

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARTHUR MONTOUR,
a/k/a "Sugar Montour,"
PETER MONTOUR, KENNETH HILL,
and NATIVE WHOLESALE SUPPLY,

Defendants.

No. CR09-0214 MJP

DEFENDANTS' MOTION TO STRIKE
ALLEGATIONS AND/OR DISMISS
SUBSTANTIVE CCTA CHARGES
(COUNTS 7-16) FOR FAILURE TO
STATE AN OFFENSE

NOTE ON MOTION CALENDAR:

March 12, 2010

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The Second Superseding Indictment ("Indictment") charges violations of the Contraband Cigarette Trafficking Act ("CCTA") predicated on Defendants' alleged violations of Washington's regulatory cigarette taxation scheme. This Court and other courts in this district have adjudicated many cases under these provisions. But most of the criminal prosecutions have involved Indian owners of retail outlets, or "smoke shops" who have acquired cigarettes tax-free and then sold them to non-Indians in apparent violation of state law. In this case, the government seeks to prosecute an out-of-state Native-owned company operating in Indian country, and selling exclusively Native-made products to

1 other Natives. To Defendants' knowledge, this is the first time the government has sought
2 to prosecute a CCTA case against a supplier this far up the vertical distribution chain.

3 This motion is predicated on an analysis of the CCTA and its intersection with
4 Washington regulatory requirements that presents legal issues not previously considered by
5 any court. This analysis shows that the government's attempt to criminalize alleged failures
6 by out-of-state suppliers to provide "advance notice" of the transportation of unstamped
7 cigarettes under Washington law cannot form a legitimate basis for prosecution under the
8 CCTA.

9 II. BACKGROUND

10 A. Allegations

11 The Indictment alleges a series of commercial transactions between April 2003 to
12 February 2008 involving the sale of cigarettes to a retailer or "smoke shop" called Blue
13 Stilly/Native American Ventures ("NAV"), located on Stillaguamish trust land. Count 1
14 alleges that Defendants conspired with each other, with the principals of Blue Stilly and
15 Blue Stilly's suppliers, and others to distribute "contraband cigarettes," as defined by the
16 CCTA. The Indictment alleges that the cigarettes were contraband because they were
17 shipped to Blue Stilly without advance notice to the Washington State Liquor Control
18 Board ("LCB"), which the Indictment alleges was required by Washington law. Indict. ¶
19 16. The Indictment further alleges that cigarette tax stamps were required to be, but were
20 not, affixed to the cigarettes at issue and that the applicable state taxes were not paid. *Id.*

21 According to the Indictment, Native Wholesale Supply ("NWS") and the individual
22 defendants imported cigarettes from a "producer and marketer" of Seneca and Opal
23 cigarettes located on the Six Nations Indian Reservation, which is located within the
24 geographical boundaries of Canada. Indict. ¶ 4. These cigarettes were shipped to a Foreign
25 Trade Zone ("FTZ") in Las Vegas, Nevada. Indict. ¶ 18. An FTZ is a creation of the
26 United States government, which allows products shipped from outside the country to be

1 stored in zones within the country and be considered outside the commerce of the United
2 States for customs purposes. See <http://ia.ita.doc.gov/ftzpage/tic.html>.¹

3 The Indictment alleges that, from the FTZ, there were three different ways cigarettes
4 were ultimately sold and shipped to Blue Stilly. First, NWS sold products to a distributor
5 located in New Mexico called Turtle Island Enterprises between about 2003 and continuing
6 to about Spring 2004. Turtle Island then distributed Seneca and Opal cigarettes to locations
7 in the Western United States, including to Blue Stilly. Indict. ¶¶ 17, 27(b) & (c). Second,
8 beginning in Spring 2004 when NWS terminated its distributorship with Turtle Island.²
9 NWS took orders directly from Blue Stilly and shipped product to it. Indict. ¶¶ 19-20.
10 Third, starting in February 2005, Isleta Native Wholesale Supply began operating as an
11 NWS distributor and NWS discontinued accepting orders from Blue Stilly. Indict. ¶¶ 21-
12 22.

13 Counts 2 through 6 allege CCTA violations arising out of shipments of cigarettes to
14 Blue Stilly between spring 2004 and February 2005, a window of time during which NWS
15 is alleged to have made direct sales to Blue Stilly. Counts 7 through 16 allege violations of
16 the CCTA involving cigarette sales by Isleta to Blue Stilly. For purposes of this motion,
17 this period of time is referred to as the "Distributor Period."

18 **B. Relevant statutory provisions.**

19 **1. Contraband Cigarette Trafficking Act**

20 Under the CCTA cigarettes are "contraband" under federal law only if they:

- 21 • are a quantity in excess of 10,000 (or, as charged in this case, 60,000);
- 22 • are currently subject to an applicable state or local tax
- 23 • are found in a State or locality that requires that some indication of the
24 payment of such taxes be placed on containers of cigarettes;
- bear no evidence of the payment of applicable local or State taxes; and

25 ¹ See also *Paul v. State*, 110 Wn. App. 387 (2002) (FTZ's are not "in Washington commerce" for purposes of
advance notice provision).

26 ² The evidence at trial will show that NWS terminated Turtle Island's distributorship due to its failure to pay
NWS more than \$400,000 for cigarettes it had purchased.

- are not in the possession of someone either authorized by state law or by federal law to be in possession of unstamped cigarettes.

18 U.S.C. § 2342(a). Notably, the CCTA does not define contraband cigarette by reference to a state's definition of contraband cigarette, or provide that any cigarette possessed or distributed in violation of state law is *ipso facto* contraband under federal law. Rather, unstamped cigarettes in a quantity in excess of 10,000 (here 60,000) are contraband under federal law only if they meet the criteria set forth above.

2. Washington State law

The taxation of cigarettes in Washington States is governed by Title 82, RCW 82.24, *et seq.*, and WAC Title 458. Under Washington law, subject to certain exemptions, cigarettes sold, used, consumed, handled, possessed or distributed in Washington are subject to an excise tax. RCW 82.24.020.³ Washington enforces the collection of its cigarette excise tax through the sale of tax stamps. RCW 82.24.030; WAC 458-20-186(301). The first taxable event occurs when a person first possesses cigarettes in the state; and the tax is imposed at the time and place of first taxable event and upon first taxable person. RCW 82.24.080; WAC 458-20-186(101). Washington law provides that unstamped cigarettes "found at any point within [the] state in violation of chapter 82.24" are subject to seizure and forfeiture as contraband. RCW 82.24.130(1)(a). Under Washington law, "no person other than a licensed wholesaler shall possess in this state unstamped cigarettes[.]" except as authorized by Chapter 82.24. RCW 82.24.040(1).⁴ A licensed wholesaler may possess unstamped cigarettes in the state for a period of time after

³ Washington exempts certain types of cigarettes sales from its excise tax laws. Among other exemptions, sales of cigarettes from an Indian tribal organization, including a wholesaler or retailer, to an enrolled member of the entity's tribe are not subject to state taxation. WAC 458-20-192; WAC 458-20-186(101)(c)(i).

⁴ Notwithstanding the general prohibition against possession of unstamped cigarettes by non-wholesalers, Washington law, confusingly, does permit the possession of unstamped cigarettes by persons other than wholesalers in other instances, including an Indian Tribal organization, as discussed in the text below. And cigarettes given away for advertising purposes, for example, although subject to taxation, are not required to have a stamp affixed. WAC 458-20-186(101)(d).

1 receiving them that is reasonably necessary to affix the required stamps, which has been set
2 by agency regulation at 72 hours. RCW 82.24.040(2)(a); WAC 458-20-186(204)(d).

3 The transportation of unstamped cigarettes in Washington law is governed by RCW
4 82.24.250, which provides, among other things, that unstamped cigarettes cannot be
5 transported in Washington by anyone other than a licensed wholesaler in the wholesaler's
6 own vehicle, or a person who has given advance notice to LCB before commencement of
7 the transportation. Washington, however, has a pass through provision that creates an
8 exception to the advance notice provision. Under this provision, it is not a violation of
9 Washington law to transport unstamped cigarettes through Washington from a point outside
10 the state "to a point in some other state" with proper invoices or delivery tickets without
11 advance notice. RCW 82.24.250(1)-(5).

12 Section (7) of RCW 82.24.250 identifies "person[s] authorized by this chapter
13 [82.24] to possess unstamped cigarettes in this state" to include: (1) a licensed wholesaler;
14 (2) the federal government; (3) any person, including an Indian tribal organization, who has
15 given notice to LCB and who within a period of time after receipt of the cigarettes "has
16 caused" stamps to be affixed to the cigarettes or "otherwise [makes] payment of the tax
17 required"; and (4) any purchaser of unstamped cigarettes, including an Indian tribal
18 organization, who has given notice to the LCB before receiving unstamped cigarettes and
19 who within a period of time after receipt of the cigarettes "has caused" stamps to be affixed
20 to the cigarettes "otherwise [makes] payment of the tax required[.]" RCW 82.24.250(7)(d)
21 specifically lists a purchaser or consignees of cigarettes as a person authorized (with
22 advance notice) to possess unstamped cigarettes without also specifying that that person
23 must also be a wholesaler. However, subsection (7) further provides that nothing in
24 subsection (7) shall be construed as modifying RCW 82.24.050 (which prohibits retailers
25 from possessing unstamped cigarettes in Washington unless the retailer is also a licensed
26 wholesaler), or 82.24.110 (which defines criminal offenses and penalties under Chapter

82.24). And subsection (3) of the same statute provides that “[i]f unstamped cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by this chapter to possess unstamped cigarettes in this state.”

III. ARGUMENT

A. Motion to strike advance notice allegations

1. Failure to observe Washington’s advance notice provision does not render cigarettes “contraband” under federal law in this case

Under the CCTA’s definition of “contraband cigarettes,” there must be “an applicable” state tax and there must be a requirement under the state law allegedly violated that “a stamp . . . be placed on packages . . . to evidence payment of cigarettes taxes[.]” 18 U.S.C. § 2341(2). Washington law does contain a stamp and tax-payment requirement. *See* WAC 458-20-186(301)(a) (“Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted[.]”). But there is no similar language in Washington’s advance notice statute. That statute provides that one “shall [not] transport or cause to be transported in this state cigarettes not having the stamps affixed to the packages or containers.” RCW 82.24.250(1). But nothing in RCW 82.24.250(1) indicates that failure to provide notice, by itself, generates a requirement that stamps be affixed. Rather, what the advance notice provision contains is a prohibition against transportation of unstamped cigarettes. Violation of that prohibition is a criminal penalty under Washington law. RCW 82.24.110(1)(f). But that is a different question from whether such violation generates a requirement to affix stamps. RCW 82.24.250(4) does make the cigarettes involved in such a violation contraband *under state law*, but that is not the same as imposing a requirement for stamping and thereby making the cigarettes contraband under the CCTA.

Defendants acknowledge language to the contrary in *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) and *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007).⁵ But these cases do not analyze the statutory language of CCTA, and appear to assume that cigarettes that are contraband under state law are always contraband under federal law, which is not the case. *Smiskin*'s result also rests on the court's assuming as true the allegations of the Indictment, as indicated in footnote 5 of the opinion. The issue on appeal there was whether, even if the Indictment's allegations were correct, tribal rights were infringed by application of the notice provision to members of the Yakima Nation, not the effects of the notice provision. Similarly, in *Fiander*, the issue was whether the holding in *Smiskin* barred a RICO prosecution to which defendant had pled guilty. Again, the parties did not litigate whether the notice provision was simply a prohibition, or rather, a means of rendering cigarettes contraband for purposes of federal law.

In short, no court has addressed the issue raised here. And analysis of the statutory language makes it clear that the failure to observe advance notice provisions under Washington law does not give rise to a requirement to pay tax or affix stamps. As a result, the Court should strike the allegations in the Indictment that violations of the advance notice provision rendered the cigarettes at issue in this case contraband under the CCTA.

2. Washington's pass-through provision exempted the alleged transactions from the advance notice requirement

Washington prohibits the transportation of unstamped cigarettes "in" the state without notice to LCB "in advance of the commencement of transportation." However, it exempts certain kinds of transportation, as follows:

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery

⁵ The *Smiskin* court stated, for example: "Because the Smiskins did not provide notice to the State prior to transporting unstamped cigarettes, the cigarettes were unauthorized under State law and contraband under the CCTA." 487 F.3d at 1263.

1 tickets which give the true name and address of such out-of-state seller or consigner
2 and such out-of-state purchaser or consignee.

3 RCW 82.24.250(5). In *Paul v. State*, 110 Wn. App. 387 (2002), the Washington State
4 Court of Appeals held that this provision prohibited the state from seizing cigarettes passing
5 through Washington. The cigarette shipper in *Paul* had imported cigarettes from Canada,
6 through Washington and into an FTZ near Bellingham, Washington. The cigarettes were
7 stored at the FTZ, but were eventually bound for Montana. Paul arranged for the cigarettes
8 to be trucked from the FTZ to Montana. However, state authorities stopped the truck before
9 it left Washington, and the cigarettes were seized as contraband. The state authorities
10 asserted the right to seize the cigarettes because Paul had not given LCB advance notice of
11 his transportation of cigarettes in Washington. The *Paul* court rejected this argument
12 noting that the advance notice requirements “do not apply when cigarettes are only passing
13 through Washington.” 110 Wn. App. at 391-92. The fact that the cigarettes came to rest in
14 Washington at an FTZ made no difference in the court’s analysis.⁶

15 In this case, the Indictment alleges that Washington’s advance notice provisions
16 apply where cigarettes are shipped from an FTZ in Nevada to Stillaguamish land.
17 Washington State’s pass-through provision, and the *Paul* decision, however, foreclose
18 conviction on this theory. Under *Paul*, an FTZ is a “point outside the state.” And, under
19 established Indian law, Stillaguamish land is not part of Washington State and, thus,
20 qualifies as a point in some other “state” as that phrase is used in legislation. See *Oklahoma*
21 *Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509
22 (1991) (Indian tribes are “domestic dependent nations” that exercise inherent sovereign

23 ⁶ The *Paul* court stated that the advance notice provisions also apply when cigarettes are transported to a
24 “non-taxable Washington destination.” 110 Wn. App. at 391-92. The court did not elaborate on the meaning
25 of this phrase. Later in the opinion, the *Paul* court noted that there was no evidence that the cigarettes were
26 destined for a location “in the State of Washington,” and there was “no intent by [Paul] to defraud the state[.]”
Id. at 392. Stillaguamish land cannot be characterized as “in” Washington, and the Indictment, furthermore,
makes no allegation that Defendants had an “intent to defraud” the State of Washington, as required under
Paul.

1 authority over their members and territories.”) (emphasis added); *see also Blatchford v.*
 2 *Native Village of Noatak*, 501 U.S. 775, 782 (1991) (comparing Indian tribes to states and
 3 foreign sovereigns, and concluding that both states and Indian tribes are “domestic”
 4 sovereigns); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057-1058 (9th Cir.
 5 2004) (same); *Winnebago Tribe v. Morrison*, 512 F. Supp. 2d 1182, 1185-6 (D. Kan. 2007)
 6 (delivery of fuel did not take place within the State of Kansas where fuel was delivered to a
 7 retailer located on an Indian reservation within the exterior boundaries of Kansas from an
 8 Indian tribe located outside of the Kansas). This interpretation is consistent with other
 9 cases interpreting the word “state” in legislation to include Indian tribal land. *See, e.g., In*
 10 *re Larch*, 872 F.2d 66, 68 (3rd Cir. 1989) (concluding that, where Congress did not define
 11 “state” for purposes of Parental Kidnapping Prevention Act, a “tribe is a ‘state’” within that
 12 Act); *In re Marriage of Susan C.*, 114 Wn. App. 766, 774 (2002) (citing to *Larch*
 13 approvingly and adopting its holding within the State of Washington); .

14 The language of Washington’s advance notice provision does not conflict with the
 15 interpretation of the pass-through provision set forth above. The general notice provision is
 16 contained in RCW 82.24.250(1), which provides:

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

20 (emphasis added). This provision explicitly applies to transportation “in this state.” In
 21 *Paul*, the court found that cigarettes being trucked through Washington and being stored at
 22 an FTZ are not being transported “in the state.” The same principle applies to cigarettes
 23 being trucked through Washington and onto Indian land, which, like an FTZ, is not a part of
 24 Washington.

25 This statutory interpretation, it should be noted, does not compel a conclusion that
 26 the LCB will not receive any notice of the transportation of unstamped cigarettes to Indian
 retailers, leaving such trade completely unmonitored by the state because other advance

notice provisions require Indian retailers to provide notice under these circumstances. For example, RCW 82.24.250(7)(c) allows any person, including an “Indian Tribal Organization,” to purchase and receive unstamped cigarettes so long as the *purchaser* gives notice to LCB in advance of receiving the unstamped cigarettes. Washington law also contains a notification provision that applies specifically to Indian sellers permitting the purchase of untaxed unstamped cigarettes for resale to qualified purchasers if the tribal seller gives advance notice of the purchase. WAC § 458-20-192(9)(a)(i).⁷ Thus, there are advance notice provisions that may apply to the receipt of cigarettes by Native retailers, but those same requirements cannot apply to out-of-state supplier engaged trade occurring entirely outside the State of Washington. Because the advance notice requirement under Washington law cannot be a basis for finding that the cigarettes in this case were contraband at the time relevant to Defendants’ possession and control of them, all allegations regarding the advance-notice provision should be stricken from the Indictment.⁸

B. Motion to dismiss Counts 6-17 under *United States v. Baker*

In *Baker*, the Ninth Circuit discussed the permissible reach of the CCTA in applying a state’s regulatory requirements to conduct occurring wholly outside the state. 63 F.3d 1478 (995). Certain defendants in *Baker* distributed and sold cigarettes in Washington, allegedly in violation of Washington’s advance notice provisions. But certain defendants in *Baker*, identified as Feist and the Clinkenbeards, conducted cigarette sales transactions only in Montana. From Montana, Feist and the Clinkenbeards supplied cigarettes to distributors

⁷ Defendants acknowledge that reported cases in the Ninth Circuit affirm convictions of Indian retailers and suppliers in cases involving the shipment of cigarettes onto Indian country in purported violation of the state’s advance notice provisions. However, none of these cases considered the pass-through provision under Washington law. The issue presented on this motion has never been decided by any court.

⁸ Defendants do not assert for purposes of this motion that *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) does not apply or that no tax liability or precollection obligation arose at the point of sale if Blue Stilly was selling cigarettes to non-Natives or non-tax exempt Natives. Any such liability, however, is distinct from the question of when and if cigarettes are “contraband” vis-à-vis Washington’s advance notice provision as applied to these defendants.

1 located in Idaho, who eventually distributed the cigarettes in Washington. According to
 2 *Baker*, cigarettes supplied by Feist and the Clinkenbeards were shipped to Idaho to
 3 “representatives of various retail smokeshops, all located on Indian reservations in
 4 Washington, [who] took possession of the cigarettes and transported them to their
 5 Washington destinations.” 63 F.3d at 1483.

6 Under this factual scenario, the *Baker* court found that Feist and the Clinkenbeards
 7 could not have violated the CCTA:

8 . . . unstamped cigarettes which are illegal in Washington but legal in Montana
 9 cannot be considered contraband until they are brought into Washington. Feist and
 10 the Clinkenbeards trafficked in the cigarettes only in Montana, where the cigarettes
 11 were not contraband. Therefore, neither Feist nor the Clinkenbeards could have
 committed the substantive crime of trafficking in contraband cigarettes, and the
 district court properly dismissed that charge against them.

12 *Baker*, 63 F.3d at 1488 n. 12. The *Baker* court’s finding in this regard makes sense in light
 13 of the language of the advance notice provision and the taxing requirements under
 14 Washington law. First, under any interpretation of Washington law, a supplier who does
 15 not possess cigarettes in the state cannot be liable for the cigarette tax because the first
 16 taxable event occurs when a person first possesses cigarettes in the state, and the tax is
 17 imposed at the time and place of first taxable event and upon first taxable person. *See*
 18 RCW 82.24.080; WAC 458-20-186(101). Thus, those engaging in cigarette sales outside of
 19 the state cannot, as a matter of law, be liable for Washington cigarette taxes. Second, the
 20 advance notice provision only applies by its very language to those who “transport or cause
 21 to be transported” unstamped cigarettes *in* the state, not those who supply those who
 22 transport cigarettes into Washington. RCW 82.24.250(1).⁹ Those that are involved in
 23 activities outside the state should not be subject to this provision, consistent with *Baker*.¹⁰

24 _____
 25 ⁹ As noted below, this statutory provision conflicts with the regulations promulgated under the statute. While
 the former requires those who “cause” transportation to give notice to LCB, the regulation does not. *See*
 WAC 458-20-186(501) and (502).

26 ¹⁰ The *Baker* court, without analysis, held, however, that Feist and the Clinkenbeards could be convicted of
 conspiracy to violate RICO – in other words, they could be convicted of conspiracy to form an enterprise to

1 It is evident from the language of the Indictment that the government fully
 2 recognizes the problem it faces in attempting to reach up the vertical distribution chain to
 3 prosecute these Defendants. The Indictment, for example, claims that NWS shipped
 4 cartons of cigarettes into Washington in conjunction with Turtle Island and Isleta. But the
 5 only facts the Indictment alleges during the Distributor Periods are that NWS sold the
 6 cigarettes to those distributors, who then sold them to Blue Stilly. The Indictment concedes
 7 that it was Turtle Island that purchased the cigarettes that were then shipped to Blue Stilly.
 8 Indict. ¶ 27(b) & (c). Moreover, the Indictment concedes that NWS did not ship cigarettes
 9 to Blue Stilly while Isleta was the distributor. Rather, it alleges only that NWS
 10 “authorized” shipments, *i.e.*, NWS allowed the cigarettes to be released from the FTZ to
 11 Isleta for sale to Blue Stilly.

12 As a result, during the Distributor Periods alleged in the Indictment, Defendants are
 13 indistinguishable from Feist and the Clinkenbeards in the *Baker* case. Defendants’ activity
 14 was conducted wholly outside of Washington. They sold product to distributors who then
 15 sold to Blue Stilly, and many other retailers for that matter. And while Defendants may
 16 have known (according to the Indictment) that at least some of the cigarettes sold to Turtle
 17 Island or Isleta would eventually be received by Blue Stilly, this does nothing to distinguish
 18 the *Baker* decision. Feist and the Clinkenbeards had the same kind of knowledge of the
 19 ultimate destination of the cigarettes, as shown by their guilty plea to the conspiracy
 20 charged in *Baker*. *Baker* still found that Feist and the Clinkenbeards could not be charged
 21 with substantive CCTA violations. Following *Baker*, the Court should dismiss Counts 7
 22 through 16.

23 IV. CONCLUSION

24 The Court should dismiss or strike the Indictment’s allegations as set forth above.
 25 Respectfully submitted this 8th day of February, 2010.

26 violate federal statutes that they could not themselves commit. As a result, Defendants do not seek to dismiss
 the conspiracy count in this case at this time.

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