No. 85661-3

SUPREME COURT
OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION,
a non-profit trade association,

Appellant,

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,

Respondents.

BRIEF OF APPELLANT AUTO

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A. INTRODUCTION

Appellant Automotive United Trades Organization ("AUTO") identified numerous state constitutional violations and abuses of authority by the Governor and the Department of Licensing (hereinafter "the State"). AUTO sought a declaratory judgment and prospective injunctive relief to stop the State's unconstitutional actions.

The State moved to dismiss this action on the grounds that the Governor may not be sued if that suit directly or indirectly questions the legality of contracts between the Governor and various Native American tribes, arguing under CR 19 that the tribes are indispensable parties who cannot be joined because they are immune from suit. In other words, the State argues, *any* contract signed by the Governor or any other executive branch officer that involves a tribe – no matter how unconstitutional or illegal the actions of the Governor or that officer may be under Washington law – is immune from *all* judicial review.

Although the tribes that have compacts with the State are not indispensable parties to AUTO's claims, and have waived sovereign immunity, and the trial court had options short of granting total immunity to the State's illegal actions, the trial court felt constrained to grant the State's motion.

The tribes are not necessary parties in this action. Moreover, as a matter of law, equity, or good conscience, this Court should not condone granting blanket immunity from oversight for all contracts between the State and the tribes. Such an action would violate the fundamental principle of checks and balances upon which our system of government is based. It would allow the State *carte blanche* to provide favors in the form of taxpayer funds to tribes without judicial recourse for Washington citizens and taxpayers. Those citizens must have recourse to the courts to redress state constitutional violations by State officers.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting the order on the State's motion to dismiss entered on January 3, 2011.

2. The trial court erred in entering the order denying AUTO's second motion to amend its complaint entered on February 4, 2011.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in determining that certain Native American tribes were necessary parties under CR 19(a) to an action challenging the Governor's conduct under article II, § 1, article VIII, § 4, and article II, § 40 of the Washington Constitution? (Assignments of Error Number 1)

2. If the tribes are necessary parties, did the trial court err in dismissing AUTO's complaint based on the Washington Constitution under CR 19(b) when the court could have taken steps to allow the case to

proceed, including the amendment of that complaint to permit the joinder of tribal officials who signed the compacts negotiated by the Governor to present the tribal perspective on such compacts? (Assignments of Error Numbers 1 and 2)

C. STATEMENT OF THE CASE

As described in *Squaxin Island Tribe v. Stephens,* 400 F.Supp.2d 1250, 1252 (2005), Washington State's fuel distribution system has four tiers. At the top are suppliers, also called licensees, which include refineries, and importers bringing fuel into Washington State by pipeline, cargo vessel, and ground transportation. The second tier is composed of distributors, businesses that transport the fuel between suppliers and those making up the third tier in the chain. Distributors purchase fuel from suppliers at a "terminal rack," which is the platform or bay at which motor vehicle fuel from a refinery or terminal is delivered into trucks, trailers, or rail cars. The third tier, retailers, are simply local stations that sell gasoline and diesel fuel. Finally, the fourth tier is composed of consumers, which includes anyone who actually uses the fuel rather than reselling it. *See generally,* CP 234.

Prior to 2007, Washington law levied fuel taxes upon distributors. However, the law also stated that the ultimate incidence of the tax was intended to fall on consumers. Any revenues derived from this tax were placed in the state Motor Vehicle Fund ("MVF") created by RCW

46.68.070, as mandated by the 18th Amendment to the Washington Constitution. That revenue could be used only for highway purposes, as defined in the 18th Amendment.

In *Squaxin Island,* tribal retailers sued the State, alleging that because there was no consumer-level enforcement mechanism, and because retailers were not entitled to refunds if consumers failed to pay the tax, the actual tax incidence of Washington fuel taxes fell on retailers. The federal district court agreed with the tribes, and held that the tax incidence was on retailers. Because the State is not permitted to tax tribes for transactions on tribal land, fuel taxes levied on tribal retailers were, therefore, illegal. 400 F. Supp.2d at 1261-62. As for the history of fuel tax agreements with the tribes, *see generally*, CP 279-81.

To remedy the concerns expressed in the *Squaxin Island* decision, the Legislature amended Washington's fuel tax statutes. CP 17-52. On May 15, 2007, Governor Gregoire signed Senate Bill 5272 into law. CP 17. The bill amended several sections of chapters 82.36 and 82.38 RCW with respect to the administration of motor vehicle fuel and special fuel taxes. By enacting that bill, the Legislature shifted the incidence of

Washington fuel taxes to the supplier tier of the distribution chain referenced *supra*. RCW 82.36.020(1); RCW 82.38.030(1).[1]

Under Washington law, fuel taxes are imposed at the first of the following transactions: 1) when fuel is removed from the terminal rack by a supplier and sold to a distributor; 2) when fuel is produced; 3) imported; or 4) blended in the State. RCW 82.36.020(2); *see also,* RCW 82.38.030(7). While fuel taxes are included in the price of fuel sold and delivered to tribal fuel retailers, the legal incidence of the tax is placed on suppliers (who are non-Indian) and the taxable event arises off reservation.

Although SB 5272 *solved* the problem identified by *Squaxin Island*, particularly after *Wagnon*, the Legislature nevertheless conferred authority upon the Governor to enter into fuel-related agreements with the tribes. RCW 82.36.450(1), enacted as part of Senate Bill 5272, provides as follows:

> The governor may 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, tribal enterprise, or tribal member licensed by the tribe to operate a retail station

[1] In *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 126 S. Ct. 676, 163 L.Ed.2d 429 (2005), a United States Supreme Court decision filed only weeks after the district court's ruling in *Squaxin Island*, the Court held such a taxation regime was proper, and did not offend tribal sovereign immunity. There, the Court upheld a Kansas statute that placed the legal incidence of a motor fuel tax off-reservation on non-Indian distributors who sold fuel to tribal gas station operators.

> located on reservation or trust property. The agreement may provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax.

See also, RCW 82.38.310(1). Under RCW 82.36.450(5), the Governor delegated the powers conferred in RCW 82.36.450 to the Department of Licensing ("DOL"). *See also,* RCW 82.38.310(5).

After May 15, 2007, DOL's Director entered into what the State described as "Fuel Tax Agreements" ("fuel compacts") with the fourteen tribes: Chehalis, Jamestown S'Klallam, Kalispel, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Skokomish, Spokane, Squaxin, Suquamish, Swinomish, Tulalip, and Upper Skagit. CP 5, 83. Pre-May 2007 agreements with five other tribes (Lummi, Makah, Muckleshoot, Quileute, and Quinault) also remain in place. *Id.*

The fuel compacts share general attributes. Under most of them, the State remits to the tribe an amount based on the equivalent of seventy-five percent (75%) of the state motor vehicle fuel and special fuel tax on each gallon of fuel purchased. CP 257, 287-88.[2]

[2] Tribes receive the remittance by submitting invoices to the DOL that detail the number of gallons delivered to the tribe's fuel facilities or other filling stations under the tribe's jurisdictional authority in the preceding month or other period at the tribe's option. CP 257-58. These provisions typically require the tribe's invoice to include the invoice date, seller name and amount of state motor fuel taxes paid or included in the price of fuel delivered in the preceding time period, and require the State to remit a payment to the tribe within 30 days of receiving the invoice. *Id.*

In exchange for the payments, some of the fuel compacts provide: 1) the tribe must purchase all motor vehicle fuel and special fuel only from persons licensed in Washington State; 2) the tribe agrees to purchase fuel on which applicable State taxes have been paid; 3) the tribe must pass ordinances requiring other fuel retailers within its jurisdiction to purchase all motor vehicle fuel and special fuel only from persons licensed in Washington State; 4) the tribe agrees to pass on to retail customers the State tax included in the price of fuel; 5) the tribe must expend fuel tax proceeds on planning, construction and maintenance of roads, bridges, boat ramps, transit services and facilities; transportation planning; police services; and other highway-related purposes; 6) the tribe must arrange an annual audit, or at such other interval that is mutually agreeable to the parties, demonstrating the tribe is complying with the terms of the agreements; and 7) the tribe must abide by specific records and invoice requirements. *See, e.g.,* CP 253-69; *see also,* RCW 82.36.450(3) and RCW 82.38.310(3).

The audits of the tribal use of moneys provided under the fuel compacts are exempt from the Public Records Act. RCW 82.36.450(4) ("Information from the tribe or tribal retailers received by the state or open to state review under the terms of an agreement shall be deemed to be personal information under RCW 42.56.230(3)(b) and exempt from public

inspection and copying.") *See also*, RCW 82.38.310(4).[3] A 2007 report to the Legislature broke down the refund amounts by tribe. CP 287-89.[4] The subsequent reports to the Legislature eliminated this information entirely. In 2009, DOL received "voluntary" disclosures about the tribes' expenditures of motor vehicle fund monies from only 4 tribes, despite efforts to get more. CP 291.

The State did not require the tribes to dedicate payments from the MVF to highway purposes; they were required to use an "equivalent amount" for transportation purposes. CP 293. The tribes spent the MVF funds on many non-highway purposes. The Squaxin Island tribe used the funds to repair a boat launch. CP 295. The Skokomish tribe reported that it was using its DOL funds for utility infrastructure and as a revenue base for its "Public Works Department." CP 300. DOL signed off on the Nooksack tribe's use of its DOL funds as collateral for a loan; the papers do not indicate the purpose of the loan. CP 302-03. The Jamestown

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[3] As a result of this provision, the manner in which tens of millions of dollars of revenue from the MVF is actually used and accounted for by the tribes is shielded from public scrutiny or oversight. The tribes select their own audit firms. CP 277. Some of the compacts have no audit requirement, secret or otherwise. CP 283. When requesting information about how the tribes spend MVF funds, DOL assures the tribes that any response is purely "voluntary." CP 285.

[4] That information was redacted in the copy provided. CP 287-88. This process has proven to be less than salutary. AUTO will shortly file a motion to expand the appellate record to include a letter sent by DOL to the Yakima tribe on March 16, 2011 outlining that tribe's extensive and repeated failures to provide DOL information requiring by a consent decree relating to fee issues.

S'Klallam tribe reported it was using tax dollars to construct an extension of the "Olympic Discovery Trail." CP 309. The trail is a "multi-use, *non-motorized* trail" for biking, hiking, etc. *See* www.olympicdiscoverytrail.com. Other projects reported as funded by MVF dollars: pedestrian tunnel, habitat remediation; infrastructure, housing development, construction of a shipping terminal. CP 309-11. The Spokane tribe apparently used a great deal of its DOL funding for general law enforcement purposes, including the purchase of a drug dog. CP 311.

The State has simultaneously claimed that payments to the tribes under the compacts both *are* and *are not* "tax refunds." Originally, Senate staff considering SB 5272 acknowledged that the fuel compact payments were subject to the 18th Amendment. They recommended treating such payments as "refunds" to avoid an 18th Amendment problem. CP 336-37.[5] However, DOL claimed that those same payments were not a "refund" of

[5] Treating the payments as "refunds" created practical problems for the State. Interstate truck drivers licensed under the International Fuel Tax Agreement ("IFTA") are entitled to a refund of state fuel taxes paid on fuel that is consumed outside the state. In October 2009, DOL issued a memo to IFTA carriers indicating that only 25% of their fuel purchases from tribal stations were considered "taxed fuel" because the other 75% had already been "refunded" to the tribes under the compacts. CP 318-20. IFTA carriers quickly began complaining about this to DOL. CP 322-23. In December 2009, DOL reversed itself and said that IFTA carriers could receive a 100% refund from tribal fuel, resulting in a 175% "refund" on fuel purchased from tribal stations but consumed out of state by IFTA carriers. CP 325-26. DOL's Paul Johnson admitted in an email that the 100% IFTA refund, combined with the "refund" under the compacts, results in a greater than 100% "refund" of the total taxes paid to the State. CP 328-31.

taxes paid, but were actually "revenue sharing." DOL Deputy Director Alan Haight stated in an email, "The Tribes' perception is the 75% fuel tax refund is a *revenue-sharing of transportation dollars*, not a refund." CP 333. Haight agreed, concluding that the tribes' arguments had merit and that "our interpretation of the tribal agreements [as constituting a refund] was incorrect." CP 334.

However, other documents reveal that the tribes and the State were aware that they cannot claim to comply with the 18th Amendment unless the payments to the tribes are truly refunds. For example, an email from Kelly Simpson of the Senate Transportation Committee to tribal and DOL members emphasized that, for the State to avoid 18th Amendment expenditure restrictions, the Legislature needed to clearly classify the payments as "refunds." CP 336-37.

In 2007, 18 tribes had compacts for a total of $11.4 million in annual refunds. CP 288. One year later with one more tribe added to the list, the annual refund almost doubled to $21.9 million. CP 272. An analysis by biennium lists DOL funds to tribes as $12,100,000 in 2005-2007, $26,700,000 in 2007-2009, and projected $39,700,000 for 2009-2011. CP 339-40.[6] Those funds are needed for Washington highways.

[6] However, even these numbers are questionable. DOL's 2007 report listing the refund as $11.4 million, and its 2008 report indicated refunds for that year were $21.9 million, a total of $33.3 million. A March 7, 2011 briefing of the House Transportation

The state's 20-year transportation budget is estimated to have a $175-$200 billion shortfall.[7]

AUTO filed the present action in the Grays Harbor County Superior Court on May 14, 2010. CP 1-80.

AUTO moved to amend its complaint to assert a federal commerce clause claim. CP 88-91. That motion was granted. CP 97-99. The State removed the case to federal court. CP 185-86. AUTO dismissed its federal commerce clause claim, and the district court remanded the case to state court. CP 188-91. AUTO then filed an amended complaint in which it contended that the State violated the State Constitution; in particular, the payments to the tribes under the fuel compacts violated the Eighteenth Amendment (article II, § 40) because the State permitted MVF moneys to be used for non-highway purposes; the State violated article VII, § 5 because the fuel tax revenues are not being utilized for their MVF purpose, and the fuel compacts shift the incidence of fuel taxes back to

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Committee by DOL acknowledges that the tribal "refunds" are understated. *See* Appendix. The Committee was advised despite markedly decreasing revenues from gas taxes, license fees, ferry revenue, and vehicle sales taxes for 2009-11, tribal refunds were understated by $22 million for that biennium alone, and by more than $150 million for 2011-21. The Court can take judicial notice of the Legislature's proceedings. *Washington State Farm Bureau Federation v. Reed*, 154 Wn.2d 668, 115 P.3d 301 (2005) (judicial notice of facts relevant to legislative determination of an emergency); *Knack v. Dep't of Retirement Systems*, 54 Wn. App. 654, 776 P.2d 687, *review denied,* 113 Wn.2d 1021 (1989) (Public Pension Commission notes).

[7] "New 20-year transportation plan emphasizes link between new transportation investment, jobs and the economy," Washington State Transportation Commission, wstc.wa.gov/news/2010/10_1216_New20YearTranspPlan.htm.

consumers, despite the enactment of SB 5272; the State violated article II, § 1 in allowing the Governor in negotiating the fuel compacts to override the direction of SB 5272 on tax incidence; and the State violated article VIII, § 4 in permitting the payments to the tribes without a legislative appropriation of such funds. CP 100-84.

Before any discovery could be conducted, the State moved to dismiss AUTO's complaint. It alleged the tribes as signatories to the compacts were necessary parties under CR 19. CP 378-80.[8] The trial court heard the State's motion and at the conclusion of argument indicated its intent to grant the motion to dismiss. Counsel for AUTO asked the trial court for leave to amend its complaint to name individual tribal officers, which the court granted. RPI:28-29.[9] In accordance with that request, this Court dismissed the complaint, but conditioned dismissal upon providing AUTO sixty days to file a motion to amend the complaint to name the individual tribal officers. CP 231-32. The trial court clearly expressed its view that the issue of a CR 19 dismissal must ultimately be decided by this Court. RPI:25-26.[10]

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[8] The State even attempted to have the motion heard on November 22, giving AUTO little time to respond.

[9] The hearing on January 3, 2011 is RPI. The hearing on February 4 is RPII.

[10] I do find one thing repugnant in this whole situation, and that is in our system of government the terminology that there is no judicial remedy. I do believe that there needs to be, after reviewing the cases

AUTO moved to amend its complaint. CP 233-46. On February 4, 2011, the trial court denied the motion, reiterating its earlier rationale and its belief this Court must address the CR 19 issue. RPII:15-17; CP 369-70. This timely appeal followed. CP 371-77.

D. SUMMARY OF ARGUMENT

The tribes who were signatories to the fuel compacts are not necessary parties under CR 19(a) to a case alleging state constitutional violations by state officers in which AUTO sought prospective injunctive relief.

Even if the tribes are necessary parties, AUTO's complaint should not have been dismissed because the tribes could be joined in the action as they waived any sovereign immunity in connection with the fuel compacts. CR 19(a)(2).

Alternatively, under CR 19(b), in equity and good conscience, AUTO's complaint should not be dismissed because the alternative is

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> from other states and more specifically the two that we deal with from the Court of Appeals, that this is an issue that needs to be addressed by our supreme court. We all know that you can get decisions from the various courts of appeals of the three divisions of this state. And I have read decision where they indicated we don't have to follow what Division X says, we are our own division.
>
> This decision needs to be resolved by our supreme court. And I go back to the statement, no judicial remedy. Our whole country and our whole system is based upon judicial remedy.

RPI:25-26.

ignoring constitutional violations and abuses of authority by state officers. Moreover, the public rights doctrine exempts AUTO's complaint from dismissal under CR 19.

The trial court erred in denying AUTO's motion to amend the complaint to join the tribal officers who signed the fuel compacts.

E. ARGUMENT

(1) The Trial Court Erred in Dismissing AUTO's Complaint Seeking Injunctive Relief for Violations of the State Constitution by State Officers

Under CR 19, a court determines whether an action must be dismissed if it is not feasible to join a required party. First, a court must determine if the nonparty is required in order for the court to hear the action. CR 19(a)(1). If so, it must order the required party to be joined. CR 19(a)(2). If the 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. CR 19(b). If it determines it cannot, the court may dismiss the action. CR 12(b)(7).

Generally, Washington appellate courts review decisions under CR 19 on an abuse of discretion standard of review, although legal decisions inherent in such a ruling are reviewed de novo. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 492, 145 P.3d 1196 (2006) (mall owner not

necessary party under CR 19 to slip and fall lawsuit filed against trust that was partner in mall ownership).

Dismissal under CR 12(b)(7) is a drastic remedy, and because Washington courts prefer trials on the merits, dismissal should be employed sparingly when there is no other means to obtain relief. *Gildon,* 158 Wn.2d at 494; *Mudarri v. State,* 147 Wn. App. 590, 604-05 n.14, 196 P.3d 153, *review denied,* 166 Wn.2d 1003 (2009); *see also,* 7 Wright & Miller § 1609 at 130 (in general, dismissal should be ordered only when a defect cannot be cured and serious prejudice or inefficiency will result). Where there is no alternative forum available to a plaintiff, the court should be particularly cautious before dismissing the suit on grounds of inability to join indispensable parties. *Mudarri,* 147 Wn. App. at 605 n.14.

CR 19 is not jurisdictional, but the rule is founded on equitable considerations. *Gildon,* 158 Wn.2d at 503-04. Thus, the CR 19(b) inquiry is necessarily case-specific. A court must consider whether "in equity and good conscience" the action may proceed or must be dismissed by applying the factors set forth in CR 19(b) in light of the particular interests present in each case. *Aungst v. Roberts Construction Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167 (1981) (case against agent of Indian tribe that threatened tribe's contracts could not be dismissed "in equity and good

conscience" because the claims were for violations of the Consumer Protection Act and The Securities Act of Washington).

The State failed to bear its 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), *review denied,* 163 Wn.2d 1020 (2008), *cert. denied,* 129 S. Ct. 197 (2008) ("The burden of proof for establishing indispensability is on the party urging dismissal"). *See also, Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) (analyzing if party is necessary "calls for determinations that are heavily influenced by the facts and circumstances of individual cases."). Because the question of whether a party is indispensable can only be determined in the context of particular litigation, it is necessary to examine legal and factual context of the present controversy, and cannot be done merely by looking at the pleadings. *Id.*

(a) The tribes are not indispensable parties

Analysis under the first step of the CR 19 test demonstrates that the tribes are not required for adjudication of this matter. A party is required only if:

> (1) in his absence complete relief cannot be accorded among those already parties, or
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his

> absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

CR 19(a). The State contends (on behalf of the tribes) that the tribes have an interest in protecting the tribal-state fuel tax agreements, making the tribes indispensable parties to the litigation. But the State fails to properly analyze this issue.

While it is true that the tribes have a *financial* interest in the fuel compacts,[11] a mere financial interest is not sufficient. In *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), the Ninth Circuit declined to find that tribes affected by quotas negotiated by the Secretary of Commerce with respect to Columbia River salmon were necessary parties to the Makahs' suit to overturn the quotas. The Court focused on whether the absent tribes have a legally protected interest in the suit, which must be more than a financial or speculative interest. *Id.* at 558.

Similarly, the Ninth Circuit has also held that tribes are not necessary parties to litigation in which the central issue is the conduct of state officers and which "may have some financial consequences for the non-party tribes." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 547 F.3d 962, 971 (9th Cir.

[11] Indeed, who would not want to receive millions of dollars in "refunds" of a tax they did not even pay?

2008), *cert. denied,* 129 S. Ct. 1987 (2009). There, the plaintiff tribe entered into a gambling compact with the State of California. California took regulatory actions regarding the scope of the tribe's authority. Sixty-two other tribes had similar compacts with the state. The district court ruled that the 62 other tribes were necessary parties to the action. The Ninth Circuit reversed, holding that the other 62 tribes having compacts with the State were not required parties merely because the litigation "may have some financial consequences" for them. *Id.* at 971. Similarly, the court concluded that tribes not having compacts with the State but that benefitted financially from a revenue found created by tribal gambling revenues were not necessary parties.

In this case, the tribes have no legally protected interest with respect to AUTO's contention that the State did not comply with the Washington Constitution.

Further, the trial court needed to assess whether the tribe's interest, whatever that might be, in the Governor's compliance with the Washington Constitution would be impaired or impeded. As the Ninth Circuit observed in *Makah*, any alleged impairment would be minimized where the absent party is adequately represented in the suit. There, the United States government adequately represented the absent tribes' interests. *Id.* at 558. Here, the interest of the tribes and the State are

aligned.[12] The State, through the Office of Attorney General, will more than adequately defend the constitutionality of its officials' actions in connection with the fuel compacts. The tribes' "interest" is neither impaired nor impeded for purposes of CR 19(a).

Finally, there is no risk of inconsistent rulings on the state law question at issue in this case.

When a suit alleges the Governor acted in a manner violative of the Washington Constitution, and the only remedy requested is prospective and declaratory relief, the tribes are not indispensable. In *State ex rel. Clark v. Johnson,* 904 P.2d 11, 15 (N.M. 1995), New Mexico citizens challenged gaming compacts signed between tribes and that state's Governor. They claimed that the Governor lacked legislative authority to sign the compacts, and sought a writ of prohibition or mandamus, and declaratory relief from the New Mexico Supreme Court. The Governor argued that because the suit threatened the viability of the compacts, the tribes were indispensable 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

[12] The compacts require the State to cooperate in the enforcement of the compacts. *See, e.g.,* CP 266. Indeed, the State has been a zealous advocate for the tribal position in state and federal court.

> 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 nature of the challenge in *Johnson* is identical to AUTO's claim here – a challenge to the legality of actions by state officers under the Washington Constitution.

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,* 135 Wn.2d 913, 959 P.2d 1037 (1998). If all "interested" parties were required in such a case, *none* would ever go forward.

Neither *Mudarri* nor *Matheson* is to the contrary. In those cases, the relief sought was invalidation of the agreements for purposes of self-enrichment. In *Mudarri,* the plaintiff wanted the contracts voided so that he could pursue his personal right to engage in electronic scratch ticket games. 147 Wn. App. at 597. The court held that preserving the tribes' sovereign immunity was more important that allowing *Mudarri* to sell lottery tickets. *Id.* at 604. In *Matheson*, a tribal member sued his tribe and

the State seeking invalidation of past agreements, an injunction against future agreements, and monetary damages for having to pay a tax that the tribe levied pursuant to a contract with the State. *Matheson*, 139 Wn. App. at 628.

Unlike *Mudarri* or *Matheson*, AUTO is not asking this Court to pad its members' bottom line, or to alleviate a tax burden imposed on them by a tribe. Rather, AUTO's claims focus on the harm to Washington citizens and taxpayers – and to the State's budget – resulting from the State's constitutional violations.

The tribes are not indispensable parties to this action because the central focus of AUTO's claims for relief are the State's authority and actions under the Washington Constitution, not the provisions of the individual compacts.

(b) The tribes can be joined because they waived sovereign immunity

Even if this Court concludes that the tribes' interests are at issue in this case, they can be joined under CR 19(a) because they have waived sovereign immunity with respect to suits involving these compacts.

While this Court has not addressed waiver of sovereign immunity, the United States Supreme Court has. A tribe can waive sovereign immunity. *C & L Enterprises v. Potawatomi Indian Tribe of Oklahoma*,

532 U.S. 411, 121 S. Ct. 1589, 149 L.Ed.2d 623 (2001). There, a tribe agreed to an arbitration clause, and to enforcement of an arbitral award, "in any court having jurisdiction thereof." The United States Supreme 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.*

No "magic words" "waiver" and "sovereign immunity" need be used for a waiver to be express and clear. *Warburton/Buttner v. Superior Court,* 103 Cal.App.4th 1170, 1190 (Cal.App. 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.[13] The 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, 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. CP 204. The Squaxin Island and Swinomish tribes have agreed to submit claims involving the contracts to the United States District Court for the Western District of Washington. *Id.* 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

[13] The Court rejected this definition of "implicit" waiver because and 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.

Association, *id.*, which the Supreme Court in *C & L Enterprises* held to be a waiver of sovereign immunity. The Suquamish agreed to JAMS mediation. CP 260.

The State is likely to claim that the tribes waived immunity only as to disputes with the State over the enforcement of the compacts themselves. But sovereign immunity once waived is waived. The tribes do not get to be selective regarding the scope of their waiver. In any event, the gravamen of AUTO's argument is that the State's officials acted unconstitutionally under the Washington Constitution. If this results in the vitiation of the compacts, plainly the tribes would invoke their dispute resolution rights with the State under them. Inevitably, this process leads back to the compacts' dispute resolution mechanisms wherein the tribes *waived* their immunity.

If the State feels that AUTO's challenges to the State's authority implicates the compacts, then those tribes that have waived sovereign immunity can join and defend their authority as they have agreed. The challenges to the State's authority are general and do not target the provisions of any one compact; the tribes can be joined under CR 19(a) to participate in the defense of the compacts.

(c) Even if the tribes are required parties who cannot be joined, this Court cannot, in equity and good conscience, dismiss AUTO's claims

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 CR 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.

CR 19(b). The trial court, at the State's insistence, failed to properly address these factors.

(i) Effect of the judgment

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. If any of the State's unconstitutional actions make reformation of the compacts necessary, the tribes and the State have a mechanism within the compacts to accomplish that.

(ii) The court could fashion relief by joining tribal officers

Under the second factor, a court could fashion relief that is injunctive and prospective only to avoid prejudice to the tribes. If the Court concludes that the tribes themselves still cannot be joined as defendants even though they have waived sovereign immunity, the tribal officials or their successors who signed or enforced the compacts could be joined to represent whatever interest the tribes have in such litigation involving the constitutionality under the state constitution of state officials' actions.

In cases seeking merely prospective relief, sovereign immunity does not extend to *tribal officials* acting in violation of the Washington State Constitution. *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 391 U.S. 392, 88 S. Ct. 1725, 20 L.Ed.2d 689 (1968). While *Matheson* acknowledges this fact, 139 Wn. App. at 633, neither the trial court nor the State paid much attention to the critical *Puyallup Tribe* holding. In *Puyallup Tribe, Inc.*, the Washington Department of Game

brought action for declaratory judgment that members of Puyallup Tribe were not exempt by virtue of federal treaty, from application of state fishery conservation measures:

> Petitioners...argue that the Washington courts lacked jurisdiction to entertain an action against the tribe without the consent of the tribe or the United States Government, viewing the suit as one to "extinguish a Tribal communal fishing right guaranteed by federal Treaty." This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts.

Id. That threshold question was reaffirmed in a subsequent opinion in the same case. *Puyallup Tribe, Inc. v. Dep't of Game of State of Washington*, 433 U.S. 165, 171, 97 S. Ct. 2616, 53 L.Ed.2d 667 (1977). "The doctrine of sovereign immunity...does not immunize individual members of the tribe." *Id.* Because the tribal officials who were involved with the compacts can be sued in state court, those officials can represent the tribal interest here.

The State argues that this rule only applies to federal claims.[14] However, this argument ignores *Matheson,* upon which the State heavily

[14] Under the doctrine first announced by the Supreme Court in *Ex Parte Young,* 209 U.S. 123, 155-56, 28 S. Ct. 441, 52 L.Ed. 714 (1908), a case arising under the Eleventh Amendment that bars actions in federal court against the States, a state official may nevertheless be sued for constitutional violations or violations of law. The present case has *nothing* to do with the Eleventh Amendment.

relies. The *Matheson* court acknowledged that "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.").

Federal courts permit suits seeking prospective relief such as enjoining tribal officers from collecting illegal taxes. *Big Horn County Electric Cooperative, Inc. v. Adams,* 219 F.3d 944, 954 (2000). *Big Horn* overruled on other grounds an earlier Ninth Circuit decision in *Burlington Northern R.R. Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation,* 924 F.2d 899 (9th Cir. 1991), *cert. denied,* 505 U.S. 1212 (1992).[15] There, the Ninth Circuit expressly held that tribal immunity did not extend to tribal officials acting pursuant to a statute unconstitutional under the federal constitution where the relief sought is prospective. *Id.* at 901-02. Nothing in *Burlington Northern* or *Big Horn* purports to exclude a state court from concluding that tribal officials could not be joined in an action alleging acts violative of state constitutional provisions by state officers and seeking prospective relief.

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[15] The *Burlington Northern* decision involved an improper characterization of a Congressionally-granted right-of-way that was then properly characterized in *Big Horn.* 219 F.3d at 953.

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

The State attempted below to "pigeon hole" AUTO's arguments as analogous to the line of 11th Amendment cases beginning with *Ex Parte Young,* that allowed actions against State officers to avoid the Amendment's prohibition on actions in federal court against the State themselves. RPII:8-9. *Young* is the genesis for the State's contention that the substitution of state officers for the State (and tribal officers for the tribes) may only occur in cases involving *federal claims.* The State

misunderstands the reasoning of AUTO's arguments in light of *Puyallup Tribe*. The rule sought by AUTO relates to *state claims*.[16]

The only commonality to AUTO's argument and *Young* is that the tribes and the States are both sovereigns ordinarily immune from suit. But *Puyallup Tribe* makes clear that tribal officials are not immune in *state court* where they are complicit in violation of *state law*. Those tribal officials who signed the compacts were parties to compacts signed by state officials acting in violation of the Washington Constitution. AUTO can join those officials in this action and they can readily defend the tribal interest, if any, in the state constitutional authority of state officers.

This argument is more compelling in the tribal setting than is the "legal fiction" indulged in by federal courts after *Young* regarding suits against state officials despite the Eleventh Amendment. In the Eleventh Amendment setting, unlike here, *a plaintiff would still have access to state courts to remedy the wrongful action.* By contrast, AUTO and similar parties have no judicial remedy in state or federal court.

The State cannot claim sovereign immunity to avoid declaratory judgment action alleging that it has violated its own laws. *See 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

[16] No Washington courts have addressed this issue. *Matheson,* 139 Wn. App. at 633.

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). This principle holds true for Indian tribes who violate state law.

Braam is particularly critical in this analysis. There, parties aggrieved by the State's operation of its foster care system filed a class action against the State alleging that it violated the substantive due process rights of the children and sought injunctive relief. Our Supreme Court analyzed the issue under the Fourteenth Amendment,[17] and upheld the trial court's injunctive relief. It is clear that *the State* would have been immune to a similar action in federal court under the 11th Amendment. Nevertheless, the action could proceed in State court. Similarly, nothing prevents an action in state court to proceed with tribal officers who signed the fuel compacts as parties. The tribal interest in an action brought under the State constitution against state officers, marginal as it is, is adequately represented by those tribal officers.

Even if the State can demonstrate that the compacts are somehow "threatened" by AUTO's claims that the State and the tribal officials

[17] State substantive due process claims under article I, § 3 are analyzed similarly to those under the Fourteenth Amendment. *State v. McCormick,* 166 Wn.2d 689, 699, 213 P.3d 32 (2009) (Washington constitution's due process clause does not afford broader protection than the Fourteenth Amendment).

violated state law, the trial court could have ordered joinder of the individual tribal officials who violated Washington State law, given the holding in *Puyallup Tribe* that such tribal officers are amenable to suit in state court for state law violations.

(iii) A judgment rendered in the absence of the tribes would be adequate

This aspect of CR 19(b) requires court to assess the nature of the action before it. Here, the gravamen of AUTO's complaint is the state constitutional authority of state officers.

The trial court here could declare which types of actions taken by state officials 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. A 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 concerning 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, *cert. denied,* 540 U.S. 1017 (N.Y. 2003), tribes participating as amici curiae supported the state's motion to dismiss a case challenging the Governor's authority to sign gambling compacts. While the New York Court of Appeals acknowledged that it could not force the tribes to participate, it did not look favorably upon the concept of voluntary absence used as a weapon to prevent judicial scrutiny of unconstitutional actions. *Id.* at 1057-58.

(iv) AUTO will be deprived of any judicial remedy by dismissal of its complaint

The fourth factor under CR 19(b) weighs heavily against dismissal. If dismissal is granted, neither AUTO nor any other Washington citizen will ever have *any* remedy for the State's unconstitutional actions.[18] "If no alternative forum exists, [courts] should be 'extra cautious' before dismissing the suit." *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.,* 276 F.3d 1150, 1162, *cert. denied,* 537 U.S. 820 (9th Cir. 2002) (quoting *Makah,* 910 F.2d at 560). The *Saratoga County* court focused on this factor in concluding that a challenge to certain gambling compacts could go forward. That court pointed out the serious danger posed by handing totally unchecked power to the executive

[18] The State's constant refrain in this case has been that AUTO's redress lies only in the Legislature, RPI:5-6; answer to statement of grounds for direct review at 7 n.5, acknowledging that dismissal deprives AUTO of any judicial relief. The trial court here found the deprivation of judicial relief to be "repugnant." RPI:25.

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.[19]

Similarly, in *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474 (Wisc. App. 2002), *review denied,* 655 N.W.2d 129 (Wisc. 2002), the Wisconsin Court of Appeals concluded that the action brought by a dog track owner against the Governor for violations of the State Constitution in negotiating gambling compacts with Native American tribes should not be dismissed under Wisconsin's statutory analog to CR 19. The court determined the tribes were necessary parties to the action, but indicated under a statutory analog to CR 19(b) that the action should not be joined. Citing *People ex rel. Lungren v. Community*

[19] Indeed, if a Governor were bribed to sign a contract with an Indian tribe to convey state funds to the tribe, 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 claim that the tribe was a necessary party with sovereign immunity. Such a result should not hold.

Redevelopment Agency for City of Palm Springs, 65 Cal. Rptr.2d 786 (Cal. App. 1997)[20] and *Saratoga County, supra*, with approval, the court emphasized that tribal immunity does not trump the need for a judicial remedy, particularly where significant public interests are at stake:

> The present litigation does not simply seek to resolve a dispute among private actors. Dairyland's lawsuit asserts that the Wisconsin Constitution, as amended in 1993, precludes the Governor from extending or renewing Indian gaming compacts which allow casino gambling in Wisconsin. There can be little question that the citizens of Wisconsin have a considerable interest in ensuring that state officials acts in accordance with the peoples' will as expressed in the state constitution. If this action is dismissed because the tribes cannot be joined as parties, not only will Dairyland have no adequate remedy, but an important legal issue having significant public policy implications will evade resolution. We conclude that, in equity and good conscience, this action, like those we have cited in California and New York, must be allowed to proceed in the absence of the tribes, notwithstanding the potential prejudice to their interests.

Id. at 486-87.

If this Court concludes that the tribes are necessary parties and cannot be joined due to their tribal sovereign immunity, there will be *no*

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[20] In *Lundgren,* the California Court of Appeal held that tribes were not indispensable parties in litigation in which the State challenged the authority of the defendant agency to enter into a casino agreement with a tribe. The court concluded the tribe was a necessary party under California's statutory counterpart to CR 19, but refused to dismiss the action. Merely because the tribe was a party to the contract did not automatically make it indispensable. Rather, under the equivalent of CR 19(b), dismissal was inappropriate because the nature of the challenge was to the agency's authority and the public has an interest in judicial review of the agency's action, noting "the Agency here seeks to establish a rule of law that would exempt all future comparable transactions from scrutiny." 65 Cal. Rptr.2d at 795.

other forum in which AUTO can address the unconstitutional actions of state officials.[21] This is why this situation is not analogous to the 11th Amendment line of cases where a party may be denied a federal forum to sue a state; that party may still seek a state court remedy. 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* and *Dairyland* courts. The Washington Attorney General suggests that the State 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 the benefit of that illegal behavior inures to a tribe. This argument implies that the Attorney General does not put much stock in his obligation to uphold Washington's Constitution on behalf of Washington citizens.

The State's reliance below on *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991), to

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[21] This is a case in equity, and equity abhors a wrong without a remedy. *Crafts v. Pitts,* 161 Wn.2d 16, 23, 162 P.3d 382 (2007); *Cogdell v. 1999 O'Ravez Family LLC*, 153 Wn. App. 384, 390, 220 P.3d 1259 (2009). When the wrong alleged is constitutional in nature and involves potential abuses of power, the lack of a remedy is even more abhorrent. A court acting in equity has broad discretion to fashion a remedy in order to do substantial justice. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003).

contend that tribal sovereign immunity trumps the fourth factor in the indispensability analysis should be rejected. The State simply reads the fourth factor out of the CR 19(b) analysis, which this Court should not do. 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. That is a matter internal to the tribes. Violation of Washington's Constitution by State officials is not. In short, the State should not be permitted to enter into contracts that depend on the disbursements from the MVF and avoid any litigation regarding the constitutionality of those disbursements, simply because the State is contracting with a tribe.

(v) The Public Rights Exception to CR 19 Applies

Further, 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 rights exception to dismissal in federal case law in cases where an entity is suing to protect the public interest. This principle applies regardless of the CR 19(b) analysis and compels rejection of dismissal of AUTO's complaint alleging state constitutional violations by state officers. This Court has not addressed this issue previously.

The United States Supreme Court enunciated the public rights exception in *National Licorice Co. v. National Labor Relations Board,* 309 U.S. 350, 363, 60 S. Ct. 569, 84 L.Ed. 799 (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" (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 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 United States Supreme Court disagreed. Comparing the NLRB action to suits brought under the Sherman Act, the Court noted that antitrust injunctions often affect nonparties 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.

The Ninth Circuit has also applied the public rights exception to CR 19. *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied,* 489 U.S. 1012 (1989). There, certain wildlife groups sued the director of the Bureau of Land Management asserting that BLM violated the National Environmental Policy Act and the Endangered Species Act in selling oil and gas leases on 1.3 million acres of national forest land in Montana. They did not join the lessees. The plaintiffs contended that the public rights exception applied, forestalling the need to apply a Fed. R. Civ. P. 19 analysis. Citing numerous cases in which joinder of all parties affected by public rights litigation was not necessary, *id.* at 1459-60, the Ninth Circuit made clear that the leases were not invalidated and that the injunctive relief was only directed against the federal government. The lessees need not be joined.

Although the State 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. By contrast, in *Makah*, the Ninth Circuit applied the public rights exception to tribes. *Id.* at 559 n.6.

Here, AUTO's claims seek to preserve the MVF for highway purposes, which the Washington Constitution requires. AUTO also seeks to prevent the squandering of taxpayer dollars in the form of "refunds" of taxes never paid and for which there is no exemption. AUTO's claims, if meritorious, will prevent the State from shifting a tax burden to retailers 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.

(2) The Trial Court Erred in Failing to Allow AUTO to Amend Its Complaint to Join Tribal Officers

Pleadings may be amended once as a matter of right before a responsive pleading is served; otherwise, they may be amended only by

leave of court or with the written consent of the adverse party. CR 15(a). The rule specifies that "leave shall be freely granted when justice so requires." *Id.* This means the rule is to be liberally applied. *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 445, 423 P.2d 624 (1967). Amendments should be freely granted unless the opposing party would be prejudiced. *Olson v. Roberts & Schaeffer Co.*, 25 Wn. App. 225, 607 P.2d 319, *review denied,* 93 Wn.2d 1023 (1980). If no prejudice is evident, then an amendment may be granted even after substantial delay. *Caruso v. Local Union 690, Int'l Bhd. of Teamsters,* 100 Wn.2d 343, 670 P.2d 240 (1983). Factors that may be considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion. *See, e.g., Wilson v. Horsley*, 137 Wn.2d 500, 506, 974 P.2d 316 (1999).

For the reasons set forth *supra,* the trial court erred in denying AUTO's motion to amend to join the tribal officials. They are complicit in the conduct of state officials who violated the Washington Constitution. They are spending MVF moneys on non-highway purposes, illegally levying taxes on non-tribal members, and are recipients of taxpayer "refunds" to which they are not legally entitled. They are receiving Washington state taxpayer funds that have not been appropriated by the Legislature.

The tribal officers will suffer no prejudice because they have been on notice, both in the federal court proceedings and now on remand, that they could be named in this suit if the trial court concluded that they were indispensable parties.

Also, amendment causes no prejudice to the State. In fact, the State has strenuously argued that this case cannot be resolved without some mechanism for defending the tribes' interest in the compacts at issue. This case is in its earliest stages. The amendment does not affect the factual landscape of this case, it merely joins additional defendants. The claims are identical to those in the prior complaint. Granting it will not alter or increase the State's discovery burden or cause any unfair surprise. Because AUTO brought this motion properly after learning that this Court was inclined to dismiss, there is no undue delay.

There is no hardship to the State or the tribal officers, there has been no undue delay or surprise, and the motion to amend came well in advance of trial. The State did not demonstrate *actual* prejudice resulting from the amendment; the amendment should have been permitted by the trial court. Without amendment, there will be no remedy for the serious constitutional violations at issue.

F. CONCLUSION

The trial court erred in dismissing AUTO's complaint. The mere fact that tribes were involved in the fuel compacts cannot shield state officers acting in violation of the Washington Constitution from judicial review of such unconstitutional conduct.

This Court should reverse the trial court's order of dismissal and its order denying the amendment of AUTO's complaint. Costs on appeal should be awarded to AUTO.

DATED this 5th day of April, 2011.

Respectfully submitted,

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APPENDIX

CR 19:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Transportation Revenue March 2011 Forecast Update

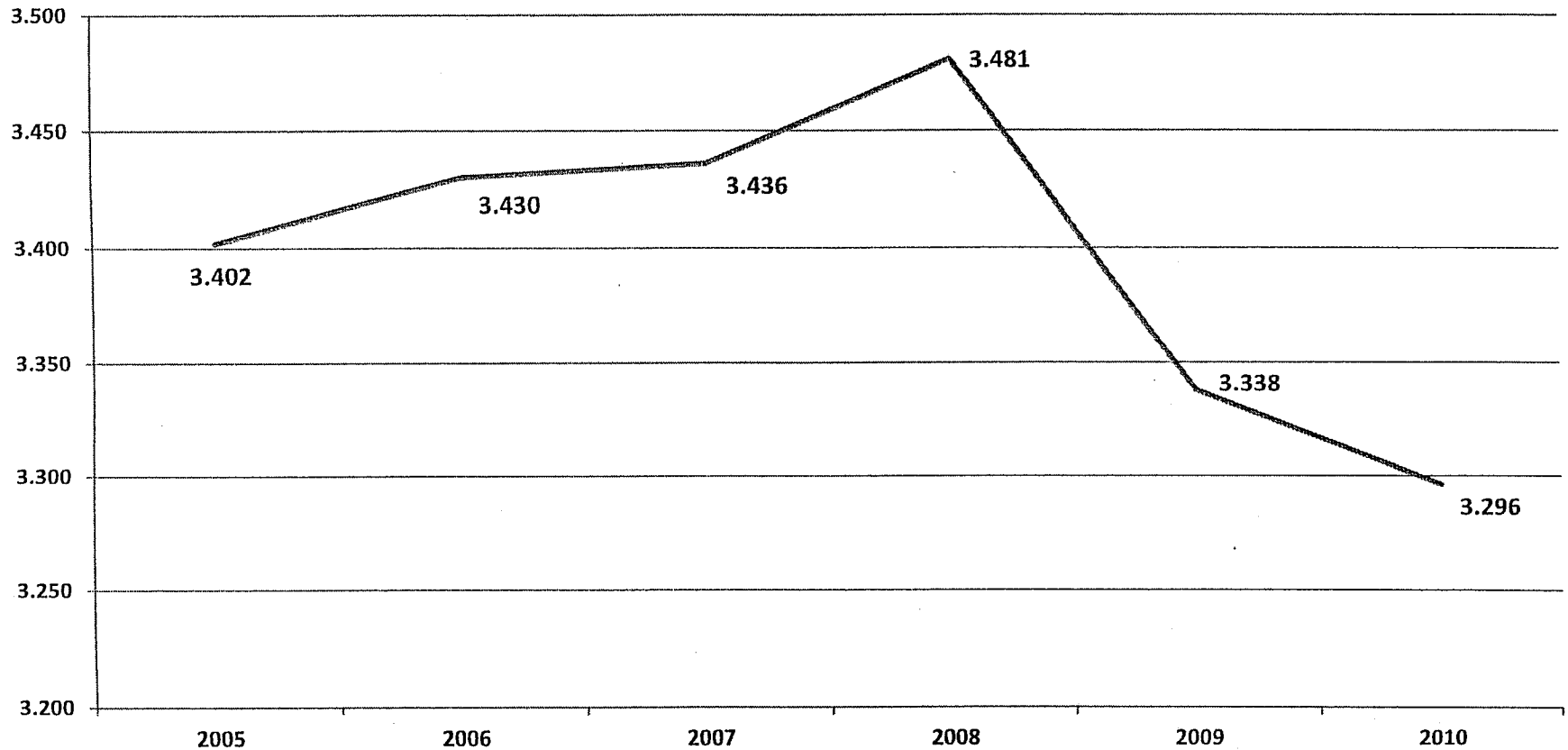
March 17, 2011

Prepared by OPR Staff

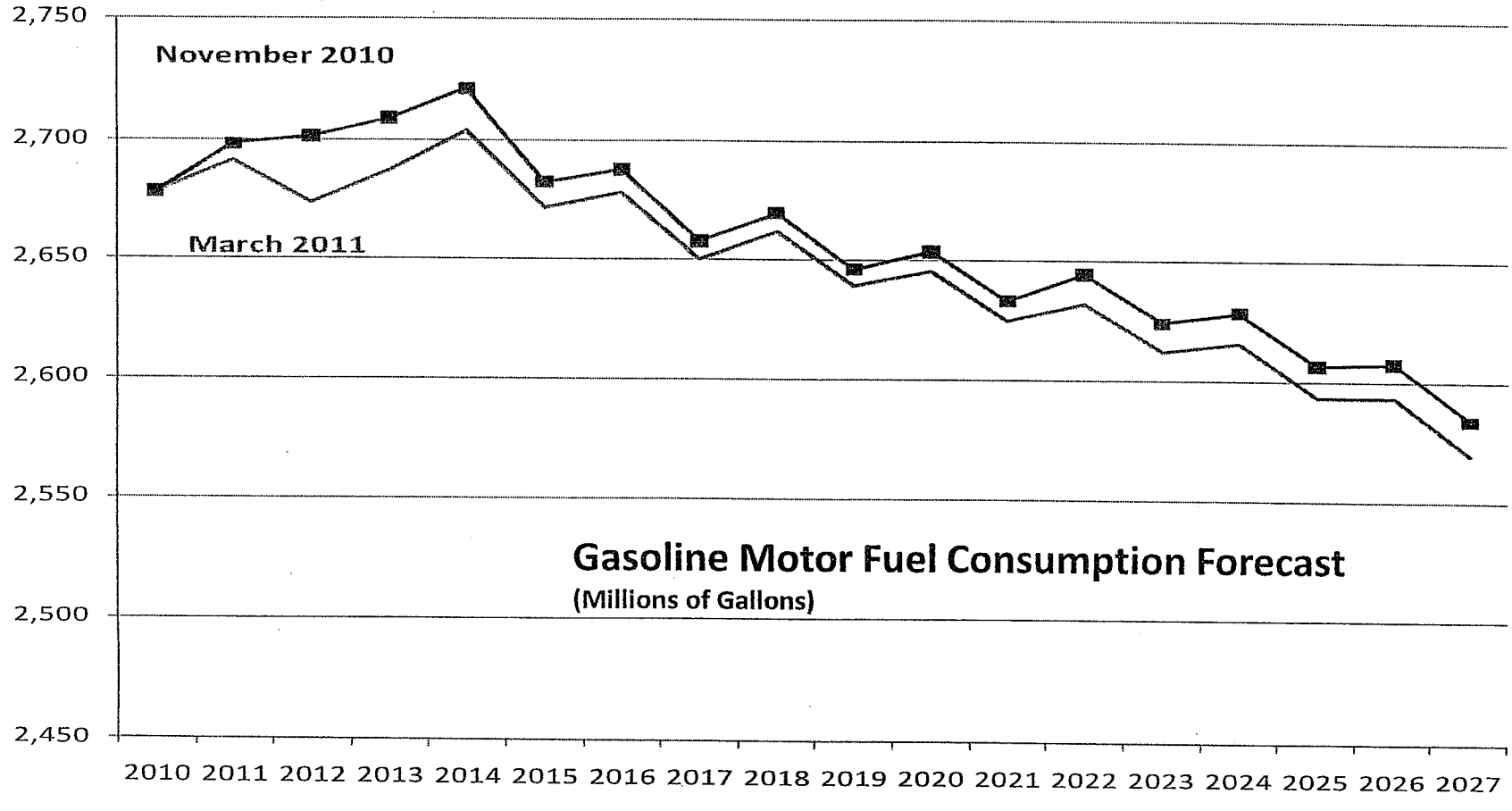
Transportation Revenue Observations

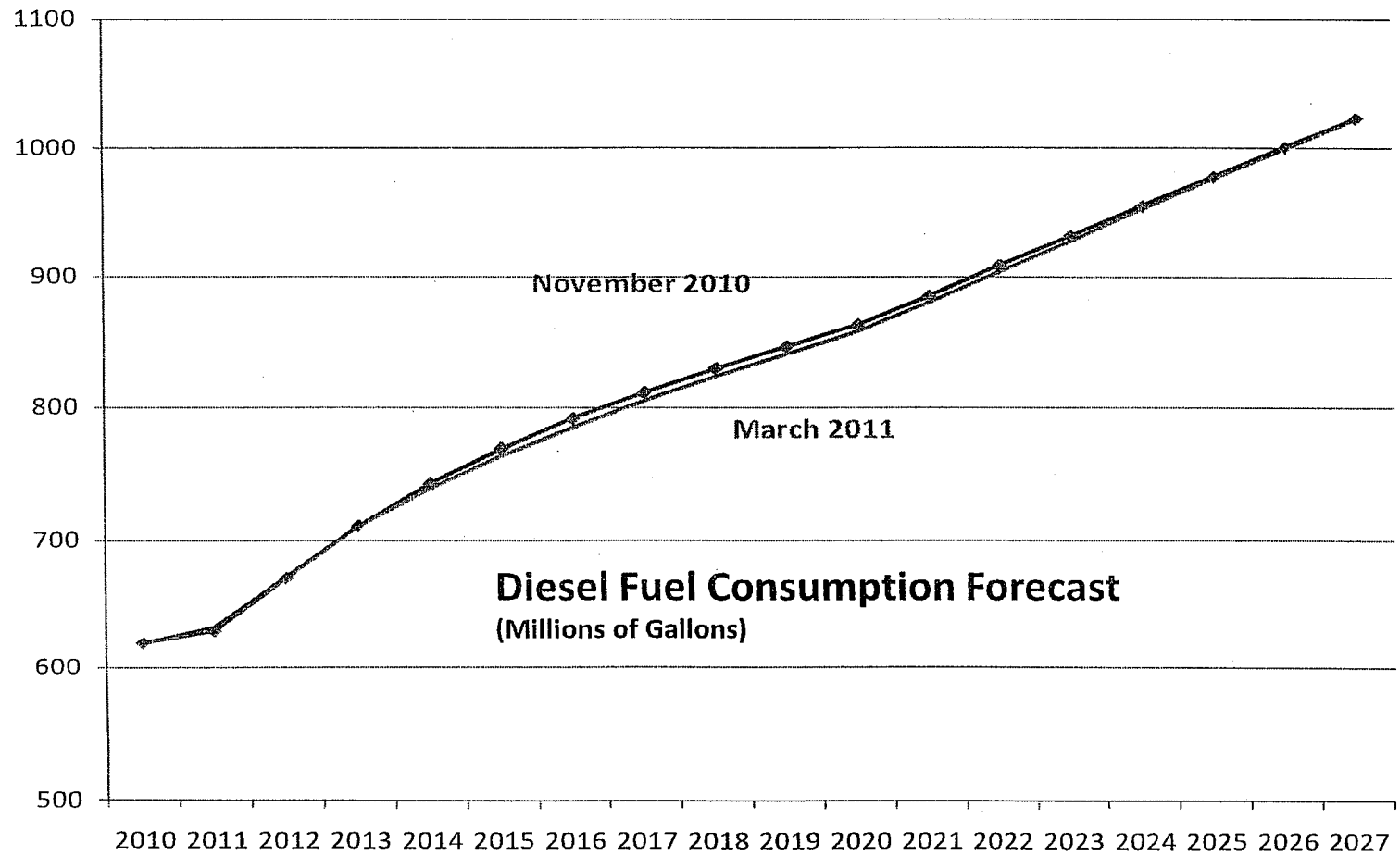
- This decrease in transportation revenue represents a weak recovery from the recent recession as revenues are recovering slowly.
- 82.6% of the transportation revenue is derived from fuel tax and licenses, permits and fees. 2009-11 $4.1 Billion and 2011-13 $4.2 Billion.
- Fuel tax revenue has decreased due to a decrease in consumption.
- In November 2010 approximately 60% of the decrease in fuel tax revenues was due to changing to new gasoline and diesel fuel tax forecasting models.
- The accounts that receive fuel tax revenues include the Motor Vehicle Account, the Nickel Account, the Partnership Account, Special Cat C, and the Ferry Accounts.
- On the local side, city and county fuel tax distributions are decreased along with the Transportation Improvement Board and County Road Administration Board.

Fiscal Year Fuel Gallons in Millions



- Overall fuel gallons increase over next 10 years 6.8%
- Gasoline gallons decrease over next 10 years (2%)
- Diesel gallons increase over next 10 years 32%


2,750
2,700
2,650
2,600
2,550
2,500
2,450
November 2010
March 2011
Gasoline Motor Fuel Consumption Forecast
(Millions of Gallons)
2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027


1100
1000
900
800
700
600
500
November 2010
March 2011
Diesel Fuel Consumption Forecast
(Millions of Gallons)
2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027

Transportation Revenue Observations

- Recent forecasts of license, permit, and fee revenues have been very close to actual.
- Drivers related fees have been very close to actual.
- Ferry ridership - both passenger and vehicles have been down.
- Rental car tax has stabilized and very close to forecast.
- Retail sales and use tax on motor vehicles is still down from the anticipated future forecasts.
- Diesel non-highway refunds have decreased, tribal refunds have increased.
- Federal funds have had a small increase.

March 2011 Revenue Forecast

- **March 2011 Forecast Compared to November 2010 Forecast**
  - 2009-2011
    - Overall no change
  - 2011-2013
    - Overall revenues decreased ($25.1) Million
    - Motor vehicle fuel tax decreased ($18.2) Million
    - License, permits and fees increased $2.2 Million
    - Ferry revenue decreased ($5.2) Million
    - Toll revenue decreased ($3.9) Million
    - Total refunds and transfers have increased ($4.1) Million

March 2011 Revenue Forecast

- **March 2011 Forecast Compared to November 2010 Forecast**

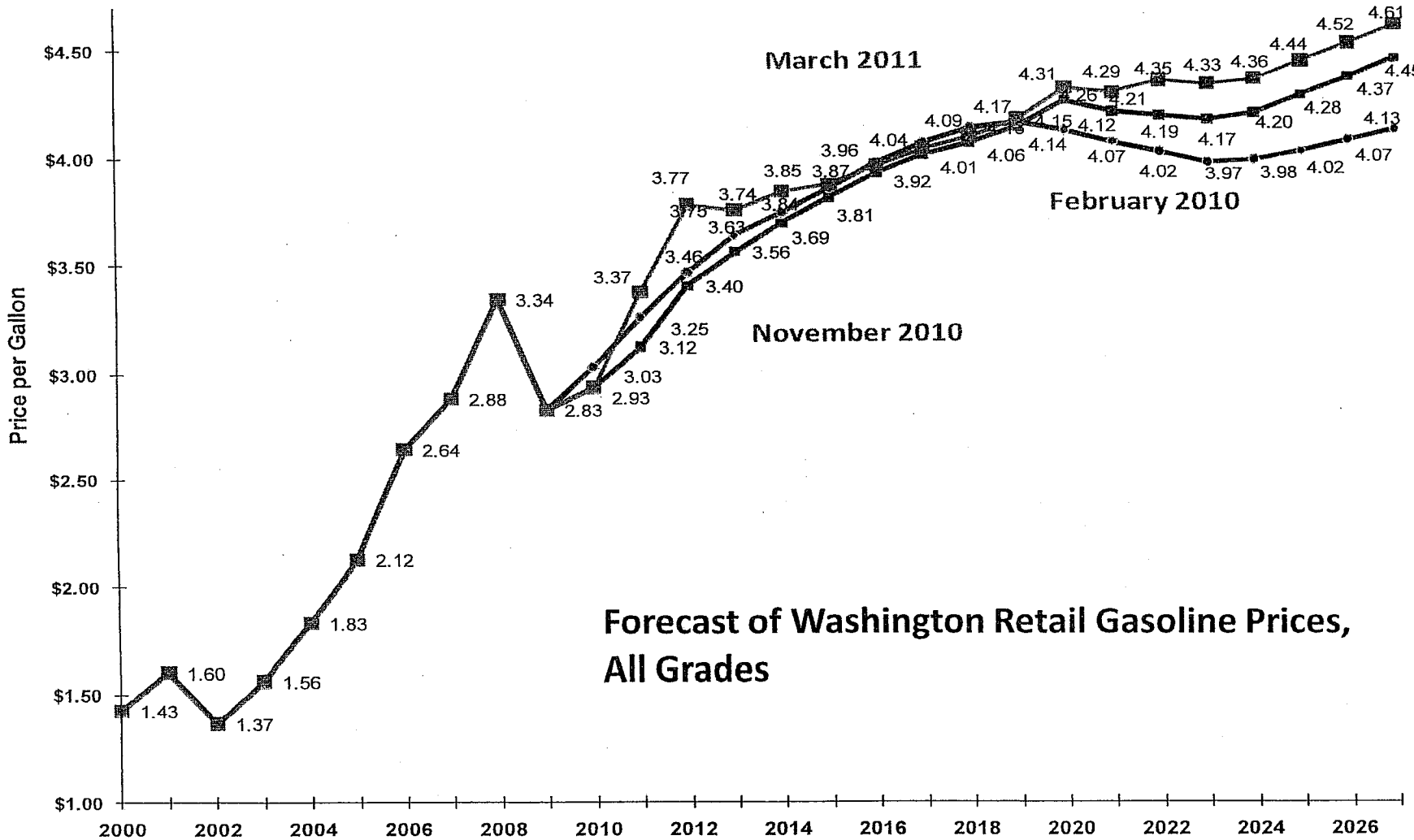
  - 2011-2021 (10 Year Period)
    - Overall revenues decreased ($55.1) Million
    - Motor vehicle fuel tax decreased ($29.6) Million
    - License, permits and fees increased $6.7 Million and very stable
    - Ferry revenue decreased ($26.1) Million
    - Toll revenue decreased ($13.9) Million
    - Fuel tax refunds and transfers increased ($69.0) Million

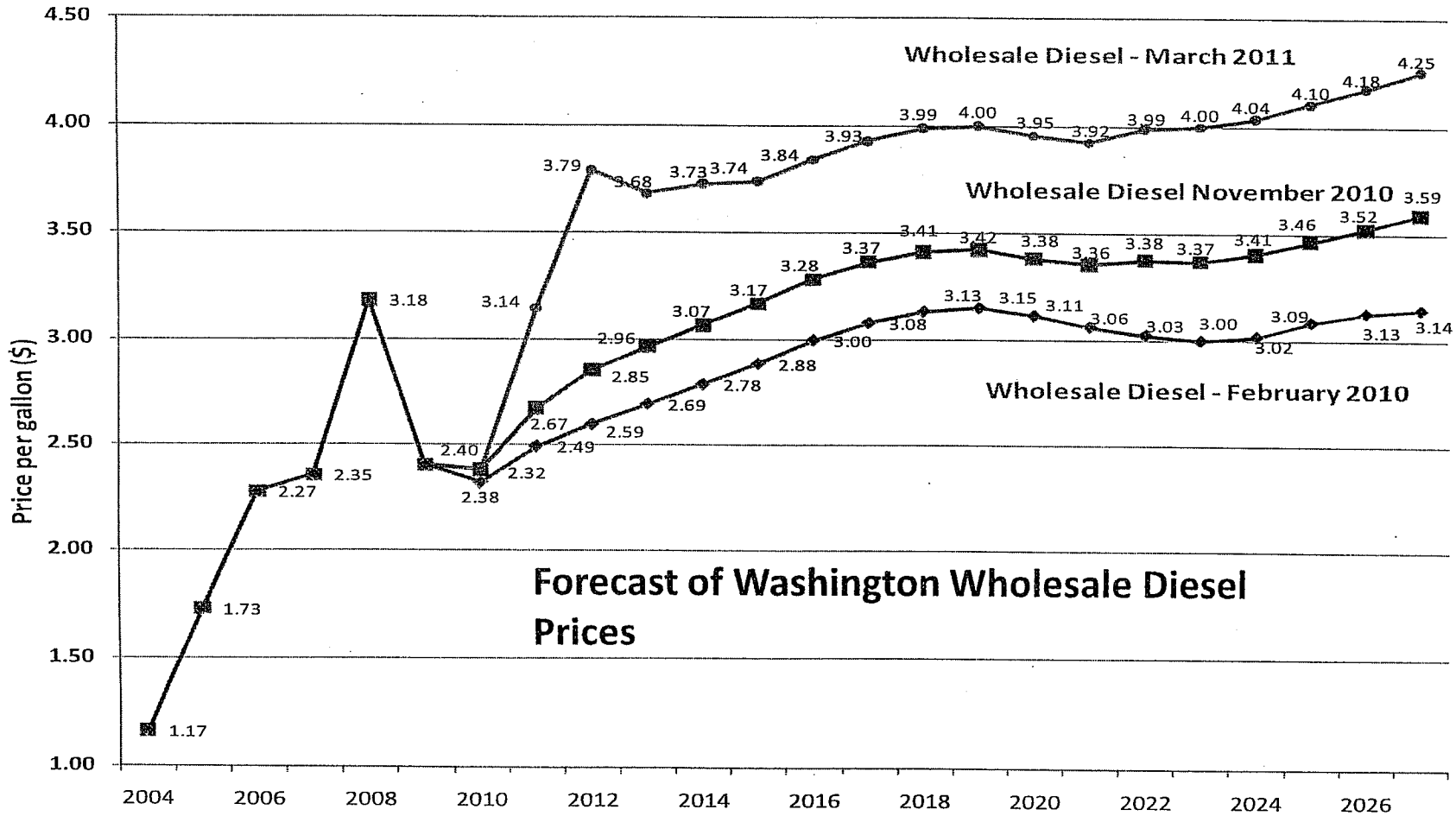
March 2011 Revenue Forecast

- **<u>March 2011 Forecast Compared to February 2010 Forecast</u>**
  - 2009-2011
    - Overall revenues decreased (67.3) Million largely in fuel tax and license, permit and fee revenue
  - 2011-2013
    - Overall revenues decreased ($100.5) Million
    - Motor vehicle Fuel tax decreased ($66.5) Million
    - License, permits and fees decreased ($9.9) Million
    - Ferry revenue decreased ($10.0) Million
    - Toll revenue decreased ($4.9) Million
    - Vehicle sales tax decreased ($9.1) Million
    - Refunds mostly due to diesel are decreased $23.7 Million
    - Tribal refunds are increased ($22.0) Million

March 2011 Revenue Forecast

- **March 2011 Forecast compared to February 2010 Forecast**
  - 2011-2021 (10 Year Period)
    - Overall revenues decreased ($1,093.5) Billion
    - Motor vehicle Fuel tax decreased ($907.8) Million
    - License, permits and fees decreased ($63.4) Million
    - Ferry revenue decreased ($41.1) Million
    - Toll revenue decreased ($10.6) Million
    - Rental car tax decreased ($18.4) Million
    - Vehicle sales tax decreased ($39.6) Million
    - Refunds mostly due to diesel are decreased $147.6 Million
    - Tribal refunds are increased ($150.7) Million


Price per Gallon
$4.50
$4.00
$3.50
$3.00
$2.50
$2.00
$1.50
$1.00
2000
2002
2004
2006
2008
2010
2012
2014
2016
2018
2020
2022
2024
2026
March 2011
February 2010
November 2010
Forecast of Washington Retail Gasoline Prices, All Grades


Forecast of Washington Wholesale Diesel Prices
Wholesale Diesel - March 2011
Wholesale Diesel November 2010
Wholesale Diesel - February 2010
Price per gallon ($)
4.50
4.00
3.50
3.00
2.50
2.00
1.50
1.00
2004
2006
2008
2010
2012
2014
2016
2018
2020
2022
2024
2026
1.17
1.73
2.27
2.35
3.18
2.40
2.38
3.14
3.79
3.68
3.73
3.74
3.84
3.93
3.99
4.00
3.95
3.92
3.99
4.00
4.04
4.10
4.18
4.25
2.32
2.67
2.85
2.96
3.07
3.17
3.28
3.37
3.41
3.42
3.38
3.36
3.38
3.37
3.41
3.46
3.52
3.59
2.49
2.59
2.69
2.78
2.88
3.00
3.08
3.13
3.15
3.11
3.06
3.03
3.00
3.02
3.09
3.13
3.14

Fuel Prices

- Last February the forecast for crude to be at $82 per barrel, today the price is $101.50 per barrel.

- February 2010 forecast for fuel prices for FY 2012 was $3.46 per gallon compared to March 2011 forecast at $3.77 per gallon.

  - Increases fuel costs for 2009-11 and 2011-13
    - Ferries
    - Washington State Patrol
    - Department of Transportation

Questions

DECLARATION OF SERVICE

On said day below I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Brief of Appellant Auto in Supreme Court Cause No. 85661-3 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED on April 15, 2011 at Tukwila, Washington.

Paula Chapler
Talmadge/Fitzpatrick