

1 Rob Costello
 Deputy Attorney General
 2 Mary Tennyson
 William G. Clark
 3 Assistant Attorneys General
 Attorney General of Washington
 4 PO Box 40110
 Olympia, WA 98504-0110
 5 Telephone: (360) 753-0225
 Fax: (360) 664-0174
 6 E-Mail: RobC@atg.wa.gov
 E-Mail: BillC2@atg.wa.gov
 7 E-Mail: MaryT@atg.wa.gov

8 **UNITED STATES DISTRICT COURT**
 9 **EASTERN DISTRICT OF WASHINGTON**

10 STATE OF WASHINGTON,
 WASHINGTON
 DEPARTMENT OF
 11 LICENSING, CHRISTINE
 GREGOIRE, Governor, and
 12 ALAN HAIGHT, Director of
 Department of Licensing,

13 Plaintiffs,

14 v.

15 THE TRIBAL COURT FOR
 16 THE CONFEDERATED
 TRIBES AND BANDS OF THE
 17 YAKAMA NATION and its
 CHIEF TRIBAL COURT
 18 JUDGE TED STRONG (in his
 official capacity) and the
 19 CONFEDERATED TRIBES
 AND BANDS OF THE
 20 YAKAMA NATION, a
 Federally-Recognized Indian
 21 Tribe,

22 Defendants.

NO. CV-12-3152-LRS

COMPLAINT FOR
 DECLARATORY AND
 INJUNCTIVE RELIEF AND
 FOR DAMAGES

1 The plaintiffs named above hereby allege and state their causes of action
2 against the Tribal Court for the Confederated Tribes and Bands of the Yakama
3 Nation (“Yakama Nation”), the Yakima Nation and Chief Judge of the Tribal
4 Court Ted Strong as follows:

5 **INTRODUCTION**

6 1. This case arises from orders and consent decrees entered by the
7 United States District Court for the Eastern District of Washington in 1994 and
8 2006 that resolved with prejudice litigation instituted by the Yakama Nation
9 concerning the State’s imposition of motor vehicle and special fuel taxes on
10 wholesale purchases of fuel destined for retail sale on the Yakama Reservation.

11 2. The 2006 consent decree modified and amended the 1994 consent
12 decree. The amended 2006 consent decree established three propositions.
13 First, the Yakama Nation released, settled and dismissed with prejudice all
14 claims actually or potentially raised over the application of the state motor
15 vehicle and special fuel taxes to purchases and sales of motor vehicle and
16 special fuel destined for retail sale on the Yakama Reservation. Next, the
17 consent decree established a percentage-based formula regarding the imposition
18 and collection of the state motor vehicle and special fuel taxes when the fuel
19 was purchased off the Yakama Reservation, although the fuel ultimately was
20 destined for sale on the Yakama Reservation. The agreed upon formula was
21 subject to annual record-keeping and audit requirements which, if carried out,
22

1 would conform the amounts of taxes owed to the actual sales of motor vehicle
2 and special fuel on the Yakama Reservation to tribal members and non-tribal
3 members alike. Through the consent decree's record-keeping and auditing
4 mandates, the State and the Yakama Nation intended that only transactions
5 actually proven to involve sales to tribal members and the tribe itself would be
6 exempt from motor vehicle and special fuel taxes. Finally, the consent decree
7 contemplated that actions to enforce its terms would be litigated only before
8 this Court, and, if the stipulated dispute resolution process was invoked but was
9 unsuccessful for 180 days, either the State or the Yakama Nation could
10 terminate the consent decree upon written notice.

11 3. The present case arises out of the State's termination of the consent
12 decree on December 5, 2012 due to the Yakama Nations' breaches of the
13 consent decree and also arises out of the improper exercise of jurisdiction by the
14 Yakama Nation's Tribal Court and its Chief Judge Ted Strong over the
15 plaintiffs in this action and over the performance and termination of this Court's
16 consent decree.

17 PARTIES

18 4. Plaintiff Christine Gregoire is currently the Governor of the state
19 of Washington, who brings this action in her official capacity. Governor
20 Gregoire was a named defendant in *Confederated Tribes and Bands of the*
21 *Yakama Nation v. Haight, et al.*, Yakama Tribal Court for the Confederated
22

1 Tribes and Bands of the Yakama Nation, Cause No. R-13-019 (“Tribal Court
2 Litigation”), which the Yakama Nation filed on December 5, 2012.

3 5. Plaintiff State of Washington and its agency, the Washington
4 Department of Licensing (“DOL”), are named defendants in the Tribal Court
5 Litigation and are parties to the consent decree with the Yakama Nation that is
6 the subject matter of this cause of action and was memorialized in formal orders
7 entered by this Court in 1994, as amended in 2006.

8 6. Plaintiff Alan Haight is the Director of the DOL and is a named
9 defendant in the Tribal Court Litigation.

10 7. Defendant Tribal Court for the Confederated Tribes and Bands of
11 the Yakama Nation is a lower level tribal tribunal for the Yakama Nation.
12 Defendant Yakama Tribal Court has entered orders in the Tribal Court
13 Litigation that plaintiffs ask this Court to dissolve and declare null and void.

14 8. Defendant Ted Strong is the Chief Judge of the Tribal Court.
15 Judge Strong is being sued in his official capacity because he has presided over
16 and, without jurisdiction, issued Orders enjoining plaintiffs and requiring
17 plaintiffs to appear personally at further proceedings in the Tribal Court
18 Litigation.

19 9. Defendant Confederated Tribes and Bands of the Yakama Nation
20 is an Indian Tribe existing under the laws of the United States and constitutes a
21 sovereign nation with an independent government and governing body,
22

1 including a Tribal Court. The Yakama Nation is a beneficiary of rights and
2 privileges reserved to and created for the members of the Yakama Nation by the
3 Treaty of 1855 between the Yakama Nation and the United States of America.

4 JURISDICTION AND VENUE

5 10. This court has subject matter over plaintiffs' claims under 28
6 U.S.C. § 1331 as the claims involve a federal question under a treaty of the
7 United States. Moreover, the question of whether a tribal court has exceeded
8 the lawful limits of its jurisdiction is a federal question under 28 U.S.C. § 1331.
9 *Nat'l Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 852-53 (1985).
10 The court also has subject matter jurisdiction over this case because the
11 plaintiffs' claims involve the legal interpretation and construction of provisions
12 of orders and the consent decree entered by this Court in 1994 and 2006. The
13 Yakama Nation has waived any sovereign immunity as a defense to this Court's
14 jurisdiction under the terms of the consent decree and because the Nation has
15 twice before invoked this Court's jurisdiction over their disputes concerning
16 motor vehicle fuel taxation.

17 11. Venue is appropriate in the Eastern District of Washington
18 pursuant to 28 U.S.C. § 1391(b) because the defendants either reside in this
19 district or because a substantial part of the events or omissions giving rise to the
20 plaintiffs' claims occurred within this judicial district.
21
22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

FACTUAL ALLEGATIONS

12. For many decades, the state of Washington has imposed an excise tax on motor vehicle fuel sold, used, consumed, possessed or distributed within its borders. *See* Wash. Revised Code Chapter 82.36. Washington is a “tax at the rack” state, with fuel taxable when it is removed from the terminal “rack” or when fuel is imported into the state. Most licensed fuel distributors and suppliers submit monthly fuel tax returns to the state through its Department of Licensing (“DOL”). Those documents track removals from the rack and imports which form the basis for the State collecting fuel tax revenues.

13. Motor vehicle fuel tax revenue collection and oversight is conducted through the DOL Pro-Rate and Fuel Tax Services (“PRFT”). The responsibilities of PRFT include the implementation of motor vehicle fuel tax agreements and one consent decree with federally recognized tribes in Washington, including the consent decree with the Yakama Nation.

14. DOL is a party to 24 fuel tax agreements with Indian Tribes resident in Washington State. Of these agreements five are predicated on a per-capita computational formula while 18 of the agreements provide that purchases of motor vehicle fuel destined for sale on the tribal reservation must be purchased with the full amount of the state tax prepaid, and the tribal government applies to DOL for a refund of 75 percent of the state fuel taxes, upon proof that the fuel was delivered to tribally owned and operated retail

1 facilities. The “75/25” allocations are subject to annual record-keeping and
2 auditing processes designed to confirm the actual amounts of fuel delivered
3 with tax prepaid, and to verify that the tribe has expended the amount of the tax
4 refunded to the tribe on highway purposes .

5
6 15. The consent decree with the Yakama Nation is the only motor
7 vehicle and special fuel tax agreement that is embodied in court orders and a
8 consent decree. In contrast, all other agreements between the state of
9 Washington and Indian Tribes concerning motor vehicle fuel taxation are
10 private, consensual agreements.

11 16. The fuel tax agreement between the Yakama Nation and the DOL
12 arose out of, and is contained in, the written consent decree entered by the
13 United States District Court for the Eastern District of Washington in
14 November 1994, effective January 1995, and amended by a settlement
15 agreement, consent decree and order entered in August 2006. Both the 1994
16 and 2006 consent decrees were in full and final resolution of litigation instituted
17 by the Yakama Nation against the state of Washington and DOL over the
18 imposition and collection of motor vehicle fuel taxes. The 1994 consent decree
19 resolved litigation under Cause No. CY-93-3050-AAM and the 1996 amended
20 decree pertained to Cause No. CV-04-3079-CI. Both documents provided that
21 the parties resolved and dismissed completely all issues that were or could have
22 been raised in the underlying litigations. Both documents provided that their

1 subject matter was the establishment of a cooperative framework for the
2 taxation and regulation, by both the Yakama Nation and the state of
3 Washington, of the distribution, sale, transfer, use or possession of motor
4 vehicle fuel and “special fuel” as defined by state law when such fuel was
5 distributed, sold, used or possessed on the Yakama Indian Reservation. Both
6 documents provided that the Yakama Nation’s claims in the underlying
7 litigation were dismissed with prejudice.

8
9 17. The consent decree required the Yakama Nation to maintain and
10 make available to the State and to third-party auditors retained by the State and
11 Nation detailed records of all transactions concerning fuel purchased for sale,
12 and fuel actually sold, on the Yakama Reservation. The consent decree also
13 required the Yakama Nation to impose through tribal laws the record-keeping
14 and auditing procedures called for in the consent decrees upon members of the
15 Yakama Tribe and upon those who operate businesses, including retail gasoline
16 stations, located on the reservation. The Yakama Nation was required to
17 maintain invoices showing the number of gallons of motor vehicle fuel and
18 special fuel purchased by the Yakama Nation for its use or for resale at tribal
19 retail gasoline stations. The Nation’s members were obligated to generate and
20 maintain the same types of records of retail sales.

21 18. To ensure compliance with the consent decree, the Yakama Nation
22 was required to arrange and participate in annual third-party audits by a

1 certified public accountant in good standing in order to verify the number of
2 gallons of motor vehicle and special fuel purchased by the Yakama Nation for
3 resale at tribal filling stations as well as the number of gallons sold at Yakama-
4 owned gas stations, including whether the retail purchasers were tribal members
5 or not. All gasoline sales at the pump had to be recorded and certified under the
6 consent decree and, if not, those sales were deemed subject to state taxation.

7
8 19. Normally, a state licensed distributor selling motor vehicle or
9 special fuel must pay the state motor and/or special fuel taxes when the fuel is
10 purchased at the rack. However, pursuant to the consent decree, a distributor
11 selling fuel to a Yakama Nation licensed fuel retailer does not pay the state fuel
12 tax in the price per gallon for 75 percent of the fuel it buys. Thus, sales of
13 motor vehicle fuel from the rack that are destined for resale on the Yakama
14 Indian Reservation are subject to only 25 percent of the taxes paid by other
15 purchasers. Yakama Nation member gas stations are not required to pass this
16 tax savings to their customers, and on information and belief, they do not do so.

17 20. The Yakama Nation has nine retail fuel stations licensed by the
18 tribe. These retail fuel stations purchase motor vehicle and special fuel from
19 state licensed distributors.

20 21. Since 2007, pursuant to the consent decree, all motor vehicle and
21 special fuel purchases by the Yakama Nation have not included the state fuel
22 tax in the price per gallon for 75 percent of the fuel sold. Under this

1 arrangement, the distributor seeks a refund from the state for the fuel tax on the
2 75 percent of the fuel sold to Yakama Nation licensed retailers.

3 22. The refund process for a licensed distributor of motor and special
4 fuel sold to the Yakama Nation requires submission of invoices for sales of
5 fuel. These invoices must include delivery dates, number of gallons of motor
6 and special fuel sold to individual tribally-licensed fuel stations on the
7 reservation and the price of fuel sold. These distributor invoice records are the
8 source for DOL's annual calculation of total gallons of motor vehicle and
9 special fuel sold to the Yakama Nation on a monthly and annual basis.

10 23. Under the consent decree the amounts of fuel sold without state
11 fuel tax included in the per gallon price are required to be audited on an annual
12 basis. This annual audit is to verify that the amounts of fuel sold to the Yakama
13 Nation without state fuel tax included are the same amounts of fuel purchased
14 by tribal members at Yakama licensed fuel retail stations. Similarly, the
15 consent decree requires the Yakama Nation to commission annual audits of its
16 licensed retail fuel stations' records to substantiate that, in fact, at least
17 75 percent of the motor vehicle or special fuel sold by Yakama Nation licensed
18 retailers was purchased by tribal members and that no more than 25 percent of
19 that fuel was purchased by non-tribal members. To the extent that the annual
20 audit revealed that motor vehicle and special fuel purchases on the Yakama
21 Reservation deviated from this 75-25 allocation, the consent decree required
22

1 that the stipulated percentage allocations be conformed to actual recorded sales
2 and that state taxes be paid or refunded accordingly.

3 24. In addition to the record keeping, annual audit and other
4 requirements imposed upon the Yakama Nation, the consent decree required the
5 Yakama Nation to impose those obligations in turn upon its members, including
6 those who own or operate retail gas stations on the Yakama Reservation.

7 25. Under the consent decree, either party was entitled to institute a
8 dispute resolution process including the retention of a mutually designated
9 third-party neutral. Once engaged, the neutral controls the conduct of the
10 mediation process. Under the consent decree the ability of a party to initiate
11 judicial proceedings to enforce the terms of the consent decree required that one
12 of the following three events occur: a) successful conclusion of the mediation;
13 b) declaration by the mediator that the parties were at an impasse; or c) the
14 provision of 180 days' written notice of a party's intent to terminate the consent
15 decree. The right to terminate was not dependent upon whether the other party
16 was in breach of the decree.

17 26. The consent decree specifically authorizes the State and DOL to
18 sue the Yakama Nation in this Court to enforce rights under the consent decree.
19 The Yakama Nation has thus consented to this Court's jurisdiction.

20 27. The Yakama Nation, however, has breached the consent decree in
21 a number of respects. For example, the Yakama Nation has failed to engage in
22

1 or complete the required annual audits of motor vehicle and special fuel sales
2 by retail outlets on the reservation. Indeed, the Yakama Nation has frustrated
3 the conduct and completion of these audits, none of which has occurred since
4 2007. Moreover, the Yakama Nation has failed to impose or enforce, by tribal
5 law or otherwise, the record-keeping provisions of the consent decree upon
6 motor vehicle and special fuel sellers on the Yakama Reservation. The Yakama
7 Nation also has frustrated and made more time consuming and expensive the
8 dispute resolution provisions of the consent decrees. Finally, the Yakama
9 Nation has breached the consent decrees by improperly instituting litigation
10 proceedings against the State, the DOL and its officials before the Yakama
11 Tribal Court, inducing that court to issue improper injunctive relief and other
12 orders against the State and its officials.

13 28. The State and DOL have observed all terms and conditions of the
14 consent decree and have endeavored to procure the compliance of the Yakama
15 Nation and its members with the decree. When mediation efforts proved
16 unsuccessful after being conducted for several months, the DOL invoked the
17 termination procedures of the consent decree and properly terminated by
18 written notice of December 5, 2012.

19 29. After notification of the DOL's intent to terminate, but before the
20 written notice could issue, the Yakama Nation improperly filed a lawsuit with
21 the Yakama Tribal Court. On minimal notice to counsel for the State, the DOL,
22

1 Governor Gregoire and Director Haight, the Yakama Nation obtained a
2 temporary restraining order from the Yakama Tribal Court which, in part,
3 enjoined the State, DOL and State officials from taking any further steps to
4 implement the termination of the consent decrees. The Tribal Court further
5 ordered the State, DOL, Governor Gregoire, Director Haight and legal counsel
6 to appear personally for a preliminary injunction hearing to occur in the Tribal
7 Court on the Yakama Reservation on January 17, 2013 at 9 a.m.

8
9 30. The Yakama Tribal Court did not have and currently has no
10 jurisdiction over the parties to and subject matter of, the proceedings instituted
11 by the Yakama Nation. The Yakama Tribal Court similarly lacked jurisdiction
12 and authority to enter orders enjoining the State, DOL and state officials and/or
13 requiring the State's counsel and officials to appear personally in Tribal Court.
14 In addition to being inappropriate on its merits, the actions of the Yakama
15 Nation and its Tribal Court will cause immediate and irreparable harm to the
16 rights of the defendants in the Tribal Court Litigation (plaintiffs herein).

17 31. The Yakama Nation's breaches of the consent decree's
18 requirements for record-keeping, auditing, for Yakama Member and business
19 compliance with the consent decree and the Nation's other breaches have
20 damaged the State and DOL in an amount to be proven at trial, but which is
21 expected to exceed several million dollars.
22

1 the lawful termination of the consent decree, to confirm the DOL's ability to
2 assess and collect the full amount of motor vehicle fuel and special fuel taxes
3 for purchases of that fuel which occur off the Yakama Reservation, and to
4 prevent the Yakama Nation from instituting further proceedings in Tribal Court
5 against the State, the DOL and state officials over motor vehicle and special
6 fuel tax matters. To the extent necessary to enforce plaintiffs' rights, claims for
7 prospective equitable relief are available as set forth in *Salt River Project*
8 *Agric. Improvement & Power District v. Lee*, 672 F.3d 1176 (9th Cir. 2012).

9
10 **PRAYER FOR RELIEF**

11 WHEREFORE, having fully pleaded the complaint in this case, the
12 plaintiffs request an award of the following relief:

13 1. Declaratory and injunctive relief against the Yakama Tribal Court
14 and/or Chief Judge Ted Strong to dissolve all existing orders against any and all
15 the plaintiffs arising out of Yakama Tribal Court No. R-13-019 and the
16 dismissal of those proceedings against these defendants;

17 2. Declaratory and/or injunctive relief against the Yakama Nation, to
18 confirm the termination of the consent decree, to confirm the DOL's right to
19 assess taxes on fuel purchases by the Yakama Nation off-reservation and to
20 prevent the Yakama Nation from instituting further proceedings against any of
21 the plaintiffs herein arising out of the consent decree;

22 3. Damages in an amount to be proven at trial;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

4. Such other and further legal and equitable relief that the court deems just and proper.

DATED this 17th day of December, 2012.

ROBERT M. MCKENNA
Attorney General

s/ William G. Clark
ROB COSTELLO, WSBA #12920
Deputy Attorney General
MARY TENNYSON, WSBA #11197
WILLIAM G. CLARK, WSBA #9234
Assistant Attorneys General
Attorneys for Plaintiffs