No. 89734-4

SUPREME COURT
OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION,

Appellant,

v.

The STATE OF WASHINGTON; JAY INSLEE, in his official capacity as Governor of the State of Washington; PAT KOHLER, in her official capacity as Director of the Washington State Department of Licensing,

Respondents.

BRIEF OF APPELLANT AUTO

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A. INTRODUCTION

This is the second time that issues associated with tribal fuel compacts have been before this Court. In *Automotive United Trades Organization v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012) ("*AUTO I*"), this Court addressed the issue of whether Native American tribes were indispensable parties under CR 19 to litigation challenging the authority of the State to enter into such compacts. This Court reversed the trial court's decision to dismiss the case.

Appearing before the same trial judge who dismissed its complaint in *AUTO I*, Automotive United Trades Organization ("AUTO") moved for summary judgment and the State cross-moved for summary judgment on the State's authority to enter into the compacts. The trial court yet again dismissed AUTO's complaint. The net effect of the trial court's decision is to uphold the illegal acts of State officers in negotiating the fuel compacts, violating the Washington Constitution. In particular, the State lacked authority to enter into compacts that violated article II, § 40 of the Washington Constitution ("the 18th Amendment") on the use of Washington fuel taxes. Similarly, the State lacked authority to enter into compacts that constitute an unconstitutional delegation of legislative authority to an executive agency where the Legislature offered virtually no

guidance on precisely what such compacts were intended to accomplish and under what terms.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting the State's motion for summary judgment and in denying AUTO's motion for summary judgment.

(2) Issues Pertaining to Assignments of Error

1. Are the disbursements to the tribes from the Motor Vehicle Fund ("MVF") pursuant to the compacts beyond the power of the State to grant under the 18th Amendment because such disbursements do not qualify as refunds of fuel taxes paid nor are they authorized by law? (Assignment of Error No. 1)

2. Are the MVF disbursements to the tribes pursuant to the compacts beyond the power of the State to grant because the underlying grant of authority to the State's Department of Licensing ("the State") was an unconstitutional delegation of legislative authority? (Assignment of Error No. 1)

C. STATEMENT OF THE CASE[1]

(1) Background to Fuel Taxes

[1] As prepared by the Grays Harbor County Superior Court Clerk's Office, the Clerk's Papers here are exceedingly difficult to follow. As might be expected, declarations were submitted below in connection with AUTO's dispositive motion. In some instances, the materials annexed to the declarations were filed under seal. It appears that the Clerk indexed the declaration of Sarah Johnson, a key declaration for AUTO, at CP 346-54, but did not index the 35 exhibits to that declaration until CP 656-909. However, the Clerk omitted various sealed exhibits. The Clerk apparently then re-indexed the exhibits (without exhibit numbers) at CP 1058-1372, and the Clerk indexed the various unredacted exhibits to the Johnson declaration at CP 1373-1532. AUTO's unredacted summary judgment motion is at CP 1533-72.

To understand the issues in this case, it is important to appreciate how fuel is distributed in our State, the history of Washington's fuel tax laws, and how those laws have affected Native American tribes.

The fuel market in Washington involves a four-tiered distribution chain. *Squaxin Island Tribe v. Stephens,* 400 F.Supp.2d 1250, 1252 (W.D. Wash. 2005); *see, e.g.,* RCW 82.36.010(12), (13), (17). Suppliers, also called licensees, are the refineries, producers, or importers that produce, blend or import fuel in Washington. *Squaxin,* 400 F. Supp.2d at 1252. Distributors transport fuel between suppliers and retailers. *Id.* Retailers sell fuel to consumers. *Id.* Consumers purchase fuel from the retailers for use in their vehicles. *Id.* Tribes and their members are retailers or consumers in this market. CP 1443.[2]

Suppliers refine fuel or bring fuel into Washington State by pipeline, cargo vessel, and ground transportation. *Squaxin*, 400 F. Supp.2d at 1252. Some producers blend various fuel components for distribution in the market. RCW 82.36.010(12). Those producers are treated as suppliers. RCW 82.36.010(12). Distributors transport the fuel between suppliers, usually by purchasing fuel from suppliers at a

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[2] The State asserts that some tribes suggested they might become fuel suppliers; AUTO addresses that speculative contention *infra.*

"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. *Id.*

Although a state cannot impose a tax on tribal activities occurring within a reservation,[3] activities outside reservation boundaries are subject to a state's general tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (upholding state gross receipts tax imposed on tribe's ski resort operated off-reservation). A fuel tax collected from suppliers or distributors operating off-reservation that is not required to be passed down the distribution chain is a lawful state tax, and a tribe and its members are not immune from paying it. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) (upholding state fuel tax because legal incidence fell on distributors operating off-reservation). In cases assessing whether a tribe is immune from state taxation, the United States Supreme Court has clarified that the "legal incidence" of a tax – where and upon whom the tax is being imposed – is the determining factor. *Id.* at 101, *citing Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-60, 462-64, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

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[3] *See, e.g., McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165-66, 171-73, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973) (invalidating state income tax imposed on tribal member's income earned on reservation).

The concept of tax incidence is critical to understanding the present case because the legal incidence of a tax determines whether there is a valid claim for preemption or immunity. If a tax is imposed on a distributor and is *voluntarily* passed through the chain of distribution as part of the cost of doing business, the incidence of the tax falls on the distributor, and not on any of those subsequent purchasers such as retailers or consumers. *Wagnon*, 546 U.S. at 103. Thus, those subsequent retailers and consumers are not entitled to exemption from those taxes simply because they are doing their business on tribal land, because the tax is not imposed for activities taking place on tribal land. *Id.*[4]

As the case law on tribal immunity and fuel taxation has evolved, the Washington Legislature has shifted where the incidence of Washington's fuel tax falls. In 1994, the fuel tax was collected from distributors, who were *required* to pass the tax down the distribution chain, rather than having the option to do so. Laws of 1983, 1st Ex. Sess., ch. 49, § 26; *see also,* Laws of 1998, ch. 176, § 7.[5] The Colville and

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[4] A helpful analogy is this: an automobile manufacturer likely pays the Washington B&O tax. That manufacturer, of course, passes forward part of the cost of that tax in the price of its car sold to the retailer. That retailer may own a dealership on tribal land. However, the retailer cannot claim to be exempt from paying that part of the wholesale price of the car that represents the B&O tax paid by the manufacturer because the incidence of that tax did not fall upon the retailer on tribal land.

[5] Any revenues derived from this tax or later versions of it are placed in the MVF created by RCW 46.48.070, as mandated by the 18th Amendment. Under the 18th Amendment, that revenue can be used only for highway purposes.

Yakama tribes sued the State, arguing that the fuel tax was being imposed unlawfully on sales to tribal members on reservation land because the law required the tax to be passed forward and thus the real incidence of the tax fell on tribal retailers on the reservation. These lawsuits resulted in consent decrees between the State and the two tribes under which the tribes agreed to track "fuel sales to members versus nontribal members." CP 735, 1377. In the consent decrees, the State agreed to repay the tribes the amount of fuel taxes paid on fuel purchased by tribal members from on-reservation retailers. CP 1381-82.[6] The tribes would tell the State the number of gallons of fuel sold to tribal members, and the State would calculate the tax refund based on the total number of gallons. *Id.*

In 1995, the Legislature granted the State permission to enter agreements with other tribes "upon terms substantially the same as those in the Colville consent decree," using this "counting gallons" approach.

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[6] The Yakamas, one of the tribes referenced above, refused to remit to the State the fuel taxes they collected. News accounts indicated that the amount withheld was as much as $25 million. http://seattletimes.com/State-Yakama-Nation-agree-on-simpler-fuel-tax-system (Nov. 23, 2013). The State sued the Yakamas to recover the past due taxes. Recently, the State settled with the Yakamas for $9 million. Simultaneously, DOL entered into an agreement with the Yakamas in which the State collects the fuel tax and remits 75% of the collections to the tribe. The Yakamas agreed to pay the State $9 million but that sum will be paid from the tax revenue the Yakamas will receive from DOL. In effect, Washington taxpayers will largely foot the tribe's arrearages out of the MVF. If it is not a proper 18th Amendment purpose for the MVF revenues to be used to pay tort judgments, *Automobile Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 171, 346 P.2d 695 (1954), it is difficult to discern how MVF revenues can be used to satisfy a tribal obligation to remit fuel taxes to the State.

Laws of 1995, ch. 320, §§ 2, 3; CP 735, 1377. The State then entered into agreements with the Lummi, Port Gamble S'Klallam and Skokomish tribes using the "counting gallons" method. CP 735. The Department of Licensing ("DOL") largely negotiated and administered those compacts.

Shortly after the 1995 fuel tax amendments, the State abandoned the "counting gallons" approach because it required substantial record-keeping requirements and imposed an administrative burden on the tribes. CP 735, 1380-81. The State's new fuel tax agreements were instead based upon a formula. CP 736. Under these agreements, the State agreed to disburse fuel tax revenues to the tribes based on the number of enrolled local tribal members, multiplied by the average per capita consumption of fuel statewide, disbursing to the tribes 100% of the fuel tax revenue applicable to this amount of fuel. CP 741, 1378-79.[7] The tribes' enrollment records were not subject to an audit process, and no restrictions were placed on the tribes' use of remitted fuel tax revenues. *See, e.g.*, CP 741-43. The State entered into such agreements with numerous tribes, including the Colville, Lummi, Port Gamble S'Klallam, Skokomish, Spokane, Kalispel, and others. *See, e.g.*, CP 746-67.

[7] The average rate of fuel consumption statewide was determined by the Washington State Department of Transportation ("WSDOT"), while the tribes agreed to maintain and provide records indicating the population of local tribal members. *See, e.g.*, CP 741-42.

In 1999, the Legislature changed the point of collection for the fuel tax from distributors to suppliers in order to increase administrative efficiency and to provide greater revenues for the State. Laws of 1998, ch. 176, § 1(3). With respect to the legal incidence of the tax, however, the law still required that the tax to be passed down the distribution chain to retailers and consumers, instead of simply allowing the suppliers to choose whether to pass on the tax. *See, e.g., id.,* §§ 48(1), 81. The Legislature made no changes to the existing tribal agreements, and the authorization to enter into such agreements remained in place. *See id.*, §§ 48(2), 81.

In the early 2000s, the Squaxin and Swinomish tribes sued the State arguing that the tribes were completely immune from Washington's fuel tax, not just for sales of fuel to tribal members but for sales to *all* fuel purchasers on tribal land. They asserted that under the then-existing law,[8] the legal obligation to pay the tax fell on the retail tier of the distribution chain, including tribal retailers. *Squaxin*, 400 F. Supp. 2d at 1251. The tribes argued 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 legal incidence of the tax fell on retailers. *Id.* at 1255-57.

[8] *See* former RCW 82.36.020. However, the law also stated that the ultimate incidence of the tax was intended to fall on consumers. *See* former RCW 82.36.407(1).

Relying on *Chickasaw*, a case in which the legal incidence of a state fuel tax also fell on tribal retailers, the district court in *Squaxin* enjoined the State from collecting fuel taxes on "the Tribes' retail sales of fuel products on Tribal land." *Id.* at 1262.[9] Because the State was not permitted to tax tribes for transactions on tribal land, the court concluded that Washington fuel taxes, the legal incidence of which fell on tribal retailers, were illegal. *Id.*

In December 2006, the United States Supreme Court issued its decision in *Wagnon*. In that case, the Court upheld Kansas' fuel tax because the tax was explicitly imposed on off-reservation sales to distributors and did not require those distributors to pass the tax forward in the distribution chain. *Wagnon,* 546 U.S. at 103. The Court concluded that because the legal incidence of the tax fell off-reservation, the tribes were not immune from the tax simply because it was included by distributors in the price of the fuel they sold on-reservation. *Id.*

In 2007, to remedy the issues raised in the *Squaxin* ruling, the State proposed, and the Legislature passed, SB 5272, which shifted the full

[9] In reaching its ruling, the *Squaxin* court noted that Washington's fuel tax (at that time) was legally required to be passed down the distribution chain to retailers. *See Squaxin*, 400 F. Supp. 2d at 1252-53. Suppliers and distributors would "simply collect and remit the funds" and would be "reimbursed for any deficiency." *Id.* at 1252. In contrast, retailers were not legally required to pass the fuel tax on to consumers, and were not entitled to a refund if a consumer failed to pay the tax. *Id.* at 1252-53.

burden of Washington's fuel tax to suppliers. RCW 82.36.020(1); RCW 82.38.030(1). CP 736-37, 1416-17. Under this statute, the legal incidence of Washington's fuel tax now falls expressly on suppliers and is imposed on the first taxable event in Washington. *See* RCW 82.36.010(12), .020(1), .026(5); RCW 82.38.030(1), (7), .035(6). *None* of the activities constituting the first taxable event – removing fuel from a refinery, removing fuel from the terminal rack, importing fuel from another state, or blending fuel – is conducted on any tribal lands. CP 285. There is no requirement that the cost of the tax be passed down, but suppliers are permitted to include "as a part of the selling price an amount equal to the tax." RCW 82.36.026.[10]

This 2007 change in Washington law shifted Washington's fuel tax regime from one similar to Oklahoma's in *Chickasaw*, where the legal incidence fell on tribal retailers, to one like Kansas' regime in *Wagnon*, where the legal incidence fell on entities located off tribal lands. Now, the incidence of Washington's fuel tax falls solely on non-tribal locations,

[10] The fuel tax is 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 the fuel tax is 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. This new taxation regime does not offend tribal sovereign immunity under *Wagnon*, a decision filed only weeks after the ruling in *Squaxin*. In fact, the new taxation regime also complied with Judge Zilly's analysis in *Squaxin*, thus eliminating the need for any special arrangements to protect tribal sovereignty.

activities, and persons. This 2007 change ended any tribal claims of immunity or preemption from Washington's fuel tax going forward. *Wagnon,* 546 U.S. at 115.

(2) Tribal Compacts at Issue Here

Although the new 2007 fuel taxation regime eliminated any potential claim that tribes had immunity from Washington fuel taxes imposed on suppliers off-reservation, the Legislature included RCW 82.36.450 in the law.[11] The provision gave the Governor authority to address any tribal preemption or immunity issues with fuel taxation through agreements with the tribes. *See* Appendix.

RCW 82.36.450 provided only general requirements for these agreements, stating that tribal retailers must purchase fuel exclusively from State-licensed (or tribal) suppliers or distributors, and the tribes must agree to "expend fuel tax proceeds or equivalent amounts" on specified items. RCW 82.36.450(3)(a)-(c); RCW 82.38.310(3)(a)-(c). Nothing in these statutes explicitly authorized the State to issue tax refunds to the

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[11] The central provision of that statute reads:

> 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 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.

tribes, although they vaguely allowed the Governor to "address" tribal claims of immunity or preemption. CP 1430-32. DOL negotiated and administered these compacts. RCW 82.36.450(5).

After SB 5272 was enacted, the State, began entering into a new kind of fuel tax agreement with the tribes. Specifically, the State offered to remit MVF revenues to each tribe[12] in an amount equivalent to 75% of all fuel taxes paid on fuel purchased by tribal retailers. CP 1380, 1383, 1386. Tribes received MVF revenues by submitting invoices to the State reflecting the number of gallons delivered to retail stations under the tribe's jurisdiction. CP 1380, 1446-47.[13] The State would then disburse 75% of the fuel tax revenues applicable to that amount of fuel. CP 1447. The State did not verify the validity of the tribes' invoices. CP 1449. The State described these payments to tribes from the MVF as "refunds,"[14]

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[12] Of course, the "tribes," as entities, never paid the fuel tax. Individual members may have had the cost of the tax included in the price of their fuel under RCW 82.36.026. Since the enactment of SB 5272, the legal incidence of Washington's fuel tax has never fallen on entities on tribal lands because there are no tribal suppliers.

[13] It is not clear from the record exactly who owns these stations.

[14] Characterization of the payments as a "refund' is contradicted by DOL's own admissions in the record. For example, 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 859-60. After complaints from IFTA carriers, 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 857. The State admits that it is claiming to

even though the tribes themselves never paid these taxes (because the suppliers did so).

The compacts typically also required that tribal retailers to pass on to consumers the fuel tax as part of the price of fuel in order to facilitate the sale of fuel "at prices competitive with surrounding retail sellers." *E.g.*, CP 759, 762. Although the State was aware that the Spokanes were "selling fuel at significantly lower rates than the surrounding retail stations," CP 769, for example,[15] the State admitted that it did not monitor compliance with this competition requirement, despite confirming such disparities. CP 1453-57. DOL's Karla McLaughlin testified as the State's designee in a CR 30(b)(6) deposition to the Department's hands-off policy: "[T]he pricing of fuel is not an issue that the department wants to get into." CP 1457.

According to its 2012 report on the compacts, the State has 75/25 agreements with 18 tribes, per capita agreements with five tribes and a

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"refund" 175% of taxes paid. CP 1435. The payments to the tribes are in the nature of revenue sharing, not true refunds.

[15] DOL had data demonstrating dramatic price differentials at tribal and non-tribal stations across the State. CP 1476-77.

consent decree with the Yakama Nation regarding fuel taxes, which the State has terminated as part of its settlement with that tribe. CP 776.[16]

From 2007 to 2012, $150 million in MVF revenues have been disbursed to the tribes under these compacts; the refunds to the tribes have grown each year. CP 469-74, 1427-29, 1474-84. $774,000 was disbursed to the tribes in 2002; that number grew to $36 million in 2012, a *40-fold increase*. CP 1429. This increase is the result of the growing number of tribes with compacts under SB 5272, an increase in the number of tribal retail fuel outlets, and an increase in fuel sales at tribal stations, whether to members or nonmembers. CP 780-81, 1469-74, 1479-84.[17]

The compacts purport to require the tribes to spend MVF revenues they receive (or equivalent amounts) on specified transportation-related items. *E.g.*, CP 751, 762.[18] The tribes may also to carry over credits against the expenditure requirements for up to ten years. CP 751.

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[16] DOL claims the right to further negotiations on fuel tax agreements with the tribes. *See, e.g.*, CP 1464-65. DOL also allows the tribes to shift between per capita and 75/25 agreements depending on what is most favorable for each tribe. *Id.*

[17] If the Legislature increases the fuel tax rate as requested by Governor Inslee in recent legislative sessions, MVF payments to the tribes will also increase correspondingly.

[18] As an example, the Port Gamble S'Klallam compact provides:

> 4.7. The Tribe agrees to expend fuel tax proceeds refunded to the Tribe or amounts equivalent thereto on: Planning, construction, and maintenance of roads, bridges, boat ramps, transit services and facilities; transportation planning; police service; and other transportation-related purposes. For the purposes of this Section 4.7, in

DOL is required to report annually to the Legislature on the status of the compacts. RCW 82.36.450(6). RCW 82.36.450(3)(c) also requires the State to include in the compacts a means of ensuring compliance with the statutory requirements. Accordingly, the compacts require tribes to submit an annual audit report to DOL certifying the total number of gallons purchased and the total amount of qualifying expenditures in each year. *E.g.*, CP 751-52, 763.

However, under the compacts, the tribes select their own audit firms, CP 751, 763, and the State exhibits a hands-off attitude toward such audit reports, often receiving nothing more than a two-page summary report prepared by the tribes. CP 1408. It does not verify that the audits conform to State standards, CP 1404-05, that the auditors have complete information,[19] CP 1405-06, 1408, or that the refunds are spent for

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> any fiscal year in which the Tribe's expenditures for the permissible transportation purposes exceed fuel tax refund receipts, the Tribe may carry forward the additional expenditure amount as a credit against the requirement of permissible transportation expenditures in any subsequent year, up to ten (10) years. The Tribe shall maintain records as necessary to demonstrate its compliance with this Section 4.7.

CP 751.

[19] The State takes no responsibility for assessing either the auditors' procedures or results, as McLaughlin testified: "Q. Does [DOL] ever confirm or verify the sufficiency of the procedures used by the auditor? A. No." CP 1462. "Q. At any time has the state gone back to a tribe or one of the CPAs providing an audit report and asked for any of the underlying documents referred to in those reports? A. No." CP 1411. She further stated that the State is not responsible for verifying whether the audits meet applicable requirements: "The department is *not* responsible. The CPA firm that's hired by the tribe certifies that they have the records that verify these elements." CP 1405.

transportation purposes. CP 1410-11. How the tribes actually spent the MVF revenues they receive is not a matter of public record.[20] In fact, some of the compacts have no audit requirement at all, secret or otherwise. In 2007, the State requested information about how the tribes spent MVF funds; it assured the tribes that any response was purely "voluntary." Reports to the Legislature did not include this refund information. *See, e.g.*, CP 796-806. In 2009, DOL received "voluntary" disclosures about expenditures of MVF monies from only 4-6 tribes, despite efforts to get more information. CP 791-93. Even this minimal voluntary reporting has now largely been discontinued in DOL's reports to the Legislature.[21] CP 773-77.

The State admits that the tribes have not spent the MVF revenues on highway or transportation purposes as provided by RCW 82.36.450 and

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[20] In addition to the fact that the tribes, not the State, select the auditor. RCW 82.36.450(4) provides: "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). As a result of this provision, the manner in which millions of dollars of revenue from the MVF is actually used and accounted for each year by a tribe is exempt from the Public Records Act, RCW 42.56 ("PRA"), and thereby shielded from public scrutiny or oversight. In fact, it required years of litigation before AUTO gained access to some of this information in discovery under a strict protective order.

[21] The State initially requested that the tribes voluntarily report information regarding qualifying expenditures for DOL's annual reports to the Legislature. CP 1388. DOL stopped collecting and including such voluntary reporting in its reports claiming the information was "confusing" to those who read the reports. CP 1391-93.

the 18th Amendment. In discovery, the State *admitted* that the MVF monies were being used for non-highway purposes:

> Q. You've just identified a number of nonhighway purposes that the tribes have reported to the department that they were using fuel tax revenues to fund; is that correct?
>
> A. Yes.

CP 1400. The Skokomish tribe reported that it was using the State funds for the tribe's water system and as a revenue base for its "Public Works Department." CP 1397-99, 1531-32. The Nisqually tribe put the funds toward a "cash match for Rural/Tribal transit program." CP 792. The Jamestown S'Klallam tribe reported it was using tax dollars to construct an extension of the "Olympic Discovery Trail," a "multi-use, *non-motorized* trail" for biking, hiking, etc. *See www.olympicdiscoverytrail.com.* CP 791, 1390, 1495. Other projects reported as funded by MVF dollars included: a pedestrian tunnel, habitat remediation, infrastructure, housing development, and construction of a shipping terminal. CP 791-92. The Spokane tribe apparently used a great deal of its funding for non-highway law enforcement purposes, including the purchase of a drug dog. CP 793.[22]

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[22] DOL took no action even when it learned that the tribes diverted MVF monies to non-highway purposes:

> Q. [A]fter receiving any of these voluntary reports of nonhighway uses for motor vehicle fuel tax revenues, did the department at any time go

(3) Procedure Below

AUTO is a trade association of motor fuel retailers, motor fuel wholesalers, and automotive service retailers and vendors operating throughout Washington. CP 815. Numerous AUTO members own retail stations in close proximity to tribal retail stations, including stations located on or near highways. CP 819-20. In addition to the State's own documentation of pricing disparities, AUTO has confirmed ongoing and substantial disparities at tribal versus nontribal retail fuel stations throughout Washington. CP 817-18, 822. AUTO's members with stations in close proximity to tribal stations have reported monetary impacts and substantial declines in revenues and profits since the inception of the 75/25 agreements. CP 825.

AUTO become concerned that the tribes were using the MVF revenues to subsidize tribal fuel retailers gasoline and diesel prices, and that the State was violating Washington law by these compacts. AUTO filed the present action in the Grays Harbor County Superior Court on

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to these tribes and say: You are not using these funds as required by the agreement?

A. No.

CP 1401.

May 13, 2010 to enjoin the diversion of fuel tax revenues to the tribes. CP 1-80.[23] The case was assigned to the Honorable Gordon Godfrey.

The State initially moved to dismiss the case under CR 19, arguing that the tribes were indispensable parties and that the lawsuit could not proceed without the tribes being joined. CP 845-46. The trial court granted the State's motion, but acknowledged the potential for injustice because AUTO could be left without a judicial remedy. CP 847-51. On direct review, this Court reversed and remanded, finding that the case could proceed without the tribes because if the case were dismissed, AUTO would be left with no adequate remedy. *AUTO I*, 175 Wn.2d at 232-33, 235. The Court "recognized that potential prejudice to tribal contractual interests may be outweighed by the broader public interest in having important and potentially far-reaching issues resolved in court." *Id.* at 234.

On remand to Judge Godfrey, both AUTO and the State moved for summary judgment. CP 258-60, 306-45. AUTO argued *inter alia* that the State lacked the authority to make MVF disbursements to the tribes because the State violated the 18th Amendment, and the State had received an unconstitutional delegation of legislative authority. CP 324-

[23] The initial complaint was amended in August 2010, CP 83-167, and again in January 2011. CP 178-96.

40. The trial court granted the State's motion and denied AUTO's motion on November 25, 2013, but offered little guidance as to the basis for its ruling. The court appeared to conclude that the refunds were proper, RP 49, although the incidence of the taxes did not fall on the tribes or their members.[24] The court entered its written order the same day. CP 482-83. This timely appeal followed. CP 488-92.

D. SUMMARY OF ARGUMENT

The State lacked the authority to enter into the fuel tax compacts with Native American tribes under RCW 82.36.450(1) because the disbursements of MVF revenues to the tribes pursuant to those compacts were not refunds authorized by law within the meaning of the 18th Amendment. If the compacts were designed to prevent tribes from becoming fuel suppliers, that is not a legitimate use of MVF money under the 18th Amendment.

Moreover, RCW 82.36.450(1) constitutes an unconstitutional delegation of legislative authority where the reasons for the compacts were

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[24] Despite ruling that the State's actions were legal, the court also advised the tribes to get into the fuel supplier business:

> Where I'm disappointed with the tribes, if I was running the operation I would be in the supply business right now. I don't even recall there ever being a gas station on any of the tribal lands back in 1944, let alone were there even roads at half of these places.

RP 49.

not articulated by the Legislature in the statute and procedural safeguards were not provided in the statute to prevent arbitrary action by the State.

E. ARGUMENT[25]

(1) The State Lacked Authority to Enter into Compacts That Violate the 18th Amendment

Washington first imposed a tax on motor vehicle fuel in 1921. *See* Laws of 1921, ch. 173, § 2. By statute, the amounts collected were to be

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[25] The trial court resolved all of the issues in the case on summary judgment. This Court reviews a summary judgment de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Under CR 56(c), all facts and reasonable inferences from the facts are reviewed in a light most favorable to AUTO as the nonmoving party. *Id.* Issues of statutory and constitutional interpretation are also reviewed de novo. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642, 15 P.3d 990 (2007).

The State may argue that "beyond a reasonable doubt" test applies to constitutional challenges to a statute. CP 269. But courts too often confuse the precise nature of that interpretive principle. It is not a burden of proof as in the criminal context. Rather, as this Court explained in *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998), the standard is one of deference to a co-equal branch of government:

> The "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assumed the Legislature considered the constitutionality of its enactments and afford some deference to that judgment.

See also, Sch. Dist.'s Alliance for Adequate Funding of Special Educ. v. State, 170 Wn.2d 599, 606, 244 P.3d 1 (2010) ("...when we say 'beyond a reasonable doubt,' we do not refer to an evidentiary standard.").

That standard does not prevent this Court from exercising its prime constitutional role of declaring what our Constitution means and finding a statute wanting, as this Court did in *Island County,* and in many other instances too numerous to recite.

placed in the MVF and applied to the maintenance and construction of state highways. *See id.*, § 5; Laws of 1921, ch. 96, § 18; Laws of 1923, ch. 181, § 3. Notwithstanding this intended limitation, governments diverted MVF revenues to non-highway purposes. CP 658, 663. This ongoing diversion both in Washington and elsewhere inspired a national movement to impose constitutional limits on the use of fuel tax revenues to prevent abuse of the fuel tax, promote fair taxation, and ensure proper maintenance of highways. CP 665-69.

As a result, the Legislature enacted House Joint Resolution No. 4 in 1943, which the voters adopted in 1944 as the 18th Amendment to Washington's Constitution (article II § 40) to protect the State's fuel tax from diversion to non-highway purposes; CP 661-62. The 18th Amendment unambiguously[26] requires that fuel tax revenues be deposited in a "special fund" to be "used exclusively for highway purposes." Const. art. II, § 40. It further enumerates specific "highway purposes" for MVF revenues may be used, namely "operating, engineering and legal expenses connected with the administration of public highways, county roads and

[26] The 18th Amendment is "free of ambiguity," and thus, "should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation." *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969). A use of fuel tax revenues is constitutional only if it actually falls within the "obvious import" of the "plain and commonly understood meaning" of the 18th Amendment. *Id.* The 18th Amendment "protects certain taxes and revenues from uses other than highway purposes.

city streets," the "acquisition of rights-of-way," "[r]efunds authorized by law," and other identified highway purposes. Const. art. II, § 40(a), (b), (d).[27]

In recent years, fuel tax revenues have been inadequate to maintain Washington's highways and roads. State transportation needs are in the billions of dollars. A group of more than 40 mayors across Washington recently sent a letter to the Governor and state legislative leaders emphasizing the need for increased fuel tax revenues to maintain roadways and bridges. CP 671-73. For example, the reconstruction of the Highway 520 bridge currently faces a $1.4 billion shortfall, while the Highway 99 tunnel project faces a funding deficit as tolls are anticipated not to cover costs, CP 675-99, and the costs of the breakdown in the tunneling efforts on the Seattle waterfront are unknown. A recent bridge collapse along I-5 in Skagit County attracted national attention to the poor state of roads and bridges in Washington, which was also demonstrated in a 2013 report of the American Society of Civil Engineers. CP 701-31.

It is a matter of public record that transportation funding is a major issue facing the State. Governor Inslee asked the Legislature in its fall

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Specifically, the amendment creates a fund and then limits the uses to which the fund may be put." *Freeman v. State*, 178 Wn.2d 387, 395, 309 P.3d 437 (2013).

[27] The full text of the 18th Amendment, Const. art. II, § 40, is reproduced in the Appendix.

2013 special session and the 2014 regular session to address transportation funding. The Governor and the Legislature contemplated a $10 billion tax package, funded in significant part from fuel tax increases, to meet Washington's transportation needs. http://theolympiareport.com/senate-will-adjourn-with-vote-on-transportation-package (Nov. 9, 2013).[28] The Legislature did not act on a transportation funding measure in either session.

The 18th Amendment is very prescriptive as to the permitted highway purposes. Two are at issue here: "[s]uch highway purposes shall be construed to include . . . construction . . . and betterment of public highways, county roads, bridges and city streets," and "[r]efunds authorized by law for taxes paid on motor vehicle fuels." Const. art. II, § 40(b) and (d).

Whether a particular use of MVF revenues constitutes a valid highway purpose is a question to be decided by the courts, rather than the legislative or executive branches. *O'Connell*, 75 Wn.2d at 563 ("Mere declaration cannot give character to a law or turn illegal operation into legal."); *Wash. State Highway Comm'n v. Pac. Northwest Bell Tel. Co.*, 59

[28] The loss of revenue in the compacts is very impactful to transportation. Such a revenue stream would support billions in bonds for transportation projects.

Wn.2d 216, 222, 367 P.2d 605 (1961) (noting "the meaning and scope" of the 18th Amendment cannot be defined "by legislative enactment").

Although the 18th Amendment allows for "[r]efunds authorized by law for taxes paid on motor vehicle fuels," the tribal disbursements do not qualify because the disbursements here are not refunds, and they have not been authorized by law.

(a) The Payments to the Tribes Do Not Qualify as "Refunds" under the 18th Amendment

For a refund to be legitimate under the 18th Amendment, the refund must be an amount that is paid back to the taxpayer, and it must be authorized by law. *Northwest Motorcycle*, 127 Wn. App. at 415. Washington courts have attempted to define what is meant by a "refund:"[29]

> A refund is generally "a sum that is paid back." Article II, section 40 merely provides that this sum must be authorized by law and that it paid back from the taxes paid for gasoline. The clear inference is that the sum should be returned to those people who used the gasoline for nonhighway purposes.

[29] *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) ("When interpreting constitutional provisions, we look first to the plain language of the text and will accord it is reasonable interpretation."). "The phrase 'refunds authorized by law for taxes paid on motor vehicle fields' is unambiguous." *Northwest Motorcycle Ass'n v. State, Interagency Comm'n for Outdoor Recreation*, 127 Wn. App. 408, 415, 110 P.3d 1196 (2005), *review denied*, 156 Wn.2d 1008 (2006).

Id. (citations omitted).[30] The refund need not be direct to the taxpayer, but the refund must be put to some use beneficial to the taxpayer. For example, Division III in *Northwest Motorcycle* concluded that direct refunds to the taxpayers were not practical, and upheld the Legislature's plan of indirectly refunding of sums to non-highway users who purchased motor vehicle fuel through a program for non-highway and off-road activities that benefitted the affected taxpayers. Division III ultimately concluded: "We find nothing in article II, section 40 that specifically prohibits the legislature from dispensing the 'refund' as it sees fit." *Id.* at 416.

Subsequently, in *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) ("*WOHVA*"), this Court addressed the same refund issue when the Legislature appropriated the excess fund balance for the program discussed in *Northwest Motorcycle* to remedy a budgetary shortfall in funding for general park maintenance and operations programs.

[30] This definition of a refund begs a key question. Any amount remitted may be "paid back." The ordinary connotation of a refund, however, is that the party receiving the payment paid too much, and is receiving the difference between what is due and the sum paid, or the person should not have paid at all because it was not legally obligated to do so. Indeed, Bryan A. Garner, *Black's Law Dictionary* (8th ed. 2004) at 1307 defines a refund as "The return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from earnings."

The *WOHVA* plurality opinion[31] concluded the appropriation was proper under the 18th Amendment, adopting the reasoning in *Northwest Motorcycle* that the expenditures at issue constituted a refund because the taxpayers who improperly paid the tax were benefitted by the expenditure, and thus "paid back" by the Legislature in a duly enacted law. *Id.* at 235. The opinion deferred to the legislative assertion that the affected taxpayers were benefitted from addressing the overall parks budget shortfall. *Id.* at 236-40. However, the plurality did conclude that claiming funding for general park maintenance and salaries was a "refund" to those who paid the fuel tax for off-highway use "stretches the statutory refund to its constitutional limits...." *Id.* at 240.

In both of the cases discussed above, however, there was no question that (1) the fuel taxes were improperly paid by those who were exempt from it, and (2) the Legislature appropriated the refund and stated that it would benefit the affected taxpayers. There was no question that their refunds were authorized by law. Both essential predicates to a "refund" were met in those cases.

[31] Three justices of this Court adopted the reasoning of the majority opinion, two justices concurred in the result but considered the issue to be moot because the appropriation had ceased more than a year prior.

Here, the factual and legal predicates that this Court has established to determine what constitutes a legitimate "refund" are at issue.

(i) The Payments to the Tribes Are Not a Return of Fuel Taxes Improperly Imposed or Collected by the State

Refunds are designed to return taxes erroneously or illegally collected to the persons or entities who paid them. *See, e.g., Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 937, 946 P.2d 1235 (1997); RCW 82.36.090; RCW 82.38.180(3).

To be valid, a refund must provide a targeted and substantial benefit to the class of taxpayers who paid the tax but are exempted from it, and thus are entitled to be "paid back." *WOHVA*, 176 Wn.2d at 235 (Owens, J., plurality opinion) ("[W]e must decide whether [an] appropriation sufficiently benefits affected taxpayers so as to constitute a refund."); *id.* at 241, 243 (J.M. Johnson, J., dissenting) ("[T]he law requires a refund under article II, section 40 to have a specifically targeted benefit to affected taxpayers in order to comply with constitutional restrictions.").

The 2007 legislation that shifted the incidence of the fuel tax off-reservation to suppliers *conclusively ended* any questions of tribal

immunity or preemption from the tax, as DOL's McLaughlin conclusively testified in her CR 30(b)(6) deposition for the State:

> Q. [quoting from DOL document] "Because the current law places the legal incidence of the tax on the Licensees, the legal incidence is not on the Tribe and thus is not vulnerable to preemption arguments." Do you see that?
>
> A. Yes, I do.
>
> . . .
>
> Q. . . . [I]s this generally reflective of the department's position with respect to whether or not the current taxing methodology in Washington state is preempted?
>
> A. Yes.

CP 1422-23. *See also,* CP 854-55. The State also concedes that the legal incidence of the fuel tax was shifted to suppliers specifically to end the litigation over tribal immunity:

> Q. Does the department understand that [one] reason why the fuel tax incidence was moved to the rack was to avoid the tribal argument that they were immune from paying Washington's fuel tax?
>
> A. Yes. The changing of the incidence of the tax was for the department to avoid future litigation with tribes regarding the incidence of taxes.

CP 1417-19.[32] Because the incidence of the tax does not fall on the tribes or tribal members or on tribal lands, there is no basis for the tribes to contend that (1) they paid the tax, or (2) they are immune from paying the

[32] DOL has informed the Yakama Nation, for example, that the tribe will *not* be able to assert immunity as a basis to obtain fuel tax refunds once the consent decree is terminated. CP 1415.

tax and therefore must be "paid back." Thus, there is no basis for the State to "refund" fuel tax money to the tribes.

The State's affirmation that the tribes are no longer immune or preempted from the fuel tax is in accord with clear precedent from the United States Supreme Court. In *Wagnon*, the Court analyzed a fuel tax system almost identical to Washington's and held that tribal retailers were not immune from a fuel tax that was legally imposed "on the receipt of motor fuel by fuel distributors within [state] boundaries." *Wagnon,* 546 U.S. at 99. Such a tax is valid as long as state law expressly "specifies that the incidence of the motor fuel tax" is imposed on suppliers or distributors and not retailers. *Id.* at 102 (internal quotations and brackets omitted). Even without such "dispositive language," there still is no immunity or preemption so long as tribal retailers are not liable for payment of the tax and there is no requirement for the tax to be passed downstream. *Id.* at 102-03. Washington's fuel tax meets each of these requirements. *E.g.*, RCW 82.36.020(1) (tax is "levied and imposed upon motor vehicle fuel licensees," not retailers); RCW 82.36.026(5) (no requirement that tax be passed down). As the State concedes,

Washington's fuel tax is entirely lawful, and neither immunity nor preemption provide a basis for diverting fuel tax revenues to the tribes.[33]

The State's administration of the disbursements to the tribes further indicates that it does not consider these payments to be "refunds" of fuel taxes. Specifically, the State acknowledges that it provides full refunds to consumers who purchase fuel, including at tribal stations, and then use the fuel for non-highway purposes or outside of the state, even though the tribes a 75% "refund" of the same taxes on the very same fuel. CP 857, 1435. The State admits that it "refunds" 175% of the tax paid on such fuel. CP 1435. This is patently inconsistent; the State cannot explain how the 100% refund and the 75% refund on the same taxes paid can *both* be a sum "paid back." *Northwest Motorcycle*, 127 Wn. App. at 415.[34]

Further, a valid fuel tax refund must also benefit taxpayers, either by directly refunding the money or by indirectly using the refund in a way

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[33] DOL also claims that a purpose of the agreements is to minimize "litigation risk" and to retain "25 percent of fuel tax that [the State otherwise] might not have" if the tribes were to prevail on an immunity argument. CP 1440, 1442. But as set forth above, DOL admits that any litigation risk has been effectively eliminated as a result of the 2007 amendments, particularly in light of *Wagnon*. The State cannot disburse fuel tax revenues to a potential claimant without regard to the underlying merits of the claim. *Cf. Automobile Club*, 55 Wn.2d at 168-69 (noting that overbroad grounds for using fuel tax revenues must be rejected under the 18th Amendment).

[34] Ironically, the State blames the Legislature for the State's policy of "refunding" 175% of the fuel taxes paid on fuel purchased at tribal stations. The State asserts that "[t]he department . . . has to [refund 175% of fuel taxes paid] because . . . the statute [] says [DOL] will do that," and "it's just unfortunate that the statute has two places where [DOL must] refund those amounts." CP 1438. But as noted above, the State now admits that no *statute* actually authorizes a refund of fuel taxes to the tribes.

that benefits a targeted taxpayer class. *Northwest Motorcycle*, 127 Wn. App. at 415-16. The disbursements to the tribes cannot be considered a direct refund because the tribes neither pay the fuel tax nor bear the economic burden of the tax. The State collects fuel taxes from suppliers, none of which are tribal entities. *See, e.g.*, RCW 82.36.020(5). Because the tribes themselves do not pay the tax, the disbursements under the fuel tax agreements cannot be "refunds" of taxes paid by the tribes.[35]

Here, the State contends that the tribal disbursements benefit "[a]ll Washington State citizens and various city and county residents in surrounding communities to the Tribes." CP 874. This purported benefit is not sufficiently targeted to a specific group of taxpayers to satisfy the test articulated in *WOHVA* and prior case law. *See WOHVA*, 176 Wn.2d at 235, 241; *Northwest Motorcycle*, 127 Wn. App. at 415-16. The State's identified class is essentially unlimited, is unrelated to payment of the fuel tax, and regardless, is not actually provided with any targeted or substantial benefit from the disbursements. In sum, the MVF disbursements to the tribes are not refunds.

(ii) The Payments to the Tribes Are Not Authorized by Law

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[35] Again, the fact that the suppliers have passed the tax along to the tribes as part of their cost of doing business is irrelevant. The incidence of the tax does not fall on the tribes, and for the purposes of determining who the taxpayer is, and thus who is entitled to immunity or a refund, that is the operative fact. *Wagnon*, 546 U.S. at 103.

A second failure of the compacts is that refunds have never been "authorized by law." That term has never been specifically defined in connection with refunds under the 18th Amendment, but the term carries a well-understood meaning in other constitutional settings addressing fiscal matters. For example, article VII, § 5 of the Washington Constitution states that no tax may be levied "except in pursuance of law." This Court has held that this means a local government must have *express* authority from the Constitution or a statute enacted by the Legislature to tax. In *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982), this Court stated: "... the counties may not look to their general police powers, or any general grant of authority by the legislature or constitution for a power to impose taxes. The counties' power to tax must be granted expressly." This Court has made it clear that this is a *strict requirement*: "If there is any doubt about a legislative grant of taxing authority to a municipality, it must be denied." *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003) (Seattle ordinance shifting the cost of streetlights from the City's general fund to utility ratepayers was, in effect, a tax that was not properly imposed under the Constitution). *See also, Lane v. City of Seattle,* 164 Wn.2d 875, 194 P.3d 977 (2008) (hydrants); *but see Sheehan v. Central Puget Sound Regional Transit*

Authority, 155 Wn.2d 790, 799-800, 123 P.3d 88 (2005) (court upheld imposition of motor vehicle excise taxes for Sound Transit and Monorail where Legislature expressly conferred authority on both agencies to levy motor vehicle excise taxes).

On the expenditure side, which is the most apt concern in this case, the Constitution and the interpretive case law are equally strict. In order for an appropriation of public monies to be permissible, there must be "an appropriation by law." Wash. Const., art. VIII, § 4. *See* Appendix.[36] That constitutional section is designed to prevent the expenditure of public funds without legislative direction. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365, 70 P.3d 920 (2003); *State ex rel. Peel v. Clausen*, 94 Wash. 166, 172-73, 162 Pac. 1 (1917). It is *mandatory*. *Id.* at

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[36] RCW 43.88.130 further reinforces this constitutional directive:

> No agency shall expend or contract to expend any money or incur any liability in excess of the amounts appropriated for that purpose: PROVIDED, That nothing in this section shall prevent the making of contracts or the spending of money for capital improvements, nor the making of contracts of lease or for service for a period exceeding the fiscal period in which such contract is made, when such contract is permitted by law. Any contract made in violation of this section shall be null and void.

See Our Lady of Lourdes Hospital v. Franklin County, 120 Wn.2d 439, 450, 842 P.2d 956 (1993) (agency may not continue to spend once appropriation is exhausted).

173.[37] *See generally,* Robert F. Utter, Hugh Spitzer, *The Washington State Constitution, A Reference Guide* (Greenwood Press: 2002) at 142-43.

Washington courts have strictly construed the constitutional imperative that disbursements of public monies can only occur by legislative appropriation. Indeed, our courts have made clear that a general legislative direction is not enough to satisfy this provision. In *State v. Perala*, 132 Wn. App. 98, 117, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006), the court stated that legislation of a general and continuing nature is no substitute for a legislative appropriation.[38] In *Mason-Walsh-Atkinson-Kier Co. v. Dep't of Labor & Industries*, 5 Wn.2d 508, 105 P.2d 832 (1940), this Court made clear that any doubts about whether the Legislature intended to appropriate funds invalidates disbursement. The Legislature appropriated $8.5 million from the worker compensation accident fund for "claims and awards and other expenses

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[37] This constitutional provision is, however, inapplicable to special or proprietary funds created by the Legislature. *See King County v. Taxpayers of King County*, 133 Wn.2d 584, 605, 949 P.2d 1260 (1997), *cert. denied*, 522 U.S. 1076, 523 U.S. 1076 (1998); *Municipality of Metro. Seattle v. O'Brien*, 86 Wn.2d 339, 345, 544 P.2d 729 (1976); *State ex rel. State Employees Retirement Board v. Yelle*, 31 Wn.2d 87, 105, 195 P.2d 646 (1948) (pension funds). It also has no application where the expenditures are for satisfaction of judgments paying just compensation in eminent domain matters under article I, § 16. The State has never argued here that the compacts somehow are immune from the requirements of an appropriation.

[38] In *Sch. Dist.'s Alliance for Adequate Funding of Special Educ., supra*, the issue was the degree of specificity in the appropriation. This Court held that nothing in the Basic Education Act or a budget bill foreclosed use of funds appropriated for special education.

provided by law." This Court rejected an argument by employers that they were entitled to a refund of overpayments made to the accident fund from the appropriation referenced above as it was not a sufficiently specific appropriation of money for refunds. *Id.* at 515.[39]

No authorization by law was present here for any refund as is required by article VIII, § 4. The State *admits* that no specific statutory authorization for its "refunds" to the tribes, again through the testimony of DOL's McLaughlin:

> Q. [I]s there any statute that specifically says that these are refunds?
>
> A. No.
>
> . . .
>
> Q. Is there anything in the statute that specifically authorizes a refund?
>
> A. No.

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[39] *See also, Wash. Ass'n of Neighborhood Stores, supra* (initiative imposing taxes and setting out objects of expenditure for such taxes did not constitute an appropriation); *Superior Court in and for the County of Pierce*, 82 Wn.2d 188, 192-94, 509 P.2d 751 (1973) (no court authority to order payment of costs of service without an appropriation); *State v. Clausen*, 160 Wash. 618, 620-32, 295 Pac. 751 (1931) (earmarking of moneys in a fund within the treasury for a purpose was not an appropriation); *Properties Four, Inc. v. State*, 125 Wn. App. 108, 118, 105 P.3d 416, *review denied*, 155 Wn.2d 1003 (2005) (contract was ultra vires in absence of appropriation to effectuate land purchase); *In re the Welfare of J.H., B.H. J.C., K.C.*, 75 Wn. App. 887, 892-95, 880 P.2d 1030 (1994), *review denied*, 126 Wn.2d 1024 (1995) (trial court lacked the authority in a dependency proceeding to order DSHS to pay for housing for mother and children, without a legislative appropriation).

The present case and the *Pierce County* case differ from *Perala* where the Court of Appeals approved of the court order on payment of indigent defense costs by Grant County, because in *Perala* there was a statute directing payment of defense costs and the court invoked its inherent authority in an emergency situation.

CP 1431, 1432.

This lack of authorization is also plain from the face of the statutes themselves, which merely allow the State to enter "agreement[s] . . . regarding motor vehicle fuel taxes included in the price of fuel delivered to [tribal] retail station[s]," without any mention of a refund of fuel tax revenues to the tribes. RCW 82.36.450(1); RCW 82.38.310(1); *see also*, Laws of 1995, ch. 320 § 2 (authorizing "an agreement . . . regarding the imposition, collection, and use of this State's motor vehicle fuel tax"). This language stands in stark contrast to all other legislatively-authorized fuel tax refunds where the Legislature both identifies the payment as a "refund" and specifically identifies the refund's basis, recipient and amount. *See, e.g.*, RCW 82.36.280 (authorizing a "refund" to "[a]ny person" using fuel in engine not registered for highways); RCW 82.36.290 (authorizing a "refund" to "[e]very person" who uses fuel for cleaning or dyeing); RCW 82.38.180(3) (authorizing "a refund" to "[a]ny person" for any tax "illegally collected or paid").[40]

Acknowledging the lack of any specific authorization, the State *concedes* that to enter the agreements with the tribes the State relied on the

[40] The Legislature uses the same clarity when creating indirect refund programs for the benefit of a targeted class of taxpayers. *See, e.g.*, RCW 46.09.520 (authorizing "refund from the motor vehicle fund" of "one percent of the [fuel] tax revenues collected" for nonhighway roads and facilities benefiting offroad vehicle users); RCW

general statute establishing the *process* for administering authorized fuel tax refunds:

> Q. Now, I believe you characterized some of the payments . . . as "refunds." Is there a particular statute that the department relies upon to treat those as refunds?
>
> A. When the state went into the fuel tax agreements – to answer your question, no, not directly related to the statute. When we went into the fuel tax agreements, we needed a process to be able to refund to the tribes under those agreements – whether they were the initial ones prior to 2007 or the newer versions – and the process utilized is the "refund" process within, so the refund process is identified within our statutes for prorating fuel tax. That's the process we utilize.

CP 1429-30. But merely because a general procedure exists for issuing a refund does not grant the State the statutory authority to issue a specific refund.

In addition to a lack of any specific statutory authority for the MVF payments to the tribes, the State cannot point to a specific provision in *any* appropriations legislation authorizing the State to disburse funds from the MVF to the tribes. No budget bill has ever appropriated the MVF monies to the tribes, or even to DOL for disbursement to the tribes.

The State *concedes* that there is no specific legislative authorization for the purported "refunds" made pursuant to the fuel tax agreements and there is no specific appropriation in any budget bill for

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46.10.510 (authorizing "refund from the motor vehicle fund" in an amount "determined to be [the] tax on snowmobile fuel" to be placed "in the snowmobile account").

these expenditures. These disbursements thus cannot be considered to be "refunds" "authorized by law" under the 18th Amendment and are unconstitutional.

(b) The Payments to the Tribes Are Not Used For Highway Purposes as Required by the 18th Amendment and RCW 82.36.450

Because the payments to the tribes are not "refunds authorized by law" under the 18th Amendment, the MVF funds paid to the tribes must be used *solely* for highway purposes. Const. art. II, § 40. Also, the State's claimed grant of legislative authority for the refunds, RCW 82.36.450, requires that the State ensure any fuel tax proceeds on "highway-related purposes." RCW 82.36.450(3). *See* Appendix.

The State *concedes* that the tribes actually use the MVF revenues for purposes outside the 18th Amendment:

> ... the State readily concedes as a factual matter that the tribes are not spending their motor vehicle fuel refund checks for the betterment of the State's public highways.

CP 262. The record also amply documents the fact that under the compacts, the tribes' use of the MVF payments was unrestricted, the tribes used the money for a myriad of non-highway-related purposes, and the State utterly failed to do any monitoring of the use of the payments.[41]

[41] Although the compacts purport to restrict the tribes' use of MVF revenues to certain specified purposes, the State concedes that the permissible purposes go well beyond 18th Amendment limitations, and even beyond the restrictions set forth in RCW

The State's concession that the MVF funds are not spent on highway purposes is crucial in light of the fact that the money is not a refund. The 18th Amendment defines the specific "highway purposes" for which MVF revenues may be spent. *See* Const. art. II, § 40(b). This Court has invalidated expenditures of MVF revenues for numerous non-highway purposes. *See, e.g., O'Connell*, 75 Wn.2d at 562-63 (funding of public transportation system unconstitutional); *Automobile Club of Wash.*, 55 Wn.2d at 171 (payment of tort judgments arising from the negligent operation of highways unconstitutional); *Wash. State Highway Comm'n*, 59 Wn.2d at 221-22 (payment for relocation of utilities from highway project unconstitutional).

In addition to the 18th Amendment violation, the State's bold assertion that the compacts need not comport with the 18th Amendment

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82.36.450. Moreover, they exceed the scope of the compacts themselves. Again, MVF dollars can be expended for tribal police services, transit services, and transportation planning. CP 751, 1463. Under the compacts, the tribes have spent MVF revenues for pedestrian and bike trails, sidewalks, a bus, bus shelters, parking lots, school transportation, a probation officer, a drug dog and the remodel of a police building. CP 1388-91, 1500-29. Other examples include a child development center and a housing development. CP 1388-91. These are not "highway purposes" under the 18th Amendment. *See* Const. art. II, § 40(b)(3) (identifying "policing by the state *of public highways*" as a highway purpose (emphasis added)); *Slavin*, 75 Wn.2d at 562-63 (planning for public transportation system not a highway purpose); *Wash. State Hwy. Comm'n*, 59 Wn.2d at 221-22 (highway purposes must be *exclusive* purposes for using fuel tax revenues). The State concedes this point. CP 1400.

Moreover, as noted previously, DOL does not meaningfully monitor the tribes' use of funds to determine whether they comply with the terms of the agreements. DOL relies solely on summary certifications from audit firms retained by the tribes to ensure compliance, and takes no steps to verify the audit information.

violates RCW 82.36.450, the statute under which the State claims legislative authority to create the compacts:

> (3) If a new agreement is negotiated, the agreement must:
>
> > (b) Provide that the tribe will expend fuel tax proceeds or equivalent amounts on: Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway-related purposes...

RCW 82.36.450(3). With this language, the Legislature imported into the compacts the 18th Amendment's restriction on the use of MVF funds for highway purposes only. Compliance with the 18th Amendment was the Legislature's only constitutional option, as the Legislature may not contravene the Constitution by passing a statute. *Island County*, 135 Wn.2d at 147.

In sum, there is no dispute that the tribes' use of MVF revenues are not restricted solely to highway purposes as required by the 18th Amendment, RCW 82.36.450(3), and the compacts themselves. Because the State does not meaningfully monitor the use of the funds, and the record demonstrates that MVF funds are being spent on non-highway purposes, summary judgment in favor of AUTO is appropriate.

(c) Payments to the Tribes to Dissuade Them From Becoming Fuel Suppliers Qualify as Neither "Refunds" nor Expenditures for "Highway Purposes" Under the 18th Amendment

The State argued below that the compacts were implicitly authorized under RCW 82.36.450 because the State wanted to forestall having the tribes become fuel suppliers, either by entering the refinery business or blending fuel. CP 273, 285.[42] The basis for the State's fear was tenuous at best: apparently a tribal lobbyist made a passing reference to this possibility in legislative testimony, CP 378, and a brief reference by the State's Karla McLaughlin to the possibility of such an occurrence. CP 284-85.[43] That the State's fear is speculative was confirmed in McLaughlin's CR 30(b)(6) deposition:

> Q. Are any tribes in Washington now, to the department's knowledge, blending fuel?
>
> A. No.
>
> Q. Are any tribes importing raw fuel or crude?
>
> A. No.
>
> Q. Are any tribes racking fuel?
>
> A. No.

[42] The State reiterates this contention in its answer to the statement of grounds for direct review at 2, 7.

[43] Notably, at the time, the State disagreed with the lobbyist's suggestion that the addition of an additive to fuel amounted to blending under Washington's fuel tax. CP 1445.

Q. Has the state done any studies of the feasibility of tribes undertaking those activities?

A. Not studies, no.

Q. Does the state have any analysis or the department have any analysis of the, for example, financial model that would be required for the tribes to engage in any of those activities?

A. No.

CP 1443-44.[44]

Leaving aside the extreme financial commitment for the establishment of a tribal refinery and the likely rancorous opposition to such a project on environmental grounds, the State's claim that is trying to forestall tribal economic activity, rather than resolve questions of immunity or preemption, only further reinforces AUTO's contention that the compacts' payments to the tribes are improper.

RCW 82.36.450(1) provides that the governor may enter into agreements that "provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax." Far

[44] If the State seriously believed that this was a reason for the compacts, then DOL was inept at negotiating on that question. The compacts do not bar the tribes from becoming fuel suppliers. The Port Gamble S'Klallam compact is instructive. In paragraph 4.2, the tribe and stations under its authority will purchase fuel from State-licensed fuel suppliers, distributors, or importers, "*or* a tribal distributor, supplier, importer or blender lawfully doing business according to all applicable laws." CP 750 (emphasis added). Indeed, paragraph 6.6 specifically allowed the tribe to blend fuel, making it a fuel supplier. CP 756. Thus, *nothing* in the compact prevents a tribe from becoming a supplier.

from addressing any immunity or preemption – which the State acknowledges do not exist after 2007 – the State apparently contends the compacts' disbursements, represent *a payment to the tribes to forestall their entrance into a facet of the fuel business*. Such payments can only be described as an attempt to avoid a competing legal interest, rather than resolution of a dispute over immunity. Payments to forestall tribal entry into the supplier/blender tier of the distribution chain do not constitute a refund. Similarly, they are not a legitimate expenditure under any other provision of the 18th Amendment.

In *Automobile Club,* this Court held that a city's use of MVF revenues to satisfy tort judgment arising from that city's negligent construction of a moveable bridge span on a roadway that was part of the city and state highway systems, built with MVF monies, was not a legitimate 18th Amendment highway purpose. 55 Wn.2d at 171. Similarly, payments to the tribes to keep them out of the fuel supplier business do not qualify.

In sum, payments to forestall tribal entry into the supplier/blender tier of the fuel distribution chain are not legitimate refunds or highway-related expenditures under the 18th Amendment.

(2) <u>The Legislature Has Delegated Authority to Enter Compacts without Providing Necessary Guidelines or Safeguards</u>

A close cousin to AUTO's argument under the 18th Amendment that the MVF disbursements to the tribes took place without the authorization of law is its contention that the compacts are also invalid because they are based on an unconstitutional delegation of legislative authority.

Washington law on delegation is well-developed. The legislative authority of the State is vested in the Legislature and cannot be abdicated or transferred to others. *See, e.g., Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998) (citing Const. art. II, § 1). The Legislature may delegate its authority, but any delegation requires both (1) "standards or guidelines" indicating "what is to be done and [who] is to do it," and (2) "adequate procedural safeguards" to ensure sufficient "public scrutiny and judicial review" so as to prevent "arbitrary administrative action" or "abuse of discretionary power." *Barry and Barry, Inc. v. State Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 163-64, 500 P.2d 540 (1972). Neither of the minimum constitutional requirements for delegation was met in connection with the compacts.[45]

[45] In order to resolve AUTO's challenge to the compacts, this Court must determine whether the underlying delegation of legislative authority was constitutional. *State ex rel. Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

First, the delegation of authority underlying the compacts is unconstitutional because the Legislature has not provided the State with sufficient guidelines for the negotiation and implementation of such agreements. The statutory delegation of authority underlying the agreements is vague and permissive, providing only that the State "may" enter into an agreement with any tribe regarding the fuel tax, and in the case of the compacts, that such an agreement "may" address tribal immunity or preemption. RCW 82.36.450(1). That is the full extent of the Legislature's direction to the State. *Nowhere* does the Legislature define the objective of such agreements. *Nowhere* does the Legislature articulate that payments must be made to the tribes, or on what basis.

Because the underlying delegation of authority to enter into the fuel tax agreements is lacking essential guidelines, both the agreements and the disbursements made pursuant to those agreements are unconstitutional. *See U.S. Steel Corp. v. State*, 65 Wn.2d 385, 387-90, 397 P.2d 440 (1964) (delegated authority to impose interest on delinquent taxes, without any guidelines or standards to guide discretion, held unconstitutional); *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 901-02, 602 P.2d 1172 (1979) (citing *U.S. Steel*); *see also*, *State v. Gilroy*, 37 Wn.2d 41, 47, 221 P.2d 549 (1950) (delegation with "no legislative declaration of the evils to be avoided or the ends to be attained" is

unconstitutional); *cf. Peninsula Neighborhood*, 142 Wn.2d at 331, 336-37 (delegation of authority to enter into agreements held constitutional because statute provided numerous guidelines and specifically identified "[t]he goal . . . to provide an efficient transportation system").

Second, a constitutional delegation of legislative authority requires that the Legislature establish adequate procedural safeguards to prevent arbitrary action or abuses of power. RCW 82.36.450(1) is *devoid* of any procedural safeguards. The State's decision to enter into an agreement (or to agree upon particular terms) is not subject to *any* formal or public review.[46]

To the contrary, the negotiation of the compacts and their implementation, are both hidden from public and media scrutiny, as the audits are exempt from the PRA. RCW 82.36.450(4). The State has been directed only to obtain undefined "[c]ompliance reports" from tribes receiving MVF revenues. RCW 82.36.450(3)(c).

Moreover, there are no legislative procedural safeguards because there is no explicit legislative scrutiny of the MVF expenditures. There are no legislative appropriations of the MVF "refunds" to the tribes.

[46] Had it not been for this Court's intervention in 2012, the agreements would have been forever shielded from *judicial* review as well.

Lawmakers elected by Washington's citizens have no opportunity to assess or debate the validity of the expenditures in the ordinary fashion.

Finally, the compacts have *no mechanism for their termination. E.g.*, CP 754 ("This Agreement shall remain in effect unless the parties mutually agree in writing that it should be terminated or superseded by a new agreement between the parties..."). The compacts seemingly have an *unlimited* duration. Unlike laws with sunset provisions or agreements of a specific duration that then afford the public or the contracting parties an opportunity to revisit and reassess the propriety of a law or agreement, the compacts lack this basic procedural safeguard.[47]

In sum, there are no procedural safeguards in place to ensure that delegated authority is exercised appropriately. *Cf. Peninsula Neighborhood*, 142 Wn.2d at 337-38 (delegation of authority to enter into agreements included sufficient procedural safeguards because agency was required to consult experts and solicit public participation, and was subject to a "prescribed reasonable standard" and judicial review).

The State lacked the authority to enter into the compacts as a result of this constitutionally inadequate delegation. The State has agreed to

[47] This lack of a durational component raises a question as to whether the compacts were intended to be perpetual. It also raises the concern that the Legislature could not choose to end the authority for such compacts without impairing a contract under article I, § 23 of the Washington Constitution. Indeed, the Legislature tacitly

disburse tens of millions of dollars in MVF revenues without legitimate basis or valid purpose, has done nothing to ensure the tribes comply with the terms of the compacts or underlying statutes, and has refused to take any action to address ongoing noncompliance. The State has done this largely in secret. The Legislature's underlying delegation of authority to the State lacks sufficient guidelines or safeguards, and thus, does not pass constitutional muster.

F. CONCLUSION

The State lacked authority to enter into compacts that provided for the ongoing and increasing disbursements of MVF revenues to the tribes. These disbursements violate the 18th Amendment because they are not refunds authorized by law under the 18th Amendment and this Court's jurisprudence. They are also not legitimate expenditures for highway purposes under the 18th Amendment. They are made pursuant to an unconstitutional delegation of authority to the State.

The trial court erred in granting summary judgment to the State and in denying AUTO's motion for partial summary judgment. This Court should reverse the trial court's November 29, 2013 order and remand the case to the trial court for entry of an order granting AUTO's

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recognized this problem in enacting RCW 82.36.450(2) in 2007. If the Legislature cannot now address the compacts, a further safeguard for their abuse is removed.

motion for summary judgment and enjoining payments to the tribes from the MVF. Costs on appeal should be awarded to AUTO.

DATED this 12th day of May, 2014.

Respectfully submitted,

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APPENDIX

RCW 82.36.450:

(1) 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 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.

(2) The provisions of this section do not repeal existing state/tribal fuel tax agreements or consent decrees in existence on May 15, 2007. The state and the tribe may agree to substitute an agreement negotiated under this section for an existing agreement or consent decree, or to enter into an agreement using a methodology similar to the state/tribal fuel tax agreements in effect on May 15, 2007.

(3) If a new agreement is negotiated, the agreement must:

(a) Require that the tribe or the tribal retailer acquire all motor vehicle fuel only from persons or companies operating lawfully in accordance with this chapter as a motor vehicle fuel distributor, supplier, importer, or blender, or from a tribal distributor, supplier, importer, or blender lawfully doing business according to all applicable laws;

(b) Provide that the tribe will expend fuel tax proceeds or equivalent amounts on: Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway-related purposes;

(c) Include provisions for audits or other means of ensuring compliance to certify the number of gallons of motor vehicle fuel purchased by the tribe for resale at tribal retail stations, and the use of fuel tax proceeds or their equivalent for the purposes identified in (b) of this subsection. Compliance reports must be delivered to the director of the department of licensing.

(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.

(5) The governor may delegate the power to negotiate fuel tax agreements to the department of licensing.

(6) The department of licensing shall prepare and submit an annual report to the legislature on the status of existing agreements and any ongoing negotiations with tribes.

18th Amendment (article II, § 40):

All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:

(a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;

(b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;

(c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section;

Provided. That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway

purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

Wash. Const., art. VIII, § 4:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited with the U.S. Postal Service a true and accurate copy of: Brief of Appellant Auto in Supreme Court cause number 89734-4 to the following:

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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 this 12th day of May, 2014, at Tukwila, Washington.

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Good afternoon:

Attached please find the Brief of Appellant Auto in Supreme Court Cause No. 89734-4 for today's filing. Thank you.

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