

No. 11-35850

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL T. MILLER, AMBER LANPHERE, and PAUL M. MATHESON,
Individually and on behalf of others similarly situated;

Plaintiffs-Appellants,

v.

CHAD WRIGHT, Puyallup Tribe Tax Department, Enforcement
Officer, HERMAN DILLON SR., Chairman, Puyallup Tribe of Indians
and THE PUYALLUP TRIBE OF INDIANS, a federally recognized
Indian tribe;

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NO. 3:11-cv-05395-RBL
THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

REPLY BRIEF OF APPELLANTS

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COUNTER-STATEMENT OF ISSUES

The Tribe at pages 1 and 5 of its brief seeks to condense the
issues and refer to combine the non-Indian plaintiff jurisdiction
with Matheson, the tribal member. *United States v. Silverman*, 861

F.2d 571, 576 (9th Cir. 1988) states, “Under the de novo standard of review, we do not defer to the lower court’s ruling but freely consider the matter anew, as if no decision had been rendered below.” All issues raised in the Complaint must be considered.

**COUNTER-STATEMENT TO THE TRIBE’S
STATEMENT OF FACTS**

Without citation to the Complaint as required by Fed.R.App.P 28(a)(7), the Tribe, at page 2 of its brief and throughout, without factual support, refers to Matheson’s business as located on trust land. Trust land is unimportant for the reason that *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655, 121 S.Ct 1825, 149 L.Ed.2d 889 (2001) holds that sales to a non-native who has the incidence of tribal tax on him/her is the subject, tribal land is not relevant. These issues are addressed later in the brief starting at page 4.

At page 5 and 33 of the Tribe’s brief it is stated, “the customers have lost” and “his customers’ lawsuits have been dismissed.” Miller was never a party to any of the earlier cases. Miller never bought until 2011 and was never a customer. The Tribe also states at 5 that privity is not an issue of res judicata. Miller’s tax refund in a

later period cannot be barred by Lanphere's actions. They cannot be privity as neither can collect the other's tax refund paid years apart. None of the cases cited at 8-9 of the Tribe's brief in support involve tax refunds, nor does the virtual representation theory in *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct 2161, 171 L.Ed.2d 155 (2008) apply.

The Tribe's argument at 11 that the two customers interests are identical is factually wrong by six years, 2005 to 2011 and the new tribal store started in 2011 in close proximity to Matheson's store. The argument at 11 that every new customer may be a new cause of action is illogical as a 2011 class action by Miller is alleged. (ER 46).

Each year and each assessment stands alone. *Miller Brewing Co. v. Indiana Department of Revenue*, 903 N.E.2d 64, 69 (Ind. 2009).

ARGUMENT

A. The Tribe Cannot Compete or Impose Cigarette Taxes on Non-Members Who Did Not Buy From the Tribe.

At page 16 of its brief, the Tribe's statement that the 1982 *Merrion* and 1980 *Colville* cases apply is wrong.

Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654, 121 S.Ct 1825, 149 L.Ed.2d 889 (2001) limits *Merrion* and holds that tribal excise tax jurisdiction can only be upheld if a consensual relationship exists between the tribe and the non-member. It states:

We therefore do not read *Merrion* to exempt taxation from *Montana's* general rule that Indian tribes lack civil authority over non-members on non-Indian fee land. Accordingly, as in *Strate*, we apply *Montana* straight up. Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon non-members on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana's* exceptions.

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 329, 128 S.Ct 2709, 171 L.Ed.2d 457 (2008) limits taxation to tribal consensual relationship. "The burden rests on the Tribe to establish one of the exceptions to *Montana's* general rule."

Id. at 330.

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 100 S.Ct 2069, 65 L.Ed.2d 10 (1980) predated these and other consensual relationship cases.

Atkinson, *Id.* at 655, fn. 6, disregards the hotel owner's relationship with the tribe since the tax exceeded the tribe's authority. Accordingly, Matheson's relationship with the Tribe is not the relevant issue. Neither non-Indian Plaintiff has ever met Matheson. (ER 42).

Atkinson, *Id.* at 656 holds that the tax must have a direct nexus to the consensual relationship and the tribe must be a party to the transaction. *Plains Commerce*, 554 U.S. at 338 states that this requirement has been repeatedly empathized. *Burlington Northern Santa Fe R. Co., v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 774 (9th Cir. 2003) a tribal tax case, rejects the tax where "there is no demonstrable nexus to the consensual relationship." The Tribe's statement at 18 that the customer status of Miller and Lanphere to Matheson's retail store

confers tribal consensual relationship to tax is unsupported and not consistent with *Plains Commerce* decided 28 years after *Colville*.

B. The Tribe Competed, Inflated Wholesale Prices and Also Fixed Minimum Prices. This Conduct is a Per Se Violation of the Federal Antitrust Law.

The Tribe at 18-19 of its brief states that it is not engaged in price fixing. The Tribe's cigarette code, 3.32.480, preventing sales by Matheson below minimum prices and 3.32.420 requires that all cigarettes be purchased from state controlled wholesalers who charge more or the Tribe who also has to charge \$5 more. 3.32.430. (Addendum A-1, pages 9-11), (ER 35, 40-1, 53, 57-8, 61, 63). The Complaint objects to the restriction to the wholesalers who charge more and that the items sold are the same kind and quality in the same market area. (ER 28, 41, 65, 97-8). Therefore, it brings this case within 15 U.S.C. § 13(a), the price fixing statute.

At 29, the Tribe admits that the retailer can only buy from any state licensed wholesaler.

Also at 8, the Tribe, without any citation to the record, states that retailers can negotiate wholesale prices. This statement is

another reason discovery should be allowed. The reason is that *R.J. Reynolds v. Premium Tobacco Stores*, 1999 WL 1249322 (N.D.Ill 1999); *F.T.C. v. Fred Meyer*, 390 U.S. 341, 88 S.Ct 904, 19 L.Ed.2d 1222 (1968) and *Texaco v. Hasbrouck*, 496 U.S. 543, 110 S.Ct 2535, 110 L.Ed.2d 492 (1990) all hold that sales of items of like kind and quality, a description that includes cigarettes, must be sold to retailers at the same prices to prevent a violation of the federal antitrust act, 15 U.S.C. § 13(a).

The Tribe gets at least \$11.75 from Miller and Lanphere's purchases from Matheson and receives \$11.75 more from its own sales since it pays the tax to no one. The Tribe gets at least \$23.50 per carton by forcing Matheson to sell at the same price.

Minimum pricing violates the federal antitrust laws. (ER 41-4). At ER 56-7, Plaintiffs allege that paying into the MSA settlement was not required by the Tribe and forces the Plaintiff to \$2 to \$5 more per carton.

324 Liquor Corp v. Duffy, 479 U.S. 335, 340, 107 S.Ct 720, 93 L.Ed.2d 667 (1987) found that a state statute mandating 112% of

the wholesale price “is to permit wholesalers to maintain retail prices at artificially high levels.” The New York statute in *Duffy* specifically forbids retailers from reducing the minimum prices set by wholesalers.

Costco v. Maleng, 522 F.3d 874, 895 (9th Cir. 2008) applies as it invalidated a wholesale pricing system.

Knevelbaard Dairies v. Kraft Foods, 232 F.3d 979, 986 (9th Cir. 2000) and *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) allow RICO suits to prohibit horizontal price fixing among competitors. This Complaint alleges RICO violations and should allow a trial. (ER 72).

Freeman v. San Diego Ass’n of Realtors, 322 F.3d 1133, 1144 (9th Cir. 2003) states, “No antitrust violation is more abominated than the agreement to fix prices. With few exceptions, price fixing agreements are unlawful *per se* under the Sherman Act and. . .no showing of so called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348, 102 S.Ct 2466, 73 L.Ed.2d 48 (1982) states that setting maximum or minimum prices is *per se* price fixing.

C. Appellants have Standing to Pursue the Tribe for Price Fixing.

The Tribe's brief at page 20 and 24, argues that a private party has no standing. Matheson alleges loss of customers and a conspiracy to drive him out of business (ER 77). RICO damage is also alleged ER 71, 67-8 and monopoly ER 63, 42. In support, the Tribe cites the district court case of *Grand River Enterprises v. King*, 783 F.Supp.2d 516 (S.D.N.Y. 2011). The Tribe was not in competition in *Grand River* nor were RICO and other violations alleged. *Id.* at 538. *Cargil v. Monfort of Colorado*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986), cited by the Tribe, was decided on lack of allegations of pricing violations. Here, the allegations are extensive.

Grand River is directly contrary to *Bedell Wholesale v. Philip Morris*, 263 F.3d 239, 249 (3rd Cir. 2001) refusing to find active supervision.

Freeman v. San Diego Board of Realtors, 322 F.3d 1133 (9th Cir. 2003) held that private real estate agents indirect buyers had price fixing standing. Injunctive relief was allowed. It is sought here. (ER 85). *Freeman Id.* at 1114 holds that price fixing, without more, allows private actions. *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers*, 526 F.2d 1196, 1203 (9th Cir. 1975) and *Northwest Wholesale Stationers v. Pacific Stationary and Printing*, 472 U.S. 284, 298, 105 S.Ct 2613, 86 L.Ed.2d 202 (1985) support private rights of action.

D. The Individual Defendants have no Immunity.

At page 6, and 14, the Tribe insists that the individual Defendants have sovereign immunity from suit. The Complaint alleges that they acted beyond their authority. (ER 33-4). Many constitutional violations are alleged. (ER 64-5). Wright is alleged to harass Matheson's employees beyond reservation boundaries. (ER 61). Actions against tribal officials in their official capacity to enjoin them from violating federal law is an exception to sovereign immunity. *Salt River Project Agr. Imp and Power v. Lee*, 2012 WL

858877 page 5 (9th Cir. 2012).

Burlington Northern Santa Fe Railway v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007) holds that tribal officials imposing unconstitutional tribal taxes are not immune from injunctive and declaratory relief. The opinion holds “under the doctrine of *Ex parte Young*, immunity does not extend to officials acting pursuant to an alleged unconstitutional statute.” Unconstitutional laws are alleged in this case. (ER 38, 62-65).

Allegations of lack of jurisdiction over non-Indians seeking prospective relief overcomes tribal officials claims of immunity. *Rogers-Dial v. Rincon Band of Luisero Indians*, 2011 WL 2619232, page 5 (D.C.Cal 2011); *Rincon Mushroom Corp of America v. Mazzetti*, 2010 WL 3768347, page 6 (D.C.Cal 2010).

The Tribe cites *Cook v. AVI Casino Enterprises*, 548 F.3d 718, 727 (9th Cir. 2008) in support of official immunity. The case is easily distinguishable as “the complaint does not allege they acted outside the scope of their authority.” Here, constitutional violations (ER 42), a conspiracy (ER 62-3), and actions beyond “any lawful authority”

are alleged. (ER 33-4).

United States v. Oregon, 657 F.2d 1009, 1012 (9th Cir. 1981) also cited by the Tribe is helpful to Matheson. It holds that tribal immunity is waived by bringing suit. In the case, no tribal member was a party. The footnote (fn. 8), likewise states “within the scope of authority.” Matheson alleges activity beyond authority.

Linneen v. Gila River Community, 276 F.3d 489, 492 (9th Cir. 2002) also cited is likewise limited to actions where no allegations are made that tribal officials acted beyond their authority.

Red Earth LLC v. United States, 657 F.3d 138, 145 (2nd Cir. 2011) upholds a preliminary injunction. It construes the law on delivery sales of cigarettes to states and also Indian country.

Tribal Code 3.32.430 and Wash.Rev.Code 43.06.455(5) mandates out of state stamping before delivery to the reservation. The Tribe and individuals enacted an unconstitutional law beyond their authority.

E. The “Arm of the Tribe” Issue Must Be Considered and Requires Discovery.

The “arm of the tribe” argument is relevant to the Tribe’s sovereign immunity as the Complaint alleges that Chad Wright is CEO of the Tahoma Market. (ER 33). It also alleges that delegation of powers to an entity that is not an arm of the tribe is a waiver. (ER 45-6, 59). Sovereignty is prevented by the Tribe ceding control to entities not controlled by the Tribe. (ER 80). Wright’s Affidavit ER 21, proves lack of control.

A state/tribe agreement waives sovereign immunity of the tribe especially when it contains an arbitration clause. *Building Inspector and Zoning Officer v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 818 N.E.2d 1040, 1050 (Mass. 2004); *C & L Enterprises v. Citizen Band of Potawotami Tribe*, 532 U.S. 411, 121 S.Ct 1589, 149 L.Ed.2d 623 (2001). *Linneen v. Gila River Indian Community*, 276 F.3d 489, 493 (9th Cir. 2002) suggests that corporate activity is subject to waiver.

Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099, 1109-1111, fn. 12 (Colo. 2010) adopted the eleven factor arm

of the tribe test. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24 (1st Cir. 2006) denies sovereignty to a tribe that sells cigarettes at retail.

An entity formed by the tribe is presumed not to be an arm of the tribe. *Wright v. Prairie Chicken*, 579 N.W.2d 7, 10 (S.D. 1998); *Dixon v. Picopa Construction Co.*, 772 P.2d 1104, 1109-10 (Ariz. 1989); and *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389 (Colo. 2008).

At page 32, the Tribe states that the “tiny detail” of a new competitive store has nothing to do with sovereignty. It has everything to do with sovereignty and res judicata as it may not be controlled by the Tribe. At 32, the Tribe asserts that the discovery did not specify facts needed. No pleadings were referenced. The discovery was specific. The statement is wrong as the Complaint, (ER 83) detailed the specific items of discovery.

In antitrust cases, summary procedures should be used sparingly as the proof is in the hands of Defendants. *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464, 472, 82 S.Ct 486, 7

L.Ed.2d 458 (1962). A full record is necessary. *Burlington Northern Santa Fe v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 774 (9th Cir. 2003).

F. The Sherman and Clayton Antitrust Acts Apply to Governments that Compete with Individuals by Selling to the Public at Retail.

The Complaint alleges that the Tribe is in direct competition on sale of pre-packaged goods with Matheson selling to the general public at retail. (ER 58, 62-3, 72).

The Tribe at 24 argues without factual proof, that it is in active supervision. Tribal Code 3.32.430 rejects this argument as tax increases are automatic. There are no facts of supervision before the Court, including whether the Tribe ordered Chad Wright to harass Matheson's employees. (ER 61).

Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 460 U.S. 150, 155, 103 S.Ct 1011, 74 L.Ed.2d 882 (1983) is in point and mandates reversal. The case carefully reviews the same antitrust statutes here involved and denied Tenth Amendment immunity against price fixing. The case states (*Id.* at 170), "there is

simply no unambiguous evidence of congressional intent to exempt purchases by a state for the purpose of competing in the private retail market with a price advantage.” The court noted that the state was “the strongest competitor of them all and that Congress feared any law that “denied small business” antitrust relief from competing governments. *Id.* at 171. At 26, the Tribe, without citation of authority, states that Congress did not intend to make the Anti Trust Act applicable to sovereign governments, *Jefferson County, Id.* at 159-160 carefully reviews the legislative history and concludes exactly the opposite. “We find no legislative intention to enable a state, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages”.

State of Georgia v. Evans, 316 U.S. 159, 162, 62 S.Ct 972, 86 L.Ed 1346 (1942) holds that a state is a person. *Burlington Northern Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) applies lack of immunity of states to tribes. The same logic should apply to antitrust violations. The statute, 15 U.S.C. § 15, works both ways.

G. Res Judicata does not Apply to Taxation Cases Involving Different Years.

The Tribe in its argument at page 8, fails to note that the parties are far from identical and that this is a tax case; that no prior judgment on the merits was entered; and no privity exists between different year tax refund, non-Indian claimants.

Commissioner v. Sunnen, 333 U.S. 591, 68 S.Ct 715, 92 L.Ed.2d 898 (1948) and *Burlington Northern Santa Fe v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 771 (9th Cir. 2003) following *Sunnen*, are tax cases. *Sunnen* only applies res judicata to the same annual tax periods. Appellants' opening brief at 37 states that *Burlington* controls. Defendants did not cite *Burlington*.

Burlington, Id. at 768, involves a tax imposed on a non-Indian company by an Indian tribe. Here, Miller and his class would never get their his tax back even though they didn't pay until 2011. The earlier cases started in 2005. If res judicata applies, all purchasers after 2005 would automatically be denied any relief and the tax would apply forever.

The Tribe's new competitive store first opened in 2011 and was not in existence as a competitor to Matheson until that time. Different facts bar res judicata. *Sunnen, Id.* at 599; *Trusted Integration v. U.S.*, 659 F.3d 1159, 1168 (Fed.Cir 2011). The Marine View Ventures store could never be enjoined. *Burlington*, 323 F.3d at 771 rejects the Tribe's argument as it holds that if different years do not bar res judicata, the tax would be forever barred.

Subsequent antitrust acts occurring after a state court action are not barred by res judicata. *International Technologies Consultants v. Pilkington PLC*, 137 F.3d 1382, 1388 (9th Cir. 1998); *Hawaiian Telephone Co., v. Public Utility of Hawaii*, 827 F.2d 1264, 1274 (9th Cir. 1987); *Los Angeles Branch of NAACP v. Los Angeles School District*, 750 F.2d 731, 740 (9th Cir. 1984).

A case must include a final judgment on the merits to have any preclusive effect. *Wakehouse v. Goodyear Tire and Rubber Co.*, 818 N.E.2d 1269, 1275 (Ill.App 2004); *Valbruna Slater Steel v. Joslyn Mfg.*, 804 F.Supp.2d 877, 883 (N.D.Ind 2011).

Matheson v. Gregoire, 161 P.3d 486, 489 (Wash. 2007) filed in 2005 was against five defendants who are not defendants in this case. Chad Wright had a different job at that time. (ER 21). Of the eleven parties, only two, the Tribe and Matheson, are the same. The case never went to trial on the merits and was dismissed for failure to join the Tribe. The Tribe was never a party. Technically, Matheson, the tribal Indian, was the only party that is the same. He never received a judgment on the merits including sovereignty as an arm of the tribe. Discovery was denied.

The federal case of *Matheson v. Wright*, 387 Fed.Appx 766 (9th Cir. 2010) is alleged to be three different cases. It is only one case, *Lanphere v. Wright*, 2009 WL 3617752, page 3 (Oct. 29, 2009) and was dismissed on failure to exhaust tribal remedies. The appeal upheld failure to exhaust, *aff'd* 387 Fed.Appx 766 (July 2010).

Of great importance is that Lanphere and Miller, both non-Indians, as established by *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330, 128 S.Ct 2709, 171 L.Ed.2d 457 (2008) a case that had not yet been decided in 2005, are

entitled to a presumption of lack of tribal jurisdiction to govern. *Burlington*, 323 F.3d 775 notes that sovereignty decisions are “in its infancy.” *U.S. v. Lara*, 541 U.S. 193, 206, 124 S.Ct 1678, 158 L.Ed.2d 428 (2004) notes Indian law evolves constantly.

Solis v. Matheson, 563 F.3d 425, 434 (9th Cir. 2009) likewise had not been decided. *Burlington*, 323 F.3d 767; 509 F.3d 1085 and *Red Earth*, 657 F.3d 138, were also undecided. Later facts bar res judicata. *Sunnen, Id.* at 600 applies only on matters that were actually determined. If “the situation is vitally altered” or “growth in legal principles” occur in subsequent years, issue preclusion does not apply. Justice Souter in *Lara, Id.* at 230 dissenting, states that Justice Thomas suggests that Indian cases are only “momentary expressions” and Indian sovereignty is in a state of confusion. Justice Thomas, *Id.* at 219 concurring, terms Indian policy “schizophrenic” and causes confusion in Indian cases.

State court decisions do not have a res judicata effect on federal court decisions. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) at footnote 8 on 1143 denies res judicata

effect in state decisions as federal courts have exclusive jurisdiction. The statements apply to state actions and it also applies to tribal court determinations. The short term appointment of judges by the Tribe and elected status of state court judges may prohibit comity and jurisdictional claims not protected by Article III lifetime judges. *Stern v. Marshall*, ___ U.S. ___, 131 S.Ct 2594, 2610-2620, 180 L.Ed.2d 475 (2011). Comity is disputed here. (ER 81).

The Tribe's reliance on *Montana v. U.S.*, 440 U.S. 147, 99 S.Ct 970, 59 L.Ed.2d 210 (1979) is misplaced as Miller seeks a federal determination and never appeared in the state court. Comity was an exception in *Montana, Id.* at 163, hence, it does not apply.

Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997) holds that tribal court cases cannot be recognized if the court will not entertain claims by non-members. None of the cases claimed to be res judicata ever went to trial and no judgment on the merits has yet occurred.

CONCLUSION.

The Tribe's brief ignores the Complaint and assumes incorrect facts and law. The case should be reversed and sent back for a full record and trial.

DATED this 9th day of April 2012.

Respectfully Submitted,

s/ Robert E. Kovacevich

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**BRIEF FORMAT CERTIFICATION PURSUANT TO
CIRCUIT RULE 32(a)(7)**

Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the REPLY BRIEF OF APPELLANTS is: proportionately spaced, has a typeface of 14 point or more, and contains fewer than 7,000 words (reply briefs).

DATED this 9th day of April 2012.

s/ Robert E. Kovacevich

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CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Reply Brief was served on Counsel for Appellee, by ECF and mailing the same by regular mail on April 9th, 2012, in a postage-paid envelope addressed as follows:

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No. 11-35850

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DANIEL T. MILLER, AMBER LANPHERE, and PAUL M. MATHESON,
Individually and on behalf of others similarly situated;

Plaintiffs-Appellants,

v.

CHAD WRIGHT, Puyallup Tribe Tax Department, Enforcement
Officer, HERMAN DILLON SR., Chairman, Puyallup Tribe of Indians
and THE PUYALLUP TRIBE OF INDIANS, a federally recognized
Indian tribe;

Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NO. 3:11-cv-05395-RBL
THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

ADDENDUM

Puyallup Tribal Code Chapter 3.32. A-1

**Chapter 3.32
CIGARETTE CODE**

Sections:

Subchapter 1. Generally

- 3.32.010 Definitions.
- 3.32.020 Privilege of operating a cigarette retail shop.
- 3.32.030 Condition for continuation.
- 3.32.040 Revocation, modification or alteration of privilege.

Subchapter 2. Licensing Generally and Fees

- 3.32.050 License required.
- 3.32.060 Eligible persons.
- 3.32.070 License term.
- 3.32.080 License processing fee.
- 3.32.090 Annual licensing fee.
- 3.32.100 Nonpayment penalty.
- 3.32.110 Duplicate license fee.

Subchapter 3. Licensing Procedures

- 3.32.120 Application – Forms and documents.
- 3.32.130 Application – Information required.
- 3.32.140 Application denial.
- 3.32.150 License renewal.
- 3.32.160 License transfer.
- 3.32.170 License posting.
- 3.32.180 Separate licenses for multiple locations.
- 3.32.190 Dual businesses at the same location.
- 3.32.200 Compliance with Tribal zoning regulations.

Subchapter 4. Cigarette Taxation

- 3.32.210 Administration and collection.
- 3.32.220 Applicability.
- 3.32.230 Amount of tax.
- 3.32.240 Exemption – Gross proceeds tax.
- 3.32.250 Record of revenue required.
- 3.32.260 Proceeds sharing.
- 3.32.270 Essential government services.

Subchapter 5. Compliance Program

- 3.32.280 Purpose.
- 3.32.290 Applicability.

- 3.32.300 Administration.
- 3.32.310 Compliance checks.
- 3.32.320 Sale to minors prohibited.
- 3.32.330 Sale to minors prohibition sign to be posted.
- 3.32.340 Age identification requirement.
- 3.32.350 Sale to minors – Penalty.
- 3.32.360 Sale of unstamped cigarettes.
- 3.32.370 Stamp compliance.
- 3.32.380 Sale of unstamped or improperly stamped cigarettes – Penalty.
- 3.32.390 Sale of cigarettes to reseller prohibited.
- 3.32.400 Resale prohibition sign to be posted.
- 3.32.410 Sale of cigarettes to reseller – Penalty.
- 3.32.420 Sale of cigarettes obtained from unauthorized sources.
- 3.32.430 Authorized sources.
- 3.32.440 Sale of cigarettes obtained from unauthorized sources – Penalty.
- 3.32.450 Delivery requirement.
- 3.32.460 Penalty for violating delivery requirement.
- 3.32.470 Pricing compliance.
- 3.32.480 Sale of cigarettes below minimum price requirement – Penalty.
- 3.32.490 Sale by mail order or through the Internet.
- 3.32.500 Sale of cigarettes by mail order or Internet – Penalty.
- 3.32.510 Failure or refusal to pay monetary penalties – Suspension of license.
- 3.32.520 Collection of information.
- 3.32.530 Failure or refusal to provide required information or access – Penalty.
- 3.32.540 Penalties to run consecutively.

Subchapter 6. Administrative and Judicial Procedure

- 3.32.550 Administrative procedure.
- 3.32.560 Post-deprivation hearing.
- 3.32.570 Judicial – Civil enforcement.
- 3.32.580 Judicial – Criminal enforcement.

Subchapter 7. Miscellaneous

- 3.32.590 Noncompliance – Report to Department.
- 3.32.600 Noncompliance – Waiver of privilege and protection.
- 3.32.610 Illegal substances – Zero tolerance.
- 3.32.620 Severability.

Subchapter 1. Generally

3.32.010 Definitions.

- (a) “Cigarette Compact” means the Cigarette Compact and subsequent Agreement entered into between the Puyallup Tribe and the State of Washington.
- (b) “Cigarette retail shop” means a member-owned business on the Reservation that sells cigarettes at retail.

- (c) "Council" means the Puyallup Tribal Council.
- (d) "Department" means the Puyallup Tribe's Cigarette Tax Department.
- (e) "Essential government services" means services provided by the Puyallup Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
- (f) "Member" means an enrolled member of the Puyallup Tribe.
- (g) "Reservation" means the area recognized as the Puyallup Indian Reservation by the United States Department of the Interior.
- (h) "Tribal enterprise" means any business owned by the Tribe.
- (i) "Tribe" or "Tribal" means or refers to the Puyallup Tribe.
- (j) "Trust land" means lands held in trust by the United States for the benefit of an enrolled Tribal member or the Tribe. [Ord. 020505B (05/02/05); prior code § 3.07.010]

3.32.020 Privilege of operating a cigarette retail shop.

In order to promote the further economic development of the Tribe, to clearly establish and exercise the Tribe's authority to regulate the conduct and operation of cigarette retail shops within the Reservation, and in order to maintain compliance with the Cigarette Compact, the Council hereby declares that the Tribe has the authority to grant, deny, or withdraw the privilege of operating a cigarette retail shop within the Reservation, except as limited by applicable law. [Ord. 020505B (05/02/05); prior code § 3.07.020]

3.32.030 Condition for continuation.

The grant of the privilege of operating a cigarette retail shop within the Reservation is conditioned upon the business's compliance with this chapter and other applicable laws of the Tribe. [Ord. 020505B (05/02/05); prior code § 3.07.030]

3.32.040 Revocation, modification or alteration of privilege.

The Council hereby reserves the right to revoke this grant of privilege of operating a cigarette retail shop within the Reservation; to modify, limit, or otherwise alter the extent of this grant; and to establish and enact such laws relating to the establishment or conduct of cigarette retail shops within the Reservation as it may deem desirable. [Ord. 020505B (05/02/05); prior code § 3.07.040]

Subchapter 2. Licensing Generally and Fees

3.32.050 License required.

Any member operating a cigarette retail shop on the Reservation must first apply for and receive a cigarette retail license from the Tribe. Expired or revoked cigarette retail licenses must be renewed before operation of a cigarette retail shop may continue. No member shall operate a cigarette retail shop on the Puyallup Indian Reservation without a

cigarette retail license. Any individual selling cigarettes on trust land must first obtain a cigarette retail license. [Ord. 020505B (05/02/05); prior code § 3.07.110]

3.32.060 Eligible persons.

Any member, 18 years of age or older, who agrees to comply with this chapter and other applicable laws of the Tribe, and who is not otherwise prohibited from operating a cigarette retail shop on the Reservation, may obtain a cigarette retail license. [Ord. 020505B (05/02/05); prior code § 3.07.120]

3.32.070 License term.

Each license shall expire 12 months from the effective date of the cigarette retail license. [Ord. 020505B (05/02/05); prior code § 3.07.130]

3.32.080 License processing fee.

Application for a cigarette retail license shall be made by submitting a nonrefundable processing fee of \$100.00 to the Department. The processing fee shall be credited toward the licensee's annual cigarette retail license fee. [Ord. 020505B (05/02/05); prior code § 3.07.140]

3.32.090 Annual licensing fee.

An annual license fee of \$250.00 shall be imposed upon every person operating a cigarette retail shop on the Reservation. Such fees must be paid in full to the Department prior to the issuance of a cigarette retail license. Failure to pay such fee shall be cause to withhold a cigarette retail license. [Ord. 020505B (05/02/05); prior code § 3.07.150]

3.32.100 Nonpayment penalty.

Failure to obtain a cigarette retail license, or failure to pay the license fee within 30 days after the day on which it is due, shall render the business subject to a penalty of 50 percent of the amount of the licensing fee for the first month of delinquency and an additional penalty of 10 percent for each succeeding month of delinquency; provided, that the total penalty shall not exceed the license fee. These nonpayment penalties shall not be credited toward the licensee's annual cigarette retail license fee. [Ord. 020505B (05/02/05); prior code § 3.07.160]

3.32.110 Duplicate license fee.

A duplicate license must be obtained in the event that the original license is lost, stolen or destroyed. A duplicate license fee of \$50.00 shall be imposed upon every issuance of a duplicate license. [Ord. 020505B (05/02/05); prior code § 3.07.160]

Subchapter 3. Licensing Procedures

3.32.120 Application – Forms and documents.

The completion of the following forms and documents shall be required of all persons applying for a cigarette retail license:

- (a) An application form;
- (b) An acknowledgement form; should the trust property be held in trust for multiple beneficial owners, proper acknowledgement of the proposed use of the land must be obtained from all beneficial owners;

- (c) Evidence of trust status;
- (d) Evidence of Tribal affiliation. [Ord. 160905A (09/16/05); Ord. 020505B (05/02/05); prior code § 3.07.210]

3.32.130 Application – Information required.

The following information shall be required of all persons applying for a cigarette retail license:

- (a) The name of the applicant;
- (b) The Tribal affiliation of the applicant;
- (c) The date of the application;
- (d) The anticipated date of commencement of business;
- (e) The name of the business if other than the name of the applicant;
- (f) The name and address of the beneficial owner(s) of the real property where the business is (or will be) located;
- (g) The names and addresses of all agents and managers currently employed at the applicant's business locations for which a cigarette retail license is sought;
- (h) The location of all distribution and all sales locations, or offices, or other places of business on and off the Reservation of any applicant, beneficial owner, manager, and officer of said business;
- (i) The signature of the applicant; and
- (j) Such other information as the Council may from time to time require. [Ord. 020505B (05/02/05); prior code § 3.07.220]

3.32.140 Application denial.

An application shall be denied if:

- (a) The Department does not timely receive all of the required forms and documents;
- (b) The Department does not timely receive all applicable fees;
- (c) The applicant's license has been suspended or revoked and the matter relating to the suspension or revocation has not been resolved;
- (d) The applicant is currently in nonconformance with Tribal law; or
- (e) The applicant is otherwise prohibited from operating a cigarette retail shop on the Puyallup Indian Reservation.

An application may be resubmitted at a later date, when any such defect is corrected and eligibility is established. [Ord. 020505B (05/02/05); prior code § 3.07.230]

3.32.150 License renewal.

All licenses shall be renewed, and the annual license fee shall be due 30 days prior to the expiration of a current cigarette retail license. The Department is authorized, but not required, to mail forms for license renewal. Failure of any business to receive such form shall not excuse the business from applying for and securing the cigarette retail license, nor from paying of the licensing fee due. [Ord. 020505B (05/02/05); prior code § 3.07.240]

3.32.160 License transfer.

Licenses issued pursuant to the terms of this chapter shall not be assignable or transferable in the event of sale or transfer of such business to other ownership or for any other purpose. [Ord. 020505B (05/02/05); prior code § 3.07.250]

3.32.170 License posting.

Every cigarette retail business shall keep and post the cigarette retail license issued to the business pursuant to this chapter on the premises of the business. [Ord. 020505B (05/02/05); prior code § 3.07.260]

3.32.180 Separate licenses for multiple locations.

A separate license must be obtained for each cigarette retail shop location. [Ord. 020505B (05/02/05); prior code § 3.07.270]

3.32.190 Dual businesses at the same location.

A separate license shall be required for the sale of liquor and a separate business license shall be required for the sale of any other goods sold at the location of a licensed cigarette retail shop. [Ord. 020505B (05/02/05); prior code § 3.07.280]

3.32.200 Compliance with Tribal zoning regulations.

The address of the real property where the business is (or will be) located must comply with Tribal zoning regulations. [Ord. 020505B (05/02/05); prior code § 3.07.290]

Subchapter 4. Cigarette Taxation**3.32.210 Administration and collection.**

The Puyallup Tribal Council grants the authority for administration and collection of the Tribal cigarette tax to the Department. [Ord. 020505B (05/02/05); prior code § 3.07.310]

3.32.220 Applicability.

The Tribal cigarette tax shall apply to the retail sale of cigarettes by cigarette retail shops and Tribal enterprises. [Ord. 020505B (05/02/05); prior code § 3.07.320]

3.32.230 Amount of tax.

The Tribal cigarette tax shall be \$11.75 per carton of 200 cigarettes and shall increase dollar for dollar with subsequent increases in the state cigarette tax. [Ord. 020505B (05/02/05); prior code § 3.07.330]

3.32.240 Exemption – Gross proceeds tax.

All sales of cigarettes shall be exempt from the Tribe's gross proceeds tax or any other Tribal tax. [Ord. 020505B (05/02/05); prior code § 3.07.340]

3.32.250 Record of revenue required.

Each cigarette retail shop shall be required to maintain accurate and complete records of revenue obtained from the sale of cigarettes. Such records must be delivered to the Department on a quarterly basis. The records must be delivered in a clear and concise form.

(a) Required Disclosures.

- (1) Gross revenue from the sale of 20-cigarette packs of cigarettes;
- (2) Pack sales of 20-cigarette packs;
- (3) Gross revenue from the sale of 25-cigarette packs of cigarettes; and
- (4) Pack sales of 25-cigarette packs.

The Department retains the right to request such records at any time deemed necessary for the administration of this chapter. The cigarette retail shop will be provided one business week to produce such records in these instances. [Ord. 020505B (05/02/05); prior code § 3.07.350]

3.32.260 Proceeds sharing.

The Tribe will share the cigarette tax proceeds with the state of Washington in accordance with the Compact. [Ord. 020505B (05/02/05); prior code § 3.07.360]

3.32.270 Essential government services.

Tribal cigarette tax revenue shall be used for essential government services, as defined by the Compact. [Ord. 020505B (05/02/05); prior code § 3.07.370]

Subchapter 5. Compliance Program**3.32.280 Purpose.**

The purpose of the compliance program is to monitor compliance with Tribal law and with the Cigarette Compact. [Ord. 020505B (05/02/05); prior code § 3.07.410]

3.32.290 Applicability.

By engaging in the retail sale of cigarettes, both cigarette retail shops and Tribal enterprises are subject to the compliance program. [Ord. 020505B (05/02/05); prior code § 3.07.415]

3.32.300 Administration.

The Department is responsible for the administration of this program. The Department, at its option and subject to state approval, may contract with an independent third party to perform compliance checks. [Ord. 020505B (05/02/05); prior code § 3.07.420]

3.32.310 Compliance checks.

In general, the compliance program will monitor and investigate cigarette retail shops and Tribal enterprises in regard to:

- (a) Sales to minors;

- (b) Sales of unstamped cigarettes;
- (c) Sale of cigarettes to resellers;
- (d) Sales of cigarettes obtained from unauthorized sources;
- (e) Pricing compliance;
- (f) Mail order and Internet sales; and
- (g) Other requirements and limitations of Tribal law. [Ord. 020505B (05/02/05); prior code § 3.07.425]

3.32.320 Sale to minors prohibited.

Neither cigarette retail shops nor Tribal enterprises shall sell or give, or permit to be sold or given, cigarettes to any person under the age of 18 years. [Ord. 020505B (05/02/05); prior code § 3.07.430]

3.32.330 Sale to minors prohibition sign to be posted.

Each cigarette retail shop and Tribal enterprise shall display a sign concerning the prohibition of tobacco sales to minors.

Such sign shall:

- (a) Be posted so that it is clearly visible to anyone purchasing tobacco products from the licensee;
- (b) Be designed and produced by the Department to read: "THE SALE OF TOBACCO PRODUCTS TO PERSONS UNDER THE AGE OF 18 IS STRICTLY PROHIBITED BY TRIBAL LAW. PHOTO IDENTIFICATION IS REQUIRED FOR PURCHASE OF TOBACCO PRODUCTS"; and
- (c) Be provided free of charge by the Department. [Ord. 020505B (05/02/05); prior code § 3.07.431]

3.32.340 Age identification requirement.

Where there may be a question of a person's right to purchase or obtain tobacco products by reason of age, the retailer, or agent thereof, shall require the purchaser to present picture identification that shows the purchaser's age and bears his or her signature. [Ord. 020505B (05/02/05); prior code § 3.07.432]

3.32.350 Sale to minors – Penalty.

The sale of cigarettes to a minor or failure of a cigarette retail shop or Tribal enterprise to post the required prohibition sign shall result in the below-defined immediate penalties:

- (a) The first offense shall result in a monetary penalty of \$100.00;
- (b) The second offense shall result in a monetary penalty of \$300.00;
- (c) The third offense shall result in a monetary penalty of \$500.00;

- (d) The fourth offense shall result in a suspension of business operations for two days and a monetary penalty of \$500.00;
- (e) The fifth offense shall result in a suspension of business operations for five days and a monetary penalty of \$500.00;
- (f) The sixth offense shall result in a suspension of business operations for 10 days and a monetary penalty of \$500.00;
- (g) The seventh offense shall result in license suspension for three months and a monetary penalty of \$1,000;
- (h) The eighth offense shall result in license revocation for six months and a monetary penalty of \$1,500;
- (i) The ninth offense shall result in license suspension for one year and a monetary penalty of \$2,000; and
- (j) The tenth offense shall result in license suspension for three years and a monetary penalty of \$2,500. [Ord. 241006E (10/24/06); Ord. 020505B (05/02/05); prior code § 3.07.433]

3.32.360 Sale of unstamped cigarettes.

Neither cigarette retail shops nor Tribal enterprises shall sell unstamped cigarettes. [Ord. 020505B (05/02/05); prior code § 3.07.440]

3.32.370 Stamp compliance.

Cigarettes sold by cigarette retail shops and Tribal enterprises must bear the proper Tribal stamp. Two types of stamps will exist, one for packages containing 20 cigarettes, and one for packages containing 25 cigarettes. Each pack of cigarettes sold must bear the proper Tribal stamp, a 20 stamp for the sale of 20 packs and a 25 stamp for the sale of 25 packs. [Ord. 020505B (05/02/05); prior code § 3.07.441]

3.32.380 Sale of unstamped or improperly stamped cigarettes – Penalty.

The sale of unstamped cigarettes or improperly stamped cigarettes by either a cigarette retail shop or a Tribal enterprise shall result in the below-defined immediate penalties:

- (a) The first offense shall result in a monetary penalty of \$500.00;
- (b) The second offense shall result in license suspension for six months and a monetary penalty of \$1,000;
- (c) The third offense shall result in license revocation for one year, a monetary penalty of \$1,500 and subject to criminal prosecution;
- (d) The fourth offense shall result in license revocation for three years, a monetary penalty of \$2,500 and subject to criminal prosecution; and
- (e) The fifth offense shall result in license revocation for five years, a monetary penalty of \$5,000 and subject to criminal prosecution. [Ord. 020505B (05/02/05); prior code § 3.07.442]

3.32.390 Sale of cigarettes to reseller prohibited.

Neither cigarette retail shops nor Tribal enterprises shall knowingly sell cigarettes to a cigarette reseller. [Ord. 020505B (05/02/05); prior code § 3.07.450]

3.32.400 Resale prohibition sign to be posted.

Each cigarette retail shop and Tribal enterprise shall display a sign concerning the prohibition of resale of cigarettes purchased from a cigarette retail shop.

Such sign shall:

- (a) Be posted so that it is clearly visible to anyone purchasing cigarettes from the licensee;
- (b) Be designed and produced by the Department to read: "THE RESALE OF CIGARETTES PURCHASED FROM A TRIBALLY LICENSED CIGARETTE RETAILER IS STRICTLY PROHIBITED"; and
- (c) Be provided free of charge by the Department. [Ord. 020505B (05/02/05); prior code § 3.07.451]

3.32.410 Sale of cigarettes to reseller – Penalty.

The sale of cigarettes to a cigarette reseller by a cigarette retail shop or a Tribal enterprise shall result in the below-defined immediate penalties:

- (a) The first offense shall result in a monetary penalty of \$500.00;
- (b) The second offense shall result in license suspension for six months and a monetary penalty of \$1,000;
- (c) The third offense shall result in license revocation for one year, a monetary penalty of \$1,500;
- (d) The fourth offense shall result in license revocation for three years, a monetary penalty of \$2,500 and subject to criminal prosecution; and
- (e) The fifth offense shall result in license revocation for five years, a monetary penalty of \$5,000 and subject to criminal prosecution. [Ord. 020505B (05/02/05); prior code § 3.07.452]

3.32.420 Sale of cigarettes obtained from unauthorized sources.

Neither cigarette retail shops nor Tribal enterprises shall sell cigarettes obtained from unauthorized sources. [Ord. 020505B (05/02/05); prior code § 3.07.460]

3.32.430 Authorized sources.

A cigarette retail shop is permitted to purchase cigarettes at wholesale only from:

- (a) State-licensed wholesalers; or
- (b) The Tribe, acting as a wholesaler. [Ord. 020505B (05/02/05); prior code § 3.07.461]

3.32.440 Sale of cigarettes obtained from unauthorized sources – Penalty.

The sale of cigarettes obtained from unauthorized sources by a cigarette retail shop or a Tribal enterprise shall result in the below-defined immediate penalties:

- (a) The first offense shall result in license revocation for one year and a monetary penalty of \$1,000;
- (b) The second offense shall result in license revocation for two years and a monetary penalty of \$1,500;
- (c) The third offense shall result in license revocation for three years, a monetary penalty of \$2,500 and subject to criminal prosecution; and
- (d) The fourth offense shall result in license revocation for five years, a monetary penalty of \$5,000 and subject to criminal prosecution. [Ord. 020505B (05/02/05); prior code § 3.07.462]

3.32.450 Delivery requirement.

Cigarette retail shops shall have all cigarettes delivered to their Tribally licensed retail locations by the authorized source that sells the cigarettes to the cigarette retail shop. Cigarette retail shops are prohibited from picking up their orders from any source. [Ord. 250506 (05/25/06); prior code § 3.07.463]

3.32.460 Penalty for violating delivery requirement.

Failure to comply with the delivery requirement shall result in the removal of the authorized source from the list of authorized sources. In addition, failure to comply with the delivery requirement shall result in the below-defined immediate penalties, which will be imposed on the cigarette retail shop:

- (a) The first offense shall result in license revocation for one year and a monetary penalty of \$1,000;
- (b) The second offense shall result in license revocation for two years and a monetary penalty of \$1,500;
- (c) The third offense shall result in license revocation for three years and a monetary penalty of \$2,500;
- (d) The fourth offense shall result in license revocation for five years, a monetary penalty of \$5,000 and subject to criminal prosecution. [Ord. 250506 (05/25/06); prior code § 3.07.464]

3.32.470 Pricing compliance.

The retail sale price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of the cigarette tax imposed on the cigarette. [Ord. 020505B (05/02/05); prior code § 3.07.470]

3.32.480 Sale of cigarettes below minimum price requirement – Penalty.

The sale of cigarettes below minimum price requirement by a cigarette retail shop or a Tribal enterprise shall result in the below-defined immediate penalties:

- (a) The first offense shall result in a monetary penalty of \$100.00;
- (b) The second offense shall result in a monetary penalty of \$300.00;
- (c) The third offense shall result in license suspension for six months and monetary penalty of \$1,000;
- (d) The fourth offense shall result in license revocation for one year and monetary penalty of \$1,500; and
- (e) The fifth offense shall result in license revocation for five years and monetary penalty of \$2,500. [Ord. 020505B (05/02/05); prior code § 3.07.471]

3.32.490 Sale by mail order or through the Internet.

Cigarette retail shops and Tribal enterprises are strictly prohibited from engaging in mail order or the Internet sale of cigarettes. [Ord. 020505B (05/02/05); prior code § 3.07.480]

3.32.500 Sale of cigarettes by mail order or Internet – Penalty.

Sale of cigarettes by mail order or Internet by a cigarette retail shop or a Tribal enterprise shall result in the below-defined immediate penalties:

- (a) The first offense shall result in a license revocation for three years, a monetary penalty of \$2,500 and subject to criminal prosecution; and
- (b) The second offense shall result in a license revocation for five years, a monetary penalty of \$5,000 and subject to criminal prosecution. [Ord. 020505B (05/02/05); prior code § 3.07.481]

3.32.510 Failure or refusal to pay monetary penalties – Suspension of license.

The failure or refusal to pay monetary penalties shall result in the immediate suspension of a cigarette retail license. A license will be suspended until the Department receives payment of the monetary penalties. [Ord. 020505B (05/02/05); prior code § 3.07.490]

3.32.520 Collection of information.

Each cigarette retail shop may be required from time to time to submit to a compliance review. Each cigarette retail shop shall be required to provide, when directed by the Department, information and access that will enable the Department to determine whether the shop is in compliance with the requirements of this chapter and Tribal law. Compliance reviews shall consist of a review, by the Department or by a third party, of the cigarette retail shop's books and records, the cigarette retail shop's premises, inventory and other items deemed necessary by the Tribe. [Ord. 020505B (05/02/05); prior code § 3.07.491]

3.32.530 Failure or refusal to provide required information or access – Penalty.

The failure or refusal to provide required information or access by a retail cigarette shop or Tribal enterprise shall result in the below-defined immediate penalties:

- (a) The first offense shall result in license suspension until compliance;
- (b) The second offense shall result in license suspension for one year;
- (c) The third offense shall result in license revocation for three years; and
- (d) The fourth offense shall result in license revocation for five years. [Ord. 020505B (05/02/05); prior code § 3.07.492]

3.32.540 Penalties to run consecutively.

All penalties prescribed in this Subchapter 5 shall run consecutively. [Ord. 250506 (05/25/06); prior code § 3.07.493]

Subchapter 6. Administrative and Judicial Procedure**3.32.550 Administrative procedure.**

The Department shall follow the administrative procedure outlined below in events of apparent and actual violation:

- (a) Notice of Apparent or Actual Violation. Penalties will be immediate and a written notice of apparent or actual violation will be provided to the licensee.
- (b) Determination by the Department. The Department shall provide the licensee with relevant documentation of the apparent or actual violation. The licensee shall have the opportunity to provide the Department with additional relevant information and shall have the opportunity to meet with the Department Director to review the claim. The Department shall consider all relevant information in making a final decision regarding the apparent or actual violation. The final decision must be made based on a preponderance of the evidence. Upon reaching a final decision the licensee shall be provided with written documentation of the Department's decision.
- (c) Discretion to Reduce Penalty. The Department Director shall have the authority to reduce the designated penalty if sufficient evidence is made available to the Director to show that the violation was incidental or unintentional. [Ord. 020505B (05/02/05); prior code § 3.07.510]

3.32.560 Post-deprivation hearing.

A cigarette retail licensee shall have the opportunity to appeal the Department's decision to suspend or revoke a cigarette retail license. Such appeals shall be heard by the Puyallup Tribal Court at a post-deprivation hearing. The decision by the Puyallup Tribal Court shall be final. [Ord. 020505B (05/02/05); prior code § 3.07.520]

3.32.570 Judicial – Civil enforcement.

A decision by the Department may be appealed to the Puyallup Tribal Court. In addition, the Puyallup Tribal Court shall hear civil cases brought by the Tribe to enforce civil penalties prescribed under this chapter. The Puyallup Tribal Court's rules of civil procedure and other applicable Court rules shall apply. [Ord. 020505B (05/02/05); prior code § 3.07.530]

3.32.580 Judicial – Criminal enforcement.

A decision made by the Department shall authorize the Puyallup Tribal Prosecutor's Office to criminally prosecute in instances where the penalty provides for criminal prosecution. The decision to prosecute will be at the discretion of the Tribal Prosecutor. The Department shall provide relevant information to the Prosecutor's Office. The Puyallup Tribal Court's rules of criminal procedure and other applicable Court rules shall apply. [Ord. 020505B (05/02/05); prior code § 3.07.540]

Subchapter 7. Miscellaneous**3.32.590 Noncompliance – Report to Department.**

Any person who possesses knowledge of noncompliance shall provide such information to the Department. Failure to provide such information to the Department may subject that person to the penalties prescribed in this chapter and other Tribal ordinances as they may apply. [Ord. 020505B (05/02/05); prior code § 3.07.610]

3.32.600 Noncompliance – Waiver of privilege and protection.

Continued noncompliance with this chapter by any person will result in a waiver of the person's privileges and protection under this chapter. [Ord. 020505B (05/02/05); prior code § 3.07.620]

3.32.610 Illegal substances – Zero tolerance.

The Tribe has a zero tolerance policy with regard to illegal substances. Any illegal substances found on the premises or sold on the premises of a cigarette retail shop shall result in the immediate revocation of a cigarette retail license. [Ord. 020505B (05/02/05); prior code § 3.07.630]

3.32.620 Severability.

If any provision of this chapter, or its application to any person or circumstance, is held invalid by the Puyallup Tribal Court, the remainder of this chapter shall remain in effect. [Ord. 020505B (05/02/05); prior code § 3.07.640]

Disclaimer: The documents on this website are the official versions of the Tribal laws. Although the Tribe makes every effort to maintain the documents with complete and accurate information, the Tribe makes no guarantee concerning the accuracy of the documents. The Tribe will, however, correct any errors brought to its attention and e-mail notice of such corrections to all who have provided an e-mail address as described on the main page of this site. The Tribe's provision of these documents does not constitute legal advice and should not be viewed as an alternative to legal advice from an attorney of your choice.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 32(a)(7)**

Pursuant to Fed.R.App.P. 32(a)(7), I hereby certify that the
REPLY BRIEF OF APPELLANTS is: proportionately spaced, has a
typeface of 14 point or more, and contains 5,061 words.

DATED this 9th day of April 2012.

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