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NO. 105377-1

SUPREME COURT OF THE STATE OF WASHINGTON

COUGAR DEN, INC.,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING
and MARCUS GLASPER,

Respondents.

**ANSWER TO STATEMENT OF GROUNDS FOR
DIRECT REVIEW**

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OID No. 91020

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I. INTRODUCTION

Although the Department of Licensing disagrees with the way Cougar Den, Inc., frames the issues in this case, it agrees direct review is appropriate under RAP 4.2(a)(4) because this case presents fundamental and urgent issues of broad public import concerning the scope of the right to travel in the Yakama Treaty of 1855, Cougar Den's attempt to evade millions of dollars in fuel taxes, agencies' authority to consider Treaty claims, and litigants' ability to sue tax officials in Administrative Procedure Act appeals.

This Court and the U.S. Supreme Court have held that the Yakama Treaty, which guarantees the Yakamas the right "to travel upon all public highways," preempts Washington's tax for *importing* fuel into the state. *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 188 Wn.2d 55, 69 (2017) (*Cougar Den I*), *aff'd*, 586 U.S. 347, 358 (2019) (*Cougar Den II*). In that case, however, Cougar Den conceded, and all nine U.S. Supreme Court Justices agreed, that the Treaty does not preempt off-

reservation taxes separate from travel, even if the taxed good is later brought to the Reservation by public highway. *Cougar Den II*, 586 U.S. at 364, 374, 380; Br. of Resp't at 35-36, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 586 U.S. 347 (2019) (No. 16-1498) (“[T]he right-to-travel provision would not preempt taxation of . . . off-reservation economic transactions occurring before or after the highway travel.”). This case involves precisely such a tax: the tax imposed under RCW 82.38.030(13)(a) when fuel is removed from terminal racks in this state. As the Department’s final order determined, and the Yakima County Superior Court affirmed, this tax does not involve travel, so the Treaty right to travel on public highways is not implicated.

Although Cougar Den previously conceded that such taxes are not preempted, since 2021 it has claimed that this tax is preempted and has refused to pay millions of dollars in fuel taxes each month. Cougar Den now claims that the Court should consider whether the tax “arises in connection with” travel, Statement of Grounds at 20, and how the fuel tax revenues are

ultimately spent, but no court has ever declared that the Yakama Treaty preempts a tax on those bases. The Department's decision is entirely consistent with precedent, including *Cougar Den I* and *II*. For this reason, the Department disagrees that RAP 4.2(a)(3) serves as another basis for direct review.

Cougar Den also claims that the Department and its Director should be liable for damages based on their compliance with APA provisions that provide for *court* review, but not administrative agency review, of constitutional claims. The superior court properly dismissed these claims, as they are not cognizable. The Department agrees, however, that this Court should review the order dismissing those claims now.

II. NATURE OF THE CASE AND DECISION

Fuel taxes are imposed at the wholesale level, when fuel is imported or removed from the terminal rack. *Cougar Den I*, 188 Wn.2d at 60. Whereas *Cougar Den I* and *II* involved the tax imposed when fuel is imported, this case involves the tax imposed when fuel is removed from the terminal rack.

A. Fuel Suppliers Remove Fuel from Terminal Racks

Fuel suppliers remove fuel from the “bulk transfer-terminal system,” a multi-tiered network of interconnected refineries, pipelines, vessels, and terminals. RCW 82.38.020(4). A “terminal” is a fuel storage and distribution facility. RCW 82.38.020(35). Terminals have structures called “racks” that transfer fuel from the bulk transfer-terminal system into tanker trucks, trailers, railcars, or other non-bulk ground transportation vehicles. RCW 82.38.020(27). To receive fuel “at the rack,” a tanker truck or other non-bulk transport vehicle enters the terminal grounds, proceeds to an area below the rack, and fuel is dispensed into the truck or other mode of transport from above. App. at 5. The truck, trailer, or railcar then transports the fuel to retailers (or transfers it to other suppliers or distributors).

B. Under RCW 82.38.030(13)(a), a Tax Is Imposed When “Fuel Is Removed in this State from a Terminal if the Fuel Is Removed at the Rack”

At issue in this case is the tax imposed under RCW 82.38.030(13)(a), when “[f]uel is removed in this state from a

terminal if the fuel is removed at the rack.” Washington’s terminal rack removal tax is nearly identical to, and is modeled on, federal regulations. Wash. Sen. Bill Rep., 1998 Reg. Sess., Sub. House Bill 2659 (“The bill would make state law consistent with federal law.”). Under 26 C.F.R. § 48.4081-2(b), a tax applies to “the removal of taxable fuel from a terminal if the taxable fuel is removed at the rack.” Federal and Department guidance explains that this tax applies when the fuel crosses the terminal rack—i.e., when it leaves the bulk transfer-terminal system and is pumped into the non-bulk transport vehicle. App. at 24, 53, 67, 73, 82.

An unlicensed person removing fuel from a terminal rack pays the rack removal tax to the terminal operator at the time of removal. *See* RCW 82.38.035(6). However, licensed fuel suppliers can postpone paying the tax and instead report and pay the taxes monthly to the Department. RCW 82.38.035(1); RCW 82.38.150.

C. The Department Assessed Cougar Den for the Terminal Rack Removal Tax

Washington law also imposes a tax when fuel is imported into the state outside the bulk transfer-terminal system, i.e., on the public highway. RCW 82.38.030(13)(c). In 2017 and 2019 respectively, this Court and the U.S. Supreme Court held that the right to travel provision in the Yakama Treaty allowed Cougar Den to import fuel by public highway without paying the importer tax or obtaining an importer license. *Cougar Den I*, 188 Wn.2d at 69; *Cougar Den II*, 586 U.S. at 358.

In 2018, Cougar Den applied for and obtained a fuel supplier license from the Department. App. at 5. After the *Cougar Den I* and *II* rulings, the Department instructed Cougar Den to report as tax-exempt its *imported*, but not its terminal rack-removed, fuel. App. at 6-7. But in its April 2021 return, Cougar Den reported as tax-exempt more than 2.3 million gallons of fuel removed that month from Washington terminal racks. App. at 13. After communicating with Cougar Den, the Department corrected the return, assessed more than \$1.1 million

in taxes, and gave notice of intent to revoke Cougar Den's fuel supplier license. App. at 7-8.

D. The Director Upheld the Department's Determination

Cougar Den filed an administrative appeal, arguing that the Yakama Treaty preempts the rack removal tax and licensing scheme. App. at 8-10. Although the Department argued the administrative law judge did not have the authority to declare an action preempted by a Treaty because that is a constitutional Supremacy Clause question, the ALJ ruled otherwise, in Cougar Den's favor. App. at 92-95.

On review, the Director's designee reversed and entered a final order affirming the assessment and intent to revoke Cougar Den's fuel supplier license. App. at 1-15. The Director concluded the tax under RCW 82.38.030(13)(a) attaches to the act of removing fuel from the bulk transfer-terminal system, as it is dispensed from a terminal rack. App. at 11. The Director did not decide whether the Treaty preempts the tax and license

revocation because he lacked authority to decide that. App. at 8-10.

E. The Superior Court Promptly Stayed the Director's Order and Later Affirmed the Order and Dismissed Cougar Den's "Independent Claims"

Six days after the Director issued the order, Cougar Den filed a petition for judicial review in Yakima County Superior Court and moved to stay the order. The court granted the stay that day.

The petition included several "counterclaims," seeking relief against the Department and its Director for alleged violations of Treaty and due process rights. App. at 106-11.

In an amended petition, Cougar Den re-pled the "counterclaims" as "independent claims" seeking damages for alleged due process and Treaty violations that it claimed had accrued in the six days between the Director's order and the superior court's stay. App. at 130-32. The independent claims alleged the Department and Director revoked Cougar Den's fuel supplier license and attempted collections without holding a

hearing on their Treaty defense, improperly communicated with Cougar Den's trading partners about the license revocation and tax assessment, and threatened Cougar Den's trading partners with audits and assessments. App. at 130-32. The Department moved to dismiss these claims as unavailable relief in an APA appeal of a final adjudicative order.

After hundreds of pages of briefing and hours of argument, the superior court affirmed the Director's order. App. at 135-39. The court ruled that the Yakama Treaty right to travel does not preempt the rack removal tax under RCW 82.38.030(13)(a) or the license revocation because the tax does not burden travel, and that the agency did not violate Cougar Den's APA and/or due process rights in entering the order without addressing Treaty preemption. The court later dismissed the independent claims under CR 12(c) for failure to state a claim. App. at 140-43.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Yakama Treaty of 1855's right to travel provision inapplicable to the imposition of fuel taxes on Cougar Den

under RCW 82.38.030(13)(a) for removing fuel from terminal racks and to the revocation of Cougar Den's fuel supplier license for failure to report and pay those taxes?

2. Do administrative agencies lack authority to construe a Treaty and determine its preemptive effect on laws they administer?
3. Does a prompt post-deprivation court hearing on a Treaty defense to an agency action satisfy due process when agencies cannot consider the defense?
4. Does Cougar Den fail to state cognizable independent claims against the Department and Director?

IV. GROUNDS FOR DIRECT REVIEW

Direct review is appropriate under RAP 4.2(a)(4) because this case involves constitutional questions of preemption under the Supremacy Clause that will undoubtedly reach this Court for ultimate determination. Given the significant tax revenue at issue, a prompt determination by this Court is warranted.

A. Whether the Terminal Rack Removal Tax Burdens Travel is a Constitutional Question Appropriate for This Court's Direct Review

The Yakama Treaty of 1855 provides the Yakamas the right “to travel upon all public highways.” Treaty with the Yakamas, art. III, June 9, 1855, 12 Stat. 951. If a Treaty does not apply, then a state’s tax laws can apply to tribal members and their businesses when those requirements are generally applicable to citizens of the State, and the legal incidence of the tax is off-reservation. *Cougar Den I*, 188 Wn.2d at 60 (“Outside an Indian reservation, Indian citizens are subject to state tax laws, [a]bsent express federal law to the contrary.” (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973))); *Chickasaw Nation v Oklahoma Tax Comm’n*, 515 U.S. 450, 458 (1995).

The Court should grant direct review to address whether the terminal rack removal tax under RCW 82.38.030(13)(a) burdens Cougar Den’s exercise of Treaty travel rights. To address this, the Court first considers how a tax operates. *See Cougar Den II*, 586 U.S. at 354-56. The Department disagrees

with *Cougar Den* that the practical effect of the rack removal tax is to burden travel. The superior court disagreed, too. That conclusion is consistent with this Court's and the U.S. Supreme Court's analysis in the prior *Cougar Den* cases. Thus, review is warranted under RAP 4.2(a)(4), but not RAP 4.2(a)(3).

1. The rack removal tax does not burden travel

Under RCW 82.38.030(13)(a), a fuel tax is “imposed when [f]uel is removed in this state from a terminal if the fuel is removed at the rack.” The Director concluded that the fuel tax attaches under RCW 82.38.030(13)(a) “at the instant fuel . . . is physically transferred from the confines of the rack,” App. at 11, without requiring any travel with that fuel, and the superior court correctly affirmed that ruling.

“Fuel taxes are imposed at the wholesale level, *when fuel is removed from the terminal rack or imported into the state.*” *Cougar Den I*, 188 Wn.2d at 60 (emphasis added). *Cougar Den I* and *II* involved the importation tax under RCW 82.38.030(13)(c), which imposes a tax on “motor vehicle fuel

importer[s]” for each gallon of fuel imported into the state by ground transportation. *Cougar Den II*, 586 U.S. at 351. The U.S. Supreme Court plurality described this as a tax on “travel by ground transportation with fuel.” *Id.* at 355. The Court held that the importation tax was preempted because it fell on Cougar Den “only because they happened to transport goods on a highway while en route to their reservation.” *Id.* at 358. Cougar Den’s “lone off-reservation act within the State” that subjected them to the tax was “traveling along a public highway with fuel.” *Id.* Thus the importation tax operated “exactly like a tax on transportation would.” *Id.*

By contrast here, the rack removal tax is owed the moment “when fuel is removed from the terminal rack.” *Cougar Den I*, 188 Wn.2d at 60. Importantly, because Washington’s terminal rack removal tax statute is nearly identical to federal law, the federal interpretation of how the tax operates applies. *Anfinson, et al. v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (when “a state statute is taken

‘substantially verbatim’ from [a] federal statute, it carries the same construction as the federal law” (internal citations omitted)). *Compare* RCW 82.38.030(13)(a) *and* 26 C.F.R. § 48.4081-2(b); *see also* Wash. Sen. Bill Rep., 1998 Reg. Sess., Sub. House Bill 2659; 26 U.S.C. § 4081(a)(1)(A); 26 C.F.R. § 48.4081-2(a); 26 C.F.R. § 48.4081-3(a); 26 U.S.C. § 4105(b)(3).

Fuel tax publications and national fuel tax uniformity guidelines further confirm that in tax-at-the-rack states, fuel is taxed “as it is dispensed over the terminal rack,” App. at 53, or, in other words, “as [fuel] cross[es] the terminal loading rack.” App. at 24. Further, the Internal Revenue Service taxes “removals of gasoline at a terminal rack.” App. at 67. Thus, the tax applies to the act of removal at the rack, not when the truck drives away from the terminal grounds or the fuel is brought to market, as Cougar Den contends. *See* Statement of Grounds at 18.

Moreover, the tax is imposed regardless of whether the fuel is driven away, loaded into a train car for rail transport, or

spilled on the ground. It is imposed “irrespective of transport or its means.” *Cougar Den II*, 586 U.S. at 366. Because application of the tax is not tied to travel, it does not burden the Treaty travel right.

Instead, the rack removal tax is more like a tax on the off-reservation purchase of goods taken to the Reservation. All nine U.S. Supreme Court Justices agreed that no Treaty right preempts such a tax. *Cougar Den II*, 586 U.S. at 364 (“[T]here is no treaty that forbids taxing Yakama off-reservation purchases of goods.”); *id.* at 374 (Gorsuch, J. concurring) (“[A] Yakama who buys a mink coat . . . at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there.”); *id.* at 380 (Roberts, C.J., dissenting) (“A Yakama member who buys a mink coat at an off-reservation store in Washington will pay the tax.”).

Cougar Den itself has previously acknowledged that off reservation economic activity occurring before or after highway travel is subject to taxation and does not violate its Treaty right:

But if the Yakama engages in any off-reservation activities distinct from the exercise of the right to travel, those activities may be taxed.

....
[T]he right-to-travel provision would not preempt taxation of acts *distinct* from the exercise of treaty rights, such as off-reservation economic transactions occurring before or after the highway travel.

Br. of Resp't at 35-36, *Cougar Den II*. The rack removal tax is an "off-reservation economic transaction . . . before or after the highway travel."

The conclusion that the tax applies only at the time fuel is removed at the rack and, therefore, does not burden travel is consistent with this Court's and the U.S. Supreme Court's analysis of the practical effect of a tax on the exercise of Treaty travel rights. Accordingly, the Department disagrees that review is warranted under RAP 4.2(a)(3) but agrees it is proper under RAP 4.2(a)(4).

2. The right to travel is not a right to trade tax free

Cougar Den possesses a Treaty right to travel upon all public highways. The Department respects and honors that right

and does not seek to erode it in any way, as Cougar Den claims. Statement of Grounds at 19.

Rather, it is Cougar Den who seeks to expand the Treaty rights beyond their reach and with no bounds. They ask the Court to conclude that a tax on goods that Cougar Den brings to market burdens trade and, therefore, must also burden travel. *See* Statement of Grounds at 3-7, 20. But “there is no right to trade in the Yakama Treaty.” *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014).

Cougar Den’s arguments could have significant impacts on retail sales or other taxes. Cougar Den or other companies owned by Yakama members could avoid taxes on any manner of goods taken to market over public highways by arguing that the tax burdens travel because travel occurs before or after the off-reservation transaction. Given the significant potential impact of Cougar Den’s arguments, review is warranted under RAP 4.2(a)(4).

3. The right to travel is not based on how the tax funds are used

Nor does the right-to-travel analysis depend on how the tax funds are ultimately used. If that were true, then any tax whose funds were used to build or maintain public highways would be preempted as to Yakamas and their businesses. *Cougar Den I and II* did not find the importation tax preempted on this basis, even though the tax was used for highway purposes. No case has declared a law preempted by the Yakama Treaty on this basis.

Yakama Indian Nation v. Flores, 955 F. Supp. 1229 (E.D. Wash. 1997), does not support Cougar Den. Statement of Grounds at 14. There, the court found that fees imposed for truck registration, licensing, and log tolerance permits were preempted because they indirectly burdened travel. *Id.* at 1249. The court did not find preemption based on the use of those funds for highway purposes. Rather, the court considered fund use only to analyze whether the fees could be saved from preemption under the “conservation” or “regulatory purpose” exception to Treaty

preemption. *Id.* at 1256. In other words, how taxes and fees are spent *could* relate to this *exception* to preemption, but it has no bearing on the threshold question of whether those taxes or fees burden travel and are preempted in the first place.

Fuel taxes are used for myriad purposes. Wash. Const., art. II, § 40. This Court should not adopt a new and unworkable test for Treaty preemption based on how funds are spent, but instead—like multiple past precedents—should grant review and analyze whether a state law or act burdens the exercise of the Treaty right to travel.

B. The Court Should Review the Superior Court’s Dismissal of the Independent Claims at the Same Time

The superior court properly dismissed Cougar Den’s additional claims for relief against the Department and its Director. In accepting direct review of the Director’s order, the Court should review the dismissal of these claims, too. Given how intertwined the independent claims are with the APA and Treaty arguments, bifurcating review would only create unnecessary delay and expense for the parties.

In its amended petition for judicial review, Cougar Den attempted to plead “independent claims” against the Department and its Director, seeking damages and other relief. App. at 130-32. But the Legislature made APA judicial review of a final agency order the exclusive remedy. RCW 82.38.300; RCW 82.38.205; RCW 34.05.510. If litigants can attach original actions to judicial review petitions on the same legal issues on appeal, then superior courts will be flooded with them.

This is especially true for claims against tax officials, like here, where the comity doctrine bars independent claims when administrative remedies are available. *Wash. Trucking Assocs., et al. v. Emp. Sec. Dep’t, et al.*, 188 Wn.2d 198, 221-22, 393 P.3d 761 (2017), cert. denied, 583 U.S. 872 (2017). This Court has emphasized the vital role of taxation and recognized that “[a]ny delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.” *Id.* at 209 (citing *Dows v. City of Chicago*, 78 U.S. (11 Wall.)

108, 110, 20 L. Ed. 65 (1871)). Cougar Den's arguments on the purported independent claims, especially relating to the license revocation and alleged attempt to collect the tax in the six days the Director's order was effective, are the *same* as their arguments on appeal of the Director's order. They are thus barred by the exclusive remedy provision and the comity doctrine. Cougar Den's arguments for avoiding comity's bar could significantly burden the courts, warranting this Court's review.

Even assuming the additional claims are premised on conduct that occurred *after* the Director's order, the superior court properly concluded the claims are not cognizable.

Cougar Den claimed that the agency violated due process in entering a final order without adjudicating its Treaty preemption argument. But the APA provides for *courts* to rule on facial or as-applied constitutional challenges. RCW 34.05.570(3)(a); *Swanson Hay Co., et al. v. Emp. Sec. Dep't*, 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017), *review denied*, 191 Wn.2d 1004, *cert. denied*, 586 U.S. 1036 (2018) (agency

commissioner “correctly observed” his lack of authority to address constitutional issues—including preemption—recognizing “that on judicial review, the superior and appellate courts may consider and rule on the constitutionality of an agency order”). A hearing on constitutional and Treaty rights is not within an agency’s authority. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) (“An administrative body does not have authority to determine the constitutionality of the law it administers; only the courts have that power.”); *Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (preemption is a function of the Supremacy Clause). Thus, Cougar Den has no due process right to have the agency consider its constitutional or Treaty defenses or claims.

The availability of a prompt post-deprivation stay hearing, as under RCW 34.05.550, where a court can consider constitutional and Treaty arguments, satisfies due process. See *Comm’r of Internal Revenue v. Shapiro*, 424 U.S. 614, 630 (1976) (when seizure of property would result in irreparable

harm, “some kind of predeprivation *or prompt post-deprivation hearing* at which some showing of the probable validity of the deprivation must be made”) (emphasis added). Cougar Den essentially argues that the APA’s bar on administrative agencies’ authority to rule on constitutional questions, including involving the Supremacy Clause, is itself unconstitutional. Given the significant potential impact of Cougar Den’s argument, this Court’s direct review is warranted.

Finally, Cougar Den’s allegations about the Department’s communications with other entities fail to state a due process claim because such communications do not amount to any taking of *Cougar Den’s* rights. Nor does Cougar Den have due process interests in agreements the State enters with sovereign Tribes. *See Conard v. Univ. of Wash.*, 119 Wn.2d 519, 530, 834 P.2d 17 (1992) (rejecting due process claim where contract did not “create legitimate claim of entitlement”).¹

¹ Cougar Den’s arguments about the Department’s compact negotiations with Tribes are wrong, irrelevant, and

Further, communicating with third parties does not burden Cougar Den's exercise of travel rights. The activities Cougar Den complains about are distinct from travel.

V. CONCLUSION

The Department agrees that direct review of this case is warranted under RAP 4.2(a)(4).

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RESPECTFULLY SUBMITTED this 12th day of June, 2026.

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improperly based on evidence outside the record. Statement of Grounds at 11-12. The Department's agreements and negotiations with non-party sovereign Tribes do not burden Cougar Den's exercise of its Treaty travel rights.

ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

APPENDIX

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STATE OF WASHINGTON
DEPARTMENT OF LICENSING
PO Box 9020 • Olympia, Washington 98507-9020

January 10, 2024

Cougar Den, Inc.
c/o Derek Red Arrow Frank
120 N Naches Ave
Yakima, WA 98901

derek.redarrow@stokeslaw.com

Leo Roinila
Assistant Attorney General
Attorney General's Office
Licensing & Administrative Law Division
PO Box 40110
Olympia, WA 98504-0110

Mr. Derek Red Arrow Frank
120 N Naches Avenue
Yakima, WA 98901

Dear Cougar Den, Inc, Derek Red Arrow Frank, and AAG Leo Roinila:

Enclosed for service upon you is the **Final Order of the Director in the Matter of COUGAR DEN, INC; Case No. 2021-0072337-01-PRFT.**

If you need any further information concerning this matter, please contact the Department of Licensing, Prorate and Fuel Tax Program, at 360-664-1850.

Sincerely,

Fred Wade
Equity, Performance, & Accountability Director

Enclosures

cc: Jennifer Clawson, Assistant Director, Business and Professions Division
Lynn Briscoe, Administrator, Prorate and Fuel Tax Program
Wesley Marks, Program Manager, Prorate and Fuel Tax Program
Rebecca Kim, Assistant Attorney General, Attorney General's Office
Micah Larripa, Administrative Law Judge, Office of Administrative Hearings
Donald Capp, Administrative Law Judge, Office of Administrative Hearings
Lisa Dublin, Senior Administrative Law Judge, Office of Administrative Hearings

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**PROCEEDINGS BEFORE THE DIRECTOR OF
THE DEPARTMENT OF LICENSING
STATE OF WASHINGTON**

In the Matter of:

Cougar Den, Inc.,

Respondent.

OAH Docket No. 03-2022-DOL-001372
DOL No. 2021-0072337-01-PRFT

FINAL ORDER

I. DIRECTOR'S CONSIDERATION

This matter comes before the Director¹ to review the Amended Initial Order on Summary Judgment Motions (Initial Order) dated October 3, 2023, granting Cougar Den, Inc.'s (Cougar Den) Motion for Summary Judgment and denying the Department of Licensing's (Department) Motion for Summary Judgment.

This matter is considered on cross-motions for summary judgment by Cougar Den and the Department. Summary judgment is appropriate only if "the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135. When determining whether an issue of material fact exists, all facts and inferences are viewed in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all of the evidence. *Id.*

¹ "Director" refers in this case to Office of Equity, Performance, and Accountability Director Fred Wade. Marcus Glasper, the Director of the Department of Licensing, designated Fred Wade on September 14, 2023 as Reviewing Officer for any and all administrative proceedings against tribal fuel tax licenses. Fred Wade has been screened from all administrative proceedings regarding these types of licenses. Cougar Den's request for appointment of a different reviewing officer than Marcus Glasper is moot.

ORDER OF THE DIRECTOR 1

Petition for Administrative Review: The Department's Prorate and Fuel Tax Unit filed a petition for review of the Initial Order on October 23, 2023. Cougar Den filed a reply on November 2, 2023.

Motion to Strike: Cougar Den filed a motion on November 15, 2023, requesting that the Director strike the Department's citation to a "Federal Fuel Tax Administrators, Motor Fuels Section, Uniformity Guide" and "Figure 1" from the Department's petition for review. The Department responded on November 27, 2023, and Cougar Den replied on December 5, 2023.

The Director denies Cougar Den's motion to strike. The Director's review in this case was limited to the record before the Administrative Law Judge. Furthermore, the Uniformity Guide is persuasive evidence cited by the Department, not substantive evidence, and Figure 1 is a "demonstrative or illustrative exhibit" like that permitted by RAP 11.4(i) "to promote clarity of argument." Demonstrative or illustrative evidence is not substantive evidence. *See State v. Lord*, 117 Wn.2d 829, 855, 822 P.2d 177 (1991), *abrogated on other grounds by State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018).

Record: The Director considered the entire record for review, which was everything entered and considered by the Administrative Law Judge, including all documents listed in 3.6 of the Initial Order and the recorded oral argument from the summary judgment hearing.²

Request for Oral Argument: Having considered the entire record on review, the Director has determined that oral argument is unnecessary and denies Cougar Den's request for oral argument. *See* RCW 34.05.464(6).

Issue: Whether the Notice of Assessment and Intent to Revoke (Notice of Assessment) issued for the April 2021 fuel tax reporting period should be affirmed, or if Cougar Den is exempt under the Yakama Nation Treaty of 1855 (Treaty)?

² The Director did not consider Katherine Ataman's supplemental declaration dated August 10, 2023, which the ALJ struck from the record. Amended Initial Order at 2.

II. FACTS FOR PURPOSES OF SUMMARY JUDGMENT

This case was decided on summary judgment, so the Administrative Law Judge (ALJ) did not serve as a fact finder and there are no findings of fact in this matter. *See Verizon Nw., Inc. v. Washington Emp. Sec. Dep't*, 164 Wn.2d 909, 914 n.3, 194 P.3d 255 (2008). The function of summary judgment proceedings “is to determine whether or not a genuine issue of fact exists, not to determine issues of fact.” *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962). “Findings of fact are superfluous in summary judgment proceedings and carry no weight on appeal.” *Hamilton v. Huggins*, 70 Wn. App. 842, 848, 855 P.2d 1216 (1993).

Where the original administrative decision is on summary judgment, the reviewing court must overlay the Administrative Procedure Act (APA) standard of review with the summary judgment standard. *Verizon Nw., Inc.*, 164 Wn.2d at 916. The APA does not explicitly authorize agencies to use summary judgment procedures, so the portion of the APA that lists the requirements for final orders does not expressly contemplate orders on summary judgment. *See* RCW 34.05.461; RCW 34.05.464(8).

Therefore, the Director specifies the following not as findings of fact, but as facts that appear without substantial controversy between the parties for purposes of summary judgment:

Cougar Den

“Punia” Kip Richard Ramsey is Cougar Den’s owner and president and is an enrolled member of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”). Ramsey Decl. ¶¶1-5.

The Yakama Nation is a federally recognized Indian tribe. Ramsey Decl. ¶2.

The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951 (the “Treaty” or “Treaty of 1855”). Ramsey Decl. ¶1, Ex. 1. The Treaty guarantees the

Yakamas certain rights, including the “right to travel,” in exchange for lands ceded to the United States. Ramsey Decl., Ex. 1.

Cougar Den is a member-owned and privately-held Yakama Nation corporation incorporated on January 3, 1992, under the laws of the Yakama Nation. Ramsey Decl. ¶7. Cougar Den is registered as a foreign corporation with Washington’s Secretary of State. Ramsey Decl. ¶9.

Cougar Den has held a Washington fuel supplier license since September 1, 2018. Ramsey Decl. ¶11; Marks Decl. ¶5.

Bulk Transfer Terminal System

One means of obtaining fuel in Washington State is from the bulk transfer-terminal system, which delivers fuel to bulk storage and distribution facilities called “terminals.” Marks Decl. ¶7.

Structures called “racks” transfer fuel out of the terminal and into fuel tanks like tanker trucks or other means of non-bulk transfer. Marks Decl. ¶8; Perez Decl. ¶6.

For a tanker truck to receive fuel “at the rack,” the tanker truck enters the terminal grounds and drives directly beneath the rack. Fuel is dispensed from the rack into the truck and the truck leaves the terminal grounds. Marks Decl. ¶8.

Cougar Den purchases fuel at Washington State licensed, IRS registered terminal racks. Perez Decl. ¶6; Marks Decl. ¶12.

Licensed Fuel Supplier Tax Requirements

All licensed fuel suppliers are required to file monthly reports with the Department showing their receipts and disbursements of fuel and to remit the net-calculated tax owed for the month with that report. Marks Decl. ¶13.

The Department distributes a Fuel Tax Compliance Manual to all licensed fuel suppliers. The Fuel Tax Compliance Manual, last updated in April 2021, provides instructions for how licensees must submit their returns and how to maintain their licenses. Ataman Decl. ¶4, Ex. 1.

Licensed fuel suppliers are required to submit “receipts schedules” of their fuel distributions. Ataman Decl. ¶7; Ex. 1, pages 11-12. The receipts schedules describe each tax-exempt distribution in more detail. Ataman Decl. ¶7, Ex. 1, p. 11-12.

Licensed fuel suppliers are responsible for remitting the tax owed on all fuel not distributed in a tax-exempt manner during the reporting period. Ataman Decl. ¶6.

The Fuel Tax Compliance Manual instructs licensed fuel suppliers to use Schedule 10G to report “[g]allons sold to other tax-exempt entities – Use this schedule to report sales to other tax-exempt entities. These exemptions are specified in Washington law (RCW 82.38.080).” Ataman Decl., Ex. 1, p. 13.

April 2021 Licensed Fuel Supplier Tax Return

Cougar Den filed a monthly report for April 2021. Perez Decl. ¶7; Ramsey Decl., Ex. 10. Cougar Den reported in its initial April 2021 Licensed Fuel Supplier tax return that between April 1, 2021 and April 30, 2021, it had obtained and delivered a total of 2,369,479.4 gallons of fuel from IRS-registered terminals in Washington. Marks Decl. ¶17, Perez Decl. ¶¶2, 6.

Cougar Den reported 2,318,902 gallons as tax exempt on Schedule 10G. Marks Decl. ¶18.

On June 2, 2021, the Department issued a notice titled “Unable to Process April 2021 Tax Return” that identified issues related to Cougar Den’s Schedule 10G submissions preventing the Department from processing that return. Marks Decl. Ex. 5. In part, the Department requested that Cougar Den submit an amended tax return that provided information regarding the specific statutory exemption claimed under RCW 82.38.080 for each transaction and supporting documentation for each exemption for verification. Marks Decl. Ex. 5.

In e-mail correspondence with Department representatives in June 2021, Cougar Den explained that it used Schedule 10G to report fuel deliveries to Tribal Stations based on instruction from the Department in a February 20, 2019 letter and based on Cougar Den's assertion that the United States Supreme Court had held that "the Yakamas' Treaty of 1855 preempts the State's fuel tax and licensing scheme." Perez Decl. Ex. C, p. 2.

In response, Wesley Marks, Policy and Outreach Program Manager for the Department, clarified that the Department's February 20, 2019 letter had instructed on how to report fuel imported into Washington from another jurisdiction following the Supreme Court decision. Perez Decl. Ex. C, p. 1. Wesley Marks reiterated the Department's request that for fuel Cougar Den received in Washington, Cougar Den explain why the fuel purchasers listed on Schedule 10G are tax-exempt under RCW 82.38.080. Perez Decl. Ex. C, p. 1.

On July 13, 2021, the Department issued a "Fuel Tax Return Correction" letter to Cougar Den which disallowed and removed the transactions Cougar Den had reported under Schedule 10G because the Department could not verify they were exempt sales authorized under RCW 82.38.080. Marks Decl. ¶21, Ex. 6.

Also on July 13, 2021, the Department issued a Notice of Assessment and Intent to Revoke that assessed \$1,123,109.99 in taxes, a \$112,311.00 penalty, and \$24,831.96 in interest. Marks Decl. ¶22, Ex. 7. The Notice of Assessment and Intent to Revoke also notified Cougar Den of the Department's intention to revoke Cougar Den's Fuel Supplier license "for failing to pay [its] April 2021 Fuel Supplier tax return." *Id.*

On August 11, 2021, Cougar Den submitted a "Letter of Appeal and Request for Reassessment to Cougar Den, Inc.". Marks Decl. ¶23, Ex. 8.

The Department acknowledged receipt of Cougar Den's letter and advised Cougar Den's counsel that it would conduct an informal hearing in accordance with RCW 82.38.170(10)(b). Red Arrow Opp. Decl., Ex. 5.

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On October 15, 2021, the Department held an informal hearing to discuss the Notice of Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period. Marks Decl. ¶¶24-25.

The Department issued an Informal Hearing Determination dated November 23, 2021 for the Fuel Supplier Return Assessment of April 2021, which upheld the Notice of Assessment and Intent to Revoke but mitigated the penalties to \$0.00 and the interest to \$0.00. Marks Decl. ¶25; Marks Decl. Ex. 10.

In the November 23, 2021 Informal Hearing Determination, the Department identified two grounds for revoking Cougar Den's Fuel Supplier license: 1) Cougar Den maintains an unsatisfied debt to the state; and 2) by reporting transactions on improper schedules, Cougar Den failed to meet the reporting requirements. Marks Decl. Ex. 10, p. 2.

On December 21, 2021, Cougar Den formally appealed the Department's November 23, 2021 Informal Hearing Determination. Marks Decl. ¶26, Ex. 11.

On March 11, 2022, the Department referred Cougar Den's appeal to the Office of Administrative Hearings for adjudication.

III. CONCLUSIONS OF LAW

Based on the Director's deliberation of the entire record on review, the Director makes the following conclusions of law:

3.1 The Director has jurisdiction to decide this appeal of a fuel tax assessment against a licensed fuel supplier. RCW 82.38.300. Based on the Department's timely filed petition for review, the Director has authority to review and decide this matter. RCW 34.05.464; WAC 10-08-211. The Director exercises all the decision-making power that the presiding officer exercised. RCW 34.05.464(4).

3.2 There is no genuine issue as to any material fact.

3.3 The ALJ incorrectly considered the issue of whether the Treaty of 1855 preempted

ORDER OF THE DIRECTOR 7

the taxes assessed in the Notice of Assessment. The Director concludes that the question of whether the Treaty preempts the Washington state fuel tax statute as applied to Cougar Den is a constitutional question that the ALJ lacked authority to decide. The ALJ erred in concluding that Cougar Den is exempt from the fuel taxes assessed in the Notice of Assessment under the Yakama Nation Treaty of 1855.

3.4 Non-discriminatory state tax laws applied to Indians outside reservation boundaries, such as the fuel taxes at issue here, are presumed valid “[a]bsent express federal law to the contrary.” See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 93 S.Ct. 1267, 1270–71, 36 L.Ed.2d 114 (1973). A treaty can constitute such an express federal law. *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996). The Supremacy Clause provides that “the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Art. VI, cl. 2; *Haaland v. Brackeen*, 599 U.S. 255, 287, 143 S. Ct. 1609, 1635, 216 L. Ed. 2d 254 (2023). Determining preemption here requires “a two-step process of first ascertaining the construction of the [federal and state laws] and then determining the constitutional question whether they are in conflict” (internal quotation marks omitted). See *Chicago & N.W. Transp. Co. v. Kal● Brick & Tile Co.*, 450 U.S. 311, 318, 101 S. Ct. 1124, 1130, 67 L. Ed. 2d 258 (1981).

3.5 The Department of Licensing and the Office of Administrative Hearings (OAH) are both part of the executive branch and therefore lack “the authority or jurisdiction to determine whether the laws it administers are constitutional; only the courts have that power.” *Swanson Hay Co. v. State Emp. Sec. Dep’t*, 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017); *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (“The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary”); RCW 34.12.120; RCW 34.12.030(1). Furthermore, the APA explicitly grants courts judicial review over facial and as applied constitutional challenges to statutes. RCW 34.05.570(3)(a).

ORDER OF THE DIRECTOR 8

In *Exendine v. City of Sammamish*, 127 Wn. App. 574, 586–87, 113 P.3d 494 (2005), the Court of Appeals affirmed the well-established principle that only the judiciary may resolve constitutional questions, including as applied to a party. The Court held that a city council, as a legislative body, had no power to enforce, interpret, or rule on the constitutionality of the city’s search warrants to the plaintiffs. *Exendine*, 127 Wn. App. at 586–87. The same principle applies here.

3.6 Contrary to Cougar Den’s assertion, *Harrington v. Spokane County*, 128 Wn. App. 202, 114 P.3d 1233 (2005) does not directly settle whether an agency has authority to decide an as applied constitutional question. Rather, it stands for the proposition that administrative review is required to develop the facts necessary for a court to adjudicate an as applied constitutional challenge. *Harrington*, 128 Wn. App. at 210. Cougar Den has had the opportunity to build a supporting factual record at the agency level in order for a court to decide if the Notice of Assessment and Intent to Revoke was unconstitutional as applied to Cougar Den.

3.7 For these reasons, the Director concludes that the only question properly before the Director is whether the Notice of Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period should be affirmed under Chapter 82.38 RCW. 3.8 The Yakama Indian Reservation is a federally recognized Indian tribal reservation located within the state of Washington. Outside an Indian reservation, Indian citizens are subject to state tax laws, “[a]bsent express federal law to the contrary.” *Mescalero Apache Tribe*, 411 U.S. at 148. The taxes and licensing requirements apply if the Treaty does not apply. *Cougar Den, Inc. v. Washington State Dep’t of Licensing*, 188 Wn.2d 55, 60, 392 P.3d 1014 (2017), *aff’d*, 139 S. Ct. 1000, 203 L. Ed. 2d 301 (2019).

3.8 The Department is responsible for implementing and enforcing the provisions of Chapter 82.38 RCW, the Fuel Tax Act. Fuel taxes under chapter 82.38 RCW “shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state.”

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RCW 82.38.031; *State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1008, 2003 L.Ed.2d. 301 (2019).

3.9 RCW 82.38.035(1) provides that “[a] licensed supplier is liable for and must pay tax on fuel as provided in [RCW 82.38.030(9)].”

Under RCW 82.38.030(9), “[t]axes are imposed when: (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack unless the removal is by a licensed supplier or distributor for direct delivery to a destination outside of the state, or the removal is by a fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320.”

The Fuel Tax Act defines “removal,” “terminal,” and “rack”:

“Removal” means “a physical transfer of fuel other than by evaporation, loss, or destruction.” RCW 82.38.020(28).

“Terminal” means “a fuel storage and distribution facility that has been assigned a terminal control number by the internal revenue service.” RCW 82.38.020(31).

“Rack” means “a mechanism for delivering fuel from a refinery or terminal into a truck, trailer, railcar, or other means of nonbulk transfer.” RCW 82.38.020(26).

3.10 Thus, fuel taxes attach under RCW 82.38.030(9) upon physical transfer of fuel from the terminal via the fuel-delivery mechanism into a truck, trailer, railcar, or other means of nonbulk transfer. The ALJ erred in the conclusion that the fuel tax does not attach until a truck carrying the fuel removes the fuel from the terminal grounds by driving away. The tax is imposed at the instant fuel is “removed” from the terminal within the meaning of RCW 82.38.020(28), which is when it is physically transferred from the confines of the rack.

3.11 Under RCW 82.38.030(9), “[t]axes are imposed ... unless the removal is by a licensed supplier or distributor for direct delivery to a destination outside of the state, or the removal is by a fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320.” Cougar Den and the Department agree that none of the transactions that

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Cougar Den reported for April 2021 on Schedule 10G were for direct delivery to a destination outside of the state or for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320.

3.12 The Fuel Tax Act requires licensees to file monthly tax reports so the Department can determine the amount of liability for taxes imposed under chapter 82.38 RCW. RCW 82.38.150(1). Licensees “must file a tax report on or before the twenty-fifth day of the calendar month following the reporting period to which it relates. A report must be filed even though no tax is due for the reporting period. Each report must contain a declaration that the statements contained therein are true and are made under penalties of perjury. The report must show information as the department may reasonably require for the proper administration and enforcement of this chapter.” RCW 82.38.150(3).

3.13 With each monthly tax return, a licensed fuel supplier must submit “receipts schedules” of their fuel distributions, which describe each tax-exempt distribution in more detail. Ataman Decl. ¶ 7. The Department’s Fuel Tax Compliance Manual instructs licensed fuel suppliers that Schedule 10G is used “to report sales to other tax-exempt entities. These exemptions are specified in Washington law (RCW 82.38.080).” Ataman Decl. ¶4, Ex. 1, p. 13.

3.14 RCW 82.38.080(2) specifies sales of motor vehicle fuel that are exempt from payment of taxes under Chapter 82.38 RCW:

- “(a) Sales to the armed forces of the United States or to the national guard when the fuel is used exclusively in ships or for export from this state;
- (b) Sales to foreign diplomatic and consular missions, if the foreign government represented grants an equivalent exemption to missions and personnel of the United States performing similar services in the foreign country; and
- (c) Sales of fuel used exclusively for racing that is not legally allowed on the public highways of this state.”

3.15 In its April 2021 Fuel Supplier tax return, Cougar Den reported removing a total of 2,369,479 gallons of fuel from state licensed, IRS-registered Washington terminal racks. Marks Decl. ¶17, Perez Decl. ¶¶ 2, 15, 26, Ex. A. Cougar Den became legally liable for the payment of tax on that fuel when it withdrew fuel from the terminal “at the rack” into its trucks.

3.16 Cougar Den reported 2,318,902 gallons of fuel as “sold to other tax-exempt entities” on its April 2021 Schedule 10G but it did not identify any statutory exemptions under RCW 82.38.080 from the taxes imposed under RCW 82.38.030 on those 2,318,902 gallons of fuel or provide documentation supporting that it delivered this fuel to statutorily tax-exempt entities. Cougar Den instead asserted that the United States Supreme Court had held that the Treaty preempts the state’s fuel tax and licensing scheme. Perez Decl. Ex. C, p. 2. Because the Department could not determine if any statutory exemptions applied to any of the gallons of fuel that Cougar Den reported on Schedule 10G, the Department correctly determined in the Notice of Assessment that Cougar Den was liable for taxes under RCW 82.38.030 on those 2,318,902 gallons.

3.17 Under RCW 82.38.170(3), “[i]f any licensee, whether or not licensed as such, fails, neglects, or refuses to file a required fuel tax report, the department must determine the tax liability and add the penalty provided in subsection (2) of this section to the liability. An assessment made by the department pursuant to this subsection or to subsection (2) of this section is presumed to be correct, and the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive.”

Cougar Den did not meet its burden under RCW 82.38.170(3) to establish by a preponderance of evidence that the Notice of Assessment is erroneous or excessive because it has not shown any exemptions under RCW 82.38.080 apply to the 2,318,902 gallons it reported on Schedule 10G with its April 2021 fuel supplier tax return.

3.18 Under RCW 82.38.120(1)(d), the Department may revoke a license of any licensee “[w]ho has an unsatisfied debt to the state assessed under either chapter 82.36, 82.38,

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82.42, or 46.87 RCW.” Cougar Den has not paid the taxes assessed under chapter 82.38 RCW in the Notice of Assessment, so it has an unsatisfied debt to the state. The Department properly sought to revoke Cougar Den’s fuel supplier license on that basis.

3.19 The Department may also revoke a license of any licensee “[w]ho violated a statute or administrative rule regulating fuel taxation or distribution[.]” RCW 82.38.120(1)(h). Here, the Department properly sought to revoke Cougar Den’s fuel supplier license based on Cougar Den violating the requirement in RCW 82.38.150(3) that licensees must submit reports that “show information as the department may reasonably require for the proper administration and enforcement of [chapter 82.38].” Licensees must comply with the reporting system the Department has created in order to determine tax amounts due. Decl. Ataman ¶¶ 4, 6. The Department requested Cougar Den provide sufficient documentation to establish Cougar Den’s claimed exemptions in Schedule 10G, but Cougar Den did not. Marks Decl. ¶20.

IV. ORDER

Based upon the foregoing Conclusions of Law, the Director orders:

The Initial Order is reversed. Summary Judgment is granted to the Department. Summary Judgment is denied to Cougar Den. The Department’s Informal Hearing Determination dated November 23, 2023, which upheld the July 13, 2021 Notice of Assessment and Intent to Revoke Cougar Den’s Fuel Supplier license, is affirmed.

Reconsideration. Pursuant to RCW 34.05.470, a party has ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Director of the Department of Licensing, P.O. Box 9020 Olympia, Washington 98507-9020, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director’s office. RCW

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34.05.010(6). A copy shall also be sent to Review Counsel for the Director, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5).

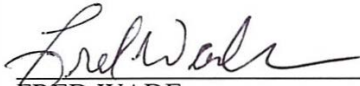
Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. Any request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of the final order shall be filed with the appropriate court and served on the Department, the Office of the Attorney General, and all parties within thirty (30) days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

DATED this 16th day of January, 2024.

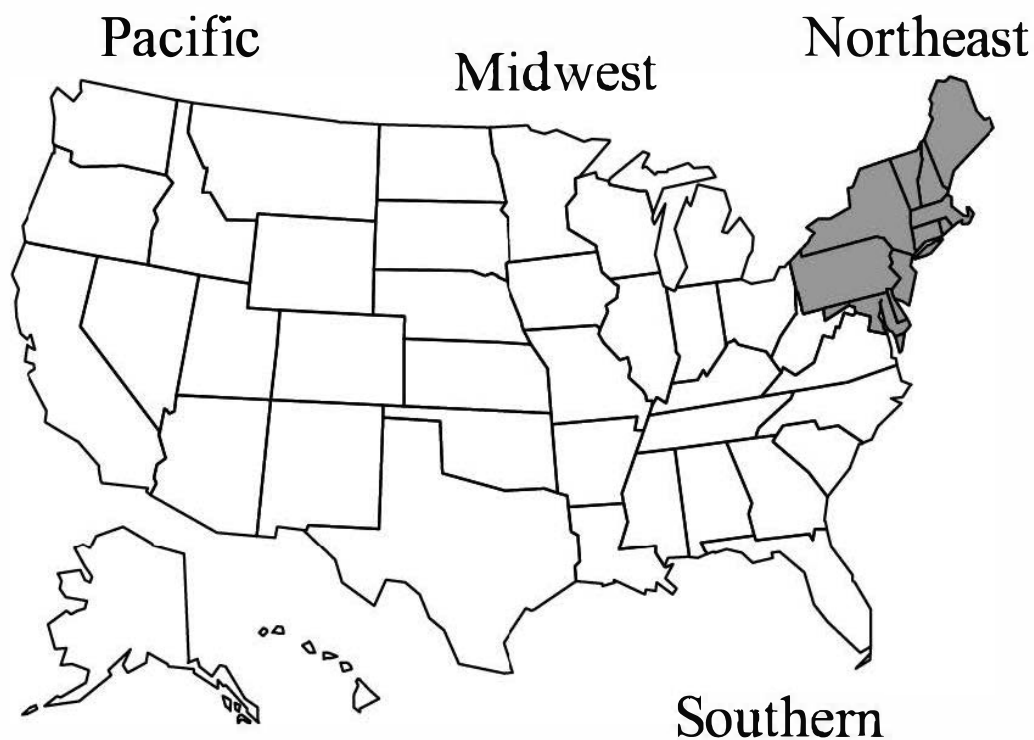
STATE OF WASHINGTON
DEPARTMENT OF LICENSING

By: 
FRED WADE
Equity, Performance, &
Accountability Director

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FTA

Motor Fuel Tax



Section

Uniformity Guide

Version: September 2023

Federation of Tax Administrators Regions

MIDWESTERN

Illinois
Indiana
Iowa
Kansas
Michigan
Minnesota
Missouri
Nebraska
North Dakota
Ohio
Oklahoma
South Dakota
Wisconsin

PACIFIC

Alaska
Arizona
California
Colorado
Hawaii
Idaho
Montana
Nevada
New Mexico
Oregon
Texas
Utah
Washington
Wyoming

OTHER MEMBERS:

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NORTHEASTERN

Connecticut
Delaware
Maine
Maryland
Massachusetts
New Hampshire
New Jersey
New York State
Pennsylvania
Rhode Island
Vermont

SOUTHERN

Alabama
Arkansas
Florida
Georgia
Kentucky
Louisiana
Mississippi
North Carolina
South Carolina
Tennessee
Virginia
West Virginia

OTHER MEMBERS:

Washington, D.C.
Ontario Canada
Quebec Canada
New Brunswick Canada

Benefits of the Motor Fuel Tax Section Activities

The section, through the FTA staff and the Uniformity Committee, has developed and continues to foster a very unique and very effective partnership among the States, Industry, Federal and Foreign Governments regarding motor fuel tax administration. As a result of this partnership, there is an international network of information established that covers almost everything related to motor fuel taxes. This information is available to the States through tax exchange, the list serve, motor fuel tax section meetings (regional, national and Uniformity Committee) and the Motor Fuel Tax Associate, all very reliable and accurate resources. The information available contains current and historical fuel tax data that facilitates statistical analysis and research on legal, enforcement and technology issues.

The overall benefits for States participating in motor fuel tax section projects and utilizing its resources is reduced evasion, improved compliance, reduced administrative costs, training for audit and enforcement staff and easy access to high quality information. The Motor Fuel Tax Section does not dictate to states, but rather provides guidance for states to use for current and future administrative and legislative actions.

An environment of open communication and cooperation exists among States, Industry, the Federal Government and the Canadian Fuel Tax Project. This reduces costs as much as possible for all partners, minimizes the burden on the motor fuel industry, controls administrative costs and fosters a combined effort to control evasion and level the playing field in the motor fuel arena.

The Uniformity Committee

Mission Statement

Provide an opportunity for government and industry to partner for the efficient and effective reporting and remittance of fuel taxes, to minimize fuel tax evasion and to act as an information resource to stakeholders.

Goals

- 1. Implement all aspects of the 11 Point Plan**
- 2. Foster communication between and among levels of government, industry and related associations and interest groups and their representatives.**
- 3. Encourage coordination of efforts among stakeholders in audit and enforcement efforts.**
- 4. Encourage sharing information among enforcement, revenue and transportation agencies in areas related to motor fuels and motor fuels revenue.**
- 5. Educate the motor fuel community in areas of audit and enforcement techniques, reporting requirements, how to identify actual and potential evasion schemes.**
- 6. Encourage active participation by stakeholders in Uniformity meetings. Inform stakeholders on how the goals of Uniformity are designed to work for all members of the motor fuel community.**
- 7. Encourage uniformity in reporting definitions and forms.**
- 8. Prepare for change; by staying informed on emerging topics and trends; by assuring personnel are fully informed to allow for ease of transition; and by being open to new ideas and methods for revenue reporting and remittance.**

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Model Legislation Checklist

The subcommittee on Model Legislation was established to provide a checklist as a guide for states who are contemplating changing their point of taxation for motor fuel products and implementing the 11 point plan.

- Dyed diesel at each point of taxation.
- Taxation at the rack.
- First receipts method.
- Distributor level.
- Taxation at the retail station.
- Third party reporting.

The intent of this model legislation checklist is to offer a resource to all taxing jurisdictions who are interested in strengthening their motor fuel tax laws to combat motor fuel tax evasion.

Motor fuel tax evasion is recognized as a nationwide problem that results in revenue losses to state and federal governments. Lost motor fuel tax revenues harm both the public and private sectors, limiting the funds available to construct and maintain roads, highways, bridges, and urban transportation systems. Fuel tax evasion also impacts honest businesses trying to compete with evaders selling motor fuel far below legitimate costs.

Once motor fuel tax evasion is recognized as a serious problem within a taxing jurisdiction, preventive measures should be taken before the matter worsens and more and more tax revenues are lost. Tax evasion can be significantly reduced by establishing stronger legislative remedies and improved administrative efforts by proposing legislative and administrative changes that: 1) strengthen enforcement efforts, 2) track all motor fuel sales, 3) reduce the number of taxpayers, 4) minimize the number of tax-free sales, 5) provide consistency between fuel tax and other state tax laws, and 6) rewrite or strengthen existing motor fuel tax laws.

The following are legislative and administrative recommendations that this model legislation checklist addresses:

- Strengthen licensing and bonding requirements.
- Strengthen reporting and record keeping requirements.
- Strengthen criminal and civil penalties.
- Strengthen enforcement and auditing efforts.
- Rewrite or strengthen existing motor fuel tax laws.
- Implement a change in point of taxation legislation

Selected References for the Model Legislation Checklist

1. Taxpayer Options

When proposing changes to existing motor vehicle fuel and/or diesel fuel tax laws, taxing authorities must decide who the taxpayer will be. In other words, how far back up the distribution chain should the incidence of the tax be placed. Following are some taxpayer options and a reference to some recent legislative actions taken by both federal and state taxing authorities.

A. Tax at the Terminal Rack

Generally, all gasoline, undyed diesel fuel and kerosene are taxed as they cross the terminal loading rack. Some states have passed variations of the federal tax at the rack legislation. rack legislation. Examples of these variations are as follows:

1. Position Holder at the Rack.
Tax is due from the position holder when the product crosses the rack.
(the person owning the inventory according to the records of the Terminal Operator).
2. Position Holder or Exchange Receiver at the Rack (Modified Position Holder).
If the position holder delivers on exchange, the exchange receiver remits the tax. Tax is due from the position holder when the product crosses the rack.
Exception-Tax is due from the receiver if receiving the product under an exchange agreement
3. First Receiver below the Rack.
The person physically receiving accountable product/motor fuel at the rack remits tax to the taxing jurisdiction, if licensed. If not licensed, then variations 1 or 2 above should be used. Tax is due from the position holder or exchange receiver unless the person physically receiving the product at the rack is a licensed distributor. No subsequent tax-free sales are allowed.

All dyed diesel fuel meeting the United States Environmental Protection Agency (EPA) and Internal Revenue Service (IRS) requirements can be sold tax free and cannot be used on the highways.

B. Tax at the Distributor/Wholesale Level

Sales of gasoline and diesel fuel are taxed at the terminal rack unless the sale is made to another licensed supplier, distributor or wholesaler. It is left up to each taxing jurisdiction to determine and define who qualifies as a license holder for the purpose of purchasing motor fuel tax-free. Examples:

1. Subsequent sales after the rack are exempt, until the product is sold to an unlicensed party. The last licensed distributor in the chain pays the tax.
2. All licensed distributors are exempt. Tax is due from the last licensed distributor who makes a sale to an unlicensed party.
3. Tax jurisdiction may allow only two (2) exempt sales to licensed distributors
And on the third (3) sale the tax is due to the taxing jurisdiction.

C. Tax at the Retail and/or Use Level

Some taxing jurisdictions license all retail dealers and users of diesel fuel within their state and impose an excise tax on sellers and users who place "special fuel" into the fuel supply tank of a motor vehicle. Usually, every person in the distribution chain is licensed, i.e. distributor, importer, exporter, wholesale, dealer, gasoline jobber, seller-user of special fuel, and retail dealer. Fuel sold to each licensee is sold tax- exempt, and the licensee who places the motor fuel into the supply tank of a

motor vehicle becomes the taxpayer. It is left up to each taxing jurisdiction on how and who should be licensed.

D. Tax on First Importation

Another taxpayer option for collecting tax on accountable product/motor fuel is to collect the tax from persons who are responsible for importing, refining, manufacturing, producing, blending, or compounding in a state. If this method is used as an option, consideration must be given to the varying refund provisions that have to be developed.

E. Tax on Importation into State/First Receipt into Storage into a Terminal or Refinery

Tax is paid by the person first receiving product at a terminal or refinery. Tax is also due from the importer when imported directly to the importer's customer or for the importer's use.

2. Collection and Payment of Tax

When considering taxpayer options, the option chosen determines who and how many taxpayers a taxing jurisdiction will have. When the Internal Revenue Service implemented its diesel fuel tax at the terminal rack legislation, it decreased the number of motor fuel taxpayers significantly. When state tax authorities are considering tax at the rack legislation, they must address the problem of former licensed taxpayers losing their cash float because they would be paying their suppliers at the time of removing accountable product/ motor fuel from the terminal rack. Consideration for refunds and supplier bad debt must also be addressed (discussion on these topics is in section 10).

State taxing authorities can decrease their number of state motor fuel taxpayers by moving the point of taxation to the terminal rack. With fewer taxpayers, taxing authorities will provide for greater scrutiny of taxpayers, will have fewer audits but greater coverage of taxable sales, and may be able to sign more manpower and resources to establish stronger on road enforcement policies. Moving the point of taxation to the rack may increase the number of refund claims depending on state statute.

An argument against decreasing taxpayers is that more tax dollars can be stolen because tax liabilities will be greater. To combat this argument, taxing authorities that allow licensed suppliers, distributors, and/or wholesalers or licensed retailers and/or users to be taxpayers increase their number of taxpayers but decrease the chance that one taxpayer can steal large amounts of tax revenue. These taxpayer options will increase the number of taxpayers, but with strong licensing requirements, an aggressive audit department, and strong on road enforcement policies, tax evasion can be curtailed.

Other items that need to be addressed when taxing authorities are deciding who their taxpayers should be are:

- A. Tax payments by importers.
- B. Pre-collection of tax by importers.
- C. Terminal operator liability.
- D. Allowing parties downstream of the taxpayer to defer reimbursement of taxes until the tax is actually remitted to a state.
- E. Tax on cross border movements of motor fuel.
- F. Bad debt allowance.
- G. Back up tax.
- H. Collection allowance/Handling allowance.

Based on the U.S. Supreme Court Case, Chickasaw Indian Nation vs. Oklahoma Tax Commission, it is imperative that states identify that the consumer is the ultimate taxpayer. This case made it clear that immune entities such as Native American Tribes cannot be the taxpayer under state law and are

GAO

United States General Accounting Office
Report to Congressional Requesters

May 1992

TAX
ADMINISTRATION

Status of Efforts to
Curb Motor Fuel Tax
Evasion



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General Government Division**B-247329****May 12, 1992****The Honorable Thomas J. Downey
The Honorable Raymond J. McGrath
House of Representatives**

You asked us to study federal motor fuel excise tax compliance and administration. You pointed out that recent indictments of several firms for excise tax evasion lent credence to the concern of petroleum industry officials that millions of dollars of federal motor fuel taxes are not being collected.

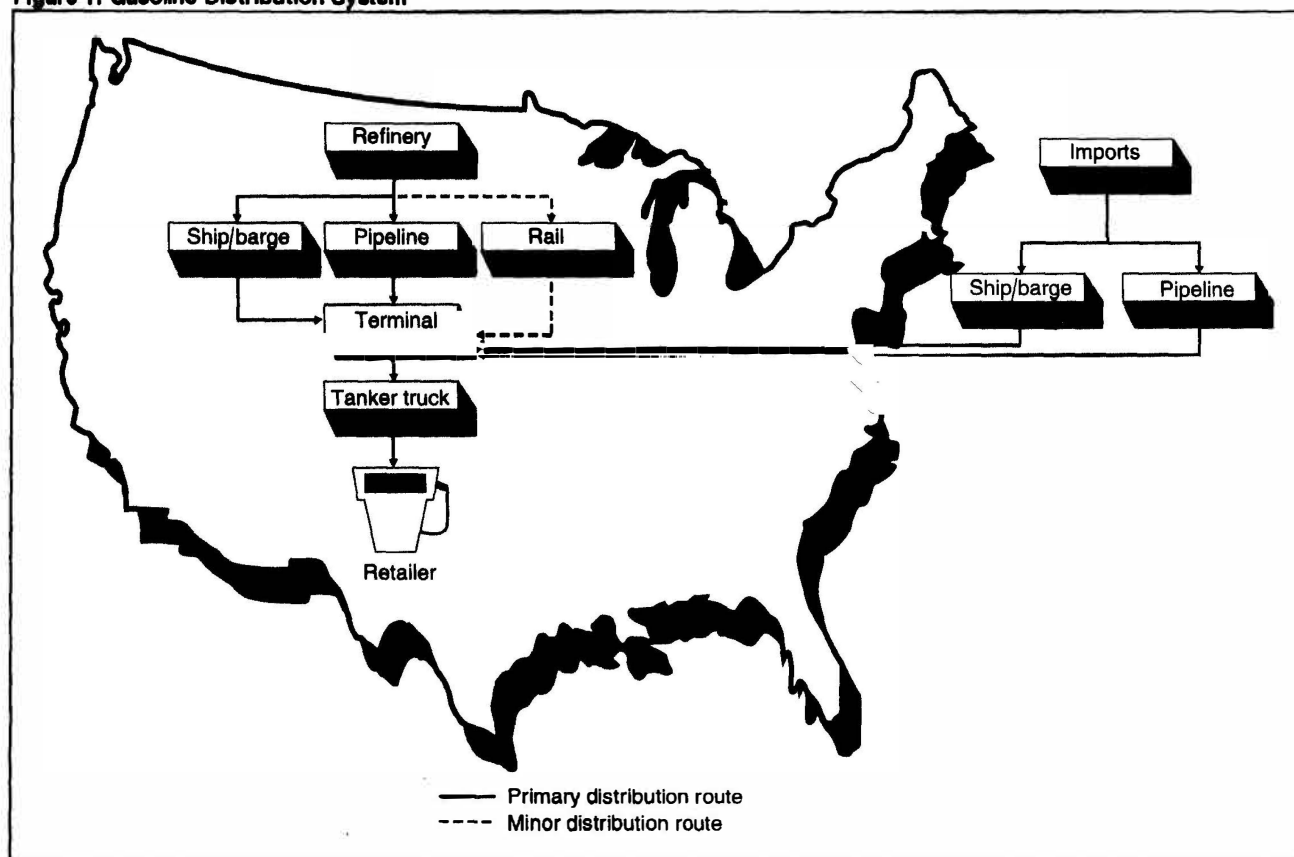
This report discusses (1) the lack of information to determine motor fuel excise tax compliance, (2) the effect of recent legislation on compliance, (3) the effectiveness of Internal Revenue Service (IRS) programs in promoting compliance, and (4) state initiatives that could be adapted to bolster federal motor fuel excise tax collections. See appendix II for further details on our objectives, scope, and methodology.

Background

In the mid-1980s, petroleum industry officials and federal and state tax administrators estimated annual gasoline tax losses to the federal government at over \$1 billion. At that time, wholesale distributors, retail chains with 10 or more gasoline sales outlets, and the many businesses that could potentially own fuel before the retail level in the distribution system (e.g., blender, throughputter, terminal operator, importer, refiner) could register as producers with IRS and purchase gasoline tax-free. Any business registered as a producer, upon selling gasoline to businesses not registered to purchase it tax-free, was responsible for remitting the tax to IRS on those sales.

Several types of firms continue to own fuel at various stages in the gasoline distribution system, and gasoline itself can flow along several routes before delivery to the retail station. Figure 1 illustrates the basic flow of gasoline within the distribution system to the retail outlet.

Figure 1: Gasoline Distribution System



The most popular tax evasion scheme in the mid-1980s, called a daisy chain, involved purchasing the product tax-free, passing ownership (on paper only) through several companies, and selling the same product to a retailer as tax-paid. IRS received no federal excise tax because the company in the chain that purchased the product tax-free and sold it as tax-paid (known as the burn company) had few if any assets or ceased to operate.

To counter these losses, Congress, through the Tax Reform Act (TRA) of 1986, moved the tax collection point in the distribution system so that fewer companies would be involved. For gasoline, the collection point was

moved from wholesale distributors to the terminal (where gasoline is dispensed from the terminal rack into a railcar or truck); for diesel fuel, it generally moved from the retailer to the wholesaler.¹ Despite this and other legislative changes over the past 5 years, the Department of Justice, the Federal Highway Administration (FHWA), and some terminal operators in the Northeast maintain that significant evasion continues.

Results in Brief

No reliable statistical information was available to estimate the current level of fuel tax evasion. IRS has recognized this problem and is investigating alternative methods for estimating motor fuel excise tax evasion. (See app. III.)

Although government and private officials involved in the motor fuel distribution and tax system agree that the legislative changes that have taken effect over the last 5 years have reduced some forms of motor fuel excise tax evasion, disagreements exist about the extent of the reductions. Justice, FHWA, and some terminal operators believe the changes may have narrowed the excise tax gap but that evasion remains high. Justice, for example, indicated that as much as \$1 billion in federal motor fuel excise taxes may be evaded annually. On the other hand, officials in IRS' Office of Examination Programs and representatives from other industry associations believe the changes significantly decreased the opportunities for evasion because the number of businesses authorized to purchase tax-free products has been reduced. (See app. IV.)

Because of the lack of data on the level of evasion, the effectiveness of IRS compliance programs cannot be assessed. IRS does not have national programs in place that address the tax evasion schemes that proliferated in the mid-1980s, but several initiatives are under way. IRS is working with FHWA and selected states to determine whether joint enforcement efforts can improve compliance with motor fuel excise taxes. In connection with this effort, IRS is also developing a database that will include information on all firms authorized to deal in tax-free motor fuels.² The database will be used by IRS and states in examining compliance. It will also be used by terminal operators in determining whether firms they do business with are properly registered with IRS and thus eligible to purchase fuels tax-free. (See app. V.)

¹Before this change, diesel fuel excise taxes generally were collected at the retail pump when diesel was dispensed into a vehicle to be used on the highway.

²IRS expected the database to be available for all users some time in 1992.

The applicability of states' compliance initiatives to federal motor fuel excise tax enforcement is difficult to gauge because of differences between state and federal taxes and collection systems. Two of the changes IRS is currently considering—to recommend to Congress moving the gasoline collection point in the distribution system to further reduce the number of companies involved and setting up a database to track motor fuel sales transactions—have been used by New York and Florida, respectively, to combat motor fuel tax evasion. A discussion of New York's experience and its federal applicability follows. (See app. VI for information on Florida's transaction database.)

Shifting the Collection Point to the Refinery Level

Moving the collection point to the refinery may improve the efficiency of tax administration and increase controls over evasion at the federal level. However, unresolved questions have been raised by the American Petroleum Institute (API) concerning competitive consequences and overall cost-effectiveness.

In 1985, after 3 years of experience with collecting from distributors—during which time state officials said evasion increased—New York changed its collection point for gasoline excise taxes. New York began collecting its excise tax when the product first entered the state, regardless of whether it was imported in bulk (ship or barge) or in smaller quantities (tanker truck).³ New York reported that motor fuel excise tax collections increased 19.6 percent the first year after this collection point change.

Moving federal taxation to a point analogous to the one used in New York (i.e., the point at which gasoline leaves the refinery for domestic fuel and to the point of entry for imported fuel⁴) might reduce the potential for evading federal gasoline excise taxes.⁵ However, before such a change is made, consideration should be given to whether the potentially higher federal excise tax collections and administrative cost savings would be

³New York State does not have any refineries. Diesel fuel cannot be taxed effectively at the refinery level because whether the diesel fuel will be used for tax-exempt purposes is not known until later in the distribution process.

⁴The Revenue Reconciliation Act of 1990 requires that gasoline be taxed upon removal from a refinery or terminal or entry into the United States unless it is transferred in bulk to a terminal. Most gasoline is transferred in bulk to terminals from refineries or upon entry into the United States. Refinery-level taxation would eliminate the exception for such transfers.

⁵An IRS task force's draft report recommended that tax collection be moved to the point at which crude oil enters the refinery. The taxation point analogous to the one used in New York is after the crude has been refined and the quantity and type of products have been determined.

greater than the overall additional cost that the industry may have to bear because of the move and the possible consequences for competitors within the industry.

Refinery-Level Collection Is Likely to Further Curb Evasion

Regardless of what the actual level of gasoline tax evasion may be, strong logical arguments suggest that refinery-level taxation would curb evasion more than the current collection scheme. Gasoline excise tax evasion may be reduced with refinery-level taxation because

- gasoline would change hands fewer times between production and taxation, resulting in larger volume transactions;
- refiners are presumed to be financially more sound and to maintain better records than other parties in the distribution chain; and
- the tax would be imposed on fewer taxpayers, thereby reducing the universe for IRS' examination efforts.

Moving the collection point to the refinery should reduce the number of taxable transactions since gasoline currently purchased at the refinery is frequently sold and resold in smaller quantities before being taxed as it leaves a storage terminal. In addition, the financial wherewithal of taxpayers and the sophistication of their records would tend to be greater since a large percentage of the tax would be collected from refiners, most of which are major U.S. companies.

The number of firms that IRS would need to oversee would likely decrease. In October 1989 congressional testimony, IRS' Deputy Commissioner provided the following information on the number of firms registered with IRS to purchase gasoline tax-free: 255 refiners; 63 importers; 293 throughputters, terminal operators, and traders; 287 blenders; and 1,309 gasohol blenders. Under refinery-level taxation, the approximately 318 refiners and importers would continue to be registered and would likely pay over 90 percent of the gasoline excise taxes when gasoline was removed from the refinery.

IRS would need to continue registering and overseeing blenders and gasohol blenders. In addition, if blenders and gasohol blenders are required to pay the full tax on the products they buy and then apply for refunds, IRS would need to devote resources to administering and enforcing this system. Currently, blenders can buy "blend stocks" tax-free

if they are registered with IRS.⁶ They would never remit taxes so long as the blend stocks were not used in gasoline. Gasohol blenders can buy gasoline at a reduced tax rate so long as they blend the gasoline with ethanol within 24 hours for sale as gasohol.

If the products sold by blenders and gasohol blenders would continue to be tax-free or tax-reduced, evasion could occur if these blenders subsequently sold their products as gasoline and collected the full amount of gasoline tax but did not remit the difference to IRS. However, blenders and gasohol blenders do not represent a large part of the gasoline market. On the basis of IRS tax collection data, gasohol represents about 6.2 percent of all gasoline sold in the United States. An industry analyst indicated that blend stock sales are far smaller than this.

In addition, the potential profits available from evading taxes on gasohol are much less than those on gasoline. Successful evasion of the federal gasoline excise tax yields 14.1 cents per gallon. However, because gasohol blenders buy gasoline tax-reduced, their potential profits are limited to the difference between the tax they pay—9.66 cents per gallon for gasohol created with ethanol—and the 14.1 cents they could collect if they sold their product as gasoline rather than gasohol. Thus, potential profits would be around 4.4 cents per gallon rather than 14.1.⁷

Competitive Disadvantages

Some industry members oppose refinery-level taxation of gasoline, arguing that it would place them at a competitive disadvantage. If a refiner is located far from its market, the refiner's customer will have to carry the additional tax-paid cost for some period of time. For example, in the Northeast, independent marketers receive some or all of their product via pipeline from Gulf Coast refiners. If the tax is collected at the refinery, these marketers would bear the cost of a carrying charge for the tax-paid gasoline until they could pass on the cost to their customers. These independent marketers may compete directly with local importers or refiners that sell their product more rapidly. Thus, the carrying charge could place independent Northeast marketers at a competitive disadvantage, which in turn might make it more difficult for Gulf Coast refiners to sell their products. Similarly, if a Gulf Coast refiner markets its own product at distant locations, it would have to bear the carrying charge

⁶Blend stocks are hydrocarbon products that can be added to gasoline to increase its volume and change its properties. However, blend stocks can also be used in the manufacture of various petrochemicals and other petroleum-related products.

⁷Potential profits for blenders using methanol to create gasohol would be about 5 cents per gallon.

for the tax-paid gasoline longer than competitors that are located closer to their markets.

API argues that these cost disadvantages would create incentives that would make the petroleum distribution system less efficient or more reliant on foreign imports. For example, increasing carrying costs for gasoline before it was marketed would create a disincentive to store gasoline, which could result in spot shortages of gasoline. The additional costs incurred during the transport of gasoline from Gulf Coast refiners to distant markets would disadvantage these refiners compared to overseas refiners whose product would not be taxed until it was unloaded from tankers or barges close to its ultimate market. However, if competitive disadvantages are insignificant, or can be ameliorated, adverse effects would likely not occur.

A study prepared for the Independent Fuel Terminal Operators Association (IFTOA), which supports moving the gasoline tax collection point to the refinery-level, concluded that the competitive disadvantage would be insignificant and would balance out nationwide. The 1987 IFTOA-sponsored study, which was updated in September 1991, estimated that the cost of carrying gasoline tax-paid would place pipeline-delivered gasoline at a 2 cent per barrel disadvantage in New York harbor compared to foreign imports.⁸ The cost disadvantage was considered minimal, compared to the price swings of 30 to 50 cents per barrel that occur daily in the gasoline market. The study concluded that the carrying charge is unlikely to significantly affect competition. The study also concluded that

- shifting the federal tax collection point to the refinery or importer will have a competitive impact only in the Northeast, especially in New England;
- the competitive stance of the domestic oil industry compared to foreign imports would be adversely affected, but this effect would be minimal because pipeline/barge shipments to the Northeast are currently more expensive than foreign supplies, thus the carrying cost of the tax would add only marginally to the current domestic disadvantage; and
- the total dollars involved in this market adjustment in the Northeast would be less than \$5 million annually.

We reviewed the methodology used in this study and found it to be sound. Further, we asked API and two federal economists with responsibilities related to the petroleum industry or excise taxation to review the study to

⁸A barrel equals 42 gallons of gasoline.

determine whether the methodology, assumptions made, or data used were flawed. API and the economists generally agreed that the study's methodology was sound. However, API disagreed with the appropriateness of the data that was used and the interpretation of the results.

API argued that the time period that should be used in calculating the carrying cost of the tax should include not only transportation time, which was used in the IFTOA-sponsored study, but also storage time before the gasoline was moved out of bulk storage at a terminal. On the basis of a 1988 API survey, API estimated that the average combined transportation and storage time for U.S.-refined gasoline is 22 days. Using this average, API calculated that the additional cost per barrel of gasoline due to moving the point of taxation to the refinery would be 4 cents rather than 2 cents as estimated in the IFTOA-sponsored study.

Moving the collection point to the refinery-level would increase all industry participants' costs for any lag time they experience between paying the tax and collecting it from the next purchaser. From a competitive standpoint, including storage time as well as transportation time may be more applicable when comparing U.S. firms to foreign competitors than when comparing them to other competitors within the United States. That is, if U.S. gasoline marketers stored gasoline in U.S. terminals in anticipation of heavy driving periods, for instance, then two competitors would be incurring similar carrying costs since both would be storing the gasoline. Their competitive costs due to the tax, therefore, would vary primarily because of differences in transportation time. However, if a marketer could obtain increased gasoline deliveries from foreign sources when demand increased, thus effectively transferring the storage requirement to the foreign supplier, such a marketer would be at an advantage compared to a competitor who had to store tax-paid gasoline in a U.S. terminal.

Thus, the differences in competitive costs that could be created by moving the point of taxation to the refinery would likely vary on average between 2 cents per barrel for U.S. competitors and 4 cents per barrel between U.S. and foreign competitors. These per barrel amounts translate into \$.0005 and \$.001 per gallon of gasoline. However, we do not know whether such cost differences could have a significant effect on competition.

The competitive consequences associated with moving the point of taxation occur among legitimate, tax-paying members of the industry. Justice and IRS officials, as well as some industry members, pointed out

that to the extent evasion occurs, legitimate firms face unfair competition from those evading taxes. Depending on how extensive evasion is in a particular market, legitimate firms could be severely disadvantaged. For example, if a tax-evading firm only evaded federal tax, tax-paying firms face a 14.1 cent per gallon disadvantage in selling gasoline.

Undesirable Incentives

As an offshoot of the competitive cost advantage argument, API representatives indicate that the carrying cost incurred by the petroleum industry would create incentives to avoid storing gasoline and to import gasoline. Reduced storage might make the industry less efficient if insufficient gasoline is stored to cope with fluctuations in demand. This situation could lead to spot shortages of fuel. To the extent that a reliance on foreign-imported gasoline is considered undesirable, the possibility of increased reliance on foreign imports would similarly be undesirable. However, because we do not know whether the estimated increased carrying costs (due to moving the point of taxation) would be a significant competitive factor, we then cannot say whether these undesirable consequences would occur or if they did, how severe they would be.

Do Gains Exceed Losses?

Using a 4 cent per barrel carrying cost for all gasoline with a refinery-level collection point, API estimates that the industry as a whole would incur \$100 million in additional cost if the collection point were moved to the refinery-level. This estimate may be high, depending on such things as whether the 4 cent per barrel estimate is correct and whether the savings to current taxpayers (from no longer having to pay the taxes to IRS) would exceed the administrative costs incurred by new taxpayers (refiners and importers) who would pay the tax.

Regardless of the specific additional cost to the industry, API's basic point is that if these additional costs are not less than the administrative savings, if any, to IRS because of the change and the additional taxes that may be realized through reduced evasion, then there would be no net gain in moving the point of collection. API combined selected FHWA gasoline usage data and Treasury tax collection data and concluded that no significant evasion seems to be occurring under the current collection system; therefore, no change to the tax collection point should be made.

As indicated earlier, we found no data to reliably estimate federal gasoline excise tax evasion levels. To the extent that the \$1-billion-and-greater estimates of motor fuel tax evasion offered by the Department of Justice

are correct, significant gasoline tax evasion may be occurring. To the extent that moving the tax collection point to the refinery-level would significantly curb this level of evasion, then a net benefit would be gained. Unfortunately, neither of these hypotheses can be proven.

An IRS Task Force Recommended Shifting the Point of Collection to Further Reduce Number of Firms

An IRS Excise Tax Task Force recognized the possible competitive consequences of moving the collection point for motor fuel taxes.⁹ In a draft report, the task force recommended that IRS study the feasibility of balancing out the relative advantages and disadvantages through adjustments to the payment timetables for industry members.

The IRS task force also recommended shifting payment of the tax to the point that crude oil is received at the refinery. The task force believed the shift could considerably decrease the number of firms that must pay these taxes, thereby reducing IRS' burden. However, some issues need to be resolved in taxing crude oil that are not presented by the option of taxing refinery output. Taxing a barrel of crude oil would entail determining on a pro rata basis the excise taxes for all products that would be produced from the barrel of crude oil. Determining the pro rata tax would be difficult because the amount of diesel, gasoline, or other products obtained from each barrel of crude oil varies by the crude's type and grade, as well as the capabilities of the refining facility. From an administrative perspective, because industry officials indicated that there are more sellers of crude oil than refiners, IRS would have more taxpaying businesses to monitor than if the tax were levied on refiners. Finally, as IRS recognized, provisions may be needed to allow credits for exempted uses, such as farming.¹⁰

Conclusions

Because of the lack of appropriate data, we could not determine if recent congressional and IRS actions to thwart the evasion of motor fuel excise taxes have been effective. Some government and private officials believe that the recent legislative changes have helped reduce some forms of federal motor fuel excise tax evasion. Others believe that although certain evasion schemes may have been reduced, evasion still remains high. Given the concern that evasion may still be a problem, IRS and FHWA officials are

⁹The task force recommendations were for internal policy development and do not represent official IRS or Treasury views.

¹⁰Similar problems exist now for tax-exempt purchases of gasoline. Taxing crude oil would extend the problem to tax-exempt diesel purchases, too.

undertaking or considering additional actions designed to further reduce the potential for evasion and to detect evaders.

Moving the collection point to reduce the number of liable firms, as has been proposed, should help minimize the potential for evasion. Refinery-level taxation bears consideration on efficiency grounds alone, since the number of taxpayers would be reduced. In addition, refinery-level taxation may also improve controls against evasion.

Industry members disagree about the desirability of such a move. A key question is whether refinery-level tax collection imposes competitive disadvantages. Reasonable attempts have been made to quantify the competitive consequences of such a move. However, it is unclear whether the resulting estimated 2 to 4 cent per barrel cost implications would have significant effects on the industry.

Matter for Congressional Consideration

We believe the potential advantages of moving the collection of gasoline excise taxes to the point at which gasoline leaves the refinery or is first imported warrant further congressional consideration. Reaching a decision on this issue is difficult. From a tax administration perspective, it would be better to collect the tax at the refinery. On the other hand, the industry raises some concerns about competitiveness that warrant consideration. We believe a piece of information critical to making a decision is the amount of the tax gap—an estimate that varies among Justice, FHWA, and IRS but for which we found no reliable supporting data. Congress should intensively explore the level of tax evasion with the agencies and the industry; if it is sufficiently high, the point of collection should be changed.

Agency Comments

We obtained informal comments from the agencies involved. Responding officials, who held responsible positions related to their agency's motor fuels excise tax-related activities, generally agreed with the information presented. Treasury, Justice, IRS, and FHWA suggested clarifications that we have included where appropriate. Treasury also said that under refinery-level taxation IRS would need to expend resources to oversee exempt uses. We more explicitly recognized this consequence.

As arranged with your offices, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the

date of issuance. At that time, we will provide copies of this report to the Secretary of the Treasury, the Commissioner of IRS, the Attorney General, the Federal Highway Administrator, and other interested parties. We will make copies available to others upon request.

The major contributors to this report are listed in appendix VII. Please contact me on (202) 272-7904 if you or your staffs have any questions concerning this report.



Jennie S. Stathis
Director, Tax Policy and Administration Issues

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Abbreviations

API	American Petroleum Institute
CID	Criminal Investigation Division
FHWA	Federal Highway Administration
IFTOA	Independent Fuel Terminal Operators Association
IRS	Internal Revenue Service
TRA	Tax Reform Act of 1986

Background

Motor fuel excise taxes are the principal funding source for the Federal Highway Trust Fund. This fund was established by the Highway Revenue Act of 1956 to provide financing for the interstate highway system and other federal-aid highway programs. Motor fuel excise taxes provided \$10.5 billion for the Highway Account and \$1.4 billion for the Transit Account of the Federal Highway Trust Fund in fiscal year 1990. Current federal tax rates are 14.1 cents per gallon for gasoline, 20.1 cents per gallon for diesel fuel, and lesser rates for specialized mixtures.¹

Generally, excise taxes are imposed on every gallon of fuel used to power a motor vehicle on the highway, while off-highway business uses are, as a rule, not taxed. Almost all of the gasoline consumed is taxable, but only about half of the diesel fuel used is taxable. The Internal Revenue Service (IRS) administers and enforces the federal excise taxes, and the Federal Highway Administration (FHWA) administers the Highway Account of the Federal Highway Trust Fund.

States also impose motor fuel excise taxes, which usually fund state transportation programs. However, state exemptions may differ from federal government exemptions. For example, California, Florida, and Texas all impose their gasoline excise taxes on state businesses, but these same businesses are exempt from federal gasoline excise taxes. The state taxation rates range from 7.5 to 26 cents per gallon, depending on the state and the product.

Taxpayers are required to file Form 720 (Quarterly Federal Excise Tax Return) for motor fuel excise taxes but must remit tax payments more frequently through the federal tax deposit system. For quarters beginning after March 1991, semimonthly deposits of the tax are required regardless of the amount of tax liability.² Since 1989, motor fuel excise taxpayers have been required to file Form 8743 to account for the amount of inventories, receipts, and disbursements of motor fuels during the reporting period. This form gives IRS some additional information to track quantities of fuel from one reporting period to the next; Form 720 only requires a single-line entry of the amount of excise taxes due.

¹One-tenth of 1 cent of the gasoline and diesel tax is for the Leaking Underground Storage Tank tax and 2.5 cents per gallon is dedicated to deficit reduction.

²Previously, the frequency of tax deposits depended on the amount of tax liability. Less than \$100 per month liability could be paid quarterly while more than \$2,000 per month liability required semimonthly deposits.

The distribution system for gasoline, diesel fuel, and other fuel products that can be used to power on- and off-highway vehicles is complex. For example, from the refinery to the retailer gasoline may go by rail, truck, ship, or pipeline and may pass through a terminal, a blender, a wholesaler, and a distributor. Figure 1 in the letter illustrates the gasoline distribution system.

From the inception of the federal gasoline excise tax in 1932 to the late 1950s, refiners and importers remitted the tax to IRS upon the first sale of gasoline. One effect of this system was that independent wholesalers purchased their gasoline on a tax-paid basis, while oil companies that also owned businesses down to the retail level did not have to pay the tax until much later in the distribution process. These companies could distribute the product internally on a tax-free basis, as far from the distribution chain as the retail level and only pay the tax when the gasoline was sold to the final consumer.

In the late 1950s, Congress concluded that this collection system was unfair to independent wholesale distributors and gave them the option to register as producers. Subsequent legislation gave the same option to compounders, blenders, and chain operators with 10 or more retail outlets. This expanded the number and types of companies that could purchase gasoline tax-free and collect the amount of the tax from retailers or motorists (when the retailer was owned by the producer).

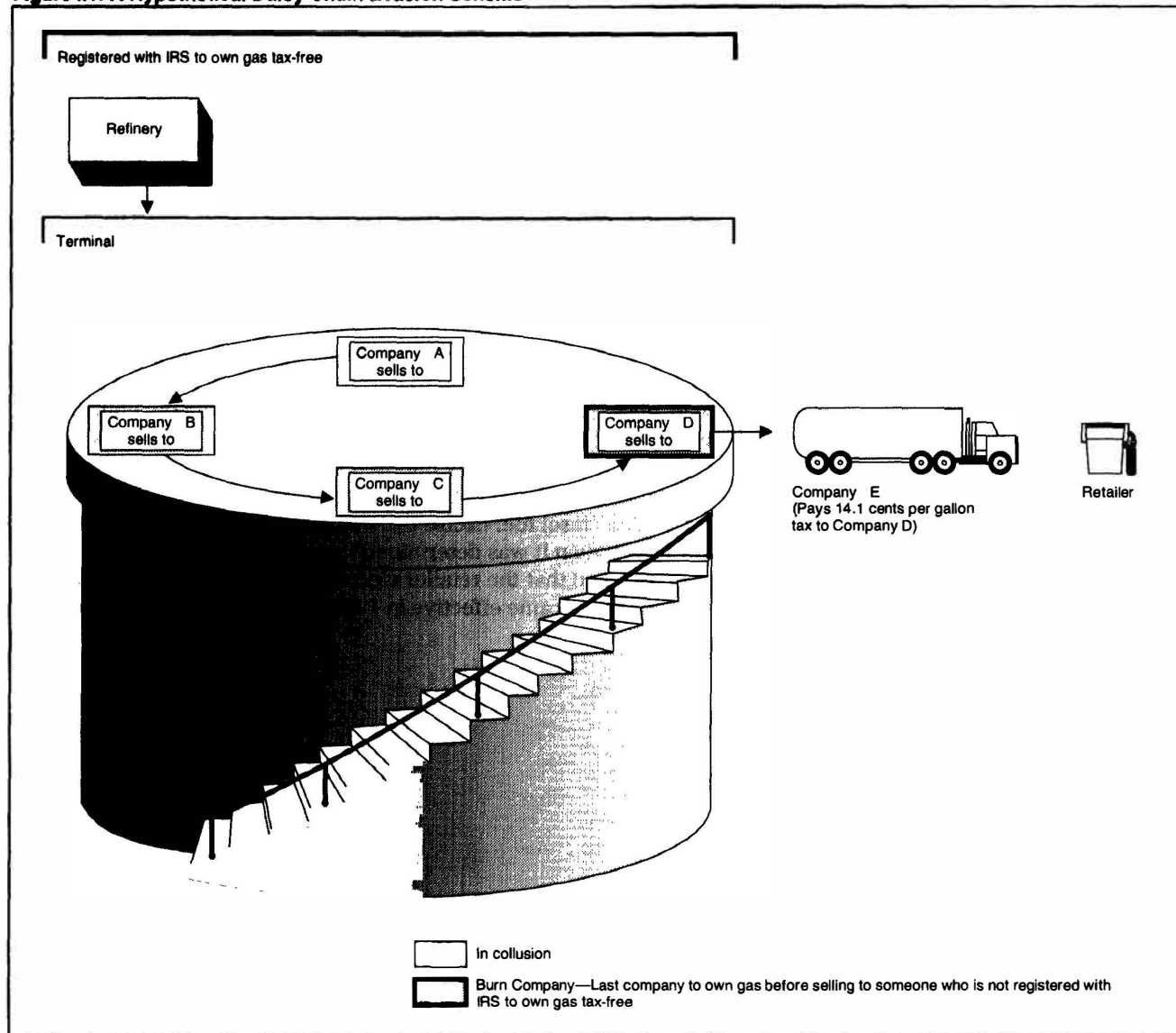
Moving the collection of the tax on gasoline, essentially to the pump, allowed tax-free sales for certain uses, such as agricultural ones. Before this collection point change, a farmer who used fuel off-highway and was exempt from the federal excise tax would have to pay the tax and then apply to IRS for a credit. For diesel fuel, the tax was paid when the fuel was dispensed into the tank of a motor vehicle that was to be used on the highway.

In 1983, the excise tax on gasoline was increased from 4 cents per gallon to 9 cents per gallon. Thus, by not paying the federal excise tax, wholesalers or other marketers of gasoline could avoid as much as \$900 per 10,000-gallon truckload, in addition to any state taxes that could be evaded. In the mid-1980s, organized groups were involved in several criminal convictions concerning evasion of both federal and state excise taxes on motor fuels.

Several evasion schemes have been used. The most popular scheme, called a daisy chain, involved purchasing the product tax-free and passing ownership (on paper only) through several companies that were registered with IRS to own fuel tax-free. The product was then sold to an unregistered company and taxes were collected by the seller but not remitted to IRS. The repeated changes in ownership complicated IRS' enforcement of federal tax laws and increased the effort to detect evasion. When IRS tried to collect the federal excise tax, the company in the chain that had purchased tax-free and sold tax-paid (known as the burn company) often had few, if any, assets and ceased operations. IRS would be unlikely to recover lost taxes even if the evasion scheme was detected. Figure I.1 illustrates one such daisy chain scheme.

**Appendix I
Background**

Figure I.1: A Hypothetical Daley Chain Evasion Scheme



Some of the other evasion schemes that have been used include

- buying fuel overseas, smuggling it into this country, and selling it as tax-paid to a retailer;
- claiming that domestic fuel was being exported and was therefore tax-exempt, then selling it to a U.S. retail outlet as a tax-paid product;
- writing off losses due to evaporation as an inventory loss when, in fact, the vapor was captured and sold for cash; and
- using a firm that was legitimately registered to buy fuel tax-free to purchase fuel for another business that was not qualified to buy fuel tax-free.

These compliance problems and indictments of organized groups evading federal excise taxes on motor fuel led to legislative changes that reduced the number of businesses allowed to purchase motor fuel tax-free. Effective in 1988, the Tax Reform Act (TRA) of 1986 moved tax collection to an earlier point in the motor fuel distribution process. Under TRA, the gasoline excise tax was generally imposed at the terminal, when the product was transferred into railroad tank cars or tanker trucks for further distribution.³ The diesel fuel excise tax was imposed at the wholesaler or distributor level, when it was determined that it would be sold for on-highway uses and that the retailer elected to purchase tax-paid. Other legislative changes became effective in 1989, 1990, and 1991. (See app. IV.)

³A terminal is a storage facility where large quantities of fuel arrive, generally from the refiner or importer, and are broken into smaller quantities for distribution. Sometimes the terminal is owned by a refiner, importer, or distributor; other times, these companies lease storage space or the entire terminal from the terminal operator.

Objectives, Scope, and Methodology

Our specific objectives were to determine

- whether information is available to gauge the level of noncompliance with motor fuel excise tax statutes,
- how recent legislated changes in collection points of some excise taxes have affected compliance,
- how effective IRS programs are in promoting motor fuel tax compliance, and
- which state initiatives to improve excise tax collection could be adapted to bolster federal collection efforts.

We interviewed officials at IRS headquarters, regional, and district offices; at FHWA and Department of Justice headquarters; at excise tax agencies in California, Florida, and Texas; at criminal investigative offices in New York; and at three industry associations—the American Petroleum Institute, the Petroleum Marketers Association of America, and the Independent Fuel Terminal Operators Association.

To identify information available to gauge evasion of the motor fuel excise tax, we reviewed various estimates prepared in the mid-1980s and evaluated their adaptability to the current situation. None of the officials we interviewed knew of any statistically-based estimates prepared after 1987.

We could not obtain conclusive evidence of the impact of recent legislative changes partly because of the number of legislative changes that have gone into effect over the last 5 years and are still being implemented. However, we did review the various regulatory and statutory changes that were expected to affect tax compliance. We obtained federal, state, and industry officials' opinions on what they believe the impact of these legislative changes has been or will be.

From IRS officials, we obtained documents describing IRS' efforts to increase compliance in its various cooperative projects with state officials and others.

We obtained informal agency comments on a draft of this report from the Departments of Justice, Treasury, and Transportation and IRS. Their comments have been incorporated in this report where appropriate. We did our work from October 1990 to December 1991 in accordance with generally accepted government auditing standards.

Total Level of Evasion Is Unknown

No verifiable estimate of the current level of motor fuel excise tax evasion is available. Several estimates were attempted before TRA took effect in 1988, but these estimates were flawed. One recent estimate purported to represent post-TRA conditions, but we did not have access to the data used to develop it. Moreover, there are inherent problems in developing an estimate. For example, to prepare a reasonably accurate estimate of motor fuel excise tax evasion, information is needed on the amount of (1) products domestically produced and imported, (2) taxable products consumed, and (3) products on which taxes were paid. However, no single source or combination of sources contains sufficiently reliable information of this type.

In January 1988, the Department of the Treasury estimated it was losing gasoline excise tax revenue at the rate of \$250 million a year, of which \$100 million was attributed to willful, organized evasion.¹ This estimate, the result of Treasury's piecing together federal and state evidence, was based on data that had inherent limitations and inconsistent time periods. In addition, the estimate relied on questionable assumptions. For instance, it assumed that state and federal gasoline compliance levels would be similar; this may not be a valid assumption. California and New York collect their taxes earlier in the distribution chain than the federal government does, and earlier collection may result in better compliance.

Another attempt to estimate evasion during the 1980s was also unsuccessful. An FHWA-contracted study, which focused primarily on diesel fuel excise tax evasion, was completed during 1987. However, the contractor concluded that because of flaws in the data used to estimate the number of potentially taxable gallons, it was impossible to quantify the level of evasion.

A private study, which compared trends in consumption of gasoline with excise taxes collected, estimated gasoline tax evasion levels of at least \$500 million per year for the years 1984 through 1986. However, when Treasury's Office of Tax Analysis attempted to update the study beyond 1986, it found that the methodology would produce results suggesting that IRS was theoretically collecting more excise taxes than it was owed in some years. This anomaly apparently stemmed from limitations in the data on fuel consumption, which were taken from states' reports to FHWA on their excise tax collections and from gasoline consumption data from the Energy Information Agency, Department of Energy. States sometimes use

¹Since 1988, the gasoline excise tax has increased from 9.1 to 14.1 cents per gallon and the diesel fuel tax has increased from 15.1 to 20.1 cents per gallon.

different collection points and definitions of taxable sales than the federal government; they also have evasion problems of an unknown magnitude. Energy Information Agency data are estimates based on surveys of refineries and downstream blenders, which do not coincide with the point at which most federal taxation occurs. Both the state excise tax reports and Energy Information Agency data on gasoline consumption were then compared with IRS data, which itself is imprecise because of such things as taxpayer errors in completing forms and adjustments for refunds, credits or audit assessments.

The following is a Treasury tax policy analyst's summary of the problems inherent in basing an estimate of gasoline tax evasion on a comparison of fuel use with revenues:

- No satisfactory source shows how much gasoline or diesel fuel is imported or produced. If such data were available, they would still have to be adjusted because although most gasoline is taxable, only about half of diesel fuel is taxable. Similarly, fuel consumption data do not distinguish between taxable and tax-exempt uses.
- No satisfactory source shows how much net excise taxes are collected for any defined period because (1) refunds for off-highway uses can take over a year to process and (2) audit adjustments are based on IRS examinations conducted 18 months after the quarterly return is filed and can take an additional year or more to resolve.

Given the lack of precision in available data sources, the Treasury official responsible for estimating gasoline excise tax collections believed that available statistical measures cannot measure evasion unless evasion exceeds about 10 billion gallons per year, or about \$910 million at the 9.1-cent tax rate between 1983 and 1990 and about \$1.41 billion at the current 14.1-cent rate. Further, the official believed that a consistent trend in collections would be needed to judge whether evasion is increasing or decreasing because various factors, such as changes in law or regulations, can cause collections to fluctuate. Such a trend does not exist.

A Department of Justice estimate was based on detected cases of evasion and was supposed to reflect evasion still occurring since the TRA changes in the excise tax collection points. According to Justice officials, the motor fuel excise tax gap in 1990 was about \$1 billion. This estimate was based on ongoing criminal investigations, informant sources, and a sharing of information among law enforcement officials. We could not corroborate Justice's estimate because we were not given access to information from

grand juries and ongoing federal criminal investigations. However, IRS officials we interviewed were skeptical about this estimate because they suspected it was based on cases generally located in the northeastern United States and may have covered periods before TRA changed the collection points. Furthermore, assuming that Justice investigates the more serious evasion cases with the biggest dollar potential, we believe that its estimate may be inflated because it would be based on the worst offenders and would not represent a good cross section of the universe of all motor fuel excise taxpayers.

Similarly, as part of the Joint Federal/State Motor Fuel Tax Compliance Project (see app. V), FHWA hopes to compile improved tax evasion estimates based on actual tax losses uncovered by audits and criminal investigations. In our opinion, any projected nationwide estimates may overstate the problem if the study focuses on suspected evaders rather than on a stratified random sample of all potential motor fuel taxpayers.

As of February 1992, FHWA was also attempting to estimate motor fuel tax evasion in response to a congressional stipulation on funding for the Joint Federal/State project. FHWA officials plan to make their estimate on the basis of information from such sources as IRS assessments, state experiences with evasion and New York's experience in moving its collection point for gasoline taxes, criminal cases, and federal experience when the collection point was moved to the terminal level.

As part of a commitment made by the Commissioner of Internal Revenue to the Subcommittee on Oversight, House Committee on Ways and Means, IRS is revisiting the issue of how to estimate the evasion level for motor fuel excise taxes. Because IRS has not been able to develop an estimate from available sources, it plans to convene individuals who are active in and knowledgeable about the motor fuel industry to (1) solicit their opinions about whether evasion continues to be a problem, (2) learn what evasion schemes are currently being used, and (3) obtain suggestions for quantifying evasion. If these individuals yield evidence of continued evasion despite changes in the collections system and if practical methods are suggested to quantify that evasion, IRS will try to estimate the degree of evasion.

Effect of Legislative Changes Is Unknown

Without reliable data on the level of evasion—either current or past—it is difficult to evaluate the effect of the legislative changes that began in the mid-1980s. Compounding this difficulty is the fact that the changes have continued up to mid-1991 and that final regulations have not been issued on some of the changes as of February 20, 1992. Under these circumstances, the opinions of knowledgeable officials are perhaps the best source of evaluation; however, their opinions differ. Some officials believe that evasion has been reduced significantly, while others believe it is still a \$1-billion-a-year business. Because the amount of actual evasion is unknown, either view could be correct.

Legislative changes, the result of compliance problems and indictments of organized groups evading federal excise taxes on motor fuels, reduced the number of companies responsible for paying the tax on motor fuels. Several pieces of legislation, ranging from TRA to the Revenue Reconciliation Act of 1990, are causing continuing changes in the federal motor fuel excise tax system. Some highlights of these legislative changes are shown in table IV.1.

Appendix IV
Effect of Legislative Changes Is Unknown

Table IV.1: Major Motor Fuels Excise Tax Legislative Changes Since 1986

Gasoline	
1987	No legislative changes took effect.
1988	TRA moved the taxing point up in the distribution system from the wholesale level to the terminal or refinery level. This move was intended to reduce the tax administrative burden on fuels outlets and tax collection and enforcement costs for IRS. The Technical and Miscellaneous Revenue Act of 1988 permitted wholesale distributors to sell gasoline on a tax-exempt basis and to claim the refunds for sales made by them for (1) export, (2) use by state and local government, (3) use in aircraft or vessels, or (4) certain nonprofit educational organizations. This provision was intended to lessen the administrative burden of the excise tax refund procedures for exempt users.
1989	No legislative changes took effect.
1990	The Revenue Reconciliation Act of 1990 raised taxes by 5 cents per gallon to raise revenue for the Highway Trust Fund and deficit reduction.
1991	The Revenue Reconciliation Act of 1990 imposed the tax upon (1) removal from any refinery or terminal, (2) entry into the United States, or (3) sale to any unregistered person (unless there has been a prior taxable removal or entry), whether or not taxes have been previously paid. Removals or entries are not taxed for bulk transfers to terminals. A refund (without interest) may be obtained if a taxpayer establishes that the gasoline was previously taxed. This situation was intended to discourage selling of tax-paid gasoline within a terminal and collect excise tax on all fuel as it is dispensed over the terminal rack.
Diesel fuel	
1987	TRA allowed a retailer to elect to buy diesel fuel tax-paid, thereby moving the excise tax liability up to the wholesale level. This change was intended to reduce the tax administrative burden on fuels outlets and tax collection and enforcement costs for IRS.
1988	The Revenue Act of 1987 mandated movement of the taxing point up in the distribution system from the retail level to the wholesale level. Also, most tax-exempt users beyond the wholesale level were required to buy fuel tax-paid, then apply for a refund. This requirement was intended to reduce opportunities to evade payment and achieve more efficient administration and collection of tax and to eliminate a competitive advantage enjoyed by vertically integrated segments of the gasoline industry.
1989	The Technical and Miscellaneous Revenue Act of 1988 reversed some of the 1987 act changes by allowing some tax-exempt motor fuel users such as farmers, off-road users, and boaters, to buy diesel tax-free. This reversal was intended to lessen the administrative burden of the excise tax refund on exempt users of diesel fuel. This action, in effect, reversed some of the 1987 act changes by allowing more entities to purchase products tax-free.
1990	The Revenue Reconciliation Act of 1990 raised taxes by 5 cents per gallon to raise revenue for the Highway Trust Fund and deficit reduction.
1991	No legislative changes took effect.

Since these changes to the collection system were made, the amount of revenue collected by IRS and turned over to the Highway Account of the Federal Highway Trust Fund does not show a consistent upward or downward trend (see table IV.2). Although there was a temporary increase in collections in 1989 for both gasoline and diesel fuel, 1990 collections fell to pre-1986 levels. The fairly dramatic increase in diesel collections in fiscal year 1989 may, according to a Treasury official, be due to (1) a one-time acceleration in collection and (2) changes in refund policies for

tax-exempt purchasers. When the tax collection point for diesel fuel was moved in April 1988, essentially from the retail to the wholesale level, collections took place earlier. In addition, the new requirement that formerly exempt purchasers of diesel fuel buy it tax-paid and apply for a refund tended to create a bulge in collections until refunds were processed. These changes may have had their greatest effect in fiscal year 1989, which began in October 1988. These collection amounts also could be explained, in part, by broader changes in the economy that affected fuel purchases as well as by changes in collection strategies, but data are not available to sort out these factors.

Table IV.2: Deposits to the Highway Account of the Federal Highway Trust Fund (Dollars in Thousands)

Fiscal year	Gasoline	Diesel
1986	\$7,801,112	\$2,452,924
1987	7,536,973	2,621,399
1988	8,086,417	2,557,282
1989	8,145,081	4,045,919
1990	7,618,486	2,896,263

Government and industry officials' opinions varied widely on the extent of the effect recent changes are having on evasion. Officials from IRS Examinations, the American Petroleum Institute, and the Petroleum Marketers Association of America (representing a majority of the companies that operate as product wholesalers and buy fuel tax-paid) said the tax gap has been narrowed. Some of these officials believed legislative changes over the last few years in the tax collection point and the parties liable to pay the tax, have substantially reduced evasion. However, they had no documentation to support their opinions.

A somewhat different view was expressed by Justice and FHWA officials and some terminal operators in the northeastern United States. Despite a lack of quantitative evidence of evasion levels, the FHWA officials and terminal operators believed that evasion was continuing, and Justice officials believed motor fuel tax evasion was at a level of \$1 billion a year. For instance, although moving the collection point for the tax earlier in the distribution system may have decreased the incidence of daisy chain evasion schemes that were occurring between the terminal and the retailer, officials believed alternative schemes are being practiced. The Justice Department based its opinion on cases currently under investigation.

The IRS Criminal Investigation Division (CID) had several post-TRA cases under investigation. The number of cases increased from 12 at the end of fiscal year 1989 to 17 at the end of fiscal year 1990 to 24 as of May 31, 1991. On the basis of discussions with law enforcement officials in the districts where gasoline and diesel fuel evasion schemes have been most common, CID officials believed that the 1988 changes did not put the hardcore bootleggers out of business. They said that these individuals merely adjusted their schemes to compensate for the changes in the tax system. For example, New York State criminal investigative officials said that the organized tax evaders moved up in the distribution chain and either own or otherwise control some terminals. Other schemes are said to involve daisy chains of companies that trade fuel within the terminal where the burn company (which may have foreign nationals as officers) has a valid registration number. The burn company may also claim that fuel is being exported and is therefore tax-exempt, then sell it to a U.S. retail outlet as a tax-paid product. CID has requested additional special agent staff years to add to the 31 currently devoted to motor fuel excise tax evasion cases.

The most recent change called for by 1990 legislation—which requires the tax to be imposed on removal from a terminal rack regardless of whether an earlier sale was tax-paid—became effective in July 1991. This legislative change was, like the others before it, designed to curb tax evasion schemes, particularly the creation of daisy chain sales schemes among companies buying and selling fuel while it is stored at the terminal.

On August 27, 1991, IRS published proposed rules implementing this change. The proposed rules would make the position holder—that is, the person who has a contract with the terminal operator for use of the terminal, or the terminal owner if the product belongs to the owner—liable for the tax imposed on gasoline removed at the terminal's rack, or distribution center. The terminal operator would be jointly and severally liable for the tax if the position holder is not registered with IRS to deal tax-free in gasoline.¹ The terminal operator can avoid liability for the tax if the operator (1) is registered with IRS to deal in gasoline tax-free; (2) obtains from the position holder a notification certificate, signed under penalties of perjury, that contains the position holder's IRS registration number; (3) does not know that any information on the certificate is false, and (4) has verified the accuracy of the notification certificate in accordance with IRS procedures.

¹If the position holder is not a gasoline registrant and the terminal operator does not follow procedures specified in the regulations, IRS may collect all or part of the tax from the terminal operator.

Until IRS finishes developing verification procedures, it is difficult to assess the potential effectiveness of these requirements. Without the regulatory provisions that make the position holder liable and the terminal owner potentially jointly and severally liable for the tax, the July 1991 change would not seem likely to curb daisy chain evasion schemes within the terminal. What would likely happen is that the last owner of the fuel in the terminal would become the burn company (as shown in figure I.1). Because months are likely to elapse before IRS might learn that taxes were not paid, those wishing to evade taxes could sell large quantities of gasoline without remitting the tax, just as evaders did in earlier evasion schemes. Electronic monitoring of taxable fuel transactions might enable IRS to more quickly detect such evasion. (See app. VI.)

By making terminal operators potentially jointly and severally liable for the tax at the time of gasoline removal from the terminal rack, the proposed regulations provide an incentive for terminal operators to assure that those who are liable for the tax are at least registered with IRS. Treasury officials believe by making position holders liable for the tax (rather than the owners of gasoline immediately before removal from the terminal rack), the proposed regulations would facilitate more timely identification of taxpayers. Officials also believe a terminal operator is likely, for the business' own purposes, to review the credit and financial resources of position holders. This review should act as an additional check on the use of burn companies to avoid tax.

Assuming that IRS develops a procedure that terminal operators can use to efficiently verify the accuracy of a company's IRS registration number, evasion could still occur if those who would evade the tax could obtain valid registration numbers and become position holders in a terminal. According to criminal investigators, those who would evade the tax have been able to obtain valid registration numbers through such means as buying small, out-of-state companies or paying a company that has a valid number for use of its number. Thus, the potential exists for evasion to continue despite the July 1991 changes. Treasury officials note that additional controls may be needed to counter this potential evasion.

IRS' Motor Fuel Tax Compliance Program

IRS does not have a national examination program directed specifically toward promoting motor fuel tax compliance. Rather, fuel tax examinations are part of the overall excise tax examination program that covers the 47 excise taxes IRS administers. Therefore, the number of fuel tax examinations depends on each district office's priorities, work load, and yield from these examinations relative to other types of excise examinations. Although it has yet to develop systems that would help it identify excise tax evaders, IRS has started several projects designed to increase compliance.

The experiences of IRS and several states in carrying out cooperative exchange projects for gasoline and diesel fuel in 1986 and 1987 provided a starting point for the current Joint Federal/State Motor Fuel Tax Compliance Project. Under this project, FHWA, IRS, and many states are embarking on a 5-year plan to improve all motor fuel excise tax compliance. The project is designed to increase motor fuel excise collections by (1) intensifying examinations, (2) identifying tax evaders by intensifying criminal investigations, and (3) deterring evasion by conducting highly publicized prosecutions.

During fiscal years 1990 and 1991, the Federal Highway Trust Fund provided nearly \$1.2 million for efforts to fight motor fuel excise tax evasion, including \$700,000 from general operating expenses. These funds were used for selected IRS activities, training course development, and initiation of regional motor fuel tax enforcement task forces centered in the lead states of New Jersey, Texas, and Indiana. Furthermore, the Intermodal Surface Transportation Efficiency Act of 1991 authorized \$5 million per year from the Federal Highway Trust Fund and \$2.5 million per year from the general fund for this program from 1992 through fiscal year 1997. FHWA officials said that in fiscal year 1992 the \$5 million was appropriated from the trust fund, but the administration declined to seek a supplemental appropriation from the general fund for the \$2.5 million authorization. Thus, fiscal year 1992 FHWA spending for motor fuels excise tax evasion will total only \$5 million rather than \$7.5 million.

As a part of this project, IRS is developing a database of taxpayers who are registered, through Form 637, and authorized to deal in tax-free products. FHWA budgeted \$300,000 to assist IRS in developing this database. The database was scheduled to be completed in June 1991 but was not completed as of February 1992. IRS now believes the system will be operational sometime later in 1992. It is expected that companies selling motor fuels will have direct access to the database to confirm that buyers

are eligible for tax-free purchases. This system will allow companies selling products tax-free to check the database to determine if the customer is properly registered with IRS.

For 1991, IRS increased examination staff years for excise tax programs by 150 to a total of 430 staff years. The additional staff were diverted from individual and corporate audits and will be used for all excise taxes. How these additional positions will be used, whether on motor fuel excise taxes or others, will not be known until reports are received from the district office directors.

In August 1990, IRS formed a Strategic Planning Excise Tax Task Force to develop a plan for excise tax administration for fiscal years 1992 through 1997. As part of the overall study, subgroups were formed to address issues for specific excise taxes applicable to market segments; one subgroup focused on motor fuel taxes. Each subgroup was charged with developing short- and long-range compliance strategies. The Strategic Planning Excise Tax Task Force has proposed a wide variety of initiatives, including the following:

- Restructure the excise tax organization to establish a single director who would be responsible for all aspects of IRS excise tax administration, including implementing new taxes, providing taxpayer services, creating and filing excise tax forms, enforcing excise taxes, and formulating legislative proposals.
- Create a national center that would gather automated information from numerous state and federal databases to use in developing compliance profiles, monitoring industry and taxpayer behavior, and targeting enforcement actions.
- Complete development of the Form 637 registration database.
- Study the feasibility of using a management information system to electronically track the purchase of tax-free excise items, including possible use of an IRS transaction card to record all tax-free transactions.
- Identify and examine, in conjunction with the Federal/State project, all motor fuel terminals to determine compliance levels.¹
- Study the feasibility of electronic filing of excise taxes.
- Create a new excise tax form solely for motor fuels that would replace the current Form 8743.
- Allow an annual versus quarterly filing of Form 720, the excise tax return.

¹IRS does not know how many motor fuel terminals there are.

- Propose legislation that would move the point of taxation for motor fuels to the receipt of crude oil at refineries or when products enter the United States.

In general, the task force report presented numerous options that may improve motor fuel excise tax administration. The last two recommendations, however, may warrant especially close study to determine their feasibility. Changing to an annual tax return for motor fuels would decrease the information available to IRS auditors and criminal investigators, unless other forms of reporting were required. Many states require or are considering requiring detailed monthly reports that can be used to better track the flow of fuels to determine where evasion may be occurring. Information reported to IRS on the quarterly Form 720 and the associated Form 8743 is less detailed than that many states receive.

CID is also planning to increase its efforts in combating motor fuels excise tax evasion. Currently, CID devotes 31 staff years to motor fuels tax investigations.

State Programs Suggest Changes in Federal Collection Strategy

Although states have recently undertaken various initiatives to improve their collection of motor fuel excise taxes, no organization has collected information on these initiatives or assessed their effectiveness. Because states' motor fuel excise taxes frequently differ from the federal excise tax—at the point at which the tax is collected and in who is exempt from taxation—considerable work would be required to assess whether state initiatives could be usefully adopted by IRS. Further, in our discussions with state officials, we found that states lacked data on the evasion rates of their own motor fuel excise taxes—data that could be used to gauge the success of their recent initiatives. However, two states have made significant changes to their motor fuel excise tax collection systems that may have the potential to increase federal compliance. New York, in effect, moved its gasoline excise tax collection point to the refinery-level, as was discussed in the letter of this report, and Florida established a database that tracks all gasoline shipments in the state. A discussion of Florida's database follows.

Florida's Fuel Inventory Tracking System

Florida's computerized Inventory Tracking System is a database that tracks monthly inventories of a vendor's fuel, identifies the source of purchased fuel, and identifies the buyers of fuel. With this system, state personnel can keep track of a vendor's fuel transactions and taxes due. The system can also match a month's beginning inventory figures with the previous month's ending inventory figures. Sales data from one vendor also allows the state to check purchased quantities claimed by another vendor or customer because they are linked in the database. Third-party reports are not yet part of Florida's tracking system. However, Florida receives these reports from terminal operators and motor fuel transporters who do not own fuel but store or transport fuel for others. Currently, Florida has no plans to track diesel fuel transactions.

Florida officials believe their tracking system is a deterrent to evading gasoline excise taxes. For example, this system was used to identify a Miami vendor who was underreporting sales volume and not remitting excise taxes to the state. Although Florida officials believe the system is a useful tool, they could not document any significant increase in gasoline excise tax revenue directly attributable to it.

Various industry members and associations have supported a federal-level tracking system, often called a transactions database, for several years. They see such a system as integral to making the current collection point for gasoline excise taxes effective. Without such a system, those who

**Appendix VI
State Programs Suggest Changes in Federal
Collection Strategy**

evade taxes have little fear of being detected for at least several months. IRS has been considering the feasibility and benefit of such a system. The IRS excise tax task force also recommended that IRS study the feasibility of establishing transactions tracking.

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Publication 510
(Rev. December 2025)

Excise Taxes

(Including Fuel Tax Credits and Refunds)

Section references are to the Internal Revenue Code unless otherwise noted.



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Future Developments

For the latest information about developments related to Pub. 510, such as legislation enacted after it was published, go to [IRS.gov/Pub510](https://www.irs.gov/pub510).

Pub. 510 updates. Pub. 510 isn't updated annually; instead it's only updated when there are major changes in the tax law. If you need further assistance see the Instructions for Forms 720, 8864, 4136, 6478, or Schedule 3 (Form 8849) for the most recent updates.

Don't claim the credits or payments for fuel sold or used after the year the credits expire unless they're extended again. Only one credit may be taken for each amount of any fuel type.

Note: "IRS Nos." refers to pre-printed numbers on Form 720.

Caution: The credits for the section 40A, biodiesel credit, biodiesel mixture credit, renewable diesel mixture credit, agri-biodiesel mixture credit, alternative fuels credit, and alternative fuel mixtures credit, and the section 40B, sustainable aviation fuels (SAF) credit, expired for fuels sold or used after December 31, 2024. Congress may take additional legislative action that impacts these credits. Don't claim the credits for fuels sold or used after 2024, unless the credits are extended. For information on these credits, see the March 2023 revision of Pub. 510.

What's New

The One Big Beautiful Bill Act of 2025 (the Act) made the following changes.

- **Small agri-biodiesel producer credit extension.** The Act extended and modified the section 40A small agri-biodiesel producer credit. The credit is extended through December 31, 2026. Don't claim the small agri-biodiesel producer credit for fuel sold or used after 2026.
- **Excise tax on remittance transfers.** The Act created new section 4475 which imposes an excise tax of 1% on remittance transfers that occur after December 31, 2025. The IRS has provided deposit-related penalty relief applicable to the first, second, and third calendar quarters of 2026. See [Notice 2025-55](#).
- **Sustainable aviation fuel (SAF) credit.** The Act terminated the section 6426(k) credit for SAF mixtures, and it will no longer apply to any sale or use for any period after September 30, 2025. The SAF mixture credit will no longer be claimed on Form 720, Schedule C; Form 4136; 8864; or Schedule 3 (Form 8849).

Inflation adjustments for 2026.

- **Superfund petroleum tax (IRS No. 16 and 53).** The section 4611(c)(2)(1)(A) tax on imported petroleum products and domestic petroleum increased to \$0.18 per barrel.
- **Transportation of persons by air (IRS No. 26).** The section 4261 tax on the amount paid for each domestic segment of taxable air transportation is increased to \$5.30.
- **Use of international air travel facilities (IRS No. 27).** The section 4261 tax on the amount paid for international flights is increased to \$23.40 per person for flights that begin or end in the United States. The tax is increased to \$11.70 per person for domestic segments that begin or end in Alaska or Hawaii (applies only to departures).
- **Arrow shafts (IRS No. 106).** The section 4161 tax on arrow shafts is increased to \$0.65 per arrow shaft.

See Revenue Procedure 2025-32 at [IRS.gov/irb/2025-45_IRB#REV-PROC-2025-32](https://www.irs.gov/irb/2025-45_IRB#REV-PROC-2025-32).

Reminders

Biodiesel and renewable diesel. The section 6426/6427 credits/refunds for mixtures of biodiesel, renewable diesel, and agri-biodiesel (allowed by section 6426(c)), expired for sales, uses, or removals after 2024.

Alternative fuel credit and alternative fuel mixture credit. The section 6426/6427 credits/refunds for alternative fuel and alternative fuel mixtures (allowed by sections 6426(d) and 6426(e)), expired for sales, uses, or removals after 2024.

Repurchase of corporate stock tax. The section 4501 stock repurchase tax applies to repurchases of corporate stock after December

31, 2022. See [Repurchase of Corporate Stock](#), later.

Reducing your excise tax liability. For federal income tax purposes, reduce your section 4081 excise tax liability by the amount of excise tax credit allowable under section 6426(c) or (e) and your section 4041 excise tax liability by the amount of your excise tax credit allowable under section 6426(d), in determining your deduction for those excise taxes or your cost of goods sold deduction attributable to those excise taxes.

Caution: Due to the IRS' acquiescence in a recent court case, the section 4611 tax on exported crude oil currently doesn't apply. See AOD 2023-01, at [IRS.gov/Actions-on-Decisions](https://www.irs.gov/Actions-on-Decisions).

The Infrastructure Investment and Jobs Act. Effective July 1, 2022, the Infrastructure Investment and Jobs Act reinstates the section 4661 excise tax on chemicals (other than ODCs) (IRS No. 54) and the section 4671 tax on imported chemical substances (IRS No. 17) (they previously expired on December 31, 1995). See the Instructions for Form 6627, and [Environmental Taxes](#), later.

The Inflation Reduction Act of 2022 (the Act) made the following changes. Effective January 1, 2023, the Act reinstates and increases the Hazardous Substance Superfund financing rate (petroleum Superfund tax rate) on domestic crude oil and imported petroleum products (the taxes previously expired on December 31, 1995). This makes the total section 4611 tax rate on domestic crude oil and imported petroleum products the sum of this reinstated Hazardous Substance Superfund financing rate (petroleum Superfund tax rate) and the Oil Spill Liability Trust Fund financing rate (petroleum oil spill tax rate). See the Instructions for Form 6627, and [Environmental Taxes](#), later.

Disregarded entities and qualified subchapter S subsidiaries. Qualified subchapter S subsidiaries (QSubs) and eligible single-owner disregarded entities are treated as separate entities for excise tax and reporting purposes. QSubs and eligible single-owner disregarded entities must pay and report excise taxes (other than IRS Nos. 31, 51, and 117); register for most excise tax activities; and claim any refunds, credits, and payments under the entity's employer identification number (EIN). These actions can't take place under the owner's taxpayer identification number (TIN). Some QSubs and disregarded entities may already have an EIN. However, if you're unsure, please call the IRS Business and Specialty Tax line at 800-829-4933.

Generally, QSubs and eligible single-owner disregarded entities will continue to be treated as disregarded entities for other federal tax purposes (other than employment taxes).

For more information on these regulations, see Treasury Decisions (T.D.) 9356, T.D. 9462, and T.D. 9596. You can find T.D. 9356 of Internal Revenue Bulletin (I.R.B.) 2007-39 at [IRS.gov/irb/2007-39_IRB#TD-9356](https://www.irs.gov/irb/2007-39_IRB#TD-9356); T.D. 9462, I.R.B. 2009-42, at [IRS.gov/irb/2009-42_IRB#TD-9462](https://www.irs.gov/irb/2009-42_IRB#TD-9462); and T.D. 9596, I.R.B. 2012-30, at [IRS.gov/irb/2012-30_IRB#TD-9596](https://www.irs.gov/irb/2012-30_IRB#TD-9596).

Photographs of missing children. The Internal Revenue Service is a proud partner with the

[National Center for Missing & Exploited Children \(NCMEC\)](#). Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

This publication covers the excise taxes for which you may be liable and which are reported on Form 720 and other forms. It also covers fuel tax credits and refunds. For information on fuel credits against income tax see the instructions for Forms 4136, 6478, or 8864. Only one credit may be taken for each amount of any fuel type.

Comments and suggestions. We welcome your comments about this publication and suggestions for future editions.

You can send us comments through [IRS.gov/FormComments](https://www.irs.gov/FormComments). Or you can write to the Internal Revenue Service, Tax Forms and Publications, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224.

Although we can't respond individually to each comment received, we do appreciate your feedback and will consider your comments and suggestions as we revise our tax forms, instructions, and publications. **Don't** send tax questions, tax returns, or payments to the above address.

Getting answers to your tax questions.

If you have a tax question not answered by this publication or the *How To Get Tax Help* section at the end of this publication, go to the IRS Interactive Tax Assistant page at [IRS.gov/Help/ITA](https://www.irs.gov/Help/ITA) where you can find topics by using the search feature or viewing the categories listed.

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Useful Items

You may want to see:

Publication

- ☐ **509** Tax Calendars

Form (and Instructions)

- ☐ **11-C** Occupational Tax and Registration Return for Wagering
- ☐ **637** Application for Registration (For Certain Excise Tax Activities)

- ☐ **720** Quarterly Federal Excise Tax Return
- ☐ **720-X** Amended Quarterly Federal Excise Tax Return
- ☐ **730** Monthly Tax Return for Wagers
- ☐ **1363** Export Exemption Certificate
- ☐ **2290** Heavy Highway Vehicle Use Tax Return
- ☐ **2290(SP)** Declaración del Impuesto sobre el Uso de Vehículos Pesados en las Carreteras
- ☐ **4136** Credit for Federal Tax Paid on Fuels
- ☐ **6197** Gas Guzzler Tax
- ☐ **6478** Biofuel Producer Credit
- ☐ **6627** Environmental Taxes
- ☐ **7208** Excise Tax on Repurchase of Corporate Stock
- ☐ **8849** Claim for Refund of Excise Taxes, and Schedules 1-3, 5, 6, and 8
- ☐ **8864** Biodiesel, Renewable Diesel, or Sustainable Aviation Fuels Credit

Information Returns

- **Form 720-TO**, Terminal Operator Report
- **Form 720-CS**, Carrier Summary Report

Guidance

- Notice 2005-4 (fuel tax), I.R.B. 2005-2, at [IRS.gov/irb/2005-02_IRB#NOT-2005-4](https://www.irs.gov/irb/2005-02_IRB#NOT-2005-4).
- Notice 2005-62 (biodiesel and aviation-grade kerosene), I.R.B. 2005-35, at [IRS.gov/irb/2005-35_IRB#NOT-2005-62](https://www.irs.gov/irb/2005-35_IRB#NOT-2005-62).
- Notice 2005-80 (LUST, kerosene, credit card issuers, mechanical dye injection), I.R.B. 2005-46, at [IRS.gov/irb/2005-46_IRB#NOT-2005-80](https://www.irs.gov/irb/2005-46_IRB#NOT-2005-80).
- Notice 2006-92 (alternative fuels mixtures), I.R.B. 2006-43, at [IRS.gov/irb/2006-43_IRB#NOT-2006-92](https://www.irs.gov/irb/2006-43_IRB#NOT-2006-92).
- Notice 2008-110 (biodiesel, cellulosic bio-fuel), I.R.B. 2008-51, at [IRS.gov/irb/2008-51_IRB#NOT-2008-110](https://www.irs.gov/irb/2008-51_IRB#NOT-2008-110).
- Notice 2010-68 (Alaska dyed diesel exemption), I.R.B. 2010-44, at [IRS.gov/irb/2010-44_IRB#NOT-2010-68](https://www.irs.gov/irb/2010-44_IRB#NOT-2010-68).
- Notice 2012-27 (fractional aircraft fuel sur-tax), I.R.B. 2012-17, at [IRS.gov/irb/2012-17_IRB#NOT-2012-27](https://www.irs.gov/irb/2012-17_IRB#NOT-2012-27).
- T.D. 9621 (indoor tanning), I.R.B. 2013-28, at [IRS.gov/irb/2013-28_IRB#TD-9621](https://www.irs.gov/irb/2013-28_IRB#TD-9621).
- Revenue Ruling 2016-03 (foreign reinsurance), I.R.B. 2016-3, at [IRS.gov/irb/2016-03_IRB#RR-2016-03](https://www.irs.gov/irb/2016-03_IRB#RR-2016-03).
- Revenue Ruling 2018-02 (butane mixture) at [IRS.gov/irb/2018-02_IRB#RR-2018-02](https://www.irs.gov/irb/2018-02_IRB#RR-2018-02).
- Notice 2023-6 (Sustainable Aviation Fuel Credit) at [IRS.gov/irb/2023-02_IRB#NOT-2023-6](https://www.irs.gov/irb/2023-02_IRB#NOT-2023-6) and other information related to the credit at [IRS.gov/Credits-Deductions/Businesses/Sustainable-Aviation-Fuel-Credit](https://www.irs.gov/Credits-Deductions/Businesses/Sustainable-Aviation-Fuel-Credit).
- Action on Decision 2023-1, 2023-10 I.R.B. 502, related to Trafigura Trading LLC v. United States, 29 F.4th 286 (5th Cir. 2022) available at [IRS.gov/Actions-on-Decisions](https://www.irs.gov/Actions-on-Decisions).

- Notice 2024-6 (Sustainable Aviation Fuel Credit, updated certificate and safe harbor), I.R.B. 2024-2, at [IRS.gov/irb/2024-02_IRB#NOT-2024-6](https://www.irs.gov/irb/2024-02_IRB#NOT-2024-6).
- Notice 2024-37 (Sustainable Aviation Fuel credit, additional safe harbors), I.R.B. 2024-21, at [IRS.gov/irb/2024-21_IRB#NOT-2024-37](https://www.irs.gov/irb/2024-21_IRB#NOT-2024-37).
- T.D. 10002 (excise tax on repurchase of corporate stock), I.R.B. 2024-29, at [IRS.gov/irb/2024-29_IRB#TD-10002](https://www.irs.gov/irb/2024-29_IRB#TD-10002).
- Notice 2024-49 Clean Fuel Production Registration Credit; Registration, at [IRS.gov/irb/2024-26_IRB#NOT-2024-49](https://www.irs.gov/irb/2024-26_IRB#NOT-2024-49).
- Notice 2024-74 (Sustainable Aviation Fuel Credit, 40BSAF-GREET 2024), I.R.B. 2024-45, at [IRS.gov/irb/2024-45_IRB#NOT-2024-74](https://www.irs.gov/irb/2024-45_IRB#NOT-2024-74).
- Revenue Procedure 2025-32 (inflation adjustments) at [IRS.gov/irb/2025-45_IRB#REV-PROC-2025-32](https://www.irs.gov/irb/2025-45_IRB#REV-PROC-2025-32).
- Notice 2025-55 (Penalty Relief for Remittance Transfer Providers), IRB 2025-43, at [IRS.gov/irb/2025-43_IRB#NOT-2025-55](https://www.irs.gov/irb/2025-43_IRB#NOT-2025-55).

Excise Taxes Not Covered

In addition to the taxes discussed in this publication, you may have to report certain other excise taxes.

For tax forms relating to alcohol, firearms, and tobacco, visit the Alcohol and Tobacco Tax and Trade Bureau website at [TTB.gov](https://www.ttb.gov).

Heavy highway vehicle use tax. You report the federal excise tax on the use of certain trucks, truck tractors, and buses used on public highways on Form 2290, Heavy Highway Vehicle Use Tax Return. The tax applies to highway motor vehicles with a taxable gross weight of 55,000 pounds or more. Vans, pickup trucks, panel trucks, and similar trucks generally aren't subject to this tax.

Note. A Spanish version (Formulario 2290 (sp)) is also available.

Registration of vehicles. Generally, you must prove that you paid your heavy highway vehicle use tax to register your taxable vehicle with your state motor vehicle department or to enter the United States in a Canadian or Mexican registered taxable vehicle. Generally, a copy of Schedule 1 (Form 2290) is stamped by the IRS and returned to you as proof of payment.

Tip: If you have questions on Form 2290, see its separate instructions, or you can call the Form 2290 call site at 866-699-4096 (toll free) from the United States, and 859-320-3581 (not toll free) from Canada and Mexico. The hours of service are 8:00 a.m. to 6:00 p.m. Eastern time.

Wagering tax and occupational tax. The information on wagering tax can be found in the Instructions for Form 730, and Form 11-C.

Part One.

Fuel Taxes and Fuel Tax Credits and Refunds

Chapter 1 defines the types of fuel, taxable events, and exemptions or exceptions to the fuel taxes. Chapter 2 provides information on, and definitions of, the nontaxable uses and explains how to make a claim.

1.

Fuel Taxes

Definitions

Excise taxes are imposed on all the following fuels.

- Gasoline, including aviation gasoline and gasoline blendstocks.
- Diesel fuel, including dyed diesel fuel.
- Diesel-water fuel emulsion.
- Kerosene, including dyed kerosene and kerosene used in aviation.
- Other fuels (including alternative fuels).
- Compressed natural gas (CNG).
- Fuels used in commercial transportation on inland waterways.
- Any liquid used in a fractional ownership program aircraft as fuel.

The following terms are used throughout the discussion of fuel taxes. Other terms are defined in the discussion of the specific fuels to which they pertain.

Agri-biodiesel. Agri-biodiesel means biodiesel derived solely from virgin oils, including esters derived from virgin vegetable oils from corn, soybeans, sunflower seeds, cottonseeds, canola, crambe, rapeseeds, safflowers, flaxseeds, rice bran, mustard seeds, and camelina, and from animal fats.

Approved terminal or refinery. This is a terminal operated by a registrant that is a terminal operator or a refinery operated by a registrant that is a refiner.

Biodiesel. Biodiesel means the monoalkyl esters of long chain fatty acids derived from plant or animal matter that meet the registration requirements for fuels and fuel additives established by the Environmental Protection Agency (EPA) under section 211 of the Clean Air Act, and the requirements of the American Society of Testing Materials (ASTM) D6751.

Blended taxable fuel. This means any taxable fuel produced outside the bulk transfer/terminal system by mixing taxable fuel on which excise tax has been imposed and any other liquid on

which excise tax hasn't been imposed. This doesn't include a mixture removed or sold during the calendar quarter if all such mixtures removed or sold by the blender contain less than 400 gallons of a liquid on which the tax hasn't been imposed.

Blender. This is the person that produces blended taxable fuel.

Bulk transfer. This is the transfer of taxable fuel by pipeline or vessel.

Bulk transfer/terminal system. This is the taxable fuel distribution system consisting of refineries, pipelines, vessels, and terminals. Fuel in the supply tank of any engine, or in any tank car, railcar, trailer, truck, or other equipment suitable for ground transportation isn't in the bulk transfer/terminal system.

Diesel-water fuel emulsion. A diesel-water fuel emulsion means an emulsion at least 14% of which is water. The emulsion additive used to produce the fuel must be registered by a U.S. manufacturer with the EPA under section 211 of the Clean Air Act as in effect on March 31, 2003.

Dry lease aircraft exchange. See [Surtax on Any Liquid Used in a Fractional Ownership Program Aircraft as Fuel](#), later.

Enterer. This is the importer of record (under customs law) for the taxable fuel. However, if the importer of record is acting as an agent, such as a customs broker, the person for whom the agent is acting is the enterer. If there is no importer of record, the owner at the time of entry into the United States is the enterer.

Entry. Taxable fuel is entered into the United States when it's brought into the United States and applicable customs law requires that it be entered for consumption, use, or warehousing. This doesn't apply to fuel brought into Puerto Rico (which is part of the U.S. customs territory), but does apply to fuel brought into the United States from Puerto Rico.

Fractional ownership aircraft program and fractional program aircraft. See [Fractional program aircraft](#), later.

Measurement of taxable fuel. Volumes of taxable fuel can be measured on the basis of actual volumetric gallons or gallons adjusted to 60 degrees Fahrenheit.

Other fuels. See [Other Fuels \(Including Alternative Fuels\)](#), later.

Pipeline operator. This is the person that operates a pipeline within the bulk transfer/terminal system.

Position holder. This is the person that holds the inventory position in the taxable fuel in the terminal, as reflected in the records of the terminal operator. You hold the inventory position when you have a contractual agreement with the terminal operator for the use of the storage facilities and terminaling services for the taxable fuel. A terminal operator that owns taxable fuel in its terminal is a position holder.

Rack. This is a mechanism capable of delivering fuel into a means of transport other than a pipeline or vessel.

Refiner. This is any person that owns, operates, or otherwise controls a refinery.

Refinery. This is a facility used to produce taxable fuel and from which taxable fuel may be removed by pipeline, by vessel, or at a rack. However, this term doesn't include a facility where only blended fuel, and no other type of fuel, is produced. For this purpose, blended fuel is any mixture that would be blended taxable fuel if produced outside the bulk transfer/terminal system.

Registrant. This is a taxable fuel registrant (see [Registration Requirements](#), later).

Removal. This is any physical transfer of taxable fuel. It also means any use of taxable fuel other than as a material in the production of taxable fuel or other fuels. However, taxable fuel isn't removed when it evaporates or is otherwise lost or destroyed.

Sale. For taxable fuel not in a terminal, this is the transfer of title to, or substantial incidents of ownership in, taxable fuel to the buyer for money, services, or other property. For taxable fuel in a terminal, this is the transfer of the inventory position if the transferee becomes the position holder for that taxable fuel.

Second generation biofuel. This is any liquid fuel derived by, or from, qualified feedstocks, and meets the registration requirements for fuels and fuel additives established by the EPA under section 211 of the Clean Air Act (42 U.S.C. 7545). It also includes certain liquid fuel that is derived by, or from, any cultivated algae,

cyanobacteria, or lemna. It isn't alcohol of less than 150 proof (disregard any added denaturants). See Form 6478 for more information.

State. This includes any state, any of its political subdivisions, the District of Columbia, and the American Red Cross. An Indian tribal government is treated as a state only if transactions involve the exercise of an essential tribal government function.

Taxable fuel. This means gasoline, diesel fuel, and kerosene.

Terminal. This is a storage and distribution facility supplied by pipeline or vessel, and from which taxable fuel may be removed at a rack. It doesn't include a facility at which gasoline blendstocks are used in the manufacture of products other than finished gasoline if no gasoline is removed from the facility. A terminal doesn't include any facility where finished gasoline, diesel fuel, or kerosene is stored if the facility is operated by a registrant and all such taxable fuel stored at the facility has been previously taxed upon removal from a refinery or terminal.

Terminal operator. This is any person that owns, operates, or otherwise controls a terminal.

Throughputter. This is any person that is a position holder or that owns taxable fuel within the bulk transfer/terminal system (other than in a terminal).

Vessel operator. This is the person that operates a vessel within the bulk transfer/terminal system. However, vessel doesn't include a deep-draft ocean-going vessel.

Information Returns

Form 720-TO and Form 720-CS are information returns used to report monthly receipts and disbursements of liquid products. A liquid product is any liquid transported into storage at a terminal or delivered out of a terminal. For a list of products, see [the product code table](#) in the Instructions for Forms 720-TO and 720-CS.

The returns are due the last day of the month following the month in which the transaction occurs. Generally, these returns can be filed on paper or electronically. For information on filing electronically, see Pub. 3536, Motor Fuel Excise Tax EDI Guide. Pub. 3536 is only available on the IRS website.

Form 720-TO. This information return is used by terminal operators to report receipts and disbursements of all liquid products to and from all approved terminals. Each terminal operator must file a separate form for each approved terminal.

Form 720-CS. This information return must be filed by bulk transport carriers (barges, vessels, and pipelines) who receive liquid product from an approved terminal or deliver liquid product to an approved terminal.

Registration Requirements

The following discussion applies to excise tax registration requirements for activities relating to fuels only. See Form 637 for other persons who must register and for more information about registration.

Persons that are required to be registered.

You're required to be registered if you're a:

- Blender;
- Enterer;
- Pipeline operator;
- Position holder;
- Refiner;
- Terminal operator;
- Vessel operator;
- Producer or importer of alcohol, biodiesel, agri-biodiesel, and renewable diesel; or
- Producer or importer of sustainable aviation fuel (SAF);
- Producer of clean transportation fuel which is SAF;
- Producer of clean transportation fuel which is not SAF; or
- Producer of cellulosic or second generation biofuel.

Persons that may register. You may, but aren't required to, register if you're a:

- Feedstock user,
- Industrial user,
- Throughputter that isn't a position holder,
- Ultimate vendor,
- Diesel-water fuel emulsion producer,
- Credit card issuer, or
- Alternative fuel claimant.

Ultimate vendors, credit card issuers, and alternative fuel claimants don't need to be registered to buy or sell fuel. However, they must be registered to file claims for certain sales and uses of fuel. See Form 637 for more information.

Taxable fuel registrant. This is an enterer, an industrial user, a refiner, a terminal operator, or a throughputter who received a letter of registration under the excise tax registration provisions and whose registration hasn't been revoked or suspended. The term "registrant" as used in the discussions of these fuels means a taxable fuel registrant.

Additional information. See the [Form 637](#) instructions for the information you must submit when you apply for registration.

Failure to register or reregister. The penalty for failure to register or reregister if you must register or reregister, unless due to reasonable cause, is \$10,000 for the initial failure, and then \$1,000 each day thereafter you fail to register or reregister.

Gasoline and Aviation Gasoline

Gasoline. Gasoline means all products commonly or commercially known or sold as gasoline with an octane rating of 75 or more that are

suitable for use as a motor fuel. Gasoline includes any gasoline blend other than:

- Qualified ethanol and methanol fuel (at least 85% of the blend consists of alcohol produced from coal, including peat);
- Partially exempt ethanol and methanol fuel (at least 85% of the blend consists of alcohol produced from natural gas); or
- Denatured alcohol.

Gasoline also includes gasoline blendstocks, discussed later.

Aviation gasoline. This means all special grades of gasoline suitable for use in aviation reciprocating engines and covered by ASTM specification D910 or military specification MIL-G-5572.

Taxable Events

The tax on gasoline is \$0.184 per gallon. The tax on aviation gasoline is \$0.194 per gallon. When used in a fractional ownership program aircraft, gasoline is also subject to a surtax of \$0.141 per gallon. See [Surtax on Any Liquid Used in a Fractional Ownership Program Aircraft as Fuel](#), later.

Tax is imposed on the removal, entry, or sale of gasoline. Each of these events is discussed later. Also, see the special rules that apply to [Gasoline Blendstocks](#), later.

If the tax is paid on the gasoline in more than one event, a refund or payment may be allowed for the "second" tax paid. See [Refunds or Payments of Second Tax](#) in chapter 2.

Removal from terminal. All removals of gasoline at a terminal rack are taxable. The position holder for that gasoline is liable for the tax.

Two-party exchanges. In a two-party exchange, the receiving person, not the delivering person, is liable for the tax imposed on the removal of taxable fuel from the terminal at the terminal rack. A two-party exchange means a transaction (other than a sale) where the delivering person and receiving person are both taxable fuel registrants and all of the following apply.

- The transaction includes a transfer from the delivering person, who holds the inventory position for the taxable fuel in the terminal, as reflected in the records of the terminal operator.
- The exchange transaction occurs before or at the same time as removal across the rack by the receiving person.
- The terminal operator in its records treats the receiving person as the person that removes the product across the terminal rack for purposes of reporting the transaction on Form 720-TO.
- The transaction is subject to a written contract.

Terminal operator's liability. The terminal operator is jointly and severally liable for the tax if the position holder is a person other than the terminal operator and isn't a registrant.

However, a terminal operator meeting all the following conditions at the time of the removal won't be liable for the tax.

- The terminal operator is a registrant.

Instructions for Form 720

(Rev. March 2026)

Quarterly Federal Excise Tax Return



Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 720 and its instructions, such as legislation enacted after they were published, go to [IRS.gov/Form720](https://www.irs.gov/Form720).

What's New

Direct deposits—Part III, line 11. If you have access to U.S. banking services or electronic payment systems, you should use direct deposit for any refunds. To directly deposit the amount shown on line 11a to your checking or savings account, complete lines 11b through 11e.

Electronic payments. The IRS also recommends paying electronically whenever possible. Options to pay electronically include using your bank account with Direct Pay, your debit or credit card, your digital wallet, or your IRS Online Account. See *Making a Payment* below or go to [IRS.gov/Payments](https://www.irs.gov/Payments) to see all your payment options.

Expiration of oil spill liability taxes (IRS Nos. 18 and 21). The section 4611 tax on crude oil received (domestic petroleum oil spill tax) or petroleum products entered (imported petroleum oil spill tax) expired after December 31, 2025.

Caution: Don't enter the expired taxes on the lines for IRS Nos. 18 and 21 unless Congress extends the taxes. To find out if legislation extends the taxes so that you can report them on your 2026 tax return, go to [IRS.gov/Form6627](https://www.irs.gov/Form6627).

The One Big Beautiful Bill Act (the Act) of 2025 made the following changes for 2026.

Excise tax on remittance transfers. The One Big Beautiful Bill Act (the Act) created new section 4475, which requires an excise tax on remittance transfers. Section 4475 imposes a 1% tax on the amount of certain remittance transfers that occur after December 31, 2025. Limited penalty relief related to remittance transfer tax deposits for the first, second, and third calendar quarters of 2026 has been provided, see [IRS.gov/RemittanceTaxPenaltyRelief](https://www.irs.gov/RemittanceTaxPenaltyRelief) for more information.

Inflation Adjustments for 2026

Arrow shafts (IRS No. 106). The section 4161 tax on arrow shafts is increased to \$0.65 per arrow shaft.

Transportation of persons by air (IRS No. 26). The section 4261 tax on the amount paid for each domestic segment of taxable air transportation is increased to \$5.30.

Use of international air travel facilities (IRS No. 27). The section 4261 tax on the amount paid for international flights is increased to \$23.40 per person for flights that begin or end in the United States. The section 4261 tax per person for domestic segments beginning or ending in Alaska or Hawaii is increased to \$11.70 (applies only to departures).

Reminders

The One Big Beautiful Bill Act (the Act) of 2025 made the following changes.

Schedule C, line 12d. Sustainable aviation fuel (SAF) credit. The Act terminated the section 6426(k) credit for SAF mixtures and it will no longer apply to any sale or use for any period after September 30, 2025. Schedule C, line 12d, has been reserved for future use.

General Instructions

Purpose of Form

Use Form 720 and attachments to report your liability by IRS No. and pay the excise taxes listed on the form. If you report a liability in Part I or II, you may be eligible to use Schedule C to claim a credit.

Who Must File

Caution: See [Patient-centered outcomes research \(PCOR\) fee \(IRS No. 133\)](https://www.irs.gov/PCOR), later, under *Part II* for special rules about who must file to report the PCOR fee.

You must file Form 720 if:

- You were liable for, or responsible for collecting, any of the federal excise taxes listed in Form 720, Parts I and II, for a prior quarter and you haven't filed a final return; or
- You are liable for, or responsible for collecting, any of the federal excise taxes listed in Form 720, Parts I and II, for the current quarter.

See [How To File](https://www.irs.gov/HowToFile), later, for more information.

When To File

You must file a return for each quarter of the calendar year as follows.

Quarter covered	Due by
Jan., Feb., Mar.	April 30
Apr., May, June	July 31
July, Aug., Sept.	October 31
Oct., Nov., Dec.	January 31

If any due date for filing a return falls on a Saturday, Sunday, or legal holiday, you may file the return on the next business day.

Send your return to the IRS using the U.S. Postal Service or a designated private delivery service to meet the "timely mailing as timely filing/paying" rule. See *Private Delivery Services (PDSs)*, later.

Floor stocks tax. Report the floor stocks tax on ozone-depleting chemicals (ODCs), IRS No. 20, on the return due by July 31 of each year. The tax payment is due by June 30. See [Floor Stocks Tax](https://www.irs.gov/FloorStocksTax), later.

Where To File

Send Form 720 to:

Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0009

How To File

If you aren't reporting a tax that you normally report, enter a zero on the appropriate line in Form 720, Part I or II. Also, if you have no tax to report, enter "None" on Form 720, Part III, line 3: and sign and date the return. If you file the second quarter Form 720 only to report the PCOR fee, no filing is required in other quarters unless you have to report other fees or taxes.

If you have adjustments to liabilities reported for prior quarters, see Form 720-X, Amended Quarterly Federal Excise Tax Return. Don't enter adjustments on Form 720.

If you attach additional sheets, enter your name and employer identification number (EIN) on each sheet.

Electronic filing. You can electronically file Form 720 through any electronic return originator (ERO), transmitter, and/or intermediate service provider (ISP) participating in the IRS e-file program for excise taxes. For more information on e-file, go to <https://www.irs.gov/ETEC>.

Making a Payment

The IRS recommends paying electronically whenever possible. Options to pay electronically include any of the payment options below. Go to [IRS.gov/Payments](https://www.irs.gov/Payments) to see all your payment options.

IRS Direct Pay. For online transfers directly from your checking or savings account at no cost to you, go to [IRS.gov/Payments](https://www.irs.gov/Payments).

Debit card, credit card, or digital wallet. To pay by debit or credit card, or digital wallet, go to [IRS.gov/Payments](https://www.irs.gov/Payments). A fee is charged by these service providers. You can also pay by phone with a debit or credit card.

Electronic Funds Withdrawal (EFW). EFW is an integrated e-file/e-pay option offered when filing your federal taxes electronically using tax return preparation software, through a tax professional or the IRS at [IRS.gov/Payments](https://www.irs.gov/Payments).

Electronic Federal Tax Payment System (EFTPS). Allows you to pay your taxes online or by phone directly from your checking or savings account. There is no fee for this service. You must be enrolled either online or have an enrollment form mailed to you.

Same-day wire. You may be able to do a same-day wire from your financial institution. Contact your financial institution for availability, cost, and cut-off times.

Paying by cash. You may be able to pay your balance due with cash at a participating retail store. See [IRS.gov/PayWithCash](https://www.irs.gov/PayWithCash).

Final Return

File a final return if you have been filing Form 720 and you:

1. Go out of business, or
2. Won't owe excise taxes that are reportable on Form 720 in future quarters.

Tip: If you are only filing to report zero tax and you won't owe excise tax in future quarters, check the "Final" return box above Part I of Form 720.

Recordkeeping

Keep copies of your tax return, records, and accounts of all transactions to show that the correct tax has been paid. Keep records to support all claims and all exemptions at least 4 years from the latest of the date:

- The tax became due,
- You paid the tax, or
- You filed a claim.

Penalties and Interest

If you receive a notice about a penalty after you file this return, reply to the notice with an explanation and we will determine if you meet reasonable-cause criteria. Don't include an explanation when you file your return.

Trust fund recovery penalty. If communications, air transportation, and indoor tanning services taxes are collected but not paid to the U.S. Treasury or are willfully not collected, the trust fund recovery penalty may apply. The penalty is the full amount of the unpaid tax.

The trust fund recovery penalty may be imposed on all persons who are determined by the IRS to be responsible for collecting, accounting for, and paying over these taxes, and who acted willfully in not doing so.

A responsible person can be an officer or employee of a corporation, a partner or employee of a partnership, an employee of a sole proprietorship, an accountant, or a volunteer director/trustee. A responsible person may also include one who signs checks for the business or otherwise has authority to cause the spending of business funds.

"Willfully" means voluntarily, consciously, and intentionally. A responsible person acts willfully if they know the required actions aren't taking place.

Additional Information

You may find the following products helpful when preparing Form 720 and any attachments.

- Pub. 510, Excise Taxes, contains definitions and examples that will help you prepare Form 720. Pub. 510 also contains information on fuel tax credits and refunds.
- Pub. 509, Tax Calendars, has deposit and payment due dates for federal excise taxes listed in this publication.
- Notice 2005-4 (fuel tax guidance), 2005-2 I.R.B. 289, at [IRS.gov/IRB/2005-02_IRB#NOT-2005-4](https://www.irs.gov/IRB/2005-02_IRB#NOT-2005-4).
- Notice 2005-24 (sales of gasoline on oil company credit cards), 2005-12 I.R.B. 757, at [IRS.gov/IRB/2005-12_IRB#NOT-2005-24](https://www.irs.gov/IRB/2005-12_IRB#NOT-2005-24).
- Notice 2005-62 (biodiesel and aviation-grade kerosene), 2005-35 I.R.B. 443, at [IRS.gov/IRB/2005-35_IRB#NOT-2005-62](https://www.irs.gov/IRB/2005-35_IRB#NOT-2005-62).
- Notice 2005-80 (LUST, kerosene, claims by credit card issuers, and mechanical dye injection), 2005-46 I.R.B. 953, at [IRS.gov/IRB/2005-46_IRB#NOT-2005-80](https://www.irs.gov/IRB/2005-46_IRB#NOT-2005-80).
- Notice 2006-92 (alternative fuels and mixtures), 2006-43 I.R.B. 774, at [IRS.gov/IRB/2006-43_IRB#NOT-2006-92](https://www.irs.gov/IRB/2006-43_IRB#NOT-2006-92).
- Notice 2007-97 (alternative fuel and alternative fuel mixtures), 2007-49 I.R.B. 1092, at [IRS.gov/IRB/2007-49_IRB#NOT-2007-97](https://www.irs.gov/IRB/2007-49_IRB#NOT-2007-97).
- Notice 2008-110 (biodiesel and cellulosic biofuel), 2008-51 I.R.B. 1298, at [IRS.gov/IRB/2008-51_IRB#NOT-2008-110](https://www.irs.gov/IRB/2008-51_IRB#NOT-2008-110).

- Notice 2010-68 (Alaska dyed diesel exemption), 2010-44 I.R.B. 576, at [IRS.gov/IRB/2010-44_IRB#NOT-2010-68](https://www.irs.gov/irb/2010-44_IRB#NOT-2010-68).
- Notice 2012-27 (fractional aircraft), 2012-17 I.R.B. 849, at [IRS.gov/IRB/2012-17_IRB#NOT-2012-27](https://www.irs.gov/irb/2012-17_IRB#NOT-2012-27).
- T.D. 9670 (tanning tax), 2014-29 I.R.B. 121, at [IRS.gov/IRB/2014-29_IRB#TD-9670](https://www.irs.gov/irb/2014-29_IRB#TD-9670).
- T.D. 9621 (indoor tanning), 2013-28 I.R.B. 49, at [IRS.gov/IRB/2013-28_IRB#TD-9621](https://www.irs.gov/irb/2013-28_IRB#TD-9621).
- Rev. Rul. 2016-03 (foreign reinsurance), 2016-3 I.R.B. 282, at [IRS.gov/IRB/2016-03_IRB#RR-2016-03](https://www.irs.gov/irb/2016-03_IRB#RR-2016-03).
- Rev. Rul. 2018-02 (butane mixture) at [IRS.gov/IRB/2018-02_IRB#RR-2018-02](https://www.irs.gov/irb/2018-02_IRB#RR-2018-02).
- Rev. Proc. 2025-32 (inflation adjustments), 2025-45 I.R.B. 695, at [IRS.gov/IRB/2025-45_IRB#REV-PROC-2025-32](https://www.irs.gov/irb/2025-45_IRB#REV-PROC-2025-32).
- Notice 2023-70 (patient-centered outcomes research (PCOR) fee), 2023-45 I.R.B. 12288, at [IRS.gov/IRB/2023-45_IRB#NOT-2023-70](https://www.irs.gov/irb/2023-45_IRB#NOT-2023-70).
- T.D. 9948 (exemption for amounts paid for certain aircraft management services) at [IRS.gov/IRB/2021-06_IRB#TD-9948](https://www.irs.gov/irb/2021-06_IRB#TD-9948).
- Notice 2023-6 (sustainable aviation fuel credit) at [IRS.gov/IRB/2023-06_IRB#NOT-2023-6](https://www.irs.gov/irb/2023-06_IRB#NOT-2023-6).
- Announcement 2023-18 (stock buybacks) at [IRS.gov/IRB/2023-30_IRB#ANN-2023-18](https://www.irs.gov/irb/2023-30_IRB#ANN-2023-18).
- Notice 2023-52 (sales of a designated drug during statutory period) at [IRS.gov/IRB/2023-35_IRB#NOT-2023-52](https://www.irs.gov/irb/2023-35_IRB#NOT-2023-52).
- Notice 2023-28 (reinstatement of the Superfund excise taxes) at [IRS.gov/IRB/2023-15_IRB#NOT-2023-28](https://www.irs.gov/irb/2023-15_IRB#NOT-2023-28).
- Rev. Proc. 2022-26 (request a determination that a substance be added to or removed from the list of taxable substances) at [IRS.gov/IRB/2022-29_IRB#REV-PROC-2022-26](https://www.irs.gov/irb/2022-29_IRB#REV-PROC-2022-26).
- Rev. Proc. 2023-20 (modifies the effective date of additions to the list of taxable substances) at [IRS.gov/IRB/2023-15_IRB#REV-PROC-2023-20](https://www.irs.gov/irb/2023-15_IRB#REV-PROC-2023-20).
- Notice 2024-6 (sustainable aviation fuel credit safe harbors) at [IRS.gov/IRB/2024-02_IRB#NOT-2024-6](https://www.irs.gov/irb/2024-02_IRB#NOT-2024-6).
- Reg. 115710-22, page 1070 (Excise Tax on Repurchase of Corporate Stock) at [IRS.gov/IRB/2024-20_IRB#REG-115710-22](https://www.irs.gov/irb/2024-20_IRB#REG-115710-22).
- Notice 2024-74 (40BSAF GREET Model), at [IRS.gov/Newsroom/IRS Guidance for SAF](https://www.irs.gov/newsroom/irs-guidance-for-saf).

Private Delivery Services (PDSs)

You can use PDSs designated by the IRS to meet the “timely mailing as timely filing/paying” rule for tax returns and payments. Go to [IRS.gov/PDS](https://www.irs.gov/PDS) for the current list of designated services. The PDS can tell you how to get written proof of the mail date. For the IRS mailing address to use if you are using a PDS, go to [IRS.gov/PDSStreetAddresses](https://www.irs.gov/PDSStreetAddresses).

Caution: PDSs can’t deliver items to P.O. boxes. You must use the U.S. Postal Service to mail any item to an IRS P.O. box address.

Photographs of Missing Children

The IRS is a proud partner with the [National Center for Missing & Exploited Children® \(NCMEC\)](https://www.nationalcenterformissingandexploitedchildren.org/). Photographs of missing children selected by the Center may appear in instructions on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Specific Instructions

Name and Address

Enter your name, your address, and the quarter ending date (month and year). If your address changes, check the “Address change” box above Form 720, Part I.

P.O. box. If the post office doesn't deliver mail to the street address and you have a P.O. box, show the box number instead of the street address.

Foreign address. Follow the country's practice for entering the postal code. Don't abbreviate the country name.

Employer Identification Number (EIN)

Enter the correct EIN. If you are a one-time filer, you may not need an EIN. See [Gas guzzler tax \(IRS No. 40\)](https://www.irs.gov/irb/2013-40_IRB#NOT-2013-40), later. If you don't have an EIN, you may apply for one online by going to [IRS.gov/EIN](https://www.irs.gov/EIN). You may also apply for an EIN by faxing or mailing Form SS-4, Application for Employer Identification Number, to the IRS.

Disregarded entities and qualified subchapter S subsidiaries (QSubs). QSubs and eligible single-owner disregarded entities are treated as separate entities for excise tax and reporting purposes. QSubs and eligible single-owner disregarded entities must pay and report excise taxes (other than IRS Nos. 31, 51, and 117); register for most excise tax activities; and claim any refunds, credits, and payments under their EINs. These actions can't take place under the owner's taxpayer identification number (TIN). Some QSubs and disregarded entities may already have EINs. However, if you are unsure, please call the IRS Business and Specialty Tax Line at 800-829-4933.

Generally, QSubs and eligible single-owner disregarded entities will continue to be treated as disregarded entities for other federal tax purposes (other than employment taxes). Thus, taxpayers filing Form 4136, Credit for Federal Tax Paid on Fuels, with Form 1040, U.S. Individual Income Tax Return, or Form 1040-SR, U.S. Tax Return for Seniors, can use the owner's TIN. For more information, see Regulations section 301.7701-2(c)(2).

Signature

Form 720 must be signed by a person authorized by the entity to sign this return.

Third Party Designee

If you want to allow an employee of your business, a return preparer, or another third party to discuss your Form 720 with the IRS, check the “Yes” box on Form 720 under Third Party Designee. Also, enter the designee's name and phone number and any five digits that person chooses as their personal identification number (PIN).

By checking the “Yes” box, you are authorizing the IRS to speak with the designee to answer any questions relating to the processing of, or the information reported on, Form 720. You are also authorizing the designee to:

- Exchange information concerning Form 720 with the IRS, and
- Respond to certain IRS notices that you have shared with your designee relating to Form 720. The IRS won't send notices to your designee.

You aren't authorizing the designee to receive any refund check, bind you to anything (including additional tax liability), or otherwise represent you before the IRS. If you want to

expand the designee's authority, see Pub. 947, Practice Before the IRS and Power of Attorney.

The authorization will automatically expire 1 year from the due date (without regard to extensions) for filing your Form 720. If you or your designee wants to revoke this authorization, send a written statement of revocation to:

Department of the Treasury
Internal Revenue Service
Cincinnati, OH 45999

See Pub. 947 for more information.

Paid Preparer Use Only

A paid preparer must sign Form 720 and provide the information in the Paid Preparer Use Only section at the end of the form if the preparer was paid to prepare the form and isn't an employee of the filing entity. The preparer must give you a copy of the form in addition to the copy to be filed with the IRS. If you are a paid preparer, enter your Preparer Tax Identification Number (PTIN) in the space provided. Include your complete address. If you work for a firm, you must also enter the firm's name and the EIN of the firm. However, you can't use the EIN of the tax preparation firm in place of your PTIN. You can apply for a PTIN online or by filing Form W-12, IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal. For more information about applying for a PTIN online, go to [IRS.gov/PTIN](https://www.irs.gov/PTIN).

Part I

Environmental Taxes

Use Form 6627, Environmental Taxes, to figure the environmental taxes on the following.

- Domestic petroleum Superfund tax, IRS No. 53.
- Chemicals (other than ODCs), IRS No. 54.
- Imported chemical substances, IRS No. 17.
- Imported petroleum products Superfund tax, IRS No. 16.
- Ozone-depleting chemicals (ODCs), IRS No. 98.
- Imported products that used ODCs as materials in the manufacture or production of the product, IRS No. 19.
- The floor stocks tax on ODCs, IRS No. 20 (reported in Form 720, Part II).

Attach Form 6627 to Form 720. The tax rates for these taxes are shown on Form 6627.

Communications Taxes

Communications Services (IRS No. 22)

The tax is 3% of amounts paid for local telephone service and teletypewriter exchange service.

Who Must File

The person receiving the payment for communications services must collect and submit the tax and file the return. Enter the amount of tax collected or considered collected for the quarter.

Credits or Refunds

If tax is collected and paid over for nontaxable services from the communications tax, the collector may request a credit or refund as described below.

Collectors. The collector may request a credit or refund only if it has repaid the tax to the person from whom the tax was collected, or obtained the consent of that person to the allowance of the credit or refund. These requirements also apply to nontaxable service refunds.

Collectors using the regular method for deposits.

Collectors using the regular method for deposits must use Form 720-X to request a credit or refund.

Collectors using the alternative method for deposits.

Collectors using the alternative method for deposits must adjust their separate accounts for the credit or refund. For more information, see [Alternative method \(IRS Nos. 22, 26, 27, and 28\)](#), later.

Air Transportation Taxes

Transportation of Persons by Air (IRS No. 26)

The taxes on transportation of persons by air are the percentage tax and the domestic segment tax. Add the percentage tax and the domestic segment tax to get the total tax on transportation of persons by air.

Note: The percentage and domestic segment taxes don't apply on a flight if the surtax on fuel used in a fractional ownership program aircraft is imposed. For more information, see [Surtax on any liquid used in a fractional ownership program aircraft as fuel \(IRS No. 13\)](#), later.

Who Must File

The person receiving the payment for air transportation services must do all of the following.

- Collect the tax.
- Submit the tax.
- File Form 720 to report the amount of the tax collected, or considered collected, for the quarter.

Exemption for amounts paid for aircraft management services. Effective December 23, 2017, certain payments related to the management of private aircraft are exempt from the excise taxes imposed on taxable transportation by air. See Pub. 510.

Percentage tax. The percentage tax is 7.5% of amounts paid for taxable transportation of persons by air.

Domestic segment tax. For calendar year 2026, the tax on the amount paid for each domestic segment of taxable transportation is \$5.30.

Example. In January 2026, Frank Jones pays \$268.60 to a commercial airline for a flight in January from Washington to Chicago with a stopover in Cleveland. The flight has two segments. The price includes the \$240 fare and \$28.60 excise tax $[(\$240 \times 7.5\%) + (2 \times \$5.30)]$ for which Frank is liable. The airline collects the tax from Frank and submits it to the government.

Charter flights. If an aircraft is chartered and the flight isn't one where the tax on fuel used in a fractional ownership program aircraft is imposed, the domestic segment tax for each segment of taxable transportation is figured by multiplying the tax by the number of passengers transported on the aircraft.

Example. In March 2026, Tim Clark pays \$1,149.20 to an air charter service to carry seven employees from Washington to Detroit with a stopover in Pittsburgh. The flight has two segments. The price includes the \$1,000 charter

payment and \$149.20 excise tax $[(\$1,000 \times 7.5\%) + (2 \times \$5.30 \times 7 \text{ passengers})]$ for which Tim is liable. The charter service collects the tax from Tim and submits it to the government.

Rural airports. If a segment is to or from a rural airport, the domestic segment tax doesn't apply.

Transportation of Property by Air (IRS No. 28)

The tax is 6.25% of amounts paid for transportation of property by air. The tax doesn't apply if the surtax on fuel used in a fractional ownership program aircraft is imposed. See [Surtax on any liquid used in a fractional ownership program aircraft as fuel \(IRS No. 13\)](#), later.

Use of International Air Travel Facilities (IRS No. 27)

For calendar year 2026, the section 4261 excise tax on any amount paid for international air transportation, if the transportation begins or ends in the United States, is generally \$23.40. However, a lower rate of tax applies to a domestic segment beginning or ending in Alaska or Hawaii, and that tax applies only to departures. For calendar year 2026, the rate of tax is \$11.70.

Communications and Air Transportation Taxes—Uncollected Tax Report

A separate report is required to be filed by collecting agents of communications services (local and teletypewriter services) and air transportation taxes if the person from whom the facilities or services tax (the tax) is required to be collected (the taxpayer) refuses to pay the tax, or it's impossible for the collecting agent to collect the tax. The report must contain the name and address of the taxpayer, the type of facility provided or service rendered, the amount paid for the facility or service (the amount on which the tax is based), and the date paid.

Regular method taxpayers. For regular method taxpayers, the report must be filed by the due date of the Form 720 on which the tax would have been reported.

Alternative method taxpayers. For alternative method taxpayers, the report must be filed by the due date of the Form 720 that includes an adjustment to the separate account for the uncollected tax. See [Alternative method \(IRS Nos. 22, 26, 27, and 28\)](#), later.

Where to file your uncollected tax report. Don't file the uncollected tax report with Form 720. Instead, mail the report to:

Department of the Treasury
Internal Revenue Service
Cincinnati, OH 45999

Fuel Taxes

First taxpayer's report. If you are reporting gallons of taxable fuel that may again be subject to tax, you may need to file a first taxpayer's report. The report must contain all the information as shown in the *Model Certificate B* in the Appendix of Pub. 510.

The person who paid the first tax must do all of the following.

- Give a copy of the first taxpayer's report to the buyer.

- File the first taxpayer's report with Form 720 for the quarter for which the report relates.
- Enter "EXCISE—FIRST TAXPAYER'S REPORT" across the top of a separate copy of the report and by the due date of Form 720, send the copy to:

Department of the Treasury
Internal Revenue Service
Cincinnati, OH 45999-0555

Diesel (IRS No. 60). If you are liable for the diesel fuel tax on removal at the terminal rack, report these gallons on line 60(a). If you are liable for the diesel fuel tax on events other than removal at the terminal rack, report these gallons on line 60(b). If you are liable for the diesel fuel tax because you have produced diesel by blending biodiesel with taxed diesel outside of the bulk transfer/terminal system, report these gallons of biodiesel on line 60(c). If you report gallons on line 60(c), don't report those gallons on line 60(b).

Multiply the total number of gallons subject to tax on lines 60(a), 60(b), and 60(c) by \$.244 and make one entry in the "Tax" column.

See [Schedule T. Two-Party Exchange Information Reporting](#), later, if applicable.

Diesel-water emulsion (IRS No. 104). If you are liable for the reduced rate (see below) of tax on a diesel-water emulsion removal at the terminal rack or other taxable event, report these gallons on the line for IRS No. 104.

Requirements. All of the following requirements must be met to be eligible for the reduced rate: (a) the diesel-water emulsion must contain at least 14% water; (b) the emulsion additive must be registered by a U.S. manufacturer with the Environmental Protection Agency (EPA) under the Clean Air Act, section 211 (as in effect on March 31, 2003); and (c) the taxpayer must be registered by the IRS. If these requirements aren't met, you must report the sale, removal, or use of a diesel-water emulsion as diesel.

IRS Nos. 105, 107, and 119. Tax is imposed at \$.001 per gallon on removals, entries, and sales of gasoline, diesel, and kerosene described as exempt transactions. Multiply the total number of gallons subject to tax for each fuel by \$.001 and enter the amount in the "Tax" column for the following IRS Nos.

- IRS No. 105, dyed diesel, LUST tax.
- IRS No. 107, dyed kerosene, LUST tax.
- IRS No. 119, LUST tax, other exempt removals; report gasoline blendstocks, kerosene used for a feedstock purpose, and diesel or kerosene sold or used in Alaska.

Kerosene (IRS No. 35). If you are liable for the kerosene tax on removal at the terminal rack (not located at an airport), report these gallons on line 35(a). If you are liable for the kerosene tax on events other than removal at the terminal rack, report these gallons of kerosene on line 35(b).

Multiply the total number of gallons subject to tax on lines 35(a) and 35(b) by \$.244 and make one entry in the "Tax" column.

See [Schedule T. Two-Party Exchange Information Reporting](#), later, if applicable.

Kerosene for use in aviation (IRS Nos. 69, 77, and 111). Generally, kerosene is taxed at \$.244 per gallon unless a reduced rate applies. See *Kerosene for Use in Aviation* in Pub. 510 for more details about these reduced rates.

- If you're liable for kerosene tax on removal directly from a terminal into the fuel tank of an aircraft for use in aviation, the

tax rate is \$.219 per gallon. This rate applies to kerosene used in noncommercial aviation. This rate can also apply to kerosene used in commercial aviation or for nontaxable aviation uses if the requirements for a further reduced rate aren't met. Report these gallons on the line for IRS No. 69.

- If you're liable for kerosene tax on removal directly from a terminal into the fuel tank of an aircraft for use in commercial aviation (other than foreign trade), the tax rate is \$.044 per gallon. Report these gallons on the line for IRS No. 77. The line for IRS No. 77 is **only** applicable to registered commercial aviation operators (Form 637 "Y" Registrant).
- If you're liable for kerosene tax on removal directly from a terminal into the fuel tank of an aircraft for nontaxable uses, the tax rate is \$.001. Report these gallons on the line for IRS No. 111.

See Pub. 510 for foreign trade rules.

Note: Fuel used in a fractional ownership program aircraft is also subject to a surtax of \$.141 per gallon. For more information, see [Surtax on any liquid used in a fractional ownership program aircraft as fuel \(IRS No. 13\)](#), later.

Other fuels (IRS No. 79). You are liable for the tax on the fuels listed below when they are delivered into the fuel supply tank of a motor vehicle or motorboat. Use the following table to determine the tax for each gallon. Fill in the number of gallons and the appropriate rate in the "Rate" column on the line for IRS No. 79. If more than one rate applies, leave the "Rate" column blank and attach a schedule showing the rates and number of gallons taxed at each rate.

Fuel	Tax rate per gallon
Qualified—	
Ethanol produced from coal	\$.184
Methanol produced from coal	.184
Partially exempt—	
Ethanol produced from natural gas	.114
Methanol produced from natural gas	.0925
B-100 (100% biodiesel)	.244
Liquefied gas derived from biomass	.184
Other fuels not shown	.184

Gasoline (IRS No. 62). If you are liable for the gasoline tax on removal at the terminal rack, report these gallons on line 62(a). If you are liable for the gasoline tax on events other than removal at the terminal rack, report these gallons on line 62(b). If you are liable for the gasoline tax because you have blended alcohol with taxed gasoline outside of the bulk transfer/terminal system, report these gallons of alcohol on line 62(b).

Multiply the total number of gallons subject to tax on lines 62(a) and 62(b) by \$.184. Combine the tax for lines 62(a) and 62(b) and make one entry in the "Tax" column.

See [Schedule T, Two-Party Exchange Information Reporting](#), later, if applicable.

Surtax on any liquid used in a fractional ownership program aircraft as fuel (IRS No. 13). Fuel used in a fractional ownership program aircraft, as defined below, after March 31, 2012, is subject to a surtax of \$.141 per gallon. The fractional ownership program manager is liable for the surtax. If you are liable, report these gallons on the line for IRS No. 13.

The surtax applies in addition to any other taxes imposed on the removal, entry, use, or sale of the fuel. If the surtax is

imposed, the flight isn't considered commercial aviation. Instead, the tax on the fuel used in the flight is imposed at the noncommercial aviation rate of \$.219 per gallon (IRS No. 69).

If the surtax is imposed, the following taxes don't apply.

- Transportation of persons by air (IRS No. 26).
- Transportation of property by air (IRS No. 28).
- Use of international air travel facilities (IRS No. 27).

Fractional ownership aircraft program is a program under which:

- A single fractional ownership program manager provides fractional ownership program management services on behalf of the fractional owners;
- There are one or more fractional owners per fractional program aircraft, with at least one fractional program aircraft having more than one owner;
- For at least two fractional program aircraft, none of the ownership interests in the aircraft are less than the minimum fractional ownership interest or held by the program manager;
- There exists a dry-lease aircraft exchange arrangement among all of the fractional owners; and
- There are multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program.

Fractional program aircraft. Any aircraft that, in any fractional ownership aircraft program, is listed as a fractional program aircraft in the management specifications issued to the manager of such program by the Federal Aviation Administration under subpart K of part 91, title 14, Code of Federal Regulations, and is registered in the United States.

Fractional program aircraft aren't considered used for transportation of a qualified fractional owner, or on account of such qualified fractional owner, when they are used for flight demonstration, maintenance, or crew training. In such situations, the flight isn't commercial aviation. Instead, the tax on the fuel used in the flight is imposed at the noncommercial aviation rate.

Fractional owner. Any person owning any interest (including the entire interest) in a fractional program aircraft.

Dry-lease aircraft exchange. An agreement, documented by the written program agreements, under which the fractional program aircraft are available, on an as-needed basis without crew, to each fractional owner.

Special rule relating to deadhead service. A fractional program aircraft won't be considered to be used on account of a qualified fractional owner when it's used in deadhead service and a person other than a qualified fractional owner is separately charged for such service.

More information. See section 4043 for more information on the surtax.

Aviation gasoline (IRS No. 14). Aviation gasoline is taxed at the rate shown on Form 720.

Also, a surtax of \$.141 per gallon applies on fuel used in an aircraft which is part of a fractional ownership program.

For further information on fractional ownership program aircraft, see [Surtax on any liquid used in a fractional ownership program aircraft as fuel \(IRS No. 13\)](#), earlier.

Alternative fuel (IRS Nos. 112, 118, and 120–124).

Alternative fuel is any liquid other than gas oil, fuel oil, or any product taxable under section 4081. You are liable for tax on alternative fuel delivered into the fuel supply tank of a motor

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Fuel Supplier

What can I do as a Supplier?

A supplier can:

- buy and sell tax-exempt fuel within the bulk transfer terminal system.
- hold tax-free inventory in IRS registered terminals.
- blend, import, and export fuel.

Note: Fuel Suppliers are generally not tax-exempt entities and cannot legally purchase tax-exempt fuel outside of the bulk transfer terminal system unless it happens on terminal grounds.

What documents do I need to apply for this license?

- An application completed:
 - online on TAP at <https://wadolprft.gentax.com/TAP/>, or
 - by paper form available at <https://www.dol.wa.gov/forms/441750.pdf>.
- A copy of the Form 637 from the Internal Revenue Service authorizing tax-free transactions in the bulk transfer terminal system.
- Copies of fuel licenses from other jurisdictions if you plan to import or export fuel.
- Proof of motor and special fuel bond coverage – equal to 3 times the estimated monthly fuel tax liability. It must be between \$5,000 and \$100,000. This coverage may be any of the following:
 - surety fuel tax bond completed by your insurance company at: <https://www.dol.wa.gov/forms/441541.pdf>. The bond form must be notarized and a Power of Attorney must be included.
 - Time Certificate of Deposit from your bank
 - cash bond (contact us at (360) 664-1852 for instructions)

What do I have to do to maintain my license?

- Report and pay timely each month – even if you have not operated in Washington (see details in the General Information section on page 6.)
- Comply with Washington State fuel tax statutes and rules
 - Fuel Tax statutes: <https://app.leg.wa.gov/RCW/default.aspx?cite=82.38>
 - Washington Administrative Code: <https://app.leg.wa.gov/WAC/default.aspx?cite=308-77>
- Maintain proper bond coverage as required by law.

What are the reporting requirements for Fuel Suppliers?

- All fields are required, including the accurate net, gross, and billed gallons.
- Butane, biodiesel, ethanol, trans-mix, and other blending products must be reported in addition to all motor and special fuel.
- If the origin or destination of the fuel is an IRS terminal or refinery, you must report the correct terminal or refinery control number as assigned by the IRS
- If the origin or destination of the fuel is not an IRS terminal or refinery, you must report the city and state.

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- Report the correct Federal Employer Identification Number (FEIN) for all buyers, sellers, and carriers.
- Report bill of lading (BOL) numbers in the document number field. Do not use dates, invoice numbers, purchase numbers, or railcar numbers.
- Report in whole gallons.
- Dyed diesel transactions between licensees below the rack on terminal grounds (or leaving or entering the terminal) must be reported on the supplier return.
- When reporting imports or exports of fuel from other jurisdictions, the exporter in the origin jurisdiction must be the importer in the destination jurisdiction. Fuel cannot change hands at the border.
- All transactions must be reported in the period in which they occur. Adjustments to prior periods must be made by amending the period in which the original transaction took place. Out of period transactions will be denied.
- Report fuel transactions occurring on terminal grounds, but not within the terminal.
- Report fuel entering or leaving the terminal (these transactions will also be reported on the Terminal Operator report).

Note: Transactions occurring inside IRS registered terminals are reported on the Terminal Operator report, not on the supplier tax return.

Receipts Schedules

- Schedule 1: Gallons received tax paid** - Use this schedule to report purchases of:
- undyed fuel when Washington fuel tax was paid to the seller at the time of purchase.
 - dyed fuel (which is always purchased without fuel tax) received outside the bulk transfer terminal system.
- Schedule 2A: Gallons received from Washington terminals or refineries, tax-exempt** - Use this schedule to report Washington tax-exempt fuel (including dyed fuel) received from IRS registered terminals or refineries.
- You must report the origin terminal or refinery number.
 - Sales occurring inside the terminal are reported by the Terminal Operator and should not be included on the supplier tax return.
- Schedule 2B: Gallons received tax-exempt blend stock** - Use this schedule to report receipt of tax-exempt blend stock.
- Blend stock includes butane and trans-mix in addition to others.
 - For a list of product codes and additives see:
<https://www.irs.gov/businesses/small-businesses-self-employed/product-code-and-quantity-reporting>.
- Schedule 3: Gallons imported below terminal** - Use this schedule to report fuel, including dyed diesel, imported outside the bulk transfer terminal system, via truck or rail.
- The origin of the fuel must be outside the state of Washington.
 - The destination must be outside of the bulk transfer terminal system.

Schedule 4: Gallons imported to tax-exempt storage terminal by truck/rail - Use this schedule to report fuel, including dyed diesel, imported outside the bulk transfer terminal system to an IRS registered terminal or refinery, by truck or rail.

- You must list the destination terminal or refinery number.
- The origin of the fuel must be from outside the state of Washington.

Disbursements Schedules

Schedule 6A: Gallons sold tax-exempt to licensed distributors for export - Use this schedule to report gallons sold tax-exempt to licensed distributors for export (including dyed fuel).

- These sales must occur at an IRS registered Washington terminal.
- The fuel must be exported immediately with no diversions.
- It cannot be held in bulk storage in Washington prior to export.

Schedule 6D: Gallons sold tax-exempt to other licensed suppliers - Use this schedule to report fuel sales to other licensed suppliers at the terminal (including dyed fuel).

- Sales occurring within the terminal will be reported by the Terminal Operator.
- A valid origin terminal number must be reported.
- Any sales occurring outside of terminal grounds are taxable, regardless of license status.

Schedule 6F: Gallons sold to IFTA authorized carriers OR sales of dyed diesel delivered to a WA licensee - Use this schedule to report sales to International Fuel Tax Agreement (IFTA) authorized carriers and for sales of dyed diesel to Washington fuel tax licensees.

- Do not report dyed diesel sales to unlicensed companies, or sales of other fuel to licensed distributors or suppliers on this schedule.

Schedule 6Z: Gallons sold for racing - Use this schedule to report motor fuel sales of racing fuel.

- The fuel sold cannot be legal for on-road use.

Schedule 7: Gallons exported - Use this schedule to report fuel exported to other states or countries when you own the fuel at the time of export.

- The fuel must be taken to a jurisdiction outside Washington to qualify for this exemption (Note: RCW 82.38.020(12) defines exports and certain limitations).
- You must also be the importer in the destination jurisdiction.

Schedule 8: Gallons sold tax-exempt to federal government - Use this schedule to report all sales of special fuel to the federal government.

Gallons sold tax-exempt to US Armed Forces or National Guard for export - Use this schedule to report sales of motor fuel to the federal government for export only.

Schedule 10C: Gallons sold tax-exempt to urban passenger transportation systems - Use this schedule to report sales of special fuel and dyed special fuel to urban passenger transportation systems.

- Sales of motor fuel do not qualify for this exemption.
- If selling motor fuel, you must charge fuel tax.

Schedule 10D: Credit card sales to tax-exempt foreign diplomatic and consular missions - Use this schedule to report credit card sales of motor fuel to foreign diplomatic and consular mission personnel.

- The name of the country must be reported and must offer a similar exemption to US personnel in like positions.
- Sales of special fuel do not qualify for this exemption.

Schedule 10F: Gallons delivered to a tax-exempt storage Washington terminal - Use this schedule to report deliveries of fuel to IRS registered terminals or refineries in Washington.

- This schedule should only be used to report disbursements to your own inventory in the terminal or refinery.
- If selling to a licensed supplier at the terminal, use schedule 6D.
- Sales occurring inside the terminal are reported by the Terminal Operator and should not be included on the supplier tax return.

Schedule 10G: Gallons sold to other tax-exempt entities - Use this schedule to report sales to other tax-exempt entities. These exemptions are specified in Washington law (RCW 82.38.080).

Note: *Washington licensed suppliers are not tax-exempt entities and should not be reported on this schedule. Proof of tax-exempt status under current law may be requested prior to approving a return with this exemption included.*

Schedule 13X: Gallons of biodiesel rebranded to dyed - Use this schedule to report gallons of biodiesel dyed outside of the bulk transfer terminal system.

- Only the biodiesel portion of a blend (B00) should be reported.

Note: *It is illegal to dye petroleum products outside of the terminal. Fuel dyed within the terminal will not be reported on the supplier return.*

Frequently Asked Questions

1. **As a supplier, are all my fuel transactions tax-exempt?**
No. Suppliers cannot legally purchase tax-exempt fuel outside of the bulk transfer terminal system unless it happens on terminal grounds.
2. **Who is responsible to verify the license status of customers?**
It is the responsibility of the seller to verify the license status of the buyer, to ensure appropriate fuel tax is collected at the time of sale. Check the Active Licensee List, available at: <https://www.dol.wa.gov/about/ftactivelists.html>.
3. **Is it legal to dye diesel outside of the terminal?**
No.
4. **What happens if I inadvertently mix dyed fuel with clear?**
You must return the fuel to the terminal. You may file a claim for refund. This fuel cannot be sold as dyed fuel.
5. **Is it legal to dye biodiesel and biodiesel blends outside of the terminal?** Yes, if the requirements below are met.
 - Rebrands of biodiesel in blends below B20 - biodiesel may be rebranded by blending it with dyed diesel if the result is a fuel that is B20 or below. Since diesel must be dyed at the terminal, rebrands of biodiesel blends outside the terminal must only be created by adding clear biodiesel with dyed diesel.
 - Rebrands of biodiesel blends above B20 - must be rebranded using a mechanical injection device. Otherwise, the dye concentration becomes too diluted to meet IRS requirements. The licensee may be asked to provide proof of purchase for the device.

Note: Only the clear biodiesel portion (B00) should be reported on the 13X schedule. However, the dyed diesel portion should also be reported on the appropriate receipt schedule.

6. **Can I report book adjustments/stock transfers on the supplier return?**
No. These adjustments can only be reported on the Terminal Operator report.
7. **How do I report fuel disbursed to the refinery?**
Report these disbursements on 10F, using the correct refinery number issued by the Internal Revenue Service. This number is available at:
<https://www.irs.gov/businesses/small-businesses-self-employed/refinery-control-number-rcn-refinery-location-directory>.
8. **What is a flash sale (also known as flash titling) and how do I report it?**
A flash sale is fuel sold to a licensed distributor or supplier who serves as an intermediary, selling the fuel again to another licensee before the fuel enters or leaves a terminal (on terminal property.)

Example:

Company X imports fuel via rail or truck to a Washington terminal and sells the fuel to a licensed supplier (Company Y). Company Y immediately sells the fuel to another supplier who is a position holder in the terminal (Company Z). These transactions should be reported by each entity as outlined below:

- Company X must report the receipt on schedule 4. "Gallons imported to tax-exempt storage terminal by truck/rail." The disbursement is reported on schedule 6D "Gallons sold tax-exempt to other licensed suppliers."
- Company Y must report receipt on schedule 2A "Gallons received from Washington terminal or refineries tax-exempt." The disbursement is reported on schedule 6D "Gallons sold tax-exempt to other licensed suppliers."
- Company Z must report receipt on schedule 2A "Gallons received from Washington terminal or refineries tax-exempt." The disbursement is reported on schedule 10F "Gallons delivered to tax-exempt storage Washington terminal."
- The Terminal Operator must report the receipt on schedule 15A "Receipts".

If your scenario does not match the example, please call (360) 664-1852 or email: FuelTax@dol.wa.gov for reporting instructions.

9. Who is responsible for reporting transactions?

All licensees must report all receipts and tax-exempt disbursements. Reportable products include dyed fuel and blending products, in addition to gasoline, diesel, and biodiesel. Transactions occurring inside the terminal are reported only by the Terminal Operator.

10. When is fuel tax imposed?

The tax is imposed upon the first taxable event, generally when fuel:

- enters Washington.
- leaves the bulk transfer terminal system in Washington.
- is produced in the state outside of the bulk transfer terminal system.

Note: The intent of the law is that tax is imposed at the time and place of the first taxable event. Failure to pay the tax does not prevent tax liability from arising if there is a subsequent taxable event.

11. Who is responsible for paying the tax to the state of Washington?

The following entities must report and pay fuel tax to the state:

- the owner of the fuel when it is imported into the state from another jurisdiction.
- the entity pulling fuel from a terminal.
- the producer of fuel made outside of the bulk transfer terminal system.

12. Do I need to report if I have no operations in Washington during a reporting period?

Yes, you will need to select "no operations" and submit your tax return by the due date. Failure to file will result in the revocation of your license.

13. What happens if I have multiple fuel tax licenses and one is revoked?

All fuel tax licenses will be revoked.

14. Are biodiesel, ethanol, and butane taxable in Washington before they are blended?

Yes, these products are fully taxable, including blends.

15. What document number do I use to report fuel transactions?

Use the bill of lading number as the document number on the tax return. Do not use dates, invoice numbers, purchase numbers, or railcar numbers.

16. Am I required to report net, gross, or billed gallons?

Yes, you must report all three. The billed gallons column will be used to calculate tax liability. This number must match the invoice.

17. How do I report transactions for prior periods?

You must amend the return for the period in which the transaction occurred. Adjustments reported in the wrong period will be denied.

18. Do I have to report fuel received at the refinery on the supplier tax return?

Yes. Please report these transactions on schedule 2A.

19. What happens when the fuel is diverted?

You must amend the tax return to correct the reported destination jurisdiction.

20. How do I determine who is responsible to report fuel exported from the state of Washington?

The company who owns the fuel when it leaves the state of Washington is responsible to report the export. If uncertain of the owner, you may review:

- the contract between buyer and seller.
- invoices to determine whether out of state tax has been charged.
 - If Washington State fuel tax or no tax has been charged, it is likely the purchaser is the owner.
 - If another's state's tax is charged, the seller is the owner. The buyer should not report the transaction on the Washington fuel tax return.
- invoices to look for the term "FOB origin" - This means the purchase took place in Washington and the purchaser is the owner.
- invoices to look for the term "FOB destination" - This means the purchase took place in another state and the seller is the owner.

Note: *The exporter in the origin jurisdiction must be the importer in the destination jurisdiction. Fuel cannot change hands at the border.*

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Cougar Den Inc.,

Respondent.

Docket No. 03-2022-DOL-00137

**AMENDED INITIAL ORDER ON SUMMARY
JUDGMENT MOTIONS**

Agency: Department of Licensing

Program: Fuel Tax

Agency No. 2021-0072337-01-PRFT

This Order has been Amended to update the date of service. All Amendments are highlighted and underlined.

1. ISSUES

- 1.1. Whether the *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period should be affirmed, or if Cougar Den, Inc. ("Respondent") is exempt from the same under the Treaty of 1855.
- 1.2. Whether the Department of Licensing ("Department") is entitled to summary judgment as a matter of law.
- 1.3. Whether the Respondent is entitled to summary judgment as a matter of law.

2. ORDER SUMMARY

- 2.1. The Respondent is not liable for the assessment at issue, pursuant to Article III of the Treaty of 1855.
- 2.2. The Department's Motion for Summary Judgment is **DENIED**.
- 2.3. The Respondent's Motion for Summary Judgment is **GRANTED**.
- 2.4. The *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period, and the Department's *Informal Hearing Determination* dated November 23, 2021, are **REVERSED**.
- 2.5. All future dates and deadlines in this matter are **STRICKEN**.

3. SUMMARY JUDGMENT MOTION HEARING

- 3.1. Hearing Date: August 24, 2023
- 3.2. Administrative Law Judge: Micah Larripa
- 3.3. Respondent: Cougar Den, Inc.
 - 3.3.1. Representatives: Matthew Harrington, Brendon Monahan, and

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8412-SCP

OAH: (253) 476-6888
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Derek Red Arrow Frank, of Stokes Lawrence
Velikanje Moore & Shore

3.4. Agency: Department of Licensing

3.4.1. Representatives: Leo Roinila and David Hankins, Assistant
Attorneys General

3.5. Observers: Sean Morrison, Assistant Attorney General; Harris
Teo; Davis Washines; Kip Ramsey; and Harry
Smiskin

3.6. Documents Considered:

Doc. No.	Document Name	Document Date	No. Pages
1	Request for Prehearing Conference and Assignment of Administrative Law Judge	3/11/22	17
2	Department's Motion for Summary Judgment	6/30/23	18
3	Declaration of Wesley Marks ("Marks Decl.") in support of Department's Motion for Summary Judgment, with Exhibi ("Ex") 1-11	6/29/23	50
4	Declaration of Katherine Ataman ("Ataman Decl.") in support of Department's Motion for Summary Judgment, with Ex 1	6/28/23	49
5	Declaration of David Hankins ("Hankins Decl.") in support of Department's Motion for Summary Judgment, with Ex 1-3	6/29/23	13
6	Cougar Den's Opposition to Department's Motion for Summary Judgment	7/27/23	25
7	Declaration of Derek Red Arrow Frank ("Red Arrow Opp. Decl.") in support of Cougar Den's Opposition to Department's Motion for Summary Judgment, with Ex 1-6	7/27/23	65
8	Department's Reply in Support of Motion for Summary Judgment	8/10/23	20
9	Supplemental Declaration of Katherine Ataman in support of Department's Reply in Support of Motion for Summary Judgment ¹	8/10/23	3

¹ The Respondent's August 23, 2023 oral motion to strike Ms. Ataman's supplemental declaration from the record is GRANTED. The undersigned did not consider this declaration because it was filed contemporaneously with the Department's Reply brief, depriving the Respondent an opportunity to respond to the facts asserted therein.

10	Appendix A in support of Department's Motion for Summary Judgment	8/10/23	7
11	Respondent's Motion for Summary Judgment	6/30/23	30
12	Declaration of Derek Red Arrow Frank ("Red Arrow Decl.") in support of Respondent's Motion for Summary Judgment, with Ex A-I	6/30/23	173
13	Declaration of Kip Richard Ramsey ("Ramsey Decl") in support of Respondent's Motion for Summary Judgment, with Ex 1-14	6/29/23	165
14	Declaration of Chantelle M. Perez in support of Respondent's Motion for Summary Judgment, with Ex A-C	6/29/23	34
15	Department's Response in Opposition to Respondent's Motion for Summary Judgment	7/27/23	17
16	Cougar Den, Inc.'s Reply in Support of Motion for Summary Judgment	8/10/23	17

4. FACTS FOR PURPOSE OF SUMMARY JUDGMENT

On a motion for summary judgment, the decision maker only considers those facts for which the parties establish "no genuine issue as to any material fact".² "Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law."³ Only evidence in the record and inferences from that evidence establish facts. If evidence in the record points to more than one possible finding of fact, then summary judgment may not rest on the moving party's version of that fact.⁴ Admissions, stipulations, procedural history, and uncontested declarations and affidavits establish facts for summary judgment. So, the record here supports the following facts for the purposes of summary judgment:

Jurisdiction

- 4.1. On July 13, 2021, the Department issued a *Notice of Assessment and Intent to Revoke* ("Notice"), based on the Respondent's alleged failure to pay its April 2021 Fuel Supplier tax return. *Marks Declaration* ("Decl."), *Exhibit* ("Ex") 7.
- 4.2. The Notice assessed \$1,123,109.99 in taxes, a \$112,311.00 penalty, and \$24,000 in interest. In addition, it notified the Respondent of the Department's intention to

² WAC 10-08-135. In Superior Court matters, CR 56 governs summary judgment. Where the relevant procedural rules do not conflict with CR 56, it and the cases interpreting it serve as persuasive authority in the management of summary judgment under WAC 10-08-135.

³ *Verizon NW, Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 916 (2008), citing *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 14 (1999).

⁴ *Verizon NW*, 164 Wn.2d 916.

revoke its Fuel Supplier license, "for failing to pay [its] April 2021 Fuel Supplier tax return." The Notice did not allege any other basis for revocation. *Id.*

- 4.3. On August 11, 2021, the Respondent timely appealed the Department's Notice. *Marks Decl., Ex 8.*
- 4.4. In an email dated August 13, 2021, Wesley Marks, Department of Licensing, acknowledged receipt of the Respondent's appeal, and advised counsel for the Respondent that the Department would conduct an informal hearing in accordance with RCW 82.38.170(10)(b). *Red Arrow Opp. Decl., Ex 5.*
- 4.5. On October 15, 2021, the Department held an informal hearing regarding the July 13, 2021 Notice and the Respondent's appeal of the same. *Marks Decl., Ex 10.*
- 4.6. On November 23, 2021, the Department issued an *Informal Hearing Determination*, which upheld the July 13, 2021 *Notice of Assessment and Intent to Revoke* but mitigated the penalties and interest assessed therein. *Id.*
- 4.7. In its November 23, 2021 *Informal Hearing Determination*, the Department asserted, for the first time, a secondary basis to revoke the Respondent's license, "for reporting transactions on improper schedules", "even if it is found that no assessment of tax is due." *Id.*
- 4.8. On December 21, 2021, the Respondent appealed the Department's November 23, 2021 *Informal Hearing Determination*. *Marks Decl., Ex 11.*
- 4.9. On March 11, 2022, the Department referred this matter to the Office of Administrative Hearings ("OAH") for adjudication. *Document ("Doc") 1.*

Cougar Den

- 4.10. "Punia" Kip Ramsey, the Respondent's owner, is an enrolled member and elder of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"). *Ramsey Decl.*
- 4.11. The Yakama Nation is a federally recognized Indian tribe. *Id.*
- 4.12. The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951 ("Treaty" or "Treaty of 1855"). *Ramsey Decl., Ex 1.* The Treaty guaranteed the Yakama certain rights, including the "Right to Travel", in exchange for lands ceded to the United States. *Id.*
- 4.13. The Respondent is a member-owned, privately held, Yakama Nation Corporation, incorporated on January 3, 1992 under the laws of the Yakama Nation. The Respondent is registered as a foreign corporation with Washington's Secretary of State. *Ramsey Decl.*
- 4.14. The Respondent is a wholesale fuel distribution company, designated by the Yakama Nation as its fuel-delivery agent. *Ramsey Decl., Ex 4.*

- 4.15. The Respondent engages in inter-tribal trade by obtaining and transporting fuel, via truck, for delivery to tribal-owned fuel stations within Indian Country.⁵ *Ramsey Decl.*
- 4.16. The Respondent has held a Washington Fuel Supplier License since September 1, 2018. *Id.* As a licensee, the Respondent is required to report all fuel purchased within Washington State, imported to Washington State, or exported from Washington State. *Marks Decl.*
- 4.17. The Department distributes a Fuel Tax Compliance Manual to all licensees. The Manual, last updated in April 2021, provides instructions for how and when licensees must submit monthly returns. *Ataman Decl., Ex 1.*
- 4.18. With each monthly tax return, a fuel supplier licensee is required to submit "schedules" of fuel distributions, which describe in detail each tax-exempt distribution. *Ataman Decl.*
- 4.19. Licensed suppliers are responsible for remitting taxes owed on all fuel not distributed in a tax-exempt manner during each reporting period. *Id.*
- 4.20. Among the Department's schedules, fuel suppliers use schedule 10G to report "gallons sold to other tax-exempt entities." *Ataman Decl., Ex 1, page 13.*
- 4.21. In previous litigation between the parties, the Washington and United States Supreme Courts held that the "Right to Travel", guaranteed in the Treaty of 1855, preempted Washington's fuel taxes as applied to the Respondent's importation activities. *Red Arrow Decl., Ex C & D ("Cougar Den I" and "Cougar Den II", respectively); Perez Decl., Ex B, page 4.*
- 4.22. The Department does not have a specific "Schedule" for reporting fuel distributions that are tax-exempt pursuant to a licensee's Treaty rights. *Perez Decl.* The Department updated its Fuel Tax Compliance Manual in 2021 but did not include guidance for reporting distributions exempted from taxation pursuant to *Cougar Den I & II*. *Perez Decl.; Ataman Decl., Ex 1.*
- 4.23. In a letter dated February 20, 2019, the Department instructed the Respondent to report fuel sold to tax-exempt entities, as well as its otherwise taxable treaty-protected deliveries of *imported* fuel to Yakama Tribal stations, on Schedule 10G. The Department further advised that "[f]or fuel received in Washington, please explain why you believe the fuel purchasers on your return on Schedule 10G are tax-exempt." *Marks Decl., Ex 4 & Ramsey Decl., Ex 14.*

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⁵ See: 18 USC § 1151.

April 2021 Fuel Supplier Tax Return

- 4.24. The Respondent timely reported its transactions for the April 2021 fuel tax reporting period. *Perez Decl.*
- 4.25. During April 2021, the Respondent obtained all of its fuel from IRS-registered Washinton terminal racks within the geographical boundaries of Washington State. *Marks Decl.*
- 4.26. In its April 2021 Fuel Supplier tax return, the Respondent reported a total of 2,369,479 gallons in tax-exempt fuel distributions. *Perez Decl. & Marks Decl.* The return identified three types of tax-exempt activity: (1) fuel distributed from a terminal to tribal retailers located within Indian Country, using public roads and highways (reported on Schedule 10G); (2) gallons sold to tax-exempt to another licensed supplier at the terminal (reported on Schedule 6D); and (3) gallons exported to other states (reported on Schedule 7). *Perez Decl.*
- 4.27. The Respondent reported 2,318,902 of the 2,369,479 total gallons as tax-exempt on Schedule 10G, and otherwise accounted for the remaining gallons to the Department's satisfaction. *Marks Decl.*
- 4.28. The April 2021 transactions reported on Schedule 10G of the Respondent's return all occurred within the geographical boundaries of Washington State. Each distribution involved: 1) a Cougar Den truck entering the highway system; 2) driving to an IRS-registered terminal; 3) loading fuel from a terminal rack into the truck; and 3) transporting and delivering the fuel to Indian-owned retail gas stations in Indian Country. *Perez Decl.*
- 4.29. On June 2, 2021, the Department issued a notice entitled "Unable to Process April 2021 Tax Return." Therein, the Department identified deficiencies related to Federal Employer Identification Number ("FEIN") records and demanded documentation to establish claimed exemptions on Schedule 10G to the Department's satisfaction. *Marks Decl., Ex 5.*
- 4.30. In email correspondence with Department representatives between June 10, 2021 and June 29, 2021, the Respondent corrected FEIN errors the Department identified and asserted its understanding, maintained since the Department's February 20, 2019 letter, that the transactions at issue were tax-exempt based on the Washington Supreme Court's decision in *Cougar Den I.* *Perez Decl., Ex C.*
- 4.31. In an email dated July 8, 2021, Wesley Marks clarified the Department's position that the Supreme Court decisions only applied to fuel *imported* into Washington, and that for fuel *received* in Washington, the Respondent must provide sufficient information to establish an exemption under RCW 82.38.080 to report the same on Schedule 10G. *Id.*

4.32. On July 13, 2021, the Department issued a "Fuel Tax Return Correction" letter and adjusted the Respondent's amended return. Therein, the Department removed and disallowed transactions the Respondent reported on Schedule 10G of its April 2021 Fuel Supplier tax return because the Department could not verify the transactions as exempt sales under RCW 82.38.090. *Perez Decl.; Marks Decl., Ex 6.*

4.33. On July 13, 2021, the Department also issued the *Notice of Assessment and Intent to Revoke* here on appeal. Therein, the Department assessed taxes, penalties, and interest on the 2,318,902 gallons it identified as disallowed in its "Fuel Tax Correction" letter. *Marks Decl., Ex 7.*

Summary Judgment Motions

4.34. The Department and Respondent each filed Motions for Summary Judgment on June 30, 2023. *Docs 2 & 11.*

4.35. On July 27, 2023, the Department and Respondent each filed responsive briefs, opposing the other party's Motion for Summary Judgment. *Docs 6 & 15.*

4.36. On August 14, 2023, the Department and Respondent each filed Replies in support of their respective Motions for Summary Judgment. *Docs 8 & 16.*

4.37. On August 24, 2023, the undersigned heard oral arguments from both parties. *Record.*

5. CONCLUSIONS OF LAW

Jurisdiction

5.1. OAH has jurisdiction over the persons and subject matter in this case under Chapters 82.38 and 34.05 RCW, and Chapters 308-77 and 10-08 WAC.

Standards for Summary Judgment

5.2. RCW 34.05.437 and WAC 10-08-135, as well as the Prehearing Conference Order in this matter, allow for the filing of dispositive motions, including motions for summary judgment. Summary judgment is a procedural device designed to avoid the time and expense of a trial when no trial is necessary. See: *Hudesman v. Foley*, 73 Wn.2d 880, 441 P.2d 532 (1968); *Karl B. Tegland*, 4 Wash. Prac., Rules Practice CR 56.

5.3. Washington Court Rule 56(c) and WAC 10-08-135 provide that "a motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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- 5.4. In making this determination, the court will consider any evidence and inferences therefrom in a light most favorable to the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.
- 5.5. The party moving for summary judgment has the burden of showing the absence of any issue of material fact. *Id.*, at 887. Once the moving party meets its burden, the non-moving party may not rest on mere allegations, argumentative assertions, speculation, or denials. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Summary judgment motions are important to the process of resolving disputes. *Id.* Summary judgment should be granted if reasonable minds could reach only one conclusion based on the facts in evidence.
- 5.6. Here, both parties moved for summary judgment. Neither party asserts, nor does the record establish, any genuine issue of material fact in this case. Accordingly, this matter is ripe for summary judgment.

Burden

- 5.7. Two separate agency actions are at issue in this case – assessment and license revocation. Notwithstanding the Department's contemporaneous issuance of a *Notice of Assessment and Intent to Revoke*, the burden and procedures for fuel tax deficiency assessments and license revocations are governed by distinct statutory provisions. RCW 82.38.170; RCW 82.38.120.

Assessment:

- 5.8. "An assessment made by the Department pursuant to [RCW 82.38.170(2) or (3)] is presumed to be correct, and the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive." RCW 82.38.170(3).
- 5.9. A 'preponderance of the evidence' is evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915).

Revocation for unsatisfied debt:

- 5.10. Pursuant to RCW 82.38.120, the Department may revoke the license of any licensee who has an unsatisfied debt to the state assessed under Chapter 82.38 RCW. RCW 82.38.120(1)(d). The Department's July 13, 2021 *Notice of Assessment and Intent to Revoke* articulated the Department's intent to revoke the Respondent's fuel-supplier license based on unsatisfied debt to the state. This basis for revocation turns upon the underlying assessment. Accordingly, the burden remains with the Respondent to establish that the assessment is not owing.

Revocation for "improper reporting"

- 5.11. "Improper Reporting" is not among the grounds for revocation enumerated in RCW 82.38.120(1)(a)-(j). The Department may revoke a license under RCW 82.38.120(1)(k), but only "[u]pon sufficient cause being shown." The plain language of RCW 82.38.120(1)(k) places the burden upon the Department to establish that improper reporting, on its own, constitutes "sufficient cause" to revoke the Respondent's fuel supplier license.

Applicable Law

- 5.12. The Department is responsible for implementing and enforcing the provisions of Chapter 82.38 RCW. The purpose of Chapter 82.38 RCW is to impose a tax upon fuels used for the propulsion of motor vehicles upon the highways of Washington. RCW 82.38.010. The legal incidence of this tax accrues "at the time and place of the first taxable event and upon the first taxable person within this state." RCW 82.38.031.
- 5.13. Pursuant to RCW 82.38.035, a licensed supplier is liable for and must pay tax on fuel as provided in RCW 82.38.030(9). RCW 82.38.030(9) identifies when taxes are imposed, including upon importation into Washington, removal from a refinery, or removal from a terminal within the state. Where the fuel is transported, how the fuel is transported, and who or what entity receives that fuel will determine whether the tax or an exemption applies. See RCW 82.38.030; 82.38.080.
- 5.14. In addition to the foregoing statutory provisions, precedential decisions direct this tribunal's analysis of whether the Right to Travel, enshrined in Article III of the Treaty, exempts the Respondent from the fuel tax assessment at issue. See: *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *Cougar Den, Inc. v. Wash. State Dep't of Licensing* ("Cougar Den I"), 188 Wn.2d 55 (2017); *Washington State Dep't of Licensing v. Cougar Den, Inc.* ("Cougar Den II"), 139 S. Ct. 1000 (2019).
- 5.15. The Department contends that OAH lacks authority to consider whether the assessment at issue is preempted by the Treaty of 1855. In support of its argument, the Department correctly asserts that, "an office within the executive branch lacks the authority or jurisdiction to determine whether the laws it administers are constitutional; only [Article III] courts have that power." *Swanson Hay Co. v. Employment Security Department* 1 Wn. App. 2d 174, 188, 404 P.3d 517 (2017). The undersigned is persuaded that the foregoing limitation precludes this administrative tribunal from entertaining the Respondent's theory of preemption based on constitutional grounds (See: Resp. Mot. at III(C)(2)); however, the issue in this case is much narrower. Here, the question is not the merits of the Respondent's facial challenge to a statute or regulation. Rather, the

issue before OAH is whether the Respondent's well-settled treaty rights exempt it from the fuel tax as *applied* in the April 2021 assessment.

- 5.16. Article III of the Treaty of 1855 provides in pertinent part:

[I]f 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.

Treaty with the Yakamas, 12 Stat. 951, 952-953 (1855).

- 5.17. In *Cougar Den I* and *Cougar Den II*, the Washington and United States Supreme Courts held that the Right to Travel, guaranteed in Article III of the Treaty of 1855, preempts the Department's assessment of taxes on the Respondent's importation of fuel, via truck, from terminals outside of Washington, for delivery to tribal gas stations within Washington's geographical boundaries. See: *Cougar Den I*, 188 Wn.2d 55; *Cougar Den II*, 139 S.Ct. 1000.
- 5.18. Although the statute at issue in *Cougar Den I & II* imposed a tax on importation of fuel, the Courts' analysis of the Right to Travel applies more broadly. The Treaty of 1855 secured "clearly and without ambiguity... the Yakamas[']... use of public highways without restriction for future trading endeavors." *Cougar Den II*, 193 S. Ct. 1017-18. "[A]ny trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." *Cougar Den I*, 88 Wn.2d at 69. Because importation is the transportation of fuel, and "it [is] simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways," the Treaty of 1855 preempts Department's authority to tax the Respondent on that activity. *Id.*
- 5.19. In the present case, the transactions at issue involve the Respondent's removal of fuel from terminals *within* the state, by truck, for distribution to fuel retailers in Indian Country. RCW 82.38.030(9)(a) applies.
- 5.20. Pursuant to RCW 82.38.030: "(9) Taxes are imposed when: (a) Fuel is removed in this state from a terminal if the fuel is removed at the rack unless the removal is by a licensed supplier or distributor for direct delivery to a destination outside of the state, or the removal is by a fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320." RCW 82.38.030(9)(a).
- 5.21. To understand the operation and incidence of fuel taxes assessed under RCW 82.38.030(9)(a), the following definitions are instructive:
- "Removal" means a physical transfer of fuel other than by evaporation, loss, or destruction. RCW 82.38.020(28).

- "Terminal" means a fuel storage and distribution facility that has been assigned a terminal control number by the Internal Revenue Service. RCW 82.38.020(31).
- "Rack" means a mechanism for delivering fuel from a refinery or terminal into a truck, trailer, railcar, or other means of non-bulk transfer. RCW 82.38.020(26).
- "Highway" means every way or place open to the use of the public, as a matter of right, for the purpose of vehicular travel. RCW 82.38.020(16).

Analysis

- 5.22. In its effort to distinguish taxable activities under RCW 82.38.030(9) from those held preempted under *Cougar Den I & II*, the Department insists that the taxable event in this case has nothing to do with travel. The Department's contention that taxes under RCW 82.38.030(9)(a) attach the moment fuel is removed from the rack, without being tied to travel at all (See, e.g., Dept. Repl. Brief at 8-9; Dept. Resp. Brief at 10-11), rests entirely upon its misapprehension, and *misstatement* of the law. Indeed, in its Motion for Summary Judgment, the Department asserts that, "[u]nder RCW 28.38.030(9), 'taxes are imposed when:' ... ***fuel is removed at the rack unless the removal is by a licensed supplier or distributor for direct delivery to a destination outside of the state, or the removal is by a fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320.***" Dept. Mot. at 4. [**emphasis and ellipsis in original**].
- 5.23. As set forth above, the statutory language the Department omits in its Motion is critical and betrays the foundation of the Department's entire analysis. The full text of RCW 82.38.030(9)(a) identifies removal of fuel "from a terminal", *if* removed at the rack, as the taxable event – not the stationary act of removing fuel from the rack itself, as the Department suggests. Under the plain language of RCW 82.38.030(9)(a) and RCW 82.38.020, removal from the rack, "into a truck, trailer, railcar, or other means of non-bulk transfer," is only determinative of *whether* fuel subsequently removed from the terminal, "a fuel storage or transportation facility," is subject to the tax. The tax at issue attaches *when* fuel is removed from the terminal facility. In order to "physically transfer" fuel *from* a terminal facility, a truck must be in motion at the time of removal, traveling upon a "place open to the use of the public, as a matter of right, for the purpose of vehicular travel."
- 5.24. Here, it is not possible for the Respondent to remove fuel from a terminal without traveling or transporting that fuel on public highways. Accordingly, the Respondent has met its burden to establish that, just like the fuel tax at issue in *Cougar Den I & II*, taxes assessed pursuant to RCW 82.38.030(9)(a) impermissibly burden the Respondent's treaty-protected Right to Travel.

Revocation

5.25. Because the Respondent is not liable for the taxes at issue, it is not subject to license-revocation for non-payment of the same. Similarly, the Department's alternative basis for revocation is unsupported by the facts of this case. The Department does not have a Schedule for reporting treaty-protected tax-exempt transactions, and the Respondent had no alternative to Schedule 10G for reporting the same. Based on the findings and conclusions herein, sufficient cause for revocation is not established.

5.26. Accordingly, the Department's Motion for Summary Judgment will be **DENIED**. The Respondent's Motion for Summary Judgment will be **GRANTED**. The *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period, and the Department's *Informal Hearing Determination* dated November 23, 2021, will be **REVERSED**.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Respondent is exempt from the assessment at issue, pursuant to Article III of the Treaty of 1855.
- 6.2. The Department's Motion for Summary Judgment is **DENIED**.
- 6.3. The Respondent's Motion for Summary Judgment is **GRANTED**.
- 6.4. The *Notice of Assessment and Intent to Revoke* issued for the April 2021 fuel tax reporting period, and the Department's *Informal Hearing Determination* dated November 23, 2021, are **REVERSED**.
- 6.5. All future dates and deadlines in this matter are **STRICKEN**.

SIGNED at Tacoma, Washington on the date of mailing.



Micah Larripa
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE IS ATTACHED

APPEAL RIGHTS

PETITION FOR REVIEW

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 written petition for review must be mailed to the Department of Licensing at:

**Director of Licensing
Department of Licensing
PO Box 9020
Olympia, WA 98504-9020**

The petition for review must be received by the Department 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. The 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. The other party's reply must be received at the address above within ten (10) days from the date the petition for review was mailed.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 03-2022-DOL-00137

I certify that true copies of this document were served on those listed below, from Tacoma, Washington via Consolidated Mail Services by one of the following: First Class Mail, Certified Mail, Hand Delivery via Messenger, Campus Mail, Facsimile, or by email:

Cougar Den, Inc. c/o Derek Red Arrow Frank Stokes Lawrence, P.S. 120 N Naches Ave Yakima, WA 98901 Respondent	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Campus Mail ☐ E-mail
Derek Red Arrow Frank Matthew Harrington Brendan Monahan Stokes Lawrence Velikanje Moore & Shore 120 N Naches Ave Yakima, WA 98901 Respondent Representatives	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Campus Mail ☒ E-mail: derek.redarrow@stokeslaw.com Brendan.Monahan@stokeslaw.com Mathew.Harrington@stokeslaw.com Madelyne.Garcia@stokeslaw.com
Leo Roinila, AAG David Hankin, AAG Office of the Attorney General MS: 40110 PO Box 40110 Olympia, WA 98504 Agency Representative	☐ First Class Mail ☐ Certified Mail, Return Receipt ☐ Campus Mail ☒ E-mail: leo.roinila@atq.wa.gov David.Hankins@atq.wa.gov dalberta.faletoqo@atq.wa.gov LalOlyEF@atq.wa.gov

Date: ~~Monday, October 02, 2023~~ **Tuesday, October 03, 2023**

OFFICE OF ADMINISTRATIVE HEARINGS



Mallory Jordan
Legal Assistant 2

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

COUGAR DEN, INC.,
Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,
and MARCUS GLASPER, the
Director of the Department of
Licensing,

Respondents.

Case No.:

OAH Docket No. 03-2022-DOL-001372
DOL No. 2021-0072337-01-PRFT

COUGAR DEN, INC.'S PETITION
FOR REVIEW OF FINAL ORDER OF
DEPARTMENT OF LICENSING

Cougar Den, Inc. ("Cougar Den") hereby provides notice of its intent to appeal the
Final Order in OAH Docket No. 03-2022-DOL-001372, DOL No. 2021-0072337-01-
PRFT and submits this Petition for Review as provided by Chapter 34.05 RCW.

I. PARTIES

1. Petitioner Cougar Den is a business organized under the laws of the Yakama
Nation. For purposes of this appeal, its mailing address is that of its attorneys, Stokes
Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima, WA 98901.

2. Respondent Department of Licensing (“the Department”) is the state agency whose action is at issue. Its address is Director of the Department of Licensing, P.O. Box 9020, Olympia, WA 98507. Its attorney is Leo Roinila, Assistant Attorney General, Licensing & Administrative Law Division, P.O. Box 40110, Olympia, WA 98504.

3. Marcus Glasper is the Director of the Department of Licensing. His address is the same as that of the Department.

4. There are no other parties to the adjudicative proceedings that led to the agency action at issue.

II. AGENCY ACTION AT ISSUE

5. This Petition is for review of the Final Order in the Matter of the Fuel Tax Assessment Issued to Cougar Den, OAH Docket No. 03-2022-DOL-001372, DOL No. 2021-0072337-01-PRFT.

III. FACTUAL BACKGROUND

6. Cougar Den incorporates the factual record and exhibits, from its administrative appeal: OAH Docket No. 03-2022-DOL-001372; DOL No. 2021-0072337-01-PRFT.

A. The Yakama Nation & The Treaty of 1855

7. In June of 1855, the fourteen tribes and bands that would comprise the Yakama Nation came together in the Walla Walla Valley within what is known today as Washington State, to treat with agents of the United States of America. See *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1262 (E.D. Wash 1997). On June 9, 1855, the United

1 States executed a treaty with the Yakama Nation. *See* Treaty with the Yakamas, Art. I, 12
2 Stat. 951 (1855).

3 Article III of the Treaty promised:

4 **ARTICLE 3.** And provided, That, if necessary for the public convenience,
5 roads may be run through the said reservation; and on the other hand, the
6 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. . . .

7 *Id.* (emphasis added).

8 8. Preserving this expansive Right to Travel was critical to the Yakama Nation.
9 Before the Treaty, travel was “an intrinsic ingredient in virtually every aspect of Yakama
10 culture.” *Yakama Indian Nation*, 955 F. Supp. at 1238. “Travel was particularly important
11 for the purpose of trade” and, at the time of the Treaty, the Yakamas’ “proclivity for trade
12 was equal to that of the whites.” *Id.* This occurred in part because “[t]he Yakamas’ way of
13 life depended on goods that were not available in the immediate area.” *See id.* at 1238.

14 9. The United States understood the importance of travel and trade to the
15 Yakamas and used it as an inducement for the Yakamas’ concession of more than 10
16 million acres of their ancestral lands. The United States’ agents promised the Yakamas
17 they would “have the same liberties outside the reservation . . . to go on the roads to
18 market.” *Id.* at 1244 (emphasis in original). Governor Isaac Stevens assured the Yakamas
19 that this was the “same libert[y] outside the reservation” as within it. *Id.* (quoting Official
20 Treaty Proceedings at 69). “Before the treaty . . . the Yakamas traveled extensively without
21 paying taxes to bring goods to and from market, and the record suggests that the Yakamas
22 would have understood the treaty to preserve that liberty.” *Wash. State Dep’t of Licensing*

1 v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1018 (2019) (“*Cougar Den II*”) (Gorsuch, J.
2 concurring). Relying on the promises of the government agents—and in exchange for most
3 of their homeland—“the Yakamas agreed to the Treaty provisions in good faith.” *Yakama*
4 *Indian Nation*, 955 F. Supp. at 1245.

5 **B. The Yakama Nation’s Treaty Right to Travel Preempts State Laws and Fees**
6 **that Burden the Yakamas’ Right to Transport Goods on all Public Highways**

7 10. The Washington Supreme Court first reviewed the Treaty Right to Travel in
8 *Cougar Den I*. *Cougar Den, Inc. v. Wash. State Dep’t of Licensing*, 188 Wn.2d 55, 69, 392
9 P.3d 1014 (2017), *aff’d*, 139 S. Ct. 1000, 203 L. Ed. 2d 301 (2019) (“*Cougar Den I*”). In a
10 case between Cougar Den and the Department (the very same parties to this case), the
11 Washington Supreme Court ruled against the Department and found the Washington fuel
12 tax to be preempted by the Treaty. Analyzing the subsection taxing fuel imported from
13 another state, the court held “any trade, traveling, and importation that requires the use
14 of public roads fall[s] within the scope of the right to travel provision of the treaty.” *Cougar*
15 *Den I*, 188 Wn.2d at 69 (emphasis added). This state’s highest court in *Cougar Den I* did
16 not limit its analysis to merely importation, and instead makes clear that “any trade” and
17 “traveling” is protected. And “[b]ased on the historical interpretation of the Tribe’s
18 essential need to travel extensively for trade purposes, this right is protected by the treaty.”
19 *Id.*

20 11. The Department appealed to the U.S. Supreme Court and certiorari was
21 granted. In *Cougar Den II*, the U.S. Supreme Court focused on the language relevant here
22 which guarantees to the Yakamas “the right, in common with citizens of the United States,

1 to travel upon all public highways.” Treaty with the Yakamas, Art. III, ¶ 1, 12 Stat. 951
2 (1855). The Court acknowledged that the words “‘in common with’ on their face could be
3 read to permit application to the Yakamas of general legislation . . . that applies to all
4 citizens,” Yakama and non-Yakama alike, but that the U.S. Supreme Court had several
5 times previously concluded the contrary “because that is not what the Yakamas understood
6 the words to mean in 1855.” *Cougar Den II*, 139 S. Ct. at 1011 (citing *United States v.*
7 *Winans*, 198 U.S. 371, 381 (1905); *Seufert Brother Co. v. United States*, 249 U.S. 194,
8 198-99 (1919); *Tulee v. State of Wash.*, 315 U.S. 681, 684 (1942); *State of Wash. v. Wash.*
9 *State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 684-85 (1979)). The
10 court once again determined instead that the words “in common with” conferred “upon the
11 Yak[a]mas continuing rights, *beyond those which other citizens may enjoy . . .*” 139 S. Ct.
12 at 1012 (citing *Tulee*, 315 U.S. at 684; *Winans*, 198 U.S. 371) (emphasis in original). Thus,
13 like the Washington Supreme Court, the U.S. Supreme Court held “the treaty negotiations
14 and the United States’ representatives’ statements to the Yakamas would have led the
15 Yakamas to understand that the treaty’s protection of the right to travel on the public
16 highways included the right to travel with goods for purposes of trade.” 139 S. Ct. at 1013.

17 **C. Kip Ramsey & Cougar Den, Inc.**

18 12. Cougar Den is a wholesale fuel distribution company owned by “Punia” Kip
19 Richard Ramsey, Sr., an enrolled member and elder of the Yakama Nation. Cougar Den is
20 incorporated under Yakama law, and is designated by the Yakama Nation as its fuel-
21 delivery agent.

1 13. Cougar Den's activities breathe life into the historical practice of inter-tribal
2 trade by obtaining and transporting fuel via truck to deliver that fuel to tribal-owned fuel
3 stations within Indian Country. Specifically, a Cougar Den truck will enter the highway
4 system, drive to an IRS-registered terminal, load fuel from that fuel terminal directly into
5 its fuel truck, utilizing the public highways to transport and deliver that fuel to Indian-
6 owned fuel stations.

7 14. After the court rulings in *Cougar Den I* and *II*, Cougar Den in good faith has
8 worked with the Department to report its Treaty protected fuel distribution activity on the
9 most relevant schedule, because the Department did not create a schedule on which to
10 report Cougar Den's lawful, tax-exempt distribution of fuel. Cougar Den's reporting of its
11 fuel distribution activity ultimately is reviewed to determine the taxability of the fuel as
12 assessed by the Department. Generally, the schedule used to report fuel distribution activity
13 depends on a number of factors, including whether fuel was distributed and sold to a tax-
14 exempt buyer or whether the fuel was exported outside the state.

15 15. After *Cougar Den I* and *II*, Cougar Den was advised by the Department to
16 report its tax-exempt fuel distribution activity on Washington's Schedule 10G. Schedule
17 10G is for reporting transactions of fuel distributed and sold to tax-exempt buyers. The
18 Department received and accepted Cougar Den's good faith use of Schedule 10G to report
19 certain tax-exempt transactions for years, but more recently objected to the use of Schedule
20 10G to report distribution of fuel from an IRS-registered terminal within the geographical
21 boundaries of Washington to a tribal convenience store or gas station within Indian Country
22 similarly within the exterior geographical boundaries of Washington.

1 **D. The April 2021 Assessment and Intent to Revoke**

2 16. On July 13, 2021, the Department issued two notices to Cougar Den. The
3 first being a Fuel Tax Correction notifying Cougar Den that “[o]ne or more transactions
4 reported under Schedule 10G could not be verified as exempt sales” and requested
5 additional details to verify the flagged distribution activity were in fact tax-exempt. The
6 second letter the Department issued was a Notice of Assessment and Intent to Revoke
7 (“April 2021 Assessment” or “Assessment”). This Assessment asserted that Cougar Den
8 owed an outstanding balance of \$1,260,252.95 to the Department for unpaid taxes. Cougar
9 Den appealed the Assessment on August 11, 2021.

10 17. On December 28, 2021, the parties entered into a Tolling and Consolidation
11 Agreement whereby all assessments are constructively appealed as to the specific issues
12 raised on the appeal.

13 **IV. PROCEDURAL BACKGROUND**

14 18. On July 13, 2021, the Department issued a Fuel Tax Correction and a Notice
15 of Assessment and Intent to Revoke to Cougar Den. After some process, Cougar Den
16 timely appealed the Department’s determinations regarding the April 2021 Assessment.
17 Upon appeal, the matter was assigned to Administrative Law Judge (ALJ) Micah Larripa
18 of the Office of Administrative Hearings under OAH Docket No. 03-2022-DOL-001372,
19 DOL No. 2021-0072337-01-PRFT.

1 **A. Judge Larripa's Initial Order**

2 19. On October 3, 2023, Judge Larripa issued an Initial Order granting summary
3 judgment to Cougar Den and concluding that Cougar Den was not liable for the April 2021
4 Assessment pursuant to Article III of the Treaty.

5 20. The Department appealed the Initial Order to the Director of the Department.
6 In Cougar Den's Reply to the Department's appeal, Cougar Den requested that Director
7 Marcus Glasper recuse himself under the appearance of fairness doctrine.

8 21. On November 21, 2023, an Order Extending Time was issued and informed
9 the parties that Fred Wade, the Director of Equity, Performance & Accountability (the
10 "Director") would review the Initial Order and issue a Final Order as the appointed
11 Reviewing Officer for the Department and Director Marcus Glasper.

12 **B. Director Wade's Final Order**

13 22. On January 10, 2024, the Director issued a Final Order that reversed the
14 Initial Order. In spite of the case law affirming the Yakamas' Treaty rights, the Director
15 concluded that the ALJ lacked authority to decide whether the Treaty of 1855 preempted
16 Washington State's fuel tax as applied to Cougar Den. The Director himself chose not to
17 acknowledge or engage with the Treaty itself or any of the cases that have construed it, and
18 promptly reversed the Initial Order and upheld the Notice of Assessment and Intent to
19 Revoke issued for the April 2021 fuel tax reporting period. The Department has asserted
20 that on the next day it purportedly revoked Cougar Den's supplier license.

21 23. Cougar Den now seeks review of the Final Order.
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V. BASIS FOR RELIEF

24. Pursuant to the 1855 Treaty, Cougar Den has the “right to transport goods to market without restriction.” *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007). This means that “any trade, traveling, or importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty.” *Cougar Den I*, 188 Wn.2d at 69. Pursuant to its rights under the 1855 Treaty, Cougar Den’s fuel distribution activity requires the use of the public highways to obtain and deliver its goods to tribal fuel stations located in Indian Country within the geographical boundaries of Washington State. Regardless, in violation of Cougar Den’s Treaty rights, the Final Order seeks to assess taxes and penalize Cougar Den’s fuel distribution activity. The Final Order as well as the underlying assessments remain preempted by the 1855 Treaty and are therefore invalid.

25. Absent relief from this Court, Cougar Den will suffer substantial and irreparable prejudice as a result of the Notice of Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period and all subsequent assessments. The Director and Department are engaged in an ongoing violation of federal law, and Cougar Den seeks prospective relief from such violation.

VI. FIRST COUNTERCLAIM: Declaratory Relief

26. Cougar Den re-alleges and incorporates herein the preceding paragraphs.

27. There is an actual, present and existing dispute between Cougar Den and the Department as to whether an ALJ may consider a federally protected Treaty Right when determining a tax assessment against Cougar Den.

1 28. The Final Order issued by the Director determined that an ALJ cannot
2 consider the Treaty of 1855 when determining fuel taxes assessed against Cougar Den,
3 preventing Cougar Den or a Yakama Nation Tribal Member from asserting their federally
4 protected Treaty Right.

5 29. Cougar Den is entitled to a declaration that Cougar Den may raise their
6 federally protected Right to Travel when the Department is requiring a Yakama Tribal
7 member to pay challenged state taxes, fees, and associated penalties that may violate that
8 Treaty right.

9 30. The violation of Cougar Den's federally protected Treaty right provides
10 Cougar Den with the right to obtain declaratory relief pursuant to the Declaratory
11 Judgement Act (Chapter 7.24 RCW).

12 **VII. SECOND COUNTERCLAIM:**
13 **Injunctive Relief**

14 31. Cougar Den re-alleges and incorporates herein the preceding paragraphs.

15 32. Cougar Den has a clear legal and equitable right and a well-grounded fear of
16 an immediate invasion of that right. The relative equities of the parties favor granting
17 injunctive relief. The Department and Director has acted and will continue to act in excess
18 of their lawful authority.

19 33. The Department's assessment of fuel taxes and imposition of related fees and
20 penalties against Cougar Den constitutes an unlawful assertion of jurisdiction and an
21 unlawful taking of a Yakama Nation Tribal Members' federal Treaty Right to Travel and
22

1 Trade unburdened, and is an invasion of, and an irreparable injury to, Cougar Den's Treaty-
2 reserved federally protected rights.

3 34. Cougar Den is entitled to injunctive relief preventing the Department and
4 Director from proceeding with the assessment of fuel taxes against a Yakama Nation
5 Member exercising their Treaty Right to Travel and against the imposition or assessment
6 of any related fees and associated penalties against a Yakama Nation Tribal Member
7 pending the resolution of this case on the merits.

8 35. The court must enjoin the Department and Director from attempting to assess
9 any taxes or revoke any licenses related to Cougar Den's treaty-protected activities of travel
10 and trade as it is an ongoing, unlawful taking of a personally held federal right that will
11 result in actual and substantial injury.

12 **VIII. THIRD COUNTERCLAIM:**
13 **Breach Of The Treaty With The Yakamas of June 9, 1855**
14 **U.S. Const. art. VI, cl. 2**

15 36. Cougar Den re-alleges and incorporates herein the preceding paragraphs.

16 37. Pursuant to the Treaty of 1855 and the Supremacy Clause of the United States
17 Constitution, Washington has the obligation to honor and uphold the Yakamas' Treaty
18 Right to Travel along the public highways.

19 38. The Treaty Right to Travel restricts state taxes, fees, and associated penalties
20 for exercising that Right.

21 39. The Department and Director have violated the off-reservation Treaty Right
22 to Travel by assessing and seeking to enforce state taxes, fees, and associated penalties on

1 Cougar Den, a Yakama Nation Tribal Member, using the public highways within the
2 geographical boundary of Washington for the purposes of delivering fuel.

3 40. The Court must hold unlawful and set aside the Director's Final Order
4 because of the treaty violation.

5 41. Cougar Den is entitled to a declaration that the assessment of fuel taxes, and
6 any related burdens, penalties and/or fees assessed to Cougar Den's treaty-protected
7 activities, constitute an impermissible and unlawful interference with Cougar Den's
8 federally protected off-reservation Treaty Right to Travel, and as such are void, unlawful,
9 and unenforceable.

10 **IX. FOURTH COUNTERCLAIM:**
11 **Violation Of Due Process**

12 42. Cougar Den re-alleges and incorporates herein the preceding paragraphs.

13 43. The exercise of a personal federal Treaty right cannot be limited in any way
14 by the police power of a state without the express authority of Congress. Yakama Nation
15 Tribal Members enjoy a federal Treaty Right to Travel unburdened by state revenue-based
16 taxes, fees, and associated penalties related to traveling on public highways.

17 44. The Fourteenth Amendment to the United States Constitution, and Article I,
18 section 3 of the Washington Constitution, restrict the Department from depriving a person's
19 federal rights without due process of law. This guarantee is intended to prevent state actors
20 from employing their power in an abusive or oppressive manner.

21 45. The Final Order issued by the Director determined that an ALJ cannot
22 consider the Treaty of 1855 when determining fuel taxes assessed against Cougar Den,

1 effectively depriving Cougar Den of its due process of law and the ability to raise their
2 federally protected Treaty Right as a defense.

3 46. Cougar Den's concerns are unique and well-founded, and the process by
4 which the department seeks to unconstitutionally coerce Cougar Den without due process
5 cannot be reconciled with the commands of federal law to which the Department and their
6 tax administration code must yield.

7 **X. WRIT OF MANDAMUS**

8 47. Cougar Den re-alleges and incorporates herein the preceding paragraphs.

9 48. The Director of the Department is a government official that has a clear duty
10 to uphold federally protected Treaty rights, execute actions which recognize the supremacy
11 of Treaty rights over state law, and forebear from actions which would unlawfully enforce
12 state law in the face of contradicting or inconsistent federal law.

13 49. Cougar Den has been denied the opportunity to seek a remedy of law during
14 the administrative review process and as such has no plain, speedy, and adequate remedy
15 at law. Declarations attesting to facts supporting these allegations are filed herewith.

16 50. Cougar Den is a beneficially interested party because of its federally
17 protected Treaty Right to Travel, which must be considered as a defense.

18 51. Cougar Den is entitled to a Writ of Mandamus pursuant to RCW 7.16.170.

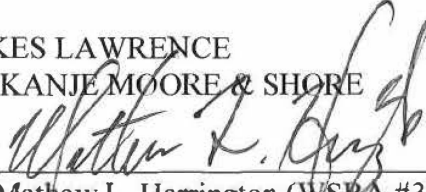
19 **XI. RELIEF REQUESTED**

20 52. Cougar Den seeks a decision that, pursuant to the 1855 Treaty, the Final
21 Order is improper, and Cougar Den is exempt from all taxes, penalties, and interest as
22 provided in the Notice of Assessment and Intent to Revoke. Cougar Den also seeks other

1 such relief as the Court's justice and equity may allow, including the award of any damages
2 and fees incurred as a result of the State's wrongful actions.

3 DATED this 16th day of January, 2024.

4 STOKES LAWRENCE
5 VELIKANJE MOORE & SHORE

6 By: 

Mathew L. Harrington (WSBA #33276)

Brendan V. Monahan (WSBA #22315)

Derek Red Arrow Frank (WSBA #55090)

Marthy Hernandez (WSBA #60618)

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Attorneys for Petitioner Cougar Den, Inc.

DECLARATION OF SERVICE

I hereby declare that on this 16th day of January, 2024, I caused copies of *Cougar Den, Inc.'s Petition for Review of Final Order of Department of Licensing* to be served upon each of the following, by First-Class Mail, postage pre-paid to:

Marcus Glasper
Director of the Department of Licensing
P.O. Box 9020
Olympia, WA 98507-9020

Review Counsel for the Director
P.O. Box 40110
Olympia, WA 98504-0110

David Hankins, AAG
Leo V. Roinila, AAG
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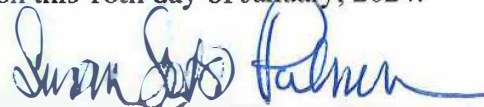
Fred Wade
Equity, Performance, & Accountability
Director
Department of Licensing
P.O. Box 9020
Olympia, WA 98507-9020

Wesley Marks
Department of Licensing
Formal Appeal - Attn: Wesley Marks
P.O. Box 9228
Olympia, WA 98507-9228

Micah Larripa, Administrative Law Judge
Office of Administrative Hearings
949 Market Street Suite 500
Tacoma, WA 98402
Fax: (253) 593-2200

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Yakima, Washington this 16th day of January, 2024.



Susan Soto Palmer / ~~Amber Cuevas~~, Practice Assistant

FILED
NOV 21 2024

Billie A. Maggard
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

COUGAR DEN, INC.,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,
and MARCUS GLASPER, the
Director of the Department of
Licensing,

Respondents.

Case No.: 24-2-00109-39

OAH Docket No. 03-2022-DOL-001372

DOL No. 2021-0072337-01-PRFT

AMENDED PETITION FOR
JUDICIAL REVIEW AND
COMPLAINT FOR DECLARATORY
JUDGMENT, INJUNCTIVE RELIEF,
AND DAMAGES

I. NATURE OF ACTION

1. This matter comprises two separate actions arising from at least two instances where the Department of Licensing (“the Department”) has violated Cougar Den, Inc.’s federal, off-reservation treaty right to travel for the purposes of inter-tribal trade as affirmed in both *Cougar Den, Inc. v. Wash. State Dep’t of Licensing*, 188 Wn.2d 55, 392 P.3d 1014 (2017) (“*Cougar Den I*”), and *Wash. State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 203 L. Ed. 2d 301 (2019) (“*Cougar Den II*”). As these authorities recognize, the 1855 Treaty with the Yakamas, 12 Stat. 951 (“Treaty of 1855” or the “Treaty”), preempts

AMENDED PETITION FOR JUDICIAL REVIEW AND COMPLAINT
FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF, AND
DAMAGES - I
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VELIKANJE MOORE & SHORE**
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

1 state fuel taxes, assessments, and licensing requirements having the “practical effect” of
2 burdening Cougar Den’s transportation of goods to market, including inter-tribal trade
3 using public highways.

4 2. Through this action, Cougar Den first appeals the Director of the Department
5 of Licensing’s Final Order in OAH Docket No. 03-2022-DOL-001372, DOL No. 2021-
6 0072337-01-PRFT (“Final Order”), which affirmed a state tax assessment against Cougar
7 Den for Cougar Den’s delivery of fuel to Indian Country without considering Cougar Den’s
8 well-recognized Treaty rights. Cougar Den asks this Court to reverse the Director’s Final
9 Order and set aside the April 2021 Notice of Assessment and Intent to Revoke (“April 2021
10 Assessment” or the “Assessment”). The Final Order should be reversed because it
11 wrongfully upheld the Assessment, which is preempted by the Treaty of 1855. The Director
12 further erred in issuing the Final Order without considering the Treaty of 1855, which all
13 parties stipulated to be the issue presented. Cougar Den also seeks a declaratory judgment
14 that the Treaty of 1855 preempts the state’s fuel tax and licensing requirements as applied
15 to Cougar Den’s inter-tribal trade and an injunction preventing further interference with
16 Cougar Den’s Treaty-protected activity.

17 3. Second, Cougar Den seeks judicial review of and relief from Respondents’
18 unlawful interference with Cougar Den’s federal Treaty rights, including their actions to
19 deprive Cougar Den of its federal Treaty rights without providing the constitutionally
20 mandated pre-deprivation hearing. These actions breached the Treaty of 1855 and
21 Respondents’ interference with Cougar Den’s federal Treaty rights caused irreparable harm

1 to Cougar Den. Accordingly, Cougar Den seeks (i) a declaratory judgment that due process
2 requires Respondents provide Cougar Den a hearing and the opportunity to be heard
3 regarding its Treaty rights before they may interfere with those rights and (ii) a permanent
4 injunction preventing Respondents from taking any action regarding Cougar Den's Treaty-
5 protected activity without first providing a hearing regarding Cougar Den's Treaty rights.
6 Cougar Den also seeks damages, costs, and its reasonable attorneys' fees for this due
7 process violation and for Respondents' invasion of Cougar Den's federally protected
8 Treaty rights.

9 4. Thus, this action seeks to protect Cougar Den's right, and the right of all
10 Native peoples, to due process of law, as well as relief from Respondents' invasion of the
11 Treaty of 1855. Cougar Den also asks this Court to hold the State to the promises of the
12 Treaty of 1855. As the U.S. Supreme Court recognized, upholding the promises of the
13 Treaty is "the least [this Court] can do." *Cougar Den II* (Gorsuch, J. concurring).

14 II. PARTIES

15 5. Petitioner Cougar Den is an Indian-owned business organized under the laws
16 of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation").

17 6. Cougar Den is a wholesale fuel distribution company owned by "Punia" Kip
18 Richard Ramsey, Sr.

19 7. "Punia" Kip Richard Ramsey, Sr. is an enrolled member and elder of the
20 Yakama Nation.

21 8. Cougar Den is incorporated under Yakama law.

1 9. Cougar Den is designated by the Yakama Nation as its fuel-delivery agent.

2 10. Cougar Den carries on the Yakama's aboriginal practice of inter-tribal trade
3 by obtaining and transporting fuel via truck to tribal-owned fuel stations within Indian
4 Country.

5 11. For purposes of this appeal, Cougar Den's mailing address is that of its
6 attorneys, Stokes Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima,
7 Washington 98901.

8 12. Respondent Department of Licensing is the Washington state agency whose
9 action is at issue.

10 13. The Department's address is the Director of the Department of Licensing,
11 P.O. Box 9020, Olympia, Washington 98507. Its attorney is Marsha Chien, Assistant
12 Attorney General, Licensing & Administrative Law Division, P.O. Box 40110, Olympia,
13 Washington 98504.

14 14. Marcus Glasper is the Director of the Department. The Director's address is
15 the same as that of the Department.

16 15. There were no other parties to the adjudicative proceedings that led to the
17 Final Order.

18 16. On information and belief, there are no other parties to the agency actions
19 giving rise to Cougar Den's independent claims.

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1 **III. AGENCY ACTION AT ISSUE**

2 17. This pleading includes a Petition for Judicial Review of the Final Order in
3 the Matter of the Fuel Tax Assessment Issued to Cougar Den, OAH Docket No. 03-2022-
4 DOL-001372, DOL No. 2021-0072337-01-PRFT.

5 18. By this pleading, Cougar Den separately complains of and seeks judicial
6 review under RCW 34.05.570(4) of other agency actions committed by Respondents which
7 post-date the Final Order.

8 **IV. FACTUAL ALLEGATIONS**

9 **A. The Yakama Nation and the Treaty of 1855**

10 19. The Yakama Nation is a federally recognized Indian Tribe.

11 20. In June of 1855, the fourteen tribes and bands that would comprise the
12 Yakama Nation came together in the Walla Walla Valley within what is known today as
13 Washington state, to treat with agents of the United States of America. *Yakama Indian*
14 *Nation v. Flores*, 955 F. Supp. 1229, 1262 (E.D. Wash. 1997) (“*Yakama Indian Nation*”),
15 *aff’d sub nom., Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

16 21. The modern Yakama Nation was formed by execution of the Treaty in 1855.

17 22. As the Yakama Nation’s founding charter, the Treaty is a sacred document
18 to the Yakama Nation’s members, “embod[ying] spiritual as well as legal meaning for the
19 tribe.” *Id.*, at 1237-38.

20 23. In the Treaty, the Yakama Nation surrendered 10 million acres—over 90%
21 of its territory—to the United States. Treaty with the Yakamas, Art. I, 12, June 6, 1855,
22 Stat. 951.

1 24. In exchange, the Treaty “secured to the Yakamas” certain “basic rights ...
2 that encompass their entire way of life.” *Yakama Indian Nation*, 955 F. Supp. at 1238.

3 25. Article II created a reservation “for the exclusive use and benefit” of the
4 Yakama Nation, within what is now Washington state.

5 26. Article III, Paragraph 1 secured the right to travel:

6 **ARTICLE 3.** And provided, That, if necessary for the public convenience,
7 roads may be run through the said reservation; and on the other hand, the
8 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. . . .

9 27. The right to travel was critical to the Yakama Nation.

10 28. Before the Treaty, travel was “an intrinsic ingredient of virtually every aspect
11 of Yakama culture,” and “was particularly important for the purpose of trade.” *Yakama*
12 *Indian Nation*, 955 F. Supp. at 1238.

13 29. “A network involving the exchange and interchangeability of goods and
14 services existed between Indian tribes of the Northwest and surrounding areas, and the
15 Yakamas were a central part of the network” *Id.*

16 30. This occurred in part because “[t]he Yakamas’ way of life depended on goods
17 that were not available in the immediate areas”—thus obtainable only via trade. *Id.*

18 31. The Yakamas enjoyed free and open access to trade networks in order to
19 maintain their system of trade and exchange.” *Id.* at 1263 (Finding 30).

20 32. Trade was both essential to the Yakamas’ religious practices and ultimately
21 their survival. *Id.* at 1263 (Finding 27).

1 33. To protect that crucial trade, the Yakamas negotiated a unique Treaty
2 provision regarding off-reservation travel.

3 34. “Before the treaty . . . the Yakamas traveled extensively without paying taxes
4 to bring goods to and from market, and the record suggests that the Yakamas would have
5 understood the treaty to preserve that liberty.” *Cougar Den II*, 139 S. Ct. at 1018 (Gorsuch,
6 J. concurring).

7 35. At the Treaty negotiations, “the Yakamas’ right to travel . . . was repeatedly
8 broached.” *Yakama Indian Nation*, 955 F. Supp. at 1243.

9 36. Isaac Ingalls Stevens, the Governor of Washington Territory (“Governor
10 Stevens”), understood the importance of travel and trade to the Yakamas and used it as an
11 inducement for the Yakamas’ concession of more than 10 million acres of their ancestral
12 lands.

13 37. Governor Stevens, as an agent of the United States and the Washington
14 Territory, promised the Yakamas they would “have the same liberties outside the
15 reservation . . . to go on the roads to market.” *Id.* at 1244 (emphasis in original).

16 38. Governor Stevens persuaded the Yakamas to accept the proposed reservation
17 in part because of its proximity to public highways, stating: “You will be near the great
18 road and can take your horses and your cattle down the river and to the [Puget] Sound to
19 market.” *Id.* at 1244 (quoting Official Treaty Proceedings at 64).

1 39. He explained, “You will be allowed to go on the roads to take your things to
2 market ... All that outside the reservation.” *Id.* (emphasis omitted) (quoting Official Treaty
3 Proceedings at 67).

4 40. He assured the Yakamas that this was the “same libert[y] outside the
5 reservation” as within it “to go on the roads to market.” *Id.* (quoting Official Treaty
6 Proceedings at 69).

7 41. Governor Stevens “repeatedly assured the Yakamas that they would be
8 allowed to travel the roads outside the Reservation ... ‘to go on the roads to market.’” *Id.*
9 at 1264 (Finding 46) (citing Official Treaty Proceedings at 69).

10 42. Based on this record, *Yakama Indian Nation* found that Governor Stevens
11 “unconditionally guaranteed that the Yakamas would have the right to take their ... goods
12 to market.” *Id.* at 1253.

13 43. The United States negotiators’ “statements regarding the Yakama’s use of
14 the public highways to take their goods to market clearly and without ambiguity promised
15 the Yakamas the use of public highways without restriction for future trading endeavors.”
16 *Id.* at 1265 (Finding 66).

17 44. Relying on the promises of the government agents—and in exchange for
18 most of their homeland—“the Yakamas agreed to the Treaty provisions in good faith.”
19 *Yakama Indian Nation*, 955 F. Supp. at 1245.

1 **B. The United States Supreme Court Affirms Cougar Den's Treaty Right to**
2 **Transport Goods to Market Free from State Encumbrance and Vacates the**
3 **State of Washington's Fuel Tax Assessments**

4 45. The Washington Supreme Court first reviewed the Treaty right to travel and
5 trade in *Cougar Den I*, 188 Wn.2d 55, 392 P.3d 1014 (2017) ("*Cougar Den I*").

6 46. *Cougar Den I* concerned Cougar Den's appeal of a Washington State
7 Department's fuel tax assessment issued because Cougar Den neither reported its deliveries
8 of fuel to tribal retailers located in Indian country, nor paid the state's fuel tax for those
9 deliveries. *Id.*

10 47. The Washington Supreme Court ruled against the Department and found the
11 Washington state fuel tax and the Department's fuel tax assessments preempted by the
12 Treaty.

13 48. The Washington Supreme Court held "**any trade, traveling, and importation**
14 that requires the use of public roads fall[s] within the scope of the right to travel provision
15 of the treaty." *Cougar Den I*, 188 Wn.2d at 69 (emphasis added).

16 49. The Department appealed to the U.S. Supreme Court which granted
17 certiorari.

18 50. The U.S. Supreme Court affirmed in *Cougar Den II*, 139 S. Ct. 1000 (2019)
19 ("*Cougar Den II*").

20 51. In its holding, the U.S. Supreme Court addressed the Treaty language
21 reserving to the Yakamas "the right, in common with citizens of the United States, to travel
22 upon all public highways." Treaty with the Yakamas, Art. III, ¶ 1, 12 Stat. 951 (1855).

1 52. The Court acknowledged that the words “‘in common with’ on their face
2 could be read to permit application to the Yakamas of general legislation . . . that applies
3 to all citizens,” Yakama and non-Yakama alike, except that the U.S. Supreme Court had
4 several times previously concluded the contrary “because that is not what the Yakamas
5 understood the words to mean in 1855.” *Cougar Den II*, 139 S. Ct. at 1011 (citing *United*
6 *States v. Winans*, 198 U.S. 371, 381 (1905); *Seufert Brothers Co. v. United States*, 249 U.S.
7 194, 198-99 (1919); *Tulee v. State of Wash.*, 315 U.S. 681, 684 (1942); *State of Wash. v.*
8 *Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 684-85 (1979)).

9 53. Following its own long line of precedents interpreting the Treaty of 1855, the
10 U.S. Supreme Court once again determined that the words “in common with” conferred
11 “upon the Yak[a]mas continuing rights, beyond those which other citizens may enjoy . . .”
12 *Cougar Den II*, 139 S. Ct. at 1012 (citing *Tulee*, 315 U.S. at 684; *Winans*, 198 U.S. 371)
13 (emphasis in original).

14 54. Thus, like the Washington Supreme Court, the U.S. Supreme Court held “the
15 treaty negotiations and the United States’ representatives’ statements to the Yakamas
16 would have led the Yakamas to understand that the treaty’s protection of the right to travel
17 on the public highways included the right to travel with goods for purposes of trade.”
18 *Cougar Den II*, 139 S. Ct. at 1013.

19 55. The U.S. Supreme Court held that any state law that has the “practical effect”
20 of burdening such activity, regardless of whether the law directly burdens the activity is
21 preempted by the Treaty. *Id.* at 1010.

1 **C. Cougar Den's Inter-Tribal Trade**

2 56. Following these rulings, Cougar Den has continued its Treaty-protected
3 aboriginal inter-tribal trade, including by providing motor vehicle fuel to Indian-owned
4 retail stations located in Indian Country.

5 57. Specifically, a Cougar Den truck will enter the highway system, drive to an
6 IRS-registered terminal, load fuel from that fuel terminal directly into its fuel truck, and
7 transport and deliver that fuel to Indian-owned fuel stations by way of the public highways.

8 58. After the court rulings in *Cougar Den I* and *II*, Cougar Den in good faith has
9 worked with the Department to voluntarily report its Treaty-protected fuel distribution
10 activity on the most relevant schedule.

11 59. Following the U.S. Supreme Court decision in *Cougar Den II*, the
12 Department did not create a schedule on which to report Cougar Den's lawfully recognized,
13 tax-exempt distribution of fuel under the right to travel.

14 60. After *Cougar Den I* and *II*, Cougar Den was advised by the Department to
15 report its tax-exempt fuel distribution activity on Washington's Schedule 10G.

16 61. Schedule 10G is for reporting transactions of fuel distributed and sold to tax-
17 exempt buyers.

18 62. Cougar Den used Schedule 10G to report on its inter-tribal trade without
19 objection from the Department for approximately two (2) years.

20 63. Cougar Den's reporting of its fuel distribution activity ultimately is reviewed
21 to determine the taxability of the fuel as assessed by the Department.

1 64. Generally, the schedule used to report fuel distribution activity depends on
2 whether fuel was distributed and sold to a tax-exempt buyer or whether the fuel was
3 exported outside the state.

4 65. After stating no objection to the use of Schedule 10G for approximately two
5 (2) years after the U.S. Supreme Court ruling, the Department refused to recognize the use
6 of Schedule 10G to report distribution of fuel from an IRS-registered terminal to a tribal
7 convenience store or gas station within Indian Country when both the terminal and the gas
8 station in Indian Country were within the exterior geographical boundaries of Washington
9 state.

10 **D. The April 2021 Assessment**

11 66. On July 13, 2021, the Department issued a Fuel Tax Correction and a Notice
12 of Assessment and Intent to Revoke to Cougar Den (i.e., the April 2021 Assessment).

13 67. Cougar Den timely appealed the Department's determinations regarding the
14 April 2021 Assessment.

15 68. Upon appeal, the matter was assigned to Administrative Law Judge (ALJ)
16 Micah Larripa of the Office of Administrative Hearings under OAH Docket No. 03-2022-
17 DOL-001372, DOL No. 2021-0072337-01-PRFT.

18 69. All parties stipulated that the issue presented was "[w]hether the Notice of
19 Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period should
20 be affirmed, or if Cougar Den Inc. is exempt from the same under the Treaty of 1855."

1 70. ALJ Larripa ordered that the issue presented was “[w]hether the Notice of
2 Assessment and Intent to Revoke issued for the April 2021 fuel tax reporting period should
3 be affirmed, or if Cougar Den Inc. is exempt from the same under the Treaty of 1855.”

4 71. The Department did not object to ALJ Larripa’s order stating the issue
5 presented.

6 72. On October 3, 2023, ALJ Larripa issued an Initial Order granting summary
7 judgment to Cougar Den and concluding that Cougar Den was not liable for the April 2021
8 Assessment.

9 73. ALJ Larripa ruled that the April 2021 Assessment was preempted by Article
10 III of the Treaty.

11 74. The Department timely appealed the Initial Order to the Director of the
12 Department.

13 75. In Cougar Den’s Reply to the Department’s appeal, Cougar Den requested
14 that Director Marcus Glasper recuse himself under the appearance of fairness doctrine.

15 76. On November 21, 2023, an Order Extending Time was issued and informed
16 the parties that Fred Wade, the Director of Equity, Performance & Accountability, would
17 review the Initial Order and issue a Final Order as the appointed Reviewing Officer for the
18 Department and Director Marcus Glasper.

19 77. On January 10, 2024, Mr. Wade issued a Final Order that reversed the Initial
20 Order and affirmed the Notice of Assessment and Intent to Revoke issued for the April
21 2021 fuel tax reporting period.

1 **E. Washington's Prior Litigation of the Treaty**

2 78. Washington, through its Territorial Governor of the Washington Territory
3 and Superintendent of Indian Affairs for Washington Territory, Governor Stevens, was a
4 party to the Treaty of 1855.

5 79. Washington state is in privity with Washington Territory during the Walla
6 Walla Council that negotiated the Treaty of 1855.

7 80. Washington was a party to *Yakama Indian Nation*.

8 81. "Kip" Richard Ramsey, Sr., the owner of Cougar Den, was a party to *Yakama*
9 *Indian Nation*. 955 F. Supp. at 1233 ("Cree plaintiff Richard "Kip" Ramsey is the owner
10 of Tiin-Ma Logging Company. Ramsey began his logging business in 1978 and was the
11 first Indian logger to haul tribal timber off-reservation.").

12 82. There is an identity of interest between Washington's interest in *Yakama*
13 *Indian Nation* and Washington's interest in this case.

14 83. The Department is in privity with Washington in *Yakama Indian Nation*.

15 84. Facts relevant to the meaning of the Treaty of 1855's right to travel were at
16 issue in *Yakama Indian Nation*, as in this case.

17 85. Washington had an opportunity to litigate the meaning of the Treaty of 1855
18 in *Yakama Indian Nation*.

19 86. *Yakama Indian Nation* resulted in a final judgment.

20 87. Washington was a party to *Cougar Den I* and *Cougar Den II*.

1 88. Washington in this case is in privity with Washington in *Cougar Den I* and
2 *Cougar Den II*.

3 89. The Department in this case is in privity with the Department in *Cougar Den*
4 *I* and *Cougar Den II*.

5 90. There is an identity of interest between Washington's interest in *Cougar Den*
6 *I* and *Cougar Den II* and Washington's interest in this case.

7 91. *Cougar Den I*, *Cougar Den II*, and this case all feature an identical claim that
8 the state fuel tax is preempted by the Treaty.

9 92. The meaning of the Treaty of 1855's right to travel was at issue in *Cougar*
10 *Den I* and *Cougar Den II*, as in this case.

11 93. Washington had an opportunity to litigate the meaning of the Treaty of 1855
12 in *Cougar Den I* and *Cougar Den II*.

13 94. *Cougar Den II* resulted in a final judgment.

14 95. The *Cougar Den I* court relied on findings of fact and conclusions of law
15 from *Yakama Indian Nation*.

16 96. The *Cougar Den II* court relied on findings of fact and conclusions of law
17 from *Yakama Indian Nation*.

18 **V. PETITION FOR JUDICIAL REVIEW OF DIRECTOR'S FINAL ORDER**
19 **(ADMINISTRATIVE PROCEDURE ACT, RCW 34.05.570(3))**

20 97. *Cougar Den* incorporates and realleges the preceding paragraphs.
21
22

1 98. In his Final Order, Mr. Wade affirmed the April 2021 Assessment without
2 hearing arguments regarding Cougar Den's Treaty rights or providing Cougar Den the
3 opportunity to be heard regarding its well-recognized Treaty rights.

4 99. In so ruling, the Department through Mr. Wade reversed the position the
5 Department took in *Cougar Den I*: that the Director may lawfully consider arguments that
6 the Treaty of 1855 preempts an assessment of the state fuel tax against a Yakama member.

7 100. Moreover, the Final Order disregarded the stipulated issue to which the
8 parties agreed was the issue in the case, which read "[w]hether the Notice of Assessment
9 and Intent to Revoke issued for the April 2021 fuel tax reporting period should be affirmed,
10 or if Cougar Den is exempt from the same under the Treaty of 1855."

11 101. Instead, Mr. Wade ruled that the ALJ and Department lacked authority to
12 decide whether the Treaty of 1855 preempted Washington state's fuel tax as applied to
13 Cougar Den.

14 102. With this ruling, Mr. Wade ignored the Treaty and declined to consider case
15 law affirming Cougar Den and the Yakamas' Treaty rights, including *Cougar Den I* and *II*.
16 The Final Order affirmed the assessment without considering these authorities or their
17 effect on the April 2021 Assessment.

18 103. These rulings are erroneous and contrary to law; the Final Order should have
19 considered the question of preemption and that the April 2021 Assessment is preempted
20 by federal law. Accordingly, Cougar Den seeks appellate review and reversal of the Final
21 Order.

1 **VI. PETITION FOR REVIEW REGARDING**
2 **THE APRIL 2021 ASSESSMENT**

3 104. Cougar Den incorporates and realleges the preceding paragraphs.

4 105. Cougar Den also seeks adjudication of its Treaty right: The Final Order
5 affirmed the April 2021 Assessment of fuel tax without considering or analyzing Cougar
6 Den's Treaty right.

7 106. Pursuant to the Treaty of 1855, Cougar Den has the "right to transport goods
8 to market without restriction." *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir.
9 2007).

10 107. This means that "any trade, traveling, or importation that requires the use of
11 public roads fall[s] within the scope of the right to travel provision of the treaty." *Cougar*
12 *Den I*, 188 Wn.2d at 69. And any state law that has the "practical effect" of burdening such
13 activity, regardless of whether the law directly burdens the activity is preempted by the
14 Treaty. *Cougar Den II*, 139 S. Ct. at 1010.

15 108. Cougar Den's fuel distribution is Treaty-protected activity.

16 109. The April 2021 Assessment assesses taxes and penalties for Cougar Den's
17 fuel distribution activity in violation of Cougar Den's Treaty rights.

18 110. The Final Order, as well as the underlying assessments, remain preempted
19 by the Treaty of 1855 and are therefore invalid.

20 111. Absent relief from this Court, Cougar Den will suffer substantial and
21 irreparable harm from the April 2021 Assessment fuel tax reporting period and all
22 subsequent assessments.

1 112. Respondents' violation of Cougar Den's federally protected Treaty right
2 provides Cougar Den with the right to obtain declaratory relief pursuant to the Declaratory
3 Judgement Act (Chapter 7.24 RCW) and/or Administrative Procedure Act ("APA"), RCW
4 34.05.574(1). Cougar Den is also entitled to have the April 2021 Assessment set aside and
5 vacated and entitled to injunctive relief preventing Respondents from further interference
6 with Cougar Den's Treaty-protected activity.

7 **VII. FIRST INDEPENDENT CLAIM FOR RELIEF**
8 **- VIOLATION OF DUE PROCESS**

9 113. Cougar Den incorporates and realleges the preceding paragraphs.

10 114. On or about January 11, 2024—immediately after the Director issued its
11 Final Order—the Department revoked Cougar Den's fuel supplier license.

12 115. The Department also initiated collection efforts regarding the State's motor
13 vehicle fuel tax, penalties, and interest against Cougar Den.

14 116. Concurrent with these actions, Respondents informed Cougar Den's tribal
15 customers, prospective customers, and tribal nations located within the geographic
16 boundaries of the State of Washington that it would be revoking Cougar Den's license,
17 threatening that Cougar Den would not be able to fulfill its trade commitments to these
18 tribal entities.

19 117. The Department has stated Cougar Den's tribal customers will face audit
20 assessments, and that it is pursuing termination of fuel tax compacts with Cougar Den's
21 tribal customers.
22

1 118. On information and belief, these actions, and other direct threats to Cougar
2 Den's tribal partners, are ongoing.

3 119. This conduct has interfered with Cougar Den's federally protected Treaty
4 right and harmed Cougar Den.

5 120. The Department took these actions, including the enforcement of the Final
6 Order and revocation of Cougar Den's fuel supplier license, without providing Cougar Den
7 a hearing or pre-deprivation opportunity for a hearing regarding its Treaty rights.

8 121. These actions interfered with Cougar Den's Treaty-protected activities,
9 including inter-tribal trade, and the right to travel freely, causing irreparable injury.

10 122. Respondents' actions to deprive Cougar Den of its Treaty rights without
11 providing Cougar Den with a hearing on those Treaty rights or even the opportunity to be
12 heard regarding its Treaty rights pre-deprivation violates due process under the United
13 States and Washington state constitutions.

14 123. Respondents unlawfully acted, and will act again, under the incorrect belief
15 that they may inflict irreparable harm on an Indian by violating a Treaty right so long as
16 the Indian has the theoretical prospect of a hearing at the end of a byzantine and lengthy
17 APA process.

18 124. RCW 34.05.570(4) provides that this Court may set aside unlawful agency
19 action when that action is unconstitutional or otherwise outside the agency's authority.

20 125. Accordingly, Cougar Den is entitled to (i) a declaratory judgment that due
21 process requires the Department provide Cougar Den a hearing and the opportunity to be
22

1 heard regarding its Treaty rights *before* it may interfere with those rights and (ii) a
2 permanent injunction preventing the Department from taking any action regarding Cougar
3 Den's Treaty-protected activity without first providing a hearing regarding Cougar Den's
4 Treaty rights.

5 126. Cougar Den is also entitled to damages and its reasonable attorneys' fees and
6 costs arising out of Respondents' constitutional violations.

7 **VIII. SECOND INDEPENDENT CLAIM FOR RELIEF**
8 **– BREACH OF THE 1855 TREATY**

9 127. Cougar Den incorporates and realleges the preceding paragraphs.

10 128. Respondents' interference with Cougar Den's Treaty-protected activities and
11 inter-tribal trade constitutes a breach of Article III of the 1855 Treaty with the Yakamas.

12 129. These acts constitute an unlawful assertion of jurisdiction and an unlawful
13 taking of a Yakama Nation Tribal Members' federal Treaty right to travel and trade
14 unburdened, and are an invasion of, and an irreparable injury to, Cougar Den's reserved,
15 federally protected rights.

16 130. Cougar Den is entitled to damages for Respondents' violation of federal law
17 and injury to Cougar Den's federally protected Treaty rights.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Petitioner Cougar Den prays for entry of judgment in favor of
20 Petitioner and against all Respondents in an amount to be proven at trial, injunctive relief,
21 declaratory relief, plus an award of attorney fees and costs and such other and further relief
22 as the Court may deem just and proper.

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DATED this 21st day of November, 2024.

STOKES LAWRENCE
VELIKANJE MOORE & SHORE

By:



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DECLARATION OF SERVICE

I hereby declare that on this 21st day of November, 2024, I caused copies of the foregoing document to be served as indicated upon each of the following:

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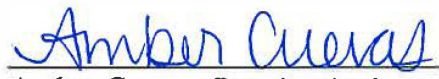
***Via Email per E-Service Agreement
dated March 13, 2024***
Attorneys for Respondents

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Attorney for Cougar Den, Inc.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Yakima, Washington this 21st day of November, 2024.


Amber Cuevas, Practice Assistant

Honorable Judge Jared A. Boswell
Date: November 24, 2025
Time: 1:30 p.m.

STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

COUGAR DEN, INC.,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING, and
MARCUS GLASPER, Director of the
Department of Licensing,

Respondents.

NO. 24-2-00109-39

clarified
~~[PROPOSED]~~ FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER AFFIRMING FINAL ORDER
OF THE DEPARTMENT OF
LICENSING

This matter came on regularly for hearing on November 24, 2025, before the above-entitled Court pursuant to the Respondents' Motion for Partial Summary Judgment, and Petitioner's Cross-Motion for Partial Summary Judgment, on Petitioner's appeal under the Washington Administrative Procedure Act, Chapter 34.05 RCW. Respondents the Department of Licensing and Marcus Glasper, Director of the Department, were represented by NICHOLAS W. BROWN, Attorney General, ERIC D. PETERSON, Senior Assistant Attorney General, MARSHA CHIEN, Deputy Solicitor General, JONATHAN PITEL and LEO ROINILA, Assistant Attorneys General; MATHEW HARRINGTON, STOKES LAWRENCE VELIKANJE MOORE & SHORE, P.S. appeared on behalf of petitioner COUGAR DEN, INC. The Court, having reviewed:

(1) the Certified Administrative Record, including as supplemented on May 8, 2024;

clarified
~~[PROPOSED]~~ FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
AFFIRMING FINAL ORDER OF THE
DEPARTMENT OF LICENSING

1
ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
360-753-2702

- 1 (2) State Respondents' Motion for Partial Summary Judgment on Administrative Procedure
2 Act Appeal;
3 (3) Cougar Den, Inc.'s Opposition to Department's Motion for Partial Summary Judgment
4 on Administrative Procedure Act Appeal and Cross-Motion for Partial Summary
5 Judgment;
6 (4) State Respondents' Reply in Support of Motion for Partial Summary Judgment on
7 Administrative Procedure Act Appeal/Response to Cougar Den's Cross-Motion for
8 Partial Summary Judgment; and
9 (5) Cougar Den, Inc.'s Reply in Support of Cross-Motion for Partial Summary Judgment,
10 (6) State Respondents' Statement of Supplemental Authority, and
11 (7) _____¹

12 and in all premises being fully advised, hereby makes the following:

13 **FINDINGS OF FACT**

14 I.

15 On July 13, 2021, the Department of Licensing issued to Petitioner a written Notice of
16 Assessment and Intent to Revoke, finding Petitioner liable for \$1,123,109.99 in Washington State
17 Fuel Tax, \$112,311.00 in Penalties, and \$24,831.96 in Interest, for a total of \$1,260,252.95 for the
18 April 2021 assessment period. The Notice also sought revocation of Petitioner's Washington State
19 Fuel Supplier License. Petitioner timely sought an administrative appeal of that Notice.

20 II.

21 On January 10, 2024, after administrative appeal proceedings involving cross-motions for
22 summary judgment, the Department of Licensing Director's Designee issued a Final Order that
23 affirmed the July 13, 2021, Notice of Assessment and Intent to Revoke. Cougar Den, Inc., timely
24 petitioned this Court for judicial review of the January 10, 2024, Final Order.

25 _____
26 ¹ The Court did not consider the declarations filed by Cougar Den with their cross-motion and reply,
because they are outside the Certified Administrative Record and were not considered by the Director.

clerk
[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
AFFIRMING FINAL ORDER OF THE
DEPARTMENT OF LICENSING

2

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
1125 Washington Street SE, PO Box 40110
Olympia, WA 98504-0110
360-753-2702

1
2 From the foregoing Findings of Fact and review of the record, the Court makes the
3 following:

4 CONCLUSIONS OF LAW

5 I.

6 The Court has jurisdiction over the parties and subject matter.

7 II.

8 Resolving the Administrative Procedure Act appeal on summary judgment is appropriate,
9 as there are no material disputes of fact.

10 III.

11 The Final Order's conclusions of law do not constitute an error of law and are otherwise in
12 accordance with the Washington Administrative Procedure Act and the Fuel Tax Act.

13 IV.

14 The Right to Travel contained in the Yakama Treaty of 1855 does not preempt the
15 Washington State fuel tax imposed under RCW 82.38.030(13)(a).

16 V.

17 Accordingly, the Director properly concluded that the Petitioner had unsatisfied debt to the
18 State under chapter 82.38 RCW and violated the reporting requirements under RCW 82.38.150(3),
19 and revocation of the Petitioner's fuel supplier license was lawful under RCW 82.38.120(1)(d) and
20 (h). And, the Yakama Treaty of 1855 does not preempt the fuel supplier license revocation.

21 VI.

22 The Department and Director did not violate Cougar Den's Administrative Procedure Act
23 and/or due process rights in adjudicating and entering the Final Order.

24 *This conclusion of law*
VI addresses only Cougar Den's APA appeal and the Director's adjudication of the Final
order. It does not limit or affect either party's arguments concerning Cougar Den's independent
claims (including due process) and treaty claims, nor does it rely upon any factual findings that would
impact those independent claims.

25 From the foregoing Findings of Fact and Conclusions of Law, the Court enters the
26 following:

clarified
[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
AFFIRMING FINAL ORDER OF THE
DEPARTMENT OF LICENSING

ORDER

IT IS HEREBY ORDERED that the January 10, 2024, FINAL ORDER of the Department of Licensing is AFFIRMED. The State Respondents' Motion for Partial Summary Judgment on Administrative Procedure Act Appeal is hereby GRANTED, and Cougar Den's Cross-Motion for Partial Summary Judgment is hereby DENIED. ~~This Court's Order Granting Motion to Stay, entered on March 15, 2024, is hereby lifted.~~

DATED this 23 day of January, 2024.


JUDGE / COURT COMMISSIONER

Presented by:
Nicholas W. Brown
Attorney General

*Modified by court; approved as to form,
notice of presentation waived*

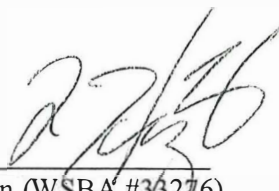
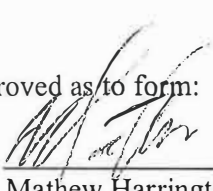
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Attorneys for the State of Washington,
Department of Licensing, and
Director Marcus Glasper

clerk
[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
AFFIRMING FINAL ORDER OF THE
DEPARTMENT OF LICENSING

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Approved as to form:



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[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
AFFIRMING FINAL ORDER OF THE
DEPARTMENT OF LICENSING

FILED: DIRECTOR OF CLERK

The Honorable Jared Boswell

Date: February 27, 2026

Time: 9:30 AM

26 APR 15 P4:21

SUPERIOR COURT
YAKIMA CO. WA

STATE OF WASHINGTON
YAKIMA COUNTY SUPERIOR COURT

COUGAR DEN, INC.,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING, and
MARCUS GLASPER, the Director of
the Department of Licensing,

Respondents.

NO. 24-2-00109-39

~~PROPOSED~~ ORDER ON
RESPONDENTS' CR 12(C) MOTION
TO DISMISS COUGAR DEN'S
INDEPENDENT CLAIMS

This matter having come before the Court upon the Respondents' CR 12(c) Motion to Dismiss Cougar Den's Independent Claims, and the Court having heard argument, and having reviewed Cougar Den's response, Cougar Den's Amended Petition for Judicial Review and Complaint for Declaratory Judgment, Injunctive Relief, and Damages, filed Nov. 21, 2024; Respondents' Answer to Amended Petition for Judicial Review and Complaint, filed Oct. 17, 2025; and the pleadings and orders on file in this matter, the Court **HEREBY GRANTS** the Respondents' CR 12(c) Motion to Dismiss Cougar Den's Independent Claims.

Cougar Den's First and Second Independent Claims for Relief, and their associated prayers for relief, are hereby dismissed with prejudice, as they fail to state a claim for relief, pursuant to CR 12(c).

~~PROPOSED~~
ORDER ON RESPONDENTS' CR 12(C)
MOTION TO DISMISS COUGAR DEN'S
INDEPENDENT CLAIMS

1

ATTORNEY GENERAL OF WASHINGTON
Licensing & Administrative Law Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7676

1 DATED this 15 day of April, 2026.

2 
JUDGE / COURT COMMISSIONER

3
4 Presented by:

5 NICHOLAS W. BROWN
6 Attorney General

7 /s/ Eric D. Peterson, 2/6/26

8 Eric D. Peterson (WSBA #35555)

9 *Senior Assistant Attorney General*

10 Marsha Chien (WSBA #47020)

11 *Deputy Solicitor General*

12 Leo V. Roinila (WSBA #51622)

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25 *Attorneys for the State of Washington Department of Licensing and*

26 *Director Marcus Glasper*

18 Approved as to form, and notice of presentation waived:

21 Mathew Harrington (WSBA #33276)

22 Brendan Monahan (WSBA #22315)

23 Derek Red Arrow Frank (WSBA #55090)

24 Emily G. Zughaib (WSBA #64491)

25 Marthy Hernandez (WSBA #60618)

26 Jamie Cuevas, Jr. (WSBA # 51108)

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120 N. Naches Avenue

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~~[PROPOSED]~~

ORDER ON RESPONDENTS' CR 12(C)

MOTION TO DISMISS COUGAR DEN'S

INDEPENDENT CLAIMS

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Attorneys for Petitioner Cougar Den

[PROPOSED]

ORDER ON RESPONDENTS' CR 12(C)
MOTION TO DISMISS COUGAR DEN'S
INDEPENDENT CLAIMS

3

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1 **PROOF OF SERVICE**

2 I, Michael Sawyer, certify that I sent a copy of **RESPONDENTS' [PROPOSED]**
3 **ORDER ON CR 12(C) MOTION TO DISMISS COUGAR DEN'S INDEPENDENT**
4 **CLAIMS** for service on all parties or their counsel of record on the date below as follows:

5 Email Service per Agreement

6 STOKES LAWRENCE VELIKANJE MOORE & SHORE, P.S.

7 Mathew L. Harrington

8 Brendan V. Monahan

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10 Jaime Cuevas, Jr.

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20 jr@ramseycompanies.com; lance@ramseycompanies.com

21 Judge's Copies via Email

22 THE HONORABLE JARED BOSWELL

23 YAKIMA COUNTY SUPERIOR COURT ADMINISTRATORS' OFFICE

24 128 N 2ND ST, RM 314

25 YAKIMA, WA 98901-2639

26 Jared.A.Boswell@co.yakima.wa.us

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 6th day of February 2026 at Seattle, WA.


MICHAEL SAWYER, Paralegal

[PROPOSED]

ORDER ON RESPONDENTS' CR 12(C)
MOTION TO DISMISS COUGAR DEN'S
INDEPENDENT CLAIMS

PROOF OF SERVICE

I, Katherine Ramirez, certify that I caused to be served a copy of the **Answer to Statement of Grounds for Direct Review** on all parties or their counsel of record on the date below as follows:

E-Served via Washington State Appellate Courts' Portal

MATHEW L. HARRINGTON
BRENDAN V. MONAHAN
JAIME CUEVAS, JR.
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E-Filed via Washington State Appellate Courts' Portal

SARAH R. PENDLETON, CLERK
WASHINGTON SUPREME COURT
<https://ac.courts.wa.gov/>

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 12th day of June 2026, in Olympia, Washington.


KATHERINE RAMIREZ
Paralegal

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

June 12, 2026 - 2:03 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 105,377-1
Appellate Court Case Title: Cougar Den, Inc. v. State of Washington et al.
Superior Court Case Number: 24-2-00109-2

The following documents have been uploaded:

- 1053771_Answer_SOG_for_Direct_Review_20260612135639SC151654_0008.pdf
This File Contains:
Answer to Statement of Grounds for Direct Review
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004_CougarDenWSSC_DeptAnswerToStatementOfGroundForDirectRvw.pdf

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