The Honorable Benjamin H. Settle

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION, a non-profit trade association, Plaintiff, v. The STATE OF WASHINGTON; CHRISTINE GREGOIRE, in her official capacity as Governor of the State of Washington; LIZ LUCE, in her official capacity as Director, Washington State Department of Licensing, Defendants.	NO. 3:10-cv-05584-BHS PLAINTIFF AUTO'S RESPONSE TO STATE'S MOTION TO DISMISS FOR FAILURE TO JOIN REQUIRED PARTIES NOTED: October 15, 2010

I. INTRODUCTION

Plaintiff AUTO has indentified numerous state constitutional violations and abuses of authority by the Governor and the Department of Licensing ("DOL") with respect to the use of Washington taxpayer dollars. AUTO seeks a declaratory judgment

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under Washington statutes and a writ of prohibition to stop the unconstitutional actions by the Governor and DOL.[1]

The State of Washington has moved to dismiss this action on the grounds that the Governor may not be sued if that suit indirectly threatens a contract between the Governor and a tribe, because a tribe is a necessary party and immune from suit. In other words, any contract signed by the Governor that favors an Indian Tribe, no matter how egregious, illegal, or harmful to Washington's taxpaying public is immune from *all* judicial review.[2]

AUTO maintains that this Court has many options other than dismissing this suit. It may proceed in the Tribes' absence, fashioning appropriate relief between the participating parties. It may also order joinder of the Tribes who have waived sovereign immunity, or order joinder of individual tribal officials who have executed these illegal contracts. This Court cannot, in equity and good conscience, dismiss this suit and provide blanket immunity for all contracts between Washington's executive branch and the Tribes when the actions of Washington's executive branch violate the constitution. Such an action would violate the fundamental principle of checks and balances upon which our system of government is based. It would allow the Governor carte blanche to provide favors in the form of taxpayer funds to Indian tribes without judicial oversight.

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[1] AUTO has filed a motion for remand, which this Court is still considering. If this Court orders remand of this case to state court, AUTO acknowledges that this Court need not decide the State's motion to dismiss.

[2] A number of Tribes have sought amicus status by motion. AUTO has moved to quash the Tribes' premature submission of a brief on the present motion. Those motions, too, need not be decided by this Court if it orders remand to state court.

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II. STATEMENT OF FACTS

In 2007, the Washington Legislature addressed an issue with Washington gas tax laws. Tribes had complained that although the tax was generally collected outside of Indian Country, the true incidence of the tax fell on tribal retailers and consumers. *See* Complaint. The Legislature responded by amending the law to clearly place the incidence of the tax on licensees (motor vehicle fuel and special fuel suppliers, importers, exporters, blenders or persons holding an international fuel tax agreement license). This moved all taxed transactions off-reservation, and should have resolved the issue. However, the Legislature also included a statutory provision allowing the Governor authority to "enter into an agreement with any federally recognized Indian tribe located on a reservation within this state regarding motor vehicle fuel taxes included in the price of fuel delivered to a retail station wholly owned and operated by a tribe.... The agreement may provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax." RCW 82.38.310(1).

Under the auspices of this vague statutory authority to compact with Washington Indian tribes, the Governor violated numerous provisions of the Washington Constitution. For example, the Governor "refunds" to the Tribes taxes paid off-reservation *by non-tribal entities*. Thus the Tribes do not bear the incidence of the taxes that they are "refunded." The "refunds" in some cases amount to 175% of the taxes actually collected by the State. See Talmadge decl. ex K (the State "refunds" 75% of gas taxes to Tribes and also refunds 100% of the taxes on those same transactions to interstate truckers). The Governor's agreement requires the Tribes to pass on the tax to consumers, without

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legislative authority, and then refunds the tax to the Tribes. *See* Complaint. This puts the incidence of the tax back on consumers when the Legislature explicitly moved the incidence of the tax from consumers to licensees.

The taxpayer funds that the Governor uses to pay the Tribes come from Washington's motor vehicle fund ("MVF") established in RCW 82.36.410. Under the Washington Constitution's 18th Amendment, MVF dollars *must* be used for highway purposes. Yet the Governor also has allowed those funds to be used for non-highway purposes. *See* Complaint, *see also* Talmadge decl. ex L.

III. EVIDENCE RELIED UPON

The declaration of Philip A. Talmadge, filed herewith, and the documents filed thus far in this case.

IV. LAW AND ARGUMENT

A. Dismissal Is Not Warranted As the Tribes Are Not Required Parties to AUTO's Claims Against the Governor Under the Washington State Constitution

Under Fed. R. Civ. P. ("FRCP") 19,[3] this Court determines whether an action must be dismissed if it is not feasible to join a required[4] party. First, the Court must

[3] The relevant text of Rule 19 is as follows: (a) Persons Required to Be Joined if Feasible. (1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest. (2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff. ...(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or

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determine if the nonparty is required in order for the Court to hear the action. FRCP 19(a)(1). If so, it must order that the required party to be joined. Rule 19(a)(2). If this Court concludes that it is not feasible to join the required party, then it must examine whether, "in equity and good conscience," the action can proceed among the existing parties. FRCP 19(b).

The State here bears the burden of demonstrating that this Court has no option but to dismiss this action. *Matheson v. Gregoire*, 139 Wn. App. 624, 635, 161 P.3d 486, 492 (2007) ("The burden of proof for establishing indispensability is on the party urging dismissal."). Rather, "[i]n analyzing whether a party is a necessary and indispensable party, CR 19 'calls for determinations that are heavily influenced by the facts and circumstances of individual cases.'" *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) ("Because the question whether a party is indispensable can only be determined in the context of particular litigation, it is necessary to set forth in some detail the legal and factual context of the present controversy" (internal citations and quotations omitted)).

The facts of this case, the nature of AUTO's claims, and constitutional provisions at issue in this litigation demonstrate this case should not be dismissed.

1. The Tribes Are Not Required Parties

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the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

[4] Although the State's motion uses the term "indispensible party," that language was revised in 2007 amendments to FRCP 19 to refer to a "required" party.

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Analysis under the first step of the FRCP 19 test demonstrates that the Tribes are not required for adjudication. A party is required only if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FRCP 19(a). The State contends that the Tribes have an interest in protecting the tribal-state fuel tax agreements, making the Tribes a necessary party to the litigation. AUTO's suit, however, seeks prospective relief only and does not challenge the validity of the tribal-state fuel tax agreements. As a result, complete relief can be accorded in this action between AUTO and the State—the State can be enjoined from taking future unconstitutional action. The Tribes' interest in the tribal-state fuel tax agreements is not the subject of the action, so the Tribes are not necessary to the litigation to protect that interest. The State and AUTO will not be subject to any risk of double, multiple, or inconsistent obligations without the Tribes joined to the litigation as parties.

The key focus of the necessary party inquiry is the relief requested. In *State ex rel. Clark v. Johnson,* citizens of New Mexico challenged gaming compacts signed between Tribes and the state's Governor. 904 P.2d 11, 15 (N.M. 1995). They claimed that the governor lacked legislative authority to sign the compacts, and sought a writ of

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prohibition or writ of mandamus, and declaratory relief from the New Mexico Supreme Court. *Id.* The governor argued that because the suit threatened the viability of the compacts, the Tribes were indispensible parties. The court disagreed, explaining that because the suit did not arise from the compacts, the Tribes were not necessary for adjudication:

> Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the compact.

Id. at 19.

The *Johnson* court's position makes sense when applied to other kinds of constitutional challenges to abuse of executive authority. For example, a suit challenging an unconstitutional tax law can be resolved in the absence of the taxpayers who benefit from that law even though they may lose a valuable interest if the suit is successful. *See e.g. Belas v. Kiga,* 959 P.2d 1037 (Wash. 1998). If all "interested" parties were required in such a case, none would ever go forward.

Authorities cited in the State's motion, *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2009) (Div. II), *rev. denied*, 166 Wn.2d 1003, 208 P.3d 1123 (2009), *Matheson v. Gregoire*, 139 Wn. App. 624, 161 P.3d 486 (2007), *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002), and *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002), do not support the conclusion that the tribes are required parties to AUTO's case. *Mudarri* involved direct and indirect attacks on tribal-state

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gaming compacts, and the court held that the tribes were indispensable parties to the claims attacking the validity of the compacts because a party to a challenged contract generally is necessary and indispensable to the litigation. 147 Wn. App. at 604, 196 P.3d at 162; *see also Matheson*, 139 Wn. App. at 635, 161 P.3d at 492 ("It is a fundamental principle that a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract" (internal quotations and citations omitted)). Similarly, in *Matheson*, the plaintiff challenged the statute authorizing the State to enter into cigarette tax compacts with the tribes and sought an order holding any resulting agreement unenforceable, enjoining the State and Tribal defendants from either reaching an agreement or enforcing it; and granting the plaintiff *monetary damages*, costs, and attorney fees. *Matheson*, 139 Wn. App. at 628, 161 P.3d at 489. In *American Greyhound*, the plaintiffs sought the eventual termination of all tribal gaming compacts in Arizona through an injunction on the execution of future compacts or the extension of existing ones. *American Greyhound*, 305 F.3d at 1023-24. The plaintiff in *Dawavendewa* sought an injunction that would have required the Salt River Project to violate a term of its lease with the Navajo Nation. *Dawavendewa*, 276 F.3d at 1155.

Unlike *Mudarri*, *Matheson*, and *American Greyhound*, none of AUTO's claims challenge the validity of the fuel tax agreements between the State and Tribes. Rather, AUTO's claims focus solely on the State's constitutional violations.[5] Furthermore,

[5] The court in *Mudarri* did not reject Mudarri's privileges and immunities claim under Article I, § 12 of the Washington Constitution based on Mudarri's failure and inability to join the tribes as

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unlike *Dawavendewa*, AUTO is not seeking an injunction that would cause the State to violate any of the terms of the tribal-state fuel tax agreements. AUTO is simply seeking declaratory judgment that the State has violated the Washington Constitution. AUTO is not seeking to "set aside" or "decimate" the fuel tax agreements. *Dawavendewa*, 276 F.3d at 1156-57.

2. If Tribal Participation Is Required, Parties Can Be Joined

Even if this Court concludes that the Tribes' interests are somehow imperiled, they can be joined, or parties necessary to protect their interests can be joined, under FRCP 19(b)(2). If this Court concludes that AUTO's suit challenges the compacts, the Tribes can be joined because they have waived sovereign immunity with respect to suits involving these compacts.

The State proclaims without analysis that "the Tribes...are immune from suit" and thus cannot be joined in this action under FRCP 19(a)(2). Motion at 7. This blanket statement is incorrect; tribal sovereign immunity does not bar this suit.

a. The Tribes Have Waived Sovereign Immunity

A tribe can waive sovereign immunity in a contract. *C & L Enterprises v. Potawatomi Indian Tribe*, (2001) 532 U.S. 411 (2001). *C & L Enterprises* resolved the split of authority that had emerged in the state and federal courts on the question whether, by agreeing to an arbitration clause, and to enforcement of an arbitral award, " 'in any court having jurisdiction thereof,' " a tribe has waived its sovereign immunity from suit.

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indispensable parties. 147 Wn. App. at 616-18, 196 P.3d at 168-70. Rather, the court rejected Mudarri's privileges and immunities claim on grounds that will be refuted on the merits by AUTO.

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The Court concluded that agreement to such contract language constitutes an *explicit* waiver, of tribal sovereign immunity. The compacts in this case are indistinguishable from the contract in *C & L Enterprises, supra,* and the only reasonable interpretation of their terms is that they clearly, and *explicitly* waive tribal sovereign immunity. The arbitration clause in *C & L Enterprises, supra,* provided: " 'All claims or disputes ... shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.... The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.' " *Id.* at 411. The Court noted that, "[t]he American Arbitration Association Rules to which the clause refers provide: 'Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.' " *Id.*

The "magic words" "waiver" and "sovereign immunity" need not be used for a waiver to be express and clear. *Warburton/Buttner v. Superior Court,* 103 Cal.App.4th 1170, 1190 (Cal.App. 4 Dist. 2002). The *C & L Enterprises* Court rejected the conclusion of the Oklahoma Court of Appeals, that the contract language constituted only a waiver by implication, because the contract did not use the words "sovereign immunity," or expressly state that the defense of sovereign immunity is waived. An implied waiver would be ineffective in the face of an established standard of federal law that requires a waiver of tribal immunity must be "clear." *C & L Enterprises,* 532 U.S. at 412, citing *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505-509 (1991). The

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Court, instead, held the contract language was unambiguous, and by agreeing to submit all disputes to arbitration, to enforcement in any court of competent jurisdiction, and accepting Oklahoma law as the law governing the contract, the tribe had clearly and explicitly waived its sovereign immunity. *Id.* at 412-13. Therefore, a tribal contract in which the Tribe agrees that disputes are governed by a court constitutes an express waiver of sovereign immunity. *Id.*

Here, such waiver is present. For example, the Colville, Skokomish, and Nisqually compacts indicate that each Tribe agrees to defend its own authority and the State's authority in "any action" filed by a third party. Talmadge decl. ex. A-C. The Squaxin Island and Swinomish Tribes have agreed to submit claims involving the contracts to *this* Court, the United State District Court for the Western District of Washington. Talmadge decl. ex. D-E. The Puyallup, Port Gamble S'Klallam, Kalispel, and Chehalis Tribes have agreed to submit disputes to binding arbitration under the rules of the American Arbitration Association, which the Supreme Court in *C & L Enterprises* held to be a waiver of sovereign immunity. Talmadge decl. ex. F-I.

If the State feels that AUTO's challenges to the State's authority indirectly implicate the compacts, then those Tribes that have waived sovereign immunity can join and defend their authority as they have agreed. Since the challenges to the State's authority are general and do not target the provisions of any one compact, those Tribes can adequately defend the interests of those Tribes that may not have waived immunity. The State also does not explain why, if it feels the Tribes' interests under the compacts

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are threatened by this suit, those Tribes that have waived immunity or voluntarily agreed to participate in the defense of the compacts cannot be joined.

b. In the Alternative This Court Can Order Joinder of the Individual Tribal Officers Who Executed the Compacts

Alternatively, if the Court concludes that the Tribes still cannot be joined as defendants even though they have waived sovereign immunity, AUTO requests leave to join the following tribal officials or their successors.[6] In cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting unconstitutionally. *Burlington N. R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991). Under the doctrine first announced by the Supreme Court in *Ex Parte Young,* an official may not claim immunity from suit for constitutional violations or violations of law. 209 U.S. 123, 155-56 (1908). Likewise, sovereign immunity does not extend to claims for declaratory and injunctive relief against tribal officers for violations of state or federal law. *See, e.g., Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 171-72 (1977). Specifically, suits seeking prospective relief to enjoin tribal officers from collecting illegal taxes are permitted. *Big Horn County Electric Cooperative, Inc.,* 219 F.3d 944, 954 (2000).

[6] *See Matheson*, 139 Wn. App. at 633, 161 P.3d at 491 ("In cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute. ... Here, Matheson named Chad Wright individually in his official capacity as the Tribe's Cigarette Tax Director. Still, no exception applies because Matheson seeks damages and equitable relief, not merely prospective relief."); *see also Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991) ("But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. ... tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.").

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In a suit virtually identical to this one except that it *directly* sought to invalidate a tribal-state tax compact, this Court ordered joinder of the individual tribal officials responsible for signing the compact, rather than dismissal. In *Nisqually Indian Tribe v. Gregoire,* the Nisqually Tribe sought to invalidate a cigarette compact between the Squaxin Island Tribe and the State of Washington. 2008 WL 1999830 at *1 (W.D. Wash. 2008) (unpublished). The State moved for dismissal under FRCP 19 arguing that the Tribe was indispensible to the litigation but could not be joined based on sovereign immunity. *Id.* This Court concluded that the Squaxin Island Tribe was necessary, but that the defect could be cured by naming an individual official who entered into the allegedly illegal compacts. *Id.* at *6.

Although this case involves only state law claims, and the *Ex Parte Young* doctrine makes state and tribal officials subject to suit in federal court under *federal* law, officials also are not immune to declaratory judgment suits for actions that violate state *or* federal law. *See e.g., Braam ex rel. Braam v. State,* 150 Wn.2d 689, 81 P.3d 851 (2003); *Coppernoll v. Reed,* 155 Wn.2d 290, 119 P.3d 318 (2005); (declaratory judgment action against secretary of state); *Osborn v. Grant County By and Through Grant County Commissioners,* 130 Wn.2d 615, 926 P.2d 911 (1996) (declaratory judgment action against county); *Acme Finance Co. v. Huse,* 192 Wash. 96, 73 P.2d 341 (1937) (declaratory judgment action against state).

Therefore, even if the State can demonstrate that the compacts are threatened by AUTO's claims that state law has been violated, this Court should order joinder of the responsible tribal officials under FRCP 19(a)(2).

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3. Even if the Tribes Are Required Parties Who Cannot Be Joined, This Court Cannot, in Equity and Good Conscience, Dismiss AUTO's Claims

In addition, even if the Tribes are required parties because tribal fuel tax compacts are tangentially related to AUTO's litigation, and even if the tribes cannot be joined, this case cannot be dismissed in equity and good conscience under FRCP 19(b). The following four factors are considered and balanced under the second part of the test to determine whether a case may proceed in the absence of a required party:

> (1) the extent to which a judgment rendered in the person's absence might be prejudicial to that person or to those already parties;
>
> (2) the extent to which the prejudice can be lessened or avoided by protective provisions in the judgment, by shaping of relief, or other measures;
>
> (3) whether a judgment rendered in the person's absence will be adequate; and
>
> (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FRCP 19(a); CR 19(b); *Dawavendewa*, 276 F.3d at 1161-62; *Mudarri*, 147 Wn. App. at 604-05, 196 P.3d at 163.

The first factor is largely a repetition of the necessary party analysis in the previous section. *See Am. Greyhound*, 305 F.3d at 1024-25. As explained above, AUTO's claims do not challenge the validity of the Tribes' fuel tax compacts and merely seek prohibition of the State's unconstitutional actions. The Tribes will not be prejudiced by a judgment on that issue in their absence.

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Under the second and third factors, this Court can fashion relief that is prospective only to avoid prejudice to the Tribes. This Court can declare which types of actions taken by the Governor are unconstitutional, and prohibit such actions in the future. If the State feels that it cannot comply with the law under the existing compacts, it has the authority under those compacts to engage in dispute resolution with Tribes to bring the compacts into compliance. This Court need not make any declaration about the existing compacts. Therefore, judgment rendered in the Tribes' absence will be adequate because AUTO is simply seeking a declaration about unconstitutional action and is not seeking judicial intervention in the tribal-state fuel tax agreements.

Also, it is important to note that the Tribes' absence is voluntary, and so any claimed prejudice to them must be understood in that context. In *Saratoga County Chamber of Commerce, Inc. v. Pataki,* 798 N.E.2d 1047, 1058 (N.Y. 2003), Tribes participating as amici supported the state's motion to dismiss a case challenging the Governor's authority to sign gaming compacts. While the *Saratoga* court acknowledged that it could not force the Tribes to participation, it did not look favorably upon the concept of voluntary absence used as a weapon to prevent remedies to other parties:

> The Tribe has chosen to be absent. Nobody has denied it the "opportunity to be heard"; in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe. While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.

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Saratoga County, 798 N.E.2d at 1057-58.

The fourth factor weighs heavily against dismissal. If dismissal is granted, neither AUTO nor any other Washington citizen will ever have *any* remedy for the Governor's unconstitutional actions. "If no alternative forum exists, [courts] should be 'extra cautious' before dismissing the suit." *Dawavendewa*, 276 F.3d at 1162 (quoting *Makah*, 910 F.2d at 560)). In *Saratoga County*, the court pointed out the serious danger posed by handing totally unchecked power to the executive branch of government. The State argued that the prejudice to the Tribes would be too great to allow the challenge, but the Court held that the lack of any alternative forum won the day:

> Not only will these plaintiffs be stripped of a remedy if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.

Id. at 1057.

If this Court concludes that the Tribes are necessary parties and cannot be joined due to their tribal sovereign immunity, there will be no other forum in which AUTO can address the Governor's unconstitutional actions. This factor should tilt the balance in favor of finding that this suit should not be dismissed.

The policy implications of the State's dismissal argument are equally startling to those warned of by the *Saratoga* court. The Washington Attorney General suggests that the Governor has total immunity from any suit alleging illegal taxation, misuse or improper gifting of public funds for private use in violation of the Washington, so long as

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the benefit of that illegal behavior inures to a Tribe. This argument on behalf of the Governor and the Tribes implies that the Attorney General does not put much stock in his obligation to uphold Washington's Constitution on behalf of Washington citizens. Hypothetically, if the Governor signed a contract with an Indian tribe to convey state taxpayer funds in exchange for political contributions, that contract would be free from scrutiny because an action to challenge the Governor's action would "indirectly" threaten the contract and the State could simply claim that the Tribe was a necessary party with sovereign immunity.[7] Such a result should not hold.

The State's reliance on *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991), to contend that tribal sovereign immunity trumps the fourth factor in the indispensability analysis should be rejected. In *Chehalis*, the plaintiff tribes sought to enjoin the United States from recognizing the Quinault Indian Nation as the governing body of a reservation. The determination of whether a person or entity is necessary and indispensable "'is heavily influenced by the facts and circumstances of each case.'" *Chehalis*, 928 F.2d at 1498 (quoting *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982)). AUTO's case, which involves a determination of whether the State is making illegal disbursements under the Washington Constitution from Washington's MVF is not equivalent to a dispute between tribes over which of several tribal governing bodies should be recognized by the federal government.

[7] To clarify, AUTO's complaint does not allege corruption. However, the State's same sovereign immunity argument that the State wishes to apply to AUTO's claims could be applied even if there were evidence that the State's motives were corrupt. In the State's view, no citizen can ever challenge in court the State's dealings with Tribes, if that challenge may indirectly affect those dealings.

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In short, the State should not be permitted to enter into contracts that depend on the disbursements from the Motor Vehicle Fund and avoid any litigation regarding the constitutionality of those disbursements, simply because the State is contracting with a Tribe.

B. The Public Rights Exception to FRCP 19 Dismissal Applies Here

Even if this Court concludes that the Tribes are required parties, cannot be joined, the balancing factors weigh in favor of dismissal, there is a public right exception to dismissal in cases where an entity is suing to protect the public interest. *Conner v. Burford,* 848 F.2d 1441 (9th Cir. 1988).

The Supreme Court enunciated the public rights exception in *National Licorice Co. v. National Labor Relations Board,* 309 U.S. 350 (1940), declaring, "In a proceeding ... narrowly restricted to the protection and enforcement of *public rights,* there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363 (emphasis added). In *National Licorice,* the National Labor Relations Board ("NLRB") had set aside, as a violation of the National Labor Relations Act ("NLRA"), contracts that the National Licorice Company had procured from its employees by means of unfair labor practices. *Id.* at 356. The company challenged the authority of the NLRB to enter such an order in the absence of the employees, arguing in essence that they were indispensable because they were parties to the contracts.

The Supreme Court disagreed. Comparing the NLRB action to suits brought under the Sherman Act, the Court noted that antitrust injunctions often affect nonparties

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by preventing the offending company from meeting contractual obligations to others not before the court. *Id.* at 365. Similarly, the Court reasoned, the Federal Trade Commission often enters orders restraining unfair methods of competition that preclude the offender from performance of outstanding contracts. In either case, "the public right [is] vindicated by restraining the unlawful actions of the defendant even though the restraint prevent[s] his performance of the contracts." *Id.* at 366. The Court felt that this burden on the contractual rights of nonparties was acceptable, however, because such adjudications do not destroy the legal entitlements of the absent parties: "In every case the third persons were left free to assert such legal rights as they might have acquired under their contracts." *Id.* at 366.

In *National Licorice* itself, the public rights at stake were the policy objectives of the NLRA. To require joinder of employees covered by labor contracts obtained through unfair labor practices would effectively undermine the ability of the NLRB to enforce the NLRA. Instead, the NLRB issued an order "directed solely to the employer" which was "ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal...." *Id.* at 366. Because the third parties' interest in the litigation was thus severable from the particular public rights at issue, the Supreme Court refused to burden the NLRB, as the party seeking to enforce public policy, with the requirement of joining the individual employees, even though their interests might be affected by the judgment.

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Although the Governor may rely upon *American Greyhound* for the proposition that the public rights exception does not apply here, that case is readily distinguishable. In *American Greyhound,* the tribal gaming compacts at issue simply permitted Tribes to conduct gaming on their reservations. 305 F.3d at 1020. There was no allegation in *American Greyhound* that taxpayer funds were being squandered or misspent, or that the Governor had enacted new tax laws in the guise of signing a contract. The plaintiffs in *American Greyhound* wanted nothing more than to remove the Tribes from business competition.

Here, AUTO's claims seek to preserve the motor vehicle fund for use on highway purposes, which the Washington Constitution requires. AUTO also seeks to prevent the squandering of taxpayer dollars in the form of 175% "refunds" of taxes collected. AUTO's claims, if meritorious, will prevent the Governor from placing a tax burden on consumers that the Legislature specifically acted to remove.

There is much more at stake here than the pecuniary interests of AUTO or its members. The public interest exception applies, and this case should not be dismissed.

C. AUTO's Delegation Doctrine Claim Also Should Not Be Dismissed Based on Failure to Join the Tribes as Indispensable Parties

Dismissal of the delegation doctrine claim under Article II, § 1 of the Washington Constitution in *Mudarri* does not require dismissal of AUTO's delegation doctrine claim here. *Mudarri* directly challenged the tribal-state gaming compact in that case as a violation of the delegation doctrine (196 P.3d at 164; 196 P.3d at 167), whereas AUTO challenges the validity of RCW 82.36.450 and RCW 82.38.310 as a violation of the

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delegation doctrine and seeks only the enjoining of disbursements from the MVF as relief.

D. If Tribes Are Necessary and Indispensable Parties that Cannot Be Joined, This Court Still Should Issue a Writ of Prohibition on Unconstitutional Disbursements from the MVF

If the Court concludes that it must dismiss AUTO's causes of action for declaratory and injunctive relief based on the status of the tribes as indispensable parties and their sovereign immunity, AUTO alternatively requests that the Court issue a writ of prohibition to Governor Gregoire and Director Luce to prohibit further unconstitutional disbursements from the MVF. Under the statutory writ (RCW 7.16.290), the actions of "any tribunal, corporation, board or person, whether they are acting in a judicial, legislative, executive, or administrative capacity, may be arrested, if acting in excess of their power." *Winsor v. Bridges*, 24 Wn. 540, 543, 64 P. 780 (1901). "Two conditions must be met to grant the writ: (1) the party to whom the writ is directed must be acting without or in excess of its jurisdiction; and (2) there must be an absence of a plain, speedy, and adequate remedy in the ordinary course of legal procedure. The writ may be issued where it appears the person to whom it is directed is about to act in excess of his or her jurisdiction." *County of Spokane v. Local #1553*, 76 Wn. App. 765, 768, 888 P.2d 735 (1995) (citing *In re Jones*, 39 Wn.2d 956, 958, 239 P.2d 856 (1952), *State ex rel. Gillespie v. Kuykendall*, 117 Wn. 415, 419, 201 P. 778 (1921), *Harris v. Brooker*, 8 Wn. 138, 139, 35 P. 599 (1894)).

Here, the other remedies sought by AUTO—declaratory and injunctive relief—may be unavailable if the Court concludes that the tribes are indispensable parties that

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cannot be joined due to their sovereign immunity. As a result, a writ of prohibition to arrest Governor Gregoire's and Director Luce's unconstitutional disbursements from the MVF, which are actions in excess of their jurisdiction, is the only remedy available. *See, e.g., County of Spokane*, 76 Wn. App. at 770 ("The employers have not shown that injunctive relief would not have been speedy and adequate. Delay, expense, annoyance, or even some hardship does not always make a remedy inadequate. The writ of prohibition is a drastic remedy, and the adequacy of other remedies lies in the sound discretion in which the proceeding is instituted. Here, there is no evidence the trial court abused that discretion." (citing *State ex rel. Ernst v. Superior Court*, 198 Wn. 133, 135, 87 P.2d 294 (1939), *State ex rel. O'Brien v. Police Court*, 14 Wn.2d 340, 348, 128 P.2d 332 (1942)).

V. CONCLUSION

The State of Washington asks this Court to hold that it may never be scrutinized in its contractual dealings with Tribes regardless of the severity of the conduct, the number of statutory and constitutional violations at issue, or the threat such total immunity would be to our system of checks and balances. This Court has many options here short of dismissal: allowing the action to proceed and fashioning appropriate relief, ordering joinder of the Tribes, ordering the State to use its power under the compacts to interplead one or more Tribes, and ordering joinder of individual tribal officials. Any of these options will avoid an unjust result that gives the State of Washington unchecked power to make secretive deals with Tribes funded by taxpayer money.

This Court should decline to dismiss the action.

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DATED this 11th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Plaintiff Auto's Response to State's Motion to Dismiss for Failure to Join Required Parties and Declaration of Philip A. Talmadge in Support of Response to State's Motion to Dismiss for Failure to Join Indispensible Parties with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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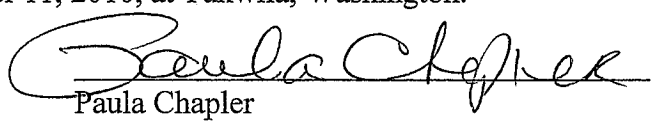
DATED: October 11, 2010, at Tukwila, Washington.



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