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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SAMISH INDIAN NATION

Appellant,

v.

WASHINGTON DEPARTMENT OF LICENSING; TERESA BERNSTEN, Director, Department of Licensing,

Respondents.

AMENDED BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves an issue of straightforward statutory interpretation. It does not involve complex principles of Indian law.

RCW 82.38.310(1) provides authority for the governor to enter into fuel tax agreements with "any federally recognized Indian tribe located on a reservation within this state." The governor has delegated this authority to the Department of Licensing. The agreements apply to fuel taxes included in the price of "fuel delivered to a retail station wholly owned and operated by a tribe, tribal enterprise, or tribal member licensed by the tribe to operate a retail station located on reservation or trust property." RCW 82.38.310(1). In the context of the statute as a whole, the meaning of "reservation" in the first clause is clear: a tribe must have a formal reservation to be eligible for a fuel tax agreement.

The Samish Indian Nation (Tribe) twice asked the Department to enter into negotiations for a fuel tax agreement. However, the Tribe lacks a reservation. Consequently, the Department is without authority to enter into an agreement.

The plain language of the statute supports the Department's decision, and none of the cases the Tribe relies on support importing the definition of "reservation" as used in determining what constitutes "Indian

country" under federal law to understand the meaning of "reservation" in RCW 82.38.310(1). The Court should affirm the Department's decision.

II. RESTATEMENT OF ISSUES

A. Where RCW 82.38.310(1) separately uses the terms "reservation" and "trust property" in the same sentence, and the Legislature has used the term "Indian country" in other statutes to describe tribal land, did the Department correctly determine that "reservation" in RCW 82.38.310(1) means a formal reservation, not tribal trust land?

B. Does the federal statutory definition of "Indian country," which applies when determining the boundaries of state and federal jurisdiction, apply to the state's statutory authority to enter into fuel tax agreements with tribes?

III. STATEMENT OF THE CASE

A. RCW 82.38.310(1) Authorizes the Department to Enter Into Fuel Tax Agreements with Tribes "Located on a Reservation"

In 1995, as a result of conflict between Washington State and its resident tribes concerning the applicability of state fuel taxes, the Legislature enacted RCW 82.38.310, which authorizes the governor to enter into an agreement with "any federally recognized Indian tribe located on a reservation within this state regarding fuel taxes . . . ." RCW 82.38.310(1). The governor has delegated "the power to negotiate

fuel tax agreements to the department of licensing." RCW 82.38.310(5). The agreements apply to fuel "delivered to a retail station wholly owned and operated by a tribe, tribal enterprise, or tribal member licensed by the tribe to operate a retail station located on reservation or trust property." *Id.*

Although there is not a universal meaning of reservation in federal law, generally, a reservation is land set aside by the federal government for the occupation of Indian tribes. *See Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1265 (10th Cir. 2001). Trust property means lands acquired by the United States under express congressional authority and held for the use and benefit of tribes and individual Indians. *See generally,* 25 U.S.C. § 5108. Land not held in trust by the United States is referred to as fee land.

Presently, the State has fuel tax agreements with 25 tribes. Clerk's Papers (CP) 206. The most common type is known as a "75/25." CP 206–208, 211. Under a 75/25 agreement, a tribe agrees to purchase all the fuel that will be sold at tribally-owned retail stations from state-licensed fuel distributors who have already paid the applicable tax. CP 211. The tribe reports total purchases of taxed fuel to the Department and then receives 75 percent of the state fuel tax revenue paid on the fuel as a refund; the state retains 25 percent. CP 211.

All of the tribes with whom the State has entered into agreements had reservations established by federal law prior to entering an agreement,

save one. In 2011, the Department entered into a fuel tax agreement with the Stillaguamish Tribe. CP 447. The Department concedes that at the time it entered into this agreement, it lacked legal authority to so do. However, that was cured when the Stillaguamish Tribe's lands were proclaimed to be a reservation, making any issue concerning the validity of the fuel tax agreement moot. *See* Proclaiming Certain Lands as Reservation for the Stillaguamish Tribe of Indians of Washington, 79 Fed. Reg. 45456 (Aug. 5, 2014).

B. The Samish Indian Tribe Lacks a Formal Reservation

The Samish Indian Tribe is a federally recognized Indian tribe. *See* 84 Fed. Reg. 1200, 1203 (Feb. 1, 2019) (Annual Bureau of Indian Affairs list of Federally-Recognized Tribes). The Tribe is the beneficial owner of a 76.9 acre parcel of land commonly known as the Campbell Lake Property, which is held in trust by the United States. CP 173. However, it is undisputed that the Tribe lacks a reservation. CP 173.

C. The Tribe Requested a Fuel Tax Agreement, and the Department Declined

In 2012, the Tribe inquired about negotiating a fuel tax agreement with the Department, but it was informed by the Department that, because it lacks a reservation, the Tribe was not eligible. CP 173. Subsequently, the Tribe attempted, during two different state legislative sessions, to have bills

passed that would amend RCW 82.38.310. CP 173. See H.B. 1631, 64th Leg. (2015); H.B. 1063, 65th Leg. (2017).[1] Neither bill became law. *See* RCW 82.38.310.

In the spring of 2018, Cody Arledge, lobbyist for the Tribe, contacted the Department to initiate negotiations for a fuel tax agreement. CP 199. The Tribe argued that the Campbell Lake Property is a reservation, making it eligible for an agreement under RCW 82.38.310. CP 168–172. The Department disagreed, concluding that the Campbell Lake Property is not a "reservation" under the statute, and, therefore, the Tribe was not eligible for a fuel tax agreement. CP 205.

The Tribe appealed the Department's decision to the Skagit County Superior Court as "other agency action" under RCW 34.05.570(4) of the APA. The Tribe and the Department filed cross-motions for summary judgment. The Superior Court ruled in favor of the Department, holding that its interpretation of RCW 82.38.310(1) was not unconstitutional, outside its authority, arbitrary and capricious, or taken by a person not lawfully entitled to take such action. CP 657–59. Ruling from the bench, the judge stated that

[1] If amended, RCW 82.38.310(1) would have read, in part, "The governor may enter into an agreement with any federally recognized Indian tribe that (a) is located on a reservation within this state or (b) has lands held in trust by the United States government in a county that is west of the Cascade mountain range that borders Puget Sound with a population of at least one hundred eighteen thousand persons, but less than two hundred fifty thousand persons,. . .."

"a common sense reading tells me that the Legislature intended there to be a distinction between those tribes that are on a reservation under the statute and those tribes which simply hold trust land." Tr. of Proceedings at 44:15–19.

IV. STANDARD OF REVIEW

In an appeal from judicial review of an administrative decision, the appellate court reviews agency action "from the same position as the superior court, and review[s] the administrative record rather than the superior court's findings or conclusions." *Crosswhite v. Dep't of Soc. and Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731 (2017). The burden of demonstrating the invalidity of the agency's action is on the party asserting its invalidity. RCW 34.05.570(1)(a). However, the Department agrees that the meaning of a statute is a question of law reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

A challenge of "other agency action" is subject to a deferential standard of review. The challenging party is entitled to relief only if the agency action is unconstitutional; outside the scope of its authority; arbitrary and capricious; or taken by an agency official not lawfully entitled to take such action. RCW 34.05.570(4)(c).

V. ARGUMENT

In determining the meaning of RCW 82.38.310, the intent of the Legislature, as expressed by the plain language of the statute, must be carried out. An analysis of RCW 82.38.310, along with what the Legislature has said in other statutes, shows that it is clear that the Legislature intended for tribes to have an established reservation as a condition of eligibility for a fuel tax agreement. Because the Legislature used the terms "reservation" and "trust property" in the same part of the statute, they demonstrated that they intended for those terms to have two different meanings. Neither the rules of grammar, including the last antecedent rule, nor the legislative intent or history of the statute changes this result. Moreover, Federal Indian law principles, defining what constitutes "Indian country" do not control the Washington Legislature's use of the term "reservation" in state law.

A. The Meaning of RCW 82.38.310(1) Is Plain

The plain language of RCW 82.38.310 provides that a state fuel tax agreement may only be entered with an Indian tribe located on a reservation. That section reads:

> The governor may enter into an agreement with any federally recognized Indian tribe *located on a reservation within this state* regarding fuel taxes included in the price of fuel delivered to a retail station wholly owned and operated by a tribe, tribal enterprise, or tribal member licensed by the tribe to operate a retail station located on reservation or trust property.

RCW 82.38.310(1) (emphasis added).

Although the word "reservation" is not defined in the statute, the plain meaning is apparent when the statutory context is considered as a whole. *See Campbell & Gwinn, LLC*, 146 Wn.2d at 11 (explaining that the plain meaning of a statute is discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.") In enacting statutes allowing the State to enter a variety of agreements and compacts with Indian tribes, the Legislature has used the terms "reservation" and "Indian Country" separately to indicate different types of holdings. This statutory context demonstrates the Legislature's deliberate decision to make a Tribe's location on a reservation a condition of eligibility for a fuel tax agreement; being located on trust property is not enough.

1. Because the Legislature used the separate terms "reservation" and "trust property" in RCW 82.38.310(1), and "Indian country" in other statutes, it is clear it intended for a tribe to have a formal reservation to be eligible for a fuel tax agreement

Looking at the entire statutory context, including terms the Legislature has used in other statutes, reveals the Legislature's intent for tribes to have an established reservation as a condition of eligibility for a fuel tax agreement.

Because the statute does not define the term "reservation," it might make sense to resort to the dictionary definition of the term, as the Tribe suggests. Br. of Appellant 25–26. Webster's defines "reservation" as (2:b(1)) "a tract of public land set aside for a particular purpose (as schools, forest, or the use of Indians)." Reservation, *Webster's Third New International Dictionary* 1930 (1993). *See State v. Jim*, 173 Wn.2d 672, 681, 273 P.3d 434 (2012) (looking to dictionary definitions of the term "reservation"). Both a formal reservation and land held in trust by the United States for the benefit of the Tribe meet these dictionary definitions. Thus if "reservation" were the only term used in the statute referring to land held for the benefit of Indians, then the Tribe's assertion that the Campbell Lake Property is a reservation for purposes of RCW 82.38.310(1) might have merit. However, later in the same sentence, the statute separately uses the term "trust property," which is also land held for the benefit of Indians, such as the Tribe's property at issue here.

It is a fundamental rule of statutory construction that when "the Legislature uses two different terms in the same statute, courts presume the Legislature intends the terms to have two different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007); *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). In the instant case, the statute permits fuel tax agreements with "any federally recognized

Indian tribe located on a reservation within this state." RCW 82.38.310(1). But the statute extends the coverage of such agreements to "a retail location located on a *reservation or trust property*." RCW 82.38.310(1) (emphasis added). Because the Legislature used two different terms in the same section of the statute, it must have intended for "reservation" to mean something different than "trust property." *Densley*, 162 Wn.2d at 219. Accordingly, having a reservation within the state is a prerequisite to entering into a fuel tax agreement, and any fuel tax agreement would, in turn, cover retail stations located on the reservation itself as well as on trust lands within a tribe's jurisdiction.

The Tribe argues that the Court should rely on the broader term "Indian country" to understand the meaning of "reservation" in RCW 82.38.310(1). But the Legislature knows how to use the term "Indian country" when it wants to, as evidenced by the use of this term in other statutes. For example, RCW 43.06.455 authorizes cigarette tax contracts between the state and tribes. These agreements are effective in "Indian country." RCW 43.06.455(2), (3). Similarly, RCW 43.06.490(1)(d) permits the governor to enter into marijuana tax agreements with tribes. The tax agreements specifically apply to the "transfer of possession of the marijuana from the seller to the buyer within *Indian country*." 43.06.490(2)(a) (emphasis added). These statutes illustrate that the Legislature knows how

to broaden tax compacting authority beyond reservations, to include Indian County or trust lands. But in RCW 82.38.310(1), with respect to the fuel tax, the Legislature limited the agreements to Tribes "located on a reservation."

Rather than reading the statutory context in full, the Tribe asks the Court to read RCW 82.38.310 in isolation, ignoring the other compacting statutes. But as the Washington Supreme Court has cautioned, the courts "assume the Legislature does not intend to create inconsistent statutes. Statutes relating to the same subject matter are in pari materia, and must be read together to ascertain the legislative intent, unless there is an irreconcilable conflict between the statutes. *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). There is no conflict among the statutes allowing tax agreements or compacts with the tribes. The Legislature has consistently used the words "reservation" and "Indian country" to indicate disparate locations.

2. The last antecedent rule cannot be used to make the same word mean two different things in the same sentence

The Tribe urges the Court to consult grammatical rules to interpret the statute, contending that the last antecedent rule dictates that the word "reservation" in the first, eligibility clause means something different than "reservation" in the last clause of the same sentence pertaining to where fuel

stations are located. Br. of Appellant 38–42. That is not how the last antecedent rule works.

Under the last antecedent rule, the court "construe[s] the final qualifying words and phrases in a sentence to refer to the last antecedent *unless a contrary intent appears in the statute*." *Eyman v. Wyman*, 191 Wn.2d 581, 599, 424 P.3d 1183 (2018) (emphasis added). The last antecedent rule should not be applied if "other factors, such as context and language in related statutes, indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation." *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). It also should not be used to "contort the language beyond its limits . . . ." *J.C. Penny Life Ins. Co. v. Pilosi*, 393 F.3d, 356, 365 (3rd Cir. 2004).

Here, applying the last antecedent rule as the Tribe advocates would contort the words the Legislature chose to use beyond their limits. The Tribe claims that applying the term "located on reservation or trust property" to only the last antecedent—"tribal member licensed by the tribe to operate a retail station"—means that the tribal member's retail station can be on a formal reservation or trust property. The Tribe contends that "reservation" in the first clause means something different than it does in the second, and includes *both* a formal reservation or trust property. But just as the Legislature is presumed to intend a different meaning when it uses different

terms, *Densley*, 162 Wn.2d at 219, when it uses "the same word . . . in different parts of the same statute, it is presumed that the words of the enactment are intended to have the same meaning." *Medcalf v. Dep't of Licensing*, 133 Wn.2d 290, 300–01, 944 P.2d 1014 (1997). The last antecedent rule cannot be used to defeat these "fundamental rule[s]" of statutory construction. *Roggenkamp*, 153 Wn.2d at 625.

3. Neither the legislative intent statement nor legislative history support the Tribe's interpretation of "reservation"

Because the meaning of the statute is plain on its face, there is no need to refer to legislative history. *Darkenwald v. Emp't Sec'y Dep't*, 183 Wn.2d 237, 244–45, 350 P.3d 647 (2015). But even if this Court were to review the legislative history, it would find nothing that supports the Tribe's contention that "reservation" includes tribal trust lands.

The Tribe conflates the impetus for RCW 82.38.310—ending fuel tax disputes with tribes over the State's taxing authority in Indian country—with eligibility for a fuel tax agreement. By enacting RCW 82.38.310, the Legislature intended that fuel tax agreements entered into with tribes located on reservations within the state would *cover* both the specific tribe's reservation as well as its related trust lands. However, the intent that the proposed fuel tax agreements would cover fuel stations located not just on a particular Tribe's reservation, but also any trust lands within its

jurisdiction, is not the same as the requirement that a tribe be "located on a reservation within this state" in order to enter into a fuel tax agreement in the first place. RCW 82.38.310(1). Nothing in the purpose of the statute confers eligibility for a fuel tax agreement on a Tribe that is without a reservation within this state.

Legislative testimony of Department and Attorney General's Office representatives does not support the Tribe. The testimony merely urged the passage of what became RCW 82.38.310 in order to both provide authority for fuel tax agreements and to avoid future litigation. *Hearing on SHB 1273 Before the S. Comm. on Transportation, 54th Leg., Reg. Sess.* (Wash. 1995) (March 22, 1995). The Tribe also points to testimony in support of the legislation, indicating that fuel tax agreements would be similar to existing consent decrees and cover both reservation and trust lands. *Id.* But again, the agreements' coverage is not the same as eligibility for an agreement.

There is nothing in either the legislative intent or the bill's history to support the contention that a tribe need only be located in "Indian country," as opposed to having a formal reservation, to be *eligible* for a fuel tax agreement.

B. Federal Indian Law Principles of What Constitutes "Indian Country" Do Not Apply to the Term "Reservation" in RCW 82.38.310

The Tribe insists that because the Legislature enacted RCW 82.38.310 as a means to resolve fuel taxing disputes between the state and tribes, Federal Indian law principles control. Br. of Appellant 5. However, the question is not whether the Tribe's Campbell Lake Property is outside the State's taxing authority, but whether this land is a reservation as contemplated by RCW 82.38.310. All of the cases cited by the Tribe for the proposition that "reservation" as used in RCW 82.38.310 must include tribal trust lands concern what constitutes "Indian country." None of the cases, state or federal, establish an all-purpose definition of "reservation."[2]

1. Interpretations of federal criminal law statutes do not provide a generally applicable definition of "reservation"

The Tribe argues that *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978) "directly addressed the issue of whether trust land qualifies as a reservation." Br. of Appellant 8. It did not. Rather, *John*

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[2] In an effort to persuade this Court that it must defer to federal interpretations, the Tribe discusses *Willman v. Wash. Utils. and Trans. Comm'n*, 154 Wn.2d 801, 117 P.3d 343 (2005), stating that the court in that decision did not give deference to an agency's determination of federal Indian law issues. Br. of Appellant 19. That is an incorrect statement. At issue in *Willman* was the Washington Utilities and Transportation Commission's (WUTC) decision to not conduct an analysis as to whether imposing tribal taxes on nonmembers was valid. Instead the WUTC "adopted a standard that presumes validity of the tax unless clearly shown to the contrary by federal law." *Willman*, 154 Wn.3d at 807. The *Willman* court agreed with the WUTC's approach to leaving complex taxation issues to federal courts.

addressed whether lands within the area designated as a reservation for the Choctaw Indians in Mississippi were "Indian county" for purposes of the Major Crimes Act, 18 U.S.C. § 1153. *John*, 437 U.S. at 635. That act provides for federal criminal jurisdiction over "Any Indian who commits . . . [a major crime] . . . *within the indian country*." *Id.* at 647. The act then provides a definition of "Indian country," which includes three categories of land, the first of which is "all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ." *id.* at 648 (quoting 18 U.S.C. § 1151). Thus the terms "Indian country" and "reservation" are not interchangeable. *State v. Cooper*, 130 Wn.2d 770, 778 928 P.2d 406 (1996).

For the same reason, the Tribe's reliance on *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 2d 676 (1914), another criminal jurisdiction case, is similarly misplaced. Again, the issue in *Pelican* was not what constitutes a reservation, but whether an individual Indian trust allotment that was once part of the Colville reservation constituted "Indian country" for purposes of federal criminal jurisdiction. *See Pelican*, 232 U.S. at 448–49. Interpretation of "Indian country" under the Major Crimes Act has no application to RCW 82.38.310, but even if it did, it would not support the Tribe's argument.

2. Interpretations of what is Indian country for taxation purposes do not provide a generally applicable definition of "reservation"

According to the Tribe, the "test" established by *John* was applied in a series of cases, addressing limitations on state taxation authority. Br. of Appellant 8–10 (discussing *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) (*Potawatomi*); *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S. Ct. 1985, 124 L. Ed. 2d 30 (1993) (*Sac and Fox*); and *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, L. Ed. 2d 400 (1995) (*Chickasaw*)). However, like the federal criminal jurisdiction cases, these taxation cases all concern what constitutes "Indian country" and do not provide a global definition of "reservation."

Potawatomi concerned whether tribal trust land amounted to "Indian country" for purposes of tribal sovereign immunity. *Potawatomi*, 498 U.S. at 511. Citing *John*—which relied on the definition of "Indian country" in the federal Major Crimes Act—the Court explained that it had never "drawn the distinction between tribal trust land and reservations . . . ." *Id.* Accordingly, the Court concluded that the trust land in question "qualifie[d] as a reservation *for tribal immunity purposes*." *Id.* (emphasis added).

Sac and Fox dealt with Oklahoma's authority to tax the income of members of the Sac and Fox Nation. *Sac and Fox*, 508 U.S. at 123. The

state argued that under an 1891 treaty, the Tribe's reservation was disestablished. *Id.* at 124. It further argued that the presumption against taxation applies only to members who live on a formal reservation; accordingly, it could tax the income of the tribal members. *Id.* at 123. It was in that context that the Court explained that its "cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.'" *Id.* at 123. The Court again relied on Congress's definition of Indian country in the Major Crimes Act, 18 U.S.C. § 1151. *Id.*

Chickasaw is similarly unavailing. This case considered two issues: 1) whether Oklahoma could impose its motor fuel tax on fuel sold by tribal retail stores on tribal trust land, and 2) whether Oklahoma could impose an income tax on tribal members employed by the Tribe but living outside Indian county. *Chickasaw*, 515 U.S. at 452–53. The resolution of both questions hinged on whether the taxed activity and subject individuals were located in Indian country and, therefore, outside the state's taxing authority. *Id.* at 453. Consistent with its other decisions, the Court determined that tribal trust lands are informal reservations within the definition of "Indian country." *Id.* (again relying on the definition of "Indian country" in 18 U.S.C. § 1151 to understand how "Congress comprehends that term.") *Id.*

at n.2). Like *Potawatomi* and *Sac and Fox*, *Chickasaw* does not inform this Court as to what constitutes a "reservation" as used in RCW 82.38.310.

As with the criminal cases cited by the Tribe, none of the federal taxing cases provide a universal definition of "reservation" or are applicable to this case. The Court should decline to rely on them.

3. Washington's interpretation of its statute assuming criminal jurisdiction over Indian country does not provide a generally applicable definition of "reservation"

Washington case law regarding state criminal jurisdiction is equally devoid of a global definition of "reservation." The three cases cited by the Tribe, interpreting the state's Public Law 280 statute, RCW 37.12.010, speak to what constitutes "Indian country." Br. of Appellant 10 (citing *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988); *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996); and *State v. Jim*, 173 Wn.2d 672, 273 P.3d 434 (2012).

In 1953, Congress enacted what is known as Public Law 280, permitting states to assume limited civil and criminal jurisdiction within Indian country. *See* 18 U.S.C. § 1360. Pursuant to Public Law 280, Washington enacted RCW 37.12.010, assuming "criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state . . . ." However, the State did not assume jurisdiction

over "Indians when on their tribal lands or allotted lands *within an established Indian reservation*," except for eight categories of civil law not relevant here. RCW 37.12.010. Thus the State assumed criminal jurisdiction only on tribal lands outside of established Indian reservations. *See Cooper*, 130 Wn.2d at 773–74. All of the state cases the Tribe relies on concerned whether the term "Indian country" in RCW 37.12.010 encompasses only formal reservations.

In *Sohappy*, the Washington Supreme Court considered whether the State had criminal jurisdiction, under RCW 37.12.010, to prosecute an assault committed by a tribal member at Crooks Landing on the Columbia River, land set aside as an "in-lieu" fishing site. *Sohappy*, 110 Wn.2d at 908. The Court noted that the jurisdictional statute, RCW 37.12.010, "must be construed in accordance with federal law." *Id.* at 911. Importantly, the Ninth Circuit Court of Appeals had already conclusively held that the Cooks Landing site was "Indian country" for purposes of 18 U.S.C. § 1151. *U.S. v. Sohappy*, 770 F.2d 816 (9th Cir. 1985). Because a violation of state law within in "Indian country" is a federal offense vesting exclusive jurisdiction in the federal and tribal governments, the State did not have jurisdiction over criminal offenses committed at Crooks Landing. *Id.* at 911–12. Although the in-lieu site was not within the original boundaries of the reservation, it was "part of a reservation *for purposes of application of the*

state jurisdiction statute." *Id.* at 912. The Court expressly stated that its holding "is narrowly limited to the in-lieu site here involved." *Id.* at 909.

Later in *Cooper*, the Court expressly rejected a similar argument about the meaning of "reservation" in RCW 37.12.010 as the Tribe makes here about RCW 82.38.310(1). Relying primarily on *Sohappy*, the defendant argued, as the Tribe does here, that the State's view of "reservation" in the statute was too narrow and urged the court to adopt the view that reservation should mean all lands held in trust for the benefit of Indians. *Id.* at 776. But as the Court explained, "*Sohappy* does not, as Cooper suggests, hold that 'reservation' includes all lands held in trust for the benefit of Indians." *Id.* at 778. Rather, the holding applied to the specific in-lieu fishing site in question. *Id.*

Importantly, the Court also rejected Cooper's invitation to look to federal precedent interpreting the term "reservation." The Court explained:

> The federal cases cited by Cooper are concerned with the definition of "Indian Country" for purposes of federal jurisdiction. . . . Furthermore . . . a determination of whether the 1963 version of RCW 37.12.010 asserted state jurisdiction over particular Indian lands (or over particular areas of law) presents a question of state law. Federal interpretations of the term "reservation" for purposes of federal jurisdiction are not helpful where, as here, reliance on such interpretations would render the plain language of RCW 37.12.010 meaningless.

Id. at 778–79. Here too, the federal cases the Tribe cites are concerned with the definition of "Indian country" for purposes of federal jurisdiction. A determination of whether RCW 82.38.310 requires a tribe to have a formal reservation in order to enter into a fuel tax agreement with the State presents a question of state law. Relying on federal interpretations of the term "reservation" are not helpful and would render the plain language of RCW 82.38.310 meaningless.

Finally, the Tribe asserts that *State v. Jim* "held that federal law definitions of 'reservation' control interpretation of the same term in state law, and that the term 'reservation' is inextricably tied to the federal definition of 'Indian country.'" Br. of Appellant 13. It did not. Rather, the Court held that *for purposes of RCW 37.12.010*, another specific in-lieu fishing site established by Congress "would be considered a reservation for purposes of federal jurisdiction," when considering the character of the land in question. *Jim*, 173 Wn.2d at 681, 685. That is because "the very authority of Washington's statutory assumption of state criminal jurisdiction over Indian lands derives from federal law . . . ." *Jim*, 173 Wn.2d at 681–82.

In contrast here, the Department's authority to enter into fuel tax agreements with tribes derives from state, not federal, law. None of the cases cited by the Tribe suggest that tribal trust lands are always a reservation under state law. The Court should reject the Tribe's attempt to

import federal Indian law principles into a matter of pure state law, particularly one of straightforward statutory interpretation.

C. None of the Other Arguments Advanced by the Tribe Supports Its Interpretation of "Reservation"

The Tribe argues that the record supports its reading of the statute, contending that "many of the fuel tax agreements that exist between DOL and Washington tribes use different definitions of 'reservation' than that now argued by DOL." Br. of Appellant 46. This contention is without merit.

A survey of the current agreements shows that two of the earliest agreements, Squaxin Island and Swinomish, do not define reservation. *See* CP 432, 467. Of the other active fuel tax agreements, 16 contain the following definition: "Reservation" means the _____ Reservation together with Tribal trust lands located outside the boundaries of the Reservation over which the _____Tribe exercises governmental authority. *See* fuel tax agreements with Chehalis CP 229, Colville CP 239, Cowlitz CP 248, Kalispel CP 274, Lummi CP 300, Makah CP 315, Muckleshoot CP 320, Nisqually CP 329, Nooksack CP 341, Port Gamble S'Klallam CP 351, Puyallup CP 362, Quileute CP 371, Quinault CP 379, Shoalwater Bay CP 391, Skokomish CP 401, and Snoqualmie CP 413. As for the remaining agreements, six define reservation in very similar terms to include the specific tribe's reservation as well as lands held in trust for the tribe outside

reservation boundaries. *See* Jamestown S'Klallam CP 264, Lower Elwha Klallam CP 284, Spokane CP 425, Suquamish CP 456, Tulalip CP 478, and Upper Skagit CP 489. It is only the agreement with the Stillaguamish that defines reservation as ""Indian Country' consistent with 18.U.S.C.1151." CP 444.

The overwhelming majority of fuel tax agreements define "reservation" as a tribe's reservation together with other lands held in trust for the tribe. As such, there is no conflict between these definitions and the Department's position that for purposes of RCW 82.38.10, tribal trust land alone is not a reservation.

Next, the Tribe argues that if the Department's interpretation of RCW 82.38.10 were correct, "there would be no tribal fuel stations being operated on fee land." Br. of Appellant 47. Based on an amicus brief filed in the Superior Court by Skagit County as well as "information and belief," the Tribe contends that other tribes are operating fuel stations on fee land, which are covered by fuel tax agreements. *Id.* This assertion is without support or merit.

There is nothing in the record supporting the Tribe's contention that tribal fuel stations located on fee land are covered by tax agreements. To the contrary, the record, which contains all current fuel tax agreements shows that, by definition, only those fuel stations located on a particular

tribe's reservation or other trust lands are covered by an agreement. As an example, Section 2.2 of the Chehalis fuel tax agreement states that the agreement is intended to "resolve . . . all issues related to motor vehicle fuel taxes and special fuel taxes *within the Reservation* ...." (emphasis added) CP 231. Section 4.2 a. of the same agreement reads: "[t]he Tribe shall by ordinance require that, when purchasing fuel *on Reservation* for distribution or sale *on Reservation*, tribal filing stations, tribal businesses, tribal member businesses, and tribal members purchase only fuel on which applicable state fuel tax has been paid . . .." (emphasis added) CP 233. As the agreements are intended to resolve conflict related to the taxation of fuel on reservation and clearly apply only to on-reservation activity, any tribal fuel station located on fee land falls outside the parameters of a fuel tax agreement.

Based on a plain meaning reading of the statute, the Department correctly determined that in the context of RCW 82.38.310(1) "reservation" means a formal reservation, not merely tribal trust land. The Tribe fails to demonstrate that the Department's interpretation of "reservation" was incorrect and that the resulting decision to not enter into negotiations for a fuel tax agreement was made without regard to the relevant facts and circumstances or reached through some process other than reason.

VI. CONCLUSION

The Tribe insists that because the Legislature enacted RCW 82.38.310 as a means to resolve disputes between the state and tribes regarding the imposition and collection of fuel taxes, Federal Indian law principles control. However, the current issue between the parties is not whether the Tribe's Campbell Lake Property is Indian country and, therefore, outside of the state's taxing authority. The question is whether this land is a reservation as contemplated by RCW 82.38.310. A plain reading of the statute is that a tribe must be located on a reservation within the state in order to qualify for a fuel tax agreement. Because the Department's interpretation of the statute is correct, its denial of a fuel tax agreement was not arbitrary and capricious. As such, this Court should uphold the Department's denial of a fuel tax agreement.

RESPECTFULLY SUBMITTED this 11 day of September, 2019.

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I certify under penalty and perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11 day of September 2019, in Olympia, Washington.

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