STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
916-323-3142• FAX 916-323-3387
www.boe.ca.gov

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Interim Executive Director

March 9, 2011

Cheryl Schmit
Director
Stand Up For California
P.O. Box 355
Penryn, CA 95663

Re: Tax Opinion Request 10-475
Application of Sales and Excise Taxes to Fuels Imported into California and Sold at Indian-Owned Service Stations

Dear Ms. Schmit:

This letter is in response to your email of November 22, 2010, requesting a legal opinion from the Board of Equalization (BOE) concerning taxes imposed on fuel that is imported into the state of California for sale at Indian-owned retail service stations located on tribal land.[1] You question, in particular, the import of fuel into California by an Indian-run company that is reportedly chartered under the bylaws of the Yakama Tribe in Washington State.

In order to provide a thorough and complete explanation of the taxes that are imposed on fuel imported into California, as they pertain to Indians (as defined below),[2] generally, I will first explain the imposition of sales and use taxes on motor vehicle fuel (gasoline) and diesel fuel, including the requirement to pay prepaid sales tax, under the California Sales and Use Tax Law,[3] and the imposition of excise tax on gasoline and diesel fuel, under to the California Motor Vehicle Fuel Tax Law[4] and Diesel Fuel Tax Law,[5] respectively. I will then discuss our understanding of how the Treaty with the Yakama, 1855[6] affects the imposition of those taxes.

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[1] You refer to "non-certified gas" and mention concerns about possible violation of federal or state clean air and other environmental laws. Please note that this letter does not address any of these issues, as they are not within the purview of the BOE. This letter addresses only the taxes imposed on fuels that are administered by the BOE, namely, sales tax and excise taxes on motor vehicle fuel and diesel fuel. Fuel that enters California prior to payment of the excise tax on that fuel is referred to as "ex-tax" fuel.

[2] The term "Indian" is used throughout federal and state statutory and case law. Accordingly, its use here is for ease of reference only and is not meant to suggest any disrespect for Native American people.

[3] Part 1 (commencing with section 6001) of division 2 of the Revenue and Taxation Code.

[4] Part 2 (commencing with section 7301) of division 2 of the Revenue and Taxation Code.

[5] Part 31 (commencing with section 60001) of division 2 of the Revenue and Taxation Code.

[6] Treaty with the Yakima, 1855, June 9, 1855, 12 Stat. 951, Native American People Treaties. In 1994, the spelling of "Yakima" was officially changed to "Yakama." (*Ramsey v. United States* (2002) 302 F.3d 1074, 1076, fn. 1 (*Ramsey*).)

DISCUSSION

Sales and Use Tax

Generally, under California law, the legal incidence (or imposition) of California sales tax is upon the retailer of tangible personal property. (Rev. & Tax. Code, § 6051.)[7] However, federal law is relevant with respect to the legal incidence of sales tax on retail sales that take place on an Indian reservation, and federal law considers the legal incidence of California sales tax to be upon the ultimate purchaser, not the retailer. (See *Diamond National Corp. v. State Bd. of Equalization* (1976) 425 U.S. 268.)

The imposition of sales and use tax on sales of tangible personal property involving Indians that occur on Indian reservations located in California is clarified and explained by California Code of Regulations, title 18, section (Regulation or Reg.) 1616. In Regulation 1616, subdivision (d), "Indian" is defined to mean "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior." (Reg. 1616, subd. (d)(2).) Indian organizations, which include Indian tribes and tribal organizations and partnerships, all of whose members are Indians, and corporations organized under tribal authority and all wholly owned by Indians, are entitled to the same exemption as Indians. (*Ibid.*) The term "reservation" means "reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian." (*Ibid.*)

> Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. (Reg. 1616, subd. (d)(3)(A)1; also subd. (d)(3)(B)1 [regarding sales by non-Indian retailers to Indians who reside on a reservation].)

Since, under federal law, California's sales tax is considered to be imposed on the purchaser, and, since sales involving Indians on a reservation are decided under federal law, an on-reservation sale by any retailer to an Indian who lives on a reservation or to an Indian tribe is immune from state sales tax. (See, e.g., *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation* (1976) 425 U.S. 463.) Accordingly, in general, sales tax does not apply to sales of tangible personal property, including gasoline and diesel fuel, by an on-reservation Indian or non-Indian retailer to an Indian who resides on a reservation.[8] (See Reg. 1616, subd. (d)(3)(A)1 & (B)1; see also § 6352 [exempting from imposition of sales or use tax sales the state is prohibited from taxing under the Constitution and laws of the United States].)

On the other hand, California "may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the [state] tax." (*Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 151.) Therefore, Indian and non-Indian retailers are required to collect and remit to the BOE use tax[9] on on-reservation sales of tangible personal property, including gasoline and diesel fuel, to non-Indians and to Indians who do not reside on a reservation.[10] (Reg. 1616, subd. (d)(3)(A)2 & (B)2.)

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[7] All future statutory references are to the California Revenue and Taxation Code unless indicated otherwise.

[8] However, an Indian is required to pay use tax if the gasoline or diesel fuel purchased is used off the reservation more than it is used on the reservation. (Reg. 1616, subd. (3)(A)1 & (B)1.)

[9] A non-Indian retailer may, instead, collect sales tax reimbursement. (Reg. 1616, subd. (d)(3)(B)2.)

[10] However, Indian retailers are not required to collect use tax on the sale of meals, food, or beverages that are sold for consumption on the Indian reservation. (Reg. 1616, subd. (d)(3)(A)2.)

Prepaid Sales Tax

With regard to gasoline[11] and diesel fuel, regardless of who the retailer or purchaser is, the BOE collects sales tax on the sale of these fuels differently than it collects sales tax on the sale of other tangible personal property. In general, the supplier of fuel, which would include the person who imports fuel into the state,[12] is required to collect a prepayment of a portion of the retail sales tax from the person to whom the gasoline is first sold. (§ 6480.1, subd. (a).) If no sale occurs at the time of imposition of the fuel tax, the supplier must prepay the retail sales tax on that fuel to the BOE. (*Ibid.*) Each subsequent seller of the fuel, other than the retailer, is required to collect the prepaid sales tax from the purchaser of the gasoline. (§ 6480.1, subd. (a).)

Normally, the retailer collects and remits to the BOE sales tax reimbursement on the retail sale of the fuel and takes a credit, on his or her sales and use tax return, for the amount of sales tax that was prepaid against the amount of sales tax due for the period in which the retail sale was made. (§ 6480.1, subd. (d).) However, since California sales tax is not imposed on on-reservation Indian retailers, an Indian retailer may obtain a refund from the BOE of the sales tax that he or she has prepaid on the gasoline or diesel fuel (§ 6480.6, subd. (a)(2)) or apply the prepaid sales tax as a credit, on its sales and use tax return, against any use tax that it owes as a result of sales or tangible personal property to non-Indians and Indians that do not reside on a reservation (§ 6480.1, subd. (d)).

Liability for Prepayment of Sales Tax Follows Imposition of Fuel Tax

A supplier is required to collect prepayment of retail sales tax from the person to whom the fuel is sold any time the gasoline or diesel fuel tax is imposed or would be imposed on any removal,[13] entry,[14] or sale[15] of fuel in this state. (§ 6480.1, subd. (a).[16]) Each supplier is required to report and pay the prepayment amounts collected to the Board. (*Ibid.*) For purposes of this discussion, the analysis for determining whether a supplier who is also an Indian must collect and pay to the BOE prepaid sales tax on fuel is the same as the analysis for determining whether the Indian supplier is subject to imposition of the excise tax on that fuel, which also relies on subdivision (d) of Regulation 1616.

Gasoline and Diesel Fuel Excise Taxes

In California, the imposition of gasoline and diesel fuel taxes is different from the imposition of the sales tax. Under the motor vehicle fuel and diesel fuel tax laws, the excise tax is imposed on the supplier, who is required to pay the tax to the BOE and who typically passes on the tax as an expense that is included in the cost of the fuel. (E.g., §§ 7362, 7363, 7366, 7368,

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[11] Also, aviation gasoline and aircraft jet fuel.

[12] Under the motor vehicle and diesel fuel tax laws, a "supplier" may one (or more) of any of the following: a "blender" (§§ 7308, 60012); an "enterer" (§§ 7311, 60013); a "position holder" (§§ 7332, 60010); a "refiner" (§§ 7334, 60011); a "terminal operator" (§§ 7340, 60009); or a throughputter (§§ 7341, 60035). (§§ 7338, 60033, respectively.)

[13] "Removal" means, among other things, "any physical transfer of [gasoline or diesel] fuel." (§§ 7336 & 60007.)

[14] "Entry" means, as is relevant here, "the importing of [gasoline or diesel] fuel into this state." (§§ 7312 & 60021.)

[15] "Sale" means, as is relevant here, "the transfer of title to [gasoline or diesel fuel] to a buyer for consideration, which may consist of money, services or other property." (§§ 7337, subd. (a) & 60048, subd. (a).)

[16] "At <u>any time that motor vehicle fuel tax or diesel fuel tax is imposed</u> or would be imposed, but for [certain exemptions], or . . . would be deemed to be imposed, on any removal, entry, or sale in this state of motor vehicle fuel, aircraft jet fuel, or diesel fuel, <u>the supplier shall collect</u> prepayment of retail sales tax from the person to whom the [fuel] is sold." (§ 6480.1, subd. (a) [emphasis added].)

60051-60055, 60061.) When an on-reservation Indian retailer purchases tax-paid[17] fuel and then sells the fuel to an Indian who resides on a reservation, the excise tax itself is not imposed on either the on-reservation Indian retailer or the Indian purchaser. Thus, unless the Indian purchaser uses the fuel in an exempt manner for which the purchaser may obtain a refund of the tax included in the cost of the fuel (e.g., for fuel used off public highways), neither the Indian retailer nor the Indian purchaser is exempt from paying the full tax-included cost of the fuel, even though the retail sale of the fuel takes place on a reservation. In other words, it does not matter to whom a supplier sells the fuel; any purchaser, Indian or non-Indian, pays a price for the fuel that includes the excise tax imposed on the supplier.

Whether the excise tax is imposed on an Indian supplier

As is relevant here, California fuel taxes are generally imposed on all suppliers who import fuel into California (supplier/enterer). However, with respect to Indian supplier/enterers, the "'who' and the 'where' of the challenged tax have significant consequences." (*Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 101 (*Wagnon*).) In *Wagnon*, the United States Supreme Court addressed two issues with respect to state taxation of Indians and Indian-owned enterprises, both of which are relevant here: (1) who bears the legal incidence of the tax; and (2) where does the transaction that gives rise to the tax liability occur? (*Id.* at pp. 101-102.)

The Court first concluded that, under the Kansas fuel tax law, the legal incidence of the fuel tax is imposed on the distributor at the time that the distributor first receives the fuel, not when the fuel is subsequently used, sold, or delivered. (*Wagnon*, *supra*, 546 U.S. at pp. 102-110.) The Court then determined that if, based on earlier decisions, "a State may apply a non-discriminatory tax to Indians who have gone beyond the boundaries of the reservation," then a state may impose a nondiscriminatory fuel tax on non-Indian distributors[18] "as a result of an off-reservation transaction." (*Id.* at p. 113.) The Court's analyses of these two issues apply here, as follows.

Who bears the legal incidence of fuel tax in California?

Under the motor vehicle fuel and diesel fuel tax laws,[19] the incidence of the tax is imposed, with respect to this inquiry, on "suppliers." As noted above, "supplier" is defined to include, among others, a person who is an "enterer." (§§ 7338 & 60033.) As is relevant here:

> "Enterer" includes any person who is the importer of record (under federal customs law) with respect to [gasoline or diesel] fuel. . . . If there is no importer of record of [gasoline or diesel] fuel entered into this state, the owner of the [gasoline or diesel] fuel at the time it is brought into this state is the enterer. (§§ 7311 & 60013.)

Further, "[e]ntry means the importing of [gasoline or diesel] fuel into this state" (§§ 7312 & 60021), and a tax is imposed on each gallon of fuel subject to tax (§§ 7360 and 60050) and is, as is relevant here, imposed on:

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[17] As defined in sections 7345 and 60048.1.

[18] In *Wagnon*, the distributor in question is non-Indian.

[19] Generally, the text of motor vehicle fuel and diesel fuel tax law sections dealing with the same matters is the same.

> The entry of [gasoline or diesel] fuel into this state for sale, consumption, use, or warehousing if either of the following applies:
>
> (1) The entry is by bulk transfer and the enterer is not a licensed supplier [or diesel fuel registrant].
> (2) The entry is not by bulk transfer.[20] (§§ 7363, subd. (b) & 60052, subd. (b).)

Finally, "[e]very enterer shall pay tax on [gasoline or diesel] fuel imported into this state as provided in subdivision (b) of [Sections 7363 and 60052, respectively]." (§§ 7366 & 60061.)

Just as was determined by the *Wagnon* court, not only is the language of the motor vehicle fuel and diesel fuel tax laws "determinative of who bears the legal incidence of a state excise tax," but also, in looking at "a 'fair interpretation of the taxing statute as written and applied,'" it is reasonable to conclude that the legal incidence of the fuel tax in California is on the supplier/"enterer." (*Wagnon, supra*, 546 U.S. at pp. 102-103 [citation omitted].) First, although enterers may pass along the cost of the fuel tax to their customers, in that they are not prohibited from doing so, they are also not required to do so. (See *id.* at p. 102.) In fact, there is no mention of passing on, or not passing on, the cost of the tax in either law.

Second, the California enterer is liable for the fuel tax upon entry of the fuel into California, before the fuel is ever sold or delivered to a distributor or retailer in California.[21] (Cf. *Wagnon, supra*, 546 U.S. at p. 108.) It is the supplier's off-reservation entry of the fuel, and not any subsequent event, that establishes tax liability. (Cf. *id.* at p. 106.) The incidence of tax is imposed on the California enterer, at the time of entry, despite subsequent allowances for deductions or exemptions "for certain postreceipt transactions" in the two laws. (See *ibid.*; see also, e.g., §§ 7401 & 60100 [exemptions].) As the Court noted:

> [T]he distributors' off-reservation receipt of motor fuel is the event that gives rise to tax liability. . . . A distributor's subsequent delivery of fuel to [an Indian retailer located on a reservation] or any other fuel retailer in Kansas has *no effect* on tax that it has already paid in a preceding month.[22] . . . . And a distributor must pay the tax even if the fuel is *never* delivered. (*Wagnon, supra*, 546 U.S. at p. 109, fn. 4 [emphasis in original].)

In sum, in keeping with the analysis in *Wagnon*, a California enterer's off-reservation importation of motor vehicle or diesel fuel is "the event that gives rise to tax liability." To paraphrase *Wagnon*, it is clear that it is the California enterer, rather than the California distributor or retailer, that is liable to pay the fuel tax. (See *id.* at p. 103.)

<u>Where does the transaction that gives rise to the tax liability occur?</u>

With respect to this inquiry, the relevant transaction that gives rise to fuel tax liability occurs when the fuel is imported into, or enters, California. To be "in this state" means that something is within the "exterior limits" or borders of California. (See §§ 7321 & 60017.)

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[20] "'Bulk transfer' means any transfer of [gasoline or diesel] fuel by pipeline or vessel." (§§ 7309 & 60029.)
[21] "'In this state' . . . means within the exterior limits of the State of California and <u>includes all territory within these limits</u> owned by or ceded to the United States . . . ." (§§ 7321 & 60017 [emphasis added].)
[22] Just as in Kansas, California enterers remit each month the fuel tax due on the fuel they imported in the previous month.

Therefore, with respect to interstate transactions, when someone or something crosses the border into California from either Oregon, Nevada, or Arizona, that someone or something enters or comes into California. With rare exception,[23] the entry of fuel into California from Oregon, Nevada, and Arizona must occur "off-reservation," because the highways on which fuel that is transported by tanker truck (i.e., that is not part of a bulk transfer) can cross the border into California are not located on any reservations.

In its discussion regarding application of the interest-balancing test articulated in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, which is otherwise not relevant here,[24] the *Wagnon* court comments that:

> We have taken an altogether different course . . . when a State asserts its taxing authority outside of Indian Country. Without applying the interest-balancing test, we have permitted the taxation of the gross receipts of an off-reservation, Indian-owned ski resort [citation omitted] and the taxation of income earned by Indians working on-reservation but living off-reservation [citation omitted]. (*Wagnon*, *supra*, 546 U.S. at pp. 112-113.)

In the case involving the ski resort, the Court stated, with regard to "tribal activities conducted outside the reservation," that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." (*Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145,148-149 [emphasis added], as cited by *Wagnon, supra*, 546 U.S. at p. 113.)

In sum, the incidence of liability for the fuel tax is imposed on the enterer when the fuel enters California, whether the enterer is an Indian or a non-Indian. Therefore, the fuel tax is a nondiscriminatory tax that is applicable to everyone who imports fuel into California by other than bulk transfer. The importation of fuel into California is an activity that, with rare exception, occurs off-reservation. Therefore, if the enterer is an Indian, it will almost always be an Indian "activity conducted outside the reservation." Finally, since the incidence of liability for the fuel tax is imposed on an enterer when the fuel enters California, it is clear that the tax is not imposed further down the chain of distribution, on a California distributor or retailer, whether Indian or non-Indian.

Therefore, Indian enterers are liable for the excise tax on all fuel they import into California at the time of importation and may pass on the excise tax to the purchasers, including retailers and consumers, of that fuel, both Indian and non-Indian, as part of the cost of the fuel they purchase. In addition, Indian enterers are required to pay to the BOE the prepaid sales tax on that fuel at the time of entry and collect the prepaid sales tax at the time of sale in the state, but Indian retailers located on a reservation may claim a credit for prepaid sales tax they have paid against any use tax liability they have incurred for the same period, and Indian consumers are not required to pay sales tax on fuel they purchase on a reservation.

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[23] We understand there are several reservations that straddle the California-Arizona border. This letter does not address the question of the imposition of tax on fuel that enters California through one of these reservations.

[24] The Supreme Court formulated the *Bracker* interest-balancing test "to address the 'difficult question' that arises when 'a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*.'" (*Wagnon, supra*, 546 U.S. at p. 110 [citation omitted] [emphasis added by *Wagnon* court].)

Effect of Treaty with the Yakama, 1855 on an Indian enterer's tax liability

Article 1 of the Treaty with the Yakama, 1855 (Treaty) provided that the Yakama[25] would cede to the United States a significant amount of land ("about 10 million acres, or 90 percent of their land") located in what was then the Territory of Washington and what was then occupied and claimed by them. (*Ibid.*; *United States v. Smiskin* (2006) 487 F.3d 1260, 1265 (*Smiskin*).) In return, a certain tract of land, as described in article 2, was to be set apart for the exclusive use and benefit of the Yakama as an Indian reservation. Article 3 of the Treaty states, with respect to that tract of land and in consideration of the substantial concessions made by the Yakama:

> 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 <u>the right, in common with citizens of the United States, to travel upon all public highways</u>. (Paragraph 1) (Emphasis added.)
>
> The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to [the Yakama], as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them: together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. (Paragraph 2)

According to the information provided with this inquiry, claims have reportedly been made by members of the Yakama Tribe that, because the Treaty secures to the Yakama the right to travel upon the public highways, members of the Yakama Tribe enjoy a special trade status that permits them to avoid paying California sales and excises taxes on fuels they import into California and to sell or deliver these fuels ex-tax to Indian-owned retail service stations located, presumably on reservation land (as defined above), in California.

The Ninth Circuit Court of Appeals (Ninth Circuit) has issued several opinions in which it addresses and interprets the scope and application of Paragraph 1. These opinions and United States Supreme Court opinions on which they rely, which interpret the language of Paragraph 2, make clear that the meaning of Paragraph 1 is not evident from a simple reading of the language. For example, "in common with citizens of the United States" does not mean that the Treaty granted to the Yakama only a right equal to the right United States citizens had to travel on the public highways.

In *Cree v. Flores* (1998) 157 F.3d. 762 (*Cree II*, as it is generally known), the Ninth Circuit determined that, with respect to Paragraph 1, heavy trucks owned by members of the Yakama Nation that were used to haul timber to market were exempt from the licensing and permitting fees that Washington State imposed on all other owners of heavy trucks. (*Id.* at p. 764.) The court noted, with respect to "in common with," that article 3 of the Treaty "conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy.*" (*Id.* at p. 771 [emphasis added in original] [citation and internal quotation marks omitted in

[25] The term "Yamaka" is used here to represent all of the confederated tribes and bands of Indians whose representatives signed the Treaty: "the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah-milt-pay, and Se-ap-cat, confederated tribes and bands of Indians." (Preamble to the Treaty.)

original and here] [quoting *Tulee v. Washington* (1942) 315 U.S. 681, 684 (interpreting the Yakama's fishing rights as set forth in Paragraph 2)].) Further: "To construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" (*Cree II*, *supra*, 157 F.3d at p. 772 [citation omitted in original] [quoting *Puyallup Tribe v. Dept. of Game* (1968) 391 U.S. 392, 397 (also interpreting the Yakama's fishing rights)].)

Based on this interpretation of "in common with" and other findings, the *Cree II* court held that "the right, in common with citizens of the United States, to travel upon all public highways," as set forth in Paragraph 1, "must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees <u>for that use</u>." (*Cree II*, *supra*, 157 F.3d at p. 769 [emphasis added]; cf. *Ramsey*, *supra*, 302 F.3d at pp. 1078-1080 [distinguishing state taxes, which were precluded by the Treaty by *Cree II*, from federal taxes based on a different standard for exemptions; the Yakama were not exempt].)

In another case, Yakama tribal members were indicted for violating the federal Contraband Cigarette Trafficking Act (CCTA) because they failed to notify Washington State's Liquor Control Board before they transported unstamped cigarettes from Idaho to and among Indian reservations in Washington, a violation of Washington state law. (*Smiskin*, *supra*, 487 F.3d at p. 1262-1263.) Relying on the district court findings and conclusions in *Yakama Indian Nation v. Flores* (1997) 955 F.Supp. 1229 (which was affirmed by *Cree II*), that the Treaty "unambiguously reserves to the Yakamas the right to travel the public highways *without restriction* for purposes of hauling goods to market" (*id.* at p. 1248 [emphasis added by *Smiskin* court) and "both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached*" (*id.* at p. 1251 [emphasis added by *Smiskin* court]), the *Smiskin* court found that Washington State's pre-notification requirement "impose[d] a condition on travel that violates their treaty right to transport goods to market without restriction." (*Smiskin*, *supra*, 487 F.3d. at p. 1266; see also *United States v. Fiander* (2008) 547 F.3d 1036, 1039-1040 [relying on *Smiskin*, finding no violation of the CCTA, but finding defendant indictable for conspiracy under the Racketeer Influenced and Corrupt Organizations Act (RICO)].)

You indicate that members of the Yakama Nation who are importing fuel into California believe that they are not required to pay prepaid sales or excise taxes on this fuel because imposition of these taxes violates their right to travel pursuant to the Treaty, as interpreted by the Ninth Circuit. The Board of Equalization and the State of California do not intend to infringe in any manner on a right for which the Yakama paid so dearly. However, it is our opinion that neither the imposition of the requirement to pay prepaid sales tax nor the imposition of excise tax on fuel imported by Yakama enterers, as described above, violates the right to travel language set forth in Paragraph 1.

The license fee at issue in *Cree II* was imposed on the heavy trucks used to haul timber to market, not on the timber itself. Moreover, the pre-notification requirement was imposed on the <u>transportation</u> of the unstamped cigarettes, not on the cigarettes themselves. As the *Cree II* court declared, the Yakamas have "the right to <u>transport goods to market</u> over public highways without payment of fees <u>for that use</u>." (*Cree II*, *supra*, 157 F.3d at p. 769 [emphasis added].) The *Smiskin* court stated that the pre-notification requirement "violates [the Yakama's] treaty right <u>to transport goods to market</u> without restriction." (*Smiskin*, *supra*, 487 F.3d at p. 1266 [emphasis added].)

The prepaid sales and excise taxes are not taxes on the Yakama's transportation of the fuel to market (i.e., on their trucks),[26] nor do they constitute a restriction on the transportation of the fuel to market. They are taxes on fuel – on the goods that are being transported to market – that will be used (it must be presumed) almost, if not completely, exclusively by non-Yakama members to travel on the public highways of California. Of course, Indian retailers and Indian consumers who purchase the fuel are exempt from paying the sales tax on the fuel, as described above, but they are not exempt from paying the excise tax on the fuel unless the purchaser uses it for an exempt use, also as described above. In addition, the Indian retailer is required to collect use tax on the sale of fuel to non-Indian purchasers, and the retailer may apply the prepaid sales tax it paid to the importer (Yakama or non-Yakama alike) to its use tax liability on its sales and use tax return.

In sum, with respect to Yakama enterers that import gasoline and diesel fuel into California, they are subject to the same requirements to pay the prepaid sales tax and excise tax on these fuels upon entry into the state as are all other persons, Indian and non-Indian, who import fuel into the state, as described above. The BOE is working with Nevada officials to ensure enforcement of these taxes and to ensure that, with respect to state taxes on fuel, it is a level playing field for all suppliers and retailers of gasoline and diesel fuel.

If you have any questions regarding the information provided here, please contact me as provided above.

Sincerely,

Carolee D. Johnstone
Tax Counsel III (Specialist)

CDJ:mcb
J:Bus/Spec/Final/Johnstone/Indian/10-475 Fuels Indian Imports & Yakama Nation.doc
J:Bus/Use/Final/Johnstone/Indian/10-475 Fuels Indian Imports & Yakama Nation.doc

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[26] Whether the licenses, permits, and fees required pursuant to the International Fuel Tax Agreement (IFTA) and section 60122 of the Diesel Fuel Tax Law (regarding trip permits) before a truck owned by a Yakama enterer (individual or corporation) is permitted to use diesel fuel on California highways would be determined to be a violation of the Yakama's right to travel (*Cree II*, *supra*, 157 F.3d at p. 774), pursuant to Paragraph 1, or a "regulatory" exception, as described by the *Smiskin* court (*Smiskin*, *supra*, 487 F.3d at pp. 1269-1270), is not addressed in this letter. We also do not address here whether trucks owned and operated by a third party carrier or independent operator engaged by a Yakama enterer to transport its fuel into California would be subject to IFTA and section 60122 license and permit requirements. (*Cree II*, *supra*, 157 F.3d at p. 774; *Smiskin*, *supra*, 487 F.3d at p. 1268.)