WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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| In the matter of:<br><br>Cougar Den Inc.,<br><br>Respondent. | Docket No.: 03-2022-DOL-00137<br><br>COUGAR DEN'S OPPOSITION TO WASHINGTON STATE'S MOTION FOR SUMMARY JUDGMENT<br><br>Agency: Department of Licensing<br>Program: Fuel Tax<br>Agency No. 2021-0072337-01-PRFT |



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This is a case about Cougar Den, Inc. exercising its federal Right to Travel, which is protected, codified, and secured under the Treaty of 1855 (the "Treaty"). Pursuant to the Treaty, the Yakama Nation holds an established Right to Travel freely for several purposes, one of them being to engage in trading endeavors without restriction by state actors. The Yakama Nation's Right to Travel is unique and sets this case apart from other Indian tax administration cases.

The Department's Cross-Motion for Summary Judgment simply misses the point. The two Indian law cases cited by the Department illustrate the Department's profound misunderstanding of this case, treaty rights, and Federal Indian Law.

For example, the Department cites *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), to support its assertion that "the tax does not violate the Treaty . . ." Department Mot. for Summ. J. at 16 ("Dept. Mot."). The Department notes that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries generally have been held subject to non-discriminatory state law otherwise applicable to all citizens." *Mescalero Apache Tribe*, 411 U.S. 148-49; Dept. Mot. at 16.

This statement and case actually support Cougar Den's position because the proviso "absent express federal law to the contrary" applies in this case. This is because under *Mescalero Apache Tribe* and cases which cite it, "[**a**] **treaty constitutes an express federal law**." *Cougar Den I*, 188 Wn.2d 55, 60, 392 P.3d 1014 (2017) (citing *Mescalero Apache Tribe*, 411 U.S. 145) (emphasis added). And "Treaties with federally recognized Indian tribes—like the treaty at issue here—**constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians**." *Cougar Den II*, 139 S.Ct. 1000, 1013 (2019) (citing *Mescalero Apache Tribe*, 411 U.S. at 148–149) (emphasis added).



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Perhaps by design, the Department's Motion fails to recognize the uniqueness of the Yakama Nation Treaty right at issue, and that it preempts Washington's conflicting fuel tax statute as applied to Cougar Den. *See* Respondent's Mot. for Summ. J. Properly framed, this is a treaty rights case centering on whether the Yakama Nation's Treaty preempts Washington's revenue generating fuel tax law as applied to a Yakama traveling the public highways with goods to and from market. Recent and dispositive precedent shows clearly that the Treaty preempts this exact Washington law. If the fuel tax does not apply to Cougar Den, then the Department's misstated concerns about the accuracy of Cougar Den's reporting fall away as moot. The Department's assessments against Cougar Den are invalid, and summary judgment should be granted to Cougar Den.

## I. FACTS

Cougar Den incorporates and sets forth the facts within the Statement of the Case section in its Motion for Summary Judgment. Select additional facts are set forth here:

### A. Cougar Den Fully and Accurately Reported Its Deliveries to the Department

A month before the United States Supreme Court ruled against the Department in regard to this same Treaty right as applied to this same fuel tax law, the Department on February 20, 2019, mailed Cougar Den a letter identifying generally three concerns with Cougar Den's November 2018, December 2018, and January 2019 fuel tax returns. *See* Dept. of Licensing, Letter to Cougar Den (February 20, 2019), attached as Ex. 14 to the Decl. of Kip "Punia" Ramsey in Support of Respondent's Mot. for Summ. J. (June 30, 2023) ("Ramsey Decl."). The Department observed first that Cougar Den reported on the wrong schedules: it reported on Receipts Schedule 2 instead of 2A and on Distributions Schedules 7 and 10G, which meant Cougar Den's disbursements were counted twice. *Id.* Second, the Department explained that



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"Schedule 10G is used for imported fuel deliveries to Yakama Tribal stations" and directed Cougar Den to explain why purchasers identified in that Schedule were tax exempt. *Id.* The Department also identified a typographical error on the November return; Cougar Den mistakenly had listed a delivery to "Portland Washington." *Id.*

Cougar Den responded on March 29, 2019, stating that it would in good faith follow the State's tailored instructions—modified to comply with federal law and accommodate Cougar Den's treaty distributions—and report its treaty-protected deliveries to Tribal Stations on Schedule 10G. Cougar Den, Inc., Letter to Paul Johnson at Dept. of Licensing (March 29, 2019) attached as Ex. 1 to Decl. of Derek Red Arrow in Support of Cougar Den's Opposition to Wash. Mot. for Summ. J. ("Red Arrow Opposition Decl."). Cougar Den explained how its activities were tax-free: the United States Supreme Court affirmed the Washington State Supreme Court's holding that the Treaty of 1855 preempted the state's fuel tax. *Id.* Cougar Den apologized for the error regarding "Portland Washington," corrected it, and also corrected the double reporting. The Department never responded. Consistent with that exchange, Cougar Den transported fuel pursuant to its Treaty right to Tribal Fuel Stations, and fully and accurately reported those deliveries on Schedule 10G for the next two years. Decl. of Chantelle M. Perez in Support of Respondent's Mot. for Summ. J. at ¶ 10 ("Perez Decl."). The Department took no issue with Cougar Den's reporting practices until it issued its Notice of Assessment and Intent to Revoke on July 13, 2021. Ramsey Decl. Ex. 12.

**B. Cougar Den's Appeal**

Cougar Den sought review of the fuel tax assessment pursuant to the Washington Administrative Procedure Act, arguing the Department interpreted and applied the law erroneously when it issued and affirmed the April 2021 Assessment. RCW 34.05.570(3)(d).



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Specifically, the Department erred when it upheld the assessment despite Washington Supreme Court and United States Supreme Court precedent to the contrary.

Regardless, the issue before this Court is adequately framed in the Court's Pre-Hearing Conference Order, issued after input by both the Department and Cougar Den in that conference:

> Whether the Notice of Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period should be affirmed, or if Cougar Den, Inc. is exempt from the same under the Treaty of 1855.

Prehearing Conference Order at 2, ¶ 3.1.1 (April 27, 2022). In its motion to compel, the Department unsuccessfully argued the scope of the case should be broader. The Department has not subsequently moved to expand the scope of this case.

## II. ARGUMENT

### A. The Department Must Comply with Federal Law, and Has No Basis to Fault Cougar Den's Tailored Reporting

#### *i. Federal Law Requires State Compliance*

The United States Constitution and federal Indian law precedent require the Department to comply and accommodate Cougar Den's Treaty right. The Supremacy Clause of the Constitution states that:

> [**A**]**ll Treaties made**, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. (emphasis added).

This means that "a state law that burdens a treaty-protected right is pre-empted by the treaty." *Cougar Den II*, 139 S. Ct. at 1015. "[T]he treaty protects the Yakamas' right to travel on the public highway with goods for sale." *Id.* Therefore, where a statute taxes or imposes preconditions on the Yakamas for traveling with fuel by public highway, as Washington's fuel



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tax statute does, that statute cannot lawfully be assessed against a Yakama such as Cougar Den. *See id.*[1]

The rule of federal preemption is the bedrock principle for resolving this dispute. Each Administrative Law Judge to consider this issue understood that the "ultimate conclusion [is] . . . that Article III of the Treaty of 1855 preempts RCW 82.36.230 [the state Fuel Tax]." *Cougar Den, Inc.*, OAH No. 02-2015-DOL-00001; 03-2015-DOL-00003, ¶ 28 at 18 (Wash. Dept. of Licensing 2015) (Order on Summary Judgment Motions) ("ALJ Beebe Determination"), attached as Ex. 2, Red Arrow Opposition Decl.; *see Cougar Den, Inc.*, OAH No. 2014-DOL-0006 (Wash. Dept. of Licensing 2014), (Order on Summary Judgment Motions) ("ALJ Leavell Determination") attached as Ex. 6, Red Arrow Opposition Decl. As did the Washington State Supreme Court and the United States Supreme Court. This is because:

> Treaties are a country's contracts. The solemn commitment of great nations, like the given word of good men, should be honored. It should not matter if the erosion of time and the bright glare of hindsight demonstrate that they were extravagant or ill-advised. The promises made at Walla Walla all those years ago were unconditional. They will be so enforced by this court.

*Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1260 (E.D. Wash. 1997).

The Department must therefore comply with federal law and accommodate Cougar Den's treaty-protected, tax-free distributions like it did as to the transactions deemed tax-free after *Cougar Den I* and *Cougar Den II*. Ramsey Decl. Ex. 14 (Letter from the Department of

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[1] The Department also cites *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 731-32 (9th Cir. 2021), for the proposition that monthly reporting is a reasonable regulatory burden. Dept. Mot. at 16-17. But in that case, no treaty was at issue. The case simply considered whether certain regulations were acceptable under general tribal sovereignty principles (not conflicting, individual off-reservation treaty rights), and whether Indian Trader statutes applied (they did not). The case also delved into whether a tribal corporation was a distinct entity from its tribe — a question which has no relevance here. The case is inapplicable here, where a treaty preempts the burden at issue.



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Licensing allowing treaty-protected distributions to be reported on Schedule 10G); *see* Decl. of Wesley Marks in Support of the Department's Mot. for Summ. J. at ¶ 14 (June 30, 2023) ("Marks Decl.") ("Following the U.S. Supreme Court's holding . . . the Department updated its fuel tax reporting system to comply with the decision.").

### *ii. The Fuel Tax Statute Burdens Travel*

The Department presents its own interpretation of how the fuel tax statute operates, but the Department's story is neither based on the text of the statute, nor does it reflect the reality of how the state fuel tax functions. *See* Respondent's Mot. for Summ. J. at § C.4, pgs. 20-24. Regardless, the Department's interpretation is not important because in a Treaty Right case, "it is the practical effect of the state law that . . . makes the difference." *Cougar Den II*, 139 S. Ct. at 1010.

An analysis of the statute makes clear that it burdens travel. The Department attempts to argue otherwise, quoting RCW 82.38.030(9) as saying "Taxes are imposed when: . . . fuel is removed at the rack . . ." Dept. Mot. at 4. But in its sections setting forth the fuel tax statute, the Department misleadingly omits critical language that undermines the Department's position. The actual text makes clear that the tax applies when fuel is removed "from a terminal" (if removed at the rack) and not, as the Department suggests, "at the rack" itself. The relevant portion of the statute says in full:

> **(9) Taxes are imposed when:**
> **(a) Fuel is removed in this state from a terminal if the fuel is removed at the rack** unless the removal is by a licensed supplier or distributor for direct delivery to a destination outside of the state, or the removal is by a fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320.

RCW 82.38.030(9)(a) (emphasis added). The Department's omission of "Fuel is removed in this state from a terminal" changes the meaning of the statute. If the language is read as actually written by the legislature, the tax is imposed when fuel is removed from a terminal. The only



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way Cougar Den removes fuel from a terminal is by driving a truck out of that terminal's gate onto a road for distribution. Thus, just like the tax in *Cougar Den I*, Cougar Den's distribution activity here cannot be separated from travel because its "trade, traveling, and importation [] requires the use of public roads [and therefore] fall[s] within the scope of the right to travel provision of the treaty." *Cougar Den I*, 188 Wn.2d at 69.

The fact that the state tax cannot apply until the destination is known further supports the fact that travel is being burdened by the operation of the tax. Both parties agree that Cougar Den's alleged violation did not occur until the time that it reported what was delivered and where. *See* Dept. Mot. at 9 ("the fuel supplier can withdraw the fuel without paying the tax up-front. After all, they may not be liable for tax on some of the fuel they withdraw and some end uses of the fuel may be tax exempt."); *see also* Dept. Mot. at 10-11 (admitting the alleged violation occurred because "Cougar Den did not provide any documentation to support that it was actually delivering this fuel to statutorily tax-exempt entities," i.e., after delivery was complete). Thus, the operation of the tax makes clear that it applies at the time of travel, and the alleged taxability of Cougar Den's distribution activity therefore cannot be known until after delivery is complete. This point is set forth more fully in Respondent's Motion for Summary Judgment at § III.C.4, pgs. 20-24.

### B. The State Cannot Require Cougar Den to Pre-Collect Taxes or Report its Distributions if that Requirement Serves a Revenue Producing Purpose

The Department claims that regardless of the tax-free status of Cougar Den's distributions, Cougar Den's license must be revoked because "Cougar Den as a regulated licensee has a precollection and reporting obligation for fuel sold." Informal Hearing Determination—Fuel Supplier Return Assessment—April 2021 at 2 ("Informal Determination")



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attached as Ex. 10 to Marks. Decl. This position fails as a matter of law because revenue generating regulations are federally preempted.

The Ninth Circuit's decision in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), is instructive. The Ninth Circuit reviewed a state requirement that directed individuals to give notice to state officials prior to transporting unstamped cigarettes within the state. *Id.* at 1262. The Circuit Court considered the Treaty of 1855, confirmed the unrestricted nature of the Treaty right to travel pursuant to its decision in *Cree II*, 157 F.3d 762 (9th Cir. 1998), and concluded that an otherwise simple "pre-notification requirement is a 'restriction' and 'condition' on the right to travel that violates the Yakama Treaty." *Id.* at 1266. In response, it was suggested that this pre-notification requirement was proper because it fell within the "Regulatory" exception that allows state regulations that serve a "purely-regulatory purpose." *See id.* at 1269-70.

The Ninth Circuit dismissed this suggestion. The court explained that "pure regulations" represent "restrictions imposed for a public purpose unrelated to revenue generation." *Id.* at 1269. Looking to the purpose of the state regulation in *Smiskin*, it determined that the regulation's purpose was to "enforce collection of the tax hereby levied," and that "[b]ecause the primary purpose of tax collection is to generate state revenue . . . the State's notice requirement does not fall within the Court's 'purely regulatory' exception, and that its application to Yakama tribal members is precluded by the Yakama Treaty." *Id.*

The reporting requirements here likewise serve one purpose: to collect state tax-revenue for the use and maintenance of public highways. RCW 82.38.010; 82.38.150; WASH. CONST. art. II, § 40 (amend. 18). This purpose is memorialized in the Department's regulations, its informal determination, and Washington's Constitution. Nonetheless, the Department requests Cougar Den to 'pre-collect' taxes for the state, and report those distributions on a Schedule, to later



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charge a tax on those distributions. Informal Determination at 2 (stating "This secondary imposition shifts the taxation point to the ultimate buyer of the fuel [Tribal Fuel Stations] if it has not been previously imposed on Cougar Den. Even in this scenario however, Cougar Den as a regulated licensee has a precollection and reporting obligation for fuel sold under the (9)(e) imposition. RCW 82.38.035."). Every aspect of the Department's request fails. The entire policy of the reporting and pre-collection requirements serves the purpose of revenue generation: a purpose already held inapplicable when confronted with the federal Treaty right. *See Smiskin*, 487 F.3d 1260. Again:

> [T]he treaty's terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. **And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market**—exactly what the treaty forbids.

*Cougar Den II*, 139 S. Ct. at 1017 (Gorsuch, J. concurring) (emphasis added); *see id.* at 1013 (lead opinion of Breyer, J.).

### C. Cougar Den Voluntarily Reported Accurately: In the Absence of an Applicable Schedule, 10G (for Sales to Tax-Exempt Entities) Was an Appropriate Choice

Both parties agree Cougar Den timely filed and reported the facts regarding its distributions. The Department complains, however, that Cougar Den reports its distributions on an incorrect schedule and therefore its license should be revoked. The Department argues the only transactions that should be reported on Schedule 10G are those subject to "exemptions specified under Washington law" enumerated at RCW 82.38.080. Dept. Mot. at 10. And because Cougar Den's tax-free distributions are not specified under Section .080, Cougar Den's distribution activities must be reported elsewhere, with tax paid. Federal law, however, preempts any contrary requirements.



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Washington fuel supplier licensees submit reports for all fuel distributions occurring outside of the IRS registered terminal using one of sixteen enumerated "Schedules." *See* Wash. State Dept. of Licensing, FUEL TAX COMPLIANCE MANUAL, at 9 § "What Do I Have to Do to Maintain My License." ("Fuel Tax Manual") attached as Exhibit E to the Decl. of Derek Red Arrow in Support of Mot. for Summ. J. (June 30, 2023). The Fuel Tax Manual describes these Schedules, including the types of distributions covered by each Schedule and its applicable limitations. *Id.* at 10-12. Schedules 1 through 4 are "Receipts Schedules" and Schedules 6A through 13X are designated "Disbursements Schedules," each with their own set of instructions. *Id.* If Cougar Den sold its tax-free gallons to a licensed distributor for export, it would report that distribution on Schedule 6A. *Id.* at 11. If Cougar Den sold its tax-free gallons to the Federal Government, that would be reported on Schedule 8. *Id.* Eleven separate Schedules exist that a Fuel Supplier may report a tax-exempt distribution: ten of these Schedules concern sales to specific entities, with the last tax-exempt distributions schedule being Schedule 10G; the catch-all for reporting distributions of "Gallons sold to other tax-exempt entities." *Id.* at 12. No schedule accommodates distributions tax-free under federal law, such as the Treaty right applicable here.

Cougar Den makes use of the most appropriate schedule and the Department has discretion to approve the use of that schedule. *See* Marks Decl. ¶ 14. Cougar Den delivers its tax-free fuel to Tribal Fuel Stations on Tribal Lands as an Indian-to-Indian transaction in Indian country; a tax-free transaction unreachable by the Department.[2] Cougar Den reports these tax-

[2] *See Squaxin Island Tribe v. Stephens*, 400 F.Supp.2d 1250 (W.D. Wash. 2005) (concluding the Department barred from collecting fuel taxes for fuel sold on tribal lands); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (held state could not apply its motor fuels tax to fuels sold by tribe in Indian country).



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free deliveries on Schedule 10G; the schedule used to report fuel deliveries to tax-exempt entities. *See* Fuel Tax Manual at 12. Schedule 10G is the only schedule available for reporting analogous activity because deliveries to "other tax-exempt entities" are analogous to deliveries which are tax-free according to the Treaty.

Cougar Den understands that Schedule 10G indicates that "[t]hese transactions are specified in Washington law (RCW 82.38.080)," *id.*, but the state's statutory exemptions do not expressly include inter-tribal tax-free distributions. Regardless, Cougar Den's distributions are tax-free by law and the only schedule on which to report these tax-free distributions would seem to be the "Other" category that Schedule 10G provides.

The Department did advise Cougar Den to report tax-free imports under *Cougar Den I* on Schedule 10G, demonstrating that the Schedule is approved by the Department and used in practice for some Treaty-protected activity. The Department's position apparently is that some lawful but novel transactions for which there is no applicable schedule can be reported on Schedule 10G, but that other lawful but novel transactions for which there is no applicable schedule cannot. This is arbitrary.

Cougar Den is apparently being punished for its reasonable attempt to comply with a set of schedules which does not provide a schedule for lawful, Treaty-preempted activity. In the absence of guidance, Cougar Den has instead been faulted for attempting to work within a system operated by a state Department historically hostile toward Treaty rights and Mr. Ramsey. *See Tulee v. Wash.*, 315 U.S. 681 (1942); *see Yakama Indian Nation*, 955 F. Supp 1229; *see Cougar Den I*, 188 Wn.2d 55; *see Cougar Den II*, 139 S. Ct. 1000.

**D. The OAH is a Proper Jurisdiction for this Dispute.**

The Department argues OAH lacks jurisdiction over whether the Treaty preempts Washington fuel tax statutes. Dept. Mot. at 13. This is a remarkable argument. First, this case



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rests in the same posture two Administrative Law Judges sat in 2014 and 2015 in the proceedings leading up to *Cougar Den I*. *See* ALJ Beebe Determination, Ex. 2 and ALJ Leavell Determination Ex. 6, Red Arrow Opposition Decl. The Department never raised such an argument before either Administrative Law Judge, which suggests this argument does not represent the consistent position of the Department. Second, the Department sought referral of this matter to OAH full well understanding that Cougar Den would raise its Treaty arguments. *See* Dept. Mot. at 12-13 ("[Cougar Den's] response to all of this will assuredly be that as a Yakama-owned business, the Treaty of 1855 preempts the State from requiring Cougar Den to follow the Washington laws applicable to all other fuel distributors."). If the Department's position were taken as true, then a neighboring subsidiary jurisdiction, like the State of Washington, would be capable of prosecuting members of the Yakama Nation but could ignore with impunity valid defenses grounded in federal law: Where is a law-abiding Yakama member to turn when faced with lawless behavior by the Department of Licensing?

The Department's jurisdictional arguments remain unfounded at best. The Department cites several authorities to support the notion that an administrative tribunal lacks authority to determine the constitutionality of a statute. Yet Cougar Den does not challenge the constitutionality of the state fuel tax statute (let alone seek to wholly and facially invalidate the statute on any grounds, constitutional or otherwise). *Cf. Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975) (cited by the Department, holding that to challenge the constitutionality of an administrative remedy before the administrative board tasked with enforcing it "would put the respondent in the position of proceeding under the statute which it seeks to challenge.").



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A direct, facial constitutional challenge to a statute is different from, as here, a challenge as-applied to the litigant. *See e.g. Prisk v. City of Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987) ("Some cases recognize a distinction between situations where the challenge is to the facial validity of the agency's authority, rather than the validity of that authority as applied by the agency to the particular claimant. Generally, in the latter case exhaustion still should be required. *See* Schwartz, Administrative Law § 8.37 (2nd Ed. 1984)."). Cougar Den raises the non-constitutional issue of preemption; whether the state statute is preempted by federal law as applied to Cougar Den and its Treaty right. *See Cougar Den II*, 139 S. Ct. at 1013 ("Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians.").[3]

Moreover, *Inland Foundry Co.. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 121, 989 P.2d 102 (1999), cited by the Department, is further distinguishable. *Inland Foundry* involved the Pollution Control Hearings Board (the "PCHB"), an adjudicative body with a specific statutory grant of jurisdiction. *Id.* at 124. The challenge alleged the PCHB lacked authority to consider a rule-making process (as opposed to an adjudication). *Id.* at 123. This Court, however, is not constrained by the PCHB's limited grant of jurisdiction, nor does Cougar Den ask the OAH to overrule a rule-making decision. This Court is instead tasked to

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[3] *See also Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 210, 114 P.3d 1233 (2005) ("Mr. Harrington relies on *Prisk* for the proposition that only the courts can decide a constitutional claim. But *Prisk* addresses the exhaustion requirement in the context of a challenge to the facial constitutionality of a law. *Prisk,* 46 Wn. App. at 798, 732 P.2d 1013. Mr. Harrington is correct that administrative agencies may not pass on the facial constitutionality of the statutes they administer. *Id.* But here, Mr. Harrington does not challenge the facial constitutionality of the Act. He is challenging the County's compliance with the Act and its constitutionality *as applied to him.* Administrative review is, therefore, required to develop the facts necessary to adjudicate this "as applied" constitutional challenge. *Presbytery of Seattle v. King County,* 114 Wn.2d 320, 337–38, 787 P.2d 907 (1990)." ).



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decide whether the state fuel tax statute conflicts with a federal Treaty right, a consideration well within its jurisdiction and with OAH precedent determining the same. *See* ALJ Beebe Determination, Ex. 2 and ALJ Leavell Determination Ex. 6, Red Arrow Opposition Decl.

The Department makes a sensible-sounding argument that an administrative review board has only that jurisdiction conferred by its authorizing statute, Dept. Mot. at 13, and then observes "nothing in RCW 34.12 grants OAH the authority to second guess the legality of the Legislature's fuel tax scheme." *Id.* However, the Department points to no authority to conclude this case falls outside of OAH's jurisdiction. *Cf. Inland Foundry*, 98 Wn. App. 121 (board was limited in jurisdiction by its enabling statute).

If taken as true, the Department's argument would likely call for staying all prosecution of Cougar Den for failure to pay the tax, so that the parties may refer the question of whether the Treaty preempts the tax to the Yakama Tribal Court, which clearly holds jurisdiction to determine this case. *See* Revised Yakama Nation Law and Order Code 2.01.03(4) ("The Yakama Nation shall have original . . . extra-territorial jurisdiction for the purpose of protecting the rights of the Yakama Nation guaranteed by the Treaty of June 9, 1855."), attached as Ex. 3, Red Arrow Opposition Decl. Cougar Den is willing to stipulate to this path, but otherwise requests that this Court exercise its jurisdiction here and rule consistent with the decisions of the OAH (in 2015), Washington State's highest court, the Supreme Court of the United States, and a century of federal precedent.

### E. This is a Treaty Rights Case: The Department Owns the Burden of Proof and it is Entitled to No Deference

The Department asserts that "Cougar Den owns the burden of proof in this matter" to establish by a fair preponderance of evidence that the assessments are erroneous or excessive. Dept. Mot. at 8-9. The Department previously said this means that "Cougar Den owns the



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burden of proving the Department erred when it determined to revoke Cougar Den's voluntarily sought and obtained state fuel supplier license . . . ." Leo Roinila, Letter to Cougar Den (December 2, 2022), attached as Ex. 4, Red Arrow Opposition Decl. The Department further represented that "[t]he state **need not 'prove' anything**" to prevail in this matter. *Id.* (emphasis added). The Department's position is incorrect no matter how many times it is repeated; regardless, a court should fault the Department's allegation.

First, the Department receives no deference in a treaty rights case. This was explained by the Washington Supreme Court in *Cougar Den I* and follows the policy of strict reverence to the rights at issue. Second, the Department's alternate argument that it can revoke Cougar Den's license on a separate basis is incorrect and cannot change the burden of proof.

***i. The Department is Not Entitled to Deference or Any Presumptions in a Treaty Rights Case.***

The sole basis stated for the Department's decision to revoke Cougar Den's fuel supplier license is Cougar Den's alleged failure to pay the tax set forth in the April 2021 Assessment. Ramsey Decl. at Ex. 12. Washington's fuel tax statute provides that an assessment made pursuant to RCW 82.38.170 "is presumed to be correct, and the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive." RCW 82.38.170(3). This follows the general rule of administrative law that an "agency decision is presumed correct and the challenger bears the burden of proof." *King County Pub. Hosp. Health Dist. No. 2 v. Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2016); RCW 34.05.570(1)(a) ("burden of demonstrating invalidity of agency action is on the party asserting invalidity.").

However, an agency's interpretation of an issue of law outside of its designated area of expertise—such as the interpretation of a treaty raising pure questions of law—**is accorded no**



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**deference at all**. *Cougar Den I*, 188 Wn.2d at 59 (citing *Chi. Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013)). The Washington Supreme Court's decision in *Cougar Den I* makes this clear. *Id.* at 59.

That this is a treaty case calls for deference to be accorded to the Indians. This is because, in construing the meaning of a treaty right:

> [i]t is [the Court's] responsibility to see that the terms of the treaty are carried out, as far as possible, in accordance with the meaning 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*, 315 U.S. at 684-85. "When it comes to the Yakamas' understanding of the treaty's terms in 1855, [this Court] ha[s] the benefit of a set of unchallenged factual findings" that describe in detail the Yakama's understanding of their Treaty right to travel. *Cougar Den II*, 139 S. Ct. at 1016 (Gorsuch, J. concurring) (referencing *Yakama Indian Nation*, 955 F. Supp. 1229).[4] And rather than presuming that the Department's interpretation or position is correct, "[i]n interpreting Indian treaties and statues, '[d]oubtful expressions are to be resolved in favor of the [tribal member asserting the treaty right].'" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 n.17 (1978) (second alteration in original, internal quotations omitted) (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)). Put another way: because the issue in this case is whether the Treaty of 1855 preempts the Department's state fuel tax assessment, any deference must go to Cougar Den and not the Department.

***ii. The Department's Alternate Argument Does Not Flip the Burden***

The Department attempts to circumvent this result by what it represents is the basis to revoke Cougar Den's fuel supplier license (but in reality is a post hoc rationale): Cougar Den

[4] Also, the Washington Superior Court relied on these factual findings in *Cougar Den I* and held Washington collaterally estopped from challenging them.



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reported the transactions at issue in the April 2021 Assessment on an incorrect schedule. Dept. Mot. at 11 (citing RCW 82.38.150(1), (3)). Again, the Department misses the point, this is a case about whether a state statute is preempted by the federal Treaty right. Regardless, RCW 82.38.150 simply outlines the filing deadlines for reporting: this cannot stand as a basis for revoking Cougar Den's license as all parties agree Cougar Den timely reported its Tribal Fuel Station distributions and there has been no dispute as to the information on those reports.

The Department's authority to revoke a fuel supplier license is set forth at RCW 82.38.120(1). Reporting on the wrong schedule is not one of the enumerated bases for revoking a license. *Id.* This means the only statutory authority for revoking the license would fall under subsection (k), "for other sufficient cause being shown." Although subsection (k) lacks any case law defining its terms, the plain language of the statute shows *the Department* holds the burden to prove this standard is met.

Washington courts discern legislative intent from the plain language enacted by the legislature, the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015) (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

In the licensing refusal/revocation statute, the Legislature placed the burden on the Department to show cause before revoking a license. RCW 82.38.120(1)(k) provides that "[t]he department may . . . revoke a license of any licensee or applicant . . . [u]pon other sufficient cause being shown." This conclusion is bolstered when juxtaposed with the language regarding assessments from the same chapter of the Revised Washington Code. "When the legislature uses



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two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). Whereas the Department may only revoke a license for sufficient cause shown, assessments are "presumed to be correct, and the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive." RCW 82.38.170(3); *Compare* RCW 82.38.120(1)(k). This difference demonstrates the Department must show sufficient cause regarding its post hoc basis to revoke Cougar Den's fuel supplier license.

### F. The Department Failed to Provide Proper Notice of a License Revocation Proceeding

Although this dispute is focused on whether the Treaty right preempts the state tax assessed in April 2021, there is another reason the Department may not revoke Cougar Den's license: It is not properly before this Court. The process for revoking a license is straightforward: the department must show that a licensee has violated one of the enumerated reasons for revocation, establish "sufficient cause" under RCW 82.38.120(1), and grant a revocation hearing while providing "at least twenty days written notice of the time and place thereof." RCW 82.38.120(2); *see also* RCW 34.05.422(1)(c) ("an agency may not revoke, suspend, or modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding"). Though the Department did provide notice of fuel tax assessments allegedly due, the Department has not provided Cougar Den with written notice of any such hearing, and none has occurred.

The only hearing that has occurred is the October 2021 "informal hearing" before Wesley Marks. This action is a direct appeal from that informal hearing. As Mr. Marks confirmed in his correspondence, that informal hearing concerned the April 2021 Assessment for fuel tax as



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authorized by RCW 82.38.170(10)(b). *See* Wesley Marks, Email to Cougar Den Attorney B. Monahan, Informal Hearing - Appeal of Notice of Assessment - Cougar Den, Inc. - April-2021 (Aug. 13, 2021, 1:54 PM) ("this is the informal hearing stage of appeal, which is intended to be an open discussion about the assessment and reasons for reconsideration.") attached as Ex. 5, Red Arrow Opposition Decl. Mr. Marks never referenced RCW 82.38.120 or a license revocation, except to expressly state in advance of the informal hearing that all "adverse actions as a result of the referenced Notice of Assessment . . . for the period of April, 2021 are stayed pending the outcome of this informal hearing." *Id.*

Mr. Marks' focus on the assessment and reference to section RCW 82.38.170 was no accident: the informal hearing process is authorized for fuel tax assessments but not license revocations. RCW 82.38.170 sets forth the process for appealing a fuel tax deficiency assessment, such as the April 2021 Assessment at issue here. Subsection 10 provides the mechanism to request reassessment and/or appeal the fuel tax assessment. Subsection 10(a) provides that a petition for that fuel tax reassessment must be filed within thirty days and subsection (10)(b) states that the Department must reconsider any assessment upon the timely receipt of a petition for reassessment. Reconsideration of the fuel tax assessment may happen one of two ways: licensees may either proceed to a formal hearing in front of an ALJ or they may request an informal hearing. If the licensee requests an informal hearing, the Department must grant that hearing and give ten days' notice of the time and place. RCW 82.38.170(10)(b).

Chapter 308-77 WAC ("Fuel Tax Rules and Regulations") elaborates on these procedures for fuel tax assessments, only. Section 102, titled "Appeals," provides additional guidance for parties issued a "notice of assessment for taxes, penalties, or interest" who wish to participate in the informal hearing process "in lieu of proceeding directly to a formal hearing." WAC 308-77-



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102(1). These regulations say nothing about license revocation hearings and the license revocation statute is not cited as authority for the informal hearing regulations. These specific statutes and regulations mean what they say.

Given this authority, the Court should find that the fuel supplier license revocation hearings described at RCW 82.38.120(2) are formal hearings in front of an administrative law judge. *See* RCW 34.05.422(1)(c) ("an agency may not revoke, suspend, or modify a license unless the agency gives notice of an opportunity for an appropriate adjudicative proceeding" under chapter 34.05 RCW or another chapter); RCW 82.38.300 (general provision stating that appeals under chapter 82.38 RCW are governed by the Washington Administrative Procedure Act). Cougar Den appealed all determinations, but Mr. Marks lacked jurisdiction to make a license revocation determination.

The October 2021 informal hearing was not a hearing regarding the Department's efforts to revoke Cougar Den's fuel supplier license for reporting on Schedule 10G as required under RCW 82.38.120(2), and Mr. Marks lacked authority to issue such a ruling without notice and in an informal fuel tax assessment hearing. If the Department is choosing to revoke Cougar Den's license for reporting on what it alleges is an incorrect schedule, that issue is not part of this appeal. Whether the tax is owed or preempted by the federal Treaty right is the issue here, and a decision regarding the tax will conclude that Cougar Den reports its tax-free distributions in good faith and appropriately.

**G. Evidentiary Objections**

Pursuant to CR 56 Cougar Den objects to the following evidence submitted by the Department, each paragraph cited is objected to in full:

- "Cougar Den voluntarily sought and affirmatively applied for this license from DOL." Marks Decl. ¶ 6. Improper Characterization; Lack of Foundation.



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- "Transactions effectuated before the fuel leaves the lip of the rack are said to occur "above the rack," while those taking place after that instant are said to be concluded "below the rack." Marks Decl. ¶ 9. Legal Conclusion; Hearsay; Lack of Foundation.
- "Flash sales . . . happens while the fuel is falling through the air between the lip of the rack and the fuel trailer through electronic transactions." Marks Decl. ¶ 11. Legal Conclusion; Hearsay; Lack of Foundation.
- "Cougar Den purchases and obtains fuel . . . and delivers that fuel to fuel stations across Washington." Marks Decl. ¶ 12. Legal Conclusion.
- "All fuel suppliers, including Cougar Den, are required to file monthly reports with DOL . . ." Marks Decl. ¶ 13. Legal Conclusion; Document and Statute Speak for Themselves.
- "Cougar Den's April 2021 initial returns reported . . ." Marks Decl. ¶ 18. Best Evidence Rule - Prejudicial as math does not appear to add up to the sums provided.
- "On July 2, 2021, Cougar Den . . . did not provide sufficient supporting documentation to establish eligibility for the exemptions . . ." Marks Decl. ¶ 20. Legal Conclusion; Vague; Lack of Foundation.
- "The Fuel Tax compliance guide, last updated in April 2021, . . . provides guidance on how licensees must submit their returns . . ." Ataman Decl. ¶ 4. Legal Conclusion; Document Speaks for Itself; Hearsay.
- "The licensed supplier is then responsible for remitting the tax owed on the balance of the fuel it maintains a tax liability on which has not been disbursed in a tax-exempt manner during the reporting period." Ataman Decl. ¶ 6. Legal Conclusion; Document and Statute Speak for Themselves.



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## CONCLUSION

As Justice Gorsuch eloquently wrote in *Cougar Den II*:

> [The State's] argument suffers from much the same problem as its predecessors . . . But the State still fails to give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to travel on the highways free of most restrictions on their movement; it also guarantees tribal members the right to move goods freely to and from market using those highways. And it's impossible to transport goods without possessing them. So **a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would**.

*Cougar Den II*, 139 S. Ct. at 1019. Based on the foregoing, Cougar Den respectfully requests the Court grant its Motion for Summary Judgment.

DATED this 27th day of July, 2023.

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By: _____

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**DECLARATION OF SERVICE**

I hereby declare that on this 27th day of July, 2023, I caused copies of *Cougar Den's Opposition to Washington State's Motion for Summary Judgment* to be served upon each of the following, by emailing to:

David Hankins, AAG
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MS: 40110
P.O. Box 40110
Olympia, WA 98504

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LalOlyEF@atg.wa.gov

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

EXECUTED at Yakima, Washington this 27th day of July, 2023.

Susan Soto Palmer

SUSAN SOTO PALMER, Practice Assistant



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