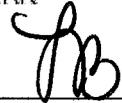


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**SUPREME COURT OF THE STATE OF WASHINGTON**

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COUGAR DEN INC.,

Respondent,

v.

DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON,

Appellant.

---

**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

The respondent Cougar Den Inc. imported fuel without paying state fuel taxes and without holding an importer's license. After a formal adjudicative proceeding, the Department of Licensing upheld the tax, with interest and penalties. The Department rejected Cougar Den's defense, which relied on the fact that its owner is a member of the Yakama Indian Nation and on a claim that taxation of the company's wholesale fuel outside the reservation infringed a right "to travel upon all public highways" found in the 1855 Treaty between the United States and Yakama Indians. This Court should affirm the Department and follow the holdings and reasoning of the federal courts. The tax on wholesale fuel does not tax travel upon public highways, it does not affect the treaty right, and it is not preempted.

## **II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED**

### **A. Assignments of Error**

1. The Yakima County Superior Court erred by entering findings, conclusions, and the judgment on August 18, 2015, in Case No. 14-2-03851-7, reversing a Department of Licensing final order.

2. The superior court erred by entering Conclusions of Law 2, 3, 4, and 5, and Finding No. 8 (which is a conclusion that incorporates by reference findings in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229

(E.D. Wash. 1997)). The court erroneously concluded that the right to travel upon all public highways in the Yakama Treaty preempted the tax imposed on Cougar Den for its importation of fuel. CP 1077-78.

3. The superior court erred by entering Conclusions of Law 6 and 7. The court misapplied the appearance of fairness doctrine and erroneously concluded that the Department had violated it. CP 1078.

**B. Issues Presented**

1. Article III of the Yakama Treaty secures a “right, in common with citizens of the United States, to travel upon all public highways.” Is this right to travel on public highways an express federal law that preempts the state’s sovereign power to tax wholesale fuel possessed in or imported into Washington by a private, Yakama Indian-owned company, where the tax is imposed on the wholesale possessor or importer of fuel outside an Indian reservation, and where the tax and associated license do not restrict, condition, or limit anyone’s travel on public highways?

2. Is an agency director’s previously announced position on an issue of law a basis for disqualification as a presiding officer in an adjudicative proceeding under the appearance of fairness doctrine?

3. Under the Administrative Procedure Act (APA), issues not raised in an adjudicative proceeding before an agency may not be raised on judicial review except when a party did not know and was under no

duty to discover or could not have reasonably discovered facts giving rise to the issue. Did the superior court err when it permitted Cougar Den to claim for the first time on judicial review that the agency director who made the final decision violated the appearance of fairness doctrine, where the materials Cougar Den submitted as the basis for the alleged violation showed that the facts were public knowledge and reasonably discoverable at the time of the adjudicative proceeding?

### **III. STATEMENT OF THE CASE**

The facts in this case are established by unchallenged findings in the final agency order on review, CP 1000-10 (“Final Order,” attached as Appendix A), and on stipulated facts, which the Final Order incorporated, CP 112-16. The findings were not disputed at superior court. *See* CP 1077.

#### **A. Statement of Facts**

##### **1. Washington imposes a fuel tax on gasoline and diesel fuel.**

Crude oil is transformed into fuels in a multi-tiered distribution chain, where the fuel is taxed at the wholesale level before it is distributed to gas stations. A pipeline, tanker vessel, or oil train brings crude to the refinery that processes it into gasoline, diesel fuel, and other products. From there, the refined fuel is supplied via pipeline or vessel to a bulk storage facility called a “terminal.” *See* RCW 82.36.010(4), (25) and

RCW 82.38.020(4), (29) (definitions of “bulk transfer-terminal system” and “terminal”); 26 C.F.R. 48.4081-1(b) (2015) (definitions of “bulk transfer/ terminal system” and “terminal”). Terminals have structures called “racks” that deliver fuel to nonbulk means of transport, such as a fuel tank truck or railcar. *See* RCW 82.36.010(22); RCW 82.38.020(20); 26 C.F.R. 48.4081-1(b) (definitions of “rack”). The fuel tank trucks transport refined fuel to gas stations, and the gas stations sell the fuel to retail customers who use it on the public highways.

Washington imposes a tax on fuel used to propel motor vehicles on state highways. *See* RCW 82.36 (gasoline tax); RCW 82.38 (tax on diesel fuel and other “special” fuels); Final Order CL 2, CP 1005.<sup>1</sup> This is the fuel tax described in *Automotive United Trades Organization v. State*, 183 Wn.2d 842, 357 P.3d 615 (2015) (*AUTO*). The tax revenue is used for highway purposes. *Id.* at 845. The tax is imposed “when a supplier removes fuel from a terminal rack and sells it to a distributor . . . [or] when fuel is imported . . . whichever comes first.” *Id.* at 849 (citing RCW 82.36.020(1), (2)); *see* RCW 82.38.030(1), (7) (diesel).

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<sup>1</sup> Legislation enacted in 2013 consolidated the gasoline tax laws and the diesel fuel tax laws into a single chapter that will cover both types of fuels. Laws of 2013, ch. 225. The legislation was originally scheduled to take effect on July 1, 2015. *Id.* § 650; *see Auto. United Trades Org. v. State.*, 183 Wn.2d 842, 849 n.3, 357 P.3d 615 (2015). The effective date has now been changed to July 1, 2016. Laws of 2015, ch. 228, § 40.

RCW 82.36.020(2)(c) and 82.38.030(7)(c) explicitly impose the tax when fuel “enters into this state.” Final Order CL 2, CP 1005 (concluding “[f]uel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state”). Under RCW 82.36.010(10) and 82.38.020(12), “[f]uel is ‘imported’ when it is brought into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.” Final Order CL 3, CP 1005. “A person who causes fuel to be imported by a means other than the bulk transfer-terminal system, who owns the fuel at the time of such importation, is acting as a fuel importer.” Final Order CL 3, CP 1005 citing RCW 82.36.010(16) and 82.38.020(26). The law thus makes every fuel importer responsible for paying the tax. Final Order CL 6, 7, CP 1006; RCW 82.36.026(3) and 82.38.035(3).

The Department of Licensing monitors and collects fuel taxes with the aid of a licensing system. “It is unlawful for a person to engage in business in Washington as a motor vehicle importer or special fuel importer without a license from the Department.” Final Order CL 5, CP 1006; RCW 82.36.080(1) and 82.38.090(1). Licensees submit monthly fuel tax returns documenting their removals and imports. RCW 82.36.031 and 82.38.150. Payment of the tax is due when the reports are submitted. RCW 82.36.035 and 82.38.160. Penalties and interest are imposed if the

tax is not paid on time. Final Order CL 6, CP 1006; RCW 82.36.040; 82.36.045; and 82.38.170. Persons who import fuel without a license are subject to the same taxes and penalties as licensees. Final Order CL 7, CP 1006; RCW 82.36.100; 82.36.045(2); 82.36.080(3); and 82.38.170(3). A person who imports gasoline without a license is also subject to a penalty of 100 percent of the unpaid tax. Final Order CL 7, CP 1006; RCW 82.36.080(3). The Department is authorized to assess taxes, penalties, and interest. Final Order CL 8, CP 1006; RCW 82.36.045; 82.36.080(3); and 82.38.170.

Washington's current fuel tax structure dates from 2007. The Legislature amended the fuel tax laws in response to a federal trial court that had held that the legal incidence of the former motor vehicle fuel tax was on fuel retailers. *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005); see *AUTO*, 183 Wn.2d at 847–49. The amendments of Chapters 82.36 and 82.38 RCW placed the incidence of taxation on fuel distributors and importers—the “wholesalers” in the distribution chain. Laws of 2007, ch. 515. Importers and wholesale suppliers are entirely responsible for the tax; there is no obligation to include an amount equal to the tax in the price they charge to retail gas stations. See RCW 82.36.026(5) and 82.38.035(6).

**2. Cougar Den imported fuel without paying taxes.**

Cougar Den Inc. is a private wholesale fuel company owned by Richard “Kip” Ramsey, who is a Yakama tribal member. CP 113 (Stip. Facts 5-7). Cougar Den has never applied for or held any type of fuel license from the State of Washington in order to acquire gasoline or diesel fuel wholesale. Final Order FF 11, CP 1004. Cougar Den, however, obtained an Oregon fuel dealer’s license in 2012. CP 113 (Stip. Fact 9). It uses that license to purchase gasoline and diesel wholesale in Oregon, but avoids Oregon fuel taxes because it exports that fuel. *See* ORS 319.240.

In March 2013 Cougar Den began exporting fuel from Oregon into Washington. CP 113 (Stip. Fact 12). Cougar Den contracted with a trucking company, KAG West, to pick up its fuel in Oregon and transport it into Washington. Final Order FF 19, CP 1004; *see* CP 1072. This occurred from March through October 2013. Final Order FF 19, CP 1004. Cougar Den stipulated that it imported millions of gallons of fuel during that period without paying Washington taxes. CP 114 (Stip. Fact 12). It stipulated to the amounts imported based on reports it filed with the Oregon Department of Transportation. *Id.*; CP 132-208; *see* ORS 319.020.

Cougar Den wholesaled more than 90 percent of its fuel to two gas stations called Wolf Den and Kiles Korner in Wapato, Washington. Final Order FF 21, CP 1004. Wolf Den and Kiles Korner sell retail fuel to the

general public. *Id.* Cougar Den wholesaled its remaining fuel to businesses owned by Kip Ramsey in White Swan, Washington. Final Order FF 22, CP 1005. Before April 2013, these retailers purchased fuel from Washington-licensed fuel suppliers who paid Washington fuel taxes. Final Order FF 23, CP 1005; *see* CP 581.

The retail gas stations that bought from Cougar Den are within the Yakama Indian Reservation, and the Yakama Nation is a federally recognized Indian tribe. CP 112 (Stip. Facts 1, 2); *see* CP 126; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989). Three state-incorporated cities, Toppenish, Wapato, and Harrah, lie within the reservation. *Brendale*, 492 U.S. at 415; *see* CP 126. The cities and general area are served by several Washington state highways and Yakima county roads. RCW 47.17.090 (State Route 22); RCW 47.17.155 (State Route 97); RCW 47.17.430 (State Route 223); RCW 47.39.020(22) (State Route 97); *Brendale*, 492 U.S. at 445 (Stevens, J., concurring). The state highways and county roads are funded in significant part by state fuel taxes. *See* RCW 46.68.090. Most people who live within the Yakama Reservation are non-Indian. *Brendale*, 492 U.S. at 445 (Stevens, J., concurring).

**3. The Department of Licensing assessed Cougar Den for unpaid fuel taxes.**

In December 2013, the Department assessed Cougar Den for taxes, penalty, and interest owed to the State with respect to the fuel imported between March and October 2013. CP 66-69; Final Order FF 15, CP 1004. The assessment was for \$3,639,954.61, and included \$1,292,913.02 in penalties for not having an import license. CP 215-16 (Stip. Ex. 7). Cougar Den appealed. CP 73. The Department commenced an adjudicative proceeding under RCW 34.05.413. CP 85.

In a motion for summary judgment, Cougar Den argued that: (1) the assessment violated due process, CP 255-56; (2) the taxes violated a “right, in common with citizens of the United States, to travel upon all public highways” created by the Treaty with the Yakamas, CP 256-60; (3) although the Yakama Nation had ceded any interest in lands outside its reservation, it had not ceded aboriginal “trading rights,” which allowed Yakama members to engage in off-reservation trading without state tax or regulation, CP 260-61; or (4) the tax violated tribal sovereignty, CP 261-62. (Cougar Den abandoned all those arguments except the right to travel theory when it later sought judicial review.)

The Department cross-moved, and showed that there was no dispute that Cougar Den imported fuels into the state without paying taxes

as described in the assessment. CP 500-03. It also showed that the case depended on a legal issue—whether the tax for importing fuel can be imposed on an Indian-owned company outside the reservation. CP 503. The well-established rule of law is that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Id.* quoting *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) (upholding Kansas tax on fuel wholesaler). Because the tax is imposed off-reservation when fuel is imported, Cougar Den had the burden to establish an express federal law preempting the tax. CP 504-06. The Department rebutted Cougar Den’s theory that the treaty right to travel was violated, and its other arguments (due process, on-reservation sovereignty, and unceded aboriginal trading rights). CP 664-77.

An administrative law judge entered an initial order and concluded that the right to travel on highways should be interpreted to preempt the tax. CP 912-22. The Department petitioned for administrative review of the initial order as authorized by RCW 34.05.464 and showed how the ALJ’s initial order inaccurately described the record and stipulated facts, and how it misinterpreted applicable case law regarding the treaty right. CP 926-52. The Director of Licensing entered a final order that corrected

some findings, made new conclusions of law, and upheld the assessment. Final Order. CP 1000-10 (Appendix A).

The final order addressed three categories of legal issues. Conclusions 1-8 address jurisdiction and the “Structure of Washington Fuel Tax Laws.” CP 1005-06. Cougar Den had acknowledged that these conclusions were accurate when proposed by the Department. CP 970. Next, conclusions 9-16 address the legal principles that make Cougar Den liable for off-reservation taxes absent express federal law to the contrary. CP 1006-07. Cougar Den had conceded that these legal principles were “not inaccurate.” CP 970.

Conclusions 17-23 of the final order examined prior cases interpreting the treaty right to travel upon public highways and found that it was not an express federal law preempting the tax and license. CP 1008-09. The prior cases examining the treaty right found only that it could preempt state laws that charge a fee or restricted travel on public highways. Final Order CL 17-20, CP 1008. Cougar Den’s case, however, concerned a tax on wholesale fuel, not a fee or restriction on travel. “[T]he taxes in this matter are not a charge for Cougar Den’s use of public highways. . . . Cougar Den is being taxed for importing fuel.” Final Order CL 20, CP 1008. Similarly, the importer license was not a pre-condition or

restriction on using public highways; it applied to importation regardless of whether fuel was imported on public highways. *Id.*

**4. The superior court ruled that the treaty right to travel upon public highways preempted the state fuel tax.**

Cougar Den sought judicial review of the agency's final order in the Yakima County Superior Court under RCW 34.05.570(3) of the APA. CP 1. No party disputed the findings in the final order. CP 1077. The superior court, however, reversed in a letter ruling and order. CP 1070-73, 1081-84. The court reviewed the same cases on the treaty right that were addressed by the final order (*Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), and *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007)), but reached a different conclusion. It held that the right to travel upon all public highways prevented taxation of fuel owned by Cougar Den when it moved fuel "across the Columbia River and into the State of Washington." CP 1071-72, 1082-83.

**5. The superior court addressed an issue raised for the first time on appeal and concluded that the Director violated the appearance of fairness doctrine.**

The superior court also found that the Director violated the appearance of fairness doctrine based on her participation in mediation of a federal court case. CP 1076-78 (FF 3; CL 6). Cougar Den raised this issue for the first time in an amended petition for judicial review. CP 9-10,

19-20. The Department opposed adding the issue to the case because it had not been raised below. CP 1014-20. The court overruled the Department's objection (CP 1058) and addressed the issue. CP 1078.

This appearance of fairness issue is rooted in events that started in 1993, when the Yakama Nation and Department were in federal court in a dispute about state fuel taxes. CP 626-49. That dispute was settled by a consent decree under which a percentage of motor vehicle fuel sold within the Yakama Reservation would be fully subject to state fuel tax laws. CP 627-28, 631-32, 635-38, 654. The State and Tribe, however, had disputes over that decree. For example, Yakama law required member-retailers to collect state taxes on sales to non-Yakamas, CP 242 (Revised Yakama Code § 30.11.02), but the Tribe did not conduct the audits required by the consent decree. *Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation*, 2013 WL 527790, \*4 (E.D. Wash. 2013) (CP 1032). In 2012, the Department gave notice and terminated. Litigation from both sides ensued, eventually arriving in the Ninth Circuit. Cougar Den was not a party to that litigation.

While the state-tribal federal court litigation was on appeal, the governor appointed Pat Kohler as Director of the Department. She was automatically substituted as a party in the federal litigation pursuant to federal court rules. In mid-2013, the Yakama Nation and State entered into

court-supervised mediation. Members of the Tribal Council, Director Kohler, and others attended mediation sessions and reached a settlement, which the Tribal Council and Governor's Office approved. CP 210-13; *see* CP 607-08.

In November 2013, Director Kohler and then-Chairman Harry Smiskin executed a Fuel Tax Agreement under RCW 82.36.450 and 82.38.310 (CP 225-40), and a Settlement Agreement regarding the State's claim for back taxes (CP 27-30). The Yakama Nation agreed to buy fuel only from state-licensed importers and suppliers (who would pay the state taxes) and to require its member-owned gas stations to do the same. CP 230. Like the agreements challenged in *AUTO*, 183 Wn.2d at 849–51, the State would refund some taxes to the tribal government. CP 231. The Department issued a press release about the settlement and local news covered the issue. CP 1054-57. This new Fuel Tax Agreement, however, also failed. *See* CP 572-75; *AUTO*, 183 Wn.2d at 851.

The superior court found that the Director participated in the 2013 mediation. CP 1076 (FF 3). It also found that the assessment against Cougar Den “referenced” the mediated agreement and that the Director's position during negotiations was that state taxes were not preempted. CP 1073, 1076 (FF 4), 1078 (CL 6), 1083. This created “an aura of partiality,

impropriety, conflict of interest, or prejudice” and violated the appearance of fairness doctrine. CP 1078 (CL 6).<sup>2</sup>

#### IV. SUMMARY OF ARGUMENT

“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). Washington’s fuel tax and fuel importer license are general, nondiscriminatory laws that have been applied to Cougar Den outside the Yakama Reservation. Cougar Den, therefore, bears the burden of showing that express federal law exempts it from these state laws. Cougar Den relies on Article III of the Yakama Treaty:

*And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, art. III, 12 Stat. 951, 952–53 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859).

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<sup>2</sup> After the assessment at issue in this case, Cougar Den has continued to import fuel from Oregon into Washington (and also into California) without paying taxes. The Department has continued to issue tax assessments for the Washington importations. These assessments are at various stages in the administrative and judicial review process. The parties have, by agreement, stayed those matters pending a decision in this case.

The plain language of Article III secures a right “to travel upon all public highways.” While this provides Yakama Indians with a right to travel on public highways in common with citizens, it does not create a right that preempts state laws that do not govern travel upon the public highways—such as the state tax imposed on wholesale possession and importation of fuel.

Cougar Den’s treaty right argument fails because it is trying to avoid a general tax on wholesale fuel and a license applicable to all fuel importers. These state laws do not impose a fee for travel on public highways or restrict travel—the laws apply without regard to whether there is any travel over a public highway. And, because the treaty language is clearly limited to travel upon highways, Cougar Den cannot create a different right using the canons of construction applicable to laws concerning Indians. Canons of construction “cannot overcome the plain and unambiguous text of the Treaty.” *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014), *cert. denied sub nom. Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542, 191 L. Ed. 2d 561 (2015). Under both the treaty language and relevant cases, the Department properly concluded that no express federal law exempted Cougar Den from the state fuel tax and importer license requirement.

This Court should also reverse the superior court's conclusion that the Director violated the appearance of fairness doctrine. The alleged basis for a violation has no legal merit. Cougar Den showed no bias; it claimed only that the Director had taken a prior adverse position on a question of law. As a matter of law, this was not a basis for disqualification. Moreover, Cougar Den failed to raise its basis for disqualification in a timely fashion. The alleged basis for disqualification was known and reasonably available to Cougar Den during the hearing. The superior court erred by deciding a question of disqualification of an administrative hearing officer when the issue was not raised below.

## V. ARGUMENT

### A. Standard of Review

This case is before the Court under the Administrative Procedure Act, where “[t]he agency decision is presumed correct and the challenger bears the burden of proof.” *King Cty. Pub. Hosp. Dist. No. 2 v. Dep’t of Health*, 178 Wn.2d 363, 372, 309 P.3d 416, 421 (2013) (quotation marks and citation omitted); *see* RCW 34.05.570(1)(a) (burden on challenger). An appellate court gives no deference to a superior court decision; it reviews the final agency order on the agency record. *King Cty. Pub. Hosp. Dist. No. 2*, 178 Wn.2d at 372; *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The issues before an appellate court are

limited by the issues Cougar Den raised before the agency and preserved at superior court. *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 246 n.3, 350 P.3d 647, 651 (2015) (APA bars issues on judicial review not raised before the agency and RAP 2.5(a) bars review of issues not raised before a trial court).

When reviewing the conclusions of law in an agency order, a court may substitute its interpretation of law for that of the agency. *King Cty. Pub. Hosp. Dist. No. 2*, 178 Wn.2d at 372. Similarly, a court “review[s] de novo the interpretation and application of treaty language.” *Ramsey v. United States*, 302 F.3d 1074, 1077 (9th Cir. 2002) (rejecting a challenge to the federal diesel fuel tax based on right to travel in Yakama Treaty). And, the interpretation of prior judicial rulings presents a question of law. *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1342–43, 97 S. Ct. 773, 774, 50 L. Ed. 2d 733 (1977); see *Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 262, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). Under all circumstances, Cougar Den bears the burden to show preemption of state law. *King Mountain*, 768 F.3d at 995.

**B. The Tax on Wholesale Fuel When It Enters Washington Is Not a Tax or Restriction on a Yakama Indian’s Right to Travel on Public Highways**

There is no dispute that Cougar Den imported millions of gallons of gasoline and diesel fuel into Washington without paying Washington

taxes and without obtaining a fuel importer license. There is no dispute that the Department assessed taxes, penalties, and interest against Cougar Den. The sole challenge to the tax is based on the right to travel upon all public highways secured by the Yakama Treaty.

The Department properly rejected Cougar Den's overly-expansive reading of the treaty and prior cases. As shown below, the treaty language and cases examining the treaty right have preempted only road use fees and a notification requirement that restricted travel on public highways. The treaty and case law do not establish that a Yakama Indian-owned company has a right to avoid taxation on its wholesale fuel supplies merely because its fuel is imported over a highway. Under the case law and a fair reading of treaty language, the Department correctly rejected Cougar Den's argument. This Court should affirm the final order.

- 1. Outside an Indian reservation, a member of an Indian tribe is subject to state law unless federal law expressly provides otherwise.**

The final order applied a well-settled legal framework established by the United States Supreme Court. Outside an Indian reservation, the Indian citizens of the states are subject to state taxes, regulations, and laws absent an *express* federal law to the contrary. *Mescalero Apache*, 411 U.S. at 148–49 (permitting state taxation of receipts from an off-reservation,

Indian-owned ski resort); *King Mountain*, 768 F.3d at 993; Final Order CL 9-16, CP 1006-1007.<sup>3</sup>

The United States Supreme Court applied the *Mescalero* framework to a fuel tax similar to Washington's in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005). *Wagnon* held that Kansas could impose its fuel tax on the off-reservation receipt of fuel by distributors who sold fuel to an on-reservation gas station owned by an Indian tribe. The tribe argued that it should be able to sell the gasoline free of the off-reservation tax, but the Court reconfirmed that state taxes imposed outside a reservation are enforceable absent express federal law to the contrary, notwithstanding the economic effect that the tax has within a reservation. *Wagnon*, 546 U.S. at 114-15 & n.6.

The tax in this case is indistinguishable from the tax upheld in *Wagnon*. See *AUTO*, 183 Wn.2d at 848. The state imposes the tax on wholesalers and on importers at the time the fuel "enters into this state" by any means, including truck transport. RCW 82.36.020(2)(c) and 82.38.030(7)(c). There can be no dispute that the place where Cougar Den imports fuel is outside an Indian reservation. Final Order FF 12, CP 1007.

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<sup>3</sup> Although Indians are members of tribes with significant self-governing sovereign powers, they are also citizens of the states in which they reside. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 n.10, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

Even the superior court agreed that Cougar Den was in the business of purchasing fuel in Oregon and bringing it into Washington as a wholesaler. CP 1070.

The framework of *Mescalero* has been applied many times by many courts.<sup>4</sup> And, Cougar Den did not seriously dispute the *Mescalero* framework. CP 970 (conceding the substance of final order conclusions 9-16 was not inaccurate). Indeed, it applied this framework when it argued that the treaty right to travel was an express federal law preempting state law. CP 776-777, 880, 886, 965. This frames the issue: is the treaty right to travel upon all public highways an express federal law that preempts state taxation of fuel (or other property or goods that might be put on a truck)?

**2. The Final Order properly concluded that the Yakama Treaty right to travel upon all public highways does not preempt Washington fuel taxes.**

Cougar Den contends that the first clause in Article III of the Yakama Nation's Treaty with the United States preempts state fuel taxes and the importer license. That clause (CP 120-21) provides:

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<sup>4</sup> E.g. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464–67, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995) (no preemption of state tax on income of tribal member who lived outside tribal land but worked for tribe); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, 237 P.3d 199 (Okla. 2010) (applying *Mescalero* to uphold application of state law to off-reservation activities of tribally-chartered company owned by tribal member); *Fla. Dep't of Revenue v. Seminole Tribe*, 65 So. 3d 1094 (Fla. Dist. Ct. App. 2011) (tribe subject to state tax on fuel it purchased outside its reservation); *State v. Olney*, 117 Wn. App. 524, 539, 72 P.3d 235, 238 (2003) (tribal members outside reservation subject to state law concerning loaded weapons in vehicles).

*And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, art. III, ¶ 1, 12 Stat. 951, 952-53 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859). As a starting point, the plain language is limited to “travel upon all public highways” and does not express any federal or tribal intent to preempt general laws of the future states. As shown next, every case that has construed this treaty language has found that the right to travel may at most, preempt state fees or a notification requirement directly related to travel on a highway. The treaty does not create a right to trade that preempts ordinary taxation or regulation of goods.<sup>5</sup>

**a. The *Cree* litigation only found preemption of state fees for use of public highways.**

The first litigation to address a claim based on the Yakama treaty right to travel concluded that certain state truck license fees restricted the free use of highways by Yakama members and were preempted. *See Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Specifically, the *Cree* litigation

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<sup>5</sup> Only two other Indian treaties contain this language regarding “travel upon all public highways.” *See* Treaty With the Nez Percés, art. III, ¶ 1, 12 Stat. 957, 958 (June 11, 1855, ratified March 8, 1859, proclaimed April 29, 1859); Treaty With the Flatheads, art. III, ¶ 1, 12 Stat. 975, 976 (July 16, 1855, ratified March 8, 1859, proclaimed April 18, 1859). The tribes that are parties to those treaties are located in Idaho and Montana.

involved Washington registration and licensing of trucks according to gross weight. See RCW 46.16A.455 (formerly RCW 46.16.070, 46.16.135) (monthly tonnage licenses). It also involved permits for overweight log trucks that also required payment of a road-use fee. RCW 46.44.047, 46.44.095 (temporary tonnage permit); *Cree*, 157 F.3d at 765. The Ninth Circuit examined the treaty language and a trial decision that evaluated its historical context as applied to road use license and permit fees. The court held that the treaty language could be interpreted as a “right to transport goods to market over public highways without *payment of fees for that use.*” *Cree*, 157 F.3d at 769 (emphasis added). The sentence is unambiguous. The right to travel ensured only that state law cannot demand “payment of fees for that [treaty] use” of the public highways. *Id.*

The trial court judgment in *Cree* also confirmed that the scope of the treaty right is limited to ensuring that fees are not imposed on the right of traveling on public highways. The court was concerned that fees could act as a barrier to treaty use of highways, and framed its case as whether the treaty “precludes the State of Washington from imposing licensing and permitting *fees on logging trucks* owned by the Yakama Indian Nation or its members.” *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1231–32 (E.D. Wash. 1997), *aff’d sub nom. Cree v. Flores*, 157 F.3d 762 (9th

Cir. 1998). The judgment itself is narrow and limited to barring fees for traveling on highways: “Article III, paragraph 1 of the Treaty with the Yakamas of 1855 provides the Yakama Indian Nation with *the right to travel on all public highways without being subject to licensing and permitting fees*, or registration requirements *exacting such fees*, related to the exercise of *that right* while engaged in the transportation of tribal goods.” 955 F. Supp. at 1260 (emphasis added). Two additional declarations further demonstrate that the treaty right affected only fees imposed for traveling on highways. First, the court ordered that tribal members and their businesses “*must comply with state regulations* designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right.” *Id.* (emphasis added). Second, the Tribe and its members “*must comply with state registration requirements* solely for identification purposes to the extent that such requirements do not impose a fee or surcharge on the Treaty right.” *Id.* (emphasis added).

The Department’s final order follows the treaty interpretation and limits set by *Cree*. That case holds only that the treaty right prevents the State from imposing truck licensing or permitting fees to travel on public roads. In contrast, the tax on wholesale fuel applies without regard to

whether the fuel is brought over a public highway. It is a tax on importing fuel by any means; it is not a fee for using public highways.

- b. *King Mountain Tobacco v. McKenna* confirms that the treaty right to travel is not a right that preempts taxation and regulation of trade and goods.**

The scope of the treaty right found by the final order is also supported by the Ninth Circuit decision in *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). Like Cougar Den, King Mountain Tobacco is a company owned by a Yakama tribal member. King Mountain transports tobacco from North Carolina to the Yakama Reservation and distributes finished cigarettes from the reservation to off-reservation retailers. State law requires manufacturers that sell cigarettes to consumers in Washington to pay into an escrow fund to cover future smoking-related health costs. RCW 70.157.020(b)(1). King Mountain and the Yakama Nation sued the State, claiming that the treaty right to travel preempted Washington's tobacco products escrow statute as applied to the company's products. The district court granted summary judgment to the State and rejected King Mountain's reliance on the right to travel. *King Mountain Tobacco Co., Inc. v. McKenna*, 2013 WL 1403342, \*8 (E.D. Wash. 2013).

The company and the Yakama Nation appealed and the Ninth Circuit affirmed. The trial court “correctly applied the *Mescalero* test and concluded that the Treaty is not an express federal law that exempts King Mountain from state economic regulations.” *King Mountain*, 768 F.3d at 994. The Ninth Circuit specifically rejected King Mountain’s argument that the case should be remanded for trial to evaluate Yakama treaty-time understanding. The district court was not required to “engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855” because “the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute.” *Id.* at 994–95.

Similarly, the Ninth Circuit rejected arguments that canons of construction favoring Indians could be used to interpret the treaty right as an express federal law preempting state power to regulate tobacco products sold or possessed in the state. It explained:

But “[t]he canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.” *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506, 106 S.Ct. 2039, 90 L. Ed. 2d 490 (1986); see also *Klamath Indian Tribe*, 473 U.S. at 774, 105 S.Ct. 3420 (“[E]ven though legal ambiguities are resolved to the benefit of the Indians, courts cannot ignore plain language that, viewed in historical context and given a fair appraisal,

clearly runs counter to a tribe's later claims." (citations and internal quotation marks omitted)).

*King Mountain*, 768 F.3d at 995. Allegations about "the Treaty's meaning to the Yakama people cannot overcome the plain and unambiguous text of the Treaty." *Id.* at 998.

The Ninth Circuit's holding and reasoning demonstrate why this Court should affirm the Department order and reject Cougar Den's nearly identical argument. Like *King Mountain*, Cougar Den claims a right to engage in *trade* in addition to or above and beyond a right to travel upon the highways. The superior court relied on a "right to travel in conjunction with trade" to preempt state economic regulation and taxation. CP 1072. But "there is no right to trade in the Yakama Treaty." *King Mountain*, 768 F.3d at 998. Therefore, final order properly rejected the treaty argument. Cougar Den is not facing a tax for "using public highways. Cougar Den is being taxed for importing fuel." Final Order CL 20, CP 1008.

The federal district court in Yakima has continued in recent cases to recognize that the treaty language and right is limited in scope and does not preempt various laws directed towards goods. In *United States v. King Mountain Tobacco Co., Inc.*, 2015 WL 4523642 (E.D. Wash. 2015), a Yakama member asserted that the right to travel upon all public highways exempted *King Mountain* from assessments against tobacco product

manufacturers under the federal Fair and Equitable Tobacco Reform Act. The court rejected that assertion. The assessments were outside the scope of the treaty because they “do not constitute a ‘restriction’ or ‘condition’ on the use of public highways.” *Id.* at \*15. Relying on the Ninth Circuit decision in *King Mountain*, the court emphasized that “the Yakama Treaty does not guarantee the right to trade unencumbered.” *Id.* And, in another case involving King Mountain Tobacco, the district court rejected the argument that federal excise taxes on tobacco products interfered with the “free access . . . to the nearest public highway” guaranteed by the treaty. The court said “King Mountain is not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products.” *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061, 1069 (E.D. Wash. 2014), *appeal docketed*, No. 14-35165 (9th Cir. March 5, 2014).

The state tax on wholesale fuel outside the reservation is indistinguishable from the regulation of tobacco products upheld in the *King Mountain* cases. The final order properly concluded that the fuel tax and license requirement concerns the fuel trade, does not limit travel on highways, and is not preempted by treaty.

**3. *United States v. Smiskin* does not recognize a treaty right to trade that preempts taxation or regulation of goods.**

To circumvent *Cree* and the negative ruling in *King Mountain*, Cougar Den has relied heavily on dicta in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). The Department's final order concluded that *Smiskin* does not recognize any type of treaty right that would preempt the fuel tax. Final Order CL 19, CP 1008 (concluding that the preemption found in *Smiskin* was based on the fact that state law required notice *before travel*). This interpretation of *Smiskin* is sound, particularly when that case is read in light of the later *King Mountain* case.

*Smiskin* arose after law enforcement officers observed Yakama tribal members transporting unstamped (untaxed) cigarettes from Idaho into Washington. Federal agents seized cigarettes and the government indicted the Smiskins on charges of violating the federal Contraband Cigarette Trafficking Act. This federal charge, however, depended on a predicate violation of state law — the Smiskins' failure to comply with a state law requiring individuals to give notice to state officials before transporting unstamped cigarettes within the state. 487 F.3d at 1263. In this posture, the Ninth Circuit considered whether the state notification requirement violated the right to travel upon all public highways, and

concluded that the treaty displaced a requirement to give notice before traveling on public highways. *Id.* at 1264–66.

The state law involved in *Smiskin*, RCW 82.24.250(1), is entirely unlike a tax on wholesale fuel. The law in *Smiskin* is violated when a person transports unstamped cigarettes on state highways without complying with the advance notice requirement. *See Matheson v. Liquor Control Bd.*, 132 Wn. App. 280, 288–89, 130 P.3d 897 (2006). *Smiskin* thus involved a law requiring notice before travel. By contrast, Cougar Den seeks to avoid laws that tax wholesale fuel and license wholesale fuel businesses. State law requires a person to get a license before “engag[ing] in business” as a fuel importer. RCW 82.36.080(1) and 82.38.090(1); Final Order CL 5, CP 1006. They require wholesale businesses to pay a tax on fuel acquired within the state or imported into it. RCW 82.36.020(2) and 82.38.030(7); Final Order CL 2, CP 1005.

The distinction between this case and *Smiskin* is that Cougar Den does not need a fuel importer license in order use public highways. Rather, Cougar Den needs a fuel importer license to engage in business as a fuel trader. Final Order CL 20, CP 1008. Cougar Den does not need to pay the fuel tax in order to travel upon the public highways. Rather, the tax applies without regard to travel on a highway. Cougar Den happens to hire trucks, but the tax applies to fuel imported by pipeline, barge, train, aircraft, as

well as by a KAG West truck. The tax is not a condition or restriction on Cougar Den's use of highways.

This distinction is critical because it answers the staggeringly broad interpretation of the treaty that Cougar Den advanced below. It argued that any state fee or tax on goods that are shipped or transported on behalf of a Yakama member-owned business over state roads should be invalid under *Smiskin*. VRP 4, 7, 11. The superior court accepted this extraordinary interpretation based on a single passage from *Smiskin* taken out of context: "The right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate" the decision in *Cree*. CP 1071 quoting *Smiskin*, 487 F.3d at 1266. This passage, however, merely responded to a federal prosecutor's argument that *Cree* was limited to non-commercial travel or travelers who possessed "tribal goods." *Smiskin*, 487 F.3d at 1266. *Smiskin* does not imply (and clearly does not hold) that the right to travel upon the public highways also created a right to engage in unregulated and untaxed trade of goods through the ruse of passing goods over a highway. Moreover, the subsequent *King Mountain* decision has limited *Smiskin* to its holding that the notification requirement was an impermissible restriction on travel. *King Mountain*, 768 F.3d at 998 (*Smiskin* "clarified the extent of the right to travel").

*Cree*, *King Mountain*, and *Smiskin* show that the treaty right cited by Cougar Den is offended only by a state law that imposes a fee for traveling on public highways, or a restriction on travel. These cases do not recognize a treaty right that preempts state tax or regulatory laws applying to goods that happen to be moved over a highway. The superior court erred by misinterpreting and relying upon *Smiskin*.<sup>6</sup>

**4. The superior court construction of the treaty right would have unforeseeable and irrational consequences.**

Article III of the treaty secures a “right, in common with citizens of the United States, to travel upon all public highways.” 12 Stat. at 953 (CP 121). In *Cree*, the trial court found that Yakamas had historically traveled for many purposes, including trade. 955 F. Supp. at 1263, 1264. As shown above, the superior court misused this fact and the *Smiskin* dicta to significantly change the right “to travel upon all public highways” into a far broader “right to trade.” CP 1071. That legal conclusion is error, as shown by *King Mountain*. 768 F.3d at 998. But the superior court interpretation is also wrong because it would also lead to unimagined and unintended preemption of fundamental state powers.

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<sup>6</sup>. The Court may distinguish *Smiskin* by simply disagreeing with its tenuous reasoning that the state law in question restricted travel upon highways. Notification allows an exception to prohibition against movement of untaxed cigarettes. The requirement notification does not restrict travel by Yakama Indians. This Court is not bound by decisions of the federal appellate courts—a principle that is particularly important where a federal court decision depends on a mistaken view of the substance of a state law. See *State v. Glasmann*, 183 Wn.2d 117, 124, 349 P.3d 829, cert. denied, 136 S. Ct. 357 (2015).

In particular, the superior court's reasoning could allow Yakama tribal members to avoid state laws that regulate goods by simply contriving to possess the goods on public highways. Turning the highways into a zone where the treaty preempts state laws over goods or property would cut an unpredictable swath. It could affect the laws that make property contraband, unlawful to possess, or subject to taxes, even though such laws do not in any ordinary sense restrict or even concern travel on public highways. One example is the statute imposing the use tax on the first possession of goods in Washington. *See* RCW 82.12.010(6)(a), 82.12.020. The "use tax" is not a tax for using the highway, simply because the first possession of taxed goods might occur on a highway. Another example would be the law barring a felon from possessing a firearm. RCW 9.41.040. That law does not restrict travel on public highways simply because it can be applied to a felon while traveling on a public highway.

The mere fact that a law can be applied to a person who possesses property on a highway cannot mean that state law affects the treaty right to travel upon the highways in common with the general public. Surely, the substance of state law matter when examining a claim that state law is

limiting a right to travel on public highways. Unless state law limits travel, it cannot be argued that it affects this provision of the treaty.<sup>7</sup>

This Court should reject Cougar Den's argument that would turn the shield of the treaty right to travel upon all public highways into a sword where, with the contrivance of using public highways, a Yakama tribal member may avoid important state laws that do not in substance tax travel upon the public highways or otherwise limit use of highways.

**C. The Final Order Did Not Violate the Appearance of Fairness Doctrine and the Superior Court Erred by Addressing That Issue When It Was Not Raised During the Agency Hearing**

The superior court also erred by concluding that Director Pat Kohler's role as agency director and final decision-maker violated the appearance of fairness doctrine. The court's conclusion on appearance of fairness is contrary to Washington law because it depends on the Director's past exposure and position on a legal issue. Knowledge of legal issues is not unfairness or bias; it reflects the structure of administrative adjudications where the agency has the final say on the meaning of the laws that it implements. Moreover, Cougar Den failed to raise this before

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<sup>7</sup> See *United States v. Gallaher*, 275 F.3d 784, 789 (9th Cir. 2001) (citing cases where laws forbidding a felon from possessing a weapon were not viewed as regulating the exercise of a treaty hunting right); *State v. Olney*, 117 Wn. App. 524, 529, 72 P.3d 235, 238 (2003) ("a safety-based statute of general application under the state police powers" concerning loaded weapons in vehicles did not regulate or restrict a treaty hunting right); *State v. Jacobs*, 302 Wis. 2d 675, 677, 735 N.W.2d 535, 536 (2007) (general law prohibiting a felon from possessing a firearm is not a law that restricts a treaty hunting right.)

the agency, even though it was commonly known that the Yakama Nation and the Department had litigated, settled, and entered into agreements concerning fuel taxes, and that Pat Kohler was the Director during some of those events. Appellate courts do not entertain disqualification claims that could have been raised earlier.

**1. The superior court erred as a matter of law that the Director's familiarity with and position on a legal issue of state law violated the appearance of fairness doctrine.**

The superior court found that the Director participated in mediation sessions with the Yakama Nation Tribal Council Chairman regarding a federal court lawsuit dismissed in November 2013, when the parties executed a short-lived state-tribal Fuel Tax Agreement. CP 1076. The court noted that the Department's tax assessment against Cougar Den "expressly referenced" that 2013 agreement. *Id.* (Infact, the assessment merely stated that under Washington law and that 2013 agreement, Cougar Den "must be properly licensed as an importer to continue importing fuel" and "enclosed the required application materials." CP 67, 216.) The superior court also relied on a declaration offered by Cougar Den alleging that, during the negotiations, Director Kohler argued that the Treaty did not apply to taxes on imported fuel even if brought on state roads. CP 1073; *see* CP 23.

The court concluded that the Director's participation in that prior litigation (and the reference to the agreement in the assessment) made it "appear unfair that Ms. Kohler would review the Initial Order" and "gives the Final Order an aura of partiality, impropriety, conflict of interest, or prejudgment, and thus violates Washington's Appearance of Fairness doctrine[.]" CP 1078. Based on this, it ruled that Cougar Den has showed facts that would have supported the grant of a motion to disqualify Director Kohler if Cougar Den had made such a motion before the Department. *See* RCW 34.05.570(3)(g) (agency order may be reversed where "facts are shown to support the grant" of a motion for disqualification and such facts "were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion"). CP 1078. The court erred.

RCW 34.05.425 governs disqualification of decision-makers in adjudicative proceedings. RCW 34.05.425(3) provides:

Any individual serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified.

These disqualification standards apply to agency heads when they review initial orders, as well as to administrative law judges who conduct hearings. RCW 34.05.464(3); *see Nationscapital Mortgage Corp. v. Dep't*

*of Fin. Inst.*, 133 Wn. App. 723, 756, 137 P.3d 78 (2006). But public officers are presumed to perform their duties properly and a party asserting an appearance of fairness claim must show evidence of actual or potential bias. *Org. to Preserve Agric. Lands v. Adams Cty.*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

This Court has recognized three types of bias that call for disqualification under the appearance of fairness doctrine.

These are (1) prejudgment concerning issues of fact about parties in a particular case; (2) partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and, (3) ... an interest whereby one stands to gain or lose by a decision either way.

*Ritter v. Bd. of Comm'rs of Adams Cty. Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 512, 637 P.2d 940 (1981) (quoting *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). Courts have applied *Ritter* to disqualification of hearing officers under RCW 34.05.425. *E.g.*, *Faghih v. Dep't of Health Dental Quality Assurance Comm'n*, 148 Wn. App. 836, 842, 202 P.3d 962 (2009).

The superior court did not find bias as required by *Ritter*. It did not find (and Cougar Den did not assert) "prejudgment concerning issues of fact." Nor could it make that claim, because no material facts were in dispute. *See* CP 1077. Even if one speculates that the federal court

mediation exposed the Director to an adjudicative fact, it would be insufficient. “Mere exposure to adjudicative facts is not a basis for disqualification.” *Ritter*, 96 Wn.2d at 513.

Nor did the superior court find that Cougar Den asserted that Director Kohler had a personal bias or prejudice, or any personal interest in the outcome of this case, such as a financial interest. The State’s interest in collecting taxes is far too attenuated to be imputed to Director Kohler. *See Nationscapital*, 133 Wn. App. at 761.

The superior court did rely on the fact that the assessment mentioned the Fuel Tax Agreement. That superficial observation does not show any bias under *Ritter*. The reference to the Fuel Tax Agreement was a statement telling the taxpayer to get licensed based on both state law *and* that agreement, which had recently come into effect. CP 67, 216. The Director’s connection to negotiation of that agreement falls far outside the bias required by *Ritter* for disqualification.

The superior court also relied on Cougar Den’s assertion that Director Kohler had taken a legal position about the Yakama Treaty during settlement discussions between state and tribal officials. CP 1073. This is legally irrelevant and unremarkable. It is hardly surprising that state and tribal officials would express different views about the effect of the Yakama Treaty during a dispute where the Tribe claimed preemption

by the treaty. Indeed, the position was no different than the general state position being litigated in cases such as *King Mountain Tobacco Co., Inc. v. McKenna*. But even assuming that Director Kohler advocated a legal position about the Yakama Treaty in negotiations, it is no basis for disqualification.

A hearing officer's comments about legal issues are not evidence of bias. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d 275, 315–17, 197 P.3d 1153 (2008) (agency chairman's comments about the relationship between the agency's governing statutes and county land use laws were not evidence of bias); *Ritter*, 96 Wn.2d at 512 (distinguishing personal bias from "issues of law or policy"). The appearance of fairness doctrine concerns prejudgment of facts and bias, not "the ideological or policy leanings of a decision maker." *Org. to Preserve Agric. Lands*, 128 Wn.2d at 890. For that reason, an agency rule requiring hearing officers to pledge to follow the agency's legal interpretations did not violate the appearance of fairness doctrine. *Skold v. Johnson*, 29 Wn. App. 541, 556–58, 630 P.2d 456 (1981). As scholars have long recognized, "[a] previously announced position on a disputed issue of law, policy, or legislative fact does not disqualify a decisionmaker." 2 Richard J. Pierce, Jr., *Admin. L. Treatise* § 9.8 at 871 (5th ed. 2010). See also *Franklin Cty. Sheriff's Office v. Sellers*, 97 Wn.2d

317, 333, 646 P.2d 113 (1982) (constitutional guarantee of a fair hearing in the administrative context “does not prohibit partiality toward an issue of law or a policy”).

This Court’s ruling in *Residents Opposed to Kittitas Turbines* confirms the superior court error. “The appearance of fairness doctrine provides that ‘[m]embers of commissions with the role of conducting fair and impartial fact-finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences, capable of hearing the weak voices as well as the strong and must also give the appearance of impartiality.’” *Residents Opposed to Kittitas Turbines.*, 165 Wn.2d at 313, quoting *Narrowsview Pres. Ass’n v. City of Tacoma*, 84 Wn.2d 416, 420, 526 P.2d 897 (1974). But this doctrine is limited to practical applications. *Id.* For example, “the fairness of a decision-making body is measured by how the legislature chose to structure the administrative body.” *Residents*, 165 Wn.2d at 314. When that principle is applied here, the Court should recognize that the law assigns the Director of Licensing the final authority for decision-making regarding the administration of state fuel tax laws. RCW 43.24.016; RCW 46.01.040(1), (2). Similarly, the APA provides an agency head with final authority over legal conclusions in the agency’s administrative adjudications. *See* RCW 34.05.461(1)(a); RCW 34.05.464(1), (2).

When a litigant disagrees with an agency's past or present legal position, the remedy is not an after-the-fact motion for disqualification; the remedy is judicial review for error. Professor Anderson's off-cited law review article about the modern Washington APA explains the deliberate legislative choice to give agencies, not administrative law judges, the final say on policy and law. William R. Anderson, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 816 (1989). The power to decide legal matters that an agency head may have encountered in the past is not "unfairness." It is a structure that "respects the legislative choice that final decision on policy matters be lodged in the agency[.]" *Id.* A litigant who disagrees with an agency's legal view may obtain de novo judicial review for questions of law. *Id.*

For all these reasons, Washington law has never made the impractical promise that a final agency decision-maker will have no prior exposure or position on legal issues that come before the agency. As Justice Utter explained in the context of judicial bias, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Harris v. Hornbaker*, 98 Wn.2d 650, 666, 658 P.2d 1219, 1225 (1983) (Utter, J. concurring) (quoting *Laird v. Tatum*, 409 U.S. 824, 835, 93 S. Ct. 7, 14, 34 L. Ed. 2d 50 (1972)

(memorandum of Rehnquist, J.)). It would be equally impractical for Cougar Den to expect an agency director not to have considered the lawful scope of state laws.

The unfairness found by the superior court was legal error. The court should have held that Cougar Den showed no facts to support Director Kohler's disqualification under RCW 34.05.425, and no basis for setting aside the Final Order for unlawful procedure or a biased decision-maker under RCW 34.05.570(3)(c) or (g).

**2. The superior court erred by allowing Cougar Den to attack the Final Order based on an alleged basis for disqualification that it did not raise before the Department.**

An issue that is not raised before the agency may not be raised on judicial review except in limited circumstances. RCW 34.05.554(1) ("Issues not raised before the agency may not be raised on appeal, except to the extent that: (a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue"). Disqualification claims are specifically barred from being raised for the first time on judicial review unless "facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion." RCW 34.05.570(3)(g). The "appropriate time for making

such a motion” is “promptly after receipt of notice indicating that the individual will preside or, if later, promptly upon discovering facts establishing grounds for disqualification.” RCW 34.05.425(4).

If a litigant proceeds to a hearing without raising a known reason for potential disqualification of a hearing officer, the litigant waives the objection and cannot raise the challenge on appeal. *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 939, 813 P.2d 125 (citing *Brauhn v. Brauhn*, 10 Wn. App. 592, 597–98, 518 P.2d 1089 (1974)), *review denied*, 118 Wn.2d 1002 (1991); see also *In re Marriage of Duffy*, 78 Wn. App. 579, 582–83, 897 P.2d 1279 (1995) (wife’s failure to object to judge’s prior working relationship with husband’s counsel waives claim on appeal), *review denied*, 128 Wn.2d 1017 (1996). Such objections are waived because otherwise a litigant might gamble on the successful outcome of the case but then attack a contrary judgment on grounds of bias. *Brauhn*, 10 Wn. App. at 597–98.

Cougar Den’s untimely claim is analogous to the claim this Court rejected in *Hill v. Dep’t of Labor & Indus.*, 90 Wn.2d 276, 580 P.2d 636 (1978). In *Hill*, an industrial insurance claimant failed to object during a hearing to the participation of the hearing board’s chairman. 90 Wn.2d at 278. Previously, the chairman had been a supervisor of industrial insurance at the Department of Labor and Industries at the time it closed

the claimant's claim, and the worker's counsel was aware of those facts. *Hill*, 90 Wn.2d at 278. The plaintiff waived the right to raise this question on appeal because it was not raised at the hearing. *Id.* at 280.

Cougar Den had no good excuse for its' untimely claim that the Director's contact with the 2013 Yakama litigation precluded her from making the final decision. Cougar Den knew from the outset that the Director would make the final decision for the agency. CP 76, *see* CP 923. It is implausible that Cougar Den was not aware of the 2013 federal court litigation between the Yakama Nation and the Department, nor would it have been reasonable for Cougar Den to assume that the State's legal positions were unknown to the Director. Cougar Den, however, held onto this issue until superior court, claiming it had recently become aware that Director Kohler was "actively" involved in that litigation. *See* CP 10, 20, 1040, 1046-47. But the Agency Record contained abundant indications of Director Kohler's active involvement, making that fact "reasonably discoverable" during the adjudicative proceeding. She signed the 2013 Fuel Tax Agreement and is listed as the contact person for the State. CP 239, 240. The litigation and settlement drew media coverage. *See* CP 1054. Cougar Den could not reasonably assume that Director Kohler did not actively participate in a high-profile case involving the Department and an Indian tribal government, given that state law requires agency

heads to be involved in certain government-to-government matters with Tribal governments. RCW 43.376.020.

Director Kohler's involvement in the prior litigation between state and tribe was "reasonably discoverable . . . at the appropriate time for making" a disqualification motion. RCW 34.05.570(3)(g). Therefore, the superior court erred when it allowed Cougar Den to amend its petition and raise the issue. *See* CP 1058. For this separate and independent reason, this Court should reverse the appearance of fairness ruling.

## VI. CONCLUSION

This court should reverse the judgment of the superior court and affirm the Final Order of the Department of Licensing. *See* RCW 34.05.526; RCW 34.05.574(1).

RESPECTFULLY SUBMITTED this 24th day of December, 2015.

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**DECLARATION OF SERVICE**

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

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

DATED this 24<sup>th</sup> day of December 2015.

  
BIBI SHAIRULLA, Legal Assistant

*Cougar Den Inc. v. Dep't of Licensing*, No. 92289-6  
Appellant's Opening Brief

# Appendix A

Final Order of Director  
*In re Cougar Den, Inc.* (Wash. Dep't of Licensing Oct. 15, 2014)

CP 1000 - 1010

PROCEEDINGS BEFORE THE DIRECTOR OF  
THE DEPARTMENT OF LICENSING  
STATE OF WASHINGTON

In the Matter of the Fuel Tax Assessment  
Issued to:

COUGAR DEN, INC.,

Respondent.

OAH Docket No. 2014-DOL-0006  
Fuel Tax Assess. No. 756M

FINAL ORDER  
OF DIRECTOR

I. DIRECTOR'S CONSIDERATION

1.1 Initial Order. This matter has come before the Director to review the Initial Order entered by Administrative Law Judge Stephen K. Leavell on July 24, 2014 (Initial Order), which is attached and incorporated into this Order by reference.

1.2 Petition for Administrative Review. The Prorate and Fuel Tax Program, Department of Licensing (Program), filed a petition for administrative review of the Initial Order on August 12, 2014. The Program argues that the Initial Order misread United States Supreme Court precedent and improperly characterized the legal incidence of the taxes at issue in this case as imposed on an Indian within an Indian reservation, where the legal incidence of the taxes is actually imposed at the point at which fuel entered into the state off-reservation, at the Oregon-Washington border.

The Program argues that the Initial Order also erroneously concluded that the fuel was exempt from fuel taxes because its sale on the reservation was in "interstate or foreign commerce," where the fuel actually never left the state of Washington, and the reservation is part of the state.

Finally, the Program argues that the Initial Order erred in concluding that the Yakama Treaty precluded the state from taxing the imported fuel based on the treaty right to travel upon the public highways, where *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) held only that Washington could not require tribal members to give notice to the state that they were transporting untaxed cigarettes for consumption on the reservation, but courts have not held that the state could not tax a product.

FINAL ORDER  
OF DIRECTOR - 1

92289 6-000001000

COUGAR DEN, INC 14-2-03851-7  
CERTIFIED RECORD

The Program filed a statement of additional authority in support of its petition for review on September 26, 2014. It is a copy of the Ninth Circuit decision in *King Mountain Tobacco Co, Inc. v. McKenna*, No. 13-35360, affirming the district court opinion cited in the Program's petition for review and holding that there is no "right to trade" in the Yakama Treaty.

Respondent Cougar Den, Inc. (Cougar Den) filed a response to the petition for review on August 26, 2014. Cougar Den argues that the Initial Order is correct and the Yakama Treaty is an express federal law that permits the Yakamas a "right to transport goods without restriction" and a "right to trade" free of any state tax or regulation. *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) held that Yakama members could carry out logging operations outside the reservation without payment of fees for the use of public highways. *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) construed the right to travel provision of the Yakama Treaty as overlapping with the right to trade under the Treaty. Cougar Den argues that the fuel taxes at issue are a tax on hauling goods to market over the public highways. Cougar Den filed a response to the Program's statement of additional authority on September 30, 2014, arguing that the treaty right to travel is dispositive of this case and distinguishing the *King Mountain* decision.

1.3 Record of Proceeding. The entire record of this proceeding was presented to the Director for her review and the entry of a final decision.

The description of the record in the "Exhibits" section of the Initial Order is incomplete and is MODIFIED to read as follows:

The parties agreed to Stipulated Facts 1-18 and Exhibits 1-9. The following evidentiary materials were also submitted by the parties for the purposes of their cross-motions for summary judgment.

ADDITIONAL EXHIBITS AND DECLARATIONS SUBMITTED BY COUGAR DEN

Exhibit No.	Description
	Declaration of Kip Ramsey III (April 7, 2014)

Attachment A to Decl. of Kip Ramsey III	Invoices dated 4/28/2013, 6/15/2013, 7/13/2013, 8/6/2013, 9/10/2013, and 10/24/2013
	Declaration of Andre M. Penalver (April 11, 2014)
Attachment A to Decl. of Andre M. Penalver	Assessment Numbers 760M and 761M
Attachment A to Respondent's Supplemental Authority	Yakama Nation General Council Memorandum (April 2, 2014) Yakama Nation General Council Motion GCM-10-2014 (March 13, 2014) Yakama Nation General Council Resolution GC-03-2014 (March 21, 2014)
Attachment B to Respondent's Supplemental Authority	Yakama Nation General Council Resolution dated Feb. 18, 1944 Yakama Nation General Council Resolution T-86-80 (June 26, 1980)

ADDITIONAL EXHIBITS AND DECLARATIONS SUBMITTED BY DEPARTMENT OF LICENSING PRORATE AND FUEL TAX PROGRAM

Exhibit No.	Description
	Declaration of Paul W. Johnson (April 24, 2014)
Exhibit 1 to Decl. of Paul W. Johnson	Yakama Nation Petroleum Permits provided to Washington Department of Licensing Prorate and Fuel Tax Section between November 2012 and November 2013
Exhibit 2 to Decl. of Paul W. Johnson	Table A—Fuel Deliveries to Yakamart, March 1, thru October 31, 2013 Table B—Fuel Deliveries, January 1, thru December 31, 2013
	Declaration of John Lane (April 22, 2014)
Exhibit A to Decl. of John Lane	Yakama Nation Retrocession Petition (July 2012), pages 25 through 27
	Declaration of Fronda Woods (April 29, 2014)
Attachment A to Decl. of Fronda Woods	November 12, 2013 letter from Yakama Nation Chairman Harry Smiskin to Washington Governor Jay Inslee and Department of Licensing Director Pat Kohler

Attachment B to Decl. of Fronda Woods	November 18, 2013 letter from Yakama Nation Chairman Harry Smiskin to Washington Governor Jay Inslee and Department of Licensing Director Pat Kohler
Attachment C to Decl. of Fronda Woods	Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation, No. CV-12-3152-LRS, Order Granting Joint Motion to Dismiss With Prejudice and Without Costs (RD. Wash. Nov. 21, 2013)
Attachment D to Decl. of Fronda Woods	Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation, No. 13-36161, Order (9th Cir. Nov. 22, 2013)
Attachment E to Decl. of Fronda Woods	November 19, 2013 letter from Yakama Nation General Council officers to Deputy and Assistant Attorneys General
Attachment F to Decl. of Fronda Woods	Emails between Quannah Spencer and Fronda Woods dated November 20 and 22, 2013
Attachment G to Decl. of Fronda Woods	Teo v. Steffenson, No. CY-93-3050-AAM, Consent Decree (E.D. Wash. Nov. 3, 1994), and Teo v. Steffenson, No. CV-04-3079-CI, Settlement Agreement, Agreed Changes to Consent Decree, and Order (E.D. Wash. Aug. 21, 2006)

1.4 Issue. The description in the "Issue" section of the Initial Order is incomplete and is STRICKEN in its entirety. The following issue statement is ADOPTED:

Did Cougar Den import fuel to Washington from March through October 2013 in violation of chapters 82.36 and 82.38 RCW? If so, does Cougar Den owe \$3,659,954.61 (as of December 9, 2013), including tax, penalties, and interest?

1.5 Findings of Fact. Having considered the record of this proceeding and the arguments of counsel, the Director ADOPTS Findings of Fact 1, 2, 4-7, 9, 10, 12-14, 17, and 18 of the Initial Order.

Finding of Fact 3 of the Initial Order is MODIFIED to conform to the stipulated facts to read as follows:

3. In entering into the Treaty of 1855, the Yakama Nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama Nation and is available to the public at <http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf>.

Finding of Fact 8 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

8. On September 29, 1993, the Secretary of the Yakama Tribal Council issued a document to Cougar Den, Inc. entitled "Petroleum Products License Responsibilities." The Yakama Tribal Council revoked the document on October 2, 2013.

Finding of Fact 11 of the Initial Order is MODIFIED to conform to the stipulated facts and correct a typographical error to read as follows:

11. Cougar Den has never applied for or held any type of motor vehicle fuel license or special fuel license issued by the State of Washington.

Finding of Fact 15 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

15. On December 9, 2013, the Washington Department of Licensing issued Assessment Number 756M to Cougar Den, Inc. Assessment Number 756M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to the fuel shown in the above table.

Finding of Fact 16 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

16. The Respondent made a timely appeal of Assessment 756M through a Letter of Appeal, dated January 3, 2014, sent to the Department.

Additional Findings of Fact 19-23 are ADOPTED to read as follows:

19. Cougar Den contracted with KAG West to transport fuel in KAG West's trucks from Oregon to customers within the Yakama Reservation from March 2013 through October 2013. Decl. Ramsey ¶ 5; Stip. Ex. 5 (see "Schedule of Receipts" and "Schedule of Disbursements" pages).

20. When Cougar Den, Inc. sells fuel to a business, its invoice includes an amount for federal taxes and fees, and an amount for tribal taxes. Decl. Ramsey ¶ 6 & Attach. A. On October 2, 2013, the Yakama Tribal Council rescinded the tribal tax. Stip. Ex. 6.

21. Cougar Den sold more than 90 percent of the fuel it imported to Wolf Den and Kiles Korner, both in Wapato. Stip. Ex. 5 ("Schedule of Disbursements" pages). Wolf Den and Kiles Korner are retail gas stations owned and operated by Yakama tribal members under permits from the Yakama Nation. Decl. Johnson ¶ 3 & Ex. 1; see Decl. Ramsey Attach. A. Yakama tribal law allows tribally-licensed fuel retailers to sell to "any person." RYC § 30.11.09 (Stip. Ex. 9).

22. Cougar Den sold the remaining fuel it imported to Cougar Den, Inc. and Tiin-Ma Logging, both in White Swan. Stip. Ex. 5 ("Schedule of Disbursements" pages). Cougar Den, Inc. is a retail gas station and restaurant owned by Kip Ramsey. Decl. Johnson ¶ 3 & Ex. 1; Decl. Ramsey ¶ 2. Tiin-Ma Logging is owned by Kip Ramsey. See Decl. Ramsey ¶ 6 & Attach. A.

23. Before April 2013, Wolf Den, Kiles Korner, and Cougar Den bought fuel from Washington-licensed fuel suppliers. Decl. Johnson ¶ 6 & Exhibit 2, Table B.

1.6 Conclusions of Law. Having considered the record of this proceeding and the arguments of counsel, the Director STRIKES the Conclusions of Law of the Initial Order in their entirety.

The Director ADOPTS new Conclusions of Law 1-23 to read as follows:

Jurisdiction

1. There is jurisdiction to hear this matter pursuant to chapter 34.05 of the Revised Code of Washington (RCW), RCW 82.36.045, 82.38.170, and chapter 10-08 of the Washington Administrative Code (WAC).

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Structure of Washington Fuel Tax Laws

2. Washington state law imposes a tax upon fuels used for the propulsion of motor vehicles upon the highways of the state. Chapter 82.36 RCW governs taxes on motor vehicle fuel, or gasoline. RCW 82.36.010(19); WAC 308-72-800(3). Chapter 82.38 RCW governs taxes on "special fuel," which includes diesel fuel. WAC 308-77-005(1); see RCW 82.38.020(23). Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state. RCW 82.36.020(2) and 82.38.030(7). The current tax rate is 37.5 cents per gallon. RCW 82.36.025 and 82.38.030.

3. Fuel is "imported" when it is brought into this state by a means of conveyance other than the fuel supply tank of a motor vehicle. RCW 82.36.010(10) and 82.38.020(12). A person who causes fuel to be imported by a means other than the bulk transfer-terminal system, who owns the fuel at the time of such importation, is acting as a fuel importer. See RCW 82.36.010(16) and 82.38.020(26). The "bulk transfer-terminal system" means the fuel distribution system consisting of refineries, pipelines, vessels, and terminals. RCW 82.36.010(4) and 82.38.020(4). Fuel in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system. RCW 82.36.010(4) and RCW 82.38.020(4).

4. Fuel imported into this state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce is exempt from tax. RCW 82.36.230; see RCW 82.38.180(2). Fuel distributed to a federally recognized Indian tribal reservation located within the State of Washington is not considered exported outside this state. RCW 82.36.230 and 82.38.180(2).

5. Fuel taxes are collected through a licensing system administered by the Department of Licensing. It is unlawful for a person to engage in business in Washington as a motor vehicle importer or special fuel importer without a license from the Department. RCW 82.36.080(1) and 82.38.090(1). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18).

6. Licensed importers are liable for taxes on fuel imported into this state. RCW 82.36.026(3) and 82.38.035(3). License holders must submit monthly fuel tax returns to the Department documenting their removals and imports. RCW 82.36.031 and 82.38.150. Payment of tax is required when the reports are submitted. RCW 82.36.035 and 82.38.160. Penalties and interest are due if the tax is not paid on time. RCW 82.36.040; 82.36.045; and 82.38.170.

7. Persons who import fuel into the state without a license are subject to the same taxes and penalties as licensees. RCW 82.36.100; see RCW 82.36.045(2); 82.36.080(3); and 82.38.170(3). A person who imports motor vehicle fuel into the state without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3).

8. The Department is authorized to assess taxes, penalties, and interest. RCW 82.36.045; 82.36.080(3); and 82.38.170. Where the validity of the Department's assessment is questioned, the burden is on the person who challenges the assessment to establish by a fair preponderance of evidence that it is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

Cougar Den is Liable for the Tax Absent Express Federal Law to the Contrary

9. The Department asserts that Cougar Den imported fuel into the state of Washington without the licenses required by state law and failed to pay the taxes required by state law. The Department issued Assessment Number 756M to Cougar Den. Stip. Ex. 7. Cougar Den has the burden to establish by a fair preponderance of evidence that Assessment Number 756M is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

10. Cougar Den argues that it is exempt from the tax because of Bulk User Petroleum Permits the Yakama Nation issued to Cougar Den in 2012 and 2013 (Stip Ex. 4), and because of a Petroleum Products License Responsibilities document that the Secretary of the Yakama Tribal Council issued to Cougar Den in 1993 (Stip. Ex. 3). Cougar Den relies on the Yakama Treaty of 1855 (Stip. Ex. 1). The fuel was transported from the state of Oregon across ceded lands and Yakama Reservation lands, and delivered to Yakama-owned businesses within the Yakama Reservation. Cougar Den argues that, based on case law, it is exempt from the state fuel tax and licensing requirements. Cougar Den relies primarily upon *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

11. Outside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d

114 (1973). Whether a state can impose a tax that affects Indians depends on where the tax is imposed and who bears its legal incidence. If the tax is imposed outside an Indian reservation, the tax is enforceable absent express federal law to the contrary, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

12. Under RCW 82.36.020(2)(c) and 82.38.030(7)(c), Washington fuel taxes are imposed when fuel "enters into this state" if the "entry is not by bulk transfer" or if the entry is by bulk transfer and the importer is not a licensee. The fuel at issue in this matter entered into this state at the Highway 97 bridge across the Columbia River. *See* Stip. Fact 13. The entry was not by bulk transfer because it was not a transfer by pipeline or vessel. RCW 82.36.010(3) and 82.38.020(5). Therefore, the taxes in this matter were imposed when the fuel entered into this state at the Washington-Oregon boundary on the Highway 97 bridge, which is not within any Indian reservation. *See* Stip. Ex. 2.

13. The person who is liable for Washington fuel taxes is a "licensee," or a person acting as a licensee if the person does not have a license. RCW 82.36.020(1); 82.36.100; and 82.38.030(1); *see* RCW 82.36.045(2) and 82.38.170(3). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18). Cougar Den is a corporation. Stip. Fact 7. Cougar Den owned the fuel at the time the fuel entered into this state. *See* Stip. Ex. 5. Cougar Den did not have a license. Stip. Ex. 11. Cougar Den acted as a licensee because it imported fuel into the state by tank truck, which is a means other than the bulk transfer-terminal system. RCW 82.36.010(10), (12), (16) and 82.38.020(12), (15), (26). Therefore, Cougar Den bears the legal incidence of the tax.

14. Cougar Den caused fuel to be imported from Oregon to customers within the Yakama Reservation. The Yakama Reservation is a federally recognized Indian tribal reservation located within the state of Washington. *See, e.g., Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. 463, 469, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979). Cougar Den did not export the fuel outside the state of Washington because fuel distributed to a federally recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state. RCW 82.36.230; RCW 82.38.180(2). The lands that the Yakama Nation ceded to the United States in Article I of the Yakama Treaty are also within the State of Washington. *See Seufert Bros. Co. v. United States*, 249 U.S. 194, 196, 39 S. Ct. 203, 63 L. Ed. 555 (1919). Therefore, the fuel that Cougar Den imported is not exempt from tax under RCW 82.36.230 or 82.38.180(2).

15. Cougar Den imported gasoline without a license from the department. A person who imports gasoline without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3). If Cougar Den is liable for the unpaid tax, Cougar Den is also subject to the civil penalty for unlicensed gasoline imports.

16. Because the taxes, license requirements, and penalties in this matter are imposed outside of any Indian reservation, they are enforceable against Cougar Den absent express federal law to the contrary.

Federal Law Does Not Preempt the State Laws at Issue

17. Cougar Den asserts that the Yakama Treaty is "express federal law" that preempts the taxes, license requirements, and penalties in this case. Article III of the Yakama Treaty provides that, "if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at 952-53 (Stip. Ex. 1). Members of the Yakama Nation view the Treaty as a "sacred" and "founding" document of the Yakama Nation. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38, 1262 (E.D. Wash. 1997), *aff'd sub. nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

18. In *Yakama Indian Nation v. Flores*, the court held that Article III of the Yakama Treaty preempted Washington state truck license and permit fees as applied to Yakama Indian-owned logging trucks that hauled Yakama Nation timber from Yakama Reservation forests over state highways to off-reservation mills. The fees were a direct charge on the Yakamas' use of public highways and were not apportioned to account for off-reservation travel. The Ninth Circuit affirmed, concluding that the right "to travel upon all public highways" clause in Article III of the Yakama Treaty "must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use." *Cree v. Flores*, 157 F.3d at 769. The *Flores* Court held that the truck license and permit fees involved in the litigation were preempted by the Yakama Treaty "right, in common with citizens of the United States, to travel upon all public highways."

19. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), federal officials suspected that Yakama tribal members were transporting contraband cigarettes from an Indian reservation in Idaho to various Indian reservations in Washington. The federal government indicted the members on charges of violating the federal Contraband Cigarette Trafficking Act. The basis for the charges was the members' alleged failure to comply with a Washington state requirement that individuals give notice to state officials before transporting unstamped cigarettes within the state. The Ninth Circuit held that the notice requirement imposed a condition on travel that violated the "right, in common with citizens of the United States, to travel upon all public highways" in Article III of the Yakama Treaty.

20. Unlike the fees in the *Flores* litigation, the taxes in this matter are not a charge for Cougar Den's use of public highways. Cougar Den is not being taxed for using public highways. Cougar Den is being taxed for importing fuel. Unlike the notice requirement in *Smiskin*, the license requirements in this matter are not a condition on Cougar Den's use of public highways. Cougar Den does not need a Washington fuel importer license to transport fuel over public highways. Cougar Den needs a Washington fuel importer license to bring fuel into this state. The taxes, license requirements, and penalties in this matter are not preempted by Article III of the Yakama Treaty as construed in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

21. The Bulk User Petroleum Permits and Petroleum Products License Responsibilities document that the Yakama Nation issued to Cougar Den do not exempt Cougar Den from the state laws involved in this case. See *Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 525, 648 P.2d 468 (1982). Though federal law can preempt state law, tribal law standing alone does not. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

### Conclusion

22. Cougar Den has not met its burden to establish by a fair preponderance of evidence that Assessment Number 756M is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

23. Respondent Cougar Den imported fuel to Washington from March through October 2013 in violation of chapters 82.36 and 82.38 RCW. Cougar Den owes \$3,639,954.61 (as of December 9, 2013) including tax, penalties, and interest.

## II. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the

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### Director ORDERS:

2.1 The Initial Order is REVERSED, and the Program's assessment of taxes against Cougar Den, Inc. for importation of special fuel and motor vehicle fuel under Assessment Number 756M is upheld. The current amount owing and payment instructions may be obtained by contacting the Prorate and Fuel Tax Program of the Department of Licensing.

2.2 Reconsideration. Pursuant to RCW 34.05.470, a party has ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Director of the Department of Licensing, P. O. Box 9020 Olympia, Washington 98507-9020, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's office. RCW 34.05.010(6). A copy shall also be sent to Bruce L. Turcott, Assistant Attorney General,

FINAL ORDER  
OF DIRECTOR - 10

92289 6-000001009

COUGAR DEN, INC 14-2-03851-7  
CERTIFIED RECORD

Review Counsel for the Director, PO Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

2.3 Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Director has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

2.4 Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Department, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

2.5 Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

DATED this 15<sup>th</sup> day of October, 2014.

STATE OF WASHINGTON  
DEPARTMENT OF LICENSING

By: Pat Kohler  
PAT KOHLER  
Director

FINAL ORDER  
OF DIRECTOR - 11

92289 6-000001010

COUGAR DEN, INC 14-2-03851-7  
CERTIFIED RECORD

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**Cc:** Woods, Fronda (ATG); Geck, Jay (ATG)  
**Subject:** RE: Case# 92289-6-- Cougar Den, Inc. v. Dep't of Licensing; Appellant's Opening Brief with Appendix A

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**Cc:** Woods, Fronda (ATG) <FronaW@ATG.WA.GOV>; Geck, Jay (ATG) <JayG@ATG.WA.GOV>  
**Subject:** Case# 92289-6-- Cougar Den, Inc. v. Dep't of Licensing; Appellant's Opening Brief with Appendix A

Dear Clerk and Counsel,

Attached for filing and service, please find the Appellant's Opening Brief with Declaration of Service and Appendix A.

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

If you any questions regarding the foregoing document, please contact our office.

Thank you,

***Bibi Shairulla***

Legal Assistant  
Office of the Attorney General  
Licensing & Administrative Law Division  
PO Box 40110, Olympia, WA 98504-0110  
Ph: (360) 586-2610  
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