NO. 10-35776

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiff-Appellant,

v.

CHRISTINE O. GREGOIRE, Governor of the State of Washington; *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court,
Eastern District of Washington
Case No. 2:08-cv-03056-RHW
The Honorable Robert H. Whaley, Senior District Court Judge

BRIEF OF APPELLEES

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I. JURISDICTIONAL STATEMENT

Appellees agree with the Yakama Nation's jurisdictional statement.

II. ISSUE PRESENTED FOR REVIEW

Did the district court correctly hold, as the United States Supreme Court held in 1980, that the legal incidence of Washington's cigarette tax does not fall on Yakama Nation retailers where (a) the tax is imposed only on the "first taxable event and upon the first taxable person," (b) tax-exempt retailers have a "precollection obligation" to collect the tax from their customers who are not exempt, and (c) the tax expressly "shall not apply" to persons who are tax-exempt under federal or constitutional law?

III. STATEMENT OF THE CASE

The Yakama Nation filed a complaint on September 2, 2008, with five causes of action, challenging the State of Washington's statutory scheme for collecting, administering, and enforcing the state cigarette tax with respect to Yakama Nation members, tribal retailers, and sales on the reservation. ER 206-30.[1] The complaint sought primarily declaratory relief and injunctive relief. ER 227-30. As part of the second cause of action, the Yakama Nation

[1] Joining the Yakama Nation as a plaintiff was the Yakama Nation Commerce Association, a business association of tribal cigarette retailers. *See* ER 56; ER 208-09, ¶ 1.2. After the plaintiffs filed this appeal, the Commerce Association sought and was granted voluntary dismissal from the case. Dkt. 10 (1/10/11).

alleged the cigarette tax statute was unenforceable because it unlawfully places the incidence of the tax on Indians. ER 224.

The Nation named as defendants Christine Gregoire, Governor of the State of Washington; three officials of the Washington State Department of Revenue, Cindi Holmstrom, Leslie Cushman, and Stuart Thronson; and an official with the Washington State Liquor Control Board, Pat Parmer.[2] ER 209-10.

The Yakama Nation requested a temporary restraining order, which the District Court granted on September 12, 2008. The temporary restraining order effectively prohibited the State from enforcing or threatening enforcement of the state cigarette tax statutes against the Yakama Nation, tribal retailers, and any wholesalers or customers doing business with them. ER 190-91. The District Court required the Yakama Nation to post a TRO bond in the amount of $500,000. ER 187.

After some months, the parties filed cross motions for summary judgment. ER 13. The Yakama Nation moved for judgment on two of its five causes of action, and the State moved for judgment as to all claims. ER 17-18, 23-24. After a hearing in October 2009, Judge Robert Whaley entered an

[2] Appellees will be referred to collectively in this brief as "the State."

Order on Cross Motions for Summary Judgment on January 4, 2010 ("Order"). ER 13-30. Judge Whaley denied the Yakama Nation's motion and granted summary judgment to the State on the second, third, and fifth causes of action. ER 17-23, 28. In the remainder of the Order, Judge Whaley granted in part and denied in part the State's motion related to the first cause of action, and denied it regarding the fourth cause of action. ER 24, 28-29.

In February 2010, the State filed a motion to dissolve the temporary restraining order (Dkt. 168, 170), and the Yakama Nation filed a notice of appeal to this Court of the summary judgment order (Dkt. 171). The State filed a motion to dismiss the appeal for lack of jurisdiction, which this Court granted in April 2010. (Dkt. 9 in Case No. 10-35108). In August 2010, the District Court granted the State's motion to dissolve the temporary restraining order and entered judgment for the State on the two remaining causes of action. ER 6-12. The Yakama Nation filed a new notice of appeal. ER 34-35. Three months later, the District Court also awarded the State the entire amount of the $500,000 cash bond the Yakama Nation posted in 2008, and the Yakama Nation amended its notice of appeal to include that order. ER 1-4, ER 31.

IV. STATEMENT OF FACTS

The State of Washington imposes an excise tax on cigarettes sold, used, consumed, handled, possessed or distributed within its borders. Wash. Rev. Code §§ 82.24.020, 82.24.026 (2010).[3] The State collects this tax by selling cigarette stamps, which must be affixed to all packages of cigarettes possessed within the state that have not been preapproved for tax exemption. Wash. Rev. Code § 82.24.030. Only Washington-licensed wholesalers may possess unstamped cigarettes, and then only under specified circumstances. Wash. Rev. Code §§ 82.24.040(2), 82.24.050. Wholesalers and certain retailers must maintain records showing "all transactions" relating to the purchase and sale of cigarettes, and showing "all physical inventories performed on those articles, all invoices, and a record of all stamps imposed." Wash. Rev. Code § 82.24.090(1).

The Washington Legislature deemed a number of actions to be gross misdemeanors and punishable as such (*e.g.*, retailing cigarettes without stamps first being affixed, Wash. Rev. Code § 82.24.110(1)(a)). Knowingly

[3] In this brief, references to provisions in Wash. Rev. Code § 82.24 are to the 2010 version of the Code, except where otherwise indicated. *See* Addendum. No amendments to the statute material to the arguments in this case have been made since the Yakama Nation filed this action in September 2008.

transporting in excess of 10,000 cigarettes without proper stamps is deemed a Class C felony unless notice is given to the State and other requirements are met. Wash. Rev. Code § 82.24.110(2). The Legislature also gave the Department of Revenue ("Department") and the Liquor Control Board authority to impose monetary penalties for violations of section 82.24 and set forth procedures for seizure and forfeiture of contraband material and vehicles used for transport. Wash. Rev. Code §§ 82.24.120-.180.

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

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

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

In other words, the statutory exemption for sales by Indian tribal organizations to its own enrolled members does not extend to sales by an Indian tribal organization to non-Indians or to Indians who are not members of that tribe. Wash. Rev. Code § 82.24.020(4). In addition, the cigarette tax statutes "shall not apply" if the State is prohibited from taxing under the federal or state constitutions or federal statutes. Wash. Rev. Code § 82.24.900.

A final exception to the notice, stamping, and cigarette tax requirements is the exception for cigarettes subject to lawful transactions covered by cigarette tax contracts between specified Indian Tribes and the State under Wash. Rev. Code §§ 43.06.450 *et seq.*, under which Tribes are able to impose a tribal cigarette tax in lieu of the state tax. *See* Wash. Rev. Code §§ 82.24.020(5) (terms of contract under compact statute control over conflicting provisions of chapter 82.24), 82.24.030(5) (exception to stamping requirement), 82.24.250(8) (transportation of unstamped cigarettes), 82.24.295 (sales by Indian retailer under cigarette tax contract).

The Department's rules provide further guidance for the assessment and collection of cigarette taxes sold by tribal retailers. An enrolled member of a tribe purchasing cigarettes within Indian country is exempt from the cigarette tax. Wash. Admin. Code § 458-20-186(102)(c) (*see* Addendum). If the

incidence of the tax falls upon an Indian or tribe, the tax is not imposed. Wash. Admin. Code § 458-20-192(5) (*See* Addendum). However, tribal retailers making sales to nonmembers must collect the state's retail sales tax and cigarette tax. Wash. Admin. Code § 458-20-192(5)(c). Hence, if a tribal retailer desires to sell cigarettes to nonmembers, the wholesaler is obligated to pre-collect the tax, and the tribal retailer must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed to the packages for such sales. The tribal retailer would then collect such amount from the nonmember customer. Wash. Admin. Code § 458-20-192(9)(a)(i).

In 2001, the Legislature enacted the cigarette compact statute as a means "to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance enforcement of the state's cigarette tax law, ultimately saving the state money and reducing conflict." Wash. Rev. Code § 43.06.450. Agreements under the statute provide for a tribal tax in lieu of the state cigarette tax and applicable retail sales taxes and require the tribe to use the revenues for "essential government services." Wash. Rev. Code § 43.06.455(3), (8).

The State entered into a cigarette tax agreement with the Yakama Nation in 2004 under the compacting statute. SER 34-35 ¶¶ 2, 3 (Doc. 93 at 1-2).

Difficulties arose in its implementation, and in February 2007, the Department sent the Yakama Nation a notice of intent to terminate the agreement. SER 35 ¶ 5. The parties engaged in a dispute resolution process but could not reach a satisfactory resolution. As a result, the Department terminated the agreement in July 2008. *Id.*; ER 232-33. As part of that termination, the Department communicated to the Yakama Nation and licensed cigarette wholesalers that it was reinstating the state tax on taxable sales to non-members and expected the state stamp to be affixed to all cigarettes sold to Yakama tribal retailers, rather than the tribal tax stamp. ER 232-38. Before collection of state taxes on sale to non-members began, however, the Yakama Nation filed this action, on September 2, 2008. *See* ER 243, 246.

V. SUMMARY OF ARGUMENT

The broad question in this case is who bears the legal incidence of Washington's cigarette tax. The answer, under the unambiguous language of the cigarette tax statute, is one only a lawyer could love: "It depends." First, it depends on who is the first person to sell, use, consume, handle, possess, or distribute the cigarettes in the state. Wash. Rev. Code §§ 82.24.020(1), §82.24.080(1). Second, it depends on whether that first person is exempt from the tax under federal law or state constitutional law. Wash. Rev. Code §§

82.24.080(2), 82.24.900. If so, the tax "shall not apply," meaning that person does not bear the legal incidence. Wash. Rev. Code § 82.24.900.

The Yakama Nation argues that because the legal incidence of Washington's cigarette tax can fall on cigarette retailers, the statute invalidly places the legal incidence on Yakama tribal retailers. Opening Brief at 12. The Nation reaches this conclusion by ignoring the express prohibition in Wash. Rev. Code § 82.24.900 on imposing the tax where federal law would preclude it. The Nation also dismisses as irrelevant the statute's requirement that an exempt cigarette seller collect the tax instead from its taxable buyer, despite United States Supreme Court authority to the contrary. Opening Brief at 39; *see United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599 (1975); Wash. Rev. Code §§ 82.24.010(4), 82.24.080(2). In addition, the Nation advocates complete disregard of the Legislature's statements of intent regarding imposition of the tax, even though those statements formed the basis of the Supreme Court's ruling in 1980 that the legal incidence of the cigarette tax did not fall on tribal retailers. Opening Brief at 37-39; *see Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

The Nation's arguments do not meet the standard of a "fair interpretation of the taxing statute as written and applied." *California Bd. of Equalization v.*

Chemehuevi Tribe, 474 U.S. 9, 11 (1985) (*per curiam*); *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 681 (9th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005). Given the structure of Washington's cigarette tax statute, under which the first person engaging in various specified actions triggers the tax, but only if the person is taxable, the only "fair interpretation" is that the legal incidence never falls on tribal retailers. The Court in *Colville* gave the statute a fair interpretation in 1980, this Court did so in 1995, and so did the district court in this case. This Court should affirm the district court's ruling granting summary judgment to the State.

VI. ARGUMENT

A. Discerning The Legal Incidence Of A Tax By Applying A Fair Interpretation Of A Statutory Taxing Scheme Requires Examination Of All Relevant Statutory Provisions.

The "who" and "where" of challenged taxes in Indian tax cases have significant consequences. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 455 (1995) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985). Legal incidence concerns "who" legally

bears the tax. *Wagnon*, 546 U.S. at 101.[4] States may not place the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country without congressional authorization. *Wagnon*, 546 U.S. at 101-02; *Chickasaw*, 515 U.S. at 459.

Some state statutes expressly identify who bears the legal incidence of the tax. For instance, Montana's cigarette tax indicated that it "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482 (1976) (upholding imposition of tax on reservation sales to non-Indians).[5] Similarly, the motor fuel tax statute at issue in *Wagnon* stated that "the incidence of [the] tax is imposed on the distributor of the first receipt of the motor fuel." *Wagnon*, 546 U.S. at 102; Kan. Stat. Ann. § 79-3408(c) (2003 Cum. Supp.).

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[4] One authority has described legal incidence analysis as determining "the person whom the legislature has designated or otherwise indicated as having the legal obligation to pay the tax either directly or through another participant in the commercial transaction." Conf. of Western Attorneys General, *American Indian Law Deskbook* at 471 (4th ed. 2008) (citing *United States v. California State Bd. of Equalization*, 650 F.2d 1127, 1130-31 (9th Cir. 1981), *aff'd mem.*, 456 U.S. 901 (1982)).

[5] The Court in *Moe* was considering the 1947 version of the statute, but the statute contains the same provision in its current version. *See* Mont. Code Ann. § 16-11-112 (2010).

The Supreme Court has indicated that such express language is "dispositive" and "determinative of who bears the legal incidence of a state excise tax." *Wagnon*, 546 U.S. at 102; *Chickasaw*, 515 U.S. at 461. But most statutes the Court has considered are not as clear on the point. For such state statutes, "[t]he test . . . is nothing more than a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection requirements be 'explicitly stated.'" *Chemehuevi*, 474 U.S. at 11 (1985); *Wagnon*, 546 U.S. at 102-03; *Chickasaw*, 515 U.S. at 461.

Under this "fair interpretation" standard, the legal incidence of Washington's cigarette tax statute never falls on tribal retailers.

B. Under A Fair Interpretation Of Washington's Cigarette Tax Statute As Written And Applied, The Tax Buck Never Stops With Tribal Retailers.

The district court correctly concluded as a matter of law that the legal incidence of Washington's cigarette tax statute does not fall on Yakama Nation retailers. For over 75 years, the statute has not imposed the tax on persons who are exempt from state taxation under federal law. To the extent wholesalers, retailers, or consumers did not understand their respective obligations in the early years, the Legislature has clarified the statute over time to provide additional guidance with regard to transactions involving tax-exempt persons.

Under a fair interpretation of Washington's cigarette tax statute, no ruling in favor of the Yakama Nation is reasonable because the legal incidence of the tax never falls on Yakama Nation retailers or tribal members.

1. Washington's cigarette tax has never been imposed on persons who are exempt from the tax under federal law.

The core features of the cigarette tax statute today are the same as they have been since the early 1900s. The Legislature has never specified a single triggering event giving rise to the tax or directed that the tax obligation rests solely on a particular person in the distribution process. In the Revenue Act of 1935, the Legislature directed that the cigarette tax be levied "upon the sale, use, consumption, handling or distribution of all cigarettes . . . ." 1935 Wash. Sess. Laws, ch. 180, § 82.[6] The Legislature also directed that the tax be imposed upon the first of these triggering events:

> It is the intent and purpose of this title to levy a tax on all of the articles taxed herein, sold, used, consumed, handled or distributed within this state and to *collect the same from the person who first sells, uses, consumes, handles or distributes* the same in the State of Washington.

1935 Wash. Sess. Laws, ch. 180, § 82(g) (emphasis added). Thus, the tax could be collected from a wholesaler, retailer, or ultimate purchaser, depending upon who first handled, used, consumed, distributed, or sold the cigarettes in

[6] The session laws discussed in this brief are included in the Addendum.

Washington. "[T]he legal incidence of the tax will fall upon the one who first brings the cigarettes into the state and does any of the mentioned acts." *Canteen Service, Inc. v. State of Washington*, 83 Wash. 2d 761, 762, 522 P.2d 847 (1974) (applying virtually identical language in Wash. Rev. Code § 82.24.080 to 1962-66 tax years and concluding legal incidence fell on retailer who purchased tax stamps).[7]

Just as the statute provides today, collection of the cigarette tax in 1935 was accomplished primarily through the use of tax stamps affixed to every package of cigarettes. *Id.*, § 82(a)-(f); *see* Wash. Rev. Code § 82.24.030 (2010). Stamps on cigarette packages allowed the State Tax Commission, the Department's predecessor agency "to readily ascertain by inspection, whether or not such tax has been paid . . . ." 1935 Wash. Sess. Laws, ch. 180, § 82(a); *see* Wash. Rev. Code § 82.24.030(1). In addition to stating generally that "[e]very person" had an obligation to affix stamps before selling, handling, using, or consuming cigarettes in Washington, the Legislature expressly required wholesalers to affix the stamps immediately after receipt of cigarettes. 1935 Wash. Sess. Laws, ch. 180, § 82(a), (b). The Legislature also imposed

[7] The *Canteen Service* case did not involve Indians or on-reservation sales.

the same requirement upon retailers if the tax had not already been paid by a wholesaler. 1935 Wash. Sess. Laws, ch. 180, § 82(b), (c).

From the earliest days of the cigarette tax, the Legislature also recognized that certain persons were exempt from the tax under the Washington Constitution or federal law. As to these persons, the Legislature expressly stated that that tax *would not apply*:

> The provisions of this title shall not apply in any case in which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or the laws of the United States.

1935 Wash. Sess. Laws, ch. 180, § 94. Like the tax-imposing and intent provisions in the statute, this "backstop" provision did not attempt to provide a list of exempt persons or specify particular circumstances under which a person would be exempt. Instead, the Legislature had the foresight to recognize that federal statutes or the body of cases representing constitutional law, for example, might change over time, affecting the state's ability to impose its tax on certain persons or entities.

Under a fair interpretation of the 1935 statute, including the tax imposition language, the intent provision, and the provision prohibiting the application of the tax to persons exempt from the tax under federal law, the legal incidence of the tax did not fall on reservation Indians, whether as

wholesalers, retailers, or consumers. The same continued to be true in later years and up to the present.

In 1961, the Legislature codified the tax code into chapter 82.24. The section imposing the tax, Wash. Rev. Code § 82.24.020, continued to state the tax was imposed on "the sale, use, consumption, handling, or distribution of all cigarettes." 1961 Wash. Sess. Laws, ch. 15, § 82.24.020. The stamping duties remained the same as the 1935 law. *Id.*, §§ 82.24.030, .040, .050. Likewise, the intent section was nearly identical:

> It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, or distributes them in the State of Washington.

Id., § 82.24.080. The Legislature also reaffirmed that the cigarette tax "shall not apply" where the state was prohibited from imposing the tax under federal or constitutional law. *Id.*, § 82.24.900.

In 1972, the Legislature amended sections 82.24.020 and 82.24.080, adding "possession" to the list of events triggering the tax. 1972 Wash. Sess. Laws, 1st Ex. Sess., ch. 157, §§ 3, 4. The Legislature also provided some clarification, stating that the tax would apply only to the first *taxable* event. As amended, section 82.24.080 provided:

> It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, 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 . . . or distributes them in the state. . . .
>
> *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 occurring within this state*: PROVIDED, HOWEVER, That failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

1972 Wash. Sess. Laws, 1st Ex. Sess., ch. 157, § 4 (emphasis added). This clarification made explicit what section 82.24.900 implied – if the first person possessing cigarettes in the state could not be taxed under federal or constitutional law, there was no "taxable event," and the tax instead would be imposed on the next taxable step in the distribution chain.

2. Giving a fair interpretation to the cigarette tax statute, the Supreme Court in *Colville* concluded the legal incidence did not fall on tribal retailers.

The 1972 version of the statute was in effect when, in May 1973, the plaintiff Tribes, including the Yakama Nation, filed their action in district court in *Colville*. *Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1345 (E.D. Wash. 1978), *aff'd in part and rev'd in part*, 447 U.S. 134 (1980). The district court in *Colville*, a three-judge panel, examined the tax imposition and intent sections, along with various state law

authorities, including *Canteen Service* and another case decided that same year, *Tonasket*, which specifically addressed the new "first taxable event" language in the statute. *Id.*, 446 F. Supp. at 1353-55; *see Tonasket v. State of Washington*, 84 Wash. 2d 164, 525 P.2d 744 (1974).

In *Tonasket*, the Washington Supreme Court treated the "first taxable event" amendment as an expression of what the Legislature had always intended with respect to section 82.24.080. *Tonasket*, 84 Wash. 2d at 181. It concluded that the first taxable event concerning a tribal retailer who obtained cigarettes from Oregon would be the resale of the cigarettes to a non-Indian, at which time the tribal retailer could be required to collect the tax from the non-Indian customer. *Id.* The court reached this conclusion without mentioning the constitutional backstop provision, section 82.24.900.

As did the court in *Tonasket*, the district court in *Colville* recognized the alternative applicability of the tax to different taxable events, such as use or consumption. *Colville*, 446 F. Supp. at 1355. The district court viewed *Tonasket* as confirming "that the legal incidence of the tax could shift depending on the circumstances of the transaction." *Id.* The district court also considered a 1975 amendment to the cigarette tax statute as strong evidence of legislative intent to place the legal incidence of the tax on non-Indians in

reservation sales. The amendment related to the circumstance where a retailer is the first possessor of unstamped cigarettes in Washington (as opposed to purchasing stamped cigarettes from a wholesaler), and it required the retailer to collect the tax from the buyer:

> Any retailer who sells or otherwise disposes of any unstamped cigarettes other than . . . (2) a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe *shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020* . . . and remit the same to the department . . . .

1975 Wash. Sess. Laws, 1st Ex. Sess., ch. 22, § 1 (emphasis added; amending Wash. Rev. Code § 82.24.260 (1972)).

The district court concluded from all these authorities that "the statute evidences the legislature's intent to impose the legal incidence of the tax at the earliest constitutional opportunity." *Colville*, 446 F. Supp. at 1355. As in *Tonasket*, the district court did not mention section 82.24.900, which compels the same conclusion.

The United States Supreme Court affirmed the district court's legal incidence holding. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 142 n.9 (1980). In doing so, the Court expressly recognized that the incidence of the tax could shift under Washington's statute, depending on the circumstances:

> In the case of sales by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses, or distributes the products. But where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan v. Arizona State Tax Comm'n*, [411 U.S. 164 (1973)], the first taxable event is the use, consumption, or possession by the non-Indian purchaser. Hence, the District Court concluded, the tax falls on that purchaser. We accept this conclusion.

Id. This alternative incidence feature of Washington's cigarette tax statute, which continues to exist today, distinguishes the Washington statute from the fuel tax statutes in the cases upon which the Yakama Nation relies, as discussed below in Part C.

3. More recent amendments to the cigarette tax statute reinforce that the tax buck never stops with tribal retailers.

Since the decision in *Colville*, the key provisions of the statute that bear on legal incidence have not materially changed. To the extent the statutes have changed, the amendments reinforce the conclusion that the tax buck never stops with tribal retailers.

In 1986, the Legislature repealed a prior act in the business and professions title governing cigarette pricing by licensed wholesalers and retailers. The Legislature stated its purpose was to allow the marketplace to determine prices, but to preclude the use of cigarettes as loss leaders. 1986

Wash. Sess. Laws, ch. 321, § 1. Accordingly, it enacted a provision precluding licensed wholesalers and retailers from selling cigarettes "below the actual price paid" and declared violations an unfair or deceptive act or practice under the Consumer Protection Act, Wash. Rev. Code, ch. 19.86. 1986 Wash. Sess. Laws, ch. 321, § 13 (currently codified as Wash. Rev. Code § 19.91.300).

The following year, the Legislature amended the tax imposing statute, section 82.24.020, to allow wholesalers *and* retailers to, "if they wish, absorb one-half mill per cigarette of the tax and not pass it on to purchasers without being in violation of this section or any other act relating to the sale or taxation of cigarettes." 1987 Wash. Sess. Laws, ch. 80, § 1. No other language in section 82.24.020 required wholesalers or retailers to pass the tax on to their purchasers, so this amendment apparently was a reference to the price control provision in section 19.91.300. The explanatory note to the session law stated that the act "makes no substantive changes." In 2003, the Legislature deleted the words "and retailers" from this implied pass on requirement, thereafter allowing only wholesalers to absorb .05 cents per cigarette without passing it on. 2003 Wash. Sess. Laws, ch. 114, § 1; *see* Wash. Rev. Code § 82.24.020(2).

In 1995, the Legislature made changes in how the tax is administered and collected, shifting the burden of stamping cigarettes to wholesalers, and no

longer allowing retailers to purchase stamps or maintain inventories of unstamped cigarettes, except under limited circumstances. 1995 Wash. Sess. Laws, ch. 278.[8] The Legislature also amended section 82.24.080(2), clarifying its intent that the tax apply to "the first taxable person." In addition, the Legislature expressly imposed what the Court in *Colville* and the Washington Supreme Court in *Tonasket* had inferred from existing language, an obligation on the part of a tax-exempt seller to collect the tax from the purchaser.

As amended in 1995 and as it appears today, section 82.24.080 provides:

> (1) 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 . . . or distributes them in the state. . . . .
> (2) 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. *Any person whose activities would otherwise require payment of the tax imposed by subsection (1) of this section but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state.* . . . .

Wash. Rev. Code § 82.24.080; 1995 Wash. Sess. Laws, ch. 278, § 5. The Legislature also defined "precollection obligation" to mean "the obligation of a seller otherwise exempt from the tax imposed by this chapter to collect the tax

[8] Additional amendments in 2003 clarified the different roles of wholesalers and retailers. *See* 2003 Wash. Sess. Laws, ch. 114, §§ 1-4, 8-9.

from that seller's buyer." Wash. Rev. Code § 82.24.010(4); 1995 Wash. Sess. Laws, ch. 278, § 1. Accordingly, if the legal incidence of the tax would otherwise fall on a tribal retailer, the retailer must collect the tax from its taxable non-Indian purchasers.

The precollection obligation in section 82.24.080 is not, as the Yakama Nation argues, merely a statement of legislative intent. Opening Brief at 37. It is contained within a section that also includes statements of intent, but it is an operative provision of the cigarette tax law and is referenced in other sections. For instance, if the rate of the cigarette tax increases, the first person who sells, uses, possesses, etc., cigarettes taxed at the lower tax rate is "liable for the additional tax, *or its precollection obligation as required in this chapter*, represented by the rate increase." Wash. Rev. Code § 82.24.080(3) (emphasis added). Likewise, the precollection obligation has been incorporated into the 1975 amendment that the district court in *Colville* relied upon as strong evidence that tribal retailers do not bear the legal incidence of the tax:

> Other than:
> . . . .
> (c) An Indian tribal organization with respect to sales to enrolled members of the tribe,
> a person who is in lawful possession of unstamped cigarettes and who intends to sell or otherwise dispose of the cigarettes *shall pay, or satisfy its precollection obligation that is imposed by this chapter, the tax* required by this chapter by remitting the tax . . . .

Wash. Rev. Code § 82.24.260(1) (emphasis added).

In summary, the statute today continues to impose a tax "upon the sale, use, consumption, handling, possession, or distribution of all cigarettes." Wash. Rev. Code § 82.24.020. The tax is imposed "at the time and place of the first taxable event and upon the first taxable person" within the state. Wash. Rev. Code § 82.24.080(1), (2). If the person upon whom the tax would otherwise apply is not taxable under federal or constitutional law, the tax "shall not apply." Wash. Rev. Code § 82.24.900. If that exempt person is a seller, the seller has the "precollection obligation" to collect the tax instead from its purchasers, if they are taxable. Wash. Rev. Code §§ 82.24.010(4), 82.24.080(2); *see also* Wash. Rev. Code § 82.24.260(1) (obligations on sellers when cigarettes are unstamped); Wash. Rev. Code § 82.24.080(4) (intent that tribal retailers collect the tax from all purchasers who are not tribal members).

4. The district court properly granted summary judgment to the State on the Yakama Nation's legal incidence claim.

The Supreme Court has on multiple occasions cited *Colville* approvingly, recognizing the challenges states face in particular with cigarette taxes. "States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on

reservations." *Dep't of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (citing *Moe*, *Colville*, and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)). The district court correctly considered the current statute in light of *Colville* and concluded that the legal incidence of Washington's cigarette tax does not fall on tribal retailers. ER 21, 24-25. The incidence of the tax can fall on wholesalers, retailers, or consumers, but it *never* falls on tribal retailers or tribal members with regard to sales on the reservation because federal law prohibits state taxation of such sales. Wash. Rev. Code §§ 82.24.010(4), 82.24.080, 82.24.900.

a. When wholesalers pass the tax on to their purchasers, the legal incidence does not come to rest on *tribal* retailers.

As the statute contemplates in its provisions regarding cigarette stamping, the first taxable person is usually going to be the wholesaler, who purchases and affixes the stamps. *See* Wash. Rev. Code §§ 82.24.030, .040, .050. Use of the stamp is how the tax usually is paid, and stamped cigarettes show the tax has been paid. Wash. Rev. Code §§ 82.24.010(7), 82.24.030(1), 82.24.060.

Nonetheless, the statutes make clear that both retailers and consumers can be liable for the tax, in addition to wholesalers. Any buyer or possessor of unstamped cigarettes who is not tax exempt has "personal liability for the tax imposed by this chapter." Wash. Rev. Code § 82.24.260(3). Non-exempt purchasers from a seller with a precollection obligation (because of its tax-exempt status) are obligated to pay the tax. Wash. Rev. Code § 82.24.080(2); *see also* Wash. Rev. Code § 82.24.020(4) (persons who are not enrolled members of the tribe are not exempt on purchases from tribal retailers on a reservation); Wash. Admin Code § 458-20-186 (101)(c) ("failure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax").

A key element in the Yakama Nation's argument is that wholesalers are required to pass the tax on to retailers, but no similar requirement is imposed on retailers to pass the tax on to their consumers, leaving retailers holding the bag for tax liability. Opening Brief at 22-25. With regard to wholesalers, the Nation is referring to section 82.24.020(2), which does imply that wholesalers must pass on all but a tiny fraction of the tax to purchasers. Assuming

wholesalers have this obligation, the Yakama Nation nonetheless reaches an incorrect conclusion with regard to legal incidence.

For *tribal retailers*, who are themselves exempt from the tax, the statutes require that the tax be imposed on their non-exempt customers, persons who are not members of the tribe. The "precollection obligation" expressly requires that the tax be collected from (that is, passed on to) the exempt seller's customers. Wash. Rev. Code §§ 82.24.010(4), 82.24.080(2). The Supreme Court has instructed that such an express provision "establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599, 608 (1975). In addition, the liability the Legislature imposed on downstream purchasers is consistent with this precollection obligation. *See* Wash. Rev. Code §§ 82.24.020(4), 82.24.260(3). Thus, the wholesaler's implied obligation to pass on the tax to retailers does not result in the legal incidence of the tax falling on *tribal retailers*, even if it might for off-reservation retailers.

Even if the precollection obligation did not exist, however, the Nation's legal incidence conclusion is incorrect. In *Chemehuevi*, the Supreme Court rejected the notion that state statutes must contain an explicit provision imposing a collection obligation on tribal retailers for their sales to non-

Indians. Instead, it is sufficient that the "entire . . . statutory scheme . . . evidences an intent to impose on the Tribe such a 'pass on and collect' requirement." *Chemehuevi*, 474 U.S. at 12.[9] Even without considering the precollection requirement in § 82.24.080(2) and § 82.24.010(4), the statutory scheme in Washington evidences an intent that tribal retailers collect the tax from their taxable customers. The tax applies only to the "first taxable event and upon the first taxable person" under § 82.24.080. Furthermore, section 82.24.900 precludes the tax from applying to tribal retailers: "The provisions of this chapter *shall not apply*" where the state is prohibited from taxing "under the Constitution of this state or the Constitution or the laws of the United States." Wash. Rev. Code § 82.24.900 (emphasis added). The only reasonable reading of these provisions is that if a tribal retailer is the first person to possess cigarettes in the state, the retailer should collect the taxes instead from its taxable purchasers. The Court in *Colville* so held, even without considering the constitutional backstop provision. 447 U.S. at 142 n.9.

[9] The Supreme Court in *Chemehuevi* and in *Colville* inferred a precollection obligation on tribal retailers from the statutes at issue, which did not contain express language to that effect. In its 1976 decision in *Moe*, the Court rejected a legal incidence challenge where the statute expressly imposed that obligation on retailers. *Moe*, 425 U.S. at 482. The Supreme Court also has approved imposing a precollection obligation on tribal wholesalers. *Dep't of Taxation*, 512 U.S. at 74-76.

Under the "fair interpretation" standard, this Court must discern legal incidence from the entire statutory scheme. *Chemehuevi*, 474 U.S. at 12, *Hammond*, 384 F.3d at 685; *see generally Christensen v. Comm'r of Internal Revenue*, 523 F.3d 957, 960 (9th Cir. 2008) (the court derives statutory meaning from context, which requires reading the relevant statutory provisions as a whole). A statute must be construed so that no part is inoperative or meaningless. In a legal incidence analysis, the backstop section is as important as any of the tax-imposing sections of the statute because it expressly states when the legal incidence of the tax *may not be imposed*. The backstop and wholesaler pass-on provisions should be read in harmony as part of a total statutory scheme, in which each provision can be applied. *See Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008) (where court can construe statutes so that they can be reconciled and both can be applied, it is obliged to reconcile them). Here, that means the wholesaler pass-on provision "shall not apply" to transfer the legal incidence of the cigarette tax to any tribal cigarette retailer.

Reading the wholesaler pass-on provision in section 82.24.020(2) in harmony with the precollection obligation in section 82.24.080(2) and the backstop provision in section 82.24.900, the cigarette tax statute does not place

the legal incidence of the tax on tribal retailers. The district court reached the correct conclusion as a matter of law.

b. The district court properly relied on the decision in *Colville*.

In reaching its decision and entering summary judgment for the State, the district court properly relied upon the Supreme Court's decision in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The Yakama Nation argues that claim preclusion does not apply, and that the district court mistakenly relied on the doctrine of *stare decisis* in following the holding of *Colville*.[10] Opening Brief at 19-22. According to the Yakama Nation, *Chickasaw* and *Hammond* control the outcome of this case, but *Colville* does not. *Id.* at 21. The Yakama Nation is incorrect.

It is "[the Supreme Court's] prerogative alone to overrule one of its precedents." *United States v. Hatter*, 532 U.S. 557, 567 (2001). When the Supreme Court has reviewed and interpreted an earlier version of a statute in a prior decision, that decision controls the outcome of a later case addressing the

[10] The Yakama Nation correctly notes that the State did not assert claim preclusion with respect to the Nation's legal incidence claim, unlike the Nation's claim that Washington's cigarette tax scheme violates the Treaty of 1855, 12 Stat. 951. The Supreme Court rejected both claims in *Colville*. 447 U.S. at 142 n.9, 156. The difference for purposes of claim preclusion is that the language of the Yakama Nation Treaty has not changed since then, while some provisions of the cigarette tax statute have been amended.

same issue under the statute, if the amendments to the statute have left the substance of the prior statute largely unchanged and the legislative body has given no clear indication of an intent to make a significant change regarding the issue. *United States v. O'Brien*, ___ U.S. ___, 130 S. Ct. 2169, 2173, 2176-80 (2010) (affirming First Circuit's decision that prior Supreme Court decision interpreting statute regarding use of firearm in committing crime was "close to binding").

For the same reasons as in *O'Brien*, *Colville* should be considered controlling here. There have been amendments to the statute, but the material features of the cigarette tax statute that were in place to preclude the legal incidence of the tax falling on tribal retailers in *Colville* are still in effect today: (a) The tax applies to the first *taxable* use, handling, sale, possession, consumption, or distribution of cigarettes in Washington, and (b) the tax "shall not apply" to persons who are not taxable. Wash. Rev. Code §§ 82.24.020, 82.24.080, 82.24.900. Since the decision in *Colville*, the Legislature has only strengthened the statute, clarifying that the tax applies only to the "first taxable person" and requiring tax-exempt sellers to collect the tax from their taxable customers through the precollection obligation. Wash. Rev. Code §§ 82.24.010(4), 82.24.080(2).

Because the statute today is nearly identical in all material respects to the statute the Court interpreted in *Colville*, and because no other legal incidence case interprets a statute with the same language and structure, the district court properly gave *Colville* great weight and treated it as a starting point for its analysis. ER 18-19.

C. Washington's Cigarette Tax Statute Is Unlike The Fuel Tax Statutes In *Chickasaw* And *Hammond*.

This Court has commented on multiple occasions that its task in discerning legal incidence is to ascertain "the legal obligations imposed upon the concerned parties." *Hammond*, 384 F.3d at 681 (quoting *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1111 (9th Cir. 1981)). Here, the "concerned parties" are tribal retailers. The Yakama Nation points to obligations imposed on retailers in general, but stops at that point. It fails to inquire further. It does not analyze "the entire taxation scheme." *See Hammond*, 384 F.3d at 682 n.4 (quoting *United States v. California State Bd. of Equalization*, 650 F.2d 1127, 1131 (9th Cir. 1981)).

The Yakama Nation also fails to recognize some very critical differences between the motor fuel tax statutes in *Chickasaw* and *Hammond* and the cigarette tax statute at issue here. These differences dictate a different legal incidence result in this case than in those cases.

1. The motor fuel taxes in *Chickasaw* and *Hammond* share none of the core features of Washington's cigarette tax.

In *Chickasaw*, the Supreme Court held that the language and import of Oklahoma's motor fuels tax was that through collection by the distributor, the taxes were legally imposed on the retailer rather than on the distributor or consumer. *Chickasaw*, 515 U.S. at 461-62. The Oklahoma legislation did not expressly identify who bore the legal incidence of the tax or contain any "pass through" provision requiring distributors or retailers to pass the tax on to consumers. *Id.* at 461. In the absence of what it called such "dispositive" language, the Court addressed the "fair interpretation of the taxing statute as written and applied." *Id.* at 461 (quoting *Chemehuevi*, 474 U.S. at 11).

Most significant to the Court was that the statute required the distributor to remit the tax "on behalf of a licensed retailer." *Id.* at 461; Okla. Stat. tit. 68, § 505(C) (1991). Distributors were compensated for their services as "agent of the state for [tax] collection" by retaining a small portion of what they collected. *Id.*; Okla. Stat. tit. 68, § 506(a).[11] This implied that the tax obligation was legally the retailer's, not the distributor's. *Chickasaw*, 515 U.S. at 461. The law also allowed distributors a deduction against future payments

[11] The Oklahoma legislature repealed these statutes in 1996. 1995 Okla. Sess. Laws, ch. 345, § 67.

for tax amounts that were determined to be uncollectible by distributors. *Id.* Based on these provisions, the Court agreed with the Tenth Circuit that distributors were no more than "transmittal agents" for the taxes imposed on the retailers. *Id.* at 461-62.

Moreover, the Oklahoma law contained no similar provisions indicating retailers were simply collection agents for taxes ultimately imposed on consumers. *Id.* at 462. The Oklahoma statute also imposed "no liability of any kind on a consumer for purchasing, possession, or using untaxed fuel." *Id.*

The statute at issue in *Hammond* was similar. There, the Idaho Supreme Court determined in 2001 that the legal incidence of Idaho's motor fuel tax impermissibly fell on tribal retailers. *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002). The Idaho legislature responded by amending the statute, including declaring in an uncodified statement its intent that the tax fall upon the distributor's receipt of fuel. *Hammond*, 384 F.3d at 680. Tribes argued that the incidence of the tax continued to fall on tribal retailers, and this Court agreed. *Id.* at 680-81.

First, this Court noted that the incidence of a state tax on a sovereign Indian nation is a question of federal law, and accordingly, a state legislature's statement of intent does not conclusively resolve the question in and of itself.

Id. at 682-84. Examining the amended statute, the Court concluded that despite the statement of intent, the operative provisions of the statute remained in substance unchanged. *Id.* at 684-85. The Court stressed the similarities between the Idaho statute and the Oklahoma statute in *Chickasaw*. *Id.* at 685.

The amended Idaho statute still required distributors who received and sold fuel to pass on the tax and collect it from retailers, then remit it to the state. *Id.* Proceeds in the amount of the tax from fuel sales to retailers were held in trust by the distributor for the state. *Id.* at 686. The distributor received a credit "for the expense incurred *on behalf of the state of Idaho* in collecting and remitting motor fuel tax moneys," for maintaining records "*for the state*," and for preparing reports and remittances, among other things. *Id.* at 686-87 (emphasis added); Idaho Code § 63-2407(4) (2002). The Idaho statute also gave distributors a credit for taxes previously paid on gallons represented by purchaser accounts found to be worthless and actually charged off for income tax purposes. *Id.* at 687, Idaho Code § 63-2407(6). From these provisions, this Court concluded that, as in *Chickasaw*, motor fuel distributors in Idaho were no more than transmittal agents for the taxes imposed on retailers. *Id.* at 687.

Like the statute in *Chickasaw*, the statute in *Hammond* contained no provision requiring retailers to collect the tax from consumers and no provision

making consumers liable for the tax. Retailers were not compensated for any collection efforts, and the statute provided no credit for the bad debts written off on consumer accounts. *Id.* This Court concluded that the amended statute continued to be a "collect and remit" scheme that placed the legal incidence of the tax on Indian retailers. *Id.* at 688. "So it is plain that the tax buck stops with the Indian tribal retailers." *Id.* at 687.

The holdings in *Chickasaw* and *Hammond* do not dictate the same result here. Washington's cigarette tax statute imposes the tax on the first "sale, use, consumption, handling, possession, or distribution" of cigarettes, which allows the tax to be imposed on events that may occur at the wholesaler/distributor, retailer, or consumer level. Wash. Rev. Code §§ 82.24.020(1); 82.24.080(1). The statutes in *Chickasaw* and *Hammond* focused solely on distributors and retailers. Rather than compensating wholesalers for acting "on behalf of" the State to prepare records and collect the cigarette tax, as in the Idaho and Oklahoma motor fuel tax statutes, the compensation wholesalers receive under chapter 82.24 is "for their services in affixing the stamps required under this chapter." Wash. Rev. Code § 82.24.295(2).[12] Likewise, the cigarette tax

[12] The statute indicates both wholesalers and retailers are allowed this compensation. As a practical matter, only wholesalers will receive it because

contains no provision allowing wholesalers to receive credit from the State for uncollectible accounts charged off on sales to retailers, unlike the statutes allowing such credits in *Chickasaw* and *Hammond*. *See also Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1252-53 (W.D. Wash. 2005) (both suppliers and distributors allowed credits on motor fuel tax for uncollectible debts on sales, but not retailers). Nothing in chapter 82.24 indicates that wholesalers act as agents of the State in collecting the tax from retailers.

Unlike Washington's cigarette tax statute, which makes consumers personally liable for the tax when they purchase or possess cigarettes that have not been taxed, the statutes in *Chickasaw* and *Hammond* contained no such downstream tax liability. *See* Wash. Rev. Code §§ 82.24.260(3), 82.24.020(4). Consumers who fail to meet their obligations in Washington can be charged with a gross misdemeanor, just like wholesalers and retailers. Wash. Rev. Code § 82.24.110(m), (p). The court in *Squaxin Island* noted that under Washington's fuel tax statute (since amended), no real enforcement against consumers occurred, and "consumers often have no way to know whether they have or have not paid the tax." *Squaxin Island*, 400 F. Supp. 2d at 1253, 1259-60. The same is not true for the cigarette tax statute, under which the

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another section provides that only wholesalers may purchase cigarette stamps. Wash. Rev. Code § 82.24.030(3) (as amended in 2003).

Department routinely issues assessments against consumers. SER 2, 5, 6 (Doc. 123, ¶¶ 37, 105, 108); SER 27-28 (Doc. 102-9 at 123-24); *see* SER 19-20, 22-23 (Doc. 102, ¶¶ 37, 105, 108).

The statutes in *Chickasaw* and *Hammond* did not address the circumstance of tax exempt persons in the distribution chain, unlike Washington's cigarette tax statute. They did not limit imposition of the tax to the "first taxable event" or the "first taxable person," as does section 82.24.080(2). They did not contain a backstop provision, stating that the tax "shall not apply" if imposing the tax is precluded under federal or constitutional law. *See* Wash. Rev. Code § 82.24.900. And finally, they did not impose an obligation on tax-exempt sellers in the distribution chain to instead collect the tax from their taxable purchasers, such as Washington's precollection obligation. Wash. Rev. Code §§ 82.24.010(4), 82.24.080(2).

The Yakama Nation applies quotations from this Court's decision in *Hammond* to its characterization of Washington's cigarette tax, but for legal incidence purposes, the Nation is comparing apples to oranges. Unlike the statutes in *Chickasaw* and *Hammond*, the legal incidence of the cigarette tax never falls on tribal retailers.

2. This Court should reject the Yakama Nation's suggestion to disregard codified statements of legislative intent in state statutes.

The Yakama Nation asks this Court to disregard the statement in section 82.24.080(2) of the Legislature's intent, that the cigarette tax should apply to the "first taxable event" and "first taxable person." The Nation terms the statement "superficial" and "not probative." Opening Brief at 37. Moreover, the Nation argues that *Hammond* precludes relying on the intent language in determining whether the legal incidence of the cigarette tax statute falls on Yakama retailers. *Id.* at 37-38. The Nation misreads *Hammond*, and its argument is without merit.

In *Hammond*, this Court faced the question of what effect to give an uncodified statement of legislative intent the Idaho legislature added in amendments to its motor fuel tax statute to avoid the result in *Goodman Oil*, which held the statute was invalid as applied to tribal retailers. *Hammond*, 384 F.3d at 680, 682-85. The Court determined that the question of legal incidence, which is a question of federal law, could not be conclusively resolved by statements of legislative intent. *Id.* at 682-84. A legislative declaration of intent is dispositive as to what the legislature intended, but not entirely dispositive of the legal issue federal courts address to determine the

legal incidence of the tax. *Id.* at 684. If the rule were otherwise, a state could "name one party the taxpayer while requiring another to pay the tax." *Id.*

Having determined that a mere statement of legislative intent was not alone controlling of the legal incidence question, this Court went on to examine the other relevant sections of the statute that bore on the question. The Court concluded that, despite the intention expressed in the legislature's statement, the operative provisions of the statute in substance remained essentially unchanged. *Id.* at 684. Thus, the statute still improperly placed the legal incidence of the tax on tribal retailers. *Id.* at 688.

Contrary to what the Yakama Nation argues, this Court should not disregard or treat as "not probative" the Washington Legislature's statements of intent in section 82.24.080 as to how the cigarette tax applies. The statement of intent in subsection (1) that the tax is to be collected from the person who first sells, uses, possesses, etc., cigarettes in the state has been part of the codified statute since 1935. In 1972, the Legislature added the statement in subsection (2) that the tax is to be imposed on the "first taxable event." The district court in *Colville* and the Washington Supreme Court in *Tonasket* both gave this intent statement great weight in concluding that the legal incidence of the tax did not fall on tribal retailers. *Colville*, 446 F. Supp. at 1353-55;

Tonasket, 84 Wash. 2d at 181. The Supreme Court adopted the district court's analysis. *Colville*, 447 U.S. at 142 n.9.

The lesson of *Hammond* is not to disregard statements of legislative intent, but to view them in light of other expressions of legislative intent in the entire operative provisions of the statute. That is what a "fair interpretation" of a statute requires, both in the context of determining the legal incidence of a tax and in general.

Here, the statements of legislative intent in section 82.24.080 are entirely consistent with the operative provisions of the statute. The backstop provision in section 82.24.900 dictates that the statutes "shall not apply" where federal law prohibits it. This compels the conclusion that when the legislature directed that the tax be applied at the time and place of the first use or possession of cigarettes in Washington, it was imposing the tax only on the first *taxable* event and the first *taxable* person. In addition, the precollection obligation requires tax-exempt sellers to collect the tax from taxable purchasers. Thus, unlike in *Hammond*, the legislative intent statements and the operative provisions in the statute work hand in hand. Both should be given the weight they are due.

3. States are not required to impose their taxes on a single triggering event or at a particular point in a distribution scheme.

In an argument related to its discussion of statements of legislative intent, the Yakama Nation also implies that the structure of Washington's cigarette statute is improper because the question of who bears the legal incidence of the tax has different answers, depending on what is the first act in the state and whether the first person in possession of the cigarettes may be lawfully taxed. Opening Brief at 37-40. According to the Yakama Nation, the State's tax scheme is invalid under *Hammond* because it "purports to shift *by fiat* the legal incidence of the tax based on the Indian or non-Indian status of the retailer." Opening Brief at 12 (emphasis in original).

Contrary to the Yakama Nation's argument, this Court in *Hammond* did not hold that States are required to impose their taxes on a single triggering event or at a particular point in a distribution scheme. Nor did this Court hold that States are prohibited from structuring their tax statutes so that legal incidence can shift depending upon whether a person who would otherwise bear the tax is exempt from it. The statute in *Hammond* did not present those questions.

The Yakama Nation has not cited a single case supporting its theory that States may not structure their statutes to avoid imposing taxes when the legal incidence would fall on an Indian. The State would be surprised to see such a case because that is exactly what the Supreme Court upheld in *Colville* – a statute that shifted the legal incidence of the tax based on the Indian or non-Indian status of the retailer. The Supreme Court expressly noted that the legal incidence of the tax could change under Washington's cigarette tax statute, depending upon whether "the wholesaler or retailer is an Indian on whom the tax cannot be imposed under [*McClanahan*]." *Colville*, 447 U.S. at 142 n.9. *Colville* controls this question, not *Hammond*.

4. Limiting the ability to purchase tax stamps to wholesalers does not place the legal incidence on tribal retailers.

The Yakama Nation also argues that the legal incidence of the cigarette tax falls on tribal retailers because wholesalers are required to purchase and affix tax stamps, but retailers are not, and the recordkeeping required for wholesaler/retailer transactions and retailer/consumer transactions is different. Opening Brief at 22-29. This is part of the Nation's argument that retailers are not required to collect or pass on the tax to their customers. As discussed in Part B.3., this overlooks the express precollection obligation in the statute

requiring tax-exempt sellers such as tribal retailers to collect the tax from their taxable customers. Wash. Rev. Code §§ 82.24.010(4), 82.24.080(2).

The Yakama Nation has cited no authority indicating that imposing the burden of purchasing and affixing stamps solely on wholesalers somehow places the legal incidence of the tax on tribal retailers. To the contrary, this Court recognized in 1995 that Washington's regulatory program for administering the cigarette tax had largely moved off-reservation in the years after *Colville*, with most of the duties imposed on off-reservation wholesalers. *United States v. Baker*, 63 F.3d 1478, 1489 (9th Cir. 1995), *cert. denied*, 516 U.S. 1097, 516 U.S. 1117 (1996). The Court noted that recordkeeping and stamping duties for tribal retailers had been greatly reduced, concluding: "If Washington's tax scheme did not unduly interfere with Indian sovereignty when *Colville* was decided, it certainly does not do so now." *Id.* This Court also rejected the defendants' legal incidence argument:

> Washington's tax scheme . . . does not impose any tax on reservation Indians. It merely requires Indian retailers to prepay taxes to be collected from their non-Indian consumers. This precollection requirement is a permissible, minor burden on Indian trade.

Id. at 1491. *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (commenting that States

may focus collection and enforcement efforts on off-reservation cigarette wholesalers to obtain revenue for taxable sales on reservations).

Likewise, the State is unaware of any legal incidence case requiring states to impose identical recordkeeping requirements at all levels of the distribution scheme for a taxed product. The Yakama Nation's complaint that consumers need not receive a document from retailers stating they have paid the tax is baffling. *See* Opening Brief at 25-26. Under a statutory scheme such as Washington's, where the first taxable person handling cigarettes may be a wholesaler, retailer, or consumer, but where payment of the tax is usually made through the wholesaler's act of purchasing and affixing a tax stamp, the State has no need for proof the tax has been paid by consumers beyond the stamp on the package of cigarettes. Two different sections of the statute indicate this is a primary purpose of having the stamp. Wash. Rev. Code §§ 82.24.030(1), 82.24.060. In this respect, cigarettes are a very different product than motor fuel – it would be difficult to affix stamps or other proof of payment "on the smallest container or package" of motor fuel. *See* Wash. Rev. Code §82.24.030(1). As a result, the tax collection scheme and recordkeeping requirements of motor fuel taxes and cigarette taxes logically are different.

The Yakama Nation points out that the retail sales tax scheme requires documentation at the point of sale that the tax has been paid, in contrast to the cigarette tax.[13] Opening Brief at 26. The taxable event for the retail sales tax, however, is the "sale at retail" of an item or taxable service, whereas the triggering event for cigarette taxes is the first "sale, use, consumption, handling, possession, or distribution" of cigarettes in the state. Wash. Rev. Code §§ 82.08.020, 82.04.050, 82.24.020(1). Sales by wholesalers for the purpose of resale are exempt from the retail sales tax. Wash. Rev. Code § 82.04.050(1)(a). Thus, no need for proof of payment arises until the retail transaction occurs. Because the retail sales tax scheme does not rely on stamps as proof the tax has been paid, other documentation at the point of sale is required.

In a similar vein, the Yakama Nation notes that when the tax rate increases, retailers are required to pay the additional tax amount on all cigarettes remaining in their inventory, but consumers are not required to do the same for previously purchased cigarettes in their possession. Opening Brief at 28. Actually, both wholesalers and retailers are required to remit the

[13] The State is pleased that the Yakama Nation appears to acknowledge its responsibility to collect the retail sales tax on sales to nonmembers. *See Colville*, 447 U.S. at 160-61.

additional amount on their inventories, not just retailers. Wash. Rev. Code §§ 82.24.080(3), 82.24.280; Wash. Admin. Code § 458-20-186(302)(b); SER 6, 7 (Doc. 123, ¶¶ 111-112); *see* ER 64 (Doc. 102, ¶¶ 111-112). On the effective date of the tax increase, consumers making purchases at retail must pay the higher rate. *Id.* Cigarettes consumers purchased before the effective date of the tax increase are out of the chain of commerce, and to impose the additional tax on them would be more in the nature a property tax than an excise tax. The State is aware of no cigarette tax case suggesting that the question of legal incidence turns on whether consumers must pay for a post-purchase tax increase on cigarettes they have not yet smoked. The Nation's argument is meritless.

The Court should also reject the Nation's argument that Washington's cigarette tax scheme places the legal incidence of the tax on retailers because wholesalers, but not retailers, may defer paying the stamp vendor for tax stamps up to 30 days. Opening Brief at 23-24, 29. Under the Department's rule, wholesalers must pay cash for the stamps through automatic withdrawal, unless they provide security in the form of a surety bond for 30 days of tax liability. Wash. Admin. Code § 458-20-186(301)(b). Neither the statute nor the rule attempt to dictate terms of credit between wholesalers and retailers,

and the Yakama Nation has not explained why they should. It is true that retailers will bear the economic burden of the tax from the time they purchase cigarettes from wholesalers until they sell the cigarettes to consumers. But as the Nation has correctly noted, this temporary economic burden cannot be equated with legal incidence. Opening Brief at 17-18, 27. Moreover, this burden is exactly what the Supreme Court explicitly approved in *Moe* and *Colville* and this Court approved in *Baker*.

5. Refunds are available to anyone who is legally entitled to one.

The Yakama Nation's last argument is that the legal incidence of the cigarette tax falls on tribal retailers because they cannot obtain refunds of the cost of the tax stamp. Opening Brief at 29-34. The Nation mischaracterizes the law and the facts, and the argument should be rejected.

Section 82.24.210 allows the Department to "promulgate rules and regulations providing for the refund to *dealers* for the cost of stamps affixed to articles taxed herein," which are damaged and unfit for sale. (Emphasis added). The Nation argues "dealers" means only wholesalers, because only wholesalers affix stamps, concluding that retailers are not eligible for the refund. Opening Brief at 31-32. Section 82.24.210 also provides for refunds in other circumstances, including when the Washington Attorney General

removes a brand from the list of approved cigarettes for sale in Washington. In this instance, the statute references refunds to "a distributor or wholesaler that has lawfully affixed stamps to cigarettes."

The Department handles refunds under a rule providing that "*any person* may request a refund of the face value of the stamps when the tax is not applicable and the stamps are returned to the department." Wash. Admin. Code § 458-20-186(303) (emphasis added). This includes retailers, and it includes situations where a cigarette brand has been removed from the approved list, along with other situations. SER 3-4, 6 (Doc. 123, ¶¶ 99, 100, 102, 109); SER 16 (Doc. 123-2 at 148); ER 164 (Request for Admission Nos. 2 & 3); *see* SER 21-23 (Doc. 102, ¶¶ 99, 100, 102, 109).

When a retailer requests a refund from the Department, the Department asks them to first work with the wholesaler, because the Department is not in a position to provide a refund for the cost of the cigarettes, unlike the wholesaler. SER 4 (Doc. 123, ¶ 101); SER 15 (Doc. 123-2 at 145); ER 120 (Doc. 102-11); *see* SER 21 (Doc. 102, ¶ 101). If the retailer is unable to obtain a refund for the cost of the cigarette stamps from the wholesaler, the Department will process a refund for the retailer. *Id.*

The Department has only one refund claim form, the Cigarette Tax Claim for Refund form. ER 149; SER 14 (Doc. 123-2 at 144). Although language in the form appears to be directed to wholesalers, the Department uses it for all refund claims. SER 3-4 (Doc. 123, ¶¶ 99, 100); SER 14 (Doc. 123-2 at 144); *see* SER 21 (Doc. 102, ¶¶ 99, 100).

One example of the variety of situations in which the Department might issue a refund arose in 2004, when the State and the Yakama Nation entered into a cigarette tax compact, under which the Nation imposed a tribal tax in lieu of the state cigarette and retail sales taxes. *See* Wash. Rev. Code §§ 43.06.450 *et seq*. The Department offered to refund the state tax prepaid on cigarettes remaining in the Nation's inventories on the date the compact went into effect. SER 35, 37 (Doc. 93, ¶ 4 & Attach. B).

It is true that the Department does not issue any refunds to retailers for the cost of cigarette stamps when the retailer has sold the cigarettes to consumers, but has been unable to collect the required amount from the consumer. *See* ER 163-64 (Request for Admission No. 1). The same is true for wholesalers, however. Unlike the statutes in *Chickasaw*, *Hammond*, and *Squaxin Island*, the cigarette tax statute provides no financial protection to

wholesalers for uncollectible accounts. The Department will not issue refunds without the return or verified destruction of the stamp. ER 149-50.

The Yakama Nation also argues incorrectly that wholesalers are compensated by the State for their role in "collecting and remitting tax on the State's behalf." Opening Brief at 35. As explained earlier, the compensation wholesalers receive under Chapter 82.24 is "for their services in affixing the stamps required under this chapter." Wash. Rev. Code § 82.24.295(2). It is unlike the compensation to distributors in *Chickasaw* and *Hammond*, which was expressly for collection "on behalf of" or for acting as an "agent of the state" in collecting the taxes. Licensed cigarette wholesalers are not agents of the State under Chapter 82.24.

In short, the differences the Yakama Nation notes between the rights and responsibilities of cigarette wholesalers and retailers under Washington's cigarette tax statute do not support its claim that the legal incidence of the cigarette tax falls on tribal retailers. To the contrary, the only fair interpretation of the provisions of Washington's cigarette tax statute, including the provision precluding application of the chapter when doing so would violate federal law, is that the statute never places the legal incidence of the tax on tribal retailers. The Yakama Nation presents a strained interpretation of the

statute that fails to consider all relevant provisions and ignores the controlling precedent, *Colville*. The district court correctly granted summary judgment to the State on this claim.

D. The Yakama Nation Has Abandoned All Arguments On Appeal Other Than Its Legal Incidence Claim.

Regardless of how this Court rules on the Yakama Nation's legal incidence claim, it should reject the Yakama Nation's request to vacate the remaining portions of the district court's summary judgment order or any other order included within the Yakama Nation's notice of appeal. *See* Opening Brief at 13 n.3, 42. By not providing argument or authorities regarding any issue other than that of legal incidence, the Yakama Nation has waived or abandoned any other arguments it could have made on appeal. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008) (arguments not raised by a party in its opening brief are deemed waived); *Martinez-Serrano v. Immigration & Naturalization Service*, 94 F.3d 1256, 1259 (9th Cir. 1996) (issues raised in a brief but not supported by argument are deemed abandoned), *cert. denied*, 522 U.S. 809 (1997); Fed. R. App. P. 28(a)(9).[14]

[14] In addition, the Nation's cited authority for vacatur is inapposite. In *Wal-Mart Stores,* the First Circuit vacated a district court's preliminary

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order granting summary judgment to the State on the question of the legal incidence of the cigarette tax and the other orders granting judgment to the State, awarding the State the entire cash bond on the temporary injunction, and denying relief to the Yakama Nation.

RESPECTFULLY SUBMITTED this 29th day of May, 2011.

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injunction where the parties settled the case on appeal, conditioned on vacatur, and the special circumstances of the case justified that relief. *Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747, 749-50 (1st Cir. 2003). Here, there is no settlement, and no basis exists to vacate any portion of the district court's orders in this case. Vacatur would deprive the orders of the finality necessary for collateral estoppel, contrary to sound judicial policy. *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp.2d 226 (D. Mass. 2009) (denying motion to vacate portion of final judgment pursuant to settlement) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971)).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,379 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007, Times New Roman 14 point.

Dated this 29th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 29, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 29th day of April, 2011.

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STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

To the best of undersigned counsel's knowledge, there are no related cases currently pending before the Court.

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