendants intend any "carve out" exceptions to the
25 application of RCW 82.24 – to the contrary. At the time of these actions, the State did
26

1 not specify exactly what types of enforcement action it planned to take and instead
2 indicated it was still investigating its options. (*See* LR 56 Statement ¶ 27-28, 56-58)
3 However, most of the enforcement provisions outlined in RCW 82.24, such as
4 bookkeeping requirements and on-demand audits, searches, seizures and arrests for
5 violations, would necessitate that Defendants take action within the boundaries of the
6 Yakama Reservation.

7 Although the State's agents have since admitted informally during this
8 litigation, through deposition testimony and discovery responses, that Defendants do
9 not have jurisdiction to take enforcement action on the Yakama Reservation, these
10 admissions have only recently come to light. Moreover, the text of the statute fails to
11 recognize the State's jurisdictional limits in Indian Country based on fundamental
12 principles of federal Indian law. Plaintiffs therefore seek formal clarity with respect to
13 both the State's and the Yakama Nation's respective territorial jurisdictions, to
14 facilitate continued improvements in government-to-government relations.

15 The possibility of the State attempting to enforce RCW 82.24 on the Yakama
16 Reservation is of great concern to the Yakama Nation as a government with sovereign
17 authority over its lands and on-reservation activities. The lack of clarity on State
18 enforcement authority also poses a disruptive threat to members of the Yakama
19 Commerce Association as they go about running their businesses in compliance with
20 tribal law. Plaintiffs therefore seek entry of a court order that outlines the State's
21 admitted limited jurisdictional enforcement authority as it relates to particular
22 provisions of RCW 82.24 in light of fundamental principles of federal Indian law.

23 The U.S. Supreme Court has never authorized on-reservation enforcement of
24 State cigarette tax statutes and instead has indicated that states are limited to off-
25 reservation actions. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian*
26

1 *Tribe*, 498 U.S. 505, 514 (1991) (indicating that states can negotiate compacts with
2 tribes, enforce against non-tribal wholesalers, bring suits against tribal officials, or
3 seize cigarettes off the reservation). The State now concedes, consistent with
4 Supreme Court jurisprudence and fundamental principles of federal Indian law, that it
5 does not have authority to take enforcement action on the Reservation, and in fact has
6 limited its actions accordingly thus far. The problem, however, is that RCW 82.24
7 outlines various enforcement actions the State may generally take and fails to
8 recognize the State's enforcement limits in Indian Country under federal law—despite
9 the fact that application of enforcement provisions on the Yakama Reservation against
10 tribal members would undermine the sovereignty and exclusive jurisdiction of the
11 Yakama Nation and exceed the jurisdiction of the State of Washington.

12 Moreover, the provisions of RCW 82.24 are predicated on the threshold notion
13 that activity must occur “in the state” (i.e. within the State's jurisdictional territory and
14 reach) and not within the boundaries of the Yakama Reservation. Therefore, because
15 they would necessarily require on-reservation enforcement and exceed the State's
16 jurisdiction, RCW 82.24.090, RCW 82.24.110, RCW 82.24.103 and RCW 82.24.110
17 should be declared invalid as applied to Yakama members on the Yakama
18 Reservation.

19 A. **The U.S. Supreme Court Has Recognized the Jurisdictional Limits of**
20 **State Authority to Enforce Cigarette Tax Statutes on Indian**
21 **Reservations.**

22 This issue turns on the U.S. Supreme Court having sanctioned a state's ability
23 to require retailers to collect taxes on transactions between state citizens and retailers
24 in another jurisdiction without outlining a remedy to enforce collection of that tax. For
25 the purposes of this motion only, Plaintiffs do not ask the Court to consider
26 application of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)

1 or *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S.
2 134 (1980), to the Yakama Nation or the Yakama Reservation. Rather, Plaintiffs ask
3 this Court to consider what the Supreme Court left unanswered in those decisions but
4 outright delineated in *Potawatomi*.

5 In *Moe and Colville*, the Supreme Court found after applying certain factual and
6 legal standards, that the involved states could require tribal retailers to collect state
7 taxes at the cash register on cigarette sales to non-Indians within the exterior
8 boundaries of the involved reservations. But while acknowledging a general right to
9 require collection of such taxes from non-Indians, the Court never reached the issue of
10 what remedy states were to use to collect on those taxes in the event that tribal
11 retailers did not collect that tax from the on-reservation sale.

12 Notably in *Colville*, the Supreme Court implicitly recognized the state's lack of
13 jurisdiction within reservation boundaries in upholding the state's right to seize
14 unstamped cigarettes in transit to the reservation from out-of-state wholesalers. It
15 expressly noted that "[i]t is significant that these seizures take place *outside the*
16 *reservation*, in locations where state power over Indian affairs is considerably more
17 expansive than it is within reservation boundaries." *Id.* at 162 (*citing Mescalero*
18 *Apache Tribe v. Jones*, 411 U.S. 145 (1973)) (emphasis supplied). The Court found it
19 significant that by seizing the cigarettes outside the reservation, the state avoided
20 "unnecessarily intruding on core tribal interests." *Id.* at 162. The Court declined to
21 directly address the state's contention that it could also enter reservations to seize
22 cigarettes because the issue was not properly before it under the facts of the case. *Id.*

23 The Court more recently had occasion to squarely address the enforcement
24 issue in a suit brought by a state directly against a tribe for collection of alleged back
25 taxes. *Potawatomi* 498 U.S. at 510. The state in that case complained to the Court
26

1 that cases like *Moe* and *Colville* had given it a right to tax but without a remedy to
2 collect because of jurisdictional enforcement limitations. *Id.* at 514. The Court
3 clarified and characterized its decisions in *Moe* and *Colville* as standing “for the
4 proposition that the doctrine of tribal sovereign immunity does not prevent a State
5 from requiring Indian retailers doing business on tribal reservations to collect a state-
6 imposed cigarette tax on their sales to nonmembers of the Tribe.” *Id.* at 513. But the
7 Court then went on to acknowledge *limitations to enforcement* by holding that “[t]here
8 is no doubt that sovereign immunity *bars* the State from pursuing the most efficient
9 [collection] remedy, but we are not persuaded that it lacks any adequate alternatives.”
10 *Id.* at 514 (emphasis supplied).

11 The Court then proceeded to outline the available “adequate alternatives,”
12 acknowledging jurisdictional enforcement limits by explaining that states can enter
13 into compacts with tribal governments for a “mutually satisfactory regime for
14 collection,” assess wholesalers who supply unstamped cigarettes to tribal retailers,
15 possibly bring suit against tribal officials,⁷ or seize unstamped cigarettes “off the

17 ⁷ The Court curiously explained this option in the negative: “We have never held that
18 individual agents or officers of a tribe are not liable for damages in actions brought by
19 the State.” *Oklahoma Tax Comm’n*, 498 U.S. at 514 (citing *Ex Parte Young*, 209 U.S.
20 123 (1908)). However, it is doubtful that a court could allow such an action to proceed
21 because it would seek damages rather than injunctive relief and would presumably be
22 paid by the tribe itself. See *Edelman v. Jordan*, 415 U.S. 651, 664-665 (1974)
23 (allowing suits against officials for prospective injunctive relief but not monetary
24 damages); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) (allowing suit to
25 proceed against government officials where it sought only prospective injunctive
26 relief). Such an alternative would also trigger tribal court jurisdiction issues as well.

1 reservation” to collect the tax. *Id.* (emphasis supplied). Again, the Court was careful
2 to avoid discussion of any remedy that would involve state enforcement action on the
3 reservation itself. It also suggested that this list of options was exclusive in concluding
4 that if states find that none of them prove to be satisfactory, they “may of course seek
5 appropriate legislation from Congress.” *Id.* at 514.

6 The State of Washington concedes and acknowledges that Supreme Court
7 jurisprudence has not sanctioned the use of direct enforcement methods and has rather
8 suggested that States must negotiate consensual agreements with tribes⁸ or utilize off-
9 reservation methods of enforcement. Defendants expressly recognized the limits on
10 their enforcement jurisdiction in accord with *Potowatomi*. (See LR 56 Statement ¶¶
11 43-49 and Exhibit 57 “Enforcement Matrix”)

12 These limits are also affirmed by statements from representatives from the
13 Department of Revenue, including its Deputy Director and tribal liaison, and a
14 representative from the Washington State Liquor Control Board (WSLCB) in
15 depositions, and by actions the State took leading up to the entry of the Temporary
16 Restraining Order (TRO) in this case. (See LR 56 Statement ¶¶ 55, 59)

17 **B. The State of Washington Concedes That It Does Not Have**
18 **Jurisdiction to Enforce RCW 82.24 Within the Boundaries of the**
19 **Yakama Reservation and Instead Has Focused on Enforcement**
Against Non-Indians Outside the Reservation.

20 Although the State originally asserted broad authority to enforce RCW 82.24
21 against members of the Yakama Nation without indicating which specific provisions it
22 would employ, the State has since conceded through discovery and most notably
23 deposition testimony, that it does not have jurisdiction to apply the Washington
24 _____

25 ⁸ The State currently has entered into 20 Cigarette Tax Compacts out of the 29
26 Washington State Federally recognized tribes. (See LR 56 Statement ¶ 54, Exhibit P)

1 Cigarette Tax enforcement provisions on the Yakama Reservation. Properly so, any
2 contention to the contrary would fly in the face of long-established principles of
3 Indian law jurisdiction.

4 The State of Washington has no jurisdiction or authority to take enforcement
5 action against tribal members within the boundaries of the Yakama Reservation.
6 Absent express congressional authorization, states have no jurisdiction over Indians in
7 Indian Country—i.e. Indian retailers. *Montana v. Blackfeet Tribe of Indians*, 471 U.S.
8 759, 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151, 252
9 (1980); *McClanahan v. State Tax Comm’n of Arizona*, 411 U.S. 164, 168, 170-71
10 (1973); *Williams v. Lee*, 358 U.S. 217, 220 (1959). This is because tribes are domestic
11 dependent nations with inherent sovereignty to govern their territories and their
12 members. *See United States v. Lara*, 541 U.S. 193, 204-205 (2004); *Worcester v.*
13 *Georgia*, 6 Pet. 515, 557 (1832); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831). To
14 hold otherwise would eviscerate legal principles that have been consistently applied to
15 Indian tribes since treaty time and would render the fundamental concepts of “tribal
16 sovereignty” and “Indian Country” meaningless.

17 “The policy of leaving Indians free from state jurisdiction and control is deeply
18 rooted in the nation’s history.” *McClanahan*, 411 U.S. at 168. The policy was first
19 expressed more than 150 years ago when Chief Justice Marshall held that “Indian
20 nations were distinct political communities, having territorial boundaries, which is not
21 only acknowledged, but guaranteed by the United States.” *Worcester*, 6 Pet. at 557.
22 From the very first days of our government, the Federal government has allowed the
23 Indians to govern themselves, free from state interference. *McClanahan*, 411 U.S. at
24 170.

1 The State can cite to no Congressional act that has given it jurisdiction to
2 enforce its tax scheme against tribal members in Indian Country. In particular, the
3 State lacks the necessary civil regulatory jurisdiction to enforce RCW 82.24 against
4 the Plaintiffs for activity occurring in Indian Country. *See California v. Cabazon Band*
5 *of Mission Indians*, 480 U.S. 202 (1987); *Bryan v. Itasca County*, 426 U.S. 373
6 (1976).⁹

- 7 1. State agents concede that their enforcement options are limited,
8 consistent with federal Indian law and Supreme Court precedent.

9 Although the State originally asserted broad intentions to enforce RCW 82.24
10 without indicating how it would do so, its agents have more recently conceded the
11 State's options do not include on-reservation enforcement. For instance, a
12 Department of Revenue director, who authored letters asserting the State's general
13 intent to take enforcement action, indicated in deposition that the State's enforcement
14 options are actually quite limited due to jurisdictional issues. (*See* LR 56 Statement ¶
15 26-34) Involuntary enforcement actions on Indian reservations, such as seizing
16 untaxed product, are simply outside the State's jurisdiction. (*See* LR 56 Statement ¶
17 32, 34, 36)

18 Likewise, a manager for the Tobacco Tax Unit of the Washington State Liquor
19 Control Board (WSLCB) testified that the WSLCB does not have jurisdiction to go on
20 reservation land to do inspections of tribal retail shops. (*See* LR 56 Statement ¶ 38, 39,
21 42) The WSLCB does not conduct any technical assistance visits, during which an

22 _____
23 ⁹ “[I]f the state law generally permits the conduct at issue, subject to regulation, it
24 must be classified as civil/regulatory.” *Cabazon*, 480 U.S. at 209. An otherwise
25 regulatory state law that is enforceable by criminal as well as civil means is not
26 converted into a criminal law. *Id.* at 211.

1 officer ensures retailers or wholesalers are in compliance with RCW 82.24, on tribal
2 lands. (See LR 56 Statement ¶ 40-42) The State also admitted through discovery that
3 WSLCB enforcement officers do not conduct unannounced inspections of Indian-
4 owned businesses located on the reservations. (See LR 56 Statement ¶ 62)

5 Plaintiffs have also discovered that after the termination of the Yakama tax
6 compact and during the time that the State was threatening enforcement, the State
7 developed an “Enforcement Matrix” to outline its general enforcement strategy for the
8 Yakama Nation (without indicating which specific provisions of RCW 82.24 it would
9 utilize). (See LR 56 Statement ¶ 43, 60) The State’s main focus in the strategy is
10 educating consumers about their responsibilities when purchasing cigarette products
11 other than from a Washington retailer that has already paid the State tax on the
12 product. (See LR 56 Statement ¶¶ 44, 46) The State also indicates that it will focus on
13 education and enforcement activity for state-licensed wholesalers. (See LR 56
14 Statement ¶ 45) Consistent with this plan, the State sent letters to all Washington State
15 licensed wholesalers informing them that the compact had been terminated. (See LR
16 56 Statement ¶¶ 28-30, 45) The State also contemplates developing civil litigation
17 against Yakama smoke shop owners or officials to enforce RCW 82.24.¹⁰ (See LR 56
18 Statement ¶ 31, 48)

19 Nowhere in the Enforcement Matrix does the State indicate that it intends to
20 take the enforcement actions outlined in RCW 82.24.090 (recordkeeping and on-
21 demand inspection), RCW 82.24.110 (outlining misdemeanor and felony offenses),
22 RCW 82.24.130 (authorizing seizures) or RCW 82.24.190 (authorizing searches)
23 against tribal members on the Yakama Reservation. The testimony was that absent
24

25 ¹⁰ Any civil action against a tribal member would be subject to exclusive tribal court
26 jurisdiction. See *Williams v. Lee*, 358 U.S. 217 (1959).

1 entry of the TRO, the plan would have been put into effect. (See LR 56 Statement
2 ¶ 61)

3 In fact, the State simply could not do so, and although it has admitted its general
4 jurisdictional limitations as it relates to this case, the Court should enter an order
5 clarifying the specific sections of RCW 82.24 that the State cannot enforce on the
6 Yakama Reservation against Yakama members.

7 Likewise, the Deputy Director of the Department of Revenue testified that
8 because it did not want to go to Congress to ask for a change in law pursuant to the
9 Supreme Court's direction in *Potowatomi*, the State instead focuses on negotiating tax
10 agreements with tribes. (See LR 56 Statement ¶ 50, 51, 53, 54) According to the State,
11 the point of these agreements is to provide internal controls to ensure that tribal
12 retailers collect the tax. (See LR 56 Statement ¶ 52) The State's focus on negotiating
13 agreements to enforce RCW 82.24 is further indication that it would not otherwise
14 have authority to enforce the statute against tribal retailers on reservations. See
15 *Goodman Oil*, 28 P.3d at 1001 (consensual agreement between tribe and state
16 providing for collection of fuel tax indicated that the relevant statute did not otherwise
17 provide authority for collection).

- 18 2. The State of Washington has alternative methods for collecting its
19 cigarette tax when a non-Indian consumer purchases cigarettes
20 from an entity other than a Washington retailer and uses the
21 product in Washington – the Plaintiffs want that method of
22 collection to have equal application to its sales.

23 While conceding that it does not have authority to employ on-reservation
24 enforcement methods, the State clearly indicates that it is not without alternative
25 methods for collecting the tax. For instance, when a consumer buys the cigarettes
26 “from sources other than licensed retailers in this state” (see WAC 458-20-186
(702)(g)), and brings them in to the State to use, that consumer is under an obligation

1 to self-report the purchase to the DOR because the Washington State tax –usually
2 already paid by the Washington retailer before the consumer can even buy the
3 product, has not yet been paid because the product came from out of state. (*See* LR 56
4 Statement ¶¶ 35, 37, 106, 107 and attached Exhibit 30)

5 The State knows, for example, that it has no jurisdictional reach into Oregon,
6 Idaho or British Columbia to force foreign retailers to pay Washington State cigarette
7 tax on product sold to a Washington resident –that simply can not occur. So too is the
8 State’s jurisdictional reach unavailable as a matter of law to force the Indian retailer to
9 pay the Washington cigarette tax under RCW 82.24 for product sold to a Washington
10 resident. Instead, the State has chosen a method for Washington consumers to use the
11 DOR self-reporting declaration form when that consumer has purchased product from
12 an entity other than a Washington retailer so the State can capture revenue that it
13 otherwise would have received on that cigarette product from a Washington retailer.
14 (*Id.*)

15 The use of this consumer form should apply with equal force to transactions
16 occurring on the Yakama Reservation, but which product is then used/possessed by a
17 non-Indian consumer off reservation, just as the form is used for transactions that
18 occur in Oregon, Idaho or British Columbia—i.e. forums outside the State’s
19 jurisdictional enforcement reach. (*See* LR 56 Statement ¶¶ 35, 37, 106, 107) This is
20 yet another appropriate alternative that does not threaten tribal sovereignty or exceed
21 the State’s jurisdiction. The Enforcement Matrix also indicates other various methods
22 the State can employ that does not involve taking action on the Yakama Reservation.
23 (*See* LR 56 Statement ¶ 47)

24 Because the State admits, both expressly and implicitly through its actions, that
25 it does not have jurisdiction on the Yakama Reservation, this Court should enter an
26

1 order expressly finding the specific provisions of RCW 82.24.090, RCW 82.24.110,
2 RCW 82.24.130 and RCW 82.24.190 specifically unenforceable against Yakama
3 tribal wholesalers and retailers on the Yakama Reservation. The State should instead
4 give equal application to the use of the consumer tax form for transactions on the
5 Yakama Reservation as it does with any other purchases made by consumers from a
6 retailer somewhere other than Washington. Just as it has no authority to enforce the
7 provisions of RCW 82.24 on an Idaho retailer, so too should this Court find that
8 Defendants cannot enforce RCW 82.24 on the Yakama Reservation.

9 3. Defendants are prohibited from implementing specific enforcement
10 provisions of RCW 82.24 because to do so would violate Federal
11 law on Indian Country and would exceed defendants admitted lack
12 of jurisdictional enforcement authority on the Yakama
13 Reservation.

14 Defendants admit generally to their jurisdictional limits to enforcement of RCW
15 82.24 in Indian Country – which have historically led to their need to enter into
16 agreements with various tribes located within the geographical boundaries of the State
17 of Washington. Plaintiffs therefore ask this Court to enter an order finding particular
18 sections of the state unenforceable on the Yakama Reservation for the purposes of
19 clarity to facilitate governmental relations going forward. The Defendants are limited
20 by (1) their inability to enforce the particular sections because to do so would
21 necessarily require coming on the Yakama Reservation and apply state law to tribal
22 members; and (2) the statute's penalty provisions are predicated on conduct occurring
23 "in the state" and within the State's jurisdictional reach, and therefore cannot cover
24 activity taking place on the Yakama Reservation.

25 a. *RCW 82.24 does not properly recognize state jurisdictional*
26 *limits in Indian Country.*

1 RCW 82.24 contains a hodgepodge of conflicting provisions that create
2 ambiguity as to the State's jurisdiction to enforce the statutory scheme in Indian
3 Country, particularly on the Yakama Reservation. This ambiguity is at least partly due
4 to various amendments attempting to take advantage of Supreme Court decisions
5 regarding cigarette taxation in Indian Country and some amendments related to the
6 Yakama Nation's treaty rights in particular.¹¹ The enforcement provisions of the
7 statute, and particularly the State's ability to apply them in Indian Country, have never
8 been approved or sanctioned by any court.

9 Pursuant to legislation passed in 2008, RCW 82.24.080(4) now declares:

10 It is the intent of the legislature that, in the absence of a
11 cigarette tax contract or agreement under chapter 43.06
12 RCW, applicable taxes imposed by this chapter be collected
13 on cigarettes sold by an Indian tribal organization to any
14 person who is not an enrolled member of the federally
15 recognized Indian tribe *within whose jurisdiction the sale*
16 *takes place* consistent with collection of these taxes
17 generally *within the state*. The legislature finds that
18 *applicable collection and enforcement measures* under this
19 chapter are reasonably necessary to prevent fraudulent
20 transactions and place a minimal burden on the Indian tribal
21 organization, pursuant to the United States [S]upreme
22 [C]ourt's decision in *Washington v. Confederated Tribes of*
23 *the Colville Indian Reservation*, 447 U.S. 134 (1980).

24 (emphasis supplied)¹²

25 _____
26 ¹¹ For instance, after the Ninth Circuit decision in *United States v. Smiskin*, 487 F.3d
1260, 1264 (2007), the state amended the provision that was held invalid as applied to
the Yakamas and also added additional provisions regarding enforcement of the
statute against tribes. *See also* Act of Feb. 18, 2008, ch. 226 §§ 2, 4, Laws of 2008.
The State's attempts to legislate around federal court decisions on treaty rights further
exemplify the need for an interpretation of its enforcement authority.

¹² Act of Feb. 18, 2008, ch. 226 § 2, Laws of 2008.

1 Although the statute cites the *Colville* decision, that decision did not address
2 enforcement other than implicitly indicating that states could not take action on an
3 Indian reservation. *Colville*, 447 U.S. at 162. In its broad statement regarding the
4 alleged necessity of “applicable collection and enforcement measures,” the statute
5 does not clarify which enforcement measures in RCW 82.24 are considered
6 “applicable” in Indian Country, nor does it acknowledge or recognize fundamental
7 tenets of federal Indian law with regard to tribal jurisdiction on the reservation.

8 Rather, the statute generally provides for a host of mechanisms for the State to
9 enforce its tax generally. For instance, it requires that all wholesalers and retailers
10 keep an “accurate set of records” for five years showing all transactions relating to the
11 purchase and sale of cigarettes. RCW 82.24.090. These records “shall be open to
12 inspection at all reasonable times by the department of revenue or its duly authorized
13 agent.” *Id.* Pursuant to RCW 82.24.130, the State can seize unstamped cigarettes as
14 well as any vehicles, vessels or aircraft used to transport unstamped cigarettes. The
15 State can also search any place or thing where it has “good reason to believe” that
16 cigarettes are being “kept, sold, offered for sale, or given away” in violation of the
17 statute. RCW 82.24.190.

18 The statute also declares specific violations of its provisions either gross
19 misdemeanors or class C felonies, punishable as such. RCW 82.24.110. For instance,
20 selling or possessing cigarettes that do not have state tax stamps affixed, *Id.* § (1)(a);
21 refusing to allow the Department of Revenue to make inspections on demand of any
22 place of business, *Id.* § (1)(i); failing to produce all invoices for the past five years on
23 demand, *Id.* § (1)(l); and any other violation of the provisions of RCW 82.24 or rules
24 made by the Department of Revenue are declared gross misdemeanors, punishable by
25 up to 90 days in a County jail and/or a fine of up to \$1000. *Id.*; RCW 9A.20.010(2)(a).
26

1 Those provisions, while applicable to a Washington-licensed wholesaler or
2 retailer, cannot simply have a blanket application on the reservation, without
3 trampling federal jurisdictional limits that apply on Indian reservations. Yet the State
4 itself has never expressly indicated that there are any carve out exceptions to the
5 provisions for on-reservation activity. (*See* LR 56 Statement ¶ 63)¹³

6 The statute also declares specific violations of its provisions either gross
7 misdemeanors or class C felonies, punishable as such. RCW 82.24.110. For instance,
8 selling or possessing cigarettes that do not have state tax stamps affixed, *Id.* § (1)(a);
9 refusing to allow the Department of Revenue to make inspections on demand of any
10 place of business, *Id.* § (1)(i); failing to produce all invoices for the past five years on
11 demand, *Id.* § (1)(l); and any other violation of the provisions of RCW 82.24 or rules
12 made by the Department of Revenue are declared gross misdemeanors, punishable by
13 up to 90 days in a County jail and/or a fine of up to \$1000. *Id.*; RCW 9A.20.010(2)(a).

14 To be applied to Yakama Nation retailers, these enforcement provisions would
15 necessarily require the State to take action within the territorial jurisdictional
16 boundaries of the Yakama Reservation. The State could not demand an inspection of
17 Yakama retailer records dating back five years without coming onto the Reservation.
18 *See* RCW 82.24.090; § 82.24.110(l). It also could not demand to make a full
19 inspection of a tribal place of business without also asserting jurisdiction to make such
20 a search on the Reservation. RCW 84.24.110(i)-(j). In order to search the premises of
21 or seize unstamped product from a retail shop on the reservation, the State would also
22 have to enter the tribe's jurisdiction and assert authority. *See* RCW 82.24.110; §

23
24 ¹³ Noteworthy, the State itself has admitted to its own jurisdictional enforcement
25 problems, which is presumably why they focus on negotiating compacts with tribes
26 throughout the state.

1 82.24.130; § 82.24.190. The State also could not make arrests or prosecute alleged
2 violations under the penalty provisions without asserting criminal jurisdiction to apply
3 state law to tribal members on the Reservation. *See* RCW 82.24.110; §
4 9A.20.010(2)(a).

5 Defendants have no jurisdictional authority in this regard, and Plaintiffs
6 therefore move for an order finding those particular statutory provisions unenforceable
7 against tribal members on the Yakama Reservation.

8 *b. RCW 82.24's penalty provisions are predicated on conduct*
9 *occurring within Defendants' jurisdictional boundaries –*
10 *“in the state” – and therefore cannot be applied on the*
11 *Yakama Reservation, a sovereign nation.*

12 The language of RCW 82.24 and its enforcement provisions specifically rise
13 and fall on conduct occurring *within the State of Washington*. For instance, RCW
14 82.24.040 provides that “[n]o person other than a licensed wholesaler shall possess *in*
15 *this state* unstamped cigarettes.” (emphasis supplied). Likewise, “[n]o retailer may
16 possess unstamped cigarettes *within this state* unless the person is also a wholesaler in
17 possession of the cigarettes in accordance with RCW 82.24.040.” RCW 82.24.050
18 (emphasis supplied). Moreover, the stated purpose of the statute is to “levy a tax on all
19 of the articles ... sold, used, consumed, handled, possessed, or distributed *within this*
20 *state* and to collect the tax from the person who first sells, uses, consumes, handles,
21 possesses ... or distributes them *in the state*.” RCW 82.24.080 (emphasis supplied).

22 The penalty provisions are also predicated on the conduct occurring in the State
23 of Washington to constitute an offense. Some of them specifically include this
24 language. *See, e.g.* RCW 82.24.10 (“Each of the following acts is a gross
25 misdemeanor and punishable as such: ... (b) To sell *in Washington* as a wholesaler to a
26 retailer who does not possess and is required to possess a current cigarette retailer’s

1 license ... (m) For any person to receive *in this state* a quantity of ten thousand
2 cigarettes or less unless the proper stamps required by this chapter have been affixed
3 ... (n) For any person to possess or transport *in this state* a quantity of ten thousand
4 cigarettes or less unless the proper stamps required by this chapter have been
5 affixed.”) All other offenses are dependant on the tax being applicable for a violation
6 to occur. *See, e.g.* RCW 82.24.10 (“(i) To refuse to allow the department of revenue or
7 its duly authorized agent, on demand, to make full inspection of place of business
8 where any of the articles *herein taxed* are sold ... (l) for any wholesaler or retailer or
9 his or her agents to fail to produce on demand of the department of revenue all
10 invoices or all the articles *herein taxed* ...”) (emphasis supplied); *See also* RCW
11 82.24.080 (stating that the purpose of the statute is to “levy a tax on all of the articles
12 ... sold, used, consumed, handled, possessed, or distributed *within this state* ...”
13 (emphasis supplied).

14 Any threats of civil and criminal enforcement against Yakama members on the
15 Yakama Reservation are therefore contradicted by the language of the very statutory
16 scheme sought to be enforced. The Yakama Reservation is not “in the state” of
17 Washington for the purposes of political territorial jurisdiction, but is rather subject to
18 the exclusive sovereign authority of the Yakama Nation, its tribal government, and its
19 laws.

20 *c. The Yakama Reservation is subject to the sovereign*
21 *jurisdiction of the Yakama Nation and is not considered “in*
22 *the state” of Washington for purposes of the State’s*
jurisdictional enforcement reach.

23 The Yakama Nation is not “in the state” of Washington for the purposes of
24 RCW 82.24. The Yakama Nation is a sovereign federation of formerly autonomous
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1 Indian tribes. Through the Treaty of 1855¹⁴ with the United States, the Yakama
2 Nation ceded approximately 11 million acres in exchange for a tract of 1.2 million
3 acres for their “*exclusive* use and benefit,” and agreed to be considered “as one
4 nation.” (LR 56 Statement ¶ 14) The Treaty is a sacred document to the Yakamas,
5 embodying spiritual as well as legal meaning. It enumerates basic rights secured to
6 them in perpetuity that encompass their entire way of life. Each provision has special
7 meaning and governs the present-day actions of the Nation. (LR 56 Statement ¶ 13)

8 The Treaty and records from its proceedings make clear that both the Yakama
9 Nation and the federal government intended that the Yakama Nation be its own
10 sovereign territory – not simply a part of the State of Washington. This is evidenced
11 by assurances made to them during treaty negotiations that the Reservation would be a
12 separate territory politically distinct from the State of Washington. (See LR 56
13 Statement ¶ 15) It is also supported by the fact that the treaty retained a prominent
14 Yakama chief as the leader of the Confederation. (See LR 56 Statement ¶ 17) There is
15 nothing in the treaty itself or contemporaneous records that would have suggested to
16 the tribal representatives that their country would one day be part of a future state.
17 (See LR 56 Statement ¶ 16)

18 In fact, treaty negotiators went to great lengths to describe with particularity the
19 boundaries of the territory to be given up and retained using metes and bounds

21 ¹⁴ The Treaty “was not a grant of rights to [the Yakamas], but a grant of rights from
22 them – a reservation of those not granted.” *U.S. v. Winans*, 198 U.S. 371, 381 (1905).
23 The text of a treaty must be construed as the Yakamas’ would naturally have
24 understood it at the time of the treaty, with any doubtful or ambiguous expressions
25 resolved in their favor. *United States v. Smiskin*, 487 F.3d 1260, 1264 (2007).
26

1 descriptions of particular geographic features. (See LR 56 Statement ¶ 19) This was
2 due to tribal representatives' concerns that they be protected from further
3 encroachment by the whites. (See LR 56 Statement ¶ 18) The Nation's concern about
4 boundaries has even been noted by the Supreme Court: "[the Yakamas] feared the
5 encroachments of the white man. Their fears were allayed by adapting the treaty to
6 their understanding, by delineating the land they conveyed and the land they reserved
7 by great and commanding objects." *Pacific Ry. V. United States*, 227 U.S. 355, 361
8 (1913).

9 A recent Tenth Circuit case held that an Indian reservation can be excluded
10 from being "in the state" if the tribe reserved its land from the boundaries of the state
11 by treaty. *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 577 (10th Cir.
12 2000). That case concerned a Kansas motor fuel tax that exempted the tax when the
13 fuel was being taken out of the state. *Id.* at 570. The court relied on a Kansas
14 Supreme Court decision that had already addressed the same issue and held that all
15 territory not previously exempted from boundaries of Kansas by treaty between the
16 United States and an Indian tribe was included within the State of Kansas. *Id.* It
17 therefore upheld the tax in that case based on the Kansas Supreme Court's
18 interpretation of that band of Indians' treaty and its lack of provisions clearly
19 separating reserved lands from the state. *Id.*

20 Unlike the tribe in that case, the Yakama Treaty does specifically exclude the
21 Yakama Reservation from the Territory and future State of Washington. (See LR 56
22 Statement ¶ 18, 19.) Tribal members understood that their territory was to be separate
23 from the existing Washington Territory or future State of Washington. (See LR 56
24 Statement ¶ 15, 16.)
25
26

1 The Supreme Court has also consistently recognized that Indian tribes retain
2 “sovereignty over both their members and their territory.” *United States v. Mazurie*,
3 419 U.S. 544 (1975). The Yakama Nation is a “distinct political society, separated
4 from others, capable of managing its own affairs and governing itself[.]” *United States*
5 *v. Lara*, 541 U.S. 193, 204-205 (2004) (quoting *Cherokee Nation v. Georgia*, 5 Pet. At
6 17); *See also Worcester v. Georgia*, 6 Pet. at 559. A tribe’s plenary and exclusive
7 power over tribal territory and tribal members is subject only to the control of the
8 federal government. *Lara*, 541 U.S. at 199.

9 As with all sovereigns, the jurisdictional powers of Indian Tribes are territorial
10 within their reservations. The general rule is that “Indians on [the reservation are]
11 largely free to run the reservation and its affairs” and should be “free from state
12 interference.” *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 380 U.S. 685,
13 690, 686-87 (1965). The Yakama Nation was strongly recognized in the Treaty of
14 1855 as enjoying the usual “authority of Indian governments over their reservations.”
15 *Williams v. Lee*, 358 U.S. 217, 223 (1959). Accordingly, and the Yakama Nation “has
16 consistently contested the wisdom and the legality of attempts by the State [of
17 Washington] to exercise jurisdiction over its Reservation lands.” *Washington v.*
18 *Yakima Indian Nation*, 439 U.S. 463, 469, 489, 476 (1979) (contesting Washington’s
19 limited extension of jurisdiction under Public Law 280).

20 4. Yakama members are subject to regulation by tribal government
21 under tribal law.

22 Nothing has occurred since treaty time that has diminished the Yakama
23 Nation’s powers with respect to its own territory and particularly its own people. As
24 the Supreme Court has noted, since treaty ratification in 1859, “the Yakima Nation
25 has without interruption maintained its tribal identity;” in 1953 it was recognized to be
26

1 one of the few tribes to have a “tribal law-and-order organization that functions in a
2 reasonably satisfactory manner[.]” (*Id.* at 469)

3 Indeed, since the time of the Treaty, the Yakama Nation has continued to
4 exercise all powers of a sovereign government. (*See* LR 56 Statement ¶ 22) It has an
5 extensive tribal government with elected officers, composed of an elected Tribal
6 Council, General Council of all members, and several committees created to govern
7 specific governmental issues. (*Id.*) The Nation specifically has adopted a Law and
8 Order Code which comprehensively regulates businesses operating on the
9 Reservation. (*See* LR 56 Statement ¶ 64, Ex. J) Yakama Nation businesses, including
10 cigarette retailers and wholesalers, are licensed and regulated by the Yakama tribal
11 government under this code.

12 Because RCW 82.24 is not even triggered until a taxable event occurs “in the
13 state,” and outside the boundaries of the Yakama Reservation, enforcement provisions
14 such as RCW 84.24.090, RCW 82.24.110, RCW 82.23.130 and RCW 82.24.190
15 cannot be applied against tribal retailers doing business within the boundaries of the
16 Yakama Reservation. As it has indicated, the State of Washington is not without other
17 remedies that should be utilized without threatening tribal jurisdiction.

18 **III. The Court Should Order that Dr. Walker’s Conclusions Are Not**
19 **Genuinely At Issue and Are Established for this Action.**

20 Rule 56(d) provides that if summary judgment “is not rendered upon the whole
21 action, the Court should, to the extent practicable, determine what material facts are
22 not genuine at issue....It should then make an order specifying what facts...are not
23 genuinely at issue. The facts so specified must be treated as established in the action.”
24 Fed. R. Civ. Proc. 56(d)(1). Rule 56(d) authorizes summary adjudication as to part of
25 a claim with the purpose to determine before trial that certain issues shall be deemed
26

1 established in advance of trial. *Farrell Lines, Inc.*, 641 F.2d 765, 768-69 (9th Cir.
2 1981) (citing 6 Moore's Federal Practice P 56.20(3.-2) (2d ed. 1976)). The procedure
3 was intended to avoid a useless trial of facts and issues over which there was never
4 really any controversy and which would tend to confuse and complicate a lawsuit. *Id.*;
5 *see also Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1441 (9th Cir. 1990) (affirming
6 grant of motion for summary adjudication of certain issues pursuant to Rule 56(d));
7 *IGT v. Alliance Gaming Corp.*, 2007 U.S. Dist. LEXIS 20668, **36-37 (D. Nev.
8 Mar. 22, 2007) (Rule 56(d) authorizes summary adjudication on less than whole
9 claim) (citations omitted).

10 In his expert report, Dr. Walker renders opinions and conclusions, including but
11 not limited to those as set forth in Plaintiff's LR Statement at paragraphs 1-22, which
12 this Court should deem established for this action. They have gone wholly
13 un rebutted, undisputed, and are not contradicted.

14 Dr. Walker's conclusions and opinions establish facts that are directly relevant
15 to the culture, sovereignty, government structure, and strength of the Yakama Treaty
16 to be recognized in current business and political affairs—including but not limited to
17 Plaintiffs' rights take goods to market free of undue restrictions, and regulate as a
18 sovereign nation issues related to tobacco sales on-reservation. Dr. Walker's opinions
19 and conclusions bear on the cultural, religious, economic, and spiritual significance of
20 tobacco and whether, at the time the Treaty was negotiated and executed, the
21 Yakamas contemplated that they would have had State cigarette taxes imposed on
22 their activities or goods or that they would have to act as a tax collector for a later
23 formed State. *See id.* Each of these conclusions is thereby material to the Yakamas'
24 Second Cause of Action, which alleges that RCW 82.24 is unenforceable because it
25 violates the Yakama Nation members' treaty rights to trade and travel. *See* Cmplt. ¶
26

1 57. To the extent, the Court denies all or part of Plaintiffs' motions for summary
2 judgment related to incidence of the tax and/or limits to enforcement authority, the
3 Court should nevertheless adjudicate that Dr. Walker's conclusions are undisputed
4 and established for trial. FED. R. CIV. P. 56(d)(1).

5 As set forth in Defendants' motion to strike the Emily Greenwald report,
6 Defendants have failed to rebut Dr. Walker's conclusions because Dr. Greenwald
7 failed to respond to any of them and, in any event, provided an inadmissible opinion.
8 Even if her report and testimony is admissible, it in no way rebuts or contradicts
9 Dr. Walker, but instead, raises an opinion on an unrelated and irrelevant issue.
10 Therefore, the Court should order that Dr. Walker's expert opinions establish the
11 absence of genuine factual issues with respect to his opinion and conclusions that are
12 central to this case. *See Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo y*
13 *Beneficiencia*, 394 F.3d 40, 44 (1st Cir. 2005) (where hospital failed to present expert
14 testimony to rebut opinions of two experts retained by doctor, the two experts'
15 opinions established absence of genuine factual issue central to the case).

16 The order should deem those conclusions established for this case. Such an
17 order serves the purposes of Rule 56(d), because it will avoid a useless trial of facts
18 and issues over which there is no real controversy. A trial on the conclusions set forth
19 in Dr. Walker's report would not only waste time given the absence of any rebuttal
20 evidence by Defendants, but may tend to confuse and complicate the trial by delving
21 into the complex and voluminous research Dr. Walker relied upon to support his
22 conclusions. (*See* LR 56 Statement, Ex. A, pp. 3-64.)

23 CONCLUSION

24 Of particular importance to the Plaintiffs is for this Court to consider, outside
25 the prism of mainstream perceptions about tobacco, the traditional cultural
26

1 significance that tobacco has played throughout the history of the Yakamas and up
2 through to the present. Consistent with its traditional cultural significance in Yakama
3 affairs, tobacco played an important part in the 1855 treaty negotiations. Ceremonial
4 uses of tobacco continue to play a significant part in all formal political interactions
5 within the Yakama Nation between the Yakama and other tribes of the Northwest and
6 surrounding cultural areas. Tobacco for the Yakama has always had economic,
7 religious and cultural significance. (LR 56 Statement: Ex. A Walker Expert Report at
8 pg. 65 ¶ 8; *see also* Ex. D: Excerpts of D. Walker Dep. at pgs 113-122, 218-236, 250-
9 251)

10 Tobacco was both a medium of exchange or currency in the Yakama system of
11 trade and exchange in addition to its cultural and religious use. (*See* LR 56 Statement
12 Ex. D: Excerpts of D. Walker Dep. at pgs 250:22-251:15, 118:16-19) It was traded
13 widely amongst the Yakama and other tribes prior to contact with the Hudson's Bay
14 Company. (*See* Ex. D: Excerpts of D. Walker Dep. at pgs 114:12-118:19; 121:3-
15 122:8)

16 Tobacco was and still is used extensively for religious ceremonies. (*See* Ex. D:
17 Excerpts of D. Walker Dep. at pgs 221:22-224:10; 121:3-122:8) And as succinctly
18 stated by a direct descendent of Chief Kamiakin:

19
20 The smoking of tobacco is a part of the Yakama history and culture, and
21 is significant in our religious practices. The Yakamas have a spiritual
22 connection with tobacco. A form of tobacco grew wild on the Yakama
23 reservation, and was used by our ancestors in religious, cultural and
24 social gatherings in a ritualistic way. My ancestors cured this tobacco
25 themselves and often used berries to flavor the tobacco for their own
26 use. The Yakamas being traders, traded their tobacco to Indians from
other tribes. When our ancestors had a gathering, they would begin by
smoking and prayer. The smoking was a way of honoring our ancestors
and Pahto and the land and water which originated from the mountain.
It is customary and a part of our religion that when we pray, we smoke
and the smoke from the tobacco carries our prayers to heaven." (*See*

1 Wheeler Declaration Filed in Support of Motion for Temporary
2 Restraining Order (Sept. 2, 2008)).

3 For all these reasons, Plaintiffs respectfully asks this Court to acknowledge
4 their sovereignty, acknowledge their treaty rights, and acknowledge their abilities as
5 a sophisticated governing power to regulate the on-reservation activities related to
6 tobacco – a product that has a long and significant history for the Plaintiffs—
7 associated not only with their rights to trade in that good without undue restriction,
8 but to which significant cultural and religious significance attach. And, for this
9 Court to acknowledge and find that by entering an order granting Plaintiffs' motions
10 for summary judgment does not leave Defendants in any position other than treating
11 the Yakamas and sales on the Yakama Nation reservation the same as Defendants
12 have to treat purchases of cigarette products by Washington consumers who
13 purchase outside the state –i.e. beyond the jurisdictional reach of the Defendants and
14 RCW 82.24. An order to this effect granting Plaintiffs motions for summary
15 judgment would not trample on tribal jurisdiction and sovereignty, would not
16 improperly tax the tribal retailer, would not make a tribal retailer act as the State's
17 tax collector, and would leave the State with all its available remedies and chosen
18 method of dealing with this very commonplace scenario of consumers buying
19 products outside the state and/or purchasing product other than from a Washington
20 licensed retailer that is required to pay the tax before a consumer can even purchase
21 the product in Washington.

22 For all the foregoing reasons, Plaintiffs ask for the Court to enter summary
23 judgment in its favor.
24
25
26

1 Respectfully submitted this 3rd day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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