Supreme Court No. 92289-6

SUPREME COURT OF THE STATE OF WASHINGTON

COUGAR DEN INC.,

Respondent,

v.

DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Treaty of 1855 between the Yakama Nation and the United States provides the Yakamas with the inviolable "right to transport goods to market without restriction." *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007). Cougar Den is a corporation organized under the laws of the Yakama Nation that hauls fuel from Oregon to the Yakama Reservation where it sells the fuel exclusively to enrolled members of the Yakama Nation. In keeping with its rights under the Treaty, Cougar Den does not pay the Department of Licensing's fuel import tax. In violation of the Treaty, the Department of Licensing issued Assessment No. 756M against Cougar Den on December 9, 2013, demanding more than $3.6 million in unpaid taxes, penalties, and licensing fees for hauling fuel from Oregon to the Yakama Reservation. Assessment No. 756M (the "Assessment") is the subject of this appeal. The Department has since assessed additional taxes, penalties, and fees against Cougar Den, bringing the total claim to more than $16,000,000.

Cougar Den appealed the Assessment to the Department of Licensing's Administrative Law Judge ("ALJ") who threw out the entire Assessment as an impermissible restriction under the 1855 Treaty. The Director of the Department of Licensing, Pat Kohler, reversed the ALJ and ruled in the Department's favor.

The Yakima County Superior Court, sitting in an appellate capacity, reversed the Director and again threw out the entire Assessment. The Department of Licensing has appealed the Superior Court's decision, seeking review of the Director's Final Order under the Administrative Procedure Act (the "APA"), Chapter 34.05 RCW. This Court need only look to the 1855 Treaty between sovereign nations to affirm the Superior Court's determination that the Director of the Department of Licensing's Final Order constitutes an erroneous interpretation or application of the law under RCW 34.05.570(3)(d).

II. STATEMENT OF THE CASE

A. The Yakama Nation & The Treaty Of 1855

On June 9, 1855, the United States and the Yakama Nation entered into a solemn treaty that defined the rights of the Yakamas and acted as a "founding document" to the Yakama Nation. *See* 1855 Treaty, Art. III, 12 Stat. 951 (1855); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997). The 1855 Treaty is a sacred document to the Yakama Nation: "The Treaty embodies spiritual as well as legal meaning for the tribe; it enumerates basic rights secured to the Yakamas that encompass their entire way of life." *Id.* at 1238.

Of particular importance to the Yakamas was the right to travel and trade (the "Right to Travel"), codified in Article III of the Treaty:

> *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also *the right, in common with citizens of the United States, to travel upon all public highways.*

1855 Treaty, Art. III, 12 Stat. at 952-53 (second emphasis added).[1] This right may be exercised by "individual members" of the Yakama Nation. *Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998) (*Cree II*).

For the Yakamas, "[t]ravel was particularly important for the purpose of trade." *Yakama Indian Nation*, 955 F. Supp. at 1238. At the time of the 1855 Treaty, the Yakamas' "proclivity for trade was equal to that of the whites, as the Yakamas constantly moved goods back and forth between the Coast and Interior and obtained access to goods from the Plains." *Id.* Sensitive to these trading practices, government agents promised the Yakamas that they would "have the same liberties outside the reservation . . . *to go on the roads to market.*" *Id.* at 1244 (emphasis added by Judge McDonald in *Yakama Indian Nation*). Relying on the promises of the government agents and in exchange for most of their traditional homeland, "the Yakamas agreed to the Treaty provisions in good faith on June 9, 1855." *Id.* at 1245.

[1] Clerk's Papers ("CP") 120-21 (1855 Treaty).

B. Kip Ramsey And Cougar Den, Inc.

Cougar Den, Inc. is a private business organized under the laws of the Yakama Nation.[2] Kip Ramsey, Cougar Den's owner and president, is an enrolled member of the Yakama Nation.[3] Cougar Den was established in 1992 as a way to supply fuel to members of the Yakama Nation.[4] Accordingly, Cougar Den's sales are to enrolled members of the Yakama Nation, a fact that Cougar Den verifies by placing the enrollment number of the buyer on its sales invoices.[5]

On September 29, 1993, the Yakama Nation appointed Cougar Den, Inc. to serve as an agent of the Yakama Nation "for the purpose of collecting and transmitting Tribal taxes to the Yakima Indian Nation on a monthly basis and for the purpose of obtaining petroleum products for sale and delivery to the Yakima Indian Nation and its members."[6]

In 2012 and again in 2013, the Yakama Nation issued a license to Cougar Den to import fuel, and it "granted the privilege of taking delivery of petroleum in bulk without assessment of state fuel taxes [p]rovided that compliance is maintained with the laws of the Yakama Nation."[7] In

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[2] CP 113 (Stipulated Fact No. 7).
[3] CP 113 (Stipulated Fact Nos. 5 & 6).
[4] CP 470 (Ramsey Decl. ¶ 2).
[5] CP 471, 474-79 (Ramsey Decl. ¶ 6 & Attachment A).
[6] CP 470 (Stipulated Fact No. 8); CP 128 (Stipulated Exhibit No. 3). In 1994, the Yakima Indian Nation formally adopted the practice of spelling its name as "Yakama." *State v. Buchanan*, 138 Wn.2d 186, 203 n.7, 978 P.2d 1070 (1999).
[7] CP 130-31 (Stipulated Exhibit No. 4; Import Permits) (emphasis added).

compliance with its appointment as an agent of the Yakama Nation and the import licenses, Cougar Den assesses federal and tribal taxes on its sales, but it does not assess state taxes.[8]

Cougar Den began hauling fuel from Oregon to the Yakama Reservation on March 20, 2013.[9] In hauling the fuel, it has used its own trucks and those of KAG West, an agent of Cougar Den that hauls fuel at Cougar Den's direction.[10] Between March and October of 2013, Cougar Den's trucks crossed from Oregon at Biggs Junction and then traveled north to the Yakama Reservation on U.S. 97. At all times, the trucks remained in Oregon, the Ceded Area of the Yakama Nation, or the Yakama Reservation.[11] Each month, Cougar Den filed reports with the Oregon Department of Transportation showing the number of gallons exported.[12]

C. The Purported Fuel Tax Agreement

The Yakama Nation and the Department of Licensing have long disagreed about state fuel taxation.[13] In the fall of 2013, the Yakama Nation Tribal Council and the Department engaged in a number of

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[8] CP 474-79 (Attachment A of Ramsey Decl.).
[9] CP 470-71 (Ramsey Decl. ¶ 3).
[10] CP 471 (Ramsey Decl. ¶ 5).
[11] CP 114 (Stipulated Fact No. 13); CP 470-71 (Ramsey Decl. ¶ 3). The Ceded Area, defined in Article I of the 1855 Treaty, is made up of the lands that the Yakama Nation ceded to the United States when it signed the Treaty. CP 112 (Stipulated Fact No. 2).
[12] CP 113-14 (Stipulated Fact No. 12).
[13] CP 574 (General Council Resolution GC-03-2014).

mediation sessions to address the scope of the Yakamas' Treaty rights.[14] At those sessions, Pat Kohler, Director of the Department of Licensing, represented the Department and advocated for a narrow reading of the Treaty rights.[15] The result of those sessions was a "Fuel Tax Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington" (hereinafter "the purported Fuel Tax Agreement").[16] On October 2, 2013, the Yakama Nation's Tribal Council passed Resolution T-002-14, resolving to enter into the purported Fuel Tax Agreement.[17]

Under Yakama Nation law, the Tribal Council is responsible for the day-to-day functions of the Yakama Nation, but all "matters of great importance" require approval of the Yakama Nation General Council, a larger body made up of all adult members of the Yakama Nation.[18] Acting on this prerogative, the General Council vetoed Resolution T-002-14 on November 7, 2013.[19] It also sent notice of its veto to the Attorney General of Washington on November 19, 2013.[20]

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[14] CP 23 (Declaration of Harry Smiskin ¶¶ 2, 4-7).
[15] CP 23 (Declaration of Harry Smiskin ¶¶ 2, 4-7).
[16] CP 225-40 (Stipulated Ex. No. 8; purported Fuel Tax Agreement).
[17] CP 574 (General Council Resolution GC-03-2014).
[18] CP 574 (explaining prerogative of General Council over "Matters of Great Importance"); CP 577-78 (General Council Resolutions establishing requirements for "Matters of Great Importance"); CP 471 (Ramsey Decl. ¶ 8).
[19] CP 574 (General Council Resolution GC-03-2014).
[20] CP 575.

Despite the veto, Tribal Council Chairman Harry Smiskin signed the purported Fuel Tax Agreement on November 12, 2013, and Director Kohler signed on behalf of the Department of Licensing on November 18, 2013.[21] Absent the veto by the General Council, the purported Fuel Tax Agreement was to take effect on November 22, 2013.[22] Thus, even ignoring the veto, the purported Fuel Tax Agreement would not apply to the tax period at issue here, March through October, 2013.[23]

D. Assessment No. 756M

Not long after the Attorney General received notice of the General Council's veto, the Department of Licensing sent Assessment No. 756M to Kip Ramsey as the owner of Cougar Den.[24] The Assessment was the first notice Cougar Den had of any taxes, penalties, or interest owing for Cougar Den's fuel business.[25] The Assessment alleged that Mr. Ramsey and Cougar Den owed $3,639,954.61, including $1,292,913.02 in penalties, for not having a Washington import license during the months of March through October 2013.[26] In asserting that Cougar Den must have an import license, the Department of Licensing relied on the

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[21] CP 224, 240 (Stipulated Ex. No. 8).
[22] CP 116 (Stipulation providing for "effective date of November 22, 2013").
[23] CP 215-223 (Stipulated Exhibit No. 7; Assessment No. 756M).
[24] *Id.*
[25] CP 471 (Ramsey Decl. ¶ 7).
[26] CP 215-16 (Stipulated Exhibit No. 7; Assessment No. 756M).

purported Fuel Tax Agreement, which could not possibly have been in effect during the relevant tax period:

> Per Washington State law and the 2013 "Fuel Tax Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington," Paragraph 4.3b, you must be properly licensed as an importer to continue importing fuel.[27]

Since this appeal, the Department of Licensing has sent Cougar Den new assessments approximately every two months.[28]

E. Procedural Background

On January 3, 2014, Kip Ramsey and Cougar Den filed a timely appeal of the Assessment to the Department of Licensing's ALJ.[29] On March 31, 2014, the Department of Licensing moved to dismiss Mr. Ramsey from the Assessment, leaving Cougar Den as the sole respondent.[30]

Both parties moved for summary judgment, and on July 24, 2014, Administrative Law Judge Leavell issued an Initial Order, granting summary judgment to Cougar Den and dismissing the Assessment in its

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[27] CP 216 (Stipulated Exhibit No. 7; Assessment No. 756M).
[28] CP 480-85 (Penalver Decl. ¶ 3 & Attachment A).
[29] CP 215 (Stipulated Fact No. 16).
[30] CP 215 (Stipulated Fact No. 18).

entirety.[31] In reaching his Initial Order, Judge Leavell relied on the 1855 Treaty and the Treaty's historical context: "The history of the Yakama Nation and Treaty was understood to allow members of the tribe to freely travel and trade free from the interference from the State."[32]

The Department of Licensing sought review of the Initial Order,[33] and on October 15, 2014, Pat Kohler, the Director of the Department of Licensing, reversed the Initial Order and affirmed the Assessment.[34]

On November 14, 2014, Cougar Den filed its Petition for Review of Final Order with Yakima County Superior Court under cause number 14-2-03851-7.[35] On January 15, 2015, Cougar Den moved for leave to file an amended petition with the Superior Court to raise the issue of Director Kohler's appearance of unfairness, offering new evidence in the form of a Declaration of Harry Smiskin.[36] Over the objection of the Department of Licensing, the Yakima County Superior Court granted leave to file an amended petition and denied the Department of Licensing's Motion to Strike the Declaration of Harry Smiskin.[37] On February 2, 2015, Cougar

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[31] CP 912-25.
[32] CP at 922.
[33] CP at 926-53.
[34] CP 1000-11.
[35] CP 1-8.
[36] CP 1046-47; 1050-57.
[37] CP 1058-59.

Den filed an Amended Petition for Review of Final Order of Department of Licensing.[38]

On August 18, 2015, the Yakima County Superior Court entered its Findings of Fact and Conclusions of Law in 14-2-03851-7.[39] The Superior Court reversed the Director's Final Order and invalidated the entire Assessment in keeping with the 1855 Treaty.[40] As an independent basis for its ruling, the Superior Court determined that Ms. Kohler violated the Appearance of Fairness doctrine by ruling on a case in which she was previously involved as a party.[41]

On September 10, 2015, the Department of Licensing filed a Notice of Appeal of the Superior Court's decision with this Court.[42] On September 22, the Department filed its Statement of Grounds for Direct Review, and Cougar Den filed its Answer to the statement on October 2, 2015, agreeing that this Court should accept direct review of the case on the sole issue of whether the Department of Licensing's Assessment against Cougar Den is preempted under the 1855 Treaty.[43]

After the Verbatim Report of Proceedings and Clerk's Papers containing the agency record were filed with this Court, the Department

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[38] CP 1060-69.
[39] CP 1089-99.
[40] *Id.*
[41] *Id.*
[42] CP 1087.
[43] *See* Statement of Grounds for Review and Answer to same on record with this Court.

sent an additional tax assessment to Cougar Den, Assessment No. 788M, dated December 18, 2015, and denied Cougar Den's fuel exporter license application by letter, dated December 15, 2015, on the grounds that Cougar Den failed to pay the amounts required under the assessments, plus interest and penalties.[44] In issuing Assessment No. 788M and denying Cougar Den's fuel exporter license application in December of 2015, the Department of Licensing ignored the Superior Court's controlling determination that the Department is preempted by the 1855 Treaty from assessing import taxes against Cougar Den. The Department took this action after the record on appeal was perfected. Cougar Den moves to supplement the record with Appendices A & B.

The Department contends that as of December 18, 2015, Cougar Den owes approximately $16,269,928 in unpaid assessments, penalties and interest.[45]

III. ISSUES PRESENTED

1. The canons of treaty construction require courts to interpret Indian treaties as the Indians who signed them would have understood

[44] The Department of Licensing denied Cougar Den's fuel exporter license by letter, dated December 15, 2015, Appendix A, and the Department sent Assessment No. 788M to Cougar Den by letter, dated December 18, 2015. Appendix B.

[45] The Department's December 15, 2015 license denial letter stated that Cougar Den owed $12,842.458.86 in unpaid assessments, penalties, and interest. The Department's December 18, 2015 letter for Assessment No. 788M stated that Cougar Den owed an additional amount of $3,427,470.08. Thus, the Department's position appears to be that Cougar Den owes the Department a total of $16,269,928, as of December 18, 2015.

them. Looking to the history of the Yakamas, the ALJ and Yakima County Superior Court determined that the Treaty preempted the Assessment because of the Yakamas' tradition of carrying goods from Oregon to the Reservation. The Director of the Department of Licensing has offered no competing view of the history. Is the Assessment invalid where the Director erroneously interpreted and applied the law in failing to examine or to apply the history of the Yakamas to its determination in this case? Yes.

2. The 1855 Treaty protects the Yakamas' "right to transport goods to market without restriction." In *Smiskin*, the Ninth Circuit addressed a simple hypothetical: what if the government imposed an actual fee on the goods at issue? *Smiskin* held that such a fee on goods (*i.e.*, an import tax) "would certainly be an impermissible restriction on the Yakamas' right to travel." Is the Assessment invalid where the Department of Licensing seeks to do what the Ninth Circuit expressed would be a clear violation of the Right to Travel? Yes.

3. Pat Kohler as Director of the Department of Licensing failed to recuse herself from adjudicating the Final Order of the Department after having advocated for the Department as a party. She also declined Cougar Den's request that she recuse herself. On these facts, is the Assessment invalid? Yes.

IV. ARGUMENT

A. Standard of Review

Under the APA, this Court sits in the same position as the superior court and reviews the agency's decision by applying the standards in the APA directly to the agency record. RCW 34.05.510. This Court reviews an agency's interpretation or application of the law *de novo*. *Chicago Title Ins. Co. v. Wash. State Office of Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). Legal determinations are reviewed using the error-of-law standard, which allows the court to substitute its view of the law for that of the agency. *Id.* An agency's interpretation of a pure question of law is accorded no deference. *Id.*

B. Canons of Treaty Construction Require Courts to Consider the 1855 Treaty's Historical Context, and No Reading of the Historical Context Would Support the State's Import Tax Assessment Against Cougar Den.

In deciding for Cougar Den, both the ALJ and the Yakima Superior Court based their decisions on the history of the Yakama Nation.[46] As the Superior Court ruled:

> When travel is at issue, courts and adjudicators are required to examine the historical context of the Treaty to interpret the Right to Travel as the Yakamas of 1855 would have understood it, resolving any doubtful expressions in the Yakamas[']' favor. . . . To examine the historical context

[46] CP 922 & 1092 at ¶¶ 2-4.

> of the Treaty, the Director should have looked to the Findings of Fact of Yakama Indian Nation v. Flores, . . . Such Findings are preclusive in this case.

In contrast, in deciding for the Department of Licensing, the Director of the Department of Licensing did not consider the history of the Yakama Nation.[47] In arguing against Cougar Den before this Court, the Department of Licensing similarly offers no consideration of the history of the Yakama Nation.

The reason for the Department of Licensing's omission is clear: there is no reading of the history of the Yakamas under which a tax on importation is justified, but proper consideration of the history is required when interpreting the Yakama Treaty. Because the canons of treaty construction require a historical inquiry, and because such an inquiry necessarily determines the case in favor of Cougar Den, the Court can begin and end its analysis with the historical inquiry.

1. Whenever travel is at issue, a historical inquiry is required when interpreting Article III of the 1855 Treaty.

Before any court can interpret Article III of the 1855 Treaty, it must first begin by examining the historical context of the Treaty:

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning

[47] CP 1000-11.

> they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. State of Wash., 315 U.S. 681, 684-85, 62 S. Ct. 862, 86 L. Ed. 1115 (1942). The U.S. Supreme Court "has often held that treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S. Ct. 1328, 25 L. Ed. 615 (1970).

The Supreme Court has applied this canon of construction to Article III of the 1855 Treaty: "This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor." *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979). The Ninth Circuit has similarly applied this canon to the travel provision of Article III: "We have also applied this rule of construction in interpreting the Yakama Treaty, and the Right to Travel provision in particular." *United States v. Smiskin*, 487 F.3d 1260, 1264-65 (9th Cir. 2007).

More recently, the Ninth Circuit has confirmed that a historical inquiry is necessary *whenever* travel is at issue, even when the issue of travel overlaps with the issue of trade:

> We had previously found ambiguity in Article III's right to travel, and required application of the Indian canon of construction to clarify the extent of that right. . . . But the right to travel is express in Article III of the Yakama Treaty, and the *Cree* cases involved the right to travel (driving trucks on public roads) for the purpose of transporting goods to market. In *Smiskin,* we rejected the government's argument that the right to travel did not apply when the Yakama were engaged in commerce. 487 F.3d at 1266–67 ("[T]he right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent."). These cases clarified the extent of the right to travel found in Article III of the Yakama Treaty. But there is no right to trade in the Yakama Treaty.

King Mountain Tobacco Co. v. McKenna, 768 F.3d 989, 998 (9th Cir. 2014). By the Ninth Circuit's reasoning, a factual inquiry is required when a law restricts travel (the *Cree* cases) and when it restricts travel for the purposes of trade (*Smiskin*), but not when it restricts trade without travel (*King Mountain*). Here, unlike in *King Mountain*, travel is obviously at issue. As in *Smiskin*, the Department of Licensing's import

taxes restrict Cougar Den's right to haul goods to market, and so a historical inquiry was required.

2. The history of the 1855 Treaty and the Yakama Nation have been articulated by federal courts.

Cree I held that it was reversible error not to undergo a historical analysis of the travel provision of the 1855 Treaty. *Cree v. Waterbury*, 78 F.3d 1400, 1404 (9th Cir. 1996) ("*Cree I*"). On remand, on order of the Ninth Circuit, the Eastern District of Washington held an extensive factual inquiry and arrived at thorough Findings of Fact regarding the 1855 Treaty and the historical context of the Right to Travel. *See Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1261-65 (E.D. Wash. 1997). The adjudicators and Superior Court judge in this matter could rely on those same findings in making a historical inquiry in this case.

Nearly a decade after *Yakama Indian Nation* and its Findings of Fact, the district court in *United States v. Smiskin* relied on these same findings in order to make its ruling on the Right to Travel: "In considering Defendants' motions, the Court relies on the factual findings [in *Yakama Indian Nation*] affirmed by the Ninth Circuit in *Cree*. Those findings clearly indicate that traveling and transporting goods for the purposes of trade were vital to the Yakama Tribe's survival in 1855." 2005 WL 1288001, at *3 (E.D. Wash. May 31, 2005); *see also Smiskin*, 487 F.3d at

1265 ("Further, in light of the detailed factual findings in *Yakama Indian Nation,* we have little difficulty in concluding that the Yakamas' treaty right extends to the case at hand.").

As in *Smiskin*, the courts and adjudicators could properly rely on the factual findings from *Yakama Indian Nation v. Flores.*[48] In this case, the ALJ did just that in citing to *Smiskin*, *Cree,* and *Yakama Indian Nation.*[49] Relying on those cases, the ALJ ruled that the Treaty "should be read as the Indians [who signed it] would have understood it," and "[t]he history of the Yakama Nation and Treaty was understood to allow members of the tribe to travel freely and to trade free from interference by the State."[50] The ALJ and Yakima County Superior Court similarly relied on the principles articulated in Findings 1 through 53 from *Yakama Indian Nation*, 955 F. Supp. at 1261-65, in ruling that the Assessment was an impermissible restriction on Cougar Den's Treaty rights.

3. It is reversible error to ignore the history of the Yakamas altogether, as the Final Order did.

Unlike the ALJ's Initial Order, the Director's Final Order in this case offered no analysis of the historical context of the Treaty.[51] The

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[48] Cougar Den previously argued that the findings in *Yakama Indian Nation v. Flores* are preclusive in this case. *See* CP 257-58 (Cougar Den's Motion for Summary Judgment). The Department of Licensing did not challenge that argument.
[49] CP 921.
[50] CP 921-22.
[51] CP 1000-11 (Final Order).

Director instead treated Article III as ambiguous, based on the language of the Treaty, without reference to what that language would have meant to the Yakamas in 1855. *See* Br. of App. at 21-32.

This error by the Director—of treating the Right to Travel under Article III as "unambiguous" without regard to the historical context—is the very same error that the Ninth Circuit identified in *Cree I,* 78 F.3d at 1404. As in *Cree I*, the ALJ properly applied the required historical analysis based on the Findings of Fact from *Yakama Indian Nation.* In compliance with this cannon of construction, both the ALJ (and later, on review, the Yakima County Superior Court) considered the history and ruled in Cougar Den's favor. Because the Department of Licensing offers no other reading of the history, this Court should reverse the Director's Final Order as an erroneous interpretation or application of the law under RCW 34.050570(3)(d).

C. The 1855 Treaty Preempts Any Restriction on the Yakamas' Right to Haul Goods to Market Without Restriction; the Director of the Department of Licensing Improperly Applied the Assessment Against Cougar Den.

Article III of the 1855 Treaty granted the Yakamas a broad Right to Travel on state roads without the burden of any tax assessment: "the 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

(1855). With the history of the Yakamas in mind, the federal courts have held as a matter of law that "Article III, paragraph 1, of the Treaty With the Yakamas, when viewed in historical context, unambiguously reserves to the Yakamas the right to travel the public highways without restriction." *Yakama Indian Nation*, 955 F. Supp. at 1260, cited by *Cree II*, 157 F.3d at 770. This provision, as with all Indian treaties, "is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty." *State v. Buchanan*, 138 Wn.2d 186, 201, 978 P.2d 1070 (1999); *see also* U.S. Const. Art. VI, cl. 2 (establishing treaties as "supreme law of the land").

In violation of the Treaty, the Department of Licensing assessed taxes, penalties, and interest against Cougar Den (1) for not meeting certain licensing requirements prior to hauling its fuel and (2) for not paying a tax on each unit of fuel that Cougar Den hauled on state roads. Applying *Smiskin* and *Cree II*, it is clear that both components of the Assessment are invalid under the Treaty's Right to Travel provision, and, thus, the Director of the Department of Licensing improperly applied the Assessment against Cougar Den in violation of the Treaty.

1. The Treaty bars the licensing requirements imposed by the Department of Licensing and upheld by the Director.

Article III of the 1855 Treaty protects the "right to transport goods to market without restriction," and it does not draw "an arbitrary line between travel and trade." *Smiskin*, 487 F.3d at 1266. As such, the Treaty protects the Yakamas' right to use the roads, and it also protects the goods that the Yakamas are hauling on those roads. *See id.*

In *Smiskin*, the Ninth Circuit addressed a requirement that Yakamas notify the State before transporting unstamped cigarettes, a requirement that the Government used "for the purpose of enforcing the lawful tax on sales to non-Indians." *Id.* at 1263 n.4. The only purpose for the notice requirement was the collection of taxes on the transported goods:

> Washington's stated purpose for requiring cigarette stamps, and hence for requiring notice before unstamped cigarettes are transported within the State, is to "enforce collection of the tax hereby levied."

Id. at 1269 (quoting RCW 82.24.030). As with the tax at issue here, the pre-notification requirement in *Smiskin* was triggered by the transportation of cigarettes *into* the state: "both Washington statutes require anyone bringing unstamped and untaxed cigarettes *into* the state to first notify the Board." *Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 858,

10 P.3d 1079, 1084 (2000) (emphasis added), *review denied*, 143 Wn2d 1009 (2001).

In violation of the pre-notification requirement, Harry Smiskin transported several thousand cartons of unstamped cigarettes to his home on the Yakama Reservation. *Id.* at 1263. The federal bureau of Alcohol, Tobacco, and Firearms charged Mr. Smiskin with violation of the Contraband Cigarette Trafficking Act, a federal law that incorporated the State's pre-notification requirement. *Id.* But because the pre-notification requirement infringed on the Yakamas' "uniquely important right to travel," the Ninth Circuit held that the law was unenforceable against a Yakama such as Mr. Smiskin. *Id.*

Here, as in *Smiskin*, the Department of Licensing requires that Cougar Den obtain a license prior to hauling goods into the state, and it has assessed millions of dollars in penalties for the lack of a license alone.[52] Also here, as in *Smiskin*, the only purpose of this licensing requirement is to collect taxes. The license application is called a "Fuel Tax Application."[53]

The Department of Licensing offers a meaningless distinction between hauling fuel on state roads and hauling fuel into the state. According to the Director's Final Order, for example, "Cougar Den does

[52] CP 214.
[53] CP 218.

not need a Washington fuel importer license to transport fuel over public highways. Cougar Den needs a Washington fuel importer license to bring fuel into this state."[54] But in *Smiskin*, the pre-notification requirement was triggered when Mr. Smiskin hauled cigarettes into the state, and yet the Right to Travel provision still applied and preempted the State's pre-notification requirement. Here, in the same way, the Right to Travel provision preempts the Department's licensing requirements and the resulting assessments, interest, and penalties.

2. The Department of Licensing taxes Cougar Den for transporting goods, not operating a business.

In addition to the meaningless distinction between importing and hauling fuel into the state, the Department of Licensing would also like to characterize the taxes and penalties at issue as a tax on engaging in business.[55] But the Assessment is not a business tax, nor does it merely regulate the fuel business, as the Department contends. Rather, it is a tax on each gallon of fuel that Cougar Den has hauled to market on the Reservation.[56] Such a tax is undeniably a tax on transporting goods. And because the licensing requirements only serve to collect the Department of Licensing's tax, they are similarly invalid, just like the pretax regulation at issue in *Smiskin*: "Because the primary purpose of tax collection is to

[54] CP 1008.
[55] Br. of App. at 30-31.
[56] CP 215-18.

generate state revenue, . . . the State's requirement notice does not fall within the Court's 'purely regulatory' exception, and . . . is precluded by the Yakama Treaty." *Smiskin*, 487 F.3d at 1269 (citation omitted).

3. In addition to preempting the Department of Licensing's licensing requirements, the Treaty also preempts taxes on the actual goods that the Yakamas are hauling to market.

Because the Treaty protects Cougar Den's "right to transport goods to market without restriction," it preempts licensing requirements as well as an actual tax on the goods that Cougar Den is transporting. *See Smiskin*, 487 F.3d at 1266. In *Smiskin*, the Government attempted to distinguish a fee on the use of roads as in *Cree II* with a restriction on "commerce" such as the importation of Mr. Smiskin's cigarettes. *Id.* The Ninth Circuit rejected that distinction:

> [W]e refuse to draw what would amount to an arbitrary line between travel and trade in this context . . . . the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.

Id. at 1266.

In reaching its decision, the Ninth Circuit considered a hypothetical: what if instead of a pre-notification requirement, the

Contraband Cigarette Trafficking Act (the "CCTA") placed an actual fee on the cigarettes (essentially an import tax). In that case, the Treaty would surely apply:

> In light of *Cree II*, the CCTA would certainly 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.

Id. at 1267.

Here, the Department of Licensing seeks to impose a fee on all the fuel that Cougar Den transports to market on state roads. Such a tax fits the hypothetical that the Ninth Circuit described as a *certain* "impermissible restriction" on the Right to Travel. To hold otherwise "would amount to an arbitrary line between travel and trade" without regard to the Yakamas' extensive history of trade.

Moreover, to accept the Department of Licensing's view—that the Treaty prohibits taxes on the use of the highway but not on the goods being hauled on the highway—would allow the Department to prohibit taking goods on the highway to the Reservation. After all, "[a]n unlimited power to tax involves, necessarily, a power to destroy." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819). If the Yakamas have the right to haul goods to market without restriction, then it

necessarily follows that the Department of Licensing cannot tax them for doing so.

4. It is irrelevant if Cougar Den's fuel is not a tribal good.

The Treaty is not limited to goods produced on the Reservation. *Smiskin*, 487 F.3d 1268. In *Smiskin*, the Government argued that the Treaty only applied to "goods that are either collectively owned or produced on the reservation by the tribe," and because the cigarettes at issue did not fit this definition, the Treaty could not apply. *Id.* The Ninth Circuit rejected that argument, and in looking at the Findings from *Yakama Indian Nation*, it held that at the time of the Treaty's signing, "the Yakamas then understood the right to travel to extend beyond tribal goods." *Id.* Here, the fuel is not produced on the Reservation, and yet the Treaty still applies.

5. It is irrelevant if Cougar Den exercised its Treaty rights though an agent such as KAG West.

The Yakamas may exercise their Treaty rights through non-Yakama agents, and the limit of such exercise is a matter for the Yakama Nation. *See Cree II*, 157 F.3d 762. In *Cree II*, the Ninth Circuit addressed the State's attempt to impose licensing fees on Yakama logging trucks traveling from the Yakama Reservation to logging mills off the Reservation. Among the issues raised on appeal was the fact that some of the drivers of the logging trucks were "non-Indians . . . hired by Indians or

Indian corporations to drive log trucks, a practice permitted by the Yakama Nation under its Tribal Employment Rights Ordinance . . . ." *Id.* at 774. But the *Cree II* court relied on the finding of the lower court in that case that the "'Treaty right to travel, although secured to the Yakama Indian Nation, can be exercised by its individual members, and any Yakama-owned and operated corporation or business which is tribally licensed.'" *Id.* (quoting *Yakama Indian Nation,* 955 F. Supp. at 1260). Accordingly, the State had "no basis to object to the manner in which the Yakama Nation elects to exercise this right through its employment ordinance." *Cree II*, 157 F.3d at 774.

Here, as in *Cree II*, the Right to Travel belongs to the Yakama Nation, but it is exercised by Cougar Den. The Yakama Nation designated Cougar Den its agent to obtain petroleum products for the Reservation,[57] and Cougar Den does that in part by using KAG West to haul the fuel on its behalf. The Department of Licensing has no basis to object to the manner in which the Yakama Nation elects to exercise its rights through Cougar Den.

Finally, the Department of Licensing argues that entry into the state with a load of fuel is the trigger for the taxes at issue. And yet by that reasoning, the proper taxpayer is KAG West unless KAG West is

[57] CP 128.

merely the extension of Cougar Den. By assessing taxes against Cougar Den instead of KAG West, the Department of Licensing acknowledges that KAG West is merely the agent of Cougar Den and, thus, is no different from the non-Indian truck drivers in *Cree II*.

D. The Case Law Cited by the Department of Licensing Does Not Limit the Holdings of *Smiskin* and *Cree II*.

Against the clear application of *Smiskin*, the Department relies on *King Mountain v. McKenna*, an inapposite case that addressed an escrow account imposed on cigarette manufacturers. But the Department's argument fails to articulate the proper scope of the Yakamas' Right to Travel.

King Mountain v. McKenna addressed Washington's escrow statute, which requires each cigarette manufacturer to pay into an escrow account to offset smoking-related health care costs. *See* RCW 70.157.005. The escrow account differs from the fuel tax in three critical ways. First, the "escrow statute is not a tax": it is an account that bears interest for King Mountain and may be released if there is no claim against the amount. *King Mountain*, 768 F.3d at 996. Second, the escrow has nothing to do with the transportation of goods. There was no travel at issue in *King Mountain*. The escrow in that case was instead "based on the number of cigarette sales made that are subject to state cigarette taxes,"

and so it does not implicate the Right to Travel. 768 F.3d at 991, 997-98; 2013 WL 1403342, at *6 (E.D. Wash. Apr. 5, 2013); *see also* supra at § VI.B.1. Third, the escrow only applies to sales to non-Yakamas: "Washington law imposes non-discriminatory requirements when King Mountain chooses to sell cigarettes to nonmembers in Washington." *Id.* Here, the Department of Licensing taxes each unit of fuel hauled on state roads and sold exclusively to Yakama members.[58] The reasoning of *King Mountain* cannot apply.

E. In Addition to the Director's Errors Under the Treaty, It Was Error for the Director to Personally Rule in Spite of the Appearance of Unfairness.

As Director of the Department of Licensing, Pat Kohler (1) represented the Department in asserting that the Yakama Treaty does not preempt the Department's fuel taxes, then (2) reversed an ALJ decision while acting as an adjudicator on the very same matter. These actions by the Director certainly appear unfair, and on that basis alone, the Director's Final Order is reversible.

In 2013, seeking to impose fuel taxes on the Yakamas, Ms. Kohler represented the Department in mediation sessions with the Yakama Nation.[59] Much of what was discussed and what Ms. Kohler learned in

[58] CP 471, 474-79 (Ramsey Decl. ¶ 6 & Attachment A).
[59] CP 22-23.

those sessions is hidden behind the mediation privilege.[60] Even so, it is clear that Ms. Kohler advocated for the Department's position on the Treaty, and her position was that the Treaty does not preempt the Department's fuel taxes.[61] The result of those mediation sessions was the purported Fuel Tax Agreement, which served as the basis for the Assessment.[62] Once Cougar Den challenged the Assessment, Ms. Kohler moved from the position of advocate to the position of adjudicator to decide the very same question: does the Treaty preempt the Department's fuel taxes?

The Department of Licensing contends that Ms. Kohler's mere "[k]nowledge of legal issues" is insufficient to show unfairness or bias, but it is Ms. Kohler's personal participation and legal determinations in this dispute that appear unfair and biased—not just her "[k]nowledge of legal issues."[63]

Even if Ms. Kohler could set aside all the information provided at the mediation (information that is not part of the agency record), and even if she could look at the Department's position without bias or prejudice (a position based on her own mediation sessions), her shift from advocate to adjudicator would still *appear* unfair. For that reason, Ms. Kohler's

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[60] CP 58.
[61] CP 23.
[62] CP 23, 216.
[63] Br. of App. at 34.

involvement in this matter both as advocate and adjudicator is prohibited by Washington law.

In asserting the appearance of unfairness doctrine, Cougar Den does not need to show unfairness; rather, as the doctrine's name suggests, Cougar Den need only show the *appearance* of unfairness: "The core of the doctrine announced in Smith and repeated often is that hearings to which the doctrine applies *must not only be fair in fact, but must appear to be fair* and to be free of an aura of partiality, impropriety, conflict of interest, or prejudgment." *Hayden v. City of Port Townsend*, 28 Wn. App. 192, 196, 622 P.2d 1291 (1981) (emphasis added).

Thus, in *Hayden*, the court applied the doctrine when the chairman of a planning commission that rezoned a parcel also worked for a bank that had the option to buy the rezoned parcel. There was no evidence that this connection influenced the commissioner's decision, and the court acknowledged that the commissioner's employer, not the commissioner, would have received the benefit. Nonetheless, "[t]he doctrine reaches the appearance of impropriety, not just its actual presence." *Id.* On that basis alone, the *Hayden* court reversed the lower decision. *Id.* at 198. Ms. Kohler acted as a party advocating a position, and then decided the same issue as an adjudicator—a much clearer conflict than the indirect

connection in *Hayden*, and so just as in *Hayden*, this Court must reverse her decision.

In addition, the Department has argued that because the legislature made Ms. Kohler the ultimate authority for decision-making regarding the administration of state fuel tax laws, then surely this is how the legislature chose to structure the entity. In support of this view, the Department cites to *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 315, 197 P.3d 1153 (2008), in which the legislature mandated that certain interested parties would sit on the State Energy Facility Site Evaluation Council, despite having an interest in the outcome.[64]

In trying to apply the logic of *EFSEC* to this case, the Department omits an important caveat: here, unlike in *EFSEC*, the legislature specifically provided a mechanism for Ms. Kohler to disqualify herself and to appoint a deputy in her place:

> **Presiding officers — Disqualification, substitution.**
>
> (1) Except as provided in subsection (2) of this section, in the discretion of the agency head, the presiding officer in an administrative hearing shall be:
>
> (a) The agency head or one or more members of the agency head;

[64] Br. of App. 38.

> (b) If the agency has statutory authority to do so, a person other than the agency head or an administrative law judge designated by the agency head to make the final decision and enter the final order;

RCW 34.05.425 (emphasis added).

In addition, according to RCW 43.24.016(2), the Director has the power to "(e) Delegate powers, duties and functions as the director deems necessary for efficient administration . . . and (f) perform other duties as are necessary and consistent with law." Accordingly, when Ms. Kohler learned that she would be called as an adjudicator to rule on the same position that she had already advocated as a party, she had the means to appoint a replacement. The legislature never chose to structure the entity for the unfairness in this case: Ms. Kohler chose that for herself. It bears noting that the Department, under Ms. Kohler's direction, has been particularly aggressive with the Yakamas since failing to reach a settlement in November of 2013 on the purported Fuel Tax Agreement.[65] Ms. Kohler's Department has even issued a new assessment and license denial in December 2015 which ignore the clear ruling of the Yakima County Superior Court. *See* Appendices A & B.

The Department of Licensing contends that the issue of Ms. Kohler's appearance of partiality should not have been considered by the

[65] CP 22-56 (Smiskin Decl. & Exhibits); CP 1054-57 (Penalver Decl. & Exhibits).

Superior Court on review because it "could have been raised earlier."[66] But as Cougar Den explained below, Cougar Den did not learn of the extent of Ms. Kohler's personal involvement in the issue of assessing state taxes against the Yakamas until December 5, 2014, when counsel for Cougar Den met with Harry Smiskin, former chairman of the Yakima Nation.[67] Cougar Den prepared a declaration for Mr. Smiskin to sign, which declaration discussed Ms. Kohler's history of personal involvement, on behalf of the Department of Licensing, in attempting to assess state tax against tribal fuel business.[68] The Superior Court denied the Department of Licensing's motion to strike the Smiskin Declaration and granted Cougar Den leave to file an amended petition for review that included the appearance of partiality argument based on the Smiskin declaration.[69] Once Mr. Smiskin' s declaration had been reviewed and signed, it was filed with and considered by the Superior Court over the Department's objection.[70] The Department of Licensing fails to articulate in its Brief of Appellant why the Superior Court's ruling was in error in light of the new information disclosed in the Smiskin Declaration. Cougar Den asked Ms. Kohler to recuse herself from ruling on the Final Order, she had the

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[66] Br. of App. at 35.
[67] CP at 1040.
[68] *Id.*
[69] *See* CP 1058-59.
[70] *Id.*

opportunity to step down using the disqualification process to appoint a deputy in her place, but she refused to do so.[71] Under Washington's APA, although judicial review is generally limited to the agency record, RCW 34.05.558, a court may take evidence in addition to the agency record if it relates to the validity of the agency action and is needed to decide disputed issues regarding improper agency action, unlawfulness of procedure, or material facts not required to be determined on the agency record. *See* RCW 34.05.562(1); *Wash. Indep. Tel. Ass'n v. Washington Utils. & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002) *aff'd,* 149 Wn.2d 17, 65 P.3d 319 (2003).

In the circumstances of this case, where the appearance-of-partiality argument relates directly to conduct on the part of the Department of Licensing's Director, Ms. Kohler, the Superior Court did not err in considering the appearance of partiality issue on appeal in Cougar Den's Amended Petition for Review.

V. CONCLUSION

In exchange for giving up nearly all their homeland, the Yakamas secured the "right to transport goods to market without restriction." In clear violation of that right, the Department of Licensing assessed a tax on all the goods that Cougar Den hauled to market on the Reservation. For

[71] CP 1040.

these reasons, the Superior Court's ruling finding that the 1855 Treaty preempts the assessments should be affirmed and the Director's Final Order should be reversed. The Superior Court's ruling should also be affirmed on the additional basis that the Director of the Department of Licensing's shift from advocate to adjudicator appears unfair and is prohibited by Washington law.

Respectfully Submitted this 25th day of January, 2016.

By: s/ Brendan V. Monahan

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Attorneys for Respondent Cougar Den Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 25th day of January, 2016, I caused a true and correct copy of the foregoing document, "Respondent's Brief," to be delivered by agreement of the parties by e-mail as follows:

Jay D. Geck, jayg@atg.wa.gov

Fronda Woods, frondaw@atg.wa.gov

I caused a true and correct copy of the foregoing document to be filed with the Court by e-mail as follows:

Supreme Court Clerk's Office, Supreme@courts.wa.gov

Dated this 25th day of January, 2016, at Seattle, Washington.

s/ Mathew L. Harrington
Mathew L. Harrington, WSBA #33276

Appendix A

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
PO Box 9228• Olympia, Washington 98507-9228

December 15, 2015

Ms. Charissa Johnston, Attorney
Stokes Lawrence, Velikanje, Moore and Shore
120 North. Naches Avenue
Yakima, Washington 98901-2757

Dear Ms. Johnston:

SUBJECT: Cougar Den Inc. – Application for Motor Fuel and Special Fuel Exporter Licenses

Application History
We received an application for a motor fuel exporter license on December 24, 2014. The application was denied in a letter dated January 29, 2015, by Jeff Beach. Cougar Den appealed, and the matter was referred to an administrative law judge. On August 10, 2015, the administrative law judge remanded the matter to the Department to provide the parties an opportunity to address the completeness of Cougar Den Inc.'s licensing application.

Additional information was provided in Mr. Penalver's letters and enclosures, which we received on September 1 and November 4, 2015.

Mr. Penalver's letter received September 1, 2015, indicates that Cougar Den Inc. is applying for a special fuel exporter license, as well as a motor fuel exporter license. Page three of the completed application form received November 4, 2015, has only the motor fuel exporter box checked, but page four of the application form includes estimated monthly exports of both gasoline (motor fuel) and diesel (special fuel). A $500 cash bond for special fuel was also received. Therefore, we assume the application is for both motor fuel and special fuel exporter licenses.

Mr. Penalver's letter received September 1, 2015, also indicates fuel will be exported to Oregon. Cougar Den Inc. is licensed as a motor vehicle fuel dealer in the State of Oregon. This information satisfies Revised Code of Washington (RCW) sections 82.36.060(4) and 82.38.110(4).

The completed application form received November 4, 2015, appears to include the remaining additional information and documents requested in Mr. Beach's letter to Mr. Penalver dated September 14, 2015. Therefore, Cougar Den Inc. has now submitted a complete application. {RCW 82.36.060} {RCW 82.38.110}

Refusal to Issue for Unsatisfied Debts to the State

Washington State law allows the Department to refuse to issue a license to a person who has an unsatisfied debt to the state assessed under either chapter 82.36 or 82.38 RCW {RCW82.36.070(4)} {RCW 82.38.120(4)}. The Department's records show that the Director of the Department of Licensing has issued three Final Orders to Cougar Den Inc. assessing tax, penalties, and interest under chapters 82.36 and 82.38 RCW for importing fuel into the State of Washington without compliance with Washington State law. The Final Orders are dated October 15, 2014 (Assessment 756M), March 30, 2015 (Assessments 760M and 761M), and July 7, 2015 (Assessments 768M and 775M-Amended). The Department's records show that these assessments, totaling $12,842,458.86, have not been paid.

Cougar Den Inc. appealed the three Final Orders to the Yakima County Superior Court. The Superior Court reversed Assessment 756M on August 18, 2015, and on September 14, 2015, the Department appealed to the Washington Supreme Court. On September 22, 2015, the Yakima County Superior Court stayed Assessments 760M, 761M, 768M, and 775M-Amended at the parties' request because of the Department's appeal in Assessment 756M. The Department's appeal is now pending in the Washington Supreme Court, Case No.92289-6. The Department is asking the Court to rule that the October 15, 2014, Final Order regarding Assessment 756M is valid.

It is the position of the Washington Department of Licensing that Cougar Den Inc. is subject to Washington tax when it imports fuel into Washington, and that the Final Orders upholding Assessments 756M, 760M, 761M, 768M, and 775M-Amended are valid. The Department's position is that the tax, penalties, and interest in Assessments 756M, 760M, 761M, 768M, and 775M-Amended are unsatisfied debts to the state under chapters 82.36 and 82.38 RCW.

Therefore, the Department refuses to issue a motor fuel exporter license and a special fuel exporter license to Cougar Den Inc. because of unsatisfied debts to the state assessed under chapters 82.36 and 82.38 RCW.

Appeal Instructions

If you do not agree with the Department's decision, you may request a formal hearing before an administrative law judge. {RCW 82.36.070} {RCW 82.38.120} {RCW 34.05.413, 34.05.422} A request for a formal hearing must be in writing and postmarked within twenty calendar days of receipt of this letter. {WAC 308-08-085} If a request for formal hearing is not received, the denial of the exporter licenses for Cougar Den Inc. will become final and closed to further administrative appeal. Please mail all correspondence to:

Department of Licensing
Prorate and Fuel Tax Services
Post Office Box 9228
Olympia, Washington 98507

The Revised Code of Washington (RCW) and the Washington Administrative Code (WAC) are available online at http://leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx.

Questions
If you have questions, please call (360) 664-1876.

Sincerely,

Alexandra Porter
Fuel Tax Manager
Fuel Tax Services

Appendix B

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
Prorate and Fuel Tax, Fuel Tax Unit
PO Box 9228 • Olympia, Washington 98507-9228

December 18, 2015

Kip Ramsey
Cougar Den, Incorporated
Post Office Box 669
White Swan, Washington 98952

Charissa Johnston
Stokes Lawrence Velikanje Moore and Shore
120 North Naches Avenue
Yakima, Washington 98901-2527

Assessment Number: 788M

Dear Mr. Ramsey:

Importing fuel without a license

We received reports from Oregon Department of Transportation, Fuels Tax Group, showing your company imported fuel to Washington from Oregon in September and October 2015. These imports are subject to Washington taxes under chapters 82.36 and 82.38 of the Revised Code of Washington (RCW). The current amount owing is $3,427,470.08, including tax, penalties, and interest. Please review the following chart for a breakdown of the tax, penalty, and interest owed:

Special Fuel (SF) (RCW 82.38)

2015	Gallons	Tax	Penalty	Unlicensed Imports Penalty	Interest	Total
September	771,863	$343,479.04	$34,347.90	Not applicable	0	$377,826.94
October	746,489	$332,187.61	33,218.76	Not applicable	0	$365,406.37
					Special Fuel Total	**$743,233.31**

Motor Fuel (MF) (RCW 82.36)

2015	Gallons	Tax	Penalty	Unlicensed Imports Penalty	Interest	Total
September	1,449,304	$644,940.28	$12,898.81	$644,940.28	0	$1,302,779.37
October	1,536,831	$683,889.80	$13,677.80	$683,889.80	0	$1,381,457.40
					Motor Fuel Assessment	**$2,684,236.77**
					Total Assessment	**$3,427,470.08**

What you must do

Within 30 days of the receipt date of this letter, you must either:

- pay this assessment, or
- submit a written appeal or request for reassessment

Payment Instructions

Send payment, via electronic funds transfer to the Department of Licensing. Follow the instructions below to complete your EFT wire or ACH transfer:

Bank Name:	US Bank
Address:	60 Livingston Ave; St. Paul, MN 55107-2292
Name of Bank Account:	2400 – DOL FUEL TAX
Checking Account Number:	153910882320
ABA/Routing Number:	123000848
Account Type:	Checking
Comment/Message:	Assessment 788M

After 30 days, an additional 10 percent late payment penalty is added to the tax due, unless payment is received. On the first of each month, 1 percent interest is applied to the unpaid balance.

Licensing Requirements

Per Washington State law and the Final Order of the Director for fuel tax assessment 786M, you must be properly licensed as an importer to continue importing fuel. Find information to apply for a license at: http://www.dol.wa.gov/vehicleregistration/ftmotorspecial.html.

Appeal Instructions

If you decide to appeal this assessment, mail your explanation or reason for appeal or reassessment to:

Fuel Tax Section
Department of Licensing
Post Office Box 9228
Olympia, Washington 98507-9228

The procedures that apply to appeals are described in sections 308-72-930 and 308-77-102 of the Washington Administrative Code (WAC). The Revised Code of Washington and the Washington Administrative Code are available online at:
http://www.leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx.

If we do not hear from you within 30 days, this assessment becomes final and closed to further appeal.

Questions
Contact Alexandra Porter at (360) 664-1876 or email Aporter@dol.wa.gov.

Respectfully,

Paul W. Johnson
Program Manager
Prorate and Fuel Tax Services

cc Thao Manikhoth, Administrator – Prorate and Fuel Tax Services
Compliance Unit
Fuel Tax Unit

OFFICE RECEPTIONIST, CLERK

To: Yu-Shan Sheard; 'jayg@atg.wa.gov'; 'frondaw@atg.wa.gov'
Cc: Mathew Harrington; Joan Hemphill; Brendan V. Monahan
Subject: RE: Filing by Attachment to E-Mail

Received on 01-25-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Yu-Shan Sheard [mailto:Yu-Shan.Sheard@stokeslaw.com]
Sent: Monday, January 25, 2016 4:48 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; 'jayg@atg.wa.gov' <jayg@atg.wa.gov>; 'frondaw@atg.wa.gov' <frondaw@atg.wa.gov>
Cc: Mathew Harrington <Mathew.Harrington@stokeslaw.com>; Joan Hemphill <Joan.Hemphill@stokeslaw.com>; Brendan V. Monahan <Brendan.Monahan@stokeslaw.com>
Subject: Filing by Attachment to E-Mail

Case Name: Cougar Den Inc., Respondent v. Department of Licensing of the State of Washington, Appellant
Case Number: 92289-6
Person filing the document: Name: Mathew L. Harrington; Phone Number (206) 626-6000; Bar Number 33276; Email address: MLH@stokeslaw.com

Attached, respectfully submitted, is Respondent's Brief in the above referenced matter.

Yu-Shan Sheard
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