WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

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



**STOKES LAWRENCE**
**VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

Table of Contents






**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

Cougar Den is being taxed only because it distributes fuel via truck. The Department appears to be confused about the actual legal issues before this Court. To determine whether Cougar Den is exempt from the Department's April 2021 Assessment, the Court must consider (1) the rights reserved under the Treaty and (2) the practical effect of the restriction or condition imposed by the state law. *Cougar Den II*, 139 S. Ct. 1000, 1010 (2019) ("it is the practical effect of the state law" on the treaty right that "makes the difference.").[1] Cougar Den enjoys the Article III off-reservation Right to Travel pursuant to its federal Treaty. *See id.* The Right to Travel incorporates "any trade, traveling, or importation that requires the use of public roads." *Cougar Den I*, 188 Wn.2d 55, 69 (2017). Cougar Den exercises its Treaty right by using the public roads to obtain fuel from a fuel terminal, to then deliver that fuel via public road to tribal fuel stations across Washington State: Cougar Den does not transport the fuel via pipeline, it does not fly the fuel via airplane, nor, as the Department flippantly suggests, Department's Response in Opposition to Respondent's Mot. for Summ. J at 10:6 ("Dept. Opp."), does Cougar Den "teleport" the fuel to Indian Country. Cougar Den's distribution activity instead "requires the use of public roads." *Cougar Den I*, 188 Wn.2d at 69. The state assessed a state tax against Cougar Den after its travel activity was complete and subsequently reported to the Department. Cougar Den now properly contests the applicability of that state tax assessment as applied to its federal treaty right.

[1] The Department has confusingly chosen to refer to the U.S. Supreme Court decision as "*Cougar Den I*." For the sake of clarity, this Reply brief will carry forward the short cites used in Cougar Den's Motion for Summary Judgment: the decision of the Washington Supreme Court (between these same two parties) will continue to be referred to as "*Cougar Den I*," and the decision of the U.S. Supreme Court (affirming *Cougar Den I*) will continue to be referred to as "*Cougar Den II.*"



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

The fuel tax acts upon Cougar Den as a revenue-producing charge, and has the practical effect of burdening the exercise of Cougar Den's Treaty Right to Travel. This cannot occur as a matter of law and summary judgment should be granted to Cougar Den.

## A. The Department Cannot Escape the Fact That Washington State's Fuel Tax Burdens the Treaty Right to Travel and is Therefore Preempted

### 1. The Practical Effect Test Demonstrates the State Fuel Tax is an Unlawful Burden on the Treaty Right to Travel

The practical effect test recognizes over a century of jurisprudence in which courts have consistently focused on the determinative issue of whether the challenged regulation impacts the exercise of treaty rights. *See United States v. Winans*, 198 U.S. 371, 381 (1905); *see Tulee v. Washington*, 315 U.S. 681 (1942); *see Cougar Den II*, 139 S. Ct. 1000. Both parties agree the practical effect test applies here. *See* Dept. Opp. at 11: 6-7 ("Accordingly, the practical effect of the fuel tax . . .").

A state law is preempted where it even indirectly burdens the exercise of the Treaty Right to Travel, i.e., has the practical effect of burdening the Right to Travel. *Cougar Den II*, 139 S. Ct. 1014 ("the statute charges the Yakamas for an 'integral feature' of a treaty right. But even if the statute indirectly burdened a treaty right, under our precedents, the statute would still be pre-empted."). The U.S. Supreme Court first analyzed the practical effect of Washington State's statutory schemes in *Winans*, when it held a Washington trespass statute could not be enforced against Yakama members who crossed private property to fish at a traditional riverbed. 198 U.S. 371. While the parties agreed the Yakamas had effectively violated the state trespass law, what mattered was the trespass violation occurred because it fell upon "the Yakamas when they were exercising their treaty-protected right." *Cougar Den II*, 139 S. Ct. at 1010-11 (citing *Winans*, 198 U.S. 371)); *see Tulee v. Washington*, 315 U.S. 681, 685 (1942) (finding the Yakama Treaty pre-empted the State from charging Yakamas license fees for off-reservation fishing because



STOKES LAWRENCE
VELIKANJE MOORE & SHORE
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

such action "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve").

Here, the state fuel tax law similarly "acts upon" Cougar Den as a charge, and has the practical effect of burdening Cougar Den's exercise of its Treaty Right to Travel. Cougar Den drives its trucks along a public road to a fuel terminal, loads its truck with that fuel, to then use the public roads (to deliver that fuel to a tribal fuel station within Indian Country). Once the state reviewed where Cougar Den delivered its fuel via public road, it assessed its tax on Cougar Den's travel.

While the state makes the attempt to qualify its tax as a type of "sales tax," a "tax on the possession of fuel," or a tax at "the rack spigot," Dept. Opp. at 8, it cannot escape the facts. The tax at issue here is not a sales tax. Dept. Opp. at 12 (citing their trusted hypothetical about the purchase of a "mink coat" by a Yakama, and whether that sale would be tax free under a sales tax). The fuel tax burdens *travel* quite directly. The Department argues that the tax applies when the fuel is removed from the rack (spigot), Dept. Opp. at 8, but ignores that RCW 82.38.030(9)(a) actually says taxes are imposed when "fuel is removed in this state from a terminal . . ." The Department also argues "[t]he fuel tax applies to the act of physically removing fuel from Washington racks, all of which are . . . well away from the public highways," Dept. Opp. at 9, but this ignores that when a Cougar Den truck leaves a terminal, it is pulling directly onto, and is required to use, a public highway.

The Department also completely fails to respond to the evidence submitted from the Fuel Tax Compliance Manual, which is the Department's own guidance stating that the tax applies when the fuel *leaves* the Terminal – a clear act of motion, and the commencement of travel, and indisputably onto a state highway. *See* Respondent's Mot. for Summ. J.



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

Prior precedents control the outcome of this case. "[T]he State still fails to give full effect to the treaty's terms and the Yakamas' original understanding of them . . . [T]he 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." *Cougar Den II*, 139 S. Ct. at 1019. The Washington Supreme Court likewise held that "**any trade**, **traveling** . . . **that requires the use of public roads** fall within the scope of the right to travel provision of the treaty." *Cougar Den I*, 188 Wn.2d 55, 69 (2017). Regardless of how you parse the statute, Cougar Den is being taxed only because it is distributing fuel. *See* Decl. of Chantelle M. Perez in Support of Resp. Mot. for Summ. J., and Decl. of Kip "Punia" Ramsey in Support of Resp. Mot. for Summ. J. (illustrating the activity being taxed, and that the applicability of the tax cannot be known until after the travel is complete and the destination has become certain). It matters not whether the state law is an express or direct tax on travel itself; what matters is whether that tax has the practical effect of burdening Cougar Den's exercise of its treaty-protected activity that requires the use of public roads. *See Cougar Den I*, 188 Wn.2d 55; *see Cougar Den II*, 139 S. Ct. 1000.

**2. The Department Cannot Differentiate this Case from *Cougar Den I* and *II***

The Department strains desperately to separate Washington and U.S. Supreme Court precedent from this dispute. Dept. Opp. at 4-5. Yes, *Cougar Den I* and *II* considered a separate provision of this same fuel tax, specifically the importation statute. *See id.* (citing fuel tax statute predecessor RCW 82.38.030(9)(c), and RCW 82.38.020(17) ("'Import' means to bring fuel into this state")). Yet, to read either case this narrow ignores the broad holdings of both supreme courts. *See, e.g. Cougar Den I*, 188 Wn.2d at 69 ("**any** trade, traveling, or importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

treaty."); *Cougar Den II*, 139 S. Ct. at 1015-16 ("First, **a state law** that burdens a treaty-protected right is pre-empted by the treaty. Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway."). The term "any" used by the Washington Supreme Court was no mistake, the term "any" is used to express a lack of restriction. *See* Oxford English Dictionary (online ed. 2023) ("'Any' — used to express a lack of restriction in selecting one of a specified class."). The U.S. Supreme Court likewise meant what it said when it held "a state law that burdens a treaty-protected right is pre-empted . . .," similarly meaning "any" state law that burdens a treaty-protected right is pre-empted by the treaty. *Cougar Den II*, 139 S. Ct. at 1015-16. It does not matter that one law involves "importation" expressly, what matters is the practical effect of "any" state law that may burden that federal right.

These rulings and their supporting analyses support a finding that the Treaty makes Cougar Den immune from taxation in this case, where the distribution activity cannot be separated from the taxable activity. The Department seemed to realize this when it removed critical language in its own statute: "Taxes are imposed when: [**(a) Fuel is removed in this state from a terminal if the**] fuel is removed at the rack . . ." *See* Department Mot. for Summ. J. at 4 (partially quoting RCW 82.38.030(9)(a)) (emphasis added).

**3. The *King Mountain Tobacco* Case Does Not Save the Department.**

The Department avers that this case is unlike *Cougar Den I* and *II*, because there is "no connection between this tax and travel or public roads," and instead compares this dispute with that of *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). This comparison fails. *King Mountain Tobacco* is of questionable validity after *Cougar Den I* and *II,* and in any event is distinguishable. In *King Mountain Tobacco*, the Ninth Circuit considered whether an



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

escrow statute was preempted by the Treaty. The statute required cigarette manufacturers, like King Mountain, to place money into escrow to reimburse the state for health care costs related to tobacco product use. *Id.* at 990. King Mountain argued it was exempt from the escrow requirements pursuant to both Articles II and III of the Treaty. *See id.* at 995-998.

In its Article III analysis, the court relied on both *Yakama Indian Nation* and *Smiskin* to conclude that the escrow payment did not implicate the right to travel. *Id.* at 997-98. The Court explained that under its right to travel precedence, "the right to travel [was just that,] (driving trucks on public roads) for the purposes of transporting goods to market," *id.* at 998, and that the issue before it instead dealt with nondiscriminatory fees related to health care from tobacco products: the escrow payment did not pay for the construction of public highways, exemptions were not determined based on the destination of any product or the placement of such product into commerce, and the concept of travel remained unrelated to its liability to pay its escrow obligation.

The *King Mountain Tobacco* case was decided before *Cougar Den I* and *II*, and it is questionable whether its reasoning would be applied today in light of those precedents, both of which include strong protection for travel and trade. *Cougar Den I,* 88 Wn.2d at 69 ("[A]ny trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty."); *Cougar Den II,* 139 S. Ct. 1017-18 (Yakama Treaty secured "clearly and without ambiguity . . . the Yakamas['] . . . use of public highways without restriction for future trading endeavors.").

Even if it were good law, the case is distinguishable. Unlike the Ninth Circuit's summary of the issue in *King Mountain Tobacco*, in this case the fuel tax is constitutionally mandated to pay for the construction of the public roads, the tax is assessed after the delivery of the product is



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

reported and concluded, and the only way Cougar Den can engage in this activity is through the use of trucks traveling the public roads. *See* Respondent's Mot. for Summ. J. at § II, C-D; III, B. As written in *Cougar Den I*, "'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 [the Ninth Circuit's] decision in *Cree II* and render the Right to Travel provision truly impotent.'" *Cougar Den I*, 188 Wn. 2d at 65 (quoting *United States v. Smiskin*, 487 F.3d 1260, 1266-67 (9th Cir. 2007)); *see also* 188 Wn. 2d at 67 (Washington Supreme Court expressly stating the Department's reliance on *King Mountain* is "unpersuasive.").

**4. Incidence is the Wrong Analysis for a Treaty Right Case**

The Department makes unconvincing and irrelevant arguments about the incidence of this tax. The Department repeats throughout its brief that the incidence "occurs at the moment the fuel is withdrawn from the rack," Dept. Opp. at 5:9-10, but provides vanishingly little support for this concept. It does not even cite authority for this position. *See* Dept. Opp. at 5:9-15; *see also* Dept. Opp. at 10 (opining, without citation, on the operation and incidence of the fuel tax statute). As shown above, the tax does not operate in the way the Department argues.

More importantly, though, the Department continues to confuse Indian law principles and threatens to lead the court off-track. The Department urges the Court to adopt an incidence analysis, but that is the wrong standard in an off-reservation treaty-rights case. Dept. Opp. at 4-5; *see also id.* at 11 (improperly citing *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 457 (1995), for proposition "that it is the legal incidence of the tax, and not the economic incidence or cost of the tax that is dispositive in determining whether a state tax can be preempted."). Cases such as *Chickasaw Nation*, dealt with a Tribal Enterprise, Tribal Governmental Sovereignty, and conduct that occurred on Indian territories — not individual tribal members exercising individual off-reservation treaty rights. *Compare Chickasaw Nation,*



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

515 U.S. 450, *with Cougar Den I*, 188 Wn.2d 55, *and Cougar Den II*, 139 S. Ct. 1000. For example, in *Chickasaw Nation*, the U.S. Supreme Court considered whether the state could impose a state fuel tax on fuel sold by the Chickasaw Nation at its own fuel stations on reservation, and whether the state could impose an income tax on employees of the tribe that resided outside the tribe's territory; no express off-reservation treaty rights were at issue. *See Chickasaw Nation,* 515 U.S. 450. The court concluded that the state's tax was unenforceable **because its legal incidence fell** on the Indian tribe or its members for sales made within Indian Country which would impact the inherent sovereignty of the tribe itself. *See Chickasaw Nation,* 515 U.S. 450; *see also Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005).

However, the *Chickasaw Nation* court determined the state income tax could rightfully fall on tribal members living outside the reservation boundaries. *Chickasaw Nation,* 515 U.S. at 464-66. The court dismissed the argument that the Chickasaw Treaty protected off-reservation members from state taxation as there was no provision in the treaty that granted such an off-reservation right. *Id.* ("We do not read the Treaty as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits"). No off-reservation rights were considered, and no individual member exercised a recognized off-reservation right. *Chickasaw Nation* dealt with the sovereign ability of the tribe to regulate commerce inside its territory and the application of a state income tax on those living off-reservation.

Here, by contrast, Cougar Den exercises a unique, express, individual off-reservation federal treaty right. An individual off-reservation treaty right is an express federal law, personal to the member exercising it. *See Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1260 (E.D.



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

Wash. 1997), *aff'd sub nom*. *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). And an "express federal law to the contrary" overrides the general rule that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Chickasaw Nation*, 515 U.S. at 465 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149 (1973); *see Cougar Den I*, 188 Wn.2d at 60 ("A treaty constitutes express federal law."); *see also 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."). Therefore, because of the unique individual rights at issue here, "it is **the practical effect of the state law** that . . . makes the difference," and an incidence analysis is improper. *Cougar Den II*, 139 S. Ct. at 1010 (emphasis added); *see supra* § I. a.

**B. This Fuel Tax Scheme's Purpose is Solely to Pay for the Public Roads, and Therefore is Entirely Preempted as to Cougar Den.**

While the application of the fuel tax as to the April 2021 Assessment at issue is unquestionably preempted as to Cougar Den, the fuel tax scheme as a whole should further be deemed to burden the Treaty Right to Travel and be preempted as to Cougar Den. *See* Cougar Den's Mot. Summ. J. at 14 § C.2.

It is indisputable that all taxes on motor vehicle fuel must be used exclusively for highway purposes. WASH. CONST. art. II, § 40 (amend.18). The Department does not contest this.

The Department makes the argument that "Cougar Den has suffered no further justiciable injury in fact by reason of the mere existence of the fuel tax system." Dept. Opp. at 7:6-7. Cougar Den of course is unconcerned with the "existence" of the fuel tax system. It does not seek preemption or repudiation of the system itself. It is the application of the system in this



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

specific case that is the problem, and the imposition of fuel taxes that act upon Cougar Den as a charge for its use of the roads – the same exercise of reserved ancestral rights that *Tulee* found impermissible. The fuel tax system is accordingly only preempted as it applies to, and makes demands of, Cougar Den related to paying for the use of the roads. The fuel tax system can continue in operation and without interruption as nearly all suppliers, distributors, pipeline operators, tanker vessels, refineries, and bulk transfer participants. Just not Cougar Den.

The Department makes a strange and indefensible argument at footnote 4, on page 5 of its Opposition. The Department argues that the fuel tax statute is actually not only a revenue generating statute for the maintenance of the public highways (which a Yakama member cannot be made to pay for), but is also a safety statute. Dept. Opp. at 5 n.4 ("without revenue raising regulations, there could be no safety regulations"). The Fuel tax statute is not a safety statute. It exists to raise money to maintain the roads. If the Department's indefensible and, frankly, frivolous argument were true, that could not be squared with *Cougar Den I* and *II*. But Yakamas cannot be made to pay for the use of the public highways, regardless of whether the dollars raised to maintain the roads affects their safety. Yakamas cannot be required to pay for their use of the public highways, *see* Cougar Den's Mot. for Summ. J. at 14, § C.2, and therefore they cannot be required to participate in any aspect of the fuel tax statute, which must be exclusively used for highway funding.

**C. Washington Should Avoid the Shameful Arguments it has Made in the Past.**

The Department recklessly argues that Cougar Den would seek to monopolize the fuel industry and evade taxes. These arguments are irresponsible and baseless. There is no evidence or indication that Cougar Den could come close to monopolizing the fuel industry. Indeed, the record evidence is that Cougar Den distributes only to tribal retailers, and that it does so in order



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

to help tribes provide affordable transportation opportunities for their members. It is exercising a historical and honored tradition of intertribal trade, and the allegations of corporate greed and market domination for the sake of profit are without merit and shameful. The State of Washington has an unfortunate history of fearmongering and slander when the Yakama have previously exercised their lawful rights in ways that the State dislikes. This was seen in *Smiskin*, when Washington alleged that "if affirmed, the court's ruling would 'preclude the State of Washington and the federal government from regulating tribal transportation of other 'restricted goods,' such as illegal narcotics and 'forbidden fruits [and] vegetables.'" 487, F.3d at 1270-71. The Ninth Circuit rejected this argument as "unfounded, if not disingenuous." *Id.*

In *Cougar Den I* and *II*, Washington alleged that if affirmed, "Yakama tribal members could avoid the law barring a felon from possessing a firearm simply because by traveling on a public highway, the treaty preempts state law." 188 Wn.2d at 68. The Washington Supreme Court condemned the State's position. *Id.*

In reality, Cougar Den is a lone Indian-owned business, exercising a preserved right by providing fuel to tribal fuel stations throughout the state. Every transaction of Cougar Den's breathes life into the words of Article III, para. 1 of the Treaty, and represents the "future economic endeavor" that its ancestors intended. *See Yakama Indian Nation*, 955 F.Supp. at 1266 (finding "no restrictions upon the right of the Yakamas to use the public highways" for "future economic endeavors"). The entire negotiation of these treaty rights was for the benefit of the tribes, specifically securing such rights to provide advantages for tribal member success. *See id.* at 1248 ("the accessibility of the public roads **was described as an advantage** for the Yakamas, without any mention of possible disadvantages, such as paying for or maintaining public roads.")



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

(emphasis added). Any allegation that Cougar Den is "evading" a tax, or "seeking" some advantage not rooted in lawful rights is without merit and should cease.

The State of Washington has long reckoned with the fact that some Indian rights lawfully create some leakage in its fuel tax collection system. This is the State's problem, not Cougar Den's. The State deliberately ceased taxing gas stations in favor of taxing tax distributors. It just so happens that Cougar Den is a distributor who is immune from being taxed for its distribution. This system, where Yakama distributors may travel with fuel tax-free, is better for the state than the prior system where many more transactions at a gas station on reservation were tax free. The legislature "picked its poison," and that is hardly an existential threat to the fuel tax. *See* Cougar Den's Mot. for Summ. J. at 18 n.4 (discussing *AUTO v. State*, 183 Wn.2d 842, 848-50 (2015) (reviewing history whereby the legislature abandoned the prior fuel tax system and devised the current fuel tax system so that the tax would fall on those who were supplying or distributing, so as to levy the fuel before it reached a reservation)).

**D. The Department's Anti-Commandeering Argument is Misplaced**

The Department raises a novel argument against Treaty rights, that they somehow cause the Federal government to "commandeer" the State in contravention of the Tenth Amendment. *See* Dept. Opp. at 13-14. However, preemption in this case does not "commandeer" the State to do anything. Rather, preemption of this statute as to Cougar Den simply renders Cougar Den immune from a demand being made by a State. This is an unremarkable proposition. *See Cougar Den II*, 139 S. Ct. at 1013 (explaining rule of Supremacy, "Treaties with federally recognized Indian tribes —like the treaty at issue here— constitute federal law that preempts conflicting state law as applied to off-reservation activity by Indians."). "[U]nder all of the United States Supreme Court decisions cited or quoted hereinabove there can be no doubt that it



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

is not within the province of state police power, however liberally defined, to deny or 'qualify' rights which are made the supreme law of the land by the federal constitution," like treaty rights. *United States v. State of Wash.*, 384 F. Supp. 312, 342 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). Any concerns that immunity conferred by this Treaty Right to Travel upon Cougar Den constituted commandeering of the State could have been addressed by the U.S. Supreme Court in its 2017 opinion, but the U.S. Supreme Court conspicuously did not mention any such concern when it ruled that the Treaty preempts the fuel tax statute as to Cougar Den, or when it has ruled any state law is preempted by a treaty right. *See Winans*, 198 U.S. 371; *Tulee*, 315 U.S. 681; *see also Wash.*, 384 F. Supp. 312; *Yakama Indian Nation*, 955 F.Supp. 1229; *Smiskin*, 487 F.3d 1260. In fact, and to the contrary, the U.S. Supreme Court recently rejected anti-commandeering claims and made clear that "state law is naturally preempted to the extent of any conflict with a federal statute." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1635 (2023) (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000)) (explaining that a federal law that modifies a state law does not limit its preemptive effect).

**E. The State of Washington Cannot Relitigate Issues Previously Decided.**

The Department hardly quibbles with the res judicata and collateral estoppel arguments made in Cougar Den's Mot. for Summ. J. at 24. Cougar Den argued the Department is "barred from re-litigating: **the meaning of the Treaty of 1855; the Yakamas' understanding of their Treaty; whether a tax operates as a "burden" on the Right to Travel; whether revenue collecting regimes burden the Right to Travel; the framework for determining the scope of the Treaty Right to Travel**; and that the fuel tax is preempted when applied to Cougar Den's fuel distribution activities." *Id.* at 24 (emphasis added). The Department's only argument is that "this case involves a different tax provision and a different taxable event." Dept. Opp. at 14-15.



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

At most the Department argues it should be able to argue anew the application of the subsection invoked here, RCW 82.38.030(9) ("Taxes are imposed when: (a) Fuel is removed in this state from a terminal . . . "). The other issues listed above cannot be re-argued in this case.

**F. The Department Abandoned its License Revocation Argument**

The Department has apparently abandoned any attempt to defend its license revocation. *See generally* Dept. Opp. The Department thus apparently agrees with Cougar Den's position, *see* Resp. Opp. to Dept. Mot. for Summ. J. at 20, that any decision to revoke the license was not properly preserved for this Court to decide, and in any event that Cougar Den's behavior did not support any revocation of its license. This issue must be decided in Cougar Den's favor. The only question properly preserved for this tribunal is whether the fuel tax assessment is preempted by the Treaty Right to Travel.

DATED this 10th day of August, 2023.

STOKES LAWRENCE
VELIKANJE MOORE & SHORE

By: _____

Mathew Harrington (WSBA #33276)
Brendan Monahan (WSBA #22315)
Derek Red Arrow Frank (WSBA #55090)
120 N. Naches Avenue
Yakima, WA 98901-2757
Phone: 509-853-3000
Facsimile: 509-895-0060
E-mail: Mathew.Harrington@stokeslaw.com
E-mail: Brendan.Monahan@stokeslaw.com
E-mail: Derek.Redarrow@stokeslaw.com
Attorneys for Cougar Den, Inc.

## DECLARATION OF SERVICE

I hereby declare that on this 10th day of August, 2023, I caused copies of Cougar Den's Reply to the Department's Response in Opposition to be served upon each of the following, by emailing to:

| | |
|---|---|
| David Hankins, AAG<br>Office of the Attorney General<br>MS: 40110<br>P.O. Box 40110<br>Olympia, WA 98504 | David.hankins@atg.wa.gov<br>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 10th day of August, 2023.

DEBBIE J. WILSON



**STOKES LAWRENCE VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000