

# A review of WA's tribal motor fuel tax compacts



Prepared for the Automotive United Trades Organization (AUTO) by:

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Completed: March 18, 2014

## Preamble

In January of 2014, the Automotive United Trades Organization (AUTO) requested that I review the tribal motor fuel compacts created after Washington's Legislature passed SB 5272 in 2007. These compacts have resulted in the Department of Licensing (DOL) forwarding approximately \$193 million dollars in state motor fuel taxes to certain treaty tribes operating retail motor fuel outlets in Washington State. AUTO asked that I first review the legislative and court history of these agreements, the language in the actual compacts signed, and data on dollars flowing between DOL and the tribes. I have done so.

Upon completion of my review, AUTO asked if I could address the following questions:

- Is the term “refund” applicable to the dollars sent to the tribes?
- Is the term “audit” applicable to DOL's abilities to track where the dollars sent the tribes went?
- What has been the cost to the taxpayers by year-end 2013?
- Can one estimate the amount the compacts will cost the taxpayers over the next decade?
- If the Legislature decides to increase fuel taxes in the future, will the increase in rates paid by the taxpayers' effect the amounts sent to the tribes?
- Can the amounts sent to the tribes impact the state's sale of bonds used to fund major transportation projects?

### Is the term “refund” applicable?

A refund of taxes is typically defined with “*Return by the taxation authorities of excess tax paid by an individual or a firm. Also called tax refund.*”<sup>1</sup> In simple terms, a refund of taxes is used to reimburse the taxpayer for taxes previously collected that were not legally owed.

Review of the court records in the litigation over the compacts<sup>2</sup> and the actual statute itself (RCW 82.36.450) shows the state of Washington recognizes that tribal recipients of funds from the motor vehicle account do not have an exemption to the tax under state or federal law, including the historical federal treaties.

With the passage of SB 5272 in 2007, the taxes are actually paid by the motor fuel wholesaler prior to the delivery to the tribal station and built into the price the public pays at the tribal pump just as it is for consumers at non-tribal stations. The tribe is not the taxpayer and

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1 <http://www.businessdictionary.com/definition/refund.html>

2 “Statement of Grounds”, Automotive United Trades Org. v- Washington No. 89734-4

could not have overpaid the tax.

### **Is the term “audit” applicable?**

RCW.82.36.450 states the compacts:

*(c) Include provisions for audits or other means of ensuring compliance to certify the number of gallons of motor vehicle fuel purchased by the tribe for resale at tribal retail stations, and the use of fuel tax proceeds or their equivalent for the purposes identified in (b) of this subsection. Compliance reports must be delivered to the director of the department of licensing.” (emphasis added)*

The compacts themselves allow the tribe receiving the funds to comply by having a short annual statement prepared by the tribe’s accounting firm delivered to DOL. DOL has no ability whatsoever to obtain records, receipts, invoicing, or any other type of verification documents and as a result, cannot determine on its own or validate in any professional auditing fashion where any of the funds provided the tribe have gone. The limited report provided to DOL is then shielded from view under confidentiality. This process provides no public transparency and DOL is likewise denied the ability to conduct independent review over these funds coming from the public treasury to the tribal accounts.

The term “audit” could prove misleading to the public that assumes an audit by a state agency would actually be able to track where the public tax dollars are going when the capability to do so has been denied the Department by the language inserted into the compacts.

### **The cost to the taxpayers**

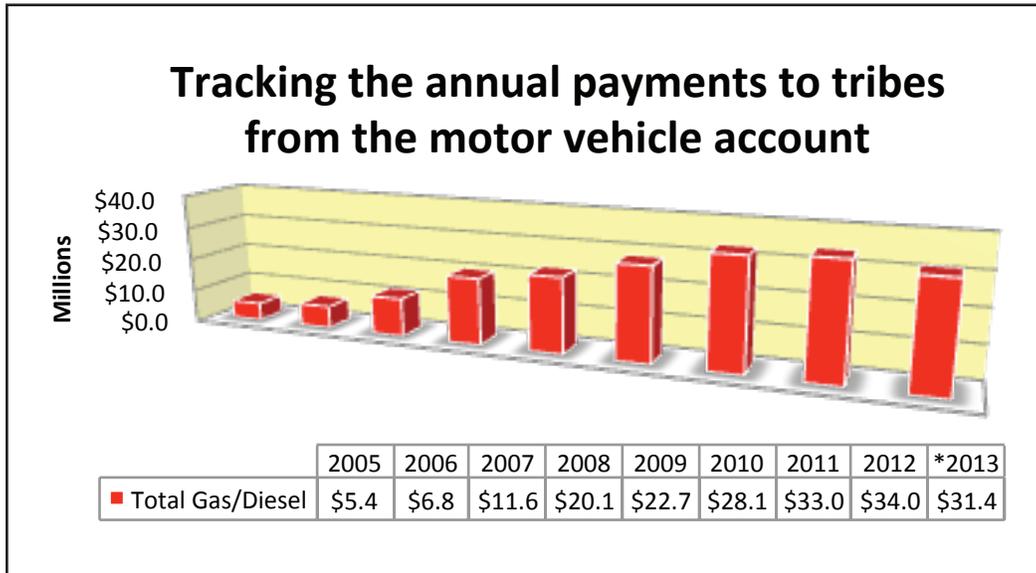
Prior to passage of SB 5272, the state typically refunded tribes for fuel consumed by tribal members on-reservation. In 2005, a lawsuit determined the current tax code did not allow the state to collect fuel taxes on reservations. The following year, the tribes received a total of \$6.8 million. Passed in 2007, SB 5272 aligned the WA fuel tax code with a U.S. Supreme Court case out of Kansas where the taxes were collected from the wholesaler prior to delivery to the tribal station. At that point, neither the tribes nor any of their members held a legal exemption to paying the state fuel tax.

While the statute is void of any reference to a “refund”, then Governor Gregoire entered into compacts with tribes that provided they would receive a payment equal to 75% of the tax built into fuel sold at tribal stations to all customers regardless of their tribal affiliation. Currently the state tax rate for gasoline and diesel is 37.5¢ per gallon creating a payment to the tribe of 28¢ per gallon for each and every gallon of gasoline or diesel sold at a tribal station.

As these agreements increased in number, the cost to the taxpayers climbed dramatically as shown in the chart below. By 2014, the annual payments to tribes rose above \$30 million<sup>3</sup>. From 2005-2013, the tribes have received \$193 million in payments out of the account hold-

<sup>3</sup> Source: DOL spreadsheets including “2007-2013 Refunds Payment Table.....PDF”

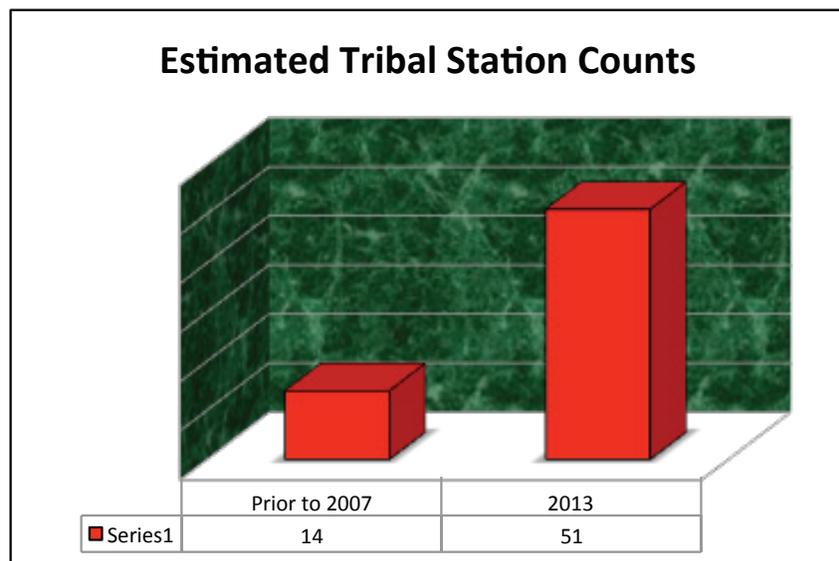
ing the fuel taxes.



### Estimating future costs to the taxpayers

The growth in the amounts paid tribes annually is reflective of the dramatic increase in the number of outlets operated by the tribes. The number of stations operated has tripled in a span of eight years jumping from an estimated 14 locations prior to the compacts to over 50 today. This growth in the number of tribal stations will likely continue as the tribes build new stations or acquire existing ones from non-tribal operators. The growth rate in the future is uncertain and the number of stations that come on line is the largest factor that changes gallons sold, which in turn, drives the amount of tax dollars sent the tribes.

If the payments remain constant with 2013, the cost to the taxpayers in the next decade would be an additional \$340 million. While I cannot confidently predict the future increase in the number of tribal stations, the dramatic increase seen since the creation of these compacts leads one to believe the number of tribal stations will continue to grow in the foreseeable future.



## If an increase in motor fuel taxes is passed by the Legislature, will that action impact the amount paid the tribes?

The compact language states the money sent the tribe will be calculated by multiplying the number of gallons of gasoline and diesel sold to the public at tribal stations by a factor equal to 75% of the then current tax rate. Currently, 75% of the 37.5¢ rate equates to 28 cents per gallon. A rate increase of 10 cents per gallon would grow the number for the tribes by 7.5 cents per gallon to 35.5¢ per gallon.

Using the 2012 experience again, the \$34,030,308 total amount paid tribes divided by 28 cents shows the tribes sold 121,536,814 gallons of fuel that year. A 7.5¢ per gallon raise in the fuel excise tax rate would result in a raise of \$9.1 million in the amounts paid the tribes on the same amount of gallons. Even if the tribal station counts and sales volumes were to remain constant at today's level, a dime increase in the fuel excise tax would raise the compact cost to the taxpayers in the following decade approximately \$9.1 million annually adding another \$91 million to the amounts shown above for the upcoming decade.

## Do the payments to the tribes affect the state's ability to sell bonds for transportation projects?

The state of Washington collects an excise tax of 37.5 cents per gallon of gasoline and diesel from motor fuel wholesalers of which 11.96 cents is forwarded to cities and counties leaving a remainder of 25.54 cents for the state's Department of Transportation. Of this 25.54 remainder, 8 cents is reserved for maintenance of existing roads and 17.54 cents or approximately 69% of the state's apportionment is used to pay interest and principal on bonds sold to finance current or past major projects<sup>4</sup>

<i>Where does the gas tax go?</i>							
				<b>WSDOT</b>	<b>Cities</b>	<b>Counties</b>	<b>Grants for Local Governments*</b>
Pre-2003 Base	{ 1991 increased to:	23.0¢/gal	=	12.04¢	2.46¢	4.43¢	4.07¢
2003 Nickel Pkg.	{ 2003 increased by:	5.0¢/gal	=	5.00¢	-	-	-
	<b>2003 New Rate:</b>	<b>28.0¢/gal</b>	<b>=</b>	<b>17.04¢</b>	<b>2.46¢</b>	<b>4.43¢</b>	<b>4.07¢</b>
2005 Transportation Partnership	{ 2005 increased by:	3.0¢/gal	=	2.50¢	0.25¢	0.25¢	-
	{ 2006 increased by:	3.0¢/gal	=	2.50¢	0.25¢	0.25¢	-
	{ 2007 increased by:	2.0¢/gal	=	2.00¢	-	-	-
	{ 2008 increased by:	1.5¢/gal	=	1.50¢	-	-	-
	<b>2008 New Rate:</b>	<b>37.5¢/gal</b>	<b>=</b>	<b>25.54¢</b>	<b>2.96¢</b>	<b>4.93¢</b>	<b>4.07¢</b>
				<b>(4.04¢)</b>			Used to pay bond debt service on state highway and ferry projects funded by the pre-2003 base portion of the gas tax.
				<b>(13.50¢)</b>			Used to fund transportation construction and pay bond debt service on 2003 Nickel and 2005 Partnership projects statewide.
				<b>8.00¢</b>			Remains for <b>maintenance and operations</b> , as well as, <b>preservation, safety improvements and congestion relief</b> projects for state highways and ferries.

\*Grants for local governments administered through Transportation Improvement Board (TIB) and County Road Administration Board (CRAB)

4 <http://www.wsdot.wa.gov/NR/rdonlyres/F151179B-8CA9-4127-982D-0C8D55C4B395/0/WhereDoesTheGasTaxGoOct2013.pdf>

The ability to sell the bonds and the interest rates an investor would find acceptable to purchase the bonds is directly tied to the ability of the state to pay the interest and principal. The loss of \$340 to \$597 million of motor fuel taxes over the next decade will reduce the cash flow into the motor vehicle fund. I cannot specifically estimate the loss of bond capacity or impact on the interest rates paid. I can state that the money sent the tribes is drawn from the fund that finances transportation. The loss of this revenue could result in a loss of capacity to issue and pay for bonds that could finance future transportation projects in the state.

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