

INTERGOVERNMENTAL AGREEMENT
BETWEEN
THE SWINOMISH INDIAN TRIBAL COMMUNITY
AND
THE WASHINGTON STATE DEPARTMENT OF LICENSING

I. PREAMBLE AND GUIDING PRINCIPLES

The Parties to this Agreement are:

1.1 The Swinomish Indian Tribal Community, a federally-recognized Indian Tribe organized under the Indian Reorganization Act of 1934 and Swinomish Development Authority, a governmental subdivision of the Swinomish Indian Tribal Community, and with its principal place of business on the Swinomish Reservation (hereinafter "Tribe").

1.2 The State Department of Licensing, the state agency with the authority and responsibility for collecting state motor vehicle fuel and special fuel taxes (hereinafter "State").

II. PURPOSE AND OBJECTIVES

2.1 The Tribe had proposed to blend motor vehicle fuels on its reservation and then sell the blended fuels to retail customers, including non-members, from Tribally owned and operated gas stations located on its reservation. The Tribe proposed to blend such motor vehicle fuels by purchasing unadditized motor vehicle fuel and diesel fuel from outside the reservation, transporting the unadditized fuel to the reservation, and there, blend it with other additives at a blending facility, the construction of which would likely require a substantial capital investment by the tribal government. As of the date of, and as a consequence of, the execution of this agreement, it is uncertain whether the Tribe will proceed with its blending proposal.

2.2 This Agreement 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 government on

COPY

its reservation (“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 separately agree the provisions of this Agreement should not apply, either in whole or in part.

2.3 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 or imported to the state.

2.4 The Tribe contends that by building and operating existing infrastructure, services, and amenities and thereby generating a market for fuel on its reservation, as well as by purchasing unadditized fuel from the terminal rack and blending such fuel with other additives it has generated value on its reservation and has therefore pre-empted Washington State’s motor vehicle fuel and special fuel taxes.

2.5 The State contends that all motor vehicle fuel and special fuel sales by the Tribe are subject to the state’s motor vehicle fuel and special fuel taxes imposed under chapters 82.36 and 82.38 RCW.

2.6 The Parties’ conflicting contentions are the subject of federal court litigation that is proceeding independent of this Agreement. This Agreement is the result of each of the Parties’ mutual good faith efforts to resolve some of the issues that underlie or could underlie the legal disputes, and to agree on a fuel taxing system that will operate as between the Parties under the terms and for the periods specified in this Agreement.

2.7 This Agreement primarily addresses the establishment of a framework for a cooperative taxing and service provision scheme, which shall operate during the term of this Agreement, that recognizes and addresses the substantive needs and interests of the respective Parties, without deciding or conceding their respective legal arguments.

2.8 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.

2.9 The Swinomish Indian Tribal Community is a federally recognized Tribe, the governing body of which is interested in preserving and advancing the economic well-being and self-sufficiency of the Tribe and providing employment opportunities for members of the Tribe. In addition, the Tribe contributes funds and in-kind services to off-reservation recipients, including local governments. The Tribe has a cross-deputization agreement with the local Sheriff's Department and a service agreement with the local fire district.

2.10 The Swinomish Indian Tribal Community has the authority to impose certain taxes respecting fuel used in motor vehicles, and to expend the revenue from such taxes for governmental services.

2.11 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 Agreement, 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.

III. INTENT

3.1 In general the Parties intend this Agreement to 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 Tribe to impose tribal fuel taxes; and to ensure that state and local highway needs and purposes, as well as tribal road and highway needs and purposes, continue to be met.

IV. ACTIONS TO BE TAKEN BY THE PARTIES

4.1 Without waiving any legal argument or otherwise conceding that they are required to do so, the Tribe agrees:

- a. The reciprocal promises and commitments in this Agreement are not dependent or contingent on the Tribe's blending of fuel. The promises and commitments will apply equally to fuel that is already "additized" as well as the fuel that the Tribe may choose to blend.
- b. In the event that the Tribe does choose to blend, the Tribe agrees 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, supplier or importer lawfully doing business according to all applicable laws.
- d. Unless otherwise agreed to in writing, or directed by court order, 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 tribal government or by the Swinomish Development Authority.
- 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 4.1(f), the one-time payment identified in section 4.2(a), or amounts equivalent thereto and the remittance if any identified in section 4.2(c)(i) on the following:

Planning, construction, and maintenance of roads, bridges, boat ramps,

Qualifying transit services and facilities,

Transportation planning,

Police services, and

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

The amount of any tax payment to the State pursuant to section 4.2(c)(ii) shall be deducted from the amount of tax proceeds for the purposes of this section 4.1(g).

- h. To cause an audit to be performed at the end of the contract term, 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 Tribe 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 4.1(g) above and to deliver a copy of the final written report of such audit to the Director of the State Department of Licensing.
- i. Meet periodically with state agency officials for the purpose of assessing the successfulness of this Agreement in achieving its purposes and objectives.

- j. To use good faith efforts to continue the cross-deputization and fire services agreements referenced in section 2.9 above.
- k. To use good faith efforts to continue to provide the off-reservation funds and in-kind services referenced in 2.9 above.

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

- a. Pay to the Tribe within 30 days following the execution of this Agreement a one time lump sum payment of \$250,000.00, which shall constitute a full and final settlement of any and all claims by the Tribe for refunds of motor fuel and special fuel taxes paid by the Tribe up to the effective date of this Agreement.
- b. Meet periodically with Tribal officials for the purpose of assessing the successfulness of this Agreement in achieving its purposes and objectives.
- c. On condition that the Tribe complies with the provisions of this Agreement, the following provisions for tax remittance shall apply:
 - i. Beginning February 1, 2006, for any motor vehicle or special fuel on which State tax has already been collected prior to delivery to the Tribal Fuel Facilities, the State will monthly remit to the 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. The Tribe shall submit copies monthly of invoices for fuel delivered to its Tribal Fuel Facilities, 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 an invoice, the State will remit to the 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 Tribe shall use their best efforts to resolve the issue informally. If such informal efforts are unsuccessful, the dispute resolution provisions of this Agreement shall apply.

- ii. Beginning February 1, 2006, for any motor vehicle or special fuel on which State tax has not already been collected prior to delivery to the Tribal Fuel Facilities pursuant to any court order in effect at the time of purchase, the Tribe shall monthly remit to the State an amount equal to 25% of the tribal motor vehicle and special fuels tax actually collected on sales of that motor vehicle and special fuels from the Tribal Facilities in the preceding month. The Tribe shall submit with its payment copies of monthly invoices for fuel delivered to its Tribal Fuel Facilities, which invoices shall include the same information required under section 4.2(c)(i) above. If the accuracy or authenticity of any invoice submitted is in question, the state and Tribe shall use their best efforts to resolve the issue informally. If such informal efforts are unsuccessful, the dispute resolution provisions of this Agreement shall apply.

V. IMPLEMENTATION, DURATION & TERMINATION

5.1 The Parties agree that this Agreement will become effective immediately upon signing by all parties and shall remain in effect for a period of at least one year unless earlier terminated by written agreement of the parties. This agreement, however, shall be terminable at the will of any party (with or without the agreement of the other party,) for a period of 90 days after the expiration of one year from the date all parties sign. Such termination shall be effected by giving the other party at least 30 days written notice of the intent to terminate.

5.2 If at any time in the future the State enters an agreement, compact or consent decree with any other federally recognized Indian Tribe, of or relating to the collection and reimbursement of state fuel taxes, and in the event such agreement or compact contains terms more favorable to the other Indian Tribe than the terms contained herein, the Tribe (party to this agreement) shall be entitled to modify and replace the terms of this agreement with the more favorable terms. Provided, however, that the state shall be entitled to insist that such other terms as are associated with, facilitated, or were given in exchange for the more favorable terms, also be included in any modification of replacement terms.

5.3 Dispute Resolution

- a. Neither the Tribe nor the State nor officers acting on either government's behalf may petition a court to enforce this Agreement 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 Tribe and the State upon an issue of compliance with the Agreement by either party, or by its officers,

employees or agents, the Parties shall attempt to resolve the dispute through the following dispute resolution process:

1. Either party may invoke the dispute resolution process by notifying the other 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 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 parties shall come to the meeting with the authority to settle the dispute.
3. If the Parties are unable to resolve the dispute within 60 days of the date of the written notice, the Parties shall engage the services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate the dispute. Cost for the mediator shall be borne equally between the disputing Parties.
4. The 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, 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 United States District Court for the Western District of Washington for enforcement of the Agreement as to the disputed and unresolved issue or issues.

DATE: June 29, 2006

Brian Cladoosby
Brian Cladoosby, Tribal Chairman
Swinomish Indian Tribal Community

Elizabeth A. Luce
Elizabeth A. Luce, Director
Washington State Department of Licensing