

# EXHIBIT 5

1 MICHAEL E. VINDING (SBN 178359)  
 2 BLAIR W. WILL (SBN 224929)  
 3 BRADY & VINDING  
 400 Capitol Mall, Suite 2640  
 4 Sacramento, CA 95814  
 Telephone: (916) 446-3400  
 Facsimile: (916) 446-7159  
 mvinding@bradyvinding.com  
 bwill@bradyvinding.com

6 Attorneys for Plaintiff  
 Salton Sea Venture, Inc.

**FILED**

AUG 01 2011

SUPERIOR COURT  
 COUNTY OF IMPERIAL  
 KRISTINE S. KUSSMAN, CLERK  
 BY                      DEPUTY

**G. MONTES**

8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
 9 **COUNTY OF IMPERIAL**

11 SALTON SEA VENTURE, INC., a  
 California corporation,

12 Plaintiff,

13 v.

14 ROBERT RAMSEY, an individual, and  
 15 FIRST AMERICAN PETROLEUM, an  
 unknown business entity, and DOES 1  
 through 30, inclusive,

17 Defendants.

CASE NO. ECU06547

MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 PLAINTIFF'S EX PARTE APPLICATION  
 FOR A TEMPORARY RESTRAINING  
 ORDER AND PRELIMINARY  
 INJUNCTION

DATE: August 9, 2011  
 TIME: 8:30 a.m.  
 DEPT: 9

BY FAX

19 **I. INTRODUCTION**

20 Plaintiff SALTON SEA VENTURE, INC., ("SSV" or "Plaintiff") is a corporation organized  
 21 and existing under the laws of the State of California, with a principal place of business at  
 22 2084 South Marina Drive, Salton City, California, in the County of Imperial. SSV owns and  
 23 operates a fuel station (gasoline and diesel motor fuel) and convenience store at the intersection of  
 24 highways State Route 22 and State Route 86 in Salton City, California. SSV's business is known as  
 25 the "ARCO Travel Center" or "Plaintiff's Fuel Station"

26 Defendant FIRST AMERICAN PETROLEUM ("FAP" or "Defendant") is a business entity  
 27 of unknown form with an office and/or place of business located at 3089 Norm Niver Road,  
 28 Thermal, California, in the County of Imperial. FAP's business at this location is a fuel station and

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY  
 RESTRAINING ORDER AND PRELIMINARY INJUNCTION

1 convenience store ("Defendants' Fuel Station"), which provides services similar to those available  
2 at SSV's gas station.

3 Defendants' Fuel Station and Plaintiff SSV's ARCO Travel Center are approximately six  
4 miles apart. Therefore, SSV and FAP service the same market.

5 The gravamen of SSV's Complaint is that FAP is using illegal practices which allow FAP to  
6 sell fuel at below-market prices. These illegal practices allow FAP to gain an unfair economic  
7 advantage with regard to SSV's competing business. FAP's illegal practices include (1) selling fuel  
8 at below FAP's cost to drive competing gas stations out of business; (2) importing fuel from  
9 Nevada which has a lower cost basis when ultimately sold in California because it does not comply  
10 with the gasoline formulations required by California law; (3) failing to pay California taxes  
11 (including the pre-payment of sales tax and excise taxes) on fuel imported from Nevada; and  
12 (4) failing to register with the California Secretary of State which is a requirement to do business in  
13 California.

14 FAP's illegal and unfair business practices directly cause SSV to suffer continuing grave  
15 economic damage on a daily basis. In addition, , as a result of Defendants' Fuel Station selling fuel  
16 below cost and an anti-competitive price, a prospective buyer has withdrawn the offer to purchase  
17 Plaintiff's Fuel Station. As a consequence, SSV hereby requests that the Court issue a temporary  
18 restraining order and preliminary injunction prohibiting FAP from engaging in its illegal and unfair  
19 business practices specifically including (a) selling fuel at below FAP's costs; (b) importing fuel  
20 from Nevada which does not comply with California law; (c) failing to pay California taxes on fuel  
21 imported from Nevada; and (d) operating a business within California in violation of the  
22 requirement that all businesses conducting business in California register with the California  
23 Secretary of State.

## 24 II. PROCEDURAL HISTORY

25 Plaintiff's Complaint alleges Defendants (1) sold fuel below cost, (2) failed to charge  
26 patrons taxes, (3) sold fuel that did not meet California's minimum standards for reformulated gas,  
27 (4) failed to register with the Secretary of State, (5) sold fuel at an anti-competitive price in order to  
28 put Plaintiff out of business, and (6) sold fuel an anti-competitive price resulting in the loss of sale

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION

BY FAS

1 of Plaintiff's business.<sup>1</sup> Due to the Defendants' continuing illegal activity that is daily causing grave  
 2 economic harm to the Plaintiff, Plaintiff requests that the Court grant the temporary relief sought  
 3 herein until such time as the Court may consider the merits of the Complaint. The requested  
 4 temporary relief consists of (1) a temporary restraining order pending a hearing on Plaintiff's  
 5 request for a preliminary injunction and (2) a preliminary injunction.

### 6 III. STATEMENT OF FACTS

7 Plaintiff SSV opened the ARCO Travel Center in the spring of 2009. Construction costs  
 8 were over eleven million dollars. The ARCO Travel Center is sited on a 4.5 acre parcel and  
 9 comprises an ARCO-branded gasoline and diesel filling station and a 10,000 square foot mini-mart  
 10 and convenience store. The ARCO Travel Center is one of the largest in California, which provides  
 11 SSV with significant purchasing power when it buys fuel and convenience store items in bulk.

12 Defendants' Fuel Station opened in approximately 2004. The fuel was originally purchased  
 13 fuel from wholesaler Sellers Petroleum, which is located in Imperial, California. By 2008, Sellers  
 14 Petroleum was owed approximately \$200,000 in unpaid fuel invoices and, as a consequence, Sellers  
 15 Petroleum ceased supplying fuel.

16 In June of 2009, Defendant FAP began selling fuel to Defendants' Fuel Station. From the  
 17 date Defendants' Fuel Station first opened in 2004, it was a branded Union 76 franchise. However,  
 18 the fuel FAP sold to Defendants' Fuel Station starting in June, 2009, was imported from Nevada  
 19 and was not branded "Union 76." When Union 76 discovered that Defendants' Fuel Station was  
 20 selling unbranded fuel, it withdrew the Union 76 franchise. Subsequently, on or about May 13,  
 21 2011, Defendant FAP took over all direct sales of fuel at Defendants' Fuel Station.

22 The fuel FAP presently sells at Defendants' Fuel Station originates in Clark County,  
 23 Nevada. The fuel is then imported into California and sold at Defendants' Fuel Station pumps.

#### 24 FAP's Below-Cost Sales:

25 FAP sells its fuel at below its cost, which is a violation of California law. (See, Business &  
 26 Professions Code § 17043.) For over a year, and through at least May 13, 2011, the advertised

27 <sup>1</sup> As noted in Exhibit 1 hereto, the former-potential buyer of Plaintiff's Fuel Station refused to conclude the purchase  
 28 due to Defendants' illegal acts of selling fuel below cost, failing to charge taxes and selling illegal fuel.

1 price of a gallon of regular unleaded gasoline at Defendants' Fuel Station has averaged thirty-four  
 2 cents below wholesale-market cost and the advertised price of a gallon of diesel has averaged  
 3 twenty-four cents below wholesale-market cost.

4 To cite one specific example, on May 13, 2011, Plaintiff SSV's cost for regular unleaded  
 5 gasoline was \$3.79 per gallon. The cost of diesel was \$3.99 per gallon. To be clear, this is the cost,  
 6 per gallon of fuel, which SSV had to pay to obtain fuel on the wholesale market. Even if SSV were  
 7 willing to lose money on every gallon of fuel sold at the ARCO Travel Center, SSV could not sell  
 8 fuel for less than SSV's cost because, under California law, businesses are prohibited by law from  
 9 selling a product at less than the business's cost. Nevertheless, on the same date (May 13, 2011),  
 10 Defendants' Fuel Station was selling a gallon of regular unleaded gasoline for \$3.55 per gallon and  
 11 \$3.80 per gallon for diesel, or approximately 20 cents less than SSV's cost-to-purchase fuel on the  
 12 wholesale market.

13 In sum, on May 13, 2011, as it had most days in the previous year and as it continues to do  
 14 presently, Defendants' Fuel Station was selling fuel at less than the wholesale cost of the fuel in an  
 15 effort to drive competing fuel vendors, such as SSV, out of business.

16 FAP's Failure to Pay Taxes and Fees on Fuel Imported Into California:

17 A business which owns motor fuel inventory at a fuel terminal, or owns motor fuel within  
 18 the bulk-transfer/distribution system, or imports fuel into California from outside the state, is  
 19 required to prepay sales tax to the California Board of Equalization ("BOE"). (See, Revenue &  
 20 Taxation Code §§ 7340, 7341, 7332, 7311, 60013, 60009, 60035, 60010.) Because FAP imports  
 21 motor fuel from Nevada, FAP is liable for prepayment of sales taxes to the BOE.

22 FAP does not prepay sales tax on fuel it sells at Defendants' Fuel Station.<sup>2</sup> Nor does FAP  
 23 pay the statutorily required underground storage fees of two cents per gallon, the Superfund fee of a  
 24 tenth of a cent per gallon, or the required excise tax and/or use tax on the fuel FAP sells at  
 25 Defendants' Fuel Station. In contrast, Plaintiff SSV is required to, and does, pay all applicable  
 26 taxes and fees on the fuel it sells at the ARCO Travel Center.

27 <sup>2</sup> To the extent that FAP in fact collects sales tax from customers on the sale of each gallon of motor fuel, this  
 28 additional revenue is booked as profit since FAP did not prepay those sales tax remittances to the BOE.

1        There is no legal excuse for the failure to remit taxes by Defendants' Fuel Station. As set  
 2        forth in BOE Tax Opinion Request No. 10-475 (attached hereto as Exhibit 2), persons who import  
 3        fuel into California must pay both the prepaid sales tax and excise taxes on the imported fuel. In  
 4        addition, retailers must collect and remit to the BOE use taxes on sales of gas and diesel fuel  
 5        whether it is sold to tribal members or non tribal members not residing on a tribe's reservation.  
 6        Applicable statutes and case-law are in accord with the BOE's determination.

7        Because FAP sales at Defendants' Fuel Station are to non-tribal members and/or tribal  
 8        members that do not reside on a reservation, FAP is required to pay and/or collect sales tax, use tax,  
 9        and other applicable fees on the sale of fuel at Defendants' Fuel Station. FAP has not done so, and  
 10       continues to fail to do so. FAP's failure to pay these taxes and/or fees has resulted in a loss of  
 11       revenue to the BOE in excess of three million dollars over the last several years. In addition, FAP's  
 12       failure to collect the required taxes and/or fees allows FAP to sell fuel at a lower rate than the rate at  
 13       which Plaintiff SSV may sell fuel, which constitutes an illegal competitive advantage, and profits,  
 14       over non-tribal fuel retailers such as SSV.

15       FAP's Sale of Motor Fuel That Does Not Meet California Standards:

16       California requires that fuel sold for use on California's roads meet certain requirements.  
 17       Once such requirement relates to the oxygen content of reformulated gasoline ("RFG"). Although  
 18       fuel with a lower oxygen content is less costly to produce, and thus lower cost when sold, fuel with  
 19       a lower minimum oxygen content is potentially damaging to the environment. As a consequence,  
 20       California Air Resources Board regulations require a minimum oxygen content for RFG sold in  
 21       California of five percent (5%). The fuel FAP imports from Nevada and sells to customers at  
 22       Defendants' Fuel Station contains three and a half percent oxygen content, which is the legal  
 23       minimum requirement in Clark County, Nevada, the point of origin of the fuel. RFG with three and  
 24       a half percent (3.5%) oxygen content has a lower production cost and is consequently less costly for  
 25       FAP to buy. But it does not meet the minimum requirement for RFG sold in California and is  
 26       therefore illegal to sell in California. Furthermore, the illegal sale of fuel with a lower cost-basis  
 27       allows FAP to gain an unfair economic advantage over legal fuel sellers such as Plaintiff SSV.

28       ///

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY  
 RESTRAINING ORDER AND PRELIMINARY INJUNCTION

1 FAP is Not Authorized to Conduct Business in California:

2 FAP has failed to register with the California Secretary of State and is therefore prohibited  
 3 from transacting intra-state business within the state. (See, Corporations Code §§ 2105, 15909.02,  
 4 16959 and 17451.) FAP's conduct of intra-state business in California allows FAP to gain an  
 5 unfair, illegal and improper economic advantage over registered businesses. This failure is an unfair  
 6 business practice. FAP is able to avoid oversight by California state agencies and avoid paying  
 7 required business fees which, again, allow FAP to operate at a lower cost than legally operated  
 8 businesses such as Plaintiff's business.

9 **ARGUMENT**

10 A temporary restraining order ("TRO") is properly granted on *ex parte* notice in order to  
 11 maintain the status quo and prevent irreparable injury pending a hearing on the request for a  
 12 preliminary injunction. (Code Civ. Proc., § 527(c); see also 6 Witkin, Cal. Procedure (4th ed. 1997)  
 13 Provisional Remedies, § 286, p. 227.) A TRO should be granted when it appears by the complaint,  
 14 and supporting declarations, that the plaintiff is entitled to the relief demanded and the relief, or any  
 15 part thereof, consists in restraining the commission or continuance of the act complained of, either  
 16 for a limited period or perpetually. (Code Civ. Proc. § 526(a)(1); *Dingley v. Buckner* (1909) 11 Cal.  
 17 App. 181; see *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991)  
 18 230 Cal. App. 3d 207.)

19 The test most frequently used by California courts in deciding whether to issue a TRO  
 20 (and/or a preliminary injunction) requires the evaluation of: (1) the likelihood that the plaintiff will  
 21 succeed on the merits of its claims at trial; (2) the harm that plaintiff is likely to suffer if the TRO  
 22 does not issue, balanced against (3) the harm that the defendant is likely to suffer if the TRO does  
 23 issue. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286 [219 Cal. Rptr. 467]; *IT Corp. v.*  
 24 *County of Imperial* (1983) 35 Cal.3d 63, 69-70 [196 Cal. Rptr. 715]; 6 Witkin, *supra*, § 296, pp.  
 25 235-236.)

26 In most cases, the plaintiff must prove the likelihood that it will suffer immediate and  
 27 irreparable harm due to the inadequacy of other legal remedies. (*Triple A Machine Shop v.*  
 28 *California* (1989) 213 Cal.App.3d 131, 138 [261 Cal. Rptr. 493].) Although SSV can make a

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY  
 RESTRAINING ORDER AND PRELIMINARY INJUNCTION



1 showing of immediate and irreparable harm, where injunctive relief is authorized by a statute and  
 2 the statutory conditions for its issuance have been satisfied, irreparable injury need not be shown to  
 3 obtain injunctive relief. (6 Witkin, *supra*, § 298, p. 238; see also *IT Corp. v. County of Imperial*,  
 4 *supra*, 35 Cal.3d 63; *Paul v. Wadler* (1962) 209 Cal. App. 2d. 615, 625 [26 Cal. Rptr. 341] ["where  
 5 an injunction is authorized by statute, a violation is good and sufficient cause for its issuance"].) In  
 6 the instant case, injunctive relief is authorized by statute. (Business & Professions Code § 17203.)

7 A temporary restraining order is required in the instant case because: (1) SSV will prevail on  
 8 its claim that FAP has engaged in illegal and improper business activities; (2) SSV will suffer  
 9 irreparable injury unless relief is granted; and (3) the relief sought will have limited adverse effect  
 10 on FAP and no adverse impact on the public interest.<sup>3</sup> (See, *Tyler v. County of Alameda* (1995) 34  
 11 Cal.App.4th 777, 782-83 [citing *Robbins v. Superior Court* (1985) 38 Cal.3d 199]; Code Civ. Proc.  
 12 526.)

13 **A. Plaintiff Will Prevail On The Merits.**

14 Plaintiff SSV can show that FAP has engaged in illegal and unfair business practices  
 15 prohibited under Business and Professions Code section 17200 et seq. and other statutes. It is  
 16 without dispute that:

- 17 (1) Defendants sold fuel below cost in the relevant market;
- 18 (2) Defendants failed to charge patrons taxes or remit taxes to the BOE;
- 19 (3) Defendants sold fuel that did not meet California's minimum standards for  
 20 reformulated gas;
- 21 (4) Defendants failed to register with the Secretary of State;
- 22 (5) Defendants sold fuel at an anti-competitive price in order to put Plaintiff out of  
 23 business; and
- 24 (6) Defendants sold fuel an anti-competitive price resulting in the loss of sale of  
 25 Plaintiff's business.

26  
 27 <sup>3</sup> Although Plaintiff SSV satisfies each of the required elements, under California law it is unnecessary to show  
 28 irreparable harm or inadequacy of money damages to obtain injunctive relief. (See, *Tyler v. County of Alameda*  
 (1995) 34 Cal.App.4th 777, 782-83; Code Civ. Proc. 526.)



1           **B. Plaintiff Will Suffer Irreparable Injury If Defendants Are Allowed To Continue**  
 2           **to Engage in Illegal and Unfair Business Practices.**

3           As a consequence of Defendant FAP's sale of fuel at below cost, SSV has suffered and  
 4 continues to suffer economic damage in the amount of approximately \$2,400 per day due to lost  
 5 revenue from the sale of motor fuel. SSV arrives at this figure by calculating the thirty cents per  
 6 gallon below-cost selling price FAP advertises, multiplied by the 8,000 gallons per day which SSV  
 7 typically sells at the ARCO Travel Center.

8           The ARCO Travel Center also sells items other than motor fuel. These items range from  
 9 food and beverages to camping supplies and automobile parts. Reduced customer traffic, due to  
 10 motorists patronizing Defendants' Fuel Station because of its lower fuel prices, has caused SSV to  
 11 suffer lost sales on non-fuel items. Reduced sales of non-fuel items are at least \$3,000 per day.  
 12 Thus, in total, SSV continues to suffer losses of at least \$5,400 per day.

13           In addition to continuing revenue and sales losses, SSV's competitive position has been  
 14 eroded. On July 7, 2011, GNC Properties, Inc., a real estate investment company which has placed  
 15 a bid to buy the ARCO Travel Center from SSV, withdrew that bid. In withdrawing its bid, GNC  
 16 Properties, Inc. specifically cited the ARCO Travel Center's lack of competitiveness with respect to  
 17 Defendants' Fuel Station. It is well established that loss of competitiveness may demonstrate the  
 18 requisite harm required to support a preliminary injunction. (See, e.g., *MCA Records, Inc. v. Olivia*  
 19 *Newton-John* (1979) 90 Cal.App.3d 18.)

20           **C. The Harm To Plaintiff Absent Interim Relief Outweighs Any Potential Harm**  
 21           **To Defendants.**

22           A TRO or preliminary injunction requiring that Defendant FAP comply with California law  
 23 will not cause substantial harm to FAP. The order will require merely that FAP sell motor fuel at  
 24 no lower than FAP's cost, that FAP comply with California taxation requirements, and that FAP  
 25 properly register as a corporation authorized to conduct business within the state of California.  
 26 These are all requirements which are incumbent on any legitimate business operating in California.

27           In contrast, Plaintiff SSV faces continuing losses of at least \$5,400 per day, plus erosion of  
 28 SSV's competitiveness in the marketplace such that the ARCO Travel Center may cease to remain

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR A TEMPORARY  
 RESTRAINING ORDER AND PRELIMINARY INJUNCTION

1 economically viable over both the short and longer term.

2 **IV. CONCLUSION**

3 For the reasons stated above and presented in the accompanying declarations, Plaintiff SSV  
4 respectfully requests that the Court grant SSV's request for the issuance of a temporary restraining  
5 order enjoining Defendant FAP as set forth in the attached [proposed] order.

6 Notice of this *ex parte* motion has been given to Defendants, pursuant to California Code of  
7 Civil Procedure section 527(c), California Rule of Court 379. As detailed in the accompanying  
8 Declaration of Michael E. Vinding, Esq., filed in Support of this Application ("Vinding  
9 Declaration"), counsel for Plaintiff SSV has given notice of this Application to the Defendants by  
10 sending a fax copy to each of the named Defendants' or counsels containing the following: (i) a  
11 Notice of the filing of this Application, a copy of which is attached to the Vinding Declaration as  
12 Exhibit A (the "Notice") and (ii) a copy of the Complaint. The Plaintiff has not previously sought  
13 such a temporary restraining order against Defendants.

14 Dated: July 25, 2011

BRADY & VINDING

By:  For

Michael E. Vinding  
Attorneys for Plaintiff  
Salton Sea Venture, Inc.

BY FAX

BY FAX

## **EXHIBIT 1**

From: "Gaby Jabbour" <jabbour8@gmail.com>  
Subject: **Business Offer Withdrawal!**  
Date: July 14, 2011 10:48:12 AM PDT  
To: "Dennis Rieger" <dennis@ssv-inc.com>, <mvinding@bradyvinding.com>

7/7/11

Mr. Dennis Rieger  
Salton Sea Ventures, Inc.

Dear Dennis:

I would like to inform you that my investors and I are withdrawing our bid to buy your "ARCO Travel Center" at this time because of its "lack of competitiveness and profitability" - very much in line with the below article descriptions.

It is apparent at this time that your site cannot compete in its marketplace with your fuel volume being so low and your Fuel prices being so much more expensive than your competitor "Red Earth Travel Center" and therefore, your current Fuel volume and profits can not warrant a sales price that is even close to the \$10 MM price that we have considered so far.

I have no interest in buying your business at this time and as long as your competitor the "First American Petroleum" and "Robert Ramsey" who I believe is the operator of the "Red Earth Travel Center" continues to a) Sell fuel without having to pay sales Tax and b) sell the non-carb fuel (I believe that this is not even allowed to be sold in CA!).

Should your business circumstances improve relative to "Red Earth Travel Center" today, please let me know so we could reconsider the situation. Till then, I thank you for the time that we spent together discussing the opportunity and I wish you the best.

Best regards,

Gaby Jabbour  
GNC Properties, Inc.  
805-444-4229

### **Rivals complain tribal-owned gas station doesn't charge state tax**

Written by MIKE PERRAULT The Desert Sun May 31, 2011

A tribal-owned gas station in Salton City is selling gas so cheap that competitors, county officials and others are crying foul.

Arco Travel Center owner Dennis Rieger claims the Red Earth Travel Center, which is owned by the Torres Martinez Desert Cahuilla Indian Tribe, is undercutting competition by not charging state sales tax. Red Earth was selling unleaded regular gas for \$3.55 a gallon this week, and less than \$3.80 for diesel.

Many gas stations across the Coachella Valley have dropped gas prices in recent weeks, but most are

BY FAX

hovering around the \$4 mark for regular unleaded.  
Motorists have lined up at Red Earth's station on Highway 86 to fill up their tanks.

"I can't blame people," said Rieger, head of Salton Sea Ventures Inc., which invested \$11.5 million to build the Arco station two years ago about 6 miles south of Red Earth on Highway 86 at South Marina Drive.  
**"But it's a big, unfair advantage. I can't even pay my bills because of this."**  
Rodney Bonner, Torres Martinez's tribal administrator, insisted the tribe is doing nothing wrong.

"We pay taxes; we pay everything that we're supposed to as far as doing business on tribal land," he said.  
"It's a competitive business. Whatever we're doing; it's nothing illegal."

Rieger said he had to lower the price of his station's regular unleaded gasoline to \$3.79 this week to compete. But that's what it costs him to purchase the fuel, he said. He also lowered the diesel price to \$3.99.

Rieger, others in the industry and at least one Imperial County supervisor claim the Red Earth gas station isn't paying upward of 60 cents per gallon in taxes.  
They claim that's how it can sell gas substantially cheaper, lure customers from competitors and still turn a profit.

Gary Wyatt, Imperial County's District 4 supervisor, said he has tried since 2009 to get state officials to investigate why the Torres Martinez tribe is allowed to operate without paying state taxes.

"It's completely wrong, and (the tribe) is wrong for doing this," Wyatt said.  
He said the state hasn't appeared to be interested in pursuing the tribe for failing to pay gas taxes since the tribal station opened about six years ago.  
"The only other recourse might be at the federal level," Wyatt said.  
The Red Earth station was closed for nearly two months but reopened on May 17.

Bonner said the station has been under fire despite its efforts to meet laws it must adhere to on the reservation and its donations of "a lot of money to the sheriff's department, the fire department, ambulances, schools."

"Our business is not prospering like everyone thinks it is," Bonner said.  
"We're in trouble. I don't understand why every time we start making a move forward, somebody starts downgrading what we're doing."  
Bonner said the Red Earth Travel Center and casino has created more than 170 jobs.

"We created over 172 jobs. It's not like we're doing something wrong, and we're not asking anyone for anything," Bonner said. "We pay our way. We're just doing business."

#### **State taxes do apply to tribes**

In recent months, the state Board of Equalization has sought public input — including that of tribal members — to update Publication 146, said Anita Gore, BOE spokeswoman.

The publication, titled "Sales to American Indians and Sales on Indian Reservations," details how sales taxes and personal property taxes are applied regarding American Indians and sales on Indian reservations. Gore pointed to the most recent draft of the publication, which states "there are no special exemptions from the state's motor vehicle or diesel fuel taxes related to the fuel sales in Indian country."

The Morongo Travel Center off Interstate 10, for example, charges all applicable local, state and federal

BY FAX

taxes, said Michael Fisher, a spokesman for the Morongo Band of Mission Indians.

In a recent legal opinion, the Board of Equalization determined that tribes that import fuel into the state must pay both sales and excise taxes on the fuel. Indian retailers must collect and remit to the board's use tax on sales of gas and diesel fuel on the reservation whether it is to Indians or non-Indians who do not reside on the reservation, board officials said.

Other states such as Washington have wrestled with the issue. Washington lost a court battle in 2006 when the court ruled that tribes, as sovereign nations, did not have to pay the state gas tax.

Then, in a move to head off future court disputes, the governor and legislature signed an agreement requiring Washington to pay the tribes back 75 percent of the gas tax.

Still, Washington state is attempting to recoup about \$11 million in unpaid gas taxes from the Yakama Nation after it failed to submit audit reports for several years that are required to differentiate sales to tribal members from nontribal members.

#### **Taxes add about 60 cents per gallon**

Wyatt said it's unfair that California businesses that pay the state taxes must go up against unfair competition, especially at a time when the state and counties desperately need the money.

"It's completely wrong, and they (the tribe) are wrong for doing this," Wyatt said.

Rieger said regular unleaded gas costs him about \$3.29 per gallon plus freight charges, excluding taxes. Add about 60 cents in taxes, and Rieger is selling his gas at cost when charging \$3.89.

If Rieger were to sell gas for less than what it costs him, he'd be fined by the state, he said. But he admits he has considered trying it to match the tribal station's price.

"I don't know if it's a good idea, but it may call attention to this," Rieger said. Reed Sellers, owner of Sellers Petroleum in Imperial, said he ran into problems with the Torres Martinez tribe while supplying the gas station several years ago. Now Sellers said the state is attempting to collect about \$28,000 in taxes from his firm.

Sellers said his company provides wholesale fuel to other tribes that pay state taxes.

"When somebody comes in and undercuts like (the Torres Martinez tribe) is, that just kills everybody," Sellers said.

"They can under-price their competition by 30 cents a gallon and still make money. And these stations are working on 5, 8, 10 cents a gallon margin."

Sellers said gas stations stay competitive with gasoline prices to draw customers who purchase items in their stores. "That's where they make their money," Sellers said.

Sellers and Rieger said Red Earth's supplier — fuel wholesaler First American Petroleum — is bringing in gas from Nevada.

First American Petroleum is licensed as a tribal business in Washington state under the Yakama Indian Nation.

Robert Ramsey, founder and CEO of First American Petroleum, did not return phone calls or respond to questions in email.

Rieger estimated it may cost the tribal station about 10 cents more a gallon to ship it in from Las Vegas, but the tribe saves about 60 cents or so by not paying taxes, Rieger said.

"We pay 35.3 cents per gallon sales tax to the state of California and another 11 cents in an add-on sales tax. It's 2.75 percent of whatever you sold the fuel for," Rieger said.

There also are underground storage fees of about 2 cents a gallon and a Superfund fee of a tenth of a cent per gallon that Rieger and other station owners must pay.

**Stand Up For California**  
Cheryl Schmit - Director  
P.O. Box 355, Penryn, California 95663  
PH: (916) 663-3207 • FAX: (916) 663-1415  
e-mail

PLEASE NOTE MY NEW EMAIL ADDRESS ==>> [jabbour8@gmail.com](mailto:jabbour8@gmail.com)

Gaby Jabbour  
GNC Properties, Inc.  
dba: Olive View AMPM  
15000 Olive View Drive, Suite A  
Sylmar, CA 91342  
Ofc: 818-367-7317  
Fax: 818-367-7627  
Cell: 805-444-4229

P Please consider the environment before printing this email.



EXHIBIT

## EXHIBIT 2



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA  
PO BOX 942870, SACRAMENTO, CALIFORNIA 94279-0002  
916-323-3142 • FAX 916-323-3367  
www.boe.ca.gov

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Interim Executive Director

March 9, 2011

Cheryl Schmit  
Director  
Stand Up For California  
P.O. Box 355  
Penryn, CA 95663

**Re: Tax Opinion Request 10-475**  
**Application of Sales and Excise Taxes to Fuels Imported into California and Sold at**  
**Indian-Owned Service Stations**

Dear Ms. Schmit:

This letter is in response to your email of November 22, 2010, requesting a legal opinion from the Board of Equalization (BOE) concerning taxes imposed on fuel that is imported into the state of California for sale at Indian-owned retail service stations located on tribal land.<sup>1</sup> You question, in particular, the import of fuel into California by an Indian-run company that is reportedly chartered under the bylaws of the Yakama Tribe in Washington State.

In order to provide a thorough and complete explanation of the taxes that are imposed on fuel imported into California, as they pertain to Indians (as defined below),<sup>2</sup> generally, I will first explain the imposition of sales and use taxes on motor vehicle fuel (gasoline) and diesel fuel, including the requirement to pay prepaid sales tax, under the California Sales and Use Tax Law,<sup>3</sup> and the imposition of excise tax on gasoline and diesel fuel, under the California Motor Vehicle Fuel Tax Law<sup>4</sup> and Diesel Fuel Tax Law,<sup>5</sup> respectively. I will then discuss our understanding of how the Treaty with the Yakama, 1855<sup>6</sup> affects the imposition of those taxes.

<sup>1</sup> You refer to "non-certified gas" and mention concerns about possible violation of federal or state clean air and other environmental laws. Please note that this letter does not address any of these issues, as they are not within the purview of the BOE. This letter addresses only the taxes imposed on fuels that are administered by the BOE, namely, sales tax and excise taxes on motor vehicle fuel and diesel fuel. Fuel that enters California prior to payment of the excise tax on that fuel is referred to as "ex-tax" fuel.

<sup>2</sup> The term "Indian" is used throughout federal and state statutory and case law. Accordingly, its use here is for ease of reference only and is not meant to suggest any disrespect for Native American people.

<sup>3</sup> Part 1 (commencing with section 6001) of division 2 of the Revenue and Taxation Code.

<sup>4</sup> Part 2 (commencing with section 7301) of division 2 of the Revenue and Taxation Code.

<sup>5</sup> Part 31 (commencing with section 60001) of division 2 of the Revenue and Taxation Code.

<sup>6</sup> Treaty with the Yakima, 1855, June 9, 1855, 12 Stat. 951, Native American People Treaties. In 1994, the spelling of "Yakima" was officially changed to "Yakama." (*Ramsey v. United States* (2002) 302 F.3d 1074, 1076, fn. 1 (*Ramsey*)).

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DISCUSSIONSales and Use Tax

Generally, under California law, the legal incidence (or imposition) of California sales tax is upon the retailer of tangible personal property. (Rev. & Tax. Code, § 6051.)<sup>7</sup> However, federal law is relevant with respect to the legal incidence of sales tax on retail sales that take place on an Indian reservation, and federal law considers the legal incidence of California sales tax to be upon the ultimate purchaser, not the retailer. (See *Diamond National Corp. v. State Bd. of Equalization* (1976) 425 U.S. 268.)

The imposition of sales and use tax on sales of tangible personal property involving Indians that occur on Indian reservations located in California is clarified and explained by California Code of Regulations, title 18, section (Regulation or Reg.) 1616. In Regulation 1616, subdivision (d), "Indian" is defined to mean "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior." (Reg. 1616, subd. (d)(2).) Indian organizations, which include Indian tribes and tribal organizations and partnerships, all of whose members are Indians, and corporations organized under tribal authority and all wholly owned by Indians, are entitled to the same exemption as Indians. (*Ibid.*) The term "reservation" means "reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian." (*Ibid.*)

Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. (Reg. 1616, subd. (d)(3)(A)1; also subd. (d)(3)(B)1 [regarding sales by non-Indian retailers to Indians who reside on a reservation].)

Since, under federal law, California's sales tax is considered to be imposed on the purchaser, and, since sales involving Indians on a reservation are decided under federal law, an on-reservation sale by any retailer to an Indian who lives on a reservation or to an Indian tribe is immune from state sales tax. (See, e.g., *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation* (1976) 425 U.S. 463.) Accordingly, in general, sales tax does not apply to sales of tangible personal property, including gasoline and diesel fuel, by an on-reservation Indian or non-Indian retailer to an Indian who resides on a reservation.<sup>8</sup> (See Reg. 1616, subd. (d)(3)(A)1 & (B)1; see also § 6352 [exempting from imposition of sales or use tax sales the state is prohibited from taxing under the Constitution and laws of the United States].)

On the other hand, California "may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the [state] tax." (*Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 151.) Therefore, Indian and non-Indian retailers are required to collect and remit to the BOE use tax<sup>9</sup> on on-reservation sales of tangible personal property, including gasoline and diesel fuel, to non-Indians and to Indians who do not reside on a reservation.<sup>10</sup> (Reg. 1616, subd. (d)(3)(A)2 & (B)2.)

<sup>7</sup> All future statutory references are to the California Revenue and Taxation Code unless indicated otherwise.

<sup>8</sup> However, an Indian is required to pay use tax if the gasoline or diesel fuel purchased is used off the reservation more than it is used on the reservation. (Reg. 1616, subd. (3)(A)1 & (B)1.)

<sup>9</sup> A non-Indian retailer may, instead, collect sales tax reimbursement. (Reg. 1616, subd. (d)(3)(B)2.)

<sup>10</sup> However, Indian retailers are not required to collect use tax on the sale of meals, food, or beverages that are sold for consumption on the Indian reservation. (Reg. 1616, subd. (d)(3)(A)2.)

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Prepaid Sales Tax

With regard to gasoline<sup>11</sup> and diesel fuel, regardless of who the retailer or purchaser is, the BOE collects sales tax on the sale of these fuels differently than it collects sales tax on the sale of other tangible personal property. In general, the supplier of fuel, which would include the person who imports fuel into the state,<sup>12</sup> is required to collect a prepayment of a portion of the retail sales tax from the person to whom the gasoline is first sold. (§ 6480.1, subd. (a).) If no sale occurs at the time of imposition of the fuel tax, the supplier must prepay the retail sales tax on that fuel to the BOE. (*Ibid.*) Each subsequent seller of the fuel, other than the retailer, is required to collect the prepaid sales tax from the purchaser of the gasoline. (§ 6480.1, subd. (a).)

Normally, the retailer collects and remits to the BOE sales tax reimbursement on the retail sale of the fuel and takes a credit, on his or her sales and use tax return, for the amount of sales tax that was prepaid against the amount of sales tax due for the period in which the retail sale was made. (§ 6480.1, subd. (d).) However, since California sales tax is not imposed on on-reservation Indian retailers, an Indian retailer may obtain a refund from the BOE of the sales tax that he or she has prepaid on the gasoline or diesel fuel (§ 6480.6, subd. (a)(2)) or apply the prepaid sales tax as a credit, on its sales and use tax return, against any use tax that it owes as a result of sales of tangible personal property to non-Indians and Indians that do not reside on a reservation (§ 6480.1, subd. (d)).

Liability for Prepayment of Sales Tax Follows Imposition of Fuel Tax

A supplier is required to collect prepayment of retail sales tax from the person to whom the fuel is sold any time the gasoline or diesel fuel tax is imposed or would be imposed on any removal,<sup>13</sup> entry,<sup>14</sup> or sale<sup>15</sup> of fuel in this state. (§ 6480.1, subd. (a).<sup>16</sup>) Each supplier is required to report and pay the prepayment amounts collected to the Board. (*Ibid.*) For purposes of this discussion, the analysis for determining whether a supplier who is also an Indian must collect and pay to the BOE prepaid sales tax on fuel is the same as the analysis for determining whether the Indian supplier is subject to imposition of the excise tax on that fuel, which also relies on subdivision (d) of Regulation 1616.

Gasoline and Diesel Fuel Excise Taxes

In California, the imposition of gasoline and diesel fuel taxes is different from the imposition of the sales tax. Under the motor vehicle fuel and diesel fuel tax laws, the excise tax is imposed on the supplier, who is required to pay the tax to the BOE and who typically passes on the tax as an expense that is included in the cost of the fuel. (E.g., §§ 7362, 7363, 7366, 7368,

<sup>11</sup> Also, aviation gasoline and aircraft jet fuel.

<sup>12</sup> Under the motor vehicle and diesel fuel tax laws, a "supplier" may be one (or more) of any of the following: a "blender" (§§ 7308, 60012); an "enterer" (§§ 7311, 60013); a "position holder" (§§ 7332, 60010); a "refiner" (§§ 7334, 60011); a "terminal operator" (§§ 7340, 60009); or a throughputter (§§ 7341, 60035). (§§ 7338, 60033, respectively.)

<sup>13</sup> "Removal" means, among other things, "any physical transfer of [gasoline or diesel] fuel." (§§ 7336 & 60007.)

<sup>14</sup> "Entry" means, as is relevant here, "the importing of [gasoline or diesel] fuel into this state." (§§ 7312 & 60021.)

<sup>15</sup> "Sale" means, as is relevant here, "the transfer of title to [gasoline or diesel fuel] to a buyer for consideration, which may consist of money, services or other property." (§§ 7337, subd. (a) & 60048, subd. (a).)

<sup>16</sup> "At any time that motor vehicle fuel tax or diesel fuel tax is imposed or would be imposed, but for [certain exemptions], or . . . would be deemed to be imposed, on any removal, entry, or sale in this state of motor vehicle fuel, aircraft jet fuel, or diesel fuel, the supplier shall collect prepayment of retail sales tax from the person to whom the [fuel] is sold." (§ 6480.1, subd. (a) [emphasis added].)

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60051-60055, 60061.) When an on-reservation Indian retailer purchases tax-paid<sup>17</sup> fuel and then sells the fuel to an Indian who resides on a reservation, the excise tax itself is not imposed on either the on-reservation Indian retailer or the Indian purchaser. Thus, unless the Indian purchaser uses the fuel in an exempt manner for which the purchaser may obtain a refund of the tax included in the cost of the fuel (e.g., for fuel used off public highways), neither the Indian retailer nor the Indian purchaser is exempt from paying the full tax-included cost of the fuel, even though the retail sale of the fuel takes place on a reservation. In other words, it does not matter to whom a supplier sells the fuel; any purchaser, Indian or non-Indian, pays a price for the fuel that includes the excise tax imposed on the supplier.

Whether the excise tax is imposed on an Indian supplier

As is relevant here, California fuel taxes are generally imposed on all suppliers who import fuel into California (supplier/enterer). However, with respect to Indian supplier/enterers, the “who” and the “where” of the challenged tax have significant consequences.” (*Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 101 (*Wagnon*).) In *Wagnon*, the United States Supreme Court addressed two issues with respect to state taxation of Indians and Indian-owned enterprises, both of which are relevant here: (1) who bears the legal incidence of the tax; and (2) where does the transaction that gives rise to the tax liability occur? (*Id.* at pp. 101-102.)

The Court first concluded that, under the Kansas fuel tax law, the legal incidence of the fuel tax is imposed on the distributor at the time that the distributor first receives the fuel, not when the fuel is subsequently used, sold, or delivered. (*Wagnon, supra*, 546 U.S. at pp. 102-110.) The Court then determined that if, based on earlier decisions, “a State may apply a non-discriminatory tax to Indians who have gone beyond the boundaries of the reservation,” then a state may impose a nondiscriminatory fuel tax on non-Indian distributors<sup>18</sup> “as a result of an off-reservation transaction.” (*Id.* at p. 113.) The Court’s analyses of these two issues apply here, as follows.

Who bears the legal incidence of fuel tax in California?

Under the motor vehicle fuel and diesel fuel tax laws,<sup>19</sup> the incidence of the tax is imposed, with respect to this inquiry, on “suppliers.” As noted above, “supplier” is defined to include, among others, a person who is an “enterer.” (§§ 7338 & 60033.) As is relevant here:

“Enterer” includes any person who is the importer of record (under federal customs law) with respect to [gasoline or diesel] fuel. . . . If there is no importer of record of [gasoline or diesel] fuel entered into this state, the owner of the [gasoline or diesel] fuel at the time it is brought into this state is the enterer. (§§ 7311 & 60013.)

Further, “[e]ntry means the importing of [gasoline or diesel] fuel into this state” (§§ 7312 & 60021), and a tax is imposed on each gallon of fuel subject to tax (§§ 7360 and 60050) and is, as is relevant here, imposed on:

<sup>17</sup> As defined in sections 7345 and 60048.1.

<sup>18</sup> In *Wagnon*, the distributor in question is non-Indian.

<sup>19</sup> Generally, the text of motor vehicle fuel and diesel fuel tax law sections dealing with the same matters is the same.

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The entry of [gasoline or diesel] fuel into this state for sale, consumption, use, or warehousing if either of the following applies:

- (1) The entry is by bulk transfer and the enterer is not a licensed supplier [or diesel fuel registrant].
- (2) The entry is not by bulk transfer.<sup>20</sup> (§§ 7363, subd. (b) & 60052, subd. (b).)

Finally, "[e]very enterer shall pay tax on [gasoline or diesel] fuel imported into this state as provided in subdivision (b) of [Sections 7363 and 60052, respectively]." (§§ 7366 & 60061.)

Just as was determined by the *Wagnon* court, not only is the language of the motor vehicle fuel and diesel fuel tax laws "determinative of who bears the legal incidence of a state excise tax," but also, in looking at "a 'fair interpretation of the taxing statute as written and applied,'" it is reasonable to conclude that the legal incidence of the fuel tax in California is on the supplier/"enterer." (*Wagnon, supra*, 546 U.S. at pp. 102-103 [citation omitted].) First, although enterers may pass along the cost of the fuel tax to their customers, in that they are not prohibited from doing so, they are also not required to do so. (See *id.* at p. 102.) In fact, there is no mention of passing on, or not passing on, the cost of the tax in either law.

Second, the California enterer is liable for the fuel tax upon entry of the fuel into California, before the fuel is ever sold or delivered to a distributor or retailer in California.<sup>21</sup> (Cf. *Wagnon, supra*, 546 U.S. at p. 108.) It is the supplier's off-reservation entry of the fuel, and not any subsequent event, that establishes tax liability. (Cf. *id.* at p. 106.) The incidence of tax is imposed on the California enterer, at the time of entry, despite subsequent allowances for deductions or exemptions "for certain postreceipt transactions" in the two laws. (See *ibid.*; see also, e.g., §§ 7401 & 60100 [exemptions].) As the Court noted:

[T]he distributors' off-reservation receipt of motor fuel is the event that gives rise to tax liability. . . . A distributor's subsequent delivery of fuel to [an Indian retailer located on a reservation] or any other fuel retailer in Kansas has *no effect* on tax that it has already paid in a preceding month.<sup>[22]</sup> . . . And a distributor must pay the tax even if the fuel is *never* delivered. (*Wagnon, supra*, 546 U.S. at p. 109, fn. 4 [emphasis in original].)

In sum, in keeping with the analysis in *Wagnon*, a California enterer's off-reservation importation of motor vehicle or diesel fuel is "the event that gives rise to tax liability." To paraphrase *Wagnon*, it is clear that it is the California enterer, rather than the California distributor or retailer, that is liable to pay the fuel tax. (See *id.* at p. 103.)

Where does the transaction that gives rise to the tax liability occur?

With respect to this inquiry, the relevant transaction that gives rise to fuel tax liability occurs when the fuel is imported into, or enters, California. To be "in this state" means that something is within the "exterior limits" or borders of California. (See §§ 7321 & 60017.)

<sup>20</sup> "'Bulk transfer' means any transfer of [gasoline or diesel] fuel by pipeline or vessel." (§§ 7309 & 60029.)

<sup>21</sup> "'In this state' . . . means within the exterior limits of the State of California and includes all territory within these limits owned by or ceded to the United States . . ." (§§ 7321 & 60017 [emphasis added].)

<sup>22</sup> Just as in Kansas, California enterers remit each month the fuel tax due on the fuel they imported in the previous month.

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Therefore, with respect to interstate transactions, when someone or something crosses the border into California from either Oregon, Nevada, or Arizona, that someone or something enters or comes into California. With rare exception,<sup>23</sup> the entry of fuel into California from Oregon, Nevada, and Arizona must occur "off-reservation," because the highways on which fuel that is transported by tanker truck (i.e., that is not part of a bulk transfer) can cross the border into California are not located on any reservations.

In its discussion regarding application of the interest-balancing test articulated in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, which is otherwise not relevant here,<sup>24</sup> the *Wagnon* court comments that:

We have taken an altogether different course . . . when a State asserts its taxing authority outside of Indian Country. Without applying the interest-balancing test, we have permitted the taxation of the gross receipts of an off-reservation, Indian-owned ski resort [citation omitted] and the taxation of income earned by Indians working on-reservation but living off-reservation [citation omitted]. (*Wagnon*, *supra*, 546 U.S. at pp. 112-113.)

In the case involving the ski resort, the Court stated, with regard to "tribal activities conducted outside the reservation," 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." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 148-149 [emphasis added], as cited by *Wagnon*, *supra*, 546 U.S. at p. 113.)

In sum, the incidence of liability for the fuel tax is imposed on the enterer when the fuel enters California, whether the enterer is an Indian or a non-Indian. Therefore, the fuel tax is a nondiscriminatory tax that is applicable to everyone who imports fuel into California by other than bulk transfer. The importation of fuel into California is an activity that, with rare exception, occurs off-reservation. Therefore, if the enterer is an Indian, it will almost always be an Indian "activity conducted outside the reservation." Finally, since the incidence of liability for the fuel tax is imposed on an enterer when the fuel enters California, it is clear that the tax is not imposed further down the chain of distribution, on a California distributor or retailer, whether Indian or non-Indian.

Therefore, Indian enterers are liable for the excise tax on all fuel they import into California at the time of importation and may pass on the excise tax to the purchasers, including retailers and consumers, of that fuel, both Indian and non-Indian, as part of the cost of the fuel they purchase. In addition, Indian enterers are required to pay to the BOE the prepaid sales tax on that fuel at the time of entry and collect the prepaid sales tax at the time of sale in the state, but Indian retailers located on a reservation may claim a credit for prepaid sales tax they have paid against any use tax liability they have incurred for the same period, and Indian consumers are not required to pay sales tax on fuel they purchase on a reservation.

<sup>23</sup> We understand there are several reservations that straddle the California-Arizona border. This letter does not address the question of the imposition of tax on fuel that enters California through one of these reservations.

<sup>24</sup> The Supreme Court formulated the *Bracker* interest-balancing test "to address the 'difficult question' that arises when 'a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.'" (*Wagnon*, *supra*, 546 U.S. at p. 110 [citation omitted] [emphasis added by *Wagnon* court].)



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Effect of Treaty with the Yakama, 1855 on an Indian enterer's tax liability

Article 1 of the Treaty with the Yakama, 1855 (Treaty) provided that the Yakama<sup>25</sup> would cede to the United States a significant amount of land ("about 10 million acres, or 90 percent of their land") located in what was then the Territory of Washington and what was then occupied and claimed by them. (*Ibid.*; *United States v. Smiskin* (2006) 487 F.3d 1260, 1265 (*Smiskin*).) In return, a certain tract of land, as described in article 2, was to be set apart for the exclusive use and benefit of the Yakama as an Indian reservation. Article 3 of the Treaty states, with respect to that tract of land and in consideration of the substantial concessions made by the Yakama:

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. (Paragraph 1) (Emphasis added.)

The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to [the Yakama], as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them: together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. (Paragraph 2)

According to the information provided with this inquiry, claims have reportedly been made by members of the Yakama Tribe that, because the Treaty secures to the Yakama the right to travel upon the public highways, members of the Yakama Tribe enjoy a special trade status that permits them to avoid paying California sales and excises taxes on fuels they import into California and to sell or deliver these fuels ex-tax to Indian-owned retail service stations located, presumably on reservation land (as defined above), in California.

The Ninth Circuit Court of Appeals (Ninth Circuit) has issued several opinions in which it addresses and interprets the scope and application of Paragraph 1. These opinions and United States Supreme Court opinions on which they rely, which interpret the language of Paragraph 2, make clear that the meaning of Paragraph 1 is not evident from a simple reading of the language. For example, "in common with citizens of the United States" does not mean that the Treaty granted to the Yakama only a right equal to the right United States citizens had to travel on the public highways.

In *Cree v. Flores* (1998) 157 F.3d 762 (*Cree II*, as it is generally known), the Ninth Circuit determined that, with respect to Paragraph 1, heavy trucks owned by members of the Yakama Nation that were used to haul timber to market were exempt from the licensing and permitting fees that Washington State imposed on all other owners of heavy trucks. (*Id.* at p. 764.) The court noted, with respect to "in common with," that article 3 of the Treaty "conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy.*" (*Id.* at p. 771 [emphasis added in original] [citation and internal quotation marks omitted in

<sup>25</sup> The term "Yamaka" is used here to represent all of the confederated tribes and bands of Indians whose representatives signed the Treaty: "the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah-milt-pay, and Se-ap-cat, confederated tribes and bands of Indians." (Preamble to the Treaty.)

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original and here] [quoting *Tulee v. Washington* (1942) 315 U.S. 681, 684 (interpreting the Yakama's fishing rights as set forth in Paragraph 2)]. Further: "To construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" (*Cree II, supra*, 157 F.3d at p. 772 [citation omitted in original] [quoting *Puyallup Tribe v. Dept. of Game* (1968) 391 U.S. 392, 397 (also interpreting the Yakama's fishing rights)].)

Based on this interpretation of "in common with" and other findings, the *Cree II* court held that "the right, in common with citizens of the United States, to travel upon all public highways," as set forth in Paragraph 1, "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 II, supra*, 157 F.3d at p. 769 [emphasis added]; cf. *Ramsey, supra*, 302 F.3d at pp. 1078-1080 [distinguishing state taxes, which were precluded by the Treaty by *Cree II*, from federal taxes based on a different standard for exemptions; the Yakama were not exempt].)

In another case, Yakama tribal members were indicted for violating the federal Contraband Cigarette Trafficking Act (CCTA) because they failed to notify Washington State's Liquor Control Board before they transported unstamped cigarettes from Idaho to and among Indian reservations in Washington, a violation of Washington state law. (*Smiskin, supra*, 487 F.3d at p. 1262-1263.) Relying on the district court findings and conclusions in *Yakama Indian Nation v. Flores* (1997) 955 F.Supp. 1229 (which was affirmed by *Cree II*), that the Treaty "unambiguously reserves to the Yakamas the right to travel the public highways *without restriction* for purposes of hauling goods to market" (*id.* at p. 1248 [emphasis added by *Smiskin* court]) and "both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached*" (*id.* at p. 1251 [emphasis added by *Smiskin* court]), the *Smiskin* court found that Washington State's pre-notification requirement "impose[d] a condition on travel that violates their treaty right to transport goods to market without restriction." (*Smiskin, supra*, 487 F.3d at p. 1266; see also *United States v. Fiander* (2008) 547 F.3d 1036, 1039-1040 [relying on *Smiskin*, finding no violation of the CCTA, but finding defendant indictable for conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO)].)

You indicate that members of the Yakama Nation who are importing fuel into California believe that they are not required to pay prepaid sales or excise taxes on this fuel because imposition of these taxes violates their right to travel pursuant to the Treaty, as interpreted by the Ninth Circuit. The Board of Equalization and the State of California do not intend to infringe in any manner on a right for which the Yakama paid so dearly. However, it is our opinion that neither the imposition of the requirement to pay prepaid sales tax nor the imposition of excise tax on fuel imported by Yakama enterers, as described above, violates the right to travel language set forth in Paragraph 1.

The license fee at issue in *Cree II* was imposed on the heavy trucks used to haul timber to market, not on the timber itself. Moreover, the pre-notification requirement was imposed on the transportation of the unstamped cigarettes, not on the cigarettes themselves. As the *Cree II* court declared, the Yakamas have "the right to transport goods to market over public highways without payment of fees for that use." (*Cree II, supra*, 157 F.3d at p. 769 [emphasis added].) The *Smiskin* court stated that the pre-notification requirement "violates [the Yakama's] treaty right to transport goods to market without restriction." (*Smiskin, supra*, 487 F.3d at p. 1266 [emphasis added].)

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The prepaid sales and excise taxes are not taxes on the Yakama's transportation of the fuel to market (i.e., on their trucks),<sup>26</sup> nor do they constitute a restriction on the transportation of the fuel to market. They are taxes on fuel – on the goods that are being transported to market – that will be used (it must be presumed) almost, if not completely, exclusively by non-Yakama members to travel on the public highways of California. Of course, Indian retailers and Indian consumers who purchase the fuel are exempt from paying the sales tax on the fuel, as described above, but they are not exempt from paying the excise tax on the fuel unless the purchaser uses it for an exempt use, also as described above. In addition, the Indian retailer is required to collect use tax on the sale of fuel to non-Indian purchasers, and the retailer may apply the prepaid sales tax it paid to the importer (Yakama or non-Yakama alike) to its use tax liability on its sales and use tax return.

In sum, with respect to Yakama enterers that import gasoline and diesel fuel into California, they are subject to the same requirements to pay the prepaid sales tax and excise tax on these fuels upon entry into the state as are all other persons, Indian and non-Indian, who import fuel into the state, as described above. The BOE is working with Nevada officials to ensure enforcement of these taxes and to ensure that, with respect to state taxes on fuel, it is a level playing field for all suppliers and retailers of gasoline and diesel fuel.

If you have any questions regarding the information provided here, please contact me as provided above.

Sincerely,



Carolee D. Johnstone  
Tax Counsel III (Specialist)

CDJ:mcb

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<sup>26</sup> Whether the licenses, permits, and fees required pursuant to the International Fuel Tax Agreement (IFTA) and section 60122 of the Diesel Fuel Tax Law (regarding trip permits) before a truck owned by a Yakama enterer (individual or corporation) is permitted to use diesel fuel on California highways would be determined to be a violation of the Yakama's right to travel (*Cree II, supra*, 157 F.3d at p. 774), pursuant to Paragraph 1, or a "regulatory" exception, as described by the *Smiskin* court (*Smiskin, supra*, 487 F.3d at pp. 1269-1270), is not addressed in this letter. We also do not address here whether trucks owned and operated by a third party carrier or independent operator engaged by a Yakama enterer to transport its fuel into California would be subject to IFTA and section 60122 license and permit requirements. (*Cree II, supra*, 157 F.3d at p. 774; *Smiskin, supra*, 487 F.3d at p. 1268.)