FILED
SUPREME COURT
STATE OF WASHINGTON
5/29/2026 4:10 PM
BY SARAH R. PENDLETON
CLERK

No. 1053771
(Trial Court No. 24-2-00109-39)

SUPREME COURT OF THE STATE OF WASHINGTON

COUGAR DEN, INC,
Petitioner/Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING
and MARCUS GLASPER,
Respondents/Appellees.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

Mathew L. Harrington
WSBA #33276
Brendan V. Monahan
WSBA #22315
Jaime Cuevas, Jr.
WSBA #51108
Emily G. Zughaib
WSBA #64491
STOKES LAWRENCE VELIKANJE
MOORE & SHORE
120 N. Naches Avenue
Yakima, Washington 98901
(509) 853-3000

Lance A. Pelletier
WSBA #49030
General Counsel
COUGAR DEN, INC.
61 W. Wapato Road
Wapato, WA 98951
Phone: (509) 907-5111

Attorneys for Cougar Den, Inc.

I. INTRODUCTION

This case presents issues important to Native peoples and treaty-rights holders.

Despite this Court's holding in *Cougar Den, Inc. v. Washington State Dep't of Licensing*, 188 Wn.2d 55, 69 (2017) ("*Cougar Den I*"), *aff'd*, 586 U.S. 347 (2019) ("*Cougar Den II*"), the Washington State Department of Licensing ("Department") again assessed Cougar Den for its transportation and distribution of fuel to Indian country. These opinions emphasized the practical effect of state action on the treaty-right holder. The Department advocates replacing that analysis with a narrower test that ignores practical effects to circumvent, then erode, treaty rights.

This matter also raises significant questions regarding the scope (if any) of state authority over treaty-rights holders. The Department affirmed a tax assessment, revoked Cougar Den's license, and initiated collection efforts on that assessment over Cougar Den's timely and well-pled treaty defense—inflicting irreparable injury—without first granting a hearing on or otherwise considering the recently affirmed treaty right.

Worse, the Department asserts Native peoples have no effective remedy for a state agency's breach of or interference with their treaty rights as a matter of law. Appx. A, B. Under this theory, if a state agent violates a treaty right and harms a rights-holder, Native peoples are simply entitled to a later order setting aside that unlawful action and nothing more.

The superior court accepted these arguments without explanation or supporting legal authority. These positions, if affirmed, would be an unprecedented expansion of state power and a corresponding diminishment of the rights of Native peoples. It is vitally important that this Court clarify the rights and remedies available to treaty-right holders and Native peoples confronted with state power.

The Department supports direct review of all issues in this case under RAP 4.2(a)(4).

II. STATEMENT OF THE CASE

A. Context for the Dispute

Cougar Den is a Yakama Nation corporation wholly owned by an enrolled Yakama member. It is the Nation's designated fuel distribution agent, and it exclusively distributes fuel to tribal government- and member-owned stations located within Indian country, as defined at 18 U.S.C. § 1151. Cougar Den exercises its treaty right to travel and bring goods to market as set forth at Article III of the 1855 Treaty with the Yakamas, 12 Stat. 951 (June 6, 1855), to distribute fuel and other goods in Indian country free from the burden of state taxes or fees upon that right to travel. This right was unambiguously affirmed by *Cougar Den I* and *II*.

Cougar Den's inter-tribal trade promotes economic development and tribal sovereignty for tribal nations within their Indian country. Federal law has long recognized that states and state agencies are wholly "without power to tax" Indians within their Indian country. *Oklahoma Tax Comm'n v. Chickasaw*

Nation, 515 U.S. 450, 458 (1995). To evade this categorical prohibition, states have altered their laws to take advantage of the modern geography of Indian country—shaped by centuries of forced removal, seizure of Native land, and confinement on reservations—leaving tribal nations surrounded by their "deadliest enemies."[1] Washington thus amended its fuel tax statue to ostensibly tax fuel off reservation, as it entered the marketplace. *See AUTO v. State*, 183 Wn.2d 842, 847–49 (2015). This effectively creates an embargo, ensuring no fuel reaches Indian country unless burdened by state taxes.

Exercising its reserved, federally guaranteed rights, Cougar Den breaks that embargo. It provides goods to tribal businesses free of state taxes, passing along the full amount of tax savings. Cougar Den does not retain *any* amounts that would have been collected and remitted as state taxes. Thus, Cougar

[1] For centuries, states have been the "deadliest enemies" of tribes, *United States v. Kagama*, 118 U.S. 375, 384 (1886), and the entities "least inclined to respect" tribal sovereignty, *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020).

Den's partners may (and do) impose their own tribal taxes and provide for their own people, without suffering the devastating, state-imposed consequences of double taxation (i.e., when state taxes crowd out the ability of tribes to levy their own taxes). *See* Appx. C (*The Problem of Double-Taxation in Indian Country*, The Federal Lawyer, 33-56 (March/April 2022)).[2] This exercise of tribal sovereignty is possible only because of Cougar Den's treaty right.

B. This Court and the United States Supreme Court Recognized the Right to Travel and Held Washington's Motor Fuel Tax is Preempted as Applied to Cougar Den

The Yakama treaty right to travel has reinvigorated the historical and aboriginal network of intertribal trade, with the Yakama reprising their pre-colonial role as traders connecting the Native peoples of the continent. A catalyst for this renaissance was this Court's 2017 opinion regarding Cougar

---

[2] As explained in *Michigan v. Bay Mills Indian Community*, double taxation discourages economic growth and investment in Indian Country, amongst other harms. 572 U.S. 782, 811 (2014) (Sotomayor, J. concurring).

Den's exercise of its treaty rights, which governs this case and precludes the Department's actions.

In *Cougar Den I*, this Court considered an assessment purporting to tax fuel Cougar Den obtained in Oregon and transported to the Yakama reservation for sale or distribution. Relying on "the factual record regarding the treaty interpretation of the historical meaning of the right to travel," this Court vacated the assessment, affirming the treaty and recognizing its breadth: "[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 [1855 Yakama] treaty." 188 Wn.2d at 61–62, 69.

The U.S. Supreme Court affirmed, ruling that the Yakamas' federal treaty right to travel preempted the State from imposing an otherwise nondiscriminatory tax on Cougar Den's fuel distribution activities because that tax burdened reserved rights. *Cougar Den II*, 586 U.S. at 348 (lead opinion of Breyer, J.). The court reasoned that the Treaty's protection of the right to travel includes the unrestricted right to travel with goods for purposes of trade and that Washington's fuel tax impermissibly burdened this Treaty-protected activity. *Id.* at 360–64 (lead opinion of Breyer, J.), 369–372 (Gorsuch, J. concurring).

C. The Department Again Assessed Cougar Den and an ALJ Again Vacated the Assessment

On July 13, 2021, the Department again assessed Cougar Den's fuel distribution activities, this time for traveling with fuel from an IRS-registered terminal within the geographic boundaries of Washington—less than seven miles from the terminal in *Cougar Den I*—to various markets in Indian country. The Department issued two notices: (i) a Fuel Tax Correction and (ii) a Notice of Assessment and Intent to Revoke (the "Assessment"), relying on RCW 82.38.030—the same statute challenged in *Cougar Den I*.

Cougar Den timely appealed. At the Office of Administrative Hearings, all parties stipulated that the issue presented was: "Whether the Notice of Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period should be affirmed, or if Cougar Den, Inc. is exempt from the same under the Treaty of 1855."

On this stipulated issue, ALJ Micah Larripa issued an Initial Order granting summary judgment to Cougar Den, denying the Department's cross-motion and recommending that the assessment be vacated as preempted under *Cougar Den I* and *Cougar Den II*. Appx. D. ALJ Larripa also rejected the Department's arguments for revoking Cougar Den's license and chastised the Department for misstating relevant statutory language in its arguments. *Id.*

D. The Department Affirmed the Assessment by Ducking the Treaty, then Frustrated Cougar Den's Ability to Fully Litigate its Rights

The Department petitioned for review of the Initial Order by its own Director's designee, who reversed and issued a Final Order. The Final Order did not distinguish the relevant treaty cases or dispute their application to Cougar Den's activities. Instead, it refused to consider Cougar Den's treaty rights at all, based on a novel and tendentious argument that the treaty defense was "constitutional" such that the agency lacked authority to consider it. Thus, the Final Order disregarded the parties' stipulated issue and ignored the Yakamas' sacred rights.

The Department revoked Cougar Den's fuel supplier license the next day and initiated collection efforts on the Assessment. Further, the Department contacted Cougar Den's trading partners and customers to disparage Cougar Den, claiming it could not satisfy its contracts.

Upon learning of these lawless actions, Cougar Den filed a Petition for Judicial Review and sought an emergency stay. The Petition also asserted independent claims against the Department, its Director, and the State for (i) breach of and interference with the Treaty of 1855 and (ii) violation of Cougar Den's due process rights. The superior court stayed the Final Order in January 2024.

Over the following two years of litigation, the Department used myriad procedural maneuvers to avoid Cougar Den's independent claims. The superior court indulged these efforts even after denying a Rule 12 motion to dismiss the independent claims. Consequently, the Department did not answer those claims for 21 months and dodged discovery on them.

E. Challenged Rulings and Decisions Below

Between November 2025 and February 2026, the Department presented dispositive motions, which the superior court granted by simply signing the proposed orders.

Cougar Den now appeals and seeks direct review of these rulings. Specifically, Cougar Den seeks direct review of (i) the Clarified Findings of Fact, Conclusions of Law and Order Affirming Final Order of the Department of Licensing entered January 23, 2026, as informed by the Court's November 24, 2025 oral ruling, and (ii) the Order Granting Respondent's CR 12(c) Motion to Dismiss Cougar Den's Independent Claims entered April 15, 2026.

The Department joins the request for direct review of the January 23, 2026 Order, but not because it believes treaty rights are fundamental, urgent, or of broad public import. Instead, the

Department is likely to argue that direct review is necessary because of the significant tax dollars it contends are at stake.

This claim is grossly overstated. The Department admits that every gallon at issue here originating from Vancouver, Washington could have instead originated in Oregon, 7 miles away, and been delivered tax-free under *Cougar Den I* to Indian country within the geographic boundaries of Washington. Thus, this case is not about tax dollars. Further, the Department has executed "90%-10%" compacts with tribal nations wherein it remits 90% of the state tax collected in Indian country to tribes, provided those nations cease trading with Cougar Den and cede core components of their sovereignty to Washington. Indeed, Cougar Den is informed that the Department has offered 100%-0% compacts to tribal nations, following Oregon's example. *See* O.R.S. 319.245(2), (3).

This case is rather about taxation as power over Native peoples, compelling tribal nations to accept state authority in their sovereign government functions and economic development efforts. The Department seeks a return to the days where it controlled tribal commerce through compacts permitting the state to decide (i) the amount of tax Native businesses impose and (ii) how tribal governments may spend tax revenues, while (iii) requiring tribal governments make annual certifications and open their books for state auditing. *See* Appx. E, F. These are fundamental, urgent, and important issues. Cougar Den respectfully requests review.

III. ISSUES PRESENTED FOR REVIEW

1. Does the right to travel reserved at art. III of the 1855 Treaty with the Yakama preempt the fuel tax Assessment because it burdens treaty-protected activity?

2. May the state assess fuel taxes under ch. 82.38 RCW on a Yakama member when the Treaty promised the Yakama that roads would be constructed for their benefit and they would not be charged for the construction, maintenance, or use of the roads, and where Amendment 18 of the Washington

Constitution mandates that fuel tax revenues must pay for the use and maintenance of the roads?

3. May an administrative agency consider the preemptive effect of federal treaty rights on state law or state actions, or do the rights reserved by treaty raise "constitutional questions" implicating separation of powers concerns?

4. Do Native peoples have a due process right to a pre-deprivation hearing when state action will deprive them of a federal treaty right, causing irreparable injury?

5. What remedies, if any, are available to Native peoples when a state agency breaches a federal treaty right?

IV. GROUNDS FOR DIRECT REVIEW

A. Cougar Den's Treaty Rights Merit Direct Review

The first and second issues presented for review arise from Cougar Den's right to travel under the 1855 Treaty, which preempts the Department's motor vehicle fuel tax assessment issued under RCW 82.38.030(13). The Treaty contains two guarantees protecting Cougar Den's activity.

First, the Treaty protects the right to travel the public highways with goods for the purposes of trade "without restriction." Yet the practical effect of the state's motor vehicle fuel tax, RCW 82.38.030(13)(a)—which taxes and imposes licensing, reporting, and other requirements on persons transporting fuel from a terminal to market in Washington state using public highways—burdens that right. The *Cougar Den I* and *Cougar Den II* courts previously rejected a tax imposed under RCW 82.38.030(13)(c) for burdening this same right. The Department contends the difference between these subsections—and not any practical effect on treaty-rights holders—is material.

Second, the Treaty-protected right to travel includes both the unrestricted right to use public highways and the government's promise to construct public highways for the Yakama's use and benefit—with no corresponding obligation to the Yakama to pay for their construction, use, or maintenance. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1250, 1255–56 (E.D. Wash. 1997). The fuel tax here serves one purpose: to collect revenue for the construction and maintenance of state roads. WASH. CONST. art. II, § 40 (amend. 18). The state cannot make a Yakama member pay for the use, construction, or maintenance of roads.

Both present fundamental and urgent issues of broad public import, and they merit this Court's review.

1. Treaty Rights Are an Important Public Interest

"The enforcement of rights that are reserved by treaty to the Tribes is an important public interest, and it is vital that the courts honor those rights." *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1516 (W.D. Wash. 1988). Cougar Den asks this Court to again fulfill its role in safeguarding treaty rights.

This Court has repeatedly served as a bulwark against state action to diminish treaty rights. In *Cougar Den I*, this Court's review was necessary to protect Cougar Den's treaty rights. More recently, this Court confirmed it will not permit state enforcement actions to undermine treaty guarantees. *State v. Towessnute*, 197 Wn.2d 574, 584–85 (2021) (invalidating conviction for fishing protected by Treaty of 1855); *State v. Wallahee*, 3 Wn.3d 179, 183 (2024) (invalidating conviction for hunting protected by Treaty of 1855). This Court also acknowledged its responsibility to correct prior departures from that duty. Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (Wash. June 4, 2020).

Treaty promises are not self-executing and require judicial enforcement. *Wallahee*, 3 Wn.3d at 183 (treaty rights endure only through active recognition by courts and governments). That principle is directly implicated here, and it extends beyond Cougar Den. It affects the scope and enforceability of treaty-protected activity across Washington and implicates the State's continuing efforts to diminish that activity. The decision below encourages this incremental erosion of treaty rights. The issues presented are fundamental, have urgent public importance, and warrant direct review under RAP 4.2(a)(4).

2. <u>The Superior Court's Summary Ruling is Inconsistent with *Cougar Den I* and *II*</u>

The superior court's decision is also inconsistent with the holdings of *Cougar Den I* and *Cougar Den II*. RAP 4.2(a)(3). Those opinions hold that the governing inquiry is whether a state tax, in its practical operation, burdens the Yakama right to travel with goods to market. *Cougar Den I,* 188 Wn.2d at 69 (holding that "any trade, traveling, and importation that requires the use of public roads falls within the scope of the [treaty] right"); *Cougar Den II,* 586 U.S. at 360–62 (affirming and stating that, in a treaty-preemption case, what matters is "the practical effect of the state law" on the treaty right and not what activity the tax purports to be "on"). What matters is whether the tax "act[s] upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Id.* at 360–61 (quoting *Tulee v. Washington*, 315 U.S. 681, 685 (1942)). The decision below departs from this framework.

To explain this conflict, Cougar Den briefly references arguments the superior court apparently accepted.

First, the Department claimed the tax is on "the removal [of fuel] from the rack"[3] and this action, read on its own and in isolation, does not implicate travel. The Department argued the court could not consider statutory exemptions or other predicate elements to imposing the tax, as the treaty right is concerned only with the legal imposition of the tax. Appx. G 77-78. Accepting that framing, the superior court opined that "travel is not a part of the tax the state of Washington is imposing here." Appx. H.

The superior court's characterization is divorced from the practical effect of the tax, treating it as somehow separate from the actions necessary to impose the tax: the transportation of fuel to market. Similarly, the superior court accepted the Department's invitation to dismiss Cougar Den's highway

---

[3] This misreads the statute, which does not tax fuel "at the rack" but instead taxes fuel "when [] fuel is removed from a terminal if the fuel is removed at the rack." RCW 82.38.030(13)(a). The Department does not dispute the ALJ's finding that the only way to remove fuel from a terminal (defined as the "storage and distribution facility," RCW 82.38.020(31)) that has been removed from a rack is to drive along a public highway with the fuel in the body of a truck or trailer. Appx. D ¶¶ 5.22-.24.

construction, use, and maintenance arguments by concluding the Department could require the Yakama to fund public highways so long as the tax was merely "earmarked" for those purposes. Appx. G 75-77 & n.10. The court thus treated the questions as an abstract framing exercise rather than an inquiry into the practical effect on the treaty-rights holder. Appx. H.

It is not difficult to see the erosion of treaty rights that would result by turning their validity into a legal framing exercise. The U.S. Supreme Court has rejected such efforts. As Justice Gorsuch stated,

> If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to possess the fish they catch—just like their right to ***move*** goods on the highways embraces the right to possess them there.

Cougar Den II, 586 U.S. at 374 (emphasis in original).

When the fuel tax statute is read as a whole, the practical effect is clear: the tax applies only where fuel is carried by ground transportation to a market in Washington. Fuel that does not move, that is placed in storage or transferred, or that moves out of the terminal by other means such as pipeline or vessel, is not taxed. The tax burden thus arises in connection with the very activity the Treaty protects.

Cougar Den's treaty-protected activity is the distribution of goods by highway to market. The entire fuel tax statutory scheme operates as a tax on the distribution of fuel by highway to market. Because the state is forbidden from taxing on-reservation retail stations, *see* above at 4-5, it had to move the tax off-reservation and to those who transport the fuel into Washington. But the U.S. Supreme Court made clear that this tax cannot apply to Cougar Den under the 1855 Treaty:

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

Cougar Den II, 586 U.S. at 369 (Gorsuch, J. concurring).

Treaty rights are too fundamental to be cast aside or diminished through framing exercises by clever litigants. The superior court substituted the Supreme Court's mandatory analysis with such a framing exercise, creating a conflict with those decisions—one prejudicially affecting the rights of Native peoples. Such a ruling requires review. RAP 4.2(a)(3).

B. Administrative Review of Treaty Rights, Due Process, and Remedies

The remaining issues also merit direct review. Indeed, the Department admits they are inextricably intertwined with the treaty right issues. Appx. I 106.

First, this Court should review the superior court's dismissal of Cougar Den's claims regarding the right of Native peoples to a pre-deprivation hearing when the state acts to infringe on their treaty rights. Two points here:

(a) The state has no power or authority over such rights. Treaty rights are protected, preserved personal civil rights held and exercised by individual tribal members that cannot be taken, violated, or in any way limited by a state. *U.S. v. Washington*, 384 F. Supp. 312, 337 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975); *see also*, Felix S. Cohen, Handbook of Federal Indian Law § 18.02 at 1156 (2012 ed.).

(b) The Department does not dispute that the wrongful deprivation of a treaty right causes irreparable harm. Appx. J 119, 121. It simply believes the possibility of irreparable harm is irrelevant to due process, such that the state may inflict whatever harms it wishes and offer a hearing later. All authorities Cougar Den is aware of disagree. *E.g., Mann v. City of Tucson, Dep't of Police*, 782 F.2d 790, 792 (9th Cir. 1986) (where the deprivation is substantive and more than just property rights, postponement of judicial determination of liability is inadequate process).

Second, this Court should consider an agency's authority to hear a treaty claim. The Department contends treaty preemption raises a constitutional question because preemption implicates the supremacy of federal law (a principle not challenged here), but courts have generally found that preemption presents only a rule of decision to resolve choice of law, akin to statutory construction. *See Close v. Sotheby's, Inc.*, 909 F.3d 1204, 1209 (9th Cir. 2018); *City of Baton Rouge v. Goings*, 684 So.2d 396, 397–98 (La. 1996); *State v. Sarrabea*, 126 So. 3d 453, 456 n.2 (La. 2013).

In *Cougar Den I*, the agency (through ALJ Stephen Leavell) ruled—without objection by the Department—on the treaty claim and found the tax preempted. This time, and despite the Department's stipulation to the issue before the agency, Cougar Den waited 51 months before obtaining a hearing on its treaty right. The agency process alone took 29 months.

Which leads to the third issue, whether remedies exist for treaty violations. Most treaty-rights holders are hunters, gatherers, and fishermen. They cannot afford years of futile agency proceedings until a reviewing court will hear their treaty claim. Yet the Department unabashedly suggests—and the superior court agreed—that these individuals may be summarily stripped of their treaty rights without a hearing during this entire process *and* that there is zero redress available as a matter of law if a court (eventually) declares the state action unlawful.

These issues are of substantial public importance and they are urgent. It was not so long ago that the Ninth Circuit compared Washington State's "extraordinary machinations" against federal treaty rulings to Southern resistance against desegregation rulings. *Puget Sound Gillnetters Ass'n v. United States Dist. Court for W. Dist. of Wash.*, 573 F.2d 1123, 1126 (9th Cir. 1978) (citations and subsequent history omitted). If the decisions below are allowed to stand, Washington risks returning to that ignoble chapter of its history. Direct review is warranted.

V. CONCLUSION

Respectfully, Cougar Den submits each of these issues for this Court's direct review under RAP 4.2(a)(4) and (3).

RESPECTFULLY SUBMITTED this 29th day of May, 2026.

I certify that the foregoing Brief is 4,000 words in compliance with RAP 18.17(c)(17).

By: *s/ Mathew L. Harrington*

Mathew L. Harrington (WSBA #33276)
Brendan V. Monahan (WSBA #22315)
Jaime Cuevas, Jr. (WSBA #51108)
Emily G. Zughaib (WSBA #64491)
STOKES LAWRENCE VELIKANJE
MOORE & SHORE
120 N. Naches Avenue
Yakima, Washington 98901-2757
Telephone: (509) 853-3000
Fax: (509) 895-0060
E-mail: Mathew.Harrington@stokeslaw.com
E-mail: Brendan.Monahan@stokeslaw.com
E-mail: Jr.Cuevas@stokeslaw.com
E-mail: Emiliy.Zughaib@stokeslaw.com

Lance A. Pelletier (WSBA #49030)
General Counsel
COUGAR DEN, INC.
61 Wapato Road
Wapato, Washington 98951
Telephone: (509) 907-5111
E-mail: Lace@ramseycompanies.com

Attorneys for Cougar Den, Inc.

PROOF OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the 29th day of May, 2026, I caused a true and correct copy of the foregoing document to be served via appellate court web portal to:

Marsha Chien
Leo V. Roinila
Jonathan E. Pitel
Eric D. Peterson
Attorney General of Washington
Licensing & Administrative Law Division
P.O. Box 40110
Olympia, WA 98504

Eric A. Mentzer
Attorney General of Washington
Complex Litigation Division
P.O. Box 40111
Olympia, WA 98504-0111

Dated this 29th day of May, 2026, at Seattle, Washington.

s/Laura Smith
Laura Smith, Practice Assistant

APPENDIX INDEX

COUGAR DEN, INC., V.
STATE OF WASHINGTON DEPARTMENT OF LICENSING AND MARCUS GLASPER

Yakima County Superior Court Cause No. 24-2-00109-39

Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

COUGAR DEN, INC.,)
)
Petitioner,)
)
) No. 24-2-00109-39
vs.)
)
STATE OF WASHINGTON,)
DEPARTMENT OF LICENSING,)
and MARCUS GLASPER, the)
Director of the)
Department of)
Licensing,)
)
Respondents.)
)

FTR TRANSCRIPTION OF PROCEEDINGS
11/01/24 HEARING

BE IT REMEMBERED that the above-mentioned cause came on for a hearing on November 1, 2024, before the Honorable Jared Boswell, Yakima County Superior Court, Yakima, Washington.

COUNSEL IN ATTENDANCE were Mr. Mat Harrington; Mr. Jaime Cuevas, Junior; Mr. Lance Pelletier, Attorneys at Law, representing the Petitioner; Ms. Marsha Chein and Mr. Jonathan Pitel, Attorneys for the Respondents.

Transcribed by: Jori L. Moore, CCR, RPR

sought a stay here. And that's why we're here stayed while this case is on petition for judicial review.

So nothing -- so at this point now that the Department has sought a motion to dismiss. It is time to actually test Cougar Den's allegations. Cougar Den can't just say this is a separate claim from the APA. That's not enough. They have to point to something that the Department did or allege something that the Department did that was somehow outside the scope of the final order.

Now Cougar Den repeatedly argues that it didn't have a hearing. It had a hearing. Yes, the Department determined under Bare vs. Gorton that it couldn't decide on the constitutionality of a state law. But under the APA, Cougar Den will be able to bring that claim in court on the petition for judicial review.

The Department is not -- the Department -- the Department is not seeking to preclude or short circuit Cougar Den's ability to argue that it has treaty rights. The Department is seeking the quickest review possible on the issue of treaty rights. And that is through the court of appeals that this court certified to the court of appeals. Because it is understandable in the interest of justice the highest court should due process claim if the court of appeals finds there isn't a treaty violation?

MR. HARRINGTON: Yes. Because the due process claim is founded on a constitutional right to process before deprivation.

The point is we were not afforded the process whether we win or lose before that deprivation.

I guess I'd also encourage the Court to consider the consequences of the theories advanced by the Department here that essentially if this is the way the world works, the Department may freely disregard treaty rights and not provide a forum for any Indians to vindicate their treaty rights and then cause irreparable injury. And that simply cannot be the way the law works. That can't be the way this was all designed to play out.

Finally, Ms. Chien -- as to address the last point she made that the state did not stipulate to the issue before the ALJ being the treaty violation or the preemption of the treaty, that the treaty preempts the state tax. But, rather, simply stipulated to that being Cougar Den's defense.

Well, I -- if you look at the stipulation arising out of the initial order before ALJ Larippa, that is the only issue that is in the statement of under other agency action.

Here there is an adjudicative order. There is a final order that's being challenged. So it does apply here.

Number two. The judge's question is exactly right. If the court of appeals determines there was no treaty right, there is no deprivation. So there is no due process claim.

Number three. The Department's argument is that the treaty right issue needs to be decided by the judicial branch, not by the executive agency. It is clear that parties still may make their record before the administrative hearing, including about their constitutional claims. But the actual ruling on those claims need be made by a judicial court. And that right now is the court of appeals.

I have nothing further.

(Court's ruling)

THE COURT: All right. So I have had an opportunity to review and heard arguments. I think at this point -- and perhaps it kind of came out from the Court's questions I guess. I don't believe I made a determination that there was separate conduct. And I can understand the argument that the separate conduct came from the Court's prior rulings. The way I was

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

I, Jori L. Moore, Certified Court Reporter in the State of Washington in and for the County of Yakima, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct: That I am the Official Certified Court Reporter who reported/transcribed the aforementioned proceedings; that the transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript; that I am in no way related to or employed by any party in this matter, nor any counsel in this matter; and I have no financial interest in the litigation.

/s/ Jori L. Moore

Jori L. Moore - Certified Court Reporter
Yakima County Superior Court - Rm. 311
128 N. 2nd Street
Yakima, WA 98901
Phone: (509) 574-2733
E-mail: jori.moore@co.yakima.wa.us

Appendix B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

COUGAR DEN, INC., Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF LICENSING, and MARCUS GLASPER, the Director of the Department of Licensing, Respondents.	)	No. 24-2-00109-39

TRANSCRIPTION OF PROCEEDINGS
FTR RECORDED MOTION HEARING
THE HONORABLE JARED BOSWELL

BE IT REMEMBERED that the above-mentioned cause came on for a motion hearing on January 10, 2025, before the Honorable Jared Boswell, Yakima County Superior Court, Yakima, Washington.

COUNSEL IN ATTENDANCE were Mr. Mathew Harrington, representing Petitioner; Ms. Marsha Chien, representing the Respondents (appearing via Zoom).

Transcribed by: Jori L. Moore, CCR, RPR

For example, Cougar Den claims dismissal with prejudice will mean the Department can freely interfere with the native peoples treaty rights. That flatly ignores the petition for judicial review that is currently on review before the court of appeals.

Dismissal of Cougar Den's independent claims will not threaten Cougar Den's treaty rights.

The Department recognizes that the Yakama have solemn treaty rights. Those are not at risk right now. None of Cougar Den's independent claims are necessary given that the petition for judicial review is up on appeal. And this court has stayed enforcement of the final order.

Cougar Den's petition for judicial review will answer all of the legal questions posed by the Cougar Den's independent complaints.

Not only does Cougar Den not face irreparable harm now, irreparable harm is not enough for a legal 12(b)6 argument. Cougar Den has no claim, nor does it allege one. Its independent claims must be dismissed.

I'm happy to answer the Court's questions. But I would reserve my time after Cougar Den's argument.

THE COURT: So I guess the question I have is isn't the issue not the stay and not the agency order, sorry, blind referring to the Department as both shameful for trying to enforce the state tax law. Those are not legal arguments.

The legal argument that the state is making is that Cougar Den can bring its claims about its treaty rights to the court of appeals.

They have -- Mr. Harrington repeatedly refers to the irreparable harm. Irreparable harm is not part of a due process claim. This is a 12(b)6. For a 12(b)6 to exist there needs to be a constitutionally protected right and some due process violation.

The constitutional protected right here is a property interest. Cougar Den's own cases confirm that the treaty right is a property interest. We are not -- the Department is not arguing that this is a usual tax case. The Department is arguing that this is the same as Washington Trucking Association, which involved a constitutionally protected interest just like it does here. It involves a constitutionally protected interest under due process.

In here due process was provided. And I think that if you look -- if you look -- if you follow the thread that Mr. Harrington was referring to, if -- there was no treaty right, if the court of appeals says there's no treaty right, Cougar Den's argument is that they still have a due process claim. That's not true.

Cougar Den is saying that the Department should have considered the treaty discussion at the administrative level. But the Department did not have the authority to do so. The Department cannot violate due process by failing to exercise an authority it does not have. It's an executive agency. It cannot say that the tax law does not apply. That is something for the judicial courts to do.

Additionally, the APA states that a final order is effective when entered. So the final order is the legal document that revokes Cougar Den's license, not any letter the Department wrote after the final order's issuance.

And the Department complied with the APA. Nothing in Cougar Den's amended petition indicates that we did not comply with the APA. The APA -- there was -- there was a final order issued, which is effective immediately. And the Department enforced it. Cougar Den, as its right, came to this court and sought a stay. It obtained a stay. That is all that the APA requires. That is all that due process requires. Due process does not require more than what the APA already provides.

heard together it just cannot be that they are both independent and not heard together.

So I -- I'm hearing in Mr. Harrington's argument a concession that the independent claims are not, in fact, independent.

And, again, this court does not -- there's no legal claim under RCW 82.38 or Washington Trucking Association where Cougar Den's claims survive.

And I just want to take a moment and indicate that the Department is not saying that -- is not saying that the Yakama don't have a treaty right. That there isn't a right to travel. There's certainly a right to travel. The argument is whether or not it applies to the taxation of fuel being dropped at a terminal site that is different from Cougar Den.

I'm happy to answer any of the questions before the Court. I would encourage the Court to grant a dismissal so that this can cleanly be reviewed before the court of appeals.

If the Court is inclined to issue a stay, that is what we asked for many months ago and will alternatively take that. But legally speaking, these claims cannot exist separate from all of Cougar Den's repeated reference to irreparable harm. That is not what -- so due process does not protect parties or entities from irreparable harm. That's not what due process does. There has to be a constitutionally protected interest. And here it is a property interest.

MS. CHIEN: And the question is whether or not process was provided in protection of that property interest. And it's very clear the Department has complied with the APA. And it's -- and the separation of powers between consecutive agency and judiciary that a due process violation happened here.

THE COURT: But wasn't it stipulated at the administrative level That the issue was going to be the preemption?

MS. CHIEN: But that's exactly what happened in Washington Trucking Association, right? The parties can agree that the issue might be at the administrative level and that the constitution issues might be litigated. But they won't be decided until the judicial -- before a judicial court. And that is what happened in Washington Trucking Association. The agency also declined to review the constitutional issue until it could be litigated before the Court. And the Court still said that's an adequate procedure.

And just -- well, I won't go further. But a stipulation that this is what Cougar Den's defense is

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

I, Jori L. Moore, Certified Court Reporter in the State of Washington in and for the County of Yakima, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct: That I am the Official Certified Court Reporter who reported/transcribed the aforementioned proceedings; that the transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript; that I am in no way related to or employed by any party in this matter, nor any counsel in this matter; and I have no financial interest in the litigation.

/s/ Jori L. Moore

Jori L. Moore - Certified Court Reporter
Yakima County Superior Court - Rm. 311
128 N. 2nd Street
Yakima, WA 98901
Phone: (509) 574-2733
E-mail: jori.moore@co.yakima.wa.us

Appendix C

The Problem of Double-Taxation in Indian Country

DR. GAVIN CLARKSON

Despite the moral rectitude of the tribal position that federal treaty obligations require financial support for services such as tribal healthcare, economic dependency on the federal government is not a viable long-term strategy for tribal nations. If tribal sovereignty is to mean something, at a minimum, it should mean the ability of a tribe to tax and regulate all economic activity on its territory, just like states do. Tribal governments, just like state governments, need to develop a tax base in order to provide vital services to their citizens. Unfortunately, aided by fundamentally flawed Supreme Court jurisprudence,[1] states repeatedly overran the boundaries of tribal sovereignty and created a pernicious problem of double-taxation for on-reservation economic activity. The impact is particularly acute for tribes that are trying to grow their economies by attracting outside capital and non-Indian businesses to the reservation.

The founding fathers were fully aware of the grave threat to tribal economies posed by the states and thus gave Congress the exclusive "power to ... regulate Commerce ... with the Indian Tribes."[2] Beginning in 1790, Congress passed a series of Indian Trader Statutes (ITS) asserting federal primacy in Indian affairs to completely preempt state involvement in tribal economies.[3] The Supreme Court was similarly aware of this threat. Citing both the Constitution and the relevant acts of Congress, such as the Indian Trader Act,[4] Chief Justice Marshall famously rebuked Georgia's attempt to require non-Indians to obtain a license to interact with Indians as "repugnant to the Constitution, laws, and treaties of the United States."[5] Marshall went further, declaring that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[6]

The ITS were originally passed in the vacuum of accurate and clarifying federal regulations, and the current ITS regulations[7] date from the late 1950s and early 1960s. In the interim, the states and the courts have filled the void with a patchwork of case law that could not have done a better job of destroying tribal economies than if it had been by purposeful design. Under no definition of a federal trust responsibility to Indian Country is the goal to ensure and enforce poverty in perpetuity.

While a Reagan-era Presidential Commission recommended that Congress pass legislation for "exclusive tribal government taxation authority and [tribal] responsibility for the provision of public services to all people,"[8] Congress failed to act. Instead, congressionally delegated authority allows the Department of the Interior to achieve these same goals via regulation.[9]

Federal common law decisions establish most rules governing on-reservation taxation, yet federal policy acknowledges that Indian tribes are sovereign governments with plenary power over their citizens and lands. Inherent in tribal authority is the power to tax, which is a necessary instrument of self-governance and territorial management, and for improving the dire economic conditions faced by many tribal communities.

After successfully preempting all state tax, regulatory, and jurisdictional authority over tribal leasing (25 C.F.R. Part 162) and rights-of-way on trust lands (25 C.F.R. Part 169), an Obama appointee in the Department of Interior, Larry Roberts, issued an Advance Notice of Proposed Rulemaking[10] (ANPRM) regarding updates to the Indian Trader regulations (ITR).[11] That initiative prompted substantial tribal commentary that I incorporated in an article for the 2017 Sovereignty Symposium, "American Indians versus the Billion-Dollar Tax Weevil: The Pernicious Dual-Taxation of Tribal Economies after *Cotton Petroleum*."[12]

Immediately thereafter, I took leave from my academic position and accepted a presidential appointment to serve as the Deputy Assistant Secretary for Policy and Economic Development – Indian Affairs (DASPED). My primary goal as DASPED was advancing revisions to the Indian Trader regulations to eliminate double-taxation in Indian Country. After obtaining empirical data from tribal leaders about what projects were not happening because of double-taxation, we developed a working paper[13] that laid out the economic case for the proposed regulatory change as well as the accompanying empirical data provided by Indian Country.[14] The economic model we developed was subsequently published in a peer-reviewed economics journal.[15]

Our research empirically demonstrated that the dual tragedy of double-taxation is not only that tribal economies are harmed, but so too are state economies. According to our model, for every $1,000 of exclusive tribal taxation authority, the surrounding states will receive upwards of $10,000 in benefit from increased economic activity in off-reservation communities as well as reductions in welfare transfer payments as on-reservation poverty diminishes. This article argues that careful revision of the ITR would provide a mechanism to reverse the judicially imposed disaster of double-taxation.

Background of the Problem[16]

While the Indian Trader laws have their origins in the Indian Trade and Intercourse Act of 1790, Congress legislatively reinforced the notion of excluding state authority in 1834, noting that:

> [E]ach tribe, by adopting those laws as their own, and establishing competent tribunals, may relieve us from the burden of executing them, and it is hoped that this will be done ... Such regulations must be made either by the United States or by the tribes, [but not the States]. They will be more satisfactory if made by them, than if made by us, and it must be our desire to do nothing for them which they can do for themselves.[17]

Similarly, in 1876 Congress delegated that "sole power and authority ... to make such rules and regulations as he may deem just and proper ... for the protection of said Indians," to the "Commissioner of Indian Affairs."[18]

The Supreme Court similarly attempted to maintain federal exclusivity in Indian Affairs. In *Cherokee Nation v. Georgia*,[19] Chief Justice Marshall wrote that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[20] A half-century later, the Supreme Court would opine that the "relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[21] The concept that so confounds both Congress and the courts is that, on the one hand, Indian tribes are separate sovereigns, "domestic dependent nations,"[22] ensconced as "third sovereign[s]"[23] in the federal framework, while on the other hand, Congress has plenary authority over Indian tribes. While the fabrication of this plenary authority has dubious origins,[24] it nonetheless provides the authority, along with the Indian Commerce Clause, for congressional passage of the Indian Trader Acts.

However, the acknowledged existence of tribal sovereignty has served to balance the exercise of that plenary authority, and the maintenance of tribal sovereignty is critical to the success of any revisions of the ITR, as the "first key to economic development is sovereignty."[25] As one tribal chairman noted, while the ITS are

> rooted in an antiquated historical, political, and legal foundation [and] presumes the inability of Indians to self-govern and self-regulate trade within their territories in a manner that protects their interests and thus requires the assistance of the federal government to prevent potentially harmful commercial interactions between Indians and non-Indians ... the policy foundation supporting the [Indian] Trader Statutes—protecting trade with Indians—remains relevant today in a different context.[26]

The best guiding principle on this subject comes from *Warren Trading Post Company v. Arizona State Tax Commission*, holding that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders."[27]

In *Warren Trading Post*, Arizona sought to impose a tax on the gross proceeds of sales or gross income of a licensed Indian trader. After noting that Arizona had expressly disclaimed all rights and title to Indian lands within its boundaries[28] and reviewing the legislative history of the Indian Trader Act, the Court held the tax invalid.[29]

A subsequent attempt by Arizona to tax on-reservation economic activity was similarly thwarted in *Central Machinery Company v. Arizona State Tax Commission*.[30] Even though Central Machinery was not a licensed Indian trader and did not have a permanent place of business on the reservation, the Court applied *Warren Trading Post* and overruled the Supreme Court of Arizona, concluding that since

> the transaction was plainly subject to regulation under the federal statutes and implementing regulations governing the licensing of Indian traders, federal law pre-empts the asserted state tax. It is irrelevant that appellant was not a licensed Indian trader, since it is the existence of the Indian trader statutes, not their administration, that pre-empts the field of transactions with Indians occurring on reservations. Nor is it relevant that appellant did not maintain a permanent place of business on the reservation, since the Indian trader statutes and regulations apply no less to a nonresident who sells goods to Indians on a reservation than they do to a resident trader.[31]

Given the exclusively federal nature of the Indian Commerce Clause and the ITS, one would think that the Supreme Court holding in *Warren Trading Post* would serve as *stare decisis*. Unfortunately, cash-strapped states continued to look at on-reservation resources and activity as potential "free money," and subsequent cases proved disastrous.

Moe, Larry, and Cotton: The Intellectual Dishonesty of Race-Based Taxation

A state ordinarily may not regulate or tax property or economic activity in Indian Country. As stated by the Supreme Court in a case invalidating a state tax on royalty interests held by a tribe under oil and gas leases to non-Indians:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes..., and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.[32]

Moe v. Salish and Kootenai[33]

In *Moe*, the Court presumed that a state could tax cigarette sales to non-Indians and upheld a state requirement that tribes keep records of such sales, reasoning that these requirements amounted to a "minimal burden."[34] *Moe* constituted a departure from established law, which has required a clear expression of congressional intent to justify extension of state governmental power over Indians or Indian tribes on reservations without regard to the extent of regulatory burden on Indian tribes.[35]

Colville v. Washington[36]

The *Colville* Court extended the *Moe* exception to allow a state to require more burdensome collection and recordkeeping requirements on Indian cigarette sellers.[37] Ironically, the Court seemed far more concerned about non-Indians off-reservation than Indians on-reservation, citing *Moe* for the notion that "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax."[38]

While the duty of a non-Indian to pay tax for an on-reservation purchase has a dubious basis, the Court completely rejected the foundational principles from *Warren Training Post*. The Court stated, "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."[39] The intellectual dishonesty inherent in this opinion is discussed *infra*.

The Presidential Commission Addresses *Bracker's* "Unbalancing"

On Jan. 24, 1983, President Ronald Reagan issued a Statement on Indian Policy declaring that "responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments but also to federally recognized American Indian tribes."[40] President Reagan further acknowledged that "growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective [in part because of the failure at] reducing the numerous and complex regulations which hinder economic growth." While accordingly declaring that it is vitally "important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government," President Reagan noted that tribes "have had limited opportunities to invest in their own economies, because often there has been no established [tax] base for community investment and development. Many reservations lack a developed physical infrastructure, including utilities, transportation, and other public services."

In an effort to "reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies,"[41] President Reagan established the Presidential Commission on Indian Reservation Economies to "identify obstacles to Indian reservation economic development and to promote the development of a healthy private sector on Indian reservations."[42] After extensive review, the Commission concluded that two primary factors exacerbated poor on-reservation economic conditions. First,

> A Byzantine system of overregulation actually deters investment by raising costs, creating uncertainty, and undermining local initiative. ... The [federal support] system is designed for paternalistic control and it thrives on the failure of Indian tribes.... A reorganization of government systems which focuses on trust responsibility from the perspective of protection, rather than management, which provides a population-resource formula for block grants to tribes, and which acknowledges their rights to manage their own affairs, would provide the right kind of support.[43]

The Commission also lamented the lack of a viable tribal tax base, which itself stemmed in large part from the lack of exclusive tribal tax authority over Indian Country:

> When businesses believe that there will be [double] taxation if they locate on Indian reservations and do business there, they tend to locate along the outside border of a reservation. In spite of *White Mountain Apache Tribe v. Bracker*,[44] denying the state's right to tax a non-Indian business entity doing business with an Indian tribe, there is still widespread ambiguity over the extent to which state taxing power may reach.[45]

While *Bracker* was a relatively new decision at the time of the Presidential Commission's report, as discussed *infra*, courts have since applied *Bracker*'s "balancing test" to further damage tribal tax revenue generation capabilities and thwart tribes' abilities to meet the needs of their members. Perhaps in anticipation of how *Bracker* would be misused, the Presidential Commission recommended that:

> In order to minimize the adverse effects of double-taxation on economic activity and to avoid discouraging a partnership among non-Indians and Indians, legal persons residing or doing business within the boundaries of a reservation should not incur the burdens of supporting two sovereigns. Indians and non-Indians [should be subject to] the exclusive taxing authority and jurisdiction of an Indian tribe. [Such] exclusive tribal taxing authority would also create a responsibility on the part of the tribe to provide necessary public services to all residents within its boundaries.[46]

The Presidential Commission found that "significant litigation and jurisdictional conflicts [over issues such as double-taxation constituted] a major source of obstacles to Indian reservation economic development,"[47] and those obstacles have only grown more problematic in the 33 years since the report.

Bracker held that when a state seeks to tax non-Indians doing business in Indian Country, courts must conduct "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[48] This test, which has come to be known as "*Bracker* balancing," examines factors such as the state's provision of public services related to the tax, the level of federal regulation of the activity being taxed, and the scope of adverse economic consequences on the tribe. If the examining court determines that the state's interests outweigh those of the federal government and the tribe, the state tax is authorized. Unfortunately, courts overwhelmingly use *Bracker* balancing against tribal interests, and the results of such balancing are rarely, if ever, revisited, even in the face of substantially altered circumstances.[49]

The practical effect of *Bracker* has been to discourage on-reservation economic activity and deprive tribes of revenue. As states aggressively tax non-Indians doing business in Indian Country, tribes face several unsatisfying options. First, tribes may impose tribal taxes on top of the state taxes, resulting in double-taxation that often makes a given project financially unviable or at the very least drives it off-reservation. Second, tribes may forego imposing taxes altogether and lose the revenue necessary to provide government infrastructure and services such as roads, schools, electric power, water and sanitation services, telecommunications, law enforcement, fire departments, and healthcare, which most states neither directly provide nor fund in Indian Country. Third, tribes may challenge the state taxation in court, leading to protracted, expensive, and uncertain litigation that may permanently damage the relationship between tribes and state and local governments.[50] Finally, tribes may attempt to enter into taxation agreements with state and local governments; to the extent that these governments are willing to do so, the tribes still only recover a percentage of the revenue to which they would otherwise be entitled. Thus, *Bracker* obstructs tribes from fully promoting, fostering, and encouraging on-reservation economic development.

Cotton Petroleum v. New Mexico[51]

The *Cotton Petroleum* Court took up the question of whether, after *Bracker*, the commerce clause prohibited state taxes on oil and gas production also taxed by a tribe. The Court held that the tax was not sufficiently confiscatory to violate the due process clause. The Court did not rule on the impact of the Indian commerce clause on the double-taxation problem. Instead, it declared that it was "treacherous" to import concepts developed under the interstate commerce clause to the application of the Indian commerce clause.[52]

In the years following *Cotton Petroleum*, there was some discussion of a federal legislative solution to double-taxation.[53] To date, however, Congress has failed to act.

Intellectual Dishonesty

Like many of the justices who decided *Moe* and *Colville*, I also attended Harvard Law School. During my time at Harvard, both public and private economic interests continually invited everyone to "shop tax-free in New Hampshire," yet the Supreme Court's flawed notion of tribal sovereignty in *Colville*[54] denied tribes the ability to similarly market tax differentials with the surrounding states.

When a state government markets a tax incentive, it is considered savvy. When a tribal government markets a tax incentive, it is attacked in court as implementing unfair market practice, has its core sovereignty as a nation challenged, and incurs millions of dollars in legal fees.

In its ANPRM comments, the National Congress of American Indians pointed out the intellectual disconnect created by the Supreme Court:

> We also strongly encourage Interior to displace the uncertain balancing test created in [*Bracker*] because the application of this extremely fact-specific test, and the accretion of inconsistent holdings it has spawned provides strong incentives for state and local governments to take aggressive positions in taxing transactions and property on Indian reservations, thereby forcing tribes and the Department [of Interior] into costly and frequent litigation to protect their economic rights. The outcome of such litigation is frequently unpredictable. For example, in *Bracker*, the Supreme Court found that federal regulation of Indian timber is "comprehensive" and Arizona's taxes could not be applied to a non-Indian company working under contract with a tribal corporation. Nine years later in *Cotton Petroleum Corp. v. New Mexico*, the Court upheld imposition of state severance taxes on a non-Indian company extracting oil and gas on Jicarilla tribal trust lands. Yet federal regulation of both trust resources, timber and minerals, is comprehensive, and in both cases resource revenues constituted the largest source of tribal government revenue. The two cases cannot be reconciled, making it difficult to predict outcomes in balancing test cases.[55]

Instead of the intellectually dishonest *Bracker* balancing test, both the NCAI and this article argue that the best approach is the elimination of double-taxation through a careful revision of the ITR.

Economic Impacts

Leakage

An earlier article demonstrated[56] how economic leakage operates in Indian Country. Although we identified fractionated land interests and problems with trust land as significant factors in the pervasive problem of economic leakage, double-taxation also has a substantial and negative impact on tribal entrepreneurship. Because of double-taxation, it is almost always more expensive for a non-Indian to engage in commerce on a reservation, so tribal communities cannot expand their economic base beyond the on-reservation population. Even when communities can use tourism to attract off-reservation customers, double-taxation thwarts those efforts. For example, Crownpoint, N.M., attracts thousands of visitors to its monthly Navajo rug auctions each year. Yet, there are no hotels for visitors in Crownpoint, nor are there other stores for shopping, in part because New Mexico would impose additional taxation on those ventures and thus make them less profitable if the entrepreneurs want to be competitive with hotels and stores in Gallup. Nationwide, there are fewer entrepreneurial ventures on reservations and thus fewer options for on-reservation consumers to spend their money on the reservation. The inevitable consequence of such a lack of consumer spending options on-reservation is leakage.

The 2014 Diné Policy Institute Food Sovereignty Report[57] found that 60 percent of respondents needed food items that were not available locally.[58] The Navajo Nation Department of Economic Development reports that 71 percent of Navajo dollars are spent off-reservation,[59] and nearly 80 percent of tribal consumers purchased their groceries off-reservation.[60] This economic leakage happens despite the long drives off-reservation to the grocery store, some drives as long as 240 miles.[61] These startling statistics not only demonstrate the magnitude of the economic leakage that pervades the Navajo Nation but also explain why the Walmart in Gallup is one of the largest in the world.

Such leakage is not unique to the Navajo Nation but instead is pervasive throughout Indian Country. The former chairman of the Crow Nation in Montana suggests that if "anyone doubts that money flows into Billings [from the Crow Nation], go to Walmart today after members receive their per-capita check from the tribe. 'We don't call it Walmart, we call it Crow-Mart.'"[62] The Crow Nation and the six other federally recognized tribes in Montana also conducted a study that found that tribal and BIA salaries pump more than $200 million directly into the state economy, and "since every dollar turns at least five times in a local economy, the total annual contribution may reach $1 billion."[63] When private-sector wages as well as goods and services purchased by tribal and BIA entities are considered, the contribution to the state of Montana "could reach $3 billion to $5 billion a year."[64]

In his book, *Reservation Capitalism*, Professor Robert Miller identifies several studies on leakage from various reservations in addition to the Montana tribal study, such as research on the Zuni Pueblo economy that found that 84 percent of all individual income was spent off-reservation.[65] Former commissioner of Indian Affairs, Robert L. Bennett, perhaps best summarized the problem of leakage: "[w]hen a million dollars is invested in most communities, it generates approximately ten million dollars of cash flow. But in Indian communities, one million dollars generates just one million dollars of cash flow."[66]

Double-Taxation Chases Away Outside Investment

When states wrongly insist on taxing on-reservation resources and economic activity, they make otherwise economically viable projects impossible to pursue. Perhaps the single greatest impediment for tribes that want to monetize the wealth contained within their natural resource endowment is the double-taxation after *Cotton Petroleum*.

In a 2015 study, the Government Accountability Office determined that double-taxation by state and tribal governments is one of seven factors that has hindered tribal economic development.[67] On Sept. 21, 2017, Deputy Secretary of Energy Dan Brouillette told the Indian Country Energy and Infrastructure Working Group that double-taxation "prevent[s] many projects from ever happening."[68]

Thus, tribal governments face a Hobson's choice when faced with double-taxation. As the National Congress of American Indians noted, if tribes:

> impose a tribal government tax, then the resulting [double] taxation drives business away. Or, tribes collect no taxes and suffer inadequate roads, schools, police, courts and health care. To add insult to injury, reservation economies are funneling millions of tax dollars into treasuries of state and local governments who spend the funds outside of Indian Country. This dilemma is fundamentally unfair to tribal governments, undermines the Constitution's promise of respect for tribal sovereignty, and keeps Indian reservations the most underserved communities in the nation.[69]

The impact is particularly acute for tribes that are trying to grow their economies by attracting outside capital and non-Indian businesses to the reservation. As one tribal chairman noted, "Our non-Indian customers and business partners are targeted for tax assessment by the state and local governments simply because they are non-Indians. As a result of this discriminatory taxation, our commerce with them is economically burdened and our economic growth frustrated."[70]

Economic Modeling of Revised Indian Trader Regulations

During my time as DASPED, my primary focus was on making the economic case to eliminate double-taxation in Indian Country. I initiated a new round of tribal leader listening sessions and asked tribal leaders for empirical data in a July 28, 2017, "Dear Tribal Leader" letter.[71] Specifically, we requested details on

> Specific projects that your tribe or tribal organization cannot initiate or approve under existing regulatory requirements, but which you believe could move forward if new regulations gave tribes greater economic flexibility. For each project include:
>
> a) Details regarding Indian Country capital investment under the project.
> b) Details regarding the annual tribal revenue associated with the project.
> c) The number of Indian Country jobs that could be created under the project.
> d) Any specific impediment preventing forward progression on your project.

Indian Country responded like never before in terms of empirical economic data, and we went to work. My colleague Dr. Steven Payson and I took that data and developed an economic model that demonstrated that when states stop attempting to tax on-reservation activity, those same states will generate additional revenue rather than experience any net loss of revenue.[72] We also made sure that the underlying data was published so that others could replicate our work,[73] and the economic model we developed was subsequently published in a peer-reviewed economics journal.[74]

There is a sense of poetic justice in the notion that the Indian Trader regulations, born out of an antiquated sense of paternalism, could potentially be used to benefit Indian Country and strengthen tribal sovereignty in the 21st century and beyond. Our research proved that revising those regulations to secure exclusive tribal taxation authority will lead to dramatic increases in state revenues and significant reductions in welfare transfer payments, both of which will enhance state budgets. We estimated that the nationwide impact could be as high as a $40 billion increase in economic activity, with the vast majority of that benefit flowing into the most economically disadvantaged parts of the country.

Given the solid empirical and economic case that we made, eliminating double-taxation should have been a win-win. Unfortunately, complaints from state tax collectors and congressional turf battles stymied our efforts at the Department of Interior to solve double-taxation via updated Indian Trader regulations. Such opposition was particularly unfortunate given that many of those same states have previously reduced or eliminated their severances taxes on "high-cost" gas mining operations so as to spur economic activity. The reduction in tax burden resulted not only in increased oil and gas development but also an increase in research and development activity that ultimately led to the advancement of horizontal drilling technologies that allow for the extraction of petrochemicals in the Eagle Ford and Bakken formations. Concomitant with the increase in drilling activity was an economic boom in previously economically depressed areas. That increased activity led to increased state tax receipts that ultimately dwarfed the forgone severance tax revenue. My research similarly demonstrates that a reduction in the tax burden in Indian Country would spur significant and positive economic activity, both on- and off-reservation.

Obviously, the political climate has changed since I was DASPED, but many of the folks who were instrumental in launching the initial ANPRM have returned to the Department of the Interior, with several in much higher positions. Thus, given that the necessary empirical work has been done to make the economic case for eliminating double-taxation, the current administration will hopefully revisit this issue.

Administrative Authority Exists to Eliminate Double-Taxation

The Constitution expressly delegates to Congress the authority to regulate tribal commerce. Any and all laws, regulations, state or federal actions, or case law regarding Indian commerce or Indian traders all stem from the Indian Commerce Clause. The Indian Trader Act is essentially a codification of the Indian Commerce Clause. Congress has not abrogated these rights to states; to the contrary, Congress explicitly delegated this power to the Commissioner of Indian Affairs in the Indian Trader Act.

In 1787, the U.S. Constitution assigned Congress the exclusive power to "regulate Commerce … with the Indian tribes." Between 1790 and 1834, Congress passed five separate bills regulating trade between Indians and non-Indians. As the Supreme Court has noted, while these early statutes had multiple purposes (such as preventing the illegal occupation of Indian lands by non-Indians, preventing the sale of Indian lands to non-Indians, and enforcing the laws by garrisoning troops in and around Indian Country), their overarching goal was "to prevent 'fraud and imposition' upon the … Indians."[75] For example, referring to these series of laws, President George Washington stated in a 1790 speech to the Seneca Nation that the tribe "will perceive by the law of Congress, for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians,"[76] and reassured the Nation that the United States would put an end to non-Indian physical and economic impositions and depredations of tribal communities.

Early iterations of these Indian trade statutes included language and legislative history indicating that the states lacked authority over Indian Country commerce. For example, the 1790 Act stated that Indian traders "shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe." Similarly, the legislative history of the 1834 Act noted that the "regulations of trade and intercourse among the tribes should be liberal and uniform; such regulations must be made either by the United States, or by the tribes."[77] When considered in light of contemporary understanding that each Indian tribe comprised "a distinct community, occupying its own territory … in which [state] laws … can have no force,"[78] it suggests that Congress viewed these trade statutes as reinforcing exclusive federal and tribal authority over Indian Country commerce to the exclusion of the state.

With this historical backdrop in mind, Congress eventually enacted the "modern" ITS statutes that authorized the Department of the Interior to promulgate preemptive regulations. In the ITS, Congress delegated the "Commissioner of Indian Affairs" (now the BIA Director) the "sole power and authority to appoint traders … and to make such rules and regulations as [that official] may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."[79] In addition, the ITS mandated that non-Indian businesses seeking to engage in on-reservation trade must obtain a federal license and subsequently operate "under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."[80] The ITS represent congressional delegation to broadly regulate in the area of Indian trade and commerce, including the authority to preempt state taxation.

Congress may authorize agencies to issue regulations displacing federal common law court decisions. Federal common law decisions are those that "amount[], not simply to an interpretation of [the Constitution,] a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision."[81] *Bracker* and its progeny represent "federal common law" in that they fashioned a special rule for determining when states may or may not tax on-reservation activity. Thus the ITS represent the necessary congressional delegation for Interior to promulgate regulations displacing *Bracker* altogether (although this may not address other cases specifically interpreting the scope of the ITS).

The ANPRM comments from the National Congress of American Indians contain an excellent analysis of the Department of Interior's authority to issue regulations that completely preempt state tax laws:

> Consistent with traditional administrative law principles, validly promulgated regulations authorized by the agency's organic statute displace conflicting state laws by operation of the Supremacy Clause, because "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization."[82] The Supreme Court has found that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation" and hence render unenforceable state or local laws.[83] As the Supreme Court stated in *Altria Group v. Good*,[84] a federal law that conflicts with a state law will trump, or "pre-empt," that state law. The Supreme Court has long recognized that state laws that conflict with federal law are "without effect."[85]
>
> Regulatory pre-emption by the Department of Interior can be detected in almost every aspect of natural resources use and development on federal lands in the United States; from surface mining reclamation requirements in coalfields to protection of wild horses and burros on grazing ranges to the terms of timber sales in federal forest holdings; from the TVA to Grand Coulee Dam, with FERC licensed facilities on nearly every river in the country. The Department of Interior is intimately familiar with the doctrine of federal regulatory pre-emption, and exercises it daily on federal lands throughout the United States.
>
> In comparison, revised Indian Trader Regulations will be a modest exercise of regulatory preemption. The Indian Commerce Clause is an enumerated Congressional authority, Indian Country is land traditionally reserved to federal authority to preserve tribal self-government, and Congress

has specifically delegated authority to regulate commerce with Indians on reservations to Interior under 25 U.S.C. 262.[86]

NCAI also pointed out that validly issued federal regulations can also overturn federal common law:

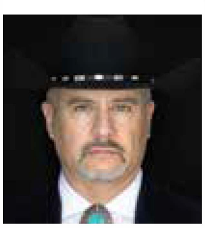
> Validly issued federal regulations may also displace federal common law. Common law is a collection of judicial decisions that govern matters that do not fall within the realm occupied by Congress. Legislation has primacy over areas formerly within the domain of the common law.[87] Administrative agencies, created and empowered by statute to carry out mandates, regularly promulgate regulations that carry the force of laws passed by Congress. Such agencies also have the authority to issue regulations overturning common law decisions. Under the balance of power inherent in our system, courts have a limited role only to invalidate regulations only if they exceed statutory authority.[88]

The language in the Indian Trader Act is about as broad, discretionary, and comprehensive as any language in any statute. It clearly delegates to the Commissioner of Indian Affairs the "power" to protect that naturally accompanies the "duty" to protect, as the Court discussed in *Kagama*.

Conclusion: A Template for Regulatory Revisions

The Indian Trader regulations should be completely revised consistent with many of the guiding principles elucidated by the various tribal leaders and organizations that submitted comments. The new regulations should:

1. Advance tribal self-governance and self-determination by ensuring that tribes have final decision-making authority on matters related to trade within Indian Country.
2. Include both comprehensive standards related to final decisions made by Indian tribes on matters involving trade within Indian Country and provisions regarding state taxation similar to those contained in 25 C.F.R. Part 162 (Leasing) and 25 C.F.R. Part 169 (Rights of Way), as necessary to bolster the preemptive weight of the ITR as applied to state and local taxation within Indian Country.[89]
3. Require all persons engaging in trade within Indian Country to comply with all tribal laws and regulations.
4. Declare that all persons engaging in trade within Indian Country are subject to the laws and regulations of the tribe and are subject to the jurisdiction of tribal courts.
5. Restore the exclusive constitutional authority of Congress to regulate trade in Indian Country and to ensure the protective authority of the ITS that existed as recently as 1980.[90] ☉



Dr. Gavin Clarkson is an enrolled member of the Choctaw Nation of Oklahoma and is managing director of Clarkson PLLC. He earned undergraduate and MBA degrees from Rice University, graduated cum laude from Harvard Law School, was the first-ever tribal member to earn a doctorate from Harvard Business School, and remains the only Harvard Business School doctoral graduate to have placed in a livestock show. Named the nation's "leading scholar in tribal finance" by The Financial Times*, Clarkson has been cited by* Bloomberg, *the* Wall Street Journal, *and* USA Today *on matters of tribal finance, economic development, and federal Indian law.*

Endnotes

[1]*Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).
[2]U.S. Const. art. I, § 8, cl. 3.
[3]Indian Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137. Subsequently updated by Congress and eventually renamed the Indian Trader Act ch. 19, 1 Stat. 329 (1793); ch. 30, 1 Stat. 469 (1796); ch. 46, 1 Stat. 743 (1799); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1834).
[4]Indian Trader Act, ch. 161, 4 Stat. 729 (cited in *Worchester v. Georgia*, 31 U.S. 515 (1832) (Marshall, J.)).
[5]*Worcester v. Georgia*, 31 U.S. 515, 562 (1832).
[6]*Id.* at 520.
[7]*See, e.g.,* 25 C.F.R § 140.
[8]Presidential Comm'n on Indian Rsrv. Econs., Report and Recommendations to the President of the United States 38 (Nov. 30, 1984), https://files.eric.ed.gov/fulltext/ED252342.pdf.
[9]25 U.S.C. § 262 ("Any person desiring to trade with the Indians on any Indian reservation shall ... do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians"); *see also* 25 U.S.C. § 9.
[10]Traders With Indians, 81 Fed. Reg. 89015 (Dec. 9, 2016) (to be codified at 25 C.F.R. 140).
[11] *See* 25 C.F.R. § 140
[12]Proceedings of the 30th Annual Sovereignty Symposium (Oklahoma Supreme Court Network, Oklahoma City, OK) (June 7, 2017) (hereinafter *Tax Weevil*).
[13]Steven Payson & Gavin Clarkson, *An Economic Analysis of the Effects of State Taxes on Infrastructure Development and Economic Growth in Tribal Nations*, (Dec. 14, 2017), https://ssrn.com/abstract=3943926.
[14]*2017 Review of Licensed Indian Trader Regulation*, https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/indian-traders-25-cfr-140 (last visited Feb. 17, 2022) (hereinafter *Indian Trader Data*).
[15]Steven Payson, *The Economic Effects of Infrastructure Development in American Indian Tribal Areas with Low Income and High Unemployment,* 11 Am. J. of Econ. & Bus. Admin. 61, 77 (2019).
[16]A fuller examination of the background of the Indian Trader Act can be found in *Tax Weevil*, *supra* note 12.
[17]H.R. Rep. No. 23-474 at 19 (May 20, 1834).
[18]25 U.S.C. §§ 261, 262.
[19]*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
[20]*Id.*
[21]*United States v. Kagama*, 118 U.S. 375, 381 (1886).
[22]*Cherokee Nation*, 30 U.S. at 17.
[23]In the words of Justice O'Connor, "Today, in the United States, we have three types of sovereign entities – the Federal government, the States, and the Indian tribes. Each of the three sovereigns . . . plays an important role . . . in this country." Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 2 (1997).
[24]*Tax Weevil*, *supra* note 12, at n.78.
[25]Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 Comm. Reinvestment 5 (1997).

[26]Advanced Notice of Proposed Rulemaking, comments (Apr. 10, 2017); *Indian Trader Data, supra* note 14.

[27]*Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965).

[28]*Id.* at 687, n.3.

[29]*Id.*

[30]*Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980).

[31]*Id.*

[32]*Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985).

[33]*Moe v. Salish & Kootenai*, 425 U.S. 463 (1976).

[34]*Id.* at 483. The Court's opinion does not provide an analysis for its view that a state may tax Indian retailers' on-reservation sales of cigarettes to non-Indian purchasers, but appears instead merely to assume the validity of this proposition. *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1203–1204 (1995).

[35]*See, e.g., Blackfeet Tribe*, 471 U.S. 759; *Bryan v. Itasca Cnty.*, 426 U.S. 373 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

[36]*Washington v. Colville*, 447 U.S. 134 (1980).

[37]*Id. at* 159–160.

[38]*Moe*, 425 U.S. at 482.

[39]*Colville*, 447 U.S. at 155.

[40]President Ronald Reagan, *Statement on Indian Policy* (Jan. 24, 1983), https://www.reaganlibrary.gov/archives/speech/statement-india n-policy.

[41]Presidential Commission on Indian Reservation Economies, Report and Recommendations to the President of the United States, at 19 (Nov. 30, 1984).

[42]*Id.* at 1.

[43]*Id.* at 31.

[44]*Central Machinery*, 448 U.S. at 160.

[45]Presidential Commission, *supra* note 8, at 38.

[46]*Id.*

[47]*Id.*

[48]*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Absent congressional authorization to the contrary, states are generally prohibited from taxing tribes or their members for on-reservation economic activity.

[49]At the time I served as DASPED, DOI was unaware of a single instance of *Bracker* balancing being revisited. The reasons for this lack of reexamination could be due to a perception that tribes are barred from revisiting these cases or tribes may simply be choosing not to expend resources revisiting these cases.

[50]*Bracker* balancing is extraordinarily fact-specific and thus particularly difficult to litigate: the tribe will have to develop a factual record concerning whether the incidence of the tax fell on Indians or non-Indians, the ownership and nature of the business, use of funds, place of incorporation, whether there is "value added" on reservation, which government provides services and infrastructure, whether there are improvements, the type of customer and employees, whether there is a lease, whether work is being outsourced off-reservation, etc.

[51]*Cotton Petroleum Corp.*, 490 U.S. at 163.

[52]*Id.* at 192-93.

[53]*See* Jeanne S. Whiteing, *Tribal and State Taxation of Natural Resources on Indian Reservations*, 7 Nat. Resources & Env't L. Rev. 17, 59 (1993).

[54]*Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).

[55]Proposed Rulemaking, *supra* note 26; *Indian Trader Data, supra* note 14.

[56]Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 J. of Law, Econ. and Policy 31 (2016).

[57]Dine Policy Institute, *A Report on the Navajo Nation Food System and the Case to Rebuild a Self-Sufficient Food System for the Dine People*, 17 (Apr. 2014) (hereinafter *Food Sovereignty Report*).

[58]*Id.*

[59]Trib Choudhary, *2002-2003 Comprehensive Economic Development Strategy of the Navajo Nation 13* (2003); *Navajo Nation Division of Development, Navajo Economic Data Bulletin*, 001-0212, 1 (2012), http://navajobusiness.com/pdf/Ads/NavEconomicDataBulletinFinal_030212.pdf.

[60]*Id.*

[61]Food Sovereignty Report, *supra* note 57, at 17.

[62]Becky Shay, *Crow Leader Outlines Plan for Fuel Plant*, Billings Gazette (Dec. 6, 2007), http://billingsgazette.com/news/local/crow-leader-outlines-plan-for-fuel-plant/article_d0207741-ec01-51a6-9596-c2a3bacd2f1f.html.

[63]Ron Selden, *Economic development attitudes must change*, Indian Country Today (June 13, 2001).

[64]*Id.*

[65]Robert Miller, Reservation Capitalism, 136 (2012).

[66]Robert L. Bennett, *The War on Poverty*, in Indian Self-Rule: First Hand Accounts of Indian-White Relations from Roosevelt to Reagan at 224 (Kenneth R. Philp ed., 1986).

[67]*See* U.S. Gov't Accounatbiliy Off., GAO 15-502, Indian Energy Development: Poor Management by BIA Has Hindered Energy Development on Indian Lands 15 (June 2015).

[68]Dan Brouillette, Deputy Secretary, United States Dep't of Energy, Remarks before the Indian Country Energy and Infrastructure Working Group (Sept. 22, 2017).

[69]Advanced Notice of Proposed Rulemaking, *supra* note 55; *Indian Trader Data, supra* note 14.

[70]Proposed Rulemaking, *supra* note 26; *Indian Trader Data, supra* note 14.

[71]*See* Letter from Dep. Ass't Secretary, U.S. Dep't of the Int., Gavin Clarkson to Tribal Leader (July 28, 2017), https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/raca/pdf/DTLL_Indian_Trader%20Extension%2009-11-17.pdf ("Dear Tribal Leader Letter").

[72]Payson & Clarkson, *supra* note 13.

[73]All of the tribal responses to the Dear Tribal Leader Letter are available at https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/indian-traders-25-cfr-140.

[74]Payson, *supra* note 15, at 61-77.

[75]*Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 163 (1980) (internal citation omitted).

[76]Am. State Papers: Indian Affairs 1:142-144 (1823).

[77]H.R. Rep. No. 23-474, at 19 (May 20, 1834). Note that Congress again excluded the states from the list of sovereigns responsible for regulating trade and commerce in Indian Country.

[78]*Worcester*, 31 U.S. at 536.

[79]25 U.S.C. § 261.

[80]25 U.S.C. § 262.

[81]*Atherton v. Fed. Dep. Ins. Corp.*, 519 U.S. 213, 218 (1997).

[82]*City of New York v. Fed. Comm. Comm'n.*, 486 U.S. 57, 63 (1988).

continued on page 56

The Problem of Double-Taxation in Indian Country *continued from page 40*

[83]*La. Public Service Comm'n v. Fed. Comm. Comm'n*, 476 U.S. 355, 368-369 (1986).
[84]*Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008).
[85]*Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).
[86]Proposed Rulemaking, *supra* note 26; *Indian Trader Data*, *supra* note 26.
[87]*See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).
[88]Proposed Rulemaking, *supra* note 26; *Indian Trader Data*, *supra* note 14.
[89]As further noted in the Pokagon comments:
[In order] to counteract the Supreme Court's apparent devaluing of the preemptive weight of the Indian Trader [Acts] and the Regulation, the Regulations should be updated to include provisions regarding state and local taxation similar to those contained in 25 C.F.R. Part 162 (Leasing); and 25 C.F.R. Part 169 (Rights of Way). *See* 25 C.F.R. 162.0017; 25 C.F.R. 169.11. These provisions, which were structured in part based upon *Warren* and *Central Machinery*, have proven valuable in helping to insulate Indian Country economic activity from state and local taxation. *See Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015) (noting: "[T]he extensive and exclusive regulation of Indian leasing – as evidenced by federal law and regulations – precludes the imposition of state [rental] taxes on that activity."). *See Indian Trader Data*, *supra* note 14.
[90]As the Lummi comments noted, "Congress has never consented to the broad authority of outside governments to regulate trade in Indian Country and the Department should revise Part 140 to conform with the Constitution and Congressional authorization," Proposed Rulemaking, *supra* note 26; *Indian Trader Data*, *supra* note 14.

Appendix D

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of: Cougar Den Inc., Respondent.	Docket No. 03-2022-DOL-00137 **AMENDED INITIAL ORDER ON SUMMARY JUDGMENT MOTIONS** Agency: Department of Licensing Program: Fuel Tax Agency No. 2021-0072337-01-PRFT

This Order has been Amended to update the date of service. All Amendments are highlighted and underlined.

1. ISSUES

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

1.2. Whether the Department of Licensing ("Department") is entitled to summary judgment as a matter of law.

1.3. Whether the Respondent is entitled to summary judgment as a matter of law.

2. ORDER SUMMARY

2.1. The Respondent is not liable for the assessment at issue, pursuant to Article III of the Treaty of 1855.

2.2. The Department's Motion for Summary Judgment is **DENIED**.

2.3. The Respondent's Motion for Summary Judgment is **GRANTED**.

2.4. The *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period, and the Department's *Informal Hearing Determination* dated November 23, 2021, are **REVERSED**.

2.5. All future dates and deadlines in this matter are **STRICKEN**.

3. SUMMARY JUDGMENT MOTION HEARING

3.1. Hearing Date: August 24, 2023

3.2. Administrative Law Judge: Micah Larripa

3.3. Respondent: Cougar Den, Inc.

3.3.1. Representatives: Matthew Harrington, Brendon Monahan, and

APPENDIX D

	Derek Red Arrow Frank, of Stokes Lawrence Velikanje Moore & Shore
3.4. Agency:	Department of Licensing
3.4.1. Representatives:	Leo Roinila and David Hankins, Assistant Attorneys General
3.5. Observers:	Sean Morrison, Assistant Attorney General; Harris Teo; Davis Washines; Kip Ramsey; and Harry Smiskin

3.6. Documents Considered:

Doc. No.	Document Name	Document Date	No. Pages
1	Request for Prehearing Conference and Assignment of Administrative Law Judge	3/11/22	17
2	Department's Motion for Summary Judgment	6/30/23	18
3	Declaration of Wesley Marks ("Marks Decl.") in support of Department's Motion for Summary Judgment, with Exhibit ("Ex") 1-11	6/29/23	50
4	Declaration of Katherine Ataman ("Ataman Decl.") in support of Department's Motion for Summary Judgment, with Ex 1	6/28/23	49
5	Declaration of David Hankins ("Hankins Decl.") in support of Department's Motion for Summary Judgment, with Ex 1-3	6/29/23	13
6	Cougar Den's Opposition to Department's Motion for Summary Judgment	7/27/23	25
7	Declaration of Derek Red Arrow Frank ("Red Arrow Opp. Decl.") in support of Cougar Den's Opposition to Department's Motion for Summary Judgment, with Ex 1-6	7/27/23	65
8	Department's Reply in Support of Motion for Summary Judgment	8/10/23	20
9	Supplemental Declaration of Katherine Ataman in support of Department's Reply in Support of Motion for Summary Judgment[1]	8/10/23	3

[1] The Respondent's August 23, 2023 oral motion to strike Ms. Ataman's supplemental declaration from the record is GRANTED. The undersigned did not consider this declaration because it was filed contemporaneously with the Department's Reply brief, depriving the Respondent an opportunity to respond to the facts asserted therein.

10	Appendix A in support of Department's Motion for Summary Judgment	8/10/23	7
11	Respondent's Motion for Summary Judgment	6/30/23	30
12	Declaration of Derek Red Arrow Frank ("Red Arrow Decl.") in support of Respondent's Motion for Summary Judgment, with Ex A-I	6/30/23	173
13	Declaration of Kip Richard Ramsey ("Ramsey Decl") in support of Respondent's Motion for Summary Judgment, with Ex 1-14	6/29/23	165
14	Declaration of Chantelle M. Perez in support of Respondent's Motion for Summary Judgment, with Ex A-C	6/29/23	34
15	Department's Response in Opposition to Respondent's Motion for Summary Judgment	7/27/23	17
16	Cougar Den, Inc.'s Reply in Support of Motion for Summary Judgment	8/10/23	17

4. FACTS FOR PURPOSE OF SUMMARY JUDGMENT

On a motion for summary judgment, the decision maker only considers those facts for which the parties establish "no genuine issue as to any material fact".[2] "Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law."[3] Only evidence in the record and inferences from that evidence establish facts. If evidence in the record points to more than one possible finding of fact, then summary judgment may not rest on the moving party's version of that fact.[4] Admissions, stipulations, procedural history, and uncontested declarations and affidavits establish facts for summary judgment. So, the record here supports the following facts for the purposes of summary judgment:

Jurisdiction

4.1. On July 13, 2021, the Department issued a *Notice of Assessment and Intent to Revoke* ("Notice"), based on the Respondent's alleged failure to pay its April 2021 Fuel Supplier tax return. *Marks Declaration ("Decl."), Exhibit ("Ex") 7.*

4.2. The Notice assessed $1,123,109.99 in taxes, a $112,311.00 penalty, and $24,000 in interest. In addition, it notified the Respondent of the Department's intention to

[2] WAC 10-08-135. In Superior Court matters, CR 56 governs summary judgment. Where the relevant procedural rules do not conflict with CR 56, it and the cases interpreting it serve as persuasive authority in the management of summary judgment under WAC 10-08-135.

[3] *Verizon NW, Inc. v. Employment Sec. Dep't,* 164 Wn.2d 909, 916 (2008), *citing Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 14 (1999).

[4] *Verizon NW,* 164 Wn.2d 916.

revoke its Fuel Supplier license, "for failing to pay [its] April 2021 Fuel Supplier tax return." The Notice did not allege any other basis for revocation. *Id.*

4.3. On August 11, 2021, the Respondent timely appealed the Department's Notice. *Marks Decl., Ex 8.*

4.4. In an email dated August 13, 2021, Wesley Marks, Department of Licensing, acknowledged receipt of the Respondent's appeal, and advised counsel for the Respondent that the Department would conduct an informal hearing in accordance with RCW 82.38.170(10)(b). *Red Arrow Opp. Decl., Ex 5.*

4.5. On October 15, 2021, the Department held an informal hearing regarding the July 13, 2021 Notice and the Respondent's appeal of the same. *Marks Decl., Ex 10.*

4.6. On November 23, 2021, the Department issued an *Informal Hearing Determination*, which upheld the July 13, 2021 *Notice of Assessment and Intent to Revoke* but mitigated the penalties and interest assessed therein. *Id.*

4.7. In its November 23, 2021 *Informal Hearing Determination*, the Department asserted, for the first time, a secondary basis to revoke the Respondent's license, "for reporting transactions on improper schedules", "even if it is found that no assessment of tax is due." *Id.*

4.8. On December 21, 2021, the Respondent appealed the Department's November 23, 2021 *Informal Hearing Determination*. *Marks Decl., Ex 11.*

4.9. On March 11, 2022, the Department referred this matter to the Office of Administrative Hearings ("OAH") for adjudication. *Document ("Doc") 1.*

Cougar Den

4.10. "Punia" Kip Ramsey, the Respondent's owner, is an enrolled member and elder of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"). *Ramsey Decl.*

4.11. The Yakama Nation is a federally recognized Indian tribe. *Id.*

4.12. The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951 ("Treaty" or "Treaty of 1855"). *Ramsey Decl., Ex 1.* The Treaty guaranteed the Yakama certain rights, including the "Right to Travel", in exchange for lands ceded to the United States. *Id.*

4.13. The Respondent is a member-owned, privately held, Yakama Nation Corporation, incorporated on January 3, 1992 under the laws of the Yakama Nation. The Respondent is registered as a foreign corporation with Washington's Secretary of State. *Ramsey Decl.*

4.14. The Respondent is a wholesale fuel distribution company, designated by the Yakama Nation as its fuel-delivery agent. *Ramsey Decl., Ex 4.*

4.15. The Respondent engages in inter-tribal trade by obtaining and transporting fuel, via truck, for delivery to tribal-owned fuel stations within Indian Country.[5] *Ramsey Decl.*

4.16. The Respondent has held a Washington Fuel Supplier License since September 1, 2018. *Id.* As a licensee, the Respondent is required to report all fuel purchased within Washington State, imported to Washington State, or exported from Washinton State. *Marks Decl.*

4.17. The Department distributes a Fuel Tax Compliance Manual to all licensees. The Manual, last updated in April 2021, provides instructions for how and when licensees must submit monthly returns. *Ataman Decl., Ex 1.*

4.18. With each monthly tax return, a fuel supplier licensee is required to submit "schedules" of fuel distributions, which describe in detail each tax-exempt distribution. *Ataman Decl.*

4.19. Licensed suppliers are responsible for remitting taxes owed on all fuel not distributed in a tax-exempt manner during each reporting period. *Id.*

4.20. Among the Department's schedules, fuel suppliers use schedule 10G to report "gallons sold to other tax-exempt entities." *Ataman Decl., Ex 1, page 13.*

4.21. In previous litigation between the parties, the Washinton and United States Supreme Courts held that the "Right to Travel", guaranteed in the Treaty of 1855, preempted Washington's fuel taxes as applied to the Respondent's importation activities. *Red Arrow Decl., Ex C & D ("Cougar Den I" and "Cougar Den II", respectively); Perez Decl., Ex B, page 4.*

4.22. The Department does not have a specific "Schedule" for reporting fuel distributions that are tax-exempt pursuant to a licensee's Treaty rights. *Perez Decl.* The Department updated its Fuel Tax Compliance Manual in 2021 but did not include guidance for reporting distributions exempted from taxation pursuant to *Cougar Den I & II*. *Perez Decl.; Ataman Decl., Ex 1.*

4.23. In a letter dated February 20, 2019, the Department instructed the Respondent to report fuel sold to tax-exempt entities, as well as its otherwise taxable treaty-protected deliveries of *imported* fuel to Yakama Tribal stations, on Schedule 10G. The Department further advised that "[f]or fuel received in Washington, please explain why you believe the fuel purchasers on your return on Schedule 10G are tax-exempt." *Marks Decl., Ex 4* & *Ramsey Decl., Ex 14*.

// //

// //

---

[5] *See:* 18 USC § 1151.

April 2021 Fuel Supplier Tax Return

4.24. The Respondent timely reported its transactions for the April 2021 fuel tax reporting period. *Perez Decl.*

4.25. During April 2021, the Respondent obtained all of its fuel from IRS-registered Washinton terminal racks within the geographical boundaries of Washington State. *Marks Decl.*

4.26. In its April 2021 Fuel Supplier tax return, the Respondent reported a total of 2,369,479 gallons in tax-exempt fuel distributions. *Perez Decl. & Marks Decl.* The return identified three types of tax-exempt activity: (1) fuel distributed from a terminal to tribal retailers located within Indian Country, using public roads and highways (reported on Schedule 10G); (2) gallons sold to tax-exempt to another licensed supplier at the terminal (reported on Schedule 6D); and (3) gallons exported to other states (reported on Schedule 7). *Perez Decl.*

4.27. The Respondent reported 2,318,902 of the 2,369,479 total gallons as tax-exempt on Schedule 10G, and otherwise accounted for the remaining gallons to the Department's satisfaction. *Marks Decl.*

4.28. The April 2021 transactions reported on Schedule 10G of the Respondent's return all occurred within the geographical boundaries of Washington State. Each distribution involved: 1) a Cougar Den truck entering the highway system; 2) driving to an IRS-registered terminal; 3) loading fuel from a terminal rack into the truck; and 3) transporting and delivering the fuel to Indian-owned retail gas stations in Indian Country. *Perez Decl.*

4.29. On June 2, 2021, the Department issued a notice entitled "Unable to Process April 2021 Tax Return." Therein, the Department identified deficiencies related to Federal Employer Identification Number ("FEIN") records and demanded documentation to establish claimed exemptions on Schedule 10G to the Department's satisfaction. *Marks Decl., Ex 5.*

4.30. In email correspondence with Department representatives between June 10, 2021 and June 29, 2021, the Respondent corrected FEIN errors the Department identified and asserted its understanding, maintained since the Department's February 20, 2019 letter, that the transactions at issue were tax-exempt based on the Washington Supreme Court's decision in *Cougar Den I*. *Perez Decl., Ex C.*

4.31. In an email dated July 8, 2021, Wesley Marks clarified the Department's position that the Supreme Court decisions only applied to fuel *imported* into Washington, and that for fuel *received* in Washington, the Respondent must provide sufficient information to establish an exemption under RCW 82.38.080 to report the same on Schedule 10G. *Id.*

4.32. On July 13, 2021, the Department issued a "Fuel Tax Return Correction" letter and adjusted the Respondent's amended return. Therein, the Department removed and disallowed transactions the Respondent reported on Schedule 10G of its April 2021 Fuel Supplier tax return because the Department could not verify the transactions as exempt sales under RCW 82.38.090. *Perez Decl.; Marks Decl., Ex 6.*

4.33. On July 13, 2021, the Department also issued the *Notice of Assessment and Intent to Revoke* here on appeal. Therein, the Department assessed taxes, penalties, and interest on the 2,318,902 gallons it identified as disallowed in its "Fuel Tax Correction" letter. *Marks Decl., Ex 7.*

Summary Judgment Motions

4.34. The Department and Respondent each filed Motions for Summary Judgment on June 30, 2023. *Docs 2 & 11.*

4.35. On July 27, 2023, the Department and Respondent each filed responsive briefs, opposing the other party's Motion for Summary Judgment. *Docs 6 & 15.*

4.36. On August 14, 2023, the Department and Respondent each filed Replies in support of their respective Motions for Summary Judgment. *Docs 8 & 16.*

4.37. On August 24, 2023, the undersigned heard oral arguments from both parties. *Record.*

5. CONCLUSIONS OF LAW

Jurisdiction

5.1. OAH has jurisdiction over the persons and subject matter in this case under Chapters 82.38 and 34.05 RCW, and Chapters 308-77 and 10-08 WAC.

Standards for Summary Judgment

5.2. RCW 34.05.437 and WAC 10-08-135, as well as the Prehearing Conference Order in this matter, allow for the filing of dispositive motions, including motions for summary judgment. Summary judgment is a procedural device designed to avoid the time and expense of a trial when no trial is necessary. See: *Hudesman v. Foley,* 73 Wn.2d 880, 441 P.2d 532 (1968); *Karl B. Tegland*, 4 Wash. Prac., Rules Practice CR 56.

5.3. Washington Court Rule 56(c) and WAC 10-08-135 provide that "a motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

// //

5.4. In making this determination, the court will consider any evidence and inferences therefrom in a light most favorable to the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

5.5. The party moving for summary judgment has the burden of showing the absence of any issue of material fact. *Id.,* at 887. Once the moving party meets its burden, the non-moving party may not rest on mere allegations, argumentative assertions, speculation, or denials. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Summary judgment motions are important to the process of resolving disputes. *Id.* Summary judgment should be granted if reasonable minds could reach only one conclusion based on the facts in evidence.

5.6. Here, both parties moved for summary judgment. Neither party asserts, nor does the record establish, any genuine issue of material fact in this case. Accordingly, this matter is ripe for summary judgment.

Burden

5.7. Two separate agency actions are at issue in this case – assessment and license revocation. Notwithstanding the Department's contemporaneous issuance of a *Notice of Assessment and Intent to Revoke*, the burden and procedures for fuel tax deficiency assessments and license revocations are governed by distinct statutory provisions. RCW 82.38.170; RCW 82.38.120.

<u>Assessment:</u>

5.8. "An assessment made by the Department pursuant to [RCW 82.38.170(2) or (3)] is presumed to be correct, and the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive." RCW 82.38.170(3).

5.9. A 'preponderance of the evidence' is evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.,* 84 Wash. 411, 146 Pac. 861 (1915).

<u>Revocation for unsatisfied debt:</u>

5.10. Pursuant to RCW 82.38.120, the Department may revoke the license of any licensee who has an unsatisfied debt to the state assessed under Chapter 82.38 RCW. RCW 82.38.120(1)(d). The Department's July 13, 2021 *Notice of Assessment and Intent to Revoke* articulated the Department's intent to revoke the Respondent's fuel-supplier license based on unsatisfied debt to the state. This basis for revocation turns upon the underlying assessment. Accordingly, the burden remains with the Respondent to establish that the assessment is not owing.

Revocation for "improper reporting"

5.11. "Improper Reporting" is not among the grounds for revocation enumerated in RCW 82.38.120(1)(a)-(j). The Department may revoke a license under RCW 82.38.120(1)(k), but only "[u]pon sufficient cause being shown." The plain language of RCW 82.38.120(1)(k) places the burden upon the Department to establish that improper reporting, on its own, constitutes "sufficient cause" to revoke the Respondent's fuel supplier license.

Applicable Law

5.12. The Department is responsible for implementing and enforcing the provisions of Chapter 82.38 RCW. The purpose of Chapter 82.38 RCW is to impose a tax upon fuels used for the propulsion of motor vehicles upon the highways of Washington. RCW 82.38.010. 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.

5.13. Pursuant to RCW 82.38.035, a licensed supplier is liable for and must pay tax on fuel as provided in RCW 82.83.030(9). RCW 82.38.030(9) identifies when taxes are imposed, including upon importation into Washington, removal from a refinery, or removal from a terminal within the state. Where the fuel is transported, how the fuel is transported, and who or what entity receives that fuel will determine whether the tax or an exemption applies. *See* RCW 82.38.030; 82.38.080.

5.14. In addition to the foregoing statutory provisions, precedential decisions direct this tribunal's analysis of whether the Right to Travel, enshrined in Article III of the Treaty, exempts the Respondent from the fuel tax assessment at issue. *See: Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *Cougar Den, Inc. v. Wash. State Dep't of Licensing ("Cougar Den I"),* 188 Wn.2d 55 (2017); *Washington State Dep't of Licensing v. Cougar Den, Inc. ("Cougar Den II"),* 139 S. Ct. 1000 (2019).

5.15. The Department contends that OAH lacks authority to consider whether the assessment at issue is preempted by the Treaty of 1855. In support of its argument, the Department correctly asserts that, "an office within the executive branch lacks the authority or jurisdiction to determine whether the laws it administers are constitutional; only [Article III] courts have that power." *Swanson Hay Co. v. Employment Security* Department 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017). The undersigned is persuaded that the foregoing limitation precludes this administrative tribunal from entertaining the Respondent's theory of preemption based on constitutional grounds (*See:* Resp. Mot. at III(C)(2)); however, the issue in this case is much narrower. Here, the question is not the merits of the Respondent's facial challenge to a statute or regulation. Rather, the issue before OAH is whether the Respondent's well-settled treaty rights exempt it from the fuel tax *as applied* in the April 2021 assessment.

5.16. Article III of the Treaty of 1855 provides in pertinent part:

[I[f necessary for the public convenience, roads may be 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.

Treaty with the Yakamas, 12 Stat. 951, 952-953 (1855).

5.17. In *Cougar Den I* and *Cougar Den II*, the Washington and United States Supreme Courts held that the Right to Travel, guaranteed in Article III of the Treaty of 1855, preempts the Department's assessment of taxes on the Respondent's importation of fuel, via truck, from terminals outside of Washington, for delivery to tribal gas stations within Washington's geographical boundaries. *See: Cougar Den I*, 188 Wn.2d 55; *Cougar Den II*, 139 S.Ct. 1000.

5.18. Although the statute at issue in *Cougar Den I & II* imposed a tax on importation of fuel, the Courts' analysis of the Right to Travel applies more broadly. The Treaty of 1855 secured "clearly and without ambiguity… the Yakamas[']… use of public highways without restriction for future trading endeavors." *Cougar Den II*, 193 S. Ct. 1017-18. "[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 I*, 88 Wn.2d at 69. Because importation is the transportation of fuel, and "it [is] simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways," the Treaty of 1855 preempts Department's authority to tax the Respondent on that activity. *Id.*

5.19. In the present case, the transactions at issue involve the Respondent's removal of fuel from terminals *within* the state, by truck, for distribution to fuel retailers in Indian Country. RCW 82.38.030(9)(a) applies.

5.20. Pursuant to RCW 82.38.030: "(9)Taxes are imposed when: (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack unless the removal is by a licensed supplier or distributor for direct delivery to a destination outside of the state, or the removal is by a fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320." RCW 82.38.030(9)(a).

5.21. To understand the operation and incidence of fuel taxes assessed under RCW 82.38.030(9)(a), the following definitions are instructive:

- "Removal" means a physical transfer of fuel other than by evaporation, loss, or destruction. RCW 82.38.020(28).

- “Terminal” means a fuel storage and distribution facility that has been assigned a terminal control number by the Internal Revenue Service. RCW 82.38.020(31).
- “Rack” means a mechanism for delivering fuel from a refinery or terminal into a truck, trailer, railcar, or other means of non-bulk transfer. RCW 82.38.020(26).
- “Highway” means every way or place open to the use of the public, as a matter of right, for the purpose of vehicular travel. RCW 82.38.020(16).

Analysis

5.22. In its effort to distinguish taxable activities under RCW 82.38.030(9) from those held preempted under *Cougar Den I & II*, the Department insists that the taxable event in this case has nothing to do with travel. The Department’s contention that taxes under RCW 82.38.030(9)(a) attach the moment fuel is removed from the rack, without being tied to travel at all (*See, e.g.,* Dept. Repl. Brief at 8-9; Dept. Resp. Brief at 10-11), rests entirely upon its misapprehension, and *misstatement* of the law. Indeed, in its Motion for Summary Judgment, the Department asserts that, *“[u]nder RCW 28.38.030(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.”* Dept. Mot. at 4. [**emphasis** and ellipsis in original].

5.23. As set forth above, the statutory language the Department omits in its Motion is critical and betrays the foundation of the Department’s entire analysis. The full text of RCW 82.38.030(9)(a) identifies removal of fuel “from a terminal”, *if* removed at the rack, as the taxable event – not the stationary act of removing fuel from the rack itself, as the Department suggests. Under the plain language of RCW 82.38.030(9)(a) and RCW 82.38.020, removal from the rack, “into a truck, trailer, railcar, or other means of non-bulk transfer,” is only determinative of *whether* fuel subsequently removed from the terminal, “a fuel storage or transportation facility,” is subject to the tax. The tax at issue attaches *when* fuel is removed from the terminal facility. In order to “physically transfer” fuel *from* a terminal facility, a truck must be in motion at the time of removal, traveling upon a “place open to the use of the public, as a matter of right, for the purpose of vehicular travel.”

5.24. Here, it is not possible for the Respondent to remove fuel from a terminal without traveling or transporting that fuel on public highways. Accordingly, the Respondent has met its burden to establish that, just like the fuel tax at issue in *Cougar Den I & II,* taxes assessed pursuant to RCW 82.38.030(9)(a) impermissibly burden the Respondent’s treaty-protected Right to Travel.

Revocation

5.25. Because the Respondent is not liable for the taxes at issue, it is not subject to license-revocation for non-payment of the same. Similarly, the Department's alternative basis for revocation is unsupported by the facts of this case. The Department does not have a Schedule for reporting treaty-protected tax-exempt transactions, and the Respondent had no alternative to Schedule 10G for reporting the same. Based on the findings and conclusions herein, sufficient cause for revocation is not established.

5.26. Accordingly, the Department's Motion for Summary Judgment will be DENIED. The Respondent's Motion for Summary Judgment will be GRANTED. The *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period, and the Department's *Informal Hearing Determination* dated November 23, 2021, will be REVERSED.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1. The Respondent is exempt from the assessment at issue, pursuant to Article III of the Treaty of 1855.

6.2. The Department's Motion for Summary Judgment is **DENIED**.

6.3. The Respondent's Motion for Summary Judgment is **GRANTED**.

6.4. The *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period, and the Department's *Informal Hearing Determination* dated November 23, 2021, are **REVERSED**.

6.5. All future dates and deadlines in this matter are **STRICKEN**.

SIGNED at Tacoma, Washington on the date of mailing.

Micah Larripa
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE IS ATTACHED

APPEAL RIGHTS

PETITION FOR REVIEW

Under RCW 34.05.464 and WAC 10-08-211, any party to this proceeding may file a Petition for Review of this Initial Order. The written petition for review must be mailed to the Department of Licensing at:

Director of Licensing
Department of Licensing
PO Box 9020
Olympia, WA 98504-9020

The petition for review must be received by the Department within twenty (20) days from the date this initial order was mailed to the parties. A copy of the petition for review must be sent to all parties of record. The petition for review must specify the portions of the initial order with which the party disagrees, and must refer to the evidence in the record which supports the party's position. The other party's reply must be received at the address above within ten (10) days from the date the petition for review was mailed.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 03-2022-DOL-00137

I certify that true copies of this document were served on those listed below, from Tacoma, Washington via Consolidated Mail Services by one of the following: First Class Mail, Certified Mail, Hand Delivery via Messenger, Campus Mail, Facsimile, or by email:

Cougar Den, Inc. c/o Derek Red Arrow Frank Stokes Lawrence, P.S. 120 N Naches Ave Yakima, WA 98901 ***Respondent***	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Campus Mail ☐ E-mail
Derek Red Arrow Frank Matthew Harrington Brendan Monahan Stokes Lawrence Velikanje Moore & Shore 120 N Naches Ave Yakima, WA 98901 ***Respondent Representatives***	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Campus Mail ☒ E-mail: derek.redarrow@stokeslaw.com Brendan.Monahan@stokeslaw.com Mathew.Harrington@stokeslaw.com Madelyne.Garcia@stokeslaw.com
Leo Roinila, AAG David Hankin, AAG Office of the Attorney General MS: 40110 PO Box 40110 Olympia, WA 98504 ***Agency Representative***	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Campus Mail ☒ E-mail: leo.roinila@atg.wa.gov David.Hankins@atg.wa.gov dalberta.faletogo@atg.wa.gov LalOlyEF@atg.wa.gov

Date: ~~Monday, October 02, 2023~~ **Tuesday, October 03, 2023**

OFFICE OF ADMINISTRATIVE HEARINGS

Mallory Jordan

Mallory Jordan
Legal Assistant 2

Appendix E

FIRST AMENDMENT TO THE AGREEMENT CONCERNING TAXATION OF FUEL BETWEEN THE COWLITZ INDIAN TRIBE AND THE STATE OF WASHINGTON

WHEREAS, on September 22, 2017, the State of Washington ("State") and the Cowlitz Indian Tribe ("Tribe") entered into an Agreement Concerning Taxation of Fuel ("Compact"), pursuant to RCW 82.38.310; and

WHEREAS, the purpose of the Compact is to establish a cooperative framework for taxation and regulation by the Tribe and by the State, respecting the distribution, sale, transfer, use or possession of Fuel within the Reservation, and to avoid legal disputes surrounding tax immunity and tax preemptions, and the Compact has achieved such purpose; and

WHEREAS, under the Compact, the Tribe agrees to buy and sell only fuel upon which the State Fuel Tax has been paid and remitted to the State, and in exchange, the State refunds a set portion of such tax dollars for all gallons of fuel sold by Tribal Fuel Facilities and Tribal Member Stations in Indian country; and

WHEREAS, the Compact ensures that every dollar of refunded State Fuel Tax is used exclusively for highway related purposes; and

WHEREAS, the State Fuel Tax refunds have resulted in the Tribe's significant contributions to infrastructure improvements for highway-related purposes, including the replacement of the interchange located on Interstate-5 at Exit 16, the widening of SW 31st and Cowlitz Way through the Cowlitz Reservation, and increased transit services, for the benefit of both Parties; and

WHEREAS, the State recognizes the fuel compact in place has resulted in a cooperative framework for taxation, to the benefit of both the Tribe and the State.

NOW, THEREFORE, the Compact shall be, and is hereby amended as follows:

Section 3.10 of the Agreement is amended as follows:

3.10 "State Fuel Tax" means taxes imposed under chapter 82.38 RCW, <u>as it now exists or as amended in the future.</u>

A new Section 3.17 is added to the Agreement to read as follows:

3.17 "Untaxed Fuel" means any fuel upon which State Fuel Tax has not been collected and paid to the state by the Distributor, Supplier, or Blender; provided, however, Untaxed Fuel shall not include dyed special fuel as contemplated in RCW 82.38.

Section 4.1(b) of the Agreement is amended as follows:

b. The State's laws and rules respecting the imposition and collection of State Fuel Tax from all persons and companies as provided under this Agreement; and

Sections 4.3(a) and 4.3(b) of the Agreement are amended as follows:

4.3 The Tribe agrees to:

a. Purchase Fuel on which State Fuel Tax has been paid as required by state law from ~~(i)~~ persons or companies operating lawfully and who are properly licensed in the State to distribute Fuel in accordance with chapter 82.38 RCW as a Fuel Distributor, Supplier, or Blender~~, or (ii) a tribal Distributor, Supplier, or Blender lawfully doing business according to all applicable laws~~. The Tribe will not purchase Untaxed Fuel from any source without an amendment to this agreement as required by ¶ 4.3(e) below.

b. Enact an ordinance requiring Tribal Fuel Facilities and Tribal Member Stations to purchase Fuel from (i) persons or companies operating lawfully and who are properly licensed in the State to distribute Fuel in accordance with chapter 82.38 RCW as a Fuel Distributor, Supplier, or Blender~~, or (ii) a tribal Distributor, Supplier, or Blender lawfully doing business according to all applicable laws~~. Tribal Fuel Facilities and Tribal Member Stations will not purchase Untaxed Fuel from any source without an amendment to this agreement as required by ¶ 4.3(e) below. The Tribe's ordinance shall become effective within six (6) months of the execution of this Agreement.

A new Section 4.3(e) is added to the Agreement to read as follows:

e. Initiate negotiations with the State to modify the terms of this Agreement if the Tribe or its Tribal Fuel Facilities or Tribal Member Stations wish to purchase Untaxed Fuel from a tribal Distributor, Supplier, or Blender. The Tribe agrees that prior to any such purchases, an amendment to this Agreement would be necessary to address the following topics:

i. resolve or mitigate any impediments to the State's obligations under the International Fuel Tax Agreement;

ii. imposition of a tribal fuel tax that is at least 100% of the State Fuel Tax; and

iii. inclusion of reasonable and necessary enforcement and record-keeping requirements for compliance with terms created under (i) and (ii) above.

Section 4.4 of the Agreement is amended as follows:

4.4 Upon compliance with the procedures described in ¶ 6.1.b of this Agreement, the Tribe shall be entitled to and the State shall refund an amount equal to ~~75~~90% of the tax paid to the State and included in the price on each gallon of Fuel purchased by any Tribal Business or, if applicable, Tribal Member Station for resale. This ¶ 4.4 does not apply to refunds for Fuel purchased by the Tribe as described in ¶ 4.5.

A new Section 5.2 is added to the Agreement to read as follows:

5.2 In the event the State becomes aware, through fuel supplier returns and/or other records, that the Tribe begins purchasing Untaxed Fuel without previously negotiating an amendment, as described in ¶ 4.3(e), the State may terminate this Agreement effective within 30 days of written notice sent to the Chairman of the Tribe, without following the dispute resolution steps set forth in Section 5.1.

Section 5.2 of the Agreement is amended as follows:

~~5.2~~5.3 This Agreement takes effect on the date that the last Party signs it. This Agreement shall remain in effect until (a) the Parties mutually agree in writing that the Agreement should be vacated or terminated and superseded by a new agreement between the Parties within that time frame, or (b) the Agreement is terminated pursuant to ¶5.1.e or ¶5.2.

Section 6.1(a) and 6.1(c) of the Agreement are amended as follows:

6.1 The following procedures for tax remittance shall apply:

a. For any Fuel on which the State Fuel Tax already has been collected prior to delivery to the Tribal Fuel Facilities and Tribal Member Stations, the State shall remit monthly to the Tribe an amount equal to ~~75~~90% of the State Fuel Tax actually paid and included in the price on all such Fuel delivered to the Tribal Fuel Facilities and Tribal Member Stations in the preceding month, in accordance with ¶¶ 6.1.b and 6.1.c. This ¶ 6.1.a does not apply to refunds for Fuel purchased by the Tribe as described in ¶ 6.1.d.

. . .

c. Within thirty (30) days of receiving an invoice under ¶ 6.1.b, the Department shall remit to the Tribe ~~75~~90% of the State Fuel Tax actually paid to the State and included in the price of the Fuel delivered to the Tribal Fuel Facilities, Tribal Businesses, and Tribal Member Stations, as shown on the invoice.

Section 6.5 of the Agreement is amended as follows:

6.5 The contact person for the Tribe, for any changes or concerns about this Agreement, shall be~~: Dan Meyer,~~ the Tribal Treasurer. Correspondence for the Tribe may be sent to the Treasurer's attention at: P.O. Box 2547, Longview, WA 98632. The Tribal Treasurer may be contacted via email at treasurer@cowlitz.org, or by telephone at ~~(360) 353-9200~~ (360) 577-8140. The contact person for the State, for any changes or concerns about this Agreement, shall be: ~~Pat Kohler~~ Marcus J. Glasper, Director, Department of Licensing. Correspondence for the State may be sent to the Director's attention at P.O. Box 9020, 1125 Washington St. SE, Olympia, WA 98507. The Director may be contacted by telephone at (360) 902-4042. Each Party shall notify the other of changes in contact information within thirty (30) days of the change.

IN WITNESS WHEREOF, the Cowlitz Indian Tribe and the State of Washington have executed this First Amendment to the Compact.

COWLITZ INDIAN TRIBE	**DEPARTMENT OF LICENSING**
BY: ______________	BY: ______________
WILLIAM IYALL	MARCUS J. GLASPER
Chairman	Director
DATE: __________	DATE: 3/11/25

Appendix F

AGREEMENT
CONCERNING TAXATION OF FUEL BETWEEN THE MUCKLESHOOT INDIAN TRIBE AND THE STATE OF WASHINGTON

I. RECITALS

1.1 The Muckleshoot Indian Tribe (hereinafter "Tribe") enters into this Agreement with the State of Washington. The Tribe is a federally recognized Indian Tribe located on the Muckleshoot Reservation within the State of Washington.

1.2 The State of Washington ("State") is a state within the United States of America, possessed of full powers of a state government. The Department of Licensing is an agency of the State of Washington. The State of Washington and the Department of Licensing are referred to collectively in this Agreement as the "State." RCW 82.38.310 allows the Governor to enter into an agreement with any federally recognized Indian tribe located on a reservation within the State regarding fuel taxes. The Governor has delegated this authority to the director of the Department of Licensing.

1.3 The Tribe and the State (collectively "the parties") have conferred and engaged in government-to-government negotiations in a mutual, good faith effort to reach an arrangement in regard to State fuel taxes on the distribution, sale, transfer, use, or possession of fuel within the Reservation. Each party to this Agreement respects the sovereignty of the other and desires to work within the framework of a government-to-government relationship.

1.4 The parties acknowledge that, pursuant to chapter 82.38 RCW, the State imposes State fuel taxes on fuel suppliers and importers, the revenue from which is used exclusively for highway purposes. The Tribe expends Tribal funds each year for public highways and traffic law enforcement within the Reservation as well as for other essential governmental purposes. The parties mutually acknowledge the need to maintain the integrity and quality of public roads within the Reservation.

1.5 This Agreement addresses only the taxation and regulation of fuel as defined herein, and shall not be construed as affecting any other area of Tribal or State taxation or regulation.

1.6 By entering into this Agreement, the State does not concede that the Tribe has any immunity from the State's fuel tax and fuel tax collection provisions.

1.7 This Agreement is not intended, and will not be construed to confer a benefit or create any right on a third party, or the power or right of any third party to bring an action to enforce any terms of this Agreement.

II. PURPOSE AND OBJECTIVES

2.1 This Agreement addresses the establishment of a cooperative framework for taxation and regulation, by the Tribe and by the State, respecting the distribution, sale, transfer, use or possession of fuel when such fuel is distributed, sold, used, transferred, or possessed within the Reservation. In general, the Parties intend this Agreement to facilitate the on-reservation retail sale of fuel products to Tribal member and non-member customers at prices competitive with surrounding retail sellers.

2.2 The parties agree that this Agreement is consistent with the parties' mutual interests. The parties intend that this Agreement be binding upon the parties and upon persons subject to regulation by the parties.

III. DEFINITIONS

3.1 "Blender" has the meaning given in RCW 82.38.020(2), as it now exists or as amended in the future.

3.2 "Department" means the Washington State Department of Licensing, or any successor agency, and its officials, employees, and agents acting in their official capacity.

3.3 "Distributor" has the meaning given in RCW 82.38.020(8), as it now exists or as amended in the future.

3.4 "Filling station" means a place of business open to the general public and operated for the purpose of delivering fuel into the fuel tanks of motor vehicles.

3.5 "Fuel" has the meaning given in RCW 82.38.020(14), as it now exists or as amended in the future.

3.6 "Motor vehicle" means every self-propelled vehicle designed for operation upon land and utilizing fuel as the means of propulsion.

3.7 "Reservation" means Muckleshoot Indian Reservation, together with Tribal trust lands located outside the boundaries of the Reservation over which the Tribe exercises governmental authority.

3.8 "State" means the State of Washington and the Washington State Department of Licensing.

3.9 "Supplier" has the meaning given in RCW 82.38.020(30), as it now exists or as amended in the future.

3.10 "Tribe" means the Muckleshoot Indian Tribe. "Tribe" has the same meaning as ¶ 1.1 of this Agreement.

3.11. "Tribal business" means a business that is wholly owned and operated by the Tribe or a separately administered entity wholly owned by the Tribe.

3.12 "Tribal Fuel Facilities" means a retail filling station located within the Reservation that is owned and operated by the Tribe or by a Tribal business, and any facilities owned and operated by the Tribe or a Tribal business for bulk storage of fuel within the Reservation.

3.13 "Tribal member" means a person who is an enrolled member of the Tribe.

3.14 "Tribal member station" means a retail filling station located within the Reservation and operated by a Tribal member under license from the Tribe.

3.15 "State Fuel Taxes" or "State Fuel Tax" means any taxes imposed on fuel by the State of Washington pursuant to the State Fuel Tax Act, codified in RCW 82.38.

IV. AGREEMENT

Government-To-Government Cooperation

4.1 The State and the Tribe shall cooperate to the extent legally permitted to ensure the enforcement of:

a. the Tribe's laws with respect to the taxation and regulation of the purchasing, delivery and sale of fuel within the Reservation as defined herein;

b. the State's laws and rules respecting the imposition and collection of its fuel taxes from all persons and as provided under this Agreement; and

c. The terms of this Agreement.

Framework for Taxation and Regulation

4.2 The Department shall collect Washington State fuel taxes in accordance with chapter 82.38 RCW, as it now exists or as it may hereafter be amended.

4.3 The Tribe agrees to

a. Purchase fuel on which Washington State fuel tax has been paid, and to purchase fuel only from persons or companies operating lawfully and who are properly licensed in Washington State to distribute fuel in accordance with chapter 82.38 RCW as a fuel distributor, supplier, or blender, or from a tribal distributor, supplier, or blender lawfully doing business according to all applicable laws;

b. Enact an ordinance requiring non-tribal filling stations, Tribal Fuel Facilities, Tribal businesses, and Tribal member stations to purchase fuel subject to this Agreement on which Washington State fuel taxes have been paid, and only from persons who are properly licensed in Washington State to distribute, supply, or blend fuel in accordance with chapter 82.38 RCW. Such ordinance shall become effective within six months of the execution of this Agreement.

c. Before permitting Tribal members or Tribal member stations to sell fuel on the Reservation, enact an ordinance that requires those Tribal members and Tribal member stations to be licensed under the laws of the Tribe and to purchase fuel in compliance with the requirements in ¶ 4.3.a.

d. Include the amount of the State fuel tax in the price of fuel sold at retail, and to require Tribal members and Tribal member stations to do the same.

4.4 Upon compliance with the procedures described in ¶ 6.1.b of this Agreement, the Tribe shall be entitled to and the State shall refund an amount equal to 75% of the tax paid to the State and included in the price on each gallon of fuel purchased by the Tribe, Tribal businesses or, if applicable, businesses operated by Tribal members for resale. This ¶ 4.4 does not apply to refunds for fuel purchased by the Tribe as described in ¶ 4.5.

4.5 Upon compliance with the procedures described in ¶ 6.1.d of this Agreement, the Tribe shall be entitled to and the State shall refund 100% of the State fuel tax included in the price of fuel purchased for uses that are eligible for the Federal fuel tax exemptions for Indian Tribal government entities. The amount of refund is limited to the number of gallons claimed for credit or refund for Federal fuel tax purposes on Internal Revenue Service (IRS) Form 4136, Credit for Federal Tax Paid on Fuels. These gallons are then multiplied by the State fuel tax rate in effect to arrive at a dollar amount to be refunded to the Tribe.

4.6 The Tribe, Tribal Fuel Facilities, or Tribal businesses may also be eligible for refunds under the provisions of RCW 82.38.080, RCW 82.38.180, and similar state fuel tax exemption statutes that may be later adopted, but only (1) to the extent such statutes apply to the Tribes and the Tribal business and to the particular use of fuel and (2) to the extent a refund was not made to the Tribe under ¶ 4.4 or ¶ 4.5 of this Agreement for those specific gallons of fuel.

4.7 No refund of State fuel taxes need be made by the State except as specifically set out in this Agreement.

4.8 The Tribe agrees to expend State fuel tax proceeds refunded to the Tribe or amounts equivalent thereto on: Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway-related purposes. For the purposes of this ¶ 4.8, in any fiscal year in which the Tribe's expenditures for the permissible transportation purposes exceed fuel tax refund receipts, the Tribe may carry forward the additional expenditure amount as a credit against the requirement of permissible transportation expenditures in any subsequent year, up to ten (10) years. The Tribe shall maintain records as necessary to demonstrate its compliance with this ¶ 4.8.

Records and Audit Provisions

4.9 The Tribe shall maintain the following records:

a. invoices showing the invoice date, name of seller, FEIN of seller, the amount of State fuel taxes paid to the State and included in the price of fuel and number of gallons of fuel purchased by the Tribe for resale at Tribal Fuel Facilities;

b. invoices, if any, provided to the Tribe by Tribal members or Tribal member stations showing the information required on invoices in the preceding ¶ 4.9.a;

c. records to document the use of State fuel tax proceeds or their equivalent for the purposes identified in ¶ 4.8 of this Agreement, including funds carried forward;

d. Internal Revenue Service (IRS) Forms 4136 and detail schedules reflecting the number of gallons claimed for credit or refund for Federal fuel tax purposes identified in ¶ 4.5 of this Agreement; and

e. copies of any tribal licenses issued for the operation of each Tribal member station.

4.10 The Tribe shall maintain the records described in ¶ 4.9 for a minimum of three years or for such time as necessary to demonstrate that credited amounts were used as agreed in ¶ 4.8—whichever period is longer.

4.11 The Tribe shall cause an audit to be performed annually, by an independent third party auditor who shall be a certified public accountant licensed under RCW 18.04 and in good standing, to review such records as are necessary to certify (a) the number of gallons of fuel purchased by the Tribe for re-sale at Tribal Fuel Facilities, FEIN of the sellers, and the amount of State fuel tax included in the price of the fuel purchased by the Tribe, and, (b) if the Tribe has sought refunds under ¶ 6.1.b(2), the number of gallons of fuel purchased by Tribal members for re-sale at Tribal member stations operating under license from the Tribe at the time of the purchase, and the amount of State fuel tax included in the price of the fuel so purchased. The auditor shall also certify the fuel tax proceeds or an equivalent amount was expended by the Tribe for the purposes identified in ¶ 4.8 above, and the audit report shall list the amounts of expenditures by the categories listed in ¶ 4.8. The Tribe shall deliver a copy of the final written report of such audit to the Director of the State Department of Licensing.

4.12 If any audit required by ¶ 4.11 is not performed, or if the final written report is not delivered to the Director within the time period agreed to by the parties, the

Tribe shall be entitled to no further refunds until the audit is performed and the report delivered.

4.13 If the auditor is unable to make any certification required by ¶ 4.11, either party may invoke the dispute resolution process under ¶ 5.1. If the parties are unable to resolve the dispute through that process, either party may terminate this Agreement in accordance with ¶ 5.1.e.

4.14 The State agrees to treat as personal information under RCW 42.56.230(4)(b) any information received by the State or otherwise made available to the State for review pursuant to this Agreement and to exempt such information from public inspection and copying.

V. DISPUTE RESOLUTION, TERM AND RENEWAL

5.1 Neither the Tribe, nor the State, nor officers acting on either government's behalf, may petition any court to enforce this Agreement unless (a) the dispute resolution process described in ¶¶ 5.1.a. and 5.1.b. has been followed in good faith to completion without successful resolution, or unless (b) the other party fails to enter into the dispute resolution process or terminates the process before its completion. Should a dispute arise between the Tribe and the State upon an issue of compliance with the Agreement by either government, or by their officers, employees or agents, the Tribe and State shall attempt to resolve the dispute through the following dispute resolution process:

a. Either party may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice shall set out the issues in dispute and the notifying party's position on each issue.

b. The first stage of the process shall include a face-to-face meeting between representatives of the two governments to attempt to resolve the dispute by negotiation. The meeting shall be convened within 30 days of the date of the written notice described in ¶ 5.1.a. The representatives of each government shall come to the meeting with the authority to settle the dispute. The parties may agree to convene one or more additional face-to-face meetings if they mutually agree that significant progress has been made and that one or more additional meetings are necessary to resolve the dispute.

c. If the parties are unable to resolve the dispute within sixty (60) days of the date of the face-to-face meeting between representatives of the two governments, either party may demand mediation by sending a written mediation demand to the other party, no sooner than sixty (60) days after the date of the face-to-face meeting. If either party demands mediation, the parties shall engage the services of a mutually-agreed upon qualified mediator to assist them in attempting to negotiate the dispute. Cost for the mediator shall be borne equally between the disputing parties. The parties shall pursue the mediation process in good faith until the dispute is resolved or until ninety (90) days after the date of the mediation demand, whichever occurs first. The parties may continue mediation after the 90-day period by mutual agreement. If the parties cannot agree on a format for the mediation process, the format shall be that directed by the mediator. If the dispute is resolved, that resolution shall be memorialized by the mediator and shall bind the parties so long as an Amendment to this Agreement is not required to resolve the dispute.

d. (1) If the Tribe demands mediation, the State will continue to issue refunds in accordance with ¶¶ 4.4, 4.5, and 6.1 of this Agreement during the mediation period unless the parties mutually agree otherwise.

(2) If the State demands mediation, the following procedures will apply unless the parties mutually agree otherwise. During the mediation period, the Tribe will continue to submit copies of invoices and IRS Forms 4136 to the Department in accordance with ¶ 6.1.b and 6.1.d of this Agreement. The Department will hold and maintain the invoices and IRS forms but will not remit refunds during the mediation period. If the dispute is resolved and the parties mutually agree that the Tribe is entitled to some portion of the tax shown on the invoices submitted during the mediation period, the Department will promptly remit to the Tribe the agreed-upon amount. After the dispute is resolved, the Department will resume remitting refunds to the Tribe in accordance with ¶¶ 6.1.c and 6.1.d of this Agreement. If the dispute is not resolved, the Tribe will not be entitled to refunds under ¶ 4.4 or ¶ 4.5 after the date of the mediation demand.

e. After completion of the process in ¶¶ 5.1.a-d or one-hundred eighty (180) days after the written notice described in ¶ 5.1.a, whichever occurs first, either party may terminate this Agreement upon thirty (30) days' written notice served upon the Chairman of the Tribe or the Director of the Department of Licensing.

5.2 This Agreement takes effect on January 1, 2022. This Agreement shall remain in effect for ten (10) years, unless (a) the parties mutually agree in writing that the Agreement should be vacated or terminated and superseded by a new agreement between the parties within that time frame, or (b) the Agreement is terminated pursuant to ¶ 5.1.e. The Agreement shall automatically renew for an additional ten (10) year period unless either party provides written notice to the other, no later than 60 days before the expiration of the ten (10) year period, that they wish to modify the terms of the Agreement.

5.3 In any action filed by a third party challenging either the Tribe's or the State's authority to enter into or enforce this Agreement, the Tribe and the State each agree to support the Agreement and defend their authority to enter into and implement this Agreement.

5.4 This Agreement supersedes all other fuel tax agreements between the State and the Tribe.

VI. <u>PROCEDURES, IMPLEMENTATION, AMENDMENTS</u>

6.1 The following procedures for tax remittance shall apply:

a. For any fuel on which the State fuel tax already has been collected prior to delivery to the Tribal Fuel Facilities, Tribal businesses, and Tribal member stations, the State shall remit monthly to the Tribe an amount equal to 75% of the State fuel tax actually paid and included in the price on all such fuel delivered to the Tribal Fuel Facilities, Tribal businesses, and Tribal member stations in the preceding month, in accordance with ¶¶ 6.1.b and

6.1.c. This ¶ 6.1.a does not apply to refunds for fuel purchased by the Tribe as described in ¶ 6.1.d.

b. (1) Each month, the Tribe shall submit to the Department copies of invoices for fuel delivered to Tribal Fuel Facilities and Tribal businesses, which invoices shall include the invoice date, name of the seller, FEIN of the seller, and the amount of State fuel taxes paid and included in the price of the fuel.

(2) The Tribe may also submit copies of invoices for fuel delivered to Tribal member stations during the same month, which invoices shall include the invoice date, name of the seller, and the amount of State fuel taxes paid and included in the price of the fuel.

c. Within 30 days of receiving an invoice under ¶ 6.1.b, the Department shall remit to the Tribe 75% of the State fuel tax actually paid to the State and included in the price of the fuel delivered to the Tribal Fuel Facilities, Tribal businesses, and Tribal member stations, as shown on the invoice.

d. Each month, the Tribe shall submit to the Department copies of invoices for fuel purchased for uses that are eligible for the Federal fuel tax exemptions for Indian Tribal government entities, along with a copy of the IRS Form 4136 and detail schedules. Within 30 days of receiving such documents, the Department shall remit monthly to the Tribe an amount equal to 100% of the tax included in the price of the fuel, as shown on the invoices.

6.2 If any audit required by ¶ 4.11 is not performed, or if the final written report is not delivered to the Director within the time period agreed to by the parties, the Tribe shall be entitled to no further remittances until the audit is performed and the report delivered.

6.3 If the accuracy or authenticity of any invoice submitted by the Tribe is questioned, the State and the Tribe shall use their best efforts to resolve the issue informally. If informal dispute resolution efforts are unsuccessful, the dispute resolution provisions in Part V of this Agreement shall apply.

6.4 This Agreement may be amended only by a written instrument duly signed and executed by the Parties.

6.5 The contact person for the Tribe, for any changes or concerns about this Agreement, shall be: Jaison Elkins, Chairman, Muckleshoot Indian Tribe, 39015 172nd Avenue S.E., Auburn, Washington 98092-9763). The contact person for the State, for any changes or concerns about this Agreement, shall be: Teresa Berntsen, Director, Department of Licensing, P.O. Box 9020, 1125 Washington St. SE, Olympia, WA 98507, (360) 902-4042. Each party shall notify the other of changes in contact information within 30 days of the change.

6.6 The Tribe shall provide the State with a list of the name and physical location (address) of each retail filling station operated by the Tribe and covered by this Agreement, and each Tribal member station covered by this Agreement. No later than 30 days after any new Tribal retail filling station or Tribal member station is opened, the same information will be provided to the State. If any Tribal retail filling station or

Tribal member station closes or is no longer licensed by the Tribe, the Tribe shall notify the State within 30 days of the change.

VII. SIGNATURES

7.1 The signatories to this Agreement represent that they have the authority to bind their respective governments to this Agreement. This Agreement may be terminated only as provided in ¶ 5.1 or by mutual agreement.

DATED this 19th day of October, 2021

MUCKLESHOOT INDIAN TRIBE

Jaison Elkins, Chairman

DATED this 2 day of November, 2021

DEPARTMENT OF LICENSING

Director

Approved as to Form

N/A

Tribal Attorney

Assistant Attorney General

Appendix G

EFILED
Clerk Billie Maggard
10/24/2025 8:30 AM
Superior Court Yakima County, WA

Honorable Judge Jared A. Boswell
Date: November 24, 2025
Time: 1:30 p.m.

STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

COUGAR DEN, INC., Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF LICENSING, and MARCUS GLASPER, Director of the Department of Licensing, Respondents.	NO. 24-2-00109-39 STATE RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON ADMINISTRATIVE PROCEDURE ACT APPEAL/RESPONSE TO COUGAR DEN'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Cougar Den seeks to expand their Treaty rights beyond their reach and with no bounds. If Cougar Den were correct that they can avoid taxes on removal of fuel at the terminal rack simply because they then take it to market, then the Treaty right would exempt any company owned by a Yakama tribal member from paying state taxes when they purchase any goods and then travel to market. But that is not what the Treaty of 1855 says and that is not what the United States Supreme Court held in *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 586 U.S. 347, 139 S. Ct. 1000, 203 L.Ed.2d 301 (2019) *(Cougar Den II)*. The rack removal tax in RCW 82.38.013(13)(a) is no different than the tax on off-reservation purchase of goods taken to the Reservation that no Treaty right preempts.

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

To assess whether it burdens the exercise of Treaty rights, the Court must first consider how a tax operates. That determination of how the statute works is governed by Administrative Procedure Act (APA) and statutory construction principles. The Final Order of the Director of the Department of Licensing correctly interprets how the rack removal tax works.

This Court then considers whether the Treaty right is violated. The Treaty right to travel does not preempt state taxes on goods that occur before or after travel, i.e., where the legal incidence of the tax is imposed on a tribal member off-reservation. Cougar Den once admitted this, too. Every Justice of the United States Supreme Court embraced this reasoning. The earlier litigation involving Cougar Den dealt with a materially different state fuel tax law concerning fuel importation, which expressly taxed travel itself. *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 188 Wn.2d 55, 67, 392 P.3d 1014 (2017) (*Cougar Den I*). But state taxes imposed irrespective of travel are not preempted. *Cougar Den II*, 586 U.S. at 366. The rack removal tax on fuel is distinct from travel and is such a valid law.

Nor does the Treaty right to travel depend on how the tax funds are used. If that were true, then Cougar Den and Yakama tribal members would potentially avoid all manner of taxes if they were later spent on roads. No case has ever declared a law preempted by the Yakama Treaty of 1855 on this basis. The preemption analysis instead turns on whether the state law burdens the exercise of Treaty rights, not how funds are spent.

Further, the Department's suspension of Cougar Den's license is not preempted, and Cougar Den's violation of tax payment and reporting requirements is a valid basis to affirm its license suspension.

Finally, the Department Director properly declined to rule on preemption, which, under the APA, is for this Court to consider. The Director, as a member of the executive branch, lacks competence to declare the invalidity of laws the agency administers. That APA framework does not violate Cougar Den's due process or Treaty rights. This Court should affirm the Final Order.

II. ARGUMENT

A. Cougar Den Bears the Burden of Showing the Department's Order Was Wrongly Decided Under The APA, and Cougar Den Must Prove Their Treaty Claim

Cougar Den argues that because this is a "treaty case," the standard of review under the APA does not apply. Cross-Motion/Response at 13. That is wrong. As the Washington State Supreme Court noted in *Cougar Den I*, "This case began as a challenge to an administrative order; therefore, review is governed by chapter 34.05 RCW." *Cougar Den I*, 188 Wn.2d at 59. And the standards for APA review are well-established. Under RCW 34.05.570(1)(a), "the burden of demonstrating the invalidity of agency action is on the party asserting invalidity." The Fuel Tax Act, RCW 82.38.170(3), further provides that a fuel tax assessment is "presumed to be correct, and the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive." *See also* RCW 82.38.300 (incorporating APA standards).

Concerning Treaty rights, as the United States Supreme Court explained in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160, 100 S. Ct. 2069, 65 L.Ed.2d 10 (1980), it is the Tribes—and not the State—that bear the burden of showing a state law requirement which they are challenging is invalid. *See also Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1236 (E.D. Wash. 1997). Cougar Den argues without authority that "in a Treaty case there is no burden shifting." Cross-Motion/Response at 10.

In the *Cougar Den II* case, the United States Supreme Court set forth a two-step analysis for determining whether the right to travel contained in the Treaty of 1855 preempts a Washington fuel tax assessment. First, the Court must consider *how* the tax works. Indeed, in *Cougar Den II*, the lead opinion spent five full pages examining in detail how the tax at issue in that case operated. 586 U.S. at 353-58 ("We start our journey at the beginning of the

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

statute . . . ."); Second, the Court must consider whether the operation of this tax violates the Treaty Right. *Id.* at 359 ("Thus, we must turn to the question whether this fuel tax, falling as it does upon members of the Tribe who travel on the public highways, violates the treaty.").

Regarding the first step, "[w]hen interpreting a statute, the court's fundamental objective is to ascertain and give effect to the legislature's intent." *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). Courts will not turn to other interpretative means when the plain language of the statute suffices. *Id.* And in *Cougar Den I* and *Cougar Den II*, the language of the tax statute on importation of fuel across the border to Washington was sufficiently clear that those courts did not look to the Department's interpretation to determine how that tax worked. 188 Wn.2d at 59-60; 586 U.S. at 354. But the provision here, for withdrawals of fuel at terminal racks within Washington, has vastly different language. The plain language of RCW 82.38.030(13)(a) compels the Department's interpretation of how the rack removal tax works. If the Court finds the statutory language is ambiguous, then the Department's interpretation is owed substantial deference. *Cobra Roofing Service, Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004); *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).[1] Courts will "give substantial weight to the agency's interpretation of statutes and regulations within its area of expertise." *Cobra Roofing Service, Inc.*, 122 Wn. App. at 409. An agency's interpretation of the statutes it is charged with administering will be adopted "if it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *See Seatoma Convalescent Ctr. v. Dep't of Social & Health Svcs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996) (internal citations omitted).

Here, there is no question that the Department is the agency with expertise in the administration and interpretation of fuel tax statutes. It is the agency "charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that

[1] That is not to say that the Department's interpretation is binding on the Court. Cougar Den falsely claims the Department so argued. Cross-Motion/Response at 13-14, n. 2.

field . . . ." *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1097 (1998); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004). So, Cougar Den pivots. Cougar Den argues that since the second step involves the analysis of the Treaty Right, the first step of statutory construction must also resolve doubts in the Yakamas' favor. But that is wrong. Only interpretation of the Treaty right should be resolved in the Yakamas' favor—not interpretation of state law. The fuel tax must be analyzed under standard canons of statutory construction.

Treaty interpretation is a legal question reviewed de novo. *Cougar Den I*, 188 Wn.2d at 59. This Court is considering this question in the first instance. The State nowhere argues that its interpretation of the Treaty right is owed deference.

As did the *Cougar Den II* Court in its two-step analysis, this Court must consider both how the tax works—which is a matter of *statutory interpretation* reviewed under APA standards and canons of statutory construction, and whether the operation of the tax infringes the Treaty Right—applying Indian Law canons of construction.

B. The Fuel Tax Legally Attaches as the Fuel is Dispensed Over the Terminal Rack

The Court's first step is to determine how the fuel tax law at issue works. Under RCW 82.38.030(13)(a), "taxes are imposed when: (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack . . ." The Department's Final Order properly held that fuel taxes attach "at the instant fuel … is physically transferred from the confines of the rack." AR 1453. The Washington State Supreme Court recognized the correctness of this reading, saying in *Cougar Den I*: "Fuel taxes are imposed at the wholesale level, *when fuel is removed from the terminal rack.*" *Cougar Den I*, 188 Wn.2d at 60 (emphasis added). Cougar Den apparently reads RCW 82.38.030(13)(a) as applying when leaving the terminal facility or grounds. Cross-Motion/Response at 23 ("hauled out of the facility"), 24 (driving away "from the terminal facility or grounds," or "removal from the terminal facility"). But Cougar Den's interpretation and added words cannot be squared with the purpose of the statute or its plain language.

And Cougar Den's silence on multiple arguments by the Department is deafening.

First, in its Cross-Motion/Response, Cougar Den never addressed the ample authority argued by the Department that the state law is nearly identical to the federal law, thus making the state law carry the same construction as federal law. *Anfinson v. FedEx Ground Package Sys.*, 174 Wn.2d 851, 868, 281 P.2d 289 (2012); State's Motion at 14-15. *Compare* RCW 82.38.030(13)(a) ("Taxes are imposed when: (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack . . .") *with* 26 C.F.R. § 48.4081-2(b) ("Tax is imposed on the removal of taxable fuel from a terminal if the taxable fuel is removed at the rack."); 26 U.S.C. § 4081(a)(1)(A) ("There is hereby imposed a tax at the rate specified in paragraph (2) on… (ii) the removal of a taxable fuel from any terminal . . ."); 26 C.F.R. § 41.4081-1(b) ("*Taxable fuel* means gasoline, diesel fuel, and kerosene.") (emphasis in original); 26 C.F.R. § 48.4081-2(a) ("This section provides the general rule that all *removals* of taxable fuel *at a terminal rack* are subject to tax . . .") (emphasis added); 26 C.F.R. § 48.4081-3(a) ("Although 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.") (emphasis added).

The federal law has been uniformly interpreted to tax fuel "as it is dispensed over the terminal rack," U.S. Gov't Accountability Off., GGD-92-67, Tax Administration: Status of Efforts to Curb Motor Fuel Tax Evasion, p. 26 (1992) (available at https://www.gao.gov/assets/ggd-92-67.pdf), AR 1316, 1383, or, in other words, "as they cross the terminal loading rack," Federal Fuel Tax Administrators, Motor Fuels Section, Uniformity Guide, p. 289 (Sep. 2023) (available at https://taxadmin.org/wp-content/uploads/resources/motor-fuels/2023-uniformity-book.pdf), AR 1317, 1383[2]. The

[2] Citing 2021 edition, with this same language.

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

Internal Revenue Service taxes "removals of gasoline at a terminal rack." I.R.S. Pub. 510, p. 5 (revised Mar. 2025) (available at https://www.irs.gov/pub/irs-pdf/p510.pdf), AR 1317, 1383; I.R.S. Form 720-TO instructions, p. 6 (revised Jun. 2025) (available at https://www.irs.gov/pub/irs-pdf/i720.pdf), AR 1317, 1383.

The intent to have state law carry this same meaning as federal law about taxing fuel *as it is dispensed over the rack* is evident from use of this substantially verbatim language in the law, and from the Legislature's expressed purposes: "The bill would make state law consistent with federal law." Wash. Sen. Bill Rep., 1998 Reg. Sess., Sub. House Bill 2659.

Cougar Den makes no acknowledgement of these many federal persuasive authorities showing the meaning of Washington's law, and Cougar Den in no way attempts to grapple with them. The closest Cougar Den comes to addressing this is a plea that the Court should for some reason ignore federal authority to the extent it is not in the record. Cross-Motion/Response at 23, n.7. But the record includes the federal authorities, AR 1316-17, 1383, the Director declined to strike them, AR 1445, and nothing prevents the Court from considering persuasive authority in support of arguments, as here.[3]

Second, Cougar Den ignores that the line of demarcation for imposition of fuel taxes under RCW 82.38.030(13)(a) is whether the fuel is above-the-rack (and hence within the bulk transfer-terminal system) or below-the-rack (and hence outside the bulk transfer-terminal system), and this is consistent with the Fuel Tax Act's overall statutory scheme. State's Motion at 12-13. The Director's Order properly recognized the "tax is imposed at the instant fuel is 'removed' from the terminal within the meaning of RCW 82.38.020(28) [now, (30)], which is

[3] Cougar Den, however, improperly attaches new declaration evidence with its Cross-Motion/Response that is outside the administrative record. RCW 34.05.554, .558. Much of this goes beyond persuasive authority in support of legal arguments. This Court already ruled in its July 26, 2024, order that the record is complete. The State limited the evidence in support of its motion to the Certified Agency Record. State's Motion at 8-9. The Department moves to strike, and this Court should decline to consider: the news article, Harrington Decl., Ex. C, the amended compact between the Department and the Cowlitz Tribe, Harrington Decl., Ex. E, and a new Declaration of Fernando Lemus. This new evidence serves only to confuse the issues, without aiding in statutory construction of RCW 82.38.030(13)(a) or preemption analysis.

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

when it is physically transferred from the confines of the rack." AR 1453 (conclusion 3.10). The Department's fuel tax manual provided to licensees likewise explains: "When is fuel tax imposed? The fuel tax is imposed upon the first taxable event, when fuel: . . . leaves the bulk transfer terminal system in Washington." AR 1144; AR 1072, 1166. Indeed, RCW 82.38.030(13)(a) imposes taxes on removals at the "rack," which is defined as a "mechanism for delivering fuel from a refinery or terminal into a truck, trailer, railcar, or other means of nonbulk transfer," RCW 82.38.020(27)—which again supports the distinction in the Director's order and the Department's manual that "removal" from the "terminal" within the meaning of the statute is removal from the bulk transfer-terminal system into a form of non-bulk ground transportation. *See* AR 1453 (conclusion 3.10). The definition of a distributor further supports the Department, for similar reasons, when read correctly:[4] "'Distributor' means a person who acquires fuel outside the bulk transfer-terminal system [i] for importation into Washington, [ii] from a terminal or refinery rack located within Washington for distribution within Washington, or [iii] for immediate export outside the state of Washington." RCW 82.38.020(9) (alterations added). All distribution activity is "outside the bulk transfer-terminal system," RCW 82.38.020(9), and thus is distinguished from suppliers' "tax-free transactions of fuel in the bulk transfer-terminal system," RCW 82.38.020(33).

Third, Cougar Den offers a hypothetical of a truck driving half-full to the rack and leaving with a full tank owing taxes only when leaving the terminal grounds. Cross-Motion/Response at 23. However, that hypothetical instead only proves the Department's point, because it creates statutory conflicts. Under Cougar Den's reasoning, the fuel driven into the terminal in the half-full truck would apparently be part of the bulk transfer-terminal system

[4] Cougar Den in its Cross-Motion/Response attempted to alter RCW 82.38.020(9) by adding subsection breaks, but put them in the wrong place, in effect obscuring that distribution is outside the bulk transfer-terminal system. *See* Cross-Motion/Response at 21-22 (showing grammatically improper and thus incorrect alterations). This error is akin to how the Department, in one brief before the ALJ misquoted RCW 82.38.030 in one place, while correctly quoting it elsewhere in the same brief and many other briefs below and since. *See* AR 1053-69. Yet Cougar Den still unduly chastises the Department for the one inadvertent proofing error. Cross-Motion/Response at 27-28.

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

while on terminal grounds even though it was only ever in ground transportation. Yet, RCW 82.38.020(4) defines "Bulk transfer-terminal system," stating: "Fuel in a refinery, pipeline, vessel, or terminal is in the bulk transfer-terminal system." Instead, the only plausible construction of the statute, which is reflected in the Department's manual and federal guidance and in the Director's Final Order, is that fuel leaves the bulk transfer-terminal system when it crosses the rack and enters ground transportation. Fuel in ground transportation is never part of the bulk transfer-terminal system. 26 C.F.R. § 48.4081-1(b) ("bulk transfer/terminal system" definition—"Taxable fuel in the fuel supply tank of any engine, or in any tank car, rail car, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer/terminal system."); RCW 82.38.020(4) ("Bulk transfer-terminal system" definition referring to only refineries, pipelines, vessels, and terminals—but not ground transportation).[5]

Further, Cougar Den's assertion of the tax being owed only when leaving the terminal grounds impermissibly fails to give meaning to all terms in another, related section of the Fuel Tax Act, governing two-party exchanges. Under RCW 82.38.035(1): "A licensed supplier is liable for and must pay tax on fuel as provided in [RCW 82.38.030(13)(a) and (i)[6]]. On a two-party exchange, or buy-sell agreement between two licensed suppliers, the *receiving exchange partner or buyer shall be liable for and pay the tax*." (Emphasis added.) A two-party exchange involves an instantaneous transaction occurring at the rack among licensed suppliers. *See* RCW 82.38.020(37); 26 U.S.C. § 4105(b)(2). If, as Cougar Den contends, RCW 82.38.030(13)(a) means the fuel tax is not imposed until the truck leaves the terminal grounds, then the first and second sentences of RCW 82.38.035(1), with respect to two-party exchanges, would mean the same thing. The supplier leaving the terminal grounds with the fuel would be the receiving

---

[5] While this is nuanced and detailed, Washington's fuel tax law is "long and complex." *Cougar Den II*, 586 U.S. at 354. Ultimately, Cougar Den's arguments about the fuel tax statute fall apart upon scrutiny. The Department has expertise in this dense area.

[6] The statute references RCW 82.38.030(7)(a) and (i), but the Code Reviser explained that the section was amended in 2015 to change subsection (7) to subsection (9) and then was amended in 2025 to change subsection (9) to subsection (13). It thus seems that the continued reference to RCW 82.38.030(7) is a legislative oversight.

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

exchange partner. Both sentences of RCW 82.38.035(1) would mean that the receiving supplier is liable for and must pay the tax. Yet when interpreting statutory language, a reviewing court must do so in a way that "give[s] effect to all language, so as to render no portion meaningless or superfluous." *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).[7]

The plain language of the statute, the Washington Legislature's explicit intent in amending the Fuel Tax Act in 1998, the Department's interpretation, and the nationwide uniform interpretation confirms the legal incidence of the tax occurs on Cougar Den as the fuel is dispensed at the rack—a stationary location outside Indian country. The Court should reject as contrary to legislative intent Cougar Den's attempt to *move* the imposition of the rack removal tax to the public highway, to make it seem like the importation tax.

C. Because the Rack Removal Tax Applies Irrespective of Travel, It Does Not Burden the Yakama Treaty Right and is Not Preempted

Absent express federal authorization, a State cannot impose a tax the legal incidence of which falls on a Tribe or its members in Indian country. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 132 L.Ed.2d 400 (1995). But outside of Indian country, absent federal law to the contrary, tribal members are treated the same as any other citizen. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 36 L.Ed.2d 114 (1973). Treaties can represent federal law to the contrary. *Cougar Den I*, 188 Wn.2d at 60. In

---

[7] In contrast, under the Department's correct interpretation of RCW 82.38.035(1) and .030(13)(a), the two sentences in RCW 82.38.035(1) have different meanings. The first establishes the normal rule as described *supra* that the tax is imposed when fuel is removed at-the-rack. The second clarifies—for that moment that is "contemporaneous with completion of removal across the rack," 26 U.S.C. § 4105(b)(2)—who is to be treated as having removed the fuel from the rack, determining it is the receiver. The tax for the rack removal is at-the-rack, as always, and not upon leaving terminal grounds. Indeed, 26 U.S.C. § 4105(b)(3) is also instructive, as Washington's Fuel Tax Act (as amended in 1998) was meant to be consistent with federal fuel taxes. Wash. Sen. Bill Rep., 1998 Reg. Sess., Sub. House Bill 2659. That provision states: "The terminal operator in its books and records treats the receiving person as the person that removes the product *across the terminal rack* for purposes of reporting the transaction to the Secretary." 26 U.S.C. § 4105(b)(3) (emphasis added). This again supports, as with other federal authorities, that the rack removal tax is imposed as fuel crosses the rack, not upon leaving terminal grounds.

effect, they can operate to expand the Indian country rules outside of Indian country to the Treaty-protected activity.

The incidence of the rack removal tax is on Cougar Den outside Indian country, as it is imposed on the terminal grounds as fuel crosses the rack. That activity of taxing at-the-rack is off the public highway and distinct from travel. It thus does not implicate, impact, in any way burden, or otherwise interfere with Cougar Den's Treaty right to travel.

1. *Cougar Den II* Supports that Taxes on Off-Reservation Economic Transactions Occurring Before or After Travel, Such as the Rack Removal Tax, Are Distinct from Exercise of Treaty-Protected Rights

Cougar Den possesses a Treaty right to travel upon all public highways without any burden, condition, or limitation on that right, including for purposes of transporting their goods to and from market for purposes of trade. The State of Washington respects and honors that right. And the rack removal tax does not in any way burden, condition, or limit that right. It is imposed irrespective of travel or its means. It is a tax on an off-reservation transaction occurring before or after travel but is distinct from the exercise of the Treaty-protected right to travel itself.

Cougar Den essentially admitted this in its briefing filed in the United States Supreme Court in *Cougar Den II*, though without reference to the rack removal tax specifically:

> 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 35-36 (Sep. 17, 2018) (emphasis in original); AR 1068. Now, Cougar

Den fails to even acknowledge its admission and makes no attempt to grapple with it in their Cross-Motion/Response.

Instead, Cougar Den argues the Supreme Court's decisions in *Cougar Den I* and *II* bind the Court here. That is flatly wrong. The rack removal tax, as described above, is different from the importation tax provision at issue in earlier litigation. The rack removal tax does not involve any travel but instead is imposed when fuel is dispensed over the stationary terminal rack. In contrast, the importation tax is a tax on travel itself, as it "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" from out of state. *Cougar Den II*, 586 U.S. at 358. Accordingly, the importation tax infringed on the Yakamas' Treaty right.

But every Justice of the United States Supreme Court distinguished the importation tax from taxes that are imposed "irrespective of transport or its means." *Cougar Den II*, 586 U.S. at 366. The plurality opinion, by Justice Breyer, joined by Justices Sotomayor and Kagan, explained: "there is no treaty that forbids taxing Yakama off-reservation purchases of goods." *Id.* at 364. They further added: "the treaty does not protect the Yakamas from state sales taxes imposed on the off-reservation sale of goods. Instead, the treaty protects the Yakamas' right to travel the public highways without paying state taxes *on that activity*, much like the treaty protects the Yakamas' right to fish without paying state taxes on that activity." *Id.* at 364-65 (emphasis added). The concurring opinion, by Justice Gorsuch, joined by Justice Ginsburg, reasons likewise, saying: "Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there." *Id.* at 374. And the dissenting opinion, by Chief Justice Roberts, joined by Justices Thomas, Alito, and Kavanaugh, echoed the same proposition, saying: "A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax. . . . [This] in no way burdens highway travel." *Id.* at 380.

While every Justice agreed that Washington's imposition of a *retail sales tax* on tangible property purchased by a Yakama member at an off-reservation Washington brick and mortar retailer does not violate the Treaty right to travel, differences between the plurality/concurrence and the dissent concerning a *use tax* on the example of a mink coat purchased *in Oregon* support the State. A retail sales tax is imposed on a purchaser at the business location of the purchase for a good received there. *See* RCW 82.08.020(1); RCW 82.08.050(1); RCW 82.32.730(1)(a). A use tax is on the first use of certain tangible property as a privilege for its use within the state, *see* RCW 82.12.020(1); the *Cougar Den II* dissent termed this, for purposes of the example, a "tax [that] charges individuals for possessing expensive furs." 586 U.S. at 380. The dissent would still have found no burden on highway travel for this example of a coat purchased in Oregon and brought to the Reservation. *Id.* The plurality, however, concluded that this kind of tax would be treated like the fuel importation tax, because it would trigger on the public highway at the state line, and "there is a treaty that forbids taxing Yakama travel on highways with goods (*e.g.*, fuel, or even furs) for market[.]" *Id.* at 364. The concurrence agreed. *Id.* at 374 (discussing the "Yakama who buys the same coat right over the state line"). This distinction between sales taxes and use taxes supports the State, because the fuel importation tax at issue in *Cougar Den I* and *II* was similar in operation to a use tax set forth in Chapter 82.12 RCW. Such a use tax on a coat purchased in Oregon and brought by a Yakama into Washington would be preempted, based on *Cougar Den I* and *II.* In contrast, the fuel tax imposed upon removal at the rack is almost identical in design and operation to the retail sales tax in Chapter 82.08 RCW, which no Justice would find preempted. Both the rack removal of fuel and the retail sales purchase of a coat at a Washington brick and mortar store operate in the same way; both are off-reservation; and the respective taxes apply to acts without any nexus to travel. All nine Justices agreed that any travel before or after the occurrence of these taxable events is irrelevant to the Treaty right to travel.

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

Cougar Den makes no attempt to distinguish this rationale about the off-reservation purchase of goods except to say in passing that the example used involved a sales tax instead of the rack removal tax on fuel. Cross-Motion/Response at 28. But the rationale concerning the Washington retail sales purchase applies equally here: unlike the importation tax—which is inseparable from, and imposes a burden on, travel—taxing activity or transactions occurring before or after travel is not preempted by the Treaty right to travel simply by virtue of the Yakamas' later travel with the items. *Cougar Den II*, 586 U.S. at 364-66, 374, 380. This rationale applies perfectly in this case.

2. The Yakamas Do Not Have a Treaty-Protected Right to Purchase Goods Tax Free Just Because They May Travel with Those Goods, and Cougar Den's Discussion of the "Practical Effects" Standard is Irrelevant Here

Importantly, Cougar Den's argument has no limiting principle and would unduly extend their Treaty right to avoid taxes on any goods just because they later travel with them to market. As both Cougar Den and the Department acknowledge, where a treaty right applies, it extends to off-reservation conduct. *See* State's Motion at 4; Cross-Motion/Response at 3, 19. The exemption from retail sales and use and business taxes that Cougar Den notes, in seeming attempt to narrow breadth of their arguments, is for transactions in and deliveries to Indian country. Cross-Motion/Response at 15, n. 3 (citing WAC 458-20-192(1) ("Under federal law the state may not tax Indians or Indian tribes in Indian country.")); *see also* RCW 82.32.730 (sourcing of retail sales and use taxes, generally). But Cougar Den goes a step further and asks this Court to conclude the Treaty right protects the Yakamas from paying taxes or fees on any goods they deliver to any location, including outside Indian country. *See* Cross-Motion/Response at 8 ("Cougar Den exercises the Treaty right to travel and bring goods to market to distribute motor vehicle fuel *and other goods* in Indian Country without remitting state taxes *or fees*") (emphasis added), 19 ("The Treaty preserves and protects the Yakamas' right to travel and trade. Before

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

the Treaty, Yakamas traveled extensively without paying taxes for the use of public roads or the sale or delivery of goods.").[8] Cougar Den might thus undercut any number of non-Indian and Indian businesses and reduce state revenues that are vital for a multitude of services if they can avoid taxes on any goods with which they travel in furtherance of trade.

The right to travel is not so broad as to require—in a circumstance not involving "taking fish," nor "hunting, gathering roots and berries, and pasturing their horses and cattle," *see* Article III of the Treaty with the Yakamas of 1855—that the Yakama can *obtain* their goods tax-free to take them to market. *See Cougar Den II*, 586 U.S. at 364-66, 374, 380. The right to travel must be without burden. But taxing a transaction not involving travel does not burden travel. A tax imposed "irrespective of transport or its means" is not preempted. *Id.* at 366.

Cougar Den argues that the State articulated the wrong test for preemption. Not so. The State correctly argued: "Because application of the tax is not tied to travel, it does not burden the treaty right to travel." State's Motion at 17. The State analyzed at length the bases for the *Cougar Den I* and *Cougar Den II* decisions, which *hinged* upon how the importation tax directly taxed Cougar Den for using public highways. State's Motion at 17-22. Indeed, Cougar Den's distillation of the *Cougar Den I* opinion is just as the State argued: Cross-Motion/Response at 24 ("tax preempted because 'in this case, it was impossible for Cougar Den to import fuel without using the highway,'" quoting *Cougar Den I*, 188 Wn.2d at 67). But Cougar Den's discussions of "practical effects" and "indirect" burdens are inapposite here because the rack removal tax does not involve travel at all, and it has *no effect* and causes *no burden* upon the Treaty right to travel. Cougar Den argues that what the tax is "on" is somehow "irrelevant," or that the "triggering" activity is somehow "immaterial." Cross-Motion/Response at 10-11, 21, 27. But

[8] *Yakama Indian Nation* notes that the Yakamas' travel for trade included trading with non-Indian settlers, including those of the Hudson's Bay Co., 955 F. Supp. at 1238, and that their right to take goods to market meant the "white man's market," *Id.* at 1253, but in any event the right to travel upon public highways is without restriction, *Id.* This shows that Cougar Den would presumably use a ruling extending the Treaty right to travel to preempt a tax imposed before or after travel to in turn distribute goods besides just fuel to places besides just Indian country. No case or authority supports doing so, as Cougar Den's preemption argument reaches too far.

that makes no sense. To determine whether the Yakamas are exempt from a specific tax necessarily requires consideration of the tax itself. And, the courts in *Cougar Den I* and *II* would not have spent pages analyzing how state law worked or tying their reasoning to the state law's operation if the state law did not matter. The rack removal tax is exactly like the off-reservation retail sales tax on purchase of goods that every United States Supreme Court Justice approved as not implicating the Treaty right to travel, notwithstanding that the Yakama would then take the taxed goods to their Reservation. *See Cougar Den II*, 586 U.S. at 364-66, 374, 380. The Justices all explained this, and concluded such an off-reservation tax *preceding* travel would not be preempted, thus necessarily meaning it would not "have the practical effect" of "mak[ing] the difference" for preemption. *See Cougar Den II*, 586 U.S. at 358.

The relevant question is whether the tax acts upon the Yakamas "as a charge for exercising the very right their ancestors intended to reserve," which, here, is the Treaty right to travel. The State contends there is no burden on travel because the tax in question is imposed upon the act of removing fuel at the rack as the fuel crosses from the bulk transfer-terminal system to a truck or other mode of ground transportation, irrespective of any travel by the Treaty rights holder. That removal—and not the later transportation of fuel to market—is the taxable act under RCW 82.38.030(13)(a). That the Treaty rights holder later travels on public highways, after the tax attaches, is immaterial.

Cougar Den's contention that "incidence" as argued by the State is the wrong test makes no sense. Cross-Motion/Response at 10-11. The *Cougar Den I* opinion began its analysis of preemption by noting the same proposition cited by the State: "Outside an Indian reservation, Indian citizens are subject to state tax laws, '[a]bsent express federal law to the contrary.'" 188 Wn.2d at 60 (quoting *Mescalero Apache Tribe*, 411 U.S. at 148); State's Motion at 3-4. The *Cougar Den II* Court referred to the "incidence" of a tax, noting it is a question of state law. 586 U.S. at 357. The Court analyzed in detail how the importation tax functioned and where and on whom its incidence fell. *Id.* at 357-59. "The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of the tax . . ." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 132 L.Ed.2d 400 (1995). The *Cougar Den II* Court also noted that states may amend laws to shift legal incidence of a tax if they do not burden treaty-protected rights in doing so. 586 U.S. at 359; *see also Chickasaw Nation*, 515 U.S. at 451. Cougar Den even cites many of the same principles and cases. *See, e.g.,* Cross-Motion/Response at 12, 15. Without a substantive argument, Cougar Den repeatedly claims that the State asks the wrong questions and misstates or ignores the law or tries to relitigate previously decided issues. But the State does not challenge the wisdom of *Cougar Den I* or *II*. Instead, the State is applying those precedents to a different context and a different state law. The State's arguments are not based on dissenting opinions, Cross-Motion/Response at 13, except to the extent the State highlights the retail sales tax example in Chief Justice Roberts's dissent of an off-reservation purchase of a mink coat with which a Yakama member travels not triggering preemption—which every Justice agreed with, and Cougar Den agreed with in the previous litigation, and Cougar Den now completely ignores.

3. *Cree v. Waterbury*, *Yakama Indian Nation v. Flores*, *Cree v. Flores*, and *United States v. Smiskin* are Distinguishable; and *King Mountain Tobacco Co., Inc. v. McKenna*, Which Distinguishes Those Precedents, Supports the State

Not only do *Cougar Den I* and *II* support the State's position and not Cougar Den's concerning Treaty preemption in this case, but cases other than *Cougar Den I* and *II* do, too.

Three related cases addressed whether the Yakama Treaty right to travel protected Yakama members from citation for nonpayment of state licensing and permitting fees when driving logging trucks on public highways to bring goods to market. *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (1997); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Those cases ultimately found preemption, as the licensing and permitting fees and registration requirements "indirectly exact[ed] such fees on Indian-owned trucks when hauling tribal goods to market." *Yakama Indian Nation*, 955 F. Supp. at 1249. The state laws and actions involved burdens on Yakama activities that *required* travel on public highways. Trucks operating on roads needed to be registered, with an accompanying registration fee that varied based on gross weight. *Cree I*, 78 F.3d at 1402. The individual plaintiffs were Yakama tribal members who were issued traffic citations—*while traveling on public highways*—for failing to pay licensing fees and to obtain truck permits. *Id.* In this context the Treaty right preempted the registration and permit fees that, if not paid, subjected Yakamas to citation while traveling to market with tribal goods. *Yakama Indian Nation*, 955 F. Supp. at 1249. It is in this manner that the registration and permit fees *indirectly* burdened the Yakamas' Treaty right to travel; if they were not paid then the Yakamas risked citation while traveling on the highway. *Id.* The cases tie the analysis to the exercise of the Treaty right, and do not support preemption of taxes or fees distinct from travel on public highways. *See Cree II*, 157 F.3d at 769 ("the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*" (emphasis added), i.e., travel).

A comparison between cases that have found preemption and those that have not is helpful. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the Ninth Circuit Court upheld the dismissal of an indictment charging two Yakama tribal members with failure to notify the state about transporting unstamped cigarettes as required by state law. The notification requirement was a "restriction" and "condition" on the exercise of the Treaty right to travel and thus preempted. *Id.* at 1266.

In contrast, where the state law in question does not require travel on public highways, the Treaty right to travel does not apply. In *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), the court considered a challenge by a Yakama-member owned company and the Yakama Nation for declaratory and injunctive relief from a Washington escrow statute that required tobacco sellers to contribute to cover health care costs relating to use of tobacco products. *Id.* at 990. King Mountain, which manufactures tobacco products, initially complied with the escrow statute but then sued to contest its obligation. *Id.* at 992. King Mountain contended that Article III of the Yakama Treaty of 1855, which reserves the right to travel, prohibits "imposition of economic restrictions or pre-conditions on the Yakama people's Treaty right to engage in the trade of tobacco products." *Id.* at 997. The Ninth Circuit disagreed. Distinguishing the *Cree* cases and *Smiskin*, where the laws indirectly and directly burdened the exercise of travel rights, the court held: "[T]here is no right to trade in the Yakama Treaty." *Id.* at 998. Since a flat fee for each qualifying unit of tobacco sold did not turn on travel, the Treaty right to travel did not preempt the escrow statute. *Id.*

Tellingly, Cougar Den fails in its Cross-Motion/Response to cite *King Mountain* or to acknowledge the proposition it supports.

In considering the validity of the importation tax, the *Cougar Den I* Court recognized the similarity between the *Smiskin* facts and the case before it, noting that in both instances travel on the public highways was required to trigger the application of the state law. *Cougar Den I*, 188 Wn.2d at 64-69. The Court also recognized the critical distinction between *Smiskin* and *Cougar Den I*, on the one hand, and *King Mountain*, on the other, stating: "The difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue. In *King Mountain*, the court held that under the facts that 'there is no right to trade in the Yakama Treaty.' [internal citation omitted]. Where trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." *Cougar Den I*, 188 Wn.2d at 67.

The rack removal tax at issue here likewise does not involve travel on the public highways and requires no travel as a condition precedent for its application. Unlike the activities at issue in *Cree I*, *Yakama Indian Nation*, *Cree II*, *Smiskin*, and *Cougar Den I* and *II*, the removal of fuel from a Washington terminal rack does not involve travel on public highways as much as

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

an inch. In fact, it is impossible to remove fuel from stationary Washington terminal racks while traveling on the public highway. Like *King Mountain*, the tax at issue applies without need for any travel. The Treaty right to travel is not implicated. There is no separate Treaty right to trade. *King Mountain*, 786 F.3d at 998. No case prevents the State from imposing economic burdens on trade prior to travel on the public highways.

Cougar Den asserts that "the Department's belief [is] that its fuel distribution to Indian country is not treaty protected activity." Cross-Motion/Response at 17. Cougar Den fails to grasp an important distinction and mischaracterizes the Department's position. Rather, the State contends the Treaty of 1855 does not preempt the rack removal tax, which does not infringe exercise of their right to travel and *precedes* their distribution activity. Indeed, Cougar Den's distribution activity, in which they are exercising their right to travel, is treaty-protected, and any laws that require them to give notice before that travel (*Smiskin*) or pay registration or weight fees for that travel (*Cree I/Yakama Indian Nation/Cree II*), or taxes on fuel importation—which is itself travel on a public highway (*Cougar Den I* and *II*), or other charges upon or for the travel itself, would be preempted. For these distribution activities, the Yakamas do possess greater rights than non-Indians, who need to pay such state law charges. The State does not argue that the Yakamas' Treaty right is "reduced to a narrow right to travel the roads and nothing more." Cross-Motion/Response at 16. Yet, critically, no authority supports that the Yakama Treaty of 1855 preempts an off-reservation imposition of a tax on a good with which a Yakama member later travels. In such a scenario, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe*, 411 U.S. at 148-49. The rack removal tax is such a valid law.

D. The Rack Removal Tax is Not Preempted Just Because Those Revenues Are Used to Maintain Highways

Cougar Den next argues that revenues from state fuel taxes are used for highway purposes and for this "fundamental reason" the tax is preempted because the "Treaty of 1855 reserves the right of the Yakama people to travel without paying for the use or maintenance of public highways." Cross-Motion/Response at 29. There are many problems with this argument, the most obvious being that if the fuel tax was preempted for that reason then *Cougar Den I* and *II* would read very differently[9] as they would have invalidated the tax on that ground, instead of analyzing in detail the operation of the state law and its relationship to the exercise of reserved Treaty rights. Instead, it is that relationship that must be examined. The issue is whether the tax burdens the exercise of the right to travel, not how the funds are spent.[10]

Cougar Den's reliance on *Yakama Indian Nation* is misplaced. Cross-Motion/Response at 31. In *Yakama Indian Nation,* the court noted that the fees imposed for truck registration, licensing, and log tolerance permits were preempted because they indirectly burdened the exercise of the treaty right to travel. 955 F. Supp. at 1249. Preemption was not because the funds were used primarily for highway purposes, which fact the court noted. *Id.* at 1233. Instead of analyzing fund use as a basis for preemption, as Cougar Den suggests, the court analyzed whether—"*notwithstanding* the Yakamas' Treaty travel right," that the funds are allocated for highway preservation and maintenance makes the charges "*permissible*." *Id.* at 1255 (emphasis added). The inquiry was whether the laws could be *saved* from preemption for a conservation or regulatory purpose, in effect aiding the ability of the Yakama to exercise their Treaty right

---

[9] *Cougar Den I* and *II* attached no particular significance to the fact that the importation tax was on motor vehicle fuel as opposed to any other good. *See Cougar Den II*, 586 U.S. at 378, n. 1 (C.J. Roberts, dissenting) ("There is something of an optical illusion in this case that may subtly distort analysis. It comes from the fact that the tax here happens to be on motor fuel. There is no claim, however, that the tax inhibits the treaty right to travel because of the link between motor fuel and highway travel. The question presented must be analyzed as if the tax were imposed on goods of any sort.").

[10] Basing preemption on funding alone would be unworkable and have no limit, in any event, because money is fungible, and thus taxes on activities that do not burden exercise of Treaty rights could ultimately result in that money being spent on use and maintenance of public highways. Further, highway purposes are funded by many sources besides state fuel or other taxes.

to travel. *See id.* at 1255-56. Thus, Cougar Den's argument is backward; the court examined preemption based on whether the state law burdened the exercise of the Treaty right to travel and did *not* find it based on how funds were spent. The *Yakama Indian Nation* court declined to save the laws in question, as the "regulatory purpose of these statutes—to discourage overweight travel on the highways—can be accomplished without the imposition of these fees," and the record did not suggest the charges were "'indispensable' to the preservation of the highways." *Id.* at 1256. "Therefore, the fact that the state uses such fees to maintain highways does not overcome the Yakamas' retained travel right." *Id.* But the court held that the Yakamas "must comply with state regulations designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right to travel." *Id.* at 1267 (Finding 84). While the court found that overweight fees on trucks are not indispensable to the preservation of the highways, here, instead, fuel taxes are a significant source of revenue, needed for highway maintenance—in turn supporting the Yakamas' exercise of travel rights and roadway services vital for all State residents.

Smiskin also recognized an exception to Treaty right preemption in the context of regulatory laws, referring to this as a "narrow exception to the inviolability of treaty rights." 487 F.3d at 1269. In the context of discussing regulatory laws that can be applied to the Yakama even in the exercise of their treaty rights, the Yakama Nation explained as amicus in *Smiskin*: "the Yakama Nation and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and *adequate public infrastructure*." *Id.* at 1271 (emphasis added). Many uses of funds for highway purposes under Wash. Const. art. II, Sec. 40, are purposes that promote public health and safety, ensure adequate public infrastructure, and benefit the Yakamas' exercise of travel rights. Those purposes include: "(a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets; (b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street[.] . . . ." Wash. Const. art. II, Sec. 40.

Cougar Den tries to recast the rack removal tax as a roadway use tax, relying on quotations by one lawmaker in a recent news article outside the administrative record. Cross-Motion/Response at 29-30. The argument is unavailing, as that is not how RCW 82.38.030(13)(a) operates. The law taxes fuel suppliers who remove fuel at the rack, as explained above in Section B, describing the Department's, federal, other state department, and the Washington State Supreme Court's interpretations, and statutory canons of construction.

Cougar Den's attempt to avoid fuel taxes simply because of their earmarked nature must be rejected as unsupported. No case has ever declared a law preempted by the Yakama Treaty of 1855 on this basis. Preemption turns upon whether a state law burdens exercise of a Treaty right, not how revenues are spent.

E. The Fact that the Fuel Tax Contains Exemptions for Certain Deliveries Does Not Convert the Fuel Tax Nor Reporting Requirements Into Burdens on Travel, Because the Rack Removal Tax is Imposed At-the-Rack and Exemption is a Separate Matter from Imposition

Cougar Den argues that it withdrew fuel at the rack "without incurring liability," noting that some fuel was exempted because it was sold to other states and claiming that "where Cougar Den distributes the fuel is determinative—this is, the movement and destination of the fuel." Cross-Motion/Response at 24. Cougar Den is wrong. This same misunderstanding is reflected in their argument: "The tax may only be invoked when Cougar Den attempts to do something **taxable** with the fuel. Here, that purportedly taxable activity is the transportation of fuel from the terminal market to a retail market in Indian Country." Cross-Motion/Response at

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

28 (emphasis in original). The destination of the fuel is not the basis for the Department's assessment, as Cougar Den claims. Instead, by the plain language of RCW 82.38.030(13)(a), "*Taxes are imposed when*: (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack . . . ." (Emphasis added.) The imposition of taxes—the issue for preemption—is not dependent on where the fuel is delivered. If a tax is preempted, the tax is not validly imposed. *See Cougar Den I*, 188 Wn.2d at 67 (preempting tax "imposed at the border"). The Department's assessment is based on the taxable activity of Cougar Den's removal of fuel at-the-rack, not its later travel to markets in Indian country or elsewhere in Washington. Like a customer at a gas station, who is liable for the cost of the fuel at the time it leaves the pump nozzle, whether they place it in their car tank, in a container for transport, or spill it on the ground, or like a retail sales purchaser at a cash register, Cougar Den is liable for the rack removal tax the moment the fuel crosses the rack and thus leaves the bulk transfer-terminal system, not when they drive away from the terminal grounds.

While it is true that some fuel taxes are later exempted based on where they are delivered, that exemption is a separate matter from when the tax is imposed. Exemptions are contained in RCW 82.38.080, a separate statute from imposition, showing the concepts differ.

All tax exemptions only apply after the tax is fully applicable. *See Petroleum NAV Co. v. King County*, 1 Wn.2d 489, 494, 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") (emphasis added). That is, an exemption from a tax can only apply if the tax already applies. Thus, it is not the case that Cougar Den cannot know if the tax applies until they transport the fuel and find where it is ultimately delivered, including potentially to exempt locations or for exempt purposes, like racing. The rack removal tax applies as the fuel crosses the terminal rack. Where the fuel is transported has no bearing on whether the rack removal tax is imposed.

For that same reason, Cougar Den's obligation to report fuel removed at the rack is not preempted. Cougar Den's obligation to report fuel removed is triggered at the rack—not when the fuel is delivered. Imposition of the rack removal tax does not violate the Treaty, so Cougar Den may be required to report its removals. It is of no moment that *Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021), did not involve a Treaty right as argued in the Cross-Motion/Response at 32-33. There is no Treaty right here either. In the absence of a Treaty violation, reporting requirements can be lawfully applied to tribal members as reasonable regulatory burdens to assist with enforcement of valid state taxes. *See Big Sandy*, 1 F.4th at 731 (discussing *Colville*, 447 U.S. at 160 (which placed burden on Tribe to show the challenged regulations "are not reasonably necessary as a means of preventing fraudulent transactions")).

A tax exemption presumes the valid imposition of the tax, but removes the requirement to pay the tax, where the criteria for exemption are met. *See Petroleum NAV Co.*, 1 Wn.2d at 494. Delivering for exempt purposes or to exempt locations does reduce the amount Cougar Den needs to pay when they later file a report by the 25th day of the following month. *See* RCW 82.38.150. Cougar Den can avail this later reporting only as a licensed supplier. *Id.*

Indeed, as the State argued in its Motion at 15-16, which Cougar Den did not address in its Cross-Motion/Response, by voluntarily seeking its fuel supplier license, Cougar Den recognized that the rack removal tax is imposed at the rack, and nowhere else. For, without a fuel supplier license, Cougar Den would be free to purchase fuel from suppliers just *below the rack* and take it wherever they wanted without incurring the legal incidence of the tax—which would have been imposed on the removing licensed supplier. The tax is imposed on only the first taxable event and upon the first taxable person. RCW 82.38.031. For fuel withdrawn at the rack by another licensed supplier and then purchased without a license by Cougar Den, there would be no tax for leaving the terminal grounds with the fuel. That is never when the tax attaches—in Washington nor any jurisdiction. The rack removal tax is universally imposed as the fuel is dispensed over the rack. But in so purchasing fuel without a supplier license, Cougar Den would certainly end up paying the economic cost of the tax, because the licensed supplier would pass it along in its resale price to Cougar Den. Only by obtaining and maintaining a fuel supplier license could Cougar Den avail itself of the privilege of delaying payment of the rack removal tax, which it has unlawfully refused to pay.

In claiming Treaty preemption of reporting, Cross-Motion/Response at 31-34, Cougar Den in essence alleges that their *Treaty right* is burdened by reporting because they obtained a *state license* that enables them to delay reporting and subtract from the full taxes imposed the amounts exempted. *Cf.* RCW 82.38.150. There is no Treaty right to reap advantages of a state license. Rather, Cougar Den's attempt to characterize the delivery destination of markets in Indian country as a factor supporting preemption is misguided and unavailing, as it misconstrues the operation of the rack removal tax and exemption statutes.

F. The Department Director Properly Revoked Cougar Den's Fuel Supplier License Because Cougar Den Did Not Report Correctly

Having shown above that the Department properly assessed the rack removal tax to Cougar Den, and that imposition of that tax and reporting obligation on it is not preempted by the Treaty of 1855, the Final Order of the Director properly revoked Cougar Den's fuel supplier license because they did not pay rack removal taxes due and did not report correctly. The Department advised Cougar Den in 2019 that Schedule 10G "is used to report fuel sold to tax-exempt entities." AR 258. The Department told Cougar Den to explain why purchasers listed on their Schedule 10G report were exempt. *Id.* After the *Cougar Den I* and *II* decisions, it instructed this was permitted for imported fuel. *Id.* ("To clarify how fuel imported to Washington from another jurisdiction is reported: . . . Schedule 10G is used for imported fuel delivered to Yakama Tribal stations."); *see also* AR 1084 ("As 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 the state laws that apply to all licensed fuel suppliers."). The Department repeatedly communicated with Cougar Den about need for explanation of their reported exemptions, and Cougar Den relied only on an allegation that their Treaty right preempted. The Department never permitted Cougar Den to report removals of fuel from Washington terminal racks on Schedule 10G. *See* AR 1448; AR 1073-75, 1083-84, 1086, 1088, 1090, 1092-93, 1094-1100. Cougar Den did not, before the assessment and administrative appeals, try to seek declaratory or injunctive relief concerning their allegations like King Mountain Tobacco Co. attempted. *King Mountain*, 768 F.3d at 990.

In the administrative appeal, the Director in the Final Order properly affirmed the July 2021 Notice of Assessment *and Intent to Revoke Cougar Den's Fuel Supplier License*. AR 1456. Cougar Den, as a licensed supplier, needed to comply with all relevant laws, including tax payment requirements and reporting obligations under RCW 82.38.150, showing information the Department reasonably requires for proper administration and enforcement. The Department may suspend a license upon violation of "a statute or administrative rule regulating fuel taxation or distribution[.]" RCW 82.38.120(1)(h). Cougar Den did not pay the rack removal tax nor report as required because it misreported rack removals as tax-exempt and did not provide sufficient documentation to establish claimed exemptions. AR 1456; AR 1083-1100. The Director's Final Order did not err in suspending Cougar Den's supplier license on these bases.

G. The Director Properly Recognized the Department Has No Authority to Declare State Law Preempted; Doing So Would Violate the Separation of Powers

Whether a Treaty between the United States and a Tribe preempts state law is a question of constitutional law. *See Larson v. Yoon*, 187 Wn. App. 508, 515, 351 P.3d 167 (2015) (assessing whether state law was consistent with Hague Convention). It is black letter law that the executive branch—i.e., the Department—cannot determine the constitutionality of a law—i.e., cannot determine that a state law is preempted by federal law. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power."); *see also Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (preemption is a function of the Supremacy Clause of the United States Constitution).

Cougar Den continues to ignore this plain legal principle in arguing that the Department committed a prejudicial procedural error when the Director did not consider whether the Treaty of 1855 preempted the fuel tax. It is wrong. The Department properly limited its scope of review to the issues that fell within its authority to decide: the meaning and application of state law.

1. The Department Properly Declined to Determine if State Law is Preempted by the Treaty of 1855

In its Final Order, the Department determined that, as part of the executive branch, it lacked "the authority or jurisdiction to determine whether the laws it administers are constitutional; only the courts have that power," and cited several cases, including *Swanson Hay Co. v. State Emp. Sec. Dep't*, 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017) and *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978), in support.

That was entirely correct. As the Department has argued throughout this case, including to the Administrative Law Judge and the Director upon review, the Department could not determine that a statute passed by our Legislature was preempted as a function of federal law; that is left to the Courts to the decide. AR 1065, 1196, 1308-10, 1377-79. However, once the executive branch has exercised all the authority it has, the APA provides a forum to consider preemption issues on judicial review, a structure that provides all the process necessary. *See* RCW 34.05.570(3)(a); *see also Wash. Trucking Assocs. v. Emp't Sec. Dep't*, 188 Wn.2d 198, 221,

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

393 P.3d 761 (2017) ("because the Carriers may raise any constitutional claims on judicial review, Washington law provides an adequate remedy").

Cougar Den misrepresents the holding of *Harrington v. Spokane Cty.*, 128 Wn. App. 202, 114 P.3d 1233 (2005), to argue that the Department had the authority to determine that this tax was pre-empted "as applied." Cross-Motion/Response at 38. Yet, *Harrington* supports the Department, as that court *never* held that an administrative tribunal could decide an "as-applied" constitutional challenge. Rather, the *Harrington* court addressed whether exhaustion of administrative remedies was necessary before bringing an as-applied constitutional challenges in the Superior Court. Thus, the *Harrington* court distinguished *Prisk v. City of Poulsbo*, 46 Wn. App. 793, 732 P.2d 1013 (1987), which held exhaustion was not required when considering a facial constitutional challenge, because the specific facts are not material in a facial challenge, while they are required in an as-applied challenge. *Harrington*, 128 Wn. App. at 210. Cougar Den omits the critical sentence in *Harrington* which distinguishes *Prisk*: "Administrative review is, therefore, required to develop the facts necessary to adjudicate this 'as applied' constitutional challenge." *Harrington*, 128 Wn. App. at 210. As the *Prisk* court said: "Where the issue raised is the constitutionality of the very law sought to be enforced, exhaustion is unnecessary. This is because the administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power." 46 Wn. App. at 798 (*citing Bare v. Gorton,* 84 Wn.2d 380, 526 P.2d 379 (1974)).

In addition to relying on a misstatement of the holding in *Harrington*, Cougar Den ignores the clear case law limiting the scope of agency review—case law that the Department has cited repeatedly throughout this litigation. That silence speaks volumes. The basic principle that an administrative body cannot declare the law it administers invalid, as only courts have that power, has been reaffirmed repeatedly by Washington courts. *Swanson Hay Co.*, 1 Wn. App.2d at 188 ("[T]he 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.") (internal citations omitted); *Carr v. State ex rel Wash. State Liquor Control Bd.*, 188 Wn. App. 212, 226, 352 P.3d 849 (2015); *Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-87, 113 P.3d 494 (2005) (concluding only the judiciary may resolve constitutional questions, including as applied to a party).

Without addressing the overwhelming case law against it, Cougar Den turns to two arguments, both of which fail. First, Cougar Den—relying on the text of California's Administrative Procedure Act—argues that because Washington's APA does not contain an express prohibition on the consideration of constitutional claims by administrative tribunals, no such prohibition exists. Cross-Motion/Response at 37. Second, Cougar Den argues that the because the sole issue presented in a prehearing conference order was whether the Treaty of 1855 preempts the notice of assessment and intent to revoke, the Department was required to consider the Treaty argument as part of the administrative process. Cross-Motion/Response at 36.

Both arguments fail for the same reason: they ignore the inherent limitations on administrative agencies, as repeatedly recognized by Washington courts. Because preemption of a state law (the fuel tax statute) by federal law is a product of the Supremacy Clause, any federal preemption claim is necessarily a constitutional claim that a state law should be declared invalid. *See Stevedoring Servs. of Am., Inc.*, 129 Wn.2d at 23. Put another way, "an administrative agency does not have the authority to decide the validity of the law under which it operates[.];" *Higgins v. Salewsky*, 17 Wn. App. 207, 213, 562 P.2d 655 (1977).

Cougar Den's reliance on the statement of issues is similarly unavailing. The only basis Cougar Den ever presented for challenging the April 2021 assessment was that it was preempted by the right to travel in the Treaty of 1855. AR 246-52. Thus, the only issue set forth in the Prehearing Conference Order was whether "Cougar Den Inc. is exempt from the [Notice of Assessment] under the Treaty of 1855." AR 269. But neither party agreed that the Department had the authority to determine whether a state law should be set aside. The Department repeatedly argued a lack of this authority, AR 1065, 1196, 1308-10, 1377-79, and Cougar Den also argues "[t]he Department of Licensing has no specialized knowledge in determining whether the Yakama Treaty of 1855 preempts state law," Cross-Motion/Response at 14, n. 2. More importantly, the parties could not agree to grant the Department authority it does not have. State agencies are creatures of the executive branch. Title 43 RCW. In exercising their administrative adjudicative roles, they remain organs of the executive branch. The executive branch may not determine that a properly enacted state law should be set aside, in any case. Only the *courts* may do so. The Department properly exercised the full scope of its authority; and the Department Director considering Cougar Den's Treaty claims would have exceeded the Director's authority.

2. The APA Provides for the Courts to Determine Constitutional Questions

Because an executive branch agency the Department could not determine the validity of its own law, the APA provides a forum to consider preemption issues on judicial review, a structure that provides all the process necessary. *See* RCW 34.05.570(3)(a); *see also*, *Wash. Trucking Assocs.*, 188 Wn.2d at 221 ("because the Carriers may raise any constitutional claims on judicial review, Washington law provides an adequate remedy.").

Contrary to Cougar Den's mischaracterization, the State has never asserted that "the administrative process is inadequate to resolve treaty claims." Cross-Motion/Response at 39. The administrative tribunal cannot rule on Treaty preemption, but the "administrative process" of the APA includes judicial review in court, Chapter 34.05 RCW, Part V, and courts can rule on Treaty preemption issues. The State argues here and has consistently argued (1) that the APA is the exclusive process for challenging the tax assessment and related license suspension based on failure to report and pay taxes on rack removals of fuel, and (2) that constitutional claims—including Treaty preemption—are heard under the APA review in the *courts*. *See* Resps.' Mot. to

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

Dismiss at 11; Resps.' Reply In Support of Motion to Dismiss at 7; Resps.' Mot. Dismiss Amended Pet. at 11-13; Resps.' Reply in Support of Motion Dismiss Amended Pet. at 7-8.

Cougar Den identified its constitutional challenge to the Department's assessment during the administrative proceedings and it was provided the opportunity to develop any factual record necessary to support its constitutional claims. *See Harrington*, 128 Wn. App. at 210 (holding that exhaustion of administrative proceedings was necessary to develop factual basis for as-applied constitutional challenge, even if only courts were permitted to determine constitutional claim). And then Cougar Den filed a petition for judicial review, under which this Court can now determine if Washington's fuel tax statute is preempted by the Treaty of 1855.

Saving preemption for this Court's review is the appropriate process under the APA and ensures that the proper branch of government is determining constitutional issues. The APA—and the Director's procedures in this case—provide all the process Cougar Den is due. That is why in *Washington Trucking*, the Washington State Supreme Court specifically held that APA review of the tax assessment constituted an adequate remedy. *Id.* at 221-23.

Nonsensically, Cougar Den concludes by arguing that the State is somehow offering "to seek resolution in tribal court." Cross-Motion/Response at 39. The State never so offered, and the Yakama Nation Tribal Court does not have the authority to determine that a state law is preempted by federal law.

Cougar Den agreed to follow Washington's rules of administrative procedure when it voluntarily sought a Washington State Fuel Supplier license. Under those rules of procedure, administrative agencies exercise the limited authority granted to them under the Constitution and APA. Questions of constitutional law—such as Treaty preemption—are reserved for the courts to decide on review of agency decisions. The Director's Final Order complied with all procedural requirements and did not prejudice Cougar Den in any way.

H. Substantial Evidence Supports the Director's Factual Findings

Finally, Cougar Den, for the first time, asserts that the Final Order contains factual findings not supported by substantial evidence. Cross-Motion/Response at 8. This is not a serious argument. "Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the finding's truth." *Gibson v. Emp. Sec. Dep't*, 185 Wn. App. 42, 51, 340 P.3d 882 (2014). "A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Evidentiary standards are relaxed in the APA. Evidence, including hearsay, 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." RCW 34.05.452(1).

Cougar Den assigns error to three factual findings: "That structures called 'racks' transfer fuel out of the terminal into fuel tanks like tanker trucks;" "that a tanker truck receives fuel at the rack;" and "that racks transfer fuel out of the terminal." Cross-Motion/Response at 9. Each of these factual findings is fully supported by evidence in the record and should be affirmed.

As to Cougar Den's first claim of error—that "structures called 'racks' transfer fuel out of the terminal into fuel tanks like tanker trucks"—the record is replete with support for this finding. In the declaration of Wesley Marks, "Terminals use structures called racks to transfer fuel out of the terminal and into fuel tanks like tanker trucks . . . ." AR 1072. The Washington Fuel Tax Compliance Manual defines a "rack" as "a dock, platform, or open bay with metered pipes, hoses, or both, that is used to dispense fuel from a refinery or terminal into a truck, railcar, marine vessel, or aircraft." AR 1168. Cougar Den's other assignments of error are similarly misguided. Cougar Den challenges that the Director found that, "a tanker truck receives fuel at the rack." But that is also supported by the uncontested evidence in the record. AR 1072. And, finally, the Director's finding that "racks transfer fuel out of the terminal," is also supported by uncontested evidence. AR 1072, 1168. In any event, Washington law supports these findings, as

RCW 82.38.020(27) defines a "rack" as "a mechanism for delivering fuel from a refinery *or terminal* into a truck . . . ." (emphasis added).

The Director's factual findings are supported by substantial evidence and must be upheld.

III. CONCLUSION

The Court should grant the State's motion for partial summary judgment, deny Cougar Den's cross-motion for partial summary judgment, and affirm the Final Order of the Director.

DATED this __23rd__ day of October, 2025.

NICHOLAS W. BROWN
Attorney General

/s/ Eric D. Peterson
ERIC D. PETERSON, WSBA # 35555
Senior Assistant Attorney General
MARSHA CHIEN, WSBA # 47020
Deputy Solicitor General
JONATHAN E. PITEL, WSBA #47516
LEO V. ROINILA, WSBA # 51622
Assistant Attorneys General
Attorneys for Washington State Department of Licensing and Marcus Glasper
E-mail: EricD.Peterson@atg.wa.gov
Jonathan.Pitel@atg.wa.gov
Marsha.Chien@atg.wa.gov
Leo Roinila@atg.wa.gov
LalOlyEf@atg.wa.gov

PROOF OF SERVICE

I, Dalberta B Faletogo, certify that I sent a copy of **State Respondents' Reply In Support of Motion for Partial Summary Judgment on Administrative Procedure Act Appeal/Response to Cougar Den's Cross-Motion for Partial Summary Judgment** for service on all parties or their counsel of record on the date below as follows:

Email Service per Agreement

STOKES LAWRENCE VELIKANJE MOORE & SHORE, P.S.
Mathew L. Harrington
Brendan V. Monahan
Marthy Hernandez
Jaime Cuevas, Jr.
Derek Red Arrow Frank
Rob Smith
Mathew.Harrington@stokeslaw.com, MLH@stokeslaw.com
Brendan.Monahan@stokeslaw.com, BVM@stokeslaw.com
Marthy.Hernandez@stokeslaw.com
Jr.Cuevas@stokeslaw.com
CougarDen@stokeslaw.com
Susan.Palmer@stokeslaw.com
DRedArrow@ktslaw.com
RRSmith@ktslaw.com
JBlack@ktslaw.com
jr@ramseycompanies.com

Judge's Copies via Legal Courier and Email

THE HONORABLE JARED BOSWELL
YAKIMA COUNTY SUPERIOR COURT ADMINISTRATORS' OFFICE
128 N 2ND ST, RM 314
YAKIMA, WA 98901-2639
Jared.A.Boswell@co.yakima.wa.us

Filed via eFile Washington with

SUPERIOR COURT CLERKS
YAKIMA COUNTY SUPERIOR COURT
128 N 2ND ST, RM 323
YAKIMA, WA 98901-2639

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

DATED this _23rd_ day of October 2025 at Olympia, WA.

DALBERTA B FALETOGO, Paralegal

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

Appendix H

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

COUGAR DEN, INC., Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF LICENSING, and MARCUS GLASPER, the Director of the Department of Licensing, Respondents.	)	No. 24-2-00109-39

TRANSCRIPTION OF PROCEEDINGS
FTR RECORDED MOTION HEARING
THE HONORABLE JARED BOSWELL

BE IT REMEMBERED that the above-mentioned cause came on for a motion hearing on November 24, 2025, before the Honorable Jared Boswell, Yakima County Superior Court, Yakima, Washington.

COUNSEL IN ATTENDANCE were Mr. Mathew Harrington, representing Petitioner; Mr. Eric D. Peterson, representing the Respondents.

Transcribed by: Jori L. Moore, CCR, RPR

removal at the rack, as we know it. And this clarifies as well as the state law clarifies in RCW 82.38.035(1) that it's the removing supplier that receives the fuel, you know, in that instance.

This is a special rule for this special, unique circumstance.

THE COURT: Anything else, Mr. Harrington?

MR. HARRINGTON: Well, just that I defer to our briefing on this. I think it makes clear that it's the -- yeah, it's the receiving supplier who then leaves terminal grounds who's going to be responsible for the tax. But I also question the relevance of the federal law we're talking about construing the state law.

Thank you.

(Court's ruling)

THE COURT: I had the opportunity of reviewing all the briefing the parties had presented. I had the opportunity of reviewing the cases that were cited, namely, Cougar Den I and II, which I am not going to cite for the record. I think that those are well-known cases and cited throughout the party's materials.

I guess what I'm really being asked on by both sides is to, I guess, either affirm or reject the Director's interpretation at the lower level. And then also to make a determination on whether or not the Treaty of 1855 preempts the taxation in the state of Washington.

Really, the Treaty rights that we're talking about is the right to travel. And in that right to travel is whether or not this law has been a burden on the right to travel being an issue as I think is articulated by the state.

And that's how this Court sees it as well, is that the right to travel has to be without burden. And that's what the rulings were in the initial Cougar Den rulings. And that's why, in those cases, the Supreme Court decided that preemption was appropriate.

Because in those, you have the importation tax that only kicked in when there was traveling on the road.

Here it's argued, and the Court agrees, that travel is not a part of the tax that the state of Washington is imposing on here.

I'm not -- so I guess I'm going to affirm the decision of the Director. I do find that it is proper.

The next question is whether or not to

preempt the law. And I can't find that preemption is appropriate here either. I deny the request to really step outside or expand the Treaty rights further than any court has done.

And so I'm going to affirm the Director and deny the request to preempt.

Mr. Peterson.

MR. PETERSON: I had submitted to the Court a proposed order. I had updated it in light of the subsequent filings and emailed a copy to counsel. I believe that the order is consistent with your other ruling and appropriate for entry.

THE COURT: Do you have a copy? I don't think I've seen one.

MR. PETERSON: I do have a copy. This updated copy was sent along with the state's statement of supplemental authority. So it would have been on Wednesday of last week.

THE COURT: Mr. Harrington.

MR. HARRINGTON: I don't see anything in terms of form to object to.

THE COURT: The only thing I -- anything else, Mr. Harrington?

MR. HARRINGTON: I think we will be considering expedited appeal under WAC 2.3D4 on a

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

I, Jori L. Moore, Certified Court Reporter in the State of Washington in and for the County of Yakima, do hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct: That I am the Official Certified Court Reporter who reported/transcribed the aforementioned proceedings; that the transcript is a true and correct record of the proceedings to the best of my ability, including any changes made by the trial judge reviewing the transcript; that I am in no way related to or employed by any party in this matter, nor any counsel in this matter; and I have no financial interest in the litigation.

/s/ Jori L. Moore

Jori L. Moore - CCR, RPR
Yakima County Superior Court - Rm. 311
128 N. 2nd Street
Yakima, WA 98901
Phone: (509) 574-2733
E-mail: jori.moore@co.yakima.wa.us

Appendix I

STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

COUGAR DEN INC., PETITIONER, V. STATE OF WASHINGTON, DEPARTMENT OF LICENSING, AND MARCUS GLASPER, THE DIRECTOR OF THE DEPARTMENT OF LICENSING, RESPONDENTS.	NO. 24-2-00109-39 DEPARTMENT'S REPLY IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS

I. INTRODUCTION

After nearly a year of litigation and only in its Response to the Department's *second* Motion to Dismiss has Cougar Den apparently formulated its "independent" claims, which do not appear in its Amended Petition. However, even accepting this latest formulation, Cougar Den's independent claims suffer the same fatal flaws which require dismissal. First, Cougar Den cannot simply "amend" its Petition for Judicial Review in a matter that has already been certified for review by the Court of Appeals. Second, both of Cougar Den's "independent" claims fail, as they are time-barred, fail to state a claim on which relief may be granted, are indistinguishable from the Petition for Review, and are barred by the doctrine of comity. Third, the relief Cougar Den seeks is also barred.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

Tellingly, while the Department has continuously sought the quickest means of review of Cougar Den's overarching claim—that the Treaty of 1855 permits it to remove fuel from the rack in Washington without paying any fuel tax—Cougar Den has continuously delayed that adjudication as it continues to benefit from the Court's order staying enforcement of the Final Order.

II. STATEMENT OF FACTS

While the Court is familiar with the underlying facts of this matter, it is important to clarify the administrative proceedings. On Wednesday, January 10, 2024, the Department of Licensing issued its Final Order in DOL No. 2021-0072337-01-PRFT, *In the matter of: Cougar Den, Inc.* In its Final Order, the Department found that Cougar Den was liable for taxes assessed based on its April 2021, fuel tax return, and revoked Cougar Den's state-issued fuel supplier license. Harrington Decl. ¶ 8; Ex. 4. As the Final Order was effective when entered, Cougar Den's fuel supplier license was revoked.

The following Monday, January 16, 2024, Cougar Den filed a Petition for Judicial Review, pursuant to chapter 34.05 RCW, in which it sought "review of the Final Order in the Matter of the Fuel Tax Assessment Issued to Cougar Den, OAH Docket No. 03-2022-DOL-001372, DOL, No. 2021-0072337-01-PRFT." Init. Pet. ¶ 5. Simultaneously, Cougar Den sought a stay of the effectiveness of the Final Order, pursuant to RCW 34.05.550(2). Mot. to Stay at 9. The Court granted Cougar Den's requested stay that same day, and Cougar Den continues to operate as a Washington licensed fuel supplier. Ord. Granting Mot. Stay.

This Court certified Cougar Den's Petition for Judicial Review to the Court of Appeals and later dismissed Cougar Den's alleged four "counterclaims." Ord. Transferring ALR; Ord. Granting Motion to Dismiss. Cougar Den now refiles an Amended Petition for Judicial Review and two independent claims.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

III. EVIDENCE RELIED UPON

The Department relies upon Cougar Den's Amended Petition for Judicial Review and Complaint for Declaratory Judgment, Injunctive Relief, and Damages, filed November 21, 2024, and pleadings previously filed with this Court.

IV. ARGUMENT

A. Cougar Den's Petition for Judicial Review is before the Court of Appeals; this Court Lacks Jurisdiction to Consider its Amended Petition

This Court should dismiss for lack of subject matter jurisdiction. Cougar Den seeks to assert new claims in an action that has already been certified for direct review by the Court of Appeals. Resp. at 18-20. Although Cougar Den correctly notes that the superior court has original jurisdiction over original actions, *see* RCW 2.08.010, Cougar Den has *never* filed an original action, nor could it do so except as specifically set forth in statute. RCW 82.38.205 (prohibiting injunctive relief or any "legal or equitable process… to prevent or enjoin the collection under this chapter of any tax or amount of tax required to be collected."); RCW 82.38.200 (providing requirements for original actions seeking recovery of taxes improperly collected).

Instead, Cougar Den properly filed a Petition for Judicial Review of the Department's Final Order, which is governed by the Administrative Procedure Act. RCW 82.38.300 ("Judicial review and appeals shall be governed by the Administrative Procedure Act, chapter 34.05 RCW"). On July 26, 2024, the Court ordered "that this case is certified for direct review by the Court of Appeals. . . ."

Having certified the case for transfer to the Court of Appeals, this Court is now an improper venue for this case. Washington Constitution, Article IV, Section 6 and its implementing statute confer original subject matter jurisdiction over cases challenging a tax's legality, but courts have expressly held "[t]hose claims do not include the superior court's original appellate jurisdiction in cases originating in agency actions governed by the APA." *See Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 359, 271 P.3d 268 (2012). In short, this Court lacks authority to preside over a subset of Cougar Den's newly submitted, self-styled "independent" claims. When this Court certified the petition for judicial review to the Court of Appeals, it lost all jurisdiction over this matter. *Cf. Coinbase, Inc. v. Bielski*, 599 U.S. 736, 741, 143 S. Ct. 1915, 216 L. Ed. 2d 671 (2023) ("[I]t 'makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.'")

B. Cougar Den's "Independent" Claims Must be Dismissed

As explained in the Department's Motion, both of Cougar Den's "independent" claims must be dismissed, for a multitude of reasons. These claims are not "independent" of the underlying Petition for Judicial Review, but rather assert the same legal issue that the Court of Appeals will consider when reviewing the Department's Final Order. Regardless, the claims are time barred, barred by the comity doctrine, and fail to state a claim on which relief may be granted. The Court should dismiss these claims.

1. Cougar Den's Newly Asserted APA Claims Are Time-Barred

In its Response to the Department's Motion to Dismiss, Cougar Den unambiguously asserts that its "independent claims" are made pursuant to the Administrative Procedure Act, specifically RCW 34.05.570(4). Resp. at 8. Even assuming these claims were "independent" of the underlying APA action (which they are not), they are now time barred.

When performing a review of an agency action under the APA, the superior court is of limited subject matter jurisdiction, and all statutory procedural requirements must be met before jurisdiction is properly invoked. *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 617, 902 P.2d 1247 (1995). This includes timeliness of the appeal. *Stewart v. State, Dep't of Emp. Sec.*, 191 Wn.2d 42, 52-53, 419 P.3d 838 (2018). And if the court lacks jurisdiction, the appeal must be dismissed. *Id.*

Here, Cougar Den's claims are time-barred. Cougar Den's allegations underlying its "independent" claims stem from the Department's actions prior to this Court's Stay, issued on January 16, 2024. But, under RCW 34.05.542(3), "A petition for judicial review of agency action

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action. . . ." It is undisputed that Cougar Den never mentioned any challenge to "other agency action" until it filed its Response to the Department's initial Motion to Dismiss on October 21, 2024, more than 10 months after the alleged conduct.

Cougar Den incorrectly asserts that "Notice Pleading" is all that is required to evade this time bar. Resp. at 21. That is neither correct nor relevant here. The APA is a statutory scheme, and as a statutory scheme, the APA requires strict compliance with its jurisdictional requirements. *See Stewart v. Employment Security Dep't*, 191 Wn.2d 42, 53, 419 P.3d 88 (2018) ("As we have previously held, compliance with statutory time limits for perfecting appeals from agency decisions is necessary "in order to invoke the jurisdiction of the superior court."" *citing Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 198, 796 P.2d 412 (1990).) "We have also held that the test for compliance is strict because "[i]t is impossible to substantially comply with a statutory time limit. . . . It is either complied with or it is not." *Id.* citing *City of Seattle*, 116 Wn.2d at 928-29, 809 P.2d 1377.

Even if only notice pleading were required, Cougar Den failed to meet that less-demanding standard. Cougar Den's initial Petition was clear in its intent and the nature of its APA claims: "This Petition is for review of the Final Order in the Matter of the Fuel Tax Assessment Issued to Cougar Den, OAH Docket No. 03-2022-DOL-001372, DOL, No. 2021-0072337-01-PRFT." Init. Pet. ¶ 5. If that was insufficiently clear, Cougar Den left no question of its intent, "Cougar Den now seeks review of the Final Order." *Id.* ¶ 23. In contrast to Cougar Den's repeated, clear intent to bring an APA appeal of the Final Order, only a single sentence in the Initial Petition makes any reference to actions taken after the issuance of the Final Order, "The Department has asserted that on the next day it purportedly revoked Cougar Den's supplier license." *Id.* ¶ 22. In fact, it was the Final Order that revoked Cougar Den's fuel supplier license, as the Final Order constitutes the Final Action of the Department. Harrington Decl. ¶ 8; Ex. 5 13,

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

("The Department's Informal Hearing Determination dated November 23, 2023, which upheld the July 13, 2021 Notice of Assessment and Intent to Revoke Cougar Den's Fuel Supplier license, is affirmed."); RCW 34.05.464, .473.

Any claim that Cougar Den's Initial Petition included discussion of "actions taken by the Department beyond the Final Order, including actions occurring after the Final Order," is unsupported. Resp. at 21. It was only in a later attempt to preserve its "independent claims," that Cougar Den asserted it was seeking to challenge any "other agency action," under RCW 34.05.570(4). *See* Resp. Motion to Dismiss (filed October 21, 2024). And it was not until its most recent Response that Cougar Den even passingly articulated it was attempting to challenge the Department's actions between the issuance of the Final Order and this Court's Stay.

But the only factual assertions the Amended Petition makes about the period *after* the Final Order issued is that the Department communicated with third parties about (1) the lawful impact of the Final Order prior to the stay (Cougar Den's license was revoked) and (2) the Department's relationship *with those third parties*. Amend. Pet. ¶¶ 116-17. And still those actions are directly tied to the Director's Final Order. Amend. Pet. ¶¶ 114, 120 ("On or about January 11, 2024—immediately after the Director issued it Final Order—the Department revoked Cougar Den's fuel supplier license;" and "The Department took these actions. . . without providing Cougar Den a hearing or pre-deprivation opportunity for a hearing regarding its Treaty rights…."). There is no plausible manner in which Cougar Den brought any claim alleging "other agency action," within the thirty days statutorily required. *See also* RCW 34.05.546 (requiring petitions identify "the agency action at issue").

Any attempt to bring a claim under RCW 34.05.570(4) for the Department's actions between January 10 and January 16, 2024, is time barred, and Cougar Den's "independent" claims must be dismissed.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

2. Cougar Den Fails to State a Claim for a "Due Process" Violation

Cougar Den's "due process" claim remains unclear. In this latest form, Cougar Den's "due process" claim appears to be either (1) that the Department violated due process when it failed to consider Cougar Den's treaty claims at the administrative level or (2) that the Department was required to ensure that Cougar Den received a judicial hearing on its Treaty defense before enforcing the Final Order and communicating the status of Cougar Den's state-issued license to other parties.

This purported claim fails for multiple reasons. First, as explained at length by the Department, it is black-letter law that an executive branch agency cannot weigh the constitutionality of a statute, including by finding that a Washington statute is preempted by federal law. The Department did not violate due process by failing to exercise authority it does not have. Second, the Department could not violate Cougar Den's due process by complying with the express statutory scheme set forth in the APA. Third, Cougar Den cannot support a due process claim based on the Department's alleged communications with third parties regarding intergovernmental agreements to which Cougar Den is not a party, and in which it has no interest.

Fundamentally, Cougar Den cannot state a claim for a violation of due process based on the Department's compliance with the statutory requirements of the APA, and the Department's proper recognition that it lacks authority to determine the constitutionality of statutes.

a. There is no question the Department lacks authority to declare statutes preempted and could not consider Cougar Den's treaty arguments in administrative proceedings

As the Department has repeatedly explained, as an executive branch agency, it lacks any authority to determine that a state law is constitutionally preempted—that authority is reserved to the courts. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) ("An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power."). Cougar Den confusingly asserts that it is not challenging the constitutionality of the fuel tax, only whether the fuel tax is preempted by operation of federal law. *See e.g.*,

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

Amend. Pet. ¶ 103 ("the Final Order should have considered the question of preemption and that the April 2021 Assessment is *preempted by federal law*."). But whether a treaty between the United States and a tribe preempts state law is a question of constitutional law because it invokes the Supremacy Clause of the United States Constitution. *See Larson v. Yoon*, 187 Wn. App. 508 (2015); *see also Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (observing preemption is a function of the Supremacy Clause of the United States Constitution).

Despite this clear and controlling law, Cougar Den continues to argue that the Department had the authority to determine that a Washington statute is preempted by federal law (i.e. make a constitutional determination). Resp. at 6 n.2. That is simply incorrect, and the Department properly exercised only the authority the executive branch is granted under our separation of powers and left to the courts the constitutional question of preemption.

b. The APA provides all necessary due process and the Department expressly followed the provisions of the APA

Just as the Department could not violate Cougar Den's due process rights by staying within its own, limited authority, it could not violate Cougar Den's due process rights by expressly complying with the various provisions of the APA. On January 10, 2024, the Department issued its Final Order, finding that Cougar Den was liable for the April 2021 taxes assessments and revoking Cougar Den's state-issued license which allowed Cougar Den to pay fuel taxes at the end of a reporting period rather than at the point-of-sale.[1] Under the APA, a Final Order is effective the moment entered. *See* RCW 34.05.473(1) (confirming that a Final Order is "effective when entered"). Certainly, Cougar Den opposed the Department's conduct when the preemption issue had not been reached, but again, the APA provides an avenue for seeking a stay both from the administrative tribunal and before this Court. RCW 34.05.467, .550. And this Court stayed enforcement of the Final Order, the same day Cougar Den requested the stay.

[1] Cougar Den remained free to withdraw fuel without a license and pay taxes at the time of withdrawal.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

Cougar Den nevertheless argues its allegation of irreparable harm is somehow relevant for its due process claim. Not so.

Due process protects individuals against the deprivation of a "constitutionally protected interest"—not irreparable harm. *See Bd. Of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Even assuming Cougar Den suffered "irreparable harm" in the six days after the Final Order issued (which it did not), irreparable harm is a factor that supports a stay or a preliminary injunction—not a due process claim. To suggest otherwise, Cougar Den first turns to *United States v. Washington*, 384 F. Supp. 312, 337 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975) ("*Boldt I*") and *United States v. Washington*, 20 F. Supp. 3d 986, 1022 (W.D. Wash. 2013). But *United States v. Washington* did not analyze due process at all—it considered irreparable harm in the context of issuing an injunction. And *Boldt I* merely confirms that state regulations that implicate a treaty right must be considered in accordance with the APA. *See* 384 F.Supp. at 402 ("[R]egulations that affect the harvest by the tribes on future runs must receive a full, fair, and public consideration and determination in accordance with the Washington Administrative Procedures Act.").

Here, the Department does not challenge the application of the APA and Cougar Den does not allege the Department violated it, in fact, Cougar Den cannot do so because, as discussed above, the Department did nothing wrong. The Department provided Cougar Den a pre-deprivation administrative hearing and enforced the Final Order as set forth under the APA. *See* RCW 34.05.473(1) (confirming that a Final Order is "effective when entered"). While Cougar Den chose not to seek an administrative stay, Cougar Den successfully obtained a judicial stay just six days after the Final Order. Cougar Den has no due process claim where the Department followed the exact process contemplated under the APA.

Cougar Den nevertheless insists that "irreparable harm" is a "significant interest that requires a different analysis." But Cougar Den's own cited cases do not support its attempt to elevate the protections for an amorphous "irreparable harm." Cougar Den's own quotation from

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

Muckleshoot Indian Tribe v. Hall makes clear that a treaty right is a protected property interest. 698 F.Supp. 1504 (W.D. Wash. 1988) ("The treaty [] right is a property right.") "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Mann v. City of Tucson, Dep't of Police*, 782 F.2d 790, 792, 93 (9th Cir. 1986). Nothing Cougar Den cites suggests a due process violation when the Department enforces a Final Order that squarely complies with the APA.

Comm'r of Internal Revenue v. Shapiro, 424 U.S. 614, 616, 96 S.Ct. 1062, 1065, 47 L.Ed.2d 278 (1976) is inapposite. *Shapiro* predates several U.S. Supreme Court cases recognizing that comity bars independent claims against state tax officials when adequate administrative appeal remedies are available. *See, e.g., Fair Assessment in Real Estate Ass'n Inc. v. McNary*, 454 U.S. 100, 108, 102 S.Ct. 177 (1981); *California v. Grace Brethren Church,* 457 U.S. 393, 412, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). More importantly, however, Cougar Den egregiously misquotes the case, which states that, when seizure of property would result in irreparable harm, "some kind of predeprivation *or* prompt post-deprivation hearing at which *some showing* of the *probable validity* of the deprivation must be made." 424 U.S. at 630 (emphasis added). Here, Cougar Den received both a prompt administrative hearing and a prompt stay hearing with this Court, in which Cougar Den raised its treaty right arguments. *Shapiro* does not require a full adjudication on the merits before the Final Order can be enforced. In fact, under Washington's APA, the Department's Final Order is presumptively correct. Cougar Den cannot state a claim for violation of due process simply on the basis that the Department did not wait to enforce an order that was immediately effective under the APA.

Finally, the Department's communications with third-parties (to the extent there was any post-Final Order) do not give rise to a due process claim either. Again, due process only protects against the deprivation of a "constitutionally protected interest." Although Cougar Den has a property interest in its treaty right generally, Cougar Den has no property interest in the fuel

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

agreements made between the Department and third-parties. *See, e.g., Conard v. Univ. Of Wash.*, 119 Wn.2d 519, 530, 834 P.2d 17 (1992) (rejecting due process claim where terms of contract did not "create legitimate claim of entitlement"); *Durland v. San Juan Cnty*, 182 Wn.2d 55, 73, 340 P.3d 191 (2014) (rejecting due process claim where county building code was meant to protect public views, not a private neighbors' views). Any effort by the Department to enforce a separate fuel agreement that Cougar Den is not privy to cannot be the basis of a due process claim by Cougar Den.

3. Cougar Den's "Independent Claims" Are Inextricable from its Petition For Review, and the Comity Doctrine Bars Cougar Den's Claims

Neither of Cougar Den's "independent" claims is actually independent of the underlying issue set forth in Cougar Den's Petition for Judicial Review. Instead, each of them relies on the determination that the Final Order was incorrect. A straightforward analysis of the claims explains why. Pursuant to the Final Order (which was "effective when entered"), Cougar Den was liable for the taxes assessed and Cougar Den's state-issued license should be revoked. Cougar Den's "independent" claims assert nothing more than that the Department violated Cougar Den's treaty rights when it (1) determined that Cougar Den was liable for fuel taxes and (2) enforced a Final Order revoking Cougar Den's state-issue license for failure to properly remit taxes and file fuel reports.

The distinction that Cougar Den attempts to draw between the Final Order and the Department's actions in enforcing the Final Order does not exist. The necessary predicate for each of Cougar Den's independent claims is that the Treaty of 1855 bars the Department from imposing the fuel tax when Cougar Den removes fuel.

But whether the Treaty preempts the tax is exactly the issue that the Court of Appeals will be addressing in reviewing the Petition for Judicial Review. No court has yet adjudicated Cougar Den's claim that it is entitled to evade state fuel taxes on fuel it withdraws at the rack from fuel terminals in Washington. So, Cougar Den seeks to litigate whether the Treaty of 1855

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

preempts this tax in two separate venues under two separate claims. This is nothing more than a collateral attack on the Final Order. For instance, in its Amended Petition, Cougar Den asserts, "The Department took these actions [described in the 'First Independent Claim'], including the enforcement of the Final Order and revocation of Cougar Den's fuel supplier license, *without providing Cougar Den a hearing or pre-deprivation opportunity for a hearing regarding its Treaty rights*." Amend. Pet. ¶ 120 (emphasis added). This is the exact argument Cougar Den has raised and can raise in the Court of Appeals as a basis to challenge the Department's action. Under the APA, Fuel Tax Act, and comity, Cougar Den's administrative appeal is the only avenue for litigating these claims.

Because these "independent" claims are simply another avenue for litigating the correctness of the Department's Final Order, the comity doctrine requires they be dismissed. *See Wash. Trucking Assocs., v. Emp. Sec. Dep't*, 188 Wn.2d 198, 210-11, 393 P.3d 761 (2017) (affirming dismissal of constitutional claims brought against the Employment Security Department based on tax assessments against various trucking companies).

As the Court has already found, the comity doctrine bars these claims where there is an adequate state law avenue for judicial determination of federal constitutional objections. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512-14, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981). The focus for comity is on a *procedure* for raising claims. So long as there is an avenue for challenging a tax that affords "the taxpayer with a 'full hearing and judicial determination' at which [the taxpayer] may raise any and all constitutional objections to the tax," then the state law remedy is adequate. *Wash. Trucking Assocs.*, 188 Wn.2d. at 215 (quoting *Rosewell*, 450 U.S. at 514). In fact, contrary to Cougar Den's claims, our Supreme Court expressly rejected that application of the comity doctrine is altered by the remedy sought. *Id.* ("The Department and WSAMA are correct that the focus is on state procedures, not on the substance of specific remedies."). Indeed, the Supreme Court in *Washington Trucking Associations* reversed the Court of Appeals' holding in that case because of its improper comparison of remedies in recognizing

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

a supposed separate constitutional claim, which the Supreme Court instead dismissed with prejudice. 188 Wn.2d at 203, 213-14, 225.

As explained above, Cougar Den's "irreparable harm" arguments have nothing to do with the application of the comity doctrine. Instead, they pertain only to whether a stay or preliminary injunction should issue. Notably, Cougar Den does not cite a single case that stands for the proposition that the comity doctrine does not apply in instances of purported irreparable harm. Resp. at 14-18. Indeed, the only case Cougar Den cites, *Shapiro*, militates strongly against Cougar Den's position, as it recognizes that a post-deprivation hearing—such as the stay hearing this Court conducted—protected even against "irreparable harm."

Cougar Den's assertions that its "independent" claims are not a collateral attack on the Final Order is wrong.

Cougar Den can fully and adequately challenge the Department's application of the fuel tax—including any argument regarding the Treaty of 1855—in the course of the judicial review of the Final Order, just as it did in *Cougar Den I*. That provides an adequate remedy at law and the comity doctrine bars this Court from entertaining independent "counterclaims" for damages or injunctive relief. *Rosewell*, 450 U.S. at 514; *Wash. Trucking Ass'ns*, 188 Wn.2d at 215-16. The Court is required to dismiss Cougar Den's newly-labeled "independent" claims.

II. CONCLUSION

This Court should dismiss Cougar Den's two purported "independent" claims with prejudice.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

DATED January 6, 2025.

ROBERT W. FERGUSON
Attorney General

MARSHA CHIEN, WSBA # 47020
Deputy Solicitor General
JONATHAN E. PITEL, WSBA # 47516
LEO V. ROINILA, WSBA #51622
Assistant Attorneys General
ERIC D. PETERSON, WSBA #35555
Senior Assistant Attorney General
Attorneys for Washington State Department of Licensing
E-mail: Marsha.Chien@atg.wa.gov
Jonathan.Pitel@atg.wa.gov
Leo.Roinila@atg.wa.gov
EricD.Peterson@atg.wa.gov
LalOlyEf@atg.wa.gov

PROOF OF SERVICE

I, Dalberta B Faletogo, certify that I sent a copy of **Department's Reply In Support of Its Partial Motion to Dismiss Amended Petition for Judicial Review and Complaint for Declaratory Judgment, Injunctive Relief, and Damages** for service on all parties or their counsel of record on the date below as follows:

Email Service per Agreement

STOKES LAWRENCE VELIKANJE MOORE & SHORE, P.S.
Mathew. Harring@stokeslaw.com
BVM@stokeslaw.com
DRedArrow@ktslaw.com
RRSmith@ktslaw.com
Marthy.Hernandez@stokeslaw.com
Jaime.Cuevas@stokeslaw.com

Judge's Copies via Email

THE HONORABLE JARED BOSWELL
YAKIMA COUNTY SUPERIOR COURT ADMINISTRATORS' OFFICE
128 N 2ND ST, RM 323
YAKIMA, WA 98901-2639
Jared.A.Boswell@co.yakima.wa.us

Filed via eFile Washington with

SUPERIOR COURT CLERKS
YAKIMA COUNTY SUPERIOR COURT
128 N 2ND ST, RM 314
YAKIMA, WA 98901-2639

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

DATED this 6th day of January 2025 at Olympia, WA.

DALBERTA B FALETOGO, Paralegal

Appendix J

The Honorable Jared Boswell
Date: February 27, 2026
Time: 9:30 AM

STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

COUGAR DEN INC., PETITIONER, V. STATE OF WASHINGTON, DEPARTMENT OF LICENSING, AND MARCUS GLASPER, THE DIRECTOR OF THE DEPARTMENT OF LICENSING, RESPONDENTS.	NO. 24-2-00109-39 RESPONDENTS' CR 12(C) MOTION TO DISMISS COUGAR DEN'S INDEPENDENT CLAIMS

I. INTRODUCTION

The Court is well-familiar with this case. Respondents previously moved to dismiss the claims Cougar Den, Inc., tacked onto their petition for judicial review because the claims asserted were the same as their arguments in their petition for judicial review and therefore barred.[1] For the purposes of this motion under CR 12(c), even assuming that the conduct challenged occurred *after* and separate from the Director's Final Order, Cougar Den has no cognizable legal claims. Because the Court has now determined the propriety of the Final Order on the merits, it should consider the independent claims in the light of that Order. The Court should now address: whether—before an agency can act to implement a final order—a pre-

[1] Respondents' bases for this motion are distinct from their previous motion to dismiss under CR 12(b), filed Dec. 2, 2024, and reply filed Jan. 6, 2025, though Respondents believe that dismissal of the independent claims is warranted on the grounds raised in the previous motion and hereby incorporate by reference those arguments.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

deprivation court hearing is required on constitutional and Treaty arguments which an administrative agency lacks authority to adjudicate, when a process for a prompt post-deprivation hearing is available and was availed; whether Respondents' mere communications with third parties deprives Cougar Den of protected interests; and whether Cougar Den has a due process interest in fuel tax compacts between the State and Tribes. Further, having ruled on the scope of the Treaty right and the issues in the judicial review petition, the Court must apply those rulings and understandings to Cougar Den's independent claims. All of Cougar Den's independent claims fail to state a claim.

The allegations fail to state any due process claim because the Administrative Procedure Act provides for judicial stays of a final agency order. RCW 34.05.550. In a stay hearing a party can promptly have a court consider constitutional and Treaty arguments, which is sufficient for due and adequate process. A pre-deprivation hearing by the agency on the constitutional and Treaty claims is not required nor is it within the agency's authority, as this Court has already determined. The availability of a prompt post-deprivation judicial stay hearing complies with due process. To rule otherwise is to rule that the APA is unconstitutional—an incredible claim not supported by any precedent.

Cougar Den's allegations about Respondents' communications with other entities additionally fail to state a due process claim because even assuming any statements occurred, a state agency communicating with a third party does not amount to any taking of *Cougar Den's* rights. And Cougar Den does not have due process interests—or any interests—in any agreement the State enters with a sovereign Tribe.

Cougar Den's allegations fail to state a Treaty breach claim because, as this Court found, the fuel tax assessment and the license revocation is valid and did not violate the Treaty right nor burden Cougar Den's right to travel. Likewise, communicating with third parties about the fuel tax imposition and/or license suspension, or about potential impacts on those third parties, does not at all burden nor impact Cougar Den's exercise of their right to travel.

Cougar Den's independent claims must be dismissed with prejudice.

II. STATEMENT OF THE CASE

The Director of the Department of Licensing entered a Final Order on Jan. 10, 2024, that affirmed the notice of assessment and intent to revoke Cougar Den's fuel supplier license. Certified Agency Record (AR) at 1456.

Cougar Den filed a judicial petition from the Director's Final Order on Jan. 16, 2024, along with a motion to stay, which was entered ex parte that day. Cougar Den's petition sought APA judicial review and asserted four counterclaims. The stay motion asserted Treaty and due process arguments. After further briefing on the Treaty and constitutional arguments, the stay of the Director's Final Order was continued by order of the Court on Mar. 15, 2024, during the pendency of further proceedings.

Respondents filed a motion to dismiss the counterclaims under CR 12(b)(1) and (6). The Court granted dismissal of the counterclaims without prejudice, ruling on Nov. 1, 2024, that the Court does not have jurisdiction over the claims and they each fail to state a claim. Cougar Den then filed an amended petition on Nov. 21, 2024, seeking APA judicial review of the Director's Final Order and asserting two independent claims.

The first independent claim is for "VIOLATION OF DUE PROCESS." *See* Am. Pet. ¶¶ 113-126. This first claim purports to rely on several acts: revoking Cougar Den's fuel supplier license; initiating collection efforts (though Cougar Den does not allege Respondents seized any funds, and they did not); and communications with Cougar Den's customers and prospective customers, including communications with tribes with whom the Department has entered fuel tax compacts. *Id.* ¶¶ 114-118. Cougar Den alleges this interfered with their treaty right and was done "without providing Cougar Den a hearing or pre-deprivation opportunity for a hearing regarding its Treaty rights," *Id.* ¶¶ 119-120, 122-123. Cougar Den described its Treaty-protected activities as "including inter-tribal trade, and the right to travel freely." *Id.* ¶ 121.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

Cougar Den seeks a declaratory judgment, under RCW 34.05.570(4), that "due process requires the Department provide Cougar Den a hearing and the opportunity to be heard regarding its Treaty rights *before* it may interfere with those rights" and "a permanent injunction preventing the Department from taking any action regarding Cougar Den's Treaty-protected activity without first providing a hearing regarding Cougar Den's Treaty rights." *Id.* ¶ 125. Cougar Den also claims damages and reasonable attorneys' fees and costs arising out of the alleged due process violations but does not state a source of authority for this. *Id.* ¶ 126.

The second independent claim is for "BREACH OF THE 1855 TREATY." *See* Am. Pet. ¶¶ 127-130. It asserts that the "interference with Cougar Den's Treaty protected activities and inter-tribal trade constitutes a breach of Article III of the 1855 Treaty with the Yakamas." *Id.* ¶ 128. It alleges unlawful taking of a Treaty right "to travel and trade unburdened." *Id.* ¶ 129. And it claims damages. *Id.* ¶ 130.

The Respondents previously moved for dismissal of the independent claims under CR 12(b)(1) and (6) because the "other agency action" claim is time-barred and, instead, it is bound up in the APA review of the adjudicative order under RCW 34.05.570(3), which is exclusive. Additionally, Respondents argued the due process claim fails because the Department followed the APA, there is no right to have an executive agency consider a constitutional claim in an administrative proceeding, and the comity doctrine bars the claim.

The Court denied the Respondents' CR 12(b) motion to dismiss the independent claims but stayed further proceedings. *See* Jan. 10, 2025, Order.

The Court of Appeals entertained motions by both parties from this and earlier rulings. Relevant to the independent claims, the Court of Appeals Commissioner ruled that the Respondents did not demonstrate that the Court obviously erred or departed from the accepted and usual course of judicial proceedings by refusing to dismiss Cougar Den's independent claims. Commissioner's Ruling, July 17, 2025, at 13. The ruling explained: "The Department argues the issue on its merits. But the Department's burden under RAP 2.3(b)(1) is to produce *some controlling legal authority that demonstrates the superior court had to conclude Cougar Den's independent claims failed to state a claim for relief.*" *Id.* at 15 (emphasis added). The Commissioner ordered a remand for further proceedings. *Id.* at 19.

Upon remand the Department moved for summary judgment on the APA review of the Final Order. The Court granted the Department's motion, ruling that the "Right to Travel contained in the Yakama Treaty of 1855 does not preempt the Washington State fuel tax imposed under RCW 82.38.030(13)(a)." Jan. 23, 2026, Clarified Order, Conclusion of Law No. IV. And the Court ruled that Cougar Den had unsatisfied debt and violated Fuel Tax Act reporting requirements, and revocation of Petitioner's fuel supplier license was lawful. *Id.*, Conclusion of Law No. V. Further, "the Yakama Treaty of 1855 does not preempt the fuel supplier license revocation." *Id.* As to Cougar Den's claims of violations of their rights, the Court ruled:

> The Department and Director did not violate Cougar Den's Administrative Procedure Act and/or due process rights in adjudicating and entering the Final Order. This conclusion of law VI addresses only Cougar Den's APA appeal and the Director's adjudication of the Final Order. It does not limit or affect either party's arguments concerning Cougar Den's independent claims (including due process and treaty claims), nor does it rely upon any factual finding that would impact those independent claims.

Id., Conclusion of Law No. VI.

During the pendency of those summary judgment proceedings on the APA review of the Director's Final Order, the Court lifted its stay of the independent claims, and, on Oct. 17, 2025, the Department filed its Answer, generally denying the independent claim allegations.

The Respondents now move for dismissal of the independent claims under CR 12(c).

III. EVIDENCE RELIED UPON

Respondents rely upon Cougar Den's Amended Petition for Judicial Review and Complaint for Declaratory Judgment, Injunctive Relief, and Damages, filed Nov. 21, 2024; their Answer to Amended Petition for Judicial Review and Complaint, filed Oct. 17, 2025; and the pleadings and orders on file.

IV. LEGAL STANDARD

A complaint may be dismissed under CR 12(c), for judgment on the pleadings. Like motions under CR 12(b)(6), dismissal is appropriate if the Court concludes a plaintiff cannot prove any set of facts that would justify relief. *P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

V. ARGUMENT

Respondents reserve their arguments that Cougar Den's independent claims are time-barred and that they are subsumed in or can be raised only in the APA review. For purposes of this motion, however, except as otherwise specifically argued in Section V.A.2, Respondents assume, as this Court has ruled, that the acts complained of are separate from those addressed in the APA review. Specifically, Respondents assume that the independent claims are for alleged actions post-dating the Final Order. *See, e.g.,* Cougar Den's Reply in Support of Motion for Reconsideration, Dec. 17, 2025, at 4-6.[2] Regardless, Cougar Den's claims must be dismissed.

A. Cougar Den's Due Process Claim Fails to State a Claim

1. A Pre-Deprivation Hearing on Cougar Den's Treaty Rights is Not Required Because the APA Provision for Seeking Judicial Stay is a Prompt Post-Deprivation Hearing that Provides Due and Adequate Process

Cougar Den says, in a summary table, that the "predicate" for the first component of their due process claim in the amended petition is the Department "enforcing the Final Order and Assessment WITHOUT providing a hearing on treaty rights," which is applicable to the "6 day period after Final Order and before stay entered," and this violates their rights because "a pre-deprivation hearing" on their treaty right is required. Cougar Den Opp. to Dep't Mtn. to Dismiss, filed Dec. 30, 2024, at 8.

[2] Cougar Den's amended petition starts each independent claim by incorporating all prior paragraphs. Am. Pet. ¶¶ 113, 127. The Court has ruled on those paragraphs through its Clarified Findings of Fact, Conclusions of Law and Order Affirming Final Order of the Department of Licensing, entered Jan. 23, 2026, finding no violation of due process nor the Treaty of 1855. Hence the present focus is only on alleged actions post-dating the Final Order.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

But as a matter of law, a hearing on their Treaty rights is not required before a state agency acts on a final order. Contending that a court hearing on constitutional or Treaty rights arguments must occur before a state agency acts on a final agency order is tantamount to a claim that the APA itself is unconstitutional. This Court has not so ruled, nor did the Court of Appeals Commissioner. This argument must be addressed upon this Motion. The APA, which provides all process due, makes each final order effective immediately, and then establishes a process for seeking stay of a final order. That process for stay—i.e., an opportunity for a hearing, where a court can consider their Treaty right—complies with due process. Cougar Den successfully availed itself of that process and obtained a stay just six days after the Director's Final Order. As a matter of law, Cougar Den had available to it and received all process due.

As the Court recognized through its Conclusion of Law VI in its order on the APA review of the Final Order, the Department and Director did not violate Cougar Den's APA and/or due process rights in adjudicating and entering the Final Order. Indeed, as an executive branch agency, the Department lacks authority to consider Treaty rights claims. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 333, 646 P.2d 113 (1982) ("The failure to include a declaration of support for federal and state constitutions [in administrative tribunal members' acceptance of appointment form] . . . does not violate the guaranty of a fair hearing, especially since the tribunal, as an administrative agency, has no authority to determine the constitutionality of the law it administers." (citing *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) (which confirmed "only the courts have that power")); *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (preemption is a function of the Supremacy Clause of the United States Constitution); *Larson v. Yoon*, 187 Wn. App. 508, 515, 351 P.3d 157 (2015) (whether a Treaty preempts state law is a constitutional Supremacy Clause question).

In other cases, the Washington State Supreme Court has explained that agencies declining to rule on constitutional arguments in an APA review comports with due process, because constitutional claims could be raised at the judicial review stage. In *Wash. Trucking*

Assocs., v. Emp't Sec. Dep't, the Court dismissed under CR 12 trucking carriers' attempted independent due process claims against agency tax officials, even though the carriers' arguments were not addressed until judicial review proceedings under the APA. 188 Wn.2d 198, 210-11, 221, 393 P.3d 761 (2017) ("because the Carriers may raise any constitutional claims on judicial review, Washington law provides an adequate remedy"), *cert. denied*, 583 U.S. 872 (2017); *Swanson Hay Co. v. Emp't Sec. Dep't*, 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017) (noting that the agency commissioner "correctly observed" his lack of authority to address the constitutional issues raised by the carrier, while at the same time recognizing "that on judicial review, the superior and appellate courts may consider and rule on the constitutionality of an agency order"), *review denied*, 191 Wn.2d 1004, *cert. denied*, 586 U.S. 1036 (2018).

Just as the Department lacked competence to consider Treaty claims in entering the Final Order, it lacked competence to consider those claims in the six days that followed.

The APA expressly provides that an agency's order is "effective when entered." RCW 34.05.473(1). Indeed, the APA distinguishes between the effectiveness of initial orders and final orders. RCW 34.05.473(2). An initial order is not immediately effective if further administrative review is available; it instead becomes effective when it becomes a final order. RCW 34.05.473(2)(a), (b). The Director's Final Order is a final order. It explained its effectiveness, noting a petition to the Director for reconsideration "does not stay the effectiveness of this Order," and any request for stay "should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550." AR at 1457.

RCW 34.05.550(2) allows parties seeking judicial review of agency action to seek a stay or other temporary remedy. Courts may grant stay "on appropriate terms." RCW 34.05.550(4). Cougar Den moved for relief under RCW 34.05.550 along with their original petition, on Jan. 16, 2024, asserting their Treaty and due process arguments. Indeed, under the APA, Treaty and constitutional claims may *only* be considered upon judicial review. RCW 34.05.570(3)(a). The

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

Court considered the Treaty and due process arguments and granted a stay of the Director's Final Order on the same day the petition was filed, later extending the stay.

Critically for this claim, as a matter of law, due process does not require a pre-deprivation hearing before taking action that allegedly infringes on parties' rights. As explained below, a prompt post-deprivation process, including the judicial stay process under the APA, complies with due process.

The Fourteenth Amendment protects individuals against the deprivation of a constitutionally protected interest without due process of law. U.S. Const. amend. XIV, § 1. But "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 417, 481 (1972). Indeed, "[t]he formality and procedural requisites for [a due process] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1970). In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the United States Supreme Court identified three factors to consider in determining whether the due process provided was sufficient: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional procedural requirements would entail.

Even under *Comm'r of Internal Revenue v. Shapiro*, 424 U.S. 614 (1976), which Cougar Den has previously relied upon, when seizure of property would result in irreparable harm, "some kind of predeprivation *or prompt post-deprivation hearing* at which *some showing* of the *probable validity* of the deprivation must be made." 424 U.S. at 629 (emphasis added). *Shapiro* thus does not require a full adjudication on the merits of treaty rights or constitutional claims before a final order can be enforced and does not require a pre-deprivation hearing when an adequate post-deprivation hearing is available.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

A ruling that an agency must conduct a *pre-deprivation hearing* before infringing a party's constitutional or treaty rights does not make sense because an agency does not have that power. *Bare*, 84 Wn.2d at 383; *Swanson Hay Co.*, 1 Wn. App. at 188.

Further, a ruling that an agency must wait to enforce a final order, despite the plain language in RCW 34.05.473, to see whether court review is sought or if a court orders a stay, would be a radical proposition. Such a ruling would be unprecedented and effectively determine the APA itself is unconstitutional. The APA provisions for judicial stay are adequate safeguards that reduce the risk of erroneous deprivation and that reflect the appropriate government functions and interests under *Mathews*, especially given agencies' lack of authority to consider constitutional and Treaty claims and how it would, at a minimum, delay effectiveness of any agency action and prove operationally infeasible for an agency's final order to not be immediately effective. For example, there is no deadline in RCW 34.05.550(2) for when a stay motion may, or must, be heard. When is it that the court has considered constitutional claims, under this theory, so that an agency order can be enforced?

Even when liberty interests against self-incrimination and allegedly illegal search and seizure are implicated in agency proceedings of a quasi-criminal nature for due process purposes, and a licensee contends that following APA processes is "insufficient to protect his constitutional interests, because it requires him to provide information to the Board (which he contends would violate his constitutional rights) or risk penalties for noncompliance," *Alsager v. Bd. of Osteopathic Medicine & Surgery*, 573 Fed. Appx. 619, 620, (9th Cir. 2014) (unpublished), the court found no deprivation of the rights in the APA procedures, *Alsager v. Bd. of Osteopathic Medicine & Surgery*, 196 Wn. App. 653, 665, 673, 384 P.3d 641 (2016). In that case, a medical board summarily suspended a physician's license based on allegations relating to controlled substance prescriptions and failure to cooperate with an investigation, and the board upheld that summary suspension upon a show cause hearing and then later permanently revoked the physician's license. 196 Wn. App. at 660-61. These actions summarily suspending and then

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

revoking Alsager's license preceded court review, yet upon judicial review the court found no deprivation of Alsager's constitutional rights by these standard APA procedures. *Id.* at 673.

Courts have also applied standard APA procedures when a tribal member raised Indian law preemption arguments. In *Comenout v. Wash. State Liquor Control Bd.*, 195 Wn. App. 1035, 2016 WL 4184367 (2016) (unpublished), the tribal member, Comenout, challenged the Board's seizure of unstamped cigarettes from an unlicensed store on trust allotments outside a reservation. *Id.* at 1. Comenout filed an administrative forfeiture action seeking the return of the cigarettes. The initial and final agency order concluded Comenout was subject to state law and did not demonstrate he could lawfully possess the cigarettes. *Id.* at 1-2. Comenout then filed an APA appeal, and the superior court affirmed. *Id.* at 2. Comenout argued on appeal that the state superior court lacked jurisdiction to hear his APA appeal because of federal preemption as he was an Indian in Indian Country. *See id.* at 2. The court disagreed, reasoning that a court decision finding criminal jurisdiction over the same seizure also supports civil jurisdiction. *Id.* at 3. The court also rejected Comenout's other arguments, including a challenge of the validity of the search warrant in Indian Country. *Id.* at 5. The court applied APA standards ("The APA governs our review of the Board's final order.") and held that Comenout did not carry his burden of establishing invalidity of the agency action. *Id.* at 6. The court did not apply different standards than those explicit in the APA, although the litigant was a tribal member.

As shown above, courts recognize that litigants bringing as-applied challenges to agency actions must exhaust administrative remedies even though the agency lacks power to declare the agency's action unconstitutional or preempted, and in full recognition that an agency's final order is effective before the court's review. In none of the cases did the courts require that the agency must automatically stay its action until there are court proceedings on those claims that exceeded the agency's authority, as Cougar Den's petition seemingly alleges.

In exercising its judicial review rights under the APA, Cougar Den received due process. Cougar Den received both a prompt administrative hearing and a prompt stay hearing with this

Court, in which Cougar Den raised its Treaty-rights and constitutional arguments and successfully obtained stay relief. Thus, Cougar Den's first grounds for its due process independent claim—i.e., that the Department needed to provide or await a pre-deprivation hearing before revoking Cougar Den's fuel supplier license or allegedly initiating collection efforts—necessarily fails to state a claim.

2. The Allegation About the Fuel Supplier License Revocation Also Fails to State a Claim Because the Court Already Ruled that It Was Lawful

For the reasons above, Cougar Den's allegation necessarily fails to state a due process claim because a pre-deprivation hearing on Cougar Den's treaty rights is not required before the Department can revoke Cougar Den's fuel supplier license, when a prompt post-deprivation hearing is available in which the Treaty rights and constitutional arguments can be—and were—considered under RCW 34.05.550. However, additionally, the Court has *already addressed Cougar Den's fuel supplier license revocation* in the APA proceedings. The Court's ruling applies equally here.

As the Court should now recognize—having carefully considered the APA review petition, which it had not yet done before the earlier motions to dismiss—the license revocation is *not* independent of the APA review petition. The original Notice of Assessment and Intent to Revoke, issued on July 13, 2021, said that the Department "will revoke your Fuel Supplier license on August 12, 2021 for failing to pay your April 2021 Fuel Supplier tax return," and Cougar Den "may appeal the license revocation" which "request must be received by August 11, 2021." AR at 1092. "If we do not hear from you by August 11, 2021 . . . all licenses will be revoked." *Id.* Cougar Den timely appealed, and the Department held an informal hearing. The Informal Hearing Determination, issued on November 23, 2021, itself "upholds [the Department's] intent to revoke the fuel supplier license due to improper reporting and [Cougar Den's] unsatisfied debt to the state." AR at 1106. The determination stated appeal rights and said if it is not timely appealed, it becomes final. *Id.* Cougar Den timely appealed. Arguments in the

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

administrative appeal proceedings addressed at length the license revocation in addition to the assessment. *See, e.g.,* AR at 1058, 1063-65, 1068-69, 1197, 1203-04, 1210-12, 1218-21, 1311-14, 1365, 1368, 1377, 1387-88, 1422-25. Upon the conclusion of the administrative hearings, the Director specifically ruled in the Final Order: "The Department's Informal Hearing Determination dated November 23, 2023, which upheld the July 13, 2021 Notice of Assessment *and Intent to Revoke Cougar Den's Fuel Supplier license, is affirmed*." AR at 1456 (emphasis added). Indeed, the APA defines an "order," as meaning "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." RCW 34.05.010(11)(a).

Thus, as the Department's Answer explains, "the Final Order itself revoked Cougar Den's fuel supplier license." Answer ¶ 114. And, this Court has ruled:

> [T]he Director properly concluded that the Petitioner had unsatisfied debt to the State under chapter 82.38 RCW and violated the reporting requirements under RCW 82.38.150(3), *and revocation of the Petitioner's fuel supplier license was lawful under RCW 82.38.120(1)(d) and (h). And, the Yakama Treaty of 1855 does not preempt the fuel supplier license revocation.*

Clarified Order, Jan. 23, 2026, Conclusion of Law No. V (emphasis added). Cougar Den did not move for reconsideration of this ruling, even when seeking clarification of a different conclusion.

The Court's separate and clarified conclusion of law, while not *automatically* dispositive given the modifications, also means that Cougar Den's claim fails. The Court ruled: "The Department and Director did not violate Cougar Den's . . . due process rights in adjudicating and entering the Final Order." Clarified Order, Jan. 23, 2026, Conclusion of Law No. VI (going on to preserve both parties' arguments about the effect on the independent claims). As shown, the Final Order *itself revoked* Cougar Den's fuel supplier license. That there was a note entered into the system, and a letter was issued the next day reflecting this, Answer ¶ 114, is immaterial. It does not somehow negate the entirety of the parties' arguments and the Department's and the Court's rulings on the propriety of the license revocation under the facts, law, and due process.

Because the Department did not violate due process in adjudicating the Final Order, and the Final Order affirmed revocation of the fuel supplier license, this aspect of Cougar Den's due process claim fails as a matter of law. The Court has so ruled already. It can now confirm that.

3. The Department Cannot Deprive Cougar Den of Due Process Simply by Communicating with Third Parties

Cougar Den's next grounds for its independent due process claim is that before and after the stay of the Final Order was entered the "Department continues to communicate with third parties." Cougar Den Opp. to Dep't Mtn. to Dismiss, filed Dec. 30, 2024, at 8. Cougar Den alleges that the Department told customers and prospective customers and tribal nations "it would be revoking Cougar Den's license," which Cougar Den claims amounts to a threat that Cougar Den would not be able to fulfill its trade commitments. Am. Pet. ¶ 116. Cougar Den further alleges the Department "has stated Cougar Den's tribal customers will face audit assessments." Am. Pet. ¶ 117. Cougar Den ties this allegation to its argument that a pre-deprivation hearing or opportunity for one regarding its Treaty rights was required. Am. Pet. ¶ 120. Because the Department could not—as a matter of law—provide such a hearing, and because, as explained above, a pre-deprivation hearing is not required, these claims fail, and dismissal is required.

Additionally, as a matter of law, even if the Respondents engaged in such communications, this does not state a *due process* claim. Cougar Den does not have a due process interest in what state agencies and officials say to others. Any such statements do not amount to the taking or deprivation of any rights, and no court has previously ruled that Respondents' communications to others states a potential due process claim. This must be addressed upon this Motion. Due process protects a party's property and liberty interests. To the extent that Cougar Den claims its Treaty right is implicated by the Respondents' alleged statements to customers (and due process protections apply to takings of Treaty rights), this is separately addressed below in Section V.B, as the statements do not burden Cougar Den's exercise of their right to travel.

Further, even accepting the amended petition allegations as true, telling customers that the Department "would be revoking Cougar Den's fuel supplier license," Am. Pet. ¶ 116, is lawful. First, as this Court already determined, the Department was correct in revoking Cougar Den's license. Second, under RCW 34.05.473(1)(b), if others are impacted by an agency's final order, they would need to know about it before they could be required to comply. The final order is a public record, as are all pleadings in this proceeding. It does not violate due process for Respondents to communicate with others about the revocation of Cougar Den's fuel supplier license. Under Cougar Den's mistaken theory, if third parties asked about the status of Cougar Den's license or requested related public records, Respondents could not state Cougar Den's license was revoked without violating Cougar Den's due process rights. This is nonsense.

And, even if accepted as true (which, as stated, it is not), telling Cougar Den's customers they "will face audit assessments," Am. Pet. ¶ 117, does not violate Cougar Den's due process rights and is lawful. Indeed, under RCW 82.38.031, fuel taxes are imposed "at the time and place of the first taxable event and upon the first taxable person within this state." The statute goes on:

> 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. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

RCW 82.38.031. Further, under RCW 82.38.032, International fuel tax agreement licensees (e.g., many commercial truck operators) "are liable for and must pay the tax under RCW 82.38.030 to the department on fuel used to operate motor vehicles on the highways of this state. This provision does not apply if the tax under RCW 82.38.030 has previously been imposed and paid by the international fuel tax agreement licensee or if the use of such fuel is exempt from the tax under this chapter." These fuel tax laws mean that persons other than the supplier or distributor may become liable for paying fuel taxes in certain circumstances. An IFTA licensee operating a motor vehicle on Washington highways, using fuel on which the state fuel tax due has not been paid, for a nonexempt use (*see* exemptions in RCW 82.38.080), is "liable for and must pay the tax under RCW 82.38.030." RCW 82.38.032.

In this statutory context, if Cougar Den does not pay the rack removal tax under RCW 82.38.030 on fuel removed from Washington terminal racks and sells the fuel without the tax to others, then it is possible that others may become responsible for paying the tax, even though Cougar Den was originally liable for payment. Cougar Den cannot muzzle the Department from lawfully explaining potential impacts to others, including Cougar Den's customers or potential customers. If those customers are audited or are issued fuel tax assessments, they can exercise their own rights.

Cougar Den's claims in their amended petition about Respondents' communications with third parties fail to state a due process claim.

The allegations about Respondents' communications with tribes concerning fuel tax compacts fail for these same reasons but this also warrants more discussion. Cougar Den complains that the Department has stated "it is pursuing termination of fuel tax compacts with Cougar Den's tribal customers." Am. Pet. ¶ 117. The Governor is authorized by a specific statute, RCW 82.38.310, to enter agreements with federally recognized Indian Tribes regarding fuel taxes included in the price of fuel delivered to tribal retail stations on reservation or trust property. That law describes provisions for those agreements, including that the agreements entered after May 15, 2007, must require that the tribe or tribal retailer "acquire all fuel only from persons or companies operating lawfully in accordance with this chapter as a fuel distributor, supplier, or blender, or from a tribal distributor, supplier, or blender lawfully doing business according to all applicable laws," and more. RCW 82.38.310(3).

The fuel tax agreements (i.e., compacts) are between the State and Tribes, *see* RCW 82.38.310(1), and the Governor may delegate power to the Department to negotiate them, RCW 82.38.310(5). Cougar Den is not a party to these agreements. The agreements contain provisions agreed to by the parties, *see* RCW 82.38.310, for example, a "requirement in the compact to purchase only fuel on which the state fuel tax has been paid." Answer ¶ 117. When one Tribe breached this contractual requirement, and the Department and Tribe could not otherwise resolve the dispute, the Department invoked the contractually agreed upon termination clause in the fuel tax compact. Answer ¶ 117.

As a matter of law, Respondents' communications with Tribes about fuel tax compacts, including any discussions of terminating those agreements with respect to Tribes who may purchase fuel from Cougar Den or want to consider doing so, fails to state a claim for violating Cougar Den's due process rights. Cougar Den cannot identify a property interest in a fuel tax compact made between the State and a Tribe. *See Conard v. Univ. of Wash.*, 119 Wn.2d 519, 530, 834 P.2d 17 (1992) (rejecting due process claim where terms of contract did not "create legitimate claim of entitlement"); *Durland v. San Juan Cnty*, 182 Wn.2d 55, 73, 340 P.3d 191 (2014) (rejecting due process claim where county building code was meant to protect public views, not a private neighbors' views). The Department's efforts to enforce a separate fuel tax agreement that Cougar Den is not privy to cannot be the basis of a due process claim. Cougar Den does not have a contractual interest protected by due process in those tribal compacts. Neither this Court nor the Court of Appeals Commissioner ruled upon previous arguments that Cougar Den has a due process interest in fuel tax compacts between the State and Tribes. This, too, must be addressed upon this Motion.

4. Cougar Den's Plea for Relief Under Their Due Process Claim is Unavailing

Because Cougar Den fails to state a due process claim, its plea for declaratory and injunctive relief must be denied. Am. Pet. ¶ 125. Its plea for damages relief, Am. Pet. ¶ 126, must be denied for this reason and another. The due process independent claim is asserted under RCW 34.05.570(4). But the APA authorizes award of damages "only to the extent expressly authorized by another provision of law." RCW 34.05.574(3). Cougar Den does not identify any provision of law authorizing damages for their due process claim. *See* Am. Pet. ¶ 126. There is none. The claimed damages relief thus fails for this additional reason.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

For all of these reasons, as a matter of law, Cougar Den's independent claim for violation of due process must be dismissed with prejudice.

B. Cougar Den's Treaty Rights Claim Fails to State a Claim

Cougar Den contends that the same acts complained of in their due process claim constitute a breach of Article III of the 1855 Treaty. This contention rests on assertions that the Treaty protects "inter-tribal trade," Am. Pet. ¶¶ 121, 128, and the right to "trade unburdened," Am. Pet. ¶ 129, in addition to the right to travel.

The Court is familiar now with the nature of the Yakamas' rights under Article III of the 1855 Treaty, having carefully considered the issue in the APA review. The Treaty protects the Yakamas' right to travel without burden on exercise of that right. *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 188 Wn.2d 55, 67, 392 P.3d 1014 (2017) (*Cougar Den I*); *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 586 U.S. 347 (2019) (*Cougar Den II*). That right to travel is the protected right. Acts that in no way burden highway travel or are "irrespective of transport or its means" are not preempted. *Cougar Den II*, 586 U.S. at 366. The same is true of acts before or after travel but distinct from the exercise of the Treaty-protected right to travel itself. *See* Brief of Respondent, Cougar Den, Inc., a Yakama National Corporation, United States Supreme Court, Dkt. No. 16-1498 at 35-36 (Sep. 17, 2018); *Cougar Den II*, 586 U.S. at 364-66, 374, 380 (Justices' discussion of a hypothetical mink coat purchased by Yakama off-reservation and brought to reservation). Indeed, and in contrast, the fuel importation tax invalidated by the Court is a tax on travel itself, as it "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" from out of state. *Cougar Den II,* 586 U.S. at 358.

Further, the state laws and actions in other cases analyzing the Yakama Treaty right to travel—*Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007)—also involved burdens on Yakama activities that required travel on public highways. The opinions tie their analysis to the exercise of the Treaty right and do not support preemption of acts distinct from travel on public highways.

"[T]here is no right to trade in the Yakama Treaty." *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014). Hence, the focus in the amended petition on inter-tribal trade is inapposite. *See* Am. Pet. ¶¶ 121, 128, 129.

And, just like the rack removal tax does not involve travel and has no effect and causes no burden upon the Treaty right to travel, the conduct alleged in the second independent claim fails to state a breach of Treaty claim. Again, the conduct complained about was: revoking Cougar Den's fuel supplier license based on their failure to report and pay taxes as to the removal of fuel at Washington terminal racks; allegedly initiating collection efforts on the assessment of the rack removal tax; communicating with Cougar Den's customers and prospective customers; and, communicating with tribes with whom the Department has entered fuel tax compacts. Am. Pet. ¶¶ 114-119; Cougar Den Opp. to Dep't Mtn. to Dismiss, filed Dec. 30, 2024, at 8. None of this burdens exercise of Cougar Den's Treaty right to travel. It is distinct from travel itself.

The Court has ruled now that imposition of the rack removal tax and revocation of Cougar Den's fuel supplier license did not violate Cougar Den's Treaty rights. Clarified Order, Jan. 23, 2026, Conclusions of Law No. IV and V. Allegedly collecting the assessment and communicating with customers (including Tribes) relating to these acts that the Court ruled are valid—i.e., not preempted by the Treaty—does not burden Cougar Den's exercise of their right under the Treaty to travel without burden. Now that the scope of the Treaty right has been addressed by the Court, it is appropriate for the Court to apply the same understanding to the independent Treaty rights claim.

Thus, for all these reasons, Cougar Den's second independent claim, for breach of the Treaty of 1855, fails to state a claim and must be dismissed as a matter of law.

VI. CONCLUSION

This Court should now dismiss with prejudice Cougar Den's two independent claims.

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington St. SE
Olympia, WA 98504-0110
(360) 753-2702

DATED February 6, 2026.

NICHOLAS W. BROWN
Attorney General

/s/ Eric D. Peterson

ERIC D. PETERSON, WSBA #35555
Senior Assistant Attorney General
MARSHA CHIEN, WSBA # 47020
Deputy Solicitor General
JONATHAN E. PITEL, WSBA # 47516
LEO V. ROINILA, WSBA #51622
Assistant Attorneys General
Attorneys for Washington State Department of Licensing and Marcus Glasper
E-mail: Marsha.Chien@atg.wa.gov
Jonathan.Pitel@atg.wa.gov
Leo.Roinila@atg.wa.gov
EricD.Peterson@atg.wa.gov
LalOlyEf@atg.wa.gov

PROOF OF SERVICE

I, Michael Sawyer, certify that I sent a copy of **Respondents' CR 12(c) Motion to Dismiss Cougar Den's Independent Claims and Note for Motion Calendar** for service on all parties or their counsel of record on the date below as follows:

Email Service per Agreement

STOKES LAWRENCE VELIKANJE MOORE & SHORE, P.S.
Mathew L. Harrington
Brendan V. Monahan
Marthy Hernandez
Jaime Cuevas, Jr.
Derek Red Arrow Frank
Rob Smith
Emily Zughaib
Mathew.Harrington@stokeslaw.com, MLH@stokeslaw.com
Brendan.Monahan@stokeslaw.com, BVM@stokeslaw.com
Marthy.Hernandez@stokeslaw.com; Emily.Zughaib@stokeslaw.com
Jr.Cuevas@stokeslaw.com; CougarDen@stokeslaw.com
Susan.Palmer@stokeslaw.com; DRedArrow@ktslaw.com
RRSmith@ktslaw.com; JBlack@ktslaw.com
jr@ramseycompanies.com; lance@ramseycompanies.com

Judge's Copies via Email

THE HONORABLE JARED BOSWELL
YAKIMA COUNTY SUPERIOR COURT ADMINISTRATORS' OFFICE
128 N 2ND ST, RM 323
YAKIMA, WA 98901-2639
Jared.A.Boswell@co.yakima.wa.us

Filed via eFile Washington with

SUPERIOR COURT CLERKS
YAKIMA COUNTY SUPERIOR COURT
128 N 2ND ST, RM 314
YAKIMA, WA 98901-2639

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

DATED this 6th day of February 2026 at Seattle, WA.

MICHAEL SAWYER, Paralegal

STOKES LAWRENCE, P.S.

May 29, 2026 - 4:10 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	105,377-1
Appellate Court Case Title:	Cougar Den, Inc. v. State of Washington et al.
Superior Court Case Number:	24-2-00109-2

The following documents have been uploaded:

- 1053771_State_of_Grounds_for_Direct_Rvw_20260529160519SC294777_1246.pdf
  This File Contains:
  Statement of Grounds for Direct Review
  The Original File Name was 20260529 Statement of Grounds for Direct Review.pdf

A copy of the uploaded files will be sent to:

- ComCEC@atg.wa.gov
- EricD.Peterson@atg.wa.gov
- Nicole.Beck-Thorne@atg.wa.gov
- SGOOlyEF@atg.wa.gov
- bvm@stokeslaw.com
- debbie@ramseycompanies.com
- emily.zughaib@stokeslaw.com
- eric.mentzer@atg.wa.gov
- jonathan.pitel@atg.wa.gov
- jr.cuevas@stokeslaw.com
- lalolyef@atg.wa.gov
- lalseaef@atg.wa.gov
- lance@ramseycompanies.com
- leo.roinila@atg.wa.gov
- marsha.chien@atg.wa.gov
- seth.dawson@stokeslaw.com
- susan.palmer@stokeslaw.com

Comments:

Sender Name: Laura Smith - Email: laura.smith@stokeslaw.com
Filing on Behalf of: Mathew Lane Harrington - Email: mlh@stokeslaw.com (Alternate Email: laura.smith@stokeslaw.com)

Address:
1420 5TH AVE STE 3000
SEATTLE, WA, 98101-2393
Phone: 206-626-6000

Note: The Filing Id is 20260529160519SC294777