

**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF LICENSING**

In the matter of:

Cougar Den, Inc.,

Respondent.

Docket Nos. 2014-DOL-0036 & 2015-DOL-0002

Fuel Tax Assessment Nos. 768M, 775M-Amended

**INITIAL ORDER ON SUMMARY
JUDGMENT MOTIONS**

1. ISSUES PRESENTED

Issue No. 1: Whether the Department's February 2, 2015, Motion to Amend Prehearing Conference Order requesting consideration of Fuel Tax Assessment 775M-Amended should be granted.

Issue No. 2: As presented by Cougar Den's Motion for Summary Judgment and the Department of Licensing's Motion for Summary Judgment, with respect to Fuel Tax Assessment No. 768M, whether Cougar Den, Inc. imported fuel to Washington State from March 2014 through May 2014 in violation of RCW 82.36 and 82.38, or is Cougar Den, Inc. exempt as per Article III of the Treaty of 1855, and whether Cougar Den, Inc. owes \$1,930,520.97 (as of June 30, 2014) in taxes, penalties and interest.

Issue No. 3: As presented by Cougar Den's Motion for Summary Judgment and the Department of Licensing's Motion for Summary Judgment, with respect to Fuel Tax Assessment No. 775M-Amended, whether Cougar Den, Inc., imported fuel to Washington State from May 2014 to September 2014 in violation of RCW 82.36 and 82.38, or is Cougar Den, Inc. exempt as per Article III of the Treaty of 1855, and whether Cougar Den, Inc. owes \$3,681,472.73 (as of January 27, 2015) including taxes, penalties and interest through February 28, 2015.

2. ORDER SUMMARY

Issue No. 1: The Department's February 2, 2015, Motion to Amend Prehearing Conference Order requesting consideration of Fuel Tax Assessment 775M-Amended is **GRANTED**.

Issue No. 2: Cougar Den's Motion for Summary Judgment is GRANTED and the Department of Licensing's Motion for Summary Judgment is DENIED, with respect to Fuel Tax Assessment No. 768M. Cougar Den, Inc. did not import fuel to Washington State from March to May 2014 in violation of RCW 82.36 and 82.38 because Cougar Den, Inc. is exempt from these provisions as per Article III of the Treaty of 1855. Cougar Den, Inc. does not owe \$1,930,520.97 in taxes, penalties and interest as of June 2014. The Department of Licensing's Fuel Tax Assessment No. 768M is REVERSED.

Issue No. 3: Cougar Den's Motion for Summary Judgment is GRANTED and the Department of Licensing's Motion for Summary Judgment is DENIED, with respect to Fuel Tax Assessment No. 768M-Amended. Cougar Den, Inc. did not import fuel to Washington State from May to September 2014 in violation of RCW 82.36 and 82.38 because Cougar Den, Inc. is exempt from these provisions as per Article III of the Treaty of 1855. Cougar Den, Inc. does not owe \$3,681,472.73 in taxes penalties and interest as of January 27, 2015. The Department of Licensing's Fuel Tax Assessment No. 775M-Amended is REVERSED.

3. TELEPHONIC ORAL ARGUMENT

Hearing Date: March 26, 2015, 9:00 a.m.

Administrative Law Judge: Courtney E. Beebe

Respondent: Cougar Den, Inc.

Representative: Andre Penalver, Stokes Lawrence Velikanje, Moore & Shore

Agency: Dept. of Licensing

Representative: Fronda C. Woods, Assistant Attorney General

Exhibits: Stipulated Exhibits 1-15 as attached to the Stipulation of Facts and Admissibility of Documents filed February 5, 2015 were admitted into record. The Attachments 1 through 5 to the Declaration of Andre M. Penalver, Attachment 1 to the Declaration of Christine Heglar, and Attachment 1 to the Supplemental Declaration of Andre M. Penalver, filed February 5, 2015, were admitted into record.

The Administrative Law Judge considered the following documents:

Doc. No.	Document Name	Document Date	No. Pages
1	Respondent's Motion for Summary Judgment and Attached Case Law	02/05/2015	21
2	Declaration of Andre M. Penalver in Support of Cougar Den's Motion for Summary Judgment and Attachments 1-5	02/05/2015	3
3	Department's Response to Respondent's Motion for Summary Judgment	03/04/2015	22
4	Declaration of Fronda Woods and Exhibits A - I	03/04/2015	4
5	Appendices to Department's Response to Respondent's Motion for Summary Judgment – Appendices J - P	03/04/2015	1
6	Cougar Den Inc.'s Reply in Support of Motion for Summary Judgment	03/16/2015	14
7	Declaration of Christine Heglar and Attachment 1	03/16/2015	3
8	Department's Motion for Summary Judgment and Arguments in Support Thereof	02/06/2015	19
9	Appendices to Department's Motion for Summary Judgment – Appendix A – I	02/06/2015	1
10	Cougar Den Inc.'s Response to Department's Motion for Summary Judgment and Attachments 1 - 7	03/06/2015	3
11	Department's Reply in Support of Department's Motion for Summary Judgment	03/13/2015	8
12	Stipulation of Facts and Admissibility of Documents – Stipulated Exhibits 1-15	02/05/2015	8
13	Motion to Amend Prehearing Conference Order	02/05/2015	3

4. FINDINGS OF FACT

The parties stipulated to 28 undisputed facts set forth in the Stipulation of Facts and Admissibility of Documents filed February 5, 2015. The Administrative Law Judge hereby adopts Stipulation of Facts 1 to 28 as Findings of Fact 1 through 28 as follows:

1. The Confederated Tribes and Bands of the Yakama Nation (referred to in this proceeding as "Yakama Nation"), is a federally recognized Indian tribe.

2. The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951 (hereafter "Treaty of 1855"). Its boundaries are described in Article II of the Treaty. The ceded lands of the Yakama Nation are described in Article I of the Treaty.
3. In entering into the Treaty of 1855, the Yakama Nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama Nation and is available to the public at <http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf>.
4. The Yakama Nation is a governmental authority that exercises jurisdiction within the Yakama Indian Reservation.
5. Richard "Kip" Ramsey is an enrolled member of the Yakama Nation.
6. Kip Ramsey is the owner and president of Respondent Cougar Den, Inc.
7. Cougar Den, Inc. is a private Yakama Indian-owned company incorporated under the laws of the Yakama Nation. The business office of Cougar Den, Inc. is located within the Yakama Reservation. Cougar Den Inc. is registered as a foreign corporation with the Washington Secretary of State.
8. Since February 2012, Cougar Den, Inc. has held a motor vehicle fuel dealer's license issued by the State of Oregon.
9. In May 2013, the Yakama Nation issued Bulk User Petroleum Permit 03-13 to Cougar Den Inc., with an expiration date of May 24, 2014. The Yakama Nation issued Yakama Nation Tribal Petroleum License PD-2014-0001 to Kip Ramsey, Sr., doing business as Cougar Den, Inc., with an expiration date of May 31, 2015.
10. During the time period involved in this proceeding, Cougar Den had never applied for or held any type of motor vehicle fuel license or special fuel license issued by the State of Washington.
11. In March 2013, Cougar Den began exporting motor vehicle fuel (gasoline) and special fuel (diesel fuel) from Oregon to locations within the Yakama Reservation. Cougar Den filed reports with the Oregon Department of Transportation, Fuels Tax Group, showing the number of gallons exported.
12. On October 2, 2013, the Yakama Tribal Council adopted Resolution T-002-14.

13. In November 2013, the Chairman of the Yakama Nation Tribal Council and the Director of the Washington Department of Licensing signed a document entitled "Fuel Tax Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel Between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington."
14. On December 9, 2013, the Department issued Assessment Number 756M to Cougar Den. Assessment Number 756M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to fuel exports that Cougar Den had reported to the Oregon Department of Transportation for the months of March through October 2013. Cougar Den timely appealed Assessment Number 756M. The Department referred the appeal to the Office of Administrative Hearings, which docketed the matter as 2014-DOL-0006. On October 15, 2014, the Director of the Department issued a Final Order in Docket No. 2014-DOL-0006 (Fuel Tax Assessment No. 756M). On November 14, 2014, Cougar Den timely filed a petition for judicial review of the Final Order in the Yakima County Superior Court, Case No. 14-2-03851-7.
15. On February 19 and April 1, 2014, the Department issued Assessment Numbers 760M and 761M to Cougar Den. Assessment Numbers 760M and 761M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to fuel exports that Cougar Den had reported to the Oregon Department of Transportation for the months of November 2013 through February 2014. Cougar Den timely appealed both assessments. The Department referred the appeals to the Office of Administrative Hearings, which docketed the matters as 2014-DOL-0012 and 2014-DOL-0020, and consolidated them. An Administrative Law Judge issued an Initial Order in favor of Cougar Den. The Department's Petition for Review of Initial Order is currently pending.
16. On March 13, 2014, the Yakama Nation General Council approved Motion GCM-10-2014. On March 21, 2014, the Yakama Nation General Council adopted Resolution GC-03-2014.
17. In July 2014, the Chairman of the Yakama Nation Tribal Council and the Director of the Washington Department of Licensing signed a document entitled "Mutual Agreement to Terminate the 2013 Fuel Tax Agreement Between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington."

18. The following table shows the number of gallons that Cougar Den exported from Oregon to Wapato, White Swan, and Toppenish between March 2014 and May 2014, as reported by Cougar Den to the Oregon Department of Transportation.

Month	Motor Vehicle Fuel (Gasoline) (gallons)	Special Fuel (Diesel Fuel) (gallons)
March 2014	578,808	355,789
April 2014	594,819	354,498
May 2014	712,301	371,315
TOTALS	1,885,928	1,081,602

19. The following table shows the number of gallons that Cougar Den exported from Oregon to Wapato, White Swan, and Toppenish between June 2014 and September 2014, as reported by Cougar Den to the Oregon Department of Transportation.

Month	Motor Vehicle Fuel (Gasoline) (gallons)	Special Fuel (Diesel Fuel) (gallons)
June 2014	655,527	401,302
July 2014	801,612	448,578
August 2014	1,104,882	461,774
September 2014	1,018,400	486,657
TOTALS	3,580,421	1,798,311

20. Wapato, White Swan, and Toppenish are within the Yakama Reservation.
21. The trucks that transported the petroleum products described in Paragraphs 18 and 19 from Oregon to the Yakama Reservation remained at all times in the state of Oregon, the Ceded Area of the Yakama Nation, or the Yakama Reservation. The trucks left Interstate 84 at Biggs Junction, Oregon, and took U.S. Highway 97 from there to the Yakama Reservation. For some shipments, Cougar Den used trucks that it owns. For other shipments, Cougar Den contracted with non-Yakama carriers.
22. Cougar Den did not pay Washington fuel taxes on the fuel described in Paragraphs 18 and 19 above.

23. Cougar Den reported to the Oregon Department of Transportation that it sold the fuel described in Paragraphs 18 and 19 to Kip Ramsey, Kip Ramsey III, Delbert Wheeler, or Ty Young, all of whom are enrolled members of the Yakama Nation. Kip Ramsey III is the Chief Operating Officer for Ramsey Companies, which includes Cougar Den, Inc. Ramsey Companies, LLC is registered as a Washington limited liability company with the Washington Secretary of State.
24. On June 27, 2014, the Department issued Assessment Number 768M to Cougar Den. Assessment Number 768M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to the fuel described in Paragraph 18 above.
25. Cougar Den made a timely appeal of Assessment 768M through a Letter of Appeal, dated July 7, 2014, sent to the Department.
26. On November 20, 2014, the Department issued Assessment Number 775M to Cougar Den. On January 27, 2015, the Department issued Assessment Number 775M-Amended to Cougar Den. As amended, Assessment Number 775M described the taxes, penalty, and interest the Department asserted were owed through February 28, 2015, to the State of Washington with respect to the fuel described in Paragraph 19 above. Assessment Number 775M-Amended also asserted that taxes, penalty, and interest were owed with respect to an additional 3250 gallons of motor vehicle fuel not described in Paragraphs 18 or 19 above.
27. Cougar Den made a timely appeal of Assessment 775M through a Letter of Appeal, dated December 8, 2014, sent to the Department.
28. The Department referred the appeals to the Office of Administrative Hearings. The Office of Administrative Hearings docketed the appeal of Assessment 768M as 2014-DOL-0036. On January 2, 2015, Administrative Law Judge Debra Pierce issued a Notice of Prehearing Conference for Assessment 768M. The Administrative Law Judge conducted a prehearing conference on January 14, 2015. During the prehearing conference, the parties agreed to consolidate the appeal in Assessment 768M with the appeal in Assessment 775M. The Administrative Law Judge issued a Notice of Hearing and Prehearing Conference Order on January 27, 2015.

In addition to stipulated facts 1-28, the Administrative Law Judge finds as follows:

29. The Director of the Department of Licensing entered a Final Order in Docket No. 2014-DOL-0006 on October 15, 2014, affirming that Cougar Den was required to pay taxes, penalties and interest as per Fuel Tax Assessment 756M. On

November 18, 2014, Cougar Den petitioned for judicial review of the Final Order in Yakima County Superior Court, Case No 14-2-03851-7. This matter is scheduled for Oral Argument on July 10, 2015.

30. The Department referred Appeals of Fuel Tax Assessments 760M and 761M to the Office of Administrative Hearings for entry of an Initial Order. The Office of Administrative Hearings entered an Initial Order in Docket Nos. 2014-DOL-0012 and 2014-DOI-0020 on December 15, 2014, reversing Fuel Tax Assessments 760M and 761M. The Department has petitioned the Director of the Department for review the December 15, 2014, Initial Order.
31. The Department has requested entry of an Initial Order in this matter, Docket Nos. 2014-DOL-0036 and 2015-DOL-0002, addressing Fuel Tax Assessments 768M and 775M-Amended. On January 27, 2015, the Department amended Assessment 775M to correct an error and to update the interest calculations. (Stipulated Exhibit 8.) The Department filed a Motion to Amend Prehearing Conference Order on February 2, 2015, requesting that the Administrative Law Judge revise the Prehearing Conference Order and record to reflect the amendment of Fuel Tax Assessment 775M.
32. The Department has requested entry of an Initial Order in Docket Nos. 02-2015-DOL-00001 and 03-2015-DOL-00003, addressing Fuel Tax Assessments 777M and 779M. These matters are set for oral argument on May 21, 2015.
33. The issues presented by 2014-DOL-0006, 2014-DOL-0012, 2014-DOL-0020, 2014-DOL-0036, 2015-DOL-0002, 02-2015-DOL-00001 and 03-2015-DOL-00003 are the same, save for the dates and amounts of the fuel purchased in Oregon and transported to the Yakama Reservation.
34. The Department issued a denial of a motor vehicle fuel export license application submitted by Cougar Den, Inc. Cougar Den has appealed the denial of the license application and the matter is pending before the Office of Administrative Hearings as Docket No. 03-2015-00004. This matter is set for oral argument on July 23, 2015.
35. Cougar Den has not sold fuel purchased in Oregon to non-members of the Yakama Nation. However, the members of the Yakama Nation who purchased fuel from Cougar Den have sold the fuel to non-members of the Yakama Nation.
36. As referenced in paragraph 16 above, on March 13, 2014, the Yakama Nation General Council approved Motion GCM-10-2014. On March 21, 2014, the Yakama Nation General Council adopted Resolution GC-03-2014, rejecting the 2013 Fuel Tax Agreement. The 2013 Fuel Tax Agreement was rejected by

signature of both the Director of the Department and the Yakama Nation in July 2014.

37. During the period covered by Fuel Tax Assessments 768M and 775M-Amended, the Yakama Nation and the Department did not have an agreement in place regarding fuel tax collection or purchasing from only Washington-licensed fuel suppliers who pay fuel taxes to the Department, because the Yakama Nation Council did not at any time ratify the proposed 2013 Fuel Tax Agreement.

5. CONCLUSIONS OF LAW

Based on the facts above, I make the following conclusions:

Jurisdiction

1. The Administrative Law Judge has jurisdiction to hear this matter pursuant to Revised Code of Washington (RCW) 34.05 and chapter 10-08 Washington Administrative Code (WAC) RCW 82.36.045 and RCW 82.38.170.

Motion to Amend Prehearing Conference Order

1. On January 27, 2015, the Department amended Assessment 775 M to correct an error and to update interest calculations. (Stipulated Exhibit 8.) The Department filed a Motion to Amend Prehearing Conference Order on February 2, 2015, requesting that the Administrative Law Judge revise the prehearing Conference Order and record to reflect the amendment of Fuel Tax Assessment 775M. Cougar Den did not object to the Department's Motion to Amend Prehearing Conference Order and stipulated to entry of Fuel Tax Assessment 775M-Amended into the record. The Department's motion, then, should be granted and the Prehearing Conference Order is amended to include Fuel Tax Assessment 775M.

Motions for Summary Judgment – Applicable Law

1. 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. WAC 10-08-135.
2. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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.' CR 56(c)." *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 584, 192 P.3d 306 (2008).

3. "The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party." *Korslund v. Dycorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005) (citations omitted).
4. "Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented." *Korslund*, 156 Wn.2d at 177.
5. "The burden is on the moving party to demonstrate there is no issue as to a material fact, and the moving party is held to a strict standard." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, 828 P.2d 549 (1992) (citation omitted).
6. If the moving party meets this initial showing and, as here, does not have the burden of proof at the forthcoming evidentiary hearing on the merits, then the nonmoving party must set forth specific facts that remain at issue to establish that here is a genuine issue to be resolved at the forthcoming hearing. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989) (citations omitted).

Analysis

1. When fuel tax assessments are issued, the assessments are presumed to be correct, and the burden is on Cougar Den to show otherwise. First, RCW 82.36.045(2) provides: "[a]n assessment made by the Department under this subsection or subsection (1) of this section is presumed to be correct, In any case where the validity of the assessment is questioned, the burden is on the person who challenges the assessment to establish by a fair preponderance of evidence that it is erroneous or excessive as the case may be." Further, RCW 82.38.170(3), also states: "[a]n assessment made by the department pursuant to this subsection or to subsection (2) of this section shall be presumed to be correct, and in any case where the validity of the assessment is drawn in question, the burden shall be on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive as the case may be."
2. Thus, the burden is on Cougar Den to show by a preponderance of the evidence that Fuel Tax Assessments 775M-Amended and 768M are erroneous.
3. In the Initial Order issued on December 15, 2014, in Dockets 2014-DOL-0012 and 2014-DOL-0020 the Administrative Law Judge concluded that the Final Order of Director issued on October 15, 2014 in 2014-DOL-0006 was not precedential. The Department asserts again in this case that the Director of the Department of Licensing is the issuer of final orders and that a Director's October

15, 2014 Final Order is binding precedent on all subsequent initial orders issued by the Administrative Law Judge regarding the same issue of law.

4. However, when charged with the task of entering an initial order by the Department, the Administrative Law Judge must enter an initial order that includes a statement of findings and legal conclusions and the reasons therefore in the particular case presented. RCW 34.12.060 and 34.05.461; see also *Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981). While the Administrative Law Judge must consider final orders issued by the Director of the Department of Licensing, the Administrative Law Judge is not required by either statute nor rule to adopt the legal conclusions of those final orders in every case, particularly if the legal conclusion set forth in the final order is an incorrect application or interpretation of the law. Thus, the Department's request that the Administrative Law Judge conclude that the Director's Final Order issued October 15, 2014, in Docket No. 2013-DOL-0006 is controlling in this case, must be denied. Instead, the Administrative Law Judge shall consider the October 15, 2014 Director's Final Order to be persuasive legal authority that supports the arguments and positions of the Department in this case.
5. Regardless, the structure of the State of Washington fuel tax process is correctly set forth in detail in the Final Order of Director issued October 15, 2014, in Docket No. 2013-DOL-0006, and is as follows:

"Washington State Law imposes a tax upon fuels used for the propulsion of motor vehicles upon the highways of the state. Chapter 82.36 RCW governs taxes on motor vehicle fuel, or gasoline. RCW 82.36.010(19); WAC 308-72-800(3). Chapter 82.38 RCW governs taxes on "special fuel," which includes diesel fuel. WAC 308-77-005(1); see RCW 82.38.020(23). Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state. RCW 82.36.020(2) and 82.38.030(7). The current tax rate is 37.5 cents per gallon. RCW 82.36.025 and 82.38.030.

Fuel is "imported" when it is brought into this state by a means of conveyance other than the fuel supply tank of a motor vehicle. RCW 82.36.010(10) and 82.38.020(12). A person who causes fuel to be imported by a means other than the bulk transfer-terminal system, owns the fuel 82.36.010(16) and 82.38.020(26). The "bulk transfer-terminal system" means the fuel distribution system consisting of refineries, pipelines, vessels, and terminals. RCW 82.36.010(4) and 82.38.020(4). Fuel in a railcar, trailer, truck, or

other equipment suitable for ground transportation is not in the bulk transfer-terminal system. RCW 82.36.010(4) and RCW 82.38.020(4).

Fuel imported into this state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce is exempt from tax. RCW 82.36.230; see RCW 82.38.180(2). Fuel distributed to a federally recognized Indian tribal reservation located within the State of Washington is not considered exported outside this state. RCW 82.36.230 and 82.38.180(2).

Fuel taxes are collected through a licensing system administered by the Department of Licensing. It is unlawful for a person to engage in business in Washington as a motor vehicle importer or special fuel importer without a license from the Department. RCW 82.36.080(1) and 82.38.090(1). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18).

Licensed importers are liable for taxes on fuel imported into this state. RCW 82.36.026(3) and 82.38.035(3). License holders must submit monthly fuel tax returns to the Department documenting their removals and imports. RCW 82.36.031 and 82.38.150. Payment of tax is required when the reports are submitted. RCW 82.36.035 and 82.38.160. Penalties and interest are due if the tax is not paid on time. RCW 82.36.040; 82.36.045; and 82.38.170.'

Persons who import fuel into the state without a license are subject to the same taxes and penalties as licensees. RCW 82.36.100; see RCW 82.36.045(2); 82.36.080(3); and 82.38.170(3). A person who imports motor vehicle fuel into the state without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3).

The Department is authorized to assess taxes, penalties, and interest. RCW 82.36.045; 82.36.080(3); and 82.38.170."

(Stipulated Exhibit 10).

6. The Department's position is that once Cougar Den's fuel trucks cross from Oregon into Washington and over Yakama ceded land, the fuel becomes subject to Washington fuel taxes as per the above statutes because Cougar Den has imported fuel into Washington for sale, regardless of whether Cougar Den transports the fuel directly to the Yakama Reservation or sells the fuel only to

Yakama tribe members. Alternately, the Department implies that the 2013 Fuel Tax Agreement requires the Yakama Nation and its companies, like Cougar Den, to pay fuel tax on imported fuel.

7. Cougar Den does not assert that the statutory scheme is invalid. Instead, Cougar Den argues that this valid statutory scheme is preempted by Article III of the Yakama Nation Treaty and therefore Cougar Den is not required to pay fuel taxes for fuel transported from out of state, across ceded lands, to the Yakama Reservation and sold to Yakama tribe members. Cougar Den also asserts that the 2013 Fuel Tax Agreement required ratification by the Yakama Nation Council, not just the Chairman of the Council, and that the Yakama Nation Council rejected the 2013 Fuel Tax Agreement, and therefore Cougar Den as a Yakama Nation business was not required to pay fuel tax as per the 2013 Fuel Tax Agreement.
8. Thus, the first question of law presented is whether Article III of the Treaty of 1855 preempts Washington's fuel tax statutes under the facts of this case.
9. Article III of the Treaty of 1855 states: "And provided, That, if 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.*" (Stipulated Exhibit 1 (Emphasis Added).)
10. According to *Yakama Indian Nation v. Flores*, 955 F.Supp.1229, 1237-38 (E.D. Wash. 1997), for the Yakamas, "[t]ravel was particularly important for the purpose of trade," because the Yakamas "proclivity for trade was equal to that of the whites, as the Yakamas constantly move goods back and forth between the Coast and Interior and obtained access to goods from the Plains." Thus, the United States government promised the Yakamas that they would "have the same liberties outside the Reservation . . . to go on the roads to market." *Yakama Indian Nation*, 955 F. Supp. at 1244.
11. In interpreting a treaty with an Indian Nation, courts must interpret the treaty's terms as "the Indians would have understood them." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-631, 90 S.Ct. 1328 (1970). Accordingly, "any doubtful expressions in the Treaty should be resolved in the Yakama's favor." *Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998) (Cree II).
12. Cougar Den relies on two cases in support of its position that Article III of the Treaty of 1855 preempts Washington law regarding fuel tax assessment: *U.S. v.*

Smiskin, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (*Cree II*).

13. In *Smiskin*, the issue was whether Yakama tribal members must “notify” the State before transporting unstamped cigarettes that were not owned or produced by the Yakama tribe from a location outside the Yakama Reservation to the Yakama Reservation. The State used the notification requirement “for the purpose of enforcing the lawful tax on sales [of cigarettes] to non-Indians.” 487 F.3d at 1263. The Ninth Circuit concluded that “the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent.” *Id.* at 1266. The Ninth Circuit found for *Smiskin*, concluding that the State could not require a Yakama tribal member to notify the State about use of state highways to transport unstamped cigarettes simply because the State could collect tax on sales of cigarettes from Yakama Nation members to non-Indians.
14. Cougar Den argues that this matter is the same as *Smiskin*: the State of Washington cannot require a Yakama tribal member to have a license nor pay taxes on fuel transported across ceded Yakama land because the fuel is sold only to Yakama Nation members by a Yakama Nation member and the Yakama Nation members have a right to travel across ceded Yakama land for purposes of trade as per Article III of the Treaty of 1855.
15. The Department attempts to distinguish *Smiskin*, arguing that it involved a criminal penalty, and a criminal penalty is not at issue in this matter. The Department also argues that *Smiskin* involved the regulation of the transportation of a product, not the regulation of the fuel businesses and imposing a tax on fuel at a particular point in the distribution chain.
16. The Administrative Law Judge agrees that Cougar Den’s interpretation of the *Smiskin* case is correct. *Smiskin*’s holding means that the State, here the Department, cannot insert itself into the right of Cougar Den to travel across ceded lands to the Yakama Reservation by imposing a tax on the good transported or imposing a license requirement on the tribal member to conduct the activity.
17. Cougar Den also relies on the *Cree II* case. In that case, the Ninth Circuit reviewed an attempt by the State of Washington to regulate the transportation of timber on and off the Yakama Reservation. *Cree II*, 157 F.3d at 765. Members of the Yakama Nation operated logging trucks that hauled logs from the Yakama Reservation to mills outside the Reservation. *Id.* at 768. The Ninth Circuit held that the Treaty clause must be interpreted to guarantee the Yakamas the right to

transport goods to market over public highways without payment of fees for that use. *Id.* at 769.

18. Cougar Den claims that this matter is similar to *Cree II*, in that a Yakama Nation member is using the highways to transport goods to market and that the State cannot charge a fee for that use.
19. The Department distinguishes the *Cree II* case, arguing that the fuel tax and license requirement are not a charge for the use of public highways or a restriction on use, but instead a regulation of off-reservation fuel industry activities in the State of Washington.
20. The Administrative Law Judge agrees that Cougar Den's interpretation of the *Cree II* case is correct. *Cree II*'s holding stands for the proposition that Cougar Den is simply transporting goods over a public highway to the reservation and the Department cannot interfere with that activity by taxing the good transported (whether it be lumber or fuel) or requiring a license to conduct the activity that is for the purpose of trade as defined in Article III of the Treaty of 1855.
21. Given the holdings of both *Smiskin* and *Cree II*, as well as the plain language of Article III of the Treaty of 1855, under the facts of this case RCW 82.36.020 and 82.36.030 are preempted and the Department issued Fuel Tax Assessments 768M and 775M- Amended in error.
22. Notably, in addition to Article III of the Treat of 1855, RCW 82.36.230 provides that "[t]he provisions of this chapter requiring the payment of taxes do not apply to motor vehicle fuel imported into the state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce." (See, *United States Supreme Court held in Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 460 (1995), holding that Oklahoma may not apply its fuel tax "if its legal incidence falls on a Tribe or its members for sales made within Indian country").
23. The Department acknowledges that a bulk supplier transporting fuel through the State of Washington to another state would not be subject to the fuel tax or license requirement. For example, a purchase of bulk fuel in Oregon destined for Idaho and being hauled through the State of Washington to Idaho is not taxed by the Department and a license is not required, because doing so would interfere with interstate commerce in violation of RCW 82.36.230.
24. It is difficult to see how the activities of Cougar Den differ from the acts of other fuel transporters who obtain fuel in Oregon and transport the fuel through Washington to another destination outside of Washington. Cougar Den obtains the fuel out of state and transports it directly to the Yakama Reservation, land

that is consistently legally characterized as the “foreign” and “sovereign” nation of the Yakama tribe.

25. Thus, given the plain language of RCW 82.36.230 and the facts of this case, even if Article III of the Treaty of 1855 does not preempt RCW 82.36.020 and 82.38.020, the Administrative Law Judge concludes that RCW 82.36.230 exempts Cougar Den from the fuel tax and licensing requirements because Cougar Den imports fuel into the State of Washington and sells the fuel in interstate or foreign commerce to Yakama tribal members on the Yakama Reservation. The Department issued Fuel Tax Assessments 768M and 775M-Amended in error.
26. The second question of law is whether the 2013 Fuel Tax Agreement required Cougar Den to pay fuel tax to the Department.
27. The Department implies that the 2013 Fuel Tax Agreement between the Director of the Department and the Chairman of the Yakama Tribal Council required Cougar Den to pay fuel taxes on the imported from Oregon to the Yakama Reservation. However, a review of the terms of the 2013 Fuel Tax Agreement shows that it was not binding until ratified by the Yakama Tribal Council. The Yakama Tribal Council did not ratify the 2013 Fuel Tax Agreement and it was rescinded in total by the Tribal Chairman in July 2014. As such, there was no agreement to pay fuel taxes by Cougar Den or the Yakama Nation. Moreover, 2013 Fuel Tax Agreement appears to address a number of other taxing issues, such as the collection of fuel tax for sales to non-tribal members by Yakama Nation members.
28. Under the circumstances as presented, the Administrative Law Judge concludes that the 2013 Fuel Tax Agreement has no bearing on resolution of the issues presented in this case because the document was not ratified by the Yakama Nation Council. The Department issued Fuel Tax Assessments 768M and 775M-Amended in error.

6. ORDER

1. The Department of Licensing’s Motion to Amend Prehearing Conference Order to include consideration of Fuel Tax Assessment No. 775M-Amended, is GRANTED.
2. Cougar Den’s Motion for Summary Judgment is GRANTED and the Department’s Motion for Summary Judgment is DENIED. The Department of Licensing’s Fuel Tax Assessment No. 768M is REVERSED as set forth above.

3. Cougar Den's Motion for Summary Judgment is GRANTED and the Department's Motion for Summary Judgment is DENIED. The Department of Licensing's Fuel Tax Assessment No. 775M-Amended is REVERSED as set forth above.

Dated: May 6, 2015.



Courtney E. Beebe
Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

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 petition must be filed with the Director of Licensing, P.O. Box 9020, Olympia, WA 98504-9020 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. A 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. Any party to this proceeding may file a reply to a petition for review. The reply must be filed with the Director of Licensing at the address above within ten (10) days from the date the petition for review was mailed.

