Hon. Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

DANIEL T. MILLER, AMBER LANPHERE, and PAUL M. MATHESON, Plaintiffs, v. CHAD WRIGHT, HERMAN DILLON, SR., and THE PUYALLUP TRIBE OF INDIANS, Defendants.	No. 3:11-cv-05395RBL DEFENDANTS' MOTION TO DISMISS and MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF NOTE ON MOTION CALENDAR: July 29, 2011

MOTION TO DISMISS

The Puyallup Tribe of Indians and two Tribal officials, the defendants named in this Complaint, respectfully move the Court for an order dismissing the case under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction based on (1) the Tribe's sovereign immunity from suit and (2) the *res judicata* effect of rulings by two court systems on the issue of immunity in earlier versions of this case.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

This Motion is based on the pleadings on file in this case and the Defendants' Memorandum of Authorities, below, including the Affidavits of Eric A. Scott and Chad R. Wright and Declaration of John Howard Bell that accompany this Motion.

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

FACTUAL BACKGROUND

This is the fourth lawsuit that Paul Matheson has filed in an effort to invalidate the Puyallup Indian Tribe's cigarette tax and the Cigarette Tax Agreement ("Agreement") signed in 2005 by the Tribe and the State of Washington. RCW 43.06.465.[1] It makes the same claims and arguments and asks for the same relief as the first three.

The first case, *Matheson v. Gregoire*. This suit against the Puyallup Tribe and the State of Washington, as well as officials of each government, asked the Thurston County Superior Court to invalidate the Agreement and enjoin the Tribe from assessing its cigarette tax on sales made by Matheson to non-Indian customers. Among its many claims and arguments was the assertion that the defendants had no authority to tax those transactions and acted in violation of federal antitrust law.[2] The Superior Court dismissed the Tribe and its officials based on sovereign immunity. The Washington Court of Appeals upheld the

[1] The Agreement settled a longstanding dispute between the Tribe and the State over taxation of cigarette sales on the Puyallup Indian Reservation in a manner suggested by the United States Supreme Court—an agreement between two sovereigns. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The Agreement provides that cigarette sales made in compliance with its terms are not in violation of state law for the purpose of the federal Contraband Cigarette Trafficking Act, 18 U.S.C. §2341, et seq. The Agreement thus enables retail businesses licensed by the Tribe to conduct business without fear of criminal prosecution by the United States, a step the U.S. took several times before the Agreement was reached.

[2] Pages 2, 14, 29, 36 and 38 of the Complaint found at pages 4, 5, 6, 9 and 11 of attachments to Declaration of Bell.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

dismissal, observing that, "both the Tribe and Wright are protected by sovereign immunity; the trial court did not err in dismissing them, and we affirm."*Matheson v. Gregoire*, 139 Wn.App. 624, 633, 161 P.3d 486, 491 (2007); *rev. denied*, 163 Wn.2d 1020, 180 P.3d 1292 (2008); *cert. denied*, ___ U.S. ____, 129 S.Ct. 197, 172 L.Ed.2d 140 (2008).

The second case, *Matheson v. Wright.* Matheson and Lanphere filed the second suit in this chain in Puyallup Tribal Court. They asked the court to enjoin collection of the Tribal cigarette tax based on, among other arguments, their assertions that the Tribe lacked authority to tax purchases made by non-Indians and that the Tribe was acting in violation of federal antitrust law.[3] The trial court dismissed the case based on the Tribe's sovereign immunity; the Tribal Court of Appeals upheld the dismissal, noting that the Tribe is immune from suit and ruling that Mr. Wright is protected by that immunity as well because he "was a tribal official acting in his official capacity, within the scope of his authority, and not in violation of federal law." The Court ruled that he did not act in violation of federal law because "all three branches of the federal government have recognized that Indian tribes have the power to tax economic activities involving non-Indians in Indian country."[4]

In short, combinations of these plaintiffs have already fully litigated and lost the issue of dismissal based on the Tribe's sovereign immunity in the Washington state courts and in Puyallup Tribal Court, including appeals in both systems.

---

[3] Pages 20, 21, 24, 42, 54, 55, 56 and 58 of the Complaint found at pages 13, 14, 16, 17, 19, 20, 21 and 23 of attachments to Declaration of Bell.

[4] The two opinions from the Tribal Court are found at pages 24 and 27 of attachments to Declaration of Bell. The language quoted in the text here is from page 7 of the Tribal Court of Appeals opinion, found at page 33 of attachments to Declaration of Bell.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

Although it is unnecessary for the purpose of this motion to determine the myriad facts alleged in the Complaint, it is very much worth noting that simple arithmetic refutes the plaintiffs' primary protest. Far from being put at any competitive disadvantage by the Tribe's cigarette tax, Mr. Matheson and his customers have exactly the same tax burden as other retailers licensed by the Tribe and their customers, and a substantially lower tax than do any retailers other than those licensed by the Tribe and their customers. The tax differential is ten dollars and higher, depending on the base price of the cigarettes. Affidavit of Scott, p. 3, §§ 6 & 7.

The basic arithmetic, as well as paragraph J on page 60 of the Complaint, demonstrates plaintiffs' real motivation: they do not want their sale or purchase of cigarettes to be taxed at all.[5]

SUMMARY OF ARGUMENT

The Complaint merits dismissal for two reasons. First, Mr. Matheson litigated and lost, in two earlier cases, the issue of the Tribe's sovereign immunity in the context of the claims plaintiffs make here. Although Mr. Matheson has tried to avoid the *res judicata* effect of those actions by adding a new plaintiff in each subsequent lawsuit, that step is unavailing. All of the plaintiffs are in privity with each other, and therefore bound by the earlier rulings, for the purpose of their attack on the Tribe's immunity.

Second, the Tribe's sovereign immunity from suit bars the case. The Complaint does not allege facts demonstrating any waiver of or exception to that immunity, including the

[5] The irony presented by this case is that if the plaintiffs convince the courts to invalidate the Cigarette Tax Agreement, their tax advantage will disappear and, far worse, they will be faced with criminal prosecution under the federal Contraband Cigarette Trafficking Act noted above, a statute that includes time in federal prison as a potential penalty. *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995).

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

protection given by that immunity to Tribal officials. Plaintiffs arguments in that regard are incorrect as a matter of law. Indian tribes have authority to tax purchases of cigarettes by non-Indian customers from tribal and tribal member businesses, and the Tribal Cigarette Code does not violate federal antitrust law.

ARGUMENT

Introduction

A motion to dismiss is an established method for disposition of cases involving Indian tribes' immunity from suit. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 53, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Lewis v. Norton,* 424 F.3d 959, 961 (9th Cir. 2005); *Pan Am. Co. v. Sycuan Band of Mission Indians,* 884 F.2d 416, 418 (9th Cir. 1989). As this Court noted in *AT&T Communications v. Central Puget Sound Reg'l Transit Auth.*, 2008 WL 2790228, Sl.Op. 3 (W.D.Wash. 2008), "Motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory," citing *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). Section II, below, will demonstrate that plaintiffs' allegations, even if proven, as a matter of law would not overcome the Tribe's immunity.

I. The Sovereign Immunity of Indian Tribes Divests the Court of Jurisdiction Over the Tribe and Tribal Officials

A. Rulings on Sovereign Immunity in Their Earlier Cases Are Binding On the Plaintiffs Under the Principle of *Res Judicata*

In two earlier cases, the plaintiffs litigated the issue of whether the Tribe's sovereign immunity bars suit involving the same claims they assert here. Both the Washington state and Puyallup Tribal court systems ruled that sovereign immunity indeed bars the suits. The

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

principle of *res judicata* therefore resolves against the plaintiffs the sovereign immunity issue presented by this motion.

The legal principle *res judicata* now covers both claim and issue preclusion, simplifying a formerly "confusing lexicon" that used two different terms. *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008). The principle bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment… ." *New Hampshire v. Maine,* 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

The instant case meets the three requirements spelled out in *Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)[6] for application of *res judicata*: (1) the issue presented in this motion (sovereign immunity) is the same one resolved in *Matheson v. Gregoire* and *Matheson v. Wright*; (2) neither the facts nor the law has changed since the rulings in those cases; and (3) this case does not fall within any of the three exceptions to the doctrine. The first exception is for cases involving

> unmixed questions of law in successive actions involving substantially unrelated claims…. Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate.

440 U.S. at 162. The instant case involves precisely the same subject matter and the same claims as plaintiffs' two earlier cases. This motion presents the same issue – the Tribe's sovereign immunity – decided against the plaintiffs in those cases.

[6] We cite in this Memorandum two cases with the same name: *Montana v. United States*. The 1979 case cited at this point deals with the principle of *res judicata*. We will refer to that case by the shorthand "*Montana – res judicata*." Later in this brief we discuss a 1980 case by the same name dealing with the issue of tribal jurisdiction over non-Indians. We will refer to that case as "*Montana – tribal jurisdiction*."

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

The second exception is for a litigant who goes to federal court but is "compelled, without his consent . . ., to accept a state court's determination of those claims." *Ibid.* That is not the situation here; plaintiffs chose state court (and then Puyallup Tribal Court) of their own volition.

> Considerations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court.

Ibid. Plaintiffs chose to litigate in state and tribal courts; they do not qualify for this exception.

The third exception is for cases that did not provide "a full and fair opportunity" to litigate claims. *Id.* at 164. Plaintiffs here have aired their arguments on sovereign immunity at the trial and appellate levels of two different court systems. Their complaints in those cases included the antitrust claim that they characterize as the heart of the instant case. This factor is thus no basis for an exception to *res judicata*.

Mr. Matheson is undoubtedly seeking to avoid application of *res judicata* when he adds a new plaintiff, as he did in the Tribal Court proceeding and has done here. That attempt is unavailing. "Even when the parties are not identical, privity may exist if there is substantial identity between parties, that is, a sufficient commonality of interest." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003). *Accord, Headwaters, Inc. v. U.S. Forest Service*, 382 F.3d 1025, 1030 (9th Cir. 2004); *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997). The courts have thus applied the doctrine in appropriate circumstances even when there is no family, business, or contractual relationship between the two parties. *Shaw v. Hahn*, 56 F.3d 1128, 1131 (9th Cir. 1995).

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

Plaintiffs Lanphere and Miller are, according to the Complaint, customers who purchased cigarettes from Mr. Matheson's business. As such, their interests in overcoming the Tribe's sovereign immunity are not only similar but identical to Mr. Matheson's and to each other's. If either Mr. Matheson or his customers were allowed to evade *res judicata* simply by finding another new customer for each lawsuit, there would be no end to litigation; his business undoubtedly has hundreds, probably thousands of customers.

Privity will be found in this kind of case "where the interests of the non-party were adequately represented in the earlier action[.]" *Pedrina v. Chun,* 97 F.3d 1296, 1301-02 (9th Cir.1996). That test is met here. Mr. Matheson had every incentive to contest vigorously the issue of sovereign immunity, just as Ms. Lanphere did in the second case and Mr. Miller here. He made all of the claims in the earlier cases that are asserted here. The two customers have the same counsel here that Mr. Matheson had in the earlier cases suggesting that they consider their interests to have been adequately represented in the earlier cases.

The reasoning and policy that underlie *res judicata* resonate loud and clear in this case. The expense and vexation of dealing with the plaintiffs' repeated attempts to re-litigate the same issue is a compelling reason to put this case to rest. There is no reason a third court system should repeat the thorough job done by the first two.

> Knowingly refiling a decided action under another party name not only wastes scarce judicial resources but also shows corrosive disrespect for the finality of the decision. Were we to hold otherwise, groups would be free to attack a judgment *ad infinitum* by arranging for successive actions leaving the [defendant's authority] perpetually in flux.

Headwaters, Inc., supra, 382 F.3d at 1031.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

B. Indian Tribes Are Immune From Suit

In addition to counseling dismissal based on *res judicata*, the earlier cases correctly decided the issue of sovereign immunity. Longstanding case law is clear and consistent: Indian tribes are immune from suit in the same manner as other sovereign governments. *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58; *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Suit against a tribe is barred unless the tribe has clearly and explicitly waived its immunity. To be effective, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo, supra*, 436 U.S. at 58; *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). The doctrine applies whether the Tribe's activity under scrutiny is governmental or commercial and whether it took place within or outside its Reservation boundaries. *Kiowa, supra*, 523 U.S. at 760.

As we will discuss below, the Tribe has not waived its immunity. This action is therefore barred by the Tribe's sovereign immunity.

C. The Tribe's Immunity Bars Suit Against Tribal Officials

A suit filed against a tribal official acting in his official capacity is in effect against the tribe and is also barred by the tribe's immunity unless the official acted outside the scope of his authority. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 728 (9th Cir. 2008); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1984), *cert. denied*, 467 U.S. 1214 (1984); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981). The same rule applies to other sovereigns. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

The courts are particularly careful not to allow suit against a government official where the relief sought is against the government itself or where the result of the case, if the plaintiff prevails, would be to require action by the government. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *Imperial Granite Co., supra,* 940 F.2d at 1271. The reason for that scrutiny is to ensure that a plaintiff is not circumventing a tribe's sovereign immunity by naming an individual as a defendant in order to accomplish the same result that would be barred in a suit against the government.

> In … such [a] case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual office. If it is, then the suit is barred … because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Larson, supra, 337 U.S. at 688.

The Tribal officials named in this case are the Tribal Council Chairman and the CEO of the Tribe's economic development corporation. (The plaintiffs may have intended to name the Cigarette Tax Administrator, as well.) Those officials act in their official capacities when they enact or collect the Tribe's cigarette tax. They are therefore protected by the Tribe's immunity. The Complaint suggests that collecting the Tribal cigarette tax from non-Indian customers of Mr. Matheson's business is an act beyond the Tribe's authority and is in violation of federal law, thus creating an exception to the protection afforded to Tribal officials by the Tribe's immunity. As we will discuss in Section II of this Memorandum, however, the U.S. Supreme Court has found that taxation to be fully within Indian tribes' authority and not in violation of federal law. The Tribal tax thus does not create an exception to the Tribe's immunity.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

It is not at all clear why Chad Wright, the CEO of the Tribe's wholly-owned economic development corporation, is named as a defendant or what allegations are being made against him. None of the relief requested in the Complaint is sought against him. He has no role in setting or administering the Tribal tax. The corporation simply pays and then collects the same Tribal tax the plaintiffs deal with. As a result, the facts here fit the principles established in the cases cited above. As the Ninth Circuit held in *Cook, supra*,

> [h]ere, Cook has sued [tribal officials] in name *but seeks recovery from the Tribe* [and he] cannot circumvent tribal immunity through a mere pleading device. Accordingly, we hold that tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority.

548 F.3d at 718 (emphasis added; citation and internal punctuation omitted). *See also Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

II. Plaintiffs Can Demonstrate Neither a Waiver of Nor an Exception to the Tribe's Immunity From Suit

Plaintiffs submit in their Complaint, as they did in their earlier cases, that *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), leaves the Tribal officials outside the protection of the Tribe's immunity, suggesting that the Tribe acted in excess of its authority or in violation of federal law. The argument is not persuasive. The Tribal officials should therefore be dismissed from this case as well.

A. The Tribe Has Authority to Tax Purchases of Cigarettes From Tribal Member-Owned Businesses on Trust Land on the Reservation, Even When the Purchaser Is a Non-Indian

Plaintiffs argue that imposing its cigarette tax on non-Indian purchasers exceeds the Tribe's authority. They are incorrect – Indian tribes have unquestioned authority to impose

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

and collect taxes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985).

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services.

Merrion, supra, 455 U.S. at 137. It is squarely within the Puyallup Tribe's authority to levy the cigarette tax challenged in this case.

That authority extends to taxation of purchases that non-Indians make from Tribal members on trust land on the Reservation. The Supreme Court decided precisely that issue in *Colville, supra*.

> [T]he State argues that the … Tribes have no power to impose their cigarette taxes on nontribal purchasers. We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain … [subject to two exceptions not relevant here].

447 U.S. at 152. The Court upheld the very tax the Puyallup Tribe imposes here.

Plaintiffs have argued in their earlier cases that *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001), changed that legal principle. The Supreme Court there disallowed a tribal tax imposed on customers of a non-Indian business operated on non-Indian fee land. *Id.*, 532 U.S. at 647. But the Court very explicitly did not overrule tribes' authority to tax non-Indians in appropriate circumstances. The opinion distinguished *Merrion*, where the Court had upheld a tribal tax on non-Indians, pointing out that

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

> *Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to " 'transactions occurring on *trust lands* and significantly involving a tribe or its members.' "

Id., 532 U.S. at 653 (emphasis in original), quoting *Merrion* (which in turn was quoting *Colville*).

The customers in *Atkinson* had dealings only with a business owned by non-Indians on fee land. *Id*. at 654. The Court therefore held that imposing the tax was beyond the tribe's authority. *Atkinson* reconfirmed, however, the holding in *Colville* that tribes can tax non-Indian customers who make purchases on trust land. Accordingly, *Merrion* and *Colville* are still good law.

Plaintiffs have also argued previously that the Tribe's jurisdiction is defeated by the test in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("*Montana – tribal jurisdiction,*" as indicated in footnote 7, *supra*). In that case the Supreme Court held that tribes generally do not have jurisdiction over non-Indians on fee land within an Indian reservation, subject to two exceptions. Even if *Montana – tribal jurisdiction* were the relevant test on trust land, the Tribe would still have authority to tax sales to non-Indian customers because the purchase of goods from a Tribal member on trust land on an Indian reservation falls squarely within the first of the exceptions the Supreme Court listed in *Montana – tribal jurisdiction.*

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

450 U.S. at 566. The Puyallup Tribe is squarely supported by that test when it applies its cigarette tax to purchases made by non-Indians from Mr. Matheson's business. *Montana – tribal jurisdiction* identified taxation as one form of authority a tribe can exercise under this

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

exception; it gave "commercial dealing" as an example of a qualifying consensual relationship; and it indicated that commercial dealings with tribal members satisfy the test, and it cited *Colville* as an example of taxing authority that falls within the exception.

The Supreme Court reinforced that conclusion yet again in *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). The Court observed that, "*Montana's* list of cases fitting within the first exception … indicates the type of activities the Court had in mind …" *Id*. at 457. The Court then summarized the four cases it had given as examples in *Montana*, one of which, as noted, is *Colville*. The *Strate* opinion then summarized *Colville* by noting that,

> tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status".

Strate, supra, 520 U.S. at 457. In short, the Supreme Court has emphasized that the purchase of cigarettes by a non-Indian from a tribe or tribal member's business establishes a consensual relationship for the purpose of the *Montana* exception.

B. <u>The Tribe's Ordinance and Actions Do Not Violate Federal Antitrust Law</u>

A second contention plaintiffs offer in hopes of avoiding sovereign immunity is that the Tribe's actions violate federal antitrust law, thus taking Tribal officials outside the protection of the Tribe's immunity. The Sherman Act, 15 U.S.C. § 1 et seq., prohibits actions "in restraint of trade or commerce among the several States," or that attempt "to monopolize any part of [that] trade or commerce." The actions of the Tribe and its officials, however, do not violate that statute for several reasons: the Act (1) does not confer standing on these plaintiffs, (2) is not applicable to actions of sovereign governments and their officials, and (3)

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

even if applicable here would not proscribe the Tribal Cigarette Code provision plaintiffs challenge.

1. Plaintiffs Do Not Have Standing to Raise a Sherman Act Claim

The first obstacle to plaintiffs' Sherman Act claim is that they do not have standing to pursue it. A private party has that standing only if the injury it has suffered or is threatened with goes beyond the mere financial impact of a tax or fee but rather is "loss or damage caused by the alleged violation of the antitrust laws," and "is the type [of injury] the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986). A plaintiff has standing "only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

Here, the impact to the plaintiffs of section 470 of the Tribe's Cigarette Code is nothing that the Sherman Act prohibits. The provision simply ensures that retailers, who have already paid the Tribal cigarette tax to the wholesaler in order to obtain their inventory, pass that tax along to the retail customer. All retailers collect and all customers pay the same tax. That requirement in no way reduces competition or burdens one retailer or customer more than another. In short, it does not create the kind of injury the antitrust laws are designed to prevent.

A relevant example of the standing problem is *Grand River Enterprises Six Nations v. King*, 2011 WL 924247 (S.D.N.Y. Mar. 17, 2011). The court there dismissed for lack of standing, based on *Cargill* and *Atlantic Richfield, supra*, the claim of a cigarette distributor

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

challenging a fee brought about by the Master Settlement Agreement (MSA) reached by most states and the larger tobacco companies. The court in *Grand River* ruled that because a higher fee brought about by the settlement is not the kind of injury the antitrust laws address, the plaintiff did not have standing to litigate such a claim. The court pointed out that the higher cost was one imposed on all of the wholesalers' competitors as well and thus did not create any competitive disadvantage.

The same is true of the Puyallup Tribe's cigarette tax and its requirement that retailers pass the tax along to purchasers. Plaintiffs are placed at no competitive disadvantage and thus have no standing under federal antitrust laws.

2. The Sherman Act Does Not Apply to Actions of Sovereign Governments

Case law long ago established that the Sherman Act does not apply to actions taken by sovereign state governments that would, if carried out by a private party, be prohibited restraints of trade. *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Hoover v. Ronwin*, 466 U.S. 558, 567-568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (2007); *Sanders v. Brown*, 504 F.3d 903, 915 (9th Cir. 2007), *cert. denied*, 553 U.S. 1031, 128 S.Ct. 2427, 171 L.Ed.2d 229 (2008). The reasoning that led the Supreme Court to that conclusion supports the same result for Indian tribes, also sovereigns: the Sherman Act does not apply.

The Court need not resolve the Supreme Court's two unreconciled versions of the test for state immunity, *Sanders v. Brown, supra*, 504 F.3d at 915-916, because the provision of Tribal law challenged by plaintiffs here is immune under either version. The Ninth Circuit seems to prefer the more straightforward version found in *Hoover v. Ronwin*, 466 U.S. 558,

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

567-568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (2007) (citing *Parker v. Brown, supra*, 317 U.S. at 351):

> Thus, under the Court's rationale in Parker [v. Brown, supra], when a state legislature adopts legislation, its actions constitute those of the State, [citation omitted] and ipso facto are exempt from the operation of the antitrust laws.

"[A] state's own acts in the antitrust area are always immune…" *Sanders v. Brown, supra* 504 F.3d at 915-916. *See also Fisher v. City of Berkeley*, 475 U.S. 260, 267-68, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986). As long as the restraint in question is the unilateral act of the government, it is immune from antitrust law.

The alternative approach, spelled out in *California Retail Liquor Dealers Ass'n, v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), gives a two-prong test for determining when state immunity applies:

> The anticompetitive policy not only must be (1) "clearly articulated and affirmatively expressed as state policy," but also must be (2) "actively supervised by the state itself." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* (*Midcal)*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

Sanders v. Brown, supra, 504 F.3d at 915. The Ninth Circuit speculated that the most logical way of reconciling the two is application of the 'active supervision' requirement only in situations involving private action that a state is adopting or regulating, a so-called "hybrid restraint." *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 890 (9th Cir. 2008). But if "the potential anti-competitive effect is not the result of private pricing or marketing decisions, but the logical and intended result of the statute itself" then the action is unilateral, the 'active supervision' requirement does not apply, and the Sherman Act is not violated. *Ibid*.

As we will see in a moment, these formulations need not be resolved or reconciled because the Tribe's Cigarette Code is exempt under either phrasing of the test. First, however,

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

we turn to the threshold issue of whether state immunity from antitrust law applies as well to actions of Indian tribes. The Supreme Court found state immunity by interpreting Congressional intent in the Sherman Act:

> In a dual system of government in which … the states are sovereign, … an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

Parker v. Brown, supra, 317 U.S. at 352.

The Court's reasoning applies with equal force to actions of sovereign Indian tribal governments. Congress expressed no intention in the Sherman Act to make it applicable to tribes. Indeed, the importance of enabling states to pursue broader policies unconstrained by antitrust laws is equally important to Tribal governments. That conclusion is underlined when the Supreme Court indicates, as it did in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), that, "[m]unicipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." The strong suggestion is that sovereign status carries with it immunity from the Sherman Act.

Section 470 of the Puyallup Tribe's Cigarette Code,[7] the subject of plaintiffs' challenge, satisfies the test for immunity under either of the Supreme Court's enunciations. It is a unilateral action of the Tribal government; it does not ratify or even involve action by any private party. *Fisher v. City of Berkeley, supra.* It also satisfies the two requirements of

[7] "The retail sale price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of the cigarette tax imposed on the cigarette." Tribal Codes, 3.32.470.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

California Retail Liquor Dealers Ass'n, *supra*: it is "articulated and affirmatively expressed as Tribal policy," a test satisfied by legislative enactments, *Sanders v. Brown*, *supra*, 504 F.3d at 915; it satisfies the second prong of the test as well by involving not only 'active supervision' by the Tribal government, but in fact action only by the government; the Tribe is not ratifying or involving private action in any way.

The District Court for the Eastern District of Washington recently decided a case that is instructive here. In *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 717 F. Supp. 2d 1159 (E.D. Wash. 2010), the court considered a Sherman Act challenge to state law limiting the number of hospitals allowed to perform a certain surgical procedure. Even though the law created a monopoly, an action that would violate the Sherman Act if carried out by a private party, the court held that the unilateral action of the State was not subject to scrutiny under the Sherman Act. *Id.* at 1164.[8]

Enactment of the Tribe's cigarette tax by the Tribal Council and enforcement of that tax by Tribal officials are actions of the government in its sovereign role. They are therefore beyond the reach of the Sherman Act under the Supreme Court's reasoning in *Parker v. Brown*.

[8] Even if the 'active supervision' requirement were applied to the Tribe's Cigarette Code, the enactment would pass the test. Government action has failed that test only when a state is simply authorizing private parties to determine and carry out the anti-competitive policy, the state is not immune. *California Retail Liquor Dealers Ass'n, supra; 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-345, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987). State actions satisfy that test, however, when state agencies are much more involved in conducting and regulating the activity. *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978).

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

3. Section 470 of the Tribe's Cigarette Code Would Not Constitute an Antitrust Violation Even if the Sherman Act were Applicable

A third flaw in plaintiffs' antitrust argument is that their allegations, even if proven, do not state a violation of the Sherman Act. Plaintiffs characterize section 470 of the Cigarette Code as a price-fixing provision. But the only restriction it contains is that retailers cannot sell cigarettes at a price lower than the cost of the cigarettes including the Tribal cigarette tax. The provision has one purpose only: to help guard against retailers attempting to evade their responsibility to collect the Tribal cigarette tax. The need for such protection is graphically illustrated by the Complaint in this case where, as noted, Mr. Matheson advertises himself as someone who seeks to avoid the tax entirely.

Although vertical minimum price requirements were at one time deemed to be *per se* violations of the Sherman Act, that standard recently changed. The Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007), overruled its previous decisions on the subject and held that, although some practices remain *per se* violations of the Act, vertical agreements to set minimum prices are not and must instead be analyzed by a "rule of reason." The relevant inquiry is whether the system or practice at issue creates an unreasonable restraint on trade:

> Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

551 U.S. at 885 (quoting *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)).

Section 470 of the Puyallup Tribe's Cigarette Code does not create any restraint on competition, much less an unreasonable one. Retailers are free to obtain their inventory from

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

any licensed wholesaler they choose and negotiate whatever price they are able. The minimum price at which they can sell the cigarettes thus varies depending on what kind of price the retailer negotiates with the wholesaler. Again, that section has only one purpose – to ensure that the retailer collects the Tribal tax. It does not establish a rigid set of prices at which cigarettes must be sold, the kind of restraint that has been held violative of the Sherman Act when carried out by private parties. *California Retail Liquor Dealers Ass'n, supra*. In short, even if the pricing requirement in Section 470 were created or imposed by private parties rather than by the Tribe in its sovereign capacity, it would not constitute a violation of the Sherman Act because it does not create an unreasonable restraint on competition.[9]

CONCLUSION

The Puyallup Tribe respectfully requests that the Court dismiss this action for want of jurisdiction, based on the sovereign immunity of the Tribe and its officials. A proposed order is filed herewith.

DATED this 7th day of July, 2011.

[9] It is true that the Puyallup Tribe engages to a limited extent in the retail sales of cigarettes, as plaintiffs complain. It is not clear, however, why they feel that puts them at any disadvantage or, more to the point, how that could conceivably constitute a violation of the Sherman Act. The Tribe pays to wholesalers and collects from customers the full amount of the Tribal cigarette tax, just as its licensees are required to do. Affidavit of Wright, p. 2, § 2. Section 470 of the Code gives the Tribe no price advantage whatsoever.

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877

Respectfully submitted,

John Howard Bell

Andrea D. George

John Howard Bell, WSBA #5574
Andrea D. George, WSBA #36764
Attorneys for defendants Puyallup Tribe of Indians and Herman Dillon, Sr.

James H. Jordan, Jr.

James H. Jordan, Jr., WSBA #15796
Miller Nash LLP
james.jordan@millernash.com
(206) 622-8484
Attorneys for Chad Wright

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties required to be served in this case.

By: s/John Howard Bell
John Howard Bell, WSBA #5574

LAW OFFICE, PUYALLUP INDIAN TRIBE
3009 E. PORTLAND AVE.
TACOMA, WA 98404
(253) 573-7877