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The Honorable Thomas S. Zilly

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

SQUAXIN ISLAND TRIBE, ISLAND
ENTERPRISES, INC., SWINOMISH
INDIAN TRIBAL COMMUNITY, and
SWINOMISH DEVELOPMENT
AUTHORITY,

Plaintiffs,

v.

FRED STEPHENS, Director,
Washington State Department of
Licensing,

Defendant.

NO. C03-3951Z

CONSENT DECREE

The parties consent to entry of this Consent Decree in full settlement of all issues arising in the case, as follows:

I. RECITALS

1.1 The "Plaintiff Parties" are: the Squaxin Island Tribe of Washington, a federally-recognized Indian Tribe organized under the Indian Reorganization Act of 1934; Island Enterprises, Inc., a corporation organized under the laws of the Squaxin Island Tribe, wholly owned by the Squaxin Island Tribe and with its principal place of business on the Squaxin Island Reservation; the Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized under the Indian Reorganization Act; and the Swinomish Development Authority, a governmental subdivision of the Swinomish Tribe, wholly owned and controlled by

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the Swinomish Tribe and with its principal place of business on the Swinomish Indian Reservation.

1.2 The "State" Defendant is the Director of the State Department of Licensing, the state agency with the authority and responsibility for collecting state motor vehicle fuel and special fuel taxes.

1.3 The Plaintiff Parties propose to blend motor vehicle fuels on their respective reservations and then sell the blended fuels to retail customers, including non-members, from Tribally owned and operated gas stations located on their respective reservations. Plaintiff Parties propose to blend such motor vehicle fuels by purchasing unadditized motor vehicle fuel and diesel fuel from outside the reservations, transporting the unadditized fuel to the reservations, and there, blend it with other additives at a blending facility, the construction of which would likely require a substantial capital investment by the respective tribal governments.

1.4 This Consent Decree applies to the sale of all fuel for use in motor vehicles, blended and non-blended (i.e. already additized) sold at all facilities owned by the Tribal governments on their respective reservations ("Tribal Fuel Facilities"), except for "alternative fuels" (such as bio-diesel, ethanol, or other similar non-blended fuels) which are produced on-reservation, and for which the parties agree the provisions of this consent decree should not apply, either in whole or in part.

1.5 Pursuant to chapters 82.36 and 82.38 RCW, the State imposes a tax on motor vehicle fuel users and special fuel users, the revenue from which is used exclusively for highway purposes. The state fuel taxes are currently collected when the fuel is removed from a terminal rack. The State contends, however, that the taxes are ultimately paid by the retail customers; see RCW 82.36.020 and RCW 82.38.030.

1.6 Plaintiff Parties contend that by building and operating existing infrastructure, services, and amenities and thereby generating a market for fuel on their reservations, as well

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3 as by purchasing unadditized fuel from the terminal rack and blending such fuel with other
4 additives they have generated value on their reservations and have therefore pre-empted
5 Washington State's motor vehicle fuel and special fuel taxes.

6 1.7 The State contends that all motor vehicle fuel and special fuel sales by the
7 Plaintiff Parties are subject to the state's motor vehicle fuel and special fuel taxes imposed under
8 chapters 82.36 and 82.38 RCW.

9 1.8 The parties have conferred and engaged in negotiations in an attempt to resolve
10 the issues underlying this case. This Consent Decree is the result of each of the parties' mutual
11 good faith efforts to resolve this case.

12 1.9 Each of the governmental parties to this Consent Decree desires to engage in the
13 future discussions and agreements contemplated by this Consent Decree, within the framework
14 of a government-to-government relationship.

15 II. PURPOSES AND SCOPE OF THIS CONSENT DECREE

16 2.1 This court has subject matter jurisdiction under 28 U.S.C. §§ 1331, and 1362,
17 as interpreted in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 462 (1976).

18 2.2 The parties agree that this Consent Decree constitutes a fair and reasonable
19 resolution and compromise of this matter and the underlying competing contentions of the
20 parties. The parties intend that this Consent Decree completely resolve, as among them, all
21 issues raised in this case, or that could properly have been raised in this case, and that this
22 Consent Decree be binding upon the parties and upon persons subject to regulation by the
23 parties.

24 2.3 It is the parties' intent and agreement that this Consent Decree replace the
25 Court's November 22, 2005 Order on Summary Judgment and January 4, 2006 Judgment and
26 Permanent Injunction (collectively "Judgment" or "January 4, 2006 Judgment"), and that such
Judgment be vacated. If such Judgment is not vacated, this agreement will expire by its own

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terms, one year from the date of its entry. Refund obligations arising during the term of this Consent Decree shall survive any such termination.

2.4 Though intended to resolve all issues in the case, this Consent Decree primarily addresses the establishment of a framework for a cooperative taxing and service provision scheme that recognizes and addresses the substantive needs and interests of the respective parties, without deciding or conceding their respective legal arguments.

2.5 The State Department of Licensing is empowered and directed to collect motor vehicle fuel taxes and special fuel taxes, where those taxes are applicable. These tax revenues are used and needed to keep roads in good repair and to support a broad array of highway and road needs.

2.6 The Squaxin Island Tribe, and the Swinomish Indian Tribal Community are federally recognized Tribes, the governing bodies of which are interested in preserving and advancing the economic well-being and self-sufficiency of their respective Tribes and providing employment opportunities for members of their respective Tribes. In addition, both Tribes contribute funds and in-kind services to off-reservation recipients, including local governments. Both Tribes have cross-deputization agreements with the respective Sheriffs, and service agreements with the local fire districts.

2.7 This Consent Decree replaces and supersedes the State-Tribal Fuel Tax Agreement entered into by the Department of Licensing and the Swinomish Tribe under RCW 82.36.450 and RCW 82.38.310. Upon approval of this Consent Decree, monthly payments under said Agreement will cease.

2.8 The Squaxin Island Tribe and the Swinomish Tribe each have the authority to impose certain taxes respecting fuel used in motor vehicles, and to expend the revenue from such taxes for governmental services.

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2.9 The State of Washington has the authority to impose certain taxes respecting fuel used in motor vehicles, and to expend the revenue from such taxes for highway related governmental services. Except where specifically indicated otherwise in this decree, the parties intend the State's laws and regulations concerning the imposition and collection of fuel and special fuel taxes will remain in full force and effect.

- 2.10 In general the parties intend this Consent Decree to accomplish the following:
- a. Allow for the fuel blending operations contemplated by the Plaintiff Parties with the attendant benefits to the Tribes and their respective members, should the Tribes choose to pursue such operations.
 - b. Facilitate the on-reservation retail sale of fuel products to member and non-member customers at prices competitive with surrounding retail sellers, while at the same time allowing the respective Tribes to impose tribal fuel taxes should they choose to do so.
 - c. Ensure that state and local highway needs and purposes, as well as tribal road and highway needs and purposes, continue to be met.

III. ACTIONS TO BE TAKEN BY THE PARTIES

3.1 Without waiving any legal argument or otherwise conceding that they are required to do so, the Plaintiff Parties agree:

- a. The reciprocal promises and commitments in this consent decree are not dependent or contingent on the plaintiff Tribes blending of fuel. The promises and commitments will apply equally to fuel that is already "additized" as well as the fuel that the Tribes may choose to blend.

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- b. In the event that the Tribes do choose to blend, the Tribes agree to abide by all applicable Federal laws related to the blending and sale of motor vehicle fuel and diesel fuel.
- c. Unless otherwise agreed to in writing, to acquire all motor vehicle and diesel fuel, additized or unadditized, only from persons/companies who are properly licensed in Washington State as a fuel or special fuel distributor, supplier or importer in accordance with chapters 82.36 and 82.38 RCW, respectively, or a tribal distributor or supplier lawfully doing business in Indian country.
- d. Unless otherwise agreed to in writing, to purchase only fuel on which applicable state taxes have been paid.
- e. To sell fuel to retail customers, only from retail outlets owned and operated by the respective tribal governments.
- f. To impose and maintain in effect a tax on the retail sale of all fuel sold at Tribal Fuel Facilities equaling no less than 100 percent of the then-current state tax on motor vehicle or diesel fuel, which taxes are expressed in cents per gallon ("Tribal Fuel Tax"), or to pass on to the retail customer any state tax included in the price of the fuel.
- g. To expend fuel tax proceeds identified in section 3.2d below, and the one-time payments identified in section 3.2a below, or amounts equivalent thereto, on the following:
 - Planning, construction, and maintenance of roads, bridges, boat ramps,
 - Qualifying Transit services and facilities,
 - Transportation planning,

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Police services, and

Such other highway related purposes as the parties shall mutually agree.

- h. To cause an audit to be performed annually, consistent with each Tribe's fiscal year, by an independent third party auditor who shall be a certified public accountant in good standing, to review such records as are necessary to certify the number of gallons of motor vehicle and diesel fuel purchased by the Tribes for re-sale at Tribal Fuel Facilities, the amount of state tax paid by the Tribe, the amount of Fuel Tax collected from retail customers and the use of Fuel Tax proceeds or their equivalent for the purposes identified in paragraph 3.1(g) above and to deliver a copy of the final written report of such auditor to the Governor of the State of Washington.
- i. To meet routinely (on a schedule to be determined by the parties) with state agency officials for the purpose of assessing the successfulness of this consent decree in achieving its purposes and objectives.
- j. To use good faith efforts to continue the cross-deputization and fire services agreements referenced in section 2.5 above.
- k. To use good faith efforts to continue to provide the off-reservation funds and in-kind services referenced in 2.5 above.

3.2 Without waiving any legal argument or otherwise conceding that it is required to do so, the State agrees to:

- a. Pay to the Plaintiff Tribes, within 30 days following the entry of this consent decree, a one time lump sum payment of:

Swinomish \$250,000

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Squaxin \$550,000

which shall constitute a full and final settlement of any and all claims by the Plaintiff Tribes for refunds of motor fuel and special fuel taxes paid by such Tribes up to the effective date of this consent decree, regardless of whether the January 4, 2006 Judgment is vacated.

- b. Meet routinely (on a schedule to be determined by the parties) with Plaintiff Party officials for the purpose of assessing the successfulness of this consent decree in achieving its purposes and objectives.
- c. Meet periodically (on a schedule to be determined by the parties) with Plaintiff Party officials for the purpose of helping to identify anticipated highway related needs and any possible collaborative approaches to meeting those needs in a mutually beneficial way.
- d. On condition that the Plaintiff Tribes comply with the provisions of this Consent Decree, the State will monthly remit to each Plaintiff Tribe an amount equal to 75% of the state motor vehicle fuel and special fuels tax actually paid on all sales of motor vehicle and diesel fuel from the Tribal Fuel Facilities in the preceding month. Each Tribe shall submit copies monthly of invoices for fuel delivered to their stations, which invoices shall include the invoice date, name of the seller, and the amount of state motor vehicle fuel taxes and special fuels taxes paid or included in the price of the fuel. Within 30 days of receiving the invoices, the State will remit to each Tribe 75% of the state motor vehicle fuel and special fuels tax actually paid or included in the price. If the accuracy or authenticity of any invoice submitted is in question, the State and Tribes shall use their best efforts to resolve

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the issue informally. If such informal efforts are unsuccessful, the dispute resolution provisions of this Consent Decree shall apply.

IV. IMPLEMENTATION, DURATION & TERMINATION

4.1 The parties agree to jointly move the court for an order vacating the Judgment entered in this matter on January 4, 2006. The parties further agree that if said Judgment is not vacated, this Consent Decree will expire, by its own terms and without need for further court action or order, one year from its entry.

4.2 Should the Judgment not be vacated, and this Consent Decree expires, the parties nonetheless agree to meet and attempt to negotiate a replacement Consent Decree or other such agreement.

4.3 If the January 4, 2006 Judgment is vacated, this Consent Decree shall be automatically renewed from year to year unless the parties mutually agree otherwise.

4.4 The parties, not more than one year after entry of this Consent Decree, shall confer, on a government-to-government basis, to evaluate the effectiveness of the Consent Decree and to attempt to mutually agree upon solutions to any problems that may have arisen.

4.5 Dispute Resolution

a. Neither the Plaintiff Parties, nor the State, nor officers acting on either government's behalf, may petition the Court to enforce this Consent Decree unless (a) the dispute resolution process described herein has been followed in good faith to completion without successful resolution, or unless (b) the other party fails to enter into the dispute resolution process or terminates the process before its completion.

b. Should a dispute arise between the Plaintiff Parties and the State upon an issue of compliance with the Consent Decree by any party, or by its

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officers, employees or agents, the affected parties shall attempt to resolve the dispute through the following dispute resolution process:

1. Any party may invoke the dispute resolution process by notifying the other(s), in writing, of its intent to do so. The notice shall set out the issues in dispute and the notifying party's position on each issue.
2. The first stage of the process shall include a face-to-face meeting between representatives of the disputing parties to attempt to resolve the dispute by negotiation. The meeting shall be convened within 30 days of the date of the written notice described above. The representatives of the disputing party shall come to the meeting with the authority to settle the dispute.
3. If the disputing parties are unable to resolve the dispute within 60 days of the date of the written notice, the disputing parties shall engage the services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate the dispute. If the parties cannot agree on who the mediator should be, the mediator shall be a person or persons selected by the Court pursuant to Local Rule 39.1(c)(3). Cost for the mediator shall be borne equally between the disputing parties.
4. The disputing parties shall pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute. If the parties cannot agree upon a format for the mediation process, the format shall be that directed by the mediator. If the dispute is resolved,

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that resolution shall be memorialized by the mediator and shall bind the parties.

5. If any party terminates the process before completion, or if the mediator determines that the dispute can not be resolved in the mediation process, or if the dispute is not resolved within 30 days of the date the mediator is selected, the other party(s) may petition the Court for enforcement of the Consent Decree as to the disputed and unresolved issue or issues.

IV. ORDER

4.1 The court has examined the foregoing Consent Decree and concludes that the Consent Decree is fundamentally fair, adequate, and reasonable, and is consistent with applicable law. *See Firefighters v. Cleveland*, 478 U.S. 501 (1986); *United States v. Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990).

4.2 The Consent Decree is hereby adopted as a court order and incorporated herein. This Order is binding on the signatories to the Consent Decree and shall be enforceable by them in accordance with the terms of the Consent Decree.

4.3 All parties shall bear their own costs and attorney fees incurred in this case.

DONE this _____ day of _____, 2006.

HON. THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

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Stipulated to and approved for entry:

SQUAXIN ISLAND LEGAL DEPARTMENT



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