No. 92289-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COUGAR DEN, INC.,
Respondent,

v.

DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON,
Appellant.

AMICUS CURIAE BRIEF OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF AMICUS

The identity and interest of amicus curiae are set forth in the accompanying Motion for Leave to File an Amicus Curiae Brief.

II. INTRODUCTION

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") appears as amicus to assist the Court in understanding the issues in this appeal from the Yakama Nation's perspective, as the sovereign responsible for the regulation and administration of the Treaty rights squarely at issue. The Yakama Nation is an impartial non-party government whose primary interest is to protect the rights guaranteed to it and its people by the Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859) ("Treaty"). The State of Washington's ("State") pattern of seeking to narrow Yakama Treaty rights by attacking Yakama members who exercise those rights, can only, and must, be addressed by the Yakama Nation.

III. STATEMENT OF THE CASE

The Yakama Nation adopts the Statement of the Case set forth by Respondent, Cougar Den Inc. ("Cougar Den").

IV. ARGUMENT OF AMICUS CURIAE

Whether a Treaty exempts an Indian tribe from a state law depends on the parties' intent when they entered the Treaty. *Cree v. Waterbury*, 78 F.3d 1400, 1404 (9th Cir. 1996) [hereinafter "*Cree I*"]. In determining the parties' intent, the

Court must "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed." *Id.* at 1405. Additionally, the Treaty "must be interpreted as the Indians would have understood [it]." *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) [hereinafter "*Cree II*"]. "Where ambiguity exists, ambiguities must be resolved in favor of the Indians." *State v. Schmuck*, 121 Wn.2d 373, 396 850 P.2d 1332 (Wash. 1993) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 993 (9th Cir. 2014).

Here, there is no ambiguity. Time and again courts—including the Washington State Superior Court in this case—have held that Article III of the Yakama Treaty of 1855 unambiguously "guarantee[s] the Yakamas the right to transport goods to market" for "trade and other purposes." *Cree II*, 157 F.3d at 769. This is the case regardless of what "goods" are being transported. *United States v. Smiskin*, 487 F.3d 1260, 1268 (9th Cir. 2007). If a state fee or restriction interferes with the right to transport, then it is *per se* invalid. *Id.*

A. DOL Is Attempting To Regulate Travel.

For over 100 years, the State has sought to limit the rights guaranteed to the Yakama Nation in its Treaty with the United States. *See, e.g., State v. Towessnute*, 89 Wash. 478, 154 P. 805 (Wash. 1916); *Tulee v. State of Washington*, 315 U.S. 681, 62 S. Ct. 862, 86 L. Ed. 1115 (1942). Over the last

two decades, the State has repeatedly attacked the Yakama Nation's Treaty right to travel. *E.g., Cree I*, 78 F.3d 1400, *Cree II*, 157 F.3d 762; *Smiskin,* 487 F.3d 1260. The matter before this Court is an extension of the State's efforts to limit Yakama Treaty rights.

The Department of Licensing of the State of Washington ("DOL") argues incorrectly that the lower court "reached a different conclusion" than the federal courts did in *Yakama Indian Nation v. Flores*. *Flores,* 955 F. Supp. 1229 (E.D. Wash. 1997); *Cree II*, 157 F.3d 762; *Smiskin*, 487 F.3d 1260. App.'s Opening Br., at 12. According to DOL, the State's tax on imports "apply without regard to whether there is any travel." *Id.* at 16. But the Court need go no further than the first line of DOL's brief to expose the fatal flaw in this logic: "The respondent Cougar Den Inc. imported fuel without paying state fuel taxes and without holding an importer's license." App.'s Opening Br., at 1 (emphasis added). DOL's position is that, "Cougar Den is being taxed for importing fuel." *Id.* at 11 (citing CP 20, CP 1008) (emphasis added). In other words, DOL claims that one can somehow "import" without "traveling" or "transporting." DOL is mistaken.

1. The plain text of the statutes at issue restricts importation.

Assessment No. 756M did not state what statute, specifically, Cougar Den was alleged to have violated. Instead, it stated that Cougar Den owed $3,639,954.61 in tax, penalties, and interest for a vague violation of "chapters 82.36 and 82.38 of the Revised Code of Washington." CP 66. Director Kohler

clarified these allegations in her Final Order, however, by holding that "Cougar Den imported gasoline without a license from the department," in violation of RCW 82.36.080(3). CP 1007.

The statute cited by Director Kohler imposes liability for unpaid tax and penalties upon any person who "acts as a licensee without first securing the license required." RCW 82.36.080(3). According to Director Kohler's Final Order, "Cougar Den needs a Washington fuel importer license to bring fuel into this state." CP 1008. Thus, Director Kohler found Cougar Den liable for being "a person who imports motor vehicle fuel into the state" without paying a fee. RCW 82.36.010; *see also* RCW 82.36.020(2)(c) (incidence of the tax falls upon the importer).

2. Importation is a form of travel protected by Article III of the Treaty.

Notwithstanding DOL's efforts to contort the meaning of State tax laws, the Court must assign meaning to the terms based on the plain meaning of statutory language. *Jackowski v. Borchelt*, 174 Wn.2d 720, 732, 278 P.3d 1100 (Wash. 2012) (citing *Dowler v. Clover Park Sch. Dist. No. 400*, 72 Wn.2d 471, 258 P.3d 676 (Wash. 2011). Since the language of the statute here is not ambiguous, the Court must "not construe it to mean anything different from what it says." *Id.*

The Washington State Legislature did not leave the term "import" to the courts to define. In the State of Washington, the statutory definition of "Import"

is to "bring fuel into this state." RCW 82.38.020(17), *See also* RCW 82.36.010(10) (same); *State v. Fid. & Deposit Co. of Maryland*, 194 Wash. 591, 595, 78 P.2d 1090 (Wash. 1938) ("The word 'import,' when used as a verb, means, by derivation, to bear or carry into, and by common usage, to bring in . . . .").

Similarly, the term "travel" is commonly defined as "'to go from one place to another at a distance.'" *State ex rel. Leis v. Ferguson*, 149 Ohio St. 555, 557, 80 N.E.2d 118 (Ohio 1948) (quoting Black's Dictionary (3d ed.)); *see also Barlow v. State ex rel. Wyo. Workers' Safety & Comp. Div. (In re Barlow),* 2011 WY 120, P12, 259 P.3d 1170 (Wyo. 2011) ("travel" occurs when a person is being "transported"). In other words, **imports have to travel**; **one cannot import without traveling**. The plain meaning of the State statutory taxing scheme cannot mean otherwise.

But DOL argues that state law means something other than what it plainly says. First, according to DOL, "[u]nless state law limits travel, it cannot be argued that it affects this provision of the treaty." App.'s Opening Br., at 34. But this is not the law. *Cf. Smiskin*, 487 F.3d at 1266 (a state law that "imposes a condition on travel" violates Yakama's "treaty right to transport goods to market without restriction"); *Flores*, 955 F. Supp. at 1251 (Yakamas possess a "right to travel outside reservation boundaries, with no conditions attached"). Even if a tax on importation did not "limit" travel—it does—a tax on importation

unquestionably "imposes a condition on travel." *Smiskin*, 487 F.3d at 1266.

Second, according to DOL, "Cougar Den is not being taxed for using public highways. Cougar Den is being taxed for importing fuel." CP 1008. This is like saying, "You are not being taxed for traveling. You are being taxed for driving a truck." Bringing fuel "into th[e] state" is a specific type of travel that falls under the larger umbrella of "transportation" that is preempted by Article III of the Treaty. *Id.*

According to DOL, "the importation of fuel . . . applies without regard to use of highways." App.'s Rep. Br., at 6. Again, DOL's suggestion that it may restrict Yakamas' travel as long as it restricts *all* means of travel cannot be the law. And, at any rate, on the simple facts of this case, fuel is imported through highway use only.

In its Reply Brief, DOL attempts for the first time to portray the statutory scheme as a "taxation of wholesale fuel," implying that the tax is not for the importation of the fuel, but instead for merely possessing the fuel. App. Rep. Br., at 2; *cf.* App's Opening Br., at 11 (at issue statutes are a "tax[] for <u>importing</u> fuel") (emphasis added). But this interpretation of the State's taxing scheme would require the type of linguistic gymnastics that the Court is prohibited from employing when, as here, the plain meaning of the statute is clear and defined. *Jackowski*, 174 Wn.2d at 732. Again, even according to DOL, "Cougar Den is being taxed for importing fuel." App. Opening Br., at 11.

In sum, DOL is *only* attempting to regulate "importation," which on the facts of this case means travelling. Both parties appear to agree that importation, in this case, means driving a truck full of fuel on public highways from State of Oregon to the State of Washington along Highway 97. CP 114. As applied here, Cougar Den is travelling by highway. *Id.* While DOL imagines a fantastical scenario in which the Treaty travel right is not exercised on the public highway, here, importation and travel are synonymous. There is no evidence of any practical or actual importation that does not occur on a public highway. Indeed, importation is identical to the activity protected in *Smiskin*: "'transport[ing] goods to market.'" 487 F.3d at 1266 (quoting *Cree II*, 157 F.3d at 769).

To find otherwise, the Court would have to conclude that the Yakama Nation understood the Treaty to give local government authorities the right to require them to pay to import any good, including traditional trade items, prior to taking them home. This is not how the Treaty is to be interpreted. It has already been held that "the Treaty's language and its history support conclusions that Yakama members would be allowed to use public highways to transport goods to market with as much freedom as they had prior to the treaty." *United States v. Smiskin*, No. 04-2107, 2005 WL 1288001, at *3 (E.D. Wash. May 31, 2005) (citing *Flores*, 955 F.Supp. 1229). This means that the transportation of goods by a Yakama member—into, out of, or within the State of Washington—cannot be restricted by DOL. *Id.* Wish as it might, DOL could never show that the

Yakamas should have understood in 1855 that the territorial government would impose fees and taxes on the importation of goods into its own land.

3. The State's taxing provisions must be construed liberally in favor of the Yakama Nation, with ambiguous provisions interpreted to its benefit.

When there is ambiguity in a statute, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). The U.S. Supreme Court has long held that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174, 93 S. Ct 1257, 36 L. Ed 2d 129 (1973); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L. Ed. 941 (1912)).

Here, even if there were any question as to whether the State's taxation of "importation" is a taxation of travel—there is not—the Court cannot read the travel aspect of importation out of the statute. Instead, it must interpret the statute liberally in favor of the Yakama Nation. Here, that means reading the statute in a manner that least restricts the Yakama right to travel.

B. Treaty Travel Is Not A Crime.

DOL raises the straw man of lawlessness to attack what the Yakama Nation has regulated and administered for over 160 years: the Treaty right to travel. DOL's comparison of Treaty travel to an armed "felon while traveling on

a public highway" is shameful. App. Opening Br., at 33.

Indeed, DOL's boogie-man argument that an affirmance against the State will create "a zone where the treaty preempts state laws over goods or property," or an "unpredictable swath" of territory where "laws that make property contraband" will have no effect, has been squarely rejected by other courts. *Id*. In response to the exact same argument, the Ninth Circuit Court of Appeals stated:

> First, the Government contends that the court's ruling, if affirmed, would preclude the State of Washington and the federal government from regulating tribal transportation of other "restricted goods," such as illegal narcotics and "forbidden fruits [and] vegetables." This concern is unfounded, if not disingenuous. As the Government argued extensively in its brief to this court, and as we discussed above, regulations with a purely regulatory purpose can be applied to Indians, treaty rights notwithstanding. The restricted goods to which the Government refers are regulated for the public safety, not for a revenue generating purpose. Drug laws, for instance, have the stated purpose of protecting the public from the dangers of drug use and the drug trade, and are not intended to generate revenue for the government. To the contrary, cigarettes are generally legal, and unstamped cigarettes are deemed contraband when individuals transport them without providing notice to the State only for the sake of improving the collection of cigarette taxes and increasing State revenues ("fair playing field" arguments aside).

Smiskin, 487 F.3d at 1270-71. DOL's arguments are similarly disingenuous here, and DOL's interests are likewise purely monetary.

The Yakama Nation will intercede when the State of Washington attacks the Treaty. But as a responsible tribal sovereign, it has no interest in shielding

activities by Yakama members that pose real danger. The Yakama Nation must, like all good governments, protect the interests of its citizens and constituents in public health and safety. Indeed, if the Yakama Nation regulated Yakama Treaty activity irresponsibly, Congress could react by exercising its power to abrogate or limit the Treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903).

The Yakama Nation has and does exercise the authority to regulate Treaty travel by Yakama members. DOL's scare tactics are imaginary.

C. DOL's Generalized Interests In More Revenue Fail To Justify Treaty Violations.

The Yakama Treaty right to travel, as articulated in *Flores*, is nonexclusive. 955 F.Supp. at 1257. The State of Washington is generally prohibited from regulating Yakama travel. *See Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2472, 186 L. Ed. 2d 607 (2013) ("[T]reaties of the United States '[are] the supreme Law of the Land.'") (quoting U.S. Const., Art. VI, cl. 2). But even under the least restrictive interpretation of treaty supremacy, courts have held that the State may regulate travel by tribal members, along with travel by other members of the general public, for safety and "to preserve and maintain the condition of the roads." *Id.* Thus, it was noted in *Smiskin* that a pre-notification requirement does not necessarily contravene or burden the right to travel as established in the Treaty because it does not impose a financial burden on Yakamas. *Smiskin*, 487 F.3d at 1269. However, the Court went on to find that

because the Washington State Legislature enacted the pre-notification requirement in RCW 82.24.250 solely to facilitate the collection of taxes from the sales of cigarettes to non-Indians by Indian smoke shops, and because the purpose of the statute was tax-collection, rather than an important travel-related concern, the statute could not stand. *Id.*; *see also Tulee,* 215 U.S. at 684-85 (striking down license fees in conflict with an express Treaty right because they were both regulatory and revenue-producing and "their regulatory purpose could be accomplished otherwise").

Here, a similar situation exists. DOL admits that it "monitors and collects fuel taxes with the aid of its licensing system," which subjects anyone traveling into the state "to the same taxes and penalties as licensees" if that person "import[s] fuel without a license." App. Opening Br., at 5-6. There is no purpose for the State's taxing and licensing scheme other than to tax. Because DOL's taxes and license seek solely to generate revenue for the State of Washington, they are impermissible.

D. DOL's Reliance On *Wagnon* And *King Mountain* Is Misplaced.

DOL argues that *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005), applies to this case. App. Opening Br., at 20. But *Wagnon* is the opposite of this case. *Wagnon* did not involve a Treaty. The High Court instead analyzed a state tax under the general principle that "'[a]bsent express federal law to the contrary, Indians going beyond the

reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.'" *Id.* at 122-23 (quotation omitted). "[I]t follows," the Court said in *Wagnon*, "that [a state] may apply a nondiscriminatory tax where . . . the tax is imposed on non-Indians as a result of an off-reservation transaction." 546 U.S. at 113.

Wagnon simply does not apply here. The Yakama Nation has the Treaty—a document "universally recognized as the highest law of the land," *Wong v. Tenneco, Inc.*, 39 Cal. 3d 126, 142 702 P.2d 570 (Cal. 1985), and which is "paramount to all legislative acts." *Sleght v. Rhinelander*, 1 Johns. 92, 1806 WL 858 (N.Y. Sup. Ct. 1806). *Wagnon* is entirely inapplicable here.

DOL's reliance upon *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), is also misplaced. In *King Mountain*, a Yakama-owned tobacco company challenged a statute that required tobacco manufacturers to place funds into an escrow fund on a per-unit basis. *King Mountain Tobacco Co. v. McKenna*, No. 11-3018, 2013 WL 1403342, at *1 (E.D. Wash. Apr. 5, 2013), aff'd 768 F.3d 989 (9th Cir. 2014). The trial court did not adopt King Mountain's Treaty travel argument because "the escrow statutes . . . regulate the product itself that is subject of commerce, rather than how such a product is brought to market." *Id.* at *6 (emphasis added). The Ninth Circuit Court of Appeals likewise found that "the right to travel (driving trucks on public roads) for the purpose of transporting goods to market" had nothing to do with the State's escrow statute.

King Mountain, 768 F.3d at 998. That state law was a regulation—on the product itself, not the movement of it—that had nothing to do with travel. This case is different. DOL is not attempting to tax the product, the fuel; it is trying to tax the movement, the importation, of fuel.

The Yakama Nation possesses a right to travel and to "transport goods," *i.e.*, to import goods, unburdened from state interference. *Smiskin*, 487 F.3d at 1266. Unlike the escrow statute at issue in *King Mountain*—which placed fees on goods—the statute at issue here taxes an activity—and that activity is travel.

E. Courts Consistently Strike Down Taxes On Treaty Activity.

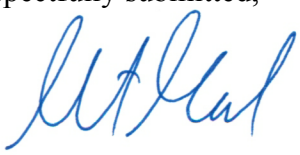
Again, the tax here is one on "importing"—an activity, not a good. Every case examining State taxes on Yakama Treaty activity, as opposed to State taxes on goods, has resulted in such tax being struck down. *See, e.g., Smiskin*, 487 F.3d 1260; *Cree I*, 157 F.3d 762; *Cree II*, 78 F.3d 1400. Cases where taxes have been on a good are inapposite, and even explicitly affirm the distinction. *See, e.g., United States v. King Mountain Tobacco Co.*, No. 14-3162, 2015 WL 4523642, at *13 (E.D. Wash. July 27, 2015) (upholding taxes "imposed against King Mountain as a manufacturer" but not those imposed against King Mountain as "a driver on the roads"); *King Mountain*, 768 F.3d 989 (same).

V. CONCLUSION

The Yakama Nation respectfully requests that the Court affirm the Washington State Superior Court's decision in this matter.

Dated: August 26, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true copy of the foregoing document was served upon the following individuals via electronic mail, pursuant to an agreement by counsel, and filed electronically with the Court via electronic mail to supreme@courts.wa.gov on August 26, 2016:

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