NO. 92289-6

SUPREME COURT OF THE STATE OF WASHINGTON

COUGAR DEN INC.,

Respondent,

v.

DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). Cougar Den claims it is exempt from state tax law under a federal treaty securing to Yakama Indians a right to "travel upon all public highways" in common with citizens of the United States. This treaty provision, on its face and as construed by courts applying the required canons of interpretation, does not defeat state taxation of Cougar Den's importation of wholesale fuel.

Cougar Den argues that state taxation of wholesale fuel it imports in trucks "restricts" its travel on public highways. That argument misrepresents the actual effect of state law. The tax is on the first possession of wholesale fuel in Washington, and it applies without regard to whether the goods are moved by truck. Opening Br. 4. The tax and associated licenses affect persons who trade in fuel without regard to whether the person is traveling on a highway. Thus, the tax is not in any sense a fee for Cougar Den's travel on highways or a restriction on travel.

Recognizing that it actually seeks to immunize off-reservation *trade* activity from taxation, Cougar Den attempts to recast the travel right

as an off-reservation right to engage in trade. This argument, however, has no foundation in treaty language and is contradicted by case law. Cougar Den relies upon out-of-context dicta from *United States v. Smiskin*. But *Smiskin* does not support the claimed trading right because that case concerned only a pre-transport notice requirement—a condition on travel—and established nothing more.

When Cougar Den claims that it has a right to trade in goods free from state taxation because Yakama Indians historically traveled for trade, it fails to distinguish the Ninth Circuit's rejection of the analogous argument in *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452, 191 L. Ed. 2d 561 (2015). The holdings in *King Mountain* apply with equal force to this case. "[T]he Treaty is not an express federal law that exempts King Mountain from state economic regulations" and "there is no right to trade in the Yakama Treaty." *King Mountain*, 768 F.3d at 997, 998. This case, like *King Mountain*, is controlled by the repeated admonition of the United States Supreme Court that courts must not rewrite treaty language when it unambiguously does not support the tribal member's claim. *Id.* at 995.

In short, state taxation of wholesale fuel does not restrict travel on public highways, and the treaty cannot be rewritten to preempt state laws taxing wholesale fuel trade. The final agency order should be affirmed.

II. ARGUMENT

A. The Final Order Properly Concluded That Taxing Wholesale Fuel When It Enters Washington Is Not a Tax or Restriction on Cougar Den's Travel on Public Highways

1. *United States v. Smiskin* does not support Cougar Den's claim that the treaty allows it to avoid the state tax

Cougar Den does not deny that, under *Mescalero*, only an express federal law can defeat the state tax on wholesale fuel imports. Cougar Den claims that *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), interpreted the right to travel upon all public highways to preempt taxes on goods hauled on highways, such as the fuel tax. Response Br. 12, 21, 24-25. But *Smiskin* does not say or hold that, and the federal courts have refused to read *Smiskin* that way.

In *Smiskin*, the Ninth Circuit held that a pre-transport notice requirement for moving cigarettes was a condition on travel that was inconsistent with the treaty. 487 F.3d at 1264-66. The court relied on its prior ruling that the treaty preempted state truck license fees in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"). To explain why it would not distinguish between monetary fee conditions on travel and the notice condition, the court stated in dictum that the federal cigarette law would "be an impermissible restriction on the Yakamas' right to travel if the Government could rely on it to enforce against tribal members a state *fee*

on the transport of unstamped cigarettes." 487 F.3d at 1267. Cougar Den argues that this dictum means the treaty bars taxes on cigarettes. Response Br. 25. But this misreads *Smiskin* and the hypothetical point. The Ninth Circuit simply described a "fee" for use of highways as in *Cree II*. This point does not suggest the treaty allowed Smiskin to avoid taxes on goods; it explained that requiring a notification before using a highway was like requiring a fee before using a highway.

The dictum in *Smiskin* is immaterial here. Washington imposes a tax on wholesale fuel when it enters the state or is removed from a bulk facility in the state, and the person taxed is the fuel owner. RCW 82.36.010(16), 82.38.020(26), 82.36.020(2), and 82.38.030(7); Final Order CL 2, 3, 13 (CP 1005, 1007). The tax is "not a charge for Cougar Den's use of public highways. . . . Cougar Den is being taxed for importing fuel." Final Order CL 20 (CP 1008). Cougar Den cannot transform the tax on wholesale fuel into a fee for use of highways or even a fee for transporting goods over highways. Washington simply does not impose any such fee, though some states do.[1] Moreover, the substantive difference between the tax on wholesale fuel and a charge for use of

[1] For example, Oregon imposes an $8-per-load fee for the transport of petroleum products, which funds a hazardous substance emergency response program. OR. ADMIN. R. § 837-090-1145 (2013). The petroleum load fee is separate from the fuel taxes imposed under OR. REV. STAT., ch. 319 (2013).

highways is confirmed by the fact that KAG West, the carrier that transported fuel for Cougar Den, CP 1004, is not liable for taxes on Cougar Den's fuel and does not pay a fee for using the highways.

Taking another phrase from *Smiskin* out of context, Cougar Den claims it has a "treaty right to transport goods to market without restriction," which preempts state taxes on any goods it has transported, and preempts the associated license requirement. Response Br. 1, 12, 21, 24, 35. But *Smiskin* decided nothing about taxes on goods and it does not purport to expand upon the treaty right declared in *Cree II*. In context, the *Smiskin* court said only that the pre-transport notice requirement at issue in that case was indistinguishable from a highway use fee, and that "[a]pplying either type of requirement to the Yakamas imposes a *condition on travel* that violates their treaty right to transport goods to market without restriction." 487 F.3d at 1266 (emphasis added). Thus, the "condition on travel" reflects only the treaty right found in *Cree II*. But, as the Ninth Circuit confirmed in *King Mountain, Smiskin* did not by this passage declare a right to engage in off-reservation trade.

2. Taxing wholesale fuel importation and possession is not equivalent to imposing a fee for using public highways

Putting aside *Smiskin*, Cougar Den boldly argues that a tax on goods hauled on highways is the same as taxing travel on the highway.

Response Br. 25. Cougar Den dramatically argues that state power to tax wholesale fuel could destroy the right to travel upon public highways. That argument should be rejected. This Court can distinguish between a tax on the importation of fuel, which applies without regard to use of highways, and state laws that impose a fee for use of highways. As the Department showed, Opening Br. 22-24, the federal courts in the *Cree* litigation made the same distinction and specifically limited the judgment to the rule that a fee could not be imposed for using public highways. *Id.* at 23, 24; *see Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1260 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998).

3. Cougar Den does not distinguish the opinions that reject its argument claiming a treaty right to engage in trade that defeats state taxation

The Opening Brief cited several rulings that rejected arguments that the Yakama Treaty preempts state cigarette taxes, which are taxes on goods often hauled on highways. Opening Br. 25-28. Cougar Den ignores this precedent almost entirely.

For example, the Yakama Nation sued the State and made the same argument Cougar Den makes here that Washington cigarette taxes were invalid under *Smiskin*. The federal court disagreed and held "there is no basis in the law or the record to extend *Smiskin*'s holding to invalidate the

state's [cigarette] taxation scheme *in toto*." *Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1267-68 (E.D. Wash. 2010), *aff'd*, 658 F.3d 1078 (9th Cir. 2011). *See also Washington v. Confederated Tribes & Bands of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980) (Yakama Treaty does not preempt state cigarette taxes); *United States v. Flander*, 547 F.3d 1036 (9th Cir. 2008) (Yakama member could be prosecuted for conspiracy to traffic in contraband untaxed cigarettes); *Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175 (9th Cir. 2002) (government properly seized contraband untaxed cigarettes from Yakama business).

Thus, except for the superior court in this case, every time a Yakama member has argued that the right to travel upon public highways displaces a tax or fee on a product, the courts have *upheld* the tax or fee. *King Mountain*, 768 F.3d at 998 (state cigarette escrow payments); *Ramsey v. United States*, 302 F.3d 1074, 1080 (9th Cir. 2002) (federal diesel fuel tax); *United States v. King Mountain Tobacco Co., Inc.*, 2015 WL 4523642 (E.D. Wash. 2015) (federal tobacco assessments); *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014) (federal cigarette tax), *appeal docketed*, No. 14-35165 (9th Cir. March 5, 2014); *Yakama Nation v. Gregoire*, 680 F. Supp. 2d at 1268 (state cigarette tax).

In particular, Cougar Den cannot distinguish the Ninth Circuit's ruling in *King Mountain v McKenna*. First, it argues that case involved money put into an escrow account, which the state might eventually refund. Response Br. 28. But that makes no difference. Fuel taxes, too, can be refunded. *See Auto. United Trades Org. v. State*, 183 Wn.2d 842, 854-59, 357 P.3d 615 (2015) (upholding fuel tax refunds to tribal governments under state-tribal fuel tax agreements). The state exercises the same sovereign power in requiring cigarette escrow payments and in taxing wholesale fuel. Future use of the escrowed money does not distinguish *King Mountain* from taxes on possession and importation of fuel.

Next, Cougar Den claims the escrow fund had "nothing to do" with the transportation of goods because the escrow charge was based on the number of cigarettes sold. Response Br. 28. This point cuts sharply against Cougar Den, because the fuel tax also has "nothing to do" with transportation of goods. That tax is based on the volume of wholesale fuel possessed in Washington and applies because Cougar Den owns that fuel. Final Order CL 2, 3, 13 (CP 1005, 1007). In fact, the cigarette escrow payments have, at most, the same minimal relationship with transportation as the wholesale fuel taxes, because both laws apply only when cigarettes or fuel are possessed in Washington outside the reservation. Either way,

Cougar Den's second alleged distinction confirms that *King Mountain* is on-point.

Finally, Cougar Den argues that the escrow requirement applied only to cigarettes that were ultimately sold to non-Yakamas, while Cougar Den sells wholesale fuel to Yakama Indian-owned gas stations. Response Br. 29. Again, this makes no difference; it merely reflects a detail in the cigarette tax scheme. The escrow payments at issue in *King Mountain* were required only for cigarettes that are subject to the state cigarette tax. Some on-reservation purchases by Indians for personal use are tax-exempt under RCW 82.24.020 and thus exempt from the escrow requirement. *King Mountain Tobacco Co., Inc. v. McKenna*, 2013 WL 1403342, *7, *8 (E.D. Wash. 2013), *aff'd*, 768 F.3d 989 (9th Cir. 2014). The fuel tax laws lack a parallel exemption, but tribal governments can share in fuel tax revenues under state-tribal agreements. *See Auto. United Trades Org.*, 183 Wn.2d at 844.

This is a case where precedent matters. *King Mountain* rejected a treaty right to engage in untaxed trade. Its reasoning fully applies to this case, and Cougar Den offers no reason to avoid it. A state tax is not preempted by the treaty right "to travel upon all public highways" if the tax is not a charge, fee, or condition for use of highways. The Final Order correctly recognized that Washington fuel taxes are not a charge, fee, or

condition for Cougar Den's use of public highways. Final Order CL 20 (CP 1008). This Court should follow the above federal cases, reject Cougar Den's misreading of *Smiskin*, and hold that the treaty is not an express federal law allowing Cougar Den to avoid taxes on its wholesale fuel imports.[2]

B. The Fuel Importer License Requirement Is Not a Restriction on a Yakama Indian's Right to Travel Upon All Public Highways

Cougar Den also argues that the license it failed to obtain is like the pre-transport notice requirement in *Smiskin* because it "requires that Cougar Den obtain a license prior to hauling goods into the state." Response Br. 22. But Washington fuel license laws *do not* regulate the hauling of goods or use of highways. The law requires persons who "engage in business" as a "fuel importer" to be licensed and does not require fuel transporters to be licensed. RCW 82.36.080(1)(d) and 82.38.090(1)(d); Final Order CL 5 (CP 1006). The license is not a precondition for using highways; Cougar Den needs a fuel importer license regardless of the means by which its wholesale fuel enters the state. *See* Final Order CL 3 (CP 1005).

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[2] Washington is not the only state where a Yakama member is attempting to avoid state taxes with arguments like Cougar Den's. In a case currently pending in New York, the King Mountain Tobacco Company is arguing that New York taxes on cigarettes that King Mountain ships into that state violate the Yakama Treaty right to travel upon all public highways. *New York v. Mountain Tobacco Co.*, No. 2:12-cv-06276 (E.D.N.Y.).

Moreover, even Cougar Den's carrier, KAG West, does not need a fuel importer license to haul fuel on public highways. Fuel haulers are simply required to have invoices in their possession during transport, and there is no issue in this case about the carrier complying with the invoice-in-possession requirements in RCW 82.36.210 and 82.38.140(4). Again, this shows that the license is in no sense a precondition for using highways; the license relates to Cougar Den's choice to engage in a particular type of commerce in Washington—the wholesale fuel business.[3]

Nor does the penalty for failure to obtain a license make the license a condition or fee for using the highways. The penalty is a straightforward mechanism to enforce important state tax laws. A person in the wholesale fuel business must have a license and pay the taxes, and the penalty is an additional deterrent against importers who choose to evade state tax laws for their personal gain.

C. The Final Order of the Department of Licensing Properly Applied the Rules of Treaty Construction

According to Cougar Den, the Director of Licensing erred in not considering Yakama history, and a court interpreting the Yakama Treaty "must first begin by examining the historical context of the Treaty." Response Br. 12, 14. Cougar Den's first assertion is factually wrong and

[3] Some states do require fuel transporters to be licensed. *See* NEV. REV. STAT. §§ 365.092 (2014), 365.270 (2013); OKLA. STAT. § 68-500.33(2014).

its second assertion misstates the law. The Director's Final Order correctly applied federal court precedent when it addressed Cougar Den's arguments regarding the treaty right to travel upon all public highways.

1. The Final Order examined the cases Cougar Den cites for history, but recognized that those cases and the history described therein provided no basis to construe the right to travel as a preemption of taxation of off-reservation commerce in wholesale fuel

Cougar Den is mistaken when it argues that the Director of Licensing "did not consider the history of the Yakama Nation" or that she ignored historical findings in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997). Response Br. 12, 14, 18-19. The record shows that the Director did consider those findings. The Final Order cited and even quoted the historical findings in *Yakama Indian Nation v. Flores*. Final Order CL 17 (CP 1008) (quoting Finding 19, 955 F. Supp. at 1262). But the Director, like the federal court decisions examined above, *disagreed* with Cougar Den's argument about the relevance of those

findings. *See* Final Order at 2 (CP 1001). The supposed error of overlooking history that Cougar Den describes does not exist.[4]

2. The Final Order is consistent with other cases that examined the historical background for the treaty, because nothing in the treaty language can be read as an express federal law that preempts state taxation of the wholesale fuel trade

Nothing in prior cases supports the broad right to engage in tax-free commerce that Cougar Den claims. For the most part, Cougar Den relies on its misreading of *Smiskin* and argues that because *Smiskin* cited some historical findings, those findings must support Cougar Den, too. Response Br. 17.

Moreover, the only specific historical point Cougar Den cites is the *Smiskin* trial court's reference to findings from *Cree* "indicat[ing] that traveling and transporting goods for the purposes of trade were vital to the Yakama Tribes' survival in 1855." Response Br. 17, quoting *United States v. Smiskin,* 2005 WL 1288001 at *3 (E.D. Wash. 2005). The fact that Yakama Indians traveled at treaty time for trade or other purposes helps explain why the treaty-makers included language assuring the Yakamas of

[4] Cougar Den also suggests the superior court or administrative law judge properly examined "history." *E.g.*, Response Br. 18. But no historical evidence was offered. Rather, Cougar Den relied on opinions in *Cree*, where a court took evidence to address a different claim—the claim that the right to travel barred a state fee for highway use. Cougar Den's invocation of "history" is therefore misleading. It argued about how the Director should use prior judicial decisions—an argument about "the interpretation of prior judicial rulings [which] presents a question of law." *See* Opening Br. 18 (citing cases). Thus, the issue in this case is limited to whether precedent supported Cougar Den's defense, because it is the only argument preserved below.

a right, in common with the citizens of the United States, to travel upon all public highways. *See Yakama Indian Nation v. Flores*, 955 F. Supp. at 1247-48. But it provides no basis for inferring additional treaty rights about trading and commerce off-reservation that would, somehow, be free of the future laws of the several states.

That is because courts begin "with the language of the treaty and the context in which the written words are used." *State v. Buchanan*, 138 Wn.2d 186, 202, 978 P.2d 1070 (1999). Treaty interpretation is a question of law. *Robinson v. Jewell*, 790 F.3d 910, 917 n.6 (9th Cir. 2015); *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1997). Certainly, history can be a critical tool in determining the parties' intent. *E.g. Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S. Ct. 672, 87 L. Ed. 877 (1943); *Ramsey*, 302 F.3d at 1079. But unambiguous treaty language must be construed in accordance with plain language. *Choctaw*, 318 U.S. at 432; *Yakama Indian Nation v. Flores*, 955 F. Supp. at 1262.

Thus, Cougar Den is wrong when it claims that history comes first, Response Br. 14, and when it suggest that history is more important than treaty language. Treaty language comes first. Courts must construe it "in accordance with the tenor of the treaty" but "stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for . . . is for the Congress." *Nw. Bands of Shoshone Indians v. United States*,

324 U.S. 335, 353, 65 S. Ct. 690, 89 L. Ed. 985 (1945). Cougar Den's arguments violate this admonition.

The language of the treaty provides for a "right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. 951, 953 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859). This language addresses only "travel upon all public highways," but Cougar Den claims it is a "right to transport goods to market without restriction" that preempts state laws taxing or regulating any goods that it has transported. Cougar Den justifies this rewrite of the treaty language based on the fact that Yakama Indians historically engaged in trade. Response Br. 1, 12, 21, 35; *see id.* 17, 19. This Court should not take the unremarkable historic fact that Yakamas (like other Native groups) engaged in trade and use it to turn plain language ensuring equal rights to travel on highways into a right to engage in off-reservation trade immune from the future laws of the nation. The language addresses travel on public highways, not off-reservation trade and commerce, and for that reason the language cannot support the right claimed by Cougar Den. *See King Mountain*, 768 F.3d at 995, 998.

3. *Cree I* did not create a "rule" that requires a historic factual inquiry for claims based on the public highways right in the Yakama Treaty

Cougar Den also claims that Ninth Circuit law requires a "factual inquiry" into history if a Yakama member asserts a treaty-based exemption from a law that regulates trade in goods that happen to be transported on highways. Response Br. 16-17. Cougar Den relies primarily on *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996) ("*Cree I*"). In that case, the Ninth Circuit reviewed a summary judgment in which the trial court had borrowed findings and conclusions from cases involving the "right of taking fish . . . in common with citizens," and reasoned that the travel right was intertwined with the fishing right because they are in the same article of the treaty. *Cree v. Waterbury*, 873 F. Supp. 404, 417-26 (E.D. Wash. 1994). The Ninth Circuit reversed because the two treaty clauses are distinct, and cases construing the fishing right did not define what it meant to assure 1855 Yakama Indians that they could use public highways in common with United States citizens. *Cree I*, 78 F.3d at 1403-04. The district court had erred in equating the two, so the Ninth Circuit remanded for further proceedings appropriate to the claim that the treaty barred imposition of truck fees for highway use. *Id.* at 1404-05.

Cougar Den, however, reads *Cree I* as a rule that requires an inquiry into history in every case involving the Yakama Treaty right "to

travel upon all public highways." Response Br. 16-19. But the holding in *Cree I* applies only to that case, which involved fees for trucks using public highways and a treaty clause not previously examined. *See Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004) (language in judicial opinions must be read in context); *Org. to Preserve Agric. Lands v. Adams Cty.*, 128 Wn.2d 869, 877, 913 P.2d 793 (1996) (same). The context for remand was an erroneous trial court ruling that uncritically relied on fishing rights decisions. *Cree I*, 78 F.3d at 1404.

Furthermore, the Ninth Circuit rejected the argument that *Cree I* compelled a historical inquiry in *King Mountain*. King Mountain argued the Yakama people could have understood the highway right to be a right to trade and that *Cree I* mandated reliance on that possible understanding. The Ninth Circuit, however, found no textual basis for the alleged right to trade in the treaty, and held that the trial court properly ruled "without making findings about the historic meaning of the Treaty to the Yakama people, because the Treaty's meaning to the Yakama people cannot overcome the plain and unambiguous text of the Treaty." 768 F.3d at 998.

Cougar Den tries to avoid this holding by arguing that travel was not involved in *King Mountain*, Response Br. 16, 28, but as discussed above that distinction has no merit. Supra, at 8-9. Moreover, the court described extensive off-reservation travel in bringing King Mountain

cigarettes to market. 768 F.3d at 994. Just as Cougar Den ships fuel on trucks, King Mountain shipped tobacco on trucks. *King Mountain*, 2013 WL 1403342 at *2.

Finally, Cougar Den concedes that the state law in *King Mountain* regulated "trade" in cigarettes, not travel on highways. Response Br. 16; *see* RCW 70.157.020. That concession confirms how this case is not significantly different from *King Mountain*. Just as the laws there regulated trade in cigarettes, the laws here tax trade in fuel, not travel on highways. State law requires a person to get a license before "engag[ing] in business" as a fuel importer. RCW 82.36.080(1) and 82.38.090(1); Final Order CL 5 (CP 1006). It requires wholesale businesses to pay a tax on fuel acquired within the state or imported into it. RCW 82.36.020(2) and 82.38.030(7); Final Order CL 2 (CP 1005). The person who owns the fuel when it enters the state, not the person who transports it, is the "importer" liable for the tax. *See* RCW 82.36.010(16) and 82.38.020(26); Final Order CL 3, 13 (CP 1005, 1007).

This Court should follow the holding in *King Mountain* that the plain language of the Yakama Treaty secures only a "right to travel upon all public highways" and unambiguously precludes a claim of a right to be exempt from laws that tax or regulate trade in goods. 768 F.3d at 998. *King Mountain* confirms that the Director's reading of the prior cases was

correct and that nothing in those cases can get Cougar Den to the result it seeks. The Final Order, therefore, did not err in its consideration of federal court precedent. Final Order CL 17-20 (CP 1008). No finding or ruling in any prior case compels this Court to transform the right to travel into a right to engage in untaxed commerce in wholesale fuel.

D. Cougar Den's Argument That It Imports Fuel Under a Tribal License Is Immaterial for Showing That the Treaty Preempts State Taxation

Cougar Den claims the Yakama Indian Nation authorized it to exercise tribal travel rights by hiring KAG West, a private non-Indian trucking company, to haul its fuel. Response Br. 26-27. Cougar Den appears to suggest that a tribal license preempts state law. But courts have universally recognized that tribal governments have no power to preempt the application of state laws outside an Indian reservation; preemption of state law occurs solely by virtue of federal intent and the supremacy clause. *Colville*, 447 U.S. at 158; *Cree v. Waterbury*, 873 F. Supp. at 416; *Red Devil Fireworks v. Siddle*, 32 Wn. App. 521, 525, 648 P.2d 468 (1982) (tribal license "was no substitute" for state license). The Final Oder

properly recognized that any tribal licenses Cougar Den obtains cannot displace state law. Final Order CL 21 (CP 1009).[5]

Cougar Den's arguments on this subject are also misleading. Cougar Den suggests it supplies the reservation with fuel, and claims it sells to Yakama members. That rhetoric is immaterial and Cougar Den does not show why it would be relevant when Cougar Den's fuel entered the state outside the reservation. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005). The record is undisputed that Cougar Den's wholesale fuel is almost all sold by retail gas stations and thus consumed by the general public traveling on the very state highways funded by state fuel taxes. *See* VRP 7; Final Order FF 21, 22 (CP 1004-05). Thus, Cougar Den's passing statements that it sold to a station owned by a tribal member has no relevance. This case is not about whether the Yakama Nation can regulate Cougar Den, or about whether gas stations get supplied with fuel. This case is about whether Cougar Den may profit through unlawful avoidance of the state's wholesale fuel taxes.

[5] Cougar Den's argument about KAG West appears to seek a gratuitous ruling that a treaty right can, as a matter of law, be exercised by KAG West. The Department order on review did not address that issue and it was not briefed below. Moreover, neither the Yakama Nation nor KAG West is a party in this case, so that this appeal is an inappropriate case to rule on how non-Indian companies may or may not participate in the use of treaty rights.

E. The Final Order Did Not Violate the Appearance of Fairness Doctrine

Cougar Den offers no reason why this Court should even reach the appearance of fairness issue, given that its objection to the Final Order involves a question of law that can be resolved by this Court. Cougar Den, however, also fails to show that it preserved the issue and fails to rebut the Department's showing that there was no violation.[6]

1. Under RCW 34.05.570(3)(g), the superior court should not have addressed the appearance of fairness claim

Cougar Den does not refute that the law prohibits a court on judicial review from reaching an issue not raised at the hearing absent extraordinary circumstances to excuse the failure. Opening Br. 42-43. Cougar Den, however, claims it "asked Ms. Kohler to recuse herself from ruling on the Final Order . . . but she refused to do so." Response Br. 34-35 (citing CP 1040). This claim misreads the declaration cited at CP 1040. The declaration shows that Cougar Den *did not ask* the Director to recuse in this case—the proceeding about Assessment 756M. It says that Cougar Den raised the issue only in a subsequent agency proceeding, after this case went to superior court. CP 1, 1040.

[6] Cougar Den listed three issues for appeal: two questions of law regarding the treaty plus the appearance of fairness claim. Response Br. 11-12. Cougar Den neglected to assign error to the Final Order as required by RAP 10.3(h) for a "respondent" who challenges a final agency order. But Cougar Den's issue statements make it clear that Cougar Den challenges Conclusions of Law 18-20 in the Final Order. Cougar Den has not challenged the Findings of Fact in the Final Order, and they are verities on appeal. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

Alternatively, Cougar Den excuses its untimeliness by arguing that it raised the issue as soon as it was aware of some details regarding Director Kohler's participation in mediation with the Yakama Nation. Response Br. 34. That excuse fails to overcome the record showing that Director Kohler's involvement in that mediation was "reasonably discoverable . . . at the appropriate time for making" a disqualification motion. RCW 34.05.570(3)(g). In particular, Cougar Den does not dispute that: (1) it knew from the outset that Director Kohler would make the final decision, CP 76; (2) it knew about the 2013 litigation between the State and the Yakama Nation, *see* CP 1054-55; and (3) the Agency Record showed active involvement by the Director in that 2013 litigation. CP 607-612. This irrefutably shows that the alleged basis for disqualification was reasonably discoverable during the agency proceeding but ignored. As such, it cannot be raised on judicial review. RCW 34.05.570(3)(g).

2. The Director's familiarity with a legal issue did not violate the appearance of fairness doctrine

To argue that the Director violated the appearance of fairness doctrine, Cougar Den mischaracterizes the record. It claims the Final Order was in the same "case" or "matter" as the federal court case in which the Director had been a party. Response Br. 10, 29, 31. That is incorrect. The Director of Licensing was a party in *Washington v. Tribal*

Court for the Confederated Tribes and Bands of the Yakama Nation, a federal court lawsuit involving the Yakama Nation and state fuel taxes, which was settled and dismissed in November 2013. CP 614-15, 617. The Director participated in mediation and settlement; but Cougar Den was not a party and its tax liability was not at issue. *See* CP 614.

This case, in contrast, involves Assessment 756M issued to Cougar Den in December 2013. This case arose after the federal lawsuit was dismissed. CP 66-68; Final Order FF 15 (CP 1004). This case involves an adjudicative proceeding under the Washington Administrative Procedure Act. CP 85; *see* RCW 34.05.413. Thus, the Final Order now before this Court involves an entirely different "case" or "matter" from the federal court lawsuit between the State and the Yakama Nation.

Cougar Den also fails to apply the standards for disqualification of decision-makers under RCW 34.05.425(3) or this Court's formulation for appearance of fairness claims in *Ritter v. Bd. of Comm'rs of Adams Cty. Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 637 P.2d 940 (1981). Instead, Cougar Den claims that it looks unfair for a state official to make a decision on a legal issue when the official took a position in prior mediation, with *other* parties, in a case that was settled, not litigated. Response Br. 29-31. That is not the standard for applying the appearance of fairness doctrine. To assert a violation of the doctrine, a party must

present evidence of actual or potential bias. *Org. to Preserve Agric. Lands*, 128 Wn.2d at 890. A decision-maker's knowledge of the law or prior exposure to legal issues does not justify disqualification under the appearance of fairness doctrine. *Id.*; *see* Opening Br. 38-41.

The sole case Cougar Den cites to claim the Director's role appears unfair is *Hayden v. City of Port Townsend*, 28 Wn. App. 192, 622 P.2d 1291 (1981). That case is readily distinguishable. In *Hayden*, the chairman of a planning commission rezoned a parcel but also worked for a bank that had the option to buy the parcel. The potential for self-dealing and prejudgment of facts was clear. In contrast, Cougar Den's case involves a legal question of whether state law is preempted. The Director has no pecuniary interest in the outcome. And, prior statements about legal issues are not evidence of bias and prior positions on disputed issues of law do not disqualify a decision maker. *See* Opening Br. 38-41. *Hayden*, therefore, does not hold or even imply that the Director's prior exposure to a legal issue would disqualify her from entering the Final Order.

The Court should reject Cougar Den's theory that the Director violated the appearance of fairness doctrine or was otherwise disqualified. Cougar Den showed no evidence of actual or potential bias by the Director and the superior court's ruling does not show any. CP 1078. As such, there

is no basis for finding an unlawful procedure or a biased decision-maker under RCW 34.05.570(3)(c) or (g).

III. CONCLUSION

The Court should reject Cougar Den's claim that the Yakama Treaty entitles it to use highways as a zone to avoid laws taxing wholesale fuel. The Court should reverse the judgment of the superior court and affirm the Final Order of the Department of Licensing.

RESPECTFULLY SUBMITTED this 9th day of March, 2016.

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DECLARATION OF SERVICE

I, Bibi Shairulla, declare that I caused a copy of this document, **Appellant's Reply Brief**, to be served on all parties or their counsel of record by agreement of the parties via Electronic mail and US Mail Postage Prepaid on the date below and as follows to:

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

DATED this 9th day of March 2016.

Bibi Shairulla
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Dear Clerk and Counsel,

Attached please find Appellant's Reply Brief with Declaration of Service for filing with the Court and service on counsel in the above-referenced case.

Counsel, a hard copy will also follow via U.S. Mail.

Thank you,

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