STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Fuel Supplier Return Assessment of: Cougar Den, Inc	OAH No.03-2022-DOL-00137 DOL No. 2021-0072337-01-PRFT DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Respondent Cougar Den, Inc. ("Cougar Den") voluntarily obtained a fuel supplier license from the Washington State Department of Licensing (DOL), but refused to pay $1,123,109.99 in fuel tax it owes on fuel it removed from the Washington bulk transfer-terminal system in April 2021[1] and to properly report its fuel transactions at those terminals. As a consequence of those failures, DOL in July 2021 issued a Notice of Assessment and Intent to Revoke to Cougar Den ("Notice"). The assessment and revocation were upheld by the Department in an informal hearing. Cougar Den appealed the informal determination and asserts that it owes no taxes and is exempt from the reporting obligations imposed on all Washington licensees because of the Yakama Nation's treaty with the United States.

Cougar Den's arguments fail as a matter of law. It is legally liable for Washington taxes on the fuel it removed, and it is required—like every other licensee—to file the required reports. The Yakama Nation's treaty rights do not shield it from any of these obligations. DOL moves for

[1] The Parties agreed to treat assessments after April 2021 as constructively appealed and to consolidate all appeals. The Department has forwarded those assessments to the Office of Administrative Hearings, which are now OAH Docket No. 05-2023-DOL-00153. The total of unpaid fuel tax for those assessments consolidated, to date, in OAH Docket No. 05-2023-DOL-00153 is $ 34,979,246.89 (excluding penalties and interest).

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summary judgment upholding its Informal Hearing determination assessing unpaid taxes against Cougar Den and revoking Cougar Den's fuel supplier license.

II. EVIDENCE RELIED UPON

In support of its motion, DOL relies upon the Declarations of Wesley Marks, Katherine Ataman, and David Hankins.

III. STATEMENT OF FACTS

A. Overview of The Fuel System and Washington's Fuel Tax System

Washington's fuel tax law is "long and complex." *Washington State Dep't of Licensing v. Cougar Den, Inc.,* ___U.S. ___, 139 S. Ct. 1000, 1008, 203 L.Ed.2d. 301 (2019). Because so too is the system for moving fuel around the State of Washington and the United States.

1. Fuel Distribution Network

Fuel gets from the drilling rig to the fuel tank of a motor vehicle via a multi-tiered distribution network. At the heart of this network lies a system of interconnected refineries, pipelines, vessels and terminals together known as the bulk transfer-terminal system (BTTS). RCW 82.38.020(4). Fuel in a refinery, pipeline, vessel, or terminal is considered to be within the bulk transfer-terminal system, while fuel in any tank car, rail car, trailer, truck, or other equipment suitable for non-bulk ground transportation is not. *Id*. A fuel storage and distribution facility is called a "terminal." RCW 82.38.020(31). Terminals have structures called "racks" that deliver fuel into fuel tanks, such as a tanker truck, or other means of non-bulk transfer. RCW 82.38.020(26).To receive fuel "at the rack," a tanker truck, or some other means of non-bulk transportation, generally enters the terminal grounds and proceeds to an area directly below the rack apparatus, from which fuel will be dispensed into the truck or other non-bulk transfer means from above. Currently, there are 29 state licensed, IRS registered fuel terminals in Washington. Declaration of Wesley Marks (Marks Decl.) ¶8.

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. Tanker trucks then transport the fuel to retail gas stations and unload it into their

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storage tanks. *Id*. at ¶10. From there, fuel is dispensed from the gas station pumps in to the motor vehicle fuel tanks of retail customers. *Id*.

Within the bulk transfer-terminal system itself, transactions between position holders, terminal operators, refiners and other players in the fuel industry are commonplace. Gasoline and diesel fuel are routinely bought and sold, like any other commodity. So long as these transactions occur between parties that are registered with the Internal Revenue Service under IRC Code 4101, and involve fuel that remains within the self-contained bulk transfer/terminal system, they are exempt from the federal excise tax on fuel. 26 U.S.C. 4081; 26 C.F.R. 4081-1. If, on the other hand, a sale of fuel located within the bulk transfer/terminal system is made to a purchaser that is not registered with the IRS, and the tax has not already been applied, the fuel tax will be imposed. 26 C.F.R. 4081-3(f)(1).

B. Washington's Fuel Taxation System

1. Fuel Tax Licenses

Washington fuel taxes are collected through a licensing system administered by DOL. Those licenses include distributors, supplier, terminals, and blenders. RCW 82.38.090(1). Relevant to this case, a "supplier" is a "person," which includes a corporation, "who holds a federal certificate of registry issued under the internal revenue code and authorizes the person to engage in tax-free transactions of fuel in the bulk transfer-terminal system." RCW 82.38.020(3), (24). As explained above, bulk terminals are facilities or locations where large quantities of fuel are stored, sold, and purchased.

2. Washington's Fuel Tax is Based On the First "Taxable Event" and Applies to the "First Taxable Person"

Washington law imposes an excise tax on certain activities involving fuels used for the propulsion of motor vehicles upon the highways of the state. *See* ch. 82.38 RCW. The legal incidence of this tax accrues "at the time and place of the first taxable event and upon the first taxable person within this state." RCW 82.38.031. Although the end result is the same, the

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mechanics of the tax's imposition differ depending upon on how fuel enters the state and who is withdrawing the fuel. Under RCW 82.38.030(9), "taxes are imposed when:"

> . . . ***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 tax obligations of licensed fuel suppliers are set forth more simply in RCW 82.38.035(1), "A licensed supplier is liable for and must pay tax on fuel as provided in *RCW 82.38.030(7) (a) and (i). On a two-party exchange, or buy-sell agreement[2] between two licensed suppliers, the receiving exchange partner or buyer shall be liable for and pay the tax."[3] Thus, under Washington law, the moment at which the fuel leaves the physical confines of the bulk transfer-terminal system at the rack is the critical point of demarcation for purposes of taxation. RCW 82.38.030(9).

3. Reporting Requirements for Washington Licensed Fuel Suppliers

Washington licensed fuel suppliers are not required to pay their tax liability at the time they withdraw fuel from the rack. Instead, the Department of Licensing requires fuel tax suppliers to file monthly tax returns and remit the amount of tax owed.

The Department of Licensing provides each fuel licensee a copy of its Fuel Tax compliance guide. Declaration of Katherine (Ataman Decl.) ¶4, Ex. 1. The manual provides guidance on how licensees must submit their returns, and how to maintain their licenses. *Id*. The returns submitted by fuel tax licenses include gallons of fuel received tax paid, gallons of fuel received from Washington terminals or refineries tax-exempt, gallons imported into Washington below the terminal, and gallons imported to tax-exempt storage terminals by truck and rail. Ataman Decl. ¶5. Returns also include reporting of various tax-exempt disbursements such as gallons of fuel sold tax-exempt to licensed suppliers, gallons sold tax-exempt to the federal government, and gallons

[2] These terms are defined in RCW 82.38.020(33).

[3] The statutory language was not updated when RCW 82.38.030 was amended, therefore RCW 82.38.035(1) refers to "RCW 82.38.030(7)(a), but, the Code Reviser notes the reference is actually to RCW 82.38.030(9)(a).

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exported, among others. *Id*. 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. *Id*. at ¶6. With each monthly tax return, the licensee is required to submit "schedules" of fuel distributions, which describe in more detail each tax-exempt distribution. These schedules include, for example, gallons sold tax-exempt to other licensed suppliers (Schedule 6D), fuel exported out of state (Schedule 7), and gallons sold to other tax-exempt entities (10G). *Id* at ¶7.

All licensees' tax reports are due "on or before the twenty-fifth day of the calendar month following the reporting period to which it relates." RCW 82.38.150(3). Licensees must file tax reports, even if "no tax is due for the reporting period." *Id.* The reports, "must show information as the department may reasonably require for the proper administration and enforcement of this chapter," and the licensee must attest that the report is, "true and [] made under penalties of perjury." *Id.* As the compliance guide explains, licensees, must "report and pay timely each month," and must "[c]omply with Washington State fuel tax statutes and rules," in order to maintain their license. Ataman Decl. ¶4, Ex 1, p. 10.

C. Cougar Den's History as a Washington State Licensed Fuel Supplier

Cougar Den is a privately held fuel supplier owned by "Punia" Kip Richard Ramsey ("Kip Ramsey"). Marks Decl. ¶5, Ex. 2; Declaration of David Hankins (Hankins Decl.) ¶4, Ex. 3. Cougar Den purchases and obtains fuel at state-licensed, IRS-registered terminal racks in Washington, and delivers that fuel across Washington, including to locations in Bellingham and Oroville. Marks Decl. ¶12; e.g., 18 U.S.C. § 1151. Cougar Den has, since September 1, 2018, held a State of Washington Fuel Supplier License. Marks Decl. ¶5, Ex. 2. Cougar Den voluntarily sought and affirmatively applied for this license from DOL. Marks Decl. ¶6.

Cougar Den's owner, Mr. Ramsay, is an enrolled member of the Confederated Tribes and Bands of the Yakama Nation (the "Yakama Nation").[4] Cougar Den is organized under the laws of

[4] The Yakama Nation is a federally recognized Indian tribe. 12 Stat. 951. The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951 (the "Yakama Treaty" or "Treaty"). Hankins Decl. ¶

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the Yakama Nation and registered as a foreign corporation with the Washington Secretary of State. Hankins Decl. ¶4, Ex. 3.

As explained above, all fuel suppliers, are required to file monthly reports with DOL showing their receipts and disbursements of fuel. RCW 82.38.150(1); Marks Decl. ¶13; Ataman Decl. ¶4, Ex. 1, p. 10. In February 2019, DOL advised Cougar Den that Schedule 10G "is used to report fuel sold to tax-exempt entities" as explained in the fuel tax compliance guide. Marks Decl. ¶16, Ex. 4. It further advised that "[f]or fuel received in Washington, please explain why you believe the fuel purchasers listed on your return on Schedule 10G are tax-exempt." *Id*. In the same advisory, DOL explained that for "fuel imported to Washington from another jurisdiction," Schedule 10G "is used for imported fuel delivered to Yakama Tribal stations." *Id*.

D. Cougar Den's April 2021 Tax Payments and Reports

In its April 2021 Fuel Supplier tax return, Cougar Den reported that it removed a total of 2,369,479 gallons of fuel from state licensed, IRS-registered, Washington terminal Racks. Marks Decl. ¶17. The following table shows the number of gallons that Cougar Den obtained from the Rack and delivered to retailers between April 1, 2021 and April 30, 2021, as reported to DOL:

Origin City	Origin State	Destination City	Destination State	Buyer Name	Net Gallons	Tax Return Schedule
Tacoma	WA	White Swan	WA	Cougar Den Inc. Fuel	2,1497	10G
Tacoma	WA	Toppenish	WA	Cougar Den Inc. Fuel	6,650	10G
Seattle	WA	Oroville	WA	Gene's Native Smoke Shop	44,801	10G
Tacoma	WA	Oroville	WA	Gene's Native Smoke Shop	11,401	10G
Tacoma	WA	White Swan	WA	KBT Distributing LLC	49,997	6D
Renton	WA	White Swan	WA	Kip Ramsey Sr. CD	36,004	10G
Tacoma	WA	White Swan	WA	Kip Ramsey Sr. CD	1,700	10G
Renton	WA	Wapato	WA	Kip Ramsey Sr. WD	1,093,460	10G
Tacoma	WA	Wapato	WA	Kip Ramsey Sr. WD	57,903	10G
Pasco	WA	Wapato	WA	Kip Ramsey Sr. WD	4,803	10G
Vancouver	WA	Wapato	WA	Kip Ramsey Sr. WD	9,199	10G
Ferndale	WA	Bellingham	WA	Salish Travel Center	747,630	10G
Tacoma	WA	White Swan	WA	White Swan Supply	64,901	10G
Vancouver	WA	White Swan	WA	White Swan Farm Supply	800	10G
Vancouver	WA	Happy Valley	OR	Willamette National Cemetery	580.4	7

2, Ex. 1. Its boundaries are described in Article II of the Treaty. *Id*. The ceded lands of the Yakama Nation are described in Article I of the Treaty. *Id*.

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Renton	WA	Toppenish	WA	Yakamart, Inc.	3,400	10G
Tacoma	WA	Toppenish	WA	Yakamart, Inc.	207,949	10G
Pasco	WA	Toppenish	WA	Yakamart, Inc.	6,804	10G
				TOTAL GALLONS	**2,369,479.4**	

Marks Decl. ¶17.

Cougar Den's April 2021 returns reported that 25,498 gallons of special fuel and 24,499 gallons of dyed special fuel were sold tax-exempt to other licensed suppliers and reported on Schedule 6D. *Id*. at ¶18. A further 580 gallons of the motor fuel was reported as exported on Schedule 7. *Id*. The remaining dyed special fuel of 45,400 gallons was not reported on any schedule and is presumed to have been distributed within Washington but is by its nature non-taxed fuel. *Id*. Every other gallon of fuel was reported as tax exempt on Schedule 10G. *Id*. While these 50,577 gallons were exempt from taxation under Washington's statute, the remaining 2.3 million gallons of fuel were not. Nonetheless, Cougar Den reported the remaining 2.3 million gallons of fuel as tax exempt on its Schedule 10G. Marks Decl. ¶18.

On June 2, 2021, the Department issued a notice identifying certain deficiencies in Cougar Den's exemption claims. Marks Decl. ¶19, Ex. 5. On July 2, 2021, Cougar Den submitted an amended return updating federal employer identification number (FEIN) records, but did not provide sufficient supporting documentation to establish eligibility for the exemptions Cougar Den claimed on its April 2021 Schedule 10G. Marks Decl. ¶20. Cougar Den disputes DOL's determination.

On July 13, 2021, DOL issued a Fuel Tax Return Correction, which removed several transactions that Cougar Den had identified as tax exempt on its April 2021 Fuel Supplier tax return. Marks Decl. ¶21, Ex. 6. On that same date, DOL issued a Notice of Assessment and Intent to Revoke, assessing $1,260,252.95 in taxes, penalties, and interest, and proclaiming its Intent to Revoke Cougar Den's Fuel Supplier License (the "April Notice"). Marks Decl. ¶22, Ex. 7. In the April Notice, DOL assessed Washington fuel taxes for all of Cougar Den's deliveries listed in schedule 10G. *Id*.

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On August 11, 2021, Cougar Den issued its "Letter of Appeal and Request for Reassessment Regarding Assessment to Cougar Den." Marks Decl. ¶23, Ex. 8. Subsequently, DOL notified Cougar Den that a virtual, informal hearing had been scheduled for October 15, 2021, to "discuss the Reassessment of the April Assessment and Intent to Revoke." Marks Decl. ¶24, Ex. 9**.** All parties attended this informal hearing and DOL issued its Informal Hearing Determination on November 23, 2021. Marks Decl. ¶25, Ex. 10. The Determination upheld the assessment of tax due and its intent to revoke Cougar Den's fuel supplier license due to improper reporting and unsatisfied debt to the State. *Id*.

On December 12, 2021, Cougar Den made a timely request for a formal appeal stating "[t]his letter represents Cougar Den, Inc.'s ("Cougar Den") formal appeal of the November 23, 2021, Informal Hearing Determination for the Fuel Supplier Return Assessment of April 2021 (the "Determination"). Marks Decl. ¶26, Ex. 11. Accordingly, DOL referred this appeal to the Office of Administrative Hearings.

IV. ARGUMENT

A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); WAC 10-08-135. "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert v. Grant Cty.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The motion should only be granted "if, from all of the evidence, reasonable persons could reach but one conclusion." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Although all facts and reasonable inferences are to be construed against the moving party, assessments of tax liability by the Department are presumed to be correct and the burden is on Cougar Den to establish by a fair preponderance of evidence that it is erroneous or excessive. *See*

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RCW 82.38.170(3), RCW 34.05.570(1)(a) ("The burden of demonstrating the invalidity of agency action is on the party asserting invalidity."). Because Cougar Den cannot meet its burden of establishing that the Notice is erroneous or excessive, DOL is entitled to judgment as a matter of law.

B. Cougar Den Has the Same Tax and Reporting Obligations as all other Licensed Fuel Suppliers

1. The Department Properly Found that Cougar Den Is Liable for Fuel Tax the Moment it Removes Fuel from the Rack

Washington imposes its fuel tax at the first taxable event that occurs in the state. *Washington State Dep't of Licensing v. Cougar Den, Inc.*, ___U.S. ___, 139 S. Ct. 1000, 1008 203 L.Ed.2d. 301 (2019). Pertinent here are the obligations that apply to Washington's licensed fuel tax suppliers when they are removing fuel "at the rack." These requirements apply to all Washington fuel tax suppliers, including Cougar Den.

Washington's fuel "taxes are imposed" when "fuel is removed in this state from a terminal if the fuel is removed at the rack. . . ." RCW 82.38.030(9)(a). The statute contains two exceptions to the imposition of the tax in the statute. The first is if the fuel is removed "by a licensed supplier or distributor *for direct delivery to a destination outside of the state.*" The second exception is if the fuel is removed by a licensed supplier, "for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320." RCW 82.38.030(9)(a). There is also an exception for when fuel is traded between fuel suppliers, an issue that is not raised on this appeal. Finally, some uses of fuel are tax exempt, as set forth in RCW 82.38.080.

If that statute left any doubt that removal at the rack by a fuel supplier imposes liability for Washington's fuel tax (save in narrowly drawn circumstances), RCW 82.38.035 removes it. That statute specifically provides that "a licensed supplier *is liable for and must pay* tax on fuel" as provided in RCW 82.38.030(9)(a). RCW 82.38.035(1). Thus the difference between a licensed fuel supplier and an unlicensed person that purchases fuel at the rack is that 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. Conversely, an

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unlicensed person could still withdraw fuel at the rack, they would just have to pay the tax immediately.

For each category on tax-exempt fuel, the supplier is required to submit a disbursement schedule which details how much fuel was distributed to which tax exempt entity. Pertinent here is the "Schedule 10G", which licensed fuel suppliers use "to report sales to other tax-exempt entities. These exemptions are specified in Washington law (RCW 82.38.080)." Ataman Decl. ¶4, Ex. 1, p. 13. That statute exempts three uses of motor fuel from tax in Washington: sales to the armed forces, sales to foreign diplomatic and consular missions, and sales used exclusively for racing that is not permitted on the public highways. RCW 82.38.080(2).

So, the statutory incidence of the tax—and its application to Cougar Den—is straightforward. Cougar Den is a licensed fuel supplier. When it withdraws fuel from the bulk transfer-terminal system, or "at the rack," Cougar Den is legally liable for the payment of all the tax on that fuel, unless: (1) the fuel is directly delivered to a destination outside of the state; or (2) the fuel is directly delivered to an international fuel tax agreement licensee under RCW 82.38.320; or (3) the fuel is provided to another supplier as part of a two-party exchange. And tax must be paid on the fuel unless the final end use of the fuel is exempt from paying the tax under RCW 82.38.080. Cougar Den fails to demonstrate the exceptions apply and Cougar Den is legally responsible to remit the tax owed to the State when it files its monthly return. And it is Cougar Den's obligation to prove that no tax is owed on the fuel it withdrew at the rack.

In April 2021, Cougar Den withdrew 2,369,479 gallons of fuel from Washington terminals, 1,338,280 gallons of motor fuel; 961,300 gallons of special fuel; and 69,899 gallons of dyed special fuel. Marks Decl. ¶17. 580 gallons of motor fuel were reported as exports; 25,498 gallons of special fuel and 24,499 gallons of dyed special fuel were sold tax-exempt to other licensed suppliers. *Id*. at ¶18. 45,400 of dyed special fuel were not reported as resumed to have been distributed within Washington. *Id*.

Every single other gallon of fuel Cougar Den withdrew at the rack—2,318,902 gallons—was reported as "sold to other tax-exempt entities (Schedule 10G)." Marks Decl. ¶18. But Cougar

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Den did not provide any documentation to support that it was actually delivering this fuel to statutorily tax-exempt entities.

The fuel did not meet any of the statutory exemptions that would relieve Cougar Den from liability for the tax. The fuel was not delivered outside the state. The special fuel was not delivered to an IFTA licensee who could receive untaxed special fuel. Cougar Den produced no records showing that the motor fuel was delivered to the armed forces, to a foreign diplomatic mission, or for racing. *Contra* RCW 82.38.080(1). Instead, the records submitted to the DOL is that this fuel was delivered to fuel stations across Washington. Cougar Den simply unilaterally asserted that it was exempt from any taxes ever imposed on any fuel withdrawals from the rack. That is incorrect. Nothing in Washington law exempted Cougar Den from its liability for the tax and, as explained further below, neither does the Yakama Treaty of 1855, even if this tribunal could consider it. Cougar Den simply decided that it would not pay the required tax on millions of gallons of fuel, and, DOL properly assessed it for that tax.

2. The Department Properly Revoked Cougar Den's Supplier License for Failing to Accurately File Required Reports

In addition to accurately and fully remitting the taxes it owed, Cougar Den was required to comply with the Department's reporting requirements in submitting its monthly returns. The Department provides each licensee a fuel tax compliance manual, which, among other guidance, educates licensed suppliers on their obligations to timely and accurately report, and how to submit accurate reports. Ataman Decl. ¶4. Each licensee is required to submit a report, and does so with the understanding that, "Each report must contain a declaration that the statements contained therein are true and are made under penalties of perjury." RCW 82.38.150. Failing to properly file a report, or filing an inaccurate report is grounds for the Department to revoke a license. RCW 82.38.150(1), (3).

It is important to understand the scope and nature of the Department's action and Cougar Den's claim in response. *All* the Department is asserting is that Cougar Den, in order to maintain a license issued by the State of Washington, must meet the same minimum reporting requirements

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as *every other licensee*. Rescinding this license does not prohibit Cougar Den from traveling on the highways, from purchasing fuel, or engaging in business in Washington. Cougar Den, on the other hand, appears to argue that the Department is *required* to provide Cougar Den the license it voluntarily sought, but then the Department is prohibited from holding it to any licensing requirements.

An agency with the authority to issue licenses has the authority to place conditions on them. *State, Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 597, 957 P.2d 1241, 1248 (1998); citing *State v. Crown Zellerbach Corp.*, 92 Wash.2d 894, 899, 602 P.2d 1172 (1979). Inherent in the ability of the Department to impose conditions on its licensees is the obligation of the licensees to comply with those conditions.

The Department properly found that Cougar Den failed to meet its reporting obligation as set forth in the informal determination, "By reporting transactions on improper schedules, despite previous and current guidance on such, Cougar Den is failing to report properly. . . ." Marks Decl. ¶25, Ex 10, p. 2. That failing to report was "also grounds for revocation," independent of the failure to remit taxes owed. *Id.*

This is hardly a matter of unknowing noncompliance. The Department issued Cougar Den both the fuel tax compliance guide and a notice that it was unable to process the April 2021 tax assessment, based on the improper reporting. Cougar Den simply unilaterally determined, without legal basis, that it was exempt from liability for the fuel tax it owed. It similarly determined that it would not comply with the reporting obligations attendant on the fuel supplier license it voluntarily sought. Neither of these positions was lawful, and the Department properly intends to revoke Cougar Den's fuel supplier license for failing to file accurate monthly reports, as Washington law permits.

C. The Yakama Treaty Does Not Relieve Cougar Den of its Obligations to Fully Pay Tax it Owes or Submit Reports it Voluntarily Agreed To

Cougar Den has never materially disputed any of the foregoing. Rather, its response to all of this will assuredly be that as a Yakama-owned business, the Treaty of 1855 preempts the State

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from requiring Cougar Den to follow the Washington laws applicable to all other fuel distributors. Cougar Den is incorrect.

1. This Tribunal Has Limited Authority and May Not Determine if Federal Law Preempts Washington's Fuel Tax Statutes

As an initial matter, the Office of Administrative Hearings lacks jurisdiction to review whether the Treaty with the Yakamas of 1855 preempts Washington's fuel tax statutes. This is so because "[a]n administrative review board has only the jurisdiction conferred by its authorizing statute," and nothing in RCW 34.12 grants OAH the authority to second-guess the legality of the Legislature's fuel tax scheme. *Inland Foundry Co., Inc. v. Spokane Cnty. Air Pollution Control Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999); *see also Yakima Cnty. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975) ("An administrative tribunal is without authority to determine the constitutionality of a statute."); *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) (similar); *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 798, 732 P.2d 1013 (1987) (similar). In particular, administrative tribunals lack authority to hear constitutional challenges to Washington statutes on the ground that they are preempted as applied to Indian-owned businesses. *See, e.g.*, *In the Matter of Determining Whether There Has Been A Violation of the Consumer Loan Act of Washington By: Cashcall, Inc., Respondent*, 2014 WL 2809925, at *6–8, OAH Docket No. 2011-DFI-0041 (Washington Dep. of Fin. Inst. May 30, 2014) (concluding that administrative tribunal lacked authority to hear constitutional challenge that Washington Consumer Loan Act was preempted as applied to Indian-owned financial institution).

This tribunal is limited to determining if Cougar Den complied with the statutory requirement applicable to licensed fuel suppliers in Washington. That is, did Cougar Den pay the taxes owed under Washington law, and did it properly submit the reports required of Washington licensed fuel suppliers.

2. The Fuel Tax Does Not Burden the Yakama's Right to Travel Under the Yakama Treaty

Even if this tribunal had the authority to determine questions of federal preemption, the Yakama Treaty of 1855 does not preempt Cougar Den's tax or reporting obligations under

Washington's fuel tax statutes in this instance. Washington's fuel tax imposed on withdrawals at the rack is not imposed on the basis of travel, and therefore does not burden the treaty right to travel, as Cougar Den itself has previously acknowledged. And Washington's reporting requirements for licensed fuel suppliers—of which Cougar Den voluntarily availed itself—impose no burdens on Cougar Den's treaty rights. Because Cougar Den failed to comply with its obligations to fully pay the tax it owes and to accurately report its disbursements of fuel, DOL properly revoked its license as fuel supplier and properly assessed Cougar Den for the outstanding tax.

Cougar Den's position appears to be that DOL cannot assess the fuel tax against Cougar Den because the Treaty with the Yakamas of 1855 and the recent United States Supreme Court decision interpreting the treaty, *Washington State Dep't of Licensing v. Cougar Den, Inc.,* ___U.S. ___, 139 S. Ct. 1000, 203 L.Ed.2d. 301 (2019), preempts the fuel tax. Specifically, Cougar Den seems to believe that the provision in Article III of the Treaty reserves the Yakamas the "right to travel" upon the public roads and exempts Yakama members from taxes that burden such travel.

But Cougar Den's interpretation of the Treaty goes far beyond what the language supports, and is inconsistent with the Supreme Court's *Cougar Den* decision. The specific provision states:

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

Hankins Decl. ¶2, Ex. 1 (Treaty with the Yakamas, art. III, June 9, 1855, 12 Stat. 951). In Cougar Den, the United States Supreme Court concluded the provision preempted the Department from assessing the fuel tax against Cougar Den in the limited circumstances in which doing so resulted in taxing Cougar Den for using highways to bring fuel into Washington.

In that case, Cougar Den purchased fuel in Oregon and trucked it over the public highways to the Yakama reservation. *Id.*at 1007. The Department assessed the fuel tax under former RCW 82.36.020 (2)(c), now codified at RCW 82.38.030 (9)(c). The fuel importer became liable at the time the fuel entered the state. *Cougar Den,* 139 S. Ct. at 1007. The Court held that since Cougar

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Den, a Yakama member owned company, was importing fuel by ground transportation and the tax was on the importation, it violated the Treaty provision relating to the right to travel. As the Court explained, the tax "operate[d] on the Yakamas exactly like a tax on transportation would" because "[i]t falls upon them only because they happened to transport goods on a highway while en route to their reservation." *Id.* at 1010. Critical to the *Cougar Den* decision was the Court's conclusion that the tax was imposed not on the possession of fuel, nor any particular transaction, but rather on crossing the border on a public highway. *Id.* Indeed, the Court explicitly limited its holding by explaining that it did *not* "interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation)." *Id.* at 1015.

Following the U.S. Supreme Court's holding in *Department of Licensing v. Cougar Den*, __ U.S.__, 139 S.Ct 1000, 203 L.Ed.2d 301 (2019), the Department updated its fuel tax reporting requirements to comply with the decision. Marks Decl. ¶14. At the time of Cougar Den's fuel supplier application, DOL advised Cougar Den that "[a]s a supplier, the Department will require Cougar Den to report all fuel purchased within Washington State, imported to Washington State, or fuel exported from Washington State each month as required by state laws that apply to all licensed fuel suppliers. See RCW 82.38.140; 82.38.150." Marks. Dec. ¶15, Ex. 3.

Unlike the facts in the *Cougar Den* case, here, Cougar Den does not import the fuel, but, rather, obtains the fuel from Washington fuel terminal racks. The tax is imposed when the fuel is removed from the rack, "irrespective of transport or its means." *Cougar Den,* 139 S. Ct. at 1015; *see* RCW 82.38.030(9)(a) ("Taxes are imposed when (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack. . ."). Hence, the fuel tax is a pure transaction tax. It has no nexus whatsoever to any use of highways and it does not in any way interfere with the Yakama member's right to travel.

Indeed, in its prior Supreme Court briefing, Cougar Den explicitly admitted that it would be subject to just this sort of tax imposed before or after the highway travel at issue in *Cougar Den*:

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> But if the Yakama engages in any off-reservation activities distinct from the exercise of the right to travel, those activities may be taxed.
>
> . . .
>
> [T]he right-to-travel provision would not preempt taxation of acts *distinct* from the exercise of treaty rights, such as off-reservation economic transactions occurring before or after the highway travel. Similarly, the State could tax an act that occurred *during* off-reservation highway travel, so long as that act is distinct from the highway travel itself.

Brief of Respondent, Cougar Den Inc., a Yakama Nation Corporation, United States Supreme Court, Dkt. No. 16-1498 at 35-*3*6. (Sept. 17, 2018) (emphasis in original).

This is precisely the current situation. The transaction subject to tax occurs off reservation and does not interfere with the right to travel. The tax is distinct from the highway travel itself, because the tax is not imposed upon the travel or importation. Therefore, the tax does not violate the Treaty and Cougar Den becomes liable to pay the assessed fuel tax. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9, 93 S.Ct. 1267, 1270 36 L.Ed.2d 114 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally have been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

3. The Treaty with the Yakama Nation Does Not Absolve Cougar Den of its Reporting Obligations, Which it Voluntarily Accepted.

Nor does the Treaty absolve Cougar Den of its reporting obligations under RCW 82.38.150. Just as Cougar Den correctly noted that treaty rights are not implicated by taxes that are "distinct from the highway travel itself," *see* Brief of Respondent, Cougar Den Inc., a Yakama Nation Corporation, United States Supreme Court, Dkt. No. 16-1498 at 36. (Sept. 17, 2018), so too are they untouched by Washington's general licensing requirements for fuel suppliers. Nothing in the Treaty can be read to exempt Cougar Den from the same licensing and reporting requirements that apply to all licensed fuel suppliers, particularly as Cougar Den voluntarily sought a Washington license. *See Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710, 731-32 (9th Cir. 2021) (holding that California requirements that required "monthly reports with the California Department of Tax and Fee Administration respecting their distributions both taxable and exempt,"

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were "reasonable regulatory burdens. . . to assist enforcement of valid state taxes.") (internal citations omitted).

Cougar Den voluntarily sought its Washington fuel supplier license. In order to maintain that State-issued license, it must comply with the State's licensing requirements, and meet *all* reporting obligations. It did not do so, and therefore DOL properly revoked its fuel supplier license.

V. CONCLUSION

Cougar Den is liable for the tax owed on fuel it withdrew from the rack in Washington. And, Cougar Den is required to comply with Washington's licensee reporting requirements in order to maintain its fuel supplier license. It failed to remit the tax owed, and it failed to submit the reports required. Therefore DOL properly assessed Cougar Den for the amount of tax owed on the 2 million gallons of fuel it withdrew in April 2021, and properly intends to revoke Cougar Den's fuel supplier license.

DATED this 30th day of June 2023.

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PROOF OF SERVICE

I, Dalberta Faletogo, certify that I sent a copy of **Department's Motion for Summary Judgment, Declaration of Wesley Marks, Declaration of Katherine Ataman, and Declaration of David Hankins** for service on all parties or their counsel of record on the date below as follows:

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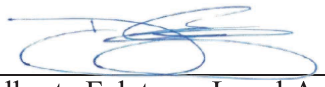
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of June 2023, at Spokane, WA.



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