

NO. 92289-6

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SUPREME COURT OF THE STATE OF WASHINGTON

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COUGAR DEN INC.,

Respondent,

v.

DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON,

Appellant.

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APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF OF THE  
CONFEDERATED TRIBES AND BANDS OF THE YAKAMA  
NATION

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## I. INTRODUCTION

Indian tribal members are subject to state tax laws and economic regulation when such laws are applied outside an Indian reservation, unless there is an express federal law preempting the state law. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) (upholding Kansas fuel tax); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–50, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); Final Order CL 11, CP 1006-07. The Amicus Yakama Nation claims the 1855 Yakama Treaty accomplishes this preemption of the wholesale fuel tax. The Treaty, however, secures a right of access to roads run through the reservation and a right to travel upon public highways. This travel right “is not an express federal law that exempts [Yakama Indians] from state economic regulations” applied outside the reservation and “there is no right to trade in the Yakama Treaty.” *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 994, 998 (9th Cir. 2014), *cert. denied sub nom. Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542, 191 L. Ed. 2d 561 (2015).

Cougar Den challenged the tax based on federal cases construing the Treaty. But those cases distinguish between laws that impose fees or pre-conditions for use of public highways and laws that regulate or tax goods that may be transported. *Id.* Amicus concedes that this case law

distinguishes state laws directed at goods themselves. Amicus Br. 12-13. Amicus, however, argues that the wholesale fuel tax is a tax on the transportation of fuel that restricts travel and is thus preempted by the treaty. Amicus Br. 12; *see* Resp. Br. 23.

The Amicus's argument is defeated by the substance of the state law. The tax applies when wholesale fuel is owned and controlled by a wholesale fuel business. It occurs when the wholesale fuel business takes control of fuel in Washington. That can occur when fuel is loaded on a tanker at a refinery or terminal in Washington or when it enters the state after being acquired elsewhere. Appellant's Opening Br. 4 (citing statutes). No person on the highway gets stopped if the fuel owner fails to pay the tax. These features confirm that this tax is *not* a fee on vehicles or people traveling on highways; it is directed at the wholesale fuel and business.

The Court should affirm the Director's conclusion that this tax does not restrict travel. Therefore, the Treaty is not an express federal law that exempts Cougar Den from state taxation of wholesale fuel it possesses in, or brings into, the state. The tax assessment should be affirmed.

## II. ARGUMENT

### A. The Yakama Treaty Concerns Travel by People on Public Highways and Does Not Preempt Taxation or Regulation of Goods

#### 1. The amicus brief misstates the holdings of the Ninth Circuit construing this treaty language

Amicus quotes language not found in the Treaty when it claims a right to “transport goods.” Amicus Br. 2, 5, 7, 13. The Treaty states:

*And provided, That, if 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, art. III, 12 Stat. 951, 952–53 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859) (emphasis added). The treaty language thus concerns the Yakama people using highways on the reservation and “also” the right “to travel upon all public highways.”

To argue that this treaty language bars taxation or regulation of goods being transported, Amicus truncates quotes from cases that make no such holding or which even reject that argument. Amicus Br. 2, 5, 7, 13. For example, the Ninth Circuit held that this treaty provision secures “the right to transport goods to market over public highways *without payment of fees for that use.*” *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (*Cree II*) (emphasis added). But that holding, like the treaty language, is limited to travel or “use” of “highways.” *See also United States v.*

*Flander*, 547 F.3d 1036, 1039 (9th Cir. 2008) (*Cree II* concerned a fee for “use” of public highways). Amicus’s omission of the italicized language wrongly implies a holding about a state law applicable to logs, when in fact the case was solely about fees imposed on trucks traveling the highway. *Id.* Although the drivers in *Cree* were carrying logs from a tribal forest, the plaintiffs did not claim, nor did the court decide, that passing logs over a highway immunized off reservation logs or logging businesses from state taxes or regulations. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1246 (E.D. Wash. 1997) (plaintiffs argued the Treaty “precludes . . . fees on Indian-owned trucks” for traveling on the highway), *aff’d sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

Amicus also argues that *United States v. Smiskin* construed the Treaty to preempt state laws on trade or goods themselves. Amicus Br. 5, 7. Amicus ignores *Smiskin*’s holding, which struck down only a pre-transport notice requirement that made it illegal for an individual Yakama Indian to use highways without notifying the state. *United States v. Smiskin*, 487 F.3d 1260, 1262-63 (9th Cir. 2007). The court explicitly held that this notice requirement violated the Treaty because it restricted travel on highways just like a fee. *Id.* at 1266 (finding “no basis . . . for distinguishing restrictions that impose a fee from those, as here, that

impose” a notification requirement). Thus, the Amicus reliance on *Smiskin* is constructed from dicta. Amicus Br. 5.

The Amicus’s misreading of dicta in *Smiskin* has been repeatedly rejected by the Ninth Circuit and lower federal courts. That is shown by the holding in *King Mountain*, discussed in the Department’s Opening Br. at 31. There, the Ninth Circuit quoted from *Smiskin* to show that it concerned a “requirement” that “imposes a condition on travel.” *King Mountain*, 768 F.3d at 998. Thus, though King Mountain claimed that *Smiskin*’s dicta about hauling goods should help it avoid a state law concerning cigarettes delivered to markets in Washington, the court held that the Treaty language unambiguously did not preempt state laws directed at such trade. *See also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 2010 WL 9113878 (E.D. Wash. 2010) (*Smiskin* held “only that the prenotification requirement in particular impermissibly infringed on Yakamas’ right to travel”), *aff’d*, 658 F.3d 1078 (9th Cir. 2011); Reply Br. 7 (citing other cases).

In *United States v. Flander*, 547 F.3d 1036 (9th Cir. 2008), decided just after *Smiskin*, the Ninth Circuit ruling confirms the distinction between laws that restrict a truck or person’s travel, which are preempted by the Treaty, and laws that tax or regulate goods or trade, which are not. Notably, the opinion is written by Judge Tashima who authored *Cree II*.

Mr. Fiander, a Yakama tribal member, picked up unstamped cigarettes in Idaho and drove them in his vehicle to customers in Washington without giving pre-transportation notice. The court followed *Smiskin* with regard to preemption of the requirement of notice before traveling on a highway. 547 F.3d at 1040. The court, however, still held that cigarettes were not immunized from state laws simply because they had been transported by Fiander on a public highway. To the contrary, the law applied to the cigarettes, making them contraband because they had been transported without tax stamps or notice to the state. *Id.* at 1042. Thus, Fiander could not be charged for traveling (a trafficking charge), but he and all the other members of his criminal enterprise could be prosecuted for conspiring to transport contraband cigarettes. *Id.* at 1042-43. The Treaty, thus, did not preempt state laws applicable to the cigarettes that had been transported without tax stamps. *Id.* at 1041-42; *United States v. Mahoney*, 298 F. App'x 555 (9th Cir. 2008).

This Court should follow *King Mountain*, *Flander*, and the other cases the Department has cited. The right to travel does not broadly secure a right to engage in unregulated off-reservation trade. *King Mountain v. McKenna*, 768 F.3d at 996-98. That is because the language is about travel by people, not about "rights to trade." *Id.* at 997-98. Just as transportation of cigarettes does not evade laws directed at the cigarettes, the

transportation of wholesale fuel does not immunize the wholesale fuel owner from taxation and licensing directed at ownership of wholesale fuel by a wholesale fuel business.

As noted above, Amicus concedes that the district court and Ninth Circuit in *King Mountain* recognized that the travel right was not implicated by the state's charge on cigarettes, because "the escrow statutes . . . regulate the product itself, rather than how such a product is brought to market." Amicus Br. 12 (emphasis added, quoting federal district court). This is the very distinction the Director made when rejecting Cougar Den's arguments. "[T]he taxes in this matter are not a charge for Cougar Den's use of public highways." Final Order CL 20, CP 1008. Cougar Den is taxed because it owns wholesale fuel that is subject to Washington tax laws. Final Order CL 13, CP 1007.

Therefore, when the case law cited by Amicus and Cougar Den is properly construed, the issue in this case is straightforward. Does the State's tax on wholesale fuel impose a fee on travel by Yakama Indians that could be preempted under *Cree II*? Or, is it directed towards the business of distributing wholesale fuel, imposed on ownership of the fuel itself, and not preempted under *King Mountain* and *Fiander*?

**2. Washington law imposes a tax on wholesale fuel, owed when wholesale fuel licensees take control of the fuel within the state. This tax is not a fee or restriction on anyone's travel on highways**

Amicus correctly observes that the state statutes at issue are “unambiguous” and that their meaning involves a question of state law. Amicus Br. 4. Amicus, however, misconstrues the statutory language to fit its claim that the tax “is attempting to regulate travel.” Amicus Br. 2-6. The tax is not a charge for traveling on highways. It is directed at the business of owning and controlling wholesale fuel in Washington.

Washington fuel taxes are imposed at the wholesaler or supplier level, when the wholesale owner first takes control of a tanker of fuel. *See* RCW 82.36.022 and 82.38.031 (2014) (“It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state”). That occurs in two ways. First, the wholesale fuel owner can cause fuel to be removed from a refinery or terminal rack in the state. Second, the wholesale owner can cause fuel to enter the state after it was removed from a refinery or terminal rack outside the state. *See* RCW 82.36.020 and 82.38.030(7) (2014); Final Order CL 12, CP 1007; *see* RCW 82.38.030(9) (2016). The tax rate is based on the amount of fuel owned by a wholesale fuel owner, and there is no fee, tax, or charge assessed against that owner

for use of highways. *See* RCW 82.36.025, 82.36.035(1) (“tax imposed by this chapter shall be computed by multiplying the tax rate per gallon . . . by the number of gallons” of taxable fuel), and 82.38.160(1) (same) (2014); RCW 82.38.030.<sup>1</sup>

Amicus relies on the word “import” to build its argument that the tax is for use of highways. Amicus Br. 3-5, 13. But the statutory terms “import” and “importer” have a meaning that has nothing to do with regulating a traveler on the highway. They describe the person who is liable for the tax. The owner of the wholesale fuel who causes the fuel to be brought into the state is an “importer.” *See* RCW 82.36.010(10), (16) and 82.38.020(12), (26) (2014); Final Order CL 3, CP 1005. Thus, the term “importer” simply complements application of the tax to a wholesale owner who causes fuel to be removed from a refinery or terminal rack within the state. In both cases, the owner is not taxed or charged a fee for transporting or traveling. Rather, both owners are taxed because they own and control wholesale fuel in Washington. *See* RCW 82.36.020 and 82.38.030(7) (2014). Thus, the words “import” and “importer” have only an incidental connection to highways, because the tax is for *owning* the

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<sup>1</sup> Effective July 1, 2016, the gasoline tax laws and the diesel fuel tax laws have been consolidated into a single chapter 82.38 RCW that covers both types of fuels. Laws of 2013, ch. 225; Laws of 2015, ch. 228, § 40. The events at issue in this case occurred while the pre-2016 laws were in effect.

wholesale fuel. *See* RCW 82.36.010(16), 82.36.020, 82.38.020(26), and 82.38.030(7) (2014); Final Order CL 3, 13, CP 1005, 1007.

As further proof that this tax is not a fee for travel, the statutory scheme does not tax or license truckers who transport fuel over highways. For example, KAG West, the trucking company who transported Cougar Den's fuel, CP 1004, was not required to be licensed as a fuel supplier or pay a tax on the fuel. The state law in this case does not restrict anyone's use of the highways.

Thus, whether state law restricts travel cannot be decided using Amicus's argument that importing fuel involves transporting it. Amicus Br. 3-5. Amicus's argument would eliminate the established distinction between laws concerning off-reservation goods and trade, and laws that restrict travel on highways. It would also mean the Treaty has an extraordinary impact on all state and federal laws governing trade and commerce, because almost all trade and goods can be incidentally connected with travel. But the federal courts have already concluded that language of the Treaty is unambiguous and contains no general preemption of state laws that regulate goods or trade without directly restricting travel. *King Mountain v. McKenna*, 768 F.3d at 997-98; *Fiander*, 547 F.3d at 1042; *see also Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S. Ct. 672, 87 L. Ed. 877 (1943) ("treaties cannot be

rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties”).

This Court should preserve the distinction for laws and taxes affecting goods made in the federal cases. And, it should hold that the statutory scheme contradicts Amicus’s argument that the tax restricts travel on highways. The tax applies to owners of wholesale fuel in Washington, not travelers. *See* Final Order CL 2, 3, 13, CP 1005, 1007. As with the laws concerning cigarettes, the connection between this tax and an individual Yakama member’s travel on highways is “too attenuated from . . . use of the public highways to be” preempted by the Treaty. *United States v. King Mountain*, 2015 WL 4523642, at \*15 (E.D. Wash. 2015).

### **3. The tax applies outside the Yakama Reservation**

Amicus speculates that treaty-time Indians would not have understood that the federal territorial government could impose fees on goods being brought to their reservation. Amicus Br. at 7-8. This speculation about a possible treaty-time understanding is not supported by the record and goes beyond Cougar Den’s arguments. It is also the same argument about this treaty language that the Ninth Circuit rejected in *King Mountain*. That court held that the district court was not required to “engage in an exhaustive review of the meaning the Yakama would have

given to the Treaty as of 1855” because “the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from” a state law applicable to cigarettes possessed outside the reservation. *King Mountain v. McKenna*, 768 F.3d at 994-95.

The Amicus’s speculation also ignores how this case is about a state law applied to wholesale fuel possessed in Washington *outside* the reservation. See Final Order CL 12, CP 1007. Absent express federal preemption, state taxes can be applied to wholesale fuel possessed by a tribe outside a reservation, even if the fuel is later taken to a reservation to be resold. *Wagnon*, 546 U.S. at 113; see *Fla. Dep’t of Revenue v. Seminole Tribe*, 65 So. 3d 1094 (Fla. Dist. Ct. App. 2011) (tribe subject to state tax on fuel it purchased outside its reservation but used within it).

Finally, many courts have already rejected arguments that the Treaty bars regulation of items brought to the Yakama Reservation. For example, the Treaty does not preclude the state from requiring Yakama retailers to pre-collect state taxes on cigarettes destined to be sold to non-Indians. *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1267-68 (E.D. Wash. 2010), *aff’d*, 658 F.3d 1078 (9th Cir. 2011). The state may seize shipments of unstamped cigarettes traveling to the reservation as contraband if the Yakama Nation does not cooperate in collecting the state’s cigarette taxes. *Washington v.*

*Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 161-62, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); see *Robertson v. Liquor Control Bd.*, 102 Wn. App. 848, 853, 10 P.3d 1079 (2000). The United States may seize shipments of unstamped cigarettes even after they arrive within the reservation. *Grey Poplars Inc. v. 1,371,100 Assorted Brands of Cigarettes*, 282 F.3d 1175, 1178-79 (9th Cir. 2002).

**4. The wholesale fuel importer license is a license to engage in a business, not a restriction on travel**

Amicus attacks the licensing requirement, but relies on a misreading of a ruling in *Smiskin*. Amicus argues that *Smiskin* struck down the pre-transport notice requirement because its purpose was tax collection and not highway safety. Amicus Br. 10-11. That is incorrect.

The *Smiskin* opinion first held that the pre-transport notice law restricted Yakama Indians' right to travel on public highways. 487 F.3d at 1264-66. After concluding the state law restricted treaty traveling, it then considered whether the law could be enforced as a "purely regulatory" measure based on an analogy to cases allowing certain state fish conservation laws to be applied to treaty fishing. *Id.* at 1269. Thus, the section of *Smiskin* that Amicus relies on is irrelevant, because the State is not arguing about imposing purely regulatory requirements affecting a treaty activity. Rather, the state wholesale fuel tax laws do not restrict

treaty travel and this avoids any need to decide if the business license is purely regulatory.

Moreover, as shown in the State's Opening and Reply briefs, the license is for the business of wholesale fuel and applies to any person owning wholesale fuel. Amicus, however, claims the license requirement "subjects anyone traveling into the state" to taxes. Amicus Br. 11. But, during the time at issue here, Washington law made it unlawful for anyone to "engage in business" as a fuel importer without a license from the Department. RCW 82.36.080(1) and 82.38.090(1) (2014); Final Order CL 5, CP 1006. The importer is the corporation or person who *owns* wholesale fuel when it is first possessed in this state. RCW 82.36.010(16) and 82.38.020(26) (2014); Final Order CL 3, 13, CP 1005, 1007. Thus, the license requirement is directed at the business of owning wholesale fuel, not travel, and the Director properly concluded that the Treaty does not preempt the license. Final Order CL 20, CP 1008.<sup>2</sup>

**B. The Amicus Brief Disregards the Yakama Nation's History With Washington Fuel Taxes**

The Amicus brief claims a long-held tribal administration of this treaty provision. Amicus Br. 1-3. The record, however, shows how the

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<sup>2</sup> As further illustration of the substance of the statutory scheme, the Court may note that, as of July 1, 2016, the licensing provisions are simplified and merged. Under today's statute, a person who acquires fuel outside the state to bring into Washington must hold a "fuel distributor" license. RCW 82.38.020(8); RCW 82.38.090(1) (2016).

state and Yakama Nation have sought diligently and respectfully to resolve fuel tax disputes in the past and work towards agreements that authorize tax refunds to the tribe. The record also shows that the Yakama Nation repeatedly recognized the state's legitimate interest in collecting the state fuel taxes. See CP 242 (Revised Yakama Code § 30.11.02), CP 631-32, 636, 638-39, 643, 654 (Consent Decree ¶¶ 4.3, 4.5, 4.10, 4.14, 4.16.g, revised ¶ 4.10.1). The record does not show a long-held tribal administration of a Treaty that preempts taxation or regulation of goods or wholesale fuel itself. See *Yakama Nation v. Gregoire*, 680 F. Supp. 2d at 1267 (*res judicata* barred the Yakama Nation from asserting the treaty right to use public highways preempted state cigarette taxes because it could have made that argument when it unsuccessfully argued a different treaty-based preemption theory in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)). Instead, theories that the travel clause preempts state laws requiring fees on trucks emerged only in the 1980s when Cougar Den's owner brought the *Cree* litigation directed at a fee for highways use. See *Cree II*, 157 F.3d at 765; Opening Br. 22-25.

For example, in 1994, the Yakama Nation promised in a federal Consent Decree to inform the Department of "persons or entities they know to be engaged in the transport of untaxed motor vehicle or special

fuel to the Reservation.” CP 632 (Consent Decree ¶ 4.4). It agreed to buy fuel only from state-licensed suppliers, and to require its members who operated gas stations (including Cougar Den) to buy fuel only from the Tribe or from suppliers who agreed to be bound by the Consent Decree. CP 635, 643, 647, 655 (Consent Decree ¶¶ 4.8, 4.16.f, 4.22, revised ¶ 4.10.4); *see* CP 581. It agreed that the state could “impose and collect, according to state law,” the state’s fuel tax with respect to fuel “used or possessed by, any person or entity,” including its members, “outside the Reservation.” CP 638-39 (Consent Decree ¶ 4.14).

Similarly, during March to October 2013, the tax period at issue here, Amicus’s own gas station enterprise, the Yakamart, bought fuel from state-licensed suppliers who paid the tax. CP 580-81, 592, 594, 602. This was while the Tribe and State were litigating over the Consent Decree. In November 2013, the Tribal Council agreed to settle that litigation, vacate the prior Consent Decree, and execute a Fuel Tax Agreement under former RCW 82.36.450 and 82.38.310. CP 27-30, 225-40, 614-615. Thus, as Cougar Den violated state fuel tax laws, the Yakama Nation Tribal Council was agreeing to buy fuel only from state-licensed suppliers who pay the tax, and to require member-owned gas stations to do the same. CP 230-31. Unfortunately, that Agreement failed in 2014. CP 572-75.

Moreover, the amicus brief's assertions about tribal regulation of travel is immaterial to the legal questions before this Court. Amicus Br. at 1, 8-10. Express *federal* law is needed before a Court will find that a state tax is preempted. *Mescalero Apache*, 411 U.S. at 148-49; *King Mountain v. McKenna*, 768 F.3d at 993. Tribal law cannot by itself preempt state law. Final Order CL 21, CP 1009; *Colville*, 447 U.S. at 158.

The State, however, welcomes the Yakama Nation's acknowledgement that regulation "on the product itself, not the movement of it" will have "nothing to do with travel." Amicus Br. at 13. This refutes Cougar Den's arguments that, taken to their logical end, appear to claim that state laws cannot regulate or prohibit possession of any property being transported. *See* Opening Br. 33.

**C. The Canon of Liberal Construction Does Not Apply to State Statutes**

While recognizing that the state taxing statutes are unambiguous, Amicus Br. 4, the amicus brief simultaneously invokes an Indian law canon of construction for construing ambiguities. Amicus Br. 8. Amicus asks the Court to use that canon to construe the state tax on wholesale fuel businesses as a type of restriction on travel on highways. Even if there were an ambiguity in the state statutes, the canon of construction cited by

Amicus has no application here, and therefore cannot be used to misconstrue the state law as a restriction of travel on highways.

When the federal government enacts laws concerning Indians, it is presumed to act under a policy of protecting Indian interests. Thus, the United States Supreme Court has a canon of construction that ambiguities in federal laws enacted for the benefit of Indians should be construed based on a presumed federal intent to benefit Indians. *See* Conference of Western Attorneys General, American Indian Law Deskbook § 1:6 (2015); *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). States do not have the same federal trust relationship with Indian tribes. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Thus, the rationale for this canon of construction does not apply to state laws.

The canon might have some relevance for laws enacted to implement federal laws that were, in fact, passed for the benefit of Indians. *See State v. Schmuck*, 121 Wn.2d 373, 396, 850 P.2d 1332 (1993) (interpreting RCW 37.12.010, enacted to implement federal Public Law 83-280 authorizing state jurisdiction within Indian country). But the state's wholesale fuel tax laws do not implement federal laws. The only sections of this code enacted for the special benefit of Indian Tribes authorize the governor to enter into fuel tax agreements with tribal governments, allowing refunds of state fuel tax revenues. RCW 82.36.450 (2014);

RCW 82.38.310; *see also* *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 357 P.3d 615 (2015). Those sections are not at issue here.

**D. Because the Treaty Language Does Not Preempt Taxation of Wholesale Fuel, the United States Supreme Court's Ruling in *Wagnon* is Directly Relevant**

Outside an Indian reservation, the Indian citizens of the states are subject to state taxes absent an *express* federal law to the contrary, regardless of whether those taxes have some effect within the reservation. *Wagnon*, 546 U.S. at 113 (upholding state fuel tax on distributors who sold fuel to an on-reservation tribally-owned gas station); *see Mescalero*, 411 U.S. at 148-49. Amicus argues that this principle can be avoided here because "*Wagnon* did not involve a Treaty." Amicus Br. 11.

There is no merit to an argument that reliance on a treaty eliminates the framework for analysis given by *Wagnon* and *Mescalero*. Courts have applied that framework in cases involving treaties, including the Yakama Treaty. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464-67, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (tribe's treaty did not preempt state income tax under *Mescalero* rule); *King Mountain v. McKenna*, 768 F.3d at 993-94; *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996). *Mescalero* itself involved a treaty issue.

Thus, Cougar Den must show an express federal law preempting the state's sovereign power to tax wholesale fuel. As discussed above and

in the Department's earlier briefs, the Yakama Treaty travel provision is not an express federal law that exempts Cougar Den from the fuel taxes in this case. Therefore, *Wagnon* applies and the tax should be affirmed.

### III. CONCLUSION

The Washington laws that tax wholesale fuel owned and controlled by a wholesale fuel business that operates outside the Yakama Reservation should be upheld here. The laws fall within prior cases holding that the Yakama Treaty right to travel upon public highways does not preempt state laws that tax or regulate products or trade. The wholesale fuel tax is directed at possession and ownership of wholesale fuel in the state, not use of the highways.

The Director's conclusions of law should be affirmed, and Cougar Den should be held liable for the tax.

RESPECTFULLY SUBMITTED this 27th day of September,  
2016.

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I, Bibi Shairulla, declare that I caused a copy of this document, **Appellant's Answer to Amicus Curiae Brief of the Confederated Tribes and Bands of the Yakama Nation**, to be served on all parties and amicus or their counsel of record by agreement of the parties via Electronic mail and US Mail Postage Prepaid on the date below and as follows to:

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Dear Clerk and Counsel,

Attached please find Appellant's Response to Amicus Curiae Brief with Declaration of Service for filing with the Court in the above-referenced case, and service on counsel.

Counsel, a hard copy will also follow via U.S. Mail.

Thank you,

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