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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

v.

FRED STEPHENS, Director, Washington
State Department of Licensing,

Defendant.

No. C03-3951Z

ORDER

The Squaxin Island Tribe and the Swinomish Indian Tribal Community (collectively, “Tribes”) seek declaratory and injunctive relief barring the State of Washington (“State”) from collecting taxes on fuel sold by the Tribes within their respective reservations.¹ The Tribes bring the following three claims: (1) the State is barred from collecting the fuel taxes for fuel sold on Tribal land because the legal incidence of the taxes fall on the Tribes without clear congressional authorization; (2) taxation by the State is preempted because the tribal and federal interests in the Tribes’ activities outweigh the State’s interest in taxing those activities; and (3) fuel taxation by the State unlawfully infringes on the Tribes’ sovereignty and right to self-government. Second Am. Compl., docket no. 68. These claims are the

¹ The Tribes operate the stations through their economic development arms, Island Enterprises, Inc., and the Swinomish Development Authority.

1 subject of cross-motions for summary judgment. Docket nos. 101, 104, 108, and 115.

2 Having reviewed the cross-motions for summary judgment, response briefs, and reply briefs,
3 and having considered the oral argument of counsel as to all of the motions on October 27,
4 2005, the Court now enters the following Order.

5 **BACKGROUND**

6 Washington State Fuel Taxes

7 The present Washington State fuel tax system is based on a four-tiered distribution
8 chain. At the top are “suppliers,” which include refineries and those bringing fuel into
9 Washington State by pipeline, cargo vessel, and ground transportation. The second tier is
10 composed of “distributors,” which are businesses that transport the fuel between suppliers
11 and those making up the third tier in the chain, “retailers.” Retailers are simply local stations
12 that sell gasoline and diesel fuel. Finally, the fourth tier is composed of “consumers,” which
13 includes anyone who actually uses the fuel rather than reselling it. See Albright Decl.,
14 docket no. 102, at p. 7 (Beach Dep. at 15-17).

15 Prior to 1999, Washington State collected its fuel tax at the distributor level. See
16 Former RCW 82.36.020 (1998). In 1998, the legislature made far-reaching amendments to
17 the fuel tax collection system. See Former RCW 82.36 et seq. (1998); RCW 82.36 et seq.
18 The State concedes that these changes were directed, in part, at avoiding the possibility that
19 the legal incidence of the taxes would impermissibly fall on tribal retailers given the United
20 States Supreme Court’s opinion in Oklahoma Tax Commission v. Chickasaw Nation, 515
21 U.S. 450 (1995), discussed below. Washington State now uses a “tax-at-the-rack” system for
22 collecting its fuel taxes, meaning the taxes are paid to the State when a supplier removes
23 motor vehicle fuel from its refinery or terminal rack as the result of a sale to a distributor.
24 Albright Decl., at 7 (Beach Dep. at 15-16); RCW 82.36.020(2). In turn, distributors are
25 required by law to remit the fuel tax to the supplier. RCW 82.36.035(5)-(6). A supplier that
26 does not receive the fuel tax from the distributor is entitled to a full refund from the State.

1 RCW 82.36.044. Consequently, suppliers bear little or no risk in the tax-at-the rack system;
2 they simply collect and remit the funds and are reimbursed for any deficiency. Similar rules
3 apply between distributors and retailers. Distributors are required to include fuel tax
4 information on sales invoices sent to retailers, and retailers are required to maintain records
5 of fuel taxes paid to distributors for two years. WAC 308-72-865(2); RCW 82.36.160. As
6 with suppliers, a distributor may obtain a full refund for fuel taxes that cannot be collected
7 from a retailer. RCW 82.36.373.

8 In contrast to those near the top of the distribution chain, the legal incidence of fuel
9 taxation is less clearly defined between the retailer and consumer in Washington State. The
10 Revised Code of Washington states that “[i]t is intended that the ultimate liability for the tax
11 imposed under this chapter be upon the motor vehicle fuel user, regardless of the manner in
12 which the collection of the tax is provided for in this chapter.” RCW 82.36.407(1). This
13 provision did not exist prior to 1999. Tax evasion of the motor vehicle tax by any person or
14 corporation is a crime in Washington State. RCW 82.36.380(1)-(2) (tax evasion is a class C
15 felony under RCW 9A.20). Despite the statement of intent and ostensible imposition of
16 criminal liability for failure to pay the fuel tax, other aspects of the Washington State fuel
17 taxation statutes indicate that little is done to ensure the tax is actually paid by the consumer.
18 For example, retailers are not required by law to pass the fuel tax on to consumers, nor are
19 they required to maintain records of having done so. Albright Decl. at 12, 16 (Beach Dep. at
20 36, 70). Additionally, there is no requirement that a fuel sales receipt indicate the amount of
21 the tax, meaning consumers often have no way to know whether they have or have not paid
22 the tax. Id. at 18 (Beach Dep. at 115). Consumers are not audited to determine whether the
23 tax has been paid, and there is no street-level enforcement of the fuel tax applied to the
24 average individual consumer. Id. at 12, 14 (Beach Dep. at 36-37, 56). Finally, unlike
25 suppliers and distributors, retailers are not entitled to a refund if the tax is never collected
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1 because a consumer fails to pay the tax or the fuel is never sold. Id. at 10 (Beach Dep. at 27-
2 28), 32.

3 Washington State has entered into compacts with some of the tribes located within its
4 border, providing that tribal members and tribal governments are not subject to the fuel tax.
5 First Cade Decl., docket no 104, at Ex. 1 (Beach Dep. at 63-64). Where the fuel tax is
6 included in the price paid at the retail level, the State remits funds directly to the tribal
7 government for that tax. Id. The remittance generally occurs on a monthly basis and is
8 based on a formula rather than actual amounts paid. Id. (Beach Decl. at 65). There is no
9 requirement that a tribal government return the remitted funds to tribal members. Id. (Beach
10 Decl. at 67). At oral argument, the parties agreed that the State has entered into such a
11 compact with the Swinomish Tribe but has not done so with the Squaxin Island Tribe.²

12 The Squaxin Island Tribe's Fuel Station

13 Through its economic development arm, the Squaxin Island Tribe owns and operates a
14 convenience store and retail fuel station known as the Kamilche Trading Post ("KTP").
15 Whitener Decl, docket no. 110, at 2. KTP shares an access road with, and is located near,
16 the Little Creek Casino Resort on the Squaxin Island Tribe's land. Id. at 3. The Squaxin
17 Island Tribe provides infrastructure and governmental services for KTP, including roads,
18 sidewalks, lighting, parking lots, water and sewer systems, and electric infrastructure. Id. at
19 4. As of May 19, 2005, approximately 44% of the employees at KTP were tribal members.
20 Id. at 6. For the purposes of this litigation, the Squaxin Island Tribe conducted a survey of
21 KTP customers. The survey results indicated that 51% ($\pm 1.4\%$) of KTP customers were

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24 ² Under the taxation compact, the State remits a percentage of the taxes collected by the
25 Swinomish Tribe based on a predetermined formula that includes assumptions as to the
26 number of tribal purchasers of fuel. Cade Decl., docket no. 104, Ex. 1 (Beach Dep. at 60-
66). This litigation only relates to the balance of the State's taxes that go beyond the funds
remitted to the Swinomish Tribe based on the formula in the compact.

1 Tribal members, residents of Tribal lands, and/or individuals visiting, working at, or making
2 deliveries to Tribal businesses. Id. at 8-9.

3 The Swinomish Tribe's Fuel Station

4 The Swinomish Indian Tribal Community owns and operates the Swinomish Northern
5 Lights fuel station and convenience store ("SNL"). Olson Decl., docket no. 112, at 4. SNL
6 shares an access road with, and is located near, the Swinomish Northern Lights Casino and
7 Bingo Hall. Id. at 9. The Swinomish Tribe provides infrastructure and governmental
8 services for SNL, including roads, bridges, parking areas and sidewalks, utilities services, as
9 well as police and emergency services. Id. at 3-4. The survey results of SNL customers
10 indicated that 72% (\pm 4.3%) of SNL customers were either Tribal members, residents of
11 Tribal lands, and/or individuals visiting, working at, or making deliveries to Tribal
12 businesses. Id. at 8.

13 The Tribes' Proposed Fuel Blending Activities

14 Both Tribes state an intent to construct on-reservation facilities capable of blending
15 unadditized motor vehicle and diesel fuel with additive components. Whitener Decl. at 8-10;
16 Olson Decl. at 19-21. Unadditized gasoline may not be lawfully sold under the Clean Air
17 Act. 42 U.S.C. § 7545. The Tribes state that they will purchase the unadditized gasoline and
18 diesel from suppliers off the reservations, transport the fuel to Tribal lands, blend it with the
19 requisite additives, and sell the fuel at wholesale to their retail stations. Whitener Decl. at 8-
20 10; Olson Decl. at 19-21. The cost of the additives is approximately \$12 per gallon, with
21 one gallon of additive sufficient to treat 8,800 gallons of unadditized gasoline (i.e., a cost of
22 \$.00137 per gallon sold). First Cade Decl., docket no. 115, Ex. 2 at p. 2. The Tribes'
23 proposed fuel blending would require the design and construction of blending facilities,
24 which the Tribes propose to pay for exclusively with Tribal and federal funds. Whitener
25 Decl. at 8; Olson Decl. at 21-22. The Tribes claim that these fuel-blending plans will be
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1 implemented “as soon as possible after the tax issue in this matter is resolved.” Id.; Olson
2 Decl. at 19.

3 This case presents a classic conflict between state attempts to extend taxation onto
4 reservation lands and tribal efforts to exercise their inherent sovereignty to its fullest. Since
5 the early smoke-shop cases, courts have been required to determine when a state may tax
6 tribal activity on tribal land. See, e.g., Washington v. Confederated Tribes of Colville
7 Reservation, 447 U.S. 134 (1980). In 1995, the Supreme Court, in Chickasaw Nation,
8 clarified the federal legal incidence analysis. States such as Idaho and Washington
9 responded to Chickasaw Nation with legislative efforts to continue their taxation of tribal
10 fuel retailers. In Coeur d’Alene Tribe of Idaho v. Hammond, 384 F.3d 674 (9th Cir. 2004),
11 cert. denied, 125 S. Ct. 1397 (2005), the Ninth Circuit addressed Idaho’s attempt to place the
12 legal incidence on distributors. The Hammond Court concluded that the incidence of
13 taxation was on retailers and held that Idaho could not enforce its tax on the retail sale of fuel
14 by the Coeur d’ Alene Tribe on Tribal land. Id. at 688. Similarly, this Court now addresses
15 the question as to whether Washington State can enforce its fuel tax on the sale of fuel by the
16 Plaintiffs on Tribal land.

17 DISCUSSION

18 Summary judgment is appropriate where there is no genuine issue of material fact and
19 the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The
20 moving party bears the initial burden of demonstrating the absence of a genuine issue of
21 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party
22 has met this burden, the opposing party must show that there is a genuine issue of fact for
23 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The
24 opposing party must present significant and probative evidence to support its claim or
25 defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir.
26 1991). For purposes of these motions, reasonable doubts as to the existence of material facts

1 are resolved against the moving party and inferences are drawn in the light most favorable to
2 the opposing party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).

3 The Tribes first claim alleges that the legal incidence of the State's fuel tax
4 impermissibly falls on the Tribes without clear congressional authorization. The Tribes
5 contend that the State's fuel taxation system, as written and applied, places the legal burden
6 of the tax on retailers. The State contends that the Washington State legislature has clearly
7 imposed the legal incidence of the fuel tax on the consumer or, alternatively, on the supplier.
8 The parties agree that, if the legal incidence claim is resolved in the Tribes' favor, the Court
9 need not reach either of the Tribes' additional claims.

10 Assuming it is necessary to reach the additional claims, the Tribes allege that the
11 State's fuel taxes are preempted as to sales on Tribal land because the Tribal and federal
12 interests outweigh the State's interest in imposing its tax. In support of their preemption
13 claim, the Tribes rely on their proposed fuel-blending activity and a market-creation theory
14 based on their use of casinos to draw customers to Tribal lands. The Tribes also allege that
15 the State's fuel taxes infringe on their right to sovereignty because the taxes effectively
16 preclude them from imposing an equivalent Tribal fuel tax. The State argues that there is no
17 preemption because the Tribes' contribution to the value of the fuel under its blending
18 proposal would be *de minimis* and that the market-creation theory is not a valid
19 consideration. Further, the State contends that it has a strong interest in collecting the taxes
20 for road construction and maintenance. The State argues that there is no infringement on
21 Tribal sovereignty because there is no requirement that the Tribes' right to tax fuel sales be
22 coextensive with the State's fuel tax.

23 I. The Legal Incidence of Washington State's Fuel Tax

24 Unless Congress clearly provides otherwise, a State's tax is not enforceable if its legal
25 incidence falls on a Tribe or its members for sales made within Indian country. Chickasaw
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1 Nation, 515 U.S. at 453, 459. The Supreme Court has adopted a categorical approach to
2 determine whether tribes or tribal members may be taxed:

3 The initial and frequently dispositive question in Indian tax cases. . . is who bears
4 the legal incidence of a tax. If the incidence of an excise tax rests on a tribe or on
5 tribal members for sales made inside Indian country, the tax cannot be enforced
absent clear congressional authorization. But if the legal incidence of the tax rests
on non-Indians, no categorical bar prevents enforcement of the tax.

6 Id. at 458-59 (citations omitted). In this case, the parties agree that there has been no “clear
7 congressional authorization” to impose the fuel tax on the tribes or tribal members. The
8 dispositive issue is, therefore, whether the legal incidence of Washington State’s fuel taxes
9 falls on retailers or some other person or entity in the distribution chain.

10 “The question of where the legal incidence of a tax lies is decided by federal law.”

11 Hammond, 384 F.3d 681 (citing Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121 (1954)).

12 The Ninth Circuit has succinctly described the legal incidence analysis as follows:

13 [T]he United States Supreme Court has instructed that we are to conduct a fair
14 interpretation of the taxing statute as written and applied. The person or entity
15 bearing the legal incidence of the tax is not necessarily the one bearing the
16 economic burden. Rather, to discern where the legal incidence lies, we
ascertain the legal obligations imposed upon the concerned parties, and this
inquiry does not extend to divining the legislature’s true economic object.
Further, a party does not bear the legal incidence of the tax if it is merely a
transmittal agent for the state tax collector.

17 Id. (citations and quotations omitted).

18 In Chickasaw Nation, the case establishing the modern legal incidence analysis, the
19 Supreme Court analyzed Oklahoma’s fuel taxation scheme to determine whether the
20 incidence fell on retailers or some other transactor, such as the wholesaler or consumer. 515
21 U.S. at 459. Oklahoma’s fuel tax statutes did not expressly identify who bore the legal
22 incidence of the taxes. Id. at 461. Given the “absence of such dispositive language,” the
23 Supreme Court was compelled to look to the Oklahoma statutes as written and applied. Id.
24 In examining the statutes, the Chickasaw Nation Court found that the following aspects of
25 Oklahoma’s fuel taxation scheme placed the legal incidence on retailers: (1) the Oklahoma
26 law required distributors to remit the fuel tax “on behalf of a licensed retailer,” indicating

1 that distributors were merely transmittal agents; (2) distributors were allowed to deduct taxes
2 that were uncollectible from retailers, but retailers could not deduct taxes uncollectible from
3 consumers; (3) distributors were allowed to retain a small portion of the taxes as
4 reimbursement for their collection services, but retailers were not; and (4) the Oklahoma law
5 imposed no liability of any kind on a consumer for purchasing, possessing, or using untaxed
6 fuel. Id. at 461-62. Because the Tribe in Chickasaw Nation was operating stations at the
7 retail level on tribal land, and the legal incidence of Oklahoma's fuel tax fell on retailers, the
8 Supreme Court held that the tax could not be enforced. Id.

9 In Hammond, the Ninth Circuit considered which link in the distribution chain bore
10 the legal incidence of the fuel tax under Idaho's system. 384 F.3d at 679. Idaho had
11 amended its fuel tax statutes after the Idaho Supreme Court ruled that the prior tax
12 impermissibly fell on tribal retailers. Id. at 678-79; See also Goodman Oil Co. v. Idaho State
13 Tax Comm'n, 136 Idaho 53, 28 P.3d 996 (2001). In amendments passed after the Chickasaw
14 Nation decision in 1995, the Idaho legislature expressly provided that non-tribal distributors,
15 rather than tribal retailers, were to bear the legal incidence of the tax. Id. at 679-80. After
16 the amendments passed, the Coeur d'Alene Tribe of Idaho sued to enjoin Idaho from
17 collecting the tax, arguing that the legal incidence continued to fall on the Tribe and its
18 members under Chickasaw Nation. Id. at 680. Both the District Court and the Ninth Circuit
19 concluded that retailers continued to bear the legal incidence of the fuel tax even after Idaho
20 explicitly attempted to place the burden on distributors. Id. at 681. As a result, the Idaho
21 fuel tax could not be enforced as to fuel sales by the Coeur d'Alene Tribe on tribal land.

22 The Hammond Court began by recognizing that Idaho's fuel tax statutes differed from
23 those in the Chickasaw Nation case because the Idaho legislature expressly stated that
24 distributors were to bear the legal incidence of the taxes. Id. at 680.³ After undertaking a
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26 ³ The Idaho Legislature had amended its fuel tax provision after Chickasaw and Goodman Oil with the clearly stated intent to place the legal incidence of the tax on distributors to

1 thorough analysis of whether Idaho’s statement represented the “dispositive language”
2 described in Chickasaw Nation, the Hammond Court concluded that the “legal incidence”
3 determination could not be resolved by a state legislature’s mere statement of intent. Id. at
4 682-83. The Hammond Court reasoned that allowing a legislature to tax tribes “by reciting
5 *ipso facto* that the incidence of the tax was on another party would wholly undermine the
6 Supreme Court’s precedent that taxing Indians is impermissible absent clear *congressional*
7 authorization.” Id. at 683 (emphasis in original). Rather than rely on Idaho’s statement of
8 intent, the Hammond Court looked to the operative provisions of the fuel tax system just as
9 the Supreme Court had done in Chickasaw Nation. Similar to Chickasaw Nation, the
10 Hammond Court found the following factors dispositive in concluding that the incidence of
11 the fuel tax fell on retailers in Idaho: (1) Idaho’s law required distributors to pass the tax on
12 to retailers; (2) distributors were entitled to tax credits for the cost of collecting and remitting
13 the tax, suggesting that they were mere transmittal agents; (3) distributors were entitled to
14 refunds for taxes they could not collect from retailers; and (4) retailers were not entitled to a
15 refund for taxes they could not collect from consumers, even where the fuel was never sold.
16 Id. at 685-88. Thus, despite the Idaho Legislature’s declaration that the legal incidence of
17 the tax was borne by distributors, the Hammond Court held that “the tax buck stops with the
18 Indian tribal retailers,” meaning the legal incidence impermissibly fell on those retailers and
19 could not be collected. Id. at 687-88.

20 In this case, the Tribes contend that the factors articulated in Chickasaw Nation and
21 Hammond are analogous and place the legal incidence on Tribal retailers. In contrast, the
22 State’s position on this issue is far from clear. Throughout its briefing, the State’s primary
23 position has been that the legal incidence is borne by motor vehicle fuel users⁴ under the
24 _____
25 allow collection of the fuel tax on Tribal reservations. Hammond, 384 F.3d at 680.

26 ⁴The term “motor vehicle fuel user” and “consumer” are intended to have the same meaning
for purposes of this Order.

1 Chickasaw Nation and Hammond factors. The State’s briefing also suggested an alternative
2 and conflicting argument, albeit not well developed, that the legal incidence is borne by
3 suppliers because Washington State attempted to model its fuel taxation system on the
4 system employed by the federal government, in which the legal incidence is placed on the
5 supplier. Inexplicably, the State shifted its primary argument at oral argument, suggesting
6 that suppliers bear the legal incidence under the Chickasaw Nation and Hammond factors.⁵
7 Left unable to divine the State’s true and final position, the Court will address each argument
8 in turn.

9 A. Motor Vehicle Fuel Users/Consumers

10 The Court first addresses the State’s argument that the Chickasaw Nation and
11 Hammond factors place the legal incidence on consumers rather than Tribal retailers.

12 1. Intent of the Washington State Legislature

13 While there is no question that the Washington State Legislature intended to place the
14 ultimate responsibility for payment of the fuel taxes on consumers, its statement of intent is
15 not dispositive. RCW 82.36.020(1) states that the fuel tax is “hereby levied and imposed
16 upon motor vehicle fuel users.” (Emphasis added). Similarly, RCW 82.36.407(1) states that
17 “[i]t is intended that the ultimate liability for the tax imposed under this chapter be upon the
18 motor vehicle fuel user, regardless of the manner in which collection of the tax is provided
19 for in this chapter.” Notably, both of these legislative statements were added after, and in
20 response to, Chickasaw Nation. Despite these unequivocal declarations, the Ninth Circuit
21 has made it clear that “the legislative declaration is ‘dispositive’ as to what the legislature
22 intended. . . [but] it cannot be viewed as entirely dispositive of the legal issue that the federal
23 courts are charged with determining as to the incidence of the tax.” Hammond, 384 F.3d at

25 ⁵The State’s suggestion that the incidence of the tax falls on the supplier is particularly
26 surprising because the Washington State Legislature clearly indicated its intent to place the
tax on “motor vehicle fuel users.” See RCW 82.36.020(1) and RCW 82.36.407(1).

1 684 (emphasis in original). Thus, federal law requires courts to acknowledge a legislature's
2 statement of intent as one factor among many in determining where the legal incidence of a
3 tax falls, with additional consideration given to the operative effect of the tax statutes. Id. at
4 685. In Hammond, the Court ultimately disregarded the Idaho Legislature's attempt to place
5 the incidence on distributors because the other factors were analogous to Chickasaw Nation.
6 Id. at 688.

7 2. Legal Requirement that the Fuel Tax Move Downstream

8 Under the tax statutes at issue in both Chickasaw Nation and Hammond, distributors
9 were required by law to collect the taxes from retailers and remit them to the State, but
10 retailers were not legally required to collect the taxes from consumers. Also, the Hammond
11 Court noted that "all invoices for sales by distributors to retailers must show that the state
12 fuel tax was charged to the retailer." 384 F.3d at 686. Here, Washington State's tax system
13 is similar to Idaho's in a number of respects. First, Washington Administrative Code § 308-
14 72-865(2)(j) requires distributors to indicate whether or not the fuel tax has been paid on
15 invoices sent to retailers.⁶ Second, retailers in Washington State are required to maintain
16 records of taxes paid for two years, which have been audited by the State in the past. RCW
17 82.36.160; Albright Decl. at 12 (Beach Dep. at 36). Finally, RCW 82.36.100 requires every
18 person who acquires motor vehicle fuel to pay the fuel tax if the tax has not yet been paid.
19 This requirement applies to both retailers and consumers, but the practical effect is that only
20 retailers can be audited for compliance because consumers need not maintain records of
21 taxes paid. As it operates, the statutory scheme requires that fuel taxes be passed from
22 distributor to retailer but not from retailer to consumer. Just as in Hammond, this factor
23 indicates that the "tax buck" stops at the retail level.⁷

24 _____
25 ⁶ The Idaho Administrative Code required distributors to provide a statement that the Idaho
26 fuel tax was included in the price of fuel sold to retailers. IAC 35.01.05.150(g).

⁷ See also Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 580 (10th Cir. 2000)

1 3. Refunds for Uncollectible Taxes

2 The fuel tax statutes in both Chickasaw Nation and Hammond allowed distributors to
3 obtain a refund for taxes that could not be collected from retailers. 515 U.S. at 461-62; 384
4 F.3d at 687. Conversely, there was no indication that the same rule applied to retailers (i.e.,
5 that retailers were entitled to a refund for taxes paid on worthless accounts receivable, stolen
6 fuel, or fuel that could not be sold to consumers). As both courts viewed it, this factor
7 suggested that those above the retail level in the distribution chain were mere transmittal
8 agents. Id. The same reasoning applies here. While both suppliers and distributors in
9 Washington State are entitled to full refunds for taxes that are uncollectible, retailers may not
10 obtain similar refunds. See RCW 82.36.044 and 82.36.373 (refunds for suppliers and
11 distributors). The State argues that this factor should carry little weight because retailers are
12 unlikely to have accounts receivable for consumers and, therefore, such losses would only
13 occur in cases of theft. State’s Reply, docket no. 117, at 5-6. The State also contends that
14 retailers can, and do, insure against such losses, making them irrelevant. These arguments
15 are unpersuasive. To the extent the State’s assertion about the lack of retail/consumer
16 accounts receivable is even accurate (the State cites nothing to support the claim), the same
17 was undoubtedly true in both Chickasaw Nation and Hammond—both of which used this
18 factor to help identify retailers as those who bear the legal incidence of the tax. This factor
19 weighs in favor of concluding that the legal incidence of the fuel tax falls on retailers in this
20 case.

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24 (“Certainly, if the fuel tax law required distributors to include the amount of the fuel tax in
25 their wholesale price, we would be justified in concluding that the legal incidence of the tax
26 falls upon the Tribes.”). In Sac and Fox, the Tenth Circuit concluded that the legal incidence
fell on non-tribal distributors where distributors were not required to pass on the tax by law,
but the “economic assumption” was that the value of the tax was passed on in the price. Id.
at 579-80. Here, there may be an economic assumption that retailers will pass on the tax to
consumers but, as in Sac and Fox, that assumption is not a controlling consideration.

1 4. Reimbursement for Collection Services

2 Both the Oklahoma and Idaho fuel tax statutes allowed distributors to retain a small
3 portion of the taxes they collected as reimbursement for the costs of such collections. The
4 Supreme Court and Ninth Circuit concluded that this reimbursement allowance indicated that
5 distributors had only a “collect and remit” function, which did not apply to retailers.
6 Chickasaw Nation, 515 U.S. at 462; Hammond, 384 F.3d at 686. This, both courts reasoned,
7 suggested that retailers were the last party in the supply chain to bear the true responsibility
8 for fuel taxation. Id. Washington State makes no such allowance for suppliers, distributors,
9 or retailers. If such an allowance existed for suppliers and distributors, but not for retailers,
10 it would provide an additional reason to conclude that the legal incidence falls on retailers.
11 However, the converse does not hold true; the unavailability of a reimbursement allowance
12 for any party does not lead to the conclusion that the legal incidence falls on consumers.
13 Rather, the Court concludes that this factor is neutral because no person or entity in the
14 distribution chain receives any payment for collection services. Every party simply bears its
15 own costs under the Washington State system.

16 5. Liability of the Consumer

17 In Chickasaw Nation, the Supreme Court noted that Oklahoma’s fuel tax imposed no
18 liability of any kind on consumers for purchasing, possessing, or using untaxed fuel. 515
19 U.S. at 462. Hammond did not address consumer liability, presumably because Idaho took
20 the position that it was distributors who bore the legal incidence under its fuel tax system.
21 This case differs from Chickasaw Nation because Washington State has declared that motor
22 vehicle fuel users are liable for fuel taxes and it potentially imposes criminal sanctions for
23 tax evasion by any person or entity in the distribution chain. See RCW 82.36.020(1) (tax
24 levied on “motor vehicle users”); RCW 83.36.407 (ultimate liability intended to be imposed
25 upon motor vehicle fuel user); RCW 82.36.380 (evasion of taxes under Chapter 82.36 RCW
26 unlawful). Despite these statutory provisions, it is not at all clear that the fuel user “liability”

1 is more than theoretical. First, there is no legal requirement that retailers pass the fuel tax on
2 to the consumers. Second, as discussed above, retailers need not keep records of taxes paid
3 by the consumers and consumers may or may not have the tax itemized on fuel receipts.
4 Albright Decl. at 18 (Beach Dep. at 115-16). Finally, there are no enforcement efforts aimed
5 at determining whether a motor vehicle fuel consumer in a passenger vehicle has paid the
6 tax. Id. at 14 (Beach Dep. at 56). Thus, to the extent it exists, direct enforcement is very
7 minimal and limited to commercial vehicles. Id. (Beach Dep. at 54-55). Because consumer
8 liability lacks real consequences, it does not weigh heavily, if at all, in favor of concluding
9 that consumers bear the legal incidence of fuel taxes.

10 B. Suppliers

11 In its brief and at oral argument, the State offered alternative arguments suggesting
12 that the supplier might bear the legal incidence of Washington State's fuel taxes. First, the
13 State argues that Washington State's taxation is analogous to the federal law and, the State
14 maintains, the federal law places the legal incidence on suppliers. Def.'s Mot., docket no.
15 104, at 15-16. Second, at oral argument, the State took the position that the legal incidence
16 rests upon suppliers under the Chickasaw Nation and Hammond factors. The Court
17 addresses each argument in turn and, for the reasons that follow, concludes that they are
18 without merit.

19 1. The Supplier as Analogous to the Federal System

20 The State argues that the legal incidence of the tax falls on suppliers if it does not fall
21 on consumers. Although not clearly developed, the State's reasoning appears to be that the
22 legal incidence of Washington State's tax falls on suppliers because the tax is modeled in
23 part after the federal fuel tax system, for which (the State argues) courts have held that the
24 legal incidence falls on suppliers. The State cites two cases in support. First, the State relies
25 on Walsh Oil Company v. United States, 26 Cl. Ct. 426 (1992), which did not address a legal
26 incidence issue. Rather, in Walsh, the plaintiff argued that there was no legal basis for its

1 payment of \$178,000.00 in costs attributable to fuel taxes owed to a “producer” (i.e., a
2 supplier) because it met the statutory requirements for an exemption. 26 Cl. Ct. at 427. The
3 Claims Court rejected the argument, concluding that the plaintiff lacked standing. Id. In
4 doing so, the Walsh court cited a 1975 Supreme Court case, Gurley v. Rhoden, 421 U.S. 200,
5 205 (1975), which held that the legal incidence of a federal excise tax on gasoline fell upon
6 the statutory producer and not the purchaser of the gasoline. Gurley is the second case upon
7 which the State relies. In Gurley, the Supreme Court held that the legal incidence fell on
8 “producers” because: (1) they were the only parties legally required to pay the tax; and (2)
9 Congress explicitly and exclusively placed the remittance burden on producers. 421 U.S. at
10 205-206.

11 Defendant’s reliance on Walsh and Gurley is not helpful for several reasons. First,
12 Walsh offers no analysis of the legal incidence question, which was not at issue in that case.
13 Walsh merely cites Gurley’s statement, made 20 years before the Supreme Court decided
14 Chickasaw Nation. Second, although the analysis in Gurley is minimal, there are obvious
15 differences between the federal statutes as they existed in 1975 and the present Washington
16 State fuel tax system. The 1975 federal system placed the tax burden solely on producers
17 and included no provisions regarding fuel tax activity lower down the distribution chain. In
18 its analysis, Defendant does nothing to describe how Washington State’s system could
19 possibly place the legal incidence on suppliers under the factors articulated in Chickasaw
20 Nation and Hammond. Nor does the Defendant make any attempt to deal with the
21 differences between the 1975 and 1988 federal fuel tax systems. In short, Walsh and Gurley
22 do not stand for the propositions upon which the State relies in arguing that the current
23 Washington State system is analogous to the federal system.

24 2. The Supplier Under the *Chickasaw Nation* and *Hammond* Factors

25 The State’s alternative argument that suppliers bear the legal incidence of the fuel
26 taxes under the modern analysis is directly contradicted by Hammond. In Hammond, Idaho

1 took the position, both in its legislation and the litigation, that the distributors bore the legal
2 incidence of the tax. The distributors in Hammond are analogous to the suppliers in this
3 case—both are legally required to pass the tax down the distribution chain and remit the tax
4 to the states. RCW 82.36.020; Idaho Code § 63-2435. Also, both are entitled to refunds
5 when they cannot collect the taxes. RCW 82.36.044; Idaho Code § 63-2407(6). Conversely,
6 retailers in both Idaho and Washington State do not face the same legal requirement and are
7 not entitled to refunds. See RCW 82.36.044 and RCW 82.36.373 (refunds for suppliers and
8 distributors only); Hammond, 384 F.3d at 687-88. The only Hammond factor not applicable
9 to this case is Idaho’s provision that distributors may retain a small portion of the taxes as
10 reimbursement for their collection responsibilities. However, as discussed above, this factor
11 is neutral in Washington State because no person or entity in the distribution chain is entitled
12 to such reimbursement. Accordingly, there is no basis to conclude that suppliers bear the
13 legal incidence of the fuel taxes in Washington State under Hammond.

14 C. Legal Incidence Conclusion

15 The question of which party bears the legal incidence of a tax is decided by federal
16 law and based on the state tax statutes as written and applied. Hammond, 384 F.3d at 681.
17 Although consumers in Washington State will nearly always find the tax imbedded in the
18 price of fuel, the Supreme Court explicitly cautioned against using “economic reality” as a
19 basis for answering the legal incidence question. Chickasaw Nation, 515 U.S. at 459-60.
20 Instead, courts must take a categorical approach based on the legal requirements of the
21 particular taxation scheme. Id. at 460. While the factors here are not identical to Chickasaw
22 Nation or Hammond, they are very similar. Washington State’s fuel tax statutes effectively
23 require suppliers and distributors to pass the fuel tax down the distribution chain without
24 imposing the same requirement on retailers. Likewise, suppliers and distributors are entitled
25 to refunds for uncollectible taxes while retailers are not. Finally, consumer “liability” for
26 payment of the fuel taxes is virtually non-existent. Simply put, the tax buck stops at the

1 retail level of the distribution chain. Absent clear congressional authorization, which does
2 not exist in this case, it is impermissible to levy the fuel taxes on the Tribes for the sale of
3 fuel products on Tribal lands. The Court GRANTS the Tribes' motion for summary
4 judgment and concludes as a matter of law that their retail fuel stations bear the legal
5 incidence of the Washington State fuel taxes and DENIES the State's cross-motion.⁸

6 CONCLUSION

7 The Court concludes that the legal incidence of Washington State's fuel taxes falls on
8 retailers and not on the motor vehicle fuel user under Chickasaw Nation and Hammond. As
9 a result, the Court GRANTS the Tribes' motion for partial summary judgment, docket no.
10 101, and DENIES the State's motion for partial summary judgment, docket no. 104, and
11 hereby ENJOINS the State from further collection of its fuel taxes as to the Tribes' retail
12 sales of fuel products on Tribal land. Further, the Court STRIKES AS MOOT the cross-
13 motions for partial summary judgment as to preemption and infringement on tribal
14 sovereignty, docket nos. 108 and 115, as those claims need not be considered where the legal

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17 ⁸ Because the State is categorically barred from imposing its fuel tax on the sale of fuel on
18 Tribal lands, the Court does not reach either the preemption or infringement on tribal
19 sovereignty claims. Although those claims require no analysis, the Court notes that the
20 hypothetical nature of the Tribes' fuel blending proposal raises a serious ripeness concern as
21 to the preemption issue. The ripeness doctrine prevents premature adjudication and is aimed
22 at cases that do not yet have a concrete impact upon the parties. See Thomas v. Union
23 Carbide Ag. Prod. Co., 473 U.S. 568, 580 (1985). Further, the "case or controversy"
24 requirement also shields federal courts from being drawn into disputes concerning abstract or
25 hypothetical cases, as federal courts have no power to render advisory opinions as to what
26 the law ought to be or affecting a dispute that has not yet arisen. Aetna Life Ins. Co. v.
Haworth, 300 U.S. 227, 240 (1937). Here, the Tribes' declarations state that their fuel
blending operations are contingent. See Whitener Decl. at 8; Olson Decl. at 19. Thus, it is
highly questionable whether the Court could consider the blending proposal in any event.
The Court also notes that the Tribes' market creation theory of value is solely based on and
analogous, if not identical, to the Tenth Circuit decision in Prairie Band Potawatomi Nation
v. Richards, 379 F.3d 979 (10th Cir. 2004). The Supreme Court accepted certiorari of
Prairie Band and heard oral argument in that case on October 3, 2005. 125 S. Ct. 1397
(2005). The Tenth Circuit decision is of questionable precedence at this time.

1 incidence of the fuel tax falls on the Tribes. Finally, the Court STRIKES AS MOOT the
2 Tribes' motion to strike, docket no. 119.

3 The Tribes are directed to file a proposed judgment and permanent injunction
4 consistent with this Order by December 9, 2005. The State may file any written objections
5 to the proposed judgment by December 16, 2005.

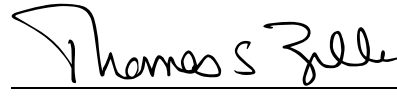
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7 IT IS SO ORDERED.

8 DATED this 22nd day of November, 2005.

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Thomas S. Zilly
United States District Judge

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