



WASHINGTON STATE DEPARTMENT OF
LICENSING

2012 Tribal Fuel Tax Agreement Report

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Background

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

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

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

Following the ruling, these two tribes negotiated an interim fuel tax agreement that included a one year sunset clause. Under these agreements, tribal fuel stations received fuel with 100 percent of the fuel tax included in the price and they were refunded 75 percent of the state fuel tax. The state retains 25 percent of the state tax. This type of agreement is commonly referred to as a "75/25 agreement."

Senate Bill 5272 was passed in 2007 moving the legal incidence of the tax to the fuel licensee, often referred to as "tax at the rack." The legislation provided a framework to improve cooperation and communication between DOL and the tribes regarding the taxation of fuel delivered onto the reservation or trust lands. The fuel tax agreements between the Squaxin Island and Swinomish Tribes provided the model agreement for DOL to negotiate with other tribes interested in a state fuel tax agreement.

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

Types of Fuel Tax Agreements

There are three types of fuel tax agreements:

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

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

Consent Decree – A consent decree is a judicial decree issued by the court expressing voluntary agreement between parties to a dispute.

Key Provisions of Fuel Tax Agreements as Authorized by RCWs 82.36.450 and 82.38.210

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

Status of Current Fuel Tax Agreements

DOL is party to eighteen 75/25 agreements, five per-capita fuel tax agreements, and one consent decree.

Per Capita Agreements

- Lummi Nation
- Makah Tribe
- Muckleshoot Tribe
- Quileute Tribe
- Quinault Nation

75/25 Agreements:

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|--------------------------------|-------------------------------|------------------------|
| • Chehalis Confederated Tribes | • Nooksack Tribe | • Squaxin Island Tribe |
| • Colville Confederated Tribes | • Port Gamble S'Klallam Tribe | • Stillaguamish Tribe |
| • Jamestown S'Klallam Tribe | • Puyallup Tribe | • Suquamish Tribe |
| • Kalispel Tribe | • Shoalwater Bay Tribe | • Swinomish Tribe |
| • Nisqually Tribe | • Skokomish Tribe | • Tulalip Tribes |
| | • Snoqualmie Tribe | • Upper Skagit Tribe |
| | • Spokane Tribe | |

Consent Decree Agreement:

- Yakama Nation – Under a now terminated consent decree between the Yakama Nation and DOL, a Washington state licensed distributor pays 100% of the state fuel tax at the time of purchase. Upon sale of the motor and/or special fuel to the Yakama Nation 75 percent of the fuel is sold exempt state fuel tax. The distributor receives a refund for the fuel tax directly from DOL, and the state retains 25 percent of the fuel tax. Under the terminated consent decree, the percentages of refunded and retained fuel taxes based on tribal member fuel purchases were to be validated or adjusted based on annual record-keeping and audits.

On December 5, 2012, DOL terminated the consent decree with the Yakama Nation. As of June 1, 2013, the State is in litigation in the U.S. District Court, seeking to judicially dissolve the consent decree with the Nation and recover unpaid fuel taxes owed to the State. Although the State is pursuing litigation, the Department has also agreed to mediation under the 9th Circuit Court of Appeals' mediation program.

New Agreements, 75/25 Agreement Compliance, and Revenue

DOL negotiated a new 75/25 fuel tax agreement with the Snoqualmie Tribe in April 2012; the tribal fuel retail station has not opened for operation. DOL was notified of four new tribal stations that opened in 2012:

- Three stations operated by the Colville Confederated Tribes
- One station operated by the Tulalip Tribes

All post-2007 75/25 fuel tax agreements include audit provisions. As of May 1, 2013, all tribes with 75/25 agreements have completed their respective audits for fiscal year 2011. For fiscal year 2012:

- Eight tribes have completed audits.
- Eight tribes are on track for timely completion of audits.
- Two tribes are not required to file a report for this period.

DOL has confirmed that all CPA audit firms performing tribal fuel tax audits are licensed and in good standing as required by state law.

The fuel tax revenue retained by Washington state for fuel purchased under the per-capita and 75/25 agreements for the time period of January 1, 2012 through December 31, 2012 is \$9.4 million.

The annual refund for the per-capita and 75/25 agreements for the time period of January 1, 2012 through December 31, 2012 is \$34 million.