The Honorable Gordon Godfrey
Date of Hearing: November 22, 2010
Time of Hearing: 1:30 p.m.

STATE OF WASHINGTON
GRAYS HARBOR COUNTY SUPERIOR COURT

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. 10-2-00599-1 MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO JOIN INDISPENSABLE PARTIES

I. NATURE OF MOTION AND SUMMARY OF ARGUMENT

The State Defendants move for an order dismissing Plaintiff's claims for failure to join indispensable parties. CR 12(b)(7), 19. The lawsuit filed by the Plaintiff, an association of gasoline retailers, would have the practical effect of eviscerating the fuel tax agreements between nineteen federally recognized Indian Tribes and the State. Indian Tribes are indispensible parties to any lawsuit that would have the practical effect of impacting the contractual rights negotiated by the Tribe. *Wilbur v. Locke,* 423 F.3d 1101 (9th Cir. 2005); *Matheson v. Gregoire,* 139 Wn. App. 624, 161 P.3d 486 (2007), *review denied,* 163 Wn.2d

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1020, 180 P.3d 1292 (2008), *cert. denied,* 129 S. Ct. 197, 172 L. Ed. 2d 140 (2008). Where the sovereign immunity of a Tribe prevents joinder of the Tribe, dismissal of the lawsuit for inability to join an indispensible party has been found to be the necessary disposition of the case.

The effect of sovereign immunity, as with judicial or any other immunity, on a particular case may seem harsh, but the recognition of immunities is a reflection of well established policy decisions. The Washington Court of Appeals, Division II, has recently noted the long-standing recognition that CR 19 dismissal for inability to join a Tribe due to sovereign immunity is required even though it may leave a Plaintiff without a judicial remedy. *Matheson,* 139 Wn. App. at 636, citing, *Wilbur,* 423 F.3d at 1115. As succinctly noted in *Wichita:*

> [I]mmunity doctrines inevitably carry within them the seeds of occasional inequities . . . . Nonetheless, the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests.

Wichita & Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 781 (D.C. Cir. 1986); *in accord, Mudarri v. State,* 147 Wn. App. 590, 604-09, 196 P.3d 153, *review denied,* 166 Wn.2d 1003, 208 P.3d 1123 (2009); *Foxworthy v. Puyallup Tribe of Indians,* 141 Wn. App. 221, 169 P.3d 53 (2007).

This case fits squarely within many years of consistent appellate decisions dismissing lawsuits under CR 19 where tribal sovereign immunity prevents joinder of a tribe to a lawsuit that would either directly or indirectly effect a contract to which the tribe was a party. *See, e.g,. Mudarri,* 147 Wn. App. at 604-09 (direct and indirect attacks on tribal agreement properly dismissed pursuant to CR 19); *Matheson,* 139 Wn. App. 624; *Wilbur v. Locke,* 423 F.3d 1101 (9th Cir. 2005); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.,* 276 F.3d 1150, 1157 (9th Cir. 2002); *Kescoli v. Babbitt,* 101 F.3d 1304 (9th Cir. 1996).

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II. FACTS

A. The Fuel Tax Agreements Between The State And The Tribes

The Plaintiff's suit indirectly challenges on a variety of state constitutional grounds a central provision of the fuel tax agreements (hereafter, the Agreements) executed by the State of Washington and 19 Indian tribes (hereafter, the Tribes). Specifically, Plaintiff seeks an order prohibiting the State from refunding to the Tribes a portion of the state fuel taxes imposed and collected on fuel sold to tribal fuel retailers. See 1st Am. Compl. (FAC) at 19. The Tribes are required by the terms of the Agreements to use the refund for tribal transportation related purposes. These refunds to the Tribes are mandated by the Agreements and any order terminating those payments would have the effect of nullifying the Agreements.

Implicitly recognizing the bar imposed by tribal sovereign immunity, the Plaintiff has sued only one of the parties to the Agreements it seeks to eviscerate: the State. Plaintiff has not sued the other parties to the Agreements, the Tribes. The reason Plaintiff has not included the Tribes in this suit is simple; the Tribes are immune from suit as sovereign governments. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 510, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

In 1995 the Legislature authorized the State to enter into agreements with the Tribes regarding the "imposition, collection and use of [the] state's motor vehicle fuel tax, or the budgeting or use of moneys in lieu thereof, upon terms substantially the same as those in the consent decree entered by the federal district court (Eastern District of Washington) in *Confederated Tribes of the Colville Reservation v. D.O.L. et al.,* District Court No. CY 92 248 JLO." Former RCW 82.36.450; *see also* Laws of 1995, ch. 320, § 1 (statement of legislative

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recognition). Pursuant to that authority, the State entered into five fuel tax agreements prior to May 2007.[1] *See* FAC at ¶ 20.

In 2007, the Washington Legislature enacted Senate Bill 5272, which modified the administration of motor vehicle and special fuel taxes. Among other things, SB 5272 shifted the legal incidence of fuel taxes from consumers to "licensees" (defined to include motor vehicle fuel suppliers, importers, exporters, blenders or persons holding international fuel tax agreement licenses.). FAC at ¶ 15; RCW 82.36.010(12), .020(1), 82.38.020(15), (24), .030(1).

SB 5272 also amended RCW 82.36.450 and 82.38.310, which authorized the Agreements between the State and the Tribes. These amended statutes expressly provide that the Agreements entered prior to their effective date are not repealed. RCW 82.36.450(2), 82.38.310(2). However, the amended legislative authorization mandates that future agreements require: (1) The Tribes or tribal retailers (collectively referred to hereafter as the Tribes) to buy all their fuel from entities doing business in accordance with applicable law; and (2) that the Tribes spend any fuel tax proceeds remitted by the State or their equivalent on "highway-related purposes." FAC at ¶ 24; RCW 82.36.450(3)(a), (b), 82.38.310(3)(a), (b).

In addition, in order to ensure the Tribes comply with the mandate to use the fuel tax refunds provided to them only for 'highway-related purposes,' the statutes require that the agreements include a vigorous audit function to verify both the amount of fuel purchased by the Tribes, and that the Tribes are spending the money only as statutorily permitted. RCW 82.36.450(3)(c), 82.38.310(3)(c). The audits or compliance reports must be provided to the Department of Licensing. *Id.* Finally, these statutes mandate that the audit information the Tribes' are required to provide is not subject to public disclosure consistent with the manner in

[1] These five tribes include the Lummi, Makah, Muckleshoot, Quileute, and Quinault. FAC ¶ 20. Each of these tribes is federally recognized. *See* Department of the Interior, Bureau of Indian Affairs, *Tribal Leaders Directory*, Summer 2010, available at http://www.bia.gov/idc/groups/xois/ documents/text/idc002652.pdf.

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which other taxpayer information is protected. RCW 82.36.450(4), 82.38.310(4); both citing, RCW 42.56.230(3).

Since the enactment of SB 5272, the State has entered into fuel tax agreements with fourteen federally recognized Tribes (in addition to the five Agreements predating the enactment of the bill).[2] FAC at ¶ 19. Most of the 19 Agreements challenged in this action require the State to refund 75 percent of the state fuel taxes to the Tribes on each gallon of fuel purchased by the Tribes or tribal retailers. FAC at ¶ 21. Approximately $14.3 million in 2008 and $23 million in 2009 were disbursed to the Tribes pursuant to the Agreements for use on tribal transportation-relation projects. FAC ¶ 23.

In exchange for the refund of the state fuel taxes to the Tribes, the Agreements require the Tribes to comply with the conditions found in RCW 82.36.450 and 82.38.310. For example, the Agreements require the Tribes to: (1) purchase fuel only from entities licensed by the State; (2) purchase only fuel on which State taxes have been paid; (3) pass the state fuel taxes on to retail customers in the price of fuel sold by the Tribes; (4) spend the state fuel taxes remitted by the State exclusively on highway-related purposes; (5) arrange an annual audit demonstrating compliance with the agreed provisions; and (6) abide by certain record-keeping requirements. FAC at ¶ 22. Finally, the Agreements contain no waiver of sovereign immunity by the Tribes to actions by third parties or non-parties to the Agreements.

B. **Current Lawsuit: Removal To Federal Court And Return To This Court**

Plaintiff is a trade association of gasoline and automotive services retailers who operate approximately 300 outlets throughout Washington where automobile fuel is sold. FAC ¶¶ at 6, 9. Plaintiff's members are competitors of the Tribes in the retail automobile fuel market and contend that the fuel tax monies remitted to the Tribes pursuant to the Agreements are not

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[2] These 14 tribes include the Chehalis, Colville, Jamestown S'Klallam, Kalispel, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Skokomish, Squaxin, Suquamish, Swinomish, Tulalip, and Upper Skagit. FAC ¶ 20. Each of these tribes is also federally recognized. *See, supra* p. 3, n.1 (and source cited therein).

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being used *in toto* for authorized purposes, but instead are being used to permit the Tribes to sell its fuel at a lower price than Plaintiff's members. *Id.* at ¶ 9.

Plaintiff originally filed this suit in this Court. However, when current counsel for Plaintiff took over the case, Plaintiff amended their complaint to add a federal constitutional claim. As anticipated by Plaintiff, the State then removed the case to federal court. In federal court, the State filed a motion to dismiss identical to this motion, arguing the absent Tribes are indispensable parties and, since they cannot be joined because of their sovereign immunity, the case must be dismissed. The CR 19 analysis is identical whether presented in either state or federal court. Compare, *Mudarri* and *Wilbur, supra.* Although the parties had fully briefed the CR 19 issue in federal court, the Plaintiff chose to dismiss its federal claim in order to secure venue in this court before a ruling was issued by Judge Settle.

III. ARGUMENT

A. Binding Authority Provides That This Action Must Be Dismissed Because The Plaintiff Cannot Join The Tribes, Which Are Necessary And Indispensable Parties, But Immune From Suit As Sovereign Powers

CR 19 provides in relevant part that a party is necessary for the just adjudication of an action if disposing of the action in the absence of the party 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)(2).

Where a party found to be necessary under CR 19(a) cannot be joined as a party, the action may be dismissed if the absent party if found to be "indispensable" after considering the following four factors:

> (1) To what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;

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(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; and

(4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b).

There are several recent appellate cases with facts essentially identical to those found in this case. *Mudarri*, 147 Wn. App. at 604-09; *Matheson*, 139 Wn. App. 624; *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005). In each of these cases, the courts have dismissed pursuant to CR 19 lawsuits seeking the effective nullification of State-tribal agreements because the plaintiffs did not sue the tribes, which the courts found to be necessary and indispensable parties.

For example, *Matheson* involved a suit filed by a tribal member and cigarette retailer against the State seeking the effective nullification of an agreement between the State and the Puyallup Tribe regarding cigarette taxes. *Matheson*, 139 Wn. App. at 627-28. The agreements were authorized by a statutory scheme similar to that involved in this matter. *Compare*, RCW 43.06.465 with RCW 82.36.450 and 82.38.310. The cigarette tax and fuel tax agreements are similar as well, with the cigarette agreement providing the Tribe with 70% of the revenue derived from tribal cigarette taxes, in return for the Tribe's commitment to peg the tribal cigarette tax at the same level as the State tax and to buy cigarettes only from State-licensees. *Matheson*, 139 Wn. App. at 627-28.

The plaintiff in *Matheson* sued both the State and the Tribe. The Tribe was dismissed based on its sovereign immunity, and the court then subsequently dismissed the State because it found the Tribe to be an indispensable party under CR 19. The Court of Appeals affirmed the trial court's actions. Specifically, the court concluded the Tribe was a necessary party to the dispute because it was a party to the contract the litigation sought to effectively abolish.

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Id. at 635. In addition, noting that Indian tribes are sovereign entities immune from suit absent Congressional abrogation or tribal waiver (neither of which were present in that case), the court concluded the action had to be dismissed because the Tribe was an indispensable party to the litigation.

Employing the four factors of CR 19(b), the court found that a judgment rendered in the Tribe's absence would greatly prejudice it because granting plaintiff's requested relief would cause the cigarette tax agreement to "essentially disintegrate." *Id.* In addition, given the draconian nature of the relief sought – abrogation of the agreement – relief could not be shaped to reduce the prejudice to the Tribe while still adequately addressing the plaintiff's concerns. *Id.* at 635-36. Finally, although dismissal would result in plaintiff having no adequate remedy or forum for his complaint, courts have routinely "held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs." *Id.* at 636.

Mudarri involved challenges to an agreement signed between the State and the Puyallup Tribe permitting the Tribe to operate electronic scratch ticket games. *Mudarri*, 147 Wn. App. at 597. The Plaintiff in *Mudarri* was, as in this matter, a non-tribal business competitor who operated a casino that was not authorized to provide electronic scratch ticket games. *Id.* The plaintiff sued the State, but not the Tribe.

Unlike the plaintiff in *Matheson* who directly challenged the State-tribal agreement, the *Mudarri* plaintiff challenged the State-Tribe gaming agreement both directly, as well as indirectly by alleging it violated various constitutional doctrines (e.g., separation of powers) and the state constitution. *Id.* at 595. The *Mudarri* plaintiff's indirect challenges to the gaming agreement are similar to Plaintiff's state constitutional challenges in this matter.

The Court of Appeals affirmed the dismissal on CR 19 grounds of both the direct and indirect challenges brought by the plaintiff. *Id.* at 605-09. The court found the Tribe to be a necessary party to any action seeking to invalidate a contract to which the Tribe is a party. *Id.* at 604. In addition, the court found that because of the Tribe's sovereign immunity, plaintiff's

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claims could not adequately be addressed and the matter should therefore be dismissed. *Id.* at 605. The court stressed that the CR 19 analysis applied just as equally to bar the plaintiff's indirect challenges, noting:

> Just as the Tribe did not waive its sovereign immunity from suit on Mudarri's direct challenge to the State-Tribe Compact, it neither waived its immunity nor consented to be sued on these claims related to and, thus, indirectly attacking the State-Tribe Compact. Because the Tribe could not be joined as a party, the trial court could have recited failure to join an indispensable party under CR 12(b)(7) and 19(b) as a ground for dismissing Mudarri's other claims indirectly related to the State-Tribe Compact. . . . [W]e affirm their dismissal on alternative CR 19(b) grounds.

Id. at 606-07.

Matheson, Mudarri, and their federal counterpart, *Wilbur,* are factually indistinguishable in all relevant respects from this matter. Each involved lawsuits whose goal was to effectively nullify State-tribal agreements, but in which the plaintiffs did not join as defendants the tribes that were parties to the agreements. As these courts have consistently held, and as analyzed in more detail below, such suits must be dismissed under CR 19 for the fundamental reason that tribes are necessary and indispensable parties to any action that would have the effect of taking from the tribes any rights or benefits flowing from an agreement to which the tribes are a party.

B. The Tribes Are Necessary Parties To This Action

In determining whether the Tribes are a required and indispensable party in this action, the Court must engage in the two-part analysis mandated by CR 19. *Mudarri,* 147 Wn. App. at 604. The Court must first determine whether the Tribes are necessary parties; i.e., to be joined if feasible. *Id.*; CR 19(a).

A non-party is a necessary party if the non-party has a legally protected interest implicated by the suit and rendering a decision in the matter may: (1) "as a practical matter" impair or impede the non-party's ability to protect its interest, or (2) leave an existing party to the suit subject to a substantial risk of incurring inconsistent obligations because of the non-

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party's interest. CR 19(a)(2). The Tribes are necessary parties within the meaning of both subsections of CR 19(a)(2) because they are parties to the Agreements and Plaintiff seeks through this action to effectively invalidate the Agreements' provision requiring the remittance of the fuel tax monies to the Tribes. *See, e.g., Matheson v. Gregoire*, 139 Wn. App. 624, 635 ("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.'"), citing, *Wilbur*, 423 F.3d at 1113, quoting, *Dawavendewa,* 276 F.3d at 1157.

The Tribes have two significant interests that would be adversely affected if the Plaintiff's prayer for relief were granted in this matter and the fuel tax remittances to the Tribes were halted. First, the Tribes would stand to lose millions of dollars in state gas tax refunds to the detriment of tribal transportation projects. A Tribe's interest in the monies due it under a contract has routinely been found sufficient to find the Tribe a necessary party within the meaning of CR 19. *See, e.g., Matheson*, 139 Wn. App. at 624, 635 (citing cases).

For example, in *Wilbur*, the Plaintiff sought to invalidate a cigarette tax agreement between the State of Washington and the Swinomish Tribe that, like the Agreements here, provided the Tribe with tax monies that the Tribe agreed to spend for essential tribal government purposes. *Wilbur*, 423 F.3d at 1104-05. However, the plaintiffs did not join the Tribe as a party to the suit. *Id.* at 1105. The State, therefore, moved to dismiss the suit pursuant to FRCP 19. *Id.* This was denied by the district court, which concluded the Tribe was not a necessary party. *Id.*

The Ninth Circuit overruled the district court and dismissed the action on the basis that the Tribe was a necessary and indispensable party. *Wilbur*, 423 F.3d at 1112. The Ninth Circuit noted that "because the Tribe has an interest in retaining the rights granted by the [cigarette tax agreement], the requirement of a 'legally protected' interest is satisfied." *Id.* The monetary benefit derived by the Swinomish from the cigarette tax agreement in *Wilbur* and that was threatened by the litigation there is identical to the monetary benefit threatened by

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Plaintiff in this action. The Tribes are, therefore, as necessary to this action as they were in *Wilbur*.

Finally, the Tribes are also a necessary party under CR 19(a)(2)(B) because, in their absence, the State may find itself subject to competing and inconsistent obligations if Plaintiff's relief is granted. The State would be faced would be required to pay refunds to the Tribes pursuant to the Agreements, and yet forbidden to do so if Plaintiff's relief were granted.

1. Any Attempt By Plaintiff To Claim The Tribes Are Not "Necessary" Parties Is Without Merit

In their response to the State's Rule 19 motion to dismiss filed in federal court, Plaintiff attempted to distinguish the cases cited by the State there in which the courts held that a tribe is a necessary party to any litigation that may impact the tribe's rights under a contract to which they are a signatory. The gist of Plaintiff's argument before the federal court - an argument the State expects the Plaintiff to reassert before this Court - is that these cases are distinguishable because here, unlike in those cases, Plaintiff has taken great care not to directly attack the Agreements themselves.

This distinction, though, is simple sophistry. As noted above, the cases cited by the State provide that the "necessary" party inquiry of CR 19 does not focus on whether the Plaintiff expressly challenges or mentions the state-tribal agreements, but whether the litigation between the State and the non-tribal plaintiff may "as a practical matter" impair the tribe's ability to protect its interests under the agreements. *Mudarri*, 147 Wn. App. at 606-07 (dismissing under CR 19 "indirect" constitutional challenges to the state-tribal compacts). It is irrefutable that 'as a practical matter' the consequence of the relief ultimately sought by the Plaintiff is an order from this Court prohibiting the State from making fuel tax refunds to the

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Tribes as required by the Agreements. As a result, the Tribes are necessary parties to this litigation.[3]

C. Joinder Is Not Feasible Because The Tribes Have Sovereign Immunity

Although the Tribes are necessary parties to this action, joinder of the Tribes is not feasible because they are immune from suit. *Mudarri,* 147 Wn. App. at 602-03. The Tribes' "'inherent sovereignty includes immunity from suit absent a clear waiver by the tribe or congressional abrogation.'" *Id.* at 603, quoting *Foxworthy,* 141 Wn. App. at 225. There has been no such waiver or abrogation in this matter. Therefore, joinder of the Tribes is legally impossible. *Mudarri,* 147 Wn. App. at 603-04; *Dawavendewa*, 276 F.3d at 1159.

1. The Tribes Have Not Waived Their Sovereign Immunity

The Plaintiff may argue, as it did in federal court, that language in the Agreements constitutes a complete waiver by the Tribes of their sovereign immunity from any suit by any entity that may affect the rights and benefits to which the Tribes are entitled under the Agreements. The language on which Plaintiff relies for this argument provides that the parties to the Agreements – the State and the Tribes – may take any disputes between them to a court for adjudication if the informal dispute resolution processes mandated by the Agreements fail. Plaintiff's argument is without merit because this language is not, as required, an unequivocal waiver of the Tribes' immunity. In addition, even if the language can be construed as a waiver, all the Tribes have agreed to by such language is consent to a possible suit by the other party to the Agreements, the State.

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[3] Plaintiff also relied in its federal court response on *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995) in arguing the Tribes are not necessary parties. However, *Clark*, a mandamus action challenging the New Mexico governor's authority to enter into gambling agreements with tribes there, is inapposite because, unlike in this case, the holding there turned on the fact the governor had no legal authority to sign the agreements. *Id.* at 19. A subsequent case from the New Mexico Supreme Court is, unlike *Clark*, on point and holds that tribes are necessary parties to any litigation that would impact their rights under agreements with the state, even where the agreements are not directly implicated or mentioned. *See Srader v. Verant*, 964 P.2d 82, 85-86, 90 (N.M. 1998).

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A tribe's waiver of its sovereign immunity must be "clear" and "unequivocally expressed". *Okla. Tax Comm'n*, 498 U.S. at 509; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978). This rule provides that there is a strong presumption against waiver of tribal sovereign immunity. *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989). The contingent language in the Agreements that the parties thereto may, at some point, decide to take any disputes between them regarding the Agreements to court does not constitute the type of clear and unequivocal waiver of sovereign immunity sufficient to overcome the presumption against such a waiver.

In addition, even assuming *arguendo* that the Agreements' language relied upon by Plaintiff can be said to constitute a waiver, that language applies to waive the Tribes' immunity only to suit by the other party to the Agreements: the State. *See, e.g., Demontiney v. United States,* 255 F.3d 801, 813-14 (9th Cir. 2001) (consent to suit by tribe for one type of claim does not open the door to suit by other claims brought by other parties). Where a tribe does, in fact, consent to suit, any conditions or limits it places on a waiver of its sovereign immunity must be strictly construed and applied. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852-53 (8th Cir. 2001). As the court there explained:

> Because a waiver of immunity "'is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.'" *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir. 1985) (quoting *Beers v. Arkansas,* 61 U.S. (20 How.) 527, 529, 15 L. Ed. 991 (1857)). In addition, if a tribe "does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied." *Namekagon Dev. Co.,* 517 F.2d at 509.

Id. at 852.

Therefore, language in the Agreements providing that a dispute between the parties to the Agreements may ultimately find its way to a court at most constitutes the Tribes' consent to a potential court action brought by the State. None of the language in any of the Agreements can be read suggest that the Tribes have waived their sovereign immunity such that they have

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consented to subject themselves to suits brought by an entity such as Plaintiff who is not a party to the Agreements.[4]

2. Plaintiff Cannot Avoid The Bar Of The Tribes' Sovereign Immunity By Seeking To Join Tribal Officials As Defendants In This Action

Plaintiff may also argue, as they did in federal court, that they can overcome the Tribes' sovereign immunity and CR 19 dismissal of this action by substituting tribal officials as defendants in place of the Tribes. Plaintiff's argument is based on *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), and the *Ex parte Young* exception to Eleventh Amendment state sovereign immunity.

In *Burlington Northern* the railroad sued several tribes, the tribes' governing bodies and tribal officials seeking to enjoin the tribes' taxation of the railroad's on-reservation rights of way because such taxation violated federal statutory and constitutional provisions. *Burlington N.R.R* at 900, 902-06. The defendants relied on tribal sovereign immunity as a defense to the action. In rejecting this defense as to the individual tribal officials, the court borrowed from Eleventh Amendment jurisprudence and the Supreme Court's holding in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), that state sovereign immunity does not bar an action against state officials seeking prospective relief for violations of federal law. *Burlington Northern*, 924 F.2d at 901.

Plaintiff's reliance on *Burlington Northern* is misplaced. By its very language, *Burlington Northern* and the *Ex parte Young* exception apply only to suits based on violation of federal law. *Id.* ("tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of *federal* law." (Emphasis added.) *See als,*

[4] The primary case relied upon by Plaintiff in its response to the motion to dismiss in federal court, *C&L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), is inapposite for the simple reason that the issue there was whether the tribe through certain contract language waived its sovereign immunity to suit by *the other party to the contract. C&L* cannot be read to provide any authority that the language in the Agreements constitutes a waiver of the Tribes' immunity to entities not parties to the Agreements.

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Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (*Ex parte Young* exception to sovereign immunity bar does not apply to permit suits based solely on state law claims). There are no federal claims in this case and therefore no basis for the *Ex parte Young* exception. *See also Dawavendewa*, 276 F.3d at 1160 (rejecting the "ploy" of attempting to name individual tribal officials.)

D. The Equitable Considerations Of CR 19(b) Demonstrate The Tribes Are "Indispensable" Parties To This Litigation

Because the Tribes are required parties who cannot be joined, this Court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." CR 19(b). CR 19(b) requires the Court to consider four factors in determining whether the Tribes are indispensable in this case. They include: (1) the prejudice to the absent Tribes; (2) whether the Court could shape any relief granted to reduce any prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent Tribes; and (4) whether the Plaintiff will have an adequate remedy if the action is dismissed. CR 19(b)(1)-(4). As demonstrated in the cases cited above, courts have consistently held that the four factors of Rule 19(b)(1)-(4) are satisfied and the Tribes are indispensable parties in cases such as this where the relief requested by the plaintiff would effectively "decimate" contracts to which tribes are a party.

1. Adjudication Would Be Prejudicial To The Tribes

The first factor considers the extent to which a judgment rendered in the Tribes' absence might prejudice the Tribes or the existing parties. CR 19(b)(1). "'[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectable interest that will be impaired or impeded by the party's absence.'" *Wilbur*, 423 F.3d at 1114 (quoting *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024-25 (2002); *see also Dawavendewa*, 276 F.3d at 1162; *Matheson*, 139 Wn. App. at 635 ("any change to the Agreement would inherently

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prejudice the Tribe."). As discussed above, the Tribes would be prejudiced by any decision in this case that impairs their right to refunds of the state gas tax as provided in the various fuel tax agreements. The first factor thus points to the Tribes' indispensability in this matter.

Plaintiff, relying on *Saratoga Cy. Chamber of Commerce, Inc. v. Pataki,* 798 N.E.2d 1047 (N.Y. 2003), asserted in federal court that prejudice to the Tribes could be lessened if they waived their sovereign immunity and voluntarily agreed to participate in this action. However, numerous other courts have roundly rejected this argument:

> The fact that a sovereign entity could have intervened, but chose not to, cannot be considered as a mitigating factor to weigh against the likelihood of prejudice [to the absent Tribe]. *See Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986) (declined to hold that "the de facto opportunity to file position papers with the court on a cross-claim is sufficient to mitigate the prejudice of non-joinder"); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir.) (holding that if intervention requires waiver of immunity, the ability to intervene does not lessen prejudice). To do so would invade the province of the sovereign and penalize it for making decisions it has the sovereign right to make. The Court cannot inject its or another party's subjective view on the propriety of that decision. Moreover, to argue that a sovereign can intervene to protect its interests "would render Rule 19(b) almost completely nugatory." *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1472 n. 25 (10th Cir. 1987) (noting that a required party that is not joined would always satisfy the requirements for intervention as fo right; to say that the availability of intervention mitigates prejudice would mean that a court could never find a required party to be indispensable).

Northern Arapaho Tribe v. Harnsberger, 660 F. Supp. 2d 1264, at 1281 (D. Wyo. 2009).

2. Prejudice To The Tribes Cannot Be Reduced By Protective Provisions In The Judgment

The second factor considered is "the extent to which any prejudice could be lessened or avoided" by protective provisions in the judgment, shaping the relief, or other measures. CR 19(b)(2). Here, no "shaping" of the judgment could mitigate the prejudice to the Tribes given the relief the Plaintiff has requested. The Plaintiff has requested a ruling that would have the Court find unconstitutional both the statutory authority authorizing the Agreements, as well as the remittance provisions of the Agreements, and to prohibit the State from providing to the Tribes *any* fuel tax revenue. Given the sweeping nature of the relief sought by the Plaintiff,

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Defendant cannot conceive of any manner in which the judgment could be shaped in this matter to avoid or lessen the prejudice to the Tribes.

The *Wilbur* court reached the same conclusion. The court noted that this factor favored the tribe there because the plaintiffs "want nothing less than nullification of the [cigarette tax agreement]. If they succeed, the Tribe will be deprived of the contractual benefits for which it bargained." *Wilbur*, 423 F.3d at 1114. As in *Wilbur,* the prejudice to the interests of the Tribes cannot be mitigated by crafting protective provisions into the relief sought by Plaintiff.

3. A Judgment in the Tribes' Absence Will Not Be Adequate.

The third test, "whether a judgment rendered in the [party's] absence would be adequate," also does not favor the Plaintiff. CR 19(b)(3). If either the statutory bases of the Agreements, or the Agreements and refunds themselves are declared illegal, then the Tribes' interests conveyed by the Agreements would be impaired. *Wilbur,* 423 F.3d at 1114; *accord, Matheson*, 139 Wn. App. at 636 (plaintiff requested relief essentially seeks "dissolution" of State-tribal agreement "and any lesser remedy (as would be required in the absence of the Tribe) will not likely be adequate to address his concerns.").

A similar situation was found in *Wilbur* where the court noted that this third factor "'does not favor the Plaintiffs,' because if the [cigarette tax agreement] is invalidated, the Tribe's 'protectable interests [under the agreement] (would be) impaired.'" *Wilbur,* 423 F.3d at 1114, quoting *American Greyhound*, 305 F.3d at 1025; *see also Dawavendewa*, 276 F.3d at 1162 (no partial relief adequate when "[any] type of injunctive relief necessarily results in . . . prejudice to [the absent Tribe]"); *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1102 (1994) (adequate judgment not possible when Plaintiff's claims could not be addressed without prejudicing absent party).

In addition, a judgment rendered without the Tribes would also be inadequate because it would not be binding on the Tribes. Nothing would prevent the Tribes from filing suit against the state officials to enforce the binding agreements for which the Tribes have for

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several years paid valuable consideration. Relief that cannot foreclose a separate action by the Tribes would not accomplish Plaintiff's goals, would not settle the State's obligations under the agreements, and would not respect the State's and Tribes' sovereign interests in effective settlement of its disputes with the Tribes over state tax authority. The third factor thus favors dismissal.

4. The Absence Of An Alternative Remedy Or Forum Favors Dismissal

Finally, the fourth factor is "whether the Plaintiff would have an adequate remedy if the action were dismissed." CR 19(b)(4). The Court of Appeals in *Matheson* in dismissing the action there on CR 19 grounds noted that, despite the lack of an adequate remedy, "the Ninth Circuit has regularly held that the tribal interest in [sovereign] immunity overcomes the lack of an alternative remedy or forum for plaintiffs." *Matheson,* 139 Wn. App. at 636, citing, *Wilbur*, 423 F.3d at 1115; *see also Clinton v. Babbitt,* 180 F.3d 1081, 1090 (9th Cir.1999); *Kescoli,* 101 F.3d at 1311 (9th Cir. 1996); *Pit River,* 30 F.3d at 1102; *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1460 (9th Cir.1994); *Confederated Tribes of Chehalis Indian Reservation v. Lujan,* 928 F.2d 1496, 1500; *Makah Indian Tribe v. Verity,* 910 F.2d 555, 560 (9th Cir. 1990); *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1326-27 (9th Cir. 1975).

E. The Public Rights Exception To Dismissal For Failure To Join An Indispensable Party Does Not Apply In This Case

Plaintiff may argue here as it did before the federal court that dismissal under CR 19 is not appropriate because Plaintiff's suit has been filed in an effort to vindicate a public right. Any such argument is without merit. The public rights doctrine creates an exception to dismissal under CR 19 where: (1) The suit transcends the private interests of the plaintiff and seeks to vindicate a public right; and (2) The suit would not "'destroy the legal entitlements of the absent parties.'" *Wilbur*, 423 F.3d at 1115 (citation omitted). This doctrine does not apply in this matter because Plaintiff's interest in bringing this action is to remedy what it perceives is an unfair advantage held by competitor tribal fuel retailers. FAC at 3, ¶ 9. Plaintiff's

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parochial business interest is similar to that which the court in *American Greyhound* held was insufficient to invoke the public rights doctrine. *American Greyhound*, 305 F.3d at 1025-26.

American Greyhound involved a challenge to the Indian gaming compacts signed between the Governor of Arizona and various Tribes there and sought an end to all gaming on Indian land. *Id.* at 1020. The plaintiffs in that case were, as here, business competitors of the Tribes. *Id.* (plaintiffs described as horse and dog track owners and operators). In concluding the plaintiffs were not seeking to vindicate a public right, the court held "their interest is in freeing themselves from the competition of Indian gaming, not in establishing for all the principle of separation of powers." *Id.* at 1026. Similarly, in this case, the Plaintiff's primary, perhaps only, motivation is aimed at asserting a private right – that the Agreements provide an unfair competitive advantage in the retail fuel business.

Plaintiff also fails to establish the second requirement of the public rights doctrine because if it is successful, it will destroy the absent Tribes' legal entitlements under the Agreements. This interest alone was sufficient for the court in *Wilbur* to hold the public rights doctrine inapplicable. *Wilbur*, 423 F.3d at 1115 ("Tribe would lose valuable contractual benefits if the [cigarette tax] Compact was held invalid. This threat to the Tribe's contractual interests precludes application of the public rights exception."). The same is true in this case. If Plaintiff's requested relief is granted, the Defendants will be unable to remit the fuel tax money owed to the Tribes pursuant to the Agreements, which is one of the primary, if not the only, consideration for the Tribes' entry into the Agreements. The public rights doctrine does not apply.

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F. Any Request For The Issuance Of A Writ Of Prohibition Should Be Dismissed Pursuant To CR 19

Finally, Plaintiff may argue here, as it did in federal court, that a writ of prohibition may still issue and is somehow exempt from the CR 19 dismissal of Plaintiff's other claims. Plaintiff is wrong. As with Plaintiff's other claims and requested forms of relief, a writ of prohibition is subject to the Rules of Civil Procedure, including CR 19. *Chief Seattle Props., Inc. v. Kitsap Cy.*, 86 Wn.2d 7, 27-28, 541 P.2d 699 (1975).

IV. CONCLUSION

Controlling authority provides that, "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.'" *Wilbur*, 423 F.3d at 1113, quoting *Dawavendewa*, 276 F.3d at 1157. The relief sought by the Plaintiff in this case would eviscerate the central feature of the fuel tax agreements between the State and the Tribes by enjoining the refund of a portion of the state gas tax to the Tribes. Because the sovereign immunity of the Tribes prevents the joinder of a necessary and indispensable party, the Plaintiff's action must be dismissed. *Mudarri*, 147 Wn. App. at 607; *accord, Wilbur*, 423 F.3d at 1114.

DATED this 12th day of November, 2010.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of November, 2010, at Tumwater, WA.

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