NO. 85661-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellant,

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,

Respondents.

AMICUS BRIEF OF WASHINGTON OIL MARKETERS ASSOCIATION

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Amicus WOMA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

IDENTITY OF AMICUS

The Washington Oil Marketers Association ("WOMA") is a non-profit trade association of "marketers" selling petroleum fuels and related products and services in Washington. Marketers purchase fuel from suppliers and deliver it to retailers, including AUTO's members, who sell the fuel to consumers. Marketers are the second tier of Washington's four-tiered distribution chain. *See* ***Squaxin Island Tribe v. Stephens***, 400 F. Supp. 2d 1250, 1252 (W.D. Wash. 2005).

WOMA has approximately 80 individual and corporate members and more than 60 associate members. All WOMA members are marketers – about 50% are also in the retail business. Our membership represents more than 90% of the petroleum fuels sold in Washington State.

Under Washington's tax-at-the-rack system, marketers pay fuel taxes when they purchase fuel from suppliers. WOMA members thus pay a large portion of the total state fuel taxes on millions of gallons of petroleum fuel marketed each year.

INTEREST OF AMICUS

WOMA members are all too familiar with the issues in AUTO's appeal, the outcome of which will have broad implications

for WOMA members and their 10,000 employees throughout the State. We have long experienced what the local news is only now reporting – the State is remitting fuel taxes to the tribes and allowing the tribes to spend them on things other than "highway purposes," contrary to the Washington Constitution, article II, section 40 ("the 18th Amendment"). In many cases, the expenditures are not even related to transportation infrastructure, but rather to utilities, water, housing or parks.

The State's failure to comply affects the price at the pump. WOMA has witnessed first-hand tribal stations undercutting non-tribal competition by as much as $.12 on the gallon. This practice would be impossible if tribes were passing the gas tax on to tribal retailers, to in turn pass it on to consumers – as is required. In short, the outcome of AUTO's claims could significantly impact our members' rights to earn a living in a fair marketplace.

But this matter affects more than just AUTO, WOMA, and every marketer and retailer in the State. It affects the statewide interest in safe, well-maintained roads, and an adequately funded transportation budget. This is about a government that abides by our Constitution, and the governmental transparency necessary to

provide the checks and balances fundamental to our tripartite system of government.

ISSUES ADDRESSED BY AMICUS

(1) Should this Court accept direct review?

(2) Did the trial court erroneously conclude that the tribes are immune from suit for declaratory, injunctive, and prospective relief?

(3) Did the trial court err in ruling that the tribes are necessary and indispensible parties?

STATEMENT OF THE CASE

Fuel taxes the State remits to the tribes are being spent on a variety of non-highway purposes, including decreasing fuel prices at tribal stations. These unconstitutional expenditures are well-documented even though the State does not require tribes to report how they spend remitted fuel taxes, assuring the tribes that expenditure reports are purely "voluntary." BA 7-9; CP 285, 291. It is impossible to know the full extent of the damage being done – even if tribes voluntarily audit their fuel-tax expenditures, the audits are exempt from the Public Records Act (PRA). BA 7-8; RCWs 82.36.450(4) & 82.38.310(4).

But the State is not even auditing the tribes. For 2008, the State received audits from only four of the 19 tribes under fuel-remittance compacts. CP 291. When asked to explain, the

Department of Licensing (DOL) responded that the tribes provided information on "how the tribes utilized fuel tax proceeds . . . on a voluntary basis." *Id.* Nothing about the statutory-audit requirement is "voluntary." When asked why it did not demand audits from all tribes, DOL replied it was "working with the individual tribes." *Id.*

The State is not required to remit fuel taxes to the tribes. BA 5-6 (citing ***Wagnon v. Prairie Band Potawatomi Nation***, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) (holding that a Kansas fuel-tax regime, much like Washington's, did not offend tribal sovereign immunity)). The State estimates that DOL remitted $12,100,000 to the tribes for 2005 through 2007, and $26,700,000 for 2007 through 2009. BA 10. The State projects that DOL will remit $39,700,000 for 2009 through 2011. *Id.*

But even these estimates are understated. BA 10-11 n.6. While the State is unnecessarily remitting tens of millions of dollars to the tribes every year, the Washington State Transportation Commission estimates that the transportation budget will have a $175-to-$200 billion shortfall over the next 20 years. BA 11.

ARGUMENT

A. This Court should accept direct review.

Direct review is appropriate where the case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination," or "[a]n action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus." RAP 4.2(a)(4) & (5). AUTO sought declaratory and injunctive relief, satisfying RAP 4.2(a)(5). It is almost as obvious that this matter satisfies RAP 4.2(a)(4).

Every Washington citizen has an interest in preserving fuel taxes for their dedicated purpose to ensure that the State is not contributing to even higher gas prices and an even greater transportation-budget shortfall. The public also has a fundamental interesting in checking the State's dereliction of duty.

The State has an 18th Amendment duty to use fuel taxes for "highway purposes":

> All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. . . .

RCWs 82.36.450 and 82.38.310 authorize the Governor to enter fuel-tax-remittance agreements with the tribes, but do not repeal the six compacts entered before 2007. RCWs 82.36.450(1) & (2), 82.38.310(1) & (2). The 18th Amendment is the only check on the State's pre-2007 fuel-tax-remittance agreements.

RCW 82.36.450 and 82.38.310 provide that compacts entered after 2007 must provide that the tribes will spend funds on defined "highway-related purposes," and must include audit provisions or a similar mechanism to ensure that tribes are doing so. RCWs 82.36.450(3)(b) & (c), 82.38.310(3)(b) & (c). The tribes "must" deliver compliance reports to DOL. *Id.* at § (c). But as noted above, the State simply is not auditing the tribes. CP 291.

Making matters worse, RCWs 82.36.450(4) and 82.38.310(4) deem any information the State receives from the tribes "personal information" under RCW 42.56.230(3)(b), exempt from the PRA. While the tip of the iceberg reveals that the State is plainly violating the 18th Amendment and the statues, insulating the audits from the PRA hides the full extent of the State's constitutional disregard. This flies in the face of the essential purpose of the PRA to enable Washington citizens to oversee the instruments they have created. RCW 42.56.030.

Audits plainly are not "personal information" as defined by RCW 42.56.230(3)(b) (emphasis added):

> The following personal information is exempt from public inspection and copying under this chapter:
>
> (3) Information required of **any taxpayer** in connection with the assessment or collection of any tax if the disclosure of the information to other persons would: . . . (b) violate **the taxpayer's** right to privacy or result in unfair competitive disadvantage to the taxpayer[.]

The tribes are not "taxpayer[s]" – the whole point of the tax-at-the-rack system is that the tax is levied off-reservation on non-tribal members. BA 4-5. As such, how the tribes spend remitted fuel taxes is not "the assessment or collection of" the fuel tax. RCW 42.56.230(3)(b) does not apply for these reasons alone.

In any event, there is no "right to privacy" in how fuel taxes imposed on the public are used. RCW 42.56.230(3)(b). The 18th Amendment is both an explicit spending clause and an explicit limitation on the State's spending authority. Transparency is thus essential to the 18th Amendment, so the State may not shield its fuel-tax expenditures from the public. The State cannot avoid transparency by funneling the remitted taxes through the tribes. "Privacy" may not hide unconstitutional spending of taxpayer dollars.

This matter is urgent and requires this Court's prompt and ultimate determination. RAP 4.2(a)(4). Tribes will continue put Washington citizens out of business with their anti-competitive pricing. And the State will indeed have a $175-to-$200 billion transportation-budget shortfall – or worse – if it continues to give away over $20 million each year to the tribes.

In short, it is beyond dispute that the State is violating the 18th Amendment and RCWs 82.36.450 and 82.38.310. The Legislature is well aware of the State's unconstitutional expenditures, but is apparently doing nothing about it. The only question is whether this Court will do anything to check its two coequal branches.

B. Tribal sovereign immunity does not apply in suits seeking declaratory, injunctive or prospective relief.

WOMA agrees with AUTO's argument that the trial court could fashion alternative relief by joining the tribal officers who signed and/or enforced the compacts. CR 19(b); BA 26-32. WOMA also agrees that the trial court erroneously denied AUTO's motion to amend its complaint to add tribal officers. BA 41-43. WOMA writes to add that, had the trial court simply allowed an amendment (which are normally liberally granted), it would not have

had to reach CR 19: tribal sovereign immunity does not apply in suits seeking solely declaratory, injunctive, or prospective relief.

The Court of Appeals most recently addressed tribal sovereign immunity in ***Mudarri v. State***, 147 Wn. App. 590, 196 P.3d 153 (2008), *rev. denied*, 166 Wn.2d 1003 (2009) and ***Matheson v. Gregoire***, 139 Wn. App. 624, 161 P.3d 486 (2007) *rev. denied*, 163 Wn.2d 1020 (2008). Before analyzing whether the tribes were necessary and indispensible parties, the appellate court analyzed whether sovereign immunity even applied. ***Mudarri***, 147 Wn. App. at 602-04; ***Matheson***, 139 Wn. App. at 632-33. If not, then the court need not reach CR 19.

In ***Matheson***, the appellate court noted two lines of cases addressing important exceptions to tribal sovereign immunity: (a) "tribal immunity does not protect tribes from declaratory and injunctive relief"; and (b) "[i]n cases seeking merely prospective relief, sovereign immunity does not extend to tribal officials acting pursuant to an unconstitutional statute." 139 Wn. App. at 632-33 (citing, *inter alia*, ***Kiowa Tribe of Okla. v. Mfg. Techs., Inc.***, 523 U.S. 751, 754-55, 760, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998); ***Comstock Oil & Gas Inc. v. Ala. & Coushatta Indian Tribes of Tex.***, 261 F.3d 567, 571-72 (5th Cir. 2001); ***Burlington N. R.R. v.***

Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991), *overruled on other grounds by* ***Big Horn Cy. Electric Coop., Inc. v. Adams***, 219 F.3d 944 (9th Cir. 2000)). The Fifth and Ninth Circuits correctly held that tribal sovereign immunity should not extend further than state sovereign immunity. ***Comstock***, 261 F.3d at 570 (citing ***TTEA v. Ysleta Del Sur Pueblo***, 181 F.3d 676, 680-81 (5th Cir. 1999)); ***Blackfeet Tribe***, 924 F.2d at 901-02.[1]

In ***Comstock***, the tribe sought to have mineral leases declared void in its new tribal court, and Comstock Oil sought a declaratory judgment in federal court that the tribal court was "nonexistent" and that the leases were valid. 261 F.3d at 569. The Fifth Circuit held that the tribal council members were not immune, where Comstock sought declaratory relief only – not damages. *Id.* at 570-72.

---

[1] The State ignores ***Comstock*** and ***TTEA***, but attempts to distinguish ***Blackfeet Tribe*** on the ground that it included a federal claim. BR 33-34. Yet the State cites ***Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.***, in which the Supreme Court held that tribal members were not immune from suit in State court for violating State conservation laws. BR 36-37 (citing 433 U.S. 165, 171, 97 S. Ct. 2616, 53 L E.d 2d 667 (1977)). In any event, the point is that the appellate court has already recognized two exceptions to tribal sovereign immunity. ***Mudarri***, 147 Wn. App. at 602-04; ***Matheson***, 139 Wn. App. at 632-33. This Court should accept review and determine whether either exception applies here.

The ***Comstock*** court simply followed its prior decision in ***TTEA***, in which TTEA, who had a contract with the tribe to manage a smoke shop on tribal property, sought injunctive relief in federal court to stop the tribe from continuing to prosecute in tribal court its claims that the contract was invalid. 261 F.3d at 570-72 (citing ***TTEA***, 181 F.3d at 679-81). In holding that tribal immunity does not bar claims for declaratory or injunctive relief, ***TTEA*** relied on ***Santa Clara Pueblo***, where the U.S. Supreme Court held that a tribal governor was not immune from a suit seeking declaratory and injunctive relief to stop enforcement of a tribal ordinance. ***TTEA***, 181 F.3d at 680-81 (*citing* ***Santa Clara Pueblo v. Martinez***, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) *citing* ***Puyallup Tribe***, 433 U.S. at 171-720). ***TTEA*** reasoned that the tribes should not have a broader immunity than the States:

> The distinction between a suit for damages and one for declaratory or injunctive relief is eminently sensible . . . State sovereign immunity does not preclude declaratory or injunctive relief against state officials. *See* ***Ex Parte Young***, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity. *Cf.* ***Seminole Tribe v. Florida***, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). In any event, ***Santa Clara Pueblo*** controls. Thus, while the district court correctly dismissed the damages claim based on sovereign immunity, tribal immunity did not support its

> order dismissing the actions seeking declaratory and injunctive relief.

TTEA, 181 F.3d at 680-81.

In ***Blackfeet Tribe***, Burlington Northern sued the tribes and various tribal officials, seeking declaratory and injunctive relief to prohibit the tribes from taxing Burlington Northern's on-reservation rights of way. 924 F.2d at 900-01. The Ninth Circuit held that tribal sovereign immunity did not bar the suit, following much the same logic – and precedent – as in ***Comstock*** and ***TTEA***:

> But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. . . . ***Ex parte Young***, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908). No reason has been suggested for not applying this rule to tribal officials, and the Supreme Court suggested its applicability in ***Santa Clara Pueblo***, 436 U.S. at 59. We strongly implied, without deciding, that ***Ex parte Young*** does apply to tribal officials in ***Chemehuevi Indian Tribe v. Calif. Bd. of Equalization***, 757 F.2d 1047, 1051-52 (9th Cir.), *rev'd. in part on other grounds*, 474 U.S. 9, 88 L. Ed. 2d 9, 106 S. Ct. 289 (1985) and ***California v. Harvier***, 700 F.2d 1217, 1218-20, 1220 n.1 (9th Cir. 1983). We now reach the issue, and conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.

Blackfeet Tribe, 924 F.2d at 901.

In short, trial officials are not immune from suit where, as here, the relief sought is solely declaratory, injunctive, or prospective. The ***Matheson*** court concluded that these exceptions

could not apply there because Matheson sought more than prospective injunctive relief, but they are certainly applicable here. 139 Wn. App. at 632-33.

C. Tribal sovereign immunity does not and cannot shield the State from causes of action aimed at ensuring compliance with Washington's Constitution.

WOMA adopts AUTO's arguments that the tribes are not indispensable parties. BA 14-37. In particular, WOMA agrees that the tribes' financial interest in receiving remitted fuel taxes is insufficient to make them necessary parties. BA 16-21. WOMA writes to expand on AUTO's assertion that the tribes have no legally protected interest in the State's failure to abide by the Constitution. BA 18.

A trial court undertakes a two-part analysis to determine whether a party is indispensable under CR 19. ***Gildon v. Simon Prop. Group, Inc.***, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006). The court must first decide whether a party is necessary. ***Gildon***, 158 Wn.2d at 494-95 (citing ***Crosby v. Spokane Cnty.***, 137 Wn.2d 296, 306, 971 P.2d 32 (1999)); CR 19(a). A party is necessary if its absence would (1) prevent the trial court from affording complete relief to existing parties; or (2) impair that party's interest. ***Coastal***

Bldg. Corp. v. City of Seattle, 65 Wn. App. 1, 5, 828 P.2d 7 (1992); CR 19(a).

If a necessary party cannot be joined, then "the court must determine whether in 'equity and good conscience' the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable." ***Gildon,*** 158 Wn.2d at 495 (quoting ***Crosby***, 137 Wn.2d at 306-07; CR 19(b)). Dismissal for failure to join a party is a "drastic remedy" that courts should employ sparingly, such as when a defect cannot be cured. ***Gildon***, 158 Wn. 2d at 494.

1. The tribes are not indispensible parties.

The tribes are not necessary parties for all the reasons discussed in AUTO's brief. But assuming *arguendo* the tribes are necessary parties who cannot be joined, the trial court erroneously dismissed AUTO's case under CR 19(b)'s four-part balancing test for determining whether "equity and good conscience" demand that a case proceed absent a necessary party:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). This inquiry is "heavily influenced by the facts and circumstances of individual cases." ***Gildon***, 158 Wn.2d at 495 (internal quotations omitted). The party seeking dismissal bears the burden of proof. *Id.*

As mentioned above, the appellate court most recently addressed whether immune tribes were necessary and indispensible parties in ***Mudarri*** and ***Matheson***, *supra*. Both cases are factually distinguishable because those plaintiffs directly attacked the compacts: Mudarri sought to void gaming compacts so that he could sell scratch tickets at his non-tribal casino. ***Mudarri***, 147 Wn. App. at 597-99. Matheson sued his Tribe and the State to void cigarette-tax compacts, so that he would not have to pay cigarette taxes the tribe imposed. ***Matheson***, 139 Wn. App. at 628. Also unlike AUTO, Matheson sought damages. *Id.*

Mudarri provides little insight here, as the appellate court summarily considered only the third factor – whether a judgment rendered in the tribe's absence would be adequate. 147 Wn. App. at 605. The appellate court held that since the Tribe is immune, "the trial court cannot render a judgment on Mudarri's challenges to the State-Tribe Compact" absent the tribe, and so could not adequately address Mudarri's claims. *Id.*

Matheson addressed all four CR 19(b) factors. 139 Wn. App. at 635-36. Its treatment of the factors is more salient here, particularly in light of the facts of this case.

i. A judgment that the State must stop violating the Constitution would not prejudice the tribes.

Under the first factor – the extent to which the judgment would prejudice the tribes – the appellate court in ***Matheson*** held that the Tribe would be greatly prejudiced by a judgment entered in its absence, where the compact would "essentially disintegrate" if the court were to grant the relief requested. *Id.* at 635. The same is not true here. Unlike Matheson, AUTO does not ask the court to invalidate the compacts – it asks the court to stop the State's unconstitutional acts. BA 25-26. If the State can perform without violating the Constitution, then the compacts need not be affected. BA 21, 25-26, 32. If not, the compacts provide for reformation. BA 26.

ii. The trial court could lessen any prejudice to the tribes by shaping the relief to require nothing more than compliance with the Constitution and/or the compacts.

As to the second factor – whether the court could fashion a remedy that would not prejudice the tribes – the appellate court held that granting relief on any of Matheson's claims would

jeopardize the compacts. 139 Wn. App. at 635. Here, however, it is entirely possible for the court to shape relief that has little, if any, direct effect on the compacts. BA 32.

WOMA adopts AUTO's argument that the court could shape relief that would not prejudice the tribes by joining the tribal members who signed the compacts. BA 26-32. The court could also lesson any prejudice to the tribes by simply declaring which State acts are unconstitutional and enjoining the State from continuing such acts. BA 32. For example, the court could require the State to limit the use of fuel taxes to highway-related purposes. This would have little if any effect on the compacts, which require the tribes to limit remitted-fuel-tax spending to "[p]lanning, construction, and maintenance of roads, bridges, boat ramps; transit services and facilities, transportation planning; police services; and other highway-related purposes." CP 257, 267.

At a minimum, the court could compel the State to comply with the compacts. Requiring the State to comply with the compacts could not possibly offend the tribes – so could not require their presence. It is axiomatic that the tribe's would-be interest must be a "legally protected" interest. ***Wilbur v. Locke***, 423 F.3d 1101, 1112 (9th Cir. 2005), *overruled on other grounds*, ***Levin v.***

Commerce Energy, Inc., __ U.S. __, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010). The tribes have no legally protected interest in violating the compacts. *Id.*

iii. A judgment requiring the State to comply with the 18th Amendment and/or to enforce the compacts would be adequate.

The ***Matheson*** court found that the third factor – whether a judgment rendered in the tribes' absence would be adequate – favored finding that the tribe was indispensible, where no remedy short of dissolving the compact would be adequate to address Matheson's concerns. 139 Wn. App. at 636. Unlike Matheson, AUTO does not ask to dissolve the compacts. Much of AUTO's – and WOMA's – concern could be alleviated by a judgment simply compelling the State to follow the 18th Amendment, *i.e.*, ensure that the fuel taxes it remits to the tribes are going to highway purposes.

And AUTO and WOMA would benefit from a judgment requiring the State to comply with the compacts. If the State regulated appropriately, then tribal gas stations could not be undercutting Washington retail competition so unfairly.

iv. There is no other remedy for AUTO (or WOMA or Washington's citizens) if the trial court dismisses AUTO's action for non-joinder.

Where there is no alternate forum, the trial court must be "extra cautious" before dismissing a suit for non-joinder. ***Mudarri***, 147 Wn. App. at 605 n.14. This provision is currently given mere lip service where tribes are concerned.

As in ***Matheson***, the fourth factor – whether dismissal will deprive AUTO of any judicial remedy – "weighs heavily" in AUTO's favor. 139 Wn. App. at 636. But in ***Matheson***, the appellate court summarily concluded that the tribes' interest in sovereign immunity overcomes the lack of an alternative remedy. *Id.* This is an additional reason for this Court to accept direct review – this Court has not yet addressed whether sovereign immunity will trump the lack of an alternate remedy.

The tribes' immunity should not carry the day under the unique facts of this case. ***Gildon***, 158 Wn.2d at 495 (CR 19 analysis is "heavily influenced by the facts and circumstances of individual cases"). Directly violating our Constitution, the State is giving fuel taxes to the tribes with little if any oversight as to how the tribes choose to spend the remitted fuel taxes. This is depleting the already inadequate transportation budget and hurting

Washington businesses. The interests involved here surpass the interests in ***Matheson*** (and ***Mudarri***) in quality and scope.

And unlike ***Matheson***, the first three factors do not heavily favor dismissal for non-joinder.[2] As discussed above, AUTO does not ask to void the compacts – the trial court could grant adequate relief without prejudicing the tribes, passing only on the constitutionality of the State's actions – not on the compacts.

In short, immunity cannot always trump the fourth factor. The tribes are not necessary parties here, but even if they were, the tribes are not indispensible.

CONCLUSION

For the reasons stated above, this Court should accept review, reverse, and remand for trial.

RESPECTFULLY SUBMITTED this 6th day of July, 2011.

MASTERS LAW GROUP, P.L.L.C.

Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

[2] Recall that the appellate court discussed only the third factor in ***Mudarri***. 147 Wn. App. at 605.

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **AMICUS BRIEF of WASHINGTON OIL MARKETERS ASSOCIATION** postage prepaid, via U.S. mail on the 6th day of July 2011, to the following counsel of record at the following addresses:

Philip A. Talmadge
Sidney Tribe
Talmadge Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188

Todd R. Bowers, Senior Counsel
Attorney General of Washington –CJD
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188

Rene D. Tomisser, Senior Counsel
Attorney General of Washington
Torts Division
P.O. Box 40126
Olympia, WA 98504-0929

Kenneth W. Masters, WSBA 22278