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SUPREME COURT
OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION,
a non-profit trade association,

Appellant,

v.

The STATE OF WASHINGTON; CHRISTINE GREGOIRE,
in her official capacity as Governor of the State of
Washington; LIZ LUCE, in her official capacity
as Director, Washington State Department of Licensing,

Respondents.

REPLY BRIEF OF APPELLANT AUTO

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ORIGINAL

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A. INTRODUCTION

Automotive United Trades Organization (“AUTO”) seeks declaratory and prospective relief from unconstitutional State actions that involve the expenditure of millions in taxpayer funds to Native American tribes pursuant to fuel compacts. The use of those funds is shrouded in secrecy, but what little information has been disclosed offers indisputable proof that revenue from the motor vehicle fund (“MVF”) is being spent in violation of art. I § 40 (“18th Amendment”).

Rather than responding to the merits of AUTO’s claims, the State hides behind tribal sovereign immunity in order to avoid judicial oversight over the conduct of State officials. It seeks to deny AUTO *any* judicial forum by invoking CR 19.¹ While the State protects the financial largesse the tribes receive from the State, it makes no mention of the interests of Washington taxpayers, whom the State allegedly represents. Nor does it seriously address the fact that the conduct of State officials in distributing this largesse violates the Washington Constitution, a document the Attorney General and the State official here are sworn to uphold.

The tribes are not necessary parties under CR 19(a). Even if they were CR 19(b) requires a balancing of interests, but the State would have

¹ This factor in the CR 19(b) balancing plainly concerned the courts of Wisconsin and New York in *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474 (Wisc. App. 2002) and *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047, *cert. denied*, 540 U.S. 1017 (N.Y. 2003).

this Court believe that the only interests to be balanced are the tribes'. As AUTO has demonstrated, other factors weigh heavily in favor of reinstating AUTO's complaint, and allowing this case to proceed. In the interests of Washington taxpayers and citizens, separation of powers, preventing the potential for corruption, and upholding the Constitution, this Court should reverse the trial court and allow this case to proceed on the merits.

B. REPLY ON STATEMENT OF THE CASE

Much of the State's counterstatement of the case contains inappropriate argument in violation of RAP 10.3(a)(5).—AUTO does not wish to compound this violation, but some of the State's assertions require a reply.

First, the State repeatedly suggests that AUTO's case has been brought directly against tribes, or that AUTO has sued to invalidate State-tribal fuel tax compacts. Br. of Resp'ts at 2. This is untrue, but it is consistent with the State's studied indifference to the constitutional violations of State officials here.

AUTO has sought judicial review of *State* actions and applicable statutes to ensure that *the State* has acted legally and in accordance with the Constitution. AUTO does not seek to invalidate the compacts, and

does not request invalidation as a remedy. Nor does AUTO seek damages or any other retroactive relief. CP 4.

The State *concedes* that tribal members must pay Washington motor fuel taxes. Moreover, after the 2007 amendments to the tax,² the tax fell on off-reservation fuel distributors who must pay such taxes, as the State further *concedes*. Br. of Resp'ts at 15 n.8. It is undisputed that there are no terminal racks on any reservation.

However, the State maintains that *the tribes*, not tribal fuel retailers, or tribal fuel consumers, are still entitled to a "refund" from the MVF of motor fuel taxes, even though *the tribes* did not pay such taxes, and that the compacts were necessitated by the disputes over whether *the tribes* are exempt from the tax. Br. of Resp'ts at 4. The State does not explain why new compacts were needed after 2007, when the incidence of the State's fuel tax moved off reservation. The State makes no attempt to describe how an off reservation transaction between a tribal member and a non-tribal member entitles a tribe to a refund of Washington taxes.

Finally, the State claims that all the MVF money it has sent the tribes has been spent on highway purposes. Br. of Resp'ts at 5, 7.

² Senate Bill 5272 (2007) resolved any legal issues pertaining to Washington fuel taxes identified by the federal court in *Squaxin Island Tribe v. Stephens*, 400 F. Supp.2d 1250 (W.D. Wash. 2005). Moreover, the United States Supreme Court in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L.Ed.2d 429 (2005) held that such an approach satisfied federal law. The State cannot identify what legal issue in Washington fuel taxes necessitated the fuel compacts.

However, in support of this assertion, the State repeatedly refers to the definition of that term under the 2007 statute, not under the 18th Amendment. Br. of Resp'ts at 7 n.6. The State also challenges AUTO's characterization of some of the expenditures, while totally ignoring others.

Id.

Because the State does not address the definition of "highway purposes" under the 18th Amendment, it plainly has no answer as to how using MVF monies for drug dogs, hiking trails, loan collateral, utilities, habitat remediation, and numerous other purposes complies with the 18th Amendment in light of the many decisions cited by AUTO below, CP 16-17, outlining highway purposes under the 18th Amendment.

Finally, the State suggests that it is "implausible" that this Governor, or future governors, would abuse their power to give millions in taxpayer funds to tribes without any ability for citizens to challenge those actions. Br. of Resp'ts at 2. To say it is implausible that unchecked power will be abused is to ignore history. One need only to recall the recent conviction of former Illinois Governor Rod Blagojevich, to know that checks and balances are needed to constrain executive power. The State's argument is essentially a "trust us" argument. It stands in direct contrast to recent news reports by KOMO television and other stories involving the Yakama Nation that belie this assertion. In fact, there is evidence of lax

accountability in this very case. It has just been revealed that for four years, the State has utterly ignored its duties to demand audits from the Yakama tribe for the last four years, and only took action after the commencement of this lawsuit.

www.komonews.com/news/problemsolvers/122370864.html.

C. SUMMARY OF ARGUMENT IN REPLY

Although the State makes an effort to walk through the various factors in the CR 19 analysis, its response to AUTO's argument can be reduced to one simple assertion: no court can review the State's unconstitutional actions because to do so might jeopardize the illegal acts of State officers and their illegal payments of Washington taxpayer money to the tribes.

Tribal sovereign immunity should not shield state officers from unconstitutional actions that harm citizens and taxpayers, or enable the State to divert MVF dollars to non-highway purposes without scrutiny.

CR 19 provides courts with many options to avoid the undesirable outcome that state officers can act unlawfully and be free from all judicial oversight. The trial court should have exercised one of those options here, and failed to do so. Its ruling should be reversed, and this case should be allowed to proceed on the merits.

D. ARGUMENT IN REPLY³

Both parties in their opening briefs have analyzed the various CR 19 factors that a court must address in deciding whether tribal sovereign immunity and CR 19 shields state officials from judicial scrutiny of illegal and unconstitutional actions.

Reviewing the State's response, it can be crystallized into three assertions. First, the State repeatedly avers that the tribes have a legal right to receive MVF payments from the State, and AUTO's challenge to the legality of the State's actions jeopardizes the tribes' right to receive those payments in the future. Second, the State suggests that no alternative short of dismissal can protect the tribes' rights without violating their sovereign immunity. Third, the State argues that case law dictates dismissal.

(1) The Tribes Are Not Necessary Parties under CR 19(a)

(a) No Legally Protected Interest of the Tribes Is Impaired By this Suit

AUTO argued in its opening that the tribes are not necessary parties because it has not sued the tribes nor has it challenged the compacts. It has only challenged the illegal acts of State officers. Br. of Appellant at 14-21. AUTO contends that the narrowly tailored,

³ The parties agree on the standard of review. *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 492, 145 P.3d 1196 (2006). The State *concedes* as well that dismissal under CR 19 is a drastic remedy to be employed sparingly. *Id.* at 494.

prospective relief requested, and the focus on the State actions renders tribal participation unnecessary. *Id.*

The State responds that is the suit necessarily imperils the tribes' legally protected interest in receiving MVF money from the State. Br. of Resp'ts at 14-17. It suggests that if the State's actions are illegal, or the statutes relied upon are unconstitutional, it would threaten the tribes' "right" to continue receive Washington taxpayer money. *Id.*

Although some courts have held that the existence of a contract is enough to create a "legally protected interest" in an action for CR 19 purposes, they have done so only in actions directly challenging the contracts in question. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57, *cert. denied*, 537 U.S. 820 (9th Cir. 2002); *Wilbur v. Locke*, 423 F.3d 1101, 1112 (9th Cir. 2005) *abrogated by Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (U.S. 2010).

AUTO's action does not challenge the compacts, it challenges the illegal actions of State officials. The remedy AUTO seeks is not invalidation of the compacts, but declaratory judgment regarding the legality of various State actions. The State incorrectly suggests that the only possible result if AUTO prevails is total invalidation of the compacts. Actually, the result is that the State must bring any agreements with the

Tribes into compliance with the law either by exercising its dispute resolution rights, or by filing an action.

An illegal contract conveys no legally protected rights. "If a contract is illegal or flows from an illegal act, a court will leave the parties as it finds them." *Evans v. Luster*, 84 Wn. App. 447, 450, 928 P.2d 455, 457 (1996). The contract is void, not merely voidable, and cannot be the basis of a judicial proceeding. *Cowley v. N. Pac. Ry. Co.*, 68 Wash. 558, 563, 123 P. 998, 1000 (1912). No action can be maintained on an illegal contract, either at law or in equity. It cannot be enforced regardless of whether it is illegal in its inception, or whether, the illegality has been created by a subsequent statute. *Id.* "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S. Ct. 839, 845, 43 L. Ed. 1117 (1899). *See also, Cooper v. Baer*, 59 Wn.2d 763, 764, 370 P.2d 871, 872 (1962).

A "legally protected interest" cannot be created by the mere existence of the illegal contract that is not the subject of this dispute, a Catch-22 would result. It would create a massive loophole with respect to illegal contracts: state officials could enter into illegal contracts, creating

a “legally protected interest.” As a result, under no circumstances can those contracts be challenged in any court of law.

The State also suggests that the tribes’ legal rights to Washington taxpayer money are beyond question because the Legislature gave the Governor authority to enter into compacts with tribes. Br. of Resp’ts at 18. It suggests that AUTO is not questioning that statutory authority in its suit. *Id.*

The State is wrong regarding both the scope of its statutory authority and the scope of AUTO’s challenge to the State’s actions. The statute in question authorized the Governor only to enter into compacts in order to “address tribal immunities or preemption” with respect to the motor vehicle fuel tax. RCW 82.36.450(1). Although there may have been outstanding issues to be resolved regarding *past* taxes levied on tribal retailers on tribal land, those issues vanished when the Legislature passed SB 5272 and placed the incidence of the tax on suppliers. Therefore, the Governor’s granting of tax “refunds” post-SB 5272 (and into the future without limit) exceeded the scope of her statutory authority.

Any *legally protected* interests of the tribes are not imperiled by AUTO’s action against the State. Either the state’s action are legal and constitutional, and the tribes’ legal interests are not in danger, or the state’s actions are illegal and unconstitutional, the tribes have no legally

protected interests flowing from those actions.. Either way, their legally protected interests are not imperiled, and they are not necessary parties.

(b) The Tribes Have Waived Sovereign Immunity as to the State; the State Can Exercise Its Right of Joinder

AUTO also argues that tribal interests can be protected by joinder of the tribes themselves because the tribes waived their immunity based on their agreement to be sued by the State in the compacts. Br. of Appellant at 21-24. AUTO maintains that the State can invoke the contractual waiver of sovereign immunity and implead the tribes if it feels tribal interests are imperiled by AUTO's suit against it.

The State concedes that the tribes have waived sovereign immunity, but only as to the State itself, and not as to AUTO. Br. of Resp'ts at 30. Therefore, the State maintains, AUTO cannot claim the tribes have waived sovereign immunity as to AUTO. *Id.*

Again, AUTO has not named the tribes in this suit, and has not suggested that any sovereign immunity waiver applies to AUTO. It is the State, not AUTO, who is insisting that the tribes must be made part of this suit. Because the Tribes have waived sovereign immunity as to the State, if the State believes this case should not go forward in the tribes' absence, then the State should exercise its right to implead the Tribes and allow this case to proceed on the merits.

In exchange for receiving millions of dollars in Washington taxpayer money, the tribes waived their sovereign immunity as to the State. This Court should not allow the State to say that it is unfair to examine the State's illegal actions without the tribes, depriving AUTO of a remedy, when the State could act to solve the problem without offending sovereign immunity.

(2) Dismissal Is Not a Proper Result under the CR 19 Balancing

In its opening brief, AUTO cited numerous methods by which the trial court could have avoided dismissal, which it must try to do under CR 19. Br. of Appellant at 21-32. It could have recognized the State's ability to protect tribal interests in this litigation, it could have ordered the State to exercise its rights under the compacts to implead the tribes, it could have ordered joinder of individual tribal officials, it could have fashioned a narrow remedy as requested by AUTO, or it could have declined dismissal under the public rights exception.

The State claims that all of these proposals are inadequate or unfeasible. It insists that the only possible outcome is dismissal, because a declaration that the State and its officials have acted illegally could threaten the tribes' continued ability to receive payment under the compacts. The State also claims that tribal sovereign immunity trumps

any concerns about illegal conduct by State officials, waste of millions in taxpayer funds, or unconstitutional diversion of MVF money to non-highway purposes. Br. of Resp'ts at 13-29.

(a) The State Can Adequately Represent the Tribes' Interests

AUTO in its opening brief said that even if the tribes are necessary parties, AUTO's suit can proceed because the State can adequately represent tribal interests. Br. of Appellant at 18-19. In fact, the compacts *obligate* the State to defend the tribes from any threat to the compacts. CP 177 ("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"). AUTO also notes that State and tribal interests are perfectly aligned, because they both want a determination that the State's actions are lawful. Br. of Appellant at 18-19. That the State has been aggressive to date in vindicating that shared position is clear from the record.

The State argues in response that any alignment of interests between the State and the tribes is "illusory." Br. of Resp'ts at 15. It suggests that its interests are only aligned with the tribes regarding the CR 19 issue, and not regarding the merits of AUTO's action. *Id.*

However, the State does not explain how the tribes and the State would be adverse on the merits of an action challenging the illegal actions of State officers. Surely the tribes have no interest in proving that the State's actions were illegal, and the tribes would agree with the State that its officials have done nothing wrong.

The State also offers no response to the observation that the compacts specifically obligate the State to defend the tribes in any actions by a third party. CP 177. The State claims that AUTO's suit threatens the compacts. Therefore, State concedes that the tribes and the State have a mutual, aligned interest directly opposed to the merits of AUTO's suit.

(b) The State Misreads CR 19(b)'s Balancing Test

In its opening brief, AUTO established that the CR 19(b) inquiry is necessarily fact-specific and must be applied on a case-by-case basis. It then proceeded through the facts of this case and applied the various CR 19(b) factors, weighing the tribes' and the State's pecuniary interests against the interests of Washington citizens and taxpayers to have oversight of the unconstitutional expenditure of public funds.

The State responds that case law establishes an absolute CR 19 immunity whenever tribes are involved,⁴ that this Court need go no further than two opinions of the Washington Court of Appeals, *Matheson v.*

⁴ Under the State's analysis, a dispute involving an Indian tribe must invariably be dismissed.

Gregoire, 139 Wn. App. 624, 161 P.3d 486 (2007), *review denied*, 163 Wn.2d 1020 (2008) and *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008), *review denied*, 166 Wn.2d 1003 (2009). Br. of Resp'ts at 13.

AUTO addressed *Matheson* and *Mudarri* at length in its opening brief. However, the State's arguments reveal the fundamental misapprehension of what AUTO's precise claims are, and the relief AUTO is seeking. In addition to the arguments in AUTO's opening brief, the most obvious distinction between *Matheson* and *Mudarri* and the case at hand is the giveaway and unconstitutional diversion of Washington MVF money to the tribes for non-highway purposes. In *Matheson* the challenged agreement involved regulation of tribal cigarette taxation and conveyance of money *from the tribes to the State*, not the other way around. *Matheson*, 139 Wn. App. at 627-28. In *Mudarri* no money changed hands under the agreements, the State simply authorized the tribes to conduct electronic scratch ticket gaming on tribal lands as required by federal law. *Mudarri*, 147 Wn. App. at 597-98.

Here, the issues extend far beyond a mere division of regulatory authority between the State and tribes. The State is giving millions of dollars in public funds to tribes, under highly questionable circumstances. The State is permitting tribes to spend those funds *in a manner that the State itself is constitutionally prohibited from doing*. The constitutional

issue here is not whether the State has general authority to contract with tribes, but whether it has abused its authority and violated the law in order to confer an unjustified benefit on the tribes.

It is this kind of unlawful State conduct that was at issue in *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (N.M. 1995), a New Mexico case on point that the State cannot properly distinguish. The State argues that *Johnson* was an action solely to enjoin the illegal acts of State officers undertaken wholly without legislative authority, and here the Legislature here granted the Governor general authority to enter into compacts. Thus, the State claims, *Johnson* is inapposite. Br. of Resp'ts at 18.

The State takes too narrow a view of challenges to authority under the separation of powers doctrine. Under a separation of powers analysis, there is no distinction between an act taken in absence of authority and one taken in violation of limited authority. *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 241, 552 P.2d 163, 169 (1976) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed" are both separation of powers questions).

Thus, the total lack of authority in the *Johnson* and the violation of authority is a distinction without a difference. In *Johnson*, the plaintiffs alleged that the Governor signed compacts without legislative authorization in violation of separation of powers. *Johnson*, 904 P.2d at 15. Here, AUTO alleges that the Governor abused and exceeded the legislative authority granted to her.

Srader v. Verant, 125 N.M. 521, 964 P.2d 82 (N.M. 1998), which clarified that *Johnson* only applied to mandamus actions to stop the illegal conduct of the Governor, merely reinforces AUTO's point. In *Srader*, disgruntled gamblers tried to take revenge against tribes by suing private financial institutions to cut off the tribes' funds. They also wanted damages to recoup their gambling losses. *Id.* at 86. The State was not accused of having violated the law or the constitution, although the gambler alleged that they violated their public duty to enforce gambling laws.

Here, AUTO's claims are prospective only and focused on illegal state actions. Under both *Johnson* and *Srader*, the fact that an action against a state might endanger a tribes' contractual rights does not alter CR 19 analysis; the action must continue.

Finally, the State challenges AUTO's assertion that the tribes' financial interest in continuing to receive future payments from the State is

not enough to justify a CR 19 dismissal. The State claims that AUTO misrepresents the holding of *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990). The State sets up a straw man argument with respect to *Makah*, and then drops its response to AUTO's *actual* argument into a footnote. Br. of Resp'ts at 16.

The *Makah* case had two types of requested relief: a challenge to treaty fishing quotas, and a challenge to the actions of the Secretary of Commerce in adopting rules and regulations. *Makah*, 910 F.2d at 557. The *Makah* tribe asked for increased quotas, which would have affected the treaty rights of absent tribes. But the tribe also challenged the legality of the Secretary's actions, alleging that the lower quotas were the result of back door-deals and statutory violations. *Id.*

The Ninth Circuit distinguished between these two types of relief—direct invalidation of treaty provisions and a challenge to state action—for the purposes of CR 19 analysis. Although the Secretary's actions, if illegal, might threaten the financial interests of other tribes *in the future*, the Ninth Circuit allowed the Makah tribe's action for prospective injunctive relief to go forward. *Id.* at 559.

Here, AUTO's requested relief is declaratory judgment regarding potential illegal state actions. AUTO does not seek to invalidate the compacts or exact any financial restitution from the State or the tribes.

AUTO is merely seeking to ensure that the law is followed in the future.

Thus, *Makah* applies.

More critically, the State's reliance on inapposite cases ignores the fundamental instruction of CR 19: that a case cannot be dismissed if "equity and good conscience" dictates otherwise. None of the cases cited by the State involve an indisputable constitutional violation proven at the outset, as AUTO has done here regarding the diversion of MVF money to non-highway purposes.

In an attempt to convince this Court that equity and good conscience favors the State and the tribes, the State defends the unconstitutional diversion of MVF money to non-highway purposes. However, the state cites statutory language in support. Br. of Resp'ts at 7 n.6. Despite the fact this Court has narrowly defined "highway purposes" under the 18th Amendment, the State implies that the Legislature was entitled to overturn that definition by statute. Thus, the State claims, the tribes are free to spend MVF funds on drug dogs, boat ramps, and hiking trails. Br. of Resp'ts at 7.

The Constitution is the highest law of Washington and the Legislature is limited by it. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 290, 174 P.3d 1142 (2007); *King County Water Dist. No. 54 v. King County Boundary Review Bd.*, 87 Wn.2d 536, 540,

554 P.2d 1060 (1976). To the extent that state statutes attempt to define “highway purposes” in a manner contrary to this Court’s constitutional definition of that term, the constitutional definition prevails. *Id.*

Thus, the State has not even attempted to argue that the many questionable purposes admitted by the tribes fit within *this Court’s* definition of “highway purposes.” It has essentially conceded that some of the tribes’ use of MVF funds violates the 18th Amendment.

This case, unlike so many the State cites, involves an indisputable constitutional violation that will go unaddressed if this case is dismissed. This case cannot be dismissed in equity and good conscience.

(c) Tribal Officials Can Be Joined

AUTO also argues that under *Puyallup Tribe, Inc. v. Dep’t of Game of Wash.*, 391 U.S. 392, 88 S. Ct. 1725, 20 L.Ed.2d 689 (1968), the tribes can be represented by joinder of individual tribal officials, who are not immune from suit for violations of state law. Since all of AUTO’s claims involve allegations of conduct by State officials in violation of state law, whatever interest the tribes have in such issues can be represented by the individual tribal officials who participated in that conduct. Br. of Appellant at 27.

The State responds first by taking this Court on a frolic and detour into the ancillary case of *Burlington Northern R.R. v. Blackfeet Tribe*, 924

F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) and *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed.2d 714 (1908), arguing that tribal officials cannot be joined because the *Blackfeet* holding that tribal officials can be joined to answer violations of law is “rooted in the Supremacy Clause” and thus only applies to federal claims, not state law claims.⁵ The State persists in misunderstanding AUTO’s argument.

Of course, AUTO does not aver that *Blackfeet* involves state law claims, which is why it relies principally upon *Puyallup Tribe* and not *Blackfeet*. AUTO cites *Blackfeet* only by way of analogy: if individual tribal officers can be named in federal cases involving potential unconstitutional taxation undertaken in their “official capacity,” it stands to reason that they can also be named in state law cases involving potential unconstitutional taxation undertaken in their official capacity. Doing so does not offend the Supremacy Clause, as there is no inherent conflict between state and federal law on this point.

The State responds to *Puyallup Tribe* by claiming that the tribal officers were involved in “government-to-government Agreements” and cannot be sued individually by AUTO for any illegal actions undertaken on behalf of their tribes. Br. of Resp’ts at 37. The State also claims that a Montana court rejected an “identical” argument made by a party who tried

⁵ *Blackfeet* and *Ex Parte Young* are not so rooted in the Supremacy Clause, as they are in the 11th Amendment. However, this is irrelevant to AUTO’s argument.

to sue a tribe in state court to stop the tribe from imposing a tax lien against him. *Id.*

It bears repeating, however tiresome the task may be, that AUTO is not suing the tribes, it is suing the State. Any argument that the tribes need to be joined is coming from the State, not AUTO. Also, the Montana case cited by the State was decided before *Blackfeet*, which held that tribal officials could be sued to test the constitutionality of their taxation schemes without offending sovereign immunity: "Accordingly, tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect." *Blackfeet*, 924 F.2d at 901-02.

Here, the State has undertaken in the compacts to tax consumers, when Washington law does not require it. CP 174. As previously demonstrated, it is also collecting Washington taxpayer money and allowing tribes to spend it on non-highway purposes in violation of the 18th Amendment. The gravamen of AUTO's action is *conduct by State officials*. To whatever extent the tribes have an interest in State officials obeying state law that can be satisfied by joining the tribal official signatories to the compacts.

Most critically, the State misstates AUTO's core argument. This is *not* an Eleventh Amendment case like *Ex Parte Young* where a state enjoys sovereign immunity under the United States Constitution barring it

from being sued in federal court. As AUTO noted in its opening brief, in such a scenario, a state may still be sued *in state court*, as took place in cases like *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 81 P.3d 851 (2003). The State's argument here, by contrast, forecloses *any* judicial remedy. But the State is wrong. *Puyallup Tribe* holds that a tribal member may be sued in state court for a violation of state law, tribal sovereign immunity notwithstanding. To the extent that tribal officials were parties to compacts that violated state law, *Puyallup Tribe* holds that such officials can be joined in such litigation.

(d) This Court Can Declare State Officers' Actions Illegal and/or Unconstitutional in the Tribes' Absence

The State also argues that AUTO can have no remedy without offending the tribes' legal rights under the compacts. Br. of Resp'ts at 21. It also claims that AUTO's only solution to this problem is joinder of tribal officials. *Id.* at 22.

Joinder of tribal officials is an option, but it is not related to the question of shaping a remedy, which the trial court can do. AUTO has requested only declaratory and prospective relief only. If the trial court concludes that the State has acted unlawfully, it can instruct the State to renegotiate the compacts to bring them into compliance with the Washington Constitution and the limits of the State's statutory authority.

If the compacts cannot be renegotiated without violating the law, then the tribes will lose the money paid to it by the State, but they will not lose anything to which they have a legal right, as explained above.

The tribes cannot claim prejudice from losing the future benefit of payment under an illegal contract. In fact, the tribes will have arguably received a windfall of past illegal payments to which they had no right, but will not have to disgorge. Either way, the remedy will not deprive the tribes of any legal entitlement, and therefore cannot prejudice the tribes.

(e) The Public Rights Exception Applies

AUTO also posits that this case falls under the public interest exception to CR 19 dismissal. Br. of Appellants at 38-39. Citing *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 60 S. Ct. 569, 84 L.Ed. 799 (1940), AUTO argues that there is an overriding public interest in ensuring that State officials behave legally and do not squander or mispend public funds.

The State responds that the exception does not apply because it threatens the “legal entitlements” of the tribes to continue receiving MVF money, and because AUTO has some private interest in pursuing its claims, along with the public interests at stake. Br. of Resp’ts at 26, 40-41. The State cites *Wilbur, supra*, in support. *Id.* The State makes no attempt whatsoever to distinguish *National Licorice. Id.*

This case is much more in line with *National Licorice* than with *Wilbur*. *National Licorice* involved a challenge to the legality of actions by an entity, but not a direct challenge to any particular contracts. A threat to contracts was a likely consequence of the suit, but that threat was not enough to overcome the important public policy at stake in the case. 309 U.S. at 366. In *Wilbur*, the plaintiffs directly sought to enjoin and prevent enforcement of all cigarette compacts between the State and the tribes. The sought to have the compacts themselves held invalid. 423 F.3d at 1115.

The State misconstrues the public rights exception as it applies to cases where a contract is not directly challenged. An attenuated contractual interest in a pending suit was not enough to overcome the public rights at stake in *National Licorice*. In that case, the Supreme Court held that an antitrust suit could proceed against a company despite the fact that it posed an attenuated threat to the contract rights of absent employees. The Court concluded that because the suit did not directly challenge the contracts, and the absent the parties could use those contract rights to vindicate their own claims, dismissal was not warranted. *National Licorice*, 309 U.S. at 366.

Responding to AUTO's argument that this case involves serious public interests, not mere private ones, the State suggests that the public interests are mere cover for AUTO's self-interest. Br. of Resp'ts at 19.

However, the State does not deny its actions in paying millions in MVF funds to tribes, when the tribes are not exempt from the tax, has potentially serious *public* consequences. It merely suggests that AUTO does not really care about those consequences, and is solely self interested. *Id.* In the CR 19 balancing test, the proper inquiry is into the actual interests at stake, not the parties' opinions about them. On the question of whether there is a significant public interest at stake here, the State has conceded the point.

The State's suggestion that AUTO cannot raise the public rights exception because there are also private interests at stake is cynical. If AUTO had no private interest whatsoever in the outcome of this case, the State would no doubt argue that the case should be dismissed for lack of standing.

In short, the trial court had numerous options under CR 19 to avoid dismissal, which it should have viewed as a last resort when no other possibility remained. In response to each of these options, the State repeatedly points to the tribes' "entitlement," and ignores all other

balancing factors, such as the indisputable constitutional violations, and the serious allegations of misuse and waste of taxpayer funds.

This Court should reverse the trial court and allow this action to proceed on the merits.

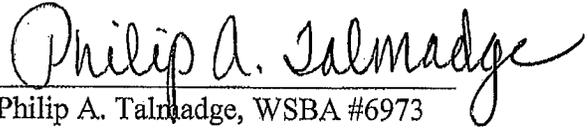
E. CONCLUSION

The trial court erred in dismissing AUTO's complaint. The tribes have no legal rights arising from an illegal contract. There are serious constitutional violations already admitted in this case, and more that are at issue. The State is potentially gifting millions of dollars in taxpayer funds to tribes, and will continue to do so into the future, in ever-increasing amounts, with no end in sight. This Court has numerous options at its disposal to ensure at least that there is judicial review of the State's illegal and/or unconstitutional conduct.

This Court should reverse the trial court's order of dismissal and its order denying the amendment of AUTO's complaint to join individual tribal officials. Costs on appeal should be awarded to AUTO.

DATED this 27th day of July, 2011.

Respectfully submitted,



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APPENDIX

CR 19:

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

DECLARATION OF SERVICE

On said day below I deposited with the U.S. Postal Service a true and accurate copy of: Reply Brief in Supreme Court Cause No. 85661-3 to the following parties:

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Clerk's Office

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

DATED this 28th day of July, 2011, at Tukwila, Washington.

Christine Jones
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