NO. 10-30185
Consolidated with Nos. 10-30186, 10-30187 & 10-30188

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

v.

C. MARVIN WILBUR, SR.

*Appellant*

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# BRIEF OF APPELLANT MARVIN WILBUR, SR.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
NO. CR09-00191 MJP, THE HONORABLE MARSHA PECHMAN.

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## A. STATEMENT OF JURISDICTION

This is an appeal from a final judgment in a criminal case entered on June 16, 2010. ER 918-920. The District Court had jurisdiction under 18 U.S.C. § 3231. ER 896-902. Timely notice of appeal was filed on June 21, 2010. ER 918-920. This Court has jurisdiction under 28 U.S.C. § 1291.

## B. BAIL STATUS

The appellant is on release without bail pending appeal.

## C. STATEMENT OF THE ISSUES

**1.** For purposes of a criminal violation of the Contraband Cigarette Trafficking Act ("CCTA") which defines "contraband cigarettes" as those which do not bear evidence of payment of "applicable state taxes":

Are there any "applicable state taxes" for cigarettes possessed on an Indian tribe's reservation within Washington State "during the effective period" of a cigarette tax contract ("CTC") between that tribe and the State?

**2.** Since there are no such "applicable state taxes," did the district court err by denying the motion to dismiss all charges?

**3.** Assuming, *arguendo*, that in order to "qualify" for Washington's cigarette tax retrocession that one must be an Indian retailer as that term is defined by RCW 43.06.455(14)(b), are the Wilburs qualified either:

**a.** Because the Trading Post was licensed by the Swinomish Tribe to sell cigarettes, or

**b.** Because the Trading Post was located on land held in trust for an Indian.

**4.** If federal criminal law on trafficking in contraband cigarettes turns on state tax statutes applicable to cigarettes possessed on an Indian reservation, and if those statutes are ambiguous, must such statutes be construed in favor of Indians, in favor of taxpayers, and in favor of accused criminal defendants?

5. Given that there was no clear precedent which would inform the defendants that they had to pay Washington State cigarette taxes during the effective period of the CTC between the Swinomish Tribe and the State, does it violate Due Process to impose criminal liability upon them for "conspiring" not to pay such taxes?

6. Did the District Court err in ordering the defendants to pay restitution to Washington State for a hypothetical state "tax loss" even though there were no state cigarette taxes applicable to the cigarettes they possessed because a CTC was in effect?

7. Is a resentencing required because the guideline ranges were erroneously calculated using a $10.9 million tax loss figure when in reality there was no tax loss at all?

## D. STATEMENT OF THE CASE

On June 11, 2009, an indictment was returned charging Marvin and Joan Wilbur (husband and wife), April Wilbur (their daughter-in-law) and Brenda Wilbur (another daughter-in-law) with multiple offenses associated with the possession of cigarettes at the Trading Post at March Point, a store located on the Swinomish Reservation in Washington State. ER 1-14. A superseding indictment was filed on October 15, 2009 (Docket #34) and a second superseding indictment was filed on October 29, 2009. ER 258-289.

Marvin and Joan Wilbur are enrolled members of the Swinomish Tribe. ER 100, 246. Marvin is a direct descendant of Goliah, a Skagit Chief who signed the Treaty of Point Elliott with Governor Stevens of the Washington Territory. ER 906. April Wilbur and Brenda Wilbur are married to Michael J. Wilbur and Marvin Wilbur, Jr.,

the two sons of Marvin and Joan Wilbur. ER 389. April is an enrolled member of the Ditidaht Band, a recognized Canadian tribe . ER 231.

All defendants were charged in Count I of the second superseding indictment with conspiracy to traffic in contraband cigarettes in violation of 18 U.S.C. §§ 2342(a) and 371. ER 258-266. All four were also charged with several substantive counts of trafficking in contraband cigarettes.[1] Marvin and Joan Wilbur were also charged with conspiracy to launder monetary instruments based upon the allegation they laundered the proceeds of sales of contraband cigarettes. ER 277-79. Finally, several substantive counts of money laundering were also charged. ER 270-277, 279-281.[2]

The defendants moved for dismissal of all the charges against them pursuant to the state statutes governing state taxes "during the effective period" of a cigarette tax contract (a "CTC"), and also pursuant to the CTC entered into between the State and the Swinomish Tribe on October 3, 2003. ER 15-39, 45-229, 567-580. They also moved for dismissal pursuant to the Due Process Clause on the ground that they could not have known that there were any applicable state cigarette taxes during the

[1] Marvin and Joan Wilbur were charged in six counts with substantive trafficking offenses; April was charged with substantive trafficking in five counts; and Brenda was charged with substantive trafficking offenses in three counts. ER 267-269.

[2] Marvin and Joan Wilbur were also charged with thirteen counts of money laundering; April was charged with eight counts of money laundering; and Brenda was charged with one count of money laundering.

period when the State and the Tribe had an existing cigarette tax contract. ER 39-42. The District Court denied this motion to dismiss on February 4, 2010. ER 732-742.

Thereafter, on February 12, 2010, each of the defendants entered into a plea agreement with the United States, and each entered a conditional guilty plea to the charge of conspiracy to traffic in contraband cigarettes (Count 1). ER 759 (April); 772 (Marvin); 786 (Brenda); and 799 (Joan). Marvin and Joan also plead guilty to a second charge of conspiracy to launder monetary instruments (Count 19). ER 772, 799. All the other counts were dismissed. ER 907, 914, 921, 928.

The following facts were agreed upon. Between July 1999 and May 2007, the defendants agreed to sell cigarettes and that no Washington State excise taxes would be paid for such cigarettes. ER 763, 776-77, 790, 803-04. Marvin and Joan operated the Trading Post, a business located near Anacortes, Washington. ER 763, 777, 790, 804. April had responsibility for ordering cigarettes and paying suppliers for their delivery. ER 763, 777, 790, 804. Brenda had responsibility for paying suppliers and for maintaining Trading Post books and records. ER 763, 777, 790, 804. On May, 15, 2007, federal agents searched the Trading Post and found over 3 million untaxed and unstamped cigarettes. ER 763-64, 777, 790-91, 804. Based on invoices recovered during the search, it was determined that the defendants purchased at least 792,981 cartons of untaxed, unstamped cigarettes and sold these cigarettes to the public at large without ever affixing a Washington state tax stamp and without

collecting any Washington state cigarette tax. *Id.* Marvin and Joan used some of the cash obtained from the sales of unstamped cigarettes to purchase cashier's checks and certificates of deposit. ER 778, 805.

In each plea agreement the defendant reserved the right to appeal several of the District Court's decisions on the defendants' pretrial motions, including the denial of the defendants' three motions to dismiss the charges on statutory, contractual, due process, and treaty law grounds. ER 767-68, 781-782, 794-95, 808-09.

The Wilburs asked the District Court to stay their sentencings because an appeal pending in Division Two of the Washington Court of Appeals posed the same questions of state tax law which the Wilbur case posed. ER 812-826, 827-830, 831-833, 834-35. They asked the District Court to postpone their sentencing until there was a decision in that case. *Id*. The District Court denied that request. ER 836.

Sentences were imposed on June 16, 2010. Marvin was sentenced to imprisonment for 12 months and 1 day, ER 922; Joan received a sentenced of five months, ER 908; and April and Brenda each received a sentence of one day, ER 915, 929. All sentences were stayed pending appeal. ER 908, 915, 922, 929.

## E. STANDARD OF APPELLATE REVIEW

Questions of law regarding statutory construction are reviewed *de novo. Gibson v. County of Riverside,* 132 F.3d 1311, 1312 (9th Cir. 1997); *Mastro v. Witt*, 39 F.3d 238, 241 (9th Cir. 1994). Questions regarding the construction of a contract are

reviewed *de novo*. *Mattel, Inc. v. MGA Entertainment*, 616 F.3d 904, 912 (9th Cir. 2010); *Aetna Casualty v. Pintlar Corp.*, 948 F.2d 1507, 1511 (9th Cir. 1991). Questions regarding the constitutionality of application of a statute to a criminal defendant are reviewed *de novo*. *United States v. Andaverde*, 64 F.3d 1305, 1308-09 (9th Cir. 1995).

## F. SUMMARY OF ARGUMENT

The Wilburs were convicted of violating the CCTA by conspiring to possess "contraband cigarettes" contrary to 18 U.S.C. § 2342(a). "Contraband cigarettes" are defined in 18 U.S.C. § 2341(2) as cigarettes that do not bear evidence of payment of "applicable state or local cigarette taxes." In the absence of an applicable state cigarette tax, it is impossible to violate 18 U.S.C. § 2342(a).

In 2001, the Washington Legislature authorized the Governor to enter into cigarette tax contracts ("CTCs") with designated Indian tribes. RCW 43.06.455. On October 3, 2003 the Swinomish Tribe and the State of Washington entered into a CTC. Under RCW 82.08.0316, 82.12.0316, and 82.24.295, there are no state taxes applicable to cigarettes "during the effective period of a cigarette tax contract." Thus, after October 3, 2003 it was legally impossible to commit any CCTA criminal offense on the Swinomish Reservation because any cigarettes found there were statutorily exempt from all "applicable cigarette taxes" pursuant to Washington statutes. Since trafficking in contraband cigarettes became legally

impossible, it also became legally impossible for anyone to engage in the money laundering of the proceeds of trafficking in contraband cigarettes. Thus, the Wilburs did not commit any federal offense, and their convictions must be set aside.

Even assuming, *arguendo*, that the state statutes at issue are ambiguous, and that it is unclear whether there are any "applicable state taxes" during the period of the CTC, the Wilburs' convictions should still be set aside because ambiguous criminal statutes are construed against the government, ambiguous tax statutes are construed in favor of taxpayers, and ambiguous statutes regarding relations with Indians are construed in favor of Indians.

Even if Washington's tax statutes did not provide for a tax retrocession which applies to cigarettes possessed on the Swinomish Reservation, the CTC itself unambiguously provided for a tax retrocession for the duration of the CTC, and thus neither the Wilburs, nor anyone else, could commit a CCTA offense on the reservation during this period.

Finally, there was no clear controlling precedent which established that state cigarette taxes applied to cigarettes sold on a reservation covered by a CTC. Therefore, it violates due process to convict them for having failed to pay such taxes and affix state cigarette tax stamps to them.

## G. APPLICABLE STATUTES

### 1. THE CONTRABAND CIGARETTE TAX ACT

Congress has defined the term "contraband cigarettes" as follows:

> 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 . . .

18 U.S.C. § 2341(2) (bold italics added).[3]

Since the CCTA defines contraband cigarettes as cigarettes which "bear no evidence of payment of applicable state taxes . . . a violation of the CCTA requires as a predicate, the failure to comply with state tax laws." *United States v. Baker*, 63 F.3d 1478, 1486 (9th Cir. 1995). *Accord United States v. Gord*, 77 F.3d 1192, 1193 (9th Cir. 1996); *United States v. Smiskin*, 487 F.3d 1260, 1263 (9th Cir. 2007).

The scope of the CCTA, and the range of acts prohibited by that act, changes over time as a direct result of changes in state cigarette tax laws:

> Nothing in the language of the CCTA or its legislative history indicates Congress intended the statute to be frozen in time. To the contrary, Congress' concern with helping the states control cigarette smuggling, and its use of the phrase "applicable State cigarette taxes," reflects an intention that ***the acts prohibited by the CCTA change as a function of evolving state law.***

[3] The statute was amended in 2006 to lower the threshold quantity of cigarettes from 60,000 to 10,000.

*Baker*, 63 F.3d at 1486, n.7 (bold italics added).

**2. ENACTMENT OF WASHINGTON STATE STATUTES GOVERNING CIGARETTE TAX CONTRACTS BETWEEN THE STATE AND INDIAN TRIBES.**

In 2001 the Washington Legislature enacted six new statutes[4] pertaining to the negotiation and operation of cigarette tax contracts between the State and certain Indian tribes. RCW 43.06.455(1) provided that the Governor "may enter into cigarette tax contracts concerning the sale of cigarettes" with specified tribes.[5] Such 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 to cover transactions by non-Indian retailers. RCW 43.06.455(2). The statute requires that all such contracts shall provide for replacement of *state* cigarette taxes with *tribal* cigarette taxes:

> 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.

RCW 43.06.455(3)(bold italics added).

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[4] These six statutes are RCW 43.06.450, 43.06.455, 43.06.460, 82.08.0316, 82.12.0316 and 82.24.295.

[5] In RCW 43.06.460, the Legislature listed those tribes with whom the Governor was authorized to negotiate CTCs. While the Swinomish Tribe was not originally included when the statute was first enacted in 2001, the statute was amended, effective September 20, 2002, to include the Swinomish Tribe.

At the same time the Legislature enacted three statutes, each of which expressly provides that so long as a CTC is in effect, all state and local cigarette taxes "do not apply" to cigarettes possessed by Indian retailers. For example, Washington State cigarette sales taxes are generally imposed on all cigarettes by RCW 82.24.020, .026, .027, and .028. But by enacting RCW 82.24.295(1), all cigarettes possessed by Indian retailers during the operation of a CTC were exempted from these taxes.

> 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.

RCW 82.24.295(1) (emphasis added).

Similarly, while Washington State use taxes are imposed on cigarettes by RCW 82.12.020, the Legislature enacted another statute which exempted CTC covered cigarettes from these use taxes:

> The provisions of this chapter ***shall not apply*** in respect to the use of cigarettes sold by an Indian retailer ***during the effective period of a cigarette tax contract*** under RCW 43.06.455 or a cigarette tax agreement under RCW 43.06.465 or 43.06.466.

RCW 82.12.0316 (emphasis added).

And finally, in 2001, the Legislature exempted all such cigarettes from the Washington State retail sales tax:

> The tax levied by RCW 82.08.020 ***does not apply*** to sales of cigarettes by an Indian retailer ***during the effective period of a cigarette tax contract*** subject to RCW 43.06.455 or a cigarette tax

agreement under RCW 43.06.465 or 43.06.466.

RCW 82.08.0316 (emphasis added).

In 2003 the Legislature amended the statute which generally requires the attachment of Washington State cigarette tax stamps to cigarettes, to make it clear that this law did *not* apply to cigarettes covered by a CTC. As amended that law states, "Nothing in this section shall be construed as limiting any otherwise lawful activity under a cigarette tax compact pursuant to chapter 43.06 RCW." RCW 82.24.030(5). Identical language exempting CTC covered cigarettes was added by amendment to the State statutes making it unlawful to possess, or to transport, unstamped cigarettes. RCW 82.24.040(6); RCW 82.24.250(8).

In *Wilbur v. Locke*, 423 F.3d 1101, 1104 (9th Cir. 2005) this Court described how such contracts work:

> ***Such contracts must "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***," but the tribe may "allow an exemption for sales to tribal members." *Id.* § 43.06.455(3). . . . Thus, ***cigarette tax contracts must provide that the state will not impose any tax,*** and must require a tribe to collect taxes effectively equal to the previously imposed state taxes, and use the revenue for essential government services.

(Emphasis added).

## H. STATEMENT OF FACTS

### 1. THE 2003 CIGARETTE TAX CONTRACT BETWEEN WASHINGTON STATE AND THE TRIBE.

On October 3, 2003, pursuant to RCW 43.06.450, .455 and .460, the Swinomish Tribe and the State of Washington entered into a CTC. ER 45, ¶ 2 & 50-66. The CTC preamble expressly references the State statutes which authorize such a contract and the statute which exempted all cigarettes sold by Indian retailers from Washington State sales taxes:

> ***[T]his contract is authorized, on the part of the State, by legislation, including*** House Bill 3572, . . . as codified in RCW 43.06.450, ***RCW 43.06.455***, RCW 43.06.460, ***and RCW 82.24.295***; and on the part of the Tribe, by a Tribal Ordinance duly adopted by the Swinomish Indian Community Senate, and signed by the Tribal Chair.

ER 51 (emphasis added).

The CTC acknowledges that the Tribe "shall impose by ordinance taxes . . . on all sales by Tribal retailers of cigarettes to non-Indian and nonmember Indian purchasers within Indian country." ER 55. "Indian country" was defined as including "[a]ll land within the limits of the Swinomish Indian Reservation" and all Indian allotments or other lands held in trust for a Swinomish Tribal member of the Tribe . . ." ER 52. The CTC contained the Tribe's contractual commitment to "impose and maintain in effect a tax on cigarettes" by "enactment of a Tribal Ordinance" and states that the tribal tax is required to be exactly equal to the total

amount of Washington State and local taxes normally imposed on the sale of cigarettes in the absence of a CTC. ER 55.

In return for the Tribe's agreement to impose a tribal cigarette sales tax, the State agreed not to levy any tax on the sale of cigarettes in Indian country:

> Pursuant to RCW 43.06.455, ***the State retrocedes from its tax*** during the time this Contract is in effect.

ER 55, CTC, Part III, ¶ 2e (emphasis added).

**2. ENACTMENT OF THE TRIBAL CIGARETTE TAX.**

The Tribe fulfilled its contractual promises by enacting a tribal cigarette sales tax. That tax is set forth in Chapter 17 of the Swinomish Tribal Code ("STC"). STC 17-04.020 sets forth the declared purpose and scope of this chapter. In subsection (F) it explicitly acknowledges the CTC entered into by the Tribe and the State. ER 402.

In fulfillment of its contractual obligations under the CTC, the Tribe enacted the promised tribal cigarette tax in STC 17-04.60. The Swinomish Tribal Code adopts definitions that track those used in the Cigarette Tax Contract, defining "Swinomish Indian country" and "Tribal Cigarette Tax" in the same terms. See STC 17-04.050(V) and (Y). The Tribe also requires that "Tribal tax stamps" be affixed to all cigarettes sold on the Reservation. STC 17-04.100.

### 3. AFTER THE EFFECTIVE DATE OF THE CTC BETWEEN THE STATE AND THE SWINOMISH TRIBE, WASHINGTON STATE STOPPED COLLECTING STATE CIGARETTE TAXES ON THE SWINOMISH RESERVATION.

In addition to the Trading Post, which is operated by the Wilburs, the Swinomish Tribe owns and operates a convenience store which sells cigarettes on the reservation. ER 70, ¶ 3. The Tribe's general manager confirmed that since October 3, 2003 when the State and the Tribe entered into a CTC, "the State of Washington has not made any attempt to levy, impose, or collect, any state or local taxes on cigarettes sold on the Swinomish Indian Reservation at the [tribal] store and no state taxes have been collected by the store." ER 70, ¶ 6. Conversely, since the CTC took effect the Tribe has collected tribal taxes on all cigarettes sold at the tribal convenience store in lieu of the previously collected State taxes. ER 70, ¶ 5.

The CTC "has a term of eight years, and unless either the State or the Tribe takes action to give notice of nonrenewal of the compact, it will be automatically renewed on October 3, 2011 for another term of another 8 years." ER 71, ¶ 6; ER 63-64, CTC Part X. "[N]either the State nor the Tribe has taken any action to terminate the Cigarette Tax Contract." ER 71, ¶ 7.

### 4. RESUMPTION OF COLLECTION OF WASHINGTON STATE CIGARETTE TAXES ON THE YAKAMA RESERVATION FOLLOWING TERMINATION OF THE YAKAMA NATION CTC.

A similar cigarette tax contract was entered into by the Yakama Nation and the

State of Washington in 2004. ER 79, ¶ 11. However, after failing to resolve a dispute between the State and the Nation through the use of contractual mediation procedures, that CTC "was terminated by the State of Washington on July 7, 2008." ER 79, ¶ 11.

Immediately upon terminating the compact with the Yakama Nation, the Washington State Department of Revenue announced that it would resume collection of state cigarette taxes. ER 79, ¶ 12. The Assistant Director of the Department notified the attorney for the Yakama Nation that since the contract had been terminated, state cigarette taxes were once again applicable, and state cigarette tax stamps once again had to be affixed to cigarettes sold to retailer on the Yakama Nation. ER 79, ¶ 12.

**5. SEIZURE OF CIGARETTES BY FEDERAL AGENTS.**

On May 15, 2007 ATF agents executed a search warrant at the Trading Post and seized approximately 3.6 million cigarettes and thousands of dollars of U.S. currency and coin. ER 100, 777.

**6. THE TRIBE'S OWN CIVIL SUIT BROUGHT IN TRIBAL COURT FOR NONPAYMENT OF TRIBAL TAXES.**

On May 28, 2008, the Tribe filed its own *civil* suit in Swinomish Tribal Court against the four Wilbur family members (as well as others). ER 46, ¶ 6; ER 108-117; ER 384, ¶ 5. In that suit the Tribe alleges that the Wilburs violated the Swinomish

Tobacco Tax Code by failing to pay the Tribal cigarette tax for the same cigarettes which the ATF agents seized on May 15, 2007. ER 115-16, ¶¶ 31-37. The Tribe seeks payment of allegedly unpaid *tribal* cigarette tax in the amount of $365,494.28 and civil penalties under tribal law in the same amount. ER 116, ¶¶ 35, 37.[6] The Tribe also seeks forfeiture of the seized cigarettes under the Tribal Tobacco Tax Code. ER 116, ¶¶ 38-40. Thus, there are currently two separate pending cases in which forfeiture of the same cigarettes is being sought; one is this case, and the other is the civil suit pending in tribal court. Preliminary forfeiture has already been ordered by the District Court in this criminal case. ER 913, 919, 926, 933.

**7. TRIBAL LICENSING OF THE TRADING POST.**

The District Court had before it the declarations of defendant Brenda Wilbur, who performed accounting duties for the Trading Post, and the declaration of Lydia Charles, the licensing clerk for the Swinomish Tribe. ER 119 -129, 218-229. Brenda Wilbur said it was her responsibility to make sure that the Trading Post had all the licenses it needed to do business on the reservation. ER 120, ¶ 3. In addition to cigarettes, the Trading Post sold blankets, Indian artwork, and clothes. *Id.* Another Wilbur business, located in a warehouse next door to the Trading Post, sold

[6] Funds obtained through payment of the tribal retail sales tax are used exclusively to pay for essential government services provided by the Tribe. Thus, the forfeiture of the seized cigarettes to the United States interferes with the Tribe's ability to collect its tribal retail sales tax, and deprives the Tribe of needed revenue. ER 82, ¶ 18.

fireworks. *Id.* To sell tobacco products, the Trading Post needed a tobacco license from the Tribe. *Id.* To sell fireworks, it needed a fireworks license. *Id.* To sell the other articles, it needed a general commercial license. *Id.* The Tribe's practice was to provide the Trading Post with one piece of paper – one license – which sometimes explicitly referred to the different types of businesses which the Trading Post was conducting on the premises, and which sometimes did not explicitly refer to all of the businesses. *Id.*

Brenda Wilbur asserted that the Trading Post was continually licensed to sell cigarettes by the Tribe from 2004 through June 6, 2007, and that the business was properly licensed by the Tribe to sell cigarettes on May 15, 2007 when federal agents executed a search warrant on the premises and seized all their cigarettes. ER 129.

Lydia Charles did not agree with the assertion that the Trading Post was properly licensed to sell cigarettes through May 15, 2007. However, she did agree that the Trading Post was properly licensed to sell cigarettes through March 27, 2005. ER 221. Charles said that her duties included "the issuance of various tribal licenses, including retail tobacco licenses, commercial and retail licenses . . . and wholesale fireworks." ER 219. The Tribe's records showed that during the period from 2001 through May 20, 2009, Charles issued a total of sixteen licenses to the Trading Post. ER 219-20. She identified License No. 42 as the last tobacco sales license that the Tribe had ever issued to the Trading Post. ER 220.

Charles produced a copy of License No. 42. ER 227 (Appendix A). Brenda Wilbur explained that she could not produce a copy of it because law enforcement agents had seized the Trading Post's copy when they conducted their search; but Brenda did produce a copy of the receipt for payment of $135, the combined fees for a tobacco license and commercial retail license which Charles gave the Trading Post at the time these licenses were paid for. ER 122, 134 (Appendix B).

The actual license bears Charles' signature. ER 227. It is dated March 3, 2004, and states that it is issued to 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." *Id.* It specifically authorizes the Trading Post to conduct tobacco sales. ER 227 (Appendix A). The license states that it is good through March 27, 2005. *Id.*

Thus, it was undisputed that the Trading Post was properly licensed by the Tribe to sell cigarettes through March 27, 2005. This licensing expiration date comes towards the latter part of the time period charged in the conspiracy count to which defendants plead guilty, that period being from July 1999 through May 15, 2007. ER 258.

## 8. TRUST STATUS OF THE LAND WHERE THE SEIZED CIGARETTES WERE POSSESSED AND SOLD.

Marvin Wilbur, Sr. purchased the land upon which the Trading Post is located in 1974 and obtained final approval for the purchase from the Bureau of Indian Affairs in 1976. ER 160. The land is an Indian allotment. ER 160. As stated by the BIA Superintendent, the land was conveyed to the United States of American in trust for Marvin Wilbur, Sr. as the beneficiary of that trust. ER 160, ¶ 4; ER 163-189.

There was no dispute about the status of the land upon which the Trading Post was located. In Count I of the second superseding indictment the United States acknowledged the trust status of the land as follows:

> At all times relevant to this Second Superseding Indictment: . . .
>
> The Trading Post at March Point (the "trading Post") was a privately owned retail establishment, located at 10045 S. March Point Road, on Allotment No. 1 on the Swinomish Indian Reservation, near Anacortes, Washington, that specialized in the sale of various tobacco products and other products, but was primarily engaged in the sale of cigarettes . . . ***The land on which the Trading Post is situated, Allotment No. 1, is held in trust by the United States on behalf of C. MARVIN WILBUR, a/k/a MARVIN WILBUR SR.***

ER 259-260 (emphasis added).

## 9. THE RULING OF THE COMMISSIONER IN THE STATE COURT OF APPEALS IN THE *COMENOUT* CASE.

After the District Court had denied the Wilburs' pretrial motion to dismiss the charges against them, and after the Wilburs had entered their conditional guilty pleas,

the Wilburs learned that three other Indians had raised the same argument regarding CTC covered cigarettes in a Washington State trial court. In *State v. Comenout* the defendants owned and operated a store in Puyallup, Washington where they sold cigarettes. After undercover agents made numerous purchases of unstamped cigarettes from the store, the Comenouts were charged in Pierce County Superior Court with theft from the State, by reason of the fact that they had not paid any state cigarette taxes, and with possession of unstamped cigarettes. ER 817.

Like the Wilburs, the Comenouts also made a pretrial motion to dismiss the criminal charges against them based upon the existence of a CTC between Washington and the Quinault Nation entered into in 2005. ER 817. Like the Wilburs, they argued that since a CTC was in effect when their unstamped cigarettes were seized, they were exempt from the payment of such taxes. Thus they could not possibly be guilty of the crimes charged because there were no state cigarette taxes at that time.

After the Comenout trial judge denied their motion to dismiss the Comenouts sought interlocutory appellate review from the Washington Court of Appeals. On February 10, 2010, an appellate court commissioner *granted* the Comenouts' motion for discretionary review. ER 816-826 (Appendix C). The Commissioner concluded that the Superior Court *had* committed an obvious error which warranted

interlocutory appellate review, so the case was accepted for appellate review by a three judge panel of the Washington Court of Appeals. ER 825; RAP 2.3(b)(1).

The Commissioner described the argument raised by the Comenouts as follows:

> The Comenouts argue that they are exempt from State cigarette taxes under RCW 82.24.295(1), which provides that the taxes imposed by chapter 82.24 RCW "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." Under RCW 43.06.455(14)(b), and "Indian retailer" includes a business owned and operated by the Indian person or persons in whose name the land is held in trust." The Comenouts contend that they qualify as an "Indian retailer" and so are exempt under RCW 82.24.295(1). ***They appear to be correct***.

ER 824 (emphasis added).

In the Commissioner's view:

> [T]he Comenouts . . . appear to fall within the definition of "Indian retailer" under RCW 43.06.455(14)(b). And their possession of the cigarettes took place during the period of the Compact into which the State and the Quinault Tribe entered under RCW 43.06.455. . . . Since the Comenouts appear to qualify as an "Indian retailer" under RCW 43.06.455(14)(b), ***they appear to fall within the exemption contained in RCW 82.24.295(1). And if they fall within that exemption, then the State has no authority to prosecute them regarding the cigarettes contained in the Store. Because the State appears not to have the authority to prosecute the Comenouts, it appears the trial court committed obvious error in denying their motion to dismiss.*** That error renders further proceedings useless, so the Comenouts have demonstrated that this court should grant discretionary review under RAP 2.3(b)(1).

ER 824-25. *State v. Comenout*, COA No. 39741-2-II, (emphasis added). In addition to granting review, the Commissioner directed that "[f]urther proceedings in the trial court are stayed pending further order of this court." *Id.* at 11.

Upon learning of the Commissioner's Ruling in *Comenout*, the Wilburs filed a motion asking the District Court to continue their sentencing hearing until a decision had been rendered in *Comenout*. ER 812-835. The District Court denied the Wilburs' motion (ER 836) and proceeded to sentence all the Wilburs on June 16, 2010. The Comenout case is still pending in the Washington Court of Appeals.

## I. ARGUMENT

### 1. THE WASHINGTON STATE STATUTES UNAMBIGUOUSLY PROVIDE THAT THE STATE RETROCEDES FROM ALL STATE CIGARETTE TAXES DURING THE EFFECTIVE TERM OF A CIGARETTE TAX CONTRACT.

#### a. The Government Concedes That The CTC Caused A State Cigarette Tax Retrocession, But Contends That This Retrocession Is *Conditional*, and That It Applies Only To Cigarettes Which "Conform to the Requirements" of the CTC By Having Tribal Tax Stamps Affixed to Them.

All of indictments in this case, including the second superseding indictment ("SSI") which contained those counts to which the defendants entered guilty pleas, explicitly acknowledge that the CTC between Washington and the Tribe caused a state tax retrocession from state cigarette taxes. ER 262, ¶ 15. Nevertheless, the United States maintains that this state tax retrocession is conditional, and that it

applies only to cigarettes possessed by Indian Retailers who are licensed by the Swinomish Tribe to sell cigarettes, and whose cigarettes bear tribal tax stamps in conformity with the requirements of the CTC. ER 262. Paragraph 15 of the SSI stated:

> ***On or about October 3, 2003, the Swinomish Tribe entered into a Cigarette Tax Contract (the "Contract" with the State of Washington.*** Under the terms of the Contract, the Swinomish Tribe is required to impose a tax on all cigarette sales by "Tribal Retailers" defined as, cigarette retailers that are wholly-owned by the Tribe and all cigarette sales by any tribal member-owned smoke shops, licensed by the Tribe and operating within the reservation, in an amount equal to that imposed by state and local governments. Both the Contract and Washington state law require that all cigarettes sold by tribal retailers bear a tribal tax stamp. ***During the effective period of the Contract, which remains in effect, the State of Washington retroceded from its collection of cigarette taxes for all sales that conformed with the terms of the Contract. With respect to cigarette sales that did not conform to the requirements of the Contract, Washington cigarette taxes remained applicable and subject to collection***.

ER 262, ¶ 15 (emphasis added).

The United States further alleged that for a period of slightly more than two years, the Trading Post was not licensed by the Tribe, and that therefore there was no State tax retrocession as to the cigarettes which the Wilburs possessed.

> In order to qualify as a tribal retailer under the Contract, any retail cigarette sales business operated on the Swinomish Reservation by a tribal member, was required to obtain a tribal license. During the period from March 28, 2005 through May 15, 2007, no tribal license permitting the retail sale of cigarettes at the Trading Post was ever issued.

ER 262, ¶ 15.

**b. <u>There Is Nothing In Any of the CTC Tax Retrocession Statutes Which Makes the Retrocession Inapplicable to Cigarette Sales or Possession That Does Not Conform to the Terms of the CTC</u>.**

The Government's "conditional" retrocession theory conflicts with the clear statutory language of the three explicit retrocession statutes. For example, the statutory language of RCW 82.24.295(1) is unambiguous:

> 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.

(Emphasis added). RCW 82.08.0316 similarly provides:

> The tax levied by RCW 82.08.020 ***does not apply*** to sales of cigarettes by an Indian retailer ***during the effective period of a cigarette tax contract*** subject to RCW 43.06.455 or a cigarette tax agreement under RCW 43.06.465 or 43.06.466.

(Emphasis added). And finally, RCW 82.12.0316 provides:

> The provisions of this chapter ***shall not apply*** in respect to the use of cigarettes sold by an Indian retailer ***during the effective period of a cigarette tax contract*** under RCW 43.06.455 or a cigarette tax agreement under RCW 43.06.465 or 43.06.466.

RCW 82.12.0316 (emphasis added).

None of these statutes contain any language which limits the scope of Washington's tax retrocession during the time period when a cigarette tax contract is

in effect. These retrocession statutes apply to all sales of cigarettes, whether or not they bear tribal tax stamps as evidence of payment of the tribal cigarette tax.

Although the United States claims that the tax retrocession applies only to "sales that conformed with the requirements of the contract," ER 262, ¶ 15, the Wilburs are not even parties to the contract and thus the contract does not even govern their behavior. The CTC is between the State of Washington and the Swinomish Tribe. No one has ever contended that the Tribe violated the CTC. And no one has ever contended that the Wilburs are contractually bound by the provisions of a contract that they are not a party to.

The Tribe has asserted, in its own civil suit, that the Wilburs violated *tribal* cigarette tax laws. But there is nothing in the CTC that even remotely suggests that violation of tribal tax laws by a third party invalidates or suspends Washington State's tax retrocession.

### c. The CTC Itself Contains an Unambiguous Provision Requiring a Total Tax Retrocession During the Effective Term of the Contract.

Like the Washington statutes, the CTC itself contains an unambiguous state tax retrocession provision which does *not* say anything about the retrocession being conditioned on third party compliance with tribal tax laws. Part III, ¶ 2e of the CTC provides simply:

> Pursuant to RCW 43.06.455, the State retrocedes from its tax *during the time this Contract is in effect.*

(Emphasis added). The scope of the retrocession is *not* conditioned upon compliance with tribal licensing requirements. Nor is it limited to cigarettes which bear tribal cigarette tax stamps.

**d. The District Court Erred When It Confused The Interpretation of a Contract With the Interpretation of a Statute. There Is No Rule That Says Contracting Parties Are Free to Modify State Statutes.**

The District Court violated well established rules of statutory construction, and compounded its error by confusing the task of contract construction with statutory construction. The District Court erroneously concluded that (1) the Governor and the Swinomish Tribe were free to enter into a CTC that provided for a more limited tax retrocession than that which the State Legislature had provided for; (2) that in fact the two contracting parties had deliberately done just that by limiting the tax retrocession to "conforming sales"; and (3) that because the defendants sold cigarettes which bore neither Washington State nor Swinomish Tribe tax stamps, these were "nonconforming" sales to which the statutory tax retrocession did not apply.

**e. When Statutes are Unambiguous There Is Nothing to Construe. RCW 82.08.0316, 82.12.0316, and 82.24.295(1) are Clear and Unambiguous.**

"[A court's] duty in applying an unambiguous statute is clear. The Supreme Court has instructed that '[w]hen we find terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.'" *Del Hur, Inc. v. National Union Fire*, 94 F.3d 548, 550 (9th Cir. 1996), quoting *Demarest v.*

*Manspeaker*, 498 U.S. 184, 190 (1991). "[A] court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency." *Aronson v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981). An unambiguous statute must be read as it was written. "There is no justification for adding limiting language to a clear and unambiguous statute . . ." *Vincent v. Apfel*, 191 F.3d 1143, 1148 (9th Cir. 1999).

Washington courts follow the same rule. "We have consistently held that an unambiguous statute is not subject to judicial construction and have declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous." *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). *Accord State v. Abrahamson*, 157 Wn. App. 672, 682-683, 238 P.3d 533 (2010).

In the present case, the language of the tax retrocession statutes is clear. There is no ambiguity in the words "does not apply," "do not apply," and "shall not apply." Similarly, there is no ambiguity in the phrase "during the effective period of a cigarette tax contract," a phrase which appears in all three statutes.

**f. <u>The District Court's Limitation of Washington State's Tax Retrocession Also Ignores the Unambiguous Language of RCW 43.06.455 Which Mandates That Every CTC "Shall" Provide for the Elimination of "All" State and Local Cigarette Taxes Imposed on Cigarettes In Indian Country by Indian Retailers</u>.**

The decision below ignores yet another unambiguous statute. The CTC between Washington and the Swinomish Tribe is legislatively authorized by RCW

43.06.455. This statute dictates that "All cigarette tax contracts shall meet the requirements for cigarette tax contracts under this section." RCW 43.06.455(1). The statute further provides, "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." (Emphasis added).

There is no ambiguity in the word "all." There is Washington case law directly on point. In *S.S. Mullen v. Marshland Flood Control District*, 67 Wn.2d 461, 407 P.2d 990 (1965) a contractor argued that the phrase "all applicable federal, state and local taxes" was ambiguous and that it did not include the state retail sales tax. The Court made short shrift of this contention, holding that "the words 'all applicable * * * taxes' encompass every conceivable tax resulting from the performance of the contract." *Id*. at 464. Similarly, in this case the command of RCW 43.06.455 that the tribal cigarette tax shall take the place of "all" state and local cigarette taxes means that the tribal tax must be in lieu of every conceivable State and local government tax that might otherwise apply in the absence of a CTC. Thus the Government's contention that the tribal tax only replaces "all" state and local taxes when the Indian cigarette retailer is licensed by the Tribe conflicts with the holding of *Mullen*. *Id.*[7]

[7] The District Court's "conditional" theory of an on-again, off-again tax retrocession which applies to some cigarettes which bear tribal tax stamps, but not to other

**g. <u>The Tribe and The Governor Cannot Contractually Modify The State's Statutory Requirements for CTCs. In Fact, Contrary to What The District Court Held, The Washington Legislature Prohibited the Governor From Restricting the Scope of a CTC Tax Retrocession By Requiring That All CTCs "Shall" Meet the Legislature's Statutory Requirements</u>.**

Rather than analyze the applicable statutes, the District Court looked exclusively to the language of the contract entered into by the Tribe and the Governor. The District Court concluded that when Part III(2)(e) of the CTC -- the tax retrocession provision -- is read "in tandem, rather than at odds with, other provisions of the Contract," it was clear (to the District Court) that "the State's retrocession under the Tax Contract applies only to sales that conform to [the Contract's] core requirements," and thus only to cigarettes which bear tribal tax stamps. ER 739-740.

The District Court concluded that the contractual promise to retrocede from all taxes had to be read in conjunction with the statement in Part V(6) of the CTC that the State would not assert any violation of law for all transactions "which conform with the requirements of this contract." ER 57. The District Court read Part V(6) as applicable to the Wilburs even though they were not parties to the CTC. The Court

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cigarettes which do not, also conflicts with dicta in this Court's opinion in *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005). That opinion expressly recognizes the requirement which RCW 43.06.455 imposes on all CTCs in Washington State, that "cigarette tax contracts must provide that the state *will not impose any tax . . .*" *Id.* at 1104 (italics added). It also states that the Tribe's agreement to enact a tribal tax on the sale of cigarettes was "in exchange for a promise by the State not to levy similar taxes." *Id*. at 1109.

read this provision as modifying and limiting the statutory commands that there be no state cigarette taxes "during the effective period of a cigarette tax contract." There are several flaws in the District Court's analysis.

First, the District Court cites to *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001), for the propositions that "a ***statute*** must be read in its entirety; language should not be read in isolation." (Emphasis added). But whereas the Washington Supreme Court applied this rule to its analysis of several provisions of ***a statute*** (the Columbia River Gorge National Scenic Area Act, 16 U.S.C. § § 544 – 544p), the District Court applies these statutory rules to its analysis of ***a contract***. But a contract is ***not*** a statute.

The District Court stated that it was applying "[a] holistic reading of the Tax Contract . . ." ER 738. But this misses the point that contracting parties cannot modify statutes which a Legislature has enacted. The Contract entered into by the Tribe and the Governor on October 3, 2003 did not – and could not -- modify or amend the tax retrocession ***statutes***, RCW 82.08.0316, 82.12.0316 and 82.24.295(1). Nor did the CTC modify RCW 43.06.455. The proper application of the rule of the *Columbia River Gorge* case is to read those *statutes* "in tandem" with each other, and such a reading reveals a consistent Legislative directive not to impose any state taxes on cigarettes when a CTC is in effect.

At one point the District Court acknowledges that RCW 43.06.455 contains

the Washington Legislature's determination to give up its taxing authority over on-reservation cigarettes where CTCs have been entered into:

> The State's forbearance from collecting and imposing its cigarette tax is referred to as a 'retrocession,' which is defined generally as "[t]he act of ceding something back." Black's Law dictionary 1343 (8th ed. 2004). Under RCW 43.06.455(3) and pursuant to the actual terms of a negotiated tax contract, ***the state gives up its taxing authority and agrees that the tribe has the sole power to tax reservation cigarette sales.***

ER 736 (emphasis added). But then the District Court goes on to state this:

> All tax contracts must meet the requirements of RCW 43.06.455, but nothing in this statute bars the governor from entering into a contract that narrows the scope of this tax retrocession.

ER 736. Significantly, the District Court *does not cite to any authority* to support the notion that the Governor and the Tribe can contractually narrow the Washington Legislature's tax retrocession. In fact, as noted above, RCW 43.06.455 contains express commands which require the Governor to negotiate CTCs which meet all the requirements of the statute. Moreover, one of those requirements is that every CTC "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." Thus, the legislature expressly *denied* the Governor the authority to negotiate a CTC which only provided for a partial tax retrocession.

**h. The State's Promise -- Not to "Assert" That Any Transactions That "Conform With the Requirements of this Contract" Violate State Law -- is a Promise Made to The Tribe On Condition That *the Tribe's Behavior* Conforms to the Contract. This Promise Has No Application to the Wilburs' Conduct Because The CTC Does Not Impose Any Requirements Upon Them and Expressly Disavows the Existence of Any Third Party Obligations.**

The District Court's reliance on Part V(6) of the CTC is also flawed because, notwithstanding the Court's expressed preference for a "holistic" reading of the contract, the Court failed to recognize that this contract provision is directed at disputes between the contracting parties: the State of Washington and the Swinomish Tribe. Part V is entitled "Tribal Tax Stamps." ER 55. It obligates the Tribe (i) to arrange for the creation and supply tribal cigarette tax stamps from some nationally recognized stamp manufacturer; (ii) to contract with a bank or a vendor for the distribution of such stamps; and (iii) to collect the tribal tax. ER 55-57. The last subsection of Part V(6) provides that "[a]s to all transactions which 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 purposes of the CCTA. ER 57.

The District Court failed to appreciate the meaning of the phrase "the requirements of this contract." The Wilburs are not parties to the CTC and thus the CTC imposes no requirements upon them. In fact, the CTC expressly states that it

imposes no requirements upon any third party. Part XII(3) of the CTC clearly states:

> ***No third party shall have any*** rights or ***obligations*** under this Contract.

(Emphasis added). Since the Wilburs have no "obligations under this Contract," they have no obligation to "conform" their transactions "to the requirements of this Contract." Therefore, Washington State's promise not to assert any violation of law for all transactions "which conform with the requirements" of the CTC has no application to the Wilburs. There is no implicit reservation of the right to resurrect state cigarette taxes because transactions conducted by the Wilbur defendants did not conform to the CTC, because the Wilburs (and all other third parties) have no obligation to so conform their behavior.

In sum, the District Court's contract theory that the Governor and The Swinomish Tribe decided to condition the State's tax retrocession on the Wilburs' conformity with the CTC is not only contrary to several explicit and unambiguous state statutes, it also conflicts with the explicit language of the CTC. Once the CTC went into effect, there simply were no applicable state cigarette taxes, and thus the Wilburs are not guilty of any CCTA violation. Since there was no CCTA violation, there was no money laundering of the proceeds of any CCTA violation either.

**2. WASHINGTON'S TAX RETROCESSION IS NOT CONDITIONED UPON THE REQUIREMENT THAT THE RETAILER BE LICENSED BY THE TRIBE TO SELL CIGARETTES. SUCH A CONDITIONAL TAX RETROCESSION WOULD LEAD TO ABSURD RESULTS AND CONFLICTS WITH PROVISIONS OF THE CTC ITSELF.**

In the District Court the Government also argued that the tax retrocession codified in Washington's statutes did not apply to the Wilburs because it only applied to "Indian retailers." The Government claimed that the Wilburs' business did not qualify as an "Indian retailer." Pointedly, the District Court declined to decide this issue and never determined if the Trading Post was an Indian retailer:

> The Court ***does not reach the issue*** of whether Defendants qualified as Tribal retailers under the Tax Contract or Indian retailers under RCW 43.06.455.

ER 740 (emphasis added). However, because the Government presumably will continue to press this argument on appeal in support of the result reached below, the Wilburs are constrained to address it.

There are three alternate ways to qualify as an "Indian retailer" under RCW 43.06.455(14)(b). One of those ways is to be a business owned and operated by an Indian and licensed by the tribe. The Government contends that failure to be properly licensed by the tribe causes Washington State's tax retrocession to be retracted, and makes the unlicensed cigarette seller once again subject to State cigarette taxes. Because the Trading Post was not licensed by the Tribe to sell cigarettes for the period of time from March 28, 2005 to May 15, 2007, the

Government contends that there was no tax retrocession during this period.

If accepted, this theory would lead to demonstrably absurd results. Notwithstanding the language of the statutes which declare a tax retrocession "during the effective period of a cigarette tax contract," the State's tax retrocession would come and go, varying with the licensing status of the retailer. The retrocession would apply to some cigarettes on a reservation covered by a CTC, but not to others.

For example, suppose an Indian cigarette retailer had a tribal tobacco license on Monday, had it revoked by the Tribe on Wednesday, and had the license reinstated by the Tribe on Friday. According to the Government, if throughout the entire week this Indian retailer possessed cigarettes which did not bear Washington State cigarette tax stamps, then he (a) was not committing the crime of possession of contraband cigarettes on Monday and Tuesday; (b) but was committing the crime on Wednesday and Thursday; and then (c) ceased committing the crime on Friday. The Government contends this result is compelled because Washington's retrocession from its cigarette taxes is only in operation when an Indian retailer is in compliance with the Tribe's licensing requirement. Or alternatively, if a member of the Swinomish Tribe let his tribal tobacco license lapse by failing to timely renew it, then realized his error and had his license reissued after a period of a week, he would still be guilty of possession of contraband cigarettes during that one-week period when he had no valid tribal tobacco license. Even if the Swinomish tribal member did not sell a

single cigarette during that one week period -- because they were all sitting in a warehouse or inside a truck during that week -- and even if he sold all of them afterwards when he had had a new and valid tribal tobacco license, he *still* would be guilty of the offense of possession of contraband cigarettes. Even though not one dime of state tax would be due at the time such cigarettes were *sold*, the Indian retailer would still be guilty of possession of contraband cigarettes for a one week period. This makes no sense.

Moreover, by relying on *federal* prosecution of Indian retailers who are not licensed by the Tribe, instead of relying upon *tribal* prosecution for violation of tribal licensing laws, the Government's "conditional retrocession" theory conflicts with one of the CTC's main purposes, which was to promote "the exercise of the attributes of tribal sovereignty." ER 51, Preamble, cl. 9.[8] Tribal prosecution of members who violate tribal licensing laws is consistent with the stated intent of the Washington Legislature to promote the exercise of tribal sovereignty; federal prosecution of tribal members for the violation of tribal licensing laws is *in*consistent with this stated legislative purpose.

In addition, the contention that for purposes of the tax retrocession statutes a CTC is not "effective" as applied to a particular cigarette seller unless that seller is

[8] "The State and Tribe will also benefit by the exercise of the attributes of tribal sovereignty . . . ."

properly licensed, conflicts with the CTC's express provisions which define the circumstances under which the CTC can be terminated. Part VIII, ¶ 6, of the CTC lists these four *exclusive* grounds for terminating the contract "for cause":

> For purposes of this section, "for cause" shall mean ***only the following violations:***
>
> (a) Retail sales of unstamped cigarettes during the effective period of a Tribal cigarette tax;
> (b) Failure to submit to mediation as required by this Part IX;
> (c) A breach of the confidentiality provisions of Part XII of this Contract;
> (d) Use of tax proceeds in violation of the terms of this Contract.

(Bold italics added).

The failure of an Indian retailer to obtain a tribal tobacco license as required by Part III, ¶ 1(c) of the Contract is ***not*** listed as one of the reasons for which the contract can be terminated. Since failure to be licensed is ***not*** an enumerated reason for termination of the contract, the contract remains in effect even if the Trading Post does not possess a valid license from the Tribe for some period of time. Thus, the Government's argument, that not having a license from the Tribe temporarily abrogates the State's contractual promise not to impose any taxes on cigarettes found on the reservation, conflicts with Part VIII, ¶ 6 by adding a *fifth* reason for contract termination to the list of "only" four reasons.

But the United States cannot rewrite the CTC to serve its goal of criminally charging the Wilburs. Since failure to possess a tribal license to sell cigarettes is *not*

cause for contract termination, the CTC remains in effect during periods of tribally unlicensed operation. And since the CTC remains in effect, the contractual tax retrocession contained in Part III, ¶ 2e also remains in effect.

The Government's argument that retrocession is conditioned upon proper tribal licensing also conflicts with Part II(3) of the CTC which identifies those cigarette sales to which the contract "does not apply." Part II(3) does *not* list sales by unlicensed members of the Tribe. The express language of Part II, ¶ 3 makes no mention of sellers who are not tribally licensed. This provision of the CTC is entitled "Scope Limited" and it states: "This Contract ***does not apply*** to:"

> a. Cigarettes sold at retail by nonIndians or nonmember Indians; and
> b. Tobacco products as that term is defined in Part I of this contract.

ER 54 (emphasis added). If the State and the Tribe had intended to exclude sales of cigarettes by tribal members who did not have a license from the Tribe, as the Government contends, then *they would have listed that category of sales in this paragraph* which explicitly lists the circumstances under which the contract does not apply.

When a contract specifies some conditions and not others, the rule of *expressio unius exclusio alterius* applies. *Port Blakely Mill Co. v. Springfield Fire & Marine Ins.*, 59 Wash. 501, 512, 110 P. 36 (1910)(rule applied to fire insurance policy which listed conditions under which policy would not apply); *Foote v. Marti's Inc.*, 69 F.2d

953 (9th Cir. 1934)(applying *expressio unius exclusio alterius*, the fact that a lease contract mentioned some grounds for lease termination but not others leads to conclusion that contract cannot be terminated for unmentioned reasons) .

Since Part II, ¶ 3 of the CTC does ***not*** list cigarettes sold or possessed by persons who are not licensed by the Tribe, unlicensed status does *not* remove these cigarettes from the scope of the CTC, and does not remove them from the scope of the tax retrocession provision set forth in Part III(2)(e).

**3. ASSUMING, ARGUENDO, THAT WASHINGTON STATE'S TAX RETROCESSION *IS* CONDITIONED UPON "INDIAN RETAILER" STATUS, THE STATE'S TAX RETROCESSION DOES APPLY TO THE CIGARETTES IN THIS CASE BECAUSE THE UNDISPUTED FACTS SHOW THAT THE TRADING POST *IS* AN INDIAN RETAILER.**

Even assuming, *arguendo*, that the Government is correct when it argues that Washington's tax retrocession during the effective period of a cigarette tax contract is conditional upon the status of the defendant as an "Indian retailer," the District Court still should have dismissed the charges because it was undisputed that the Trading Post qualified as an Indian retailer under RCW 43.06.455(14)(b).

Under Washington State law there are *three* different, *alternative* definitions of the term "Indian retailer." If a cigarette seller meets any one of these three alternate definitions, he "qualifies" as an "Indian retailer." RCW 43.06.455(14)(b) provides these three definitions of the term:

> "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 wholly 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).

**a. It Is Undisputed That the Trading Post was Validly Licensed By the Tribe To Sell Tobacco Products for Most of the Charging Period.**

As noted in section G(7), *infra*, it was undisputed that for several years the Tribe issued tobacco licenses to the Trading Post which authorized the Trading Post to sell cigarettes, and that the last such license expired on March 27, 2005. Thus, the Trading Post was validly licensed by the Tribe during most of the seven years and ten months from July 1999 to May 15, 2007 which comprises the period charged in the CCTA conspiracy count to which the Wilburs all plead guilty.

The United States *conceded* that the Trading Post was validly licensed by the Tribe for the seventeen month period of time from October 3, 2003 (the effective date of the CTC) through May 15, 2007. Even under the Government's conditional tax retrocession theory there were no applicable state cigarette taxes during this period, and therefore the Wilburs cannot possibly be guilty of conspiring to not pay state cigarette taxes during this period of time.

This leaves two other periods of time during which the Government claims there were applicable State cigarette taxes that the Wilburs were conspiring not to

pay. However, the first time period, from July 1999 through October 2, 2003, is separated from the second time period of October 3, 2005 through May 15, 2007, by a seventeen month gap where, even under the Government's conditional retrocession theory, there are no state cigarette taxes applicable to the Trading Post. The Wilburs were not indicted until June 10, 2009. ER 1. Since that was roughly 5 years and eight months after the effective date of the CTC, any and all criminal activity that occurred prior to that date is time barred by the five year statute of limitations. 18 U.S.C. § 3282(a).

The Government may contend that there was a *second* conspiracy to fail to pay State cigarette taxes that covers the time period from March 28, 2005 through May 15, 2007. But that is not the conspiracy charge which was brought and not the conspiracy to which the Wilburs (conditionally) plead guilty. The Wilburs were prejudiced by the charging of a time period which included more than four years of conduct which is barred by the statute of limitations, as well as a subsequent period during which commission of a CCTA offense was legally impossible. The amount of tax loss allegedly suffered by the State of Washington was greatly inflated. The variance between the conspiracy to which they plead, and the shorter post March 27, 2005 conspiracy period which is not time barred, renders the Wilburs' guilty pleas to Count I of the SSI invalid. *See, e.g., United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002).

**b. Since The Trading Post Is Operated By An Indian On Land Held In Trust For An Indian, It *Is* An Indian Retailer. Thus, The Tax Retrocession Mandated By RCW 82.24.295 Applies To This Case.**

Moreover, throughout the *entire* period of time charged in the SSI, the Wilburs qualified as Indian retailers under the third alternate statutory definition of this term. It was undisputed that Marvin Wilbur owned and operated the Trading Post. ER 159. Nor was it disputed that he is an Indian person. *Id.* He asserted, and the Government agreed, that the Trading Post is located on land which is held in trust for him. ER 160, 260. He produced a copy of a May 11, 1976 letter from the BIA Superintendent to him stating that "the owners of the Harry Skeahud, Swinomish 1 allotment, have conveyed to the United States of America in Trust for yourself" the land upon which the Trading Post is located. ER 163 (Appendix D).

In sum, even if the Court were to accept the Government's theory that the tax retrocession only applies to "Indian retailers," and even if one assumes that the Trading Post did not meet the definition of an "Indian retailer" set forth in RCW 43.06.455(14)(b)(ii) during the time period from March 28, 2005 through May 15, 2007, it was admitted that the Trading Post meets the alternate statutory definition of an "Indian retailer" set forth in subsection (b)(iii). Since it need only meet *one* of the three alternative definitions of "Indian retailer" throughout the entire period charged in Count I of the SSI, the Trading Post was always an Indian retailer. A CTC was in effect for the entire period from October 3, 2003 through May 15, 2007. Since the

Trading Post was an Indian retailer throughout that entire period, there were no applicable state cigarette taxes during this time, and thus the Wilburs cannot legally be guilty of any violation of the CCTA during this time frame.

**4. ASSUMING, ARGUENDO, THAT THERE IS SOME AMBIGUITY IN THE SCOPE OF THE STATE TAX RETROCESSION STATUTES, SUCH AMBIGUITY MUST BE RESOLVED IN FAVOR OF THE DEFENDANTS.**

The Wilbur appellants respectfully submit that the language of the State tax retrocession statutes, RCW 82.08.0316, 82.12.0316, 82.24.295(1) and 43.06.455, unequivocally supports their position that there were no applicable state cigarette taxes once the CTC took effect on October 3, 2003. There is nothing ambiguous about phrases such as: "The taxes imposed by this chapter do not apply **. . .** during the effective period of a cigarette tax contract . . ." and a tribal tax shall be imposed "in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes . . ."

But even if there were some ambiguity in these phrases which made these statutes reasonably susceptible to the interpretation that there were applicable state taxes even after the start of the CTC, such an interpretation would still have to be rejected under well settled canons of statutory construction involving ambiguous statutes.

**a. Ambiguous Criminal Statutes Are Construed In Favor Of Lenity.**

The Supreme Court has consistently held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971). *Accord United States v. Five Gambling Devices*, 346 U.S. 441 (1953); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant").

Since a violation of the CCTA turns upon a predicate failure to comply with state tax laws, *Baker*, 63 F.3d at 1486, ambiguity in a state tax law pertaining to cigarettes creates ambiguity in the CCTA. Washington State follows the same statutory construction rule with respect to ambiguous penal statutes. *See*, e.g., *In re Seitz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994).

**b. Ambiguous Tax Statutes Are Resolved In Favor Of The Taxpayer**

Another well recognized rule of construction provides that ambiguous tax statutes are construed in favor of the taxpayer and against the taxing power. *Tesoro Refining and Marketing v. Department of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008); *Agrilink Foods v. Department of Revenue*, 153 Wn.2d 392, 396-97, 103 P.3d 1226 (2005). When questions arise as to the applicability of a state tax *on Indians*, the rules that ambiguity compels a decision in favor of Indians and against the taxing authority become extremely powerful. In this situation, the case law requires that the

intent to impose the tax upon Indians must be "unmistakably clear." *See, e.g., Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 692-94 (9th Cir. 2004)("the language of the Hayden-Cartwright Act is ambiguous" and is "not specific enough to extend to Indians"; "The phrase 'licensed trader' does not make unmistakably clear a congressional intent to authorize states to tax deliveries to tribal entities on Indian reservations.")

**c. <u>Ambiguity Must Be Resolved In Favor Of Indians</u>**

In addition, there is also the canon of statutory construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit." *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1972). *Accord Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 1005); *Gobin v. Snohomish County*, 304 F.3d 909, 915-16 (9th Cir. 2002) (canon of statutory construction requires that "ambiguities of congressional intent be construed in favor of the Indians"). The statute authorizing cigarette tax contracts with Indian tribes specifically state that it was enacted in part to "provide needed revenues for tribal governments and Indian persons . . . " RCW 43.06.450. *See also* RCW 43.06.455(8) & (14)(a). Thus, there can be no doubt that these statutes were enacted for the benefit of Indians.

In cases where the canons involving tax statutes and statutes pertaining to Indians have both been in play, courts have resolved controversies about the

application of tax laws to Indians in favor of the Indians. For example, in *Quinault Indian Nation v. Grays Harbor County*, 310 F.3d 645 (9th Cir. 2002), this Court held that Washington state tax law regarding the sale of forest use land by a tribe to the United States to hold in trust for the tribe was not clear. The precise issue was whether the tax was a permissible ad valorem tax, or an impermissible excise tax. This Court reversed a judgment in favor of the County holding that "In this nether world of Indian taxation, ***the ambiguity inherent in this tax scheme tips the balance*** in favor of the Quinault Nation. Consequently, because the construction is ***plagued with ambiguity***, and because it is ***not enough*** to be persuaded that the County's is a permissible or even the better reading [of the statutes], we reverse." *Id.* at 647 (bold italics added).

**d. <u>All Three Canons Of Construction Lead To The Same Conclusion That Any Uncertainty As To Whether There Are Any Applicable State Taxes In This Case Must Be Resolved In Favor Of The Wilbur Appellants</u>.**

In the present case, all three canons of statutory construction cut in the same direction. They all lead to the conclusion that Washington State cigarette taxes do not apply to cigarettes possessed or sold on the Swinomish Reservation after October 3, 2003 when the cigarette tax compact between the State and the Tribe went into effect. For this reason, all counts of the indictment should have been dismissed.

**5. THE WILBURS' CONVICTIONS VIOLATE DUE PROCESS. IT WAS NOT CLEAR – AND IT *STILL* "IS NOT CLEAR BEYOND ANY DOUBT UNDER ESTABLISHED PRINCIPLES OF TAX LAW" -- THAT AN INDIAN PERSON OPERATING A BUSINESS ON LAND HELD IN TRUST FOR HIM MUST AFFIX STATE TAX STAMPS TO CIGARETTES POSSESSED DURING THE EFFECTIVE PERIOD OF A CIGARETTE TAX CONTRACT.**

**a. Debatable Questions of Tax Law May Not Be Settled By Criminal Prosecution.**

In any criminal case involving the failure to pay or comply with *tax* laws, the law existing at the time of the alleged offense must have been clearly settled. "Without sufficient clarity in the law, taxpayers lack the 'fair notice' demanded by the due process clause so they may conform their conduct to the law." *United States v. George*, 420 F.3d 991, 995 (9th Cir. 2005). Criminal prosecution is permissible when it is "***clear beyond any doubt*** that [the conduct] is illegal under established principles of tax law . . ." *United States v. Russell*, 804 F.2d 571, 575 (9th Cir. 1986)(emphasis added). *See also James v. United States*, 366 U.S. 213, 221-22 (1961)(vacating taxpayer's conviction for failure to report embezzled funds as income because conflicting case law rendered the predicate tax statute ambiguous when applied to embezzled funds).

In *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) this Court reversed and dismissed a conviction for conspiracy to file false tax returns because

the legality of the defendants' conduct was "completely unsettled by any clearly relevant precedent" at the time they acted.

> "It is settled that when the law . . . is highly debatable, a defendant – actually or imputedly – lacks the intent to violate it." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974). A criminal proceeding pursuant to section 7206 "is an inappropriate vehicle for pioneering interpretations of tax law." *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979).

*Dahlstrom*, 713 F.2d at 1428. *Accord United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985)(reversing tax evasion conviction because law regarding legality of tax shelter was unsettled and proposition that income was taxable was debatable).

The *Dahlstrom* Court cited with approval to *Critzer*, and that case is of particular significance given its facts. The defendant in *Critzer* was an Eastern Cherokee Indian. The Government prosecuted and convicted him for failure to report certain income that derived from the operation of a motel and restaurant, and from the lease of two gift shops. These businesses were located on land within the Eastern Cherokee Reservation in which the defendant had a "possessory holding." Despite the fact that the record "strongly support[ed]" the Government's contention that the defendant deliberately underreported his income for the purpose of avoiding payment of tax, the conviction was reversed because the law was not settled as to whether any tax was truly owing. The Government conceded that the exact question of whether income from this particular type of Indian land was

taxable was "undecided and there [was] no direct authority pointing to a ready answer." *Id.* at 1161. "Conversely, defendant presents a nonfrivolous argument that the income was tax exempt . . ." *Id.* Since the law was not settled, the Court held that the defendant's conviction had to be overturned regardless of what her actual subjective intent had been, because "when the law is vague or highly debatable, a defendant –actually or imputedly – lacks the intent to violate it." *Id.*

In the present case, two days before the hearing on the Wilburs' motion to dismiss, the Government disclosed to them a memo from one tribal attorney to another, in which the author expressed uncertainty as to whether the Wilburs were required to pay State cigarette taxes after the Swinomish/Washington CTC went into effect. *Transcript* 1/22/10, at 4-5. If a tribal attorney is unsure whether there is an applicable state cigarette tax, then it is entirely reasonable for an uneducated taxpayer to believe that no such taxes existed. Thus, the fact that the Wilburs believed they were not required to pay such State taxes (on top of tribal taxes) was eminently reasonable. This is particularly reasonable given the fact that RCW 43.06.455(3) declares that tribal taxes are to be "ín lieu of all state cigarette taxes."

**b. <u>The Commissioner's Ruling in the *Comenout* Case Shows That There is No Clear Precedent Which Establishes That the Wilburs Were Supposed to Pay State Cigarette Taxes After the Start of the CTC</u>.**

Long after the May 15, 2007 seizure of the allegedly contraband cigarettes at

the Trading Post, on February 8, 2010, in the *Comenout* case a Washington State Court of Appeals commissioner concluded that Indian defendants selling unstamped cigarettes on land covered by a State/tribal cigarette tax contract were *not* required to pay any state cigarette taxes and that the state trial court "appears to have erred when it denied the Comenouts' motion to dismiss because they were exempt from cigarette taxes under RCW 82.24.295(1) . . ." ER 826. If it was clear to the Commissioner in 2010 that the Comenouts did not owe any state cigarette taxes in such a situation, then *a fortiori* the Wilburs' belief in the years 2003-2007 that they did not owe any such taxes was even more reasonable. Since even a learned judge shares their view of the law, it cannot be said that it was "*clear beyond any doubt . . . under established principles of tax law*" that their alleged agreement not to pay any such taxes was an illegal conspiracy. *United States v. Russell*, 804 F.2d 571, 575 (9th Cir. 1986)(italics added).

**c. Under *Russell* And *George*, Because The Illegality Of The Tax Conduct Is Not "Clear Beyond Any Doubt," All Convictions Must Be Vacated and The Charges Dismissed.**

Here, as in *Critzer* and *Dahlstrom*, the law is completely unsettled. There is no case precedent which addresses the issue of whether a State may impose taxes on cigarettes found on an Indian Reservation, at a time when a CTC is in effect, and state law provides that state cigarette taxes do not apply "during the effective period" of such a contract. There is no case which speaks to the subsidiary

question of whether the applicability of state taxes turns on whether the possessor of the cigarettes has a tribal license to sell cigarettes. And there is no decision about whether the applicability of the state taxes turns on whether the business where the cigarettes are found is operated by Indians on land held in trust for Indians.

Even if this Court should decide that the Wilburs' construction of Washington's statutes is wrong, since their construction is debatable, and since there was no legal precedent that clearly told them that they were wrong, they should not have been prosecuted for failing to pay the tax because they had no notice that their conduct was illegal. Under *Russell* and *George* their convictions may stand only if it was "clear beyond any doubt that [the conduct] is illegal under established principles of tax law." *Russell*, at 575; *George*, at 996. The Government cannot meet this standard in this case, and therefore all convictions should be reversed and all charges dismissed.

**6. EVEN IF THE CCTA CONVICTION IS AFFIRMED, EITHER THE COURT ORDERED RESTITUTION SHOULD BE (a) ELIMINATED BECAUSE THERE WAS NO "TAX LOSS" AT ALL, OR (b) IT SHOULD BE REDUCED BECAUSE THERE WAS ONLY A TAX LOSS AFTER MARCH 27, 2005.**

The District Court concluded that the cigarettes sold by the Wilburs were contraband because they did not bear tribal tax stamps and thus were "nonconforming" cigarettes which were not covered by the CTC. ER 740.

Accordingly, the District Court declined to decide if the Trading Post was an "Indian retailer." ER 740. Since the District Court did not decide whether the Trading Post was an "Indian retailer," it never decided if the statutory tax retrocession implemented by RCW 82.08.0316, 82.12.0316 and 82.24.295 applied to the Wilburs. In the District Court's view, the Trading Post's cigarettes were contraband and yet at the same time if the Trading Post was an Indian retailer – a question she declined to decide – then Washington's tax retrocession was in effect during the life of the CTC. The United States explicitly *agreed* with the District Court's conclusion that even if no State taxes were ever due, the cigarettes could still be found to be contraband because they had no tribal tax stamps on them. *See* ER 830, *ll.* 12-19 (quoting the Government's brief in opposition to the Wilburs' joint motion to dismiss).

Prior to sentencing, the Wilburs again asked the District Court to decide if the Trading Post was an Indian retailer under either RCW 43.06.455(14)(b)(ii) or (b)(iii). ER 827-29; *Transcript* 6/16/10, at 23-24. The Wilburs explained, if the Court found that the Trading Post was an Indian retailer under (b)(ii) because it was tribally licensed to sell cigarettes up until the expiration of its last license on March 27, 2005, then Washington State did not suffer any tax loss until after that date. *Id.* and ER 829. Under that scenario, there would only be a tax loss for the period from March 28, 2005 through May 15, 2007. *Transcript*, at 25.

Alternatively, if the Trading Post was an Indian retailer under subsection (b)(iii) -- because it was owned and operated by an Indian on land held in trust for an Indian -- then Washington State *never* suffered any tax loss after October 3, 2003. ER 827-29; *Transcript*, at 24-25. Under this scenario no restitution should have been ordered at all, since any tax loss suffered prior to that time was unrecoverable due to the statute of limitations.

Concerned that perhaps it was ordering payment of restitution to the wrong government, the District Court asked whether she should order the money paid into an account which named both the Tribe and the State as beneficiaries, "so that after the Ninth Circuit determines this, then the issue of who gets the money can be negotiated." *Transcript*, at 26. The Wilburs had no objection to this. *Id*. at 26. But the United States did and told the court that it couldn't order restitution paid to the Tribe because "as a technical matter, the State of Washington is the victim in this case." *Id*. at 52-53. Ultimately the District Court made no such provision in its restitution order.

After acknowledging that "the restitution issues in this case are, to say the least, difficult to sort out," the District Court once again declined to decide the issue of whether the Wilburs' business qualified as an Indian retailer and simply left it to this Court to decide these issues. *Transcript 6/16/10*, at 54. Accordingly, the District Court imposed restitution in the amount of $10.9 million. ER 911, 918,

925, 932. This figure represented the amount of the tax loss which the United States calculated should have been paid over the entire 7 years and ten months of the charging period. Thus the District Court ignored the possibility that the Trading Post was an Indian retailer for some portion of this time, and therefore was covered by the State tax retrocession during this time period.

If this Court decides that the Wilburs' CCTA conspiracy convictions should stand, the Wilburs respectfully ask this Court to decide the questions which the District Court refused to decide: (1) Was their business an "Indian retailer" for all, or for some portion of the charging period? and (2) if so, what reduction should be made in the amount of tax loss which the Wilburs have been ordered to pay as restitution?

### 7. A REDUCTION IN THE AMOUNT OF THE TAX LOSS WOULD ALSO REDUCE THE GUIDELINE RANGE FOR THE OFFENSES, AND THUS REQUIRE A RESENTENCING.

A reduction in the amount of the tax loss to the State would also produce a reduction in the guideline range for the Wilburs' offenses. If, as the Wilburs maintain, there actually was no tax loss suffered by the State, then the base offense level and the total offense level for the CCTA conspiracy count would be reduced. For Marvin Wilbur, for example, his total offense level would become 7. ER 831. This would produce a greatly reduced guideline range of 0-6 months for the CCTA count. A similar but less pronounced reduction would have to be made for the

guideline range for the money laundering conspiracy count. Thus, if this Court determines that the "tax loss" amount was incorrectly determined, then all the defendants should be resentenced using corrected guidelines ranges.

**8. MARVIN WILBUR JOINS IN THE ARGUMENTS MADE IN THE OPENING BRIEF OF APPELLANT APRIL WILBUR.**

In the district court all four defendants joined in the motions to dismiss the charges on the grounds that (1) the prosecution violated their treaty rights under the Treaty of Point Elliot, and (2) that there was no State law predicate act which triggered CCTA liability. On appeal, these arguments are set forth in the opening brief of appellant April Wilbur. Marvin Wilbur joins in those arguments and asks this Court to vacate his convictions for those additional reasons.

## J. CONCLUSION

The Wilburs submit that they did not commit any federal crime. After October 3, 2003 it simply was not possible for anyone on the Reservation to violate the CCTA because a CTC was in effect.

Even if it is not *clear* that there have been no applicable state taxes since the effective date of the CTC, *at the very least* the governing statutes are ambiguous. Thus under the rules for the construction of ambiguous statutes, they did not violate the CCTA.

Even if the statutes in question did not cause a tax retrocession which covers

their conduct, the CTC itself contains a completely unrestricted tax retrocession which was in effect on May 15, 2007, and thus the Wilburs could not and did not violate the CCTA.

Finally, given the complete lack of precedent that would have alerted them to the fact that their alleged conduct was illegal, it would violate the Due Process Clause to permit their convictions to stand.

For these reasons, the Wilburs ask that their convictions be set aside and that all charges against them be dismissed.

Moreover, even if their convictions are found to be proper, they submit that the State of Washington suffered no tax loss, and that consequently their cases should be remanded for resentencing on the basis of guideline ranges which are not inflated by incorrect tax loss calculations.

DATED this 29th day of November, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By /s/ James E. Lobsenz
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant C. Marvin Wilbur

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am aware of the following related cases with which this case is consolidated:

The case of *State v. Comenout*, Case No. 39741-2-II, is currently pending in Division Two of the Washington Court of Appeals. That appeal concerns questions of Washington State cigarette tax law which are common to the issues raised in this appeal.

November 29, 2010

s/James E. Lobsenz
Attorneys for Appellants

**CERTIFICATE OF COMPLIANCE**
**WITH FRAP 32(a) AND CIRCUIT RULE 32-1**

CASE NO. 10-30185

I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief of appellant is proportionally spaced, has a type face of 14 points or more, and contains 13,990 words, excluding those parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

November 29, 2010 /s/ James E. Lobsenz
Attorney for Appellant Marvin Wilbur

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2010, I electronically filed the foregoing **BRIEF OF APPELLANT MARVIN WILBUR, SR.** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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| Dennis Carroll | dennis_carroll@fd.org |

I certify under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 29th day of November 2010.

*/s/Deborah A. Groth*

Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
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# APPENDIX A

EXHIBIT B

License No.: 42

**SWINOMISH INDIAN TRIBAL COMMUNITY**
**Office of Tribal Business Management**
**Division of Licensing**

BE IT KNOWN THAT: Mike Wilbur, located 10045 So. March Pt Rd, Anacortes, Wa 98221

Conducting: X Commercial Retail; ☐ Industrial Wholesale; ☐ Commercial Wholesale; ☐ Other business trading under the name and firm of Trading Post is hereby

**L I C E N S E D**

To conduct the following business or activity: Tobacco Sales/Commerical Retail within the exterior boundaries of the Swinomish Indian Reservation, effective between the periods of 3 - 28 - 04 through 3-27-05 in consideration of granting this license, and by acceptance thereof, the licensee expressly warrants that all applicable federal and tribal laws and regulations will be fully complied with in all respects and that authorized annual license fees will be paid when due. Upon failure to meet the above laws and regulations, the licensee is subject to forfeiture of this license and such further action as the law and facts may justify.

Annual License Fee: $135.00

Signature of Issuing Officer
Swinomish Indian Tribal Community

Date: 3/3/04

This License Shall Be Displayed Conspicuously Within the Place of Business

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# APPENDIX B

SWINOMISH TRIBAL COMMUNITY
PO BOX 817
LA CONNER, WA 98257
(360) 466-3163

**RECEIPT** DATE: March 3, 2004 003554

RECEIVED FROM: Trading Post

ADDRESS:

DOLLARS $ 135.00

FOR: Tobacco Lic / Com. Retail Lic.

| ACCOUNT | | HOW PAID | |
|---|---|---|---|
| AMT. OF ACCOUNT | | CASH | |
| AMT. PAID | | CHECK | 135.00 |
| BALANCE DUE | | MONEY ORDER | |

BY: LC

# APPENDIX C

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ROBERT REGINALD COMENOUT, SR., EDWARD A. COMENOUT, SR., and ROBERT REGINALD COMENOUT, JR.,<br><br>Petitioners. | Consol. Nos. 39741-2-II<br>39751-0-II<br>39761-7-II<br><br>RULING GRANTING REVIEW |



Edward A. Comenout, Sr., Robert Reginald Comenout, Sr., and Robert Reginald Comenout, Jr. (the Comenouts) are enrolled members of the Quinault Indian Tribe, Tulalip Indian Tribe, and Yakama Indian Nation, respectively. They seek discretionary review of the trial court's order denying their motion to dismiss criminal charges against them arising from the alleged unlicensed sale and possession of unstamped cigarettes from a store located on Indian trust land that lies outside the borders of any Indian reservation. Concluding that the Comenouts have shown that discretionary review is appropriate, this court grants review.

The relevant facts are not in dispute. Edward Comenout, Sr. owns the Indian Country Store (the Store) in Puyallup, Washington. Robert Comenout, Sr.

39741-2-II, 39751-0-II, 39761-7-II

and Robert Comenout, Jr. run the Store. The Store is located on Indian trust land, held for the benefit of Edward Comenout and others,[1] that lies outside the limits of any established Indian reservation. Between April 2007 and July 2008, Washington State Liquor Control Board officers made numerous purchases of cartons and packs of cigarettes from the Store. Those cartons and packs did not bear a Washington tax stamp or the stamp of any recognized Indian tribe within the State. The Comenouts and the Store are not licensed by the State of Washington or any Indian Tribe to sell cigarettes. In July 2008, officers entered the Store and seized 37,000 cartons of unstamped cigarettes. According to the State, tax on the 37,000 cartons amounts to $750,000.

The State charged the Comenouts with: (1) engaging in the business of cigarette purchase, sale, consignment, or distribution without a license; (2) unlawful possession or transportation of unstamped cigarettes; and (3) first degree theft. The Comenouts moved to dismiss all charges, arguing that: (1) the State lacks jurisdiction over the operations of the Store because it is on Indian trust land; (2) a 2005 Cigarette Compact between the Quinault Nation and the State prevents the State from taxing "tribal retailers"; and (3) federal law preempts Washington law regarding cigarette taxes. The trial court denied the motion to dismiss. The Comenouts seek discretionary review.

This court grants discretionary review only when:

[1] The Bureau of Indian Affairs awarded a one-half interest in the land to Edward Comenout and the other one-half interest to his mother, Anna Jack Comenout Harris, who died in November 1987. Edward Comenout inherited at least 3/27 of his mother's one-half interest in the property. He estimates that he owns at least a 5/9 undivided interest in the property.

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

The Comenouts argue that the trial court committed an obvious error that renders further proceedings useless when it denied their motion to dismiss the charges because (1) state courts do not have jurisdiction over Indians for offenses that occur on Indian trust land, (2) Washington's cigarette excise tax exempts Indian retailers, and (3) federal law preempts state law.[2]

## I. ANALYSIS

### A. State Criminal Jurisdiction

Generally, the superior court has original jurisdiction in all criminal felony cases and in all proceedings in which jurisdiction has not vested exclusively in some other court. WASH. CONST., art. IV, § 6; *State v. Pink*, 144 Wn. App. 945, 949, 185 P.3d 634 (2008). The federal courts have exclusive jurisdiction to try an

[2] The Comenouts also argue that this court should accept discretionary review because the Superior Court certified that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion. But the record does not show that the trial court certified any issues in this case for review by this court.

enrolled Indian tribal member for the alleged commission, in "Indian country," of most major crimes. *State v. Sohappy*, 110 Wn.2d 907, 910, 757 P.2d 509 (1988) (citing 18 U.S.C. § 13 (1982)); *Pink*, 144 Wn. App. at 949 (citing *White v. Schneckloth*, 56 Wn.2d 173, 174, 351 P.2d 919 (1960) (federal courts have exclusive jurisdiction to try tribal members of a crime enumerated in the Ten Major Crimes Act, 18 U.S.C. § 1153)). "Indian country" is defined as:

> (a) 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, (b) 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 (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. When the situs of the crime is undisputed, the issue of territorial jurisdiction is a question of law that this court reviews de novo. *Pink*, 144 Wn. App. at 950; *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997).

Here, the parties do not dispute the situs of the alleged crimes; instead, they disagree as to whether the State possesses general jurisdiction over Indian trust lands located outside the limits of the Quinault Indian Reservation. The Comenouts argue that *State v. Pink* and *Confederated Tribes of Washington v. State* rejected the idea of State jurisdiction over alleged offenses occurring on Indian trust land. *Pink*, 144 Wn. App. at 945; *Confederated Tribes of Washington*, 938 F.2d 146, 149 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992). The Comenouts are wrong.

Indian trust lands are lands belonging to individual Indians that are either held in trust by the United States or subject to restrictions on alienation. *State v. Cooper*, 130 Wn.2d 770, 772 n.1, 928 P.2d 406 (1996). Such lands may or may not be located within the boundaries of an established Indian reservation. *Cooper*, 130 Wn.2d at 772 n.1. Indian trust lands are "Indian country" for purposes of federal jurisdiction. *Cooper*, 130 Wn.2d at 772; 18 U.S.C. § 1151.

In 1953, Congress enacted Public Law 280, which authorized states to impose concurrent state jurisdiction in Indian country with or without tribal consent.[3] *Pink*, 144 Wn. App. at 950. As a result, in 1963, the Washington legislature enacted RCW 37.12.010, which expanded State criminal and civil jurisdiction to include all non-Indians in Indian country, Indians on fee-patented land on reservations, and Indians on tribally-owned or individually-owned Indian trust lands within an established Indian reservation. *Pink*, 144 Wn. App. at 951. The legislature set forth eight categories of cases over which it would not assert jurisdiction.[4] *Pink*, 144 Wn. App. at 951. Our Supreme Court has subsequently clarified the effect of RCW 37.12.010 on State jurisdiction, noting that:

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[3] In 1968, Congress narrowed the states' powers under Public Law 280 by enacting the Indian Civil Rights Act of 1968, 25 U.S.C. § 1321. Under that act, a state may not assume criminal jurisdiction without the consent of the tribe. *Pink*, 144 Wn. App. at 951. This jurisdictional limitation was not retroactive, so jurisdiction a state assumed before the 1968 act, such as Washington's, was not affected. *Pink*, 144 Wn. App. at 951 (citing *State v. Hoffman,* 116 Wn.2d 51, 68-69, 804 P.2d 577 (1991)).

[4] These excepted categories include: (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 on the public streets, alleys, roads, and highways. RCW 37.12.010.

> By enacting the 1963 version of RCW 37.12.010 . . . Washington assumed full nonconsensual civil and criminal jurisdiction over all Indian country outside established Indian reservations. Allotted or trust lands are not excluded from full nonconsensual state jurisdiction unless they are "*within an established Indian reservation.*"

*Cooper*, 130 Wn.2d at 775-76 (emphasis added) (internal citations omitted). Thus, State jurisdiction over a particular piece of Indian country turns on whether the property constitutes "tribal lands or allotted lands within an established Indian reservation." *Cooper*, 130 Wn.2d at 777. Otherwise, the phrase "within an established Indian reservation" would be meaningless. *Cooper*, 130 Wn.2d at 778.

None of the cases cited by the Comenouts holds that a state lacks jurisdiction over Indian trust land outside the boundaries of an established Indian reservation.[5] All of them address state jurisdiction for activities within an Indian reservation. *Pink*, 144 Wn. App. at 952 (State lacks criminal jurisdiction over members of the Quinault Tribe while on tribal lands within the reservation, even though driving on a State highway); *Confederated Tribes of Washington*, 938 F.2d at 149 (State may not assert civil or regulatory jurisdiction over tribal members for activities on the Colville reservation); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976)

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[5] The Comenouts cite *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991), for the holding that Indian trust land should be treated the same as reservation land for purposes of taxing cigarette sales. But this case is inapplicable because the Court was addressing tribal immunity in a state which had not asserted jurisdiction under Public Law 280.

(State may not collect cigarette sales taxes for sales by Indians to Indians on the reservation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-161, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980) (State may collect cigarette sales taxes for sales by Indians to non-Indians on the reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (State may not regulate bingo games on the reservation). *State v. Lasley*, 705 N.W.2d 481, 490-92 (Iowa 2005) (State could not prosecute the sale of cigarettes to an under-age person on the reservation); *Morgan v. 2000 Volkswagen*, 754 N.W.2d 587, 593 (Minn. App. 2008) (State could not enforce vehicle forfeiture statute against an Indian for activities occurring on the reservation).

Here, the Comenouts do not allege that the Store is located within the formal boundaries of any established Indian reservation.[6] Thus, the State has jurisdiction over the Comenouts for alleged crimes committed at the Store. The trial court did not commit obvious or probable error in so ruling.

B. The Cigarette Compact

In January 2005, the Quinault Nation entered into a Cigarette Tax Compact ("Compact") with the State. By its terms, the Compact applies to "the retail sale of cigarettes by tribal retailers." Br. of Petitioner, App. 3 at 5. The Compact defines a "tribal retailer" as "a cigarette retailer wholly owned by the

[6] The status of the property at issue was the subject of prior litigation establishing that "[t]he land is not now and has never been a part of the Puyallup reservation and was at the time of purchase on the tax rolls of the State of Washington." *Matheson v. Kinnear*, 393 F. Supp. 1025 (W.D. Wash. 1974).

Quinault Nation and located in Indian country or a member-owned smokeshop located in Indian country and licensed by the Tribe." Br. of Petitioner, App. 3 at 5. The Compact requires the Quinault Nation to maintain and enforce a requirement that any member-owned smokeshop obtain a license from the Tribe. And the Compact required the Quinault Nation to impose taxes on all sales by tribal retailers of cigarettes purchased within Indian country. All cigarettes sold by tribal retailers must bear either a Washington State Tribal Compact Stamp or a Quinault Nation tax stamp. Subject to the imposition of these tribal taxes, the State retrocedes from its tax during the time in which the Compact remains effective.[7] The Compact states that the Legislature intended for the Liquor Control Board to maintain responsibility for enforcement activities under the terms of chapter 82.24 RCW. However, the Compact makes the Quinault Nation responsible for enforcement and administration of the Compact.

The Comenouts argue that only the Quinault Nation may enforce the Compact and that, so long as the Compact remains effective, State taxes do not apply to Indian retailers. However, the Comenouts are not "tribal retailers" covered by the Compact. While the Store is a Quinault member-owned smoke shop operating in Indian country, as that term is defined in the Compact, the Comenouts do not have a license from the Quinault Tribe. Nor did the cigarettes sold from and found in the Store contain either a Washington State Tribal Compact Stamp or a Quinault Nation tax stamp. Thus, the retrocession from

[7] By its terms, the Compact would remain in effect no longer than eight years from its effective date and will renew automatically for successive periods of eight years unless either party objects.

State taxes contained in the Compact does not apply to the Store or the Comenouts.

C. Statutory Exemption

The Comenouts argue that they are exempt from State cigarette taxes under RCW 82.24.295(1), which provides that the taxes imposed by chapter 82.24 RCW "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." Under RCW 43.06.455(14)(b), an "Indian retailer" includes "a business owned and operated by the Indian person or persons in whose name the land is held in trust." The Comenouts contend that they qualify as an "Indian retailer" and so are exempt under RCW 82.24.295(1). They appear to be correct. While the Comenouts do not qualify as a "tribal retailer" under the Compact, they appear to fall within the definition of "Indian retailer" under RCW 43.06.455(14)(b). And their possession of the cigarettes took place during the period of the Compact, into which the State and the Quinault Tribe entered under RCW 43.06.455. The State contends that the proviso that the exemption exists "during the effective period of a cigarette tax contract subject to RCW 43.06.455" means that the exemption applies only to those covered by a cigarette tax contract. And because the Comenouts are not covered by the Compact, the State contends that the exemption does not apply to them. While this is one possible reading of RCW 82.24.295(1), it is not the only unambiguous reading of the statute. Had the legislature intended that the exemption applied only to those Indian retailers covered by a cigarette tax

contract, it could have said so. Since the Comenouts appear to qualify as an "Indian retailer" under RCW 43.06.455(14)(b), they appear to fall within the exemption contained in RCW 82.24.295(1). And if they fall within that exemption, then the State has no authority to prosecute them regarding the cigarettes contained in the Store. Because the State appears not to have the authority to prosecute the Comenouts, it appears the trial court committed obvious error in denying their motion to dismiss. That error renders further proceedings useless, so the Comenouts have demonstrated that this court should grant discretionary review under RAP 2.3(b)(1).

D. Federal Jurisdiction

Finally, the Comenouts argue that the federal court has jurisdiction to enforce the Compact because the Compact requires the Quinault Nation to pay into State escrow. The Comenouts rely on *Seneca-Cayuga Tribe of Oklahoma v. Edmondson*, a federal case wherein the Seneca-Cayuga Tribe alleged that Oklahoma's enforcement of its state statutes violated numerous treaties guaranteeing that the Tribe would not be subject to the laws of the State of Oklahoma on Tribal Indian Land. *Seneca-Cayuga Tribe v. Edmondson*, No. 06-CV-394-GKF-TLW, 2009 WL 484247, *5 (U.S.D.C. N.D. Okla. 2009). The court denied Oklahoma's motion to dismiss the Tribe's complaint, holding that Federal courts have subject matter jurisdiction to hear any Tribal claim for protection of rights created by United States treaty. *Edmondson*, 2009 WL at *5 (citing *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 795 (D. Idaho 1994)). This case is distinguishable because it involves neither a Tribal claim nor alleged

violation of a treaty. Moreover, the present action does not involve enforcement of the Compact, but rather state criminal jurisdiction over alleged crimes committed outside the boundaries of any reservation. As discussed above, the State has criminal jurisdiction over the Comenouts for alleged crimes committed at the Store. The trial court did not err.

CONCLUSION

The trial court did not err when it held that the State has jurisdiction over the Comenouts for alleged crimes committed at the Store. But the trial court appears to have erred when it denied the Comenouts' motion to dismiss because they were exempt from cigarette taxes under RCW 82.24.295(1) and that error renders further proceedings useless. Accordingly, it is hereby

ORDERED that the Comenouts' motion for discretionary review is granted. The Clerk will issue a perfection schedule. Further proceedings in the trial court are stayed pending further order of this court.

DATED this 8th day of February, 2010.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Robert Eugene Kovacevich
Aaron Lee Lowe
Randal B. Brown
Tom L. Moore
Hon. Katherine M. Stolz

# APPENDIX D

IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Western Washington Agency
3006 /Colby Ave., Federal Bldg.,
Everett, Washington 98201

Real Prop. Mgmt.
Acq. and Disp.

SKEAHUD, HARRY
SSwinomish #1

May 11, 1976

Mr. Marvin Wilbur
815 South March's Point Road
Anacortes, WA 98221

Dear Mr. Wilbur:

Attached are copies of seven deeds approved 4/28/76, where the owners to the Harry Skeahud, Swinomish 1 allotment, have conveyed to the United States of America in Trust for yourself the following described land:

> Lot 2, section 2, Township 34 North, Range 2 East, Willamette Meridian, except portion taken by condemnation by the State of Washington, containing 27.98 acres, more or less, after above exception.

Also attached are the original "Notes for Deferred Payment" which you signed, as these have been fulfilled upon your final payment in full for this deferred sale on 4/22/76, in the amount of $13,690.00, balance due on contract, plus $1,159.28 interest for total payment of $14,849.28.

By copy of this letter the former landowners are being advised that you have made payment in full for this land, and the Deferred Sale you had with them has been completed.

The balance of the purchase price, plus interest as shown above, has been transferred to the former owners' accounts.

The original deeds have been retained at this office.

Sincerely yours,

Superintendent.

enclosures: 11
cc: Landowners
cc: Credit,

5