

No. 89734-4

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.

REPLY BRIEF OF APPELLANT AUTO

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Ronald R. Carpenter
Clerk

bjh

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Pacifica Law Group
1191 Second Avenue, Suite 2100
Seattle, WA 98101-2945
(206) 245-1700
Attorneys for Appellant
Automotive United Trades Organization

ORIGINAL

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A. INTRODUCTION

In response to the opening brief of Automotive United Trades Organization (“AUTO”), the State’s brief is remarkable for its failure to come to grips with the factual or legal points advanced by AUTO. The State instead misstates the facts and ignores the actual nature and scope of the fuel tax compacts between its Department of Licensing (“DOL”) and the Native American tribes. More distressingly, the State’s legal arguments in justification of the compacts reflect a muddled conflation of public finance principles that would invite this Court to ignore how taxation and budgeting occur in this State.

In the end, the State officials who negotiated the compacts at issue did so illegally. The State lacked authority to enter into the compacts under article II, § 40 of the Washington Constitution (“18th Amendment”) in making payments to the tribes that were not tax refunds authorized by law and were for the actual purpose of deterring tribes from becoming fuel suppliers, an improper 18th Amendment expenditure purpose. Even if the State had the authority to enter into the compacts, which it did not, it lacked authority to enter into compacts that constitute an unconstitutional delegation of legislative authority to DOL where the Legislature offered little guidance as to what such compacts were intended to accomplish and under what terms, and the State did admittedly nothing to ensure that the

payments were used for highway purposes as directed by RCW 82.36.450(3)(b).

B. RESPONSE TO STATE'S STATEMENT OF THE CASE

The State recites the history leading up to the 2007 legislation that shifted the incidence of the tax to the supplier level, which is largely irrelevant to the current discussion. Br. of Resp'ts at 3-7.

The State misleadingly suggests that the resolution of tribal immunity issues was merely a "potential benefit" of moving to the tax-at-the-rack model, rather than a primary motivation. *Id.* In reality, the legislative history makes it quite clear that tribal immunity was central to the discussion, and was a primary motivation for the 2007 legislation. Appendix A, B, C. The legislative bill reports focus heavily on the issue of tribal immunity and the *Squaxin Island*¹ decision. *Id.*

The State also claims that the 2007 litigation resolved the "chronic litigation" between the tribes and the State. Br. of Resp'ts at 10. The State suggests that in the absence of the fuel tax agreements, the tribes would have threatened new legal challenges claiming that they still had immunity under the tax-at-the-rack model. *Id.*

¹ *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005).

What the State does not mention is that any legal challenge the tribes might have contemplated to the 2007 tax regime was foreclosed by *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 115, 126 S. Ct. 676 (2005).² In that case, the United States Supreme Court upheld a tax regime identical to Washington's in the face of a claim of tribal immunity. *Id.*

The State asserts that because the agreements require the tribes to “include the amount of the state fuel tax” in their retail price, the tribes are prohibited from negotiating discounts with suppliers equivalent to the amount of the tax. Br. of Resp'ts at 12. The State claims that non-tribal purchasers somehow have an advantage because they are “free to negotiate discounts with suppliers/distributors that may or may not include the amount of state fuel tax paid by the supplier/distributor.” *Id.*

The State's assertion is patently incorrect. Any supplier may include a discount in the fuel price in an amount “equivalent” to the fuel tax, RCW 82.36.026(5), and the agreements do not forbid this. *See, e.g.,* CP 60. The agreements simply require the tribes to “purchase only fuel on which applicable taxes have been paid” and to “submit copies of invoices” with “the amount of State Motor vehicle fuel taxes included.” *Id.* The

² The State mentions *Wagnon*, but merely calls it a “related development,” rather than a rationale for converting to a tax-at-the-rack model. Br. of Resp'ts at 7.

agreements say nothing about prohibiting discounts in amounts equivalent to the tax. For example, a tribe could receive an invoice indicating that the fuel tax has been paid, but a “customer loyalty discount” could be included in an amount equivalent to the tax. Likewise, the tribal invoice could contain similar language without violating the agreements. A non-tribal retailer is in the exact same position. The agreements impose no disadvantage on the tribes as opposed to non-tribal retailers with regard to discounts. The State even admits that the agreements do not restrict the tribes from offering other price discounts. Br. of Resp’ts at 13 n.4 (“there is no requirement that the tribes competitively price their fuel with non-tribal retailers”).

The State cites the statutory “audit” provisions as evidence that the compacts contain “safeguards” against abuse. *Id.* at 11-12. However, the record reveals that all the State receives as a result of the tribes’ self-imposed and secret “audits” are one- or two-page compliance reports from the Tribes that provide little detail and include a number of express disclaimers. *See, e.g.*, CP 581-82.

C. ARGUMENT

(1) Standard of Review

The State argues that “beyond a reasonable doubt” test applies to constitutional challenges to a statute. Br. of Resp’ts at 16. However, the

precise nature of that phrase is sometimes misunderstood in this context. It is not a burden of proof as in the criminal context. Rather, as this Court has explained, the standard is one of deference to a co-equal branch of government. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998); *see also, Sch. Dist.'s Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 606, 244 P.3d 1 (2010) (“...when we say ‘beyond a reasonable doubt,’ we do not refer to an evidentiary standard.”).

That standard does not prevent this Court from exercising its prime constitutional role of declaring what our Constitution means and finding a statute wanting, as this Court did in *Island County*, and in many other instances too numerous to recite.

(2) The State Lacked Authority to Enter into Fuel Tax Compacts to Make Payments to the Tribes Where the Payments Do Not Qualify as Refunds

The State does not discuss or distinguish AUTO’s description of the background to the 18th Amendment. Br. of Appellant at 21-25. At its core, the 18th Amendment treats fuel tax revenues from motor vehicle operators as user fees. That amendment requires the deposit of fuel tax revenues into the Motor Vehicle Fund (“MVF”). RCW 46.48.070. Under the 18th Amendment, revenues from the MVF may only be used for constitutionally-specified highway purposes. This arrangement is decidedly not akin to taxation that supports the General Fund where the

Legislature can choose to offer tax credits for public policy reasons, or General Fund expenditures which can be made by the Legislature for any purposes not foreclosed by our Constitution. This fact is highly relevant to the argument *supra* regarding “refunds” under the 18th Amendment.

The State concedes that after *Northwest Motorcycle Ass’n v. State, Interagency Comm’n for Outdoor Recreation*, 127 Wn. App. 408, 415, 110 P.3d 1196 (2005), *review denied*, 156 Wn.2d 1008 (2006) and *Wash. Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 235, 290 P.3d 954 (2012) (“*WOHVA*”), the proper inquiry for the legality of a refund under the 18th Amendment is if (1) a refund is paid back to a taxpayer and (2) the refund is authorized by law. Br. of Resp’ts at 17. The payments to the tribes here satisfy neither facet of the test.

(a) The Payments to the Tribes Are Not a Refund of Fuel Taxes Paid by the Tribes

The State claims that for the purposes of determining who is entitled to a “refund,” it does not matter where the legal incidence of the tax falls. Br. of Resp’ts at 20-22. Instead, the State argues the question of determining who is entitled to a tax refund is whether “an economic incidence” of the tax falls on that person. *Id.* at 21. In other words, anyone who buys a product with fuel tax included in the price bears the

“economic incidence” of the fuel tax and is therefore eligible for a refund of that tax. *Id.* The State is incorrect.

- (i) A Refund Can Only Be Made to a Taxpayer, Not to Any Person Who Bought a Product that Was Previously Taxed

This Court has ruled that under the 18th Amendment, any refund of taxes must “target[] and benefit[] affected *taxpayers*.” *WOHVA*, 176 Wn.2d at 239 (emphasis added). Relying on *WOHVA*, the State argues that this Court has shown “flexibility” in determining how such refunds are dispensed. Br. of Resp’ts at 18. However, the State ignores a critical predicate to the refund analysis not addressed in *WOHVA*: determining who constitutes the “taxpayer” who is entitled to a refund.³

In defining who is a “taxpayer,” Washington courts have never adopted the sweeping “economic incidence” definition that the State advances. Instead, courts have consistently relied on the Legislature to define the term in various tax contexts. *See, e.g., Impecoven v. Dep’t of Revenue*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992) (reviewing RCW 82.04.440 to determine who may be liable for B&O tax); *Morrison-*

³ This Court in *WOHVA* was not confronted with the question of whether, after the 2007 amendments that moved the incidence of the fuel tax up to the supplier level, consumers could still be considered “taxpayers” of the fuel tax. It was simply assumed – possibly based on the now-defunct tax system that placed the incidence of the tax on consumers – that the off-highway vehicle users were “taxpayers.” *WOHVA*, 176 Wn.2d at 228. A more detailed discussion of this history is included *infra*.

Knudsen Co. v. State, Dep't of Revenue, 6 Wn. App. 306, 311, 493 P.2d 802 (1972) (reciting definition of “taxpayer” from RCW 82.02.010).

The Legislature also has never defined the term “taxpayer” to include someone merely bearing the “economic incidence” of a tax. Statutes specifically defining the term “taxpayer” restrict it to mean the person or entity that *actually paid the tax*. For example, the Legislature has defined a “taxpayer” for the purposes of excise taxes to be “any individual, group of individuals, corporation, or association liable for any tax or the collection of any tax hereunder, or who engages in any business or performs any act for which a tax is imposed by this title.” RCW 82.02.010. A “taxpayer” for purposes of the use tax on consumers is the buyer or consumer. RCW 82.12.010(5). The Oil Spill Response Tax statute defines “taxpayer” as “the person owning crude oil or petroleum products immediately after receipt of the same into the storage tanks of a marine terminal in this state....” RCW 82.23B.010(8).

This Court should look to the Legislature’s definition of “taxpayer” to determine whether the tribes are “taxpayers” entitled to be “paid back” in the form of a refund. The Legislature has specifically defined suppliers, refiners, importers, and blenders of fuel as the

“taxpayers.” RCW 82.36.026(1)-(4).⁴ The tax is imposed only once. RCW 82.36.022. The Legislature expressly states that when taxpayers pass forward the cost of the tax in the price of the fuel, they are not passing on the actual tax obligation, but only “including as part of the selling price an amount *equal* to the tax.” RCW 82.36.026(5) (emphasis added).

Thus, the Legislature has explicitly defined who is a taxpayer, and it does not include those who bear the “economic incidence” of the tax. The State’s broad “economic incidence” definition of “taxpayer” robs the term of any meaning, and blurs any meaningful distinction between a refund of taxes paid, and an affirmative appropriation of public funds for a legislative purpose. In our modern economy, many products and businesses incur a multitude of local, state, and federal taxes of all kinds at various stages of commerce: sales taxes, B&O taxes, hazardous substance taxes, excise taxes, to name a few. These taxes are passed downstream as a cost of doing business. That does not mean that every consumer who buys a product is a “taxpayer” of those previously imposed taxes.

Disconnecting from the refund analysis the legal incidence of an excise tax – which is paid only once – would allow the State to “refund”

⁴ The fuel tax statute was amended in 2013, but the Legislature made no material change to the imposition of tax liability. 2013 Wash. Legis. Serv. Ch. 225 (S.H.B. 1883).

more money than it actually has collected in tax revenue. The same gallon fuel might be bought and sold three times, and each time the price of that fuel includes the amount of the tax the supplier paid. The second and third persons have borne the “economic incidence” of the tax. Yet they have not actually paid the tax into the MVF three times, and cannot all be considered “taxpayers.”

Ignoring who is actually the “taxpayer” in the refund analysis is particularly pernicious when the refund can in the form of block payments to a program administered by a third party. *WOHVA*, 176 Wn.2d at 239. Given the existence of these block payment “refund” programs, the State’s argument regarding “economic incidence” results in an absurdity. In the State’s view the Legislature may, for policy reasons, deem every party in the chain of distribution who buys fuel as a “taxpayer” entitled to a “refund” and “pay back” each of them in the form of a beneficial program. Br. of Resp’ts at 22. Even more absurdly, the same consumer could be entitled to multiple “refunds” of the exact same tax monies paid only once by the supplier. For example, if a tribal member is also a farmer and buys fuel for his tractor, then in addition to his tribe receiving a “refund” via the compacts, that tribal member would also be entitled to a “refund” of the same tax under RCW 82.36.280.

The State also does not explain how its loose interpretation of tax law comports with the distinction between a refund and an appropriation for an affirmative purpose, nor does it explain how such an interpretation would not prevent the Legislature from effectively repealing the 18th Amendment by designating any payment of MVF funds to any program as a “refund” of gas taxes for a particular policy purpose.⁵

(ii) Whether the Legislature Has Called Certain Payments to Non-Taxpayers “Refunds” Is Not Controlling, the Incidence of the Tax Determines Who Is the Taxpayer

To support its “economic incidence” argument for refunds to the tribes, the State points to statutes where the Legislature has previously approved “refunds” of fuel taxes to other consumers or entities who also do not currently bear the legal incidence of the tax. Br. of Resp’ts at 21.

It is not controlling that the Legislature named these tax provisions “refunds.” This Court has long held that the Legislature’s name for a tax is not controlling, that instead this Court looks to the incidence of the tax to determine its nature. *Jensen v. Henneford*, 185 Wash. 209, 217-18, 53 P.2d 607 (1936). *Jensen* dealt with the Fourteenth Amendment to the

⁵ This is not to say the Legislature has no recourse. It could certainly choose to provide tax credits or subsidies to worthy parties such as those providing public transportation for those with special needs. However, it cannot call such an appropriation a “refund,” nor can it fund such a program from the MVF, which must be applied to highway purposes.

Washington Constitution⁶ and the Legislature's attempt to impose an income tax. This had previously prior ruling that an income tax was unconstitutional under the Fourteenth Amendment to the Washington Constitution. *Id.* at 215. To avoid the constitutional problem, the Legislature enacted what it called an "excise tax on income." This Court rejected the Legislature's attempt to disguise the tax's true nature:

[T]he legislative body cannot change the real nature and purpose of an act by giving it a different title or by declaring its nature and purpose to be otherwise...it is for the courts to declare the nature and effect of the act. The character of a tax is determined by its incidents, not by its name.

The entire purpose of the 18th Amendment was to restrict the Legislature's ability to fund non-highway policy projects with MVF funds. If the Legislature could simply label any payment to any person from the MVF a "refund," it would constitute a de facto repeal of the 18th Amendment. Every person and group in Washington that buys motor vehicle fuel bears the "economic incidence" of the tax. If the Legislature can send anyone MVF funds and call it a refund, or more importantly, if the Legislature can set up any new non-highway program and label it a refund, then the 18th Amendment cannot be enforced.

⁶ Wash. const. art. VII § 1.

The State next argues that the Legislature is empowered to issue “refunds” in order to further tax policy goals. Br. of Resp’ts at 19. The State describes a “refund” as an amount the Legislature may, at its discretion, send to a particular group or to “incentivize” particular behavior, citing a number of tax statutes as examples. *Id.* at 19-21.

The only relevant examples⁷ that the State cites are those that involve the motor vehicle fuel tax: “refunds” that are issued to providers of public transportation for those with special needs, nonhighway users of fuel, and similar persons. In those cases, the “refund” statutes were all written made when the incidence of the tax fell on consumers. RCW 82.36.275, .280, .285, .290. Thus, there is no question that, at the time of enactment of those statutes, the consumers were taxpayers and the payments were a “refund of taxes paid.” However, the propriety of characterizing such payments as “refunds” is questionable now that the incidence of the tax no longer falls on the consumer.⁸

⁷ The sales and retail taxes the State cites go into the General Fund, the spending of which is not restricted by the 18th Amendment.

⁸ Such payments are a laudable policy decision, but if the 18th Amendment is to have any effect, going forward they should be made with equivalent amounts appropriated from the General Fund, rather than the MVF. AUTO is not challenging that statute in this action.

(b) The Payments Are Not Authorized by Law

The State contends that the payments here were authorized implicitly, not explicitly, by RCW 82.36.450(1). Br. of Resp'ts at 23-34. It claims that such payments do not violate the 18th Amendment. *Id.* at 32-34. It also claims that the payments are legally authorized even in the absence of an express legislative appropriation, notwithstanding article VIII, § 4 of our Constitution. The State's argument offers an unsupported concept of "authorized by law" and contravenes the notion of an appropriation. This Court should reject the State's arguments.

(i) The Legislature Cannot Enact a Statute that Violates the 18th Amendment or Enables the State to Violate It

Lacking specific language in RCW 82.36.450(1) that confers authority upon DOL to negotiate compacts providing for refunds to the tribes, the State argues that the Legislature intended for a continuation of previous refunds from when the tax was imposed on consumers. Br. of Resp'ts at 24-28. It asserts that RCW 82.36.450(1), a part of SB 5272 in 2007, legislation that repaired any flaws in Washington's fuel tax regime as the State *concedes*, br. of resp'ts at 7, is a continuation of provisions in earlier legislation that authorized true "refund" payments to the tribes.

It is true that the Legislature made vague provisions in the 2007 law allowing the State to enter into compacts similar to those already

existing under consent decrees. RCW 82.36.450(1). Given the Legislature's clear objective in moving the incidence of the tax to the supplier level to end tribal claims of immunity, it is unclear why the provision was needed.⁹

However, even assuming the statute authorizes payments, the statute cannot be the basis for the State's claim that the refunds are "authorized by law." No state actor, whether legislative, executive, or judicial, may violate the Constitution. It is axiomatic that an unconstitutional action is not "authorized by law."

Because the payments to the tribes are not refunds, but instead are incentive payments to avoid tribal economic development and competition in the fuel business, *as the State itself now argues*, then the statute as interpreted by the State violates the Constitution. Nowhere in the 18th Amendment does it provide that MVF funds may be expended for such the purpose of "properly" structuring the fuel industry in Washington.

⁹ The State claims that the Legislature wanted to forestall tribes from the threat of becoming suppliers and thus making all on-reservation sales 100% exempt from the fuel tax, as opposed to the 75% exemption they now enjoy. Br. of Resp'ts at 32. This argument is illogical. As the State admits, the compacts do not prevent the tribes from becoming suppliers. *Id.* Also, building one fuel terminal or refinery requires a capital investment of hundreds of millions of dollars. The total capital spending for all of Washington's 29 recognized tribes in 2010 was \$259 million. <http://www.washingtontribes.org/default.aspx?ID=3>.

Regardless of the claimed policy objectives for paying the tribes tens of millions of dollars from the MVF, the Legislature is constitutionally prohibited from doing so by the 18th Amendment.

The State contends that RCW 82.36.450(1) was critical to ensure that the tribes did not become suppliers in the chain of fuel distribution, which is not a lawful use of MVF funds under the 18th Amendment. Br. of Resp'ts at 9, 32. It is interesting to note that the State itself is unclear as to the precise meaning of RCW 82.36.450(1). Essentially, the State contends that DOL can give money from the MVF to the tribes for virtually any reason whatsoever.

The State also acknowledges that the compacts DOL negotiated with the tribes expressly allowed the tribes to be suppliers. Br. of Appellant at 43 n.44; Br. of Resp'ts at 32. If the purpose of the payments was to forestall the tribes from becoming fuel suppliers, the State's agency failed to accomplish what it claims was the Legislature's purpose in enacting RCW 82.36.450. This undercuts the State's arguments that these payments were authorized by law.

Finally, if the purpose of the payments was, however ineptly executed by DOL, to forestall tribal entry into the distribution chain as suppliers or settle threatened litigation, then such a purpose violated RCW 82.36.450(3)(b). That statute prescribed that the compacts must provide that the payments be for "highway-related purposes." That term carries over from the 18th Amendment and does not include payments to, in effect, structure the fuel distribution system in Washington and/or settle

litigation. *See, e.g., Automobile Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1954) (payment of tort judgment is not a highway purpose).

The State also misleads this Court when it contends that the Constitution does not restrict how the tribes will spend the MVF revenues they receive. Br. of Resp'ts at 31-32. The point made in AUTO's opening brief at 39-41 is that *RCW 82.36.450(3) and the compacts themselves* require the expenditure of the monies received by the tribes on "highway-related purposes."¹⁰ The State does not deny that the tribes violate these requirements and it has done *nothing* to prevent their use for clearly non-highway purposes. Br. of Appellant at 34.

In sum, the State's own argument about the purpose of the payments to the tribes undercuts its position that the payments were a refund and were expended for highway purposes under the terms of the compacts and RCW 82.36.450(3)(b). The payments are not authorized by the statute or by the Constitution.

- (ii) The State Concedes the Legislature Has Never Appropriated the Tens of Millions of Dollars the State Annually Pays the Tribes

¹⁰ This requirement certainly mirrors the purpose of MVF expenditures in the 18th Amendment.

RCW 82.36.450(1) on payments to the tribes the Legislature has never appropriated MVF monies to make these payments as noted in AUTO's opening brief at 32-39. The State has no answer to the authorities cited there by AUTO.

Rather than address AUTO's argument and the numerous cases arising under article VIII, § 4 of our Constitution, the State instead tries to belittle the argument by mischaracterizing it. Br. of Resp'ts at 29-31. The State asserts that article VIII, § 4 does not require "a separate appropriation for every tax refund remitted." *Id.* at 29. That is *not* AUTO's argument and has never been.

Article VIII, § 4 requires that no money may be paid out of the State treasury (or any other funds under State management) without an appropriation by the Legislature. This constitutional mandate ensures public control and scrutiny of public funds. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365, 70 P.3d 920 (2003). It is *mandatory*. *State ex rel. Peel v. Clausen*, 94 Wash. 166, 173, 162 Pac. 1 (1917).¹¹ No such appropriations have been made by the Legislature. Instead, an executive agency has taken it upon itself, to disburse tens of millions of

¹¹ A general appropriation of funds from the MVF by the Legislature in a transportation budget bill for "refunds" to the tribes would have been enough to satisfy the Constitution. Similarly, an appropriation attached to a substantive bill on the compacts would have sufficed.

dollars each biennium to the tribes. This is a dangerous precedent in executive overreach that violates article VIII, § 4.

The State's claim that it is "absurd to suggest" the Legislature should ever appropriate refunds is not well taken. The funds in *WOHVA* were appropriated by the Legislature. *WOHVA*, 176 Wn.2d at 238.

The State asserts that an appropriation is unnecessary where there is a statutory authorization for the expenditure.¹² But that argument was expressly rejected by this Court in *Washington Association of Neighborhood Stores*, 149 Wn.2d at 368 ("A direction to the legislature (even the use of the word 'shall') to make an appropriation is not itself an appropriation."). Further, as stated in *State v. Perala*, 132 Wn. App. 98, 117, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006), legislation of a general and continuing nature is no substitute for a legislative appropriation. This principle has a sound basis. Virtually *all* of the programs in the State general fund and transportation budgets have a basis in statute, whether they are programs in higher education, K-12 education, human services, or transportation. Under the State's theory, no budget legislation would *ever* be required and the agencies would be free to take

¹² As noted *supra*, AUTO vigorously disputes that any such statutory authorization exists.

money from the Treasury at their discretion without legislative direction. Such a scenario is contrary to article VIII, § 4.¹³

Moreover, *any doubt* about whether the Legislature appropriated the funds invalidates the disbursement. *Mason-Walsh-Atkinson-Eier Co. v. Dep't of Labor & Indus.*, 5 Wn.2d 508, 515, 105 P.2d 832 (1940). The payments to the tribes were not “authorized by law” in the absence of an appropriation by the Legislature.

(3) The Legislature’s Delegation of Authority to DOL to Enter into the Compacts Lacks the Necessary Guidelines and Safeguards for Washington’s Taxpayers

The State and AUTO agree that the Legislature cannot delegate its plenary authority to tax (or to issue a tax refund) without clearly defining the purpose of the delegation and creating procedural safeguards to prevent arbitrary administrative action. *Barry & Barry, Inc. v. State Dep't of Motor Vehicles*, 81 Wn.2d 155, 163, 500 P.2d 540 (1972); *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 761, 131 P.3d 892 (2006). The State insists that the delegation here is sufficiently

¹³ The State ignores the core holding in *Perala* and asserts that no particular form of expression is required to meet the constitutional requirement of an appropriation. Br. of Resp'ts at 30. This is true, but of course the State omits the *Perala* discussion of the fact that a statute alone is not an appropriation. In *Perala*, the Court of Appeals concluded that a general county appropriation of funds for an indigent defense services contract encompassed the fees of an attorney who was appointed to provide such defense services when the contractor was terminated.

circumscribed and contains adequate safeguards to prevent arbitrary agency action, citing *Barry*. Br. of Resp'ts at 35-43.

The delegation here is neither specific nor restrictive regarding the State's authority. The statute purporting to give the State power to enter into the compacts does not even clearly delineate a *purpose* for the compacts by which this Court can evaluate whether the State is fulfilling the Legislature's intent. The statute is also devoid of any procedural safeguards to prevent the State's abuse of power.

(a) The Delegating Statute Does Not Declare the Purpose for the Compacts, and Allows the State to Invent a Purpose in Order to Justify MVF Payments

The State attempts to convince this Court that RCW 82.36.450 is sufficiently specific by listing the many provisions in RCW Ch. 82.36 and 82.38 providing for what the agreements should contain. Br. of Resp'ts at 37-39. The State contends that these provisions constitute sufficiently specific direction regarding the State's authority to enter into fuel tax agreements with the tribes to pay them tax "refunds" from the MVF.

However, no statute clearly defines the *legislative purpose* of delegating such authority to the state. A delegation of authority at a minimum must include a statement of legislative purpose and basic rules by which administrative or judicial review can assess the agency's actions.

U.S. Steel Corp. v. State, 65 Wn.2d 385, 389, 397 P.2d 440 (1964);
Peterson v. Hagan, 56 Wn.2d 48, 63, 351 P.2d 127 (1960).

The statute purportedly authorizing the tribal agreements is devoid of any mention of their purpose. RCW 82.36.450. The State admits that it examined legislative history in an attempt to glean such a purpose. Br. of Resp'ts at 7-9. The State claims that the statute authorizes it to make a discretionary decision regarding which tribes are entitled to tax refunds, and in what amounts. *Id.* at 32 (arguing that the statute is permissive, and does not obligate the State to offer refund agreements to any or all tribes).

Strikingly, the State *denies* that addressing tribal immunities – the only hint at a legislative purpose actually contained within the statute – is actually the purpose of the statute. Br. of Resp'ts at 31 (“the statute does not limit the authorization to negotiate fuel tax refunds to instances in which the tribes have immunity claims, it merely allows such issues to be addressed...”). Instead, the State argues that the true, hidden purpose of RCW 82.36.450 is to authorize a de facto tribal tax exemption in order to fulfill the policy goal of preventing tribes from becoming suppliers in the fuel business. *Id.* at 32. Thus, the State claims that RCW 82.36.450 is a delegation of legislative authority to determine tax policy as to all Washington tribes.

Determining who is entitled to a tax refund is undoubtedly a legislative function that should only be delegated with a clearly defined purpose and intent. *Larson*, 156 Wn.2d at 761. In fact, the State admits that the “setting of tax policy and associated policy goals reflected by decisions on tax refunds and exemptions is quintessentially a legislative domain.” Br. of Resp’ts at 17.

Despite admitting that tax policy is exclusively a legislative function, the State maintains that the statute gives it “largely discretionary” authority to authorize tax refunds that have a statutorily undefined purpose. Br. of Resp’ts at 38. The statute does not establish that tribes have a right to a refund, but the State claims it has the discretionary authority to make that determination. *Id.* The statute suggests that the Legislature believed the tribes might have immunity, but the State claims that is irrelevant. Br. of Resp’ts at 31. Regardless of how specific the Legislature was in laying out the proposed *terms* of such agreements, the Legislature provided no guidance for this Court to determine whether the State has fulfilled the purpose of the 2007 statute.

The confusing result is clearly reflected in the State’s position in this case. Because the statute contains no statement of legislative purpose, the State feels free to represent to this Court both that (1) the actual purpose of the payments to the tribes – nowhere stated in RCW 82.36.450

– is to prevent them from becoming suppliers, but (2) it is irrelevant whether the compacts accomplish that purpose. Br. of Resp'ts at 32.

If this Court has no measure by which to judge whether the State's actions have complied with the statutory purpose or intent, it is an improper delegation. *U.S. Steel Corp.*, 65 Wn.2d at 389.

(b) The Compacts Lack Sufficient Procedural Safeguards to Prevent Abuse of Its Own Power, as the State Admits In Part

A legislative delegation is unconstitutional if it lacks sufficient procedural safeguards for preventing the arbitrary abuse of agency authority. In fact, examination of administrative procedural safeguards is the hallmark of this Court's review of a non-delegation challenge:

The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose...should be...protecting against unnecessary and uncontrolled discretionary power.... The focus of judicial inquiries thus should shift from statutory standards to administrative safeguards and administrative standards.

Barry, 81 Wn. 2d at 161, *quoting* 1 K. Davis, *Administrative Law Treatise*, s 2.00 (Supp. 1970).

Here, the potential abuse of agency power is great. The State has exclusive, unfettered authority to decide what tribes will receive payments from the MVF, and in what amounts. The compacts the State has signed with the tribes are unlimited in duration, unlike tax policy that might be set

by the Legislature, which may always be amended or repealed in a subsequent session. The taxpayer funds that the State gives to the tribes every year amount to tens of millions of dollars, and are increasing substantially each year. CP 777.

The State claims that two statutory procedural safeguards exist to limit its power (1) the statutory “audit” provisions, and (2) the requirement that the State report to the Legislature. Br. of Resp’ts at 40-41.

The “procedural safeguards” that the State identifies do nothing to prevent the arbitrary abuse of its power. The “audits” that supposedly provide accountability by the tribes, along with any other information about the agreements, are provided to the State *in secret*. RCW 82.36.450(4). They are “personal information” not provided to the Legislature or the public. *Id.*¹⁴ The State could easily represent that the tribes were complying with statutory provisions when they were not.

The “reports” to the Legislature are nothing more than summaries of the “status of existing agreements and any ongoing negotiations with the tribes.” RCW 82.36.450(6). The 2012 report contains nothing more

¹⁴ The Court of Appeals has broadened the scope of the PRA exemption afforded these compacts in *West v. Dep’t of Licensing*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 3842982 (June 9, 2014). Not only are the audits exempt from disclosure under the Act, the court concluded that sums paid to the tribes constituted private taxpayer information of the tribes under RCW 82.36.450 and RCW 42.56.230(4). Thus, the public has no information about these payments to the tribes in the budget process because they are unappropriated, the actual amounts paid are secret, and the audits of the moneys’

than a description of the agreements, the names of the tribes who have agreements, assurances by the State that the tribes have complied with the agreements, and the total amount of money the State has paid to the tribes (\$34 million). CP 558-60. None of the State's representations are independently verifiable, because of the confidentiality provisions of RCW 82.36.450(4). There is nothing in RCW 82.36.450 or any other statute that provides a check on the State's discretionary dispensation of millions of dollars in MVF funds every year.

The State tacitly concedes that the statutory safeguards are inadequate in one critical sense. AUTO has presented undisputed evidence that the tribes are violating the 18th Amendment and RCW 82.36.450(3)(a) by spending MVF proceeds on non-highway purposes. In response, the State makes the startling assertion that these alleged violations may only be "resolved through the dispute resolution procedures in the agreements." *Id.* In other words, the State has sole discretion over whether the statute has been violated, to raise the issue with the tribes, and to "negotiate" its resolution. *Id.*

Most remarkably, the State cites a third "procedural safeguard:" the fact that AUTO has filed this lawsuit. Br. of Resp'ts at 41-42. This is

receipt or expenditure by the tribes is also secret. These payments to the tribes, far from being transparent, are totally cloaked in secrecy.

remarkable is because the State has argued from the inception of this case that it should be dismissed on procedural grounds. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 221, 285 P.3d 52 (2012). In its first appearance before this Court, the State argued AUTO's complaint should be dismissed on CR 19 grounds because the Tribes were indispensable parties who could not be joined. *Id.* Were it not for this Court's intervention, the State's purported "procedural safeguard" of legal action by AUTO would have been illusory at best.

Also, it would be dangerous precedent for this Court to hold that the availability of the judicial process is a sufficient "safeguard" over an agency's abuse of power. Lawsuits present numerous practical and procedural hurdles to potential litigants seeking to restrain an agency run amok. There are often issues of standing, governmental immunity, and similar defenses so often invoked by the State and its lawyers to avoid a legal challenge, as well as the reality that not every Washington citizen has sufficient resources to challenge State power.

The State offers nothing to reassure this Court that the statute that it relies upon contains *any* safeguards against the abuse of power, let alone *adequate* safeguards. The Legislature has improperly delegated its very powerful authority to implement tax policy and disburse tax proceeds without sufficient guidance or procedural safeguards in place.

D. CONCLUSION

Nothing in the State's brief should dissuade this Court from reversing the trial court's judgment and granting judgment to AUTO. In its haste to provide any possible justification for compacts that pay Native American tribes tens of millions of dollars of MVF monies annually in the guise of "refunds" of fuel taxes that are *legally imposed by the State off the reservations*, the State offers dangerous arguments on what constitute 18th Amendment fuel tax "refunds," the application of article VIII, § 4, the scant guidelines and safeguards for taxpayers in the Legislature's delegation of legislative authority to DOL to negotiate the compacts. This Court should reject the State's pernicious arguments.

The trial court erred in granting summary judgment to the State and in denying AUTO's motion for partial summary judgment. This Court should reverse the trial court's November 29, 2013 order and remand the case to the trial court for entry of an order granting AUTO's motion for summary judgment and enjoining payments to the tribes from the MVF. Costs on appeal should be awarded to AUTO.

DATED this 28th day of August, 2014.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
3rd Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Pacific Law Group
1191 Second Avenue, Suite 2100
Seattle, WA 98101-2945
(206) 245-1700
Attorneys for Appellant
Automotive United Trades Organization

APPENDIX A

Transportation Committee

SB 5272

Brief Description: Modifying the administration of fuel taxes.

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

Brief Summary of Bill

- Eliminates language indicating the State's fuel tax is imposed on the end user.
- Removes references to retailers, as well as refunds and credits available to, or tax liability and payment date of, licensed fuel distributors.
- Defines licensees as fuel suppliers, importers, exporters, blenders, or international fuel tax agreement (IFTA) license holders.
- Authorizes the Governor to enter into fuel tax compact agreements with federally recognized tribes.
- Makes various administrative and technical changes to the existing fuel tax statutes.

Hearing Date: 3/22/07

Staff: Jerry Long (786-7306).

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

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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 United States 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 of Bill:

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 and payment date of, licensed fuel distributors are also removed. Amendatory language is included to define licensees as fuel suppliers, importers, exporters, blenders, or international fuel tax agreement (IFTA) license holders, and explicitly states that the incidence of taxation be borne exclusively by these entities.

New sections are added to the motor fuel and special fuel tax chapters authorizing the Governor (or the DOL 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 service 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. The 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 pass the tax through to end users as part of the selling price.

Various administrative changes are also addressed including: moving the racing fuel exemption from the special fuels to the motor fuels chapter; inserting IFTA provisions;

moving compliance language to more appropriate subsections of the two fuel tax chapters; and deleting an obsolete reference regarding marine fuel dealers.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

APPENDIX B

Transportation Committee

SB 5272

Brief Description: Modifying the administration of fuel taxes.

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

Brief Summary of Bill

- Eliminates language indicating the State's fuel tax is imposed on the end user.
- Removes references to retailers, as well as refunds and credits available to, or tax liability and payment date of, licensed fuel distributors.
- Defines licensees as fuel suppliers, importers, exporters, blenders, or international fuel tax agreement (IFTA) license holders.
- Authorizes the Governor to enter into fuel tax compact agreements with federally recognized tribes.
- Makes various administrative and technical changes to the existing fuel tax statutes.

Hearing Date: 3/22/07

Staff: Jerry Long (786-7306).

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.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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 United States 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 of Bill:

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 and payment date of, licensed fuel distributors are also removed. Amendatory language is included to define licensees as fuel suppliers, importers, exporters, blenders, or international fuel tax agreement (IFTA) license holders, and explicitly states that the incidence of taxation be borne exclusively by these entities.

New sections are added to the motor fuel and special fuel tax chapters authorizing the Governor (or the DOL 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 service 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. The 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 pass the tax through to end users as part of the selling price.

Various administrative changes are also addressed including: moving the racing fuel exemption from the special fuels to the motor fuels chapter; inserting IFTA provisions;

moving compliance language to more appropriate subsections of the two fuel tax chapters; and deleting an obsolete reference regarding marine fuel dealers.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

APPENDIX C

SENATE BILL REPORT

SB 5272

As Amended by House, April 21, 2007

Title: An act relating to the administration of fuel taxes.

Brief Description: Modifying the administration of fuel taxes.

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

Brief History:

Committee Activity: Transportation: 1/24/07, 2/5/07 [DP, DNP].

Passed Senate: 3/06/07, 34-14.

SENATE COMMITTEE ON TRANSPORTATION

Majority Report: Do pass.

Signed by Senators Haugen, Chair; Marr, Vice Chair; Murray, Vice Chair; Swecker, Ranking Minority Member; Berkey, Eide, Jacobsen, Kauffman, Kilmer, Sheldon and Spanel.

Minority Report: Do not pass.

Signed by Senators Clements, Delvin and Holmquist.

Staff: David Ward (786-7341)

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

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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 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 of Bill: 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, or international fuel tax agreement (IFTA) license holders, and explicitly states that the incidence of taxation be borne exclusively by these entities.

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 service 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. The Department of Licensing 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 pass the tax through to end users as part of the selling price.

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

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony: PRO: The decision to explicitly place the incidence of taxation at the supplier level was based on the belief that it is the most legally defensible option, harms the least number of interests, and offers the greatest level of protection against future litigation with regard to state fuel tax revenues. An important policy issue addressed by the bill is the state regulation of payment due dates within the industry, which is also eliminated in the bill. In general the tribes are supportive of the compact process and are

committed to the spending provisions constraining the use of funds for transportation purposes including policing activities. It is important that the tribes have access to funding for transportation infrastructure that can and will be used in partnership with local and state transportation projects.

CON: Distributors agree the issue needs to be addressed but believes a bill that does not eliminate the credits for distributors would also solve the problem. The state could keep the tax at the rack and impose the tax on distributors as a first possession tax upon removal from the rack. The Potawatami case in Kansas demonstrates that the float can be kept intact without jeopardizing the state's ability to tax the sale of fuel. Distributors' cash flow is negatively impacted and that inability to offer credit downstream to farmers, contractors, and retailers will hurt small businesses. The elimination of the float doesn't benefit the state but rather benefits suppliers whose payment due date to the state remains unchanged. The distributors in many cases will be required to borrow money and pay interest on the loans to replace the float the distributors will lose.

Persons Testifying: PRO: Sharon Whitehead, Department of Licensing; Kelly Croman, Squaxin Island Tribe; Marty Loesch, Swinomish Tribe; Katherine Iyall Vasquez, Cowlitz Indian Tribe; Scott Wheat, Spokane Tribe of Indians.

CON: Charlie Brown, Washington Oil Marketers Association; Lea Wilson, Broadway Fuel; Gerry Ramm, Inland Oil Company; Dan Averill, Reisner Petroleum; Tim Hamilton, Automotive United Trades Organization.

House Amendment(s): Fuel distributors are added to the definition of a licensee for purposes of fuel tax administration. However, the incidence of taxation is placed on all licensees except for distributors. As licensees, fuel distributors are eligible to retain interest earned on state fuel tax receipts held in trust prior to payment to the state. Also, the emergency clause is restored.

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited with the U.S. Postal Service a true and accurate copy of: Motion for Over-Length Reply Brief and the Reply Brief of Appellant Auto in Supreme Court cause number 89734-4 to the following:

Eric Mentzer
Alicia O. Young
Assistant Attorney General
PO Box 40126
Olympia, WA 98504-0126
ericm@atg.wa.gov
alicia.young@atg.wa.gov

Rene D. Tomisser
Senior Counsel, Atty Gen. of Wash.
Torts Division
PO Box 40126
Olympia, WA 98504-0126
renet@atg.wa.gov

Paul J. Lawrence
Matthew J. Segal
Pacifica Law Group LLP
1191 Second Avenue, Suite 2100
Seattle, WA 98101
paul.lawrence@pacificallawgroup.com
matthew.segal@pacificallawgroup.com

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 20th day of August, 2014, at Seattle, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Roya Kolahi
Subject: RE: Corrected Motion and Reply Brief of Appellant Auto Cause No. 89734

Received 8-28-14

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.

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Cc: ericm@atg.wa.gov; Alicia.young@atg.wa.gov; renet@atg.wa.gov; paul.lawrence@pacificallawgroup.com; matthew.segal@pacificallawgroup.com; Lance.Odermat@brownbear.com
Subject: Corrected Motion and Reply Brief of Appellant Auto Cause No. 89734

Good Morning:

Attached please find the Motion for Over-Length Reply Brief and Reply Brief of Appellant Auto in Supreme Court Cause No. 89734-4 for today's filing. In our previous submission we inadvertently did not insert the page numbers in the table of contents of the brief. Our apologies. Thank you.

Sincerely,

Roya Kolahi
Legal Assistant
Talmadge/Fitzpatrick, PLLC
206-574-6661 (w)
206-575-1397 (f)
roya@tal-fitzlaw.com