11-35850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL T. MILLER, AMBER LANPHERE,
and PAUL M. MATHESON,

Appellants,

v.

CHAD WRIGHT, HERMAN DILLON, SR.,
and THE PUYALLUP TRIBE OF INDIANS,

Appellees.

On Appeal from the United States District Court for the
Western District of Washington, No. 3:11-cv-05395-RBL
(Ronald B. Leighton, United States District Court Judge)

RESPONSE BRIEF OF APPELLEES PUYALLUP TRIBE OF INDIANS, HERMAN DILLON, SR., and CHAD WRIGHT

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CORPORATE DISCLOSURE STATEMENT

The three appellees in this appeal are the Puyallup Tribe of Indians, a federally-recognized Indian tribal government, and two Tribal officials. None of them is a corporation; none has a parent corporation. As a result, there is no "stock" to be held in any amount by any publicly held corporation. This brief will refer to all three appellees as "the Tribe."

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JURISDICTIONAL STATEMENT

As the district court ruled, the Puyallup Indian Tribe's sovereign immunity from suit deprives the court of jurisdiction over this action.

ISSUES PRESENTED FOR REVIEW

The issues presented in appellants' brief are in fact a list of their many legal arguments aimed at avoiding the Tribe's sovereign immunity. The Tribe will of course address those arguments in this brief; at this point they can be condensed down to the two issues legitimately presented by this appeal: (1) whether the doctrine of *res judicata* precludes the Appellants (plaintiffs below) from re-litigating the issue of the Tribe's sovereign immunity from suit; and (2) whether the Tribe's immunity deprives the district court of jurisdiction over the action.

STATEMENT OF THE CASE

Paul Matheson, owner of a retail cigarette business, and Paul Miller and Amber Lanphere, two customers of that business, brought this case seeking a determination that (1) the Cigarette Tax Agreement signed by the State of Washington and the Puyallup Tribe is invalid, and (2) the Tribe has no authority to tax purchases made by non-Indian customers of Mr. Matheson's business.

The Tribe moved to dismiss based on (1) the doctrine of *res judicata* in light of rulings against various combinations of the plaintiffs in two earlier virtually

identical cases, first in the courts of the State of Washington and then in the Puyallup Tribal Court, and (2) on the Tribe's sovereign immunity from suit. ER 5. The district court ruled in favor of the Tribe and the retailer and the customers appealed the dismissal to this Court.

STATEMENT OF FACTS

Paul Matheson (hereafter "Matheson" or "retailer") is the owner of a retail cigarette business licensed by the Puyallup Tribe and located on trust land on the Puyallup Indian Reservation (land owned by the United States in trust for Matheson). He is an enrolled member of the Puyallup Tribe. The Complaint alleges and the Tribe does not dispute that Daniel Miller and Amber Lanphere (hereafter "customers") are non-Indians who knowingly and intentionally came onto the Puyallup Indian Reservation in order to purchase cigarettes from Matheson's retail business. (Except where otherwise indicated, the three appellants are referred to collectively as "Matheson.")

Matheson and various combinations of customers have previously filed a series of lawsuits challenging the Cigarette Tax Agreement and the Tribe's authority to apply its cigarette tax to purchases made by the non-Indian customers from Matheson's business. This case is the fourth in the sequence.

State court – Matheson v. Gregoire. Matheson filed the first lawsuit in Washington state court seeking a ruling that the Cigarette Tax Agreement signed

by the State of Washington and the Puyallup Indian Tribe was invalid and that the Tribe has no authority to impose its cigarette tax on purchases made by non-Indian customers of its licensees. The trial court dismissed the case against the Tribe and Tribal officials; the Washington Court of Appeals affirmed the dismissal; the Washington and United States Supreme Courts declined to review. *Matheson v. Gregoire,*139 Wn.App. 624, 161 P.3d 486 (2007), *rev. denied*, 163 Wn.2d 1020, 180 P.3d 1292 (2008), *cert. denied*, 555 U.S. 881, 129 S.Ct. 197, 172 L.Ed.2d 140 (2008).

Tribal Court – *Matheson v. Wright.* Matheson and Lanphere in 2006 filed the second case in Puyallup Tribal Court against the Puyallup Tribe and its Cigarette Tax Administrator. SER 12. They asked the Court to invalidate the Cigarette Tax Agreement and to rule that the Tribe cannot impose its cigarette tax on the non-Indian customer. SER 14, 17, 19, 21. The trial level of the Tribal Court dismissed the case based on the Tribe's sovereign immunity. *Matheson v. Wright* (Puyallup Tribal Court 2009) SER 24. Lanphere and Matheson appealed. The Tribal Court of Appeals affirmed the dismissal. *Matheson v. Wright* (Puyallup Tribal Court of Appeals 2011) SER 27.

Federal District Court. Lanphere and Matheson filed the third case in United States District Court for the Western District of Washington. It was dismissed there for failure to complete the second case, which at that point was still

pending in Tribal Court. *Lanphere v. Wright*, 2009 WL 3617752 (W.D.Wash. October 29, 2009). This Court affirmed. 387 Fed.Appx. 766, (9th Cir. 2010).

Matheson, Miller, and Lanphere filed this fourth case in the district court after the conclusion of the appeal in the Tribal Court action. They asked the district court for the same relief sought in state and tribal court: to invalidate the Cigarette Tax Agreement and to rule that the Tribe cannot impose its cigarette tax on the non-Indian customer. The district court dismissed the case based on *res judicata* and sovereign immunity.

The Tribe's Cigarette Tax Code includes two requirements Matheson and the customers attack in this case.[1] First, Section 430(a) of the Code requires retailers to purchase their inventory from state-licensed wholesalers. Second, Section 470 requires retail sale prices no lower than the retailer's wholesale cost of obtaining the cigarettes, including the amount of the Tribe's cigarette tax. Those requirements apply to all retailers that sell cigarettes, including the businesses owned and operated by the Tribe's economic development corporation. ER 21-22.

[1] The official versions of the Tribe's ordinances, including its Cigarette Code, are found at www.codepublishing.com/WA/puyalluptribe/

SUMMARY OF ARGUMENT

The district court correctly dismissed this case for two reasons. First, Matheson and the customers have lost two previous cases on the issue of sovereign immunity. Those rulings satisfy the test for application of the doctrine of *res judicata*: (1) an identity of claims (whether sovereign immunity precludes litigation of the merits of their case); (2) a final judgment on the merits of the sovereign immunity issue; and (3) privity among the parties. Further, neither the facts nor the law has changed since the earlier rulings, and this case does not fall within any of the three exceptions to the doctrine.

Second, the Tribe's sovereign immunity from suit, even if re-examined here, deprives the courts of jurisdiction over the Tribe and the Tribal officials. This case is not within the *Ex parte Young* exception to the doctrine because Tribal officials were acting in their official capacities and within the scope of their and the Tribe's authority. The U.S. Supreme Court has explicitly confirmed Indian tribes' authority to apply their cigarette taxes to purchases made by non-Indian customers from Tribal member businesses on trust land within Indian reservations.

For ease of reference, Matheson's many arguments have been grouped into three categories and will be addressed accordingly.

1. Sovereign immunity. Matheson seeks to avoid the Tribe's sovereign immunity under the exception created by the Supreme Court in *Ex parte Young*,

209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), arguing that Tribal officials acted in excess of the Tribe's authority in two regards: by applying the Tribe's cigarette tax to non-Indian customers, and by acting in violation of federal antitrust law.

The Supreme Court, however, has established and confirmed tribes' authority to tax purchases of cigarettes by non-Indian customers from tribal and tribal member businesses on trust land. Antitrust laws do not apply to the Tribe's regulation of sales. Even if they did, the Tribe would not run afoul of antitrust law by virtue of its non-discriminatory requirements that (1) each retailer include in its retail price at least the wholesale cost and the Tribal tax, and (2) that retailers obtain their inventory only from state-licensed wholesalers.[2]

The Tribe's own retail sale of cigarettes does not create any waiver of its immunity. Moreover, Matheson's undefined concept "joint control" of cigarette sales or regulation between the Tribe and the State does not provide a waiver as to third parties.

[2] While Matheson has also asserted tort claims against Wright, this is a clear subterfuge attempting to circumvent the Tribe's sovereign immunity. Even if successful in that effort, Matheson could not obtain the result he seeks – relief from the Tribe's cigarette tax – from the CEO of the Tribe's economic development corporation. A tort claim, if successful, would get them, at best, monetary damages; it would in no way change application of the Tribe's cigarette tax, which the CEO has no authority to assess or suspend. A second problem with a tort claim is Matheson's failure to pursue, much less exhaust, Tribal remedies; the Tribe has a Tort Claims Act that Matheson ignored. This Court already sent Matheson back to the Tribe for failure to exhaust in the third of these lawsuits. The same outcome would follow here should he seriously assert a tort claim. Further, no federal question is evident in a tort claim based on a Tribal official's treatment of a licensee.

2. *Res judicata*. Matheson next argues that competition from the Tribe's retail sale of cigarettes and "unidentical parties" prevent application of *res judicata*. The Tribe's sale of cigarettes, however, follows the same Tribal laws and rules applicable to Matheson and other licensed retailers and is irrelevant to the issue of *res judicata*. This Court and the Supreme Court have explicitly established that identity of parties is not a prerequisite for application of the doctrine.

3. Miscellaneous. Matheson also makes several miscellaneous arguments, only a few of which merit a response: (a) the status of the Tribe's economic development corporation is irrelevant to the issue of sovereign immunity; (b) the Tribe's retail sale of cigarettes, following all the same rules and requirements applicable to Matheson and other retailers, does not create an exception to the principle of *res judicata*; and (c) under the standards set by this Court and the Supreme Court, discovery is not appropriate until the issue of sovereign immunity is resolved.

ARGUMENT

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

A. Standard of Review

This Court reviews de novo a district court's dismissal of an action based on *res judicata*. *Stewart v. U.S. Bancorp*, 257 F.3d 953, 956 (9th Cir. 2002).

B. The District Court Correctly Based Dismissal on *Res Judicata*

In both state and tribal courts Matheson – and in one of those cases Lanphere as well – litigated and lost two cases on the issue of whether the Tribe's sovereign immunity bars a suit involving the same claims they assert here. The principle of *res judicata* therefore precludes Matheson and his customers from re-litigating the issue of sovereign immunity.

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

Res judicata applies "whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011); *Stratosphere Litigation, L.L.C. v. Grand Casinos Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002); *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). The Supreme Court in *Montana* indicated as well that the doctrine may not apply if the relevant facts or law has changed or if special circumstances bring a case within an exception to the doctrine. *Id.* at 155.

The first exception is for cases involving "unmixed questions of law in successive actions involving substantially unrelated claims…. Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate." *Id.* at 162. The instant case involves precisely the same subject matter and the same claims as Matheson's and the customers' two earlier cases. The Tribe seeks application of the doctrine only to the issue of sovereign immunity, which was the basis for the dismissals in the two earlier cases and is dispositive of the case. Any arguments in opposition to the Tribe's immunity were available (and were presented) in the earlier cases.

The second exception is for a litigant who goes to federal court but is "compelled, without his consent . . ., to accept a state court's determination of those claims." *Id.* "Considerations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Id.* Matheson and his customers here chose of their own volition state court and then Puyallup Tribal Court for the earlier cases. As a result, they do not qualify for this exception.

The third exception is for cases that did not provide "a full and fair opportunity" to litigate claims. *Id.* at 164. Plaintiffs here have aired their arguments on sovereign immunity at the trial and appellate levels of two different court systems. Their complaints in those cases included the antitrust claim that they

characterize as the heart of the instant case. Accordingly, this factor provides no basis for an exception to *res judicata*.

Matheson's response to the District Court's ruling is meager, referring to "competition and unidentical parties" as the reasons the doctrine should not apply. (The competition argument is addressed in Part III.) His reference to "parties" reflects his addition of two customers of his business, one in the Tribal Court case, the other here.

That attempt is unavailing: both the holdings and reasoning in the case law dispose of his argument. "Even when the parties are not identical, privity may exist if there is substantial identity between parties, that is, a sufficient commonality of interest." *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003). *Accord, Headwaters, Inc. v. U.S. Forest Serv.*, 382 F.3d 1025, 1030 (9th Cir. 2004); *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997). The courts have thus applied the doctrine in appropriate circumstances even when there is no family, business, or contractual relationship between the two parties. *Shaw v. Hahn*, 56 F.3d 1128, 1131 (9th Cir. 1995).

Plaintiff/appellants Lanphere and Miller are, according to the Complaint, customers who purchased cigarettes from Matheson's business. Their interests in overcoming the Tribe's sovereign immunity are thus not only similar but identical to those of Matheson and each other. If either Matheson or his customers were

allowed to evade *res judicata* simply by finding another new customer for each lawsuit, there would be no end to litigation; his business undoubtedly has hundreds of customers who could step in as new plaintiffs each time the case is repeated.

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

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

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

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

II. The Tribe's Sovereign Immunity Bars This Suit

A. Standard of Review

This Court reviews de novo a district court's dismissal of a case based on sovereign immunity. *Alaska v. Babbitt*, 75 F.3d 449, 451 (9th Cir. 1995).

B. The Tribe Is Immune from Suit

Longstanding case law is clear and consistent: Indian tribes are immune from suit in the same manner as other sovereign governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977); *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, 760, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Suit against a tribe is barred unless the tribe has clearly and explicitly waived its immunity. To be effective, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo, supra*, 436 U.S. at 58; *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). The doctrine applies whether the Tribe's activity under scrutiny is governmental or commercial and whether it took place within or outside its Reservation boundaries. *Kiowa, supra*, 523 U.S. at 760. As noted in *Dunn & Black v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007),

> Unless [Plaintiff] satisfies the burden of establishing that [his] action falls within an unequivocally expressed waiver of sovereign immunity by Congress [or the Nation], it must be dismissed.

Contrary to Matheson's argument, the Tribe's Cigarette Tax Agreement with the State does not waive the Tribe's immunity from suits filed by third parties. While the Agreement does provides for mediation of certain issues between the two governments (ER 101-103), it is explicit that nothing in the Agreement waives the immunity of either, and it has no provision providing a waiver as to claims by third parties. ER 92, 93.

C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), does not help Matheson. The Supreme Court there held only that an explicit waiver of immunity was effective as to the party to whom the waiver was given and for the type of proceeding authorized by the waiver (arbitration and judicial enforcement of the arbitration award, in that case). The case in no way helps Matheson, who is a third party to an Agreement that provides no waiver to third parties and who seeks to pursue litigation rather than mediation, the step authorized in the Agreement.

C. The Tribe's Immunity Bars Suit Against the Individual Defendants, Who Acted in Their Official Capacities and Within the Scope of the Tribe's Authority

A suit filed against a tribal official acting in his official capacity is in effect against the tribe and is also barred by the tribe's immunity unless the official acted outside the scope of his authority. *Cook v. AVI Casino Enter., Inc.*, 548 F.3d 718,

728 (9th Cir. 2008); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981); *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002).

The Tribal officials named in this case are the Tribal Council Chairman and the CEO of the Tribe's economic development corporation. (The latter served, at the time of Matheson's first case in this series, as the Tribe's Cigarette Tax Administrator.) Those officials act in their official capacities when they enact and collect the Tribe's cigarette tax and are therefore protected by the Tribe's immunity.

Matheson does not contend that officials generally are outside the protection of a tribe's immunity. He argues instead, just as he did unsuccessfully in the earlier cases, that three factors in this case create either an exception to or a waiver of that immunity. None of his arguments, however, is persuasive.

1. The Tribe has authority to impose its cigarette tax on purchases made by non-Indian customers from businesses operated by members of the Tribe within the Reservation

Matheson contends that Tribal officials act in excess of their authority when they impose the Tribe's cigarette tax on purchases made by non-Indian customers from his retail business. He faces, however, the Supreme Court's explicit holding that tribes do have authority to impose that tax in precisely this situation. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S.

134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court noted that the State of Washington,

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

447 U.S. at 152.

Matheson in response argues that two Supreme Court decisions implicitly overruled that holding in *Colville*. His cases, however, did not have that effect and in fact underline the continuing validity of *Colville*. He points first to *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001), where the Supreme Court disallowed a tribal tax imposed on customers of a non-Indian business operated on non-Indian fee land. *Id.* at 647. But the Court very explicitly did not overrule tribes' authority to tax non-Indians in appropriate circumstances. The opinion distinguished *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), where the Court had upheld a tribal tax on non-Indians, pointing out that "*Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to transactions occurring on *trust lands* and significantly involving a tribe or its members." *Atkinson*, *supra*, 532 U.S. at 653 (emphasis in original; internal quotation omitted), quoting *Merrion* (which in turn was quoting *Colville*).

The customers in *Atkinson* dealt only with a business owned by non-Indians on fee land. *Id*. at 654. The Court therefore held that imposing the tax was beyond the tribe's authority. *Atkinson* reconfirmed, however, the holding in *Colville* that tribes can tax non-Indian customers who make purchases on trust land. Accordingly, *Merrion* and *Colville* are thus still good law, and the purchases involved here, made by the customers from a tribal member business on trust land, are firmly within the Tribe's authority to tax.

Matheson also argues that the Tribe's jurisdiction is defeated by the test in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).[3] There the Supreme Court held that tribes generally do not have jurisdiction over non-Indians on fee land within an Indian reservation, subject to two exceptions. Even if *Montana* were the relevant test on trust land, the Tribe would still have authority to tax sales to non-Indian customers because the purchase of goods from a Tribal member on trust land on an Indian reservation falls squarely within the first of the exceptions the Supreme Court gave in *Montana.* "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 566 (emphasis

[3] This 1981 decision concerning tribal jurisdiction is to be distinguished from the Court's 1979 ruling by the same name that involved the issue of *res judicata* discussed *supra* at pp. 8-9. References to *Montana* in the remainder of this section are to the 1981 tribal jurisdiction case.

added). The Court then cited four cases, example of activities falling within that first exception. One of the four is *Colville*, which as noted confirms tribes' authority to impose the very tax Matheson challenges here.

Several years later, the Supreme Court underlined that conclusion by observing that, "*Montana's* list of cases fitting within the first exception … indicates the type of activities the Court had in mind …" *Strate v. A-1 Contractors*, 520 U.S. 438, 457, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). The Court then characterized the authority upheld in *Colville*. "[T]ribal authority to tax on-reservation cigarette sales to nonmembers is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id*. (Internal quotation omitted).

The Puyallup Tribe is thus squarely supported by the *Montana* test when it applies its cigarette tax to purchases made by non-Indians from Mr. Matheson's business. The purchase of cigarettes by a non-Indian from a tribe or tribal member's business establishes a consensual relationship for the purpose of the *Montana* exception. Far from overruling *Colville*, the Court in *Montana* and *Atkinson* instead reaffirmed its validity. Consequently Tribal officials are acting squarely within the Tribe's authority and are therefore not subject to the *Ex parte Young* exception to sovereign immunity.

2. The Tribe's Cigarette Code and actions do not violate federal antitrust law

Matheson next argues that an *Ex parte Young* exception is available because the Tribe's actions violate federal antitrust law. He makes general reference to the Sherman Act, 15 U.S.C. § 1 et seq., and then accuses the Tribe, without any supporting information or even allegations, of engaging in "illegal price fixing" (Appellants' Opening Brief, hereafter "AOB," p. 2) and "horizontal price fixing monopoly" (AOB, p. 28).

In fact, nothing of the sort takes place as the record graphically demonstrates. Matheson's entire antitrust argument is based on two provisions of the Tribe's Cigarette Code. As noted, the Code requires (1) that retailers sell at a price no lower than the wholesale cost, including the Tribe's Cigarette Tax, and (2) that retailers acquire their inventory only from State-licensed wholesalers.

The price requirement falls far short of what the courts have defined as "price-fixing;" the limitation on suppliers does not even remotely tend to bring about a monopoly – for the Tribe or for anyone else. Both requirements apply to all retailers licensed by the Tribe, including the Tribe itself and its business arm, Marine View Ventures ("MVV"). ER 21-22. Each is designed for only one focused purpose: to ensure that retailers collect the Tribal tax, avoiding the issue of tax evasion that enveloped the Tribe, the State, and Tribal licensees in endless litigation for decades, including federal criminal prosecutions. Because the

provisions are uniformly applicable and applied, they create no competitive advantage for the Tribe or anyone else, and therefore no *Ex parte Young* exception. Whatever impact they have on price and revenue is caused to all retailers licensed by the Tribe. Those provisions simply do not constitute a violation of any of the provisions of federal antitrust law.

Matheson's legal argument concerning antitrust law falls short in three separate ways, any one of which is sufficient to defeat this attempt to circumvent the Tribe's sovereign immunity. The Act (1) does not confer standing on these plaintiffs; (2) is not applicable to actions of sovereign governments and their officials; and (3) even if applicable here would not proscribe the Tribal Cigarette Code provisions that Matheson challenges.

a. Plaintiffs Lack Standing to Raise a Sherman Act Claim

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

effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

An action violates the antitrust laws if it effects an "undue" restraint of trade, tends to produce monopolization, or "would have the effect of substantially lessening competition." Callman on Unfair Competition, 4th edition (2011), Section 4:19, "Violation of the antitrust laws;" *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii*, 810 F.2d 869, 876, 878 (9th Cir. 1987), which emphasizes that the Act proscribes only unreasonable restraints of trade. *Id*. at 876. Here, the Tribe's Cigarette Code has none of those impacts on Matheson's business. The Code simply ensures that retailers – who have already paid the Tribal cigarette tax to the wholesaler in order to obtain their inventory – pass that tax along to the retail customer. As noted, all retailers licensed by the Tribe (including the retail market operated by a Tribal corporation with which Matheson is concerned) collect and all customers pay the same tax.[4] That requirement in no way reduces competition or burdens one retailer or customer more than another. In short, it does not create the kind of injury the antitrust laws are designed to prevent.

[4] The provisions in fact leave in place the substantial advantage, documented in the record below, ER 24-25, that Matheson (and other retailers licensed by the Tribe) have over retailers not licensed by the Tribe. The latter pay the higher State cigarette tax as well as State sales tax (and the same MSA settlement amount that Matheson objects to).

A relevant example of the standing problem is *Grand River Enter. Six Nations v. King*, 783 F.Supp.2d 516 (S.D.N.Y. 2011). The court there dismissed for lack of standing, based on *Cargill* and *Atlantic Richfield, supra*, the claim of a cigarette distributor challenging a fee brought about by the Master Settlement Agreement ("MSA") reached by most states and the larger tobacco companies. The court in *Grand River* ruled that because a higher fee brought about by the MSA is not the kind of injury the antitrust laws address, the plaintiff did not have standing to litigate such a claim. The court pointed out that the higher cost was one imposed on all of the wholesalers' competitors as well and thus did not create any competitive disadvantage. *Id*. at 531.

The same is true of the pricing and supplier requirements in the Puyallup Tribe's Cigarette Code. Matheson is not placed at a competitive disadvantage and thus has no standing under federal antitrust laws.

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

Case law establishes that the Sherman Act does not apply to actions taken by sovereign state governments even though they might, if carried out by a private party, be prohibited restraints of trade. *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943); *Hoover v. Ronwin*, 466 U.S. 558, 567-568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (2007); *Sanders v. Brown*, 504 F.3d 903, 915 (9th Cir.

2007), *cert. denied*, 553 U.S. 1031, 128 S.Ct. 2427, 171 L.Ed.2d 229 (2008). The reasoning that led the Supreme Court to that conclusion supports the same rule for sovereign Indian tribal governments: the Sherman Act does not apply.

The Tribe respectfully submits, and the district court held, that the principle of state immunity should be applied as well to actions of Indian tribes. The Supreme Court found state immunity by interpreting Congressional intent in the Sherman Act:

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

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

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

sovereign." The strong suggestion is that sovereign status carries with it immunity from the Sherman Act.

There remains the question of whether a particular action by a state, or here an Indian tribe, qualifies for that immunity. The more cautious of two approaches to answering that question applies a two-prong test. As this Court explained in *Sanders v. Brown*, *supra*, the anticompetitive policy not only must be (1) "clearly articulated and affirmatively expressed as state policy," but also must be (2) "actively supervised by the state itself." *Id*. at 915, quoting *Calif. Retail Liquor Dealers Ass'n, v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).[5]

The two sections of the Puyallup Tribe's Cigarette Code that Matheson challenges satisfy either version of the test for antitrust immunity. The Code is the unilateral action of the Tribal government; it does not ratify or even involve action by any private party. *Fisher v. City of Berkeley*, *supra*. The provisions constitute

[5] This Court apparently opted for the more straightforward approach found in *Hoover v. Ronwin*, *supra*, 466 U.S. at 567-568, that dispenses with the second part of the test: "Thus, under the Court's rationale in *Parker* [*v. Brown*, *supra*], when a state legislature adopts legislation, its actions constitute those of the State, [citation omitted] and ipso facto are exempt from the operation of the antitrust laws." Active supervision need not be demonstrated. As this Court said in *Sanders v. Brown*, *supra*, 504 F.3d at 915-916, "[A] state's own acts in the antitrust area are always immune…". *See also*, *Fisher v. City of Berkeley*, 475 U.S. 260, 267-68, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986). As long as the restraint in question is the unilateral act of the government, it is immune from antitrust law. But we will use the more cautious, two-part test here in order to demonstrate that the Tribe's actions here are immune under either version of the test.

"articulated and affirmatively expressed as Tribal policy," a test satisfied by legislative enactments. *Sanders v. Brown, supra*, 504 F.3d at 915. The Code satisfies the second prong of the test as well by involving not only 'active supervision' by the Tribal government, but in fact action only by the government; the Tribe is does not ratify or involve private action in any way when it enacts and enforces its Code provisions.[6] Government action has failed the "active supervision" test only when a state is simply authorizing private parties who determine and carry out the anti-competitive policy; the state then is not immune. *Calif. Retail Liquor Dealers Ass'n, supra*; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-345, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987); *Miller v. Oregon Liquor Control Com'n*, 628 F.2d 1222, 1224-1225 (9th Cir. 1982). State actions satisfy that test, however, when state agencies are much more involved in conducting and regulating the activity. *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985); *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978).

[6] *See Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 717 F.Supp.2d 1159 (E.D. Wash. 2010), (state law limiting the number of hospitals allowed to perform a certain surgical procedure, and thus creating a monopoly, not subject to scrutiny under the Sherman Act because it involved unilateral action of the State. *Id.* at 1164).

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

Matheson analogizes to cases holding that federal laws of general application apply as well to Indians unless one of three specified exceptions applies, citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). AOB, 23-24. That case referred to a rule that "a general statute in terms applying to all persons includes Indians and their property interests." *Id*. at 1115 (citation omitted). That principle, however, does not help Matheson here. The opinion recognized three exceptions to that rule. One is "proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation." (Citation omitted.) *Id.* at 1116. The Sherman Act falls within that exception because, as noted above and found by the district court, the Supreme Court has consistently held that Congress did not intend to make the Act applicable to sovereign governments.

Matheson next suggests that *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 103 S.Ct. 1011, 74 L.Ed.2d 882 (1983) renders *Parker* inapplicable. In fact *Jefferson County* does no such thing. The case does indicate that state immunity does not apply to purchases made by a state

government for the purpose of competing with private parties in the retail market (*id*. at 154), suggesting that the rule is different than what applies when the government makes purchases for use in traditional functions. Matheson's real objection here, however, is not to MVV's purchase of inventory for its retail market. Rather, the Tribal action from which he wants relief is application of the Tribal tax, the price requirement, and supplier limitation. All of those features, however, are found in the Tribe's Cigarette Code, legislation enacted by the Tribe in its governmental role, not by the Tribal corporation in a commercial role. *Jefferson County* is thus of no assistance to Matheson.

The factor in *Jefferson County* that brought federal antitrust law to bear on the state was an allegation that inventory was being sold by wholesalers to the state agency at a price lower than that charged to private retailers, and that the state then re-sold the inventory at retail in competition with private parties. *Id*. at 152. But MVV's retail sales are not the basis for Matheson's antitrust allegations (nor could they be – as noted, MVV sells cigarettes in compliance with all of the Cigarette Code requirements, including the two Matheson finds objectionable). The Code provides MVV with no market advantage whatsoever. The Tribal actions at the heart of Matheson's antitrust argument are the Tribal government's enactments in its Cigarette Code, legislative acts that are unquestionably actions of the Tribe in

its governmental capacity. They are thus beyond the reach of the Supreme Court's ruling in *Jefferson County*.

The Supreme Court certainly does not think that *Jefferson County* invalidated *Parker*. The Court continues to apply *Parker* in cases where a sovereign takes action in its governmental capacity, in cases such as *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), where it referred to *Parker* as "a landmark case," *id*. at 370, and *Federal Trade Com'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Nor has this Court rejected *Parker*. *Sanders, supra*, 504 F.3d at 918.

c. The Tribe's Cigarette Code Would Not Constitute an Antitrust Violation Even if the Sherman Act Were Applicable

A third flaw in Matheson's antitrust argument is that his allegations, even if proven, would not state a violation of the Sherman Act because the Tribal Code provisions do not constitute horizontal price-fixing, as Matheson suggests. The Tribe has no agreement with any competitor, a required element under the case law. *See, e.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984); *In re Citric Acid Litigation*, 191 F.3d 1090, 1093 (9th Cir. 1999), *cert. denied*, 529 U.S. 1037, 120 S.Ct. 1531, 146 L.Ed.2d 346 (2000).

The Tribe's Code in fact does not create any restraint on competition at all, much less an unreasonable one. Retailers are free to obtain their inventory from any licensed wholesaler they choose and negotiate whatever price they are able. The minimum price at which they can sell the cigarettes thus varies depending on what kind of price the retailer negotiates with the wholesaler. The Code does not establish a rigid set of prices at which cigarettes must be sold, the kind of restraint that has been held violative of the Sherman Act when carried out by private parties. *Calif. Retail Liquor Dealers Ass'n, supra*. In short, even if the pricing requirement in the Code were created or imposed by private parties rather than by the Tribe in its sovereign capacity, it would not constitute a violation of the Sherman Act because it does not create an unreasonable restraint on competition.

Matheson portrays *Freedom Holdings v. Spitzer*, 363 F.3d 149 (2nd Cir. 2004) as holding that the Master Settlement Agreement violates antitrust law. He has ignored, however, the Second Circuit's subsequent ruling in the same case. The court rejected the antitrust argument in *Freedom Holdings v. Spitzer*, 624 F.3d 38 (2nd Cir. 2010), concluding that under *Parker*, "a state's own actions are not subject to antitrust preemption." *Id*. at 58. The Court then looked to be sure the state was not simply authorizing private violations for which *Parker* does not provide immunity. The conclusion was that the state was not doing that: "Here, plaintiffs' antitrust argument reduces to a claim that the challenged statutes, by raising their

costs, have the effect of raising cigarette prices." *Freedom Holdings, supra*, 624 F.3d at 62. Under established case law, that is insufficient to state an antitrust violation because, "[i]t is the state that determines the cost increase …" *Id*. *Freedom Holdings* thus defeats rather than supports Matheson's argument.

III. Miscellaneous Arguments

A. Whether Marine View Ventures Is an "Arm of the Tribe" Is Not Relevant to the Issue of the Tribe's or Tribal Officials' Sovereign Immunity

Whether MVV is an arm of Tribal government has no bearing at all on the sovereign immunity issue. Pursuing litigation against its CEO will accomplish nothing for Matheson: the Tribe's wholly-owned economic development corporation has no authority to establish or rescind a Tribal tax. (If MVV were not an arm of Tribal government, it would *a fortiori* be even farther from having any control of that taxation.) Matheson's arguments that Chad Wright acted beyond the Tribe's authority are based on actions he took when he was the Tribe's Cigarette Tax Administrator, not in his current role as MVV's CEO. As a result, the status of MVV is wholly irrelevant to the sovereign immunity issue.

Matheson questions whether MVV is an "arm of the Tribe" (AOB p. 11-14), after having acknowledged earlier that it is (AOB p. 9). In fact the record is explicit and uncontradicted on that point: MVV is a corporation wholly-owned by the Tribe and indeed sells, among other things, cigarettes at retail. ER 21. That

commercial activity, however, has no bearing on the issue of sovereign immunity for several reasons.

First, Chad Wright was named as a defendant below apparently for two reasons: his previous position as the Tribe's Cigarette Tax Administrator, and his current position as the CEO of the Tribe's economic development corporation, MVV. Matheson argues that MVV is not an arm of the Tribal government as a means of avoiding sovereign immunity. Pursuing this case against Wright in that role, however, would not make available to Matheson relief from the Tribe's cigarette tax, the result he seeks in the case. As the company's CEO, Wright has no authority to suspend a Tribal tax. That remedy would require action by the Tribal government and its officials, not by an official of an economic development corporation.

Second, there is nothing about the sale of cigarettes by the Tribe or its business arm that operates to waive the Tribe's immunity or its well-established application to Tribal officials, and Matheson offers no authority to the contrary. As the Supreme Court has indicated, a tribe's sovereign immunity applies even when the tribe is engaged in commercial activity. *See, Kiowa, supra*.

Finally, if Matheson is attempting to link MVV's sale of cigarettes to his antitrust argument, he cannot demonstrate any violation of federal antitrust law in those sales. In addition to the other legal obstacles that argument faces, *supra*, the

record below demonstrates that MVV follows all of the requirements and limitations imposed on cigarette sales by the Agreement with the State of Washington and by the Tribe's Cigarette Code. MVV enjoys no competitive advantage over Matheson by virtue of Tribal law.

B. The Sale of Cigarettes by a Tribal Business Does Not Have Any Bearing on the Issue of *Res Judicata*

Without any explanation or legal support, Matheson suggests that MVV's retail sale of cigarettes prevents application of *res judicata*, arguing that a market currently operated by MVV was not in business when Matheson filed the earlier lawsuits. AOB, pp. 33-37. Without regard to the accuracy of that statement (MVV has sold cigarettes in various business establishments for many years before the opening of the market that Matheson identifies), it simply has no bearing on the legal principle of *res judicata*. Even if it is a tiny detail that is different in the facts, it does not have any bearing on the only legal issue as to which the court below applied *res judicata*: the Tribe's sovereign immunity from suit. Selling cigarettes at retail simply does not waive the Tribe's immunity, and Matheson does not suggest any legal support for such a claim.

C. Discovery Concerning the Issue of Sovereign Immunity Would Be Neither Appropriate Nor Helpful

Matheson argues that he should have been allowed to conduct discovery concerning MVV's status and its sale of cigarettes before the District Court ruled on the Tribe's Motion to Dismiss. The District Court, however, correctly denied that request: "The Supreme Court has held that until the threshold issue of immunity is resolved, discovery should not proceed." *DiMartini v. Ferrin*, 889 F.2d 922, 926 (9th Cir. 1989), *cert. denied*, 501 U.S. 1204, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)); *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

While that conclusion might be different if he had pointed to additional facts required in order to resolve the sovereign immunity issue, Matheson failed to specify, as required by F.R.C.P. 26, exactly what information he would seek through discovery and how it would be relevant to the immunity issue. The facts relevant to that issue are undisputed: Matheson's retail business is located on trust land within the Puyallup Indian Reservation; the Tribe imposes its cigarette tax on sales he makes to non-Indian customers; Tribal law requires him to sell cigarettes at a price no lower than the cost of the cigarettes to him plus the Tribal tax. The parties' disagreement on the issue of immunity concerns the application of case law, not disagreement about the facts. Discovery is unnecessary and would add

nothing to the parties' arguments or to either the district court's or this Court's ability to rule on the issue.

CONCLUSION

Two of Matheson and his customers' previous lawsuits have dismissed the claims made here based on the Tribe's sovereign immunity. *Res judicata* therefore requires dismissal here. Even if the issue is re-examined here, Matheson has shown neither a waiver of nor an exception to that immunity. The district court's dismissal was therefore correct.

DATED this 12th day of March, 2012.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Tribe does not know of any related case pending in this Court as that term is used in Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 8404 words excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count in the word processing program with which this brief was compiled.

CERTIFICATE OF SERVICE

I certify that on March 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Robert E. Kovacevich, attorney for the Appellants in this case, and to James H. Jordan, attorney for Appellee Chad Wright.

John Howard Bell

John Howard Bell
Attorney for Appellees Puyallup Tribe and Herman Dillon, Sr.

11-35850

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL T. MILLER, AMBER LANPHERE,
and PAUL M. MATHESON,

Appellants,

v.

CHAD WRIGHT, HERMAN DILLON, SR.,
and THE PUYALLUP TRIBE OF INDIANS,

Appellees.

On Appeal from the United States District Court for the
Western District of Washington, No. 3:11-cv-05395-RBL
(Ronald B. Leighton, United States District Court Judge)

SUPPLEMENTAL EXCERPTS OF RECORD

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Hon. Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

DANIEL T. MILLER, AMBER LANPHERE, and PAUL M. MATHESON,

Plaintiffs,

v.

CHAD WRIGHT, HERMAN DILLON, SR., and THE PUYALLUP TRIBE OF INDIANS,

Defendants.

No. 3:11-cv-05395RBL

DECLARATION OF JOHN HOWARD BELL IN SUPPORT OF MOTION TO DISMISS

I, John Howard Bell, declare:

1. I am attorney of record for defendants Puyallup Tribe of Indians and Herman Dillon, Sr., in this case. I make this declaration in support of the Defendants' Motion to Dismiss.

Attached to this Declaration are excerpts from two documents, which I have highlighted for ease of reference, and complete copies of two shorter documents, as follows:

a. **Pages 3 through 11** attached to this Declaration are certain pages from the Complaint filed in *Matheson v. Gregoire* in Thurston County Superior Court

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on May 10, 2005, specifically pages 1, 2, 14, 29, 30, 35, 36, 37 and 38 of that Complaint.

b. **Pages 12 through 23** attached to this Declaration are certain pages from the Complaint filed in *Matheson v. Wright* in Puyallup Tribal Court on September 28, 2006, specifically pages 1, 20, 21, 22, 24, 42, 43, 54, 55, 56, 57 and 58 of that Complaint.

c. **Pages 24 through 26** attached to this Declaration are the three page Order of Dismissal issued by the trial level of the Puyallup Court on January 16, 2009, in *Matheson v. Wright*.

d. **Pages 27 through 34** attached to this Declaration are the eight page Opinion issued by the Puyallup Tribal Court of Appeals on February 25, 2011, in *Matheson v. Wright*.

I certify under penalty of perjury pursuant to 28 U.S.C. §1746 that the foregoing is true and correct. Signed at Tacoma, Puyallup Indian Reservation, State of Washington this 7th day of July, 2011.

John Howard Bell, WSBA No. 5574

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☐ EXPEDITE
☐ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge/Calendar: _____

SUPERIOR COURT, STATE OF WASHINGTON,
FOR THURSTON COUNTY

PAUL M. MATHESON

Plaintiff,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Board; and THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; and CHAD R. WRIGHT, Cigarette Compact Department Administrator; Puyallup Tribe of Indians; and the PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe;

Defendants.

No. 05-2-00892-7

COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT AND DAMAGES FOR CIVIL, CONSTITUTIONAL AND RICO VIOLATIONS

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Plaintiff, through his attorney, hereby submits this Complaint for Injunctive Relief, Declaratory Judgment, Civil Rights and RICO Damages, and alleges as follows:

FIRST CAUSE OF ACTION

DECLARATORY JUDGMENT

1. This suit is by an enrolled member of the Puyallup Tribe of Indians and an Indian business organization doing business on Indian land held in trust by the Bureau of Indian Affairs of the Department of the Interior on the Puyallup Indian Reservation. The suit seeks prospective injunctive and declaratory relief against the Defendants to prevent them from forcing Plaintiff to collect and pay over tribal cigarette taxes. The Department of Revenue, through its Director and Assistant Director, the Tobacco Tax Enforcement Manager of the Washington State Liquor Control Board and the Tobacco Tax Administrator for the Puyallup Tribe of Indians, and the Puyallup Tribe of Indians are also Defendants as allowed by *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

Constitutional Background

2. The Puyallup Indian Reservation was recognized and approved

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H. The proposed contract violates the Sherman Anti-Trust Act (15 U.S.C. § 1 and § 14).

I. Only Congress, not the State, can enact or make agreements with Indian tribes and states regarding interstate or Indian commerce. Washington's Constitution Article XXVI, Second states "Said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." RCW 37.12.010 codified public law 280 and states that "But such assumption of jurisdiction shall not apply to Indians when on their tribal lands." RCW 37.12.060 states "nothing in this chapter shall authorize . . . taxation of . . . personal property . . . belonging to any Indian . . . or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty."

J. The attempt to impose a reciprocal tax on Indian businesses while allowing military base concessionaires within the Puyallup Indian reservation and market area in the State, but outside the reservation to be exempt, violates the equal protection and civil rights of Plaintiff.

K. The State cannot contract away its powers of taxation. Wash. Const. art VII § 1.

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as the State gets 30% of the tribal tax but the Tribe gets none of the State tax or master settlement funds. The agreement is shocking to the conscience as it forces the Indian tribe to injure the Indians who are members of the Tribe. It is exceedingly calloused as it rewards convenience store and other state lobbyists for white owned business by increased sales and profits. The Puyallup tribe had no meaningful choice or even close to equal bargaining power. It had an implied threat of criminal action by the State to obtain advance tax for the State akin to illegal blackmail. On information and belief, the State forced the Tribe to capitulate on the issue of State taxation to preserve the Tribe's gaming compact with the State. The Tribe had to execute the contract on a take it or leave it basis and was presented by the State Defendants action from making Plaintiff and other tribal retailers from being informed or to derive any payments from the contract. The contract is void as it is an adhesion contract.

The Tribe Cannot Tax the Non Indian Purchaser.

i). The contract and statutory enactment places the incidence of tax on the retail purchaser of Plaintiff's products. The tax is simply added on to the sales price of Plaintiff's pre packaged products purchased at wholesale. The tax is imposed directly in the purchaser of Plaintiff's goods. The Puyallup tribe of Indians cannot tax non Indian purchaser's of

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Plaintiff's products as it has no consensual relationship with Plaintiff's purchasers. The purchases by non Indians does not significantly involve tribal services as the purchasers receive no more than any other traveler of receipt of police, fire or medical services from the Puyallup Tribe's political integrity, economic security or health or welfare. Since the incidence of tax is on the purchaser, the Puyallup tribe has no authority to tax non tribal enrolled Indians who do not live on the Puyallup reservation. The majority of Plaintiff's customers are as described, therefore a large proportion of the tax is invalid.

Plaintiff's Claims For Relief Against The Defendant Puyallup Tribe of Indians Specifically.

50. The Tribe has violated the Treaty of Medicine Creek by allowing white men and women and white owned business to be located within the boundaries of the Puyallup Indian Reservation. The Treaty of Medicine Creek requires approval of the Superintendent of Indian Affairs, which, on information and belief, was never obtained. The new cigarette enactment does not apply as the Tribe has failed to enforce the Treaty of Medicine Creek, failed to defend Plaintiff's invasion of rights by the State and failed to effectively govern or defend its borders. The Tribe, by enacting the tax, has interfered with Plaintiff's right to trade within the United States. This right is retained by Plaintiff and guaranteed by Article VII of the Treaty of

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Plaintiff by driving away customers that will never return to Plaintiff's business. The Defendants also have sufficient resources and unlimited funds. The continued litigation alone will force Plaintiff out of business.

THIRD CAUSE OF ACTION

DAMAGES

60. Plaintiff realleges and incorporates all preceding paragraphs of the First and Second Causes of Action by this reference.

61. The actions of Defendants in conducting secret negotiations and agreeing to tax Plaintiff and other tribal retailers has damaged Plaintiff and the business carried on by Plaintiff.

62. If Defendants enforce the contract without making Plaintiff a party to the contract or negotiating with Plaintiff, Plaintiff will be damaged even further.

63. Plaintiff has been and will be damaged by Defendants' monopolistic conspiracy in an amount to be determined at trial of this matter.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

A. That the Court determine and declare that all sections of

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Wash.Rev.Code 43.06.450 through 460 are void, unlawful and unenforceable as applied to cigarettes transported, distributed, received or sold by Plaintiff's retail businesses located within the exterior boundaries of the Puyallup Reservation;

B. That the Court holds any contract signed by the Defendant State and Tribe invalid and ineffective against Plaintiff;

C. That the Court temporarily, preliminarily and permanently enjoin the prospective application of RCW ch. 43.06 preventing the Defendant State and Tribe from enforcing any provision of the statutes or contracting in any way with each other or any person or entity regarding a cigarette tax on any cigarettes to be received or sold by Indian-owned retail businesses within the exterior boundaries of the Puyallup Reservation;

D. For orders of preliminary and permanent injunction, restraining and enjoining the Defendants, agencies of the State of Washington and Puyallup Tribe, its directors, employees and agents, and each of them, their agents, employees and all persons acting now or in the future in concert with them, from interfering in anyway with Plaintiff's right to purchase cigarettes from any distributor totally free from any certification or interference including the right to transport, buy or sell any items at retail at Plaintiff's store, located on trust land on the Puyallup Indian

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Reservation, including the right to purchase or sell cigarettes or other tobacco items free of reciprocal tax or state interference of any kind;

E. For an order declaring that Plaintiff and any Indian businesses selling cigarettes on the Puyallup Indian Reservation be a party to negotiations, be notified of all proceedings and be allowed to take part in meetings;

F. For a declaration that any agreement or contract entered into by the Tribe and State is invalid when attempted to be imposed or any way applied to Plaintiff;

G. For a temporary and permanent injunction enjoining the State and Tribe, the employees and agents and all persons acting in concert with Defendants now or in the future from conspiring to interfere with Plaintiff's right to sell any item of trade, including cigarettes, free of tax.

H. For an order against the Puyallup Tribe permanently enjoining the Tribe from requiring Plaintiff to be licensed by the Tribe or allowing the Tribe to pass laws requiring Plaintiff's sales of cigarettes to be taxed by the Tribe.

I. For an order restraining State and Tribe from monopolizing or balkanizing to protect cigarette sales or affect Indian commerce in the State of Washington;

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J. For damages for Defendants and those acting in concert with Defendants for violation of the laws restraining trade and commerce by conspiring to give military and other federal instrumentalities, state facilities leased under percentage leases, non-Indian convenience stores and others, an unfair and competitive advantage thereby destroying and subjecting Plaintiff's competitive right to unfair disadvantage to engage in Indian business for treble damages for RICO violations;

K. For an order of appropriate relief pursuant to 42 U.S.C. §§ 1981 and 1983 addressing the depravation committed upon Plaintiff under color of state law for ignoring constitutionally protected safeguards;

L. For reasonable costs and attorney fees; and

M. For such other and further relief in law and equity as this Court may deem proper.

DATED this 6th day of May, 2005.

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509/747-2104

IN THE TRIBAL COURT OF THE PUYALLUP TRIBE OF INDIANS OF THE PUYALLUP INDIAN RESERVATION

PAUL M. MATHESON, and AMBER LANPHERE, Individually, and on behalf of others similarly situated, Plaintiffs, CHAD R. WRIGHT, CIGARETTE TAX DEPARTMENT, THE PUYALLUP TRIBE OF INDIANS, A Native American Indian Tribe, Defendants.	No. CV-06-974 CLASS ACTION COMPLAINT FOR REFUND OF CIGARETTE TAXES; WASHINGTON STATE MASTER SETTLEMENT ACT PAYMENTS AND DAMAGES FOR PRICE FIXING

I. INTRODUCTION

1. Plaintiffs, PAUL M. MATHESON, and AMBER LANPHERE, individually, and on behalf of others similarly situated, by and through their attorney of record, Robert E. Kovacevich, of Robert E. Kovacevich P.L.L.C., bring their complaint for a class action against Defendants PUYALLUP

of Washington 43.06.450. Defendant Chad Wright has singled out Paul M. Matheson's manager for retaliation, harassment, and imposed special limitations and restrictions on Plaintiff Paul M. Matheson's business. He threatened to close Paul M. Matheson's store and discriminated against the employees. This conduct has caused Plaintiff Paul M. Matheson additional damage. Plaintiff Paul M. Matheson has not been paid the employee cost of transportation, or business interruption expense caused by the unlawful action of Defendants. The same or similar conduct by the Defendants to other Puyallup Tribe retailers has also caused similar damages to tribal retailers who will be asked to join this suit.

E. The Defendant Puyallup Tribe Cannot Tax Non-Indian, Non-Reservation Purchasers of Cigarettes.

33. Plaintiff Amber Lanphere was forced to pay the sum of $11.75 additional in pass on and collect Puyallup Tribe cigarette taxes. The price she paid included a $3.35 or more per carton charge to be deposited into the Washington State Master Escrow Settlement Agreement Fund. She has no contractual, consensual or any other legal or actual relationship with the Puyallup Tribe of Indians. She travels on and off the Puyallup Indian Reservation on state and county roads. She only stays a short time. She received no special benefit of any kind from any of the Defendants resulting from her patronage and purchase of cigarettes from Paul M. Matheson's

Milton store. Amber Lanphere, and those similarly situated, seeks the return of the taxes she or they paid on the cigarette purchases and a temporary and permanent injunction against Defendants permitting her and those similarly situated, to purchase cigarettes from Paul M. Matheson's Milton store or an Indian retailer tribal store without Puyallup Tribe cigarette tax.

VI. ALLEGATIONS IN SUPPORT OF CLAIMS FOR RELIEF

A. First Claim - Damages For Illegal Price Fixing.

34. Defendants are attempting to cause an economic blockade to aid state taxation purposes, to cause customers, wholesalers and manufacturers not to deal with Plaintiffs and to boycott Plaintiff Matheson's and those similarly-situated businesses. Defendants are attempting to control the market and exert complete market power in the region. These actions and proposed actions violate the federal Sherman Act, 15 U.S.C. §§ 1-26, the Indian Commerce and Interstate Commerce Acts and are illegal.

35. Defendants have entered into a conspiracy and sought to monopolize cigarette retail prices by regulating Indian businesses and Indian tribes to impose the same or similar amounts of cigarette tax. RCW 43.06.460. The Puyallup contract is an illegal special legislative contract allowing the Puyallup tribal retailers to charge approximately 87% of the

State cigarette tax creating a price fixing scheme allowing less tax than other contracting tribes. The two contracts by the state agencies with the Puyallup Tribe also violates Article 1 § 10 of the U.S. Constitution prohibiting import duties and contracts with states or foreign powers. The Defendants are seeking to control all wholesalers and manufacturers who do not do business in Washington to be certified by the State to stamp, collect tax and be totally regulated by the State. The State of Washington and the Puyallup tribe of Indians each sell cigarettes at retail. The attempted conduct is an illegal monopoly by the State and tribe as competitors with Plaintiff Paul M. Matheson and similarly-situated businesses to control sales of retail products. Damages to Plaintiff Paul M. Matheson and those similarly situated will be in the millions of dollars.

36. The State of Washington and the Puyallup Tribe cannot enter into a contract that interferes with Plaintiff Paul M. Matheson's or other similarly situated retailers business for at least the following reasons:

A. Only the federal government can make treaties with Indian tribes. The proposed contract is a treaty. Indian tribes are subject to exclusive uniform regulation by Congress. Art. 1 § 8 cl.2. Congress has not expressly authorized either the State or the Tribe to enter into the contract.

composed of Thurston, Pierce, King, and Snohomish counties within Western Washington. The revenue sharing by the Tribe with the State violates the commerce clause.

G. The attempt by the State and Puyallup Tribe to contract violate the State Civil Rights Act, RCW 49.60.030 and 77.110.040; the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 and 42 U.S.C. §§ 1981-1983.

H. The proposed contract violates the Sherman Anti-Trust Act (15 U.S.C. § 1 and § 14).

I. Only Congress, not the State, can enact or make agreements with Indian tribes and states regarding interstate or Indian commerce. Washington's Constitution Article XXVI, Second states "Said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." RCW 37.12.010 codified public law 280 and states that "But such assumption of jurisdiction shall not apply to Indians when on their tribal lands." RCW 37.12.060 states "nothing in this chapter shall authorize . . . taxation of . . . personal property . . . belonging to any Indian . . . or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty."

issue of State taxation to preserve the Tribe's gaming compact with the State. The Tribe had to execute the contract on a take it or leave it basis and was presented by the State Defendants action from making Plaintiff Paul M. Matheson and other tribal retailers from being informed or to derive any payments from the contract. The contract is void as it is an adhesion contract. Therefore, all taxes collected on the alternative 30% of the tax collected and paid by the State must be refunded.

E. Fifth Claim - The Tribe Cannot Tax The Non-Indian Purchaser.

69. Plaintiffs reallege and incorporate all preceding paragraphs of the First, Second, Third and Fourth Claims by this reference.

70. The contract and statutory enactment places the incidence of tax on the retail purchasers at Plaintiff Paul M. Matheson's retail store and those similarly situated. The tax is simply added on to the sales price of the tribal retailer's prepackaged products purchased at wholesale. The tax is imposed directly in the purchaser of the tribal retailer's goods. The Puyallup Tribe of Indians cannot tax Plaintiff Amber Lanphere and other non-Indian purchasers from Plaintiff Paul M. Matheson's retail store and those similarly situated, as the Puyallup Tribe has no consensual relationship with Plaintiff Paul M. Matheson's or other tribal retailer's

purchasers at retail. The tax is not authorized by Congress. The purchases by non-Puyallup Indian Tribe members or residents does not significantly involve tribal services as the purchasers receive no more than any other traveler in receipt of police, fire or medical services. The purchases do not interfere with the Puyallup Tribe's political integrity, economic security or health or welfare. Since the incidence of tax is on the purchaser, the Puyallup Tribe has no authority to tax non-tribal enrolled Indians who do not live on the Puyallup reservation. The majority of Plaintiff Paul M. Matheson's and those similarly situated retailers' customers are non-resident, non-members of the Puyallup Tribe, therefore a large proportion of the tax is invalid and must be repaid to Plaintiff Matheson and similarly situated retailers or to their customers. If all customers cannot be located, then the tax not paid must be paid to the retailers. The amounts paid by Plaintiff Amber Lanphere individually and those similarly situated to Defendants by the retailers must be refunded to them as they have no contractual or consensual relationship with the Tribe. The tax is a pass on and collect tax. The amounts paid by them and conveyed to the State must be refunded by the State as it has no extraterritorial authority to tax Plaintiff Amber Lanphere or those similarly situated.

VII.

PRAYER FOR RELIEF

A. **Relief Requested By Plaintiff Paul M. Matheson and Those Similarly Situated.**

WHEREFORE, Plaintiff Paul M. Matheson and those similarly situated tribal retailers pray for judgment and relief as follows:

A. For refunds of tribal taxes paid by Paul M. Matheson and those similarly situated retailers from May, 2005 to date of the judgment, be paid as a refund to the retailers into a common fund;

B. In the alternative, that the 30% of the tax collected by the Puyallup Tribe and remitted to the State of Washington be refunded to him and/or similarly situated retailers.

C. That the Court determine and declare that the contract of the Puyallup Tribe and the State of Washington attached hereto be declared void from its inception and unenforceable as applied to cigarettes transported, distributed, received or sold by Plaintiff Paul M. Matheson's and other similarly situated retail businesses located within the exterior boundaries of the Puyallup Reservation;

D. That the Court holds any contract signed by the Defendant Tribe and State invalid and ineffective against Plaintiff Paul M. Matheson and other similarly situated retailers;

E. That the Court temporarily, preliminarily and permanently enjoin the prospective application of the cigarette contract preventing the Puyallup Tribe from enforcing any provision of the agreement or statutes or contracting in any way with the State regarding a cigarette tax on any cigarettes to be received or sold by Indian-owned retail businesses within the exterior boundaries of the Puyallup Reservation;

F. For orders of preliminary and permanent injunction, restraining and enjoining the Puyallup Tribe, its directors, employees and agents, and each of them, their agents, employees and all persons acting now or in the future in concert with them, from exchanging any of Matheson's or similarly situated retailers from licensing, inventory or other information, interfering in any way with Plaintiff Paul M. Matheson's right or any similarly situated retailer's right to purchase cigarettes from any distributor or totally free from any certification or interference including the right to transport, buy or sell any items at retail at Plaintiff Paul M. Matheson's store or any similarly situated retailer, located on trust land on the Puyallup Indian

Reservation, including the right to purchase or sell cigarettes or other tobacco items free of reciprocal tax or state interference of any kind;

G. For an order declaring that Plaintiff Paul M. Matheson and any Indian businesses selling cigarettes on the Puyallup Indian Reservation be a party to negotiations, be notified of all proceedings and be allowed to take part in meetings;

H. For a declaration that any agreement or contract entered into by the Tribe and State is invalid when attempted to be imposed or any way applied to Plaintiff Paul M. Matheson or other Puyallup tribal cigarette retailers;

I. For a temporary and permanent injunction enjoining the Tribe, the employees and agents and all persons acting in concert with the Puyallup Tribe now or in the future from conspiring to interfere with Plaintiff Paul M. Matheson's or any tribal retailer's right to sell any item of trade, including cigarettes, free of tax;

J. For an order restraining the Tribe from monopolizing or balkanizing with the state of Washington or others to protect cigarette sales or affect Indian commerce in the State of Washington;

K. For a refund of all payments into the Master Settlement funds from Puyallup Indian retailer's sales;

L. For damages against Defendant Puyallup Tribe and those acting in concert with Defendants for violation of the laws restraining trade and commerce by conspiring to give military and other federal instrumentalities, state facilities leased under percentage leases, non-Indian convenience stores and others, an unfair and competitive advantage thereby destroying and subjecting Plaintiff Paul M. Matheson's or similarly situated retailer's competitive right to unfair disadvantage to engage in Indian business. For damages for negligence in implementing the tribal tax and torturous interference with Paul M. Matheson's or other retailers similarly situated business;

M. For an award of prejudgment interest on the amounts wrongfully collected by the Defendant Puyallup Tribe;

N. For attorney's fees and costs of this suit; and

O. For such other relief in law and equity as this Court deems proper.

B. Relief Requested By Plaintiff Amber Lanphere and Those Similarly Situated.

Plaintiff Amber Lanphere individually and on behalf of others similarly situated, prays that the Court grant the following relief:

A. That all the Puyallup tribal tax charged to Plaintiff Amber Lanphere at the point of purchase on the Puyallup Indian Reservation be refunded to Plaintiff and Puyallup tribal taxes paid by all purchasers from purchases made by any similarly situated person from any Puyallup Tribe retailer for cigarettes from May 2005 to date of judgment be refunded and deposited into a common fund for disbursement to validly confirmed purchasers;

B. For a refund of the additional price Plaintiff Amber Lanphere and others similarly situated, had to pay for cigarettes due to the MSA premium.

C. For Plaintiffs' reasonable costs and attorney fees in creating a common fund and in contesting the unlawful action of the Puyallup Tribe; and

D. For prejudgment interest on said payments;

E. For attorneys' fees and other costs of this suit; and

F. For such other and further relief in law and equity as this Court may deem proper.

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IN THE PUYALLUP TRIBAL COURT
PUYALLUP INDIAN RESERVATION
TACOMA, WASHINGTON

MATHESON, Paul M., et al.,

Plaintiffs,

vs.

WRIGHT, Chad R., et al.,

Defendants.

Case No. PUY-CV-06-974

ORDER OF DISMISSAL

The plaintiffs originally brought this same action, involving the same parties, in the Superior Court in and for the County of Thurston, Washington. See, ***Matheson v. Gregoire***, No. 05-2-00892-7. Wherein, the Superior Court ruled that the suit was barred by the sovereign immunity of the Puyallup Tribe.

This matter was set for a hearing on the motions for January 28, 2009. This court deems a hearing unnecessary and hereby vacates that hearing and enters this order addressing whether or not the court has jurisdiction to entertain this action. On or about October 20, 2006, the defendants, by and through their attorney, filed a Motion to Dismiss with a Memorandum in Support Thereof. The plaintiffs have filed a Response to defendants' Motion to Dismiss and defendants filed a Reply.

Herein, the fundamental issue before the court is the sovereign immunity of the Puyallup Tribe, its agency and official relative to whether this court has jurisdiction to entertain this suit. The court finds that the issue has been fully briefed by the parties.

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If this matter was initially filed in this court, perhaps a hearing would be more appropriate but the issue of sovereign immunity has been fully briefed and argued in the ***Gregoire*** case and now the plaintiffs want another bite at the apple. Upon a thorough review of the filings with this court, this court finds that nothing has changed, at law or in fact, since the ***Gregoire*** decision to warrant additional oral arguments on the sovereign immunity of the Puyallup Tribe, its agency or official.

In the first instance, if this court has jurisdiction, the plaintiffs would be precluded from re-litigating the sovereign immunity issue by the doctrine of ***collateral estoppel***. See, ***Montana v. United States***, 440 U.S. 147, 153-154, 99 S.Ct. 970, 59 L. Ed. 2d 210 (1979). However, this court would not address collateral estoppel or res judicata until it initially determines whether or not this court has jurisdiction to entertain this suit.

Tribal Sovereign Immunity

It is axiomatic, that Indian tribes are immune from suit absent an expressed and unequivocal waiver of their "common law" sovereign immunity. ***Santa Clara Pueblo v. Martinez***, 436 U.S 49, 98 S.Ct. 1670, 56 L. Ed. 2d 106 (1978); ***Lane v. Pena***, 518 U.S. 187, 116 S.Ct. 2092, 135 L. Ed. 2d 486 (1996); ***Linneen v. Gila River Indian Community***, 276 F. 3d 489, (9th Cir. 2002), ***cert. denied***, 2002 U.S. Lexis 4705 (June 24, 2002).

In this matter, the court does not find an expressed and unequivocal waiver of immunity by the Puyallup Tribe, its agency or official. At all times relevant, the agency, Cigarette Compact Department, and official, Director Chad R. Wright, were caring out the official acts of the Tax Department which are within the scope of their authority and therefore immune from suit. See, ***Imperial Granite Co. v. Pala Band of Mission Indians***, 940 F. 2d 1269 (9th Cir. 1991); ***Cook v. Avi Casino Enterprises***, 548 F. 3d 718 (9th Cir. 2008).

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WHEREFORE, the court finds, based upon the authorities and reasons set forth herein, that the Puyallup Tribe of Indians, its agency and official possess common law sovereign immunity; and there has not been a waiver of that immunity nor has the Puyallup Tribe expressly consented to this action, and

FOR GOOD CAUSE, IT IS HEREBY ORDERED, that this matter shall be dismissed forthwith for the reasons and authorities as set forth herein.

SO ORDERED this 16th day of January, 2009.

Francis X. Lame Bull, Judge

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Puyallup Tribal Court
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IN THE PUYALLUP TRIBAL COURT OF APPEALS
PUYALLUP INDIAN RESERVATION
TACOMA, WASHINGTON

Paul M. Matheson and Amber Lanphere,	**NO. PUY-CV- 06-974**
Plaintiffs/Appellants,	
v.	**OPINION**
Chad R. Wright, Cigarette Tax Department, and the Puyallup Tribe of Indians,	
Defendants/Appellees.	

Before: Robert J. Miller, Chief Judge,
Gregory M. Silverman, Associate Judge,
Suzanne Ojibway Townsend, Associate Judge.

Appearances: Robert E. Kovacevich, Attorney for Appellants Paul M. Matheson and Amber Lanphere; John Howard Bell, Attorney for Appellees Puyallup Tribe of Indians and Chad R. Wright.

Oral Argument Date: February 25, 2011.

Silverman, J.

INTRODUCTION

Appellant Mr. Paul Matheson, an enrolled member of the Puyallup Tribe of Indians and a Tribally-licensed retailer of cigarettes on Tribal land, and appellant Ms. Amber Lanphere, a non-Indian purchaser of cigarettes from Mr. Matheson, filed the present action against the Puyallup Tribe of Indians ("the Tribe") and Mr. Chad Wright, the Cigarette Tax Administrator of the Tribe, claiming, *inter alia*, (1) that the Tribe may not legally impose a cigarette tax on non-Indian purchasers, (2) that the Cigarette Tax Agreement ("the Agreement") entered into by the Tribe and the State of Washington ("the State") is illegal, (3) that the Tribe may not legally require Indian cigarette retailers to purchase cigarettes only from wholesalers who comply with Washington State law and the State "Master Settlement Agreement", and (4) that the Tribe may not legally set a minimum price for the sale of cigarettes by Puyallup Indian retailers. The remedies sought by the appellants through this lawsuit include damages, prospective injunctive relief and declaratory judgments. The court below dismissed the lawsuit on the grounds that both the Tribe and Mr. Wright were immune from suit under the doctrine of tribal sovereign

immunity. Appellants then filed the present appeal, arguing that it was error for the court below to dismiss the lawsuit.

THE TRIBE'S ASSERTION OF SOVEREIGN IMMUNITY

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 759 (1998), the United States Supreme Court reaffirmed its prior holdings that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. The Court also noted that "our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred"—whether on or off the reservation—and without drawing "a distinction between governmental and commercial activities of a tribe." In addition, the United States Court of Appeals for the Ninth Circuit has recognized that "when tribal officials act in their official capacity and within the scope of their authority, they are immune" from suit as well. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984).

The Puyallup Tribe of Indians is a federally recognized Indian tribe. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170n.7 (1977)(The Puyallup Tribe of Indians "is clearly recognized as such by the United States."); *The Department of Game et al., Respondents, v. The Puyallup Tribe, Inc., et al.*, 70 Wn.2d 245, 422 P.2d 754 (1967)("[T]he United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll."). As such, the Tribe enjoys a general immunity from suit under the doctrine of tribal sovereign immunity.

If, then, the lower court committed error in dismissing the action, it must be the case that either the Congress of the United States has abrogated an Indian tribe's sovereign immunity in lawsuits of this kind or the Tribe itself has consented to be sued by waiving its immunity. Regarding the former alternative, the Appellants have not cited to this Court, nor is the Court aware of, any federal statute divesting the Tribe of sovereign immunity from the present lawsuit. Quite to the contrary, existing Supreme Court precedent upholding tribal sovereign immunity in cases involving taxation of cigarettes on tribal lands suggests that no such federal statutes exist. In *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991), for example, the Supreme Court sustained tribal sovereign immunity from a tax enforcement action brought by the State of Oklahoma demanding payment of state taxes on cigarette sales to non-Indian purchasers in Indian country.

In the absence of a federal statute abrogating a tribe's sovereign immunity, a tribe is immune from suit unless it consents to be sued by waiving its immunity. A tribe "can waive immunity by tribal law or by contract as long as it is 'clearly' done." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05 (2009). It is settled law that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), citing *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. King*, 395 U.S. 1, 4 (1969). The Appellants have not cited to this Court, nor is this Court aware of, any Tribal law through which the Tribe has waived its immunity from the present suit. The Appellants argue instead that the Tribe waived its immunity from suit by entering into a cigarette tax agreement with the State of Washington under which it collects Tribal cigarette

taxes in lieu of state cigarette taxes and shares a certain percentage of that tax revenue with the State. Part I, Section 1 of the Agreement, however, clearly states that "[n]othing in this Agreement shall be construed as a waiver, in whole or in part, of either party's sovereign immunity." Far from waiving its immunity from suit, this language unequivocally expresses the Tribe's intent not to do so. Accordingly, we find that the Tribe did not waive its sovereign immunity.

Appellants also argue that even if the Tribe is immune from a suit for damages, such immunity would not bar the present action because Appellants seek prospective equitable relief, namely injunctions and declaratory judgments. This argument, however, is unpersuasive. The legal principles relevant to assessing this argument were clearly set forth by the United States Supreme Court in *United States v. United States Fidelity & Guaranty Co. et al.*, 309 U.S. 506, 514 (1940). Therein, the Court noted that "[c]onsent alone gives jurisdiction to adjudge against a sovereign" and "[a]bsent that consent, the attempted exercise of judicial power is void." Applying these principles to the issue before us, we note that a court's issuance of an injunction or a declaratory judgment is no less an exercise of judicial power than an award of damages. Thus, a court may neither enjoin a sovereign, nor adjudge against a sovereign through a declaratory judgment, without that sovereign's consent.

This conclusion is buttressed by a consideration of Puyallup Tribal law. While the Puyallup Tribal Code lacks any express statement of the scope and extent of the Tribe's sovereign immunity, we may infer the Tribe's understanding of the scope of its sovereign immunity from various provisions in the Tribal Code in which the Tribe waives its immunity from suit in specific circumstances. For example, the Tribe provides a limited waiver of its immunity from a suit in the Tribal Tort Claims Act. *See* PTC, § 4.12.030. From this provision, we may infer that Tribe views itself as immune from suits for damages sounding in tort. If the Tribe did not view itself as immune from suits for damages sounding in tort, there would be no need to waive its immunity in this context. Confirming this analysis, the language introducing this section states that "[t]he Tribe's immunity from suit shall remain in full force and effect except to the extent that it is waived by this Act." Moreover, section 2.12.010, setting forth the purpose of the Tribal Tort Claims Act, states that "[t]he Tribal Council declares that the purpose of this Act is to establish a limited waiver of the Tribe's sovereign immunity, and to impose strict procedures under which a person may file an action or claim for monetary damages against the Tribe, its agents, employees, and officers."

The Tribal Tort Claims Act is not the only Tribal law that imposes strict procedures under which a person may file an action against the Tribe. The Puyallup Administrative Procedure Act does so as well. For example, sections 2.08.100 and 2.08.190 of the Puyallup Code impose strict procedures under which a person may file a declaratory judgment action against the Tribe challenging the validity of a rule, including an order, directive or regulation of general applicability approved by the Tribal Council the violation of which subjects a person to a civil penalty or other civil administrative sanction.[1] Section 2.08.100 clearly states that unless these procedures are strictly followed, the declaratory judgment action cannot be maintained.[2]

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[1] Section 2.08.100 states, in relevant part, that "[t]he validity of any rule may be determined upon petition for a declaratory judgment addressed to the Puyallup Tribal Court when it is alleged that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair, the legal rights or privileges of the petitioner."

[2] Section 2.08.100 states, in relevant part, that "the Tribal Court shall not have jurisdiction to hear any such petition for declaratory judgment, and no declaratory judgment may be rendered, unless the petitioner has first requested in writing that the sponsoring department pass upon the validity of the rule in question."

While these sections are not denominated waivers of sovereign immunity, if the Tribe did not view itself as generally immune from declaratory judgment actions, it could not and would not assert in section 2.08.190 that "[a] person aggrieved by . . . promulgation of a rule may not use any other procedure to obtain judicial review of such . . . final rule, *even though another procedure is provided elsewhere by a . . . Tribal law of general application*." PTC § 2.08.190 (emphasis added). Accordingly, from these sections of the Puyallup Administrative Procedure Act, we may infer that the Tribe understands its sovereign immunity as extending to equitable actions and remedies.

Concluding that sovereign immunity extends to equitable actions and remedies also makes sense from a public policy perspective. Holding that a sovereign is subject to a court's power to impose equitable relief would threaten to disrupt basic governmental functions and the provision of essential governmental services. Imagine a court issues an injunction enjoining members of the Tribal Council from meeting together. If the members of the Tribal Council were subject to the court's power to issue injunctive relief, then the Tribal Council could not convene a meeting in order to address important Tribal matters. A central governmental function would be disrupted. Similarly, imagine a court issues an injunction enjoining the Tribal Tax Administrator from collecting certain Tribal taxes. If a Tribal official acting within the scope of his or her authority were subject to the court's power to issue injunctive relief, then the Tribal Tax Administrator would have to forego collecting those taxes. If those taxes were an important source of revenue for the Tribe, then as a result of that injunction, the Tribe's revenue would be reduced and essential governmental services might have to be cut due to a lack of funding. For these reasons, *inter alia*, it is clear that a sovereign's immunity from suit must extend to equitable actions and remedies.

This understanding of the scope and extent of tribal sovereign immunity parallels the federal government's understanding of the scope and extent of federal sovereign immunity. The United States Supreme Court has held that federal sovereign immunity extends to suits seeking injunctive relief, *Larson, War Assets Administrator and Surplus Property Administrator v. Domestic and Foreign Commerce Corp.*, 337 U.S. 687-689 (1949), and to declaratory judgment actions, *id.* at 689 n.9. Moreover, federal courts, including the United States Supreme Court and the Court of Appeals for the Ninth Circuit, have held repeatedly that tribal sovereign immunity extends to actions for injunctive relief and declaratory judgments. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977) (holding that the Puyallup Tribe was immune from a state court action seeking an injunction enjoining off-reservation fishing allegedly in violation of state law); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (holding Indian tribe immune from a counterclaim by the state seeking an injunction requiring the collection of a tax on nonmembers); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (holding that a tribe's sovereign "immunity extends to suits for declaratory and injunctive relief."); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) (suit for declaratory and injunctive relief, as well as damages, barred by tribal sovereign immunity); *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir.), rev'd. in part on other grounds, 474 U.S. 9 (1985) (tribal "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation").

The foregoing establishes that the court below correctly dismissed Appellants' claims for damages and injunctive relief. It remains to consider, however, whether Appellants' claim for a declaratory judgment falls within the limited waiver for declaratory judgment actions under the Puyallup Administrative Procedure Act. Under this Act, "[t]he validity of any rule may be

determined upon petition for a declaratory judgment addressed to the Puyallup Tribal Court." PTC § 2.08.100. A "rule" is defined as

> Any order, directive or regulation of general applicability approved by the Tribal Council:
>
> (A) The violation of which subjects a person to a civil penalty or other civil administrative sanction;
> (B) Which establishes, alters or revokes any procedure, practice or requirement relating to department hearings;
> (C) Which establishes, alters or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law;
> (D) Which establishes, alters or revokes any qualifications or standards for the issuance, suspension or revocation of licenses to pursue any commercial activity.

PTC § 2.08.020(k)(1). In their Complaint, Appellants seek five declaratory judgments. All five of the declaratory judgments requested concern the validity and lawfulness of various contracts and agreements, including a Contract, dated April 20, 2005, between the Governor of the State of Washington and the Puyallup Tribe, a Memorandum of Agreement, dated May 3, 2005, between the Tribe and the Washington State Liquor Control Board, and a Master Settlement Agreement, dated November 23, 1998, between tobacco manufacturers, leading tobacco product manufacturers, and 46 states, including the State of Washington. None of these contracts and agreements constitutes a "rule" within the meaning of the Puyallup Administrative Procedure Act. Accordingly, none of the claims for declaratory judgment falls within the limited waiver of sovereign immunity under that Act.

For the foregoing reasons, we conclude that Appellants' attempt to rely on their prayer for equitable remedies in order to pierce the Tribe's sovereign immunity must fail[3] and, *a fortiori*, the lower court did not err in dismissing the action against the Tribe on the grounds that it is immune from suit under the doctrine of tribal sovereign immunity. It remains only to consider whether this immunity extends to Appellee Mr. Chad Wright, the Cigarette Tax Administrator of the Tribe.

MR. WRIGHT'S ASSERTION OF SOVEREIGN IMMUNITY

Tribal sovereign immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1013 n. 8 (9th Cir. 1981); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). A plaintiff cannot "avoid the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984). However, the protection provided to tribal officials under the doctrine of tribal sovereign immunity is not absolute. The Ninth Circuit has extended the doctrine of *Ex Parte Young* to tribal officials as well: "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers

[3] For a different reason, the same argument failed to persuade the Court of Appeals of Washington, Division Two. In *Matheson v. Gregoire*, 139 Wn. App. 624, 632, 161 P.3d 486, 491 (2007), the court rejected this argument claiming that "[b]ecause Matheson requested both equitable relief and damages, sovereign immunity protects the Tribe from his suit, even" if "tribal immunity does not protect tribes from declaratory and injunctive relief."

allegedly acting in violation of federal law." *Burlington N. R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation*, 924 F.2d 899 (9th Cir. 1991), *overruled on other grounds by Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000); *see also Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (1996). As the United States Court of Appeals for the Tenth Circuit has noted,

> The situation is different, however, when the [tribal] law under which the official acted is being questioned. . . . If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess.

Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572, 574 (10th Cir. 1984). For example, "tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect." *Blackfeet Tribe*, 725 F.2d at 901-02.

Appellants argue that Mr. Chad Wright in his official role as Tribal Tax Administrator is acting in violation of federal law when he administers the Tribal cigarette tax imposed on cigarette sales by Indian retailers to non-Indian purchasers on Tribal lands. However, Appellants' argument that Mr. Wright is acting in violation of federal law does not bear scrutiny. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980), the United States Supreme Court stated that "[t]he power to tax transactions occurring on trust lands . . . is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." The Supreme Court then went on to hold that "federal law to date has not worked a divestiture of Indian taxing power" and that a tribe's power to tax cigarettes is not implicitly divested by virtue of the tribes' dependent status. *Id.* at 153-54. In reaching these conclusions, the Supreme Court stated that "we can see no overriding federal interest that would necessarily be frustrated by tribal taxation." *Id.* at 154. To the contrary, referring back to the 19th and early 20th century, the Court noted that

> Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest, 17 *Op. Atty. Gen.* 134 (1881); 7 *Op. Atty. Gen.* 174 (1855). [*153] including jurisdiction to tax, 23 *Op. Atty. Gen.* 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

Id. at 153. The Court then quoted the Solicitor of the Department of the Interior from 1934 claiming that

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Id. Moreover, the Court continued, "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity[,] *Buster v. Wright*, 135 F. 947, 950 (CA8 1905), appeal dism'd, 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (CA8 1956)" and "[n]o federal statute cited to us shows any congressional departure from this view." *Id.* Indeed, the Court opined that the

> authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476.

Id. In other words, contrary to the claims of the Appellants, all three branches of the federal government have recognized that Indian tribes have the power to tax economic activities involving non-Indians in Indian country. We are, therefore, led ineluctably to the conclusion that Mr. Chad Wright is not acting in violation of federal law when performing his official duties as the Cigarette Tax Administrator of the Tribe and administering the Tribal cigarette tax imposed on cigarette sales to non-Indians on Tribal lands.

For the reasons set forth above, we conclude that the lower court did not err in dismissing the action against Mr. Wright on the grounds that he is immune from suit under the doctrine of tribal sovereign immunity. At all times relevant to the present action, Mr. Chad Wright was a tribal official acting in his official capacity, within the scope of his authority, and not in violation of federal law.

APPELLANTS' PENDING MOTIONS

Finally, we must take up four pending motions by the Appellants. On February 17, 2011, Appellants filed a motion entitled "Plaintiffs' Combined Motion for Appointment of Special Master to Compel Answers and to Continue Hearing Set for February 25, 2011 Until Motion to Compel is Decided." In the Court's "Confirmation that Oral Argument will be Heard on February 25, 2011," dated February 18, 2011, we wrote in response to this motion that "[t]he caption of this pleading directs Plaintiffs' Combined Motion to the Tribal Court of the Puyallup Tribe of Indians of the Puyallup Indian Reservation. Despite its reference to the February 25, 2011 oral argument scheduled before this Court, Plaintiffs' Combined Motion is not directed to the Court of Appeals." The Appellants' second pending motion, filed on November 9, 2010 and entitled "Plaintiffs' Motion to Reconsider Order Denying Plaintiffs' Amendment to their Complaint," also appeared from its caption to be directed to the Tribal Court and not the Court of Appeals. Accordingly, we took no action with regard to either of them. At oral argument, however, the Appellants clarified that notwithstanding the erroneous caption on the motion, they were filing both motions before this Court. At that time, we reserved ruling on the motions. We now rule on both. Neither Plaintiffs' Combined Motion nor Plaintiffs' Motion to Reconsider raises any issues that Appellants have not already raised in prior filings, including Appellants' November 9, 2010 Motion to Reconsider Order Denying Plaintiffs' Amendment to Their Complaint and Appellants' May 28, 2009 Motion to Recuse Appellate Panel. The issues set forth in Plaintiffs' Combined Motion and Plaintiffs' Motion to Reconsider have already been addressed by various Orders of the Court of Appeals, including our January 5, 2011 Order on Oral Argument, which expressly directed the parties to present argument on Appellants' motion to amend their complaint. For these reasons, Plaintiffs' Combined Motion and Plaintiffs' Motion to Reconsider are DENIED.

The third motion pending before this Court was made at oral argument and requests that that appellate panel of judges recuse itself. Like Plaintiffs' Combined Motion and Plaintiffs' Motion to Reconsider, this motion restates an earlier motion already ruled upon by this Court. On May 28, 2009, Appellants filed a motion entitled "Motion to Recuse Appellate Panel

Including Judge Robert J. Miller." On June 29, 2009, this Court denied this motion in an order entitled "Order Denying Appellants' Motions to Recuse Panel and to Argue Additional Issues." For the same reasons stated in that order. Appellant's pending motion to recuse appellate panel is DENIED.

The fourth and last motion pending before this Court was filed on January 7, 2011 and is entitled "Plaintiffs' Motion for Temporary Injunction to Relieve Plaintiff Paul Matheson from Requirements Imposed by Defendant on Plaintiff to Purchase Cigarettes only from State of Washington Licensed Wholesalers or State Certified Wholesalers and also from the Requirement that Plaintiff Paul Matheson Must Sell Cigarettes to Retail Customers at a Minimum Price that Includes Defendants' Tribal Tax Added to the Wholesale Price Paid by Matheson." For the reasons stated earlier in this opinion, under the doctrine of tribal sovereign immunity both the Tribe and Mr. Chad Wright enjoy immunity from the injunctions sought by the Appellants. Moreover, as this motion seeks a temporary injunction and our decision issues a final judgment in this case, the motion is now moot. Accordingly, Plaintiffs' Motion for Temporary Injunction is DENIED.

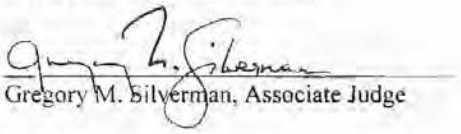
The judgment of the Puyallup Tribal Court is, accordingly.

Affirmed.

IT IS SO ORDERED. this 23rd day of April, 2011.

For the panel:

Robert J. Miller, Chief Judge
Randy Doucet, Associate Judge



Gregory M. Silverman, Associate Judge

CERTIFICATE OF SERVICE

I certify that on March 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Robert E. Kovacevich, attorney for the Appellants, and to James H. Jordan, attorney for Appellee Chad Wright.

John Howard Bell

John Howard Bell
Attorney for Appellees Puyallup Tribe and Herman Dillon, Sr.