

IN THE TRIBAL COURT  
FOR THE CONFEDERATED TRIBES AND BANDS OF  
THE YAKAMA NATION

CONFEDERATED TRIBES AND BANDS OF  
THE YAKAMA NATION, a federally-recognized  
Indian tribe,

Plaintiff,

v.

ALAN HAIGHT, Director of the Washington State  
Department of Licensing; WASHINGTON STATE  
DEPARTMENT OF LICENSING; CHRISTINE  
GREGOIRE, Governor of the State of Washington;  
STATE OF WASHINGTON;

Defendants.

NO. \_\_\_\_\_

COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF

**I. INTRODUCTION**

1. This is an action by Plaintiff the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") for declaratory and injunctive relief against Defendants, agents of the State of Washington, for acting outside of the scope of their official capacity and authority and in violation of the law, specifically for breaching a Consent Decree between the Parties.

2. Defendants take the position that they may unilaterally "terminate" a contract without first mediating in good faith to resolve their differences with the Yakama Nation on a government-to-government basis, as required by the express terms of that contract. Defendants

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1 have violated and continue to violate a binding agreement between the parties, which Defendants  
 2 drafted. *See Teo v. Steffenson*, No. 04-3079 (E.D. Wash. Aug. 21, 2006), ECF No. 66  
 3 [hereinafter 2006 Consent Decree].

4 3. Since March of 2012, Defendants and the Yakama Nation have “engage[d] the  
 5 services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate  
 6 resolution to the parties’ dispute” concerning Yakama Treaty violations and state fuel tax issues.  
 7 *Teo v. Steffenson*, No. 93-3050, at 8-9 (E.D. Wash. Nov. 2, 1994) [hereinafter 1994 Consent  
 8 Decree]. Although the Yakama Nation pursued the mediation process in good faith, and despite  
 9 the fact that Defendants know they must also do so “until the mediator determines that the parties  
 10 are not able to resolve the dispute,” Defendants formally refused to further participate in the  
 11 mediation process on December 5, 2012. *Id.* at 9. As the Mediator did not declare the parties  
 12 unable to resolve their dispute; Defendants deliberately breached their agreement with the  
 13 Yakama Nation.

14 4. Plaintiff is signatory to the Treaty With The Yakamas, 12 Stat. 951 (1855)  
 15 (“Treaty”), which the United States Constitution renders “the supreme Law of the Land.” Art.  
 16 VI, cl. 2. Through their fuel taxes, and solely for the purpose of raising revenue, Defendants  
 17 have in the past violated, and are now again violating, the Yakama Nation’s Treaty Right to  
 18 Travel. *Id.* at Art III. The Treaty Right to Travel right guarantees Yakamas the travel over  
 19 public highways “for many reasons, including trade, subsistence, and maintenance of religious  
 20 and cultural practices,” yet “without payment of fees for that use.” *U.S. v. Smiskin*, 487 F.3d  
 21 1260, 1265 (9th Cir. 2007) (quoting *Cree v. Flores (Cree II)*, 157 F.3d 762, 769 (9th Cir. 1998));  
 22 *Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1239 (E.D. Wash. 1997).

23 5. Yakama Treaty Travel is “an intrinsic ingredient in virtually every aspect of  
 24 Yakama culture. Travel was [and remains] such an essential component of the Yakamas’ way of

7. Indeed, the Yakama Nation has already successfully litigated a significant component of the Treaty Right to Travel issue against the state. On August 23, 1993, the U.S. District Court for the Eastern District of Washington ordered that Defendants be enjoined from requiring that state-licensed fuel distributors pre-pay state fuel taxes on fuel sales to Yakama member fuel retailers. *Teo v. Steffenson*, No. 93-3050, at 13 (E.D. Wash. Aug. 23, 1993).<sup>1</sup>

## II. JURISDICTION

23 <sup>1</sup> That August 23, 1993, Order continues to govern that particular issue in this subsequent stage of the same dispute.  
24 Plaintiff notes, however, that the issue of the state's unlawful restriction on enrolled Yakama members' Treaty Right to Travel for, *inter alia*, trade, subsistence, and maintenance of religious and cultural practices, by way of state fuel taxes or surcharges, has not yet been litigated before this Court, the U.S. District Court, or any other court.

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1 2.01.03(4); *see also e.g. Ramsey v. Gregoire*, No. R-08-33, at 2 (Yakama Nation Tribal Ct. Jan.  
 2 29, 2008); *Yakama v. Gregoire*, No. 08-3056 (E.D. Wash. 2010) (tribal jurisdiction over state in  
 3 *Ramsey* unchallenged). The civil obligations incurred were to be performed thereon; sustained  
 4 interaction between the Yakama Nation and Defendants occurred thereon; the subject matter of  
 5 the civil obligations incurred is located thereon; and the economic, spiritual, social, cultural, and  
 6 political impacts of the violations of those civil obligations occurred thereon.

7 10. The principles of comity and reciprocity do not afford Defendants the defense of  
 8 state sovereign immunity. This defense has been waived, *inter alia*, by WASH. REV. CODE §§  
 9 34.05 *et seq.*; the ability to sue Defendants officers to prospectively enjoin the ongoing violation  
 10 of federal law; and the state common law rule that “[w]hen the State enters into an authorized  
 11 contract with a private party, the State impliedly waives its sovereign immunity and consents to  
 12 the same responsibilities and liabilities as the private party.” *Pierce County v. State*, 185 P.3d  
 13 594, 631 (Wash. Ct. App. 2008).

14 11. The Yakama Nation is suing Defendants to enjoin and restrain Defendants from  
 15 breaching, and continuing to breach, the Consent Decree.

### 16 III. PLAINTIFF

17 12. Plaintiff does not waive, alter, or otherwise diminish any rights, privileges,  
 18 remedies or services guaranteed by the Treaty. Nor does Plaintiff waive the Yakama Nation’s  
 19 sovereign immunity from suit for money damages or consent to the jurisdiction of this Court for  
 20 purposes of any claim.

21 13. The Yakama Nation is an Indian tribal government recognized under the laws of  
 22 the United States. By virtue of its status as a sovereign nation with an independent government  
 23 and governing body, the Yakama Nation is a beneficiary of the rights and privileges reserved to  
 24

1 and created for members of the Yakama Nation by the 1855 Treaty between the Yakama Nation  
2 and the United States.

3 14. The Yakama People have resided in the Columbia River Basin since time  
4 immemorial. Under Article I of the Treaty, the Yakama Nation ceded over 10 millions of acres  
5 of its aboriginal lands to the United States, comprising approximately one quarter of the State of  
6 Washington. In return, the Yakama Nation reserved the right, "in common with citizens of the  
7 United States, to travel upon all public highways." Treaty, art. III. The Ninth Circuit Court of  
8 Appeals has held that this clause "must be interpreted to guarantee the Yakamas the right to  
9 transport goods to market over public highways without payment of fees for that use." *Cree II*,  
10 157 F.3d at 769. Yakamas frequently travel throughout the State of Washington, on and off of  
11 the Yakamas' reserved lands, as part of their cultural ways and business dealings and otherwise  
12 in exercise of the Yakamas' reserved Treaty rights. Yakamas have done so since time  
13 immemorial.

14 15. The Yakama Reservation is located in a rural, isolated, and economically  
15 distressed area of South Central Washington State, 200 miles from the urban centers of Seattle  
16 and Spokane. While the Yakama Reservation is home to a variety of businesses and commerce,  
17 ranging from farming to tobacco manufacturing, to casino and cultural centers, at roughly 39.4  
18 percent, the Reservation has been deemed to have one of the highest below-poverty level rates in  
19 the state. U.S. Environmental Protection Agency, Environmental Justice Indicators:  
20 Confederated Tribes and Bands of the Yakama Nation,  
21 [http://www.epa.gov/region10/pdf/ej/yakama\\_bpov\\_map.pdf](http://www.epa.gov/region10/pdf/ej/yakama_bpov_map.pdf) (last visited Nov. 30, 2012). At the  
22 same time, the Yakama Nation has the largest number of enrolled tribal population in the state.  
23 Roughly 50% of those enrolled members are unemployed. Multiple studies have found that this  
24 is high unemployment rate is caused by the high costs of travel. WASHINGTON STATE

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1 DEPARTMENT OF TRANSPORTATION, YAKIMA VALLEY REGION COORDINATED PUBLIC TRANSIT-  
 2 HUMAN SERVICES TRANSPORTATION PLAN 9 (2010) [hereinafter “WSDOT TRANSPORTATION  
 3 PLAN”]. According to the State of Washington, although roughly 70% of Yakamas have reliable  
 4 transportation, their inability to utilize that transportation has caused “difficulty [in] obtaining  
 5 employment.” YAKAMA NATION TRIBAL TRANSIT SERVICE OPERATION PLAN 8, 10 (2007). “The  
 6 Wapato DSHS office, located on the Yakama Nation, conducted a survey in October 2005 with  
 7 TANF clients and over 70% of the respondents indicated that transportation was a barrier to  
 8 seeking, obtaining, and retaining employment.” *Id.* at 8. Also due to this lack of mobility,  
 9 “[l]ow-income individuals have difficulty accessing education and social services that will assist  
 10 individuals to become self-sufficient citizens.” *Id.* An increase in the Reservation’s homeless  
 11 population has also been correlated to a lack of “transportation to social service appointments  
 12 and medical services.” WSDOT TRANSPORTATION PLAN, at 4.

13 16. In order to travel today, Yakamas must purchase fuel with Washington’s taxes  
 14 included in the purchase price. Yakamas are affected by purchasing fuel with Washington’s  
 15 taxes included, as well as the prospective requirement that they do so as a condition on travel.

16 17. Defendants’ fuel tax revenues fund state highway and county arterial construction  
 17 and maintenance. In 1855 the Yakama Nation bargained for Yakamas’ right to travel on state  
 18 highways and county arterials without paying for their construction and maintenance – thereby  
 19 freeing up monies associated with travel-related expenses for other Yakama uses, such as job  
 20 creation, lowering transportation cost, and other governmental services that the Yakama Nation  
 21 deems essential to its specific demographic, which the Nation provides vis-à-vis its own fuel tax.

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1 **IV. DEFENDANTS**

2 18. Defendant Alan Haight is Director of the Washington State Department of  
3 Licensing, a department or division of the State of Washington, organized and existing under the  
4 constitution and the laws of the State of Washington, and is sued in his official capacity.

5 19. Defendant Christine Gregoire is Governor of the State of Washington and is sued  
6 in her official capacity.

7 20. Plaintiff is informed and believes, and thereon alleges, that each defendant was  
8 and is the agent and/or representative of one or more of the other defendants, and that in doing  
9 the things alleged herein, has acted and continues to act with the knowledge and consent of the  
10 remaining defendants. Each of the named defendants have statutory, regulatory, and/or  
11 enforcement authority related to fuel taxation and the facts giving rise to this cause of action.

12 **V. ALLEGATIONS COMMON TO ALL CLAIMS**

13 21. The Yakama Nation is a federally-recognized Indian tribal government, whose  
14 Reservation was established by the Treaty With The Yakama, 12 Stat. 951 (1859). The Yakama  
15 Nation currently occupies, regulates, and self-governs over 1.2 million acres of lands within the  
16 Yakama Indian Reservation. In exchange for the rights guaranteed by the Treaty of 1855, the  
17 Yakama Nation ceded over 10 million acres of land to the United States. *U.S. v. Smiskin*, 487  
18 F.3d at 1265-66. The United States also promised the Yakamas that they could rely on “all [the  
19 Treaty’s] provisions being carried out strictly.” *Id.* “The Yakama Nation thus understandably  
20 assigned a special significance to each part of the Treaty at the time of signing and continues to  
21 view the Treaty as a sacred document today.” *Id.* at 1266.

22 **A. 1994 Consent Decree**

23 22. In May of 1993 the Yakama Nation filed a lawsuit against the State of  
24 Washington in the U.S. District Court for the Eastern District of Washington, seeking a

1 declaration that state “may not lawfully require the collection or payment of all state petroleum  
2 taxes by [the Nation] nor require distributors with whom [the Nation] do[es] business to prepay  
3 state taxes on entire deliveries in advance.”

4 23. After the District Court entered an Order Setting Settlement Conference on  
5 September 8, 1993, the Nation and State “conferred and engaged in mediated negotiations”  
6 leading to a settlement agreement that would become a Consent Decree.

7 24. On November 2, 1994, after over a year of mediation negotiations, U.S. District  
8 Court Judge Alan A. MacDonald entered a Consent Decree, which became effective on January  
9 1, 1995.

10 25. In it, both the Nation and State declared their “desire[] to work within the  
11 framework of a government-to-government relationship.” As explained in more detail below,  
12 through the Consent Decree, the parties consented to a process for resolving any disputes  
13 initially and primarily through mediation – a process they agreed must continue until *the*  
14 *mediator* might declare impasse, in which case the parties could invoke the continuing  
15 jurisdiction of the U.S. District Court for traditional dispute resolution. 1994 Consent Decree, at  
16 ¶ 4.7.

17 **B. 2006 Consent Decree**

18 26. In July of 2004, the Nation filed a Petition with the U.S. District Court to enforce  
19 the terms of the 1994 Consent Decree, explaining that the parties had attempted to mediate issues  
20 that had arisen under the original Decree but had “reached an impasse” after having engaged in  
21 mediation. The State answered, admitting those specific averments. The State maintained that  
22 the Nation prematurely terminated mediation “before its completion.”



27. Thereafter, the parties again “engaged in negotiations,” pursuant to Local Rule 16.2, which after a year and a half of mediation, resulted in a new Consent Decree entered by District Court Magistrate Judge Cynthia Imbrogno on August 21, 2006.

28. The resulting Consent Decree terminated any continuing jurisdiction of the U.S. District Court, but retained the 1994 Consent Decree’s mediation mandate – to wit, that the parties pursue mediation “in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute” (emphasis added).

29. Here, the State has prematurely halted mediation and the Yakama Nation has not otherwise waived the condition of a Mediator-declared impasse, which must be met – yet has not been met – for the State to legally refuse mediation.

**C. Dispute Resolution & Mediation**

30. By 2011, the State contended that “[n]either the State nor the Yakama Nation is in compliance with [the] Consent Decree,” confessing that its “requirements for audit and record keeping are difficult to administer for both parties.”

31. On March 16, 2011, DOL Director Elizabeth Luce unilaterally invoked “the dispute resolution process per section 4.7 of the Consent Decree.”

32. The State outlined five substantive “issues in dispute,” for resolution.

33. The parties commenced dispute resolution from the Yakama Nation Main Agency on June 13, 2011, with the State framing the “issues to resolve,” including the negotiation of a “future fuel tax agreement,” i.e. to modify the current Consent Decree, as well as several retrospective issues dating to 2007.

34. After a June 27, 2011 teleconference and September 14, 2011 meeting between the parties, the State unilaterally declared: “DOL feels there is not enough agreement to warrant an extension [of the Consent Decree] and will proceed with terminating the Consent Decree. . . .

1 Therefore, the Department of Licensing hereby notifies the Yakama Nation that it is exercising  
2 the termination clause in the agreement.”

3 35. The State expressed its “willing[ness] to continue negotiations with the Yakama  
4 Nation during the 180 day termination period,” meaning through March 2012.

5 36. On February 28, 2012, the Yakama Nation requested mediation of the  
6 retrospective and prospective issues previously framed by the State for dispute resolution.

7 37. After initially declining mediation, the State “reconsidered” and agreed to  
8 “mediate the issues of the consent decree under dispute as articulated in the letter sent by  
9 Director Luce to the Yakama Nation on March 16, 2011.”

10 38. Yakama and State officials entered into a Mediation Agreement, with John  
11 Bickerman, a mediator from Washington, DC, and engaged in an initial mediation session on  
12 March 23, 2012. Thereafter, the parties’ staff counsel did engage in a number of conference  
13 calls with the Mediator from May through October 2012. Most notably, on July 9 and  
14 September 28, the Mediator convened two calls with the parties’ counsel, which the Office of  
15 Legal Counsel participated in from the Yakama Nation Main Agency.

16 39. Despite two prior Yakama-State mediations under the Consent Decree, which  
17 each lasted over a year, the March 23, 2012, mediation session would prove to be the only in-  
18 person negotiation between Yakama and State officials that the Mediator would be allowed to  
19 conduct, before the State terminated mediation just seven months later, on December 5, 2012.

20 40. On December 5, 2012, attorneys for the State of Washington and the Department  
21 of Licensing participated in a conference call with attorneys for the Nation. At approximately  
22 1:30 p.m., Senior Assistant Attorney General Mary Tennyson informed the Nation’s attorneys  
23 that the state was “terminating mediation and the consent decree,” and would inform the Nation  
24 of the same via letter, to be emailed that afternoon.

42. The Nation's express stated position in the face of this unilateral attempt at so-called "termination" was that the parties remain able to resolve this matter through good faith government-to-government negotiation. Specifically, the Nation expressed its position that "continued mediation and trying to work through the differences" to "get a deal done" was still entirely "on the table."

### **First Cause of Action – Breach of Consent Decree**

15           45.     The 2006 Consent Decree requires the parties to attempt to resolve disputes in  
16     good faith on a government-to-government basis.

48. Defendants entered into the Consent Decree pursuant to the authority granted by Wash. Rev. Code § 82.36.450, and have thereby consented to the same responsibilities and liabilities as the private party regarding enforcement of that contract.

1           49. As a consequence of this breach of contract, Plaintiff has suffered and will  
2 continue to suffer substantial and irreparable harm and damages if Defendants are not enjoined  
3 from failing to mediate with Plaintiff, in good faith, and on a government-to-government basis.

4           50. The foregoing and following allegations entitle Plaintiff to a declaratory judgment  
5 and an injunction.

6                   **Second Cause of Action – State Consultation Breach**

7           51. Plaintiff hereby incorporates all prior allegations by reference.

8           52. On December 5, 2012, Defendants contacted all fuel distributors who service the  
9 Yakama Reservation, by letter and by telephone, and caused fuel to be delivered to the Yakama  
10 Reservation with 100% of taxes prepaid.

11           53. Defendants have purported to follow a “Consultation Process” under which, *inter*  
12 *alia*, “Tribal Fuel Tax Agreements are negotiated individually with each Tribe,” and in  
13 particular, “the Department of Licensing involves the Yakama Nation in any rules or policy  
14 development, which would affect the administering of the court order.” WASHINGTON STATE  
15 DEPARTMENT OF LICENSING, STATE CENTENNIAL ACCORD PLAN (2010).

16           54. “Consultation” with a tribal government must be done “in advance with the  
17 decision maker or with intermediaries with clear authority to present tribal views” to the agency  
18 decision maker. *See* RYC § 7.01.01; *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401  
19 (D.S.D. 1995) (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987)) (emphasis  
20 added). When an agency “has established a policy requiring prior consultation with a tribe, and  
21 therefore created a justified expectation that the tribe will receive a meaningful opportunity to  
22 express its views before policy is made, that opportunity must be given.” RYC § 7.01.01;  
23 *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 744, 783 (D.S.D. 2006); *see also*  
24

1 *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050,  
2 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010); Treaty With The Yakamas, Art. II, 12 Stat. 951.

3 55. By failing to consult with the Yakama Nation before deciding give notice to all  
4 fuel distributors who service the Yakama Reservation, by letter and by telephone, thereby  
5 causing fuel to be delivered to the Yakama Reservation with 100% of the state's taxes prepaid,  
6 and by its other behavior related to the Yakama Nation in the course of this dispute, Defendants  
7 failed to perform a duty that they were required to perform, acted outside the scope of their  
8 authority, and acted in an arbitrary and capricious manner, in violation of its APA. *See generally*  
9 *Kennewick Public Hosp. Dist. v. Pollution Control Hearings Bd.*, Nos. 22741-3-III, 22742-1-III,  
10 22758-8-III, 2005 WL 697224 (Wash. Ct. App. Mar. 17, 2005).

11 56. Under WASH. REV. CODE § 34.05.570, persons are entitled to injunctive and  
12 declaratory relief where their rights are violated by an agency's failure to perform a duty that is  
13 required to be performed, where an agency acts outside the scope of the authority of the agency,  
14 or where an agency acts in an arbitrary and capricious manner. Plaintiff request that such relief  
15 be issued.

## 16 VII. PRAYER FOR RELIEF & JURY DEMAND

17 Plaintiff respectfully requests that this Court issue or order:

18 A. Preliminary and permanent injunctive relief requiring that Defendants mediate  
19 with Plaintiff, in good faith and on a government-to-government basis, under the terms of the  
20 1994 and 2006 Consent Decrees; and otherwise properly carry out their duty to consult with  
21 Plaintiff in regard to issues pertaining to pre-taxed fuel delivery or supply to the Yakama  
22 Reservation.


23 B. Further injunctive or equitable relief necessary to provide complete relief to  
24 Plaintiff.

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1 Plaintiff also demands a jury for any issues triable of right by a jury.

2 DATED this 5th day of December, 2012.

3 

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