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STATE OF WASHINGTON

2011 DEC 21 A 11:57

BY RONALD R. CARPENTER SUPREME COURT
OF THE STATE OF WASHINGTON

12/21

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

Appellant,

v.

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

Respondents.

NO. 85661-3

MOTION TO EXPAND
THE APPELLATE
COURT RECORD
UNDER RAP 9.11

1. Identity of Moving Party

Automotive United Trades Organization ("AUTO") seeks the relief indicated in Part 2.

2. Statement of Relief Sought

Expansion of the appellate record to include: (1) a letter dated March 16, 2011 by the Department of Licensing ("DOL") to the Chairman of the Yakama Nation Tribal Council; (2) a letter dated April 11, 2011 from the Chairman of the Yakama Nation Tribal Council to DOL; (3) a letter written on June 23, 2011 by DOL to the lead attorney for the

Motion to Expand Record- 1

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Yakama Nation Tribal Council; and (4) a briefing paper created by DOL relating to the Yakama Nation consent decree.

3. Facts Relevant to Motion

AUTO has identified numerous state constitutional violations and abuses of authority by the Governor and DOL (“the State”) with respect to the use of Washington taxpayer dollars. AUTO filed a declaratory judgment action in Grays Harbor County Superior Court to stop such unconstitutional actions by the State.

The State moved to dismiss AUTO’s complaint on the grounds that the tribes with whom the Governor and DOL had signed compacts were indispensable parties to the action, and, due to their sovereign immunity, the action could not proceed.

In its motion, the State argued to the trial court that any concerns about statutory or constitutional violations were unwarranted, because the compacts contained “vigorous” audit provisions to ensure that the tribes were only collecting the refunds owed pursuant to the compacts.¹ Although the trial court was deeply concerned about AUTO’s allegations

¹ These assertions are belied by numerous news articles to the contrary. Those articles were reference in the Washington Policy Center amicus memorandum filed in this matter. The State again claimed its “vigorous enforcement” of the compacts in its response to AUTO’s request for direct review, but dropped that claim in its response brief on direct review. However, the State is not precluded from again raising the assertion at oral argument.

and the prospect of no judicial remedy, it granted the State's motion to dismiss.

Shortly after the State succeeded in exempting the compacts from all judicial review, it wrote a letter to the Chairman of the Yakama Tribe documenting that tribe's *long history of total noncompliance with the audit provisions of its consent decree with the State*. Talmadge decl. ex. A.² The consent decree, dated August 21, 2006, required the tribe to submit annual audit reports to the State documenting the amount of fuel purchased and sold by tribal members. *Id.* at 5. The letter claims that the tribe has never fully complied with the audit requirement, giving tardy and insufficient information for 2007 and 2008, and nothing whatsoever for 2009. *Id.* The long history of tribal noncompliance is also detailed in a DOL briefing paper created in January 2011. Talmadge decl. ex. B. Despite the tribe's continued flagrant violation of the terms of the consent decree, including the withholding of millions of dollars owed to the State, the State has only recently invoked the dispute resolution provision of the consent decree with the Yakamas. *Id.*

The tribe responded to DOL's letter on April 11, 2011. Talmadge decl. ex. C. The tribe claimed that the consent decree was "challenging"

² The compacts that were negotiated pursuant to SB 5272 required payments to tribes from the Motor Vehicle Fund ("MFV"). Certain compacts, like the consent decree involving the Yakamas, pre-dated SB 5272 and required the tribes to collect gas taxes and remit them to the State. The Yakamas owe the State millions of dollars.

to implement, and that tribal representatives wanted to meet to “improve and to clarify the relationship” between the tribe and DOL regarding fuel taxation. *Id.*

As recently as June, DOL was continuing to negotiate and make “concessions” to the Yakamas, despite their ongoing flagrant violation of the consent decree. Talmadge decl. ex. D. DOL has even bowed to tribal demands that documents regarding its violations be kept secret and not disclosed under the Public Records Act, RCW § 42.17A (“PRA”). *Id.* In the event that DOL does not feel that it can lawfully keep its actions secret under the PRA, it has agreed to give advance notice to the tribe so that it may seek to enjoin disclosure to the public on some other, unidentified grounds. *Id.*

4. Grounds for Relief and Argument

RAP 9.11 permits a party to ask the Court to expand the appellate record before a decision on the merits if (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s failure to present the evidence to the trial court, (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive,

and (6) it would be inequitable to decide a case solely on the evidence already taken in the trial court. RAP 9.11; *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593-94, 849 P.2d 669 (1993).

Moreover, this Court may waive the requirements of RAP 9.11 if the new evidence would serve the ends of justice or judicial economy. RAP 1.2(c); *Wash. Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 884-85, 665 P.2d 1337 (1983). In *WFSE*, this Court held that evidence of state agency action taken after the trial proceedings closed would be considered, even though the structures of RAP 9.11 had not been followed.³ The evidence in question directly affected the case on review, and remand would have been inefficient and unnecessary. *Id.* at 885.

In this case, the evidence in question meets all of the criteria of RAP 9.11. First, additional proof of these facts is necessary for review. The State succeeded in dismissing this case below by claiming that the tribes' right to immunity was more important than the right of Washington citizens to challenge the authority of the State to enter into these contracts with tribes. The State cited the audit provisions of the contracts in support of its argument that citizen lawsuits are not needed because the contracts guarantee "vigorous" state agency oversight.

³ Under a prior version of RAP 9.11, parties were not allowed to move for expansion of the record. Only the Court could initiate expansion. *WFSE* at 884. Nevertheless, this permitted such a motion in the interests of justice. *Id.*

As this new and previously unavailable evidence confirms, the “vigorous” oversight touted by the State below is anything but vigorous. For four years, DOL has permitted the Yakamas to flout the audit provision of the decree, apparently without saying a word. Only when faced with the light of day shed by this lawsuit challenging this type of “vigorous” enforcement did DOL seek “mediation” to resolve this violation. Talmadge decl. ex. A. Even now, DOL continues to aid the tribe in violating the consent decree, and in keeping those violations from public view. DOL is apparently “negotiating” with the tribe to change the terms of a lawful consent decree to which the parties agreed. These facts run directly contrary to a critical argument made by the State below, and are necessary for this Court’s review. Talmadge decl. ex. B, C.

These documents could change this Court’s decision. The critical question on review is whether the trial court appropriately weighed the balance between tribal sovereignty and a citizen’s right to judicial review of potential constitutional violations by state officers. Evidence that those state officers have been ignoring their duties of oversight in violation of state statutes and constitutional provisions, weighs heavily in favor of the citizenry, represented in this case by AUTO.

Also, this Court’s decision on review would change because the State is claiming that the compact audit provisions provide citizens with

the necessary assurance that taxpayer dollars are not being unconstitutionally applied or otherwise misused. State's br. on direct review at 5-6.

What the State does not disclose in its briefing and what this new evidence reveals is that the consequences for noncompliance with those audit provisions are weak or non-existent. The State can and does allow a tribe to retain millions of taxpayer dollars owed to the MVF in direct violation of the compacts, and the State refuses to act for years. If the State need not enforce the compacts and consent decrees, the State's claim that there can never be any judicial oversight of the State's duties and responsibilities under the compacts becomes even more dangerous.

If the State has no motivation to vigorously enforce these agreements, and citizens cannot through the judiciary require the State to act, then the temptation to abuse or ignore these agreements for improper purposes increases. It is not difficult to imagine what political or personal gain may be had by state officials who have the power to "overlook" millions of dollars that tribes owe to Washington taxpayers.

This new evidence also relates directly to another substantive issue before this Court: whether the State is violating the 18th Amendment by allowing tribes to spend MVF revenues on non-highway purposes. As the State argues in its answer to AUTO's request for direct review, the audit

provisions are not only intended to track tribal expenditures on fuel in order to calculate “refunds,” they are also intended to ensure that tribes spend MVF funds on highway purposes. *Id.*⁴ If the audits are not occurring, then there is no way of verifying whether there is 18th Amendment compliance, contrary to the State’s representations to this Court.

It is equitable to excuse AUTO failure to present this evidence to the trial court, for the simple reason that summary judgment was entered in this case on February 4, 2011, and the letter was sent on March 16, 2011. During the pendency of the proceedings below, AUTO had no reason to know that the State was shirking its duty to enforce the audit provisions of the compacts. Furthermore, the timing of this letter is highly suspicious. As the letter’s log indicates, the State has known for years that the Yakamas were out of compliance, yet chose not to act until after the trial court’s decision in its favor. So, at the same time the State was touting to the trial court that the “vigorous” audit requirements sufficiently

⁴ Incredibly, the State claimed in its answer to AUTO’s request for direct review that spending MVF funds on drug dogs, boat ramps, walking trails, and the like does not violate the 18th Amendment. State’s answer on direct review at 2 n.1. In support of this absurd notion, the State cites the definition of “highway purposes” in RCW 82.36.450 and RCW 82.38.310. These statutes define “highway purposes” far beyond the limits of the 18th Amendment. *See e.g., State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (maintenance of a public transportation system not a highway purpose). Therefore, the State relies upon an unconstitutional statute to argue to this Court that there is no need for judicial review of that statute or the resulting agreements with tribes.

protected the constitutional interests at stake, it was sitting on evidence to the contrary. Equity favors admission of this evidence.

Post-judgment motions in the trial court would be inadequate and unnecessarily expensive. AUTO would be forced to reopen trial court proceedings and file a CR 60 motion to vacate the judgment. Regardless of whether the trial court vacated or affirmed its prior order, this case is inevitably going to proceed to appeal because of the stakes and interests involved. Therefore, in the interest of judicial economy, this Court should resolve the question of this new evidence under RAP 9.11.

For the same reasons that post-judgment motions would be inadequate, the remedy of granting a new trial is inadequate and unnecessarily expensive. This case involves primarily legal issues that this Court will eventually need to resolve.

Finally, it would be inequitable to decide this case solely on the evidence already taken in the trial court. Again, the State heavily relied on the audit provisions of the compacts to assure the trial court that the compacts needed no judicial oversight. The State argued that it would ensure the Washington Constitution and laws were being obeyed by enforcing the compacts' "vigorous" audit provisions. This evidence belies the State's assertions.

This Court should grant AUTO's motion under RAP 9.11 to expand the record on review to include this new evidence.

DATED this 21st day of December, 2011.


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Attorneys for Appellant Automotive United
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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
capacity as Governor of the State of
Washington; LIZ LUCE, in her
official capacity as Director,
Washington State Department of
Licensing,

Respondents.

NO. 85661-3

DECLARATION OF
PHILIP A. TALMADGE
IN SUPPORT OF
MOTION TO EXPAND
THE APPELLATE
COURT RECORD
UNDER RAP 9.11

PHILIP A. TALMADGE declares as follows:

1. I am over the age of eighteen, competent to testify, and make this declaration based upon personal knowledge.
2. Attached as Exhibit A is a true and correct copy of the letter dated March 16, 2011 by the Department of Licensing.
3. Attached as Exhibit B is a true and correct copy of a briefing paper created by the Department of Licensing relating to the Yakima Nation consent decree.

4. Attached as Exhibit C is a true and correct copy of the letter dated April 11, 2011 from the Chairman of the Yakama National Tribal Counsel to the Department of Licensing.

4. Attached as Exhibit D is a true and correct copy of the letter written on June 23, 2011 by the Department of Licensing to the lead attorney for the Yakima National Tribal Council.

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

DATED this 21st day of December, 2011 at Tukwila, Washington.

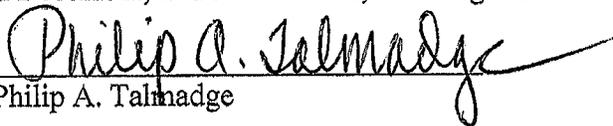

Philip A. Talmadge

EXHIBIT A



STATE OF WASHINGTON

DEPARTMENT OF LICENSING

PO Box 9020 • Olympia, Washington 98507-9020

March 16, 2011

The Honorable Harry Smiskin
Chairman, Yakama Nation Tribal Council
PO Box 151
Toppenish, WA 98498

Dear Chairman Smiskin:

The Department of Licensing (DOL) is notifying the Yakama Nation that DOL is invoking the dispute resolution process per section 4.7 of the Consent Decree between the Yakama Nation and State of Washington, Department of Licensing dated August 21, 2006 (Settlement Agreement, Agreed Changes to Consent Decree, and Order, United District Court Eastern District of Washington). Per the Consent Decree, Section 4.7.b., DOL requests dates and times the Yakama Nation's representatives are available to meet face-to-face within 30 days of receipt of this letter. The contact person for DOL to establish the meeting date and time will be Josh Johnston, Tribal Liaison. He may be reached at 360-902-3720 or by email at JJohnston@dol.wa.gov.

The following are DOL's issues in dispute and DOL's position on each issue:

ISSUE: Audits required by the Consent Decree for Periods 2007, 2008 & 2009 have not been completed or submitted to DOL.

DOL's POSITION:

DOL has acted in good faith with the Yakama Nation to attempt to informally resolve the issue of outstanding audits for 2007, 2008 and 2009. As of March 15, 2011, Yakama Nation has been unresponsive to DOL's attempts to resolve these audits. The following is a brief summary of those efforts:

- In May 2008, DOL sent notification to the Yakama Nation to initiate the annual audit of fuel purchases and sales for 2007. The Yakama Nation did not respond to the letter throughout 2008. DOL staff made multiple attempts to follow-up by phone and obtain a response, without success.
- In February 2009, DOL was able to contact Yakama Nation Chairman Ralph Sampson. A joint meeting via conference call was scheduled for April 16, 2009 to discuss the audit process for 2007.

The Honorable Harry Smiskin

March 16, 2011

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- On April 8, 2009, Director Liz Luce sent a letter to Chairman Sampson initiating the audit process for 2008. Given the 2007 audit process had not started, it was recommended the 2007 and 2008 audits be combined into one audit process to be completed by July 1, 2009.
- During a conference call on April 26, 2009 (rescheduled April 16th conference call), DOL and the Yakama Nation agreed to combine the audits for 2007 and 2008 into one audit process. The audit periods agreed upon were January 2007 through December 2007 and January 2008 through December 2008. DOL and the Yakama Nation also agreed to the records to be reviewed, the process for selecting a CPA firm by July 1, 2009, points of contact for each party throughout the audit process, and a revised audit completion date of September 30, 2009 to allow time for the Yakama Nation to complete an RFP process for an audit firm.
- On May 7, 2009, Director Liz Luce verified in writing the agreed upon audit process and confirmed the revised audit completion date of September 30, 2009.
- May through August 2009, the RFP process was completed and an audit firm was selected.
- In September 2009, DOL agreed to a second extension of the final audit due date to October 30, 2009.
- In October 2009, the Yakama Nation requested a third extension of the final audit due date and requested the determination of the due date occur after tribal council member elections, which were to be held that month. DOL agreed to participate in a conference call on November 16 to determine a final audit date.
- On November 16, 2009, the Yakama Nation was unable to provide an audit completion date and requested another extension. DOL and the Yakama Nation agreed to again discuss a final audit date at the next conference call (set for December 16, but later postponed to December 22) as both parties needed to discuss the current audit status with their respective administrations and leadership.
- On December 22, 2009, the Yakama Nation shared via conference call that they had not completed the election process for Tribal Council members which impacted the Nations' ability to provide a revised audit completion date. In addition, the audit firm shared that they were unable to obtain the necessary fuel tax records to complete the audit and could not provide audit findings to the Tribe and DOL based on current records. DOL shared it was no longer willing to extend the timeframes for audit completion, and that by January 15, 2010, the audit must be completed and presented to DOL. DOL requested prompt response from the Yakama Nation with potential dates for a face-to-face audit debrief meeting prior to the January 15, 2010 deadline.

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- In early February 2010, DOL was notified of the new Chairman, Vice-Chairman, Secretary and Tribal Council members for the Yakama Nation. DOL initiated contact with the new Chairman to make introductions, ensure he was informed of the outstanding audits and to request an in-person meeting to discuss the audits. An in-person meeting with the Chairman and Council members was eventually scheduled for August 3, 2010.
- On June 21, 2010, DOL sent a letter to the Yakama Nation initiating the audit process for 2009. The letter asked the Yakama Nation to meet with DOL to select the CPA firm to complete the audit and submit a final written report to the Director.
- On August 3, 2010, Director Luce met in-person with the Tribal Council to discuss the consent decree and audits. At the meeting, the Tribal Council agreed to an August 20 conference call with DOL to re-establish government-to-government discussions on completing the audits.
- On August 20, 2010, Yakama Nation requested that DOL offer a letter memorializing the goodwill discussions that both sides were embarking upon, and that DOL commit to not invoking the dispute resolution clause in the consent decree during these discussions.
- On September 13, 2010, DOL sent a letter to Yakama Nation Chairman memorializing the discussions and included the expectation that the discussions be completed and result in a resolution to the audits by January 15, 2011.
- Upon receipt of the letter from DOL, the Yakama Nation's attorney Julio Carranza asked that the completion date be removed because the Nation was working through the death of a tribal member. DOL offered to extend the completion date to March 15, 2011 and asked for suggestions on how to reach resolution.
- In mid-October 2010, after numerous emails and phone messages by DOL attempting to make contact with the Yakama Nation's attorney, Mr. Carranza responded with an email saying the DOL could expect correspondence later in the month or early November regarding the audits. No correspondence was received from the Yakama Nation during these time frames.
- In November and December 2010, after numerous phone messages and emails by DOL attempting contact with the Yakama Nation's attorney, Mr. Carranza said that he will try to get a response for DOL.
- As of December 31, 2010, DOL has not been contacted by the Yakama Nation regarding the 2009 audit and has not received a written audit report.
- As of January 15, 2011, there has been no further response from the Yakama Nation to DOL regarding the 2007, 2008 or 2009 audits.

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March 16, 2011
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As of March 15, 2011, DOL has not received audit reports from the Yakama Nation for audit periods 2007, 2008 and 2009.

ISSUE: Inadequate records to complete audits for 2007 & 2008 and failure by the Yakama Nation to initiate the audit process for 2009.

DOL'S POSITION:

On December 22, 2009, the CPA representative contracted to conduct audits for 2007 and 2008, and the Chief Financial Officer for the Yakama Nation informed DOL that the Yakama Nation's licensed filling stations presented for the auditor's review only partially completed or no fuel tax records for audit periods 2007 and 2008. According to the audit firm's representative, the records do not meet the record keeping requirements in the Consent Decree, section 4.17. Due to incomplete records or a lack of records available, the audit firm was unable to complete the required audits. As of March 15, 2011, the Yakama Nation has not provided audit reports to DOL for 2007, 2008, or 2009.

ISSUE: Yakama Nation is required to revoke licensing for filling stations not conducting business consistent with all terms of the Consent Decree.

DOL'S POSITION:

The Yakama Nation had eight fueling stations with licenses during 2007 and 2008 and seven fueling stations in 2009. Per section 4.16 of the Consent Decree, the Yakama Nation is required to (shall) revoke the licenses of filling station(s) on the Reservation not conducting business consistent with all terms of the Consent Decree. As of December 2009, the Yakama Nation was aware of the fueling stations' failure to comply with the record keeping requirements of the Consent Decree and is required to revoke those licenses. The Yakama Nation has renewed these licenses for the years 2010 and 2011.

ISSUE: Percentage Estimates for Fuel Delivered Tax-Free to Yakama Nation require modification due to the Yakama Nations' inability to substantiate fuel purchases of tribal vs. non-tribal members.

DOL'S POSITION:

Per the Consent Decree, sections 4.9 and 4.11, the percentage estimates of the Consent Decree are reviewed by March 31 of each year to determine actual number of gallons of fuel sold during the prior year. The percentage calculation for each upcoming year is to be based upon audit findings.

Given that DOL has not received audits for 2007, 2008, and 2009, the percentages of tax-free fuel for 2010 and 2011 will be adjusted based on records of suppliers and distributors to which DOL has access.

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March 16, 2011
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Based on those records, the percentage of tax-free fuel that will be delivered to stations on the Yakama reservation will be reduced below the current 75 percent, as the current 75 percent was set based on the estimated percentage of fuel sold to enrolled Tribal members in 2006.

ISSUE: Taxes are due to the State of Washington by the Yakama Nation.

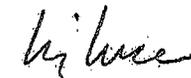
DOL'S POSITION:

Per the Consent Decree, Section 4.11, liability for state fuel taxes is to be reconciled by both parties and either the State or the Tribe must make payment by April 30. The audit findings will be instructive to the parties in determining the amount owed. Per Section 4.10.1, all gallons of fuel sold or distributed to the Tribe and not used in the manner described in Section 4.9 shall be considered subject to the State's taxes under the Consent Decree.

DOL is unable to verify, due to lack of audit reports for 2007, 2008 and 2009 by the Yakama Nation, that the Yakama Nation has used any gallons of fuel sold or distributed to the Tribe in the manner described in Section 4.9. The Yakama Nation is then subject to the State's taxes on all fuel delivered to the reservation under the Consent Decree. The estimated tax owed for 2007, 2008, and 2009 is \$11,009,069.

Please respond to Mr. Johnston to schedule a mutually acceptable meeting time as soon as possible. He can be reached via email at jjohnston@dol.wa.gov or at (360) 270-1311.

Sincerely,



Liz Luce
Director

EXHIBIT B

BRIEFING PAPER – JANUARY 2011
YAKAMA NATION – FUEL TAX AUDITS FOR 2007, 2008, 2009 & 2010

BACKGROUND:

The Fuel Tax Agreement between the Yakama Nation and the State of Washington, Department of Licensing's (DOL) is a Consent Decree issued by the United States District Court for the Eastern District of Washington in November 1994, effective January 1995, and amended per a Settlement Agreement in August 2006.

In May 2008, DOL sent notification to the Yakama Nation to initiate the annual audit of fuel purchases and sales for 2007. The Yakama Nation did not respond to the letter throughout 2008. Multiple attempts were made via phone to follow-up and obtain a response, without success.

In February 2009, DOL was able to contact the Yakama Nation's Chairman Ralph Sampson. A joint meeting via conference call was scheduled for April 16, 2009 to discuss the audit process for 2007.

On April 8, 2009, Director Liz Luce sent a letter to Chairman Sampson initiating the audit process for 2008. Given the 2007 audit process had not started, it was recommended the 2007 and 2008 audits be combined into one audit process to be completed by July 1, 2009.

Via a conference call on April 26, 2009, DOL and the Yakama Nation agreed to combine the audits for 2007 and 2008 into one audit process. The audit periods agreed upon were January 2007 to December 2007 and January 2008 to December 2008. DOL and the Yakama Nation also agreed to the records to be reviewed, the process for selection of a CPA firm by July 1, 2009, points of contact for each party throughout the audit process, and a revised audit completion date of September 30, 2009, allowing time for the Yakama Nation to complete an RFP process for an audit firm.

On May 7, 2009, Director Liz Luce verified in writing the agreed upon audit process and confirmed the revised audit completion date of September 30, 2009.

May through August 2009, the RFP process was completed and an audit firm was selected.

In September 2009, DOL agreed to a second extension of the final audit due date to October 30, 2009.

In October 2009, the Yakama Nation requested a third extension of the final audit due date and requested the determination of the due date occur after tribal council member elections, which were that month. DOL agreed to participate in a conference call on November 16 to determine a final audit date.

On November 16, 2009, the Yakama Nation was unable to provide an audit completion date and requested another extension. DOL and the Yakama Nation agreed to re-discuss a final audit date at the next conference call (set for December 16, but later postponed to December 22) as both parties needed to discuss the current audit status with their respective administrations and leadership.

On December 22, 2009, the Yakama Nation shared via conference call that they had not completed the election process for tribal council members which impacted the Nation's ability to provide a revised audit completion date. In addition, the audit firm shared that they were unable to obtain the necessary fuel tax records to complete the audit and could not provide audit findings to the Tribe and DOL based on current records. DOL shared it was no longer willing to extend the timeframes for audit completion. By January 15, 2009, the audit must be completed and presented to DOL. DOL

requested prompt response from the Yakama Nation with potential dates for a face-to-face audit debrief meeting prior to the January 15, 2010 deadline.

In early February 2010, DOL was notified of the new Chairman, Vice-Chairman, Secretary and Tribal Council members for the Yakama Nation. DOL initiated contact with the new Chairman to make introductions, ensure he was informed of the outstanding audits and to request an in-person meeting regarding the out-standing audits. An in-person meeting with the Chairman and Council members was scheduled for August 3, 2010.

On June 21, 2010, DOL sent a letter to the Yakama Nation initiating the audit process for 2009. The Yakama Nation was required to meet with DOL to select the CPA firm to complete the audit and submit a final written report the Director.

On August 3, 2010, Director Luce met in-person with the tribal council to discuss the consent decree and audits. At the meeting, the tribal council agreed to an August 20 conference call with DOL to re-establish government-to-government discussions on completing the audits.

On August 20, 2010, Yakama Nation requested that DOL offer a letter memorializing the goodwill discussions that both sides were embarking upon, and that DOL commit to not invoking the dispute resolution clause in the consent decree during these discussions.

On September 13, 2010, DOL sent a letter to Yakama Nation Chairman memorializing the discussions and included the expectation that the discussions be completed and result in a resolution to the audits by January 15, 2011.

Upon receipt of the letter from DOL, the Yakama Nation's attorney Julio Carranza asked that the completion date be removed because the Nation was working through the death of a tribal member. DOL offered to extend the completion date to March 15, 2011 and asked for suggestions on how to reach resolution.

In mid-October 2010, after numerous emails and phone messages by DOL attempting to make contact with the Yakama Nation's attorney, Mr. Carranza responded with an email saying the DOL could expect a correspondence later in the month or early November regarding the audits. No correspondence was received from the Yakama Nation.

In November and December 2010, after numerous phone messages and emails by DOL attempting contact with the Yakama Nation's attorney, Mr. Carranza said that he will try to get a response for DOL.

As of December 31, 2010, DOL has not been contacted by the Yakama Nation regarding the 2009 audits and has not received a written audit report.

As of January 15, 2010, there has been no further response by or contact from the Yakama Nation to DOL regarding the 2007, 2008 or 2009 audits.

Circumstances Requiring Immediate Audit Completion

The circumstances for DOL to require immediate audit completion were shared with the Yakama Nation during the conference calls and followed-up in writing after the August 3, 2010 meeting. Below is a portion of the information provided:

Record Keeping - The Yakama Nation has obtained for the auditor's review only partially completed fuel tax records per the record keeping requirements in the Consent Decree, section 4.17. Per the audit firm, the records

provided and lack of records available will not allow for an audit to be completed. If an audit firm is unable to complete an audit based on records, the Yakama Nation is not meeting recording keeping terms of the consent decree.

Tribally Licensed Yakama Businesses Operating Filling Stations on the Reservation - The Yakama Nation has fueling stations with licenses that expired in 2009 and 2010. Per section 4.16 of the Consent Decree, the Yakama Nation is required to (shall) revoke the licenses of filling station(s) on the Reservation not conducting business consistent with all terms of the Consent Decree.

Without a completed audit which verifies the fuel stations are maintaining records in accordance with section 4.17 of the Consent Decree, the Yakama Nation is required to, "... (shall) revoke the licenses of filling station(s)..." To date, the Yakama Nation has not revoked the licenses of any fueling stations.

Percentage Estimates - Per the Consent Decree, section 4.9 and 4.11, the percentage estimates of the Consent Decree are reviewed by March 31 of each year to determine actual number of gallons of fuel sold during the prior year.

The percentage calculation for the upcoming year is based upon audit findings. If the audit is not completed for 2007, 2008, 2009 & 2010 percentages will have to be adjusted based on limited completed records supplied by Yakama Nation and any records of suppliers and distributors to which DOL has access. Based on those records, DOL anticipates that the percentage of tax-free fuel that will be delivered to stations on the Yakama reservation will be reduced below the current 75%, as that 75% is set based on the percentage of fuel sold to enrolled Tribal members.

Payments - Liability for state fuel taxes are to be reconciled by both parties and either the State or the Tribe must make payment by April 30. The audit findings will be instructive to the parties in determining the amount owed.

Without a completed audit, the fuel taxes owed the tribe or state will not be able to be calculated and payments processed by April 30 for 2007, 2008, 2009 and 2010.

EXHIBIT C



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

April 11, 2011

Sent via Email and U.S. Certified Mail

Ms. Liz Luce, Director
Department of Licensing
Post Office Box 9020
Olympia, Washington 98507-9020
Email: LLUCE@dol.wa.gov

RE: Yakama Nation Fuel Tax Consent Decree

Dear Ms. Luce:

I am writing in response to your March 16, 2011 letter invoking the dispute resolution process in the amended fuel tax consent decree between the Yakama Nation and the State of Washington. The letter asked that the Nation respond within thirty days and provide times when the Nation is available to meet in person with representatives of the State to discuss a number of issues, specified in your letter, regarding implementation of the decree.

The Yakama Nation welcomes the opportunity to meet and to discuss ways to improve and to clarify the relationship between the Nation and the State with regard to fuel sales and taxation. The Yakama people have always been traders, and fuel sales are an important part of our current tribal economy. Our experience with the decree shows that some of its provisions are challenging for both the Nation and the State to implement. Obviously, discussions between the Nation and the State will need to address the specific issues identified in your letter. The Nation has some questions regarding the State's positions as set out in that letter, and we may have some disagreements to work through regarding them. In addition, the Nation hopes to discuss ways to adjust the relationship between the State and the Nation in the future, so as to resolve all parties' concerns simplify tax administration, and minimize future disagreements.

We suggest that we meet in Toppenish on May 25, 2011 at 9 a.m. during a Special Tribal Council Session dedicated to this issue. If possible, we would like to meet here in Toppenish because a number of tribal officials involved in these matters have difficulty traveling. I encourage you to invite all relevant state participants to this special meeting to work together on these issues.

Mr. Julio Carranza of the Yakama Nation Office of Legal Counsel will be contacting Josh Johnston, the Department's Tribal Liaison this week to verify the State's availability and finalize scheduling and location.



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

In conclusion, I regret that events within the Nation have delayed our discussions, and look forward to a productive meeting and resolution of outstanding issues concerning the State's fuel taxes.

Respectfully,

Harry Smiskin,
Chairman
Yakama Nation

cc: Josh Johnston, Department of Licensing
Julio Carranza, Office of Legal Counsel

EXHIBIT D



STATE OF WASHINGTON
DEPARTMENT OF LICENSING
PO Box 3020 • Olympia, Washington 98517-3020

June 23, 2011

Mr. Julio Carranza, Lead Attorney
Office of Legal Counsel, Yakama Nation
PO Box 151, 401 Fort Road
Toppenish, WA 98948

Sent via U.S. Certified Mail

Dear Mr. Carranza:

Thank you for your letter dated June 16, 2011. In the spirit of cooperation and good faith government to government discussions, the following is Department of Licensing's (DOL) response to requests made by the Yakama Nation:

Notification of Records Requests Regarding the Yakama Nation

- DOL agrees to provide notification to the Yakama Nation upon receipt of any request for records regarding the Yakama Nation or fuel retailers licensed by the Yakama Nation as appropriate.
- For any data or information that the Yakama Nation or licensed fuel retailers believe DOL possesses and which may be the subject of a public records request, and which the DOL does not believe contains trade secrets, DOL will commit to providing the Yakama Nation or fuel retailers licensee notice so that the Yakama Nation and/or the licensees can consider whether to seek to enjoin the release of the information.
- In good faith, DOL will provide a copy of a pending records request regarding Yakama Nation and a courtesy copy of the first installment of records provided to the requester. This information will be provided to you in a separate letter from Karla Laughlin, Prorate and Fuel Tax Administrator.

Exemption of Records

The Department of Licensing's policy regarding public records requests is to be open and forthcoming in release of records unless there is very clear exemption language in the law. After review of the various RCWs you cited and previous interpretation of exemptions related to fuel tax records by the Prorate and Fuel Tax Section, DOL agrees to the following:

Mr. Julio Carranza

June 23, 2011

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- Based on your letter and a follow-up phone conversation between your legal staff and our Assistant Attorney General on June 17, 2011, DOL agrees that information provided to DOL after May of 2007 under the Yakama Consent Decree falls within the language of RCW 82.56.450(4) and RCW 82.38.310(4). Thus, information received by the state or open to state review, regarding the Yakama Nation's or licensees' records will be treated as exempt from disclosure, to the extent that those records have not already been disclosed by DOL in response to earlier requests.

This is a new interpretation of the law by DOL. Prior to the date of this letter, DOL did not view the Yakama Nation's records as exempt under these statutes. Prorate and Fuel Tax has completed two public records requests in 2010 and 2011 that publicly released Yakama Nation and licensees' information and data.

In good faith, DOL will provide the Yakama Nation copies of the records released in response to these two records requests. As Prorate and Fuel Tax (PRFT) is responsible for the record requests, Karla Laughlin will send a courtesy copy of the records to you on June 24, 2011.

- In response to future records requests for Yakama Nation or licensees' information or data, as it pertains to interpretation of the statute, DOL agrees that documents provided by the Yakama Nation or open to the state's review under the Consent Decree will be treated as exempt from disclosure under these statutes.
- DOL agrees that it will not publicly release information with content of communications between DOL and Yakama Nation during the dispute resolution process that began on March 20, 2011. DOL must caution the Yakama Nation that once the dispute is resolved, records of the communications may well be subject to public disclosure, under case law interpreting the Public Records Act.
- DOL does not believe that its correspondence, since 2007, in its attempts to have the Yakama Nation complete the audits required by the Consent Decree, can appropriately be withheld as "deliberative process" or "litigation related" when those communications took place before invocation of the dispute resolution clause was clearly contemplated by DOL.
- DOL agrees that documents that it may have prepared that meet the description of documents in RCW 42.56.290 will be withheld from disclosure while negotiations are pending.

Mr. Julio Carranza

June 23, 2011

Page 3

We look forward to the next meeting scheduled for June 27, 2011. If you have additional questions prior to the meeting, please contact Josh Johnston at 360-359-4017.

Sincerely,



Liz Luce
Director

LL:kl

cc: Mary Tennyson, Senior Assistant Attorney General
Alan Haight, Deputy Director
Karla Laughlin, Administrator Prorate and Fuel Tax
Josh Johnston, Tribal Liaison

Skip a trip -- go online www.dol.wa.gov

We are committed to providing equal access to our services.
If you need accommodation, please call 360-664-1811 or TTY 360-664-0116.

DECLARATION OF SERVICE

On said day below I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Motion to Expand the Appellant Record Under RAP 9.11 and Declaration of Philip A. Talmadge in Support of Motion to Expand the Appellant Court Record Under RAP 9.11 in Supreme Court Cause No. 85661-3 to the following parties:

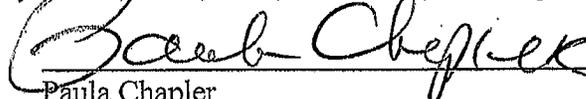
Van A. Collins 410 11 th Avenue SE, Suite 203 Olympia, WA 98501-2371	Kristopher I. Tefft PO Box 658 Olympia, WA 98507-0658
Harry J.F. Korrell Davis Wright Tremaine, LLP 1201 3 rd Avenue, Suite 2200 Seattle, WA 98101-3045	Todd R. Bowers, Senior Counsel Attorney General of Washington--CJD 800 5 th Avenue, Suite 2000 Seattle, WA 98104-3188
Rene D. Tomisser, Senior Counsel Attorney General of Washington Torts Division PO Box 40126 Olympia, WA 98504-0126	Howard M. Goodfriend Smith Goodfriend, P.S. 1109 1 st Avenue, Suite 500 Seattle, WA 98101-2988
Kenneth W. Masters Shelby R. Frost Lemmel Masters Law Group, PLLC 241 Madison Avenue North Bainbridge Island, WA 98110-1811	

Original efiled with:

Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504

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 21st day of December, 2011, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Automotive United Trades Organization v. The State of Washington, Cause No. 85661-3

Rec. 12-21-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Paula Chapler [<mailto:paula@tal-fitzlaw.com>]

Sent: Wednesday, December 21, 2011 11:04 AM

To: OFFICE RECEPTIONIST, CLERK

Subject: Automotive United Trades Organization v. The State of Washington, Cause No. 85661-3

Per Ms. Tribe's request, attached please find the Motion to Expand the Appellate Court Record Under RAP 9.11 and Declaration of Philip A. Talmadge in Support of the Motion to Expand the Appellate Court Record Under RAP 9.11 for filing in the following case:

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

Cause No. 85661-3

Attorney: Sidney Tribe, WSBA #33160

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Sincerely,

Paula Chapler

Legal Assistant

Talmadge/Fitzpatrick

(206) 574-6661