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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Under Washington law, each licensed fuel supplier is liable for Washington's fuel tax the moment it removes fuel from the rack at a terminal. These removals occur only at those racks, all of which are outside of the Yakama's Indian Country, and not on the public highways. This case is not about the Treaty of 1855. Rather, it is a straightforward tax case that does not involve the right to travel. It is controlled by ch. 82.38 RCW and not *Department of Licensing v. Cougar Den*, __ U.S. __, 139 S.Ct. 1000, 1015, 203 L.Ed.2d 301 (2018) (*Cougar Den I)*.

Cougar Den itself previously admitted taxes like this do not implicate the Treaty Right to travel: "[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." Brief of Respondent, Cougar Den Inc., a Yakama Nation Corporation, United States Supreme Court, Dkt. No. 16-1498 at 36. (Sept. 17, 2018).

Cougar Den is fully liable for the taxes on fuel it removed from the rack in Washington. The Department properly determined that Cougar Den failed to remit taxes it owed. Moreover,

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

the Department properly determined that Cougar Den failed to properly report its fuel transactions. On both bases, the Department properly revoked Cougar Den's state-issued fuel supplier license. This tribunal must deny Cougar Den's motion for summary judgment, while granting summary judgment for the Department and affirming the Department's actions.

II. ARGUMENT

Throughout its response to the Department's Motion for Summary Judgment, Cougar Den mischaracterizes the Department's arguments, misapprehends the scope of this appeal, and misstates the applicable law. This leads Cougar Den to make meritless arguments, such as suggesting that the Yakama Tribal Court has jurisdiction over an administrative appeal taken under state law. Resp.'s Opp. at 16. This tribunal should not be persuaded by these arguments.

More significantly, Cougar Den conflates the holding in *Cougar Den I* (a tax tied to the importation of fuel across the Washington border, on the public highways, was preempted by the Yakama Treaty), with the tax in question here, which applies to removal of fuel from Washington terminal racks, regardless of transportation. Because travel is not relevant to the liability for this tax, no Yakama Treaty rights are implicated, and Cougar Den is liable for these Washington taxes.

A. OAH Has Jurisdiction Over This Matter, But Lacks Authority to Determine State Law is Preempted

As an initial matter, as explained in the Department's Motion for Summary Judgment, this Tribunal lacks the authority to determine that state law is preempted by provisions of federal law, including a federal treaty. Respondents have confused the scope of this Tribunal's *authority*, with a question about the Tribunal's *jurisdiction*. *See* Resp.'s Opp. at 13-16. Nonsensically, Cougar Den then suggests that the Yakama Tribal Court has jurisdiction over this dispute. *Id.* at 16. This is an appeal, by Cougar Den, a Washington state licensee, of a decision issued pursuant to state law. Those appeals are governed by the Washington state Administrative Procedure Act

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

(chapter 34.05 RCW), which grants this tribunal jurisdiction. RCW 82.38.300. But, the scope of jurisdiction is not the same as the scope of *authority*.

As this Tribunal has previously recognized, the Office of Administrative Hearings (OAH) has a circumscribed scope of authority—it derives its authority only from the agency designating the matter for hearing. *See, e.g.,* Ltr re: Motion Hearing, April 21, 2023. In addition, longstanding Washington case law precludes administrative bodies, including the Department and this tribunal, from considering whether a law they administer or apply is unconstitutional. This includes whether a federal law preempts a state law.

"An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974). Preemption is a function of the Supremacy Clause of the United States Constitution. U.S. Const., art. VI, cl. 2; *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996). Therefore, the question of whether a federal law preempts a state law is ultimately one of the constitutionality of that state law.

The Court of Appeals has made these limitations on agency authority clear. In *Carr v. Liquor Control Board*, the Court of Appeals considered a statute that purported to give the Department of Revenue the authority to "address claims that this act [at issue in that case] unconstitutionally impairs any contract with the state." 188 Wn. App. 212, 226, 352 P.3d 849 (2015). Rather than carry out the requirements of this statute, the Department of Revenue instead issued a notice that it "lack[ed] the authority ... [to] develop rules or procedures concerning issues of constitutional impairment," and advised those who would take advantage of this provision to instead seek relief in court. *Id.* The Court of Appeals approved. *Id*. Citing *Bare*, the Court noted that agencies lack the power to decide the constitutionality of laws they administer. *Id*. The notice the Department of Revenue had provided was thus "the only step that was within [the Department of Revenue's] authority to take," as "[t]he Department cannot be expected to engage in rule making on topics that are outside of the scope of the Department's authority." *Id*. If a

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

statutory grant of authority cannot provide an agency with the authority to decide the constitutionality of the laws it administers, then the Department may not do so without such a grant.

The courts have likewise made clear that administrative tribunals may not decide constitutional issues. In *Swanson Hay Co. v. Employment Security Department,* the appellants argued that federal law preempted portions of the Employment Security Act. 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017). At the administrative level, "the Commissioner, 'mindful of [his] limited authority as a quasi-judicial body,' discussed case law from other jurisdictions dealing with the federal preemption issue but ultimately concluded that his was not the appropriate forum to decide the constitutional issue." *Id*. (addition in original). The Court of Appeals approved, noting that the Commissioner "correctly observed that the Commissioner's Review Office, being an office within the executive branch, lacks the authority or jurisdiction to determine whether the laws it administers are constitutional; only the courts have that power." *Id*.

These same rules and considerations prevent this tribunal from considering preemption here. The OAH is an administrative body that conducts administrative hearings under the Administrative Procedure Act. RCW 34.12.010. Like administrative agencies and their commissioners, the OAH is part of the executive branch: the governor appoints the chief administrative law judge, and that chief administrative judge appoints the other judges. RCW 34.12.120; RCW 34.12.030(1). Therefore, just as the Department, "being an office within the executive branch, lacks the authority or jurisdiction to determine whether the laws it administers are constitutional," so, too does the OAH lack that power. *Swanson Hay Co.*, 1 Wn. App. 2d at 188. Indeed, the OAH has refused to entertain constitutional issues in the past. *Edinger v. Emp. Sec. Dep't,* 58 Wn. App. 525, 527, 793 P.2d 1004 (1990).

Simply put, the Department—and therefore the OAH—have *jurisdiction* over this appeal by a licensee; indeed, they are the only parties that have that jurisdiction. RCW 82.38.300. But the Department—and therefore the OAH—lack the authority to determine that state law is

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

preempted by federal law; only *courts* have that authority. Thus, the only question before this Tribunal is whether Cougar Den was liable for fuel tax under Washington law, properly reported its liabilities under Washington law, and properly paid the taxes it owed under Washington law.

B. Cougar Den Had Notice of the Proposed License Revocation and Is Having the Hearing on That Revocation

Cougar Den argues that (1) it never received notice that the Department sought to revoke its state-issued fuel supplier license and (2) it has never received the hearing required for by the APA to revoke its license. Resp. at 20-22. Both contentions are plainly wrong.

First, in the Informal Hearing Determination that is the decision on appeal here, the Department notified Cougar Den of "**its intent to revoke the fuel supplier license due to improper reporting and its unsatisfied debt to the state**." *See* Marks Decl. ¶ 25, Ex. 10 (emphasis added). Moreover, that informal hearing was held after Cougar Den requested review of the "Notice of Assessment and Intent to Revoke" issued by the Department on July 13, 2021. That document specifically informed Cougar Den that it could "appeal the **license revocation** or request a reassessment in writing…." *See* Marks Decl. ¶ 22, Ex. 7 (emphasis added).

In the context of administrative discipline, due process requires that a licensee must be notified of the charges against it and have a meaningful opportunity to contest those charges. *Martin v. Dep't of Licensing*, 175 Wn. App. 9, 21, 306 P.3d 969 (2013). "Where there is sufficient notice and [an] issue is fully litigated," the administrative decision will be upheld, even if an allegation was not included in the pleadings or charging documents. *McDaniel v. Dep't of Soc. and Health Services.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988) (quoting *NLRB v. Highway & Local Motor Freight Employees, Local 667*, 654 F.2d 254, 256 (6th Cir. 1978)). There is no due process violation if a party has had the ability to prepare and present its defense. *Motley-Motley, Inc. v. State of Washington*, 127 Wn. App. 62, 81, 110 P.3d 812 (2005). Therefore, due process does not require that a specific issue or allegation be included in the pleadings, instead it requires only notice and a meaningful opportunity to be heard. *See NLRB v.*

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1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

Blake Const. Co., Inc., 663 F.2d 272, 279 (D.C. Cir. 1981). If an issue is "not raised in the [pleadings], in the briefs, or in oral argument, and no evidence was presented concerning that issue," then the Respondent has received neither notice nor a meaningful opportunity to be heard. *NLRB v. Local Union No. 25, Int'l Broth. Of Elec. Workers*, 586 F.2d 959, 961 (2nd Cir. 1978). But, where the issue has been fully litigated, the administrative law judge's decision will be upheld. *See McDaniel v. Dep't of Soc. And Health Services.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988) (citing *NLRB v. Highway & Local Motor Freight Employees, Local 667,* 654 F.2d 254 (6th Cir. 1981)).

McDaniel is instructive here. In that case, the Administrative Law Judge found that McDaniel "willfully and intentionally received an overpayment of public funds." *McDaniel*, 51 Wn. App. at 895. However, the notice issued by the Department of Social and Health Services did not indicate that "intentional" conduct would be at issue in the case. *Id.* at 898. Nonetheless, the Court found that McDaniel had "a meaningful opportunity to litigate the intention issue at the hearing." *Id.* Thus, the court found that there was no due process error, even though there was insufficient notice. *Id.*

Cougar Den asserts, incorrectly, that it has not received a formal hearing on the notice of intent to revoke. Resp.'s Opp. at 23. The current hearing before this Tribunal ***is*** that hearing. It is a formal hearing pursuant to chapter 34.05 RCW, as prescribed by chapter 82.38 RCW, of Cougar Den's appeal of a decision upholding the intent to revoke. Cougar Den has the full opportunity to present its arguments here.

C. Cougar Den Voluntarily Obtained a State-Issued Fuel Supplier License and, as a Condition of This License, is Required to Comply with Washington's Fuel Tax Laws and Department Rules

Cougar Den voluntarily sought a Washington fuel supplier license and, in so doing, agreed to comply with each of the requirements incumbent upon all such licensees. *See* Marks Decl. ¶¶ 4, 5, Exs. 1, 2. This includes the requirement to pay to the state all taxes due. RCW

82.38.035. This Cougar Den has failed to do. It also includes the requirement to properly report to the Department all of its Washington fuel transactions and activities. RCW 82.38.150(3). This Cougar Den has also failed to do. Thus even were Cougar Den's Article III right to travel on the public highways a factor in this appeal—and it is not—Cougar Den would still be obligated to comply with the requirements to which it voluntarily agreed to comply.

On this point, Washington law is clear. In *Matheson v. Dep't of Revenue*, No. 45489-8-II, 2015 WL 563970 (Wash. Ct. App. Feb. 10, 2015) (unpublished op.), for instance, the court considered the case of Colville tribal member, and Idaho reservation resident, who voluntarily sought and obtained both a Washington state business registration certificate and a cigarette wholesaler license to operate in that capacity in this state. *Id*. at *1-3[1]. The tribal member then used this license to buy over 700,000 packs of unstamped and untaxed cigarettes from Washington distributors. *Id*. As conditions of its license, the tribal member was obligated to report these purchases to the Department of Revenue (DOR) using a Schedule C tax form, and to account for the disposition of the cigarettes. *Id.* When, like Cougar Den, the tribal member failed to comply, DOR issued an assessment against the tribal member, and then revoked the registration after nonpayment. *Id.* The tribal member appealed complaining, among other things, that the state lacked personal jurisdiction. *Id.* at *4-5. The court however, flatly rejected these claims, holding that:

> Matheson availed herself of the benefits and protections of Washington's laws by applying for and obtaining a cigarette wholesaler license. This license allowed Matheson to purchase and transport unstamped, untaxed cigarettes throughout the State. But for the license, she would not have access to unstamped and untaxed cigarettes. And as a condition of this license, she was required to comply with Washington's cigarette laws and Department rules.

Id. at 4. Although a different tax is involved, the logic of the *Matheson* ruling applies here. Like Matheson, Cougar Den voluntarily sought its fuel supplier license. Like Matheson, Cougar Den

[1] Pursuant to GR 14.1 unpublished opinions may be cited as nonbinding authorities and accorded such persuasive value as the court deems appropriate. A copy of the opinion is attached as Appendix A.

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1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

failed to properly report its transactions, as required as a condition of licensure. Like Matheson, Cougar Den refused to pay to the state the amounts rightfully owed. Like Matheson, Cougar Den's license allowed it to remove fuel from Washington racks without immediately paying the fuel tax that attached to those removals at the instant of removal. Like Matheson, but for its license, Cougar Den would not have been able to do so. And like Matheson, a state agency properly revoked Cougar Den's *state-issued* license for failing to meet its statutory licensing obligations.

A similar analysis, and outcome, is dictated by *Shanlian v. Faulk*, 68 Wn. App. 320, 324, 843 P.2d 535, 537 (1992). There, the court considered the case of an attorney who objected to the imposition of real estate broker licensure requirements, after voluntarily seeking a license he was not required to hold due to his status as an attorney. In rejecting the attorney's arguments, the court held that "Shanlian chose to maintain an active real estate broker license, and in so doing, he subjected himself to the jurisdiction of the Department and the requirements of RCW 18.85." *Id*. at 324.

If Cougar Den does not wish to comply with its licensing requirements, it is free to surrender that license at any time. Failing that, however, this tribunal must uphold the Department's determination to revoke Cougar Den's license as a result of Cougar Den's failure to comply with the requirements of licensure.

D. Cougar Den Misrepresents How This Tax Operates, and then Incorrectly Argues That the Treaty Right To Travel is Implicated

Cougar Den's primary basis for asserting it is not liable for this tax assessment, is that the fuel tax in some way applies to travel. *See, e.g.*, Resp.'s Opp. at 8, 9. In support of this contention, Cougar Den misinterprets the taxing provision by reading out the taxable event itself, and, in the process, torturously distorts the operation of the tax. Cougar Den argues that the tax does not apply until Cougar Den's trucks leave the terminal grounds thus triggering the right to travel provision of the treaty. Resp. Opp. at 8-9. This is wrong. As explained further below, the

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Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

tax attaches at the moment fuel is removed from the rack, without being tied to transportation. Thus, this tax does not implicate travel on the public highways in any way.

1. This tax attaches the moment fuel is physically removed from the rack, and therefore is not based on travel.

Cougar Den's construction of this taxing provision is both incorrect and, inadvertently, acknowledges both: (1) because the tax is actually triggered at the moment fuel is removed from the rack, this case is distinct from *Cougar Den I and* (2) Cougar Den is liable for the taxes on the fuel it removed from the rack.

In pertinent part, RCW 82.38.030(9)(a) provides:

> **(9) Taxes are imposed when:**
>
> (a) Fuel is removed in this state from a terminal if the fuel **is removed at the rack ...**

Id. (Emphasis added). This means that, when a licensed supplier removes fuel from the bulk transfer-terminal system, the fuel tax is triggered and attaches at the moment the supplier removes fuel at, and from, the rack. The structure of the fuel system explains the nature of the fuel tax. Just as fuel can enter the state in but a limited number of ways, including within or without the bulk transfer-terminal system, fuel can leave Washington sited bulk-transfer terminals in only one of two ways. First, fuel can physically leave a terminal via bulk transfer within the bulk transfer- terminal system. This means fuels can leave by pipeline, vessel, or other means of bulk transfer. Or, second, fuel can leave a Washington bulk-transfer terminal via a non-bulk transfer, which occurs anytime fuel leaves a terminal rack, including into a rail car, a truck, a tank, or even falling onto the ground below.

Because, in the first instance, the fuel remains in the bulk-transfer terminal system, these movements are tax-exempt. RCW 82.38.020(30); RCW 82.38.030; 26 U.S.C. § 4081(a)(1)(B). But when a fuel supplier physically removes fuel by a non-bulk transfer at the rack, the fuel is no longer in the system and the fuel tax applies in the instant of that removal from the bulk-

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Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

transfer system at the rack. RCW 82.38.030(9)(a); 26 U.S.C. § 4081(a)(1)(A). RCW 82.38.030(9)(a) simply distinguishes these two departure types and makes clear that, in the case of non-bulk removals at the rack, the tax applies at the rack, and nowhere else. The statute is therefore unambiguous on its face, and requires no statutory interpretation, *see, e.g., Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co*., 186 Wn.2d 336, 346, 376 P.3d 372 (2016). ("If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says ... "). Most importantly, the Washington Supreme Court already recognized the structure of this tax in *Cougar Den v. Department of Licensing*, 188 Wash.2d 55, 392 P.3d 1014 (2017) when it held that "[f]uel taxes are imposed at the wholesale level, when fuel *is removed* from the terminal rack ... " *Id*. at 60 (emphasis added).

While this alone disposes of Cougar Den's statutory argument, the federal law on which Washington's law is modeled provides further support. In 1998, the Legislature first amended the fuel tax system, and became an *at-the-rack* state. It modeled its new system on the federal fuel excise tax system, which became an at-the-rack system in 1991. *See* S. Bill Rep. SHB 2659 (1997-1998), Reg. Sess. (1998); U.S. Gov't. Accountability Off., GGD-92-67, Tax Administration: Status of Efforts to Curb Motor Fuel Tax Evasion (1998) (Among other reasons this was intended to, "**collect excise tax on all fuel as it is dispensed over the terminal rack**." (emphasis added)).

It is well settled that when "a state statute is taken 'substantially verbatim' from [a] federal statute, it carries the same construction as the federal law ... " *Anfinson v. FedEx Ground Package System*, 174 Wash.2d 851 281 P.3d 289, (2012); *see also Moba v. Total Transport*, 16 F.Supp.3d 1257, 1264 (W.D. WA, 2014). So, the construction of the federal statutes instructs the interpretation of Washington law. Compare the language of 26 CFR § 48.4081-2 "[t]ax is imposed on the removal of taxable fuel from a terminal if the taxable fuel is removed at the rack." 26 CFR § 48.4081-2(b), with the virtually identical language of RCW 82.38.030(9)(a),

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Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

"Taxes are imposed when ... (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack.". The federal regulations also explain that "[t]his section provides the general rule that all **removals** of taxable fuel at a terminal rack are subject to tax." 26 CFR § 48.4081-2(a) (emphasis added). And, in describing taxable events other than removals from the rack, the federal regulations explain that "[a]lthough tax is imposed when taxable fuel is removed from the terminal at the rack, tax also is imposed in certain other situations described in this section." 26 CFR § 48.4081-3(a); *see also* I.R.S. Pub. 510. p. 5; I.R.S. Form 720-TO instructions, p. 3.

This construction is followed by fuel tax administrators across the country. In at-the-rack jurisdictions, like Washington, "all gasoline, undyed diesel fuel and kerosene are taxed as *they cross the terminal loading rack*." *See, e.g.*, Federal Fuel Tax Administrators, Motor Fuels Section, Uniformity Guide (Sept. 2021), p. 277, available at https://taxadmin.memberclicks.net/assets/docs/MotorFuel/2021%20Uniformity%20Book%202.pdf.

2. The operation of the fuel tax system further establishes that the fuel tax attaches upon the removal of fuel at the rack.

The manner in which fuel transactions occur, and are tracked and reported, above the rack further makes clear that the fuel tax attaches to removals at the rack. Washington, uses a system called GenTax for submission of tax returns and reports by fuel tax licensees and third party reporters. Ataman Supp. Decl. ¶ 11.[2] All reports, whether from licensees or third parties, are input into GenTax, and almost all are submitted electronically. *Id.* This includes Cougar Den's April 2021 tax return, as well as related information submitted by other fuel suppliers, licensees, and third parties such as terminal operators. *Id.* ¶ 12. Based on the information reported

[2] The federal government developed a similar information reporting system, named the Excise Summary Terminal Activity Reporting System (ExSTARS). See, e.g., IRS, Excise Summary Terminal Activity Reporting System (ExSTARS), available at https://www.irs.gov/businesses/small-businesses-self-employed/excise-summary-terminal-activity-reporting-system-exstars (last visited August 8. 2023).

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

through GenTax, the Department possesses the ability to determine who owns fuel as it is disbursed from the rack. *Id.* ¶ 13.

To accurately report multiple party sales, the original seller and purchaser must identify and document where the transfer of title of the fuels occurred, whether it was above the rack, or at the rack. Ataman Supp. Decl. ¶ 14. Generally these transfers are memorialized through contracts, bills of lading, or similar documentation. *Id*.

Based on a the information submitted by Cougar Den, other licensees, reports of receipts and disbursements filed by terminal operators, the Department was able to determine that Cougar was the owner of the fuel identified in its April 2021, return at the time it was disbursed from Washington racks. Ataman Supp. Decl. ¶ 15. The Department was also able to determine that Cougar Den did not pay taxes on that fuel. *Id.*

3. Because this tax is not related to travel, no treaty rights are implicated, and *Cougar Den I* does not apply.

Cougar Den argues that DOL cannot assess this fuel tax against Cougar Den as it is preempted by the Right to Travel included in 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).

But Cougar Den's interpretation of the Treaty goes far beyond the language of the Treaty right, which is a right to *travel*, and is inconsistent with the Supreme Court's *Cougar Den I* decision (and Cougar Den's prior positions). This case involves a different tax provision and a different taxable event than was at issue there. There, the taxable event occurred upon the entry into the state of Cougar Den fuel, an event that directly occurred on the public highway. *Cougar Den*, 139 S.Ct. at 1007, 1015. At the moment of entry, therefore, the tax attached in an amount determined by the number of gallons imported multiplied by the tax rate. *Id.* at 1008 As a result, it was determined that, because of this direct connection between the taxable event and travel on

the public highway, the tax burdened Cougar Den's treaty right to travel on those highways, and therefore was preempted by federal law. *Id.* at 1015-16.

Here, on the other hand, each relevant transaction occurred outside of Indian Country, at a Washington rack, and the incidence of the tax does not require any travel along the public highways to attach. Unlike *Cougar Den I*, travel along the public highways is not necessary for the operation of the tax. The fuel tax that attaches upon the physical removal of fuel at the rack is, therefore, analogous to the operation of the state's retail sales tax. In Washington, "[t]here is levied and collected a tax equal to six and five-tenths percent of the selling price on each retail sale in this state ... " RCW 82.08.020(1). Accordingly, the taxable event with respect to a retail sale is the consummation of a retail sale, that is, the sales transaction, itself. *See* RCW 82.08.010; RCW 82.04.050. And, when a sales transaction is consummated at the physical location of the seller, the transaction is deemed to occur at that location for tax purposes, RCW 82.32.730(1)(a), **not when the purchaser walks out the door**. Here the removal of fuel at the rack is the taxable equivalent of the consummation of a retail sale, while the cost of the thing sold is to the retail sales tax what the amount of fuel removed at the rack is to the fuel tax. And both apply without the slightest regard for any subsequent transport or its means. *See Cougar Den*, 139 S.Ct. 1000 at 1015 (2018).

This critically important distinction explains why the Cougar Den Court discussed Chief Justice Roberts' mink coat analogy. *Id*. at 1023. Like the mink coat purchased in Oregon and imported into Washington by a Yakama member, against which the state would be unable to impose its use tax, so it was that the state was preempted from taxing Cougar Den's fuel imports. *See Cougar Den*, 139 S.Ct. at 1014; *id*. at 1020 (Gorsuch, J., concurring), But, as all justices agreed, the state would clearly possess that authority to tax the mink coat transaction consummated at a brick and mortar Washington retailer by a Yakama member, 139 S.Ct. at 1014 (Breyer, J., joined by Sotomayor, J., Kagan, J.); *id*. at 1020 (Gorsuch, J., joined by Ginsburg, J., concurring), *id*. at 1023 (Roberts, C.J., joined by Thomas, J., Alito, J., and Kavanaugh, J.,

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

dissenting). So too does the state possess full authority to tax Cougar Den's removal transactions at the rack.

E. Cougar Den Was Required to Accurately Report its Fuel Receipts and Distributions and Did Not

In addition to failing to properly, fully, and timely remit the taxes it owed, Cougar Den also failed to accurately submit its monthly reports of receipts and disbursements. Cougar Den now asserts it 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." Resp.'s Opp. at 13. This is absurd, as Cougar Den's argument presupposes this fuel tax is preempted—even though no court had ever determined that it was. Cougar Den failed to comply with its licensing requirements by accurately reporting its sales on the schedules provided.

First, as explained above, this tax is unrelated to *travel*, as the tax is based on the removal of fuel from the rack and not the transportation of that fuel. Accordingly, no treaty rights are implicated, and the transactions at issue—and thus Cougar Den—are fully subject to state tax.

Thus, Cougar Den's sole basis for claiming it "accurately" reported its sales, i.e. that the sales were tax exempt based on Treaty preemption, immediately fails. Tax exemptions, meanwhile, are created by legislative action and exist at the pleasure of the Legislature. Absent a statutory exemption, an otherwise applicable tax fully applies. *See Seattle Chocolate Co. v. King County*, 21 Wash.2d 630, 152 P.2d 981 (1944); *Petroleum NAV Co. v. King County*, 1 Wash.2d 489, 96 P.2d 467 (1939).

Fuel sales to federal instrumentalities reflect the nature of tax preemption versus exemptions. Under the doctrine of intergovernmental immunity, first created in *M'Culloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819), for example, states may not, under the supremacy clause, tax the federal government. Thus, if the federal government were directly to remove fuel from a Washington terminal rack, the state would be preempted, and therefore unable, from imposing its fuel tax on those removals. But if, on the other hand, a Washington fuel supplier

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
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were to remove fuel at a Washington rack, incurring the legal incidence of the tax in the process, the fuel supplier could, in the absence of an exemption, resell that fuel to the federal government with the economic cost of the fuel tax included in the resale price. *See, e.g.*, *Alabama v. King & Boozer*, 314 U.S. 1, 9, 62 S.Ct. 43, 86 L.Ed. 3 (1941) (The fact that the economic burden of the tax is passed on to the United States does not make it a tax upon the United States.). In our state, however, the Legislature has opted to forego the exercise of this authority, but rather to exempt these transactions. *See* RCW 82.38.080(1)(c).

Cougar Den, rightly, recognizes that, of the "[e]leven separate Schedules exist [upon which] a Fuel Supplier may report a tax-exempt distribution", none of them apply to Cougar Den's activities here. Resp.'s Opp. at 12. That is because, unlike sales to the federal government, the Legislature has chosen not to exempt these sales from the tax. *See* RCW 82.38.080. Accordingly, Cougar Den's transactions were not exempt and Cougar Den was required to report them as taxable transactions *See* chapter 82.38 RCW. Cougar Den failed to do so.

Further, an exemption from a tax applies only after liability *for* a tax has attached. *Petroleum NAV Co. v. King County*, 1 Wash.2d 489, 96 P.2d 467 (1939) ("the term 'exemption,' as used in the statute, presupposes a liability, and is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment."). Thus, Cougar Den's argument that "the state tax cannot apply until the destination is known," is completely wrong. Resp.'s Opp. at 8. Cougar Den is liable for the tax on all the fuel the moment it is removed from the rack, whether or not any travel or delivery occurs. If some of its transactions are later exempted from some of those taxes, it is only through the operation of state law.

The Department *did* modify its reporting requirements to accommodate the holding in *Cougar Den I*, and repeatedly instructed Cougar Den to use Schedule 10G to report its fuel **imports** covered by that holding. Marks Decl. ¶¶ 13-16. That instruction did not apply to other transactions, and most certainly not to any non-exempted, non-preempted taxable transactions occurring at Washington's racks. *Id*. Cougar Den therefore improperly reported these

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

transactions as tax-exempt, based solely on its own unilateral and erroneous proclamations that the tax did not apply. As a result, the Department properly found this incorrect reporting was a basis to revoke Cougar Den's license, and this tribunal must uphold that determination. RCW 82.38.150; RCW 82.38.120.

F. The Pre-Collection Requirement Is Not Reached in This Case, but Even If It Were, Cougar Den's Arguments Would Fail and Cougar Den Would be Fully Subject to the Obligation

Cougar Den further asserts that, even if the tax is not preempted, it cannot be required to pre-collect taxes on the State's behalf. Resp.'s Opp. at 9-11. This is also wrong, because Cougar Den is not pre-collecting on behalf of the state, but rather is itself incurring the full legal incidence of the tax upon its fuel removals at the rack. Under RCW 82.38.031 "the [fuel] tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state." Here, the first taxable event in the state occurs at the moment Cougar Den removes fuel from Washington terminal racks, and the first taxable person is Cougar Den. There is, therefore, no pre-collection obligation as Cougar Den is liable for the tax directly. However, even were this a pre-collection question, Cougar Den's argument would still fail.

The pre-collection statute requires that "any person whose activities would otherwise require payment of the tax imposed by RCW 82.38.030 but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state." *Id*.

As an initial matter, Cougar Den cites the wrong controlling law, relying on *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) in an effort to liken the pre-notification requirement of that case with the tax pre-collection requirement here. In the process, Cougar Den points to the distinction that purportedly exists between revenue raising requirements, on the one hand, and regulatory requirements, on the other. Assuming *arguendo* that such a distinction exists, it is simply the wrong legal standard to apply to this requirement. The correct standard would be

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

the "minimal burden" doctrine. And, it is well settled under this doctrine that the states' may require tribes, as an acceptable "minimal burden," to collect and remit to the state non-discriminatory state taxes operating within Indian Country. *See Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 25 U.S. 463, 483 96 S.Ct. 1634, 48 L.Ed.2d 96 (1975) (Upholding an Idaho requirement that an Indian tribal seller collect a tax validly imposed as an acceptable minimal burden"); *Washington v. Confederated Tribes and Bands of the Colville Reservation*, 447 U.S. 134, 150 100 S.Ct. 2069, 65 L.Ed.2d 10 ("State may impose at least 'minimal' burdens on Indian retailer to aid in enforcement and collection of the [state] tax"); *Oklahoma Tax Com'n v. Citizen's Band Potawatami Tribe*, 498 U.S. 505, 512, 111 S.Ct. 905, 112 L.Ed.2d 1112 (Doctrine of sovereign immunity does not excuse a tribe from all obligations to assist in the collection of validly imposed state taxes). This is precisely what the pre-collection obligation of chapter 82.38 RCW does. Thus, even if this tribunal exceeded its authority and concluded that federal law preempts these taxes, it must nevertheless conclude that the state acted correctly imposing the pre-collection obligation upon Cougar Den, as an acceptable minimal burden, to aid in the enforcement and collection of the state's valid fuel tax, and uphold the Department's determination to that effect.

G. There Are No Issues of Material Fact and Cougar Den's Evidentiary Objections are Both Improper Without Merit

Despite the fact that both parties have filed cross motions for summary judgment and represented to the tribunal that there are no genuine issues of material fact in dispute, Cougar Den improperly includes a section entitled "Evidentiary Objections." Resp.'s Opp. at 22. This Tribunal should disregard the objections as both improper and unfounded. The Office of Administrative Hearing's administrative rule, WAC 10-08-135 provides the authority for parties to file motions for summary judgment in a proceeding before a tribunal. Evidence offered before a tribunal are governed by WAC 10-08-140 and RCW 34.05.452. Administrative tribunals have wide latitude in admitting evidence:

> (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

RCW 34.05.452.

The tribunal should reject Cougar Den's objections. First, Cougar Den must do something more affirmative than stating objections to a declaration attached to a motion for summary judgment. In motions for summary judgment before courts, a party must make a separate motion to move to strike the offending declaration that includes evidentiary deficiencies as stated in *Burmeister v. State Farm Ins. Co.,* 92 Wn. App. 359, 365 (1998) ("If documents are not submitted in this form opposing counsel must move to strike."); *see also*, *Raymond v. Pacific Chemical* , 98 Wn. App. 739, 794 (1999), *reversed on other grounds*, *Brown v. Scott Paper Worldwide, Co.,* 143 Wn.2d 349 (2001) (In a summary judgment motion, court did not err in failing to grant party's motion to strike when raised at oral argument.) Cougar Den cannot just include a section in its response entitled "Evidentiary Objections" and expect the Department to address in a reply brief. Further, under CR 56, a summary judgment motion may be based on "such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). Mr. Marks has been working with the Department for over 5 years as the Policy and Outreach Program Manager of the Licensing, Prorate and Fuel Tax Services Program." Wesley Marks, Decl. at 1, ¶ 2. The facts he has provided are based upon his personal knowledge and within the scope of the fuel tax program he administers. Such evidence is reasonable to admit under the standards set forth under RCW 34.05.542 and Civil Rule 56(e).

Second, Cougar Den's objections are not well founded. For example, the Department's declarant, Mr. Marks, declares that Cougar Den voluntarily sought and affirmatively applied for this license from DOL." Wesley Marks, Decl. at 2, ¶ 6. Cougar Den objects stating "Improper

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
(360) 753-2702

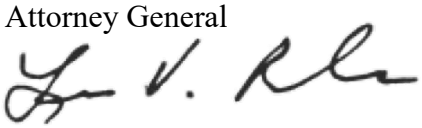
Characterization and Lack of Foundation." Cougar Den's Opp. To Dep't Mot. Summ. J. at 22. There is no recognized objection for "improper characterization" and there is no genuine issue of material fact in dispute that Cougar Den obtained a fuel supplier's license. Cougar Den applied for such license to the Department and that application can be accurately described as voluntarily. Similarly, Cougar Den objects to Mr. Mark's statement, as a legal conclusion: "Cougar Den purchases and obtains fuel ... and delivers that fuel to fuel stations across Washington." Resp.'s Opp. at 23. That statement is not a legal conclusion, but an assertion of fact and one that is undisputed. The tribunal should disregard these meritless objections.

III. CONCLUSION

Cougar Den is liable for Washington state tax on the fuel it removed from the rack. Nothing in this tax is preempted by the *Cougar Den I* decision, and nothing in this tax triggers the right to travel provisions of the Yakama Treaty of 1855. The Department correctly determined that Cougar Den owes the tax assessed, correctly determined that Cougar Den failed to file accurate reports, and correctly revoked Cougar Den's state-issued fuel supplier license. The Tribunal should grant judgment for the Department and affirm those actions.

DATED this 10th day of August 2023.

ROBERT W. FERGUSON
Attorney General



LEO V. ROINILA, WSBA #51622
Assistant Attorney General
DAVID M. HANKINS, WSBA #19194
Senior Counsel
DIONNE PADILLA-HUDDLESTON, WSBA # 38356
JONATHAN E. PITEL, WSBA #47516
Assistant Attorney Generals
E-mail: Leo.Roinila@atg.wa.gov
David.hankins@atg.wa.gov
LalOlyEf@atg.wa.gov

PROOF OF SERVICE

I, Dalberta B Faletogo, certify that I caused to be served a copy of **Department's Reply in Support of Motion for Summary Judgment** on all parties or their counsel of record on the date below as follows:

Email Service per Agreement

STOKES LAWRENCE, P.S.
120 N NACHES AVE
YAKIMA, WA 98901-2757
DRF@stokeslaw.com; MLH@stokeslaw.com,
BVM@stokeslaw.com; LAP@stokeslaw.com,
DJW@stokeslaw.com; SJA@stokeslaw.com, ALA@stokeslaw.com

OAH PRISM Portal

ADMINISTRATIVE LAW JUDGE MICAH LARRIPA
OFFICE OF ADMINISTRATIVE HEARINGS
949 MARKET STREET, STE 500
TACOMA, WA 98402
(253) 593-2200

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

DATED this 10th day of August 2023, at Olympia, WA.

DALBERTA B FALETOGO, Paralegal