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SUPREME COURT
OF THE STATE OF WASHINGTON

AUTOMOTIVE UNITED TRADES ORGANIZATION,

Appellant,

v.

The STATE OF WASHINGTON; JAY INSLEE, in his
official capacity as Governor of the State of Washington;
PAT KOHLER, in her official capacity as
Director of the Washington State Department of Licensing,

Respondents.

APPELLANT AUTO'S ANSWER TO BRIEF OF AMICI CURIAE

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A. INTRODUCTION

In this case, this Court is tasked with resolving numerous statutory and constitutional interpretation issues regarding the payment of tens of millions of taxpayer dollars to Native American tribes. This Court has already recognized that this case raises “potentially far-reaching issues” that the judiciary must resolve. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 234, 285 P.3d 52 (2012). This brief responds to the amici briefs submitted in this case.

For years, amici Native American tribal governments (“Tribes”) have declined to participate in this important litigation, and cooperated with the State in an unsuccessful attempt to dismiss it. *Id.* Now, at the eleventh hour, the Tribes ask this Court to hear their arguments regarding the propriety of the State’s actions. They cite numerous documents they have created and/or posted at their own website in support of many of their assertions; none of the Tribes’ assertions, or documents, have been tested by AUTO in discovery. The Tribes or their State ally have previously claimed sovereign immunity which precludes examination of the factual issues raised by the Tribes.

To the extent the Tribes’ amici brief relies on extra-record factual assertions, such improper materials must be disregarded.

To the extent that the Tribes' arguments rely on the actual facts in the record, they are unavailing to the State's position. The Tribes offer no persuasive argument that the State should continue sending tens of millions of dollars in tax "refunds" where such payments are not refunds authorized under the 18th Amendment. Tribal members, like other Washington citizens, properly paid for fuel whose price included fuel taxes. The Tribes offer no authority to suggest that their members are in fact immune or preempted from paying fuel taxes. Further, the compacts cannot be used as a basis to distribute "refunds." The statute that authorized the compacts did so solely for the purpose of addressing tribal immunities or preemption. Those matters are not at issue with respect to Washington's fuel tax. The payments are not appropriated, in violation of article VIII, § 4. The Legislature also improperly delegated its authority to the Governor where the standards for such compacts are lacking. Nor do the Tribes explain how the unaccountable, secret manner in which they "prove" their entitlement to fuel tax proceeds is not an unconstitutional delegation of the Legislature's plenary authority over tax policy, intergovernmental policy, and appropriation of funds.

With respect to the brief of the Washington Policy Center, AUTO largely agrees with its analysis.

B. STATEMENT OF THE CASE

Despite the Tribes' self-interested factual contentions, it is important for this Court to recall certain *undisputed* facts that are of record here:

- The compacts at issue in this case are governed by SB 5272 in 2007, in particular, RCW 82.36.450, CP 560, 583, 1408;
- RCW 82.36.450 was part of a bill that was "AN ACT Relating to the administration of fuel taxes." It *nowhere* authorized "refunds" to Native American tribes, as DOC *admitted*. Its fiscal note stated that its enactment had a zero impact on the Motor Vehicle Fund ("MVF") (*see* Appendix A);
- RCW 82.36.450 directed the Governor to enter into compacts to address only "tribal immunities or preemption;"
- The Tribes' use of the payments is subject to analysis by an auditor of the Tribes' selection, CP 62;
- The underlying audit reports are not provided to the Department of Licensing ("DOL") or the Legislature; DOL receives only a short audit summary and does not in any way assure that the Tribes spend the refund monies as directed by the compacts, CP 560, 583, 1408;
- The audit reports are exempt under the PRA; and
- In total, the tribes who have compacts received \$34 million in FY 2012 and received \$150 million from FY 2007 to 2012. They received increased monies in FY 2013 and FY 2014 and will receive increasing amounts in the future, CP 560, 737.

C. ARGUMENT IN RESPONSE

In general terms, the payment of MVF monies to the Tribes presents the perfect storm for the unaccountable, non-transparent expenditure of transportation funds. Beginning with the falsehood by DOL that the authorizing legislation had no fiscal impact to the present day, *no one* -- not this Court, the Legislature, nor the public -- can truly know how much money is going to the Tribes by this program because the moneys are not specifically appropriated. Similarly, no one can know how the moneys are spent because their use by the Tribes is fully shielded from any legislative or public scrutiny. This is precisely why these activities violate constitutional accountability constraints established by our Progressive framers and later constitutional inhibitions on expenditures of transportation funds.

- (1) This Court Should Disregard Factual Claims in the Tribes' Brief that Are Not Based in the Record; the Tribes Declined to Participate in Litigation and Should Not Be Allowed to Supplement the Record Now

As a threshold matter, the Tribes make a number of factual claims that are outside the record and thus inappropriate.¹ For example, they

¹ All appellate briefs, including amicus briefs, must conform to the requirements of RAP 10.3(a)(5). *See* RAP 10.3(e). RAP 10.3(a)(5) states a reference to the record must accompany each factual statement.

claim that fuel tax monies from the State “led”² to a traffic signal project, and cite as evidence a “Report to the Community” posted on a website by the Puyallup Tribes. Br. of Amici at 4 n.10. They also claim that fuel prices vary, citing a report from the National Association of Convenience Stores, also posted at the Puyallup Tribes’ website. *Id.* at 7 nn.12-13. They also claim that the auditors who review the Tribes’ fuel tax accounting in secret³ follow national standards, again citing a tribal website. *Id.* at 15 nn.19-21. Their brief is replete with such references.

Amicus briefs that purport to offer facts outside the record violate the fundamental principle that cases on appeal “are decided only on evidence in the record.” *State v. Leach*, 113 Wn.2d 679, 692-93, 782 P.2d 552 (1989). Appellate courts “may not speculate upon the existence of facts that do not appear in the record.” *State v. Blight*, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). As noted *supra*, this belated effort by the Tribes to rely on extra-record materials and to create a new factual narrative for the case is offensive where they or the State have asserted sovereign immunity to foreclose access along with any discovery by AUTO to their actual expenditure practices.

² The Tribes do not say the monies “funded” the project.

³ The Tribes hire auditors to review their fuel volumes and transactions, but the audits are considered private information and exempt from the Public Records Act, RCW 42.56, and are not disclosed to the Legislature or the public. RCW 82.36.450(4).

Thus, this Court should disregard any factual claim by the Tribes not supported by the record.⁴

(2) All of the Tribes' Arguments Regarding the Legislature's Ability to Enact a Refund Ignore that the Legislature Never Actually Enacted a Refund

The Tribes make a host of arguments on the subject of the Legislature's ability to enact a tax refund to the Tribes for policy reasons. They argue that the Legislature enacted tax refunds from the MVF to the Tribes to support tribal infrastructure improvements. Br. of Amici at 2-3.⁵ They claim that this was a legislative policy decision based upon the poor condition of tribal roads. *Id.* They argue that because the MVF funds they receive are "refunds," they need not spend the money on highway purposes. *Id.* at 5. They contend that the Legislature has the power to authorize tax refunds that benefit the tribes. Br. of Amici at 7-8.

All of the Tribes' arguments regarding the Legislature's ability to enact policy-based tax refunds rest on the same false premise: they incorrectly *presume* that the Legislature enacted a refund of MVF funds to

⁴ This Court already struck the Tribes' extra-record appendix. Appendix A. On that basis, AUTO believes a motion to strike any extra record factual statements would also be warranted. However, AUTO acknowledges that this Court wants to hear from the Tribes in this matter, and with the oral argument date approaching, has chosen not to file a motion to strike this inappropriate content. Instead, AUTO asks this Court to simply disregard the Tribes' assertions based on extra-record materials.

⁵ Of course, it is again appropriate to note that the Tribes, as such, never paid Washington fuel taxes. The actual tax was paid off-reservation by non-tribal fuel suppliers.

the Tribes. It did not. As the State *admitted* below, *the Legislature never enacted any refund statute upon which the Tribes can now rely.*

Q. [I]s there any statute that specifically says that these are refunds?

A. No.

...

Q. Is there anything in the statute that specifically authorizes a refund?

A. No.

CP 1431, 1432.

When the Legislature wants to enact a tax refund from the MVF, it knows how to do so: pass a refund statute. There are numerous examples of such statutes. *See, e.g.,* RCW 82.36.280 (authorizing a “refund” to “[a]ny person” using fuel in engine not registered for highways); RCW 82.36.290 (authorizing a “refund” to “[e]very person” who uses fuel for cleaning or dyeing); RCW 82.38.180(3) (authorizing “a refund” to “[a]ny person” for any tax “illegally collected or paid”).

Nothing in the statute that the Tribes rely on says anything about legislative authorization for permanent fuel tax “refunds” to Indian tribes. The statute allows the Governor to enter into agreements “regarding motor vehicle fuel taxes” that “may provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax.” RCW 82.36.450. This statute constitutes the *entirety* of the State’s

authority regarding the agreements, and it says nothing about legislative intent to enact a permanent funneling of MVF funds to Native American tribes as “refunds.”

Similarly, if the Legislature was concerned about the condition of tribal transportation facilities, it could have appropriated funds to the Tribes in the transportation budget, as it does with all other transportation expenditures. Such expenditures would be public -- they would be addressed in committee hearings, voted on in committee and on the floor of both houses, they would appear physically in the budget bill, they would be subject to legislative oversight. Of course, *none* of that occurred here with the payments to the Tribes.

The Tribes’ arguments about legislative policy decisions only amplify the flaw in their position here: *the Legislature never made a policy decision to authorize tens of millions of dollars in MVF expenditures to benefit Indian tribes.* At most, the Legislature sought to address Tribal claims of “immunity” and “preemption.” RCW 82.36.450.⁶ As explained below, no such immunity or preemption exists, so payments to the Tribes are beyond the State’s statutory authority.

⁶ The interpretation offered by AUTO based on the statute’s plain language is further re-enforced by DOL’s fiscal note for SB 5272 (2007). If the Legislature intended that payments were to be made as an aspect of the compacts, why was the fiscal impact to the MVF zero? See Appendix.

(3) Refunds Are Sums that Are Paid Back for Taxes Improperly Collected; The Tribes Do Not Bear the Incidence of the Tax, Nor Has the Legislature Exempted Them From It

The Tribes claim that AUTO is mistaken in arguing that a “refund” may only be made to a taxpayer from whom taxes are erroneously or illegally collected.⁷ They cite as an example RCW 82.36.285, which provides a refund of taxes to providers of transportation services for persons with special needs. Br. of Amici at 11. They claim that the Legislature did not authorize refunds to those groups because taxes were illegally collected, but because “the Legislature has decided that it is good policy.” *Id.*

The Tribes are mistaken when they aver that any taxes ostensibly collected from those who transport special needs citizens would not be illegally collected. In RCW 82.38.080(h), the Legislature *specifically exempted* such persons from the fuel tax. Thus, any actual collection of the tax from them would in fact be *illegal*.⁸

The Legislature has not seen fit to exempt the Tribes from the tax. If it had, then at least the Tribes would have some argument that the taxes

⁷ Of course, that is the well-understood dictionary definition of a refund, br. of appellant at 26, and the definition employed throughout the RCWs. Reply br. at 2-12.

⁸ No consumer can, after 2007, be considered a “taxpayer” of the fuel tax as the incidence of the tax does not fall on them.

included in the price of fuel were collected illegally. However, currently, no such immunity or preemption exists in Washington or federal law.

Even if the Legislature had passed a statute exempting the Tribes from the tax, however, the fact that the incidence of the tax now falls on suppliers means that the Tribes can no longer claim that the monies distributed to them from the MVF are “a sum that is paid back.” *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 235, 290 P.3d 954, 959 (2012) (“*WOHVA*”).⁹ DOL admitted below that Washington’s gas tax after 2007 is legally applied in connection with the Tribes. CP 1417-19, 1422-23.

The Tribes maintain that a ruling that the legal incidence of the tax falls on suppliers,¹⁰ and thus cannot be a “refund” to the Tribes, would invalidate a number of other fuel tax refunds the Legislature has

⁹ The Tribes incorrectly claim that the *WOHVA* case affirmed that a refund can be made to those who do not bear the legal incidence the tax. Br. of Amici at 10. The *WOHVA* case did not address the incidence issue *at all*. Elsewhere in their brief, the Tribes admit that this Court has never addressed the issue. Br. of Amici at 9. There was, in fact, no question there that the taxpayers improperly paid the tax; the only issue was to whom the refund was to be paid. This Court was not required to establish a more precise definition of a refund.

¹⁰ The Tribes do not dispute that the incidence of the fuel tax now rests on suppliers, and that therefore they do not directly pay the fuel tax. Moreover, they cannot dispute that this very same approach to fuel taxes was approved by 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). Instead, they claim that the incidence question is “not presently before the Court.” Br. of Amici at 9. That assertion is perplexing. AUTO has raised the issue in connection with the State’s arguments that payments to the Tribes are “refunds of fuel taxes paid,” as well as in connection with the statutory argument that the Tribes are not immune or preempted from paying the tax. Br. of Appellant at 28-32.

authorized. *Id.* at 9-12. They state that if this Court rules that the legal incidence of the fuel tax falls on suppliers, and rules that a “refund” can only properly be made when taxes are improperly collected, then the Legislature will no longer be able to provide other kinds of refunds it has previously enacted to benefit certain categories of fuel users. *Id.*

The issue of incidence of the fuel tax is of particular analytical importance to this case, because the Legislature authorized the compacts only to address Tribal claims of “preemption” and “immunity.” RCW 82.36.450. Thus, if the Tribes are neither immune nor preempted from paying the tax because the incidence does not fall upon them, then the compacts are not authorized by the statute. *Id.* This rationale would not apply to other refund statutes that do not constrain the State’s authority to matters involving immunity or preemption issues.¹¹

Further, the Tribes invoke a parade of horrors that would issue from this Court’s application of the law to the facts of this case. Br. of Amici at 11. They warn that if the Legislature wanted to continue issuing

¹¹ It is an interesting academic question as to whether resolution of the incidence issue might affect other refund statutes. However, those statutes are not at issue in this case. Also, this Court’s clarification of the law is helpful, not harmful. It assists the Legislature in drafting and amending its statutes to conform with constitutional principles.

fuel tax refunds to consumers, they would be “constitutionally compelled to shift the legal incidence of the tax downstream.” *Id.*¹²

If this Court rules that the incidence of the tax does not fall on the Tribes, and thus the MVF payments cannot be a “refund,” the Legislature has many options at its disposal. For example, it can reinstitute these payments, and payments to other consumers, as tax credits from the general fund. Such credits would be authorized with full legislative scrutiny, accountability, and rigor, and not in the secretive, unaccountable manner in which the State currently pays the Tribes.

The Tribes fail to note one important difference between fuel tax issues and other general taxation issues: the 18th Amendment. This case is of constitutional magnitude because the funds the State uses to pay the Tribes come from the MVF, whose expenditure objects are constitutionally restricted by the 18th Amendment to “highway purposes.” A ruling by this Court on the fuel tax will not threaten the Legislature’s ability to make taxing decisions regarding other types of taxes.

This Court should not be afraid to say what the law is because it might constrain the Executive Branch to its statutory boundaries, or cause

¹² AUTO has questioned whether payments from the MVF to forestall tribal entry into the chain of fuel distribution as suppliers is a legitimate 18th Amendment expenditure, or is within the State’s authority under RCW 82.36.450. Br. of Appellant at 43.

the Legislature to amend legislation to comply with the Constitution. That is precisely this Court's role and duty.

It is a constitutional mandate in the 18th Amendment that any "refund" of MVF monies must be "authorized by law." The expenditure of tens of millions of dollars by the State here was decidedly not "authorized by law" in any sense.

RCW 82.36.450 did not authorize "refunds" to the Tribes. Also, article VIII, § 4 mandates that monies spent by the State must be appropriated by the Legislature. That constitutional section is designed to prevent the expenditure of public funds without legislative direction. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365, 70 P.3d 920 (2003); *State ex rel. Peel v. Clausen*, 94 Wash. 166, 172-73, 162 Pac. 1 (1917). See also, Robert F. Utter, Hugh Spitzer, *The Washington State Constitution, A Reference Guide* (Greenwood Press, 2002) at 142-43.

This Court has emphasized that Article VIII, § 4 was enacted to prevent abuse of public money by the Executive Branch, which has access to, and control over, the funds. *Clausen*, 94 Wash. at 173.

Washington courts have strictly construed the constitutional imperative that disbursements of public monies can only occur by legislative appropriation. A general legislative direction fails to satisfy this provision. In *State v. Perala*, 132 Wn. App. 98, 117, 130 P.3d 852,

review denied, 158 Wn.2d 1018 (2006). In *Mason-Walsh-Atkinson-Kier Co. v. Dep't of Labor & Industries*, 5 Wn.2d 508, 105 P.2d 832 (1940), this Court made clear that *any doubts* about whether the Legislature intended to appropriate funds *invalidates a disbursement*. This Court rejected an argument by employers that they were entitled to a refund of overpayments made to the workers compensation accident fund from the appropriation referenced above as it was not a sufficiently specific appropriation of money for refunds. *Id.* at 515.¹³

The funds the Tribes receive are not specifically appropriated by the Legislature.¹⁴ Legislators, and the public, are thereby deprived of the oversight that the budget process of the Legislature provides. Tens of millions of dollars are spent each year without any oversight.¹⁵ Legislators are led to believe the Tribes are entitled to refunds because

¹³ See also, *Wash. Ass'n of Neighborhood Stores, supra* (initiative imposing taxes and setting out objects of expenditure for such taxes did not constitute an appropriation); *Properties Four, Inc. v. State*, 125 Wn. App. 108, 118, 105 P.3d 416, *review denied*, 155 Wn.2d 1003 (2005) (contract was ultra vires in absence of appropriation to effectuate land purchase); *In re the Welfare of J.H., B.H. J.C., K.C.*, 75 Wn. App. 887, 892-95, 880 P.2d 1030 (1994), *review denied*, 126 Wn.2d 1024 (1995) (trial court lacked the authority in a dependency proceeding to order DSHS to pay for housing for mother and children, without a legislative appropriation).

¹⁴ The "appropriation" in the 2014 supplemental transportation budget, for example, consisted of a \$1.2 billion line item for "tax refunds and statutory transfers." Laws of 2014, ch. 222 § 406.

¹⁵ If the Tribes' position is correct, the Legislature has ceded all of its taxing and policy-making authority to the State without sufficient direction and control to prevent potential abuse of power, and its appropriation authority in direct violation of the

they are exempt from the fuel tax. The “refunds” here are not “authorized by law” as the 18th Amendment mandates, and they are not properly appropriated under art. VIII, § 4.

(4) A Statute Authorizing Agreements that Allows the State to Invent a “Refund” Where the Legislature Has Not Authorized One Is an Improper Delegation, Particularly When the “Procedural Safeguards” Are Secret

The Tribes argue that RCW 82.36.450 constitutes a proper delegation of taxing and appropriation authority to the State. Br. of Amici at 12-17. They claim that the purpose and methodology of achieving the Legislature’s policy goals is “clear.” *Id.* at 12. The Tribes claim that the secret audits provide for “judicial review” and “legislative scrutiny” of the State’s payments to the Tribes, citing *McGee Guest Home, Inc. v. Dep’t of Soc. & Health Servs. of State of Wash.*, 142 Wn.2d 316, 327, 12 P.3d 144 (2000). *Id.* at 14. The Tribes also argue that a legislative delegation of authority to the Executive can be discretionary, and that AUTO’s “sole argument to the contrary” is wrong. Br. of Amici at 13.

The notion that the Tribes would invoke “judicial review” as an adequate procedural safeguard is startling. If the Tribes had their way, this case would have been thrown out of court at the complaint stage. *AUTO I*, 175 Wn.2d at 220. In fact, it *was* thrown out. *Id.* Were it not for the

Constitution. Without these constitutional safeguards, the State and the Tribes could, in theory, collude, and no other governmental branch or citizen would be the wiser.

intervention of this Court, the Tribes and the State would *have avoided all judicial scrutiny* by invoking tribal sovereign immunity. *Id.* The State would have been free to continue dispensing tens of millions of dollars to the Tribes indefinitely, with no judicial oversight or legislative direction.

The futility of judicial review as a means of oversight of the compacts was made clear just six months ago. *West v. Department of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014). In that case, a citizen attempted to find out how much money the Tribes were receiving under the compacts. *Id.* at 503. The Court of Appeals concluded that the amount of MVF money paid to the Tribes each year is “personal information” exempt from disclosure. *Id.* at 508. The Court read RCW 82.36.450 broadly, and concluded that the State need not disclose *any* information about how the compacts are administered, if that information would implicate “information from the tribe.” *Id.* at 508.

The “procedural safeguards” the Tribes praise are illusory. As noted *supra*, no one – not this Court, the Legislature, or the public – can know definitively whether amounts paid to the Tribes are justified under the compacts, nor how they actually use the payments. The Tribes’ absence from this litigation (until now) and the secrecy¹⁶ of their audit

¹⁶ RCW 82.36.450(4) provides: “Information from the tribe or tribal retailers received by the state or open to state review under the terms of an agreement shall be deemed to be personal information under RCW 42.56.230(4)(b) and exempt from public

information hamper judicial and legislative authority to assess whether the State is abusing its power over MVF funds. The Tribes collect their millions by reporting to the State on their fuel sales. They are subject to auditing provisions, but under the compacts the tribes select their own audit firms, giving rise to the possibility of a conflict of interest. CP 751, 763. The State exhibits a hands-off attitude toward the audit reports, often receiving nothing more than a two-page summary report prepared by the tribes. CP 1408. It does not verify that the audits conform to State standards, CP 1404-05, that the auditors have complete information,¹⁷ CP 1405-06, 1408, or that the refunds are spent for transportation purposes. CP 1410-11. In fact, audit reports in the record often disclose little useful information. CP 592-655; *see, e.g.*, Appendix B.

The State also does not mandate that the Tribes disclose how they spend the MVF revenues. In 2007, the State requested information about how the Tribes spent MVF funds; it assured the Tribes that any response

inspection and copying." *See also*, RCW 82.38.310(4). As a result of this provision, the manner in which millions of dollars of revenue from the MVF is actually used and accounted for each year by a tribe is exempt from the Public Records Act, RCW 42.56 ("PRA"), and thereby shielded from public scrutiny or oversight.

¹⁷ The State takes no responsibility for assessing either the auditors' procedures or results, as DOL's Laughlin testified: "Q. Does [DOL] ever confirm or verify the sufficiency of the procedures used by the auditor? A. No." CP 1462. "Q. At any time has the state gone back to a tribe or one of the CPAs providing an audit report and asked for any of the underlying documents referred to in those reports? A. No." CP 1411. She further stated that the State is not responsible for verifying whether the audits meet

was purely “voluntary.” Reports to the Legislature did not include this refund information. *See, e.g.*, CP 796-806. In 2009, DOL received “voluntary” disclosures about expenditures of MVF monies from only 4-6 tribes, despite efforts to get more information. CP 791-93. Even this minimal voluntary reporting has now largely been discontinued in DOL’s reports to the Legislature.¹⁸ CP 773-77. DOL does *nothing* to assure Washington taxpayers that the monies are spent in accordance with the terms of the compacts themselves. CP 1417-19, 1422-23. In sum, given the nature of the payments and the audits, despite provisions in the compacts mandating use of the “refunds” for transportation projects, the public cannot know that is the case and DOL is not attempting to know.

The Tribes misapprehend AUTO’s delegation argument when they claim that it is merely about whether the State may exercise “discretion.” Br. of Amici at 13. AUTO’s delegation challenge does not “solely” relate to the discretionary nature of the Legislature’s delegation. It challenges the *total lack of checks and balances* over potential abuse of power, checks and balances that art. VIII § 4 and this Court’s delegation rulings

applicable requirements: “The department is *not* responsible. The CPA firm that’s hired by the tribe certifies that they have the records that verify these elements.” CP 1405.

¹⁸ The State initially requested that the tribes voluntarily report information regarding qualifying expenditures for DOL’s annual reports to the Legislature. CP 1388. DOL stopped collecting and including such voluntary reporting in its reports claiming the information was “confusing” to those who read the reports. CP 1391-93.

were meant to provide. This lack of legislative direction and control is exacerbated by the fact that the State is cutting deals with other sovereign powers using Washington taxpayer funds that are constitutionally protected.

That the delegation is insufficiently specific is clear from the Tribes' creative readings of RCW 82.36.450. Although the Tribes admit that the statute allows for compacts "regarding tribal immunities or preemption," they claim that tribal immunity and or preemption is not at issue in this case. Br. of Amici at 9 nn.7, 12. They then proceed to argue that the statute authorizes the State to (1) cooperate with the Tribes "in transportation development" and "fund tribal transportation infrastructure, *id.* at 3, 19; (2) create a contract-based tax refund that does not exist in any statute, *id.* at 7; (3) support Tribal "economic development," *id.* at 8; (4) set tax policy between the State of Washington and the Tribes, *id.* at 17-20; and (5) forestall litigation regarding the incidence of the tax, *id.* at 19. *Nowhere* do these reasons for the compacts appear in RCW 82.36.450.

The policy purposes the Tribes seek to read into RCW 82.36.450 may be laudable, but they are policy decisions for the Legislature – not the Executive – to make after full public disclosure and debate, and in light of the 18th Amendment's restrictions on the expenditure of MVF funds. The Legislature did not make such decisions in RCW 82.36.450.

The Tribes' inability to precisely articulate what the Legislature meant to achieve when it enacted RCW 82.36.450 demonstrates the delegation problem. For example, the Tribes maintain that RCW 82.36.450 expressly establishes a tax "refund." Br. of Amici at 7. However, the Tribes elsewhere appear to adopt a conflicting interpretation of the statute, suggesting that the compacts are actually *revenue sharing agreements*. *Id.* at 19.¹⁹

If the Tribes are right, and the Legislature actually enacted the compacts as an expression of Legislative policy to use taxpayer funds to help the Tribes, then RCW 82.36.450 deceived the public. Passing a statute that says the Executive can make agreements to "address tribal immunities or preemption," suggests that the State is *obligated by law* to pay fuel tax money to the Tribes, rather than *choosing* to do so for public policy reasons. This is particularly problematic when the Tribes are not in fact immune nor preempted, because their members do not bear the incidence of the tax in the first place.

¹⁹ The State also struggled with characterizing payment to the Tribes as a "refund." Interstate truck drivers licensed under the International Fuel Tax Agreement ("IFTA") are entitled to a refund of state fuel taxes paid on fuel that is consumed outside the state. In October 2009, DOL issued a memo to IFTA carriers indicating that only 25% of their fuel purchases from tribal stations were considered "taxed fuel" because the other 75% had already been "refunded" to the tribes under the compacts. CP 859-60. After complaints from IFTA carriers, in December 2009 DOL reversed itself and said that IFTA carriers could receive a 100% refund from tribal fuel, resulting in a 175% "refund" of fuel taxes on the same gallons of fuel. CP 857. The State admitted that it was "refunding" 175% of taxes paid. CP 1435.

If the underlying delegation of authority cedes the Legislature's policy-making power without essential guidelines to the State's implementation of that policy, it is unconstitutional. *See U.S. Steel Corp. v. State*, 65 Wn.2d 385, 387-90, 397 P.2d 440 (1964) (delegated authority to impose interest on delinquent taxes, without any guidelines or standards to guide discretion, held unconstitutional); *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 901-02, 602 P.2d 1172 (1979) (citing *U.S. Steel*); *see also, State v. Gilroy*, 37 Wn.2d 41, 47, 221 P.2d 549 (1950) (delegation with "no legislative declaration of the evils to be avoided or the ends to be attained" is unconstitutional).

If the Legislature wants to use Washington transportation revenues to give to the Tribes for any number of policy reasons, it is free to do so by a variety of more straightforward mechanisms. Legislators' constituents will then have the opportunity to weigh in and hear debate about why their funds should go to the Tribes for their unfettered use, instead of to state highways or the ferry system. Debate can be had over the wisdom and practicality of such a decision.

When this Court refused to dismiss this case in 2012, it did so by invoking the "public interest" in the "potentially far-reaching issues" this case raises. In doing so, this Court cited similar cases from other states where fundamental notions of separation of powers were at stake. *AUTO*,

175 Wn.2d at 234. In those cases, courts issued stern warnings about the dangers of ceding too much authority to the executive branch. *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 820, 798 N.E.2d 1047 (2003) (“In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive’s actions would thus be insulated from review, a prospect antithetical to our system of checks and balances”); *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 35, 258 Wis.2d 210, 235, 655 N.W.2d 474 (2004) (“There can be little question that the citizens of Wisconsin have a considerable interest in ensuring that state officials act in accordance with the peoples’ will as expressed in the state constitution”).

The Legislature delegation here was improper, ceding to the Executive all authority to create, enforce, and withhold information about contracts establishing tax “refunds” by which tens of millions of constitutionally protected taxpayer dollars are dispensed to sovereign powers that cannot be hauled into court.

D. CONCLUSION

The Tribes offer little persuasive argument or authority on the important issues before this Court. They do not offer cogent grounds for upholding the State’s actions, which seem to be ever-shifting. They

emphasize that the State's fuel tax payments are important to them, but that is not enough to gloss over the many legal infirmities in the State's actions.

If the Legislature wants to promote tribal transportation interests with Washington taxpayer dollars, it may do so. If it wants to immunize the Tribes from the downstream effects of the fuel tax on suppliers, it may do so. However, the State may not do so until the Legislature has acted appropriately, clearly, in public view, and in accordance with the Constitution.

DATED this th 28 day of April, 2015.

Respectfully submitted,



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APPENDIX A

Individual State Agency Fiscal Note

Bill Number: 5272 SB SL	Title: Administration of fuel taxes	Agency: 240-Department of Licensing
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Part I: Estimates

No Fiscal Impact

The cash receipts and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- Capital budget impact, complete Part IV.
- Requires new rule making, complete Part V.

Legislative Contact: Jerry Long	Phone: 360-786-7306	Date: 05/31/2007
Agency Preparation: Sally McVaugh	Phone: 360-902-3642	Date: 06/06/2007
Agency Approval: Erik Hansen	Phone: 360-902-0120	Date: 06/08/2007
OFM Review: Garry Austin	Phone: 360-902-0564	Date: 06/11/2007

Request # 5272 SB SL-1

Bill # 5272 SB SL

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

Briefly describe, by section number, the significant provisions of the bill, and any related workload or policy assumptions, that have revenue or expenditure impact on the responding agency.

This bill eliminates current statutory language from state motor vehicle and special fuel tax statutes declaring that motor vehicle and special fuel taxes are imposed on the end user. References to retailers, as well as refunds and credits available to, or tax liability of, licensed fuel distributors are also removed. Language is included to define licensees as fuel suppliers, importers, exporters, blenders, distributors, or international fuel tax agreement (IFTA) license holders.

The bill authorizes the Governor, or the Department of Licensing as their designee, to enter into fuel tax compact agreements with federally recognized tribes operating or licensing retail stations on reservations or trust lands.

This bill has no fiscal impact on the Department of Licensing. This differs from prior versions of this legislation because Section 7 which deleted the handling loss for fuel distributors was vetoed.

II. B - Cash receipts Impact

Briefly describe and quantify the cash receipts impact of the legislation on the responding agency, identifying the cash receipts provisions by section number and when appropriate the detail of the revenue sources. Briefly describe the factual basis of the assumptions and the method by which the cash receipts impact is derived. Explain how workload assumptions translate into estimates. Distinguish between one time and ongoing functions.

II. C - Expenditures

Briefly describe the agency expenditures necessary to implement this legislation (or savings resulting from this legislation), identifying by section number the provisions of the legislation that result in the expenditures (or savings). Briefly describe the factual basis of the assumptions and the method by which the expenditure impact is derived. Explain how workload assumptions translate into cost estimates. Distinguish between one time and ongoing functions.

Part III: Expenditure Detail

Part IV: Capital Budget Impact

Part V: New Rule Making Required

Identify provisions of the measure that require the agency to adopt new administrative rules or repeal/revise existing rules.

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Washington Final Bill Report, 2007 Reg. Sess. S.B. 5272
Legislative History (Approx. 3 pages)

WA F. B. Rep., 2007 Reg. Sess. S.B. 5272

Washington Final Bill Report, 2007 Regular Session, Senate Bill 5272

2007

Washington Legislature
Sixtieth Legislature, First Regular Session, 2007

Synopsis as Enacted

Brief Description: Modifying the administration of fuel taxes.

Sponsors: Senators Haugen and Sheldon; by request of Department of Licensing.

Senate Committee on Transportation

House Committee on Transportation

Background: Washington's fuel tax statutes declare that motor vehicle and special fuel taxes are imposed on the end user. Statute also directs fuel taxes be collected at the time the fuel is removed from the terminal rack, with those in the chain of distribution above the retailer being allowed certain credits and required to keep records showing the tax has been passed down the distribution chain. However, retailers are not allowed those same credits, and are not required to pass on the tax to the consumer, or required to show receipts indicating the tax has been paid. Also, there is no enforcement at the user level for motor vehicle fuels to determine if the tax was paid by the end user.

Under federal law, absent explicit Congressional authorization, states are prohibited from imposing taxes on a tribe or its members for sales made on tribal lands. On January 4, 2006, the U.S. District Court for the Western District of Washington entered an order in favor of two plaintiff tribes, the Squaxin and Swinomish, declaring that the legal incidence of Washington's motor vehicle fuel tax is on the retailer. The order states that Washington's motor vehicle fuel taxes may not be applied to motor vehicle fuels delivered to, received by, or sold by any retail fuel station that is owned by a tribe, tribal enterprise, or tribal member and located on tribal lands. Because the court found that the Squaxin and Swinomish meet the above criteria, the court entered an injunction against the collection of Washington's motor vehicle fuel taxes for fuels delivered to, received by, or sold by the plaintiffs' retail stations.

In June 2006, the Department of Licensing (DOL) and the two plaintiff tribes signed short-term intergovernmental agreements that are structured so the tribes charge their customers a fuel tax equivalent to the state motor vehicle fuel tax, with the tribes receiving 75 percent of the tax revenue collected and the state receiving 25 percent.

Summary: Current statutory language declaring that motor vehicle and special fuel taxes are imposed on the end user are eliminated from state motor vehicle and special fuel tax statutes. References to retailers, as well as refunds and credits available to, or tax liability of, licensed fuel distributors are also removed. Amendatory language is included to define licensees as fuel suppliers, importers, exporters, blenders, distributors, or international fuel tax agreement (IFTA) license holders; and explicitly states that the incidence of taxation be borne exclusively by all these licensees except fuel distributors.

New sections are added to the motor fuel and special fuel tax chapters authorizing the Governor (or the Department of Licensing as their designee) to enter into fuel tax compact agreements with federally recognized tribes operating or licensing retail stations on reservation or trust lands. Existing state/tribal fuel tax agreements are unaffected by the legislation. Any future compact agreement requires the tribal entity to: (1) acquire fuel only from lawful entities; (2) spend fuel tax proceeds, or equivalent amounts, only on transportation planning, construction, and maintenance of roads, bridges, boat ramps, transit services and facilities, police services, and other highway-related purposes; and (3) allow for audits or other means of ensuring compliance to certify the number of gallons of fuel purchased for resale by the tribe and the use of fuel tax proceeds. Information from the tribal entity provided to the state is deemed personal information and exempt from public inspection or copying. DOL is required to prepare and submit an annual report to the

Legislature on the status of existing compact agreements and ongoing negotiations with the tribes. New sections are also added to the motor fuel and special fuel tax chapters requiring tribal licensees and retailers to pass the tax through to end users as part of the selling price.

Various administrative changes are also addressed including: (1) moving the racing fuel exemption from the special fuels to the motor fuels chapter; (2) inserting IFTA provisions; and (3) moving compliance language to more appropriate subsections of the two fuel tax chapters.

Votes on Final Passage:

Senate 34 14

House 83 11 (House amended)

Senate (Senate refused to concur)

House 88 10 (House amended)

Senate 33 2 (Senate concurred)

Effective: May 15, 2007

Partial Veto Summary: The Governor's section veto retains the handling loss allowance currently available to fuel distributors.

WA F. B. Rep., 2007 Reg. Sess. S.B. 5272

End of Document

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APPENDIX B



STAUFFER & ASSOCIATES PLLC
CERTIFIED PUBLIC ACCOUNTANTS

**INDEPENDENT ACCOUNTANTS' REPORT
ON APPLYING AGREED-UPON PROCEDURES**

Shoalwater Bay Indian Tribe
Tokeland, Washington, and

Washington State Department of Licensing
Olympia, Washington

We have performed the agreed-upon procedures enumerated below, which were agreed to by the Shoalwater Bay Indian Tribe (the Tribe) and Washington State Department of Licensing (the State), solely to assist you with determining the Tribe's compliance with the specified elements of the Intergovernmental Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel Between the Shoalwater Bay Indian Tribe and the State of Washington (the Agreement), dated June 8, 2010 as discussed in Part IV§ (4.8) for the period October 1, 2010 through September 30, 2011. Management of the Tribe is responsible for compliance with the Agreement. This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose.

We obtained certain records of the Tribe and Tribal retailers to determine compliance with Part IV§ (4.8). Our procedures and findings are as follows:

Tribal Retailer

Procedure – We obtained the records of the retailer to determine the total gallons of fuel and diesel purchased and calculated the total taxes owed to the State and the total taxes to be remitted to the Tribe.

Findings – The records indicated that Tribe received the proper amount of fuel tax revenue, and remitted the proper amount of taxes to the State.



Expending of Fuel Tax Revenue

Procedure – We obtained the records specified below for the period of October 1, 2010, through September 30, 2011 to determine that Tribal fuel tax revenue was used in accordance with Part IV§ (4.8) of the Agreement:

- a. General ledger and trial balance reports of the Tribe.

Findings – The records indicated that the Tribal fuel tax revenue was used in accordance with Part IV§ (4.7) of the Agreement.

We were not engaged to, and did not, conduct an examination, the objective of which would be the expression of an opinion on the Tribe's compliance with the specified elements of the Agreement as discussed in Part IV§ (4.8). Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the Shoalwater Bay Indian Tribe and Washington State Department of Licensing and is not intended to be and should not be used by anyone other than those specified parties.

Stauffer & Associates, P.C.

Liberty Lake, Washington
February 3, 2012

DECLARATION OF SERVICE

RECEIVED BY E-MAIL

On said day below, I emailed a courtesy copy and deposited with the U.S. Postal Service a true and accurate copy of the Motion for Leave to File Over-length Answer to Brief of Amici Curiae and Appellant AUTO's Answer to Brief of Amici Curiae in Supreme Court cause number 89734-4 to the following:

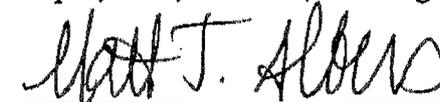
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<p>Scott Wheat General Counsel Spokane Tribe of Indians P.O. Box 100 Wellpinit, WA 99040 Email: scottwheat@icloud.com</p>	<p>Scott Crowell Crowell Law Offices – Tribal Advocacy Group 1487 W. State Route 89A, Ste. 8 Sedona, AZ 86336 Sent by U.S. mail only</p>
<p>Bruce Didesch Didesch & Associates P.O. Box 1076 Mead, WA 99021 Sent by U.S. mail only</p>	

Original E-filed with:
Washington Supreme Court
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 April, 2015, at Seattle, Washington.



Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

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Subject: Automotive United Trades Organization v. The State of Washington, et al., Supreme Ct. Cause #89734-4

Good afternoon,

Attached please find the following documents for filing with the Court:

Documents to be filed:

(1) Motion for Leave to File Over-length Answer to Brief of Amici Curiae; (2) Appellant AUTO's Answer to Brief of Amici Curiae; and (3) Declaration of Service of AUTO's Answer to Brief of Amici Curiae

Case Name: Automotive United Trades Organization v. The State of Washington, et al.

Case Cause Number: 89734-4

Attorneys Names and WSBA#s: Philip A. Talmadge, WSBA #6973 and Sidney Tribe, WSBA #33160 of Talmadge/Fitzpatrick/Tribe

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Very truly yours,

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