

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LICENSING

IN THE MATTER OF:

COUGAR DEN INC.

RESPONDENT

OAH Docket No. 2014-DOL-0006

Agency No. 756M

INITIAL ORDER

A telephone hearing in the above-entitled matter was conducted on May 24, 2014, before Stephen K. Leavell, Administrative Law Judge, at the Office of Administrative Hearings in Yakama Washington. Cougar Den, Inc., respondent was represented by Andre Penalver Attorney. Fronda Woods, Senior Counsel with the Attorney General of the state of Washington, appeared and represented the Department of Licensing (department)

EXHIBITS

The parties agreed to the stipulated facts 1-18 and the exhibits 1-9.

ISSUE

Both parties have moved for summary judgment based on the stipulated facts.

RESULT

The respondent's motion for Summary Judgment is granted and the department's motion is denied.

FINDINGS OF FACT

The parties stipulated to the following findings of fact:

1. The Confederated Tribes and Bands of the Yakama Nation (referred to in this proceeding as "Yakama Nation"), is a federally recognized Indian tribe.

2. The Yakama Reservation was established by the Yakama treaty of June 9, 1855, 12 Stat. 951. Its boundaries are described in the Article II of the Treaty. The ceded lands of the Yakama Nation are described in Article I of the Treaty.

3. In entering into the Treaty of 1855 the Yakama nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama nation.

4. The Yakama nation is a governmental authority that exercise jurisdiction within the Yakama Indian Reservation.

5. Richard "Kip" Ramsey is an enrolled member of the Yakama Nation.

6. Kip Ramsey is the owner and president of the Respondent Cougar Den, Inc.

7. Cougar Den, Inc. is a private Yakama Indian-owned company incorporated under the laws of the Yakama Nation. The business office of Cougar Den, Inc. is located within the Yakama Reservation. Cougar Den, Inc. is registered as a foreign corporation with the Washington Secretary of State.

8. On September 29, 1993, the secretary of the Yakama tribal Council issued a document to Cougar Den Inc. entitled "petroleum products license responsibilities." Yakama tribal Council revoked the document on October 2, 2013.

9. Since February 2012 Cougar Den, Inc. has held a motor vehicle fuel dealers license issued by the State of Oregon.

10. In June 2012 and May 2013 Cougar Den, Inc. was issued a Bulk User Petroleum Permit by the Yakama Nation.

11. Cougar Den, Inc. has never applied for held any type of motor vehicle fuel license or special license issued by the State of Washington.

12. In March 2013 Cougar Den, Inc. began exporting fuel (gasoline) and special fuel (diesel fuel) from Oregon to locations within the Yakama Reservation. Cougar Den Inc. filed reports with the Oregon Department of Transportation, Fuels Tax Group, showing the number of gallons exported. The following table shows the number of gallons that Cougar Den Inc. exported from Oregon to the Yakama Reservation between March 2013 and October 2013 as reported to the Oregon Department of Transportation.

Month	Motor Vehicle Fuel (Gasoline) (gallons)	Special Fuel (Diesel Fuel) (gallons)
March 2013	18,501	23,157
April 2013	304,199	163,344
May 2013	320,652	195,661
June 2013	529,753	321,623
July 2013	537,547	295,101
August 2013	602,136	320,669
September 2013	540,516	360,579
October 2013	596,464	351,606

13. The trucks that transported the petroleum products described in the above table from Oregon to Yakama Indian Reservation remained at all times in the state of Oregon, the ceded area of the Yakama Nation, or the Yakama Reservation. The trucks left Interstate 84 at Biggs Junction Oregon, and took US Highway 97 from there to the Yakama Reservation.

14. Cougar Den Inc. did not pay Washington fuel taxes on the fuel described in the above table.

15. On December 9, 2013 the Washington Department of licensing issued Assessment Number 756M to Cougar Den Inc. Assessment Number 756M described taxes, penalty, and interest the Department asserted were then owed to the state of Washington with respect to the fuel shown in the above table.

16. The respondent made a timely appeal of the assessment 756M letter of appeal dated January 3, 2014 sent to the department.

17. The department referred the appeal to the Office of Administrative Hearings. On February 24, 2014 Administrative Law Judge Stephen K. Leavell issued a notice of prehearing conference. Administrative Law Judge Robert Boggs conducted a prehearing conference on March 11, 2014 and Administrative Law Judge Stephen K. Leavell issued a notice of hearing and prehearing conference order on March 12, 2014.

18. On March 31, 2014 the Department filed a motion to correct the caption to delete Kip Ramsey as a Respondent, leaving Cougar Den, Inc. as the sole respondent.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to Revised Code of Washington(RCW) 34.05 and chapter 10-08 Washington Administrative Code (WAC).CW) 34.05 and chapter 10-08 Washington Administrative Code (WAC).

2. The Department bases their ability to tax on RCW 82.23A.020. Subsection 1 which states that "for all other cases, the wholesale value is determined upon the first bulk possession in the state." The Department contends that when the respondent purchased the bulk fuel in the state of Oregon and transported the fuel into the state of Washington that they

were obligated to pay the tax. The department asserts that the respondent imported fuel into the state of Washington and failed to pay the taxes as required by state law.

3. The respondent argued that they are exempt from the tax as a result of their standing as a licensed hauler of bulk fuel by the Yakama Nation. The respondent relies upon the 1855 Treaty with the Yakama Nation. The fuel was transported from the state of Oregon across ceded lands, Yakama Nation lands and delivered to Yakama owned businesses on the Yakama Reservation. The respondent argued that based on case law they are exempt from paying the state fuel tax.

4. The courts have held that the 1855 Treaty with the Yakama Nation (Treaty) is considered a "sacred" and "founding" document by the Yakama Nation. The language of Article III of the Treaty provides that "necessary for the public conveyance, 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."

5. The history of the treaty is such that the Yakamas were provided the right to travel on the roads outside of the reservation to go to market. The Yakamas had a history of moving goods back and forth between the coast and the interior and obtain access to goods from the plains. The treaty included language acknowledging the history of the Yakamas and trading in those regions. The treaty was written in such a way to protect the Yakamas rights to trade.

6. Cougar Den, Inc. assessed both federal taxes and Yakama Nation taxes with respect to the fuel hauled and delivered to businesses on the Yakama reservation. The respondent hauled fuel from Oregon to the reservation from March 2013 through October 2013.

7. The respondent relies upon two primary cases, the first being *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and the second *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

8. In *Smiskin* two Yakama members were arrested for transporting unstamped cigarettes in violation of state law. The court held that cigarette stamps are meant to enforce collection of a cigarette tax. The court held that the Treaty bars any restriction or condition on the right to travel and that the stamps at issue "are a pre-notification requirement that is a restriction in violation of the Treaty." The court held that the stamp which is in effect a tax acts as a restriction on the travel of members of the Yakama Nation. The Treaty is interpreted to allow unfettered access for members of the Yakama Nation to travel for the purpose carrying on trade.

9. In the *Cree* case the state sought to impose licensing requirements and fees on trucks owned by members of the Yakama nation that operated logging trucks that hauled logs from the reservation to mills outside the reservation. The Ninth Circuit rejected the states argument and held that the Treaty must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use.

10. The Department seeks to limit the application of the *Cree* case to licensing of vehicles owned by members of the Yakama Nation. The principle of both *Smiskin* and *Cree* is that the state cannot restrict travel for purposes of trade to members of the Yakama Nation either by charging a tax or requiring state licenses on member vehicles.

11. The Department characterized the respondent's actions as attempting to evade Washington taxes. The Department also stated that the Treaty does not preempt Washington fuel tax laws. The Department interpreted the *Cree* case narrowly. The Department

characterized the Cree case as involving the licensing of trucks operating on state highways. The Department argued that the fuel tax laws did not restrict use of public highways or impose a fee for such use. The Department stated that the state is regulating the fuel business. The state requires a license and imposes the tax on fuel products at a particular point in the distribution chain when the fuel enters the state regardless of the means of entry.

12. The Department believes the Smiskin case holds that the government cannot impose criminal sanctions on Yakama tribal members for failing to notify the state before transporting untaxed cigarettes. The Department argued that present case is not about the regulation of the transportation of a product but the regulation of the fuel business by requiring license and imposing a tax on fuel at a particular point in the distribution chain.

13. The Department relied upon the statutory authority in RCW 82.36.020 Tax levied and imposed

(2) The tax imposed by subsection (1) of this section is imposed when any of the following occurs:

(c) Motor vehicle fuel enters into this state if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

And; RCW 82.38.030 Tax imposed — Rate — Incidence — Allocation of proceeds — Expiration of subsection

(7) Taxes are imposed when:

(c) Special fuel enters into this state for sale, consumption, use, or storage, unless the fuel enters this state for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320, if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

14. The State's tax is imposed at the time of bulk transfer or at the time the special fuel enters the state. The issue in this case does not challenge the general application of the taxing authority but whether the state has the authority to impose the tax on the importation of

the fuel from the state of Oregon to distribution on the Yakama Nation to businesses operating on the Yakama nation.

15. The Department acknowledged that a bulk supplier transporting fuel through the state of Washington to another state would not be subject to the fuel tax. The example was given of a purchase of bulk fuel in Oregon destined for Idaho and being hauled through the state of Washington. The Department pointed to an exemption made in the RCW. The statutory exemption is an acknowledgement of the state's inability under the U.S. Constitution's commerce clause, to impose a tax that interferes with interstate commerce.

16. RCW 82.36.230 "The provisions of this chapter requiring the payment of taxes do not apply to motor vehicle fuel imported into the state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce."

17. The United States Constitution Article One Section 8 provides that "The Congress shall have Power [...] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

18. The Smiskin case at page 769 "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

19. It is clear that the courts have held that the Yakama Nation have rights reserved to them by the 1855 treaty which have been interpreted as the right to travel on the state highways and engage in commerce. The Smiskin court held the requirement that members of the Yakama nation could not travel from Idaho to the Yakama nation without affixing the state's tax stamps was a restriction on their rights established in the 1855 treaty.

20. The Department seeks to characterize this case as not restricting the travel of the respondent but that by bringing bulk fuel into the state they are subject to the states taxing authority. This case is very similar to the Smiskin case. The Department seeks to require a tax on goods purchased outside the state of Washington being transported to the Yakama Reservation by members of the Yakama Nation. The court in Smiskin held that the tax stamp was a pretax and could not be required by members of the Yakama Nation to be affixed to cigarettes being transported from Idaho to the Yakama Reservation. In the same manner the Department cannot require the payment of a tax on fuel purchased in Oregon and being transported to the Yakama Reservation my members of the Yakama Nation.

21. The state provides in RCW 82.36.230 that the payment of the tax does not apply to motor vehicle fuel imported in to the state in interstate commerce. The issue then is whether the respondent's importation of fuel from Oregon is either interstate commerce and excluded from the tax, or is protected by the 1855 Treaty and not subject to the tax.

22. The Department argued that once the fuel entered the state of Washington from Oregon the condition of the RCW is met and the Respondent imported the fuel into the state and is subject to the tax. However the statute specifically exempts haulers who are passing through the state with a final destination outside of Washington. The Respondent hauled the fuel into Washington with a final destination on the Yakama Nation.

23. The Supreme Court held; "We hold that Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. In so holding, we adhere to settled law: when Congress does not instruct otherwise, a State's excise tax is un-enforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.

Oklahoma Tax Commission v Chickasaw Nation 515 U.S. 450 (1995), 115 S.Ct. 2214, 123 L.Ed.2D 400, 63 USLW 4594

24. Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-334, that "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants." To this treaty language, the Tenth Circuit applied "the general rule that '[d]oubtful expressions are to be resolved in favor of' the Indians." 31 F.3d, at 978 (quoting *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973)). The Court of Appeals also noted that it had endeavored to "rea[d] the treaty as the Indians [who signed it] would have understood it." 31 F.3d, at 979. *Oklahoma Tax Commission v Chickasaw Nation* 515 U.S. 450 (1995), 115 S.Ct. 2214, 123 L.Ed.2D 400, 63 USLW 4594

25. The courts have held that the treaties with the Indian Nations should be resolved in favor of the Indians and the treaty and should read as the Indians [who signed it] would have understood it. In both of these constructs the 1855 Treaty with the Yakama Nation provides for the unimpeded right to travel upon state roads and highways without interference from the state. This has been upheld in numerous cases including the Smiskin case and the Cree and Flores cases. The member of the Yakama Nation doing business as Cougar Den, Inc. was exercising that right by purchasing bulk fuel in Oregon and transporting on state highways until they arrived at the Yakama Nation. State Highway 97 from the Oregon border at the Columbia River is on ceded land. The effect of that on this case is not addressed.

26. When a member of the Yakama Nation purchases products outside of the Yakama Nation they are not exempt from the sales tax imposed by the State. In this case the Respondent purchased the product in Oregon, not in Washington. The final destination of the bulk fuel was for distribution to business entities operating on the Yakama Nation. The state of

Washington is without authority to tax the bulk fuel simply because it was transported across the state highways. The history of the Yakama Nation and Treaty was understood to allow members of the tribe to freely travel and trade free from the interference from the State. The State cannot now seek to change that right without Federal legislative authority. Only the Federal government can alter the relationship by treaty or statute, not the state Department of Licensing.

27. The Department has not shown that the fuel was destined to be sold to non-Indians. The state can require the tribal business to collect the tax from non-Indians. That is not the case here and was not addressed. Under the present taxing scheme the Respondent is not required to pay the excise tax.

ORDER

The Respondent's motion for Summary Judgment is GRANTED

The Department's motion for Summary Judgment is DENIED

Issued from Tacoma, Washington, on the date of mailing.



Stephen Leavell
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

Under RCW 34.05.464 and WAC 10-08-211, any party to this proceeding may file a petition for review of this initial order. The petition must be filed with the Director of Licensing, P.O. Box 9020, Olympia, WA 98504-9020 within twenty (20) days from the date this initial order was mailed to the parties. A copy of the petition for review must be sent to all parties of record. A petition for review must specify the portions of the initial order with which the party disagrees, and must refer to the evidence in the record which supports the party's position. Any party to this proceeding may file a reply to a petition for review. The reply must be filed with the Director of Licensing at the address above within ten (10) days from the date the petition for review was mailed.

CERTIFICATE OF MAILING IS ATTACHED

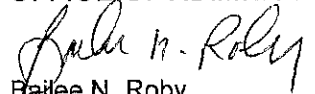
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2014-DOL-0006

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>Kip Ramsey President Cougar Den, Inc. 620 Signal Peak Rd PO Box 669 White Swan, WA 98952 Respondent</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Andre M. Penalver Attorney at Law Stokes Lawrence Velikanje Moore & Shore 120 N Naches Ave Yakima, WA 98901-2757 Fax: (509) 895-0060 Respondent Representative</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Frona C. Woods Senior Counsel Office of the Attorney General 1125 Washington St SE PO Box 40110 Olympia, WA 98504-0110 Fax: (360) 664-0174 Agency Representative</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Thursday, July 24, 2014

OFFICE OF ADMINISTRATIVE HEARINGS


Bailee N. Roby
Legal Secretary