

10-35776

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

CONFEDERATED TRIBES AND BANDS OF THE
YAKAMA INDIAN NATION
Plaintiff-Appellant

v.

CHRISTINE O. GREGOIRE, Governor of the State of Washington;
CINDI HOLMSTROM, Director of the Washington State Department of Revenue;
LESLIE CUSHMAN, Deputy Director of the Washington State Department of
Revenue; STUART THRONSON, Assistant Director of Special Programs of the
Washington State Department of Revenue; and PAT PARMER, Chief of
Enforcement and Education Division of the Washington State Liquor Control
Board,
Defendants-Appellees.

ON APPEAL FROM ORDERS AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
Case No. 2:08-cv-03056-RHW
The Honorable Robert H. Whaley, Senior District Judge

**REPLY BRIEF OF PLAINTIFF – APPELLANT
CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA INDIAN NATION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY v

I. Introduction..... 1

II. The Legislature May Not *Ipsa Facto* Shift the Legal Incidence of the Tax through Its Statement of Intent 2

III. The Operative Provisions of the Scheme Impose the Legal Incidence of the Tax on Retailers, Whether Indian or Non-Indian..... 12

IV. The *Colville* Decision Does Not Control Because the *Colville* Court Did Not Consider the Scheme or Question Presented Here 23

V. The District Court’s Other Orders Should be Reversed and the Balance of Its Order on Summary Judgment Should Be Vacated..... 28

VI. Conclusion 29

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

CASES

Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767 (9th Cir. 2003)25

Carpenter v. Shaw, 280 U.S. 363 (1930)11

Castillo v. United States, 530 U.S. 120 (2000)25

C.I.R. v. Sunnen, 333 U.S. 591 (1948)25

Coeur d’Alene Tribe of Idaho v. Hammond, 384 F.3d 674 (9th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005)*passim*

Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978), *aff’d in part and rev’d in part*, 447 U.S. 134 (1980)2, 23, 24, 26

Confederated Tribes of the Colville Indian Reservation v. Washington, 447 U.S. 134 (1980)26, 27, 28

Fain v. Chapman, 569 P.2d 1135 (Wash. 1977)4

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 (1941)14, 15

Granville v. Minneapolis Public Sch., Special Sch. Dist. No. 1, 732 N.W.2d 201 (Minn. 2007)8

Harris v. United States, 536 U.S. 545 (2002)25

In re A.G., 186 Cal. App. 4th 1454 (2010)8

Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954)6

Lawrence v. State Tax Comm’n of Miss., 286 U.S. 276 (1932)11

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976)27

Oklahoma Tax Comm’n v. Chickasaw Nation, 515 U.S. 450 (1995)*passim*

Oklahoma Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114 (1993)11

Smith v. Guest, 16 A.3d 920 (Del. 2011)8

State ex rel. Town of Mercer Island v. City of Mercer Island,
361 P.2d 369 (Wash. 1961)8

Washington v. Norris, 236 P.3d 225 (Wash. Ct. App. 2010)4

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995)24

United States v. O’Brien, ___ U.S. ___, 130 S. Ct. 2169 (2010)25, 26

United States v. State Tax Comm’n of Miss., 421 U.S. 599 (1975)14, 15

STATUTES

Idaho Code § 63-2402(1)5

Idaho Code § 63-2421(1) (2004)17

N.Y. Tax Law § 472(1)19

Or. Rev. Stat. § 323.085(2)15

Wash. Rev. Code § 1.04.0208

Wash. Rev. Code § 1.04.0218

Wash. Rev. Code § 19.91.30016

Wash. Rev. Code § 82.08.05015

Wash. Rev. Code § 82.24.020(2)15

Wash. Rev. Code § 82.24.080(2)5, 12, 22, 28

Wash. Rev. Code § 82.24.080(3)9
Wash. Rev. Code § 82.24.21020
Wash. Rev. Code § 82.24.260(1)10
Wash. Rev. Code § 82.24.260(3)16
Wash. Rev. Code § 82.24.280(1)9
Wash. Rev. Code § 82.24.280(3)9
Wash. Rev. Code § 82.24.9003, 4

REGULATIONS

Wash. Admin. Code § 458-20-186(101)(c)16
Wash. Admin. Code § 458-20-186(602)(g)17

OTHER AUTHORITIES

Supremacy Clause of the United States Constitution, art. VI, cl. 24

GLOSSARY

In discussing factual and historical matters, litigation positions, and arguments in this brief, the terms “Nation” and “Yakama Nation” refer to Plaintiff-Appellant the Confederated Tribes and Bands of the Yakama Indian Nation. In discussing litigation positions and arguments, the term “State” refers to Defendants-Appellees Christine Gregoire, Cindi Holmstrom, Leslie Cushman, Stuart Thronson, and Pat Parmer. In discussing factual and historical matters, the term “State” refers to the Washington State Legislature (“Legislature”) and to the Washington State Department of Revenue (“Department”), unless otherwise indicated. The term “the State’s cigarette tax scheme” or “the State’s scheme” refers to the Revised Code of Washington §§ 82.24.010-.900 (West, Westlaw through 2011 legislation) and to the Department’s rule implementing those statutes, Washington Administrative Code § 458-20-186 (West, Westlaw through amendments adopted on Dec. 15, 2010).

In this brief, the Yakama Nation cites to pages of its opening brief as “Yakama Br. at ___” and to pages of the opening brief of the State Defendants-Appellees as “State Br. at ___.”

I. Introduction

The parties offer the Court a stark choice as to how to answer the question presented in this case—who in the chain of distribution bears the legal incidence of the State’s cigarette tax? The Yakama Nation urges the Court to focus on the scheme’s operative provisions under the standards set forth by the Supreme Court in *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450 (1995), and by this Court in *Coeur d’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005), and to look beyond the Legislature’s statement of intent where it conflicts with the manner in which the scheme actually operates. As set forth in the Nation’s opening brief, Yakama Br. at 22-41, and as discussed below, this analysis demonstrates that cigarette retailers, whether Indian or non-Indian, are necessarily liable for the tax and accordingly bear its legal incidence. The tax is therefore invalid as applied to Yakama retailers.

The State, by contrast, urges the Court to focus on the Legislature’s statement of intent, which purports to shift the incidence of the tax when it falls on a party that is tax-exempt, such as Indian retailers. The State’s answer to the question presented is thus—“It depends.” State Br. at 8. The operative provisions of the scheme, however, do not bear out the Legislature’s intent. The State’s position thus “depends” not on any

distinction between the operative burdens imposed on Indian and non-Indian retailers, but depends only on the Legislature's turn of phrase. The State's position is the same one rejected by this Court in *Hammond*, and its contradictory arguments with respect to the operative provisions of the scheme are without merit. The State's attempt to escape the force of the *Hammond* decision likewise finds no support in *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978), *aff'd in part and rev'd in part*, 447 U.S. 134 (1980), where a very different version of the State's cigarette tax scheme was at issue.

II. The Legislature May Not *Ipsa Facto* Shift the Legal Incidence of the Tax through Its Statement of Intent

The State does not seriously dispute that the incidence of the tax falls on non-Indian retailers, State Br. at 9 (not rebutting that “the legal incidence of Washington’s cigarette tax can fall on cigarette retailers”); *id.* at 27 (“[T]he wholesaler’s implied obligation to pass on the tax to retailers does not result in the legal incidence of the tax falling on *tribal retailers*, even if it might for off-reservation retailers.”), but contends that the incidence automatically shifts to another party when the retailer is a tax-exempt Indian. The provisions cited by the State, however, merely recite the Legislature’s *intent* and related definitional terms regarding the imposition of the tax, and do not alter the manner in which the tax scheme *actually operates vis-à-vis*

Indian and non-Indian retailers. In *Hammond*, this Court held that a state legislature may not shift the incidence of a tax through its “mere say-so” to avoid the federally-protected tax immunity of Indian nations and their members. 384 F.3d at 685. *Hammond* controls here, and the State’s attempt to rebrand the Legislature’s statement of intent as an operative provision is without merit.

1. The State’s argument begins with Wash. Rev. Code § 82.24.900, which provides that “[t]he provisions of this chapter shall not apply in any case in which the state of Washington is prohibited from taxing under the Constitution of this state or the Constitution or the laws of the United States.” The State badly misconstrues the legal significance of this unremarkable provision, which has been part of the tax scheme since 1935. State Br. at 15. The State repeatedly and erroneously argues that if the incidence of the tax would otherwise fall on a party that the State is “prohibited from taxing,” this so-called “backstop provision,” *id.*, operates to shift the incidence of the tax to someone else. *See, e.g., id.* at 17 (arguing that § 82.24.900 implies that “if the first person possessing cigarettes in the state could not be taxed under federal or constitutional law . . . the tax instead would be imposed on the next taxable step in the distribution chain”); *id.* at 28 (arguing that “[t]he only reasonable reading of [§

82.24.900] is that if a tribal retailer is the first person to possess cigarettes in the state, the retailer should collect the taxes instead from its taxable purchasers”); *id.* at 29 (arguing that pursuant to § 82.24.900, “the wholesaler pass-on provision ‘shall not apply’ to transfer the legal incidence of the cigarette tax to any tribal cigarette retailer”); *id.* at 41 (same).

No court has ever suggested that § 82.24.900 is relevant to the question of legal incidence. *See* State Br. at 18-19, 28. This is because it merely reiterates fundamental principles of constitutional law—that the Supremacy Clause of the United States Constitution, art. VI, cl. 2, “nullifies state law that is incompatible with federal law,” *Washington v. Norris*, 236 P.3d 225, 236 (Wash. Ct. App. 2010), and that “[t]he state constitution must be treated as a limitation upon the general legislative power,” *Fain v. Chapman*, 569 P.2d 1135, 1139 (Wash. 1977). Section 82.24.900 thus only begs the question presented by this case, i.e., whether the legal incidence of the cigarette tax falls on Yakama retailers in violation of federal law. If it does, then the tax “shall not apply.”

2. At the core of the State’s argument is the Legislature’s statement of “intent . . . that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state,” and that where a tax-exempt person’s “activities would otherwise require

payment of the tax,” the person’s tax obligation is redefined as a “precollection obligation.” Wash. Rev. Code § 82.24.080(2) (“Legislative intent -- Taxable event --Tax liability”). The State argues that because an Indian retailer is not a “taxable person,” no tax is imposed on an Indian retailer’s sale, handling, possession, or distribution of cigarettes, notwithstanding that the tax is imposed on the same activities by a non-Indian retailer. Rather, in those circumstances, the Indian retailer’s tax obligation is automatically restyled as a “precollection obligation.” The State’s position is unmistakable—the Legislature’s statement of intent and its use of this definitional term operate to shift the legal incidence of the tax.

That is precisely the position, however, that this Court rejected in *Hammond*. In *Hammond*, the Idaho legislature purported to shift the legal incidence of the state fuel tax away from tribal retailers by “declar[ing] that the legal incidence of the tax was not on the retailer, but was on the distributor.” 384 F.3d at 680. The legislature also stated its intent to impose the fuel tax “upon the receipt of motor fuel in this state by any distributor receiving motor fuel upon which the tax imposed by this section has not previously been paid.” *Id.* (quoting Idaho Code § 63-2402(1)). Idaho thus contended that the incidence of the tax could not fall on tribal retailers.

This Court disagreed, holding that “[a] state legislature’s declaration of intent cannot be viewed as alone controlling on the federal question whether the legal incidence of a state tax falls on a sovereign Indian nation.”

Id. at 685. The Court explained:

If the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the incidence of the tax was on another party, it would wholly undermine the Supreme Court’s precedent that taxing Indians is impermissible absent clear *congressional* authorization.

Id. at 683. Indeed, the Court recognized that the Supreme Court has “squarely rejected the idea that ‘a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign.” *Id.* at 684 (quoting *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954)). Turning to the operative provisions of the scheme, “an assessment of its effects, and the total circumstances germane to incidence,” *id.* at 685, the Court concluded that the “tax buck stops” with retailers, *id.* at 687. Accordingly, the Court held “that notwithstanding the Idaho legislature’s attempt to assign the legal incidence of the motor fuels tax to the distributors, the tax’s legal incidence falls on tribal retailers.” *Id.* at 696.¹

¹ The State grudgingly acknowledges *Hammond*, State Br. at 39-40, but only after suggesting, contrary to that decision, that statements of legislative intent are dispositive of legal incidence. Compare State Br. at 11-12 with

The statutory language at issue here is functionally equivalent to the language at issue in *Hammond*. While the Idaho legislature set forth its intent to shift the incidence of the fuel tax away from tribal retailers by purporting to impose it on non-Indian distributors, the Washington legislature has set forth its intent to shift the incidence of the cigarette tax away from Indian retailers by purporting to summarily redefine their tax obligation as a “precollection obligation.” Because the Legislature cannot shift the legal incidence of the tax by “mere say-so,” *id.* at 685, the critical question is whether the operative provisions of the scheme reflect that the State is “nam[ing] one party the taxpayer while requiring another to pay the tax, in the process avoiding tax immunities held by the second party,” *id.* at 684. That question is answered affirmatively below.

3. The State’s attempts to distinguish *Hammond* are without merit. It argues, for example, that in *Hammond* the statement of intent was an uncodified section of the session laws, 384 F.3d at 680, whereas here the statement is codified. State Br. at 39. The State’s suggestion that uncodified session laws carry inferior legal force is utterly wrong-headed. It is well-established that “[s]tatute law, as adopted by the legislature, prevails over a

Hammond, 384 F.3d at 684 (concluding that the legislature’s statements are “‘dispositive’ as to what the legislature *intended*,” but not “‘dispositive’ of the legal issue that the federal courts are charged with determining as to the incidence of the tax”) (quoting *Chickasaw Nation*, 515 U.S. at 461).

restatement thereof in the code.” *State ex rel. Town of Mercer Island v. City of Mercer Island*, 361 P.2d 369, 371 (Wash. 1961) (citing Wash. Rev. Code §§ 1.04.020, .021 and noting that where the revised code “does not state the law as passed by the legislature,” the session laws control); *see also, e.g., Smith v. Guest*, 16 A.3d 920, 926 (Del. 2011); *In re A.G.*, 186 Cal. App. 4th 1454, 1460-61 (2010); *Granville v. Minneapolis Public Sch., Special Sch. Dist. No. 1*, 732 N.W.2d 201, 208 (Minn. 2007). Indeed, the State cites freely to the Washington Session Laws in its brief. State Br. at 13-16.

Nor is *Hammond* distinguishable because Wash. Rev. Code § 82.24.080(2) has been part of the statutory scheme for longer than the language at issue in *Hammond*. State Br. at 40. To be sure, the Idaho legislature expressly intended to reverse a decision of the Supreme Court of Idaho through its statement of intent, *Hammond*, 384 F.3d at 680, and the Court found that this context “reinforced” its conclusion, *id.* at 684. The Court did not suggest, however, that its core holding with respect to a state legislature’s lack of authority to shift the incidence of the tax by fiat, without regard to the operative provisions of the scheme, turned upon that context.

4. The thrust of the State’s effort to dismiss the controlling force of *Hammond* is its attempt to portray the Legislature’s statement of intent, chiefly the so-called “precollection obligation” of Indian retailers, as

something it decidedly is not—an operative provision that alters the manner in which the tax scheme actually functions. The state argues that this definitional term has operative force because the Legislature recites it at two other places in the scheme. For example, subsection (3) of the Legislature’s statement of intent provides that when the cigarette tax rate increases, the first person who sells, uses, possesses, or handles cigarettes taxed at the lower rate is “liable for the additional tax, *or its precollection obligation as required in this chapter*, represented by the rate increase.” State Br. at 23.

The operative provisions of the tax scheme, however, illustrate that this “precollection obligation” is just another name for the same “tax liability” imposed on non-Indian retailers. Indian and non-Indian retailers are required to do *exactly the same thing* when there is a tax increase—they must complete the Department’s Cigarette Floor Stock Tax Return form and remit the tax directly to the State with respect to all cigarettes in their possession. Yakama Br. at 28. Neither Indian nor non-Indian retailers are required to keep records showing that their customers in turn pay this additional tax. *See infra* at 18. While the Legislature has purported to define the burden imposed on Indian retailers as a “precollection obligation,” this burden is indistinguishable from the tax liability imposed on retailers generally. *See Wash. Rev. Code* § 82.24.280(1), (3). The same is true with

respect to Wash. Rev. Code § 82.24.260(1), wherein the Legislature uses two different phrases—“pay . . . the tax” and “satisfy its precollection obligation”—to characterize the obligation to “remit[] the tax” shared by Indian and non-Indian retailers alike. *See* State Br. at 23.

In short, when the Legislature coined the term “precollection obligation” in 1995, it did not accompany this amendment to its statement of intent with any corresponding amendments to the operative provisions of the scheme to distinguish the actual burdens imposed on Indian and non-Indian retailers, notwithstanding that it substantially amended the operative provisions of the scheme at this time to distinguish the burdens imposed on wholesalers and retailers. *See* State Br. at 21-22 & n.8. The Legislature did not, for example, require Indian retailers to keep records showing that their consumers have paid the tax, provide Indian retailers the option to defer payment of the tax pending their collection of the tax from their customers, compensate or provide other benefits to Indian retailers for acting as a transmittal agent, or relieve Indian retailers of liability for the tax when they are unable to sell the cigarettes upon which they have already paid the tax. The so-called “precollection obligation” of Indian retailers thus does not “shift[] the *substance* of the legal burdens of the tax” based upon the

retailer's Indian status, but instead "cosmetically re-assign[s] the incidence of the tax to suit the legislature's interests." *Hammond*, 384 F.3d at 684 n.7.

Hammond is clear that "state legislatures [may not] tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere." 384 F.3d at 684. Likewise, the Supreme Court has repeatedly and unequivocally held that a state legislature may not circumvent, via semantics, the prohibition against taxing Indians in Indian country. *See, e.g., Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 127-28 (1993) (where a state tax is functionally indistinguishable from a tax previously held invalid by the Court, the state may not avoid that precedent simply by giving its tax another name); *Lawrence v. State Tax Comm'n of Miss.*, 286 U.S. 276, 280 (1932) ("The present tax has been defined by the Supreme Court of Mississippi as an excise and not a property tax, but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.") (citations omitted); *Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930) ("Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.").

It is not the Nation's position that the Legislature must impose the legal incidence of the tax on a single party. *See* State Br. at 42-43. But it is the Nation's position that if the Legislature seeks to shift the incidence, it must do so via the operative provisions of the scheme, not through its statement of intent and purely definitional terms. *See Hammond*, 384 F.3d at 684-85 & n.7. Here, the actual burdens imposed on Indian and non-Indian retailers by the State's cigarette tax scheme are identical. Moreover, the State concedes that the incidence of the tax *does fall* on non-Indian retailers, *see supra* at 2, and does not dispute that other provisions of the scheme recognize that the tax *is imposed* on Indian retailers in the absence of a tax contract with the State providing otherwise, *see Yakama Br.* at 39. Because Wash. Rev. Code § 82.24.080(2) is a statement of legislative intent that does not alter the manner in which the tax scheme actually operates, it does not control the question of legal incidence.

III. The Operative Provisions of the Scheme Impose the Legal Incidence of the Tax on Retailers, Whether Indian or Non-Indian

In its opening brief, the Nation demonstrated that the operative provisions of the tax scheme do not bear out the Legislature's statement of intent, but instead compel the conclusion that the tax buck stops with retailers, whether Indian or non-Indian. *Yakama Br.* at 22-37. As noted above, the State seeks to obfuscate this distinction and to masquerade the

Legislature's statement of intent as an operative provision. The State's arguments are unpersuasive and contradictory, and underscore the force of the Court's analysis in *Hammond*. The State, moreover, does not dispute that the court below failed to address several arguments and substantial evidence submitted by the Nation, and erroneously viewed the evidence in the light most favorable to the State for purposes of its own motion for summary judgment. *Yakama Br.* at 21-22, 27, 31, 34.

1. The State does not dispute that wholesalers are required to pass on the cigarette tax (and any additional inventory tax) to retailers, and to submit detailed records to the Department confirming that retailers have paid the tax. *Yakama Br.* at 22-29; *State Br.* at 26-27. Although the State agrees that this mandatory pass-through provision generally operates to impose the legal incidence of the tax on retailers, *State Br.* at 27, it nevertheless argues that other provisions of the scheme require retailers to pass on the tax to their customers. The State, however, fails to cite any operative provision that supports its argument.

The State's principal contention is that the so-called "precollection obligation" of Indian retailers requires that they pass on the tax to their customers. As discussed above, this definitional "obligation" operates only in the context of the Legislature's statement of intent, and is accompanied by

no distinctions in the operative burdens imposed on Indian and non-Indian retailers. The State nevertheless argues that this term, in and of itself, “establishes as a matter of law that the legal incidence of the tax falls upon the purchaser.” State Br. at 27 (quoting *United States v. State Tax Comm’n of Miss.*, 421 U.S. 599, 608 (1975)).

State Tax Commission of Mississippi is distinguishable, however, because the regulation at issue there included operative mechanisms that actually imposed the legal incidence of the tax on the purchaser. The regulation “provide[d] that all direct orders by military facilities of alcoholic beverages from distillers ‘shall bear the usual wholesale markup in price,’ that the ‘price of such alcoholic beverages shall be paid by such organizations directly to the distiller,’ and that the distiller ‘shall in turn remit the wholesale markup’ to the Tax Commission.” 421 U.S. at 608-09. The Court noted that this scheme was similar to the one in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), where “North Dakota imposed a sales tax and required retailers to add the tax to the sales price of goods, ‘and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts.’” *State Tax*

Comm'n of Miss., 421 U.S. at 608 n.6 (quoting *Bismarck Lumber*, 314 U.S. at 97).

The “precollection obligation” here is not operationalized through a comparable regulatory framework, and therefore remains a turn of phrase that is functionally equivalent to the tax liability imposed on non-Indian retailers. In contrast, the State’s retail sales tax scheme, Wash. Rev. Code § 82.08.050, shares each of these operative characteristics. *See Yakama Br.* at 26. The Legislature is thus well aware of how to structure a scheme that requires retailers to pass on the tax to consumers and to document that they have done so.² Indeed, the State points out that a *prior* version of Wash. Rev. Code § 82.24.020(2) required *both* wholesalers and retailers to “pass . . . on” the tax to their downstream customers, but that the Legislature deleted “retailers” from this provision in 2003. *State Br.* at 21.

² Other states’ cigarette tax schemes illustrate how to craft a scheme in this manner. *See, e.g.*, Or. Rev. Stat. § 323.085(2) (“All taxes paid . . . are intended to be direct taxes on the retail consumer for which required prepayment, through the purchase and affixation of tax stamps, is only to achieve convenience and facility in the collection and administration of the tax. When the tax is paid by any person other than the retail consumer, the payment shall be considered an advance payment to be added to the price of the cigarette and recovered from the retail consumer. Except for a person selling cigarettes through a vending machine or machines, any person selling cigarettes at retail shall state or separately display in the retail premises a notice of the amount of the tax included in the selling price and charged or payable pursuant to ORS 323.005 to 323.482.”).

2. The State’s search for a mandatory pass-through requirement in other statutory provisions similarly fails. The State cites a provision of the Washington Consumer Protection Act, which provides that “[n]o person licensed to sell cigarettes under chapter 82.24 RCW may sell cigarettes below the actual price paid,” Wash. Rev. Code § 19.91.300. State Br. at 20-21. This provision is not even part of the cigarette tax scheme, and by its own terms, does not purport to require Yakama retailers to pass on the tax to their customers—it does not define “actual price paid” to include the cigarette tax, and applies only to persons “licensed to sell cigarettes under chapter 82.24 RCW,” a category that excludes Yakama retailers, who are licensed under Yakama, not State, law. Yakama Br. at 5.

The State also cites provisions of the scheme that require individual consumers to remit the tax directly to the Department when they purchase cigarettes that have *not* been taxed, i.e., *unstamped* cigarettes. State Br. at 26 (citing Wash. Rev. Code § 82.24.260(3) (“This section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by this chapter.”); Wash. Admin. Code § 458-20-186(101)(c) (“[F]ailure of an exempt entity with an obligation to collect and remit the tax does not relieve a subsequent nonexempt possessor of unstamped cigarettes from liability for the tax.”)). These provisions are utterly beside the point

here, where the question is who bears the legal incidence of the tax with respect to cigarettes that have been taxed, i.e., *stamped* cigarettes, prior to their sale by Yakama retailers.³

The Nation acknowledged in its opening brief that the legal incidence of the tax does not fall on retailers where a consumer purchases cigarettes that have not been affixed with a Washington tax stamp. *Yakama Br.* at 6 n.1, 36 n.8. Under those circumstances, the State has provided a mechanism to effectuate the obligation of individual consumers to pay the tax. Wash. Admin. Code § 458-20-186(602)(g) (“Consumers who buy unstamped cigarettes . . . must pay the tax when they first bring the cigarettes into this state or first possess them in this state. The tax is paid with a ‘Tax Declaration for Cigarettes,’ which may be obtained from the department.”). The State’s enforcement efforts with respect to consumers are likewise directly solely at circumstances where consumers purchase unstamped cigarettes. *State Br.* at 37-38; *Yakama Br.* at 6 n.1.

The State has no response for the scheme’s record-keeping requirements. The State does not dispute that, unlike wholesalers, Indian

³ The State is incorrect that the scheme at issue in *Hammond* contained “no such downstream tax liability,” *State Br.* at 37, for consumers purchasing previously untaxed fuel. *See* Idaho Code § 63-2421(1) (2004) (“[A]ny person who consumes motor fuels in a motor vehicle . . . upon which the tax . . . has not been paid . . . shall be liable for the tax.”).

and non-Indian retailers are not required to maintain or submit records showing that their customers have paid the tax, or to provide their customers documentation of the same. *Yakama Br.* at 24-26. The State therefore seeks to dismiss this factor altogether—“the State is unaware of any legal incidence case requiring states to impose identical recordkeeping requirements at all levels of the distribution scheme for a taxed product.” *State Br.* at 45. The State of course is generally free to impose whatever record-keeping requirements it chooses. It may not, however, pretend that those requirements are irrelevant to the question of legal incidence. *See Hammond*, 384 F.3d at 686.

3. In its opening brief, the Nation also outlined the similarities between the State’s cigarette tax scheme and the schemes at issue in *Chickasaw Nation* and *Hammond* with respect to the financial benefits and protections extended to wholesalers, but not to retailers. *Yakama Br.* at 23-24, 29-36. The State does not dispute that under the State’s scheme, only wholesalers may defer payment of the tax pending their collection of the tax from their customers, and that only wholesalers receive compensation for acting as transmittal agents for the State. *State Br.* at 36-37 n.12, 47.

The State nevertheless seeks to distinguish *Chickasaw Nation* and *Hammond*, arguing that the fuel wholesalers in those schemes were

compensated as “agents” and for collecting taxes “on behalf of” the states, whereas here, cigarette wholesalers are compensated “for their services” in affixing tax stamps. *Id.* at 36-37. This distinction has no legal significance. The *Chickasaw Nation* Court, for example, recognized that the fuel wholesalers were indeed compensated “for their services” in collecting and remitting the tax. 515 U.S. at 462. Moreover, Washington wholesalers do not purchase and affix tax stamps because they want to, but because the State compels them to. While the scheme may not refer to wholesalers as “agents” of the State, that is precisely their role. *Cf.* N.Y. Tax Law § 472(1) (noting that “agents” are entitled to compensation “for [their] services” in purchasing and affixing tax stamps, and to deferral of payment for the stamps for thirty days). Again, the State’s attempt to elevate semantics over substance is without merit.

It is of course not the Nation’s position that retailers bear the legal incidence of the cigarette tax because wholesalers, but not retailers, purchase and affix tax stamps. *State Br.* at 43-44. That is not the point. The point is that wholesalers, but not retailers, are required to pass on the tax to their customers, to document that they have done so, and receive compensation and other financial benefits for their collect-and-remit role in the tax scheme.

These operative provisions are critical to the question of legal incidence and the State cannot simply wish them away.

4. The State erroneously contends that the tax scheme makes the same refunds available to both wholesalers and retailers. The first refund is available to a “distributor or wholesaler that has lawfully affixed stamps to cigarettes” that cannot be lawfully sold because the Washington State Attorney General removes the cigarettes from the list of brands approved for sale. Wash. Rev. Code § 82.24.210. This unambiguous provision does not apply to retailers, which are not “distributor[s] or wholesaler[s],” and which may not “lawfully affix[] stamps to cigarettes.” The State’s key witness further testified that there is no “statutory or regulatory authority that would give the retailer the right to apply for a refund if he or she is left holding on to stamped products that had been removed from the [Attorney General’s] certification list.” Yakama Br. at 31. The State’s position to the contrary—that the Department may also provide this refund to retailers under a general Department regulation providing that “any person” may request a refund—is untenable. State Br. at 49.

The other refund is available “to dealers for the cost of stamps affixed” when they are unable to sell cigarettes that “by reason of damage become unfit for sale.” Wash. Rev. Code 82.24.210. The State does not

dispute (1) that the term “dealers” refers only to persons that affix tax stamps, i.e., wholesalers; (2) that the Department’s only refund form and the accompanying web application provide that only wholesalers may request this refund; (3) that the Department’s Cigarette Tax Manual speaks exclusively to refunds for wholesalers, and (4) that the State admitted in discovery “that retailers are not allowed a refund for the cost of the Washington state cigarette tax stamp paid when purchasing cigarettes but which cost could not later be collected from a consumer.” Yakama Br. at 31-33. Nevertheless, citing disputed statements of fact, the State contends that this refund is also available to “any person.” State Br. at 49-50. The example cited by the State—an email reference to a hypothetical scenario in which a refund would be made available to the Yakama Nation in connection with a cigarette tax agreement under a different statutory scheme, *id.* at 50—is irrelevant to retailers’ ability to obtain a refund when they are unable to sell cigarettes upon which they have already paid the tax.

In sum, retailers do not enjoy the same financial benefits and protections as wholesalers under the scheme, as both written and applied. As in *Chickasaw Nation* and *Hammond*, retailers are necessarily liable for the tax, and this factor weighs heavily in favor of the conclusion that the legal incidence of the tax falls on Yakama retailers.

5. The vitality of this Court’s reasoning in *Hammond* is underscored by the conflict between the State’s arguments with respect to the Legislature’s statement of intent and the operative provisions of the scheme. Wash. Rev. Code § 82.24.080(2) purports to impose the tax on “the first taxable event and upon the first taxable person,” and the State thus initially takes the position that the incidence of the tax falls on the non-Indian wholesalers that distribute cigarettes to Yakama retailers. State Br. at 8 (“[W]ho bears the legal incidence of Washington’s cigarette tax . . . depends on who is the first person to sell, use, consume, handle, possess, or distribute the cigarettes in the state.”); *id.* at 25 (“[T]he first taxable person is usually going to be the wholesaler, who purchases and affixes the stamps.”). When the State turns to the operative provisions of the scheme, however, it abandons this position and makes no attempt to argue that the incidence falls on wholesalers under the *Chickasaw Nation* and *Hammond* factors.

Instead, after effectively conceding that the incidence of the tax falls on non-Indian retailers, *see supra* at 2, the State argues that the operative provisions of the scheme shift the incidence to individual consumers, *see supra* at 13-17, at least with respect to cigarettes sold by Yakama retailers. In the end, the State’s only definite position is that wherever the legal incidence of the tax may fall—be it on wholesalers, retailers, or

consumers—it does not fall on tax-exempt Yakama retailers because the Legislature said so. The State’s contradictory positions illustrate why this Court concluded in *Hammond* that a state legislature’s statement of intent is insufficient to shift the legal incidence of a tax under federal law.

IV. The *Colville* Decision Does Not Control Because the *Colville* Court Did Not Consider the Scheme or Question Presented Here

The State argues that *Colville* controls the outcome of this case because the *Colville* court considered a statement of legislative intent in the 1976 scheme imposing the cigarette tax on the first “taxable event,” and concluded that the incidence of the tax did not fall on Indian retailers. The State is incorrect—the *Colville* court reviewed a very different scheme than the one at issue here, did not confront a conflict between the Legislature’s statement of intent and the scheme’s operative provisions, and made plain that the substance of a tax scheme, not the labels attached to it by the Legislature, control the scheme’s interpretation under federal law.

1. The State readily concedes that since the *Colville* decision the Legislature has substantially amended the operative provisions of the tax scheme to delineate very different roles for (and to impose very different burdens on) wholesalers and retailers. State Br. at 21-22 & n.8; *see also* Yakama Br. at 10, 19-20 (outlining the identical roles of wholesalers and retailers under the 1976 scheme). Accordingly, when the State urges that

“*Colville* should be considered controlling here,” State Br. at 31, it does not argue that the Nation’s challenge is barred by res judicata, *id.* at 30 n.10. Nor does it seriously argue that this dispute may be resolved by *stare decisis*.⁴

Rather, what the State urges is for *Colville* to be given preclusive effect with respect to *any* challenge to the scheme so long as the scheme includes a statement of intent that purports to shift the legal incidence of the tax when it would otherwise fall on tax-exempt Indians. That is, the State argues that regardless of the changes made by the Legislature to the operative provisions of the scheme, the incidence of the tax can never fall on Indians so long as the Legislature’s intent remains intact. The State’s position is untenable, and would permit the State of Washington to “tax

⁴ The State’s claim that this Court concluded in *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995) that the legal incidence of Washington’s cigarette tax does not fall on Indian retailers is baseless. State Br. at 44. *Baker* was a criminal case in which the defendants argued that the tax could not be lawfully applied to Indians. 63 F.3d at 1482, 1488-91. The language quoted by the State is from the Court’s discussion of the defendants’ equal protection challenge and does not purport to analyze the incidence of the tax. Compare State Br. at 44 with *Baker*, 63 F.3d at 1490-91.

Indian tribes merely on the assertion that the incidence of the tax lies elsewhere.” *Hammond*, 384 F.3d at 685.⁵

United States v. O’Brien, ___ U.S. ___, 130 S. Ct. 2169 (2010), does not support the State’s position. State Br. at 31. In *O’Brien*, the Supreme Court expressly *declined* to treat as controlling the outcome of its prior decision in *Castillo v. United States*, 530 U.S. 120 (2000), where it had interpreted an analogous provision of a prior version of the statute at issue. Rather, the Court analyzed the amended statute *in its entirety* under applicable law, including the legal framework set forth in *Castillo*, *O’Brien*, 130 S. Ct. at 2176-80; *see also id.* at 2173 (“In light of the 1998 amendments and the [intervening *Harris v. United States*, 536 U.S. 545 (2002)] decision, the question of how to interpret § 924’s machinegun provision is considered once more in the instant case.”). Although the *O’Brien* Court ultimately reached the same conclusion as it did in *Castillo*, the outcome turned on the fact that the amendments did not meaningfully “alter the substance of the statute.” 130 S. Ct. at 2180. As it is undisputed here that the Legislature *has* substantially amended the operative provisions of the scheme that control

⁵ The State’s position also runs counter to the well-established principle that the federal courts’ tax decisions do not create “perpetual, vested rights in a certain tax treatment.” *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 770 (9th Cir. 2003) (quoting *C.I.R. v. Sunnen*, 333 U.S. 591, 599 (1948)).

the question of legal incidence, the district court's failure to analyze that question in light of all of the *Chickasaw Nation* and *Hammond* factors runs contrary to *O'Brien* and was in error. *See* Yakama Br. at 20-22.

2. The *Colville* court, moreover, did not confront the issue of whether a legislature's statement of intent controls where it conflicts with the operative provisions of the scheme. In *Colville*, the district court began its analysis by considering the operative provisions of the scheme, but could not discern the legal incidence from them. 446 F. Supp. at 1352-53 (“Although the statutory language does not irresolutely lead to a conclusion that the legal incidence of the tax falls upon the purchaser, it also does not necessarily require the contrary conclusion that it falls upon the seller.”). Only then did the court consider the Legislature's statement of intent, and in doing so, noted no conflict between that statement and the scheme's operative provisions. *Id.* at 1353-55.

The Supreme Court in turn summarized the district court's conclusion in a footnote and “accept[ed]” that conclusion. *Colville*, 447 U.S. at 142 n.9. The Court did not independently analyze the question of legal incidence and certainly did not indicate that it would have viewed the Legislature's statement of intent as controlling had it conflicted with the operative provisions of the scheme. That is precisely the issue, however, that this

Court confronted in *Hammond*, and that it confronts again here. Although the instant case is the inverse of *Hammond* (the key substantive provisions of the scheme *have* substantially changed, but the Legislature's intent has not), this Court's reasoning applies with equal force.

3. The Supreme Court's analysis of another tax at issue in *Colville* confirms that the Legislature's statement of intent does not operate to shift the legal incidence of the tax. Citing its prior holding in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), "that Montana's personal property tax could not validly be applied to motor vehicles owned by tribal members who resided on the reservation," the *Colville* Court found that "the only difference between the [motor vehicle] taxes now before us and the one struck down in *Moe* is that these are called excise taxes . . . while the Montana tax was labeled a personal property tax." 447 U.S. at 163. The Court rejected the notion that by "mere nomenclature" the State could "easily circumvent[]" the Court's precedent. 447 U.S. at 163-64. Although Justice Rehnquist believed that the issue should be remanded for further development, he echoed the majority's concern and emphasized the need to focus on the operative provisions of the scheme:

There is of course no question that this Court has discarded the controlling significance of the label a State attaches to its taxes.

A tax instead must be judged by its “practical operation.” . . .
But only if the practical operation of this excise taxing scheme
is the same as the property taxing scheme addressed in *Moe*
would the tax be invalid on the basis of that decision.

Id. at 188 (Rehnquist, J., concurring in part, dissenting in part).

These analyses should guide the Court here. The Legislature may not shift the legal incidence of the tax away from Yakama retailers by the “mere nomenclature” of Wash. Rev. Code §82.24.080(2), but must do so through the “practical operation” of the scheme, which has changed substantially since 1976. This Court should accordingly reject the State’s invitation to overextend the Supreme Court’s decision in *Colville*, and in doing so, to effectively nullify this Court’s decision in *Hammond*.

V. The District Court’s Other Orders Should be Reversed and the Balance of Its Order on Summary Judgment Should Be Vacated

1. The State’s position that the Nation “has waived or abandoned” its appeal with respect to the district court’s orders (1) dissolving the restraining order and (2) disbursing to the State the proceeds of the bond posted by the Nation as security for that order is without merit. State Br. at 52. The State does not dispute that the basis for those orders was the court’s conclusion on the parties’ cross motions for summary judgment that the incidence of the tax does not fall on Yakama retailers. Yakama Br. at 41. Nor does the State cite any authority for the ridiculous proposition that it is

entitled to a \$500,000 windfall when it unlawfully taxes Indians in Indian country. These orders should be reversed.

2. Finally, the State does not dispute that the “initial . . . question in Indian tax cases” is whether the incidence of the state tax falls on an Indian nation or its members, *Chickasaw Nation*, 515 U.S. at 458, and that if the tax is invalid on this basis, the court below should not have considered whether the tax is preempted by the Nation’s treaty with the United States or other federal law, or unlawfully infringes on the Nation’s sovereignty, *id.* at 459 n.8; *Yakama Br.* at 13 n.3. Because the court below erred on the question of legal incidence, it should not have reached the Nation’s remaining claims. The Nation therefore requests that the balance of the court’s order on summary judgment be vacated.

VI. Conclusion

For the reasons set forth above and in its opening brief, the Yakama Nation respectfully requests that the Court reverse the district court’s orders and remand this case for further proceedings consistent with this Court’s order.

Dated this 23rd day of May, 2011.

Respectfully submitted,

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