American Indian Sales of Motor Fuel: Assessment of Reporting and Policy Recommendations

Office of Highway Policy Information Federal Highway Administration U.S. Department of Transportation Washington, D.C.

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Executive Summary

Overview

The Federal Highway Administration (FHWA) selected the Louis Berger Group and ICF Consulting (the Project Team) to undertake an investigation of American Indian motor fuel sales on tribal lands and to assess any reporting issues attendant to these sales. The primary objective of the work was to determine whether significant motor fuel sales on tribal lands are not included in state-level estimates of fuel sales provided to FHWA. As these estimates form the basis of FHWA´s attribution formula for Highway Trust Fund resources, such omissions raise concerns about potential bias in the attribution process. The current study's intent was to investigate attribution issues, not tax evasion issues per se.

The Project Team's efforts included a thorough review of available data and reports to understand the magnitude of these sales. The Team also undertook an analytical exercise to determine the scope of sales on tribal lands as well as estimates of sales to non-residents of tribal lands. In addition, the team also reviewed recent judicial decisions related to the issue of tribal-state excise tax issues, as the reporting issues are closely imbedded in this larger topic. The Team also completed a comprehensive survey of current reporting arrangements between tribal governments and selected states. This effort included outreach to tribal and state entities to understand the various types of reporting arrangements, as well as to assess the problems and benefits attributable to each. The Team then developed a series of policy recommendations stemming from the research and analysis conducted in the study.

Background

American Indian tribal entities exhibit a variety of inter-governmental relationships with the states surrounding or adjacent to the tribal reservation. While sovereignty is the cornerstone of the relationship, significant variation exists when comparing specific relationships between states and tribes because of historical circumstances and established treaties. One important area of variation relates to the tax treatment of fuel sales on tribal lands. In general, motor fuel sales to American Indians for on-reservation consumption are not taxable by states. In certain instances, this differential tax treatment has led to ex tax fuel sales occurring on reservations. In turn, ex tax sales to tribal members has created a situation wherein non-tribal members may make fuel purchases outside the FHWA motor fuel sales reporting regime.

Significant unreported sales could create bias in the attribution process utilized by FHWA to identify each state's share of total fuel sales and federal tax receipts. Errors in attribution would then lead to biased estimates of the amount due to each state under the Federal-Aid Highway Minimum Guarantee provision. While under-reporting could occur for various reasons, this effort seeks to identify the existence of under-reporting associated with tribal fuel sales, and whether under-reporting is of a magnitude sufficient to affect in a significant way the accuracy of FHWA's attribution formula.

Summary of Results

Task 1: Ascertaining the Scope of the Problem

The key elements of Task 1 were two-fold: first, undertake a quantitative assessment of motor fuel sales at the county level, with specific attention on those counties bordering tribal reservations; and second, complete a review of recent judicial decisions to identify the important legal issues governing state tax treatments of tribal retail activities. Key elements of the work carried out by the Project Team, as summarized in this report, include the following:

- The Team found that American Indian Tribes have made significant investments in economic development initiatives. Retail service stations have emerged as an important source of sales, both as stand-alone establishments and as components of larger investments, such as retail shopping centers and gaming facilities.
- The Team also found evidence of motor fuel sales to non-tribal residents. The finding was based on indirect evidence: Counties adjacent to tribal reservations with significant fuel outlets tended to exhibit lower fuel sales than expected. While price differentials on and off-reservation may explain the existence of export sales, other factors, such as tribal gaming activities, may explain the sales volume.
- A price differential between reservation and off-reservation sales was found to be an important determinant of on-reservation sales. Specifically, when there is indirect evidence that no price differential exists then there is little evidence of sales to non-residents.
- There appears to be a potential for reporting bias in several states where tribal sales are significant and where no agreement is currently in place to report sales. New York State may be where unreported sales are highest: The Team estimates that sales on tribal lands could account for as much as 0.5 percent of total sales in the state.
- The legal context is important to the issues of tribal fuel sales reporting. Near unanimity exists among the various US Circuit Courts in regards to the legitimacy of tribal immunity from state motor fuel excise taxation. Recent decisions in South Dakota, Idaho and Kansas have denied state attempts to levy excise taxes on motor fuel sold on tribal reservations. In October, 2005 the Supreme Court will consider an appeal from the Kansas case.
- In general, where reporting issues remain, these stem from a lack of reporting agreements between states and tribes combined with significant fuel sales on tribal lands. Imposing state taxes on fuel at the terminal level is sometimes proposed as a solution. The change in tax treatment, however, is not always a panacea; there is evidence that these restrictions can be overcome by retailers.

Task 2: State of the Practice

Twelve states were examined for this portion of the study. The team sought both state and tribal contacts knowledgeable about the status and history of tribal fuel sales reporting and taxation in each state. In all, state staff in eleven states and tribal representatives in ten states had input into the study.

- Among these twelve states, most said that tribal fuel sales were being successfully reported. In some states there was a problem with reporting in the past or an ongoing issue, generally due to tribes purchasing fuel from out-of-state distributors without reporting those sales to the state.
- As courts have generally upheld the right of tribes to an exemption from the state fuel tax, tribes cannot be compelled to report these sales. Many states have formed agreements with tribes to allow for this exemption while maintaining reporting of all sales. In these agreements, states also create an even level of taxation, often by substituting tribal fuel tax for state fuel tax, and account in some way for taxes on purchases by non-tribal members.

Agreements on tribal fuel sales reporting and taxation generally fall into one of three types.

- The most common type of agreement is a non-exceptional agreement with tribal refunds. This type of agreement is "non-exceptional" in that tribes agree to purchase fuel within the state's existing fuel sales reporting system, in return for a refund to the tribe for tribal member purchases. Typically, the amount purchased by tribal members is estimated, which lowers the administrative burden of this type of agreement. In this study, Washington, Montana, Minnesota, South Dakota, Oklahoma, Arizona, and Iowa were found to have this type of agreement with some or all tribes within their boundaries.
- A second type of agreement is the exceptional agreement with tax parity. In this type of agreement, tribal retailers purchase fuel and report it separately from other retailers, or "exceptionally." However, tribes also assess their own fuel tax, in the same amount as the state's fuel tax. This provides for tax equity between tribal and non-tribal retailers. New Mexico, Nebraska, and Arizona have this type of

agreement with some or all tribes within their boundaries. In addition, one tribe in New York reported that it was negotiating this type of agreement with the state.

- A third type of agreement is a non-exceptional agreement with individual refunds. In this type of agreement, tribal retailers purchase fuel just as any other retailer, within the state's reporting system. The state then allows individual tribal members to apply for a refund for the fuel taxes they paid at tribal retailers. Arizona has this type of agreement with some tribes, and Michigan reportedly has this type of agreement with tribes, although the state was not contacted as part of the study.
- Most states and tribes praised the effect of the agreements, saying that they created a more stable tax environment and have allowed some states and tribes to cooperate on related issues such as fuel tax evasion. They have also led in some cases to increased economic development on tribal lands, resolving legislative disputes, and a generally more cooperative relationship between states and tribes.
- A few states and tribes said they were somewhat dissatisfied with the negotiated agreement, believing either that they should have received more of the fuel tax revenue or that the agreement was questionable on principle. Some states continue to contest the exemption for tribal fuel sales to tribal members. On the other side, some tribes question any agreement because of concerns about tribal sovereignty, for example the right to set their own fuel tax rate, since most agreements require the tribal fuel tax to equal the state's tax rate.
- Both states and tribes made recommendations for other states and tribes working on agreements. A cooperative attitude and respect were emphasized by several contacts. In some cases, combining fuel taxation with other issues, such as sales taxes, was seen to be beneficial. In at least one case, however, bundling fuel taxation with other more contentious issues, such as land claims and gaming, was seen as a roadblock to an agreement on fuel taxation.
- The non-exceptional agreement with tribal refunds was recommended by several states as a flexible type of agreement with a low administrative burden. The exceptional agreement with tax parity was recommended as a way to solve the issue of unequal fuel taxation in the face of significant conflict over the issue in two states, New Mexico and Nebraska. These agreements carry a higher administrative burden for states and tribes, but tribes sometimes prefer them because the tribe administers its own tax in the first instance.

Task 3: Policy Recommendations

The Team's research suggests that tribal fuel sale reporting is not likely to be biasing FHWA's attribution formula. Most of the states surveyed reported either successful reporting agreements or movements towards achieving such agreements. Even in sates where reporting issues exist, the potential magnitude of unreported sales is relatively modest as a proportion of total fuel sales in the state.

- The resolution of outstanding reporting issues should follow from the establishment of state-tribal tax compacts. The Team's research suggests that a key to such agreements was commitment among leaders, whether agency heads, the Governor, or the tribal council. Leadership is important especially when this issue has become very contentious, such as in New Mexico prior to the 1999 compromise bill.
- For most issues involved in fuel taxation agreements, win-win solutions are possible. The one zero-sum issue is the recipient of fuel tax revenue, while each side can easily make allowances on many other issues. For tribes, respect for tribal sovereignty and economic development on tribal lands are important and not counter to state interests. For states, fuel price equity, cooperation against fuel tax evasion, and full reporting of fuel sales to FHWA can easily be win-win issues.
- Both states and tribes benefit in general from a more cooperative relationship. Courts are unlikely to resolve this issue completely, as they have upheld exemptions for tribal members, but left sales to non-members in a grey zone because of the difficulty of tracking retail sales based on tribal membership. Agreements in many states have created a "tax peace" that is beneficial to both tribes and states.

1.0 Introduction

American Indian tribal entities exhibit a variety of government-to-government relationships with the states within which they are located. While tribal nation sovereignty is the cornerstone of the relationship, there is still significant variation tied to history and the various treaties established. This has led to a varied pattern in the type of relationships between states and tribal governments. One area where this difference is noticeable is in the framework for the reporting of sales of gasoline on tribal lands.

In general, tribal sales to American Indians are not taxable by states. This has led to the possibility, in some states, that a certain volume of sales may not be reported. The potential for significant unreported sales may be of concern if it creates bias in the attribution process utilized by the Federal Highway Administration (FHWA) in apportioning resources from the Highway Trust Fund to each state. The attribution process is based on estimates of state contributions to the federal Highway Trust Fund, which are themselves based on states' reported fuel sales. This implies that unreported tribal sales adversely affect the federal share to states with significant under-reporting. While under-reporting could occur for various reasons, it is of great interest to assess the degree to which, if at all, it is associated with gasoline sales on tribal lands.

The Louis berger Group and ICF Consulting (the Project Team) was selected by FHWA to undertake a comprehensive investigation of the reporting of American Indian gasoline sales on tribal lands (the Project). The Louis berger Group led Task 1, which is described in Section 1 of this report and entailed ascertaining the scope of the problem through economic data review. ICF Consulting led Task 2, which sought to characterize current reporting arrangements for selected states by conducting outreach to tribal and state entities and soliciting feedback. The findings of Task 2 are described in Section 2 of this report, 'the State of the Practice'. Section 3 presents recommendations that stem from the research and analysis conducted for Tasks 1 and 2.

Key elements of the work carried out by the Project Team, as summarized in this report, includes the following:

- A reporting of the scale of the retail gasoline industry on tribal lands in the United States, including measures such as sales, employment, and payroll.
- An indicative assessment, with limited available data, of whether state-level reports of tribal sales seem to diverge from the identified scale of the retail base on tribal lands.
- A quantitative analysis of sales on tribal lands and an estimate of the magnitude of sales to non-residents.
- A summary of existing reporting relationships between the relevant state and tribal governments.
- A reporting of current legal issues affecting fuel sales on tribal lands.
- An assessment of existing reporting relationships between the relevant state and tribal governments. This includes the findings of an extensive outreach effort to tribes and states.
- A comparison of agreements with tribes across eleven states surveyed in depth.
- An evaluation of best practices in state and tribal agreements with respect to reporting of fuel sales, including policy recommendations for relevant parties.

The research by the Project Team reveals that retail fuel activity on tribal lands is significant with as many as 55 American Indian tribes in 24 states currently operating fuel retailing establishments. The analysis identified 51 counties that contain tribal reservations with on reservation sales. In general, the vast majority of retail activity exists west of the Mississippi, with exceptions in Connecticut, New York, North Carolina and Wisconsin. The Team's findings are the following:

- By and large reporting by tribal governments to states is successful, and recent agreements indicate the reporting structure is, if anything, improving.
- In a 2002 report thirteen states identified reporting issues related to fuel sales on tribal lands [1]. Since then several states have successfully resolved these tribal issues. The Team's partial survey of states revealed that six states had resolved outstanding reporting issues with tribal entities, two states were

well on their way to doing so, and two states still have outstanding issues. The remaining four states were not surveyed and their status is unclear.

- The Team found that significant fuel sales to non-residents are generated when a price differential exists between on and off-tribal retailers. The price differential, when it exists, implies that the state tax is not levied prior to delivery of the fuel to the tribal lands.
- There appears to be a potential for reporting bias in several states where tribal sales exist and where no agreement is currently in place to report sales. New York State may be where unreported sales are highest — total sales on tribal lands are estimated to account for at most 0.5 percent of total sales in the state.
- In general, where reporting issues remain, these stem from a lack of reporting agreements between states and tribes combined with significant fuel sales on tribal lands.
- Imposing state taxes on fuel at the terminal level is sometimes proposed as a solution. However, this is not always a panacea - there is evidence that these restrictions can be overcome by retailers.
- The best way to ensure accurate reporting is to establish successful reporting agreements between states and tribal governments. The most successful arrangements create "win-win" situation for tribes and the state.
- Three major types of agreements were found in the survey of states, non-exceptional reporting agreements with individual refunds, non-exceptional agreements with tribal refunds, and exceptional reporting agreements with tax parity. Under non-exceptional agreements, tribal retailers are required to purchase fuel wholesale within the state's existing reporting system, and either individuals or the tribal government receives a refund of the estimated taxes paid by tribal members. Under exceptional agreements with tax parity, tribes levy a fuel tax in the same amount as the state and fuel sales are reported outside the system used by other retailers in the state.
- Agreements between tribes and states described in the survey emerged from a larger cooperative process that built on leadership within state and tribal governments, and were constrained by other issues between states and tribes, such as gaming, other tax agreements, and land claims. In some states, agreements on fuel taxation have improved state-tribal cooperation on other issues such as cigarette tax, fuel tax evasion, and transportation planning.

1.1 States with American Indian Retail Motor Fuel Activity

The Project Team completed a comprehensive investigation of various available data to identify fuel sales on American Indian tribal lands. The research and findings contained in Section 1.1 are primarily descriptive: The Team analyzed available data to identify where retail gasoline sales take place on tribal lands, and to the degree possible, the magnitude of this activity.

The sources queried by the Project Team included a variety of databases, as well as information provided by Associations of American Indian enterprises, federal agencies and local economic development corporations. One important source of information is the Department of Commerce's Economic Development Administration American Indian Reservations and Trust Areas. The report proved invaluable for an initial assessment of tribal economic activity, providing details on the economic infrastructure on the American Indian reservations. [2] In addition, the Project Team assembled data from the Economic Census for 1997 and 2002 to identify total retail sales activity for establishments on tribal lands and/or owned by American Indians.

A detailed summary of findings is included in Appendix A of this report. broadly, the research finds:

- American Indian Tribes in at least 24 states generate some level of on-reservation fuel sales.
- As discussed in Section 1.5, tax officials in 14 states have received complaints of on-reservation motor fuels sold ex-tax.
- As discussed in Section 1.7, ten states have entered into tax compacts with American Indian tribes related to motor fuels.
- Nineteen states provide tax refunds or exemptions of one kind or another to American Indian fuel purchases for on-reservation usage.

1.2 National Retail Trends

The gasoline service station and convenience store sector is a large and diverse segment of the retail industry. [3] In 1997, for example, gasoline service stations accounted for over 11 percent of all retail establishments and 8 percent of total retail sales nationally. [4] Following several years of rapid expansion, the economic recession beginning in 2001 resulted in a diminution of retail sales growth. The industry and service station sector rebounded dramatically, however, beginning in 2003. Indeed, according to the National Association of convenience Stores (NACS), 2003 sales at the nation's convenience stores eclipsed $337 billion in 2003. [5] 2003 profits exceeded $4 billion, an increase of nearly 55 percent over 2002 levels. [6] The rapid increase in revenues marked the first inflation-adjusted gain in retail sales in the sector in four years, even after accounting for the steep rise in wholesale fuel and cigarette prices. [7]

Operating under conditions of near perfect competition, no one retail establishment could maintain excess profits over an extended period. indeed, with no significant barriers to entry and diverse national, regional and local competitors, new competition will ensure that excess profits would quickly disappear for any establishment or location.

If any retailer were able to maintain a price advantage, however, that retailer would garner significant market-share and could depress sales at neighboring competitors. A significant body of research has documented the extent of cross-border sales of both alcohol and cigarettes (two fungible commodity-style products with heterogeneous state excise tax rates) between adjacent taxing jurisdictions. [8] The research studies have demonstrated that tax disparities do, in fact, induce cross-border sales with retailers operating in the state imposing preferential tax rates benefiting at the expense of retailers in neighboring tax jurisdictions. recent evidence suggests that tax competition has emerged in the motor fuel retail market as Native American-owned retail establishments have begun to market ex tax motor fuels. [9]

1.3 American Indian Fuel Retail Enterprises

As an initial assessment of American Indian involvement in motor fuel retail sales, the Project Team assembled data from a separate tabulation of the 1997 Economic Census reporting specifically on American Indian and Alaskan Native-owned enterprises in the Survey of Minority-Owned Enterprises: Company statistics Survey.

In 1997, the Census bureau estimated that American Indian and Alaskan Native-owned and operated approximately 187,921 business establishments, an increase of over 83 percent from 1992. These firms represented over 1 percent of all domestic firms [10], and were present in every state in the nation. Despite this wide representation, the bulk of American Indian economic activity is concentrated in states with large tribal populations: The three states with the highest number of American Indian enterprises included California, Texas and Oklahoma, while the three states with the highest share of American Indian owned firms were Alaska, Oklahoma and New Mexico.

The Economic Census also reports estimates of American Indian owned business establishments at the two-digit Standard Industry Classification (SIC) code for all states and counties (except in cases requiring data suppression because of small sample sizes or limited economic activity). [11] Unfortunately, the two-digit classification for gasoline service stations also includes automotive dealers. Nevertheless, the category (SIC Industry 55: Automotive dealers and service stations) does allow for an initial assessment of states with American Indian owned service stations. [12] Using the national ratio of service station sales as a guide, American indian owned retail establishments operate in as many as 40 states. Delaware, District of Columbia, and Hawaii have no American Indian owned service stations or automotive dealerships in 1997. [13]

The five states with the largest sales volume of American indian and Alaskan Native-owned owned SIC 55 retail establishments were Oklahoma, North Carolina, New York, Texas and Indiana. A table summarizing all the data is included in Appendix A.

Table 1.1: States with American Indian and Alaskan Native-Owned automotive Dealers and Service Station Firms

State	American Indian and Alaskan Native-Owned Firms
Oklahoma	194
North Carolina	163
New York	120
Texas	99
Indiana	62
Illinois	59
Georgia	50
South Dakota	48
Arizona	43

Source: US Census bureau Economic Census (1997)

Note: States with significant presence of SIC 55 firms but no on-reservation sales reported in Table 1.2 are included in Table 1.1. these include Indiana, Illinois and Georgia. It is assumed all firms in SIC 55 in these cases are engaged in automotive dealerships or operate off a reservation.

Gasoline Sales on Tribal Lands

To identify instances of on-reservation sales, the Project team first relied on the Economic Development Administration report and Tiller's Guide to categorize states based on whether American Indian tribes within their boundaries engage in retail motor fuel sales. The initial investigation identified over 50 American Indian tribal reservations wherein, either the tribe or individual members operate motor fuel service stations. A subsequent search of legal sources in LexisNexis™ revealed several additional tribes involved in motor fuel retailing and named as parties in various legal disputes. The Project Team included these tribes and their respective states in the summary file, as well. The results of are summarized in Appendix A.

The Project Team also utilized a proprietary business database assembled by InfoUSA as a further check on the establishment survey. The Team purchased the database for a select number of counties based on an initial assessment of the EDA reports. To isolate retail establishments on American Indian reservations and land trusts, the Team relied on mapping software to address-match the queries of retail establishments obtained from the InfoUSA database. Staff then overlaid american Indian reservation polygons and selected all retail establishments observed within reservation boundaries. This initiative yielded further confirmation of retail establishments on American Indian reservations in several western and eastern states with potential reporting issues related to tribal sales. finally, some selected findings for fuel sales on tribal lands are also included in Section 2 as part of the survey findings.

1.3.1 Types of business Establishments

After estimating the number of American Indian establishments, the Team refined its investigation and began to categorize the types of business establishments into one of two types; stand-alone service stations, or service station ancillary to other business enterprise. Details for making the determination are as follows:

Stand-Alone business Establishments: For the purposes of this section, the Project Team has relied upon the Tiller's Guide for categorizing service stations, as stand-alone businesses or ancillary to other economic activities. the Tiller's Guide, while not categorizing tribes based on economic activity, does provide useful insights into the types of initiatives currently underway on tribal reservations. Moreover, the report explicitly describes instances of tribal gaming facilities with ancillary service activities, including motor fuel service stations, convenience stores and smokeshops.

Businesses Ancillary to Other Economic Activities: In addition to stand-alone gasoline service stations, other American Indian economic development initiatives include a full spectrum of economic activities; however, certain tourism-based initiatives, such as recreation and gaming facilities, provide synergistic benefits when co-located with motor fuel service stations. While ancillary to the tourism-based draw, service stations leverage the proximity to the tourist destination to improve traffic and bolster sales. According to the National Indian Gaming Association (NIGA), 224 tribal governments engage in gaming activities in 28 states. The burgeoning gaming industry has facilitated increased tribal-state negotiations and resulted in 249 gaming compacts. American indian gaming activities generate over $14.5bn in revenue (21 percent of total industry revenue) and employ approximately 400,000 persons. [14]

The Team followed two steps for determining the existence of gasoline service stations at American Indian gaming complexes. First, the team cross-referenced the specific tribes identified in the NIGA with the reference materials acquired from the Economic Development Administration. Finally, the team contacted tribal representatives to ascertain the existence of service stations amongst the gaming facilities and resort-complexes.

1.4 Motor Fuel Sales Reporting Issues between States and Tribal Governments

The existence of American Indian-owned retail fuel establishments does not necessarily imply tax-free sales, or even that there are any contentious issues relating to sales. Indeed, as noted in the 2002 Federation of Tax Administrators (FTA) publication, Survey of American Indian Issues most wholesale distributions of motor fuel to retailers occurs with the excise tax already applied, irrespective of whether the retail establishment is American Indian owned and operated. instead, the emergence of on-reservation fuel sales ex-tax arose, in part, as a result of judicial decisions affirming tribal sovereign immunity and in at least one instance, a tribal entity engaged in refining and wholesale fuel distribution.

For the purposes of this section, the Project Team relied upon the FTA survey results to identify states with reporting issues. The FTA documentation is suggestive:

States where Reporting Is Successful: The majority of states have avoided under-reporting issues through tax collection at the terminal level or simply because no American Indians engage in on-reservation motor fuel sales. for those states with on-reservation sales, but no reporting issues, the continuation of the status quo relies upon enforcement and monitoring of wholesale and distribution activities within the state.

States Where Reporting is Unsuccessful: the FTA survey reported that tax officials in 13 states have received citizen or special interest complaints of on-reservation ex-tax fuel sales. It should be noted that the FTA report is outdated. As discussed in later sections, the states of Arizona, Idaho, Nebraska, New Mexico, and South Dakota, identified as having reporting issues in the report, appear to have mostly resolved the issues that affected the reporting of sales on tribal lands, while Iowa, North Dakota and Washington have moved towards improved reporting as well.

The Project Team found that, of states studied, only New York and Kansas [15] continue to experience reporting issues and have not moved towards resolution. The situation in Florida, Louisiana, Nevada, Texas and Wisconsin, who indicated reporting issues in 2002, is unclear at this point as these were not case studies for the Project Team.

1.5 The Extent of American Indian Sales to Non-Residents

The degree to which gasoline sales on tribal lands are made to non-residents of the tribal lands is of interest. If these sales are negligible, then presumably there are no real issues with respect to reporting: sales of fuel on tribal lands can be estimated with simple formulas tying fuel sales to population, vehicle ownership, density or other factors.

If non-resident sales are found to be significant, this invalidates the simplest, but not the only, approach to estimating tribal sales. This is also of interest in that these sales to non-residents, not formally exempt from state taxation, may be the source of under-reporting. It is important to stress that this exercise is not intended as an estimate of tax evasion, but rather an effort to ascertain whether tribal sales can be simply estimated based on formulas if non-resident sales are negligible. In the case non-resident sales are measurable, the exercise also attempts to give a rough estimate of their scale. If fuels sold on tribal lands already include the state excise tax, however, reporting has presumably already taken place at the terminal or distributor level.

1.5.1 Testing for Non-Resident Sales Using Regression Analysis

In order to address the issues, an econometric model was constructed. Using data for a large sample of 1,496 counties [16], the Team analyzed the degree to which tribal areas with fuel sales appear to generate sales to non-residents. The approach is essentially one where fuel sales to non-residents are estimated indirectly. In this approach, the team first analyzed relationships between per capita gasoline sales in each of the counties and a series of variables that are hypothesized to affect sales within the county, including:

- The population density of the county;
- The density of the road network, as measured by per capita lane-miles in the county;

- The levels of vehicle ownership per capita in the county;
- The level of state taxes; and
- Per capita income in the county.

In addition to these variables, a series of statistical controls are added to determine if there is a significant relationship between whether a county is adjacent to a tribal land where the selling of gasoline takes place, or actually contains tribal land. What the analysis sought to quantify is the degree to which tribal lands with retail fuel facilities attract sales from non-residents. The method for identifying non-resident sales is based on observed sales in counties adjacent to, or actually containing, the tribal area. If proximity to a tribal area with retail fuel facilities leads to lower observed fuel sales in the county itself, then sales to non-residents may be significant. by relying on multivariate regression techniques, the Team is able to isolate these effects from the other effects above that are hypothesized to influence gasoline sales within a county.

The results of the statistical analysis are reported in Table 1.3 below. The main results, however, can be summarized. For the simplest model, which is referred to as Equation 1, the Team was simply trying to determine the main factors that influence per capita fuel sales. These factors include:

- County population density is a highly significant [17] factor determining a county's per capita gasoline sales, with a denser population associated with lower per capita sales;
- The levels of state gasoline taxes are negatively associated with per capita sales;
- Higher levels of vehicle ownership in a county act to increase the levels of per capita gasoline sales

These findings are all intuitive: A higher population density is associated with a greater prevalence of modal alternatives to automobiles, as well as reduced distances (if not necessarily travel times) to work and shopping. as mentioned, higher state gasoline taxes will deter driving as well as encourage purchases in lower tax states, with both effects reducing per capita gasoline sales in the county. Finally, higher levels of vehicle ownership are associated with more vehicle miles driven and, as found here, higher gasoline sales. Other variables were tested as well, notably per capita income in the county, but were not found to have a significant influence on per capita gasoline sales.

Having established a satisfactory model explaining the typical determinants of gasoline sales, the Team then introduced additional variables to test for the effects of gasoline sales on tribal lands. Specifically, the team explored whether there is evidence that sales on tribal lands to non-residents are significant. The following results were observed:

- If a county is adjacent to tribal lands selling gasoline, its own levels of per capita gasoline sales are reduced by roughly 8 percent, all else being equal. The relationship is highly statistically significant;
- No significant relationship between per capita gasoline sales and having tribal lands with gasoline sales within county borders is found; and
- Restricting the analysis to only counties in states where there are identified reporting issues only alters results slightly: For these counties adjacent to tribal lands, there is a slightly higher implied loss of gasoline sales.

In general, the findings show strong (but indirect) evidence that sales on tribal lands attract purchasers from adjacent counties. Depending on the exact form of the regression model, the Team found that counties adjacent to tribal lands where gasoline purchases are made have between 7 and 9 percent lower per capita gasoline sales themselves. The approach used, multiple regression analysis, ensures that these effects are not confused with other differences between counties (such as population density) that affect gasoline sales. In other words, the estimated shortfall in per capita gasoline sales for counties adjacent to tribal lands with sales are shortfalls from the expected levels of sales after controlling for county attributes found to influence fuel sales, such as population density, tax rates, and vehicle ownership.

In contrast, the econometric approach does not yield significant evidence that counties containing gasoline sales on tribal lands have higher than expected per capita sales. The fact that counties with tribal sales do not exhibit higher per capita sales is perhaps surprising given the findings for adjacent counties. One would expect that sales attracted from adjacent counties would result in higher than expected sales. This may be an indication that the census data on gasoline sales may not capture all sales on tribal lands. This possibility, which would need to be further substantiated, would explain the lack of a significant pattern of higher than expected county-wide gasoline sales in counties with tribal sales.

This result is also robust to various other forms of model specifications. For example, if "controls" are added for each state to capture that state's particular characteristics beyond population density, tax rates, and vehicle ownership the effect is still present: being adjacent to a tribal area that sells fuel reduces fuel sales in that county.

This is an average effect, however, that does not control yet for the actual price differential between the tribal area and the adjacent county. This price differential is unobserved. It is assumed that the price differential is important, however, and a variable is constructed to capture instances where it is assumed that no differential exists: As discussed in the later sections of this report, in states where the fuel tax is imposed at the terminal level (or at the rack), it typically enters the downstream supply with the excise tax already included in the price. In other words, in states where retail prices already include the state excise tax because of terminal level-taxation (but not always) [18] it is implied that there is no price differential between the tribal area and the state. In these cases, one would expect that the effect of proximity would vanish and that adjacent counties would not long exhibit lower sales than expected.

The Team carried out just such an analysis and confirmed its initial hypothesis. Generating a variable that indicates whether fuel in a state is taxed at the terminal level, the Team re-ran Equation 2 and Equation 3. The new equation, however, includes a new variable that indicates tax levies at the terminal level. [19] As shown in Table 1.2, these new specifications (Equation 4 and Equation 5) reveals that if one accounts for fuel being taxed at the terminal level, the effect of being adjacent to a tribal area with fuel sales mostly disappears. specifically, a county adjacent to a tribal area with fuel sales will now only Generate sales that are 3 percent lower than expected rather than 8 percent lower.

Table 1.2: Estimated Determinants of County-Level Per Capita Fuel Sales

Independent Variable:	Equation 1	Equation 2	Equation 3	Equation 4
County Population Density	-0.09**	-0.09**	-0.08**	-0.08**
Dummy Variable: Adjacent	-0.09**	-0.08**	-0.076*	
State Gasoline Tax Rate		-0.25**	-0.26**	-0.27**
Per Capita Vehicle Ownership			0.18*	0.20**

Table 1.2: Estimated Determinants of County-Level Per Capita Fuel Sales				
Independent Variable:	**Equation 1**	**Equation 2**	**Equation 3**	**Equation 4**
Dummy Variable: Contain				0.002
Regression Constant	0.17**	0.24**	0.22*	0.25**
Adjusted R2	0.11	0.12	0.12	0.11
F-Statistic	86.4	63.6	48.9	86.4
Observations	1,380	1,380	1,380	1,380

Source: United States Census 2000, SF-3; United States Census Geographic Area Series 1997; Census Tiger Files 2000; The Louis berger Group

Notes: "Dummy Variable: Adjacent" indicates the effect of a county being adjacent to tribal lands with gasoline sales

"Dummy Variable: Contain" indicates the effect of a county having tribal lands with gasoline sales within its borders

** Indicates variable is significant at the 95 percent confidence level*

*** Indicates variable is significant at the 99 percent confidence level*

All variables are converted to natural logarithms, and coefficients here are equal to elasticities, indicating the percent change in county per capita gasoline sales following a 1 percent change in the independent variable. for dummy variables, they equal the percent change in per capita gasoline sales if the county is adjacent to tribal lands with sales or contains tribal lands with sales

If Equation 3 is run with controls for counties adjacent to tribal lands but only in states with identified reporting issues, the coefficient (elasticity) increases to -0.96, while the significance declines to the 93 percent confidence level

Table 1.3: Estimated Determinants of County-Level Per Capita Fuel Sales Using Regression Analysis		
Independent Variable:	**Equation 4**	**Equation 5**
County Population Density	-0.09**	-0.09**

Table 1.3: Estimated Determinants of County-Level Per Capita Fuel Sales Using Regression Analysis		
Independent Variable:	**Equation 4**	**Equation 5**
Dummy Variable: Adjacent	-0.08**	-0.08**
State Gasoline Tax Rate	-0.26**	-0.26**
Per Capita Vehicle Ownership		0.17*
Dummy Variable: At Terminal	0.05**	0.05**
Regression Constant	0.26**	0.23**
Adjusted R2	0.12	0.13
F-Statistic	50.0	41.0
Observations	1,380	1,380

Source: United States Census 2000, SF-3; United States Census Geographic Area Series 1997; Census Tiger Files 2000; The Louis berger Group

Notes: "Dummy Variable: At Terminal" indicates the effect if the state levies fuel sales at the terminal level

** Indicates variable is significant at the 95 percent confidence level*

*** Indicates variable is significant at the 99 percent confidence level*

1.5.2 Conclusions

The econometric analysis detailed above was suggestive that tribal areas with fuel sales generate significant sales to non-residents. For the purposes of reporting, this raised two issues. First, it implied that a simple formula-based estimate of sales on tribal lands would be biased if it was based solely on measures of the tribal area itself, such as population, per capita vehicle ownership or other factors. Second, the analysis implied that these non-resident sales were much higher when fuel is *not* taxed at the terminal. The imposition of the excise tax at the terminal can mitigate the effect of the price differential between the tribal area and the adjacent counties, as the fuel should have the state tax factored into the price at the pump [20]. The fact that tribal sales to non-residents are higher in states that do not impose the motor fuels tax at the terminal level suggests in turn that a price differential is a major incentive to purchase fuel on tribal lands.

Does this have relevance for reporting? As will be discussed in the remainder of the report, the impact of fuel sales on tribal lands on reporting is varied, with most states having secured working reporting agreements that generate satisfactory accuracy in reporting. However, there is also evidence that some states, typically with contentious issues relating to fuel sales with no state tax imposed, also have potential reporting issues. The existence of sales without state taxes imposed may be highly correlated with reporting:

- While tribal area residents are exempt regardless, there is a reporting burden for the seller;
- Non-residents are not exempt, and imposing the tax would negate a price advantage.

Several of the states and tribes have pursued legal options to address the issue of untaxed sales. The degree to which there is a potential legal solution to the issue of untaxed fuel sales on tribal lands is of interest. The report now examines the legal and legislative landscape as it affects fuel sales on american Indian tribal lands.

1.6 Current Legal Issues and Developments

Beginning in 1970, the federal government set forth a policy of supporting tribal attainment of economic and political development through self-government (Ansson, 1999). The power to tax and raise revenue, while remaining independent of competing tax regimes, is the essence of sovereign immunity and is a vital part of for self-government (Tabor, 2004). Strictly applied, sovereign immunity holds that American Indian tribes are independent, sovereign nations immune from state taxation, excepting instances wherein congress provides an explicit exception.

Sovereign immunity is the defining issue in state American indian relations and taxation. The US Supreme Court has affirmed sovereign immunity and denied state attempts to tax American Indian economic activity on tribal reservations. Moreover, two recent federal circuit court decisions have called into question the legality of states' efforts to tax distributors who deliver motor fuel to tribal reservations. In the 2005 session, the Supreme court will review one of these circuit court decisions and rule on state efforts to levy excise taxes on tribal fuel sales.

1.6.1 Relevant Judicial Decisions

Recent legal challenges, as well as legal commentators, have cited provisions in the 1936 Hayden-Cartwright Act as a defensible congressional exception. The legislation expressly enables states to tax fuel sales on "...United states military or other reservations." The full text of the section is provided hereafter:

1936 Hayden-Cartwright Act, 4 U. S. C. §104

> All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.

While legal analysts have suggested the act enables state taxation (Bloeser, 1996), courts have since rejected this interpretation of "reservations" because of the "ambiguity" in the statute and the necessity for explicit congressional authorization for state taxation on tribal reservations. indeed, as the majority noted in Coeur D'Alene Tribe v. Hammond, while not previously addressing the issue itself, the 8th Circuit and all federal district courts have held "...clear congressional authorization under the Hayden-Cartwright act is not present..." (Coeur D'Alene v. Hammond at p. 691).

1.6.2 Recent litigation

The Supreme Court recently considered two petitions for Writ of Certiorari from cases originating in Idaho and Kansas. In both cases, the respective Circuit Courts ruled in favor of the tribes and against the state, idaho in the 9th Circuit Court and Kansas in 10th seeking to impose state motor fuel excise taxes on tribal retail activities. While the Supreme Court denied cert for the Idaho case, the court will hear oral arguments on behalf of litigants in the Kansas case during the October, 2005 term. A summary of the two Circuit Court decisions follows hereafter:

Coeur D'Alene Tribe v. Hammond, US Court of Appeals 9th Circuit, 384 F.3d 674; 2004 U.S. App. LEXIS 17467, December 2, 2003.

The following section summarizes the majority opinion in the Coeur D'Alene Tribe case:

- **Case background**

  The Coeur D'Alene Tribe and two other tribes, the Nez Perce and Shoshone-Bannock tribes operate motor fuel service stations on their respective tribal lands in the state of Idaho. The fuel distributor, selling motor fuel to the tribes, had applied the state excise tax and remitted it to the state, pursuant to state law. In 2001, the Idaho Supreme Court ruled in favor of the tribes and held that the legal incidence of the tax falls on retail consumers. by implication, American Indian sales were subject to a retail tax. More importantly, the Court rejected the state assertion that the Hayden-Cartwright Act provided the legal exception. Following the state court decision, the Idaho legislature in 2002 modified the tax to explicitly apply it to the distributor, not the tribal retailers. The tribe brought suit in federal district court, and the court ruled that notwithstanding the legislative directive, the legal incidence of the tax still fell upon the Indian retailers without congressional authorization. thus, the federal district court enjoined the state tax commissioners' enforcement of tax collection.

- **Court Decision**

  The Circuit Court ruled on two issues: first, on whom does the legal incidence of the tax fall; and second, if the Hayden-Cartwright Act authorizes states to tax economic activity on tribal "reservations." On cross-appeal, the Court also addressed a procedural claim by the tribe that the state lacked the legal right to re-try the Hayden-Cartwright claim (Coeur D'Alene Tribe v. Hammond, 384 F.3d at 679). On the first issue, the majority affirmed the district court's determination that tribal retailers continued to bear the burden of the tax based on an analysis of the code pertaining to motor fuel taxation (Id. at 681). After rejecting the tribal cross-appeal, the court re-considered the effect of the Hayden-Cartwright Act. The court held that, lacking an unambiguous congressional declaration, states could not collect an excise tax from on-reservation sales (Id. at 684). Furthermore, the court found that the meaning of the "reservation" exception in Hayden-Cartwright was ambiguous and therefore not a sufficient exception to enable state taxation. Thus, the court endorsed the district court decision.

Prairie band Potawatomi Nation v. Richards, US Court of Appeals 10th Circuit, 379 F.3d 979; 2004 U.S. App. LEXIS 16541, August 11, 2004

- **Case background**

  In Kansas, like Idaho, the state legislature – responding to the Supreme Court ruling in Oklahoma Tax Commission v. Chickasaw Nation – amended its motor fuel taxation regime (Spellmeier, 2003). The re-configuration of the excise tax included an explicit application of the excise tax to firms engaged in motor fuel distributions. The Prairie band Potawatomi Nation built and operates a $35m casino on a remote portion of the reservation (Prairie band potawatomi Nation v. Richards, 379 F.3d at 981). In addition, the tribe operates a service station, which in 2000 employed 15 persons, in close proximity to the casino. The retail establishment generates approximately $300k in tax receipts per year on fuel sales with an excise tax rate of 20¢ per gallon, effective January 2003 (Id. at 982). The Prairie band Potawatomi Nation case arose after the state tax commission attempted to impose the excise tax on a tribally-owned distributor.

- **Court Decision**

  The court distinguished the case from its previous ruling in Sac and Fox, 213 F.3d at 585 because the present fact-pattern indicate that unlike in Sac and Fox, the tribal retail establishment is ancillary to the Casino gaming activities that serve as the primary draw for tourists. Therefore, tribal sales resulted from "value generated" in the gaming industry and not from an anti-competitive tax advantage (Id. at 984). The court noted approvingly undisputed evidence that over 70-percent of service station customers also patronized the gaming facility (Id. at 981). Moreover, the court found that because the tribe levied its own excise tax and used the proceeds to fund transportation and social policy initiatives, the tribe's interests out-weighed the less compelling state interest of general revenue enhancements (Id. at 986).

1.6.3 Examples of Existing State Tax Compacts with American Indian Tribes

Given the uncertainty associated with litigating state excise taxation schemes, legal analysts have begun to recommend state-tribal tax compacts as an alternative, mutually beneficial resolution to tax disputes. As reported by Ansson, 200 tribes in 18 states had entered into tax compacts with states for the purposes of collecting and remitting cigarette and gasoline excise taxes. the author noted that in several cases (notably, Nevada and Louisiana), the compacts have allowed the tribes to retain all proceeds from the excise tax, provided the tribes levy an excise tax at a rate consistent with the state. while obviating the tax advantage of on-reservation retail establishments, the approach does provide the tribal government with a stable source of revenue, thereby affirming sovereign immunity and furthering the goal of tribal self government articulated in 1970.

In short, tax compacts may well provide an appropriate incentive for documentation of on-reservation sales to ensure accurate reporting of state sales to the Federal Highway Administration. The two recent Circuit Court decisions, discussed previously, illustrate the need for collaboration.

The FTA publication, Survey of American Indian Issues also reported on the extent of state-tribal tax compacts. Its analysis indicated that by 2002, 10 states had entered into motor fuel tax agreements with at least some of the tribes within their respective boundaries. In addition, several more states reported having existing agreements for the administration of excise taxation of tobacco products. Finally, the Project Team's outreach effort, described in Section 2 of this document - revealed that six states (including south Dakota discussed below) had recently reached agreement with several tribes subsequent to the publication of the FTA survey, and two more were moving towards resolution. The results of this effort are summarized in chart attached in appendix A.

The following examples are illustrative of existing state-tribal tax compacts:

Minnesota

- Chapter 270: Department of Revenue § 270.60 Taxes and fees; refund and sharing agreements with Indians

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> Subdivision 1. Taxes paid by Indians. The commissioner of revenue is authorized to enter into a tax refund agreement with the governing body of

any federally recognized Indian reservation in Minnesota. The agreement may provide for a mutually agreed upon amount as a refund to the governing body of any sales or excise tax paid by the total resident Indian population on or adjacent to a reservation into the state treasury, or for an amount which measures the economic value of an agreement by the tribal government to pay the equivalent of the state sales tax on items included in the sales tax base but exempt on the reservation, notwithstanding any other law which limits the refundment of taxes. [21]

Oklahoma

- Title 68 § 500.63

It is mutually beneficial to the State of Oklahoma and the federally recognized Indian tribes of this state, exercising their sovereign powers, to enter into contracts as set forth in subsection b of this section, for the purpose of limiting litigation on the issue of state government taxation of motor fuel sales made by Indian tribes. It is in the interest of this state to resolve disputes between the state and federally recognized Indian tribes on this issue by entering into contracts under which the Indian tribes are in part compensated for any tribal motor fuel tax revenues the Indian tribes might lose by reason of the adoption and enforcement of this act. Such mutually beneficial agreements allow both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country. [22]

South Dakota

- Chapter 10: Taxation § 12A Tax Collection Agreements with Indian Tribes

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Agreement to collect taxes for tribes--Department of Revenue and Regulation fee. The department may enter into tax collection agreements with any Indian tribe under the provisions of this chapter and chapter 1-24. these agreements may provide for the collection of any of the following state taxes and any tribal taxes imposed by a tribe that are identical to the following state taxes:

...The fuel excise tax imposed by chapter 10-47B.

The agreement may provide for the retention by the department of an agreed-upon percentage of the gross revenue as an administrative fee. [23]

1.6.4 Conclusions

Our review of current litigation and legislation finds this to be a dynamic area where several states are moving forward with efforts to redress inadequacies. In general, the focus of legislative developments has been on taxation; however, as will be discussed further in this report, a resolution of the taxation issue would implicitly resolve outstanding reporting issues.

1.7 Are There Indications of Reporting bias?

It is surprisingly difficult to answer this question with certainty for every state where tribal sales occur. One issue is that most states themselves do not explicitly detail their estimates of sales on tribal lands. For example, where state taxes are imposed at the terminal level states may not differentiate estimates of sales to retail establishments on tribal lands.

Nevertheless, there are currently at least two states that have varying degrees of reporting issues. These states are places where there is the *potential* for reporting bias. For example, it appears that New York State may be one of several areas where reporting is an issue, due in part to two factors: First, anecdotal evidence suggests that despite the fact fuel theoretically has the state fuel tax imposed at the terminal, some amount of fuel is apparently sold without either the state fuel tax and/or sales tax. Confirmation of this fact is provided by the well-known price disparities between many retail outlets on tribal lands and those off reservations [24]. Second, many of New York State's tribal lands are near fairly populated urban or adjacent to highways, meaning that the potential non-resident market is large.

While there is movement towards agreements, at this point there are no formalized reporting relationships. This means that most tribal fuel sales are not currently reported. The implications for bias are therefore real, and the potential scale of the bias are suggested by the data in Table 1.4 below, which outlines the scale of parts of the industry on tribal lands in New York state. The data is derived from the *InfoUSA* establishment and employment database, with estimated sales derived from employment on a formula basis. The table is a partial count of retail fuel establishments on tribal lands, including several where anecdotal evidence suggests sales do not include state motor fuel taxes. All are characterized by prices at the pump significantly below those charged off-reservation.

As shown, sales at these establishments may be close to $50 million a year, amounting to less than 0.5 percent of total New York State sales. It is unclear whether these fuel sales figure at all in New York State estimates. This figure would certainly represent an upper-bound on potentially unreported sales [25].

It appears that the potential for reporting bias is real, though this bias would be a relatively small fraction of total state sales. One can suggest that certain key factors appear to be associated with reporting issues:

- A lack of formalized agreements between states and tribes to report sales combined with a significant tribal retail presence are the most important factors. The lack of such an agreement may be reflective of states and tribal governmental relations generally;
- Closely related to the size of the tribal retail sector is the potential for significant non-resident sales, provided either by proximity to an urban area or to heavily traveled highways;
- The ability to purchase wholesale fuel free of state tax.

The role of reporting agreements is clearly primary in ensuring accurate reporting of fuel sales. This is clearly understood by many tribal and state governments, as witnessed by the establishment of several successful agreements in the last several years. The following section of our report now examines the state of the practice in reporting agreements.

Table 1.4: Estimated Sales Activity at Several Major Tribal Fuel Establishments in New York State				
Reservation	**Company Name**	**Establishment**	**Total Employment**	**Estimated Sales**
Cattaragus Reservation				
	Big Indian Smoke Shop	1	20	$5,380,000
	Native Pride	1	40	$12,000,000
	Seneca Hawk Restaurant	1	60	$18,000,000
	Tade Nino Neh-Gas	1	5	$910,000
Cattaragus Reservation Total		4	125	$36,290,000
Alleghany Reservation				
	Chief's Pit Stop Too	1	5	$910,000
	Seneca Hawk Petro	1	10	$3,000,000
Alleghany Reservation Total		2	15	$3,910,000
Tuscarora Reservation				
	Randy's Smoke Shop	1	4	$1,200,000

Table 1.4: Estimated Sales Activity at Several Major Tribal Fuel Establishments in New York State

Reservation	Company Name	Establishment	Total Employment	Estimated Sales
	Smokin Joes	1	20	$6,000,000
Tuscarora Reservation Total		2	24	$7,200,000

Source: The Louis berger Group, Inc.; InfoUSA (2004).

- [1] Federation of Tax Administrators FTA Survey of American Indian Issues (2002). *FTA Survey of American Indian Issues.* Motor Fuel Tax Section. Cheyenne, WY.
- [2] Subsequently, the Tiller Corporation published *The Tiller's Guide to Indian Country: Economic Profiles of American Indian Territories,* a revised version of the report as a reference guide to tribal lands,
- [3] The data typically refers to the North American Industrial Classification System (NAICS) classification for Industry 447: Gasoline stations.
- [4] U.S. Census Bureau, (1997). *Economic Census*.
- [5] National Petroleum News (2002).
- [6] Id.
- [7] Id.
- [8] See for example, Moody and Warcholik (2004) and Farrell, et al (2003).
- [9] See for example, Gladwell (1995).
- [10] The Census Bureau identifies firms as American Indian owned if American Indians control at least 51-percent of equity interest in the firm.
- [11] US Census Bureau *Economic Census* (1997). The Census Bureau reports that certain data is "withheld to avoid disclosing data of individual companies; data are included in higher level totals."
- [12] Id. Note: nationally, service station sales represented 48.9-percent of total sales in SIC 55 in 1997. In 1992, services station sales accounted for 52.2-percent of total sales in SIC 55.
- [13] Native Hawaiians and Pacific Islanders are categorized separately from American Indians and Alaskan Natives by the US Census Bureau.
- [14] See *Indian Gaming Facts*, National Indian Gaming Association: Library and Resource Center, available online: http://www.indiangaming.org/library/indian-gaming-facts/index.shtml. *Accessed 12/01/2004.*
- [15] While Kansas does not figure in the Team's survey, a review of legal and other developments led the Team to reach the conclusion that reporting issues exist.
- [16] An extensive database was constructed for this analysis, primarily relying on data from the United States Bureau of the Census. The data includes county-level fuel sales, population, vehicles ownership, income and numerous other socio-economic data. Also included are various geographic data pertaining to road density, urbanization levels and the prevailing gas tax imposed in the particular state.
- [17] Our use of the term significance is in the statistical sense. Model variables are typically found to be significant at least at the 95 percent confidence level.
- [18] Terminal level taxation does not always assure that no ex-tax sales occur. Fuel can be procured from wholesalers who agree not to impose the tax despite the requirements. It does make it more difficult, however, to have fuel available for sale ex-tax, and this accounts for the effects found in the statistical modeling.
- [19] FHWA: Office of Highway Policy Information, State Motor Fuel Tax Legislation (1997).
- [20] While taxing "at the rack" usually implies the state tax is in the price at the pump, the converse is not necessarily true, namely not taxing at the rack does not necessarily imply that the state tax is not

levied by the time the fuel is delivered to retailers. There are many instances, discussed later in the report, where distributors and wholesalers may levy the tax on behalf of the state.

- [21] Minnesota Statutes 2004 online at: http://www.revisor.leg.state.mn.us/stats/270/60.html.
- [22] Oklahoma Statutes online at: http://www.lsb.state.ok.us/.
- [23] South Dakota Statutes online at: http://legis.state.sd.us/statutes/.
- [24] New York State also has a vocal and active lobby group organized specifically around this issue. See the New York Association of Convenience Stores at http://www.nyacs.org/index.htm
- [25] The State of New York Department of Tax and Finance did not comment on this finding, and have not indicated their agreement with the view that unreported sales of this magnitude occur.

2.0 The State of the Practice

2.1 Introduction

Tribal entities across the United States continue to build and operate fuel retail establishments, with increasing fuel sales on tribal lands over the past several years. With the increased sales, the Federal Highway Administration (FHWA) has a growing interest in ensuring that those sales are reported for use in FHWA's attribution and apportionment process. However, the lack of comprehensive and detailed research on the topic has limited current understanding, with FHWA particularly concerned about the extent of data not currently reported. The research led by ICF Consulting under Task 2 of the study sought to address this issue and enhance the body of knowledge by investigating situations where voluntary reporting occurs and where it does not occur.

In order to better understand the reporting situation in various states, the team first conducted a review of the available literature on the topic, and then sought extensive input from a range of stakeholders, including tribal representatives at the 7th Annual Tribal Transportation Conference. After developing a priority list of participants, the team contacted representatives from both tribal and state offices in an effort to ensure that the list was comprehensive and balanced. In selecting the states for inclusion, the team selected the following types:

- Cases where Native American fuel sales are being reported;
- Cases where state and tribal entities are developing agreements to report sales; and
- Cases where tribes do not report fuel sales, including those where parties have been unable to reach agreements

A total of twelve states responded to outreach efforts, including three of the five states that have the greatest tribal populations. Input solicited from stakeholders included information on the circumstances that encouraged the development of agreements, and the benefits and limitations of situations. This information was analyzed for each state and across states, and recommendations developed.

The work conducted under this task is discussed below. Section 2.2 describes the research approach, section 2.3 presents findings state-by-state, and section 2.4 provides a cross-state analysis. Section 3.4 offers recommendations on crafting successful fuel sale reporting agreements, as provided by tribal representatives and state staff consulted during the study.

2.2 Approach

The team first prepared a plan that detailed its outreach strategy. The plan was designed to target a sample that covers cases where Native American fuel sales are being reported; cases where Native American fuel sales are not being reported, including those where parties have been unable to reach agreements; and, cases where state and tribal entities are developing agreements for the reporting of Native American fuel sales. The Team aimed to review a sample that encompassed the diversity of cases but was small enough to allow a full probe of the elements of reporting and non reporting.

Drawing on the Federal Tax Administration's Survey of Native American Issues, the team developed a listing of states that was grouped according to the above three categories. The team then overlaid this information with a listing of states and tribal representatives to whom FHWA and the team had been referred in the context of the study, including tribal contacts made at the 7th Annual Tribal Transportation Conference held in Scottsdale, Arizona (October 2004).

In addition, the team reviewed findings from Task 1, which shows there are several states where tribal gas sales apparently do not take place at all, in order to ensure these were not included in outreach efforts. The team also reviewed Task 1 information as a means to identifying case studies; this included states where the fuel price differential with tribal entities is most significant, as well as where there are current legal issues and litigation over the issue of fuel sale reporting and fuel taxes. This review of Task 1 findings provided an additional layer in guiding outreach efforts.

The final listing of states and tribal entities was flagged for priority outreach. State and tribal representatives were then identified in each state who could speak knowledgeably about the current state and history of fuel sales and reporting on tribal lands in the state. For the state, these contacts included representatives from tax and revenue departments, and attorney general offices. For the tribe, these contacts were primarily from transportation departments and legal counsel. The team also sought feedback from several Tribal Technical Assistance Program (TTAP) representatives.

Individuals were contacted by telephone, and information was gathered using a general discussion guide (see Appendix B). This guide was developed by the team to support open ended discussions and to ensure consistency in the study, both in terms of responses and in terms of presenting findings and conducting analysis.

Where possible, supporting documentation was gathered from study participants, such as the actual agreements between states and tribes, minutes from agreement meetings, and other materials. In general, discussion focused on gasoline sales, and did not address diesel fuels. Some individuals provided referral information for other state and tribal representatives, whose input was then solicited by the team. Write-ups of each discussion were provided to participants electronically to allow them to verify that their comments had been fully captured, as well as to give them the opportunity to provide further comments.

The final summaries by state have been drafted as a compendium of the information provided by state and tribal representatives.

2.3 Findings

This section reviews the findings from a total of twelve states, with input received from tribal representatives from ten states, and from state government officials from eleven states. State summaries are presented for all states that provided either state and/or tribal input; these states are: Alaska, Arizona, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, New York, Oklahoma, South Dakota, and Washington. Because there are many tribes in some states, the tribes' perspectives discussed in this section should be seen as the views of only some of the tribes in each state. It should also be noted that the New York summary is based on input from one tribe only.

Of the state officials who provided feedback, most believed that all tribal fuel sales were being reported. Many states have formed taxation agreements with tribes, which include reporting. Under these agreements, tribes either pay the state fuel tax and receive a rebate, or assess a tribal tax and report sales to the state. These agreements are typically the product of negotiations with each individual tribe in a given state. One of the exceptions, New Mexico, legislated an exemption for all fuel sales on tribal lands, which includes a requirement that all distributors report fuel sales to tribal entities and licensed Indian distributors. In several states with agreements, legislation was necessary to allow the state to form agreements.

2.3.1 Taxation Issues

In the state summaries presented below, state taxation of tribal fuel sales is addressed in parallel with tribal fuel sales reporting because of the way that reporting and taxation are linked in negotiations and agreements. What follows is a brief discussion of the situation surrounding tribal fuel sales reporting in the states surveyed.

Tribal sovereignty is the core philosophical issue behind disagreements on tribal fuel sales reporting and taxation. Most states in this survey have conceded tribes' right to an exemption from the state fuel tax, with the exception of Idaho, which recently challenged the exemptions in a case that the U.S. Supreme court declined to hear. However, a Kansas case currently before the U.S. Supreme court, Prairie Band Potawatomi Nation v. Richards, also addresses tribes' exemption from state fuel tax. Although Kansas was not included in the study, several of the states contacted in this study, including those with agreements, were party to an amicus brief in support of the state's assertion of its fuel tax.

In the Kansas case, the states' support for Kansas, and cases in several states in recent years are evidence that many states still assert their right to impose the state fuel tax on tribal sales, and that tribes are actively opposing those efforts. The agreements therefore range in character from a temporary declaration of truce to an accepted resolution. In some states, agreed-upon exemptions are the direct result of court decisions that forced the state to concede. In other cases, states created agreements to avoid litigation based on court decisions in other states.

Despite ongoing issues, agreements were described in many cases as welcome harbingers of stability and an important part of a more cooperative relationship between tribes and the states. Several tax administrators specifically commented that there were fuel tax evasion problems in the past, a few of which involved tribes, but that resolving the tribal taxation issue, as well as moving the taxation point further up in the supply chain, had curtailed them.

In addition to the discussion of the character of the agreements, the type of agreement in each state is described carefully below. In some states, because fuel tax is assessed so high in the chain, it is administratively difficult to allow for state tax-free fuel sales by specific retailers, who receive a small part of bulk fuel shipments distributed long after the state fuel tax has been assessed. Several states have signed agreements with tribes that specifically reduce the administrative burden for the state in light of these complications.

Table 2.1, below, shows the general status of tribal fuel sales reporting in each state contacted. This is followed by information for each state, and then a cross-state review.

	Fuel Sales Reporting	**Fuel Tax Agreements**		
State	**Tribal fuel sales reported?**	**Tribes pay state fuel tax?**	**Receive refund?**	**Tribal tax?**
Alaska	(Negligible sales, according to state)	NO	NO	n/a

Table 2.1, below, shows the general status of tribal fuel sales reporting in each state contacted. This is followed by information for each state, and then a cross-state review.

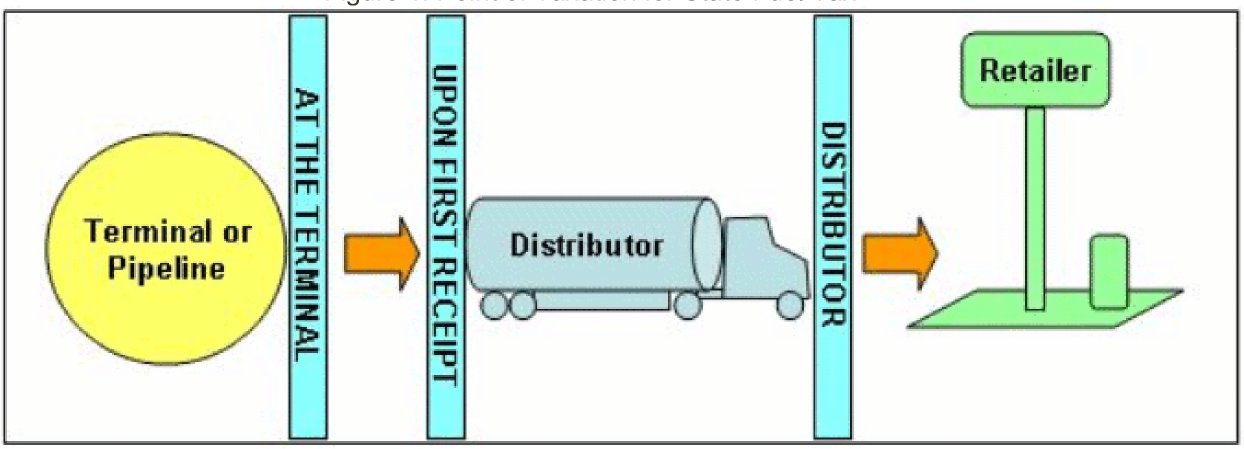
	Fuel Sales Reporting	Fuel Tax Agreements		
State	**Tribal fuel sales reported?**	**Tribes pay state fuel tax?**	**Receive refund?**	**Tribal tax?**
Arizona	100%	NO - some pay like tax to state	YES (some)	YES (some) - "like tax"; state collects for some tribes
Idaho	100%	NO	NO	YES
Iowa	Mixed	YES (some)	YES (some)	NO
Minnesota	100%	YES	YES	NO
Montana	100%	NO	YES	YES
Nebraska	100%	NO - exempt	NO	YES - collect tax and share portion with state (estimated non-member sales)
New Mexico	100%	NO - exempt	NO	YES
New York	not available	not available	not available	not available
Oklahoma	100%	YES	YES	NO
South Dakota	100%	NO-exempt	YES	YES - "like tax"; state collects
Washington	100%	YES	YES	NO

Source: ICF Consulting; State and Tribal Contacts

2.3.2 Definitions: Point of Fuel Taxation

Fuel sales are reported and fuel tax is generally collected before fuel reaches a gasoline retailer, but the exact method differs from state to state. The point of fuel tax collection sometimes influences how agreements with tribes are structured and whether additional reporting is required, and is noted in each of the state summaries. There are three points for fuel taxation: at the terminal, upon first receipt, and on distributors. The figure below shows the process and the point at which the state fuel tax is paid.

Figure 1: Point of Taxation for State Fuel Tax



- *At the terminal.* "At the rack" is commonly used to describe taxation at the terminal. In this case, the position holder (i.e. the terminal operator and/or the person with a contract with the terminal operator for the use of storage facilities and terminaling services) or importers assess the tax on distributors buying fuel from the terminal. Position holders or importers convey the fuel tax to the state.
- *Upon first receipt.* Fuel tax assessed "upon first receipt" is paid by the "importer" (i.e., the cross-state distributor), where "importation" is defined to include taking fuel from a terminal for distribution in-state. In this case, distributors convey the fuel tax to the state as soon as they "import" it.
- *Distributor.* In some states, fuel tax is assessed on licensed distributors. In these states, distributors are typically licensed to buy and sell fuel tax-free, but must pay the fuel tax when they sell it to an unlicensed business - a retailer in most cases. In this case, distributors also convey the fuel tax to the state, but at a later point in their distribution process than "upon first receipt."

Regardless of the point of taxation, many states have interstate tax agreements, which allow for fuel that is exported for sale in another state not to be taxed by both states.

For ease of administration, in recent years, several states have moved the point of taxation up the supply chain, which has also eliminated some fuel tax evasion.

Alaska Summary
Facts on State and Tribal Fuel Sales

Native American population for the state, 2003: U.S. Census Annual Estimates	122,990
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	19.0 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	There are 225 federally recognized tribes in Alaska. They are not listed here.
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	329,303,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	45,747,000 gallons
State contributions to the Highway Trust Fund, 2003 Highway Statistics 2003, Table FE-221	$64,553,000 (0.223 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	8 cents
Point of tax collection: State Contacts	At the terminal ("At the rack")
Estimated annual gasoline sales on tribal lands: State Contacts	Insignificant.
Number of retail establishments on tribal lands: State Contacts	2 Native corporations have retail motor fuel outlets on federally recognized reservations.
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	No agreement, and no need perceived for an agreement.

State Fuel Tax on Tribal Sales: History and Status

Alaska does not have fuel reporting agreements with any Alaskan Native tribes. the state does not consider the lack of agreements a problem, since the state believes that the amount of fuel sold on federally recognized reservations is relatively insignificant.

Motor fuel is taxed at the rack, and paid by the supplier. The State does not tax motor fuel sales on native reservations. Most of the federally recognized tribes not residing on reservations defer paying motor fuel tax on purchases and pay tax only if and when there is a taxable event. For example, a "taxable event" could be when otherwise tax-exempt fuel, normally used for heating, is used by a tribe or tribal member in a truck(s) on a highway.

Reporting

The State has not estimated the amount of tax-exempt fuel sold in the state. the State reports that the amount of taxable fuel sold on native tribal lands is so small that it does not consider it worth the amount of time it would take to estimate the sales.

The FHWA apportionment for the state of Alaska is not controlled primarily by the state's contributions to the Highway Trust Fund. Most of the state's federal-Aid Highway apportionment stems from the Minimum Guarantee program, which under current law guarantees that Alaska will receive 1.2 percent of total funding, even though it contributes only 0.2 percent of the total Federal motor fuel revenue.

Tribal Fuel Tax

There are only two Native American reservations with retail fuel outlets. the state reports no price differential between fuel prices on or off native lands.

Cooperative Process: Taxation and Reporting

The state reports no issues or complaints regarding reporting of fuel sales data in Alaska.

If there is an issue regarding under reporting, it may because tribal units are reluctant to report sales due to confidentiality concerns.

Arizona Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	327,547
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	5.9%

Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Ak Chin, Cocopah, Colorado River, Fort McDowell, Yavapai Nation, Fort Mojave, Gila River, Havasupai, Hopi, Hulapai, Kaibab Band of Paiute, Navajo Nation, Pascua Yaqui, Quechuan, Salt River Pima-Maricopa, San Carlos Apache, San Juan Southern Paiute, Tohono O'odham Nation, Tonto Apache, White Mountain Apache, Yavapai-Apache Nation, Yavapai-Prescott
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	2,574,087,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	726,925,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$576,955,000 (1.992 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	18 cents
Point of tax collection: State Contacts	"At the rack" (at the terminal)
Estimated annual gasoline sales on tribal lands: State Contacts	n/a
Number of retail establishments on tribal lands: State Contacts	n/a
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements with 3 tribes (out of 21)

State Fuel Tax on Tribal Sales: History and Status

The state of Arizona has fuel reporting agreements with three tribes out of 21 in the state. The first agreement was made in 1998, on the initiation of a single tribe. A second tribe formed a similar agreement in 2003. Under these agreements, the tribes enacted their own tribal fuel tax, in the same amount as the state fuel tax. The state fuel tax is levied by the state at the rack on all gasoline, including gasoline destined for tribal fuel sales. tribes sell the fuel with the state fuel tax included in the price. The state then uses a formula to estimate the amount of fuel sold to tribal members on the reservation in order to refund fuel taxes on that amount to the tribal government.

A tribal representative reported that the formula for the tribe's estimated fuel use is as follows:

- *Vehicles owned on reservation x*
- *Average fuel economy x*
- *Average vehicle miles traveled x*
- *Tribal fuel tax rate*

In effect, this formula estimates what the tribal fuel tax revenue would be if the tax were levied on gasoline; the state does not explicitly track tribal sales separate from other sales in the state.

In the case of the third tribe, which made an agreement with the state in 1999, the tribe also imposes a tribal fuel tax on fuel purchases on the reservation. However, in this tribe's case, the tribe actually collects the tax revenue from suppliers and reports deliveries to the state of Arizona. The tribe and the state negotiated a formula to estimate the percentage of reservation fuel sales to non-members, and makes a payment to the state each quarter.

In tribes without agreements, tribal members may individually apply for fuel tax refunds. The state moved to tax at the rack in 1998, and at the same time shifted the legal incidence of the fuel tax to the end consumer.

Reporting

The state receives full reporting on tribal fuel sales. In two of the agreements, tribal fuel sales occur with the fuel tax (nominally the tribe's fuel tax) already in the price, after being assessed at the rack. Thus the fuel is recorded and sold within the same system as other fuel in Arizona.

In the case of the third tribe, the state receives load by load detailed reports from the tribe, which are then matched to reports from suppliers and distributors. This particular tribe imports most of its fuel from out of state. when it obtains fuel from an Arizona rack, the supplier pays the Arizona state tax and then applies to the state for a refund, since the tribe also assesses its own tax.

Tribal Fuel Tax

Three tribes in the state levy their own fuel tax. In two cases, however, the tribes' fuel tax is in essence collected by the state and remitted to the tribes based on estimates of tribal member purchases. In the third case, the tribe collects its own tax and remits to the state the state's share, based on estimates of non-member purchases on the reservation. In all three cases, the tribal fuel tax rates are identical to the state's fuel tax rate (18 cents).

Cooperative Process: Taxation and Reporting

The Governor brings the tribes in Arizona together quarterly on different topics, including transportation. A March 2005 meeting on tribal transportation issues was planned at the time the state was contacted.

One state staff person and a tribal representative reported that in addition to the three tribes with agreements, seven other tribes have expressed interest in forming agreements with the state. The state is not currently negotiating with any of those tribes.

A representative of one tribe said that their tribe was able to come to an agreement with the state partially because it has "less baggage" on other issues with the state.

Benefits and Limitations

Benefits. According to a staff person at the state, one tribe has set aside its revenues from the tribal fuel tax for transportation purposes. this has provided more consistent funding to the tribe for transportation improvements.

In general, according to the state, the tribes were interested in establishing a revenue source from on reservation fuel sales to benefit tribal members.

One tribal representative said that the state was interested in the agreements because it would help to close a loophole that might otherwise allow untaxed fuel sales.

Limitations. While the tribes with agreements report satisfaction with the arrangements, tribes without agreements are reportedly dissatisfied with the state's dissemination of information on how tribal members can apply for individual refunds.

Recommendations

The state noted that the agreements it has with tribes are not "cookie cutter agreements," and that each tribe's situation is unique and must be addressed accordingly.

One tribal representative said that before anything else, a trust relationship between the state and the tribe must be established.

Idaho Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	29,241
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	2.1%

Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Kootenai, Coeur d'Alene, Nez Perce, Shoshone-Bannock
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	612,291,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	230,046,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$159,348,000 (0.550 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	25 cents per gallon
Point of tax collection: State Contacts	Distributor
Estimated annual gasoline sales on tribal lands: State Contacts	7,600,000 gallons ($1.9 million in state fuel tax)
Number of retail establishments on tribal lands: State Contacts	6 retailers
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	No agreements

State Fuel Tax on Tribal Sales: History and Status

In Idaho, the collection of state fuel tax from tribal sales was recently litigated. In their suit, the tribes asserted that fuel sales on tribal lands are exempt from state fuel tax, which the state disputed. The courts found in favor of the tribes. In addition to future exemptions, the tribes requested retroactive refunds of all state gas tax paid on tribal lands for the previous ten months. The courts found in favor of the tribes on this suit as well, and the state has paid the tribes retroactively for those ten months

The state estimates that 7.6 million gallons are sold annually on tribal lands, from six retailers (five owned by tribes, one by an individual tribal member).

Reporting

There are currently no reporting issues. Even though tribes sell fuel without the state fuel tax, tribal fuel sales are still reported by distributors. distributors take a deduction for gallons sold to tribal retailers from the state taxes they owe.

Even though the state is collecting information on tribal fuel sales, it is unclear that this information is being reported to FHWA.

Tribal Fuel Tax

Tribal fuel taxes are currently being levied on at least four of the six tribal retailers in the state. The two tribes involved are assessing a tribal fuel tax in the same amount as the state's (25 cents per gallon). Although one of the two tribes had originally planned to assess a lower fuel tax, the tribe's executive committee decided to raise the tribe's fuel tax to match the state's in part to address fuel price equity concerns.

One tribe has a significant business selling diesel to interstate truckers, and has imposed the tribal fuel tax on diesel as well as gasoline. This has led to some problems because of the way that the International Fuel Trade agreement (IFTA) governs revenue from diesel fuel sales. Among other functions, iFTA redistributes revenue from the tax on diesel to the state or province where the fuel was used (by mileage) rather than where it was purchased. The state of Idaho has issued a warning to other IFTA members that truckers may not count fuel bought from tribal retailers as "tax paid fuel," and that Idaho will not reimburse other states for fuel taxes paid to the tribal government. this tribe is currently seeking a resolution to this issue by working with iFTA.

Cooperative Process: Taxation and Reporting

The state is able to track tribal fuel sales despite the lack of a reporting agreement in Idaho because of the way that tribes receive tax-exempt fuel. However, contacts described a lack of cooperative talk between the two sides. staff at the state commented that tribes would be more interested in an agreement if they recognized the state's power to collect the fuel tax.

From the perspective of tribes contacted, the state's past performance in maintaining roadways on tribal lands has produced varying degrees of interest in working with the state. One tribal representative said that the tribe was Uninterested in paying the state fuel tax because of a lack of maintenance on roadways on tribal lands.

As of June 2005, both sides continued to look to legal action on the subject. two tribes contacted are anticipating the results of a Kansas case currently before the U.S. Supreme Court. This case could set a legal precedent for shifting the incidence of the fuel tax to distributors, thereby eliminating state tax exemptions for tribal fuel sales.

Outlook for future agreements

The state and tribes are not currently engaged in negotiations, and contacts did not indicate the potential for agreements in the near term.

One tribal representative expressed interest in receiving funds directly from the state and the federal government to make improvements to the roads on tribal lands. Another tribal representative said the tribe would prefer to have an agreement directly with the federal government.

Staff at the state did not describe a cooperative relationship with tribes. in their view, there are many contentious issues with tribes, and an agreement on fuel tax could not be reached without state government leadership.

Iowa Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	19,308
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	0.7 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Sac and Fox, Winnebago
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	1,566,210,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	511,789,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$321,792,000 (1.111 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	20.3 cents
Point of tax collection: State Contacts	"At the rack" (at the terminal)
Estimated annual gasoline sales on tribal lands: FHWA review	The State did not offer an estimate of fuel sales on tribal lands. However, a recent review by FHWA concluded that 1.08M

	gal/year are used on tribal lands and are thus exempted from tax.
Number of retail establishments on tribal lands: State Contacts	Two tribes have one retail fuel outlet each.
Status of state fuel tax agreements between state and tribes: State Contacts	There is an existing agreement with one tribe requiring payment of fuel taxes and then the tribe applies for a refund on behalf of its members. A negotiation is underway between the State and the other tribe.

State Fuel Tax on Tribal Sales: History and Status

Iowa has an agreement with one tribe, and is currently working toward an agreement with a second tribe for the reporting of fuel sales on the tribe's reservation. There apparently is no tracking currently done by the state to ensure that tribal fuel data is reported and is correct. There is only one fuel retail outlet for each tribe.

The existing agreement with one tribe has been in effect for some time. Under this agreement, the tribe purchases fuel including the state fuel tax in the price and then files for a refund on behalf of its members. The State and the FHWA indicate the tribe is satisfied with this arrangement.

The Iowa Department of Revenue is in the preliminary stages of negotiating an agreement with a second tribe in Iowa. Possibly within the next year or so, the state will sit down with the tribe to discuss the parameters for possible agreements. The state hopes that the two parties can lay out an agreement in a reasonable time after that.

The state indicates that the second tribe already has an agreement with Nebraska. Under that agreement, the tribe is exempt from paying the Nebraska fuel tax, and consequently does not pay it, negating the need to file for a tribal refund with Nebraska. According to the state, this tribe would prefer an agreement with Iowa with an exemption from the state gas tax similar to the one it has with Nebraska. Iowa would prefer an agreement providing for the tribe to pay the fuel tax in the first instance and apply to the state for a refund, similar to the agreement it already has with another tribe.

The state legislature has passed legislation authorizing the state to execute agreements with tribes on motor fuel reporting issues.

Reporting

Motor fuel is taxed at the rack/supplier in Iowa. Suppliers pay the tax to the state when it is sold or imported into Iowa. For the tribe with an agreement, the tribe pays the state fuel tax in the first instance, then requests a tax refund based on their records of fuel used on tribal lands. The state is confident that it receives accurate reports for fuel sales from this tribe.

Outside the tribe's refund requests, the tracking and estimation of fuel sales on tribal lands is minimal, although the state is working to improve the situation. The state indicates some uncertainty regarding the data on fuel sales it receives from the tribe that does not have an agreement. The data will likely be an issue in the on-going negotiations.

Tribal Fuel Tax

Tribes do not impose their own fuel tax.

Cooperative Process: Taxation and Reporting

The state refunds approximately $18,000/month to tribes for fuel used on tribal lands. In general, there are no particularly significant issues regarding fuel sales reporting and appropriate tax collection in Iowa. However, the state indicates that some locals are upset that tribal retailers sell fuel for less than non-tribal competitors because of their tax-exempt status.

The state is reasonably satisfied with the current arrangement, but would like to take measures to improve fuel sales reporting. There apparently has been no litigation in Iowa concerning tribal fuel sales issues.

The following issues seem to be paramount in the current negotiations between the state and the tribes:

- Whether having to pay tax and then apply for refund vs. exemption from paying tax at all,
- Documentation of sales to tribal members,
- Looking at different methods for estimating tribal member sales of gasoline versus diesel fuel,
- Tribal sovereignty and ability to impose tribal tax.

The state is aiming for a win-win solution in the negotiations with the tribes.

Benefits and Limitations

Benefits. The state is aware of other litigation and has taken the initiative to develop agreements to avoid possible litigation.

Limitations. The exemptions in the agreement the state has with one tribe only apply to fuel used on tribal lands, not fuel sold on tribal lands. The effects of this definition are not clear.

Recommendations

The state recommends that parties aim for a win-win solution in negotiations.

Minnesota Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	83,341

Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	1.6 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Lower Sioux, Prairie Island, Red Lake Band of Chippewa, Shakopee Mdewakanton Sioux, Upper Sioux, and six bands of Chippewa: Bois Forte Band, Fond du Lac Band, Grand Portage Band, Leech Lake Band, Mille Lacs Band, and White Earth Band
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	2,616,703,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	645,306,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$435,020,000 (1.502 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	20 cents
Point of tax collection: State Contacts	Upon first receipt (from distributor)
Estimated annual gasoline sales on tribal lands: State Contacts	(tribal refunds received on approximately 14 million gallons per year)
Number of retail establishments on tribal lands: State Contacts	N/A
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements in place with 10 of 11 tribes

State Fuel Tax on Tribal Sales: History and Status

The state of Minnesota has a history of cooperative agreements with tribes on taxes, starting with sales, cigarette and liquor taxes in the 1970s, after Bryant v. Itasca County (426 US 373), which found that states could not impose taxes on tribal lands. The state formed agreements with the tribes on fuel sales tax in the 1990s, after economic growth increased on tribal lands.

The state has agreements with 10 of 11 tribes in the state on motor fuel sales tax. Six tribes follow the formula described below, estimating member sales and receiving a refund. Another three tribes have no non-member sales on the reservation, and simply make quarterly sales reports in order to receive the appropriate refund. One tribe has no gasoline sales on the reservation lands, reports all fuel received, and is refunded based on those reports.

> Formula for refund:
> (tribal government purchases exempted)
> Past year's fuel tax revenue at tribal retailers –
> Estimated fuel tax revenue from tribal member purchases (based on federally registered membership) +
> 50 percent of remaining estimated purchases at tribal retailers by non-members

The per capita rate of fuel use by tribal members is adjusted every fall for inflation, using the Consumer Price Index.

The agreements with the tribes in Minnesota are different than in many other states in that the tribes do track actual sales, and although revenue from tribal sales is refunded based on estimates, the state also splits revenue from sales to non-members 50/50 with the tribes.

Reporting

Distributors report to the state monthly on their total fuel sales to tribal establishments. The state audits distributors rather than retailers. As part of the agreements with the states, tribes commit to purchasing fuel only from state licensed distributors.

Tribes report quarterly to the state the total sales at tribal facilities, and also send in documentation, such as fuel sales invoices, receipts for tribal government use, and the federal tribal population report. If a tribe misses its reporting deadline, it has up to one year to make the requisite reports. If necessary, refunds to the tribe would then be retroactively amended.

Tribal Fuel Tax

Tribes do not levy their own taxes on gasoline sales. The agreements with the tribes in Minnesota generally require tribal members to pay the tax in return for a refund from the state.

Cooperative Process: Taxation and Reporting

The relationship between tribes and the state on taxation issues has historically been very cooperative. A tribal representative related a story of state officers giving testimony together with tribal representatives when tax agreements came under question in the state legislature. Both testified in support of the agreements. Although fuel taxation agreements have been created only in the past ten years, prior agreements on other taxes (cigarette, liquor, sales) date back to the 1970s.

The Department of Revenue at the state has had the authority to form agreements with the tribes independent of the governor and legislature. This has worked to the Department's benefit in that it keeps fuel and other taxation agreements separate from more difficult issues such as gaming and criminal justice. Staff at the Department described the process as creating a living agreement, rather than fine-tuning an ideal enforcement mechanism. One said that "there had to be a level of trust - if that wasn't there, you didn't need an agreement." A tribal representative said that the Department "understands the benefits of tax peace... of having a uniform tax system throughout the state."

Benefits and Limitations

Benefits. For the state, the main benefit is the assurance that there will be no untaxed sales. For the tribes, the fuel tax refund is an important source of revenue, and discussions on the issue have been part of an historically cooperative relationship between the state and the tribes.

Limitations. The state is considering renegotiating the fuel tax agreement as part of another negotiation planned for addressing revenue from gaming operations revenue. Some minor administrative issues associated with the fuel tax agreement may also be addressed at that time, though these issues were not specified by the state.

A tribal representative said that although these agreements are part of an historically good relationship between the state and the tribes, other issues, such as gaming, have caused a deterioration in the relationship in recent years.

Recommendations

From the point of view of the state, a cooperative relationship with genuine agreement is more important than the perfect enforcement mechanism. The fuel sales agreements were made as one of several agreements, so the revenue for the tribes from them is in addition to revenues from sales and cigarette taxes.

A tribal representative cautioned that the type of agreement reached must meet the goals of each particular tribe in order to be of benefit. The agreements in Minnesota are structured around maximizing revenue for the tribes without requiring them to develop their own taxation system. Some tribes may prefer to maximize other aspects. As an example, a tribal representative in Minnesota said that agreements in Michigan focus on refunds to individual members, rather than revenue for tribal governments.

Montana Summary
Facts on State and Tribal Fuel Sales

Native American population for the state, 2003: U.S. Census Annual Estimates	69,680
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	7.6%

Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Assiniboine and Sioux of Fort Peck Indian Reservation, Blackfeet, Chippewa-Cree, Confederated Salish & Kootenai, Crow, Fort Belknap, Northern Cheyenne
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	495,078,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	194,419,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$128,682,000 (0.444 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	27 cents
Point of tax collection: State Contacts	Distributor
Estimated annual gasoline sales on tribal lands: State Contacts	N/A
Number of retail establishments on tribal lands: State and Tribal Contacts	N/A
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements with 6 of 7 tribes

State Fuel Tax on Tribal Sales: History and Status

Montana has had state fuel tax agreements with most tribes in the state since 1993. The agreements stipulate that the tribes enact a tribal tax in the same amount on their members, and that the state will collect the tax and remit it to the tribal government. In effect, it acts as a revenue-sharing agreement.

The formula for the remittance to the tribes is as follows:

Enrolled members living on the reservation x
(Per capita gasoline consumption (state average)+20% increase (negotiated)) -
Agricultural refund for off-road use per capita -
16% due to state's distribution to the counties -
Estimated off-reservation travel -
1% collection fee for the state

The agreement with each tribe is slightly different in terms of the factors used and any adjustments applied. On average, tribes are receiving about 80 percent of the fuel tax revenue from sales on tribal lands, according to state staff. Tribes receive a quarterly payment of the rebate. As in most other states in the study with agreements, payments are not determined by actual sales because recording sales to tribal members specifically would be a large administrative burden, on the cashier, the tribe, and staff at the state who would presumably process the paperwork.

One tribe still does not have an agreement with the state. Tribal members in that tribe pay the state gas tax at the pump, and the tribe does not receive any refund. This tribe reportedly has a large percentage of non-tribal members living on the reservation.

Reporting

There are no reporting issues currently with tribes in Montana. Licensed distributors report sales, including those to tribes, electronically for the most part. One tribe has a special arrangement to receive funds based on gallons of gasoline sold rather than the formula. For this tribe, sales are reported on paper.

Tribal Fuel Tax

The agreements require the tribe to enact a like tax on fuel sales within tribal lands, which is then administered by the state and rebated to the tribe according to the formula above. On- and off-reservation prices are identical.

Tribes are free to determine the best use for the funds they receive through the formula.

Cooperative Process: Taxation and Reporting

The state of Montana has had a good and long lasting relationship with the tribes on the issue of fuel taxation. The agreements were formed in 1993, and include a clause that allows either party the ability to opt out with 30 days notice; however, neither a tribe nor the state has decided to opt out since inception.

According to one tribal representative, the two parties "agree to disagree" about the state's power to tax tribal members as part of the agreements. However, for the state, a fundamental part of its commitment to the agreements is recognizing the sovereignty of the tribes. This commitment is part of a larger attitude toward the agreements and helps explain both their longevity and stability.

Prior to making the agreements, the state legislature gave the state the authority to make the agreements with the tribes. Fuel tax was negotiated along with several other issues (tobacco, etc.) at the same time, although there is a separate agreement for each.

Benefits and Limitations

Benefits. For the state tax administrators, the agreements are a win-win situation, preventing untaxed fuel sales without increasing the state's administrative burden. If tribal members were exempted from the fuel tax at the service station, the state would have to process more paperwork.

For tribes, the agreements avoid litigation, and provide a stable source of revenue. Income from the fuel tax is predictable, and its level is unlikely to change dramatically as the remittance formula is tied to population. The agreements also allow tribal members to avoid dual taxation by both the state and the tribe.

One tribal representative said that an additional benefit of the work with the state on the agreements is the good relationship that has developed with the staff who administer them. This relationship enables the tribe to have easier access to public information through those staff.

One tribe reportedly was able to use the revenue stream as collateral for a bank loan.

Limitations. The state would like to update some of the factors in the rebate calculation, especially the per capita gasoline consumption, which has not been updated since a 1993 study.

One tribal representative expressed concern that there is no way to determine if the agreements are producing the right amount of revenue for the tribes, but added that the effort to determine this would hardly be worth the improvements to the refund formula. In order to determine the correct amounts, fuel retailers on tribal lands would have to track sales for a year, gathering tribal membership information and other information on each customer. In the end, the formula may be found to slightly over or underestimate revenue; however, the tribal representative was of the opinion that the current formula is not significantly off the correct amount.

Recommendations

The state views the agreements as a win-win situation, and recommends that other states follow this type of arrangement. However, a tribal representative cautioned that the Montana agreements may not necessarily work for other tribes, depending on their needs, tax laws, and demographics.

A tribal representative emphasized the importance of having executives on both sides of the negotiations involved in the process. Because of his involvement in, and commitment to, the agreements, Montana's Attorney General has reportedly been supportive of the tribes, even when the agreements came under dispute.

Nebraska Summary **Facts on State and Tribal Fuel Sales**	
Native American population for the state, 2003: U.S. Census Annual Estimates	23,274
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	1.3 percent

Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Winnebago, Omaha, and the Santee Sioux; and the Sac and Fox, the Iowa, and the Ponca tribes (the latter three tribes either have no recognized reservation land or no retail operations in Nebraska)
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	847,443,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	377,292,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$214,331,000 (0.740 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	24.6 cents
Point of tax collection: State Contacts	Distributor (upon first receipt)
Estimated annual gasoline sales on tribal lands: State Contacts	1,620,000 gallons
Number of retail establishments on tribal lands: State and Tribal Contacts	About 5
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements with 2 of 3 eligible tribes

State Fuel Tax on Tribal Sales: History and Status

In 2000, the state received word that one of the tribes was planning to sell blended gasoline that was blended on the reservation, and exempt from the state fuel tax. The Nebraska Department of Revenue considered its options and decided to attempt to form an agreement with the tribe rather than turn to litigation. The Department requested the authority from the legislature to make an agreement with tribes on motor fuel taxation issues, and received it in 2002.

The agreements provide for tribes to purchase fuel tax-free, and then make quarterly reports and payments to the state for the state's share of the fuel tax revenue. Tribes with agreements levy a tax in the same amount as the state's (see below). One of the tribes in Nebraska serves as a distributor for gasoline retailers on most tribal lands in Nebraska, and acts under the agreements both as a distributor and a retailer. The state receives 20-25 percent of taxes on gasoline sales, and 25-40 percent of diesel tax revenue, depending on each tribe's agreement.

Although tribal members were reportedly reluctant to come to an agreement that meant giving up some tribal sovereignty, they preferred to avoid litigation. Prior to the agreement, tribes were paying some taxes, but there was no audit agreement.

Reporting

The state is confident that it is receiving full reports on fuel sales on tribal lands. The agreements also give the state the right to audit the tribal distributors. If a tribal distributor cannot show that the fuel was sold from the reservation, the assumption is that it was sold off reservation, and therefore subject to the state fuel tax.

Tribal Fuel Tax

Fuel prices on reservations used to be lower than off-reservation, but are now within 1-2 cents of other prices. The tribes agreed to charge a fuel tax at the same rate as the state's in return for their share of the revenue.

The agreements in Nebraska are different than many other state-tribal agreements on fuel tax in that they provide for the tribes to assess a fuel tax and pay the state its agreed-upon share of the revenues. While several other states in the study assess a fuel tax and then issue a refund to the tribe or tribal members, Nebraska's limitations on fuel tax revenues precluded the state from following that route.

The share that the state receives from the fuel tax revenue is a negotiated amount that approximates non-member purchases on the reservation. The state's goal in the agreement was primarily to stop tax-free fuel sales.

Cooperative Process: Taxation and Reporting

Building trust between the tribes and the state was an important part of achieving agreement on these issues. During negotiations, the Governor issued a statement that tribes would be treated as another governmental entity, and attended some of the meetings along with the tax commissioner.

One tribal representative said that the agreements are key to providing the stability that investors need in order to put capital into businesses on the reservation. For the state, getting full information on fuel sales was more important than getting the revenue from the fuel sales tax. According to a state representative, members of the public were very concerned about the agreements initially, but have since been convinced that the tribes are administering the fuel sales tax appropriately, as evidenced through the more comparable on and off-reservation fuel prices.

A tribal representative whose tribal lands straddle Nebraska and another state contrasted the dealings with the two governmental entities sharply. Although the tribe has a good relationship with the state of Nebraska, officials from the other state have reportedly alienated the tribe during the negotiations process. The tribe is now in the fifth year of negotiations with this state over the issue of fuel taxes. Nebraska state staff have worked with the tribe and the other state to help with the process.

Benefits and Limitations

Benefits. For the state, the main benefit of the agreements has been greater accountability; the state now receives full reporting on both the sales and importation of fuel on tribal lands.

One tribal representative said that the agreements have improved the economic stability of the reservation for investments. Both parties preferred to negotiate an agreement rather than turn to litigation.

Limitations. Despite the agreement, a tribal representative emphasized that the tribe still takes its taxation jurisdiction on tribal lands very seriously, and does not believe that the state should have power over tribal jurisdiction.

The administration of the agreement has been somewhat of a burden for the state because the tribes report in a slightly different way from other distributors and retailers operating in Nebraska. The state may change its procedures to streamline the process.

Recommendations

The state recommended that the administrative burden should be considered in negotiating an agreement. The state also recommended that the agreements cover tank wagon sales, which are sales directly to customers who maintain their own storage tanks.

A tribal representative said that the successful development of agreements depends on the attitudes of staff at state agencies, and that communications between the tribes and the state should be kept open to facilitate successful negotiations.

New Mexico Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	202,529
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	10.8 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Navajo Nation, Jicarilla Apache, Mescalero Apache, Ute Mountain, Zuni, and 18 Pueblo tribes: Acoma, Cochiti, Jemez, Isleta, Laguna, Nambe, Picuris, Pojoaque, San Felipe, San Juan,

	San Ildefonso, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, and Zia
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	852,800,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	440,395,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$251,758,000 (0.869 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	18.5 cents
Point of tax collection: State Contacts	At the terminal ("At the rack")
Estimated annual gasoline sales on tribal lands: State and Tribal Contacts	Estimated $14 - $17 million in tribal fuel tax revenue, or 82 - 100 million gallons
Number of retail establishments on tribal lands: State and Tribal Contacts	One tribe has 80 retailers; others unknown 22 registered Indian tribal distributors; 150 distributors take indirect deductions
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements with 2 tribes; in negotiations with others

State Fuel Tax on Tribal Sales: History and Status

The state first worked out an agreement with one tribe after a 1995 federal investigation uncovered a fuel tax evasion scheme that used a tribe's name as a cover-up. However, since then, the state has mainly used legislation to address issues of tribal fuel sales and tax collection, rather than agreements with the tribes. The state is working on agreements with other tribes to share information for auditing purposes.

The legislation in New Mexico that governs tribal fuel sales is different in many ways from other states. The Gasoline Tax Act of 1999, passed as a compromise between the state and the tribes, exempts tribal fuel sales from the state fuel tax as long as the tribe assesses its own tax. Either retailers or distributors pay the tribe's fuel tax after purchasing state tax-free fuel from distributors, and tribes are responsible for the administration of their own fuel tax, and how they levy it.

Tribes can administer their own fuel tax, and exempt sales on tribal lands from the state fuel tax, without any special agreement with the state. This is due to the nature of the legislation. The state would prefer to have information-sharing agreements with tribes to ease the auditing process, and has such agreements with two tribes. Rather than tribes, distributors currently report to the state, and they and retailers are audited by the state.

Since the 1999 law was passed, distributors file monthly reports on how much they have sold and to which stations. The tribes' fuel tax must at least match the state's fuel tax rate. Since 2001, distributors must show proof that they or the retailers to whom they sold fuel have paid the tribe's fuel tax in order to take a deduction from their state fuel tax payment.

Reporting

Distributors report all fuel sales when they submit payment of the state fuel tax. In the course of reporting their sales, they must report sales to tribal entities or licensed Indian distributors in order to take a deduction for the exempt sales. Otherwise, they would be required to pay the state fuel sales tax. If they sell fuel to a tribal entity directly, they report a direct deduction on their fuel tax payment and sales report to the state. If they sell fuel to a licensed Indian distributor, they take an indirect deduction from their state fuel tax payment and report the sales as such.

After distributors take a deduction and report fuel sales to the state, tribes levy their own tribal fuel tax. The method for reporting to tribes and paying the tribal fuel tax is determined by each tribe, and can be done by either the distributor or the retailer. The state audits distributors and retailers, but not tribes. The state has joint audit agreements with two tribes.

When the state audits a distributor, the distributor must provide tax reports from the retailers they supply. If neither the distributor nor the retailers show payments to tribal governments, the state assesses the distributor for the state fuel tax.

Tribal Fuel Tax

New Mexico law requires tribes to impose their own fuel tax at the same or higher rate as the state. Each tribe collects taxes from distributors and retailers directly.

Cooperative Process: Taxation and Reporting

Fuel sales reporting agreements seldom work outside the fuel taxation system, but the state of New Mexico is an exception. While state legislation covers the exemption of tribal fuel sales, the state also has separate agreements with two tribes that provide for information sharing only. One tribe has an agreement to do joint audits, and another has an agreement to engage in limited information-sharing with the state. This is a testament to a high level of cooperation and agreement between the state and the tribes. In addition, one of the tribes in New Mexico has information-sharing agreements with two states outside their reservation that are often the source of imported fuel onto the reservation.

In 2003, Governor Richardson formed a gasoline taxation working group to address some of the logistical problems involved with fuel taxation in New Mexico. Even though the tribes had only four representatives in the core working group, one tribal representative who had gone to the meetings as a member of the public said that they were inclusive and had fostered a cooperative atmosphere between industry, tribes, and state agencies. Prior to the working group, many of the participants had never before sat at a table together.

One tribal representative said that before 1999, the state legislature had spent entire sessions just on the issue of tribal fuel taxation. In this representative's view, the state had taken a very positive approach by engaging the tribes and other interested parties and working toward consensus on fuel taxation issues.

Benefits and Limitations

Benefits. Several tribes are now receiving substantial revenues through levying their own fuel tax. The economic development spurred by the resolution of the taxation issue and the associated increase in revenues has conferred many benefits for people living on the reservations. For example, the new stability in fuel taxation laws has attracted brand-name gasoline retailers to reservations, thereby increasing competition and lowering prices for consumers.

One tribe that has an agreement with the state for joint audits has been learning auditing skills by working with state agents.

For the state, the Gasoline Tax Act of 1999 has produced uniform fuel taxation on tribal and non-tribal lands.

Limitations. The state would prefer to have joint audit agreements with all of the tribes in order to improve enforcement. Having appropriate information exchange in agreements is also important; the state has one agreement that allows for information exchange only at the level of the head of agency, rather than the staff level, which makes working arrangements difficult.

Recommendations

The Gas Tax Working Group, organized by the Governor in 2003, was praised by both state and tribal representatives because it has improved relations between tribes, the state, and the petroleum industry. The state emphasized the importance of building good relationships with tribes, even if it takes some time. One tribal representative emphasized that each tribe is different, and has its own history and relationship to fuel retailers, and must be approached individually by the state.

New York Summary
Facts on State and Tribal Fuel Sales

Native American population for the state, 2003: U.S. Census Annual Estimates	186,024

Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	1.0 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Cayuga, Oneida, Onondaga, St. Regis Band of Mohawk, Seneca, Tonawanda Band of Seneca, Tuscarora
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	5,776,130,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	919,946,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$1,223,902,000 (4.226 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	22.65 cents
Point of tax collection: Tribal Contacts	Point of first sale
Estimated annual gasoline sales on tribal lands: Tribal Contacts	n/a
Number of retail establishments on tribal lands: Tribal Contacts	n/a; About 8 on one reservation
Status of state fuel tax agreements between state and tribes: Tribal Contacts	No agreements

Note: The State of New York was unable to comment on this topic for this study. Information below is based on tribal contacts only.

State Fuel Tax on Tribal Sales: History and Status

Although several tribes and the state government were contacted for the study, they were unable to comment. The following is based on one tribal representative.

According to one tribal representative, "you could fill a room with all of the litigation that has transpired." The Governor has made several attempts to solve the issue. In 1996, the Governor attempted to promulgate tax regulations to tax the tribes, which failed. He was later sued by a convenience store group for failing to tax tribal sales, but the court found in favor of the Governor. In 2003, the legislature passed a law requiring taxation of tribal sales to non-members, which was then vetoed by the Governor. The legislature has since overridden the veto, but enforcement of the law has been unresolved.

Currently, one tribe in the state has a negotiated agreement that has not yet been signed. The agreement, as negotiated, would provide for the tribe to impose a like tax on both fuel and cigarette sales. This is a "tax parity agreement," creating an even taxation field, although the tribe would receive all tax revenue from sales on the reservation, including non-members.

Reporting

The extent of unreported fuel sales in the state of New York is not clear.

Tribal Fuel Tax

At least one tribe in the state is interested in signing an agreement with the state that would provide for the tribe to levy a tribal fuel tax equal to the state's. It is unclear what other tribes' positions may be.

Cooperative Process: Taxation and Reporting

Although several tribes were contacted, only one tribal representative was able to comment on this issue in New York. This tribal representative described the staff at the Department of Taxation and Finance as cooperative and forthcoming in negotiations with that particular tribe. However, according to a tribal representative, the practice of the state has been to refuse to settle any individual issue when other issues are outstanding, which has hindered finalizing this tribe's agreement with the state on fuel taxation.

Opposition to the special tax status for tribes is still strong in some parts of the state, according to one tribal representative.

Outlook for future agreements

Although several tribes were contacted, only one tribe was able to comment for the study. This tribe has already negotiated an agreement hopes to sign the agreement in the near future, but reports that the state has tied this agreement to other issues. This tribe would like to resolve outstanding legal issues on fuel taxation and avoid future lawsuits and enforcement actions, in order to create more certainty for the future.

This tribe, however, views the agreement as a net fund loss for the tribe, as it would not be able to market a tax exemption. Fuel taxation is a major issue here, but more significant is cigarette sales taxation (the agreement covers both). The tribe predicts that it would have a net loss of $1 million in revenue by foregoing the cigarette and fuel tax exemptions in favor of tribal taxes equal to the state's.

Oklahoma Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	394,831
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	11.3 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Absentee-Shawnee, Alabama-Quassarte, Apache, Caddo, Cherokee Nation, Cheyenne-Arapaho, Chickasaw, Choctaw, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Delaware, Eastern Shawnee, Fort Sill Apache, Iowa, Kaw, Kialegee, Kickapoo, Kiowa, Miami, Modoc, Muscogee Creek, Osage, Ottawa, Otoe-Missouria, Pawnee Nation, Peoria, Ponca, Quapaw, Sac and Fox, Seminole Nation, Seneca-Cayuga, Shawnee, Thlopthlocco, Tonkawa, United Keetowah Band of Cherokee, Wichitaw, Keechi, Waco, Tawakonie, and Wyandotte
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	1,880,211,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	842,195,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$488,085,000 (1.685 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	17 cents per gallon

Point of tax collection: State Contacts	"At the rack" (at the terminal)
Estimated annual gasoline sales on tribal lands: State Contacts	n/a
Number of retail establishments on tribal lands: State Contacts	n/a
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	The State has agreements with 23 of 41 tribes.

State Fuel Tax on Tribal Sales: History and Status

There are 23 Oklahoma tribes which have executed agreements/compacts with the state. Under the agreements, the state distributes to each tribe a portion of state motor fuel tax revenues, which are collected prior to the retail sale ("at the rack") according to the terms of the agreement. Each contracting tribe receives $6,250 per quarter, plus tribes, which were engaged in the sales of motor fuels in the fourth calendar quarter of 1996, receive $0.02 per gallon sold during that quarter.

Agreements are executed under state enabling legislation. There was litigation in 1995 (Oklahoma Tax Commission v. Chickasaw Nation, 115 S.Ct. 2214 (1995)), which precipitated the enabling legislation allowing for agreements. The case is described as follows on the Oklahoma Indian Affairs Commission website:

> The Court found that Oklahoma's motor fuel tax laws in place at the time of the litigation could not be applied to sales of fuel by Indian tribes. In response to the decision, the state revised the motor fuel tax law so that the tax could legally be applied to fuel sales on tribal lands to non-tribal members. The basic premise of the law allows federally recognized tribes to contract with the state to receive an apportionment of the annual gross motor fuel revenues collected by the state. (http://www.oiac.state.ok.us/motorfuels.htm)

The state legislation at S68-500.63(A) outlines the legislative conditions under which agreements between the state and federally recognized tribes are developed. It makes it quite clear that when an agreement is in place, state and federal taxes will be included in the price of all fuel sales. The tribe will not sell fuel in Indian country on which the tax has not been pre-collected. In return, the tribes will receive from the state a quarterly apportionment of motor fuel tax revenues. Their apportionment is currently a 4½ percent takedown based on total state fuel tax revenue, or $14.4 million in fiscal year 2003. These funds are divided up between the various tribes as follows. Each contracting tribe receives $6,250.00 quarterly ($25,000 per year or $575,000 total for all tribes). Then each contracting tribe receives $0.02 per gallon of motor fuels sold by the tribe during the fourth quarter of 1996 (approximately $400,000 of the total)) The remainder is apportioned based upon tribal resident membership of each tribe relative to the other tribes in the state. According to the legislation, tribes must spend the funds "...for tribal government programs limited to highway and bridge construction, health, education, corrections, and law enforcement."

Copies of the agreements/compacts may be found on the web at www.oiac.state.ok.us. OIAC is the Oklahoma Indian Affairs Commission.

Reporting

One tribe in Oklahoma, which has a retail outlet, indicated that they periodically report retail sales of oil and gas to the state, which occur primarily at convenience stores related to the tribe's casino.

Suppliers report fuel taxes and pay the state fuel tax to the state (at the rack), and the Oklahoma Tax Commission reports motor fuel data to the FHWA.

Tribal Fuel Tax

The enabling legislation recognizes that both the tribes and the state government impose motor fuel taxes.

Cooperative Process: Taxation and Reporting

Native American fuel sales are being reported fully in Oklahoma. The reporting is done under agreements executed pursuant to State enabling legislation.

Litigation in 1995 precipitated enabling legislation allowing for agreements, under which the tribes receive a portion of state motor fuel tax revenues. The taxes are collected prior to the retail sale (paid by the supplier) according to the terms of the agreement. A portion of state fuel tax revenues are withheld monthly and apportioned quarterly to the tribes.

Benefits and Limitations

Benefits. There is general agreement that tribal-state relations have improved as a result of the agreements in place. The incentive of tax refunds has caused tribes to be more careful with data on fuel sales and related tax issues.

Limitations. Generally tribes are comfortable with the agreements, but there is some concern that the tribes that actually have fuel sales must share the revenues with all tribes, including those that don't actually sell fuel. In this case some feel that only those tribes with actual fuel sales should share in the revenues distributed under the agreement.

Since not all tribes have executed agreements/contracts with the state, members of non-contracting tribes apply for refunds for fuel taxes they have paid.

Recommendations

Oklahoma's agreement process is worthy of consideration by states which are in the negotiating stages with tribes on fuel tax issues.

South Dakota Summary Facts on State and Tribal Fuel Sales	
Native American population for the state, 2003: U.S. Census Annual Estimates	69,950
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	9.1%
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Cheyenne River Sioux, Crow Creek Sioux, Flandreau Santee Sioux, Lower Brule Sioux, Oglala Sioux, Rosebud Sioux, Sisseton-Wahpeton Sioux, Standing Rock Sioux, Yankton Sioux
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	419,842,000
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	166,675,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$96,331,000 (0.333 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	22 cents
Point of tax collection: State Contacts	At the terminal ("At the rack")
Estimated annual gasoline sales on tribal lands: State Contacts	16,349,617 gallons (FY 2004) (15,623,718 gallons on tribal lands with agreements; 725,899 gallons sold by two tribes without an agreement. Sales on the lands of 3 tribes are not accounted for here.)
Number of retail establishments on tribal lands: State Contacts	30-50

Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements with 4 of 9 tribes

State Fuel Tax on Tribal Sales: History and Status

There was litigation over the taxation of tribal fuel sales in recent years, ending in 2003 when the South Dakota Supreme Court upheld a lower court ruling in favor of the tribes. In addition to finding that the state was not able to tax fuel sales to members on tribal lands, the court required the state to remit 15 months of fuel tax revenue from those sales retroactively, for a total of $1.3 million.

After the court case ended in 2003, the state formed fuel taxation agreements with 4 of the 9 tribes in South Dakota. Under the agreements, tribes set a tribal fuel tax equal to that of the state. The state continues to administer the fuel tax collection, and refunds part of the revenue from sales on tribal lands to the tribes. The portion that tribes receive is based on an estimate of Native American purchases in that fiscal year, based on Census data (see formula, below).

Under the agreements, the state waived any fee for the administration of the tax.

Formula:

> Census estimates of Native American population on reservation /
> Entire population on reservation +
> 2 percent additional

For those tribes without an agreement with the state, the state fuel tax is assessed as on other sales. However, retailers can sell fuel without the state fuel tax included and request a refund, but only if they document that the sales are made to tribal members. Because this tax abatement ultimately goes to the individual purchaser, for tribes without agreements, tribal members (not the tribal government) benefit from the exemption.

Reporting

Because fuel is taxed at the rack, total sales are accounted for in all tribes. On tribal lands where tribes have an agreement with the state, retailers must submit monthly reports to the state in order for the tribe to receive the refund. Tribal governments have been assisting with asking the retailers to submit reports to the state.

On tribal lands where tribes do not have an agreement, retailers must submit evidence (with purchaser's signatures) that fuel sold without the state fuel tax was sold to tribal members. This creates a paperwork burden on the retailer and the purchaser.

Tribal Fuel Tax

One tribe contacted through the study had a tribal fuel tax on the books starting in 1993, but did not enforce it until the case with the state was settled in 2003 to avoid double taxation for tribal members.

Under the agreements, tribal fuel taxes are equal to the state's fuel tax.

Cooperative Process: Taxation and Reporting

Although the taxation of fuel sales on tribal lands is not the focus of this study, sales reporting agreements seldom are made without an agreement as to the taxation of the sales. Prior to the February 2003 South Dakota Supreme Court decision, the Attorney General of South Dakota asserted the state's right to tax these sales under the Hayden-Cartwright Act. The tribes maintained that the state fuel tax imposition was illegal, and were vindicated in 2003 in Pourier v. South Dakota Department of Revenue (2003 SD 21).

After the court case was settled, the state was willing to make agreements with tribes on this issue. Since the agreements were made with the four tribes, those relationships have improved and are now more stable.

A tribal representative said that the state received a generous portion of the tribal fuel tax revenue under the agreement, and that the agreements could have been more in favor of the tribes. A state representative said in contrast that the agreements were generous to the tribes, and described them as a win-win arrangement.

Benefits and Limitations

Benefits. The agreements discourage fuel tax evasion, which constitutes a significant benefit for the state. The agreements have also helped improve relations between the tribes and the state. In addition, the tribes now receive revenue from their own fuel tax that they did not collect before. One tribal representative described the agreements as "better than spending years in court."

Limitations. For one tribe, the agreements signaled a loss of sovereignty, because the tribe is required to set its taxation rate equal to the state's as part of the agreement. This was a difficult issue, politically. The way the agreements are administered creates some paperwork burden for the states because retailers file on paper. The state hopes to move to an electronic filing system soon.

Recommendations

The relations between the state and the tribes have improved in the last few years because of the Governor's efforts to meet and work with tribes. The Governor's tribal relations staff person, who is also a tribal member, was key in creating the agreements with the four tribes.

A tribal representative recommended that other tribes include administrative cost, retroactive reimbursement, and other issues in the negotiations over fuel tax administration. The retroactive reimbursement for just 15 months, the time period established by the South Dakota Supreme Court, was $1.3 million.

A state representative said that South Dakota was at a disadvantage in the negotiations because of the court decision. Even though tribes did not have to legally come to an agreement, they were interested in potential revenues from a tribal fuel tax, and so were motivated to work with the state. Tribes are currently receiving $1.9 million annually through their tribal fuel tax. The agreements covered multiple taxes, with the fuel tax not necessarily the primary issue.

Washington Summary
Facts on State and Tribal Fuel Sales

Native American population for the state, 2003: U.S. Census Annual Estimates	164,642
Percent of total state population that is Native American or Alaskan Native, Alone or in combination, 2003: U.S. Census Annual Estimates	2.7 percent
Federally Recognized Tribes in state: Federal Register, Vol. 67 p .46327 (2002)	Chehalis, Colville, Yakama, Cowlitz, Hoh, Jamestown S'Klallam, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble, Puyallup, Quileute, Quinault, Sarnish, Sauk-Suiattle, Shoalwater Bay, Skokomish, Snoqualmie, Spokane, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit
State gasoline sales (taxed), 2003: Highway Statistics 2003, Table MF-2	2,723,972,000 gallons
State special fuel (diesel) sales (taxed), 2003: Highway Statistics 2003, Table MF-2	572,042,000 gallons
State contributions to the Highway Trust Fund, 2003: Highway Statistics 2003, Table FE-221	$527,772,000 (1.822 percent)
State fuel tax rate for gasoline, as of November 2004: Highway Statistics 2003, Table MF-121T	23 cents per gallon
Point of tax collection: State Contacts	At the terminal ("At the rack")
Estimated annual gasoline sales on tribal lands: State Contacts	N/A

Number of retail establishments on tribal lands: State Contacts	N/A
Status of state fuel tax agreements between state and tribes: State and Tribal Contacts	Agreements with 16 tribes, 1 federal consent decree, 12 tribes no agreement

State Fuel Tax on Tribal Sales: History and Status

Under current agreements, the state of Washington recognizes that the state fuel tax is not applicable to tribal member purchases on their tribal reservation. The agreements state, however, that tribal members will pay the state fuel tax in return for a refund from the state. The first agreements were made in 1994, pursuant to a 1994 U.S. Supreme Court decision (New York v. Attea, 93-377) that retail sales made to tribal members on reservations were not subject to state fuel tax.

Of the 29 tribes in Washington State, 13 have agreements with the state that follow the formula laid out below. One has a federal consent decree under which the tribe is able to purchase a certain percentage of its fuel tax-free, approximating the amount sold to tribal members. Of the other tribes, 11 do not have retail fuel outlets and are therefore not eligible. Two other tribes are in litigation, and a third has been contacted by the state but no agreement has yet been developed.

Formula for refund:

Total tribal governmental vehicle use fuel tax +
BIA-Registered members living on or near reservation x
Average per capita gasoline consumption in Washington x
State fuel tax rate

One tribal representative said that only allowing the agreements to cover purchases on the reservation put those tribes without retailers at an unfair disadvantage. In contrast, the state has a revenue-sharing program with local government entities for transportation funds, and the program is not tied to sales of gasoline in local jurisdictions. This revenue-sharing program is perceived by some tribes as a parallel to the tribal agreements

Reporting

Fuel sold on reservations has been taxed at the terminal, and all sales are reported to the state along with the state tax payment at that point. Tribal retailers do not make any special records or report fuel sales differently than other retailers.

Tribal Fuel Tax

The state is not averse to tribes levying their own fuel tax, though tribal representatives were not aware of any tribes doing so.

Cooperative Process: Taxation and Reporting

Although this study does not concern state taxation of tribal fuel sales directly, reporting agreements are seldom made without an agreement as to the legality and propriety of the taxation itself. The Washington agreements follow the pattern of those in Montana, first made in the early 1990s. Washington State in effect exempts fuel sales to members on reservations, but in order to ease the administrative burden on the state those sales are estimated, instead of being tracked separately. Thus, the price that a tribal member pays at a tribal retailer is equal to any other fuel purchase, including the state fuel tax, and those sales are not tracked any differently than other sales. But the state makes an estimate of those sales based on the formula described above and refunds that amount to the tribal government.

Other important issues for the state, such as illegal fuel tax evasion, have been largely resolved by improving agreements with other states and Canadian/provincial governments to exchange information about distributors' licensing.

Benefits and Limitations

Benefits. The agreements carry a very low administrative burden for the state and the tribes, because they do not require separate fuel sale reporting for tribal retailers. The agreements have also helped to avoid litigation by either the state or tribes.

Limitations. Although the agreements have reportedly helped to avoid litigation, there are still two court cases moving forward in the state. One tribe is seeking to receive the refund without signing a formal agreement with the state. Another tribe is seeking exemption from the state fuel tax entirely by asserting that it is manufacturing the fuel on the reservation, though the state disputes this claim.

Some tribes are ineligible to develop agreements with the state because they do not have retail fuel sales on their lands, and one tribal representative objected to the exclusion.

Recommendations

One tribal representative emphasized that better cooperation between the state and tribes on all transportation issues can be achieved by improving communications. Montana was cited as an example of a state with better communications on transportation issues, because a tribal representative sits on the state transportation commission.

From the state's perspective, making agreements that impose a low administrative burden for the state is very important. By using a formula, rather than counting gallons sold to tribal members at the pump, the state has made the process much easier for both the state and the tribes.

2.4 Cross-State Review

Several consistent findings and themes emerged from a cross-state analysis of tribal fuel sales reporting. These themes are discussed in this section, and relate to reporting, type of agreements, cooperative process, benefits and limitations.

2.4.1 Reporting

Most of the states surveyed for the study were confident that they were receiving full reporting on fuel sales. This is due mostly to what could be called *non-exceptional reporting.* In these states, tribal fuel sales are tracked along with all other fuel sales. Tribes with agreements in these states typically agree to purchase fuel from distributors with the state fuel tax already included in the price, in return for a refund of estimated fuel taxes associated with tribal sales. In these states, the state taxes fuel high in the fuel supply chain (often at the rack), which is also the point at which the state tracks total fuel sales in the state. In effect, fuel sold on tribal lands goes through the same process of importation and distribution as other fuel sold in the state, and is fully accounted for.

In a few cases, tribes may have an agreement with a state to acquire and sell fuel outside the state's reporting system, collect a tribal fuel tax, and report sales to the state. This *exceptional reporting* was the practice in New Mexico and in one other tribe surveyed.

In most cases, tribes and states described an arrangement in which the state records all fuel sales and administers the fuel tax for tribal sales along with other fuel sold in the state as a "win-win" for both parties. This type of agreement relieves the tribe of the administrative burden of taxation and recording sales, and at the same time reserves the revenue (or an estimate thereof) from tribal fuel sales for the tribe.

In cases where the surveyed state did not have an agreement with some of the tribes in the state, this was most often described as unproblematic because those tribes do not have large volumes of fuel sales. This was the case in Washington and Nebraska. In both those states, staff said that the tribes without agreements either had no fuel sales (Washington) or very few (Nebraska).

The states that track the actual fuel sales on tribal lands typically received records not only from tribes but also from distributors. Because distributors are typically already reporting fuel sales to the state, they report as part of an existing process. Sometimes suppliers fill the reporting gap for a tribe without a reporting agreement. In Nebraska, where one tribe does not have an agreement with the state on fuel sales taxation or reporting, the state is still able to track sales to the reservation through its supplier.

2.4.2 Types of Agreements

Agreements that address fuel sales reporting are seldom made in the absence of an agreement on state fuel tax payment by the tribes. Even though the agreements reviewed in the study typically focused on fuel tax revenue, most states surveyed said a major benefit of the agreements was eliminating undocumented and untaxed fuel sales. The revenues that go to the tribes were seen as an incentive for tribes to sell taxed fuel, and in some cases, specifically to report fuel sales.

Most of the agreements reviewed provide for *non-exceptional reporting,* where the state collects the state fuel tax on all gasoline distributed within the state, and then remits to the tribes the estimated amount that is due to fuel sales on tribal lands to tribal members. Typically, these agreements either include a state admission that these sales are exempt from the state fuel tax, recognizing the sovereignty of the tribes in some cases, or providing for the state and the tribe to "agree to disagree," in the words of one tribal representative. In some cases, state action was spurred by legal decisions that exempt tribal sales from state jurisdiction.

Negotiations on these agreements typically focused on the formula used to estimate the fuel sales on tribal lands to tribal members. Factors used in the formulas include:

- Native American population from the U.S. Census, as a percent of residents on reservation
- BIA-registered Tribal members living on or near the reservation
- Per capita gasoline usage in the state
- Per capita vehicle miles traveled x vehicles owned on reservation x average fuel economy

- Subtractions for other exemptions, such as off-road agricultural use, revenue-sharing with counties
- Administrative fees for the state

In four states, actual tribal fuel sales are tracked as part of agreements: Minnesota, Nebraska, New Mexico, and South Dakota. In Nebraska, the tribe's share of fuel tax revenues was negotiated as a percentage for each tribe (one tribe receives 80 percent, another 75 percent). This percentage could include revenue from tribal sales to non-members, which are not recorded separately. In Minnesota, the state estimates tribal member purchases on tribal reservations, then shares the rest of the revenue (from estimated non-member sales on tribal lands) 50/50 with the tribes. Economic development was a key interest in these agreements. In New Mexico, distributors must report gallons of fuel sold to tribal entities or licensed Indian distributors in order to take a deduction on their state fuel taxes. In South Dakota, each tribe receives a refund of fuel sales tax collected on tribal sales in proportion to the percent of Native American population on each reservation.

In three states surveyed, some tribes reported administering their own fuel tax. In New Mexico, tribes administer their own tribal fuel tax and retain all revenues from the sales. Distributors must show proof to the state, however, that they have paid the tribe's fuel tax in each case in order to receive a deduction on the state fuel taxes owed. This compromise agreement was reached in 1999, with some modifications in administration since then.

In Arizona, one tribe administers its fuel tax and pays the state its estimated share of the revenues, based on non-tribal member purchases. This tribe may be a special case because its lands extend through three states, and the tribe levies its own fuel tax on all of its territory.

In Nebraska, two tribes administer their own fuel tax and pay the state an agreed-upon percentage of the revenue. The agreements with these tribes include the state's right to audit.

One state surveyed, Idaho, has been in litigation with tribes in recent months over state taxation of fuel sales. At the time they were contacted, some tribes were planning to levy their own fuel tax if the case were decided in their favor. The 9th Circuit decision was in favor of the tribes, and an appeal by the state was recently refused at the U.S. Supreme Court.

2.4.3 Cooperative Process

In states surveyed, those with a strong cooperative relationship with tribes had been more successful in developing agreements specifically on state fuel tax and sales reporting on tribal lands. The various processes of negotiation typically involved high-level leadership commitment within the state, in several cases involving the Governor, and often the Tax Commissioner. In some states, legislative action was required before agreements could be made with tribes.

In Minnesota, one tribal representative praised the commitment of the state staff to uphold agreements despite criticism. When fuel tax and other tax agreements were criticized by the legislature several years ago, Revenue Department officials sat side-by-side with tribal representatives and gave supportive testimony. One staff person at the state of Minnesota who was party to negotiations said that an agreement could not replace a good relationship. "There had to be a level of trust - if that isn't there, you don't need an agreement." Agreements in Minnesota still depend on ongoing cooperation from tribes, according to staff there.

In Montana, agreements are set for specific time periods, but can be cancelled by either party at any time. They have been in place since 1993.

One tribe that has territory in two states has an agreement with one and not the other. The difference, according to one tribal representative, is the attitude of the two states; while one has sought solutions, the other has produced some individuals who are antagonistic toward tribal representatives in negotiations.

In New Mexico, the Governor formed a Gas Tax Working Group that has built trust between the tribes, the state, and industry groups on the issue of tribal fuel sales. The focus of the group has been the elimination of untaxed sales, and both organizing staff and tribal representatives surveyed said that the meetings have built trust and cooperation between factions that were antagonistic prior to the meetings.

2.4. Barriers

One state surveyed, Idaho, was involved in active litigation with tribes when contacted. Another state, South Dakota, recently emerged from its own litigation with tribes. In these states, tribal representatives spoke of their need to be recognized in negotiations as sovereign governments.

In Idaho, one tribal representative said that because of past relations the tribe would prefer to have an agreement with the federal government than with the state. In Washington state, where most eligible tribes have agreements with the state, one tribe operates under a federal consent decree, reportedly because of a history of poor relations with the state.

On the other side, some states view tribal tax exemptions simply as lost revenues, and continue to seek to reduce or eliminate them in order to enforce state fuel taxes evenly. State finance departments also do not work on this issue in isolation; the general public, convenience store groups, the Governor, and the state legislature are often involved in discussions of tribal fuel tax issues. In addition, other issues with tribes, such as gaming and land claims, were cited as problems that sometimes become entangled with taxation agreements.

2.4.5 Benefits of Agreements

Despite the barriers to agreements, most states and tribes contacted for the study understood the potential benefits, even if they had not been able to reach agreements yet. Central benefits for both sides included avoiding litigation and settling taxation issues. One tribal representative said that the agreements are "better than spending years in court." Several state staff said that the agreements helped to eliminate untaxed sales. One tribal representative said that the Revenue Department in Minnesota "understands the benefits of tax peace," preferring to have "a uniform tax system throughout the state instead of having little islands where the tax situation is in limbo or even antagonistic."

Many states surveyed commented not only on the benefits of the agreements to their own government, but also on the benefits to tribal governments. This demonstrates that many successful negotiators were aware of, and sympathetic to, the needs of the other side. Several states said that the agreements benefit the tribes by providing a steady revenue source, and that the revenue supports economic development.

Several tribal representatives said that having an agreement improved overall relations with the state, both on the taxation issue and on other fronts. Tribal representatives also said that the revenue was important to tribal government functions, and often noted that they had few other sources of funds to make infrastructure improvements on tribal lands, since they do not receive funds from the Federal-Aid Highway program outside of the Indian Roads Program. This program totals $27 million each year.

2.4.6 Limitations of Agreements

Several states commented that they had administrative issues with the agreements they had set up. In New Mexico, for example, licensed Indian distributors and retailers are completely exempt from the state fuel tax, and the state is still working out the administration of the exemption. Currently, the state is processing around 250 reports from distributors manually each month, and is in the process of developing an electronic format for the monthly report on gasoline sales that is issued to the public. The state also commented that full reporting has only been achieved through audits to check that distributors had correctly paid tribal fuel taxes.

Also in New Mexico, an audit agreement the state has with one tribe does not allow for staff-level contacts, meaning that requests for information from the tribe or the state must go through the head of the agency. In contrast, the agreement New Mexico has with another tribe allows for staff-level contact and has been easier to administer.

Montana, Washington, and Minnesota specifically recommended their type of agreement for adoption by others because of low administrative burdens. These agreements stipulate that tribes receive revenues from fuel sales tax based on estimates rather than actual fuel sales.

Several tribal representatives reiterated their position that the state had no right to tax fuel sales on their tribal lands, and that they still considered the agreements a compromise. One tribal representative said that the agreements have made the situation workable, though not amicable.

3.0 Best Practices in Agreements on Tribal Fuel Sales

The research and analysis contained in this report has addressed the issue of reporting of American Indian sales of motor fuel. The concern for FHWA is that inaccurate tallies of gallons sold could create bias in the attribution process utilized in apportioning resources from the Highway Trust Fund to each state. The research by the Project Team has found the following:

- In general, the majority of states do not identify themselves as facing reporting issues with respect to tribal sales. For many states this simply reflects the fact that no tribal sales take place there; for others, it is a reflection of the fact that existing reporting agreements, often combined with state taxes being levied on all fuel entering the state, result in a satisfactory level of reporting accuracy.
- However, varying degrees of reporting issues appear to exist in several states. Data on tribal fuel sales is incomplete in these states, and the magnitude of the issue is estimated indirectly. The team examined one such area, New York State, and concluded that under-reporting is likely.
- If all of the sales of the major retailers on tribal lands in New York are unreported, this would account for 0.5 percent of state gasoline sales.
- In general, where issues exist, a factor that is consistently observed is the lack of a successful reporting agreement between states and tribal governments. While this is not the only factor, reporting agreements become increasingly important when one recognizes their close relationship with improved communication generally between the various parties

Given the role of reporting agreements on this issue, this section draws conclusions from previous sections and provides a summary of best practices that can serve as a guide for further improving reporting between all states and tribal governments.

As sovereignty of tribal governments is the basis for state-tribal relations, the best manner to ensure accurate reporting is to establish successful reporting agreements (which generally take the form of the tax compacts described in Section 1.7.3, Section 2 and in summary form below) between states and tribal governments. this may require structuring good incentives to generate a "win-win" outcome. specifically, it is important to recognize the benefits (as well as potential downside) for each of the parties if the reporting of fuel sales is improved in states where there are currently issues of under-reporting.

Successful reporting may well have its greatest benefits in terms of helping to improve relations between the tribes and states involved. If the reporting improvement leads to an increased estimate of fuel sales, the state itself may receive additional Federal-aid Highway funds through the attribution process. this means that state departments of transportation and the state government may tend to see improved reporting as a benefit in increasing transportation resources.

Improved relations with states should benefit tribal residents generally. Findings in Section 2 suggest that improved relations with the state improve necessary cooperation between the governments. Also, tribal residents should also benefit to a degree if a state finds that reporting increases its share of Federal funds. two points must be raised that mitigate the benefit to tribal residents: First, individuals could face an increased burden if they are required to report their fuel sales for a refund as part of a reporting agreement. Second, actual additional funds that would follow improved reporting could, due to the relatively small roadway and population shares on reservations, be quite small. Discussions with tribal representatives showed this to certainly be the perception.

3.1 Overview of Types of Agreements

Agreements between tribes and states on fuel sales reporting can take various forms, as demonstrated by the Task 2 research. Typically the problem of unreported fuel sales on tribal lands is caused by tribal retailers purchasing fuel outside of the state's taxation and reporting system because of the tribal exemption from state fuel taxes. Agreements provide for tribal retailers to stay within the state's system, or report their purchases and sales through another route. these two options are described as "non-exceptional" or "exceptional." If the fuel comes to the retailer "non-exceptionally," it arrives via the same route as any other fuel retailers' goods arrive, tracked and taxed at the rack or distributor level, or on first import. In effect, it is not distinguishable by the state at any point in its distribution, and is typically not tracked separately from other fuel sales at all. In contrast, with "exceptional" sales tracking, the tribal fuel distribution and sometimes tribal retail sales are tracked separately from other fuel distribution and sales, and the state typically maintains separate records.

In addition to being classified by the way that they track tribal fuel sales, agreements are differentiated on how they provide tribes with an exemption from the state fuel tax. As mentioned above, sales to tribal members on tribal lands are exempt from state fuel tax. Several court cases have upheld this exemption. although one case is currently pending at the U.S. Supreme Court, the states in this survey with agreements responded to existing court decisions in their Negotiations. Agreements support individual refunds, tribal refunds, or tax parity. The two agreements with refunds (individual and tribal) first assess the tax on the fuel, and then provide a refund to the individual or tribe. Under tax parity agreements, by contrast, tribes assess their own fuel tax on fuel sales on tribal lands, in the same amount as the state's fuel tax.

Characteristics of the three main agreement types are presented below, with comparisons across the three types. Agreements are described in more detail below.

Table 3.1: Overview of Types of Agreements

Agreement characteristics:	Non-Exceptional Agreement with Individual Refunds	Non-Exceptional Agreement with Tribal Refunds	Exceptional Agreement with Tax Parity
Fuel price equity	Yes	Yes	Yes
Full reporting or equivalent*	Yes	Yes	Yes
Tribal government receives revenue from taxes on tribal member fuel purchases	No	Yes	Yes
State shares revenue from non-member fuel purchases with tribe	No	Sometimes	Sometimes
Non-tribal members pay tribal fuel tax instead of state fuel tax	No	No	Yes

Table 3.1: Overview of Types of Agreements			
Agreement characteristics:	Non-Exceptional Agreement with Individual Refunds	Non-Exceptional Agreement with Tribal Refunds	Exceptional Agreement with Tax Parity
Tribal agreement to pay the state gas tax in the first instance, receiving a refund on exempt sales at a later time	Yes	Yes	No
Tribal agreement to purchase fuel either within state or with state's knowledge from out of state	Yes	Yes	No
Special reporting by distributors	No	No	Yes
Examples of states with this type of agreement	AZ (partial), MI (reported)	WA, MN, MT, OK, AZ (partial), IA (partial), SD	NM, NE, NY (in negotiation), AZ (partial)

Source: ICF Consulting

*Fuel sales on tribal lands may be either reported explicitly to the state by retailers on tribal lands, or can be accounted for through reporting at other points in the fuel supply chain, such as through terminal operators or distributors.

A. Non-Exceptional Agreement with Individual Refunds

Under this type of agreement, the state does not distinguish tribal fuel sales from any other fuel sales. Tribal retailers agree to purchase fuel within the state's system, just as any other retailer would. The advantage of an agreement such as this for the state is that it disallows tribal retailers from purchasing fuel ex-tax, for example by importing fuel from another state without reporting it. In order to exempt tribal member sales, the state allows individual tribal members to apply for refunds for the state fuel tax on their private fuel purchases. in this sense the agreement creates a situation similar to other individual exemptions, such as a farmer applying for an off-road fuel use exemption.

While this type of agreement was reported in Arizona, and in Michigan (not surveyed directly), the administrative burden is unclear. In addition, while arizona reported this type of arrangement with tribes that did not have any other type of agreement, it is unclear whether members of those tribes take advantage of the individual refunds. Michigan was reported to have this type of agreement with tribes, but was not surveyed directly as part of this study. in both cases, the administrative burden for the state of processing individual requests for refunds was unclear.

For tribal governments already using a different type of agreement, the non-exceptional arrangement with individual refunds may not be appealing. Because the refunds in this case go to individuals, tribal governments do not receive any direct benefit. It is also unclear how many individuals actually apply for the refunds, meaning that many tribal members de facto pay the state fuel tax.

B. Non-Exceptional Agreement with Tribal Refunds

Non-exceptional agreements with tribal refunds were the most frequently encountered agreement in the case studies. Under these agreements, tribal fuel sales are made within the state's existing fuel sale reporting and taxation system. Tribes agree to require their retailers to purchase fuel with the state fuel tax included, just as any other retailer in the state. Since most states track fuel sales through their taxation system, tribal sales are then included in the state's total. States with this type of agreement include Arizona (some tribes), Iowa (some tribes), Minnesota, Montana, Oklahoma, South Dakota, and Washington.

In return for agreeing to pay the state's fuel tax, the tribes receive a refund from the state based on an estimated amount of fuel sold to tribal members on tribal lands. The amount estimated is typically based on a negotiated formula, for example estimated fuel use per capita multiplied by the number of tribal members living on the reservation lands, though each formula is slightly different. more detail on the formula used by each state with this type of agreement is provided in Section 2.

Non-exceptional agreements with tribal refunds are advantageous because they carry a low administrative burden, compared to an agreement where tribal fuel sales are actually tracked gallon for gallon. At the same time, the state is assured that tribal fuel sales include the state gas tax amount in their price, calming concerns that tribal retailers could have a competitive advantage over Non-tribal fuel retailers. The state is also assured that tribal fuel sales are tracked along with other fuel sales in the state, and that the state apportionment from the Federal-aid Highway program will be unbiased. These agreements sometimes place restrictions on tribal use of these revenues, requiring the funds to be used for governmental purposes.

For tribes, these agreements provide a source of revenue, often with low or No administrative costs to the tribal government. However, because some tribes give up their ability to sell fuel ex-tax to all customers through these agreements, they do not necessarily see an agreement as a net economic gain. In order to lessen the net economic loss, some states refund tribes a share of revenue from Non-tribal member sales as well as the revenue from member sales. In Minnesota, for example, the state refunds an estimate of total tribal member sales to the tribes, along with 50 percent of the remaining revenues from tribal lands sales. for this agreement to work, tribal retailers in Minnesota report total fuel sales, gallon for gallon.

Tribal governments and states value the economic and taxation stability in these agreements, despite the fact that, for the most part, both sides perceive them as net revenue losers. Because tribal governments receive revenue directly from the agreements, however, they are motivated to honor them. In Montana, the agreements between the state and tribes can be cancelled by either party with 30 days' notice, and have been in existence for 12 years. States, which are often motivated by public criticism of ex-tax sales on tribal lands, have found this type of agreement to be successful in eliminating ex-tax sales.

Some tribes also pointed out in interviews that because tribal governments are responsible for public services on reservation lands, including roadway maintenance, the revenue to the tribal governments may provide a net benefit since it supports local infrastructure.

Tribal sovereignty is a key philosophical issue for tribes as they evaluated agreements for this study. Regardless of fiscal benefits, several tribes that use this type of agreement emphasized that it was difficult to negotiate because of concerns that it would weaken the tribe's power to self-govern and self-tax. in most states, these agreements require the tribe to enact a "like tax," that is a tax in the same amount as the state fuel tax, even though in practice the state collects the fuel tax from distributors or suppliers. Through this mechanism, tribal members are legally paying a tribal tax, not the state fuel tax, and the state makes a transfer payment to the tribe on the estimated amount of the tribal tax.

Finally, one advantage of this type of agreement is that in negotiation, a very fine-tuned mechanism can be created to estimate the amount of tax due to the tribal government, without increasing the administrative burden on either the state or the tribe. Several tribal and state representatives emphasized the unique situation of each tribe, making the flexibility of this type of agreement an advantage.

C. Exceptional Agreement with Tax Parity

Under an exceptional agreement with tax parity, tribes report fuel sales on tribal lands separately from other fuel sales. This *exceptional* process can take different forms, ranging from a circumscribed process enacted statewide, to a reporting mechanism specific to individual tribes. In New Mexico, licensed indian distributors report tribal fuel sales to the state, showing how much fuel was sold to tribal retailers and showing proof that they paid the tribe's fuel tax. In Nebraska, a tribal corporation functions both as the distributor and retailer and reports directly to the state on all imports, sales and exports. in Arizona, only one tribe has this type of agreement with the state, and it has a special arrangement with the state because it imports most of its fuel from its own territory in a different state.

The reporting under this type of agreement is somewhat more complicated, and tends to carry a higher administrative burden. Under the New Mexico system, which was implemented in 2002, the state is ironing out problems and inefficiencies in the reporting system. Tribes in New Mexico are also required to collect a fuel tax in the same amount as the state's on all gallons distributed to retailers on their lands. This process requires each tribe to have a tax administration system, again with some administrative burden.

The tax parity requirement in these agreements demands that the tribe enact its own fuel tax and administer it, rather than purchasing and selling fuel through the state's taxation and reporting system. This is preferable for some tribes because it confers both greater tribal sovereignty, and in some cases a larger percentage of revenues from fuel sales on tribal lands. In New Mexico, tribes retain all revenue from fuel sales on tribal lands. This is not the case in Nebraska, however, where tribes negotiated a percentage share with the state. a New York agreement that was reported to be in negotiations would provide for the tribe to keep all revenue from fuel sales taxes as well.

For states, the main advantage of the exceptional agreement with tax parity is the ability to create an equitable fuel taxation environment. Administratively and revenue-wise, it can easily be a net loss for the state, depending on whether the tribe retains all revenue from the fuel taxes. The administration of a large Number of special reports from tribal distributors and/or retailers can also be quite burdensome, depending on the level of economic activity on tribal lands. the state is also dependent on ongoing cooperation from tribes in order to conduct audits and other checks on the system.

The state with the largest number of tribes in this arrangement is New Mexico. New Mexico is an exceptional state in this study for several reasons, the most significant being that this arrangement is actually the result of state legislation, and not the result of agreements with individual tribes. This solution was created by the Governor's office in 1999, and added to in 2001, in order to bring to a halt a contentious situation surrounding fuel taxation on tribal lands. The legislative arrangement has reportedly been successful in eliminating ex-tax fuel sales, but the larger success story of this arrangement is that it has solved what seemed, for some time, to be an intractable issue for this state. for tribes, many see this arrangement as a net positive because it has not only provided for tribal revenue, but also provided for "tax peace," thus allowing for attention to other issues and for increased interest in economic development from outside companies on tribal lands. For example, one tribe reported that after the legislation passed, a brand-name fuel retailer opened on tribal lands for the first time.

In general, the tribes appreciate this type of agreement because it confers greater sovereignty on the tribe in the arrangement. Tribal members are able to avoid any payment of the state fuel tax, however temporary, and tribal retail operations are able to avoid differentiating sales to tribal members from non-member sales. The largest concession tribes make in this type of agreement is to levy a tribal fuel tax in the same amount as the state fuel tax, giving up any ability to market a tax exemption for economic development.

3.2 Most Effective Agreements

Most of the states surveyed as part of this study said that they have no issues with tribal fuel sales reporting. Of the thirteen states identified in the 2002 FTA Survey of American Indian Issues as having problems with ex-tax sales, eight were contacted for this study, of which five reported that they currently have no problems with ex-tax sales. Of the remaining three, two have outstanding issues (New York and Iowa), and one has an indeterminate status (Arizona). In that sense, all of the agreements described here are effective from the point of view of the states. The fact that the situation in these five states has changed since 2002 supports the notion that, with some effort, a state can come to an agreement with tribes which eliminates ex-tax sales and produces an equitable taxation environment.

However, as was emphasized by several tribes and states consulted as part of the case studies, each tribe has a unique history and unique needs in the present day. The various agreements that states have reached with tribes in essence represent different solutions to different problems (the central types of agreements are described above in 3.2). Nevertheless, the study found that there are general points of consensus on the best way to track tribal fuel sales for states, and general lessons can be applied to solving specific types of problems.

The agreements with the lowest administrative burden were found by far to be the **non-exceptional agreements with tribal refunds**. these agreements restrict tribal retailers to purchasing fuel within the state's system, placing them in the same position as any other fuel retailer in the state in terms of tracking. Arguably, tribes also receive the highest benefit from these agreements without incurring their own administrative burden. In some ways, these agreements function like a revenue-sharing provision. The only cost tribes bear is the lost opportunity to market a tax exemption for economic development purposes. Several states contacted as part of this study, including washington and Montana, praised these agreements as stable and easy to administer.

On the other hand, in these and other agreements, specific problems were addressed in negotiations that may be of interest to other states and tribes.

Representation of tribal membership, Census counts, or per capita mileage unclear. In some cases, tribal representatives said that figures used in the formulas for estimating tribal refunds were undercounting actual tribal members or their travel patterns. Because the formulas are negotiable, they often include general provisions to account for these differences. In Montana, the agreement calls for a 20 percent higher per capita mileage than the state average for tribal members. In Washington, the state expanded the definition of those exempt to include tribal members living near the reservation, defined generally as adjacent counties.

Intractable tribal sovereignty conflicts. Some tribes refuse to even partially or provisionally subject fuel sales on tribal lands to state taxes. In some cases, this is due to historical conflicts between the state and a particular tribe. In one such case in the state of Washington, a tribe entered into a federal consent decree because of historical conflicts with the state.

Intractable statewide conflict. In New Mexico, tribes and the state all reported that the issue of state fuel taxation had become an intractable conflict that was not making progress, was keeping state legislators from addressing other issues, and was creating an unstable taxation situation in and near tribal lands. In 1999, the state reached a negotiated agreement with all 23 tribes in the state, which was enacted through legislation. This approach of not having to negotiate with each of the tribes individually allowed for a swifter resolution of the issue. It depended on a consensus amongst tribes as to the nature of the agreement. After the legislation, the Governor created a gas tax working group to bring together opposing parties to work on common problems, such as tax evasion and reporting irregularities. The group includes representatives from tribes, the convenience store industry, fuel distributors, and others. The state reported that the legislation eliminated ex-tax sales, though not immediately.

Impending litigation. In Nebraska, the state reached a level of conflict with one tribe that could have easily led to protracted litigation. The tribe had announced its intention to sell fuel ex-tax to all customers, aware that although courts had only upheld tribal member exemptions, there was no established method of distinguishing customers' tribal status at the cash register. To reduce the potential costs and burdens associated with a long term conflict, the state proactively pursued an agreement that would eliminate ex-tax sales and provide full reporting, while allowing the tribe to retain control of the fuel sales on its lands.

3.3 Implementation Recommendations for FHWA, States and Tribes

Recommendations for FHWA

As the final user of state-level fuel reporting data, FHWA has an interest in helping states reach agreements with tribal governments. Some potential areas of involvement include the following:

Documentation of case studies: FHWA could provide detailed case studies of reporting best practices. These could be more detailed documentation for a few of the best states identified in the current study, as well as some not surveyed here. This could take the form of a booklet containing documentation of all of the case study states, or it could be a separate brochure for each of the several case study states.

Negotiation assistance: FHWA may be able to assist in the negotiation process between states and tribal governments. FHWA experts have experience working with tribal governments both on transportation planning and impact assessments (Office of Environment and Planning) and administering Federal Lands projects under the Indian Reservation Road Program. FHWA could also ease the process for the negotiating parties by entering negotiations as a neutral third party.

Presentations: At appropriate venues, such as national meetings of AASHTO, iTA, FTA, and others, the FHWA could make presentations on the importance of fuel data and the role of cooperation (including agreements) in improving the quality of fuel data reporting. This is a traditional role served by FHWA on a variety of issues important to the Federal-aid Highway Program.

Acting as a clearing house for agreements: The FHWA can serve as a clearing house or promote a clearing house in AASHTO for agreements and case studies on fuel data reporting. The FTA could serve as a clearing house, but state dOTs are more usually comfortable with FHWA acting in such a role.

Working with BIA: The FHWA has a long standing relationship with the bureau of Indian Affairs through administration of the Indian Reservation Road program. The FHWA could work with the BIA to provide information to tribes on fuel reporting issues.

Recommendations for States and Tribes

Court cases have been fairly consistent on the issue of tribal taxation. In essence, court decisions provide for the exemption of tribal member purchases on tribal lands. No court case has upheld exemptions for non-member purchases, but the method for discerning member from non-member purchases has not been established. In fact, this discrimination has been a major issue for tribes, which have generally refused to make the differentiation at the cash register. this leaves some grey area regarding non-member purchases on tribal lands, and this is the essence of the problem that can only effectively be solved through a negotiated agreement between states and tribes.

In order to come to a negotiated agreement, each party must first understand the motivations of the other. Several win-win solutions have been described in the agreements above that span a range of administrative burden and revenue sharing arrangements between the state and the tribe. Some issues are zero-sum, meaning that they are basically win-lose issues. For example, when fuel is taxed, only one party can receive the revenue from a given purchase. However, there are several issues that are not equally important to both parties, and these can be used to form a win-win solution. The relative importance of each issue is shown in the table below by X's.

Table 3.2: Issues that Motivate States and Tribes, as Reported those Contacted

Issue	States	Tribes
Fuel price equity	XXX	–
Cooperation against fuel tax evasion	XXX	–
Full reporting	XXX	–
Improved relationship between state and tribe	XX	XX
Fuel tax revenue	XX	XX
Respect for tribal sovereignty	–	XXX
Economic development on reservation	–	XXX

X's indicate general weight given to each consideration.

Source: ICF Consulting

When asked what led to successful agreements, several state staff described their commitment to finding an agreement from the beginning of the process, often with support from high-level offices within the state government or from the Governor. Generally, agreements were negotiated between the state's department for taxation, with assistance from legal counsel, and the tribe's legal counsel. In some cases, the state department needed legislative authorization to enter into an agreement on fuel taxation with tribes.

While many agreements included other taxation issues along with fuel, such as tobacco, alcohol and sales tax, combining other issues was identified as a roadblock in one state. Other contentious issues, such as gaming, archeological preservation, and land claims were seen as threats to even existing agreements on fuel taxation. In general, the benefits and drawbacks to tying fuel taxation to other issues are substantial in each case and should be taken into consideration.

Tribes highly value state recognition of their tribal sovereignty at all stages of negotiation. The study found that for tribes with failed or tenuous negotiations, the issue most mentioned was the lack of respect for the tribe and its sovereignty, much more so than lost revenue or economic disadvantage. Two states with longstanding agreements, Montana and Minnesota, made a point to emphasize in their discussion of the agreements that they respected the sovereignty of the tribes. In Minnesota, a staff attorney made the statement that "there had to be a level of trust - if that wasn't there, you didn't need an agreement." Emphasizing this recognition, both symbolically and in actions, is a way for states to develop the type of relationship that can then support successful agreements.

One state in litigation at the time they were contacted made a point of discussing the revenue they would lose through an agreement with tribes. In other states, staff expressly described part of their motivation in the negotiation process as related to the desire to avoid costly litigation. In New Mexico, the state decided that resolving the issue was more important than any tax revenue from tribal fuel sales. States may benefit from assessing the value of "tax peace," relative to the revenue they receive from tribal fuel sales. If tribes sell fuel with the same level of tax included, presumably other retailers will not lose any sales to tribes, or at least no more so than they might to any other competitor. For states, the lost revenue may thus be less under an agreement than without one, even though tribal governments receive some revenue directly from the state.

Appendix A

Table A1: American Indian and Alaskan Native Owned Automotive Dealerships and Service Stations						
State	**Firms**	**Sales and Receipts**	**Firms (Paid Employees)**	**Sales and Receipts**	**Employees**	**Payroll**
Alabama	46	14,155	28	13,517	118	1,152
Alaska	21	D	10	39,575	388	12,985
Arizona	43	20,715	37	D	100 to 249	D
Arkansas	30	89,729	16	87,163	421	4,631
California	33	D	24	D	100 to 249	D
Colorado	22	D	2	D	100 to 249	D
Connecticut	5	D	0	0	0	0
Delaware	0	0	0	0	0	0
District of Columbia	0	0	0	0	0	0
Florida	14	D	9	D	100 to 249	D
Georgia	50	8,799	10	7,294	46	1,115
Hawaii	0	0	0	0	0	0
Idaho	7	D	7	D	20 to 99	D
Illinois	59	23,334	9	D	20 to 99	D

Table A1: American Indian and Alaskan Native Owned Automotive Dealerships and Service Stations						
State	**Firms**	**Sales and Receipts**	**Firms (Paid Employees)**	**Sales and Receipts**	**Employees**	**Payroll**
Indiana	62	57,940	38	56,684	229	3,923
Iowa	13	D	13	D	20 to 99	D
Kansas	20	141,030	15	D	250 to 499	D
Kentucky	29	10,572	13	8,426	39	408
Louisiana	12	D	5	151,526	389	10,551
Maine	2	D	2	D	20 to 99	D
Maryland	31	38,674	25	D	100 to 249	D
Massachusetts	30	15,366	8	14,325	50	1,444
Michigan	18	9,215	9	D	0 to 19	D
Minnesota	28	D	8	D	100 to 249	D
Mississippi	S	S	S	S	S	S
Missouri	1	D	1	D	0 to 19	D
Montana	11	D	0	0	0	0
Nebraska	0	0	0	0	0	0
Nevada	6	D	6	D	20 to 99	D

Table A1: American Indian and Alaskan Native Owned Automotive Dealerships and Service Stations						
State	Firms	Sales and Receipts	Firms (Paid Employees)	Sales and Receipts	Employees	Payroll
New Hampshire	1	D	1	D	0 to 19	D
New Jersey	S	S	S	S	S	S
New Mexico	S	S	S	S	S	S
New York	120	41,517	21	28,857	87	2,039
North Carolina	163	163,982	102	159,768	508	11,175
North Dakota	S	S	S	S	S	S
Ohio	32	277,927	13	276,413	443	17,483
Oklahoma	194	128,263	92	115,597	521	7,752
Oregon	34	D	11	D	20 to 99	D
Pennsylvania	17	D	9	D	0 to 19	D
Rhode Island	S	S	S	S	S	S
South Carolina	S	S	S	S	S	S
South Dakota	48	D	3	3,691	20	145
Tennessee	27	5,964	1	D	0 to 19	D
Texas	99	132,605	42	127,934	318	9,284

Table A1: American Indian and Alaskan Native Owned Automotive Dealerships and Service Stations						
State	**Firms**	**Sales and Receipts**	**Firms (Paid Employees)**	**Sales and Receipts**	**Employees**	**Payroll**
United States	1,853	2,136,531	865	2,043,281	6,936	157,133
Utah	20	D	4	D	20 to 99	D
Vermont	42	D	42	D	250 to 499	D
Virginia	27	D	3	D	0 to 19	D
Washington	5	D	5	D	0 to 19	D
West Virginia	13	D	11	34,084	171	3,580
Wisconsin	13	22,219	10	D	20 to 99	D
Wyoming	5	D	5	D	20 to 99	D

Note: Entries of "D" imply data suppression, as detailed in Census-provided documentation, while entries of "S" are unreported because of data quality concerns.

Source: US Census Bureau: Economic Census (1997)

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate***	**Gastax revenue – highway spending linkage**	**Note**
Not applicable	Not applicable	Alaska	Not applicable	Existing agreements	Not applicable	No exemptions	8	yes	[1](#)
Fort Apache Reservation	Apache County	Arizona	Multiple Facilities	Existing agreements	Navajo County	Tribal exemption	18	yes	
Fort McDowell Mohave-Apache Reservation	Maricopa County	Arizona	Single Facility	Existing agreements	Pinal County	Tribal exemption	18	yes	
Hualapai Reservation	Mohave County	Arizona	Single Facility	Existing agreements	Coconino County	Tribal exemption	18	yes	
Hopi Reservation	Navajo County	Arizona	Multiple Facilities	Existing agreements	Coconino County	Tribal exemption	18	yes	
Gila River Reservation	Pinal County	Arizona	Single Facility	Existing agreements	Maricopa County	Tribal exemption	18	yes	
Hoopa Valley Reservation	Humboldt County	California	Single Facility	No agreement	Trinity and Del Norte counties	No exemptions, except for non-HW uses	18	no	

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate ***	**Gastax revenue – highway spending linkage**	**Note**
Chemehuevi Indian Reservation	San Bernadino County	California	Multiple Facilities	No agreement	Clark, NV and Mojave, AZ	No exemptions, except for non-HW uses	18	no	[2]
Ute Mountain Reservation	Montezuma County	Colorado	Single Facility	No agreement	La Plata County	Tribal purchases for reservation usage are exempt	22	yes	
Mashantucket Pequot Reservation	New London	Connecticut	Single Facility	No agreement	Windham County	Tribal purchases for reservation usage are exempt	25	no	
Fort Hall Reservation	Bannock County	Idaho	Single Facility	In litigation	Bingham and Power counties	No exemptions	26	yes	
Coeur D´Alene Reservation	Benewah County	Idaho	Single Facility	In litigation	Kootenai County	No exemptions	26	yes	[3]
Nez Perce Reservation	Nez Perce County	Idaho	Single Facility	In litigation	Idaho County	No exemptions	26	yes	
Sac and Fox Reservation	Tama County	Iowa	Single Facility	No agreement	Mashal County	Full refund for purchases	20	yes	

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate ***	**Gastax revenue – highway spending linkage**	**Note**
						used on tribal lands			
Iowa Reservation	Brown County	Kansas	Single Facility	In litigation	Donipan County	No exemptions, state can collect, per recent ruling	21	yes	
Sac and Fox Reservation	Brown County	Kansas	Single Facility	In litigation	Donipan County	No exemptions, state can collect, per recent ruling	21	yes	
Prairie Band Potowatomi	Jackson County	Kansas	Single Facility	In litigation	Shawnee and Potowatomi counties	No exemptions, state can collect, per recent ruling	21	yes	
Chitimacha Reservation	Saint Mary Parish	Louisiana	Single Facility	Existing agreements	Saint Martin Parish	Tribal purchases for reservation usage are exempt	20	no	
Upper Sioux Reservation	Yellow Medicine County	Minnesota	Single Facility	Existing agreements	Chippewa County	Tribal purchases for certain	20	yes	

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate ***	**Gastax revenue – highway spending linkage**	**Note**
						activities exempt			
Rocky Boy's Reservation	Hill County	Montana	Single Facility	Existing agreements	Chouteau County	No exemptions for individuals	27	yes	
Blackfeet Reservation	Pndera counties	Montana	Multiple Facilities	Existing agreements	Glacier County	No exemptions for individuals	27	yes	
Winnebago Nebraska Reservation	Knox County	Nebraska	Single Facility	Existing agreements	Boyd and Cedar counties	Tribal purchases for reservation usage are exempt	25.40	yes	
Snow Mountain Reservation	Clark County	Nevada	Single Facility	Existing agreements	Nye County	Tribal purchases for reservation usage are exempt	24	yes	
Washoe Reservation	Douglas County	Nevada	Single Facility	Existing agreements	Carson County	Tribal purchases for reservation usage are exempt	24	yes	

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate ***	**Gastax revenue – highway spending linkage**	**Note**
Duck Valley Reservation	Elko County	Nevada	Single Facility	Existing agreements	Owyhee County, ID	Tribal purchases for reservation usage are exempt	24	yes	
Pyramid Lake Reservation	Washoe County	Nevada	Single Facility	Existing agreements	Pershing County	Tribal purchases for reservation usage are exempt	24	yes	
Isleta Pueblo Reservation	Bernalillo County	New Mexico	Single Facility	No agreement	Torrence County	Tribal purchases for reservation usage are exempt	18	yes	4
Acomo Pueblo	Cibola County	New Mexico	Single Facility	No agreement	Bernalillo County	Tribal purchases for reservation usage are exempt	18	yes	4
Ramah Reservation	Cibola County	New Mexico	Single Facility	No agreement	Bernalillo County	Tribal purchases for reservation usage are exempt	18	yes	4

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate ***	**Gastax revenue – highway spending linkage**	**Note**
Mescalero Apache Reservation	Otero County	New Mexico	Single Facility	No agreement	Lincoln County	Tribal purchases for reservation usage are exempt	18	yes	4
Jemez Pueblo	Sandoval County	New Mexico	Single Facility	No agreement	Los Alamos	Tribal purchases for reservation usage are exempt	18	yes	4
San Ildefonso Pueblo	Santa Fe County	New Mexico	Single Facility	No agreement	Taos County	Tribal purchases for reservation usage are exempt	18	yes	4
Alleghany Reservation	Cattaraugus County	New York	Multiple Facilities	*Not applicable*	Chautauqua County	No exemption, but enforcement has been postponed	22.60	no	5
Cattaraugus Reservation	Erie County	New York	Multiple Facilities	*Not applicable*	Chautauqua County	No exemption, but enforcement has been postponed	22.60	no	5

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate ***	**Gastax revenue – highway spending linkage**	**Note**
Tuscarora Nation	Niagara County	New York	Single Facility	*Not applicable*	Erie County	No exemption, but enforcement has been postponed	22.60	no	5
St. Regis Reservation	St. Lawrence County	New York	Multiple Facilities	*Not applicable*	Franklin County	No exemption, but enforcement has been postponed	22.60	no	5
Cayuga Nation	Seneca County	New York	Multiple Facilities	*Not Applicable*	Cayuga County	No exemption, but enforcement has been postponed	22.60	no	5
Eastern Cherokee Reservation	Jackson County	North Carolina	Multiple Facilities	No agreement	Swain County	Tribal refunds available	24.45	no	
Devils Lake Sioux Reservation	Eddy County	North Dakota	Multiple Facilities	Active Negotiation	Ramsey County	Tribal governments Exempt, individuals are not	21	yes	

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate***	**Gastax revenue – highway spending linkage**	**Note**
Turtle Mountain Reservation	Rolette County	North Dakota	Multiple Facilities	Active Negotiation	Towner and Bottineau counties	Tribal governments Exempt, individuals are not	21	yes	
Choctaw Nation	11 Counties in SE Oklahoma	Oklahoma	Multiple Facilities	Active Negotiation	Texas	Tribal purchases for reservation usage are exempt	17	no	
Osage Reservation	Osage County	Oklahoma	Multiple Facilities	Existing agreements	Pawnee County	Tribal purchases for reservation usage are exempt	17	no	
Warm Springs Reservation	Jefferson County	Oregon	Single Facility	Active Negotiation	Wasco County	Refunds for purchases used on tribal lands	24	yes	
Pine Ridge Reservation	Shannon County	South Dakota	Multiple Facilities	No agreement	Jackson County	Tribal Schools exempt, judiciary-stipulated refund	22	yes	6
Cheyenne River Sioux Reservation	Ziebach County	South Dakota	Single Facility	No agreement	Dewey County	Tribal Schools exempt, judiciary-	22	yes	6

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	**County**	**State**	**Facility Comments**	**FTA Reporting Status, 2002**	**Neighboring Counties**	**Tax Exemption**	**Gas Tax Rate***	**Gastax revenue – highway spending linkage**	**Note**
						stipulated refund			
Uintah and Ouray Reservation	Duchesne County	Utah	Single Facility	Active Negotiation	Uintah and Wastch counties	Tribal agreements extending exemptions and refunds	24.75	yes	
Goshute Reservation	Juab County	Utah	Single Facility	Active Negotiation	Tooele County	Tribal agreements extending exemptions and refunds	24.75	yes	
Makah Reservation	Clallam County	Washington	Multiple Facilities	Existing agreements	Jefferson County	Tribal government vehicles, only	23	yes	
Port Gamble Reservation	Kitsap County	Washington	Single Facility	Existing agreements	King County	Tribal government vehicles, only	23	yes	
Port Madison Reservation	Kitsap County	Washington	Single Facility	Existing agreements	King County	Tribal government vehicles, only	23	yes	

Table A2: Illustrative Summary of American Indian Tribes with On-Reservation Fuel Sales									
Tribal Area Name	County	State	Facility Comments	FTA Reporting Status, 2002	Neighboring Counties	Tax Exemption	Gas Tax Rate *	Gastax revenue – highway spending linkage	Note
Skokomish Reservation	Mason County	Washington	Single Facility	Existing agreements	King County	Tribal government vehicles, only	23.	yes	
Spokane Reservation	Stevens County	Washington	Multiple Facilities	Existing agreements	Lincoln County	Tribal government vehicles, only	23	yes	
Forest County Potawatomi Reservation	Forest County	Wisconsin	Single Facility	Existing agreements	Marinette County	Tribal purchases for reservation usage are exempt	27.30	no	
Lac Courte Oreilles Ojibwa Reservation	Sawyer County	Wisconsin	Single Facility	Existing agreements	Washburn County	Tribal purchases for reservation usage are exempt	27.30	no	
Lac Du Flambeau Reservation	Vilas County	Wisconsin	Single Facility	Existing agreements	Oneida and Iron counties	Tribal purchases for reservation usage are exempt	27.30	no	
Wind River Reservation	Fremont and Hot Springs counties	Wyoming	Single Facility	No agreement	Park County	No exemptions	14	yes	7

** Motor fuel tax rates reported in cents.* Motor fuel tax rates reported in cents.*

Notes:

1. According to EDA documentation, many Inuit settlements include a retail service station, but none were on tribal lands comparable to areas in the contiguous 48-states.
2. According to EDA documents, several tribal rancherias have commercial development plans that include service stations.
3. The 9th Circuit affirmed Goodman Oil Co. v. Idaho State Tax Comm´n, 28 P.3d 996 (Idaho 2001) invalidating an Idaho legislative initiative to impose state fuel taxation on tribal sales.
4. Interview with state representative confirmed that state had reached agreement with tribal entities.
5. New York State was not included in the FTA survey.
6. The Supreme Court rejected an appeal to hear a case from South Dakota.
7. The State of Wyoming does have an existing agreement with tribal governments pertaining to tobacco sales.

Source: The Louis Berger Group, Inc.; FTA Survey of American Indian Issues; Puentes and Prince (2003)

Summary of Results						
Statesa	**On-Reservation Sales**	**Citizen Complaint**	**Tribal Tax Compact**	**Exemption or Refunds**	**Ancillary to Gaming**	**Reporting Issues**
Alabama	No	No	No	No	N/A	No
Alaska	Yes	No	Yes	No	N/A	No
Arizona	Yes	Yes	Yes	Yes	Yes	Yes
Arkansas	No	No	No	No	N/A	No
California	Yes	No	No	Yes	N/A	No
Colorado	Yes	No	No	Yes	N/A	No
Connecticut	Yes	No	No	No	Yes	No
Delaware*	No	No	No	No	N/A	No
District of Columbia*	No	No	No	No	N/A	No

Summary of Results						
Statesa	**On-Reservation Sales**	**Citizen Complaint**	**Tribal Tax Compact**	**Exemption or Refunds**	**Ancillary to Gaming**	**Reporting Issues**
Florida	Yes	No	No	Yes	N/A	No
Georgia	No	No	No	No	N/A	No
Hawaii	No	No	No	No	N/A	No
Idaho	Yes	Yes	No	Yes	N/A	Yes
Illinois	No	No	No	No	N/A	No
Indiana*	No	No	No	No	N/A	No
Iowa	Yes	Yes	No	Yes	N/A	Yes
Kansas	Yes	Yes	No	No	Yes	Yes
Kentucky*	No	No	No	No	N/A	No
Louisiana	Yes	Yes	Yes	Yes	N/A	Yes
Maine	No	No	No	No	N/A	No
Maryland	No	No	No	No	N/A	No
Massachusetts	No	No	No	No	N/A	No
Michigan	No	No	No	No	N/A	No
Minnesota	Yes	No	Yes	Yes	N/A	Yes

Summary of Results						
Statesa	**On-Reservation Sales**	**Citizen Complaint**	**Tribal Tax Compact**	**Exemption or Refunds**	**Ancillary to Gaming**	**Reporting Issues**
Mississippi	No	No	No	No	N/A	No
Missouri*	No	No	No	No	N/A	No
Montana	Yes	No	Yes	No	N/A	No
Nebraska	Yes	Yes	Yes	Yes	N/A	Yes
Nevada	Yes	Yes	Yes	Yes	N/A	Yes
New Hampshire	No	No	No	No	N/A	No
New Jersey	No	No	No	No	N/A	No
New Mexico	Yes	Yes	Yes	Yes	N/A	Yes
New York	Yes	Yes	No	No	N/A	Yes
North Carolina	Yes	No	No	Yes	N/A	No
North Dakota	Yes	Yes	No	Yes	N/A	Yes
Ohio	No	No	No	No	N/A	No
Oklahoma	Yes	No	Yes	Yes	N/A	No
Oregon	Yes	No	No	Yes	N/A	No
Pennsylvania	No	No	No	No	N/A	No

Summary of Results						
Statesa	**On-Reservation Sales**	**Citizen Complaint**	**Tribal Tax Compact**	**Exemption or Refunds**	**Ancillary to Gaming**	**Reporting Issues**
Rhode Island*	No	No	No	No	N/A	No
South Carolina	No	No	No	No	N/A	No
South Dakota	Yes	Yes	No	No	N/A	Yes
Tennessee	No	No	No	No	N/A	No
Texas	Unknown	Yes	No	No	N/A	Yes
Utah	Yes	No	No	Yes	N/A	No
Vermont	No	No	No	No	N/A	No
Virginia	No	No	No	Yes	N/A	No
Washington	Yes	Yes	Yes	No	N/A	Yes
West Virginia	No	No	No	No	N/A	No
Wisconsin	Yes	Yes	Yes	Yes	N/A	Yes
Wyoming	Yes	No	No	Yes	N/A	No

Source: The Louis Berger Group, Inc.; FTA Survey of American Indian Issues; Primary Review of State Statute

States marked with an asterisk explicitly stated to the FTA survey researchers that no tribal sales occurred within the state. Reporting issues indicate instances wherein tax representatives reported to FTA, unless otherwise indicated in Section 2 interviews.

Appendix B

Discussion Guide

Assessment of Native American Sales of Motor Fuel Issues

Research Overview: In support of a study for the Federal Highway Administration (FHWA), we are conducting research into the reporting of motor fuel sales by Native American tribes. FHWA is interested in learning about situations where reporting is successful and unsuccessful, and the circumstances that have encouraged or discouraged such reporting. In connection with the reporting of fuel sales, we are also interested in whether fuel tax agreements exist and recommendations on how these can be tailored for success in other communities. The findings of this research are intended to be used by FHWA to improve the attribution and apportionment process.

We are using a discussion guide to ensure that topics are covered in a consistent way. The guide is structured to support open-ended answers and to encourage discussion on the topic of Native American fuel sales. We thank you in advance for your participation in the study and appreciate your input.

1. Cases where Native American fuel sales are being reported

   Please discuss the following:

   - An overview of current tribal fuel sales, including the extent of sales and types of establishments engaged in sales.
   - The current arrangement for reporting fuel sales, including methods for reporting and key participants (for example, state tax commission, tribal planning or data reporting unit, tribal council or state DOT)
   - The nature and extent of reporting:
     - What is reported (volume in gallons? Costs? Daily, weekly, monthly?)
     - Does reporting cover on- and off-reservation fuel sales?
     - Are all tribal retail facilities and activities (such as fuel sales to tribal government) included?
   - When was the reporting arrangement agreed and between which entities?
   - What are the circumstances and methods that encouraged the development of the arrangement?
   - At what point is motor fuel taxed (for example, 'at the rack')?
   - Is there a tax agreement that ensures tribal fuel sales are not subject to tax? If so,
     - Please give an overview of the agreement.
     - Are deductions, credits or refunds through the tax agreement dedicated to specific programs and activities?
     - What are the circumstances and methods that encouraged the development of the tax agreement?
   - Is there a price differential between on and off reservation prices? Does the tribe itself levy a tax on fuel sales?
   - Has there been litigation on the issue of reporting and/or excise tax issues?
   - Are the reporting arrangements and/or tax agreements successful?
     1. What are the benefits associated with 1) reporting and 2) having tax agreements in place? Have general tribal-state relations improved as a result of 1) and/or 2) being in place?
     2. What are the limitations? How can these be improved upon?
   - Please provide recommendations on how reporting arrangements and tax agreements can be tailored for success in other communities.

  - Please let us know if there is anyone else we should consider contacting for participation in the study (for example, other government entities, tribal entities, or multi-state/tribal groups).

2. Cases where Native American fuel sales are not being reported, including those where parties have been unable to reach agreements

   Please discuss the following:

   - An overview of current tribal fuel sales, including the volume of sales and types of establishments engaged in sales are data are available.
   - Have there been any attempts to implement reporting of fuel sales? Why do you think these attempts were unsuccessful?
   - At what point is motor fuel taxed (for example, 'at the rack')?
   - Is there a mechanism in place to ensure that tribal fuel sales are not subject to tax?
   - Is there a price differential between on and off reservation prices? Does the tribe itself levy a tax on fuel sales?
   - Has there been litigation on the issue of reporting and/or excise tax issues?
   - In your view, what might be the benefits associated with 1) reporting and 2) having tax agreements in place? Would progress on 1) and 2) improve general tribal-state relations?
   - What do you perceive as negative impacts associated with 1) fuel sales reporting and 2) fuel tax agreements?
   - What are the circumstances and methods that would encourage reporting?
   - Please let us know if there is anyone else we should consider contacting for participation in the study (for example, other government entities, tribal entities, or multi-state/tribal groups).

3. Cases where state and tribal entities are developing agreements for the reporting of Native American fuel sales

   Please discuss the following:

   - An overview of current tribal fuel sales, including the extent of sales and types of establishments engaged in sales if data are available.
   - Have there been any attempts to implement reporting of fuel sales in the past? Why do you think these attempts were unsuccessful?
   - At what point is motor fuel taxed (for example, 'at the rack')?
   - Is there a mechanism in place to ensure that tribal fuel sales are not subject to tax?
   - Is there a price differential between on and off reservation prices? Does the tribe itself levy a tax on fuel sales?
   - Has there been litigation on the issue of reporting and/or excise tax issues?
   - Describe the current efforts being undertaken to develop agreements for the reporting of fuel sales. Are associated tax agreements also being considered?
   - What are the circumstances and methods that have encouraged parties to move forward with developing agreements?
   - In your view, what might be the benefits associated with 1) fuel sales reporting and 2) having fuel tax agreements in place? Would progress on 1) and 2) improve general tribal-state relations?
   - Do you know of other successful models of reporting and/or tax agreements that would be useful for us to review?
   - What do you perceive as negative impacts associated with 1) reporting and 2) tax agreements?
   - Please let us know if there is anyone else we should consider contacting for participation in the study (for example, other government entities, tribal entities, or multi-state/tribal groups).

References

Court Cases of Note

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