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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,

Plaintiff,

v.

ELIZABETH LUCE, Director,
Washington State Department
of Licensing,

Defendant.

NO. CV-06-0049-EFS

**ORDER GRANTING PARTIES' JOINT
APPLICATION FOR ENTRY OF
CONSENT DECREE AND CLOSING
FILE**

On November 6, 2007, a hearing was held in the above-captioned matter. Scott Wheat appeared on behalf of Plaintiff Spokane Tribe of Indians. Defendant Director Elizabeth Luce was represented by Mary Tennyson. Before the Court was the parties' Joint Application for Entry of Consent Decree (Ct. Rec. 24). The parties consent to entry of the Decree solely for the purpose of settling this case before any testimony has been taken and disclaiming any liability in connection herewith. Upon reading the submitted materials, the Court was concerned with the dispute resolution language and the lack of explicit citation to statutory provisions in the Intergovernmental Agreement. Counsel advised the Court that they were satisfied with the language of the Intergovernmental Agreement and that it contained the entire agreement of the parties. Given counsel's statements on the record, the Court finds good cause to grant the Joint Application to enter a Consent Decree

1 and approve the Intergovernmental Agreement. Accordingly, **IT IS HEREBY**
2 **ORDERED:**

3 1. This Court has jurisdiction over this action pursuant to 28
4 U.S.C. §§ 1331 and 1362; and venue is proper in the Eastern District of
5 Washington pursuant to 28 U.S.C. § 1391.

6 2. The Joint Application for Entry of Consent Decree (**Ct. Rec. 24**)
7 is **GRANTED**. The Intergovernmental Agreement Regarding Fuel Tax Between
8 the Spokane Tribe of Indians and the State of Washington (Attachment A)
9 is **APPROVED** and is made part of this Decree as if set forth fully herein.

10 3. The Court shall retain jurisdiction over this action and the
11 parties thereto for the purpose of enforcing this Decree.

12 4. Each party shall bear its own costs and attorneys fees in this
13 case.

14 5. This file shall be **CLOSED**.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter
16 this Order and provide a copy to counsel.

17 **DATED** this 6th day of November, 2006.

18
19 S/ Edward F. Shea
20 EDWARD F. SHEA
United States District Judge

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ATTACHMENT A

**INTERGOVERNMENTAL AGREEMENT REGARDING FUEL TAX
BETWEEN
THE SPOKANE TRIBE OF INDIANS
AND
THE STATE OF WASHINGTON**

1. PREAMBLE

1.1 The Spokane Tribe of Indians is an aboriginal, self-determined People, recognized by the United States Government as an indigenous sovereign Tribe, possessed of the full inherent sovereign powers of a government. Spoko Fuel is an enterprise wholly owned and operated by the Spokane Tribe of Indians. Hereinafter, the Spokane Tribe of Indians and Spoko Fuel collectively are referred to in this Agreement as the "Tribe".

1.2 The State of Washington ("State") is a state within the United States of America, possessed of full powers of a state government. The Department of Licensing is an agency of the State of Washington. The State of Washington and the Department of Licensing are referred to collectively in this Agreement as the "State".

1.3 The Tribe has filed a lawsuit in the federal district court for the Eastern District of Washington against the Director of the Washington State Department of Licensing claiming:

The Washington State motor vehicle and special fuels tax is invalid *per se* as a matter of federal law because the legal incidence of the State's motor vehicle fuel tax falls on the Tribe; and

Federal law preempts the State motor vehicle and special fuels taxes for fuel sold by the Tribe;

1.4 The State of Washington ("State") maintains that the Tribe's bulk fuel purchases are subject to the State's motor vehicle and special fuels tax.

1.5 The 60th Legislature enacted legislation effective on May 15, 2007, authorizing the State to enter into fuel tax compacts with federally-recognized Indian Tribes with reservations in the State of Washington. The Governor has delegated this authority to the director of the Department of Licensing.

1.6 The Tribe and the State ("Parties") have conferred and engaged in intergovernmental negotiations in a mutual, good faith effort to reach an arrangement in regard to State fuel taxes on the distribution, sale, transfer, use, or possession of motor vehicle fuel and special fuel on Spokane Tribal Lands.

1.6.1 By entering into this Intergovernmental Agreement ("Agreement"), the Parties do not waive their respective legal positions set forth in sections 1.3 and 1.4.

1.6.2 The Tribe and the State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on an intergovernmental basis.

1.6.3 The State recognizes the Tribe's need to generate revenue to provide essential public services such as road construction, road maintenance, road improvements, and police services.

1.6.4 The Tribe and the State enter into this Agreement for the mutual benefit of the Tribe and the State.

2. PURPOSES AND OBJECTIVES

2.1 This Agreement applies to the sale of fuel for use in motor vehicles, storage, or other mode of transportation that is sold at all Tribal Fuel Facilities and Tribal businesses located upon Spokane Tribal Lands.

2.2 This Agreement primarily addresses the establishment of a framework for a cooperative taxing and service provision scheme that shall operate during the term of this Agreement, and that recognizes and addresses the substantive needs and interests of the Parties.

2.3 The Parties, upon the full execution of this Agreement, shall move the Court to enter a consent decree in *Spokane Tribe of Indians v. Luce*, Case No. CV-06-049 that fully incorporates the terms of this Agreement, and that the case be dismissed.

3. DEFINITIONS

3.1. "Department" means the Washington State Department of Licensing, or any successor agency, and its officials, employees, and agents acting in their official capacity.

3.2. "Distributor" shall be used in this Agreement to refer to either a Motor Vehicle Fuel Distributor or a Special Fuel Distributor.

3.2.1 "Motor Vehicle Fuel Distributor" has the meaning given in RCW 82.36.010(15), as it now exists or as amended in the future.

3.2.2 "Special Fuel Distributor" has the meaning given in RCW 82.38.101(24), as now or as amended in the future.

3.3. "Essential governmental function" has the meaning given in 26 C.F.R. § 305.7871-1(d) (2000).

3.4. "Filling station" means a place of business operated for the purpose of delivering to the general public motor vehicle fuel or special fuel into the fuel tanks of motor vehicles.

3.5. "Motor vehicle" means every self-propelled vehicle designed for operation upon land or water and utilizing motor vehicle fuel or special fuel as the means of propulsion.

3.6. "Motor vehicle fuel" has the meaning given in RCW 82.36.010(20), as it now exists or as it may hereafter be amended.

3.7. "Special fuel" has the meaning given in RCW 82.38.020 (23), as it now exists or as it may hereafter be amended.

3.8. "Spokane Tribal Lands" means the Spokane Indian Reservation and lands held in trust for the benefit of the Tribe by the United States over which the Tribe exercises jurisdiction.

3.9. "State" means the State of Washington and the Washington State Department of Licensing.

3.10. "Tribe" means the Spokane Tribe of Indians.

3.11. "Tribal business" means a business that is owned and operated by the Tribe or by an enrolled Tribal member, so long as the business operated by an enrolled Tribal member is licensed or permitted by the Tribe to do business on the Reservation.

INTERGOVERNMENTAL AGREEMENT 2 of 7

3.12. "Tribal Fuel Facilities" means a retail filling station that is owned and operated by the Tribe or by a Tribal business, and any facilities owned and operated by the Tribe or a Tribal business for bulk storage of Motor vehicle fuel or Special fuel.

3.13. "Tribal member" means a person who is an enrolled member of the Spokane Tribe of Indians.

4. INTENT

The Parties intend this Agreement to facilitate the retail sale of motor vehicle and special fuel occurring on Spokane Tribal Lands to member and non-member customers at prices competitive with surrounding retail sellers, while at the same time requiring the State Department of Licensing to remit the portion of State motor vehicle and special fuel taxes to the Tribe under the terms, conditions, and amounts set forth herein.

5. ACTIONS TO BE TAKEN BY THE TRIBE

5.1 By agreeing to take the actions set forth in this section 4, the Tribe does not waive any legal argument or otherwise concede that the Tribe is required, independent of this Agreement, to take such actions.

5.2 The reciprocal promises and commitments in this Agreement are not dependent or contingent on the Tribe's blending of fuel.

5.3 In the event the Tribe proposes to blend fuel, the Tribe agrees to abide by all applicable Federal laws related to the blending and sale of motor vehicle and diesel fuel. The parties agree to meet and discuss the application of this Agreement to fuel blended by the tribe, before any such blending begins. If the tribe begins blending fuel without compliance with this paragraph, the State may terminate this Agreement on 30 day's notice.

5.4 Unless otherwise agreed to in writing, the Tribal Fuel Facilities shall acquire all motor vehicle and diesel fuel, additized or unadditized, only from persons/companies which are licensed in the State as a fuel or special fuel distributor, supplier, or importer in accordance with RCW 82.36 and 82.38, respectively, or a Tribal distributor, supplier or importer lawfully doing business according to all applicable laws.

5.5 The Tribe shall by ordinance require non-tribal filling stations, Tribal Fuel Facilities, Tribal businesses, and Tribal members to purchase only fuel on which state fuel tax has been paid, and to purchase fuel only from persons or companies operating lawfully in accordance with RCW 82.36 and RCW 82.38 as a motor vehicle or special fuel distributor, supplier, importer, or blender, or from a tribal distributor, supplier, importer, or blender lawfully doing business according to all applicable laws. Such ordinances shall become effective within 6 months of the execution of this Agreement, or unless otherwise agreed.

5.6 Unless otherwise agreed to in writing, the Tribal Fuel Facilities and Tribal businesses shall only purchase fuel on which applicable State taxes have been paid.

5.7 If the Tribe proposes to purchase fuel for bulk storage for use in Tribally owned vehicles or for resale, before such activities begin, the Tribe shall notify the State, and the parties shall confer on any changes necessary to this Agreement.

5.8 The Tribe shall provide the State with a list of the names and physical location (address) of each Tribal Fuel Facility and each Tribal business covered by this Agreement.

5.8.1 No later than 30 days after any new Tribal Fuel Facility is opened, the same information will be provided to the State.

5.9 The Tribe shall pass on to the retail customer the state tax included in the price of fuel.

5.10 The Tribe shall expend the fuel tax proceeds or equivalent amounts on the following:

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

5.10.2 Qualifying transit services and facilities;

5.10.3 Transportation planning;

5.10.4 Police Services; and

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

5.11 The Tribe shall submit copies monthly of invoices for fuel delivered to its Tribal Fuel Facilities and Tribal businesses, which invoices shall include the invoice date, name of the seller, and the amount of State motor vehicle fuel and specials fuels taxes paid or included in the price of the fuel.

5.12 The Tribe shall cause an audit to be performed 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 special fuel purchased by the Tribal Fuel Facilities and Tribal businesses; the number of gallons used by the Tribe's governmental fleet; and the use of fuel tax remittance proceeds or their equivalent for the purposes identified in section 5.10.

5.12.1 The Tribe shall cause a final written report of such audit to be delivered to the Director of the State Department of Licensing. The first required audit must cover the period starting on the effective date of this Agreement, and ending September 30, 2008, and the Auditor must report its findings to the Tribe by December 31, 2008.

5.12.2 Thereafter, the Auditor shall review records on an annual basis, or at such other interval as shall be agreed by the parties.

5.12.3 The Tribe shall deliver a copy of the final written report of such audit to the Director of the State Department of Licensing.

5.13 The Tribe agrees to meet periodically with state agency officials for the purpose of assessing the successfulness of this Agreement in achieving its purposes and objectives.

6. Actions to be Taken by the State

6.1 By agreeing to take the actions set forth in this section 5, the State does not waive any legal argument or otherwise concede that the State is required, independent of this Agreement, to take such actions.

6.2 The State agrees to meet periodically with Tribal officials for the purpose of assessing the successfulness of this Agreement in achieving its purposes and objectives.

6.3 On condition that the Tribe complies with the provisions of this Agreement, the following provisions for tax remittance shall apply:

6.3.1 Beginning on the date this Agreement is executed by the Parties, for any motor vehicle or special fuel on which the State tax already has been collected prior to delivery to the Tribal Fuel Facilities and Tribal businesses, the State shall remit monthly to the Tribe an amount equal to 75% of the state motor vehicle and diesel fuels tax actually paid on all such fuel delivered to the Tribal Fuel Facilities and Tribal businesses in the preceding month.

6.3.2 The Tribe shall submit copies monthly of invoices for fuel delivered to Tribal Fuel Facilities and Tribal businesses, which invoices shall include the invoice date, name of the seller, and the amount of State motor vehicle fuel and special fuels taxes paid or included in the price of the fuel.

6.3.3 Within 30 days of receiving an invoice, the State shall remit to the Tribe 75% of the state motor vehicle fuel and special fuels tax actually paid or included in the price of the fuel delivered to the Tribal Fuel Facilities and Tribal businesses.

6.3.4 If the accuracy or authenticity of any invoice submitted by the Tribe is questioned, the State and the Tribe shall use their best efforts to resolve the issue informally.

6.3.5 If informal dispute resolution efforts are unsuccessful, the dispute resolution provisions of this Agreement shall apply.

6.3.6 The State agrees to treat reports provided by the Tribe pursuant to sections 5.12 through 5.12.3 as personal information under RCW 42.56.230(3)(b).

6.3.7 Any additional information received by the State or otherwise made available to the State for review pursuant to this Agreement shall be exempt from public inspection and copying under RCW 42.56.230(3)(b).

6.4 Fuel rebates for Tribal governmental vehicles

6.4.1 Tax paid on fuel purchased that is claimed for refund for Tribal government vehicles for Federal fuel tax purposes on Internal Revenue Service (IRS) claim form 4136 shall be entitled to a refund of 100% of the tax. A copy of the IRS form 4136 shall accompany the refund request. Such fuel must be used by the Tribe for its essential governmental functions and Tribal businesses. The State shall remit to the Tribe 100% of the state fuel tax for motor vehicle and special fuels used by Tribal governmental motor vehicles.

6.5 Additional motor vehicle and special fuel tax rebates.

6.5.1 The Tribe, Tribal filling stations, Tribal businesses, Tribal members, or Tribal businesses may also be eligible for refunds under the provisions of RCW 82.36.280, RCW 82.36.285, RCW 82.36.290, RCW 82.36.300, RCW 82.38.080, RCW 82.38.180, and similar state fuel tax exemption statutes that may be later adopted, but only (1) to the extent such statutes apply to the Tribes, the Tribal filling station, the Tribal business, the Tribal member, or the Tribal business, and to the particular use by them of motor vehicle and special fuels and (2) to the extent a refund was not made to the Tribe under sections 5.3.1 and 5.4.1 of this Agreement.

7. Implementation & Termination

7.1 The Parties agree that this Agreement shall become effective immediately upon signing by all parties and shall remain in effect until terminated by written agreement of the parties, or under paragraph 7.3.3 of this Agreement.

7.2 Neither the Tribe, nor the State, nor officers acting on either government's behalf, may petition any court to enforce this Agreement unless (a) the dispute resolution process described in subsections 7.3.1 and 7.3.2 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.

7.3 Should a dispute arise between the Tribe and the State upon an issue of compliance with the Agreement by either government, or by their officers, employees or agents, the Tribe and State shall attempt to resolve the dispute through the following dispute resolution process:

- 7.3.1 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.
- 7.3.2. The first stage of the process shall include a face-to-face meeting between representatives of the two governments to attempt to resolve the dispute by negotiation. The meeting shall be convened within 30 days of the date of the written notice described in section 6.3.1. The representatives of each government shall come to the meeting with the authority to settle the dispute.
- 7.3.3. After completion of the process in section 6.3.1 and section 6.3.2, either party may terminate this Agreement with sixty (60) days written notice served upon the Chairman of the Tribe and Director of the Department of Licensing.

8. Miscellaneous Provisions

8.1 By entering into this Agreement, the Tribe does not concede that the laws of the state of Washington, including its tax and tax collection provisions, apply to the Tribe, its members or agents regarding activities and conduct within or without Tribal Lands.

8.2 By entering into this Agreement, the State does not concede that the Tribe has any immunity from the State's tax and tax collection provisions.

8.3 This Agreement is not intended, and will not be construed to confer a benefit or create any right on a third party, or the power or right of any third party to bring an action to enforce any terms of this Agreement.

8.4 In any action filed by a third party challenging either the Tribe's or the State's authority to enter into or enforce this agreement, the Tribe and the State each agree to support the Agreement and defend their authority to enter into and implement this agreement.

8.5 This Agreement may be amended only by a written instrument duly signed and executed by the Parties.

8.6 The contact persons for the Tribe, for any changes or concerns about this Agreement, shall be:

Richard L. Sherwood
Chairman, Spokane Tribal Business Council
PO Box 100
Wellpinit, WA 99040
(509) 458-6500


Rory Flintknife
Office of the Spokane Tribal Attorneys
PO Box 360
Wellpinit, WA 99040
(509) 458-65409

8.7 The contact person for the State, for any changes or concerns about this Agreement, shall be:

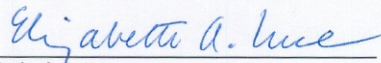
Sharon Whitehead, Deputy Director
Department of Licensing
Highways-Licenses Building
1125 Washington St SE
PO Box 48001
Olympia, WA 98504-8001
(360) 902-3603

Art Farley, Administrator
Department of Licensing
2424 Bristol Court SW
PO Box 9036
Olympia, WA 98507-9036
(360) 664-1820

SIGNED THIS 11th DAY OF October, 2007


Richard L. Sherwood
Chairman
Spokane Tribal Business Council

SIGNED THIS 24th DAY OF September, 2007


Elizabeth A. Luce
Director
Washington State Department of Licensing