

2021

Tribal Fuel Tax Agreement Report

REPORTING FOR 2020

Background

In 1994, Washington state and two tribes entered into separate Consent Decrees to settle litigation in the U.S. District Court for the Eastern District of Washington. These two tribes, the Confederated Tribes of the Colville Nation, and the Yakama Indian Nation, disputed the state's authority to impose the fuel tax upon the tribe or tribal members. The Consent Decrees set up systems to split fuel tax revenues with these tribal governments.

In 1995, the state Legislature recognized the potential for conflict over fuel taxes on fuel sold at tribal stations and enacted Substitute House Bill 1271. The new law gave the Department of Licensing (DOL) the authority to enter into an agreement with any federally recognized Indian tribe regarding the taxation of fuel on the reservation. In 1999, DOL began entering into agreements where fuel tax refunds were made to tribes based on a formula.

A lawsuit was filed in late 2003 in U.S. District Court by the Squaxin Island Tribe and Swinomish Indian Tribal Community. This suit resulted in a ruling by Judge Thomas Zilly on January 5, 2006, that held that under Washington's fuel tax structure these two tribes were exempt from paying state fuel tax on fuel delivered to their tribal stations. The basis of Judge Zilly's ruling stemmed from long-standing federal case law that prohibits states from enforcing its taxes on a Tribe or its members for sales made within Indian Country absent specific Congressional delegated authority.

Following the ruling, these two tribes negotiated an interim fuel tax agreement that included a one-year sunset clause. Under these agreements, tribal fuel stations received fuel with 100 percent of the fuel tax included in the price and they refunded 25 percent of the state fuel tax to the state.

Senate Bill 5272 was passed in 2007 moving the legal incidence of the tax to the fuel licensee, often referred to as "tax at the rack." The legislation provided a framework to improve cooperation and communication between DOL and the tribes regarding the taxation of fuel delivered onto the reservation or trust lands. The fuel tax agreements between the Squaxin Island and Swinomish Tribes provided the model agreement for DOL to negotiate with other tribes interested in a state fuel tax agreement, which were modified to require the tribes to pay the tax at the time of purchase, then DOL refunds 75 percent of the state fuel tax to the tribes. The state retains 25 percent of the state tax. This type of agreement is commonly referred to as a "75/25 agreement".

The director of DOL (by delegated authority from the Governor) may enter into motor vehicle fuel tax compact agreements with any federally recognized Indian Tribe located on a reservation in Washington. These agreements are limited to motor vehicle fuel (gasoline) and special fuel (diesel) taxes included in the price of fuel delivered to a tribally licensed retail station entirely owned by a tribe, tribal enterprise, or tribal member on reservation or trust land.

Types of Fuel Tax Agreements

There are two types of fuel tax agreements:

75 Percent Refund/25 Percent (75/25) State Tax Agreement – Tribes agree to purchase the fuel sold at tribally-owned retail stations from state-licensed fuel distributors with the state fuel tax included. Tribes report their purchases to DOL and receive 75 percent of the state fuel tax revenue collected as a refund and the state retains 25 percent as state tax.

Per Capita Agreement – A per capita agreement is a computational formula based on the average per capita consumption of gasoline by Washington state drivers (as determined by the Washington State Department of Transportation), the number of enrolled tribal members located on or near the reservation (reported by the tribe and commonly called the tribal service area) and the current state fuel tax rate. The result is an estimate of the amount of fuel tax most likely paid by tribal members purchasing fuel on the reservation. This formula provides an annual amount of fuel tax to be refunded to each tribe. All per capita agreements were entered into prior to the 2007 legislation.

Key Provisions of Fuel Tax Agreements as Authorized by RCW 82.38.310

- The tribe or the tribal retailer may acquire fuel only from persons or companies operating lawfully as a motor vehicle and/or special fuel distributor, supplier, importer or blender, or from a tribal distributor, supplier, importer, or blender.
- Under the 75/25 agreements, tribes may only expend fuel tax proceeds on planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; public safety; or other highway-related purposes.
- The 75/25 agreements must include provisions for audits or other means of ensuring compliance. Compliance reports must be delivered to the director of the Department of Licensing (DOL).
- Information from the tribe or tribal retailers received by the state or open to state review under the terms of an agreement are deemed to be personal information and exempt from public inspection and copying.
- The DOL must prepare and submit an annual report to the Legislature on the status of existing agreements and any ongoing negotiations with tribes.

Status of Current Fuel Tax Agreements

DOL is party to twenty-two 75/25 agreements and three per-capita fuel tax agreements.

Per Capita Agreements

- Makah Tribe
- Muckleshoot Indian Tribe
- Quileute Tribe

75/25 Agreements:

- Chehalis Tribal Enterprises
- Confederated Tribes of the Colville Reservation
- Cowlitz Indian Tribe
- Jamestown S’Klallam Tribe
- Kalispel Tribal Economic Authority
- Lower Elwha Klallam Tribe
- Lummi Indian Nation
- Nisqually Indian Tribe
- Nooksack Indian Tribe
- Port Gamble S’Klallam Tribe
- Puyallup Tribe of Indians
- Quinault Indian Nation
- Shoalwater Bay Indian Tribe
- Skokomish Indian Tribe
- Snoqualmie Indian Tribe
- Spokane Tribe of Indians
- Squaxin Island Tribe
- Stillaguamish Tribe of Indians
- The Suquamish Tribe
- Swinomish Tribe
- Tulalip Tribes
- Upper Skagit Indian Tribe

New Agreements, 75/25 Agreement Compliance, and Revenue

All 75/25 fuel tax agreements have audit requirements conducted by a third-party registered CPA firm. DOL confirms that all CPA audit firms performing tribal fuel tax audits are licensed and in good standing as required by state law.

The fuel tax revenue retained by Washington state for fuel purchased under the 75/25 agreements for the period of January 1, 2020, through December 31, 2020, is \$17.4 Million.

The annual refund for the per-capita and 75/25 agreements for the period of January 1, 2020, through December 31, 2020, is \$53.9 million.

U.S. Supreme Court Cougar Den Decision

In late 2013, DOL began issuing tax assessments against Cougar Den, Inc. (tribal member business) for fuel shipments made to retail fuel stations within the Yakama Reservation without payment of the state fuel tax. The assessment asserted that Cougar Den was unlawfully importing untaxed fuel from Oregon suppliers based on a fuel exporter license issued in Oregon and a tribal petroleum license issued by the Yakama Nation. Cougar Den appealed each assessment.

The appeal of the first assessments was heard in Yakima County Superior Court, which ruled in favor of Cougar Den in 2015. The judge held that the Yakama Treaty preempts Washington fuel taxes as applied to Cougar Den’s importation of fuel from Oregon. The state petitioned for direct review to the Washington Supreme Court, which accepted the case and ruled in favor of Cougar Den in March 2017.

The state petitioned for review to the U.S. Supreme Court, which accepted the case and ruled in favor of Cougar Den in March 2019. The U.S. Supreme Court opinion focused on the “right to travel” provision in the Treaty between the United States and the Yakama Nation. In June 2019, the Director of DOL issued a final order dismissing the prior tax assessments (\$46 million). With regard to Washington State tribes, the “right to travel” treaty provision is

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specific to the Yakama Nation and its members. Fuel tax requirements for businesses in Washington that are not owned by the Yakama Nation, or its members are unaffected by the opinion with regard to fuel tax requirements.