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**SUPREME COURT OF THE STATE OF WASHINGTON**

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AUTOMOTIVE UNITED TRADES ORGANIZATION,

Appellant,

v.

STATE OF WASHINGTON, JAY INSLEE, PAT KOHLER,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Washington's fuel tax agreements with Indian tribes fully comply with constitutional restrictions regarding use of the motor vehicle fund and delegations of legislative authority. This Court should affirm. First, the agreements provide for refunds of fuel tax to tribes, and refunds of the fuel tax are specifically authorized by RCW 82.36.450 and 82.38.310 and article II, section 40 of the Washington Constitution. In arguing otherwise, Automotive United Trades Organization (AUTO) relies on a crabbed reading of the statutes authorizing the refunds, which eschews proper statutory interpretation examining the statutory language as a whole and instead focuses simply on whether the word "refund" is included in the statutes. AUTO also ignores the statutes' history, which make clear the Legislature intended the State<sup>1</sup> to negotiate fuel tax refunds with Indian tribes. Similarly, in declaring that the payments to the tribes are not refunds, despite the fact that they are based on amounts paid by tribes for fuel that includes the fuel taxes, AUTO incorrectly assumes that refunds are permissible only for taxes that could not legally be imposed in the first instance. AUTO's argument does not square with the multiple instances in which the Legislature has exercised its plenary authority to

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<sup>1</sup> The Legislature authorizes the Governor or the Department of Licensing, if delegated authority from the Governor, to negotiate agreements on behalf of the State. RCW 82.36.450, 82.38.310. For simplicity, they will collectively be referred to as "the State."

grant refunds to entities that it could otherwise impose a tax on. AUTO also unduly focuses on how the tribes are spending their fuel tax refunds, which is simply irrelevant to the constitutional question of whether the payments to the tribes are refunds authorized by law.

Second, RCW 82.36.450 and 82.38.310 appropriately direct the State to negotiate fuel tax agreements with the tribes, setting forth detailed requirements that every agreement must include, including mechanisms for ensuring compliance. The agreements include dispute resolution provisions and procedures to terminate the agreements. Independent of the safeguards required by the Legislature, the State's actions are reviewable through various external processes such as the ability to seek declaratory or injunctive relief as evidenced by this very lawsuit. The agreements are also public records, subject to review by anyone wishing to stay informed.

The Legislature properly authorized the State to negotiate fuel tax refunds with the tribes, and such refunds are expressly permitted by article II, section 40. The trial court properly denied AUTO's motion to enjoin payment of the refund to the tribes and granted the State's motion for summary judgment.

## II. RESTATEMENT OF THE ISSUES

1. Where article II, section 40 of the Constitution allows for expenditures from the motor vehicle fund for refunds authorized by law, does the State's partial return of fuel taxes paid by Indian tribes comply where the refunds are negotiated pursuant to RCW 82.36.450 and 82.38.310?

2. Did the Legislature properly delegate authority to the State to negotiate fuel tax refunds with Washington's Indian tribes by instructing the State as to what the agreements should contain, and do sufficient procedural safeguards exist to control the arbitrary exercise of that authority?

## III. STATEMENT OF THE CASE

### A. **Federal Courts Have Enjoined The State From Charging Or Collecting Fuel Tax From Tribally Owned Fueling Stations When The Incidence Of The Tax Falls In Indian Country**

Since 1921, Washington has imposed a tax on motor vehicle fuel. For many years prior to 2007, Washington law passed the legal incidence of motor vehicle fuel tax down the chain of commerce to the retail point of sale, which is referred to as a "tax at the pump" model. CP at 284. Under that model, the suppliers and distributors were required to charge and collect the motor fuel tax from the retailer, but the retailer was not required to pass it along to the customer. *Squaxin Island Tribe v.*

*Stephens*, 400 F. Supp. 2d 1250, 1251-52, 2005 WL 3132216 (W.D. Wash. 2005) (citing former RCW 82.36.035(5)-(6) (2005); former WAC 308-72-865(2) (2005); former RCW 82.36.160 (2005)).

Washington's fuel tax model created flashpoints with federal law recognizing tribal immunity from State fuel taxes being imposed on tribal activity within Indian Country. A long history of chronic litigation existed between the State and various Washington tribes over whether the State could require tribal retailers to comply with the tax at the pump model at tribal fueling stations within Indian Country. CP at 285.

In 1994, litigation between the State and the Colville Nation ended in a consent decree when the federal court found that the legal incidence of the State fuel tax was being imposed on tribal fuel outlets in violation of tribal sovereignty. CP at 1030-1046. The federal *Colville* consent decree provided that the State would refund the tribe for taxes on fuel the tribe purchased and used for tribal business or resold to tribal members or businesses. The consent decree required the tribe to keep track of the amount of State fuel taxes that had been paid by the tribe and its members (excluding purchases by non-members) and to submit invoices showing the amount of state fuel tax paid in order to claim a refund. CP at 1037-1046. The Legislature specifically approved the terms of the consent decree and authorized the State to enter into agreements with other tribes

for fuel tax refunds on the same or substantially similar terms as those contained in the *Colville* consent decree. Laws of 1995, ch. 320, § 2.

A similar iteration of the government-to-government litigation over the State fuel tax was pending in federal court before the Honorable Judge Zilly in 2005 and 2006. In that case, the Squaxin Island and Swinomish tribes were suing the State for an injunction barring the State from requiring their tribal retailers to charge or collect the State motor vehicle fuel tax. In early January 2006, Judge Zilly ruled in favor of the tribes and enjoined the imposition of the State fuel tax on tribal land for tribal fuel retailers. CP at 493-496. As ordered by Judge Zilly:

The legal incidence of the State of Washington's motor vehicle fuel tax, RCW chapter 82.36, which became effective January 1, 1999, rests upon the retailer of those fuels.

As a matter of federal law, the State of 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 an Indian tribe, tribal enterprise, or tribal member that is located within the tribe's Indian Country.

Defendant is permanently enjoined from imposing or collecting motor vehicle fuel taxes, or otherwise seeking to enforce RCW chapter 86.36 with respect to motor vehicle fuels, delivered to, received by, or sold by Plaintiffs' retail fuel stations within their respective Indian Country.

CP at 493-496 (*Squaxin Island Tribe et. al. v. Fred Stephens, Director, Washington State Dep't of Licensing*, No. CO3-3951Z (W.D. Wash.) (Jan. 4, 2006)).

The preclusive effect of Judge Zilly's ruling for other Washington tribes was obvious and other tribes were preparing to file actions for similar relief. CP at 286. After denying the State's motion to vacate the injunction, Judge Zilly issued a final judgment in favor of the tribes on March 2, 2006, enjoining the State from collecting any fuel taxes from those tribal retailers. CP at 498-500. The State filed an appeal of the injunction to the Ninth Circuit, but the status quo in the spring of 2006 was that the State was not entitled to any tax revenues for fuel sold by the Squaxin and Swinomish tribal retailers.

During the pendency of the appeal, the State and the Squaxin/Swinomish tribes negotiated a settlement in which the tribes and tribal retailers would purchase tax-burdened fuel and be refunded for 75 percent of the fuel tax paid. CP at 286. The 75/25 split was based on a review of tribal fuel sales records, indicating that approximately 75 percent of the fuel was sold within the tribe, and 25 percent to non-tribal members. CP at 286. This differed from the method previously authorized by the Legislature when it allowed for agreements similar to

the consent decree ordered with the Colville Nation. Laws 1995, ch. 320 § 2; CP at 1037-1046.

A related development during this time was the United States Supreme Court decision in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005). In *Wagnon*, the Supreme Court ruled that if the legal incidence of a State's fuel tax was off the tribal reservation then tribal immunities and federal preemption were inapplicable. *Wagnon*, 546 U.S. at 116. Under *Wagnon*, the location of the incidence of the State fuel tax was the key to whether tribal immunities applied—if the incidence of the state fuel tax was off the reservation then tribal immunities were inapplicable, but if the incidence was on tribal entities within the reservation then tribal immunities applied. *Id.* at 116.

**B. Legislation Is Introduced In Washington To Move The Legal Incidence Of The Fuel Tax Up To The Supplier Level**

During the 2006 legislative session, and on the heels of the injunction imposed by Judge Zilly, Senate Bill (SB) 6785 was proposed that would move the legal incidence of Washington's fuel tax away from the "tax at the pump" model to a "tax at the rack model." CP at 284. Under the "tax at the rack" model, the legal incidence of the fuel tax is moved up the distribution chain and occurs at the supplier level. From the perspective of the Department of Licensing, the "tax at the rack" model

was preferable because it was more efficient with far fewer suppliers to keep track of than the myriad of retailers. CP at 284.

Another potential benefit of moving the legal incidence of the fuel tax up to the supplier level was the prospect of mooted Judge Zilly's injunction. CP at 284. At that time, there were no tribal fuel suppliers operating in Indian Country and the incidence of the fuel tax would therefore occur outside of Indian Country. CP at 284. Under the recent *Wagnon* decision, the State would be in a stronger position to collect fuel taxes on fuel ultimately sold by tribal retailers in Indian Country.

During the hearings on SB 6785, the suggestion was made that if the Legislature moved the legal incidence of the fuel tax up the chain to the supplier level, then some tribes would be in a position to follow suit and move up the chain to become fuel suppliers and distributors from within Indian Country. CP at 284, 532. This could occur, for example, through purchase or construction of a refinery in Indian country or through barging fuel or building a fuel rack where gas is delivered directly to Indian Country. Under the recent *Wagnon* decision, tribal suppliers/distributors would be immune from state fuel taxes and the State would be back within the tax regime enjoined by Judge Zilly. It was further observed that if the incidence of the fuel tax was moved up to the "tax at the rack" model and some tribes moved up to the

supplier/distributor level, then the State would be trading the relatively small problem of tribal retailers being exempt from state fuel taxes to the much larger problem of tribes becoming tax-exempt distributors and suppliers of motor vehicle fuel. CP at 529-34. SB 6875 failed to pass in the 2006 session.

**C. Compromise Is Reached Allowing The State To Gain The Efficiencies Of The "Tax At The Rack" Model, Resolving The Chronic Litigation Over Tribal Immunities From State Fuel Taxes, And Incentivizing The Tribes Not To Move Up To The Supplier Level**

Following the 2006 legislative session, the State, tribal representatives, and a variety of other stakeholders worked on a compromise that would allow the efficiencies of moving the state motor vehicle fuel tax to a "tax at the rack" model, but with incentives to discourage tribes from moving up to the supplier/distributor level. CP at 284-285. SB 5272 was introduced, moving the incidence of the state motor vehicle fuel tax up to the supplier/distributor and authorizing the State to continue negotiating fuel tax agreements with the tribes based on existing methodologies with new requirements. Laws of 2007, ch. 515, §§ 15, 19, 21, 31. The legislation was supported by tribal and State representatives, and, ultimately, AUTO. CP at 502 (1:25:00, 1:27:06; 1:44:30), 536-542, 544-549, 551-555. The bill was passed and signed into law. RCW 86.36.320 and 82.38.030 (moving the incidence of motor

vehicle fuel and special fuel up to the supplier/distributor level); RCW 82.36.450 and 82.38.310 (authorizing State/tribal fuel tax agreements for motor vehicle fuel and special fuel taxes).

The chronic litigation between the State and the tribes over fuel taxes has all but disappeared since the current government-to-government agreements were authorized. There are currently 23 agreements in place between the State and various Washington tribes. CP at 559. The tribes are buying tax-burdened fuel from licensed suppliers and including the price of the state fuel tax at the point of retail sale. CP at 286. The tribes submit invoices documenting the amount of tax-burdened fuel purchased by the tribe. CP at 286. The State has consistently received verification from certified auditors that the tribes are in compliance with their obligations under the agreements, with the exception of the Yakama Nation. CP at 285; CP at 579-655.<sup>2</sup> The State continues to keep 25 percent of the fuel tax generated by tribal fuel sales. No tribe has chosen to frustrate an agreement by moving up the distribution chain to the supplier level. CP at 285.

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<sup>2</sup> The State and the Yakama Nation previously operated under a federal consent decree. CP at 504-513. The Federal District Court granted the State's motion to terminate the decree based on non-compliance by the Yakama Nation. The State is currently in litigation over past due taxes owed and compliance with state fuel tax laws. *State v. Tribal Court for Confederated Tribes & Band of Yakama Nation*, No. CV-12-3152 LRS, (Order, Nov. 21, 2013) (copy attached as Appendix A). There is no fuel tax agreement with the Yakama Nation.

#### **D. Key Elements Of The Fuel Tax Agreements**

In authorizing the State to enter into agreements with the tribes, the Legislature set forth a number of elements that had to be included in any new tribal fuel tax agreement. The State also negotiated additional safeguards and features. In general, the agreements contain the following elements:

- The refunds negotiated are specifically for fuel purchased by tribes, tribally-owned and operated retail stations, or tribal members licensed by the tribes to operate retail stations located on reservation or trust property. RCW 82.36.450(1), 82.38.310(1).
- The agreements require the tribes to purchase all fuel for their fueling stations from licensed suppliers, distributors or blenders, or tribal distributors, suppliers, importers, or blenders lawfully doing business according to all applicable laws. RCW 82.36.450(3)(a), and 82.38.310(3)(a). Tribal fuel purchases must include 100 percent of the amount of the State fuel tax. CP at 286. Although not required by the legislature, the State further negotiated an agreement by the tribes to include the price of the state fuel tax in the price at the retail pump. CP at 286.
- The tribes submit invoices establishing the number of gallons of fuel that have been purchased and claim a refund for 75 percent of the fuel tax that was paid, or tribes can use a per capita refund model based on the tribal population and fuel consumption estimates.<sup>3</sup> CP at 286, 383; RCW 82.36.450(2), 82.38.310(2).
- Upon approval of the refund amount, the director of the Department of Licensing notifies the state treasurer to issue the

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<sup>3</sup> An example of a 75/25 agreement is located in the record at CP 564-572, and an example of a per capita agreement is at CP 574-578.

refund to the tribal authority. The refund must be paid from the motor vehicle fund. RCW 82.36.330(1).

- The agreement must require the tribe to spend “fuel tax proceeds or equivalent amounts on: Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway related services”. RCW 82.36.450(3)(b), 82.38.310(3)(b).
- The agreement must include an auditing or other provision for certifying the number of gallons purchased by each tribe and certifying that the fuel tax refund or an equivalent amount has been spent consistent with the requirements in section (3)(b). RCW 82.36.450(3)(c), 82.38.310(3)(c).
- The department must submit an annual report to the legislature on the status of the agreements and any ongoing negotiations. RCW 82.36.450(6).

A unique feature of the fuel tax agreements ignored by AUTO is the requirement that the tribes must purchase fully tax-burdened fuel from fuel suppliers/distributors and must include the amount of the state fuel tax in the price at the retail pump. CP at 286. By contrast, non-tribal purchasers, such as AUTO’s members, are free to negotiate discounts with suppliers/distributors that may or may not include the amount of the state fuel tax paid by the supplier/distributor. Washington’s “tax at the rack” model no longer requires the economic incidence of the fuel tax to be passed downstream, except for fuel purchased by tribes under the fuel tax agreements. These provisions were specifically negotiated to maintain a level playing field with non-tribal retailers. *See, e.g.*, CP at 910, ¶ 3.1.

**E. Allegations Of “Unfair” Fuel Pricing Are Not Supported By The Record**

AUTO alleges fuel tax refunds were being used to subsidize the price of fuel at tribal outlets, but failed to substantiate this allegation of tribal misconduct. CP at 90.<sup>4</sup> Contrary to AUTO’s suspicions, the audits of tribal use of fuel tax refunds and spending show uniform compliance with fuel tax agreements. CP at 593-655. The refunds are fully accounted for by certified independent auditors and are being spent on tribal infrastructure and law enforcement as required by the agreements. *Id.* The audits do not show unaccounted for refund money flowing back to subsidize tribal fuel pricing, nor does tribal pricing indicate the kind of discounting that would reflect the magnitude of tax-subsidized pricing. CP at 386.

A pricing study by fuel industry economist Dr. Keith Leffler showed no evidence of tribal fuel tax refunds being used to subsidize the retail price of fuel at tribal stations. CP at 385-386. Professor Leffler explained the price impact of the fuel hyper-marketers such as Costco, Fred Meyer, and Safeway. The ability of the hyper-marketers to operate high volume/low margin business models has created huge competitive

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<sup>4</sup> Outside the terms of the agreements that the tribes have voluntarily entered into with the State, in which the tribes agree to include the amount of the fuel tax in the price of fuel sold to customers, there is no requirement that tribes competitively price their fuel with non-tribal retailers.

pressure on the small independent operators that make up AUTO's members as well as tribal fuel retailers. CP at 385. The pricing by the hyper-marketers is consistently the lowest retail price, not tribal fuel prices. CP at 385-386. Dr. Leffler's explanation of fuel pricing in Washington was unchallenged and unrebutted by AUTO.

Additionally, not a single member of AUTO provided a sworn statement or documentation supporting the accusation of tribes using fuel tax refunds to unfairly price the retail sale of fuel. No expert analysis was offered by AUTO suggesting that tribal pricing could only be sustained by some sort of "unfair" tax-subsidized practice.

AUTO does present a snapshot of a Spokane tribal station selling gas at a lower price than other nearby stations on March 4, 2008. Appellant Br. at 13 (citing CP at 769). The Department of Licensing investigated and found the tribal price significantly lower than its nearest competitors on that particular day. CP at 769. Contrary to the inference created by AUTO, the Department also found the following in its investigation of the tribal station:

A review of the Spokane records requesting a refund of fuel taxes confirms that federal and state fuel taxes were charged in the price of the fuel.

CP at 769. AUTO's leading example of how the State is "aware" of unfair pricing is thus a six-year-old, one-day snapshot unaccompanied by

evidence that the Spokane tribal prices were chronically lower than competing retailers, how long the lower prices were in place, or whether the tribal price was lower than the area hyper-marketers such as Costco or Safeway.<sup>5</sup> AUTO's other evidence on this point, a one-day snapshot regarding the Puyallup tribe, shows just the opposite: the tribal station was charging prices either the same or higher than a competing station. Appellant Br. at 13 n.15 (citing CP at 1476-77).<sup>6</sup>

#### IV. PROCEDURAL HISTORY

AUTO filed this challenge to the government-to-government fuel tax agreements in Grays Harbor County. CP at 1. The lawsuit named only the State as a defendant, not the tribes. The trial court granted the State's motion to dismiss based on the inability of AUTO to join the tribes as necessary and indispensable parties. CP at 176. This Court reversed, ruling the tribes were necessary but not indispensable. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012).

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<sup>5</sup> When asked to provide information and documentation as to the "surveys" AUTO alleged were done that revealed unfair pricing, AUTO summarized its own members' observations of tribal fuel prices without providing any methodology explanation, supporting documentation, or sworn testimony. CP at 817-819. AUTO cites to these unsworn interrogatory responses as substantive evidence in its briefing. Appellant Br. at 18.

<sup>6</sup> AUTO's evidence on this point does not establish "dramatic" price differentials across the State. To the contrary, AUTO's evidence shows a variation among retailers on one particular day, in which some tribes have equal or higher prices to some non-tribal retailers, and some lower.

Upon remand, the parties brought cross-motions for summary judgment on the merits of AUTO's constitutional claims. CP at 258, 306. On November 25, 2013, the trial court ruled the fuel tax agreements and refunds to the tribes are constitutional. The State's motion for summary judgment was granted and AUTO's request to enjoin payment of fuel tax refunds was denied. CP at 482.<sup>7</sup>

## V. LAW AND ARGUMENT

### A. Standard Of Review

An appellate court's review of an order on summary judgment is de novo, but as the party challenging the constitutionality of RCW 82.36.450 and 82.38.310, AUTO bears the "heavy burden" to "prove that the statute is unconstitutional beyond a reasonable doubt." *Sch. Dist's. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). It is well established in Washington that statutes are presumed constitutional and cannot be declared to be beyond the power of the Legislature unless the statute conflicts with a specific provision of the State Constitution. *Id.*; *State ex. rel. Heavey v.*

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<sup>7</sup> AUTO argued at summary judgment and in its Statement of Grounds that the fuel tax agreements violated the State Privileges and Immunities Clause (Const. Art. I, § 12 and article VII, § 5—regarding how taxes are levied). Similarly, AUTO argued in its Statement of Grounds that the fuel tax agreements were "beyond the power of the State to grant where the State structured the compacts so as to permit the tribes to violate the terms of the compact. . . ." AUTO did not include argument in its opening merits brief on these claims. Accordingly, these claims should be deemed abandoned. *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967).

*Murphy*, 138 Wn.2d 800, 817, 982 P.2d 611 (1999). The reason for this high standard is based on the judicial branch's "respect for the legislative branch as a co-equal branch of government." *Sch. Districts' Alliance for Adequate Funding of Special Educ.*, 170 Wn.2d at 605 (quoting *Island Cnty. v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)); *Washington Off Highway Vehicle Alliance [WOHVVA] v. State*, 176 Wn.2d 225, 234, 290 P.3d 954 (2012). The setting of tax policy and the associated policy goals reflected by decisions on tax refunds and exemptions is quintessentially a legislative domain. *Heavey*, 138 Wn.2d at 813.

**B. The Fuel Tax Refunds To The Tribes Satisfy Article II, Section 40**

The Constitution unambiguously allows for state motor vehicle fund expenditures on "refunds authorized by law for taxes paid on motor vehicle fuels." Const. Art. II, § 40; *WOHVVA*, 176 Wn.2d at 228, 239; *Nw. Motorcycle Ass'n v. State*, 127 Wn. App. 408, 415, 110 P.3d 1196 (2005), *review denied*, 156 Wn.2d 1008. Accordingly, the proper inquiry for this Court is whether the disbursement is (1) a refund that is (2) authorized by law. *Nw. Motorcycle Ass'n*, 127 Wn. App. at 415. Because the payments made pursuant to the State's fuel tax agreements with the tribes are refunds for taxes paid on motor vehicle fuels that are authorized by RCW

82.36.450 and 82.38.310, they are permissible expenditures under article II, section 40.

**1. The Payments Are “Refunds”**

Washington courts have defined “refund” in the context of motor vehicle fuel taxes as simply being “a sum that is paid back.” *Nw. Motorcycle Ass’n*, 127 Wn. App. at 415 (quoting Webster’s Third New International Dictionary, 1910 (2002)); *WOHVA*, 176 Wn.2d at 234 (quoting *Nw. Motorcycle Ass’n*, 127 Wn. App. at 415). While the most straightforward form of a refund is a direct payment to a taxpayer, the Washington Court of Appeals and the Washington Supreme Court have found expenditures for the benefit of off-road vehicle and non-motorized recreation to be constitutional “refunds” within the Legislature’s “plenary powers of taxation” so long as the expenditures benefit the affected taxpayers. *WOHVA*, 176 Wn.2d at 230 (citing *Nw. Motorcycle Ass’n*, 127 Wn. App. at 416). Thus, courts have demonstrated flexibility in deciding whether a legislatively-authorized expenditure from the motor vehicle fund constitutes a “refund.”

Of course, when a refund is made directly back to the taxpayer in the form of payment, the Court need not analyze whether the refund benefits the taxpayer, because the benefit is obvious. Here, the fuel tax refunds paid to the tribes are “refunds” within the meaning of article II,

section 40 in their simplest form, because the tribes are the purchasers of tax-burdened fuel and the tribes receive “a sum that is paid back.”

AUTO raises two flawed arguments to support its contention that the fuel tax refunds called for under the tribal agreements are not “refunds” as that term is used in article II, section 40. First, AUTO argues—without support from the language of article II, section 40 or relevant case law—that only taxes illegally collected may be “refunded.” Second, and again unsupported by the language of article II, section 40 or relevant case law, AUTO incorrectly argues that since the *legal* incidence of the tax falls on suppliers rather than the tribes, that only suppliers can receive “refunds.”

AUTO asserts that a refund is only legally permissible when the fuel tax was illegally imposed and collected to begin with. Appellant Br. at 28 (citing *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn. App. 925, 937, 946 P.2d 1235 (1997)). But the Constitution places no such restrictions, and the availability of a refund does not make the initial imposition and collection of the tax illegal. Rather, the Legislature determines the bases for refunds to incentivize behavior or for a number of other reasons. *See, e.g.*, RCW 82.36.285 (allowing refunds for public transportation systems for special needs); RCW 82.08.0206 (providing for remittance of sales tax to low-income families); RCW 82.12.962 (providing for remittance of

sales tax to consumers who have purchased machinery and equipment used for generating energy); RCW 82.08.820 (providing for remittance of retail taxes paid by wholesalers or third-party warehouseers that have paid taxes on equipment and construction relating to grain elevators or distribution centers). AUTO's position is also inconsistent with the *WOHVA* and *Northwest Motorcycle Association* cases, in which refunds benefitting fuel consumers were upheld even though the legal incidence of the tax fell on suppliers. Under AUTO's theory, the validity of the refunds in those cases would mean that the taxes used to fund those refunds were illegally imposed on the suppliers. This is nonsensical.

*Tiger Oil Corporation* does not support AUTO's assertion. In that case, the Court addressed only one of several refund provisions contained in RCW 82.36 and 82.38. *Tiger Oil Corp.*, 88 Wn. App. at 937. That specific provision provided for a refund on taxes "erroneously or illegally collected or paid." RCW 82.38.180(3). The availability of a refund on one ground does not swallow the other permissible reasons the Legislature has provided for refunds.

AUTO's second argument—that the tribes are do not receive a true "refund" because they do not pay the fuel tax—is belied by the undisputed fact that the fuel tax agreements require the tribes to purchase tax-burdened fuel. RCW 82.36.450(3)(a), 82.38.310(3)(a). The constitutional

authorization to grant fuel tax refunds does not distinguish between taxpayers who bear the legal incidence of the fuel tax from those bearing an economic incidence of the fuel tax. Indeed, many other refunds provided in the fuel tax statutes are granted not to the suppliers and distributors—who bear the legal incidence of the fuel tax—but to consumers and other entities who bear an economic incidence of the fuel tax. See, e.g., RCW 82.36.275 (refunds for urban transportation systems, regardless of “whether such vehicle fuel tax has been paid either directly to the vendor from whom the motor vehicle fuel was purchased or indirectly by adding the amount of such tax to the price of such fuel”), .280 (refunds for users of nonhighway use of fuel, regardless of whether tax paid directly), .285 (refunds for nonprofit transportation providers for persons with special needs, regardless of whether tax paid directly), .290 (refunds for purchasers and users of fuel to be used as ingredient in manufacturing, cleaning, or dyeing, regardless of whether tax paid directly). AUTO’s position is, once again, inconsistent with other fuel tax cases, such as *WOHVA*, where, in addition to being indirect, the refunds were not intended to benefit the suppliers, who bear the legal incidence of the tax, but rather other entities who bore the economic incidence of the tax. The only requirement for a disbursement to be a “refund” under article II, section 40, is that the disbursement benefits the affected

taxpayers. *WOHVA*, 176 Wn.2d at 230 (citing *Nw. Motorcycle Ass'n*, 127 Wn. App. at 416).

Just as there is no barrier based on who bears the legal incidence of the tax, nor is there any constitutional prohibition on authorizing a refund to a taxpayer who may be able to further pass the cost of the tax downstream. The fact that the tribes include the fuel tax cost as part of the price of fuel charged to consumers does not change the fact that the tribes paid the tax and may seek refunds on that basis.<sup>8</sup> When a legislative enactment regarding tax policy passes constitutional muster, the court does not continue to scrutinize the enactment to determine the merits of the legislative policy. As stated in the context of motor vehicle excise taxes in *Heavey*,

For reasons stated above, we conclude that RCW 82.44.110 passes muster under Const. art. II, § 40 (amend.18), and decline to grant a writ of mandamus forbidding Treasurer Murphy from fulfilling his duties under the statute. Whether this law is good or bad public policy is not for us to say. Our task is simply to determine if it is constitutional. We have concluded that it is, and we need say nothing further.

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<sup>8</sup> AUTO's contention that by virtue of customers being able to claim a refund on fuel sold by tribal retailers, the State may, in some instances, refund 175 percent of the tax paid on such fuel is misleading. Appellant Br. at 31. The fact that a consumer may be able to claim a refund for fuel purchased from a tribal retailer does not mean that the tribe has received a refund on the same amount. To the contrary, the refunds to the tribes are not full refunds. The 75/25 split is based on estimated sales to tribal members versus non-members. The agreements specifically limit the tribes and tribal members from obtaining refunds to the extent refunds were already made pursuant to the agreements. *See, e.g.*, CP at 568.

*Heavy*, 138 Wn.2d at 814. *Accord, Nw. Motorcycle Ass'n*, 127 Wn. App. at 416 (“We find nothing in article II, section 40 that specifically prohibits the Legislature from dispersing the ‘refund’ as it sees fit.”).

AUTO’s objections to the refunds on these grounds are not based in the Constitution, and should be rejected.

**2. The Refunds Are Authorized By Law**

AUTO claims that RCW 82.36.450 and 82.38.310 do not authorize fuel tax refunds because the word “refund” does not appear in the body of the statutes. Appellant Br. at 11-12, 36-38. This overly simplistic argument ignores the plain language of the statutes, their predecessor statute, and the legal backdrop against which the legislation was passed.

**a. The legal history leading to fuel tax agreements and the original express reference to paying refunds to Indian tribes confirms legislative authorization to enter into agreements for fuel tax refunds to the tribes.**

Federal law prohibits states from placing the legal incidence of state fuel tax on tribes or tribal members for sales made within Indian Country by tribal fuel outlets. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59, 461-62, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995). Following the result of the *Colville* litigation and eventual imposition of the consent decree, the Legislature recognized the need for a

different approach to state fuel taxes in Indian Country. As recognized by the Legislature:

**Legislative recognition, belief** – The Legislature recognizes that certain Indian tribes located on reservations within this state dispute the authority of the state to impose a tax upon the tribe, or upon tribal members, based upon the distribution, sale, or other transfer of motor vehicle and other fuels to the tribe or its members when that distribution, sale, or other transfer takes place upon that tribe's reservation. While the legislature believes it has the authority to impose state motor vehicle and other fuel taxes under such circumstances, it also recognizes that all of the state citizens may benefit from resolution of these disputes between the respective governments.

Laws of 1995, ch. 320, § 1.

The Legislature implemented this approach by authorizing the State to negotiate fuel tax agreements with Indian tribes. Laws of 1995, ch. 320. The legislation authorizing the State to negotiate these agreements is titled "AN ACT Relating to refunding motor vehicle fuel and special fuel taxes to Indian tribes. . . ." Laws of 1995, ch. 320 (codified in former RCW 82.36.450 and 82.38.310). The operative language authorizing the State to enter into agreements provided:

The department of licensing may enter into an agreement with any federally recognized Indian tribe located on a reservation within this state regarding the imposition, collection, and use of this state's motor vehicle fuel tax, or the budgeting or use of moneys in lieu thereof, upon terms substantially the same as those in the consent decree entered by the federal district court (Eastern District of Washington) in *Confederated Tribes of the Colville*

*Reservation v. DOL, et al.*, District Court No. CY-92-248-JLO.

Laws of 1995, ch. 320, § 2.

The law required the agreements to include substantially the same terms as had been approved by the federal court in the Colville consent decree. Laws of 1995, ch. 320 §§ 2-3. A centerpiece of the *Colville* consent decree was the requirement for the tribe to document the amount of tax-burdened fuel that was purchased by the tribe and then submit a claim for a refund for a portion of the state fuel taxes that had been paid. CP at 1030-1049. The Legislature's specific direction to enter into fuel tax agreements "upon substantially the same terms as the *Colville* consent decree" directly authorized the State to pay fuel tax refunds to the tribes since the refunds were central to the terms of the *Colville* decree. Indeed, the bill title expressly states that the Act relates to refunding fuel taxes to Indian tribes. See *Covell v. City of Seattle*, 127 Wn.2d 874-88, 905 P.2d 324 (1995); CP at 1038 (title of enactment may be referred to as a source of legislative intent).

The State thereafter reached agreements with several Washington tribes. CP at 383, 929-1028. Consistent with the *Colville* consent decree, each of the agreements included procedures for the tribes to purchase tax-burdened fuel, to verify the amount of tax paid by the tribe for fuel

delivered to its outlets, and a procedure for subsequently claiming a refund against the amount of tax-burdened fuel that had been purchased. The fuel tax agreements are subject to public disclosure and have been provided to AUTO. No claim has been made that any of the agreements deviate from being “upon substantially the same terms as the *Colville* consent decree.”

**b. The 2007 legislation reaffirms the State’s authority to negotiate fuel tax refunds under the previously existing methodology.**

In 2007, the Legislature amended the operative statutes regarding agreements with tribes for fuel tax refunds. But nothing in the amendments or other statutory language suggests that the Legislature intended to withdraw the authority to enter agreements with tribes that provide for fuel tax refunds with tribes. To the contrary, the statutory language shows that the Legislature affirmed this authority.

When amending these statutes, the Legislature provided:

**Agreement with tribe for fuel taxes.** (1) The governor may enter into an agreement with any federally recognized Indian tribe located on a reservation within this state regarding motor vehicle fuel taxes included in the price of fuel delivered to a retail station wholly owned and operated by a tribe, tribal enterprise, or tribal member licensed by the tribe to operate a retail station located on a reservation or trust property. The agreement may provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax.

RCW 82.36.450(1). The Legislature specifically noted it was not repealing its authorization for prior fuel tax agreements. That section provides:

The provisions of this section do not repeal existing state/tribal fuel tax agreements or consent decrees in existence on May 15, 2007. The state and the tribe may agree to substitute an agreement negotiated under this section for an existing agreement or consent decree, or to enter into an agreement using a methodology similar to the state/tribal fuel tax agreements in effect on May 15, 2007.

RCW 82.36.450(2), 82.38.310(2) (containing parallel language for special fuels).<sup>9</sup> Not only did the Legislature expressly approve of existing agreements, but it authorized the State to negotiate new agreements “using a methodology similar to the state/tribal fuel tax agreements in effect on May 15, 2007,” all of which provided for fuel tax refunds.

The Legislature’s expectation that fuel tax agreements would continue to include fuel tax refunds is further revealed in its express reference to the tribes expending “fuel tax proceeds.” RCW 82.36.450(3)(b), 82.38.310(3)(b). Washington courts give meaning to every phrase in an enactment and do not edit statutory language to reach a conclusion deviating from what is otherwise plain language. *G-P Gypsum Corp. v. Dep’t of Rev.*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

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<sup>9</sup> The agreements and consent decrees in existence on May 15, 2007 included both agreements authorized under the prior 1995 legislation (the same or similar terms as reached in the *Colville* Consent Decree) and under the new 75/25 model reached with the Squaxin and Swinomish Tribes. CP at 908-1028.

The reference to “fuel tax proceeds” would make no sense if the Legislature was not intending to disburse refunds to the tribes from the motor vehicle fund since that is the only place State-owned “fuel tax proceeds” can come from. Const. art. II, § 40 (requiring all fuel taxes be paid into the state motor vehicle fund). Moreover, the Legislature would have no business telling the tribes what to do with “fuel tax proceeds” unless those “proceeds” came from the State through a negotiated agreement with the State.

If, as AUTO contends, the Legislature intended to withdraw the State’s authority to negotiate fuel tax refunds with the tribes, it is absurd to think that it would have done so in such a roundabout manner, particularly in light of the Squaxin/Swinomish injunction in effect at the time. AUTO’s argument that the Legislature did not reauthorize the payment of refunds in the 2007 legislation cannot account for the fact that the original authorizing legislation called for agreements for refunds of motor vehicle fuel taxes to the tribes, and the 2007 amendments expressly approved of the agreements in place and authorized new agreements on the same terms. RCW 82.36.450(2) (authorizing the State to “enter into an agreement using a methodology similar to the state/tribal fuel tax agreements in effect on May 15, 2007”). Nor does AUTO’s interpretation

account for why the Legislature would have contemplated control over the tribes' use of "fuel tax proceeds."

**c. The Constitution does not require a separate appropriation for every tax refund remitted.**

AUTO contends the refunds are not authorized by law because they do not include a separate express appropriation. Appellant Br. at 35-36 (citing Const. art. VIII, § 4). "The object of the constitution art. 8, § 4 . . . is to prevent expenditures of the public funds at the will of those who have them in charge, and without legislative direction." *King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 604, 949 P.2d 1260 (1997) (quoting *State v. Clausen*, 94 Wash. 166, 173, 162 P. 1 (1917)). As a preliminary matter, AUTO's veiled attempt to add a new constitutional challenge that was neither briefed nor argued below should be rejected. RAP 2.5(a).<sup>10</sup>

Regardless of the timeliness of AUTO's argument, the motor vehicle fund is a special fund established by the Constitution, which specifically sets forth the permissible bases upon which expenditures from the motor vehicle fund can be made. Const. art. II, § 40. One of those specific bases is for refunds authorized by law. *Id.* Since the payments to the tribes are refunds authorized by RCW 82.36.450 and 82.38.310, they

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<sup>10</sup> Similarly inapplicable is AUTO's reference to article VII, section 5, which, by its plain language, applies only to limit the imposition of a tax. Appellant Br. at 33; Const. art. VII, § 5.

are authorized to be paid pursuant to the statute that authorizes expenditures for all fuel tax refunds. RCW 86.36.330(1) (“Upon the approval of the director of the claim for refund, the state treasurer shall draw a warrant upon the state treasury for the amount of the claim in favor of the person making such claim and the warrant shall be paid from the excise tax collected on motor vehicle fuel.”); RCW 46.68.090(1) (providing for expenditure from motor vehicle fund for “payment of refunds of motor vehicle fuel tax and special fuel tax that has been paid and is refundable as provided by law”).

It is absurd to suggest, as AUTO appears to, that every tax refund, in order to comply with article VIII, section 4 of the Washington Constitution, requires a separate, specific legislative appropriation. *See* Appellant Br. at 35-36. AUTO’s argument would call into question the State’s ability to pay any tax refund absent a specific legislative appropriation for that refund. “While there is no particular form of expression that is constitutionally required for the court to find appropriation by law, the language of the statute may be sufficient to show that the intention of the legislature was to appropriate.” *State v. Perala*, 132 Wn. App. 98, 115, 130 P.3d 852 (2006) (citing *State ex rel. Brainerd v. Grimes*, 7 Wash. 191, 193, 34 P. 833 (1893)).

As described above, the Legislature authorized the State to negotiate fuel tax refunds under the same methodology that existed in agreements negotiated prior to May 15, 2007. RCW 82.36.450(2). The Legislature further provided a mechanism by which fuel tax refunds are paid. RCW 82.36.330(1). Additionally, there is a separate constitutional provision that authorizes payment from the motor vehicle fund for refunds authorized by law. Const. art. II, Section 40. This is more than enough to constitute a sufficient appropriation as contemplated by article VIII, section 4, if it applies.<sup>11</sup>

**d. The law does not limit authorization to reach agreements to instances in which the tribes could claim immunity.**

The authorizing statutes state that the agreements with the tribes “may provide mutually agreeable means to address any tribal immunities or any preemption of the state motor vehicle fuel tax.” RCW 82.36.450(1). AUTO attempts to morph this permissive clause into a mandatory prerequisite for any agreement for fuel tax refunds. Appellant Br. at 42-43. However, 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 in the

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<sup>11</sup> As AUTO acknowledges, article VIII, section 4 does not apply to special funds set up for specific purposes, such as retirement and state motor vehicle excise taxes held on municipalities and counties. *Mun. of Metro. Seattle v. O'Brien*, 86 Wn.2d 339, 544 P.2d 729 (1976).

agreements, if agreed to by both parties. *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976) (construing “may” to be discretionary where a mandatory term like “shall” also appears).<sup>12</sup>

In any event, the agreements were negotiated, in part, to address tribal immunity issues. One reason the State negotiated the agreements with the tribes was to dis-incentivize the tribes from becoming suppliers and cutting the State out of a larger quantity of available fuel taxes. AUTO’s argument that the agreements do not expressly prohibit the tribes from becoming suppliers is beside the point. Appellant Br. at 43 n.44. The agreements were authorized to incentivize (not prohibit) tribes from becoming suppliers and claiming immunity from the imposition of fuel tax. The fact that no tribe has become a supplier only supports the State’s basis for entering into the agreements.

**e. There are no constitutional restrictions on how refund recipients may spend their refunds.**

AUTO also argues that the fuel tax refunds do not comply with the law because the tribes are not spending their refund checks on the limited

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<sup>12</sup> The fact that the legislature used “may” and “must” in the same legislation only underscores that “may” is intended to be permissive. Compare RCW 82.36.450(1) with RCW 82.36.450(3). See also *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 438 (1982) amended, 97 Wn.2d 701, 656 P.2d 1083 (1983) (“Where a provision contains both the words ‘shall’ and ‘may,’ it is presumed that the lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.”).

bases that the State is permitted to use motor vehicle funds. Article II, section 40 restricts the State to spending its portion of the money in the motor vehicle fund on projects for the betterment of public highways (which is expressly defined to include refunds authorized by law). That restriction only applies to the State, not to recipients of refunds from the motor vehicle fund. *WOHVA*, 176 Wn.2d at 239; *Nw. Motorcycle Ass'n*, 127 Wn. App. at 412. Thus, AUTO's examples of the tribes not spending their fuel tax refunds under the same restrictions as are imposed on the State under article II, section 40 are immaterial, since those constitutional restrictions do not apply to what a tribe, or any other taxpayer, does with their refund. Any restrictions on tribal spending of fuel tax proceeds are due to what was negotiated in the fuel tax agreements, not by the Constitution.

AUTO argues that the statutes apply restrictions on tribal use of refunds which are identical to those which the Constitution applies to the State's use of non-refunded fuel tax revenues. Appellant Br. at 40-41. But nothing in the authorizing legislation incorporates constitutional restrictions on the recipients' use of fuel tax refunds. The fact that the Legislature defined categories of permissible tribal spending to include transit service, law enforcement, and boat ramps—purposes that are not permitted by article II, section 40—demonstrates the Legislature did not

intend to import constitutional restrictions into tribal agreements. RCW 82.36.450(3)(b). *See, e.g., O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (maintenance of public transportation system not a highway purpose). AUTO's arguments that the tribes are not complying with the restrictions contained in the statute or in the agreements themselves do not raise constitutional challenges to the fuel tax agreements. Issues of compliance must be resolved through the dispute resolution procedures in the agreements.

In sum, the payments to the tribes are refunds authorized by law. Article II, section 40 explicitly provides that "refunds authorized by law" are permissible expenditures of moneys from the motor vehicle fund. Accordingly, the fuel tax refunds to the tribes are constitutionally valid.

**C. The Legislature Properly Delegated Authority To The State To Enter Into Fuel Tax Agreements**

AUTO alternatively argues that if RCW 82.36.450 and 82.38.310 did authorize the State to enter into the fuel tax agreements, the statutes unconstitutionally delegate legislative authority without appropriate legislative standards. As explained below, AUTO has not established an unconstitutional delegation of legislative authority beyond a reasonable doubt.

## 1. The Test For Constitutional Delegation Of Legislative Authority Is Flexible

Prior to 1972, the Washington Supreme Court's test for proper delegation of legislative power was "excessively harsh and needlessly difficult to fulfill." *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972) (referencing numerous cases reciting exacting standards for delegation of legislative authority). In 1972, the Court emphatically announced that "the strict requirement of exact legislative standards for the exercise of administrative authority has ceased to serve any purpose." *Id.* at 159. "In addition to lacking purpose," the Court concluded that the previous strict requirements "in several respects impede[d] efficient government and conflict[ed] with the public interest in administrative efficiency in a complex modern society." *Id.* Recognizing that "the best way to work out policy is often for the legislative body to avoid generalization and to assign to an administrative agency the task of working out such policy on a case-by-case basis," the Court set forth the rule that delegation of legislative power is constitutional when it can be shown:

(1) that the legislature has provided standards or guidelines which define *in general terms* what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards *exist* to control arbitrary administrative action and any administrative abuse of discretionary power.

*Barry & Barry*, 81 Wn.2d at 158-159, 160 (emphases added); *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004).<sup>13</sup> As explained below, the statutes at issue in this case satisfy both criteria.

**2. The Statutes Set Forth Sufficient Standards That Generally Define What Is To Be Done And What Body Is To Accomplish It**

The first prong of the *Barry & Barry* test is that the “legislature must provide standards or guidelines which indicate in general terms what is to be done and the administrative body which is to do it.” *Barry & Barry*, 81 Wn.2d at 163. The “who” in RCW 82.36.450 and 82.38.310 is clearly articulated. The statutes authorize the Governor (and the Department of Licensing, if delegated by the Governor) to enter into agreements with federally recognized Indian tribes within the state, and further require the Department to annually report to the Legislature on the status of the negotiations and agreements. RCW 82.36.450(1), (5), (6), 82.38.310(1), (5), (6).

The statutes also set forth in general terms “what” is to be done, namely: (1) enter into agreements “regarding motor vehicle fuel taxes

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<sup>13</sup> The Court has since recognized that its decision in *Barry & Barry*, reflects “a significant change in [the Court’s] attitude toward the delegation of legislative authority,” which rejected earlier cases such as *U.S. Steel Corp. v. State*, 65 Wn.2d 385, 397 P.2d 440 (1964). *Yakima Cnty. Clean Air Auth. v. Glaseam Builders, Inc.*, 85 Wn.2d 255, 260-61, 534 P.2d 33 (1975) (“[I]t is readily apparent that judicial viewpoint upon the problem of delegation has undergone a substantial change in the eleven years since [*United States Steel Corporation*] was decided.”).

included in the price of fuel delivered to a retail station wholly owned and operated by a tribe,” which include certain safeguards for ensuring compliance with the law and the agreement, and (2) report to the Legislature on the status. RCW 82.36.450(1)-(3), (6), 82.38.310(1)-(3), (6). Specifically, the statutes instruct the State to reach agreements in which:

- Tribes acquire fuel only from specific entities. RCW 82.36.450(3)(a), 82.38.310(3)(a);
- Tribes expend the fuel tax proceeds (or equivalent amounts) only on specific, articulated projects. RCW 82.36.450(3)(b), 82.38.310(3)(b);
- Tribes agree to submit to audits or other means of ensuring compliance to certify the number of gallons of motor vehicle fuel purchased by the tribe for resale at tribal retail stations. RCW 82.36.450(3)(c), 82.38.310(3)(c);
- Tribes agree to submit to audits or other means of ensuring compliance to certify fuel tax proceeds or equivalents are being used for the purposes enumerated in RCW 82.36.450(3)(b) and RCW 82.38.310(3)(b). RCW 82.36.450(3)(c), 82.38.310(3)(c);
- Tribes deliver compliance reports to the Director of the Department of Licensing. RCW 82.36.450(3)(c), 82.38.310(3)(c); and
- The Department of Licensing to annually report to the legislature on the status of the existing agreements and any ongoing negotiations. RCW 82.36.450(6), 82.38.310(6).

AUTO claims the first *Barry & Barry* prong is not satisfied because the Governor or the Department is only *authorized*—not

~~required~~—to enter into agreements with tribes regarding the fuel tax. Appellant Br. at 46. However, the very nature of contracting is an arm's length bargaining process between two or more willing, voluntary participants. A law could not mandate that the State "shall" enter into agreements with the tribes, because bargaining is a two-way street, and the law certainly could not require the sovereign tribes to enter into contracts with the State.

The Supreme Court has specifically recognized that "[t]he requirements may be in general terms when the subject matter will not admit of more specific standards." *Yakima Cnty. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 258, 534 P.2d 33 (1975); *McDonald v. Hogness*, 92 Wn.2d 431, 445, 598 P.2d 707 (1979). "Standards to guide administrative action need not, and cannot, be perfectly specific." *Rody v. Hollis*, 81 Wn.2d 88, 92, 500 P.2d 97 (1972). "This is particularly so where the power which is exercised" is "largely discretionary" in nature. *Id.* The Court has upheld legislation against unlawful delegation arguments where the effectiveness of the legislation was contingent on the outcome of negotiating with third parties. *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998); *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 28, 775 P.2d 947 (1989).

Here, the Legislature provided direction to negotiate fuel tax agreements with Indian tribes, expressly approved agreements in place as of May 15, 2007, and described the terms to be included in any new agreements. RCW 82.36.450(2)-(3). As to the remaining terms of the agreements, the Legislature appropriately recognized that this was one area of policy that had to be worked out on a “case-by-case basis.” *See Barry & Barry*, 81 Wn.2d at 159. *See also State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 900, 602 P.2d 1172 (1979). All that could and should have been done by the Legislature was to generally define the objective for the Governor and the Department to work towards through voluntary negotiations with the tribes. RCW 82.36.450 and 82.38.310 satisfy the first criteria of the *Barry & Barry* test.

**3. Sufficient Procedural Safeguards Exist To Control Arbitrary Administrative Action Or Abuse Of Discretionary Power.**

The second prong is “that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.” *Barry & Barry*, 81 Wn.2d at 158-159. The procedural safeguards may exist either within the legislation or independent of the legislation, and need not provide for full review of the agency’s exercise of its delegated authority. *See, e.g., id.* (holding Administrative Procedure Act, RCW 34.04, provided adequate safeguards

for arbitrary or abusive exercise of delegated authority to Department of Motor Vehicles); *City of Auburn v. King Cnty.*, 114 Wn.2d 447, 452, 788 P.2d 534 (1990) (holding availability of writ of certiorari combined with internal administrative procedures “tending to discourage arbitrary action” provide adequate safeguards); *McDonald*, 92 Wn.2d at 446 (holding “the opportunity for limited review even in the absence of a special statute suffices,” including limited court review of a discretionary decision for abuse of discretion); *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 762-63, ¶¶ 25-26, 131 P.3d 892 (2006) (finding internal limitations constitute adequate safeguards); *Mun. of Metro. Seattle v. Div. 587, Amalgamated Transit Union*, 118 Wn.2d 639, 648, 826 P.2d 167 (1992) (finding court’s inherent power to review arbitration decision sufficient procedural safeguard); *City of Spokane v. Spokane Police Guild*, 87 Wn.2d 457, 463, 553 P.2d 1316 (1976) (holding superior court review of arbitration panel to determine if decision was arbitrary or capricious is sufficient procedural safeguard).

Here, there are adequate procedural safeguards contained both within and independent of the authorizing statutes. As to the legislation itself, RCW 82.36.450(3) and 82.38.310(3) require every negotiated agreement to include provisions for audits to ensure the tribes are (1) accurately reporting the number of gallons of fuel purchased by the

tribe for resale at tribal retail stations; and (2) spending fuel tax proceeds or equivalent amounts on the purposes designated by the statutes. The Department of Licensing is further required to annually report to the Legislature on the status of the existing agreements and any ongoing negotiations. RCW 82.36.450(6), 82.38.310(6). To the extent AUTO argues that the agreements themselves do not contain adequate safeguards required by the statutes, such arguments are irrelevant to the delegation of authority issue. *State ex. rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 339; n.1, 12 P.3d 134 (2000) (“[W]hat is contained in the actual agreement does not impact the constitutionality of the [ ] Act. The fact that the agreement may not contain that which is required by the [ ] Act affects whether or not the agreement is valid, not whether the [ ] Act is constitutional.”). Regardless, the State negotiated more safeguards into the agreements than is required by statute, including a provision for terminating the agreements. *See, e.g.*, CP at 908-1028.

Additionally, there are procedural safeguards that exist independent of the legislation. AUTO's own lawsuit disproves any claim it could make that the Department's actions are not reviewable if they were, in fact, arbitrary or without lawful authority. To prove that RCW 82.36.450 and 82.38.310 fail for lack of adequate procedural safeguards independent of the statute or the agreements, AUTO must not

only admit that this Court has no basis to review any of AUTO's claims in this lawsuit other than its constitutional delegation of authority claim, but it must also represent that this Court could never review the Department's action, no matter who brought the action and under what basis. *See McDonald*, 92 Wn.2d at 446 ("Accordingly, the opportunity for limited review even in the absence of a special statute suffices.").

As AUTO attempts to do in this case, a party with standing could seek declaratory or injunctive relief if it could show the Department contracted with a tribe beyond that which it was authorized under the statute. *See, e.g.*, RCW 7.24, 7.40. Or, as AUTO initially did in this case, a party (who had standing) believing the Department exceeded its authority could seek review of the Department's action through a statutory writ of prohibition. *See Skagit Cnty. Pub. Hosp. Dist. 304 v. Skagit Cnty. Pub. Hosp. Dist. 1*, 177 Wn.2d 718, 305 P.3d 1079 (2013). Such mechanisms are adequate safeguards to protect against any abuse of the discretionary authority delegated by the Legislature. *City of Auburn*, 114 Wn.2d at 452; *McDonald*, 92 Wn.2d at 446; *City of Spokane*, 87 Wn.2d at 463; *Muni. of Metro. Seattle*, 118 Wn.2d at 648.<sup>14</sup> Moreover, the

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<sup>14</sup> Although not argued in this case, there might well be other avenues of judicial review available to aggrieved parties seeking to challenge the Department's action. *See, e.g.*, RCW 34.05.570(4) (permitting aggrieved party to seek judicial review of "other agency action" that is unconstitutional, outside the statutory authority conferred by the legislature, arbitrary or capricious, or taken by persons not properly constituted as agency

agreements are public records, accessible to anyone wishing to examine them.

The safeguards set forth in the authorizing statutes and independent of the statutes provide sufficient procedural safeguards to control arbitrary administrative action. The Legislature properly delegated specific authority in RCW 82.36.450 and 82.38.310 to the Governor and the Department to negotiate fuel tax agreements with the tribes.

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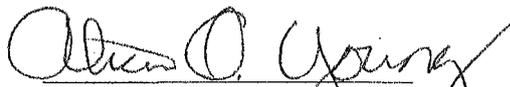
officials lawfully entitled to take such action). The availability of review under the Administrative Procedure Act is also an adequate procedural safeguard. *Barry & Barry*, 81 Wn.2d at 158-59.

## VI. CONCLUSION

The refunds paid to the tribes under the fuel tax agreements are constitutional and authorized by law. The trial court correctly granted summary judgment to the State and dismissed AUTO's action to enjoin the refunds.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of July, 2014.

ROBERT W. FERGUSON  
Attorney General



RENE D. TOMISSER, WSB #17509  
Senior Counsel  
ALICIA O. YOUNG, WSB #35553  
Assistant Attorney General  
Attorneys for Respondents

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below via electronic mail, pursuant to agreement of the parties.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of July, 2014, at Tumwater, WA.

  
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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON,  
WASHINGTON DEPARTMENT  
OF LICENSING, JAY INSLEE,  
Governor, and PAT KOHLER,  
Director of Washington State  
Department of Licensing;

Plaintiffs,

v.

THE TRIBAL COURT FOR THE  
CONFEDERATED TRIBES AND  
BANDS OF THE YAKAMA  
NATION, and its CHIEF TRIBAL  
COURT JUDGE TED STRONG,  
and the CONFEDERATED TRIBES  
AND BANDS OF THE YAKAMA  
NATION, a Federally Recognized  
Indian Tribe,

Defendants.

NO. CV-12-3152-LRS

ORDER GRANTING JOINT  
MOTION TO DISMISS WITH  
PREJUDICE AND WITHOUT  
COSTS

November 18, 2013  
Without Oral Argument

BEFORE the Court is the Parties' Joint Motion To Dismiss. Having reviewed said Motion and the file and pleadings therein, the Court deems itself otherwise fully advised in the premises. Accordingly,

ORDER GRANTING  
AMENDED JOINT MOTION TO  
DISMISS –  
CV-12-3152-LRS

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IT IS ORDERED that:

1. Plaintiffs' claims against Defendants are dismissed with prejudice, without fees or costs to any party.

2. The Consent Decree and all orders issued in *Teo v. Steffenson*, No. 93-3050 (E.D. Wash.), as amended in *Teo v. Steffenson*, No. 04-3079 (E.D. Wash.), are hereby vacated.

The District Court Executive is directed to enter this Order and provide copies of this Order to all counsel of record.

DATED this 21st day of November, 2013.

*s/Lonny R. Suko*

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LONNY R. SUKO  
Senior U. S. District Court Judge

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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Rec'd 7-11-14

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**To:** OFFICE RECEPTIONIST, CLERK  
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Automotive United Trades Organization v. State, et al.  
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