

NO. 85661-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Appellant,

v.

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

Respondents.

**RESPONSE TO  
APPELLANT'S MOTION TO  
EXPAND THE APPELLATE  
COURT RECORD UNDER  
RAP 9.11**

**I. INTRODUCTION**

On December 21, 2011, the Appellant, Automotive United Trades Organization (AUTO), filed a Motion to Expand the Appellate Court Record. This response to that motion is filed by the Respondents, the State of Washington, Governor Christine Gregoire, and the Director of the Department of Licensing, Liz Luce, within the time period provided by the Court's letter, dated December 21, 2011.

**II. ARGUMENT**

AUTO seeks the extraordinary remedy of expanding the record in this action to include several documents showing that the State has

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engaged in dispute resolution with the Yakama Nation to ensure that the Nation complies with requirements of the consent decree and settlement agreement between the State and the Nation regarding fuel taxes. Specifically, these documents show the Nation's failure to abide by certain terms of the consent decree, the various attempts made by the State to informally resolve these issues, and, finally, the State's invocation of the formal dispute resolution process as required by the terms of the consent decree and settlement agreement.

These documents were generated in January, March, April and June 2011. AUTO offers no explanation for its failure to attempt to include these in the record before the trial court. AUTO also fails to offer any explanation why it did not seek to expand the record with these documents until just two weeks before oral argument in this action.

AUTO's motion may be granted only if AUTO satisfies all six of the following conditions: 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 AUTO's failure to present the evidence to the trial court, 4) the remedy available to AUTO through post-judgment motions in the trial court is inadequate or unnecessarily expensive, 5) the appellate remedy of granting a new trial is inadequate or unnecessarily expensive, and 6) it would be inequitable to

decide the case solely on the evidence already taken in the trial court. RAP 9.11(a). Supplementing the record pursuant to RAP 9.11 “is an extraordinary remedy which will only be used in very limited circumstances.” Washington State Bar Ass’n, *Washington Appellate Practice Deskbook* § 15.17 (2nd ed. 1998).

AUTO cannot meet its burden. The material AUTO seeks is not necessary to resolve the issues on review, and would not change the decision being reviewed.

This case centers on the fuel tax agreements between the State of Washington and various Indian tribes (the Tribes), which were entered into in an effort to stem the long history of litigation between the State and Tribes over the State’s authority to tax fuel sold by and to the Tribes, its members and tribal fuel retailers. *See e.g.*, former RCW 82.36.450 (1995). Resp’s Brief at 4. The agreements (and the consent decree and settlement agreement between the State and the Yakama Nation) generally provide for the State and Tribes to split the proceeds of fuel taxes on fuel delivered to and sold by tribal fuel retailers. *Id.* at 5. AUTO’s suit, which it filed only against the State and not the Tribes, seeks to terminate the fuel tax payments the Tribes are entitled to under the agreements. *Id.* at 6-7.

The issue on review is whether the Tribes are necessary and indispensable parties under CR 19 to AUTO’s suit as the trial court

concluded. Whether the Tribes are necessary to the suit depends upon the practical effect of the relief sought by AUTO on the absent Tribes; the Tribes are necessary if AUTO's relief would impair the Tribes' right to the fuel tax payments. CR 19(a); Resp's Brief at 13-20. Whether the Tribes are indispensable requires an examination of the prejudice to the Tribes in adjudicating the matter in their absence, the extent to which this prejudice could be lessened by shaping the relief sought, the adequacy of any judgment rendered in the Tribes' absence, and the adequacy of AUTO's remedy if the action is dismissed. CR 19(b)(1)-(4); Resp's Brief at 20-29. The CR 19 necessary-and-indispensable analysis is not dependent in any manner on whether the State has invoked dispute resolution with the Yakama Nation to ensure that it abides by the terms of the consent decree and settlement agreement.

AUTO's attempt to show otherwise is based on a straw man of its own creation and is without merit. AUTO repeatedly asserts that the audit provisions the State is seeking to enforce against the Yakama are central to the State's argument that AUTO's suit was properly dismissed under CR 19. Appellant's Mot. at 5-6, 8-9. This is simply not true. The State's description of the audit provisions required by statute to be included in the fuel tax agreements was simply that - a description. Resp's Brief at 4-5. These audit provisions are immaterial to the CR 19 analysis, which

focuses almost exclusively on the impact of litigating the case and granting the requested relief on the absent Tribes, and play no part in the State's CR 19 analysis.<sup>1</sup> Resp's Brief at 13-29.

Because the evidence at issue is immaterial to the CR 19 analysis at the center of this case, expanding the record to include the evidence is not needed to fairly resolve the issues on review and would not "probably change the decision being reviewed." RAP 9.11(a)(1)-(2). For the same reason, it would not be inequitable to decide this case on the basis of the evidence already in the record before the Court. RAP 9.11(a)(6).

AUTO also alleges that the evidence should be considered because it is relevant to its 18th Amendment claim, which AUTO asserts is "another substantive issue before this Court." Appellant's Mot. at 7-8. Again, this is simply false. Although the 18th Amendment claim is part of AUTO's complaint, those substantive claims are not before the Court. The only issue before the Court is the propriety of the trial court's dismissal of the action pursuant to CR 12(b)(7) and CR 19.

Finally, AUTO's failure to present this evidence to the trial court or to move this Court to expand the record until two weeks before oral

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<sup>1</sup> Indeed, even assuming AUTO's straw man was accurate, its conclusion would still be erroneous. These documents show the Yakama have not complied with the terms of the consent decree and settlement agreement and that the State has invoked the dispute resolution procedure in order to ameliorate this. AUTO may disagree with the speed with which the State has moved to invoke this procedure, but the fact remains that the State has, in fact, done so and is moving to resolve the Yakama's failure to comply.

argument is inexcusable. At least one of these documents (ex. B to AUTO's motion) was generated in January 2011, while this matter was still pending in the trial court. The other documents were generated in the first half of 2011. AUTO offers no explanation for its failure to attempt to supplement the record before now. And, indeed, beyond what it likely perceives as a tactical advantage to presenting such evidence two weeks before oral argument, there is no explanation for AUTO's action. As a result, it would not be equitable to excuse AUTO's failure to present this evidence sooner. RAP 9.11(a)(3).

### III. CONCLUSION

For the foregoing reasons, the Respondents ask that the Court deny AUTO's motion and for all other relief just and proper under these circumstances.

RESPECTFULLY SUBMITTED this 28th day of December 2011.



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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that on the date below *Response To Appellant's Motion To Expand The Appellate Court Record Under RAP 9.11* and this *Certificate of Service* were filed in the Washington State Supreme Court according to the Court's Protocols for Electronic Filing, as a PDF attachment, at the following e-mail address: Washington State Supreme Court ([Supreme@courts.wa.gov](mailto:Supreme@courts.wa.gov)).

And that I served a copy of *Response To Appellant's Motion To Expand The Appellate Court Record Under RAP 9.11* and this *Certificate of Service* on counsel for Appellant and Amici, as follows, per agreement for electronic service:

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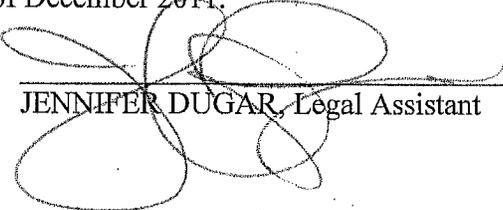
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Rec'd 12/28/2011

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