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The Honorable Bob Morton
State Senator, 7th District
P. O. Box 40407
Olympia, WA 98504-0407

The Honorable Mike Sells
State Representative, 38th District
P. O. Box 40600
Olympia, WA 98504-0600

The Honorable John McCoy
State Representative, 38th District
P. O. Box 40600
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The Honorable Debbie Regala
State Senator, 27th District
P. O. Box 40427
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The Honorable Jeannie Darneille
State Representative, 27th District
P. O. Box 40600
Olympia, WA 98504-0600

Dear Senators Morton and Regala, and Representatives Sells, McCoy, and Darneille:

By letters previously acknowledged, you have posed a number of questions requesting our opinion on the interpretation and implementation of Initiative Measure 901 (Laws of 2006, ch. 2), a new statute adopted by the people in the November 2005 general election.[1] To accommodate our analysis, we have reordered and paraphrased the various questions asked as follows:

1. Does Initiative 901 (I-901) prohibit or restrict smoking in clubs which are not open to the general public but which do have employees?

2. Does I-901 prohibit or restrict smoking in a private club if all the employees are also members of the club?

3. Does I-901 prohibit or restrict smoking in a private club if the club uses volunteers rather than employees to perform the work needed (preparing and serving food and/or drinks, cleaning the premises, handling money)?

[1] This opinion combines answers to three different requests—one from Senator Morton dated January 31, 2006; one jointly from Representatives Sells and McCoy dated March 7, 2006; and one jointly from Senator Regala and Representative Darneille dated March 16, 2006.

4. Does I-901 prohibit or restrict smoking in an outdoor area, such as a fairground, an outdoor stadium, or a bus shelter, which is not an enclosed structure but is an area in which employees work?

5. Does I-901 prohibit or restrict smoking in a private club when the club is not open to the general public but does allow members to invite guests?

6. I-901 did not expressly amend RCW 70.160.060, which provides that this "chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by non smokers". Given this language, is smoking still permitted in private enclosed work places located within "public places"?

7. To what extent does I-901 prohibit or restrict smoking in facilities operated by a tribe, tribal members, or a corporation chartered by a tribe? Does the Initiative cover facilities located within the boundaries of a reservation but operated by persons who are not members of the reservation tribe?

8. Does I-901 prohibit or restrict the use of incense, smudge sticks, smudge bowls, ceremonial pipes, or similar equipment used as part of a bona fide religious ceremony in a place which otherwise meets the definition of "public place" as described in the Initiative?

ANALYSIS AND BRIEF ANSWERS

Because of the large number of questions, we will not summarize the answers to your questions here but will include a brief answer at the beginning of the analysis responding to each question.

1. Does I-901 prohibit or restrict smoking in clubs which are not open to the general public but which do have employees?

BRIEF ANSWER: I-901 prohibits smoking in any area which meets the definition of "place of employment" set forth in RCW 70.160.020(3) as amended by I-901, whether or not the area meets the definition of a "public place."

The full text of I-901 is Appendix A to this opinion. The key language in the measure, for purposes of this analysis, is section 3 of I-901, which amends RCW 70.160.030 to read as follows: "*No person may smoke in a public place or in any place of employment.*" (Emphasis added.) The phrase "or in any place of employment" is the language added to this section by

I-901. The plain language of the section indicates, therefore, that smoking is prohibited in any area that falls into either of two categories: (1) "public place" or (2) "place of employment."[2]

The Initiative measure adopts a new definition of "place of employment", which reads as follows:

> (3) "Place of employment" means any area under the control of a public or private employer which employees are required to pass through during the course of employment, including, but not limited to: Entrances and exits to the places of employment, and including a presumptively reasonable minimum distance, as set forth in section 6 of this act, of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited; work areas; restrooms; conference and classrooms; break rooms and cafeterias; and other common areas. A private residence or home-based business, unless used to provide licensed child care, foster care, adult care, or other similar social service care on the premises, is not a place of employment.

RCW 70.160.020(3), as amended by Laws of 2006, ch. 2, § 2(3). Thus, assuming for purposes of analysis that a "private club" is not a "public place" but still has employees, the smoking prohibition still applies if the area is a "place of employment" as defined above. This would be the case as to any areas within a club or other private business "which employees are required to pass through during the course of employment." Laws of 2006, ch. 2, §2(3). The statutory definition expressly includes such areas as work areas, restrooms, break rooms, cafeterias, and other common areas. The definition impliedly includes other areas within a private club if employees are required to pass through these areas in the course of their employment. This leaves open the possibility that a private club or business could contain areas which employees are not required to enter or "pass through" in the course of their employment, but this analysis will not speculate as to what those areas might be.

2. Does I-901 prohibit or restrict smoking in a private club if all the employees are also members of the club?

BRIEF ANSWER: If a private club has employees, and therefore contains areas meeting I-901's definition of "place of employment," smoking is prohibited in such areas, whether or not the employees are also members of the club.

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[2] This point is made even clearer by the "intent and findings" section of I-901, which culminates in this sentence: "In order to protect the health and welfare of all citizens, including workers in their places of employment, it is necessary to prohibit smoking *in public places and workplaces*." (Laws of 2006, ch. 2, § 1) (emphasis added).

This question, like the first, assumes that a private club does not meet the definition of a "public place" as set forth in RCW 70.160.020(2), as amended by section 2(2) of I-901, so that smoking is not prohibited on that basis. However, this question concerns situations in which the private club has employees, but the employees are also "members" of the club. For purposes of analysis, we will assume that the "private club" in question is a membership organization, perhaps a nonprofit membership corporation organized under RCW 24.03 or similar laws,[3] in which the members directly participate in the management of the organization.

Your question is whether such a club would be subject to I-901's smoking restrictions if the club has employees but all of the employees are also members who, therefore, are in some sense "co-owners" or "co-managers" of the premises. I-901 contains no specific provisions relating to private clubs, so the question here becomes whether the organization has "employees" whose presence triggers the I-901 restrictions because some or all of the club is a "place of employment" as defined in RCW 70.160.020(3).

Neither I-901 nor RCW 70.160 contains a specific definition of the term "employee," so we look to the common understanding of the term to answer your question. *Black's Law Dictionary* defines "employee" as a "person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Black's Law Dictionary* 564 (8th ed. 2004). Other relevant definitions include the definition adopted for purposes of the Washington Industrial Safety and Health Act (WISHA), which defines employee to mean "an employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise" (RCW 49.17.020(5)) and the definition in the state's unemployment compensation laws, which defines "employment" as "personal service, of whatever nature . . . performed for wages or under any contract calling for the performance of personal services, written or oral, express or implied." RCW 50.04.100.[4] All of these definitions involve a contractual relationship (which may be express or implied) between an employer and an employee, in which the employee provides labor or personal service to the employer in return for compensation, with the additional element that the employer in such a relationship has the right to control the details of the employee's work performance.

Where these elements are present, the courts are likely to find an employer/employee relationship. If the employee is contractually obligated to provide services, with the details of

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[3] Some "private clubs" have "members" who have no management role in the organization whatsoever, where "membership" simply confers (1) the privilege of admission to the premises, or (2) the ability to purchase goods or services.

[4] The Washington Supreme Court has found that the term "employee" should be given its common law definition in the absence of a specific statutory definition, and employees are distinguished from independent contractors based on the degree of control exercised by the employer/principal over the manner of doing the work involved. *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996) (citations omitted).

the work subject to the employer's direction and control, it probably wouldn't make a difference if the employer were a club or membership organization and the employee were a member of it. In such a case, the employee might enjoy whatever privileges are associated with membership (access to the services provided by the club; possibly the right to participate by voting in the affairs of the organization) but is still subject to the direction of the organization and contractually obligated to perform duties defined and directed, at least in large part, by others. Therefore, it appears that if someone meets the definition of an "employee" of a private club, the areas through which the employee is required to pass while at work are "places of employment" for purposes of I-901, whether or not the employee is also a member, or even an officer, of the club.

3. Does I-901 prohibit or restrict smoking in a private club if the club uses volunteers rather than employees to perform the work needed (preparing and serving food and/or drinks, cleaning the premises, handling money)?

BRIEF ANSWER: If the club has no "employees" but relies on the work of volunteers who do not have an employment relationship with the club, the club is not a "place of employment" for purposes of I-901.

The analysis here is very similar to that in Question 2. As with the previous questions, we assume, for purposes of analysis, that a private club is not a "public place" as defined in I-901. If a private club uses "volunteers" to do its work (prepare and serve food and/or drink, keep the premises clean and safe, otherwise handle the club's business), the question is whether any of the "volunteers" actually meet the definition of an "employee." Again, that would depend on whether a given person has a contractual obligation to perform services, as opposed to performing them without obligation and without any entitlement to compensation in any form. If all of the work is done by people who are not "employed", then the club is not anyone's "place of employment" and does not fall under I-901's restrictions on smoking.

4. Does I-901 prohibit or restrict smoking in an outdoor area, such as a fairground, an outdoor stadium, or a bus shelter, which is not an enclosed structure but is an area in which employees work?

BRIEF ANSWER: The restrictions and prohibitions contained in I-901 (like the chapter that it amended, the Washington Clean Indoor Air Act, RCW 70.160) are focused primarily, though not exclusively, on indoor or enclosed facilities and the "presumptively reasonable minimum distance [25 feet]" associated with such structures. Whether a particular structure, facility or area meets the definition of a "public place" or "place of employment" will, however, depend on the particular circumstances presented. For example, certain bus shelters may be "buildings" and may thereby meet the definition of a "public place." Other bus shelters or bus stops may not be "buildings" but may nonetheless be "public places" because they are "transportation facilities." Moreover, it would be imprudent, if not impossible, to try to broadly

define or classify large facilities such as fairgrounds or outdoor stadiums, because these types of facilities will typically consist of a mix of buildings, structures, and areas—some of which will meet the definitions of a "public place" or "place of employment" and some of which will not. Whether a particular area, structure, or facility is subject to I-901 will, in some instances, have to be determined on a case-by-case basis by the local health department or law enforcement agency with regulatory responsibility.

While I-901 is not absolutely express on the point, the implication of its definitions are that both the terms "public place" and "place of employment" refer primarily, though not exclusively, to areas within buildings or other enclosed structures and not to the open-air portions of facilities, such as fairgrounds or outdoor stadiums. The dichotomy between open and enclosed facilities, however, is not determinative, and one must look carefully to the definitions of "public place" and "place of employment" to determine whether a particular area or space is subject to the Initiative's prohibitions and restrictions.

The term "public place" was previously defined in RCW 70.160.020(2) as "that portion of any building or vehicle used by and open to the public". Thus, although many open air facilities such as streets, parks, and other open spaces are "used by and open to the public" and traditionally thought of as "public," they are not "buildings" or "vehicles" and, consequently, did not meet the definition of a "public place."

The Initiative, however, amended the definition of "public place" in two significant ways. First, the Initiative added a non-exclusive list of "public places", which includes: "Schools, elevators, public conveyances or transportation facilities, museums, concert halls, theaters, auditoriums, exhibition halls, indoor sports arenas, hospitals, nursing homes, health care facilities or clinics, enclosed shopping centers, retail stores, retail service establishments, financial institutions, educational facilities, ticket areas, public hearing facilities, state legislative chambers and immediately adjacent hallways, public restrooms, libraries, restaurants, waiting areas, lobbies, bars, taverns, bowling alleys, skating rinks, casinos, reception areas, and no less than seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests." (RCW 70.160.020(2), as amended by Laws of 2006, ch. 2, § 2(2)). Most of the facilities described above are generally enclosed buildings or structures. Some, however, (such as schools, transportation facilities, skating rinks, and ticket areas) can be either indoor or outdoor (open-air) facilities. Second, the Initiative added language saying that "public place" also means a "presumptively reasonable minimum distance [25 feet]" from a building's entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited[5]. *Id.* As a consequence of this phrase (both as it pertains to "public place" and "place of employment"), some "outside" areas are clearly subject to the Initiative.

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[5] Section 6 of I-901, a new section, indicates that the establishment of the "presumptively reasonable distance" is intended, at least in part, to ensure that tobacco smoke does not enter a public place of employment via entrances, exits, windows, or other means.

Unlike its definition of "public place", I-901's definition of "place of employment" is not expressly limited to buildings or vehicles but applies instead to "any area" under the control of an employer, through which employees are required to pass during the course of employment (including, but not limited to entrances and exits).

As with the definition of "public place," I-901 adds a non-exclusive list of "places of employment", which include: "work areas; restrooms; conference and classrooms; break rooms and cafeterias; and other common areas." RCW 70.160.020(3). Again, as with the definition of "public place," I-901 also adds language saying that "place of employment" includes a "presumptively reasonable minimum distance [25 feet]" from buildings entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited. Laws of 2006, ch. 2, § 2(2).

The definition of "place of employment" could broadly be interpreted to mean *any* outside area that the employer controls and through which an employee may be required to pass at some point during the course of employment. Such a broad interpretation, however, would lead to absurd results. In light of the purposes and intent of the law, the facilities and areas specifically identified in the law, and the references to enclosed areas, the better interpretation is a more narrow one. Because administration and enforcement of the Initiative is delegated to local health departments and law enforcement (RCW 70.160.020(3), as amended by Laws of 2006, ch. 2, § 3), it will fall to those agencies to apply the law to the particular facts and circumstances and determine whether the restrictions and prohibitions of the law apply.

In summary, whether a given facility or space is entirely or partially "outdoors" or otherwise exposed to the weather is not determinative of whether it is a "public place." Bus shelters, either by virtue of being a "building" or a "transportation facility", may be subject to the Initiative. Furthermore, large facilities such as stadiums or fairgrounds are generally not susceptible to one label or designation solely because a portion of the facility is open, outside, or otherwise exposed to the weather. Facilities such as fairgrounds or outside stadiums will typically consist of a mix of buildings, structures, and areas, at least some of which will meet the definitions of "public place" or "place of employment."

5. Does I-901 prohibit or restrict smoking in a private club when the club is not open to the general public but does allow members to invite guests?

BRIEF ANSWER: A bona fide private club does not become a "public place" subject to I-901 merely because members may invite guests to visit.

The answer to Question 5 is based on the following assumptions: (1) The "private club" in question is not open to the general public, but only to club members, and is therefore not a "public place" as defined in RCW 70.160.020(2); and (2) the club is not a "place of

employment" as defined in RCW 70.160.020(3). The "place of employment" issue is discussed in some detail in response to other questions. It is important to distinguish, though, between a "private club" that is truly open only to its members and a "private" club that is actually open to any member of the public, perhaps by payment of a nominal admission fee.[6] There are many truly private clubs in existence—certain fraternal organizations and social organizations of various kinds—which meet and conduct business (or engage in social activities) in private homes or in buildings purchased or rented for club activities. If these facilities are truly private in nature, the ability of a member to invite a guest to the clubhouse should not alter the nature of the club any more than a private home would become a "public place" merely because the owners invited guests to dinner. By contrast, if anyone coming off the street is welcome to enter a club and participate in its activities, with or without having to pay a fee, it is likely that the courts would be unable to distinguish such a facility from a "public place" as defined in I-901.

6. I-901 did not expressly amend RCW 70.160.060, which provides that this "chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by non smokers". Given this language, is smoking still permitted in private enclosed workplaces located within "public places"?

BRIEF ANSWER: Yes, smoking is still allowed in private, enclosed workplaces, so long as they do not qualify as "places of employment" as defined in I-901.

I-901 amends several sections of RCW 70.160, and repeals several others (RCW 70.160.010, .040, .900). As the opinion request points out, I-901 does not amend or repeal RCW 70.160.060, which reads as follows:

> This chapter is not intended to regulate smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers, excepting places in which smoking is prohibited by the chief of the Washington state patrol, through the director of fire protection, or by other law, ordinance, or regulation.

By this language, the Legislature has clearly expressed an intent to "carve out" certain private enclosed workplaces which otherwise would have fallen into the definition of "public place", and

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[6] Many of the facilities specifically defined as "public places" by I-901—restaurants, bars, concert halls, and hotels, for instance—are open to the general public in the sense that there are no membership or other requirements for patronage, but they are not open free of charge. Therefore, it seems unlikely that courts would read I-901 as allowing the conversion of a restaurant or bar into a "private club" allowing smoking merely by charging a fee to anyone seeking admission.

RCW 70.160 does not prohibit smoking in such spaces.[7] While I-901 expands the definition of "public place" to include a number of areas not previously included, the Initiative leaves RCW 70.160.060 undisturbed. Your question concerns how to read section 70.160.060 together with the newer language added to the chapter by I-901.

The case law establishes that statutes relating to the same subject matter are to be construed and read together as a unified whole in ascertaining a legislative purpose so that a harmonious total statutory scheme emerges. *State v. Base*, 131 Wn. App. 207, 213, 126 P.3d 79 (2006), citing *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004). For purposes of defining what is a "public place" and therefore subject to I-901's smoking prohibition, it appears that I-901 did not intend to change the pattern already established by the previous versions of RCW 70.160: When a building or structure meets the definition of a "public place" as set forth in RCW 70.160.020(2), smoking is generally prohibited in such a building, but the law does allow smoking in "private enclosed areas" within such buildings—areas not open to the general public. In other words, such areas fall outside the definition of "public place" for purposes of applying the smoking restrictions.

However, I-901 did more than expand the definition of "public place"; it also enacted a separate prohibition on smoking in "places of employment" as defined in RCW 70.160.020(3). While we can read "private enclosed areas" as outside the definition of "public place" for purposes of applying I-901, we cannot read such areas as falling outside the definition of "place of employment" if they would otherwise meet the definition (that is, if they are areas which employees are required to pass through during the course of employment). To interpret RCW 70.160.060 as excluding such areas from the term "place of employment" would largely destroy the effect of those portions of I-901 which protect employees from second-hand smoke, because they could result in situations in which employees are required to work in "private enclosed spaces" where smoking is occurring—one of the things I-901 clearly intended to prohibit.

Accordingly, we read RCW 70.160.060 as a limitation on the definition of "public place" but not as a limitation on the definition of "place of employment," thus giving effect to all of the language of the statute. To the extent a private enclosed workplace is not anyone's "place of employment" (note the discussion above on this point), smoking could still occur in such an area without regard to whether the building around the space is a "public place" as defined in RCW 70.160.

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[7] RCW 70.160.060 does recognize that smoking may be restricted in "private enclosed workplaces" by the state patrol or by some other law, ordinance, or regulation. For purposes of this analysis, we will assume that there is no ordinance or regulation restricting smoking in such areas.

7. To what extent does I-901 prohibit or restrict smoking in facilities operated by a tribe, tribal members, or a corporation chartered by a tribe? Does the Initiative cover facilities located within the boundaries of a reservation but operated by persons who are not members of the reservation tribe?

BRIEF ANSWER: The applicability of a state law to the affairs of an Indian tribe or to activities occurring on a tribal reservation or other tribal trust land typically requires a careful analysis of the facts and law surrounding each situation. The analysis below offers some general principles but does not attempt to analyze every possible situation which might arise.

Your next question is whether I-901 prohibits or restricts smoking in facilities operated by an Indian tribe, tribal members, a corporation chartered by a tribe, or at a facility located within the boundaries of a reservation but operated by persons who are not members of the reservation tribe. To answer these questions, we turn to an analysis of state regulatory power in Indian country and in Indian affairs.

Under the United States Constitution, the federal government and the states exercise concurrent, but unequal, authority. States have general police powers, while the federal government has only those powers enumerated in the United States Constitution. Among the enumerated powers of Congress is the power to regulate commerce "with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Indian Commerce Clause and other constitutional provisions give Congress "plenary power" over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004). If state law conflicts with federal objectives, federal law may preempt state law under the Supremacy Clause, U.S. Const. art. VI, cl. 2.[8]

The beginning point for an analysis of state jurisdiction is whether the activity in question occurs in an area that the federal government has set aside for Indians. The legal term for such areas is "Indian country." *See* 18 U.S.C. § 1151 (defining "Indian country").[9] In Washington, all lands within Indian reservations, as well as off-reservation trust homesteads, allotments, and "in lieu" fishing sites, are "Indian country." *See State v. Cooper*, 130 Wn.2d 770, 772, 777, 928 P.2d 406 (1996).

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[8] This opinion addresses only whether state law applies in various Indian affairs. It does not address whether a tribe could adopt its own prohibition on indoor smoking or the consequences of a tribal regulation that conflicted with a state law.

[9] 18 U.S.C. § 1151 provides: "Except as otherwise provided in sections 1154 and 1156 of this title [relating to liquor], the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

In general, state law does not apply to tribes or tribal members within Indian country.[10] *Gobin v. Snohomish Cy.*, 304 F.3d 909, 914 (9th Cir. 2002), *cert. denied*, 538 U.S. 908 (2003). *See also Nev. v. Hicks*, 533 U.S. 353, 362 (2001); *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-16 (1987). A business entity might, or might not, be considered a tribal entity depending on the facts of a particular case, such as the degree of tribal ownership.

However, state law may apply to a tribe and tribal members within the tribe's reservation if (1) Congress expressly consents to the application of state law (*Cy. of Yakima v. Conf'd Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992)), or (2) there are "exceptional circumstances" where strong state interests outweigh federal and tribal interests. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983); *Cabazon Band*, 480 U.S. at 214-16. An example of "exceptional circumstances" is a state law requiring tribal retailers to collect state taxes on sales to non-Indians and to keep records. *Wash. v. Conf'd Tribes of the Colville Indian Reserv.*, 447 U.S. 134, 151 (1980). *See also Puyallup Tribe v. Wash. Game Dep't*, 433 U.S. 165, 172-77, (1977) (exceptional circumstances justified state regulation of on-reservation tribal fishing).

Congress has not consented to an application of state indoor clean-air laws to tribes in Indian country. Therefore, I-901 would only apply to tribes and tribal members in Indian country if "exceptional circumstances" required state interests to prevail over federal and tribal interests. An argument could be made that the state has an important interest in protecting those in Indian country from second-hand smoke. However, unlike the collection of sales tax or the regulation of fisheries, we think a court would find that preventing exposure to second-hand smoke in Indian country, while important, nonetheless fails to rise to the level of an "exceptional circumstance" sufficient to avoid preemption by federal law. Therefore, a court would likely conclude that I-901 is preempted as applied to tribes, some Indian-owned business entities (depending on the facts), and tribal members in Indian country. *See Cabazon Band*, 480 U.S. at 220-21.

State law generally does apply to non-Indians within Indian country unless it is clear that Congress intends to preempt state law. *See Ariz. Dep't of Rev. v. Blaze Constr. Co.*, 526 U.S. 32 (1999); *Cy. of Yakima v. Conf'd Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992). *See also Cordova v. Holwegner*, 93 Wn. App. 955, 965, 971 P.2d 531 (1999) ("[T]he state may exercise civil jurisdiction over nonmembers on Indian reservations in matters not affecting members or tribes.") (citation omitted). For example, state law often applies to non-tribal members living on fee lands (those not held in trust by the United States) within a reservation.

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[10] The applicability of state criminal laws differs somewhat from the analysis of state civil laws provided in this opinion. *See generally State v. Squally*, 132 Wn.2d 333, 937 P.2d 1069 (1997) (discussing applicability of state criminal laws to tribal members in Washington). However, I-901 imposes civil, not criminal, penalties. *See* Laws of 2006, ch. 2, § 5(1). The state has civil court jurisdiction on some, but not all, Washington reservations. *See* RCW 37.12. However, state civil court jurisdiction merely means that state courts can adjudicate cases. This differs from the issue addressed in this opinion of whether substantive state law applies in Indian country.

See Brendale v. Conf'd Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 431 (1989) (White, J.); *Gobin*, 304 F.3d at 918. State authority often also extends to Indians who are not members of the reservation tribe. *Wash. v. Conf'd Tribes of the Colville Indian Reserv.*, 447 U.S. 134, 160-61 (1980).

Tribal law does not preempt state law. Only federal law can do that. *See Colville Indian Reserv.*, 447 U.S. at 156, 158; *United States v. Montana*, 604 F.2d 1162, 1172 (9th Cir. 1979). If a state law affects a "transaction" between a tribe or its members and a non-Indian, courts conduct a "particularized inquiry" into the balance of state, tribal, and federal interests to determine whether Congress implicitly intended to preempt state law. *White Mount. Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Under this test, state law is preempted if federal and tribal interests outweigh those of the state. *See Mescalero*, 462 U.S. at 334 (state hunting and fishing laws preempted); *Bracker*, 448 U.S. 136 (1980) (state license and use fuel taxes preempted); *United States v. Anderson*, 736 F.2d 1358, 1363-66 (9th Cir. 1984) (state regulation of water use on non-Indian fee land not preempted). Application of this "particularized inquiry" balancing test is case-by-case and fact-specific, making outcomes unpredictable. *See generally* Conference of Western Attorneys General, *American Indian Law Deskbook* 166-171, 312-13, 348-50, 387-91 (Clay R. Smith, et al., eds., 3d ed. 2004).

Even if state law applies to a tribe, enforcement may be difficult. Tribes possess sovereign immunity from lawsuits unless Congress abrogates the immunity or the tribe expressly waives it. *See C&L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) (tribe waived sovereign immunity); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (tribe immune from suit to enforce state cigarette tax collection); *Puyallup Tribe v. Wash. Game Dep't*, 433 U.S. 165, 172-3 (1977) (tribe immune from suit to enforce state fishing laws). Tribes retain their sovereign immunity from lawsuits when they engage in activities outside of Indian country. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998). Congress has not abrogated tribes' sovereign immunity in second-hand smoke matters, nor has any Washington tribe we know of waived its sovereign immunity on this topic. Therefore, even if a tribe were subject to I-901, enforcement of the Initiative in state court might be impossible.

Depending on the facts, tribal business enterprises may be entitled to tribal sovereign immunity. *Compare Wright v. Colville Tribal Enter.*, 127 Wn. App. 644, 111 P.3d 1244, 1249 (2005), *review granted*, 156 Wn.2d 1020 (2006) (declining to recognize tribal sovereign immunity) and *Maxa v. Yakima Petroleum, Inc.*, 83 Wn. App. 763, 924 P.2d 372 (1996) *with Rodriguez v. Wong*, 119 Wn. App. 636, 640-44, 82 P.3d 259 (2004) (recognizing tribal sovereign immunity). An important factor when determining if tribal sovereign immunity applies to a tribal business entity is whether the entity's activities occur on or off reservation. *Wright*, 127 Wn. App. at 651-53. On-reservation activities are much more likely to enjoy tribal sovereign immunity than off-reservation activities.

State law generally applies to tribal members outside of Indian country. *See Wagnon v. Prairie Band Potawatomi Nation*, __ U.S. __, 126 S. Ct. 676, 688 (2005); *Maxa*, 83 Wn. App. at 768. Similarly, state courts have jurisdiction to decide civil cases involving individual tribal members outside of Indian country. *Puyallup Tribe v. Wash. Game Dep't*, 433 U.S. 165, 173 (1977); *Wright*, 127 Wn. App. at 653. Therefore, regardless of whether they are owned or operated by a tribe, tribal business entity, or tribal members, "public places" and "places of employment" outside of Indian country are subject to I-901.[11]

To summarize the answers to the tribal jurisdiction question presented above, I-901 almost certainly does not apply to a tribe or tribal members in Indian country (that is, within the boundaries of a reservation and on some off-reservation trust lands). Depending on the facts, I-901 might or might not apply to a tribal business entity in Indian country. Even if I-901 applies in a given situation, tribal sovereign immunity would prevent an enforcement action in state court against a tribe unless the tribe waived it. Depending on the facts, tribal sovereign immunity might prevent a state court enforcement action against a tribal business entity, with on-reservation economic activities more likely enjoying tribal sovereign immunity than off-reservation activities.[12]

State regulatory laws, including I-901, generally apply to fee-land facilities owned by non-Indians within a reservation. I-901 almost certainly applies to non-Indians, both as patrons of a non-tribal business and as owners or "persons in charge" of a public place or place of employment. If I-901 affects a "transaction" between a tribe, tribal business entity, or tribal member and a non-Indian, the Initiative would not apply if state interests in enforcing it did not outweigh federal and tribal interests. Outside of Indian country, I-901 applies to tribal and non-tribal members alike.[13]

8. Does I-901 prohibit or restrict the use of incense, smudge sticks, smudge bowls, ceremonial pipes, or similar equipment used as part of a bona fide religious ceremony in a place which otherwise meets the definition of "public place" as described in the Initiative?

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[11] As previously noted, while a tribe or tribal business entity outside of Indian country might be subject to I-901, the tribe, and perhaps the tribal business entity, would enjoy tribal sovereign immunity, making enforcement in state court impossible unless the tribe waived immunity.

[12] There is at least a theoretical possibility that state law could be enforced against a tribe through an action brought in the tribe's own courts, or in the federal courts. Again, however, tribes are immune from suit in federal court except where the tribe or Congress has waived immunity, and many tribes also assert immunity from suit in their own tribal courts.

[13] Individual tribal members are not immune from suit in state courts if the court otherwise has jurisdiction.

BRIEF ANSWER: Incense, smudge sticks, and smudge bowls appear to fall outside the definition of "smoke" and "smoking" in RCW 70.160.020(1) and therefore would not be prohibited by I-901. While ceremonial pipes might fall within the definition of "smoking," the courts likely would interpret the statute narrowly rather than reading it to restrict bona fide religious practices.

Your final question is whether I-901 prohibits or restricts the use of incense, smudge sticks, smudge bowls, ceremonial pipes, or similar equipment used as part of a bona fide ceremony in a place which otherwise meets the definition of a "public place" or "place of employment" as described in the Initiative. For reasons described below, we conclude that a court would likely find that incense, smudge sticks, and smudge bowls do not meet the definition of "smoking" in I-901 and, therefore, their use would not be prohibited by the Initiative. However, the use of ceremonial pipes might be considered "smoking" and therefore covered by the Initiative, but a court would then likely construe the term narrowly in light of article I, § 11 of the Washington Constitution (which protects the free exercise of religion) and might conclude that the use of ceremonial pipes is not prohibited.

Smoke of various kinds is used in a wide array of religious practices. As Senator Regala and Representative Darneille describe in their letter, Buddhist and Hindu ceremonies use incense, and Episcopal and Roman Catholic services use censers. Some Native American religious observances involve "smudging" in which smoke from natural plant products is thought to carry prayers to the spirits and provide cleansing. Some practitioners of Native American religions bundle various plants such as tobacco, sage, sweet grass, lavender and cedar into smudge sticks or smudge bowls and then burn them to produce smoke. Other Native American observances involve the use of ceremonial pipes. Smudging and ceremonial pipes are used on occasions such as weddings and funerals in public places, as well as routinely as part of daily worship in private places.

I-901 is silent on religious practices.[14] Instead, the overall purpose of the Initiative is to prevent prolonged exposure to second-hand tobacco smoke. *See* Laws of 2006, ch. 2, § 1. I-901 prohibits "smoking" in a "public place" or "place of employment." *Id.*, § 3. Incense burning, the use of censers, smudging, and the use of ceremonial pipes would often occur in a "public place" or "place of employment" such as a temple, church, wedding facility, or funeral home, so many of the uses of religious smoke are at least initially covered by the Initiative.[15] Therefore, the

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[14] I-901 contains no exemption for religious uses of smoke. We note that SB 6213 (2006) would have provided a religious use exemption. It did not pass. However, this means very little, because courts are "loathe to ascribe any meaning to the Legislature's failure to pass a bill into law." *State v. Cronin*, 130 Wn.2d 392, 400, 922 P.2d 694 (1996) (citation omitted).

[15] The use of incense, censers, smudging, or ceremonial pipes in private residences is not covered by I-901. Laws of 2006, ch. 2, § 2(3).

question of whether religious uses of smoke are covered by the Initiative centers on whether incense, censers, smudging, or ceremonial pipes constitute "smoking".

I-901 provides: "'smoke' or 'smoking' means the carrying or smoking of any kind of lighted pipe, cigar, cigarette, or any *other lighted smoking equipment.*" Laws of 2006, ch. 2, § 2(1) (emphasis added). The question is whether "any other lighted smoking equipment" encompasses incense, censers, smudging, or ceremonial pipes. If this phrase is read to mean things *other than* cigarettes, cigars, and pipes, then it might include religious uses of smoke; on the other hand, if this phrase is read to mean things *like* cigarettes, cigars, and pipes, then it would not include these practices.

A statute is ambiguous if it is "fairly susceptible to different, reasonable interpretations, either on its face or as applied to particular facts, and must be construed to avoid strained or absurd results." *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004) (citation omitted). The definition of "smoking" is susceptible to two different, reasonable meanings: (1) everything that emits smoke particles, or (2) things like cigarettes, cigars, and pipes that are directly inhaled but also produce second-hand smoke. Defining "smoking" to be everything that emits smoke particles would mean that birthday candles on a cake in a public place would be illegal. This would lead to absurd results. Therefore, because it is susceptible to two reasonable meanings and should be construed to avoid absurd results, the definition of "smoking" is ambiguous.[16]

A court may employ a statutory construction tool called *ejusdem generis* to interpret an ambiguous statute. *State Owned Forests v. Sutherland*, 124 Wn. App. 400, 410-12, 101 P.3d 880 (2004), *review denied*, 154 Wn.2d 1022, 116 P.3d 398 (2005). "The rule of ejusdem generis states that when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms." *Estate of Jones*, 152 Wn.2d 1, 11, 100 P.3d 805 (2004) (citation omitted). This means that the meaning of the general term "any other lighted smoking equipment" should be restricted to things like the specific terms of cigarettes, cigars, and pipes.

The smoke from cigarettes, cigars, and pipes is directly inhaled. Incense, censers, and smudging are not directly inhaled. Therefore, a court is likely to interpret "smoking" to mean things that are directly inhaled. Because incense, censers, and smudging are not directly inhaled, we believe that a court would probably conclude that these religious uses of smoke are not prohibited by I-901.

This conclusion is bolstered by another tool of statutory construction, the requirement to look to the purpose of the law in question and carry it out. *See State v. Leech*, 114 Wn.2d 700,

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[16] We note also that section 6 of I-901, defining a "presumptively reasonable distance" from no-smoking areas, refers the need for such an area "to ensure that tobacco smoke does not enter the area." Laws of 2006, ch. 2, § 6. This makes it clear that the smoking of tobacco was at least the primary concern of the measure's supporters.

708-09, 790 P.2d 160 (1990) ("statutes should be construed to effect their purpose") (quoted source omitted). The intent section of I-901 provides:

> The people of the state of Washington recognize that exposure to second-hand smoke is known to cause cancer in humans. Second-hand smoke is a known cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are often exposed to second-hand smoke in the workplace, and are likely to develop chronic, potentially fatal diseases as a result of such exposure. In order to protect the health and welfare of all citizens, including workers in their places of employment, it is necessary to prohibit smoking in public places and workplaces.

Laws of 2006, ch. 2, § 1. Incense, censers, and smudging presumably do not cause "chronic, potentially fatal diseases" and, therefore, we believe I-901 would not be interpreted to apply to these kinds of religious smoke.

However, ceremonial pipes might be looked at differently. Ceremonial pipes use tobacco and are directly inhaled like cigarettes and cigars. Moreover, a ceremonial pipe is a "pipe" and therefore comes directly within the I-901 definition of "smoking." *Id.*, § 2(1). For this reason, a court would likely interpret "smoking" as applying to ceremonial pipes. The question then becomes whether any other law affects the interpretation of "smoking" as it relates to the use of ceremonial pipes. The constitutionality of a restriction on the religious use of ceremonial pipes might affect this interpretation.

A court will attempt to interpret a term in a statute so that the law remains constitutional. *In Re Detention of C.W.*, 147 Wn.2d 259, 277, 53 P.3d 979 (2002). The Washington Constitution provides:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Const. art. I, § 11. The Washington Constitution is more protective of religious liberty than the United States Constitution. *First Covenant Church v. City of Seattle*, 120 Wn.2d 203, 229-30, 840 P.2d 174 (1992).[17]

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[17] Because the federal constitution sets a "minimum background" level of protection and the state constitution is more protective of religious, free exercise rights, this opinion does not attempt to define the precise level of protection to which citizens are entitled under either constitution. We confine ourselves to observing that

The free exercise of religion is a fundamental right, so a court applies a "strict scrutiny" analysis to determine if a government action is constitutional. *First United Methodist Church v. Hearing Examiner*, 129 Wn.2d 238, 246, 916 P.2d 374 (1996).

> Under this test, the complaining party must first prove the government action has a coercive effect on the practice of religion. Once a coercive effect is established, the burden of proof shifts to the government to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective. If no compelling state interest exists, the restrictions are unconstitutional.

Id.

"The first prerequisite for any free exercise challenge is that the parties have a sincere religious belief." *Munns v. Martin*, 131 Wn.2d 192, 199, 930 P.2d 318 (1997). "[W]here an individual's beliefs are 'arguably religious,' the court will recognize and consider them for purposes of constitutional analysis." *State v. Balzer*, 91 Wn. App. 44, 54, 954 P.2d 931, *review denied*, 136 Wn.2d 1022, 969 P.2d 1063 (1998) (quoted source omitted). *See also Backlund v. Bd. of Comm'rs*, 106 Wn.2d 632, 639, 724 P.2d 981 (1986), *appeal dismissed*, 481 U.S. 1034, 107 S. Ct. 1968, 95 L. Ed. 2d 809 (1987) (individual must prove only that their religious convictions are "sincere and central to their beliefs"). The use of ceremonial pipes by practicers of Native American religion would likely qualify as a sincere religious belief.[18]

The coercive-effect element is satisfied when the government action constitutes a "burden" on the free exercise of religion. *Munns*, 131 Wn.2d at 200. "Religious free exercise embraces two concepts: the freedom to believe and the freedom to act. The first is absolute while the second, by the nature of our democracy, cannot be. An individual's conduct, therefore, remains subject to regulation for the protection of society." *Balzer*, 91 Wn. App. at 52 (citations

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the courts would likely balance a law generally regulating a public health hazard against specific religious practices affected by the law.

[18] Congress has recognized that traditional Native American religious practices are a bona fide religion and instructed federal agencies to respect them. *See* 42 U.S.C. § 1996 (American Indian Religious Freedom Act). While this act does not directly affect the constitutionality of a state law ban on the use of ceremonial pipes, a court would likely note the federal policy embodied by the act.

Senator Regala's and Representative Darneille's opinion request refers to two other federal religious freedom statutes as potentially affecting the constitutionality of a ban on smoking ceremonial pipes. However, neither statute applies to I-901. The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 through b-4, only applies to federal agencies. *Id.*, § 2000bb-3(a). The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc through cc-5, applies to state and local governments, but only for actions involving land use and the institutionalization of persons. *Id.*, § 2000cc(a)(1), § 2000cc-5(A), § 2000cc-5(5).

omitted). I-901 is a religious-neutral law of general application; on its face, the Initiative does not single out religions in general, or specific religions, but rather is a ban on smoking of all kinds in places of employment and public places. However, an individual must merely show the law "indirectly" burdens the free exercise of religion to satisfy the coercive-effect element. *Id.* at 54.

I-901 appears to prohibit those practicing Native American religions from using ceremonial pipes in a "public place" or a "place of employment." The Initiative burdens the free exercise of religion as applied to the use of ceremonial pipes and therefore satisfies the first element. Now the burden shifts to government to prove (1) it has a compelling state interest and (2) the law accomplishes this interest in the least restrictive way. *Munns*, 131 Wn.2d at 200.

"Compelling interests" are "those governmental objectives based upon the necessities of national or community life such as threats to public health, peace, and welfare." *Balzer*, 91 Wn. App. at 56 (citations omitted). I-901 clearly relates to "public health", so a court could find that the Initiative involves this compelling interest.

However, the law restricting religious activities must do more than merely involve a compelling state interest like public health. Instead, the law must have a "nexus of necessity" with the asserted compelling interest. *State v. Meacham*, 93 Wn.2d 735, 740, 612 P.2d 795 (1980) (citation omitted). The use of ceremonial pipes is different than smoking cigarettes, cigars, and non-religious pipes. Because they are used only for ceremonies, the use of religious ceremonial pipes in public places presumably occurs less frequently than use of cigarettes, cigars, and non-religious pipes. For example, smoking a cigarette might be a near-constant activity, while the use of a ceremonial pipe might be limited to a funeral. Moreover, the occasional use of ceremonial pipes in public places would not seem to create the same level of exposure to second-hand smoke as cigarette smoking. Given the less significant public health effects of ceremonial pipes, their use may not have a "nexus of necessity" with public health.

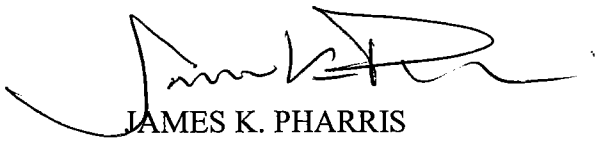
The last question is whether the law is the "least restrictive means for achieving the government objective." *Munns*, 131 Wn.2d at 199. A court would ask the government to prove that public health could not be protected without I-901's ban on the use of ceremonial pipes in Native American religious observances. Given that the use of ceremonial pipes exposes the public to less second-hand smoke than cigarettes, it would be hard for the government to prove this in many cases.

In sum, because interpreting I-901 to apply to bona fide Native American religious observances might render the law unconstitutional (as applied to those uses), it is our opinion that a court likely would conclude that the use of ceremonial pipes is not the kind of "smoking"

envisioned by the Initiative and, therefore, is lawful.[19] However, in the absence of clarifying legislation, these are questions that might have to be resolved through litigation.

We hope the foregoing analysis will prove useful. This informal opinion will not be published as an official Attorney General Opinion.[20]

Sincerely,



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[19] Local health departments enforce I-901. Laws of 2006, ch. 2, § 5(3). A local government is allowed to adopt interpretations and policies about how it enforces most laws. In light of this ambiguity in the law, we also believe that a local health department could adopt a written policy that the use of ceremonial pipes in bona fide religious observances is not "smoking" under I-901 and therefore is lawful.

[20] Our office commonly uses the singular pronouns ("I" and "my") in informal opinions to distinguish them from the plural pronouns used in formal opinions, which represent the official position of the Attorney General's Office. In this opinion, the terms "we" and "our" refer to the two attorneys who prepared and signed it.

INITIATIVE 901

I, Sam Reed, Secretary of State of the State of Washington and custodian of its seal, hereby certify that, according to the records on file in my office, the attached copy of Initiative Measure No. 901 to the People is a true and correct copy as it was received by this office.

AN ACT Relating to the prohibition of smoking in public places and places of employment; amending RCW 70.160.020, 70.160.030, 70.160.050, and 70.160.070; adding new sections to chapter 70.160 RCW; creating a new section; and repealing RCW 70.160.010, 70.160.040, and 70.160.900.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** A new section is added to chapter 70.160 RCW to read as follows:

INTENT AND FINDINGS. The people of the state of Washington recognize that exposure to second-hand smoke is known to cause cancer in humans. Second-hand smoke is a known cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are often exposed to second-hand smoke in the workplace, and are likely to develop chronic, potentially fatal diseases as a result of such exposure. In order to protect the health and welfare of all citizens, including workers in their places of employment, it is necessary to prohibit smoking in public places and workplaces.

Sec. 2. RCW 70.160.020 and 1985 c 236 s 2 are each amended to read as follows:

Appendix A

As used in this chapter, the following terms have the meanings indicated unless the context clearly indicates otherwise.

(1) "Smoke" or "smoking" means the carrying or smoking of any kind of lighted pipe, cigar, cigarette, or any other lighted smoking equipment.

(2) "Public place" means that portion of any building or vehicle used by and open to the public, regardless of whether the building or vehicle is owned in whole or in part by private persons or entities, the state of Washington, or other public entity, and regardless of whether a fee is charged for admission, and includes a presumptively reasonable minimum distance, as set forth in section 6 of this act, of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited. A public place does not include a private residence unless the private residence is used to provide licensed child care, foster care, adult care, or other similar social service care on the premises.

Public places include, but are not limited to: Schools, elevators, public conveyances or transportation facilities, museums, concert halls, theaters, auditoriums, exhibition halls, indoor sports arenas, hospitals, nursing homes, health care facilities or clinics, enclosed shopping centers, retail stores, retail service establishments, financial institutions, educational facilities, ticket areas, public hearing facilities, state legislative chambers and immediately adjacent hallways, public restrooms, libraries, restaurants, waiting areas, lobbies, ((~~and reception areas~~)) bars, taverns, bowling alleys, skating rinks, casinos, reception areas, and no less than seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests. A public place does not include a private residence. This chapter is not intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public.

(3) ((~~"Restaurant" means any building, structure, or area used, maintained, or advertised as, or held out to the public to be, an enclosure where meals are made available to be consumed on the premises, for consideration of payment.~~)) "Place of employment" means any area under the control of a public or private employer which employees are required to pass through during the course of employment, including, but not limited to: Entrances and exits to the places of employment, and including a presumptively reasonable minimum distance,

as set forth in section 6 of this act, of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited; work areas; restrooms; conference and classrooms; break rooms and cafeterias; and other common areas. A private residence or home-based business, unless used to provide licensed child care, foster care, adult care, or other similar social service care on the premises, is not a place of employment.

Sec. 3. RCW 70.160.030 and 1985 c 236 s 3 are each amended to read as follows:

No person may smoke in a public place ((~~except in designated smoking areas~~)) or in any place of employment.

Sec. 4. RCW 70.160.050 and 1985 c 236 s 5 are each amended to read as follows:

Owners, or in the case of a leased or rented space the lessee or other person in charge, of a place regulated under this chapter shall ((~~make every reasonable effort to~~)) prohibit smoking in public places ((~~by posting~~)) and places of employment and shall post signs prohibiting ((~~or permitting~~)) smoking as appropriate under this chapter. Signs shall be posted conspicuously at each building entrance. In the case of retail stores and retail service establishments, signs shall be posted conspicuously at each entrance and in prominent locations throughout the place. ((~~The boundary between a nonsmoking area and a smoking permitted area shall be clearly designated so that persons may differentiate between the two areas.~~))

Sec. 5. RCW 70.160.070 and 1985 c 236 s 7 are each amended to read as follows:

(1) Any person intentionally violating this chapter by smoking in a public place ((~~not designated as a smoking area~~)) or place of employment, or any person removing, defacing, or destroying a sign required by this chapter, is subject to a civil fine of up to one hundred dollars. Any person passing by or through a public place while on a public sidewalk or public right of way has not intentionally violated this chapter. Local law enforcement agencies shall enforce this section by issuing a notice of infraction to be assessed in the same manner as traffic infractions. The provisions contained in chapter 46.63 RCW for the disposition of traffic infractions apply to

the disposition of infractions for violation of this subsection except as follows:

(a) The provisions in chapter 46.63 RCW relating to the provision of records to the department of licensing in accordance with RCW 46.20.270 are not applicable to this chapter; and

(b) The provisions in chapter 46.63 RCW relating to the imposition of sanctions against a person's driver's license or vehicle license are not applicable to this chapter.

The form for the notice of infraction for a violation of this subsection shall be prescribed by rule of the supreme court.

(2) When violations of RCW ((~~70.160.040 or~~)) 70.160.050 occur, a warning shall first be given to the owner or other person in charge. Any subsequent violation is subject to a civil fine of up to one hundred dollars. Each day upon which a violation occurs or is permitted to continue constitutes a separate violation.

(3) Local ((~~fire~~)) health departments ((~~or fire districts~~)) shall enforce RCW ((~~70.160.040 or~~)) 70.160.050 regarding the duties of owners or persons in control of public places((~~, and local health departments shall enforce RCW 70.160.040 or 70.160.050 regarding the duties of owners of restaurants~~)) and places of employment by either of the following actions:

(a) Serving notice requiring the correction of any violation; or

(b) Calling upon the city or town attorney or county prosecutor or local health department attorney to maintain an action for an injunction to enforce RCW ((~~70.160.040 and~~)) 70.160.050, to correct a violation, and to assess and recover a civil penalty for the violation.

NEW SECTION. **Sec. 6.** A new section is added to chapter 70.160 RCW to read as follows:

PRESUMPTIVELY REASONABLE DISTANCE. Smoking is prohibited within a presumptively reasonable minimum distance of twenty-five feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited so as to ensure that tobacco smoke does not enter the area through entrances, exits, open windows, or other means. Owners, operators, managers, employers, or other persons who own or control a public place or place of employment may seek to rebut the presumption that twenty-five feet is a reasonable minimum distance by making application to the director of the local health department or district in which the public place or place of

employment is located. The presumption will be rebutted if the applicant can show by clear and convincing evidence that, given the unique circumstances presented by the location of entrances, exits, windows that open, ventilation intakes, or other factors, smoke will not infiltrate or reach the entrances, exits, open windows, or ventilation intakes or enter into such public place or place of employment and, therefore, the public health and safety will be adequately protected by a lesser distance.

NEW SECTION. **Sec. 7.** The following acts or parts of acts are each repealed:

(1) RCW 70.160.010 (Legislative intent) and 1985 c 236 s 1;

(2) RCW 70.160.040 (Designation of smoking areas in public places--Exceptions--Restaurant smoking areas--Entire facility or area may be designated as nonsmoking) and 1985 c 236 s 4; and

(3) RCW 70.160.900 (Short title--1985 c 236) and 1985 c 236 s 10.

NEW SECTION. **Sec. 8.** CAPTIONS NOT LAW. Captions used in this act are not any part of the law.

--- END ---