

No. 10-30185, 10-30186, 10-30187, and 10-30188
[NO. CR09-191MJP, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

C. MARVIN WILBUR, SR.,
JOAN WILBUR,
APRIL M. WILBUR, and
BRENDA WILBUR

Defendant-Appellants.

PLAINTIFF-APPELLEE CONSOLIDATED ANSWERING BRIEF

Appeal from the United States District Court
for the Western District of Washington at
The Honorable Marsha J. Pechman
United States District Judge

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I. PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In this consolidated appeal, Defendant-Appellants, C. Marvin Wilbur, Sr., Joan Wilbur, April M. Wilbur, and Brenda Wilbur, seek reversal of the district court's order denying their motion to dismiss the Indictment, as well as the district court's restitution order. The Indictment charged the Wilburs with a variety of crimes — including money laundering, conspiracy to violate the Contraband Cigarette Trafficking Act (CCTA) and substantive violations of that statute — all arising out of the Wilburs' refusal to comply with the Washington State cigarette tax statutes and, later, the Swinomish Tribal Tobacco Tax Code. In particular, during the eight-year period from 1999 through 2007, the Wilburs used a series of trusts to own and operate a retail cigarette sales business known as the Trading Post at March Point (the Trading Post). This business was located on trust land within the Swinomish Indian Reservation. From that business, the Wilburs sold millions of unstamped cigarettes to the general public and refused to collect any applicable cigarette excise taxes — either under Washington law or the Swinomish tribal statutes — thereby depriving Washington State of over \$10.9 million in taxes and achieving handsome profits for themselves.

Over thirty years ago, the Supreme Court held that, as an excise tax imposed on cigarette purchasers, Washington State cigarette taxes apply to on-reservation sales of cigarettes to both non-Indians and non-member Indians. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Nonetheless, the Wilburs contend they were exempt from state tax laws and, thus, were not engaged in the trafficking of contraband cigarettes in violation of federal law. They are incorrect. The Wilburs' claims to a general exemption from state tax law are either foreclosed by *Colville*, or else are premised on a faulty construction of the relevant Washington State cigarette tax statutes and the resultant tax contract between the Swinomish Tribe and Washington State.

The Wilburs also assert they enjoy a treaty-based right to trade tobacco free of any state tax laws, but this argument is foreclosed by this Court's decision in *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), and is also predicated on a faulty construction of the treaty. Finally, the Wilburs' claim that Washington State's limited assumption of Public Law 280 jurisdiction exempts them from the State's tax laws is foreclosed by the Supreme Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). Accordingly, the Court should affirm the

Wilburs' convictions, following their conditional guilty pleas for conspiracy to traffic in contraband cigarettes and, for two defendants, the related conspiracy to launder monetary funds derived from the trafficking activities. Also, because the Wilburs' attack upon the district court's restitution order is dependent upon their ill-founded attack upon the Indictment, the court's restitution order should likewise be affirmed.

II. STATEMENT OF ISSUES

- A. Did the district court properly find that when Washington State entered into a Tax Contract with the Swinomish Tribe, the State retroceded its taxation authority over only those cigarette sales that conformed to the contract's requirements?
- B. Did the district court properly deny the Wilburs' motion to dismiss claiming that they were exempt from state taxation under the Treaty of Point Elliott, where the taxation scheme places the tax burden on the cigarette purchasers and the Supreme Court has already upheld Washington's right to tax reservation cigarette sales to nonmembers and non-Indians?
- C. Did the district court properly deny the defendants' motion to dismiss where the Supreme Court has already recognized that a state's authority to tax on-reservation cigarette sales to nonmembers and non-Indians is neither derived from, or dependent upon, Public Law 280?
- D. Where the rights secured by the Treaty of Point Elliott are held communally by the Swinomish and other signatory tribes, may a group of individuals comprised of both members and nonmembers of a signatory tribe invoke a communally-held Treaty right as a defense to a criminal prosecution?
- E. Did the district court properly find that the Contraband Cigarette Trafficking Act is not a restriction on trade in cigarettes and that

compliance with Washington's cigarette tax scheme does not infringe on rights secured by the Treaty of Point Elliott?

- F. Did the district court properly determine the tax loss and order restitution based on the number of cigarettes sold during the duration of the conspiracy, since all of the Wilburs relevant cigarettes sales during the period from October 2003, to May 2007, failed to conform with the Tax Contract's requirements?

III. STATEMENT OF JURISDICTION

The Wilburs appeal their convictions and sentences following the entry of conditional pleas of guilty. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291, and 18 U.S.C. § 3742. The Wilburs each were sentenced on June 16, 2010, CR_166-168, 170,¹ and the judgments were entered on that date. CR_155-158. The Wilburs timely appealed. CR_164, 169, 171, 172. *See* Fed. R. App. P. 4(b).

IV. BAIL STATUS

The Wilburs are each on bond pending appeal.

¹ "CR_" refers to the district court clerk's docket; "ER_" refers to Appellants' Excerpts of Record; and "SER_" refers to the government's Supplemental Excerpts of Record.

V. STATEMENT OF THE CASE

A. Statement of Procedure.

On June 10, 2009, the Wilburs were each charged in a multi-count Indictment with a conspiracy to traffic in contraband cigarettes, in violation of 18 U.S.C. §§ 371 and 2342(a), and substantive violations of the Contraband Cigarette Trafficking Act (“CCTA”), in violation of 18 U.S.C. § 2342(a). CR_1. Ultimately, a Second Superseding Indictment (“Indictment”) was returned on October 29, 2009. CR_54. The Indictment charged the same conspiracy count, modified the substantive CCTA counts, added thirteen counts of Money Laundering, based on either promoting contraband cigarette trafficking, or concealing the proceeds of that crime, and one count of Conspiracy to Commit Money Laundering (charging only C. Marvin Wilbur and Joan Wilbur). Not all defendants were charged in each count. Relevant to this appeal, the Indictment charged that beginning on July 28, 1999, and continuing until May 15, 2007, the Wilburs engaged in a conspiracy to traffic in contraband cigarettes. ER_258-66. The Indictment further alleged that the Wilburs sold millions of unstamped cigarettes to the public, which resulted in a \$10,984,565 tax loss to the State of Washington. ER_263-64.

The Wilburs moved to dismiss the Indictment claiming that because of the Tax Contract between Washington State and the Swinomish Tribe and

related statutory provisions, there was no state law predicate for the CCTA charges and, thus, a conviction under the CCTA was legally impossible.

CR_43. The Wilburs also argued that dismissal was warranted because the State's tax requirements do not apply to on-reservation sales of cigarettes, CR_86, and that this prosecution violated their right as Swinomish tribal members (or agents of members) to trade free of taxation based on the Treaty of Point Elliott, a treaty signed by the Swinomish Tribe in 1855. CR_45.

On January 22, 2010, the district court heard argument on these motions and held an evidentiary hearing on the treaty-related motion. CR_116. These motions were denied by written order dated February 4, 2010. CR_123, ER_732.

On February 12, 2010, the Wilburs entered conditional guilty pleas. CR_127-130. Each defendant pleaded guilty to conspiracy to traffic in contraband cigarettes as charged in Count One of the Indictment. In addition, C. Marvin and Joan Wilbur each pleaded guilty to conspiracy to launder monetary instruments as charged in Count Nineteen of the Indictment. CR_127-130. In support of their guilty pleas, each defendant admitted participation in a conspiracy to traffic in contraband cigarettes during the period from July 1999, to May 2007, and acknowledged that some 792,981 cartons of unstamped cigarettes were sold from the Trading Post for which no

tax was collected. ER_764, 777-78, 791, 804-05. Pursuant to Fed. R. Crim. P. 11(a)(2), the Wilburs specifically reserved the right to appeal the district court's order denying their pretrial motions to dismiss the Indictment.

The Wilburs were sentenced on June 16, 2010. CR_166-168, 170. The district court rejected the Wilburs' arguments that for purposes of calculating the loss amount and therefore restitution. The pertinent time period was limited to the period from March 27, 2005, to May 15, 2007, when the Trading Post was unlicensed by the Swinomish Tribe. SER_89. The court found the applicable tax loss to be \$10.9 million — the total loss incurred during the eight-year conspiracy — and ordered restitution in the same amount. SER_90. C. Marvin Wilbur was sentenced to twelve months and one day of imprisonment. Joan Wilbur received a sentence of five months of imprisonment. April and Brenda Wilbur were each sentenced to serve one day of imprisonment. This appeal followed.

B. Statutory Framework.

This appeal addresses the intersection of the CCTA, the Washington State cigarette excise tax statutes, and the terms of a Tax Contract that the State negotiated in 2003 with the Swinomish Indian Tribe. To provide context

for the factual statement and the arguments that follow, this overview of the statutes and regulatory scheme is included here.²

1. *The Contraband Cigarette Trafficking Act.*

As relevant to this appeal, the CCTA makes it “unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.” 18 U.S.C. § 2342(a). This statute was enacted to assist the states in enforcing their cigarette tax laws. *See* S. Rep. 95-962, 1978 U.S.C.C.A.N. 5518. To accomplish this purpose, the CCTA defines “contraband cigarettes” as a specified quantity of cigarettes that “bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp.”³ 18 U.S.C. § 2341(2). Prior to March 9, 2006, the threshold quantity of cigarettes was 60,000. *See* 18 U.S.C. § 2341(2) (2006). Thereafter, that threshold quantity was lowered to 10,000. *See* 18 U.S.C. § 2341(2). Since the CCTA defines “contraband cigarettes” by reference to state law, Washington law governs the question whether the cigarettes at issue

² Copies of each of the relevant statutes and regulations are included in the addendum to this brief.

³ The statute excludes from the definition of “contraband cigarettes” cigarettes possessed by certain specified individuals. *See* 18 U.S.C. § 2341(2)(A)-(D). These exemptions are not relevant to this appeal.

constitute “contraband.” *See United States v. Smiskin*, 487 F.3d 1260, 1263 (9th Cir. 2007).

2. *The Washington State Cigarette Taxation Scheme.*

a. Overview.

Washington imposes an excise tax on all cigarettes sold, used, consumed, handled, possessed, or distributed within the state. RCW § 82.24.020. Washington’s tax scheme is enforced by stamps that must be affixed on every package of cigarettes to reflect payment of the applicable cigarette tax (as a precollection of the taxes subsequently obtained from the purchaser), or the tax-exempt status of the cigarettes. RCW §§ 43.06.455(4), 82.24.030(1); *see also* WAC § 458-20-186(301)(a) (2007).⁴ In short, every package of cigarettes sold at retail in Washington must bear an appropriate stamp, and retailers and consumers are specifically prohibited from possessing unstamped cigarettes. RCW §§ 82.24.050. Such unstamped cigarettes are considered “contraband” under Washington law, RCW § 82.24.120, and in sufficient quantities, are also “contraband cigarettes”

⁴ The relevant Washington Administrative Code provisions have been amended since the period charged in the conspiracy. The government has included a copy of each administrative code provision cited in this brief that was in effect during the period of the charged conduct.

under the CCTA. *See, e.g., United States v. Baker*, 63 F.3d 1478, 1486-87 (9th Cir. 1995).

The only persons authorized to possess cigarette stamps are licensed wholesalers. RCW § 82.24.030(3). Wholesalers are also the only persons authorized to possess unstamped cigarettes, since wholesalers are required to affix the stamps prior to sale. RCW §§ 82.24.030(3); 82.24.040.

Washington law also regulates the transportation of unstamped cigarettes. With a single exception not applicable here, anyone who transports or causes the transportation of unstamped cigarettes into the State must first provide notice regarding the shipment to the Washington State Liquor Control Board (WSLCB).⁵ RCW § 82.24.250; WAC § 458-20-186(501)-(506). The appropriate stamp must then be affixed to the packages of cigarettes within a reasonable time period after the cigarettes enter the state. RCW § 82.24.250(7)(c), (7)(d).

From July 1999, to December 31, 2001, Washington imposed a tax of \$8.25 on every carton of cigarettes sold. From January 1, 2002, to June 30,

⁵ The only persons exempt from this prenotification requirement are licensed wholesalers transporting cigarettes in their own vehicles. RCW § 82.24.250(1)(a); WAC § 458-20-186(501) (2007).

2005, the tax was \$14.25 per carton sold. From July 1, 2005, to May 15, 2007, the tax was \$20.25 per carton sold. ER_763, 777, 790, 804.

b. Indian Cigarette Sales.

As noted above, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158-161 (1980), the Supreme Court held that Washington State cigarette taxes apply to on-reservation cigarette sales made to non-Indians or non-members of the particular tribe. Consistent with *Colville*, under Washington law, cigarettes sold by an Indian tribal organization to an enrolled member of that tribe are exempt from taxation.

RCW § 82.24.020(6). However, such packages of cigarettes must bear an “exempt” stamp. WAC § 458-20-192(9)(a)(ii).

Moreover, Indian tribal organizations may transport unstamped cigarettes into the state, and purchase unstamped cigarettes for delivery into the state, but when doing so must still comply with Washington’s prenotification requirement. RCW § 82.24.250(7)(c), (7)(d); *see also Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175, 1178 (9th Cir. 2002). Unstamped cigarettes transported without the required prenotification — including cigarettes delivered to Indian retailers — are “contraband” under Washington law, RCW § 82.24.250(4);

WAC § 458-20-186(506) (2007), and, in sufficient quantities, are “contraband cigarettes” under the CCTA. *See, e.g., United States v. Fiander*, 547 F.3d 1036, 1039 (9th Cir. 2008).

3. *Cigarette Tax Contracts between Washington State and Indian Tribes.*

In 2001 and 2002, the Washington legislature authorized the governor to enter into agreements concerning cigarette tax collection, referred to as “cigarette tax contracts,” with a limited list of federally recognized tribes, including the Swinomish Tribe.⁶ RCW §§ 43.06.455 and 43.06.460.

Where the State enters into such a tax contract, the tribe is permitted to collect and retain the cigarette taxes for “essential government services.”

RCW § 43.06.455(8). The purpose of the contracts is to “provide a means to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance enforcement of the state’s

⁶ In the twenty years between the *Colville* decision and the Legislatures’ enactment of these tax contract statutes, Washington State repeatedly sought to enforce its cigarette tax laws through the CCTA on Indian business, commonly referred to as “smoke shops,” that were located on Indian Reservations but sold cigarettes to the public. *See, e.g., Fiander*, 547 F.3d at 1039; *United States v. Smiskin*, 487 F.3d 1260, 1263 (9th Cir. 2007); *Grey Poplars*, 282 F.3d at 1177-78; *United States v. Baker*, 63 F.3d 1478, 1486-87 (9th Cir. 1995). The legislation, in part, was designed to end the conflict with the tribes that often resulted. One stated purpose for this legislation was to further the “government-to-government” relationship between the State and the tribes. RCW § 43.06.450.

cigarette tax law, ultimately saving the state money and reducing conflict.”

RCW § 43.06.450. Cigarette tax contracts must meet the requirements of

RCW § 43.06.455.

Tax Contracts must be “in regard to retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country,” and must not permit cigarette sales to minors. RCW § 43.06.455(2). They can only apply to cigarettes sales by “Indian retailers,” a term defined as “(i) a retailer wholly owned and operated by an Indian tribe, (ii) a business wholly owned and operated by a tribal member and licenced by the tribe, or (iii) a business owned and operated by the Indian person or persons in whose name the land is held in trust.

RCW § 43.06.455(14)(b).⁷

The contracts must require that all cigarettes sold bear a traceable tribal stamp, affixed by means which assures precollection of the tax by wholesalers, and must limit the source of supply to specified wholesalers or manufacturers.

RCW § 43.06.455(4) and (5). Contracts must include “provisions for

⁷ Although RCW § 43.06.455(b)(14)(iii) includes this third definition of “Indian retailer” (a business owned and operated by the Indian person or person in whose name the land is held in trust”), as discussed in Section VI.A.5 below, the governor is not authorized to contract with respect to cigarettes sales by such persons. *See* RCW § 43.06.460. The governor is only authorized to contract with Indian tribes.

compliance, such as transport and notice requirements, inspection procedures, stamping,” recordkeeping and audit requirements, as well as dispute resolution procedures. RCW § 43.06.455(7) and (13).

The contracts “shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers,” and may exempt tribal members from paying the tribal tax. RCW § 43.06.455(3). The State’s contractual forbearance from collecting and imposing its cigarette tax is referred to as a “retrocession.” Under RCW § 43.06.455(3), where the State and a tribe have negotiated and signed a tax contract, the State gives up its taxing authority in exchange for the tribe’s agreement to collect an equivalent tribal cigarette tax and to use the proceeds from this tax for essential government services.

4. *The Swinomish Tribal Cigarette Tax Contract.*

On October 3, 2003, the Swinomish Indian Tribal Community and Washington State entered into a cigarette tax contract (“Tax Contract”). ER_55-60. By its terms, this Tax Contract is limited to “the retail sale of cigarettes by Tribal retailers.” ER_54, Part II(2). “Tribal retailer” is defined as “a cigarette retailer wholly owned by the Swinomish Tribe and located in Indian country or a member-owned smokeshop located in Indian country and

licensed by the Tribe.”⁸ ER_53, Part I(20). This definition is narrower than the definition of the term “Indian retailer” contained in the contract enabling statute, RCW § 43.06.455, because it omits section 14(b)(iii) regarding an Indian person operating on their trust land. To qualify as a “tribal retailer” under the Tax Contract, a retailer is required to be licensed by the Swinomish Tribe. ER_54, Part III(1)(c).

The Tax Contract also provides that “all cigarettes sold by the Tribal retailers shall bear a Tribal tax stamp.” ER_55, Part V(1)(a). Of importance to this appeal, the Tax Contract further states that for “all transactions that conform with the requirements of this Contract, such transactions do not violate state law, and the State agrees that it will not assert that any such transactions violate state law for purpose of [the CCTA].” ER_57, Part V(6). The State also agreed to “retrocede[] from its tax during the time this Contract is in effect.” ER_55, Part III(2)(e).

As provided for in the Tax Contract, the Swinomish enacted a tobacco tax ordinance which conformed to contract requirements.

⁸ The Tax Contract defines “Indian country” consistent with 18 U.S.C. § 1151. ER_52.

C. Statement of Facts.

C. Marvin Wilbur, Sr. and his wife, Joan Wilbur, are enrolled members of the Swinomish Tribe, who, together with other family members, owned and operated the Trading Post, a retail smoke shop. This business was located on land held in trust for C. Marvin Wilbur within the Swinomish Indian Reservation, near Anacortes, Washington. ER_259-60. The Trading Post purchased and sold approximately 792,981 cartons of unstamped cigarettes to the public from July 1999 through May 15, 2007. ER_764, 777-78, 791, 804-05.

The Wilburs conducted their retail cigarette business through several opaque trust entities, i.e., the Salish Trust,⁹ the Skagit Trust,¹⁰ and the Skagit Cigarette Sales Trust.¹¹ April and Brenda Wilbur, daughters-in-law of

⁹ The Salish Trust is a Massachusetts Trust organized under the laws of the State of Washington, dealing in cigarettes and doing business as “The Trading Post at March Point.” The grantor of the Salish Trust is Marvin Wilbur, Jr. (not Sr.) and among its trustees are Lenora Wilbur, Marvin Wilbur Jr., Michael Wilbur, Marvin Wilbur, and Joan Wilbur. ER_358. According to the Wilburs, “[t]he Wilbur Family collectively own and operate the Salish Trust.” ER_517.

¹⁰ The Skagit Trust was the consignee on multiple loads of unstamped cigarettes shipped to the Trading Post by Global Trading Co of Tampa, Florida. ER_459.

¹¹ The grantor of Skagit Cigarette Sales Trust is Lena Wilbur Cook and the Trustees are Michael J. Wilbur and Joan Wilbur. ER_360. In a civil

(continued...)

C. Marvin and Joan Wilbur,¹² worked at the Trading Post and were actively involved in the business operations. April Wilbur was responsible for ordering unstamped cigarettes and paying suppliers, and Brenda shared responsibility for paying cigarette suppliers and maintained the cigarette business' books. ER_763, 790. The Wilburs, the Trading Post, and the associated trust entities were not licenced cigarette wholesalers in Washington. ER_340.

From July 1999, through October 2, 2003, the Wilburs purchased 395,292 cartons of unstamped cigarettes from out-of-state wholesalers, which they sold to the public. ER_764, 778, 791, 805. The tax loss to the State associated with these purchases was approximately \$3.4 million. SER_30.

In 2003, C. Marvin and Joan Wilbur, and Marvin Wilbur, Jr., as trustee of Salish Trust, brought a federal lawsuit seeking to enjoin the State from entering into a tax contract with the Swinomish Tribe. ER_509-35. The Wilburs argued that requiring the Trading Post to collect tribal cigarette taxes equivalent to the State taxes imposed on nonmember sales would put the Trading Post out of business. ER_519-20, 527-28. The case was subsequently

¹¹(...continued)

forfeiture action, this trust claimed ownership of the cigarettes seized at the Trading Post on May 15, 2007. ER_451-55.

¹² It is undisputed that April and Brenda Wilbur are not Swinomish tribal members.

dismissed on jurisdictional grounds. *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005) (affirming dismissal on other grounds).

Nevertheless, the Wilburs continued to purchase and receive large shipments of unstamped cigarettes from out-of-state wholesalers, which they sold to the public. ER_341-51. From October 3, 2003 , through March 27, 2005, the Wilburs purchased at least 61,710 cartons of unstamped cigarettes with an associated tax loss of approximately \$879,367. ER_764, 778, 790, 805; SER_30. The Wilburs refused to purchase cigarettes from wholesalers approved in the Tax Contract, or packages of cigarettes to which Swinomish tribal stamps were affixed. As a result, there was no precollection of the tribal tax or remission of the tax to the Tribe. The Wilburs also refused to purchase State tax-stamped cigarettes, and thus, did not precollect and remit the State excise tax. Furthermore, no one provided notice to the WSLCB of the numerous shipments of unstamped cigarettes to the Trading Post. ER_764, 777, 791, 804.

In response to the Wilburs' continued failure to comply with the terms of the Tax Contract, in 2005, the Swinomish Tribe refused to renew the Trading Post's tribal tobacco license. ER385-86. Nevertheless, the Wilburs continued selling unstamped and untaxed cigarettes at a significant

competitive advantage because they did not collect any tax, which ranged from \$8.25 to \$20.25 per carton during the relevant periods.

In part at the request of the Swinomish Tribe, the trafficking of unstamped cigarettes at the Trading Post became the subject of a federal criminal investigation, which culminated, on May 15, 2007, in the execution of search warrants at the Trading Post and C. Marvin and Joan Wilbur's residence. During the search, agents seized approximately 3,600,820 contraband cigarettes contained in packaging without either Washington or Swinomish cigarette tax stamps.¹³ ER_371, 777. Agents also seized a substantial quantity of cash, and voluminous records documenting the shipment of millions of unstamped cigarettes to the Trading Post between July 1999, and May 15, 2007. From March 28, 2005, when the Trading Post lost its license, to May 15, 2007, when the search warrant was executed, the Wilburs sold another 335,979 cartons of unstamped cigarettes, with an associated tax loss of \$6.7 million. ER_764, 777, 791, 804; SER_30.

¹³ A civil forfeiture action was initiated against the seized cigarettes. *United States v. Approximately Three Million Six Hundred Thousand Eight Hundred Twenty (3,609,820) Cigarettes*, No. C07-1603TSZ, W.D. WA. Law enforcement officers also seized and sought forfeiture of funds from bank accounts of several suppliers of cigarettes to the Trading Post. *See United States v. Funds ...held in the Name of R K Company, Inc., d/b/a Cigar Cartel Totaling \$201,147.00*, 639 F.Supp.2d 1203 (W.D. WA 2009).

While law enforcement executed the warrants, C. Marvin and Joan Wilbur left their residence to conduct banking transactions. ER_778. Joan went to Skagit State Bank, where she prematurely closed out a certificate of deposit in excess of \$600,000, which was previously purchased with proceeds from the sale of untaxed cigarettes, and applied these funds to two outstanding bank loans. ER_805. C. Marvin went to Summit Bank and prematurely cashed out six certificates of deposit totaling in excess of \$600,000, which were previously purchased with proceeds from the sale of untaxed cigarettes. ER_778. This conduct gave rise to the money laundering conspiracy charges to which Marvin and Joan Wilbur pleaded guilty. ER_772-73, 778, 799-800, 805.

VI. ARGUMENT

A. The District Court Properly Found That the State Retroceded its Taxation Authority Only for Cigarette Transactions That Conformed to the Tax Contract.

The Wilburs contend that Washington law should be interpreted to mean that the State retrocedes its taxation authority over all Indian Country cigarette sales once a tax contract is in effect. The Wilburs argue this is true regardless of whether particular cigarette sales comply with the Tax Contract's requirements, or whether the business is licenced by the contracting tribe as required. Thus, they claim that regardless of their defiant lawlessness, once

the Swinomish Tax Contract became effective on October 3, 2003, no state taxes applied to the unstamped cigarettes sold at the Trading Post, and therefore the unstamped cigarettes were not “contraband cigarettes” giving rise to a CCTA violation. The Wilburs would have this Court interpret the Washington statutes as providing a loophole that would leave them free to flout the law without felony consequences. This analysis both ignores and undermines the purpose of the statutory program, and the forces the statutory language to produce an absurd result. Therefore, it should be rejected by this Court.

1. Standard of Review.

A district court’s legal conclusions are reviewed *de novo*. See *United States v. Smiskin*, 487 F.3d at 1262. Similarly, a district court’s decision whether to dismiss an indictment based on its interpretation of a federal statute is also reviewed *de novo*. See *United States v. Gorman*, 314 F.3d 1105, 1100 (9th Cir. 2002).

2. The Language of the Swinomish Tax Contract Governs the Scope of the State’s Tax Retrocession.

The Wilburs’ dealings in unstamped cigarettes violated the CCTA because the unstamped cigarettes were contraband under Washington State law. Under the Tax Contract, the State retroceded from collecting taxes only

for those cigarette sales that conformed to the Tax Contract's requirements. The cigarettes at issue were not stamped, and for a substantial period of time the Trading Post was not a "Tribal retailer" as defined by the Tax Contract, and, thus, the sales did not conform to the Tax Contract's requirements. As a result, the unstamped cigarettes were contraband under state law, and correspondingly, the CCTA.

The central issue regarding the Tax Contract is the extent of the State's retrocession of taxation authority over cigarette sales. The Tax Contract is narrower than the enabling statutes in two ways. First, the Tax Contract provides that only transactions conforming with the Contract's requirements do not violate State law, whereas the enabling statute simply states that a contract shall provide for a tribal cigarette tax in lieu of all State cigarette taxes. Second, the Tax Contract's definition of tribal retailer is limited to two of three possible categories of "Indian Retailer" defined in RCW § 43.06.455(14)(b), that is, those defined in subsections (i) and (ii).

Regarding retrocession of taxation authority, the Tax Contract provides for the establishment of a tribal tax, ER_53-55, and further provides that "[p]ursuant to RCW § 43.06.455, the State retrocedes from its tax during the time this Contract is in effect." Part III(2)(e), ER_55. The Tax Contract then

explicitly requires that cigarette transactions must conform to the terms of the Contract in order to be exempted from enforcement of State law:

State Agreement Regarding Compliance with State and Federal Law

As to all transactions that conform with the requirements of this Contract, such transactions do not violate state law, and the State agrees that it will not assert that any such transactions violate state law for the purpose of [the CCTA] or other federal law specifically based on violation of state cigarettes laws.

Part V(6), ER_57.

The district court determined that “[f]or sales that conform to its requirements, the Tax Contract provides a limited exception to the state’s cigarette taxation rules.” ER_738. This holding is entirely consistent with the Tax Contract language. Under its express language, only those transactions conforming with all the Tax Contract’s requirements comply with State law for purposes of the CCTA. The converse is also true, transactions that do not conform to the Tax Contracts’ requirements do violate State cigarette laws — because the State has not contractually retroceded its taxing authority over non-conforming sales — and, in requisite amounts, the CCTA. This construction of the Tax Contract is consistent with the general rule that all cigarettes possessed and sold by retailers within Washington must be stamped and otherwise conform to the state’s cigarette tax requirements. *See, e.g., Grey Poplars*, 282 F.3d at 1178; *Baker*, 63 F.3d at 1486-87.

With respect to conforming transactions, the Tax Contract conditions retrocession “on the imposition of the Tribal cigarette tax,” which must “apply to the retail sale of cigarettes by Tribal retailers.” ER_54. A “tribal retailer” is defined only as a tribally-run smoke shop or member-owned smokeshops that are licensed by the Tribe. ER_53. Cigarettes sold must also bear evidence of payment of tribal taxes. ER_55. Accordingly, the Tax Contract — and the corresponding retrocession of State taxing authority — applies only to sales of tribally-stamped cigarettes by tribal-run or tribal-licensed retailers. Sales of unstamped cigarettes, or sales from a non-licensed retailer, do not benefit from the limited retrocession of State taxation authority because they are not authorized by the Tax Contract.

To date, this Court has not addressed the Swinomish Tax Contract, or any similar cigarette tax contract with the State of Washington. However, two other district judges considering forfeiture actions related to the underlying prosecution have reached the same conclusion the district court did here, and determined that the extent of the State’s taxation retrocession is governed by the scope of the Tax Contract. *See United States v. Funds ...held in the Name of R K Company, Inc., d/b/a Cigar Cartel Totaling \$201,147.00 (Cigar Cartel)*, 639 F.Supp.2d 1203, 1206-11 (W.D. WA 2009) (holding that cigarette transactions that failed to conform to the Tax Contract’s requirements violated state and

federal cigarette laws); *United States v. Approximately 3,629,820 Cigarettes*, No. C07-1603TSZ (W.D. WA 2009) (“Thus the [Tax Contract] did not apply to Claimants, and the State did not retrocede its power to tax these cigarettes.”), ER_380.¹⁴

Here, the Indictment alleged, and the Wilburs admitted, that the cigarettes at issue were not stamped with either a tribal stamp or a state tax stamp. ER_764, 777, 791, 804. Moreover, the Indictment alleged, and the documents submitted to the district court established, that the Trading Post was not licensed after March 27, 2005, and therefore, was not a “tribal retailer” under the Tax Contract. Thus, the sales at issue did not conform to the Tax Contract and the State did not retrocede taxation authority over those transactions. Because the cigarettes were unstamped, they were contraband under state law, and correspondingly under the CCTA. The district court properly denied Wilburs’ motion to dismiss.

¹⁴ In the second-cited case, the court determined that the Trading Post did not qualify as a “Tribal retailer,” and thus, the unstamped cigarettes in its possession were contraband under the CCTA. ER_380.

3. ***The Tax Contract's Language Does Not Establish Complete Retrocession of the State's Taxing Authority During the Effective Term of the Contract.***

The Wilburs claim otherwise. According to them, Part III(2)(e) of the Tax Contract, represents an agreement that the State retroceded its taxing authority of all cigarette sales on the Swinomish reservation during the Tax Contract's "effective period," regardless of whether the sales comply with, or flout, the requirements of the contract. Appellate Brief One at 25.¹⁵ They are incorrect.

That provision, in turn, refers to the enabling statute which provides that a cigarette tax contract "shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers." RCW § 43.06.455(3). As the district court noted, read in isolation, the Tax Contract provision suggests that no state taxes apply from 2003, through the term of the agreement. ER_739.

However, as the district court also found, Section III(2)(e) must be read in the context of the entire Tax Contract, and interpreted with its other provisions and the purposes of the contract. ER_739. *See Wagner v. Wagner*, 95 Wash.2d 94, 101 (1980) ("An interpretation of a [contract] which gives effect to all of its

¹⁵ Appellate Brief One refers to the opening brief filed by Marvin Wilbur, Sr. Appellate Brief Two refers to the brief filed by April Wilbur.

provisions is favored over one which renders some of the language meaningless or ineffective.”).

While the contract is not a treaty, it nevertheless is an agreement between two sovereignties on a subject matter concerning their respective sovereign authority. It is therefore appropriate to employ treaty interpretation principles in construing it, which require a court “to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.” *Air France v. Saks*, 470 U.S. 392, 399 (1985). Where the text is ambiguous, the court should consider the contract’s “purposes . . . , its drafting history, [and] the understanding of the contracting parties” *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993-94 (9th Cir. 2002).

The Tax Contract requires conformity with its provisions, and only then does the retrocession take effect and provide a limited exception to the State’s cigarette tax requirements. Wilburs read Part III(2)(e) in isolation, which would render superfluous other limitations contained in the Tax Contract, specifically Part V(6). Part V(6) states that transactions that conform to the Tax Contract’s requirements are not a violation of State law, and that the State will not assert that conforming transactions are a basis for a CCTA violation. ER_ 57. Clearly, if the Tax Contract were designed to retrocede state taxation authority over every transaction on Swinomish land during its effective period,

there would be no need for the parties to define and agree which transactions are in violation of state and federal law. As with the principles that require courts to avoid construing a statute to render other parts superfluous, so too must a contract be interpreted to give effect to all of its provisions. *Bayview Hunters Point Community Advocates v. Metropolitan Transit Comm'n*, 366 F.3d 692, 700 (9th Cir. 2004).

4. *If a Conflict Exists Between the Cigarette Enabling Statute and a Tax Contract, the Tax Contract Language Takes Precedence.*

The Wilburs present a series of related arguments suggesting the Tax Contract violates the enabling statutes. Specifically they contend: (1) the governor lacked authority to enter into a contract narrower in scope than what is authorized by the enabling statutes (Appellate Brief One at 26, 29); (2) the theory of conditional retrocession conflicts with unambiguous language of the enabling statutes (Appellate Brief One at 24); and (3) the enabling statutes provide for complete retrocession regardless of contract compliance (Appellate Brief One at 24, 26, 27). These arguments lack merit.

First, the Wilburs have cited no authority for the proposition that the State lacks authority to enter in a more narrow contract than what the enabling statute authorized. This is not surprising as there is no logic to their argument. While the legislature defined the parameters of such tax contracts, the

contracts themselves are agreements that are the subject of negotiations between the State and tribal sovereigns. During the course of the negotiations, the parties may reach an agreement that is narrower in scope than that which the legislature permitted. What the enabling statute does is to address the subject matters that are required, and the outer parameters of when the State will cede its taxing authority. Nothing in the enabling statute purports to create a rigid set of requirements which cannot be narrowed.

Indeed, the opposite is true, as the legislation envisions a negotiated agreement. *See, e.g.*, RCW § 43.06.455(10) (“The governor may delegate the power to *negotiate* cigarette tax contracts to the department of revenue.”) (emphasis added). It would defeat the purpose of the negotiation if the agreement did not then control the scope of retrocession. If this Court interprets the enabling statutes as requiring a complete retrocession of the State’s taxation authority for all cigarette sales on the Swinomish reservation, instead of applying only to conforming sales under the Tax Contract, the Court will grant retrocession that is more expansive than the parties intended, and for which they contracted.

On this point, it is also notable that in 2008, the Washington State legislature enacted RCW § 82.24.020(7) which specifically provides that “[i]f the state enters into any cigarette contract or agreement with a federally

recognized Indian tribe under chapter 43.06 RCW, the terms of the contract or agreement shall take precedence over any conflicting provisions of this chapter while the contract or agreement is in effect.” RCW § 82.24.020(7) (2008).

This provision should be viewed as the Legislature’s effort to reinforce and make explicit the intent of the earlier statutes, namely that the language and scope of the tax contract will control the scope of retrocession from state tax, as district court effectively found.¹⁶ *See generally Baker*, 63 F.3d at 1487 (“[A]n amendment to a statute does not necessarily indicate that the unamended statute meant the opposite.’ A state legislature ‘may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.’”). Here, Washington’s legislature specifically has contemplated that the governor may enter into contracts that conflict with, or narrow, the enabling statute, and stated that the Tax Contract language controls any such conflict.

¹⁶ This 2008 statutory amendment “also *clarifies* that enrolled members of a Tribe who purchase cigarettes from their own Tribe are exempt from the state’s cigarette taxes, *while nonmembers are not exempt except as provided in cigarette tax contracts or agreements.*” (Fact Statement provided to legislature in connection with testimony of Washington Department of Revenue, Assistant Director Stuart Thronson before committee considering HB 2542, which became RCW § 82.24.020(7)) (emphasis added). This document is the subject of the government’s motion to supplement the record.

Furthermore, the remedy the Wilburs request is inappropriate. If the Court finds that the statutory language concerning tax contracts must be met in its entirety, the answer is not to amend the contract through judicial fiat. Rather, the appropriate Court would have to declare the contract is void as failing to meet the intent and requisites of the legislation, which in turn, would mean the State retroceded *none* of its taxing authority. The result cannot be that conduct that fails to comply with the requirements of the contract, the contract enabling statute, and Washington's cigarette taxation scheme, effectively avoids any possible punishment under Washington law. This result, which the Wilburs seek, defies common sense, and is surely at odds with the legislative intent in providing for cigarette tax contracts.

The Wilburs also contend the Tax Contract's requirements are inapplicable to them because they were not a party to the contract and, as a result, it imposes no obligations on them. Appellate Brief One at 32. This is sophistry. The Wilburs do not stand accused of violating the Tax Contract. The tax contract system is merely a tax-shifting mechanism, which deals with which entity is permitted to collect the tax that state law would otherwise impose. If retailers, such as the Wilburs, choose not to comply with the tax stamp and licensing requirements of the Tribe, they cannot claim immunity from state taxation law, nor from any CCTA prosecution resulting from their

failure to comply with state law. Conversely, if retailers comply with the tax contract and tribal requirements, they are protected from state taxation requirements by the State's agreement with the tribe. To determine otherwise would permit gamesmanship of the highest order --- the Wilburs wish to benefit from the existence of a tax contract and thus the State's tax retrocession, but also avoid precollecting the tribal tax imposed as a condition of that Tax Contract.

Wilburs also argue that neither the Tax Contract nor the enabling statutes provide that retrocession is conditioned upon the requirement that a retailer be licensed by the Tribe. Appellate Brief One at 34. However, the Tax Contract, by its terms, defines "Tribal retailer" as either "a cigarette retailer wholly owned by the Swinomish Tribe" or "a member-owned smokeshop located in Indian country *and licensed* by the Tribe." ER_53, Part I(20) (emphasis added). As noted above, the Tax Contract retrocedes State tax authority only for conforming transactions — which require that the retailer be licensed. If that were not the case, there would be no reason to include this more limited definition within the Tax Contract.

As the Wilburs have acknowledged (despite some seeming arguments to the contrary), the Trading Post was not licensed by the Swinomish Tribe after March 27, 2005, because the Tribe refused to renew the license due to the

Wilburs' defiant refusal to collect tribal taxes. Thus, the Trading Post was not a "Tribal retailer" as defined by the Tax Contract after March 27, 2005.

Nor is there anything absurd about the Tax Contract's linking the State's tax retrocession to a retailer's licensing status. The extreme hypotheticals that the Wilburs offer do not prove to the contrary. Indeed, it makes perfect sense that one whose license is revoked or suspended is no longer privileged to continue the activity unlicensed, regardless of how brief the suspension. The fact that the suspension could last as little as a couple of days is immaterial; it is just as illegal to drive on a license suspended for five days as one suspended for a year. Moreover, as the district court observed, the Indictment alleged the Wilburs' conduct involved not days, but years of deliberate unlicensed operation in defiance of federal, state and tribal law. This is the conduct the Wilburs have now admitted which occurred despite the Swinomish Tribe's efforts to obtain the Wilburs' compliance. ER_385-86, 397-400. Simply put, the Tax Contract's tax retrocession was not intended to provide amnesty from tax collection, but rather, to shift the recipient of the taxes from the State to the Tribe. As here, if a retailer chooses not to comply with the tribal licensing requirements, then no shift has occurred and the retailer must comply with the State taxation scheme.

5. *Federal Prosecution of the Wilbur Does Not Conflict with the Stated Purpose of Tribal Sovereignty.*

By its terms, the Tax Contract specifically contemplates state and federal enforcement of non-confirming cigarettes transactions. It only exempts conforming sales from state and federal prosecution. *See* ER_57, Part V(6) (providing that for transactions conforming with the Tax Contract, the State “will not assert that any such transactions violate state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws.”). Further, the enabling statute clearly contemplates enforcement actions by state authorities. *See* RCW § 43.06.455(12); *see also* Section VI.A.9 *infra*. Since the Swinomish Tribe expressly agreed that non-conforming sales would be subject to federal enforcement, no issue of tribal sovereignty is presented.

Indeed, the Swinomish Tribe actually requested federal assistance in dealing with the Wilburs’ unlicensed sales of unstamped cigarettes, ER_386, 429, after making unsuccessful efforts to bring the Trading Post into compliance with the Swinomish Tribal Tax Code. ER_385-86, 397-400. Most significantly, in 2005, the Tribe refused to renew the Trading Post’s license for cigarette sales because the Wilburs refused to collect the Tribal tax in accordance with the Tax Contract. ER_385-86. Lacking the resources

necessary to conduct the appropriate enforcement operations, the Swinomish Tribe turned to the federal government for enforcement under the provisions of the CCTA, in order to curtail the Wilburs' unlawful cigarette sales. ER 385-86, 429. Moreover, the Tribe's lawsuit against the Wilburs seeking to forfeit the seized unstamped cigarettes under the Tribal Tobacco Code recognized the paramount federal interest in this matter. ER_395. The Tribe's actions demonstrate conclusively that this federal prosecution does not undermine principles of tribal sovereignty.

6. The Termination Provisions of the Tax Contract Do Not Warrant Dismissal of the Indictment.

The Wilburs contend that conditioning retrocession of State taxation authority on the licensing status of a retailer is inconsistent with the termination provisions of the Tax Contract, because the parties cannot terminate the Tax Contract when a retailer does not obtain a license. Appellate Brief One at 37. There is no doubt that these termination provisions identify certain violations for which a party "may" seek to terminate the contract "for cause," and that the failure of a retailer to comply with the tribal ordinances that reflect the agreements in the Tax Contract are not among them. ER_62. But that fact is of no moment since the State never sought to terminate the Tax Contract.

The State obviously was not required to terminate an otherwise satisfactory contract with the Swinomish Tribe to enforce its tax laws against the Wilburs' renegade operations. In fact, the State had no justification whatever to terminate the Tax Contract. The Tribe itself was in full compliance with the Tax Contract and had made good faith but unsuccessful efforts to obtain the Wilburs' compliance with Tribal law, including seeking federal enforcement when the Wilburs defied the Tribal efforts. The Wilburs' focus on the Tax Contract's termination provision is a complete red herring.

7. The Wilburs Waived Any Statute of Limitation Argument and Thus Are Barred from Raising It.

The Wilburs argue that if this Court determines that retrocession depends upon their status as Tribal retailers under the Tax Contract (or as "Indian retailers" as defined in subsection (ii) of RCW § 43.06.455(14)(b)), the Indictment should be dismissed on statute of limitation grounds. Appellate Brief One at 40-41. This claim is both waived and meritless.

Count One, to which all Wilburs pleaded guilty, charged a conspiracy to sell contraband cigarettes from July 28, 1999, to May 15, 2007. For purposes of this argument, there are three relevant time periods: (1) from the beginning of the conspiracy in July 1999, to October 2003, when the Tax Contract was enacted; (2) from October 3, 2003, to March 27, 2005, the middle period of the

conspiracy when the Trading Post possessed a tribal license; and (3) from March 27, 2005, to May 15, 2007, when the Trading Post did not possess a license. Prior to October 3, 2003, no retrocession argument is available and the Wilburs' conduct plainly violated State law. Similarly, after March 2005, the Wilburs did not qualify as tribal retailers under the Tax Contract. Because the Trading Post possessed a license from October 3, 2003, to March 27, 2005, Wilburs allege there was a break in the middle of the charged conspiracy when their conduct was not subject to the CCTA because they were licensed. Thus, they claim that the Indictment charged multiple conspiracies, the first of which occurred prior to the statute of limitations (July 1999 to October 2003).

The Wilburs did not challenge the timeliness of their prosecution in any pretrial motion or any time prior to pleading guilty. This issue is therefore waived. *See* Fed. R. Crim. P. 12(b)(3)(a) and (e). Absent a showing of good cause (which has not been attempted), this issue is unreviewable even for plain error. *See United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002).

Further, the defense of statute of limitations, which is an affirmative defense and not jurisdictional, *see United States v. Akmakian*, 647 F.2d 12, 14 (9th Cir. 1981), is waived by a guilty plea where the defendant did not raise the statute of limitations defense at the time the plea was entered. *United States v. Littlefield*, 105 F.3d 527, 528 (9th Cir. 1997).

Moreover, the Wilburs mistake the nature of the charged conspiracy. They were charged with engaging in an eight-year overarching conspiracy to defeat the collection of any taxes on the cigarettes they sold. As part of this conspiracy, they failed to provide prenotification to the State of cigarette shipments and avoided collecting state taxes, and later avoided collecting the corresponding tribal tax. The existence of a Tribal tax contract, or a license, does not change the nature of their intent to avoid complying with the obligation to collect cigarette taxes whether directly to the State or, as a result of the Tax Contract, to the Swinomish Tribe.

The fact that the Wilburs maintained a tribal license for a period does not legitimize those cigarette sales. Regardless of the license, they continued to sell unstamped cigarettes. Because the cigarettes were unstamped, they were non-conforming and contraband for that reason alone. *See* Part VI.A.2. The existence of a license did not change their defiant refusal to precollect taxes and, thus, to relinquish the distinct competitive advance that permitted the Wilburs to underprice any competitor, including the Swinomish Tribal smokeshop, and thereby raking in profits from their lawless behavior.

8. *The Definition of “Indian Retailer” in RCW § 43.06.455(14)(b)(iii) Does Not Apply to the Trading Post Because it Is a Cigarette Business Located Within Reservation Boundaries.*

Following from the argument that the Tax Contract cannot be narrower than the State enabling statutes, the Wilburs argue that they meet the definition of “Indian retailers” under RCW § 43.06.455(14)(b)(iii) and, as such, enjoy a statutory exemption from State cigarette tax laws regardless of their illegal unstamped cigarette sales. The district court declined to decide this issue, as it was not necessary to its ruling. ER_740. Regardless, there simply is no basis to read this statute as providing a separate exemption from State taxation not otherwise tethered to a tax contract. To permit this reading of the state statutory scheme would produce an absurd result.

As noted above, Washington law provides a third definition of “Indian retailer” not incorporated into the Tax Contract, that is, “a business owned and operated by the Indian person or persons in whose name the land is held in trust.” RCW § 43.06.455(14)(b)(iii). If subsection (iii) is read as the Wilburs contend, once a contract is entered into between the State and any recognized Washington tribe, *any* Indian person occupying land held in trust for him/her *anywhere in the State* could claim to be an “Indian retailer,” exempt from State taxation. This is because the language of subsection (iii) is not

limited to members of a tribe which has contracted with the State, although it is a definition contained in the enabling statute for tax contracts.

It is well-established that statutory interpretation “turns on ‘the language [of the statute] itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *Nken v. Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341(1997)). A court should interpret a statute “so as to give effect to the intent” of the legislature, *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940), and “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, (1982); *see also Public Citizen v. Department of Justice*, 491 U.S. 440, 454, (1989) (a court may look beyond statutory language when plain meaning would “compel an odd result”). A court should not adopt a construction of a law “demonstrably at odds with the intentions of its drafters,” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) and “[p]articular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme.” *United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir.), *cert. denied*, 130 S. Ct. 646 (2009).

As discussed, the purpose of the tax contract enabling statutes is to allow the State to contract with Tribes with an eye toward retroceding its taxing authority over cigarette sales in favor of a corresponding tax imposed directly by the tribe. A construction of RCW § 43.06.455(14)(b)(iii) that permits an individual from *any* tribe to enjoy state tax retrocession not tied to a contracting Tribe, is clearly at odds with the legislative intent. It would permit free-riders who could avoid precollecting either state tax or tribal tax, thereby enjoying a competitive advantage over every other retailer in the State. Surely, the State had no intention to allow untaxed and unstamped cigarettes to be freely sold to non-Indians, merely because of the existence of a tax contract. The Wilburs' argument that the State statutes must be interpreted to create an inadvertent loophole, applicable to Indians selling cigarettes on their own Trust land without regard to tribal membership, reservation situs, and compliance with tax contract terms, simply because a single contract exists between the State and any one of the enumerated recognized tribes, is patently absurd.

The absurdity of the Wilburs' claims regarding the extent and meaning of RCW § 43.06.455(14)(b)(iii) is also reflected in the statutes authorizing the government to negotiate tax contracts. RCW §§ 43.06.455(1) and (3), and 43.06.460. The governor's authority is limited to negotiating with federally

recognized tribes within Washington State. RCW § 43.06.460. The Legislature did not authorize contracts, and thus, retrocession with Indian persons operating a business on trust land. Any other interpretation would mean that the legislature, without specifically so stating, gave up the State's taxing authority regarding every retailer on trust land anywhere in the state, regardless of reservation situs and regardless of any form of compliance.¹⁷

Moreover, neither the governor nor the negotiating tribes were obligated to include a retailer falling within the RCW § 43.06.455(14)(b)(iii) definition in their tribal cigarette contract. The statutory definitions of "Indian retailer" are stated in the disjunctive, *see* RCW § 43.06.455(14)(b), and nothing in the statutory scheme requires a tax contract's retrocession be extended to all classes of "Indian retailers." The governor was free to negotiate a tax contract which limits the State's tax retrocession to only a sub-set of Indian retailers. That is precisely what occurred here. The Tax Contract contemplates

¹⁷ In the district court, the government submitted a declaration by Leslie Cushman, an Assistant Director of the Washington state Department of Revenue, who played a key role in drafting the enabling legislation and in drafting and negotiating the Swinomish Tax Contract on behalf of the State. ER_295. Although the declaration does not qualify as legislative history, it confirms Cushman's understanding as a drafter of both the enabling statute and a negotiator of the Tax Contract. Specifically, Cushman notes that the current legislation authorizes the governor to contract only with specific federally recognized Tribes, and not with businesses "owned and operated by . . . Indian . . . persons in whose name the land is held in trust." ER_297.

retrocession only as to “Indian retailers” covered by subsections (i) and (ii), i.e., the “Tribal retailers” specified in the Tax Contract. *See Cigar Cartel*, 639 F.Supp.2d at 1211 (“The Contract expressly limits its application ‘to the retail sale of cigarettes by tribal retailers.’”).

Finally, the Wilburs’ reliance on a Washington State Court of Appeals’ Commissioner grant of discretionary appellate review in *State v. Comenout*, Appellate Brief One at 19-22 is misplaced. To begin, this order was unpublished and should not be cited. *See* Wash. Gen. C. R. 14.1(a). More importantly, this order is not a disposition on the merits. It is nothing more than an order permitting discretionary review in a case dealing with different defendants and a different cigarette contract, one involving the Quinalt Indian Tribe. Subsequent to the commissioner’s order, the Washington Supreme Court certified the case for review at the request of the Court of Appeals. The Supreme Court currently has before it a motion by the State to decertify the matter because of the death of one of the defendants. The commissioner’s order, quite simply, has no authoritative value to the present litigation.

9. *The Trading Post Does Not Qualify as an “Indian Retailer” as Defined in RCW § 43.06.455(14)(b)(iii).*

Even if this Court were to find that, despite the express terms of the Tax Contract, the State has retroceded its taxation authority over all “Indian

retailers” as defined in RCW § 43.455(14)(b)(iii), the Wilburs do not qualify as such. Subsection (14)(b)(iii) defines Indian retailer to include: “a business owned *and* operated by *the* Indian person or persons in whose name the land is held in trust.” RCW § 43.06.455(14)(b)(iii) (emphasis added). As the statutory language makes clear, to qualify as an “Indian Retailer” under this section all of the owners *and* operators must be persons for whom the land on which the cigarette retail business operates is held in trust. Here, the land is held in trust for C. Marvin Wilbur, Sr. However, the cigarette sales business at the Trading Post was jointly-owned and operated by a number of additional persons and entities, who held no interest in the trust land and some of whom are not even enrolled members of federally-recognized Indian tribes. Indeed, the cigarette business was largely owned and operated by a number of business entities, such as the Skagit Cigarette Sales Trust, the Skagit Trust, and the Salish Trust (see notes 9 through 11 *supra*), none of which can claim that a beneficial interest in the property was held in trust for it by the United States.

Further, as the Wilburs acknowledge, the Trading Post’s license to sell cigarettes before March 28, 2005 was held not by defendant C. Marvin Wilbur, Sr., but by “Mike Wilbur, who is conducting a business under the name of the Trading Post, a business located ‘within the exterior boundaries of the Swinomish Indian Reservation.’” Appellate Brief One at 18. This alone

establishes that the RCW § 43.06.455(14)(b)(iii) definition of Indian retailer has not been met.

10. Principles of Statutory Construction Do Not Require Dismissal of the Indictment.

The Wilburs argue that several principles of statutory construction, such as the rule of lenity, cannons regarding imposing taxpayer liability, and cannons regarding the application of penal and tax statutes to Indians, support their claim that the Indictment should have been dismissed. Appellate Brief One at 43-46. That simply is not the case.

First, the rule of lenity does not apply because the CCTA contains no “grievous ambiguity.” *Dean v. United States*, 129 S. Ct. 1849, 1856 (2009). It is firmly established that the CCTA is a criminal law of general applicability, fully applicable to Indians as well as all other persons. *Grey Poplars*, 282 F.3d at 1178; *Baker*, 63 F.3d at 1484-85. It creates a general intent crime, *Baker*, 63 F.3d at 1491-92, and persons, such as the Wilburs, who engage in commercial transactions involving large quantities of cigarettes, are presumed to be familiar with, and aware of, the requirements of state cigarette tax laws. *Id.* at 1492. Further, the CCTA’s interplay with the Washington cigarette taxation scheme is “simple,” *id.*, and this remains so even with the advent of a Tax Contract. Simply put, the Wilburs were required either to precollect the

tax and remit it to the Tribe, or also precollect the tax and remit it to the state. They made no effort to do either.

Moreover, neither the CCTA nor the underlying state statutes are the type of criminal tax statutes that should be construed in favor of a taxpayer. This is because retailers like the Wilburs are not the cigarette taxpayer. While the Wilburs were responsible for precollecting the applicable cigarette taxes, the incidence of that cigarette tax in sales to non-Indians, falls on the consumer. *See Colville*, 447 U.S. at 158. Since the underlying law did not impose a tax liability on the Wilburs, their appeal to rules of construction for taxpayers are ill-founded. *See also* argument in Section VI.B.3 below.

11. The Indictment Did Not Offend Due Process.

The Wilburs' argument that their prosecution was barred by the Due Process Clause, because they lacked "fair notice" that their conduct was unlawful, is equally without merit. As an initial matter, all the cases on which the Wilburs rely involve criminal tax prosecutions for willful violations of the tax laws, such as charges of willfully filing false tax returns, or willfully evading federal taxes by failing to report income.¹³ *See, e.g., United States v.*

¹³ In these criminal tax statutes, "wilfulness" means an intentional disregard of a known legal duty. *See Ratzlaf v. United States*, 510 U.S. 135 (1994). Although a violation of the CCTA also requires "wilful," conduct, in the sense that the
(continued...)

George, 420 F.3d 991 (9th Cir. 2005). These cases stand for the proposition that where criminal tax liability requires a specific intent to violate the tax law, the law must be sufficiently clear that the defendant had fair notice that his conduct was unlawful. Here, the Indictment does not charge a criminal tax offense, so the Wilburs' reliance on this line of authority is misplaced.

Trafficking in contraband cigarettes is a general intent crime, and ignorance of the law is not a defense to a CCTA prosecution. *Baker*, 63 F.3d at 1491-92. In *Baker*, this Court held that “[T]he interaction between the CCTA and Washington’s tax scheme . . . does not involve a complex regulatory scheme with the potential of trapping unwary merchants trading in cigarettes.” *Baker*, 63 F.3d at 1492. To the contrary, “[t]he law is quite simple.” *Id.* Moreover, this Court held “knowledge of cigarette taxing requirements can be presumed among those who deal in cigarettes in quantities exceeding 60,000.” *Id.*

Here, the addition of the Tax Contract does not render the taxation scheme so complex as to make it impossible for the Wilburs to know they were engaging in illegal conduct. The Tax Contract has straightforward

¹³(...continued)

defendant must act “knowingly,” unlike the cases relied on the Wilburs, it does not “require knowledge that the actions engaged in violate the law.” *Baker*, 63 F.3d at 1491-92.

requirements (e.g., obtaining cigarettes from specified wholesalers who affix tribal stamps), which if complied with, provide a limited exception to state taxation authority. The Wilburs have not articulated any reason to create an exception to the rule set out in *Baker* that people who deal in cigarettes in quantities exceeding 60,000 are presumed to know the taxing requirements. *Id.*

More importantly, the Wilburs' dealings in unstamped, contraband cigarettes did not begin with the signing of the Tax Contract in 2003. Rather the activities charged in the Indictment are a continuation of a longstanding pattern of selling unstamped and untaxed cigarettes to the public which continued unabated after the decisions in *Colville*, *Baker*, *United States v. Gord*, 77 F.3d 1192 (9th Cir. 1996), *Yakima Indian Nation v. Washington*, 176 F.3d 1241, 1246-47 (9th Cir. 1999), and *Grey Poplars* made the application of State cigarette tax laws to their activities unmistakably clear. Thus, the Wilburs can hardly claim the subsequent adoption of the Tax Contract somehow created confusion giving rise to their criminal conduct.

12. The Cigarettes at Issue Were Also Contraband Because No Party Provided Prenotification of Their Shipment into the State, and the Trading Post Was Not Authorized to Possess Unstamped Cigarettes.

Regardless of the Tax Contract, other provisions of the Washington tax regime were applicable to the cigarettes shipped to the Trading Post, including

the prenotification requirement and the ban on the unauthorized purchase or possession of unstamped cigarettes. As the government argued below, CR_78 at 3-5, 8, the Wilburs' failure to comply with the prenotification requirement rendered those cigarettes contraband and the Trading Post unauthorized to possess unstamped cigarettes. As a result, the cigarettes were contraband under state law and the CCTA. Thus, even if the Wilburs are correct that they were exempt from precollecting any taxes, their actions still ran afoul of the CCTA. *See generally, United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005) (this Court may affirm "on any basis supported by the record").

The tax contract enabling statute explicitly reserved state enforcement of certain of its cigarette tax laws in Indian Country including the enforcement activities provided in "Chapter 82.24 RCW." RCW § 43.06.455(12). Those enforcement provisions include both the prenotification requirement of RCW § 82.24.250(1), and the ban on unauthorized purchase or possession of unstamped cigarettes in RCW § 82.24.250(3). Moreover, the Tax Contract confirms the limitations and reservations contained in the authorizing statute, stating explicitly that "[t]his agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW." ER_63, Part IX(2).

As discussed earlier, Washington law prohibits the transport of unstamped cigarettes into the State unless notice is given to the WSLCB "in

advance of the commencement of transportation.” RCW § 82.24.250(1).

Without advance notice regarding the transportation of unstamped cigarettes, “the cigarettes so transported shall be deemed contraband subject to seizure and sale.” RCW § 82.24.250(4). Here, the Indictment alleged, and the Wilburs have admitted, that no prenotification was given for any of the cigarette shipments at issue. ER_ 764, 777, 791, 804. As a result, the cigarettes were contraband under state law, and also contraband under the CCTA.

The unstamped cigarettes were also contraband because the Trading Post was not authorized to possess such cigarettes. Under Washington law, any person who purchases unstamped cigarettes in the State must be “a person authorized . . . to possess unstamped cigarettes in this state.” RCW § 82.24.250(3). Persons authorized to possess unstamped cigarettes are limited to: (1) a wholesaler licenced under Washington law; (2) the United States or agency thereof; or (3) any person, including an “Indian tribal organization,” if stamps are affixed within a reasonable time after receipt of the cigarettes, and only if notice is given to the WSLCB prior to the transport of the unstamped cigarettes into the State. RCW § 82.24.250(7). If the purchaser is not authorized to possess unstamped

cigarettes, the “cigarettes so transported shall be deemed contraband subject to seizure and sale.” RCW § 82.24.250(4).

The Trading Post was authorized to possess unstamped cigarettes only if prenotification was given to the WSLCB, and only tax stamps were affixed within a reasonable time after receipt of the cigarettes. RCW § 82.24.250(7)(c). The Indictment alleges, and the Wilburs admitted, that no prenotification was given and that no stamps were affixed. ER_ 764, 777, 791, 804. Thus, the cigarettes were contraband under the state statute, and hence under the CCTA. The Wilburs’ convictions can be affirmed on this ground as well.

B. The District Court Correctly Refused to Dismiss the Indictment Based on the Purported Lack of a Predicate Violation of Washington State Cigarette Tax Laws.

1. Standard of Review.

A district court’s legal conclusions are reviewed *de novo*. See *Smiskin*, 487 F.3d at 1262, as is a district court’s decision whether to dismiss an indictment based on its interpretation of a federal statute. See *Gorman*, 314 F.3d at 1110.

2. It Is Well-Established That Washington May Tax Cigarettes Sold by Indian Retailers to Nonmembers and Non-Indians.

Colville held that Washington may impose taxes and record-keeping requirements on reservation sales of cigarettes by an Indian retailer to

nonmembers and non-Indians without infringing upon tribal sovereignty. *Colville*, 447 U.S. at 156-59. *Colville* remains binding precedent. See *Baker*, 63 F.3d at 1489; see also *Matheson v. Wash. State Liquor Control Board*, 130 P.3d 897 (Wash. Ct. App. 2005); *Bercier v. Kiga*, 103 P.3d 232 (Wash. Ct. App. 2005). Nevertheless, the Wilburs argue that there was no predicate violation to support the CCTA charges against them because Washington's cigarette tax scheme purportedly does not apply to the on-reservation sales of cigarettes by Indians. Appellate Brief Two at 22-24. In particular, the Wilburs rely on *Bercier* and *Matheson*. This reliance is misplaced.

As the district court recognized, ER_743-44, *Bercier* and *Matheson* simply do not support the Wilburs' tax exemption argument. These cases recognize that Washington may impose a cigarette tax and a sales tax on purchases of cigarettes by non-Indians and by Indians who were not members of the tribe on whose reservation the sales took place. To the extent not supplanted by the Tax Contract, the state cigarette taxation scheme applies to cigarettes transported, received, possessed and sold by the Trading Post, as to all individuals, except sales to members of the Swinomish Tribe.

3. *The Legal Incidence of Washington's Cigarette Tax Scheme Does Not Fall upon Indian Retailers.*

The person who bears the legal incidence of a tax has the legal obligation to pay the tax. *Colorado Nat'l Bank of Denver v. Bedford*, 310 U.S. 41, 52 (1940). Washington law places the burden of the state cigarette tax on nonmember and non-Indian purchasers, not on the Indian retailer.

Under the State cigarette scheme, the tax falls upon the first event that may be constitutionally subject to tax. *See* RCW § 82.24.080(2). In the case of an Indian retailer selling to a nonmember or non-Indian, the cigarette tax must be collected from the purchaser. *Id.* This is the statutory scheme upheld in *Colville*, 447 U.S. at 142 n.9, and in subsequent federal and Washington cases. *See Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *Smiskin*, 487 F.3d at 1263 n.4; *Grey Poplars*, 282 F.3d at 1177-78; *Baker*, 63 F.3d at 1485 n.6; *Matheson*, 130 P.3d at 899-90; *Bercier*, 103 P.3d at 237.

In *Baker*, the defendants argued that changes to Washington's cigarette tax scheme made it more burdensome on Indian retailers than the record-keeping requirements approved in *Colville*, and shifted the legal tax incidence to Indian retailers. The Court rejected this argument, stating that, to the contrary, Washington's "current scheme is *less* burdensome to Indians than it

was when *Colville* was decided.” *Baker*, 63 F.3d at 1489 (emphasis in original). *Colville* and *Baker* are dispositive of the Wilburs’ argument on this point.¹⁴

Despite this controlling authority, the Wilburs argue that the district court erred in “assum[ing], without conducting any detailed inquiry, that the legal incidence of the Washington State Cigarette Excise Tax does not fall upon Indian tribal retailers.” Appellate Brief Two at 27-30. The record establishes however that the district court conducted the requisite inquiry, and the Wilburs’ reliance on *Coeur D’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004), and *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wa. 2005) is misplaced.

Hammond and *Stephens* involved successful tribal challenges to Idaho and Washington’s motor fuels tax schemes. Unlike the Washington cigarette tax scheme upheld in *Colville*, Idaho’s motor fuels tax was previously held to be unenforceable regarding on-reservation retail sales because the legal incidence of the tax fell on Indian retailers. See *Goodman Oil Co. v. Idaho State Tax Comm’n*, 28 P.3d 996 (Idaho 2001). Although the Idaho legislature

¹⁴ The Wilburs contend the existence of the Tax Contract somehow “presents more of an intrusion upon tribal sovereignty than the minimal intrusion . . . in *Colville*.” Appellate Brief Two at 26-27. This is absurd. The Tax Contract is a voluntary agreement with the Tribe, and thus infringes not at all upon tribal sovereignty.

subsequently amended the motor fuels tax scheme by including a legislative statement of intent that the legal incidence of the tax should fall only on non-tribal distributors, the Court in *Hammond* concluded, after analyzing the state's statutory scheme, that the incidence of the tax still fell on retailers. *Hammond*, 384 F.3d at 685-88. The *Stephens* Court reached the same conclusion with respect to Washington's fuel taxes. *Stephens*, 400 F. Supp.2d at 1258-62.

Here, the district court correctly concluded the legal incidence of Washington's cigarette taxes "falls not on the tribal retailer, but on the nonmember and non-Indian purchaser." ER_747 (citing *Colville*, 477 U.S. at 156). Nothing in *Hammond* or *Stephens* changes this.

Under the Washington tax scheme, the first person who sells, uses, consumes, handles, possesses or distributes cigarettes must collect the cigarette tax. RCW § 82.24.080(1). Thus, a wholesaler selling cigarettes in the State must prepay the cigarette tax, including if the wholesaler sells to Indian retailers. See WAC § 458-20-192(9). Indian retailers have a "precollection obligation" to precollect the tax from nonmembers-retail purchasers. RCW § 82.24.080(2). Significantly, the term "precollection obligation" is defined as "the obligation of a seller otherwise exempt from the tax imposed by this chapter to collect the tax from that seller's buyer." RCW § 82.24.010(4).

The fact that Washington requires Indian retailers to precollect the tax, by purchasing stamped cigarettes that include the state cigarette tax, does not indicate that the incidence of the tax falls on them. *See Colville*, 447 U.S. at 151. As *Hammond* recognized, the “person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden.” *Hammond*, 384 F.3d at 681. Further, “a party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector.” *Id.* (citation omitted). Under Washington’s cigarette tax scheme Indian retailers, such as the Wilburs, merely collect and transmit the state taxes paid by the retail purchasers.¹⁵ *See Baker*, 63 F.3d at 1491; *see also United States v. Mahoney*, 798 Fed. App’x 555, 556-57 (9th Cir. 2008). Nothing in Washington’s current law shifts the legal incidence of this tax from the end purchaser to the Indian retailer. *See Confederated Tribes and Bands of Yakama Nation v. Gregoire*, 680 F. Supp.2d 1258, 1263-64 (E.D. Wa. 2010).

¹⁵ Consistent with this analysis, the current version of RCW § 82.24.260(2), which addresses sales or disposal of unstamped cigarettes, and provides that, except for an Indian tribal organization with respect to sales to its members, a person in lawful possession of unstamped cigarettes who intends to sell them must either pay the tax, or satisfy its precollection obligation by remitting the tax or alternatively by affixing stamps in the manner provided by Department of Revenue rules.

The Wilburs nevertheless insist that the Washington statutes actually place the incidence of the tax upon the seller. Noting that RCW § 82.24.295 affords an exemption from state taxes for cigarettes sold by an Indian Retailer, the Wilburs posit this exemption is an “acknowledg[ment] by the legislature that the tax is otherwise upon them.” Appellate Brief Two at 27. This is obviously incorrect. This exemption merely serves to effect the tax contract’s retrocession of State taxing authority, thereby relieving the *purchaser* of having to pay both state tax and tribal tax, and the retailer of having to precollect both taxes. The Wilburs also contend that because wholesalers can receive a refund of taxes they prepaid on cigarettes they are unable to sell, while “such refunds are not available to cigarette retailers,” this shows the legal incidence of the tax falls upon the retailer. Appellate Brief Two at 28-29. The short answer to this argument is that retailers are allowed to obtain a refund for any precollected taxes on unsold cigarettes. *See* WAC § 458-20-186(303); *Gregoire*, 680 F.Supp.2d at 1264. Nor does it matter, as the Wilburs assert, that only wholesalers are “allowed to retain a portion of the state taxes for precollecting the tax by affixing stamps.” Appellate Brief Two at 29. This is a payment for the wholesalers’ administrative costs for affixing the stamps, a burden the retailers do not share under the current law. *See* RCW §§ 82.24.040(2)(a), 82.24.050(1); *Gregoire*, 680 F.Supp.2d at 1264.

In short, the question of who bears the legal incidence of Washington's cigarette taxes has been definitively answered in *Colville, Baker, Mahoney*¹⁶ and other cases holding that nonmembers and non-Indians purchasing cigarettes are responsible for payment of the cigarette and sales taxes. The legal incidence of the cigarette tax does not fall on Indian retailers, who simply have an obligation to collect the tax from nonmembers and non-Indians through the use of the tax stamps, which are normally applied at the wholesale level. Because the State was permitted to impose their minimal precollection burden, the Wilburs' failure to precollect the requisite taxes could indeed serve as a predicate offense for a CCTA prosecution. The Wilburs are wrong in claiming otherwise.

4. *Washington's Authority to Tax Certain On-Reservation Cigarette Sales is Neither Derived From nor Dependent upon Public Law 280 or RCW § 37.12.010.*

The Wilburs make two jurisdictional arguments based on Public Law 280. They contend that "Washington lacks jurisdiction to apply or enforce its cigarette excise tax laws against Indians buying or selling cigarettes on tribal lands on their own reservations" because the State's assumption of

¹⁶ The district court relied on *United States v. Mahoney, et al.*, CR-05-2099-RHW (E.D. Wash. Dec. 1, 2005), in determining that the "state's cigarette tax falls on the purchaser, not on the tribal retailer." ER_744; *see also* SER_10-22 (*Mahoney* Order Denying Motion to Dismiss).

jurisdiction pursuant to Public Law 280 does not expressly allow it. Appellate Brief Two at 24. They next contend that because Washington subsequently retroceded its criminal jurisdiction with respect to the Swinomish reservation, it is “unreasonable to conclude that . . . [the state] retained authority to impose tax collection burdens upon [Swinomish Indians].” Appellate Brief Two at 26. These arguments are without merit. Washington’s assumption of Public Law 280 jurisdiction over the Swinomish reservation, and its subsequent retrocession of criminal jurisdiction, have absolutely no bearing on the State’s authority to tax on-reservation sales of cigarettes.

Congress enacted Public Law 280 primarily to address law enforcement within Indian reservations. Pub. L. 280, 67 Stat. 588; 28 U.S.C. § 1360 (1953); *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976). Public Law 280 directed specified states to assume jurisdiction over Indian lands and authorized others, including Washington, to do so voluntarily. Washington assumed jurisdiction in a particularly complicated way that has resulted in different rules for different parts of Indian Country within the state. *See* RCW §§ 37.12.010-150.

Under RCW § 37.12.010, Washington will not assert jurisdiction over conduct on lands within an Indian reservation unless a tribe requests the State to do so. The statute, however, lists eight subject areas in which the State will exercise jurisdiction without the necessity of a tribal request. None of these

eight areas concern excise taxes on cigarettes. From this, the Wilburs mistakenly contend that Washington lacks jurisdiction or authority under RCW § 37.12.010 to impose its cigarette taxing scheme with regard to on-reservation sales of cigarettes.

However, in *Potawatomi* the Supreme Court squarely held that a state could tax cigarette sales to nontribal members on tribal land, even if the state had not elected to assert Public Law 280 jurisdiction. *Potawatomi*, 498 U.S. at 513-14. *Potawatomi* is dispositive of the Wilburs' Public Law 280 arguments on this point. A state's authority to tax on-reservation sales of cigarettes is neither derived from, nor dependent upon, Public Law 280. Consequently, Washington's adoption and subsequent retrocession of Public Law 280 jurisdiction over the Swinomish Tribe are irrelevant to determine whether the Wilburs committed a predicate state offense to support criminal charges under the CCTA.

C. The District Court Properly Denied the Wilburs' Motion to Dismiss Because Washington's Cigarette Regulatory Scheme and the CCTA Do Not Infringe upon Any Rights Reserved in the Treaty of Point Elliott.

1. Standard of Review.

A district court's legal determinations and application of law to facts, including the interpretation and application of treaty language, are reviewed *de novo*. *Smiskin*, 487 F.3d at 1262.

2. *The Wilburs Lack Standing to Seek Enforcement of any Rights Afforded the Swinomish Tribe by the Treaty of Point Elliott.*

It is well-established that rights conferred by an Indian treaty belong to the tribe as a whole, and thus an individual Indian may not avoid federal criminal liability by invoking a tribal treaty right.¹⁷ *See United States v. Gallaher*, 275 F.3d 784, 789 (9th Cir. 2001). Only if a treaty specifically confers rights upon individual Indians may a member of a signatory tribe rely upon that treaty right to forestall a criminal prosecution. *See, e.g., Smiskin*, 487 F.3d at 1264-69. Nothing in the Treaty of Point Elliott purports to create any individual rights. Indeed, this Court has made clear this Treaty secured only communal rights held by the signatory tribes. *See United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975). Because the Wilburs enjoy no individually-enforceable rights under the Treaty, their treaty-based attack on the Indictment necessarily fails.

¹⁷ There are some exceptions to this rule, most notably that, under some treaties, individual Indians may invoke the tribe's treaty right to hunt and fish on tribal land. *E.g. United States v. Dion*, 476 U.S. 734, 737 n.4 (1986); *but see, e.g., Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515-16 (9th Cir. 2005). This exception is obviously not implicated here.

Moreover, April Wilbur and Brenda Wilbur, who are not Swinomish tribal members, have not established any entitlement to benefit from whatever treaty rights are held by Swinomish Tribal members. Consequently, they have no free-standing right to seek enforcement of Swinomish Treaty rights. *Cf. United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) (treaty rights may be exercised only by “the tribes that signed the treaties”). Accordingly, any entitlement April and Brenda Wilbur may have to benefit from the Treaty must derive from Swinomish tribal law. *See Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998). April and Brenda Wilbur, however, have not pointed to any provision of Swinomish tribal law that would allow them to exercise rights held by tribal members.

3. *Requiring a Swinomish Cigarette Retailer to Collect Taxes on the Sale of Cigarettes to Nonmembers and Non-Indians Does Not Impermissibly Burden a Treaty Right to Trade.*

Based entirely upon the testimony of Dr. Daniel Boxberger regarding the “Swinomish’s trading rights that may have been reserved at the time of [the] treaty,” the district court made three factual findings: (1) the Swinomish traded tobacco freely before the Treaty, subject to no taxation or regulation; (2) the topic of domestic trade was not discussed during the Treaty negotiations (let alone any possible future taxation); and (3) the Swinomish signatories did not believe the Treaty would restrict their pre-treaty trading practices. ER_746-47.

From these findings, the court construed the Treaty as protecting a reserved tribal right to unrestricted trade in tobacco products. *Id.*

The Wilburs contend that based on these findings of fact, the district court erred in rejecting their Treaty defense. Their principal argument appears to be that because the Swinomish, at the time of the Treaty, traded in tobacco on their reservation without any obligation to collect excise taxes, Washington's cigarette tax scheme, and thus the CCTA, are inconsistent with their Treaty trade rights. Appellate Brief Two at 19. Nevertheless, the district court, "guided" by relevant Ninth Circuit authority, concluded that application and compliance with Washington's cigarette tax scheme and the CCTA does not infringe upon rights reserved in the Treaty of Point Elliott. ER_747-48.

The United States certainly agrees with the district court's determination that Washington's cigarette tax scheme does not infringe on rights reserved in the Treaty. However, the government disagrees with the district court's conclusion that the Treaty of Point Elliott construed any specific right to trade in tobacco products. In concluding otherwise, the district court relied heavily on the maxim that Indian treaties are generally read as "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). Because tobacco trade was not mentioned in the Treaty, and because the Swinomish were

trading in tobacco prior to the Treaty, the court concluded the Treaty gave them the right to continue that conduct unrestricted. This is incorrect.

The principle announced in *Winans* only operates to preserve rights a tribe actually held before the treaty. The mere fact a tribe engaged in certain conduct before signing a treaty does not mean the tribe had a *legally recognized right* to do so, and thus had a reserved right to continue that conduct enforceable under the treaty. See, e.g., *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392, 397-98 (1968). The only sources of preexisting rights are prior treaties (not the situation here), see, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195-200 (1999), or else the “original natural rights” the signatory tribe held as a previously-independent political entity. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); see also *Dion*, 476 U.S. at 738. The right to engage in commerce with other sovereigns is undoubtedly a “natural right” held by nations. However, the right to do so free from any regulation which might be required by a trading partner’s sovereign is another matter. Indeed, if the Treaty of Point Elliott protects a reserved right to *completely* unrestricted trade (even outside of tribal territory) — because the “signatories to the Treaty would not have intended to submit to be restricted in their trade of tobacco or other tribal products,” ER_747 — that logically means the Treaty exempts trading activities from state and federal regulatory and tax

laws. Yet, the Supreme Court has held otherwise. See *Dillon v. United States*, 792 F.2d 849, 853-54 (9th Cir. 1986); see also *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418, 420-21 (1935). Thus, it cannot be that the Treaty reserves unrestricted trade in tobacco products.

But even assuming the Treaty confirms a right to trade in tobacco, that right was, as the district court recognized, not burdened here. “Federal laws of general applicability are presumed to apply with equal force to Indians.” *Fiander*, 547 F.3d at 1039 (internal quotes and citation omitted). The CCTA is a generally-applicable federal law, and because Indians are not expressly excluded from its scope, this Court has held Indians are presumptively subject to this criminal statute. *Baker*, 63 F.3d at 1485-86. *Baker* acknowledged, however, there are three exceptions which could preclude application of the CCTA, one of which is if “the application of the law to the tribe would abrogate rights guaranteed by Indian treaties.” *Id.* at 1485. The Wilburs argue that applying the CCTA to their sale of unstamped cigarettes on the Swinomish Reservation violates their purported Treaty right to trade tribal goods free of any taxation. Appellate Brief Two at 18-20.

The Wilburs, however, make no claim that the Treaty contains an express right of tax-free trade. Rather, they assert that the Swinomish Tribe had a pre-existing right to tax-free trade, which was effectively incorporated

into the Treaty. Because this right purportedly existed when the Swinomish Tribe signed the Treaty, and because the Tribe did not expressly relinquish this right, the Wilburs argue the Swinomish intended their right to continued tax-free trade to survive this Treaty. *See generally Tulee v. Washington*, 315 U.S. 681, 684 (1942) (an Indian treaty must be construed, “so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council. . .”). This argument fails for myriad of reasons.

The Treaty is concerned primarily with setting forth the terms for establishing and maintaining the reservations of the Swinomish and other signatory tribes. Indeed, the topic of trade is expressly discussed only once, in Article XII, which provides in pertinent part:

The said tribes and bands further agree not to trade at Vancouver’s Island or elsewhere out of the dominions of the United States[.]

12 Stat. 927, 929. The Treaty says nothing about what rights, if any, the signatory tribes have to trade their goods within the United States. The Treaty does not affirmatively afford Indians a general right to free trade, nor expressly prohibit the government from imposing taxes that might impact Indian trade generally, or trade with non-tribal members in particular.

Relying on the principle that Indian treaties are generally read “as ‘not a grant of rights to the Indians, but a grant of rights from them – a reservation of

those not granted,” *Winans*, 198 U.S. at 381, the Wilburs argue that Article XII’s silence on the topic of domestic trade means that the Swinomish Tribe retained all the trading rights it had before signing the Treaty. *See* Appellate Brief Two at 11-13. Moreover, because the Swinomish “traded regularly” with non-Indians for many goods (including tobacco) “in the decades preceding their treaty,” the Wilburs assert that subsequent to the Treaty they enjoyed a continued right to free trade that could not be burdened by any obligation to precollect taxes imposed on nontribal purchasers. *See id.* at 14, 19-20.

It does not follow, however, that because Article XII restricted only the signatory tribes’ ability to trade outside the United States, the tribes were afforded a general right to free trade in all other circumstances. Certainly, the tribes could not have understood Article XII to be guaranteeing them a right to trade free of any tax-related regulation, such as collecting a tax levied on their non-tribal-member trading partners. Such a conclusion would be difficult, if not impossible, to square with *Colville*, which upheld Washington’s right to tax cigarette sales to non-Indians by another signatory tribe of the Treaty, the Lummi Nation. *See* 447 U.S. at 143 n.13, 154-59.

Similarly, this Court held that a treaty provision almost identical to Article XII – Article XII of the Medicine Creek Treaty, 10 Stat. 1132, 1134

(1954) (signed December 26, 1854)¹⁸ – did not prohibit the imposition of federal tax upon income generated from an on-reservation smokeshop. *Dillon*, 792 F.2d at 853-54. And in *Baker*, the Court rejected the defendants’ claim that this provision of the Medicine Creek Treaty afforded a defense to a CCTA prosecution. 63 F.3d at 1485. The Treaty of Point Elliott was signed less than a month after the Medicine Creek Treaty, and there is no reason to believe Article XII of the Treaty of Point Elliott affords any more rights than its virtually-identical predecessor. *Baker* is dispositive of the Wilburs’ treaty-based defense.

The Wilburs’ argue that the district court erred in adopting the analysis in *Baker* without regard to the “particular facts of the case before it.” Appellate Brief Two at 9. They contend *Baker* is distinguishable because it involved a different treaty and because the district court in *Baker* did not conduct an evidentiary hearing. Appellate Brief Two at 8. That there was no evidentiary hearing in *Baker* is of no consequence. The Court in *Baker* assumed a treaty right to trade tobacco existed, here the district court made that finding after an evidentiary hearing. This is a distinction without a difference.

¹⁸ The Medicine Creek Treaty was signed by several other tribes in the Washington Territory. Article XII of that treaty provides in pertinent part: “The said tribes and bands finally agree not to trade at Vancouver’s Island, or elsewhere out of the dominions of the United States[.]” 10 Stat. 1132, 1134.

As for the Wilburs point that *Baker* was construing another treaty, the fact remains *Baker* involved a clause in the Medicine Creek Treaty that was virtually identical to the pertinent clause of the Treaty of Point Elliott. And, in *Baker*, the Court held that whatever trade rights were conferred by this treaty language, that right was not infringed by the CCTA, since “the CCTA does not restrict trading in cigarettes; it makes it a crime to fail to pay applicable state taxes on cigarettes subject to tax.” 63 F.3d at 1485 (footnote omitted). The Wilburs offer no reason why Article XII of the Treaty of Point Elliott should be construed as affording any more rights than the all-but-identical provision of the Medicine Creak Treaty.¹⁹

Nothing in this Court’s *Smiskin* decision dictates a different result. *Smiskin*, 487 F.3d 1260. *Smiskin* did uphold a treaty-based defense to a CCTA prosecution, but critically, *Smiskin* did not involve a claim regarding Washington’s cigarette tax scheme. Rather, the issue in *Smiskin* was the Yakama Nation’s right to travel upon the public highways specifically

¹⁹ The Wilburs claim the district court “committed error by *sub silentio* applying the ‘minimal burden,’ or balancing, analysis to [their] treaty rights.” Appellate Brief Two at 7, 10, 18-19. The court did no such thing. Following *Baker*, the court simply concluded that Washington State’s cigarette tax scheme — and particularly its precollection requirement — caused no infringement whatever on the Wilburs’ treaty-based right to trade tobacco.

guaranteed by the Yakama's Treaty, which this Court held was violated by Washington's prenotification requirement. *Smiskin*, 487 F.3d at 1265-69. The Treaty of Point Elliott has no parallel "right to travel" provision, and thus the district court correctly determined that *Smiskin* was inapposite.

D. The District Court Properly Calculated the Restitution and the Amount of Loss for Sentencing Purposes.

Wilburs argue that even if their CCTA convictions are affirmed, the restitution ordered by the district court should be eliminated because, they claim there was no tax loss at all. Alternatively, they argue the restitution amount should be reduced because there was only a tax loss after March 27, 2005, when the Trading Post was no longer licensed by the tribe to sell cigarettes. Wilburs assert that because the district court did not decide whether the Trading Post was an "Indian retailer," it never decided if the tax retrocession applied to the Wilburs. Appellate Brief One at 52. The Wilburs then reiterate their claim that, in fact, the State had retroceded its taxing authority over them because they were an Indian retailer exempt from state taxation.

In rejecting Wilburs' pretrial motions, the district court ruled that the State retroceded from collecting taxes only on sales that conformed to the Tax Contract's requirements. The government alleged, and the Wilburs

admitted, that all cigarettes subject to the federal charges were not stamped with a tribal or state stamp. Since the Wilburs' transactions did not conform to the terms of the Tax Contract, the State tax retrocession did not apply to the sale of cigarettes at the Trading Post during the entire period of the conspiracy, from July 28, 1999 until May 15, 2007, and thus the \$ 10,984,565.25 restitution order was appropriate. SER_89-90. Pursuant to the court's pretrial rulings, it was irrelevant whether the Trading Post qualified as an Indian retailer.

The district court accepted the government's calculations of the amount of the excise tax loss based upon documented sales of unstamped cigarettes between July 1999 and May 15, 2007, and the applicable excise tax rates per carton in effect during that period. SER_30, 89. Indeed, the Wilburs admitted in their plea agreements to the number of cartons sold. It is simple arithmetic to multiply the number of cartons by the applicable tax rate to reach the loss amount. The Wilburs did not challenge the calculation. SER_30, 89-90. Because the district court correctly ruled that the State had not retroceded its taxing authority over the Wilburs' non-conforming sales, *see* Section VI.A, the Wilburs' challenge to the court's restitution order necessarily fails. In addition, the total restitution amount imposed by the district court, \$10,984,565.25, also

reflects the correct calculation of the tax loss for purposes of the Sentencing Guidelines.²⁰

Finally, even if the Wilburs' conspiracy convictions were affirmed, but the period during which the Tax Contract was in effect and the Trading Post was licensed by the Tribe to sell cigarettes were excluded from tax loss calculation as Wilburs advocate, resentencing would not be necessary. In that event the Wilburs would still owe restitution for tax losses incurred by the State between July 1999 and October 2, 2003, and from March 28, 2005 through May 15, 2007, which total \$10,105,197.75.²¹ SER_30. Further, a reduction of the tax loss from \$10.9 million to \$10.1 million would not change the advisory Guidelines calculation, *see* U.S.S.G. § 2T4.1(K), (L), so there would also be no

²⁰ It is worth noting that the Wilburs' argument ignores their pre-Tax Contract sales of contraband cigarettes during the first four years of the conspiracy. Because there was no Tax Contract in effect from July 1999 to October 2003, there was no state tax retrocession available during that period, and \$3,387,399.00 in excise taxes on the unstamped cigarettes sold by the Trading Post were owed to the State of Washington. SER_30.

²¹The tax loss calculation for the period October 3, 2003 to March 27,2005, based on records of documented sales obtained during the investigation of the Trading Post at March Point, totaled \$879,367.50. SER_30.

basis for re-sentencing. *See generally United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010) (harmless sentencing errors do not require resentencing).

VII. CONCLUSION

For the reasons set forth above, the Wilburs' convictions and the sentence of the district court should be affirmed.

DATED this 1st day of February, 2011.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the government is not aware of any related cases which should be considered with this matter.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionately spaced, has a Calisto MT typeface of 14 points, and contains 16,238 words.

Dated this 1st day of February, 2011.

/s/ Mary K. Dimke
MARY K. DIMKE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, I electronically filed the foregoing Plaintiff-Appellee's Consolidated Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and transmitted via Federal Express four copies of the Excerpts of Record to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit.

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 1st day of February, 2011.

s/ Helen J. Brunner

HELEN J. BRUNNER

Assistant United States Attorney

ADDENDUM



Effective: March 9, 2006

United States Code Annotated [Currentness](#)

Title 18. Crimes and Criminal Procedure ([Refs & Annos](#))

▣ [Part I. Crimes \(Refs & Annos\)](#)

▣ [Chapter 114. Trafficking in Contraband Cigarettes and Smokeless Tobacco \(Refs & Annos\)](#)

→ **§ 2341. Definitions**

As used in this chapter--

(1) the term “cigarette” means--

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term “contraband cigarettes” means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if the State or local government requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than--

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 ([19 U.S.C. 1311](#) or [1555](#)) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person--

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

(3) the term “common or contract carrier” means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under subtitle IV of title 49, or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands;

(5) the term “Attorney General” means the Attorney General of the United States;

(6) the term “smokeless tobacco” means any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted;

(7) the term “contraband smokeless tobacco” means a quantity in excess of 500 single-unit consumer-sized cans or packages of smokeless tobacco, or their equivalent, that are in the possession of any person other than -

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as manufacturer of tobacco products or as an export warehouse proprietor, a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311, 1555), or an agent of such person;

(B) a common carrier transporting such smokeless tobacco under a proper bill of lading or freight bill which states the quantity, source, and designation of such smokeless tobacco;

(C) a person who--

(i) is licensed or otherwise authorized by the State where such smokeless tobacco is found to engage in the business of selling or distributing tobacco products; and

(ii) has complied with the accounting, tax, and payment requirements relating to such license or authorization with respect to such smokeless tobacco; or

(D) an officer, employee, or agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State), having possession of such smokeless tobacco in connection with the performance of official duties; [FN1]

CREDIT(S)

(Added Pub.L. 95-575, § 1, Nov. 2, 1978, 92 Stat. 2463, and amended Pub.L. 97-449, § 5(c), Jan. 12, 1983, 96 Stat. 2442; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 107-296, Title XI, § 1112(i)(1), Nov. 25, 2002, 116 Stat. 2277; Pub.L. 109-177, Title I, § 121(a)(1), (b)(1), (6), Mar. 9, 2006, 120 Stat. 221, 222.)

[FN1] So in original. The semicolon probably should be a period.

Current through P.L. 111-311 (excluding P.L. 111-259, 111-267, 111-275, 111-281, 111-291, 111-296, and 111-309) approved 12-15-10

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18 U.S.C.A. § 2341

United States Code Annotated [Currentness](#)

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 114. Trafficking in Contraband Cigarettes (Refs & Annos)

§ 2341. Definitions

As used in this chapter—

(1) the term “cigarette” means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term “contraband cigarettes” means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than—

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1986 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 ([19 U.S.C. 1311](#) or [1555](#)) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person—

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

(3) the term “common or contract carrier” means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under subtitle IV of title 49, or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands; and

(5) the term “Attorney General” means the Attorney General of the United States [\[FN1\]](#)

CREDIT(S)

(Added [Pub.L. 95-575, § 1](#), Nov. 2, 1978, 92 Stat. 2463, and amended [Pub.L. 97-449, § 5\(c\)](#), Jan. 12, 1983, 96 Stat. 2442; [Pub.L. 99-514, § 2](#), Oct. 22, 1986, 100 Stat. 2095; [Pub.L. 107-296, Title XI, § 1112\(i\)\(1\)](#), Nov. 25,

C

Effective: March 9, 2006

United States Code Annotated [Currentness](#)

Title 18. Crimes and Criminal Procedure ([Refs & Annos](#))

▾ [Part I. Crimes \(Refs & Annos\)](#)

▾ [Chapter 114. Trafficking in Contraband Cigarettes and Smokeless Tobacco \(Refs & Annos\)](#)

→ **§ 2342. Unlawful acts**

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 10,000 in a single transaction.

CREDIT(S)

(Added [Pub.L. 95-575](#), § 1, Nov. 2, 1978, 92 Stat. 2464, and amended [Pub.L. 109-177](#), Title I, § 121(a)(2), (b)(2), Mar. 9, 2006, 120 Stat. 221, 222.)

Current through P.L. 111-311 (excluding P.L. 111-259, 111-267, 111-275, 111-281, 111-291, 111-296, and 111-309) approved 12-15-10

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28 U.S.C.A. § 1360

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Effective:[See Text Amendments]

United States Code Annotated Currentness

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 85. District Courts; Jurisdiction (Refs & Annos)

→ § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

<i>State of</i>	<i>Indian country affected</i>
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

CREDIT(S)

(Added Aug. 15, 1953, c. 505, § 4, 67 Stat. 589, and amended Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, § 2, 72 Stat. 545; Nov. 6, 1978, Pub.L. 95-598, Title II, § 239, 92 Stat. 2668; July 10, 1984, Pub.L.

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West's RCWA 37.12.010

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West's Revised Code of Washington Annotated Currentness

Title 37. Federal Areas--Indians (Refs & Annos)

▣ Chapter 37.12. Indians and Indian Lands--Jurisdiction (Refs & Annos)

→ 37.12.010. Assumption of criminal and civil jurisdiction by state

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

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West's Revised Code of Washington Annotated [Currentness](#)

Title 43. State Government--Executive ([Refs & Annos](#))

▢ [Chapter 43.06. Governor \(Refs & Annos\)](#)

→ **43.06.450. Cigarette tax contracts--Intent--Finding--Limitations**

The legislature intends to further the government-to-government relationship between the state of Washington and Indians in the state of Washington by authorizing the governor to enter into contracts concerning the sale of cigarettes. The legislature finds that these cigarette tax contracts will provide 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. In addition, it is the intent of the legislature that the negotiations and the ensuing contracts shall have no impact on the state's share of the proceeds under the master settlement agreement entered into on November 23, 1998, by the state. Chapter 235, Laws of 2001 does not constitute a grant of taxing authority to any Indian tribe nor does it provide precedent for the taxation of non-Indians on fee land.

CREDIT(S)

[[2001 c 235 § 1.](#)]

Current through Laws 2011, chapters 1 and 2

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Title 43. State Government--Executive ([Refs & Annos](#))

[Chapter 43.06](#). Governor ([Refs & Annos](#))

→ **43.06.455. Cigarette tax contracts--Requirements--Use of revenue--Enforcement--Definitions**

(1) The governor may enter into cigarette tax contracts concerning the sale of cigarettes. All cigarette tax contracts shall meet the requirements for cigarette tax contracts under this section. Except for cigarette tax contracts under [RCW 43.06.460](#), the rates, revenue sharing, and exemption terms of a cigarette tax contract are not effective unless authorized in a bill enacted by the legislature.

(2) Cigarette tax contracts shall be in regard to retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country, and are not in regard to transactions by non-Indian retailers. In addition, contracts shall provide that retailers shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen years.

(3) A cigarette tax contract with a tribe shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers. The tribe may allow an exemption for sales to tribal members.

(4) Cigarette tax contracts shall provide that all cigarettes possessed or sold by a retailer shall bear a cigarette stamp obtained by wholesalers from a bank or other suitable stamp vendor and applied to the cigarettes. The procedures to be used by the tribe in obtaining tax stamps must include a means to assure that the tribal tax will be paid by the wholesaler obtaining such cigarettes. Tribal stamps must have serial numbers or some other discrete identification so that each stamp can be traced to its source.

(5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:

(a) Wholesalers or manufacturers licensed to do business in the state of Washington;

(b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the state of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative and enforcement powers over such wholesalers or manufacturers to the extent permitted by law;

(c) A tribal wholesaler that purchases only from a wholesaler or manufacturer described in (a), (b), or (d) of this subsection; and

(d) A tribal manufacturer.

(6) Cigarette tax contracts shall be for renewable periods of no more than eight years. A renewal may not include a renewal of the phase-in period.

(7) Cigarette tax contracts shall include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping requirements, recordkeeping, and audit requirements.

(8) Tax revenue retained by a tribe must be used for essential government services. Use of tax revenue for subsidization of cigarette and food retailers is prohibited.

(9) The cigarette tax contract may include provisions to resolve disputes using a nonjudicial process, such as mediation.

(10) The governor may delegate the power to negotiate cigarette tax contracts to the department of revenue. The department of revenue shall consult with the liquor control board during the negotiations.

(11) Information received by the state or open to state review under the terms of a contract is subject to the provisions of [RCW 82.32.330](#).

(12) It is the intent of the legislature that the liquor control board and the department of revenue continue the division of duties and shared authority under chapter 82.24 RCW and therefore the liquor control board is responsible for enforcement activities that come under the terms of chapter 82.24 RCW.

(13) Each cigarette tax contract shall include a procedure for notifying the other party that a violation has occurred, a procedure for establishing whether a violation has in fact occurred, an opportunity to correct such violation, and a provision providing for termination of the contract should the violation fail to be resolved through this process, such termination subject to mediation should the terms of the contract so allow. A contract shall provide for termination of the contract if resolution of a dispute does not occur within twenty-four months from the time notification of a violation has occurred. Intervening violations do not extend this time period. In addition, the contract shall include provisions delineating the respective roles and responsibilities of the tribe, the department of revenue, and the liquor control board.

(14) For purposes of this section and [RCW 43.06.460](#), [82.08.0316](#), [82.12.0316](#), and [82.24.295](#):

(a) "Essential government services" means services such as tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development;

(b) "Indian retailer" or "retailer" means (i) a retailer wholly owned and operated by an Indian tribe, (ii) a business wholly owned and operated by a tribal member and licensed by the tribe, or (iii) a business owned and operated by the Indian person or persons in whose name the land is held in trust; and

(c) "Indian tribe" or "tribe" means a federally recognized Indian tribe located within the geographical boundaries of the state of Washington.

CREDIT(S)

[2001 c 235 § 2.]

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Title 43. State Government--Executive ([Refs & Annos](#))

▢ [Chapter 43.06](#). Governor ([Refs & Annos](#))

→ **43.06.460. Cigarette tax contracts--Eligible tribes--Tax rate**

(1) The governor is authorized to enter into cigarette tax contracts with the Squaxin Island Tribe, the Nisqually Tribe, Tulalip Tribes, the Muckleshoot Indian Tribe, the Quinault Nation, the Jamestown S'Klallam Indian Tribe, the Port Gamble S'Klallam Tribe, the Stillaguamish Tribe, the Sauk-Suiattle Tribe, the Skokomish Indian Tribe, the Yakama Nation, the Suquamish Tribe, the Nooksack Indian Tribe, the Lummi Nation, the Chehalis Confederated Tribes, the Upper Skagit Tribe, the Snoqualmie Tribe, the Swinomish Tribe, the Samish Indian Nation, the Quileute Tribe, the Kalispel Tribe, the Confederated Tribes of the Colville Reservation, the Cowlitz Indian Tribe, the Lower Elwha Klallam Tribe, the Makah Tribe, the Hoh Tribe, the Spokane Tribe, and the Shoalwater Bay Tribe. Each contract adopted under this section shall provide that the tribal cigarette tax rate be one hundred percent of the state cigarette and state and local sales and use taxes within three years of enacting the tribal tax and shall be set no lower than eighty percent of the state cigarette and state and local sales and use taxes during the three-year phase-in period. The three-year phase-in period shall be shortened by three months each quarter the number of cartons of nontribal manufactured cigarettes is at least ten percent or more than the quarterly average number of cartons of nontribal manufactured cigarettes from the six-month period preceding the imposition of the tribal tax under the contract. Sales at a retailer operation not in existence as of the date a tribal tax under this section is imposed are subject to the full rate of the tribal tax under the contract. The tribal cigarette tax is in lieu of the state cigarette and state and local sales and use taxes, as provided in [RCW 43.06.455\(3\)](#).

(2) A cigarette tax contract under this section is subject to [RCW 43.06.455](#).

CREDIT(S)

[[2008 c 241 § 1](#), eff. June 12, 2008; [2007 c 320 § 1](#), eff. July 1, 2007; [2005 c 208 § 1](#), eff. July 24, 2005; [2003 c 236 § 1](#), eff. July 27, 2003; [2002 c 87 § 1](#); [2001 2nd sp.s. c 21 § 1](#); [2001 c 235 § 3](#).]

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Title 82. Excise Taxes (Refs & Annos)
 ⁵ Chapter 82.24. Tax on Cigarettes (Refs & Annos)
 → **82.24.010. Definitions**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter:

- (1) "Board" means the liquor control board.
- (2) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.
- (3) "Indian tribal organization" means a federally recognized Indian tribe, or tribal entity, and includes an Indian wholesaler or retailer that is owned by an Indian who is an enrolled tribal member conducting business under tribal license or similar tribal approval within Indian country. For purposes of this chapter "Indian country" is defined in the manner set forth in 18 U.S.C. Sec. 1151.
- (4) "Precollection obligation" means the obligation of a seller otherwise exempt from the tax imposed by this chapter to collect the tax from that seller's buyer.
- (5) "Retailer" means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate.
- (6) "Retail selling price" means the ordinary, customary or usual price paid by the consumer for each package of cigarettes, less the tax levied by this chapter and less any similar tax levied by this state.
- (7) "Stamp" means the stamp or stamps by use of which the tax levy under this chapter is paid or identification is made of those cigarettes with respect to which no tax is imposed.
- (8) "Wholesaler" means every person who purchases, sells, or distributes any one or more of the articles taxed herein to retailers for the purpose of resale only.

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(9) The meaning attributed, in chapter 82.04 RCW, to the words "person," "sale," "business" and "successor" applies equally in this chapter.

CREDIT(S)

[1997 c 420 § 3; 1995 c 278 § 1; 1961 c 15 § 82.24.010. Prior: 1959 c 270 § 9; 1949 c 228 § 14; 1935 c 180 § 83; Rem. Supp. 1949 § 8370-83.]

HISTORICAL AND STATUTORY NOTES

Effective date--1995 c 278: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [1995 c 278 § 17.]

Laws 1995, ch. 278, § 1, rewrote the section, which previously read:

"For the purposes of this chapter, unless otherwise required by the context:

"(1) 'Wholesaler' means every person who purchases, sells, or distributes any one or more of the articles taxed herein to retailers for the purpose of resale only;

"(2) 'Retailer' means every person, other than a wholesaler, who purchases, sells, offers for sale or distributes any one or more of the articles taxed herein, irrespective of quantity or amount, or the number of sales, and all persons operating under a retailer's registration certificate;

"(3) 'Retail selling price' means the ordinary, customary or usual price paid by the consumer for each package of cigarettes, less the tax levied by this chapter and less any similar tax levied by this state;

"(4) 'Cigarette' means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state;

"(5) 'Stamp' means the stamp or stamps or meter impressions by use of which the tax levy under this chapter is paid;

"(6) The meaning attributed, in chapter 82.04 RCW, to the words 'person,' 'sale,' 'business' and 'successor' shall apply equally in the provisions of this chapter."



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WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 82. EXCISE TAXES
CHAPTER 82.24. TAX ON CIGARETTES

82.24.020. Tax imposed--Additional taxes for specific purposes--Absorption of tax--Possession defined

(1) There is levied and there shall be collected as provided in this chapter, a tax upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to one and fifteen one-hundredths cents per cigarette.

(2) An additional tax is imposed upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to five hundred twenty-five one-thousandths of a cent per cigarette. All revenues collected during any month from this additional tax shall be deposited in the violence reduction and drug enforcement account under [RCW 69.50.520](#) by the twenty-fifth day of the following month.

(3) An additional tax is imposed upon the sale, use, consumption, handling, possession, or distribution of all cigarettes, in an amount equal to two and five one-hundredths cents per cigarette . All revenues collected during any month from this additional tax shall be deposited in the health services account created under [RCW 43.72.900](#) by the twenty-fifth day of the following month.

(4) Wholesalers subject to the payment of this tax may, if they wish, absorb five one-hundredths cents 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.

(5) For purposes of this chapter, "possession" shall mean both (a) physical possession by the purchaser and, (b) when cigarettes are being transported to or held for the purchaser or his or her designee by a person other than the purchaser, constructive possession by the purchaser or his or her designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

(6) In accordance with federal law and rules prescribed by the department, an enrolled member of a federally recognized Indian tribe may purchase cigarettes from an Indian tribal organization under the jurisdiction of the member's tribe for the member's own use exempt from the applicable taxes imposed by this chapter. Except as provided in subsection (7) of this section, any person, who purchases cigarettes from an Indian tribal organization and who is not an enrolled member of the federally recognized Indian tribe within whose jurisdiction the sale takes place, is not exempt from the applicable taxes imposed by this chapter.

(7) If the state enters into a cigarette tax contract or agreement with a federally recognized Indian tribe under chapter 43.06 RCW, the terms of the contract or agreement shall take precedence over any conflicting provisions of this chapter while the contract or agreement is in effect.

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Title 82. Excise Taxes ([Refs & Annos](#))

▢ [Chapter 82.24. Tax on Cigarettes \(Refs & Annos\)](#)

→ **82.24.030. Stamps**

(1) In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department. The stamps must be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid or whether an exemption from the tax applies.

(2) Except as otherwise provided in this chapter, only a wholesaler shall cause to be affixed on every package of cigarettes, stamps of an amount equaling the tax due thereon or stamps identifying the cigarettes as exempt before he or she sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: PROVIDED, That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

(3) Only wholesalers may purchase or obtain cigarette stamps. Wholesalers shall not sell or provide stamps to any other wholesaler or person.

(4) Each roll of stamps, or group of sheets, shall have a separate serial number, which shall be legible at the point of sale. The department of revenue shall keep records of which wholesaler purchases each roll or group of sheets. If the department of revenue permits wholesalers to purchase partial rolls or sheets, in no case may stamps bearing the same serial number be sold to more than one wholesaler. The remainder of the roll or sheet, if any, shall either be retained for later purchases by the same wholesaler or destroyed.

(5) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

CREDIT(S)

[2003 c 114 § 2, eff. July 27, 2003; 1995 c 278 § 2; 1990 c 216 § 1; 1975 1st ex.s. c 278 § 61; 1961 c 15 § 82.24.030. Prior: 1959 c 270 § 3; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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Title 82. Excise Taxes ([Refs & Annos](#))

▢ [Chapter 82.24. Tax on Cigarettes \(Refs & Annos\)](#)

→ **82.24.040. Duty of wholesaler**

(1) Except as authorized by this chapter, no person other than a licensed wholesaler shall possess in this state unstamped cigarettes.

(2) No wholesaler in this state may possess within this state unstamped cigarettes except that:

(a) Every wholesaler in the state who is licensed under Washington state law may possess within this state unstamped cigarettes for such period of time after receipt as is reasonably necessary to affix the stamps as required; and

(b) Any wholesaler in the state who is licensed under Washington state law and who furnishes a surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of the wholesaler's stock as may be necessary for the conduct of the wholesaler's business in making sales to persons in another state or foreign country or to instrumentalities of the federal government. Such unstamped stock shall be kept separate and apart from stamped stock.

(3) Every wholesaler licensed under Washington state law shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state or to a federal instrumentality, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the department, at Olympia, not later than the fifteenth day of the following calendar month. For failure to comply with the requirements of this section, the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed.

(4) Unstamped cigarettes possessed by a wholesaler under subsection (2) of this section that are transferred by the wholesaler to another facility of the wholesaler within the borders of Washington shall be transferred in compliance with [RCW 82.24.250](#).

(5) Every wholesaler who is licensed by Washington state law shall sell cigarettes to retailers located in Washington only if the retailer has a current cigarette retailer's license or is an Indian tribal organization authorized to possess untaxed cigarettes under this chapter and the rules adopted by the department.

(6) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

CREDIT(S)

[2003 c 114 § 3, eff. July 27, 2003; 1995 c 278 § 3; 1990 c 216 § 2; 1969 ex.s. c 214 § 1; 1961 c 15 § 82.24.040. Prior: 1959 c 270 § 4; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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Title 82. Excise Taxes ([Refs & Annos](#))

▢ [Chapter 82.24. Tax on Cigarettes \(Refs & Annos\)](#)

→ **82.24.050. Retailer--Possession of unstamped cigarettes**

(1) No retailer in this state may possess unstamped cigarettes within this state unless the person is also a wholesaler in possession of the cigarettes in accordance with [RCW 82.24.040](#).

(2) A retailer may obtain cigarettes only from a wholesaler subject to the provisions of this chapter.

CREDIT(S)

[[2003 c 114 § 4](#), eff. July 27, 2003; [1995 c 278 § 4](#); [1990 c 216 § 3](#); 1969 ex.s. c 214 § 2; 1961 c 15 § 82.24.050. Prior: 1959 c 270 § 5; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

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 Chapter 82.24. Tax on Cigarettes (Refs & Annos)
 → **82.24.080. Legislative intent--Taxable event--Tax liability**

(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 (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles taxed under this chapter is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this 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. A pre-collection obligation may not be imposed upon a person exempt from the tax who sells, distributes, or transfers possession of cigarettes to another person who, by law, is exempt from the tax imposed by this chapter or upon whom the obligation for collection of the tax may not be imposed. 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.

(3) In the event of an increase in the rate of the tax imposed under this chapter, it is the intent of the legislature that the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed articles after the effective date of the rate increase shall be liable for the additional tax, or its precollection obligation as required by this chapter, represented by the rate increase. The failure to pay the additional tax with respect to the first taxable event after the effective date of a rate increase shall not prevent tax liability for the additional tax from arising from a subsequent taxable event.

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

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[2008 c 226 § 2, eff. June 12, 2008; 1995 c 278 § 5; 1993 c 492 § 308; 1972 ex.s. c 157 § 4; 1961 c 15 § 82.24.080. Prior: 1959 c 270 § 8; prior: 1949 c 228 § 13, part; 1943 c 156 § 11, part; 1941 c 178 § 13, part; 1939 c 225 § 23, part; 1935 c 180 § 82, part; Rem. Supp. 1949 § 8370-82, part.]

HISTORICAL AND STATUTORY NOTES

Finding--Intent--2008 c 226: "The legislature finds that under Article III of the treaty with the Yakamas of 1855, members of the Yakama Nation have the right to travel upon all public highways. It is the legislature's intent to honor the treaty rights of the Yakama Nation, while protecting the state's interest in collecting and enforcing its cigarette taxes." [2008 c 226 § 1.]

Effective date--1995 c 278: See note following RCW 82.24.010.

Findings--Intent--1993 c 492: See notes following RCW 43.20.050.

Short title--Severability--Savings--Captions not law--Reservation of legislative power--Effective dates--1993 c 492: See RCW 43.72.910 through 43.72.915.

Severability--1972 ex.s. c 157: See note following RCW 82.24.020.

Laws 1993, ch. 492, § 308, in the first paragraph, in the first sentence, substituted "under this chapter" for "herein"; in the second sentence, substituted "taxed under this chapter" for "herein taxed"; in the second paragraph, substituted ". Failure" for "": *Provided, However, That*"; and, added the third paragraph.

Laws 1995, ch. 278, § 5, designated subsec. (1); designated subsec. (2); then rewrote the resulting subsection, which previously read:

"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. 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.";

designated subsec. (3); then divided the resulting subsec. (3) into two sentences; and, in the resulting first sentence, following "shall be liable for the additional tax" inserted ", or its precollection obligation as required by this chapter,".

2008 Legislation

Laws 2008, ch. 226, § 2, added subsection (4).

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Title 82. Excise Taxes ([Refs & Annos](#))

▢ [Chapter 82.24. Tax on Cigarettes \(Refs & Annos\)](#)

→ **82.24.120. Violations--Penalties and interest**

(1) If any person, subject to the provisions of this chapter or any rules adopted by the department of revenue under authority hereof, is found to have failed to affix the stamps required, or to have them affixed as herein provided, or to pay any tax due hereunder, or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration hereof, there shall be assessed and collected from such person, in addition to any tax that may be found due, a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes or two hundred fifty dollars, plus interest on the amount of the tax at the rate as computed under [RCW 82.32.050\(2\)](#) from the date the tax became due until the date of payment, and upon notice mailed to the last known address of the person or provided electronically as provided in [RCW 82.32.135](#). The amount shall become due and payable in thirty days from the date of the notice. If the amount remains unpaid, the department or its duly authorized agent may make immediate demand upon such person for the payment of all such taxes, penalties, and interest.

(2) The department, for good reason shown, may waive or cancel all or any part of penalties imposed, but the taxpayer must pay all taxes due and interest thereon, at the rate as computed under [RCW 82.32.050\(2\)](#) from the date the tax became due until the date of payment.

(3) The keeping of any unstamped articles coming within the provisions of this chapter shall be prima facie evidence of intent to violate the provisions of this chapter.

(4) This section does not apply to taxes or tax increases due under [RCW 82.24.280](#).

CREDIT(S)

[[2007 c 111 § 102](#), eff. July 22, 2007; [2006 c 14 § 6](#), eff. June 7, 2006; [1996 c 149 § 7](#); [1995 c 278 § 8](#); [1990 c 267 § 1](#); 1975 1st ex.s. c 278 § 64; 1961 c 15 § 82.24.120. Prior: 1949 c 228 § 15; 1939 c 225 § 25; 1935 c 180 § 87; Rem. Supp. 1949 § 8370-87.]

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Title 82. Excise Taxes ([Refs & Annos](#))

[Chapter 82.24. Tax on Cigarettes \(Refs & Annos\)](#)

→ **82.24.250. Transportation of unstamped cigarettes--Invoices and delivery tickets required--Stop and inspect**

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

(2) When transporting unstamped cigarettes, such persons shall have in their actual possession or cause to have in the actual possession of those persons transporting such cigarettes on their behalf invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes so transported.

(3) If unstamped cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by this chapter to possess unstamped cigarettes in this state.

(4) In the absence of the notice of transportation required by this section or in the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not a person authorized by this chapter to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of [RCW 82.24.130](#).

(5) Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state seller or consignor and such out-of-state purchaser or consignee.

(6) In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

(7) For purposes of this section, the term "person authorized by this chapter to possess unstamped cigarettes in this state" means:

(a) A wholesaler, licensed under Washington state law;

(b) The United States or an agency thereof;

(c) Any person, including an Indian tribal organization, who, after notice has been given to the board as provided in this section, brings or causes to be brought into the state unstamped cigarettes, if within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with [RCW 82.24.030](#) or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department; and

(d) Any purchaser or consignee of unstamped cigarettes, including an Indian tribal organization, who has given notice to the board in advance of receiving unstamped cigarettes and who within a period of time after receipt of the cigarettes as the department determines by rule to be reasonably necessary for the purpose the person has caused stamps to be affixed in accordance with [RCW 82.24.030](#) or otherwise made payment of the tax required by this chapter in the manner set forth in rules adopted by the department.

Nothing in this subsection (7) shall be construed as modifying [RCW 82.24.050](#) or [82.24.110](#).

(8) Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW.

(9) Nothing in this section shall be construed as limiting the right to travel upon all public highways under Article III of the treaty with the Yakamas of 1855.

CREDIT(S)

[[2008 c 226 § 5](#), eff. June 12, 2008; [2003 c 114 § 8](#), eff. July 27, 2003; [1997 c 420 § 7](#); [1995 c 278 § 10](#); [1990 c 216 § 6](#); [1972 ex.s. c 157 § 6](#).]

Current through Laws 2011, chapters 1 and 2

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West's Revised Code of Washington Annotated Currentness

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ **82.24.260. Selling or disposal of unstamped cigarettes--Person to pay and remit tax or affix stamps--Liability**

(1) Other than:

(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,

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 or causing stamps to be affixed in the manner provided in rules adopted by the department.

(2) When stamps are required to be affixed, the person may deduct from the tax collected the compensation allowable under this chapter. The remittance or the affixing of stamps shall, in the case of cigarettes obtained in the manner set forth in RCW 82.24.250(7)(c), be made at the same time and manner as required in RCW 82.24.250(7)(c).

(3) This section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by this chapter.

(4) Nothing in this section shall relieve a wholesaler from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

CREDIT(S)

[2003 c 114 § 9, eff. July 27, 2003; 1995 c 278 § 11; 1987 c 80 § 3; 1986 c 3 § 13. Prior: 1983 c 189 § 3; 1983 c 3 § 217; 1975 1st ex.s. c 22 § 1; 1972 ex.s. c 157 § 7.]

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West's Revised Code of Washington Annotated Currentness

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.24. Tax on Cigarettes (Refs & Annos)

→ **82.24.295. Exceptions--Sales by Indian retailer under cigarette tax contract**

(1) The taxes imposed by this chapter do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by an Indian retailer during the effective period of a cigarette tax contract subject to RCW 43.06.455.

(2) Effective July 1, 2002, wholesalers and retailers subject to the provisions of this chapter shall be allowed compensation for their services in affixing the stamps required under this chapter a sum computed at the rate of six dollars per one thousand stamps purchased or affixed by them.

CREDIT(S)

[2001 c 235 § 6.]

HISTORICAL AND STATUTORY NOTES

Intent--Finding--2001 c 235: See RCW 43.06.450.

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Treatises and Practice Aids

31 Wash. Prac. Series 82.04.601, Exemptions--Affixing Stamp Services for Cigarette Sales.

West's RCWA 82.24.295, WA ST 82.24.295

Current through Laws 2011, chapters 1 and 2

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WAC 458-20-186

Tax on cigarettes.

(1) **Introduction.** This rule addresses those taxes activities that apply exclusively to cigarettes as defined by RCW 82.24.010. See WAC 458-20-185 for tax liabilities associated with tobacco products other than cigarettes. The tax on cigarettes is in addition to all other taxes owed. For example, retailers and wholesalers are liable for business and occupation tax on their retailing or wholesaling activities, and must collect and remit sales tax on retail sales of cigarettes. Consumers pay the cigarette tax in addition to sales or use tax on purchases of cigarettes for consumption within this state. (Wholesalers not licensed in the state of Washington who are making sales of cigarettes to Indians in accordance with a cigarette tax contract authorized by RCW 43.06.455 must comply with the specific terms of their individual contracts. See also WAC 458-20-192 regarding sales in Indian country.)

(2) **Licensing requirements and responsibilities.** The Washington state liquor control board assumed the licensing responsibilities for cigarettes on July 1, 2009. Please see chapters 314-33 and 314-34 WAC.

(3) **Organization of rule.** The information provided in this rule is divided into six parts:

- (a) Part I explains the tax liabilities of persons who sell, use, consume, handle, possess, or distribute cigarettes in this state.
- (b) Part II explains the stamping requirements and how the cigarette tax rates are calculated.
- (c) Part III describes the exemptions from the tax and the procedures that must be followed to qualify for exemption.
- (d) Part IV explains the requirements and responsibilities for persons transporting cigarettes in Washington.
- (e) Part V explains the requirements and responsibilities for persons engaged in making delivery sales of cigarettes into this state.
- (f) Part VI explains the enforcement and administration of the cigarette tax.

Part I - Tax on Cigarettes

(101) **In general.** The Washington state cigarette tax is due and payable by the first person who sells, uses, consumes, handles, possesses, or distributes the cigarettes in this state.

(a) **Possession.** For the purpose of this rule, a "possessor" of cigarettes is anyone who personally or through an agent, employee, or designee, has possession of cigarettes in this state.

(b) **Payment.** Payment of the cigarette tax is made through the purchase of stamps from banks authorized by the department of revenue (department) to sell the stamps. Only licensed wholesalers may purchase or obtain cigarette stamps. Except as specifically provided in Part III of this rule, it is unlawful for any person other than a licensed wholesaler to possess unstamped cigarettes in this state. However, as explained in subsection (102)(b) of this rule, certain consumers may possess unstamped cigarettes for personal consumption if they pay the tax as provided in this rule.

(c) **Imposition of tax.** Ordinarily, the tax obligation is imposed on and collected from the first possessor of unstamped cigarettes. However, 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.

(d) **Promotions.** Cigarettes given away for advertising or any other purpose are taxed in the same manner as if they were sold, used, consumed, handled, possessed, or distributed in this state, but are not required to have the stamp affixed. Instead, the manufacturer of the cigarettes must pay the tax on a monthly return filed with the department. See subsection (602) of this rule.

(102) **Possession of cigarettes in Washington state.**

(a) Every person who is (i) in possession of unstamped cigarettes in this state, and (ii) is not specifically exempt by law, is liable for payment of the cigarette tax as provided in chapter 82.24 RCW and this rule.

(b) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the cigarette tax as provided in subsection (602) of this rule when they first bring the cigarettes into this state or first possess them in this state. This requirement includes, but is not limited to, delivery sales as described in Part VI of this rule.

(c) **Cigarettes purchased from Indian retailers.** Special rules apply to cigarettes purchased from Indian retailers.

(i) Indians purchasing cigarettes in Indian country are exempt from the state cigarette tax; however, these sales must comply with WAC 458-20-192. Other consumers may purchase cigarettes for their personal consumption from "qualified Indian

retailers" without incurring liability for state cigarette tax. A "qualified Indian retailer" is one who is subject to the terms of a valid cigarette tax contract with the state pursuant to RCW 43.06.455.

(ii) Consumers who purchase cigarettes from Indian retailers who are not subject to a cigarette tax contract with the state must comply with the reporting requirements and remit the cigarette tax as explained in subsection (602) of this rule. These consumers are also liable for the use tax on their purchases. See WAC 458-20-178.

(iii) It is the duty of the consumer in each instance to ascertain his or her responsibilities with respect to such purchases.

(d) **Cigarettes purchased on military reservations.** Active duty or retired military personnel, and their dependants, may purchase cigarettes for their own consumption on military reservations without paying the state tax (see Part III). However, such persons are not permitted to give or resell those cigarettes to others.

(e) **Counterfeit cigarettes.** It is unlawful for any person to manufacture, sell, or possess counterfeit cigarettes. A cigarette is counterfeit if (i) it or its packaging bears any logo or marking used by a manufacturer to identify its own cigarettes, and (ii) the cigarette was not manufactured by the owner of that logo or trademark or by any authorized licensee of the manufacturer. RCW 82.24.570.

(f) Possession of unstamped and untaxed cigarettes, and possession of counterfeit cigarettes, are criminal offenses in this state. See Part VI.

Part II - Stamping and Rates

(201) Cigarette stamps.

(a) Stamps indicating payment of the cigarette tax must be affixed prior to any sale, use, consumption, handling, possession, or distribution of all cigarettes other than those specifically exempted as explained in Part III of this rule. The stamp must be applied to the smallest container or package, unless the department, in its sole discretion, determines that it is impractical to do so. Stamps must be of the type authorized by the department and affixed in such a manner that they cannot be removed from the package or container without being mutilated or destroyed.

(b) Licensed wholesalers may purchase state-approved cigarette stamps from authorized banks. Payment for stamps must be made at the time of purchase unless the wholesaler has prior approval of the department to defer payment and furnishes a surety bond equal to the proposed monthly credit limit. Payments under a deferred plan are due within thirty days following purchase. Licensed wholesalers are compensated for affixing the stamps at the rate of \$6.00 per thousand stamps affixed ("stamping allowance").

(202) Rates.

(a) The Washington state cigarette tax is imposed on a per cigarette basis. The rate of the tax is a combination of statutory rates found in RCW 82.24.020, 82.24.027, and 82.24.028.

(b) When the rate of tax increases, the first person who sells, uses, consumes, handles, possesses, or distributes previously taxed cigarettes after the rate increase is liable for the additional tax.

(203) **Refunds.** 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. Documentation supporting the claim must be provided at the time the claim for refund is made.

(a) Refunds for stamped untaxed cigarettes sold to Indian tribal members or tribal entities in the full value of the stamps affixed will be approved by an agent of the department.

(b) Refunds for stamped cigarettes will not include the stamping allowance if the stamps are:

(i) Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor; or

(ii) Improperly or partially affixed through burns, jams, double stamps, stamped on carton flaps, or improperly removed from the stamp roll.

(c) The claim for refund must be filed on a form provided by the department. An affidavit or a certificate from the manufacturer for stamped cigarettes returned to the manufacturer for destruction or by an agent of the department verifying the voiding of stamps and authorizing the refund must accompany the claim for refund.

Part III - Exemptions

(301) **In general.** There are limited exemptions from the cigarette tax provided by law. This part discusses exemptions and

the procedures that must be followed to qualify for an exemption.

(302) **Government sales.** The cigarette tax does not apply to the sale of cigarettes to:

(a) The United States Army, Navy, Air Force, Marine Corps, or Coast Guard exchanges and commissaries and Navy or Coast Guard ships' stores;

(b) The United States Veteran's Administration; or

(c) Any person authorized to purchase from the federal instrumentalities named in (a) or (b) above, if the cigarettes are purchased from the instrumentality for personal consumption.

(303) **Sales in Indian country.**

(a) The definitions of "Indian," "Indian country," and "Indian tribe," in WAC 458-20-192 apply to this rule. "Cigarette contract" means an agreement under RCW 43.06.450 through 43.06.460.

(b) The cigarette tax does not apply to cigarettes taxed by an Indian tribe in accordance with a cigarette contract under RCW 43.06.450 through 43.06.460.

(c) The cigarette tax does not apply to cigarettes sold to an Indian in Indian country for personal consumption; however, those sales must comply with the allocation provisions of WAC 458-20-192. Sales made by an Indian cigarette outlet to nontribal members are subject to the tax, except as provided in (b) above.

(d) See WAC 458-20-192 for information on making wholesale sales of cigarettes to Indians and Indian tribes.

(304) **Interstate commerce.** The cigarette tax does not apply to cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to the buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to the buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales or in making sales to the federal government must furnish a surety bond in a sum equal to twice the amount of tax that would be affixed to the cigarettes that are set aside for the conduct of such business without affixing cigarette stamps. The unstamped stock must be kept separate and apart from any stamped stock.

Part IV - Transporting Cigarettes in Washington

(401) **Transportation of cigarettes restricted.** No person other than a licensed wholesaler may transport unstamped cigarettes in this state except as specifically set forth in RCW 82.24.250 and this rule, or as may be allowed under a cigarette tax contract subject to the provisions of RCW 43.06.455. Licensed wholesalers transporting unstamped cigarettes in this state must do so only in their own vehicles unless they have given prior notice to the liquor control board of their intent to transport unstamped cigarettes in a vehicle belonging to another person.

(402) **Notice required.** Persons other than licensed wholesalers intending to transport unstamped cigarettes in this state must first give notice to the liquor control board of their intent to do so.

(403) **Transportation of unstamped cigarettes.** All persons transporting unstamped cigarettes must have in their actual possession invoices or delivery tickets for such cigarettes. The invoices or delivery tickets must show the true name and address of the consignor or seller, the true name and address of the consignee or purchaser, and the quantity and brands of the cigarettes transported. It is the duty of the person responsible for the delivery or transport of the cigarettes to ensure that all drivers, agents, or employees have the delivery tickets or invoices in their actual possession for all such shipments.

(404) **Consignment.** If the cigarettes transported pursuant to subsection (401), (402), or (403) of this rule are consigned to or purchased by any person in this state, that purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state.

(405) **Out-of-state shipments.** Licensed wholesalers shipping cigarettes to a point outside Washington or to a federal instrumentality must, at the time of shipping or delivery, report the transaction to the department. The report must show both (a) complete details of the sale or delivery, and (b) whether stamps have been affixed to the cigarettes.

The report may be made either by submitting a duplicate invoice or by completing a form provided by the department, and must be filed with the department as set forth in subsection (602) of this rule.

(406) **Compliance required.** No person may possess or transport cigarettes in this state unless the cigarettes have been properly stamped or that person has fully complied with the requirements of RCW 82.24.250 and this rule. Failure to comply with the requirements of RCW 82.24.250 is a criminal act. Cigarettes in the possession of persons who have failed to comply are deemed contraband and are subject to seizure and forfeiture under RCW 82.24.130.

Part V - Delivery Sales of Cigarettes

(501) **Definitions.** The definitions in this subsection apply throughout this rule.

(a) **"Delivery sale"** means any sale of cigarettes to a consumer in the state where either: (i) The purchaser submits an order for a sale by means of a telephonic or other method of voice transmission, mail delivery, any other delivery service, or the internet or other online service; or (ii) the cigarettes are delivered by use of mail delivery or any other delivery service. A sale of cigarettes made in this manner is a delivery sale regardless of whether the seller is located within or outside the state. (For example, "Royal Tax-free Smokes," located in the state of Vermont, offers sales via the internet and a toll-free telephone number, and ships its products to consumers in this state. These transactions are delivery sales.) A sale of cigarettes not for personal consumption to a person who is a wholesaler licensed under chapter 82.24 RCW or a retailer licensed under chapter 82.24 RCW is not a delivery sale.

(b) **"Delivery service"** means any private carrier engaged in the commercial delivery of letters, packages, or other containers, that requires the recipient of that letter, package, or container to sign to accept delivery.

(502) **Tax liability.** Cigarettes delivered in this state pursuant to a delivery sale are subject to tax as provided in Part I of this rule. Persons making delivery sales in this state are required to provide prospective consumers with notice that the sales are subject to tax pursuant to chapters 82.24 and 82.12 RCW, with an explanation of how the tax has been or is to be paid with respect to such sales.

(503) **Additional requirements.** Persons making delivery sales of cigarettes in this state must comply with all the provisions of chapter 70.155 RCW. All cigarettes sold, delivered, or attempted to be delivered, in violation of RCW 70.155.105 are subject to seizure and forfeiture. RCW 82.24.130.

Part VI - Enforcement and Administration

(601) **Books and records.** An accurate set of records showing all transactions related to the purchase, sale, or distribution of cigarettes must be retained. RCW 82.24.090. These records may be combined with those required in connection with the tobacco products tax (see WAC 458-20-185), if there is a segregation therein of the amounts involved. All records must be preserved for five years from the date of the transaction.

(602) **Reports and returns.** The department may require any person dealing with cigarettes in this state to complete and return forms, as furnished by the department, setting forth sales, inventory, and other data required by the department to maintain control over trade in cigarettes.

(a) Manufacturers and wholesalers selling stamped, unstamped, or untaxed cigarettes must submit a complete record of sales of cigarettes in this state monthly. This report is due no later than the fifteenth day of the calendar month and must include all transactions occurring in the previous month.

(b) Persons making sales of tax-exempt cigarettes to Indian tribes or Indian retailers pursuant to WAC 458-20-192 (9)(a) must transmit a copy of the invoice for each such sale to the special programs division of the department prior to shipment.

(c) Wholesalers selling stamped cigarettes manufactured by nonparticipating manufacturers as defined in WAC 458-20-264 must report all such sales to the special programs division no later than the twenty-fifth day of the calendar month and must include all transactions occurring in the previous month.

(d) Persons making sales of cigarettes into this state to other than a licensed wholesaler or retailer must file a report as required under Title 15, Chapter 10A, section 376 of the U.S. Code (commonly referred to as the "Jenkins Act" report). This report is due no later than the 10th day of each calendar month and must include all transactions occurring in the previous month.

(e) Persons shipping or delivering any cigarettes to a point outside of this state must submit a report showing full and complete details of the interstate sale or delivery as set forth in Part V of this rule. This report is due no later than the fifteenth day of the calendar month immediately following the shipment or delivery.

(f) Persons giving away unstamped cigarettes for advertising, promotional, or any other purpose, must report and pay the tax on the number of cigarettes distributed in this state.

(g) Consumers who buy unstamped cigarettes or who purchase cigarettes from sources other than licensed retailers in this state must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a "Tax Declaration for Cigarettes," which may be obtained from the department.

(603) **Criminal provisions.** Chapter 82.24 RCW prohibits certain activities with respect to cigarettes. Persons handling cigarettes within this state must refer to these statutes. The prohibited activities include, but are not limited to, the following:

(a) **Transportation, possession, or receiving 10,000 or fewer cigarettes.** Transportation, possession or receiving 10,000 or fewer unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a gross misdemeanor. RCW 82.24.110 (1)(n).

(b) **Transportation, possession, or receiving more than 10,000 cigarettes.** Transportation, possession, or receiving more than 10,000 unstamped cigarettes is prohibited unless the notice requirements set forth in RCW 82.24.250 have been met; failure to meet those notice requirements is a felony. RCW 82.24.110(2).

(c) **Forgery or counterfeiting of stamps.** Alteration, fabrication, forgery, and counterfeiting of stamps are felonies. RCW 82.24.100.

(d) **Counterfeit cigarettes.** The manufacture, sale, or possession of counterfeit cigarettes in this state is a felony. RCW 82.24.570.

(604) **Search, seizure, and forfeiture.** The department or the liquor control board may search for, seize, and subsequently dispose of unstamped cigarette packages and containers, counterfeit cigarettes, conveyances of all kinds (including aircraft, vehicles, and vessels) used for the transportation of unstamped and/or counterfeit cigarettes, and vending machines used for the sale of unstamped and/or counterfeit cigarettes. See RCW 82.24.130, et seq., for provisions relating to search, seizure, and forfeiture of property, possible redemption of property, and for treatment of such property in the absence of redemption.

(605) **Penalties.** RCW 82.24.120 provides a penalty for failure to affix the cigarette stamps or to cause the stamps to be affixed as required, or to pay any tax due under chapter 82.24 RCW. In addition to the tax deemed due, a penalty equal to the greater of \$10.00 per package of unstamped cigarettes or \$250.00 will be assessed. Interest is also assessed on the amount of the tax at the rate as computed under RCW 82.32.050(2) from the date the tax became due until the date of payment. The department may, in its sole discretion, cancel all or part of the penalty for good cause.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). 10-10-033, § 458-20-186, filed 4/26/10, effective 5/27/10; 07-04-119, § 458-20-186, filed 2/7/07, effective 3/10/07. Statutory Authority: RCW 82.24.235, 82.32.300, and 82.01.060(1). 05-02-035, § 458-20-186, filed 12/30/04, effective 1/30/05. Statutory Authority: RCW 82.32.300. 94-10-062, § 458-20-186, filed 5/3/94, effective 6/3/94; 90-24-036, § 458-20-186, filed 11/30/90, effective 1/1/91; 90-04-039, § 458-20-186, filed 1/31/90, effective 3/3/90; 87-19-007 (Order ET 87-5), § 458-20-186, filed 9/8/87; 83-07-032 (Order ET 83-15), § 458-20-186, filed 3/15/83; Order ET 75-1, § 458-20-186, filed 5/2/75; Order ET 73-2, § 458-20-186, filed 11/9/73; Order ET 71-1, § 458-20-186, filed 7/22/71; Order ET 70-3, § 458-20-186 (Rule 186), filed 5/29/70, effective 7/1/70.]

WAC 458-20-192

Indians — Indian country.

(1) **Introduction.**

(a) Under federal law the state may not tax Indians or Indian tribes in Indian country. In some instances the state's authority to impose tax on a nonmember doing business in Indian country with an Indian or an Indian tribe is also preempted by federal law. This rule only addresses those taxes administered by the department of revenue (department).

(b) The rules of construction used in analyzing the application of tax laws to Indians and nonmembers doing business with Indians are:

(i) Treaties are to be construed in the sense in which they would naturally have been understood by the Indians; and

(ii) Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

(c) This rule reflects the harmonizing of federal law, Washington state tax law, and the policies and objectives of the Centennial Accord and the Millennium Agreement. It is consistent with the mission of the department of revenue, which is to achieve equity and fairness in the application of the law.

(d) It is the department's policy and practice to work with individual tribes on a government-to-government basis to discuss and resolve areas of mutual concern.

(2) **Definitions.** The following definitions apply throughout this rule:

(a) "Indian" means a person on the tribal rolls of an Indian tribe. A person on the tribal rolls is also known as an "enrolled member" or a "member" or an "enrolled person" or an "enrollee" or a "tribal member."

(b) "Indian country" has the same meaning as given in 18 U.S.C. 1151 and means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation;

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

(c) "Indian tribe" means an Indian nation, tribe, band, community, or other entity recognized as an "Indian tribe" by the United States Department of the Interior. The phrase "federally recognized Indian tribe" and the term "tribe" have the same meaning as "Indian tribe."

(d) "Indian reservation" means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the use and occupancy of Indian tribes by treaty, law, or executive order and that are areas currently recognized as "Indian reservations" by the United States Department of the Interior. The term includes lands within the exterior boundaries of the reservation owned by non-Indians as well as land owned by Indians and Indian tribes and it includes any land that has been designated "reservation" by federal act.

(e) "Nonmember" means a person not on the tribal rolls of the Indian tribe.

(f) "State sales and use tax" includes local sales and use tax.

(3) **Federally recognized Indian tribes.** As of the effective date of this rule there are twenty-eight federally recognized Indian tribes in the state of Washington. You may contact the governor's office of Indian affairs for an up-to-date list of federally recognized Indian tribes in the state of Washington at its web site, www.goia.wa.gov or at:

Governor's Office of Indian Affairs

531 15th Ave. S.E.

P.O. Box 40909

Olympia, WA 98504-0909

360-753-2411

(4) **Recordkeeping.** Taxpayers are required to maintain appropriate records on the tax exempt status of transactions. For

example, in the case of the refuse collection tax, the refuse collection company must substantiate the tax-exempt status of its customers. This could be done, for example, one of two ways. The tribe can provide the refuse collection company with a list of all of the tribal members living in Indian country or the individual members can provide exemption certificates to the company. A buyer's retail sales tax exemption certificate that can be used for this purpose is located on the department's web site (www.dor.wa.gov/forms/other.htm) or may be obtained by contacting the department. The company must then keep the list or the certificates in its files as proof of the tax exempt status of the tribe and its members. Individual businesses may contact the department to determine how best to keep records for specific situations.

(5) Enrolled Indians in Indian country. Generally. The state may not tax Indians or Indian tribes in Indian country. For the purposes of this rule, the term "Indian" includes only those persons who are enrolled with the tribe upon whose territory the activity takes place and does not include Indians who are members of other tribes. An enrolled member's spouse is considered an "Indian" for purposes of this rule if this treatment does not conflict with tribal law. This exclusion from tax includes all taxes (e.g., B&O tax, public utility tax, retail sales tax, use tax, cigarette tax). If the incidence of the tax falls on an Indian or a tribe, the tax is not imposed if the activity takes place in Indian country or the activity is treaty fishing rights related activity (see subsection (6)(b) of this rule). "Incidence" means upon whom the tax falls. For example, the incidence of the retail sales tax is on the buyer.

(a)(i) Retail sales tax - tangible personal property - delivery threshold. Retail sales tax is not imposed on sales to Indians if the tangible personal property is delivered to the member or tribe in Indian country or if the sale takes place in Indian country. For example, if the sale to the member takes place at a store located on a reservation, the transaction is automatically exempt from sales tax and there is no reason to establish "delivery."

(ii) Retail sales tax - services. The retail sales tax is not imposed if the retail service (e.g., construction services) is performed for the member or tribe in Indian country. In the case of a retail service that is performed both on and off Indian country, only the portion of the contract that relates to work done in Indian country is excluded from tax. The work done for a tribe or Indian outside of Indian country, for example road work that extends outside of Indian country, is subject to retail sales tax.

(b) Use tax. Use tax is not imposed when tangible personal property is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(c) Tax collection. Generally, sales to persons other than Indians are subject to the retail sales tax irrespective of where in this state delivery or rendition of services takes place. Sellers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them to nonmembers in Indian country. A tribe and the department may enter into an agreement covering the collection of state tax by tribal members or the tribe. (See also the discussion regarding preemption of tax in subsection (7) of this rule.)

In order to substantiate the tax-exempt status of a retail sale to a person who is a tribal member, unless the purchaser is personally known to the seller as a member, the seller must require presentation of a tribal membership card or other suitable identification of the purchaser as an enrollee of the Indian tribe. A tribe and the department may enter into an agreement covering identification of enrolled members, in which case the terms of the agreement govern.

A person's tax status under the Revenue Act does not change simply because he or she is making a tax-exempt sale to a tribe or tribal member. For example, a person building a home for a nonmember/consumer is entitled to purchase subcontractor services and materials to be incorporated into the home at wholesale. See RCW 82.04.050. A person building a home for a tribal member/consumer in Indian country is similarly entitled to purchase these services and materials at wholesale. The fact that the constructing of the home for the tribal member/consumer is exempt from retail sales tax has no impact on the taxability of the purchases of materials, and the materials continue to be purchased for resale.

(d) Corporations or other entities owned by Indians. A state chartered corporation comprised solely of Indians is not subject to tax on business conducted in Indian country if all of the owners of the corporation are enrolled members of the tribe except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be considered as satisfying the "comprised solely" criteria if at least half of the owners are enrolled members of the tribe.

(6) Indians outside Indian country.

(a) Generally. Except for treaty fishery activity, Indians conducting business outside of Indian country are generally subject to tax (e.g., the B&O, the public utility tax, retail sales tax). Indians or Indian tribes who conduct business outside Indian country must register with the department as required by RCW 82.32.030. (See also WAC 458-20-101 for more registration information.)

(b) Treaty fishery - preemption. For the purpose of this rule, "treaty fishery" means the fishing and shellfish rights

preserved in a tribe's treaty, a federal executive order, or an act of Congress. It includes activities such as harvesting, processing, transporting, or selling, as well as activities such as management and enforcement.

(i) **Indians - B&O tax.** The gross income directly derived from treaty fishing rights related activity is not subject to state tax. This exclusion from tax is limited to those businesses wholly owned and operated by Indians/tribe who have treaty fishing rights. If a business wholly owned and operated by Indians/tribe deals with both treaty and nontreaty fish, this exclusion from tax is limited to the business attributable to the treaty fish. "Wholly owned and operated" includes entities that meet the qualifications under 26 U.S.C. 7873, which requires that:

(A) Such entity is engaged in a fishing rights-related activity of such tribe;

(B) All of the equity interests in the entity are owned by qualified Indian tribes, members of such tribes, or their spouses;

(C) Except as provided in the code of federal regulations, in the case of an entity which engages to any extent in any substantial processing or transporting of fish, ninety percent or more of the annual gross receipts of the entity is derived from fishing rights-related activities of one or more qualified Indian tribes each of which owns at least ten percent of the equity interests in the entity; and

(D) Substantially all of the management functions of the entity are performed by members of qualified Indian tribes.

(ii) **Indians - sales and use tax.** The retail sales tax and use tax do not apply to the services or tangible personal property for use in the treaty fishery, regardless of where delivery of the item or performance of the service occurs. Gear, such as boats, motors, nets, and clothing, purchased or used by Indians in the treaty fishery is not subject to sales or use tax. Likewise, retail services in respect to property used in the treaty fishery, such as boat or engine repair, are not subject to sales tax.

(iii) **Sales to nonmembers.** Treaty fish and shellfish sold by members of the tribe are not subject to sales tax or use tax, regardless of where the sale takes place due to the sales and use tax exemption for food products.

(iv) **Government-to-government agreement.** A tribe and the department may enter into an agreement covering the treaty fishery and taxable activities of enrolled members, in which case the terms of the agreement govern.

(7) **Nonmembers in Indian country - preemption of state tax.** Generally, a nonenrolled person doing business in Indian country is subject to tax. Unless specifically described as preempted by this rule, the department will review transactions on a case-by-case basis to determine whether tax applies. A nonmember who is not taxable on the basis of preemption should refer to WAC 458-20-101 (tax registration) to determine whether the person must register with the department.

(a) **Preemption of tax on nonmembers - gaming.** Gaming by Indian tribes is regulated by the federal Indian Gaming Regulatory Act. Nonmembers who operate or manage gaming operations for Indian tribes are not subject to tax for business conducted in Indian country. This exclusion from tax applies to taxes imposed on income attributable to the business activity (e.g., the B&O tax), and to sales and use tax on the property used in Indian country to conduct the activity. Sales tax will apply if delivery of property is taken outside of Indian country.

Nonmembers who purchase tangible personal property at a gaming facility are subject to retail sales or use tax, unless:

(i) The item is preempted based on the outcome of the balancing test. For example, depending on the relative state, tribal, and federal interests, tax on food at restaurants or lounges owned and operated by the tribe or a tribal member or sales of member arts and crafts at gift shops might be preempted. See the balancing test discussion in subsection (c) below; or

(ii) The item is purchased for use in the gaming activity at the facility, such as bingo cards or daubers.

(b) **Preemption of B&O and public utility tax - sales of tangible personal property or provision of services by nonmembers in Indian country.** As explained in this subsection, income from sales in Indian country of tangible personal property to, and from the performance of services in Indian country for, tribes and tribal members is not subject to B&O (chapter 82.04 RCW) or public utility tax (chapters 82.16 and 54.28 RCW). The taxpayer is responsible for maintaining suitable records so that the taxpayer and the department can distinguish between taxable and nontaxable activities.

(i) **Sales of tangible personal property.** Income from sales of tangible personal property to the tribe or to tribal members is not subject to B&O tax if the tangible personal property is delivered to the buyer in Indian country and if:

(A) The property is located in Indian country at the time of sale; or

(B) The seller has a branch office, outlet, or place of business in Indian country that is used to receive the order or distribute the property; or

(C) The sale of the property is solicited by the seller while the seller is in Indian country.

(ii) **Provision of services.** Income from the performance of services in Indian country for the tribe or for tribal members is

not subject to the B&O or public utility tax. Services performed outside of Indian country are subject to tax. In those instances where services are performed both on and off of Indian country, the activity is subject to state tax to the extent that services are substantially performed outside of Indian country.

(A) It will be presumed that a professional service (e.g., accounting, legal, or dental) is substantially performed outside of Indian country if twenty-five percent or more of the time taken to perform the service occurs outside of Indian country. The portion of income subject to state tax is determined by multiplying the gross receipts from the activity by the quotient of time spent outside of Indian country performing the service divided by total time spent performing the service.

For example, an accountant with an office outside of Indian country provides accounting services to a tribal member. The accountant performs some of the work at the office and some work at the business of the tribal member in Indian country. If at least twenty-five percent of the time performing the work is spent outside of Indian country, the services are substantially performed outside of Indian country and therefore a portion is subject to state tax. As explained above, the accountant must maintain suitable records to distinguish between taxable and nontaxable income in order to provide for a reasonable approximation of the amount of gross income subject to B&O tax. In this case, suitable records could be a log of the time and location of the services performed for the tribal matter by the accountant, his or her employees, and any contractors hired by the accountant.

(B) For services subject to the retailing and/or wholesaling B&O tax (e.g., building, installing, improving, or repairing structures or tangible personal property), the portion of income relative to services actually performed outside of Indian country is subject to state tax.

For example, a contractor enters into a contract with a tribe to install a sewer line that extends off reservation. Only the income attributable to the installation of the portion of the sewer line off reservation is subject to state tax.

(C) For public utility services under chapters 82.16 and 54.28 RCW it will be presumed that the service is provided where the customer receives the service.

(c) **Preemption of tax on nonmembers - balancing test - value generated on the reservation.** In certain instances state sales and use tax may be preempted on nonmembers who purchase goods or services from a tribe or tribal members in Indian country. The U.S. supreme court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: The degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. See *Salt River Pima-Maricopa Indian Community v. Waddell*, 50 F.3d 734, (1995). This analysis is known as the "balancing test." This preemption analysis does not extend to subsequent transactions, for example if the purchaser buys for resale the tax imposed on the consumer in the subsequent sale is not preempted. However, because these balancing test determinations are so fact-based, the department will rule on these issues on a case-by-case basis. For such a ruling please contact the department at:

Department of Revenue

Executive

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Olympia, WA 98504-7454

(d) **Federal contractors.** The preemption analysis does not extend to persons who are doing work for the federal government in Indian country. For example, a nonmember doing road construction for the Bureau of Indian Affairs within an Indian reservation is subject to state tax jurisdiction.

(e) **Indian housing authorities.** RCW 35.82.210 provides that the property of housing authorities and the housing authorities themselves are exempt from taxes, such as state and local sales and use taxes, state and local excise taxes, state and local property taxes, and special assessments. This covers tribal housing authorities and intertribal housing authorities both on and off of Indian land. Please note that tribal housing authorities, like all other housing authorities, are exempt from tax anywhere in the state, and the delivery requirement and other geographic thresholds are not applicable.

Not all assessments are exempted under RCW 35.82.210. See *Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District*, 112 Wn2d 262 (1989).

For the purposes of the exemption:

(i) "Intertribal housing authority" means a housing authority created by a consortium of tribal governments to operate and administer housing programs for persons of low income or senior citizens for and on behalf of such tribes.

(ii) "Tribal government" means the governing body of a federally recognized Indian tribe.

(iii) "Tribal housing authority" means the tribal government or an agency or branch of the tribal government that operates

and administers housing programs for persons of low income or senior citizens.

(8) **Motor vehicles, trailers, snowmobiles, etc., sold to Indians or Indian tribes.** Sales tax is not imposed when a motor vehicle, trailer, snowmobile, off-road vehicle, or other such property is delivered to an Indian or the tribe in Indian country or if the sale is made in Indian country. Similarly, use tax is not imposed when such an item is acquired in Indian country by an Indian or the tribe for at least partial use in Indian country. For purposes of this rule, acquisition in Indian country creates a presumption that the property is acquired for partial use in Indian country.

(a) **Registration of vehicle, trailer, etc.** County auditors, subagencies appointed under RCW 46.01.140, and department of licensing vehicle licensing offices must collect use tax when Indians or Indian tribes apply for an original title transaction or transfer of title issued on a vehicle or vessel under chapters 46.09, 46.10, 46.12, or 88.02 RCW unless the tribe/Indian shows that they are not subject to tax. To substantiate that they are not subject to tax the Indian/tribe must show that they previously paid retail sales or use tax on their acquisition or use of the property, or that the property was acquired on or delivered to Indian country. The person claiming the exclusion from tax must sign a declaration of delivery to or acquisition in Indian country. A statement in substantially the following form will be sufficient to establish eligibility for the exclusion from sales and use tax.

(b) **Declaration.**

DECLARATION OF DELIVERY OR ACQUISITION IN INDIAN COUNTRY

The undersigned is (circle one) an enrolled member of the tribe/authorized representative of the tribe or tribal enterprise, and the property was delivered/acquired within Indian country, for at least partial use in Indian country.

name of buyer

date of delivery/acquisition

address of delivery/acquisition

(9) **Miscellaneous taxes.** The state imposes a number of excise taxes in addition to the most common excise taxes administered by the department (e.g., B&O, public utility, retail sales, and use taxes). The following is a brief discussion of some of these taxes.

(a) **Cigarette tax.** The statutory duties applicable to administration and enforcement of the cigarette tax are divided between the department and the liquor control board. Enforcement of nonvoluntary compliance is the responsibility of the liquor control board. Voluntary compliance is the responsibility of the department of revenue. See chapter 82.24 RCW for specific statutory requirements regarding purchase of cigarettes by Indians and Indian tribes. For a specific ruling regarding the taxability of and stamping requirements for cigarettes manufactured by Indians or Indian tribes in Indian country, please contact the department at:

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Where sales of cigarettes are the subject of a government-to-government cooperative agreement, the provisions of that agreement supersede conflicting provisions of this subsection.

(i) Sales of cigarettes to nonmembers by Indians or Indian tribes are subject to the cigarette tax. The wholesaler is obligated to make precollection of the tax. Therefore, Indian or tribal sellers making sales to non-Indian customers must (A) purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales or (B) they may make purchases of cigarettes from licensed cigarette distributors for resale to qualified purchasers or (C) may purchase a stock of untaxed unstamped cigarettes for resale to qualified purchasers if the tribal seller gives advance notice under RCW 82.24.250 and Rule 186.

For purposes of this rule, "qualified purchaser" means an Indian purchasing for resale within Indian country to other Indians or an Indian purchasing solely for his or her use other than for resale.

(ii) Delivery or sale and delivery by any person of stamped exempt cigarettes to Indians or tribal sellers for sale to qualified purchasers may be made only in such quantity as is approved in advance by the department. Approval for delivery will be based upon evidence of a valid purchase order of a quantity reasonably related to the probable demand of qualified purchasers in the trade territory of the seller. Evidence submitted may also consist of verified record of previous sales to qualified purchasers, the probable demand as indicated by average cigarette consumption for the number of qualified purchasers within a reasonable distance of the seller's place of business, records indicating the percentage of such trade that

has historically been realized by the seller, or such other statistical evidence submitted in support of the proposed transaction. In the absence of such evidence the department may restrict total deliveries of stamped exempt cigarettes to Indian country or to any Indian or tribal seller thereon to a quantity reasonably equal to the national average cigarette consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the resident enrolled membership of the affected tribe.

(iii) Any delivery, or attempted delivery, of unstamped cigarettes to an Indian or tribal seller without advance notice to the department will result in the treatment of those cigarettes as contraband and subject to seizure. In addition, the person making or attempting such delivery will be held liable for payment of the cigarette tax and penalties. See chapter 82.24 RCW.

Approval for sale or delivery to Indian or tribal sellers of stamped exempt cigarettes will be denied where the department finds that such Indian or tribal sellers are or have been making sales in violation of this rule.

(iv) Delivery of stamped exempt cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to Indian country. Delivery of stamped exempt cigarettes outside of Indian country at the distributor's dock or place of business or any other location outside of Indian country is prohibited unless the cigarettes are accompanied by an invoice.

(b) **Refuse collection tax.** Indians and Indian tribes are not subject to the refuse collection tax for service provided in Indian country, regardless of whether the refuse collection company hauls the refuse off of Indian country.

(c) **Leasehold excise tax.** Indians and Indian tribes in Indian country are not subject to the leasehold excise tax. Leasehold interests held by nonenrolled persons are subject to tax.

(d) **Fish tax.** Chapter 82.27 RCW imposes a tax on the commercial possession of enhanced food fish, which includes shellfish. The tax is imposed on the fish buyer. The measure of the tax is the value of the enhanced food fish at the point of landing. A credit is allowed against the amount of tax owed for any tax previously paid on the same food fish to any legally established taxing authority, which includes Indian tribes. Transactions involving treaty fish are not subject to the fish tax, regardless of where the transaction takes place.

(e) **Tobacco tax.** The tobacco tax is imposed on "distributors" as that term is defined in RCW 82.26.010. Tobacco tax is not imposed on Indian persons or tribes who take delivery of the tobacco in Indian country. Effective July 1, 2002, persons who handle for sale any tobacco products that are within this state but upon which tax has not been imposed are subject to the tobacco tax. Chapter 325, Laws of 2002. Thus, persons purchasing tobacco products for resale from Indians who are exempt from the tobacco tax are subject to tobacco tax on the product. See WAC 458-20-185, Tax on tobacco products.

(f) **Real estate excise tax.** The real estate excise tax is imposed on the seller. A sale of land located in Indian country by a tribe or a tribal member is not subject to real estate excise tax. A sale of land located within Indian country by a nonmember to the tribe or to a tribal member is subject to real estate excise tax.

(g) **Timber excise tax.** Payment of the timber excise tax is the obligation of the harvester. The tribe or tribal members are not subject to the timber excise tax in Indian country. Generally, timber excise tax is due from a nonmember who harvests timber on fee land within Indian country. Timber excise tax is not due if the timber being harvested is on trust land or is owned by the tribe and located in Indian country, regardless of the identity of the harvester. There are some instances in which the timber excise tax might be preempted on non-Indians harvesting timber on fee land in Indian country due to tribal regulatory authority. For such a ruling please contact the department at:

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Executive
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[Statutory Authority: RCW 82.32.300, 02-14-133, § 458-20-192, filed 7/2/02, effective 8/2/02; 00-24-050A, § 458-20-192, filed 11/30/00, effective 1/1/01; 80-17-026 (Order ET 80-3), § 458-20-192, filed 11/14/80; Order ET 76-4, § 458-20-192, filed 11/12/76; Order ET 74-5, § 458-20-192, filed 12/16/74; Order ET 70-3, § 458-20-192 (Rule 192), filed 5/29/70, effective 7/1/70.]



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Native American
Treaty between the United States and the Dwámish, Suquámish, and other allied
and subordinate Tribes of Indians in Washington Territory.
Concluded at Point Elliott, Washington Territory, January 22, 1855.
January 22, 1855.
Ratified by the Senate, March 8, 1859.
Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

ARTICLE I.

ARTICLE II.

ARTICLE III.

ARTICLE IV.

ARTICLE V.

ARTICLE VI.

ARTICLE VII.

ARTICLE VIII.

ARTICLE IX.

ARTICLE X.

ARTICLE XI.

ARTICLE XII.

ARTICLE XIII.

ARTICLE XIV.

ARTICLE XV.

JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES, TO ALL AND SINGULAR TO WHOM
THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the

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Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the herein-after-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalhkahmish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mish, Mee-see-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eight-hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-cháh-mish, Me-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE I.

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

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ARTICLE II.

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Shâis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE III.

There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV.

The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V.

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

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ARTICLE VI.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner - that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII.

The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX.

The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government

(Publication page references are not available for this document.)

out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE X.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI.

The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII.

The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII.

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV.

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for

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the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent,

[L. S.]

SEATTLE, Chief of the Dwamish and Suquamish tribes. his x mark. [L. S.]

PAT-KA-NAM, Chief of the Snoqualmoo, Snohomish and other tribes. his x mark. [L. S.]

CHOW-ITS-HOOT, Chief of the Lummi and other tribes. his x mark. [L. S.]

GOLIAH, Chief of the Skagits and other allied tribes. his x mark. [L. S.]

KWALLATTUM, or General Pierce, Sub-chief of the Skagit tribe. his x mark. [L. S.]

S'HOOTST-HOOT, Sub-chief of Snohomish. his x mark. [L. S.]

SNAH-TALC, or Bonaparte, Sub-chief of Snohomish. his x mark. [L. S.]

SQUUSH-UM, or The Smoke, Sub-chief of the Snoqualmoo. his x mark. [L. S.]

SEE-ALLA-PA-HAN, or The Priest, Sub-chief of Sk-tah-le-jum. his x mark. [L. S.]

HE-UCH-KA-NAM, or George Bonaparte, Sub-chief of Snohomish. his x mark. [L. S.]

TSE-NAH-TALC, or Joseph Bonaparte, Sub-chief of Snohomish. his x mark. [L. S.]

NS'SKI-OOS, or Jackson, Sub-chief of Snohomish. his x mark. [L. S.]

WATS-KA-LAH-TCHIE, or John Hobtst-hoot, Sub-chief of Snohomish. his x mark. [L. S.]

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SMEH-MAI-HU, Sub-chief of Skai-wha-mish. his x mark. [L. S.]

SLAT-EAH-KA-NAM, Sub-chief of Snoqualmoo. his x mark. [L. S.]

ST'HAU-AI, Sub-chief of Snoqualmoo. his x mark. [L. S.]

LUGS-KEN, Sub-chief of Skai-wha-mish. his x mark. [L. S.]

S'HEHT-SOOLT, or Peter, Sub-chief of Snohomish. his x mark. [L. S.]

DO-QUEH-OO-SATL, Snoqualmoo tribe. his x mark. [L. S.]

JOHN KANAM, Snoqualmoo sub-chief. his x mark. [L. S.]

KLEMSH-KA-NAM, Snoqualmoo. his x mark. [L. S.]

TS'HUAHNTL, Dwa-mish sub-chief. his x mark. [L. S.]

KWUSS-KA-NAM, or George Snatelum, Sen., Skagit tribe. his x mark. [L. S.]

HEL-MITS, or George Snatelum, Skagit sub-chief. his x mark. [L. S.]

S'KWAI-KWI, Skagit tribe, sub-chief. his x mark. [L. S.]

SEH-LEK-QU, Sub-chief Lummi tribe. his x mark. [L. S.]

S'H'-CHEH-OOS, or General Washington, Sub-chief of Lummi tribe. his x mark. [L. S.]

WHAI-LAN-HU, or Davy Crockett, Sub-chief of Lummi tribe. his x mark. [L. S.]

SHE-AH-DELT-HU, Sub-chief of Lummi tribe. his x mark. [L. S.]

KWULT-SEH, Sub-chief of Lummi tribe. his x mark. [L. S.]

KWULL-ET-HU, Lummi tribe. his x mark. [L. S.]

KLEH-KENT-SOOT, Skagit tribe. his x mark. [L. S.]

SOHN-HEH-OVS, Skagit tribe. his x mark. [L. S.]

S'DEH-AP-KAN, or General Warren, Skagit tribe. his x mark. [L. S.]

CHUL-WHIL-TAN, Sub-chief of Suquamish tribe. his x mark. [L. S.]

SKE-EH-TUM, Skagit tribe. his x mark. [L. S.]

PATCHKANAM, or Dome, Skagit tribe. his x mark. [L. S.]

SATS-KANAM, Squin-ah-nush tribe. his x mark. [L. S.]

(Publication page references are not available for this document.)

SD-ZO-MAHTL, Kik-ial-lus band. his x mark. [L. S.]
DAHTL-DE-MIN, Sub-chief of Sah-ku-meh-hu. his x mark. [L. S.]
SD'ZEK-DU-NUM, Me-sek-wi-guilse sub-chief. his x mark. [L. S.]
NOW-A-CH AIS, Sub-chief of Dwamish. his x mark. [L. S.]
MIS-LO-TCHE, or Wah-hehl-tchoo, Sub-chief of Suquamish. his x mark. [L. S.]
SLOO-NOKSH-TAN, or Jim, Suquamish tribe. his x mark. [L. S.]
MOO-WHAH-LAD-HU, or Jack, Suquamish tribe. his x mark. [L. S.]
TOO-LEH-PLAN, Suquamish tribe. his x mark. [L. S.]
HA-SEH-DOO-AN, or Keo-kuck, Dwamish tribe. his x mark. [L. S.]
HOOVILT-MEH-TUM, Sub-chief of Suquamish. his x mark. [L. S.]
WE-AI-PAH, Skaiwhamish tribe. his x mark. [L. S.]
S'AH-AN-HU, or Hallam, Snohomish tribe. his x mark. [L. S.]
SHE-HOPE, or General Pierce, Skagit tribe. his x mark. [L. S.]
HWN-LAH-LAKQ, or Thomas Jefferson, Lummi tribe. his x mark. [L. S.]
CHT-SIMPT, Lummi tribe. his x mark. [L. S.]
TSE-SUM-TEN, Lummi tribe. his x mark. [L. S.]
KLT-HAHL-TEN, Lummi tribe. his x mark. [L. S.]
KUT-TA-KANAM, or John, Lummi tribe. his x mark. [L. S.]
CH-LAH-BEN, Noo-qua-cha-mish band. his x mark. [L. S.]
NOO-HEH-OOS, Snoqualmoo tribe. his x mark. [L. S.]
HWEH-UK, Snoqualmoo tribe. his x mark. [L. S.]
PEH-NUS, Skai-whamish tribe. his x mark. [L. S.]
YIM-KA-NAM, Snoqualmoo tribe. his x mark. [L. S.]
TWOOI-AS-KUT, Skaiwhamish tribe. his x mark. [L. S.]
LUCH-AL-KANAM, Snoqualmoo tribe. his x mark. [L. S.]
S'HOOT-KANAM, Snoqualmoo tribe. his x mark. [L. S.]

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- SME-A-KANAM, Snoqualmoo tribe. his x mark. [L. S.]
- SAD-ZIS-KEH, Snoqualmoo. his x mark. [L. S.]
- HEH-MAHL, Skaiwhamish band. his x mark. [L. S.]
- CHARLEY, Skagit tribe. his x mark. [L. S.]
- SAMPSON, Skagit tribe. his x mark. [L. S.]
- JOHN TAYLOR, Snohomish tribe. his x mark. [L. S.]
- HATCH-KWENTUM, Skagit tribe. his x mark. [L. S.]
- YO-I-KUM, Skagit tribe. his x mark. [L. S.]
- T'KWA-MA-HAN, Skagit tribe. his x mark. [L. S.]
- STO-DUM-KAN, Swinamish band. his x mark. [L. S.]
- BE-LOLE, Swinamish band. his x mark. [L. S.]
- D'ZO-LOLE-GWAM-HU, Skagit tribe. his x mark. [L. S.]
- STEH-SHAIL, William, Skaiwhamish band. his x mark. [L. S.]
- KEL-KAHL-TSOOT, Swinamish tribe. his x mark. [L. S.]
- PAT-SEN, Skagit tribe. his x mark. [L. S.]
- PAT-TEH-US, Noo-wha-ah sub-chief. his x mark. [L. S.]
- S'HOOLK-KA-NAM, Lummi sub-chief. his x mark. [L. S.]
- CH-LOK-SUTS, Lummi sub-chief. his x mark. [L. S.]

Executed in the presence of us -

M. T. SIMMONS,

Indian Agent.

C. H. MASON,

Secretary of Washington Territory.

BENJ. F. SHAW,

Interpreter.

CHAS. M. HITCHCOCK.

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H. A. GOLDSBOROUGH.

GEORGE GIBBS.

JOHN H. SCRANTON.

HENRY D. COCK.

S. S. FORD, Jr.

ORRINGTON CUSHMAN.

ELLIS BARNES.

R. S. BAILEY.

S. M. COLLINS.

LAFAYETEE BALCH.

E. S. FOWLER.

J. H. HALL.

ROB'T DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, Secretary."

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Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL.]

JAMES BUCHANAN.

By the President:

LEWIS CASS,

Secretary of State.

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END OF DOCUMENT

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The Office of the President of the United States

(TREATY)

TREATY WITH THE NISQUALLI, PUYALLUP, ETC., 1854.

December 26, 1854.

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in theyear one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them. [FNA] [FNB]

ARTICLE 1

The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly [FNC] direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

(Publication page references are not available for this document.)

ARTICLE 2

There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammerslev's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them. [FND] [FNE] [FNF]

ARTICLE 3

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter. [FNG]

ARTICLE 4

In consideration of the above session, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year; and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial

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objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto. [FNH] [FNI]

ARTICLE 5

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree [FNJ] to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6

The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on renumrating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment to be made accordingly thereof. [FNK] [FNL]

ARTICLE 7

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals. [FNM]

ARTICLE 8

The aforesaid tribes and bands acknowledge their dependence on the Government of

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the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial. [FNN]

ARTICLE 9

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine. [FNO]

ARTICLE 10

The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities. [FNP]

ARTICLE 11

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter. [FNQ]

(Publication page references are not available for this document.)

ARTICLE 12

The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent. [FNR] [FNS]

ARTICLE 13

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States. [FNT]

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

Isaac I. Stevens, (L.S.)

Governor and Superintendent Territory of Washington.

Qui-ee-metl, his x mark. (L.S.)

Sno-ho-dumset, his x mark. (L.S.)

Lesh-high, his x mark. (L.S.)

Slip-o-elm, his x mark. (L.S.)

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Kwi-ats, his x mark. (L.S.)

Stee-high, his x mark. (L.S.)

Di-a-keh, his x mark. (L.S.)

Hi-ten, his x mark. (L.S.)

Squa-ta-hun, his x mark. (L.S.)

Kahk-tse-min, his x mark. (L.S.)

Sonan-o-yutl, his x mark. (L.S.)

Kl-tehp, his x mark. (L.S.)

Sahl-ko-min, his x mark. (L.S.)

T'bet-ste-heh-bit, his x mark. (L.S.)

Tcha-hoos-tan, his x mark. (L.S.)

Ke-cha-hat, his x mark. (L.S.)

Spee-peh, his x mark. (L.S.)

Swe-yah-tum, his x mark. (L.S.)

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(Publication page references are not available for this document.)

Cha-achsh, his x mark. (L.S.)

Pich-kehnd, his x mark. (L.S.)

S'Klah-o-sum, his x mark. (L.S.)

Sah-le-tatl, his x mark. (L.S.)

See-lup, his x mark. (L.S.)

E-la-kah-ka, his x mark. (L.S.)

Slug-yeh, his x mark. (L.S.)

Hi-nuk, his x mark. (L.S.)

Ma-mo-nish, his x mark. (L.S.)

Cheels, his x mark. (L.S.)

Knutcanu, his x mark. (L.S.)

Bats-ta-kobe, his x mark. (L.S.)

Win-ne-ya, his x mark. (L.S.)

Klo-out, his x mark. (L.S.)

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(Publication page references are not available for this document.)

Se-uch-ka-nam, his x mark. (L.S.)

Ske-mah-han, his x mark. (L.S.)

Wuts-un-a-pum, his x mark. (L.S.)

Quuts-a-tadm, his x mark. (L.S.)

Quut-a-heh-mtsn, his x mark. (L.S.)

Yah-leh-chn, his x mark. (L.S.)

To-lahl-kut, his x mark. (L.S.)

Yul-lout, his x mark. (L.S.)

See-ahts-oot-soot, his x mark. (L.S.)

Ye-takho, his x mark. (L.S.)

We-po-it-ee, his x mark. (L.S.)

Kah-sld, his x mark. (L.S.)

La'h-hom-kan, his x mark. (L.S.)

Pah-how-at-ish, his x mark. (L.S.)

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(Publication page references are not available for this document.)

Swe-yehm, his x mark. (L.S.)

Sah-hwill, his x mark. (L.S.)

Se-kwaht, his x mark. (L.S.)

Kah-hum-klt, his x mark. (L.S.)

Yah-kwo-bah, his x mark. (L.S.)

Wut-sah-le-wun, his x mark. (L.S.)

Sah-ba-hat, his x mark. (L.S.)

Tel-e-kish, his x mark. (L.S.)

Swe-keh-nam, his x mark. (L.S.)

Sit-oo-ah, his x mark. (L.S.)

Ko-quel-a-cut, his x mark. (L.S.)

Jack, his x mark. (L.S.)

Keh-kise-bel-lo, his x mark. (L.S.)

Go-yeh-hn, his x mark. (L.S.)

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Sah-putsh, his x mark. (L.S.)

William, his x mark. (L.S.)

Executed in the presence of us - -

M. T. Simmons, Indian agent.

James Doty, secretary of the commission.

C. H. Mason, secretary Washington Territory.

W. A. Slaughter, first lieutenant, Fourth Infantry.

James McAlister,

E. Giddings, jr.

George Shazer,

Henry D. Cock,

S. S. Ford, jr.,

John W. McAlister,

Clovington Cushman,

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Peter Anderson,

Samuel Klady,

W. H. Pullen,

P. O. Hough,

E. R. Tyerall,

George Gibbs,

Benj. F. Shaw, interpreter,

Hazard Stevens.

FNA Ratified Mar. 3, 1855.

FNB Proclaimed Apr. 10, 1855.

FNC Cession to United States.

FND Reservation for said tribes.

FNE Removal thereto.

FNF Roads to be constructed.

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(Publication page references are not available for this document.)

FNG Rights to fish.

FNH Payments for said cession.

FNI How applied.

FNJ Expenses of removal.

FNK Removal from said reservation.

FNL Ante, p. 612.

FNM Annuities not to be taken for debt.

FNN Stipulations respecting conduct of Indians.

FNO Intemperance.

FNP Schools, shops, etc.

FNQ Slaves to be freed.

FNR Trade out of the limits of the United States forbidden.

FNS Foreign Indians not to reside on reservation.

FNT Treaty, when to take effect.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	NO. 10-30185, 10-30186, 10-30187,
)	and 10-30188
)	
Plaintiff-Appellee,)	D.C. No. CR09-00191MJP
)	Western District of Washington
)	
v.)	APPELLEE’S MOTION TO
)	FILE OVERLENGTH
)	CONSOLIDATED ANSWERING
C. MARVIN WILBUR, SR.)	BRIEF
JOAN WILBUR,)	
APRIL M. WILBUR, and)	
BRENDA WILBUR)	
)	
<u>Defendant-Appellants.</u>)	

Plaintiff-Appellee, United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Mary K. Dimke, Assistant United States Attorney for said district, hereby files this motion, pursuant to Rule 32-2 of the United States Court of Appeals for the Ninth Circuit, requesting permission to file a brief in response to

appellant's opening brief that exceeds the 15,400 word limit for briefs filed in consolidated cases.

This is a consolidated appeal in which the Defendant-Appellants, C. Marvin Wilbur, Sr., Joan Wilbur, April M. Wilbur, and Brenda Wilbur, and April Wilbur, challenge their convictions for Conspiracy to Traffic in Contraband Cigarettes (all defendants) and Conspiracy to Commit Money Laundering (Marvin Wilbur and Joan Wilbur only). Prior to the Court's order consolidating these appeals, the appellants filed two opening briefs containing a combined word count exceeding 20,700 words, each of which raises distinct challenge to their convictions. All told, the government has been required to address no less than fifteen legal issues pressed by the appellants.

Given the shear number of legal questions raised by this appeal — many of which require substantial exposition of Washington State law concerning cigarette taxation — the government respectfully submits that its overlength filing is necessary. The government respectfully requests that it be permitted to file the overlength brief submitted with this motion. That brief contains 16,239 words, far less than opening briefing submitted by the appellants. While lengthy, the government submits this oversized filing is necessary to

address adequately the myriad legal issues presented in the appellants' opening briefs.

DATED this 1st day of February, 2011.

Respectfully submitted,

JENNY A. DURKAN
United States Attorney

/s/ Mary K. Dimke _____

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