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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF GRAYS HARBOR**

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

Plaintiff,

v.

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

Defendants.

No.

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF AND  
WRIT OF PROHIBITION

The Automotive United Trades Organization ("AUTO") seeks declaratory and injunctive relief and a writ of prohibition against Governor Christine Gregoire ("Governor") and Liz Luce, Director of the Washington State Department of Licensing ("Director"), to restrain the unlawful disbursement of funds from the Washington State Motor Vehicle Fund.

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**I. PARTIES**

1. Plaintiff AUTO is a nonprofit trade association consisting of independent gasoline and automotive service retailers, and is located in McCleary, Washington.

2. Defendant Christine Gregoire is the Governor of Washington.

3. Defendant Liz Luce is the Director of the Washington State Department of Licensing.

**II. JURISDICTION AND VENUE**

4. AUTO's principal place of business is 370 W Elma Hicklin Road, McCleary, Washington, in Grays Harbor County.

5. This Court has jurisdiction over this matter and venue is proper in the Grays Harbor County Superior Court pursuant to RCW 4.92.010(1).

**III. STANDING**

6. AUTO is a trade association of gasoline marketers and automotive services retailers whose members operate approximately 300 gasoline service stations, truck stops, car washes, and convenience stores in Washington state. AUTO's membership is located throughout the State.

7. Washington's motor vehicle fuel and special fuel excise taxes are paid to the State by licensees (motor vehicle fuel and special fuel suppliers, importers, exporters, blenders, and persons holding international fuel agreement licenses). Some AUTO members are licensees and transmit the taxes directly to the Department of Licensing. Tax revenues are deposited in the Washington State Motor Vehicle Fund. Pursuant to Article II, § 40 of the Washington Constitution, any disbursements from the Motor Vehicle Fund must be used exclusively for highway purposes

8. AUTO members are taxpayers of the State of Washington. AUTO has standing to bring this action because unlawful disbursements have been made, and are

1 presently being made, from the Washington State Motor Vehicle Fund to Indian tribes for  
2 non-highway purposes. Through these disbursements, the State of Washington pays  
3 Indian tribes, referenced below, approximately 28 cents for every gallon of motor vehicle  
4 or special fuel purchased by the tribes.

5 9. AUTO members operate retail gas station facilities. Surveys of retail fuel  
6 pricing show that prices are substantially lower (in the range of 5 cents or more per  
7 gallon) at tribal retailers compared with similarly branded non-tribal retailers in the same  
8 region. Upon information and belief, these lower fuel prices are the result of the  
9 disbursements the State of Washington pays Indian tribes and cause AUTO members to  
10 suffer an economic injury.

11 10. Because one or more members of AUTO are injured by the unlawful  
12 disbursement of funds from the Washington State Motor Vehicle Fund to tribes, AUTO  
13 may represent these members in proceedings for judicial review.

14 11. Alternatively, AUTO has standing because the matter is of serious public  
15 importance, immediately affects substantial segments of the population and its outcome  
16 will have a direct bearing on commerce, finance, labor, industry or agriculture generally.

17 12. Alternatively, AUTO has standing because on January 12, 2010, AUTO  
18 made a demand upon Attorney General Rob McKenna to investigate the above described  
19 disbursements and institute legal proceedings. On February 12, 2010, the Attorney  
20 General declined to institute proceedings.

#### 21 IV. FACTS

22 13. On May 15, 2007, Defendant Governor Gregoire signed into law Senate  
23 Bill 5272. A true and correct copy of this legislation is attached to this complaint as  
24 Exhibit 1.  
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1           14.     Senate Bill 5272 amended several sections of chapters 82.36 and 82.38  
2 RCW with respect to the administration of motor vehicle fuel and special fuel taxes.

3           15.     Under that bill, the Legislature shifted the legal incidence of the state fuel  
4 tax from consumers to licensees. RCW 82.36.020(1); RCW 82.38.030(1). With respect  
5 to where the legal incidence of the tax falls, licensees include motor vehicle fuel and  
6 special fuel suppliers, importers, exporters, blenders or persons holding an international  
7 fuel tax agreement license, but specifically exclude fuel distributors. *See*  
8 RCW 82.36.010(12), 82.36.020(1); *see also* RCW 82.38.020(15) & (24), 82.38.030(1).

9           16.     The fuel tax is imposed at the first of the following transactions: 1) when  
10 fuel is removed from the rack by a supplier and sold to a distributor; 2) when fuel is  
11 produced; 3) imported; or 4) blended in the State. RCW 82.36.020(2); *see also* RCW  
12 82.38.030(7).

13           17.     Under Senate Bill 5272, while the Washington State fuel tax is included in  
14 the price of fuel sold and delivered to tribal fuel retailers, the legal incidence of the tax is  
15 placed on non-Indian parties, and the taxable event arises off reservation.

16           18.     RCW 82.36.450(1), enacted as part of Senate Bill 5272, provides as  
17 follows: "The governor may enter into an agreement with any federally recognized Indian  
18 tribe located on a reservation within this state regarding motor vehicle fuel taxes included  
19 in the price of fuel delivered to a retail station wholly owned and operated by a tribe, tribal  
20 enterprise, or tribal member licensed by the tribe to operate a retail station located on  
21 reservation or trust property. The agreement may provide mutually agreeable means to  
22 address any tribal immunities or any preemption of the state motor vehicle fuel tax." *See*  
23 *also* RCW 82.38.310(1).

1           19. Under RCW 82.36.450(5), the Governor may delegate the powers  
2 conferred in RCW 82.36.450 to the Department of Licensing. *See also* RCW  
3 82.38.310(5). Upon information and belief, such delegation has occurred.

4           20. Since May 15, 2007, the Director has entered into what the State described  
5 as “Fuel Tax Agreements” with the following fourteen tribes: Chehalis, Colville,  
6 Jamestown S’Klallam, Kalispel, Nisqually, Nooksack, Port Gamble S’Klallam, Puyallup,  
7 Skokomish, Squaxin, Suquamish, Swinomish, Tulalip, and Upper Skagit. Agreements  
8 with five other tribes (Lummi, Makah, Muckleshoot, Quileute, and Quinault) that predate  
9 May 15, 2007, also remain in place.

10           21. Under most of these “Fuel Tax Agreements,” the State remits to the tribe  
11 an amount based on the equivalent of seventy-five percent (75%) of the state motor  
12 vehicle fuel and special fuel tax on each gallon of fuel purchased. *See, e.g.*, Tribal-State  
13 Agreement Concerning Motor Vehicle Fuel and Special Fuel Taxes Between the  
14 Suquamish Tribe and the State of Washington (“Suquamish Fuel Compact”), § 4.3  
15 (Exhibit 2). These tribes receive the remittance by submitting invoices to the Department  
16 of Licensing that detail the number of gallons delivered to the tribe’s fuel facilities or  
17 other filling stations under the tribe’s jurisdictional authority in the preceding month or  
18 other period at the tribe’s option. *See* Suquamish Fuel Compact, § 4.3. These provisions  
19 typically require the tribe’s invoice to include the invoice date, seller name and amount of  
20 state motor fuel taxes paid or included in the price of fuel delivered in the preceding time  
21 period, and require the State to remit a payment to the tribe within 30 days of receiving  
22 the invoice. *See* Suquamish Fuel Compact, § 4.3.

23           22. In exchange for the payments, some of the “Fuel Tax Agreements” include  
24 the following types of provisions: 1) the tribe must purchase all motor vehicle fuel and  
25 special fuel only from persons licensed in Washington State; 2) the tribe agrees to

1 purchase fuel on which applicable State taxes have been paid; 3) the tribe must pass  
2 ordinances requiring other fuel retailers within its jurisdiction to purchase all motor  
3 vehicle fuel and special fuel only from persons licensed in Washington State; 4) the tribe  
4 agrees to pass on to retail customers the State tax included in the price of fuel; 5) the tribe  
5 must expend fuel tax proceeds on planning, construction and maintenance of roads,  
6 bridges, boat ramps, transit services and facilities; transportation planning; police services;  
7 and other highway-related purposes; 6) the tribe must arrange an annual audit, or at such  
8 other interval that is mutually agreeable to the parties, demonstrating the tribe is  
9 complying with the terms of the agreements; and 7) the tribe must abide by specific  
10 records and invoice requirements. *See, e.g.*, Suquamish Fuel Compact, §§ 4.2, 4.6, 4.8;  
11 Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel Between the  
12 Nooksack Indian Tribe and the State of Washington (“Nooksack Fuel Compact”), §§  
13 4.2.A., 4.2.B., 4.7, 4.9 (Exhibit 3); *see also* RCW 82.36.450(3) and RCW 82.38.310(3).

14 23. Upon information and belief, in 2008, approximately \$14.3 million was  
15 disbursed to the tribes from the Motor Vehicle Fund (RCW 82.36.410; RCW 82.38.290);  
16 in 2009, approximately \$23 million was disbursed to the tribes from the Motor Vehicle  
17 Fund.

18 24. RCW 82.36.450(4), enacted as part of Senate Bill 5272, provides as  
19 follows: “Information from the tribe or tribal retailers received by the state or open to  
20 state review under the terms of an agreement shall be deemed to be personal information  
21 under RCW 42.56.230(3)(b) and exempt from public inspection and copying.” *See also*  
22 82.38.310(4). As a result of this provision, to date the manner in which tens of millions of  
23 dollars of revenue from the Motor Vehicle Fund is actually used and accounted for by the  
24 tribes is shielded from public scrutiny or oversight.

1 V. CONSTITUTIONAL VIOLATIONS

2 A. ARTICLE II, § 40 OF THE WASHINGTON CONSTITUTION

3 25. The Plaintiff repeats and re-alleges each of the foregoing allegations as  
4 though fully set forth herein.

5 26. Article II, § 40 of the Washington Constitution provides that any  
6 disbursements from the Motor Vehicle Fund must be exclusively for highway purposes:

7 All fees ... and all excise taxes collected by the State of Washington on the  
8 sale, distribution or use of motor vehicle fuel and all other state revenue  
9 intended to be used for highway purposes, shall be paid into the state  
10 treasury and placed in a special fund to be used exclusively for highway  
11 purposes. Such highway purposes shall be construed to include the  
12 following: (a) The necessary operating, engineering and legal expenses  
13 connected with the administration of public highways, county roads and  
14 city streets; (b) The construction, reconstruction, maintenance, repair, and  
15 betterment of public highways, county roads, bridges and city streets;  
16 including the cost and expense of (1) acquisition of rights-of-way, (2)  
17 installing, maintaining and operating traffic signs and signal lights, (3)  
18 policing by the state of public highways, (4) operation of movable span  
19 bridges, (5) operation of ferries which are a part of any public highway,  
20 county road, or city street; (c) The payment or refunding of any obligation  
21 of the State of Washington, or any political subdivision thereof, for which  
22 any of the revenues described in section 1 may have been legally pledged  
23 prior to the effective date of this act; (d) Refunds authorized by law for  
24 taxes paid on motor vehicle fuels; (e) The cost of collection of any  
25 revenues described in this section: *Provided*, That this section shall not be  
construed to include revenue from general or special taxes or excises not  
levied primarily for highway purposes ....

20 27. Generally, disbursements from the Motor Vehicle Fund to Indian tribes  
21 violate Article II, § 40 because the disbursements are not exclusively for the construction,  
22 operation, maintenance or betterment of the State's public highway system.

23 28. More specifically, even if disbursements from the Motor Vehicle Fund  
24 could be made to Indian tribes, the tribes are not using the disbursements for activities or  
25 projects within the confines of "exclusively for highway purposes."

1           29. Information is limited because it is shielded by statute (RCW 82.36.450(4),  
2 RCW 82.38.310(4)), but the tribes have disclosed some non-highway purposes to which  
3 the State's disbursements from the Motor Vehicle Fund to Indian tribes have been applied.  
4 Upon information and belief, some of the disbursements have been used for trail  
5 construction, police services unrelated to highways and traffic enforcement, and park and  
6 greenbelt development.

7           30. Upon information and belief, surveys of retail fuel pricing also suggest use  
8 of the Motor Vehicle Fund disbursements to reduce fuel prices—an additional non-  
9 highway purpose. These surveys show that prices are substantially lower (in the range of  
10 5 cents or more per gallon) at tribal retailers compared with similarly branded non-tribal  
11 retailers in the same region.

12           31. The State attempts to characterize the disbursements from the Motor  
13 Vehicle Fund to the Indian tribes as "refunds" to avoid the restrictions of Article II, § 40.  
14 The disbursements are not refunds, however, because they (a) are not authorized by law  
15 (Article II, § 40(d)) and (b) do not reflect repayments of taxes actually paid.

16           32. First, no state statute authorizes tribes to receive "refunds" of the motor  
17 vehicle or special fuel taxes paid into the Motor Vehicle Fund.

18           33. Second, the tribes ultimately do not pay, nor incur liability for, motor  
19 vehicle or special fuel taxes. Therefore, categorizing the disbursements from the Motor  
20 Vehicle Fund as a refund ignores the tribes' lack of payment upon which the  
21 repayment/refund can be based. Furthermore, upon information and belief, categorizing  
22 the disbursements from the Motor Vehicle Fund as a refund also ignores that at least some  
23 retail customers of tribal fuel retailers qualify for and obtain refunds for the taxes paid on  
24 the same retail purchases for which the State is making disbursements from the Motor  
25 Vehicle Fund to the tribes. For example, interstate truckers receive a 100% refund on



1 Washington motor vehicle and special fuel taxes for fuel purchased in Washington but  
2 consumed outside of the state. The interstate truckers receive this full refund regardless of  
3 whether the fuel is purchased from a tribal or non-tribal fuel retailer. *See* Department of  
4 Licensing, *Policy Change – Fuel Tax Paid Credit for Fuel Purchased in Washington*  
5 *State*, Dec. 17, 2009 (Exhibit 4) (available at [http://www.dol.wa.gov/vehicleregistration/](http://www.dol.wa.gov/vehicleregistration/IFTATribalFuelPurchases.pdf)  
6 [IFTATribalFuelPurchases.pdf](http://www.dol.wa.gov/vehicleregistration/IFTATribalFuelPurchases.pdf)); Department of Licensing, *Tribal Fuel Stations – 25%*  
7 *Fuel Tax Credit*, July 15, 2009 (Exhibit 5) (available at [http://www.dol.wa.gov/](http://www.dol.wa.gov/vehicleregistration/IFTANotification.pdf)  
8 [vehicleregistration/IFTANotification.pdf](http://www.dol.wa.gov/vehicleregistration/IFTANotification.pdf)).

9 34. By granting the tribes “refunds” based upon tax revenue that they never  
10 paid nor had legal liability for, and which are not specifically authorized by law,  
11 Defendants have violated, and continue to violate, Article II, § 40(d) of the Washington  
12 Constitution.

13 35. Finally, Article II, § 40 by its terms requires some form of judicial review  
14 available to ensure disbursements from the Motor Vehicle Fund are actually used  
15 “exclusively for highway purposes”; if there is no opportunity for judicial review, the  
16 constitutional provision is unenforceable and illusory.

17 36. To the extent the State contends RCW 82.36.450(4) and RCW  
18 82.38.310(4) preclude disclosure and scrutiny of the specific manner in which Article II,  
19 § 40 Motor Vehicle Fund disbursements to tribes are utilized, these statutes are  
20 unconstitutional as applied.

21 **B. ARTICLE VII, § 5 OF THE WASHINGTON CONSTITUTION**

22 37. The Plaintiff repeats and re-alleges each of the foregoing allegations as  
23 though fully set forth herein.

24 38. Disbursements to the tribes from the Motor Vehicle Fund violate  
25 Article VII, § 5 of the Washington Constitution which provides: “No tax shall be levied

1 except in pursuance of law; and every law imposing a tax shall state distinctly the object  
2 of the same to which only it shall be applied.”

3 39. Washington State motor vehicle fuel and special fuel taxes are raised  
4 “exclusively for highway purposes” and are held in the public treasury until expended for  
5 such purposes.

6 40. Here, the applicable statutes state the object of the tax (motor vehicle fuel  
7 and special fuel licensees) and specify how that tax will be applied to that object: “All  
8 moneys collected by the director shall be transmitted forthwith to the state treasurer,  
9 together with a statement showing whence the moneys were derived, and shall be by him  
10 credited to the motor vehicle fund.” RCW 82.36.410; *see also* RCW 82.38.290, RCW  
11 46.68.090.

12 41. In the case of payments to the tribes under the “Fuel Tax Agreements”  
13 described above, motor vehicle fuel and special fuel taxes are not being used for their  
14 stated object, but are being diverted for another purpose. Many of the “Fuel Tax  
15 Agreements” state that the funds will be used for enhancement of tribal infrastructure,  
16 although documentation concerning the actual use of the funds is withheld from public  
17 scrutiny.

18 42. Article VII, § 5 of the Washington Constitution prohibits the application of  
19 tax revenue to a purpose other than that stated and, therefore, prohibits the disbursements  
20 described herein.

21 **C. ARTICLE I, § 12 OF THE WASHINGTON CONSTITUTION**

22 43. The Plaintiff repeats and re-alleges each of the foregoing allegations as  
23 though fully set forth herein.

24 44. Article I, § 12 of the Washington Constitution provides:  
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No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

45. State disbursements from the Motor Vehicle Fund to tribes in violation of Article II, § 40 unlawfully deny AUTO and its members rights, privileges, immunities and the protections of equality afforded by Article I, § 12.

**D. ARTICLE II, § 1 OF THE WASHINGTON CONSTITUTION**

46. The Plaintiff repeats and re-alleges each of the foregoing allegations as though fully set forth herein.

47. Article II, § 1 of the Washington Constitution vests legislative authority in the Legislature.

48. Under the delegation doctrine, the Legislature may delegate limited law-making authority to an administrative agency if two requirements are met: (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.

49. RCW 82.36.450 and RCW 82.38.310 are an unconstitutional delegation of legislative power.

50. RCW 82.36.450 and RCW 82.38.310 fail to provide sufficient standards or guidelines defining the Governor's and Director's authority to enter into agreements with tribes regarding motor vehicle fuel and special fuel taxes.

51. RCW 82.36.450 and RCW 82.38.310 also fail to provide procedural safeguards to control arbitrary administrative action and administrative abuse of discretionary power.





1           64.     Alternatively, 1) Washington Constitution Article VII, § 5 requires that  
2 “every law imposing a tax state distinctly the object of the same to which only it shall be  
3 applied,” 2) RCW 82.36.410 and RCW 82.38.290 provide that the motor vehicle fuel tax  
4 is to be “credited to the motor vehicle fund,” and 3) Article II, § 40 provides that such  
5 fund is to be “used exclusively for highway purposes”; for reasons including but not  
6 limited to those set out herein, the Defendant Governor and Defendant Director are acting  
7 in excess of their jurisdiction under Article VII, § 5, Article II, § 40, RCW 82.36.410 and  
8 RCW 82.38.290 by authorizing disbursements to tribes from the Motor Vehicle Fund.

9           65.     Alternatively, Washington Constitution Article I, § 12 provides that “No  
10 law shall be passed granting to any citizen, class of citizens, or corporation other than  
11 municipal, privileges or immunities which upon the same terms shall not equally belong  
12 to all citizens, or corporations.” For reasons including but not limited to those set out  
13 herein, the Defendant Governor and Defendant Director are acting in excess of their  
14 jurisdiction by authorizing disbursements to tribes from the Motor Vehicle Fund that  
15 violate Article I, § 12.

16           66.     Alternatively, Washington Constitution Article II, § 1 vests legislative  
17 authority in the Legislature; for reasons including but not limited to those set out herein,  
18 the Defendant Governor and Defendant Director are acting in excess of their jurisdiction  
19 by authorizing disbursements to tribes from the Motor Vehicle Fund pursuant to RCW  
20 82.36.450 and RCW 82.38.310, which are unconstitutional delegations of legislative  
21 authority.

22           67.     For reasons including but not limited to those set out herein, Plaintiff has  
23 no plain, speedy, and adequate remedy in the ordinary course of law.

24           68.     Plaintiff is beneficially interested in the granting of the requested writ of  
25 prohibition beyond that interest shared in common with other citizens.

