

**MOTOR FUELS TAX AGREEMENT**

**The Confederated Tribes of the Umatilla Indian Reservation (“Tribes”) and the State of Oregon (“State”), acting through the Oregon Department of Transportation (“Department”), agree as follows:**

**RECITALS**

**WHEREAS**, the Board of Trustees is the governing body of the Confederated Tribes of the Umatilla Indian Reservation by the authority of the 1949 Constitution and By-Laws as adopted on November 4, 1949, and approved on December 7, 1949; **AND**

**WHEREAS**, the Department administers the Oregon Motor Vehicle Fuel (MVF) tax as used in ORS 319.010 – 319.430 and Fuel taxes, as used in ORS 319.510 – 319.880, and imposes a tax upon the first sale, use or distribution of MVF and the use of Fuel in a motor vehicle; **AND**

**WHEREAS**, the Tribes are a sovereign entity having regulatory power and authority over certain lands known as the Umatilla Indian Reservation; **AND**

**WHEREAS**, “Reservation” means, solely for purposes of this agreement, Indian country as defined by 25 U.S.C. Section 1903(10) and 18 U.S.C. Section 1151, which includes all trust lands whether within the original reservation or subsequently acquired, all Indian allotments, and all lands located within the exterior boundaries of the Umatilla Indian Reservation, notwithstanding the issuance of any patent, and including rights-of-way; **AND**

**WHEREAS**, the taxes on fuel used by the Tribes’ operated motor vehicles that are owned, leased, or used for the purpose of providing essential governmental functions (no personal usage allowed) shall be 100% refundable from MVF and Fuel taxes collected and paid to the Department as required by this agreement and ORS Chapter 319; **AND**

**WHEREAS**, the Tribes and the Department shall cooperate to administer and enforce the provisions of this Agreement; **AND**

**WHEREAS**, this Agreement provides a mutual benefit by reducing litigation over regulatory and taxation authority regarding motor fuels, insuring that all MVF and Fuel taxes are properly collected and providing certainty for tribal and state governments in sharing those tax revenues to fund essential governmental functions; **AND**

**WHEREAS**, both the Tribes and the State of Oregon recognize that pursuant to applicable law each is a sovereign entity with dominion over their respective territories and governments and it is not the intent nor shall it be construed to cause the sovereignty of either the Tribes or the State to be diminished by entering into this Agreement; **AND**

**WHEREAS**, the Tribes and Department wish to establish a fair and practical method of administering the requirements of ORS Chapter 319 within the Umatilla Indian Reservation and to apply applicable law governing the regulation and taxation of MVF and Fuel sold within the Reservation; **AND**

**WHEREAS**, this Agreement is not intended to cover the sale or distribution of motor vehicle fuel or fuel as defined in this Agreement outside of the exterior boundaries of the Umatilla Indian Reservation; **AND**

**WHEREAS**, the annual Oregon MVF and Fuel consumption rate computed by ODOT on a per capita basis multiplied by a 0.8 factor shall be the basis for the consumption rate for the gallons per tribal member consumed per year. The adjustment factor of 0.8 is used for the purpose of estimating purchases of MVF and Fuel used by tribal members on Tribal roads on the Reservation, and to provide an allowance for individual tribal member refund claims filed with ODOT (e.g. ORS 319.280); **AND**

**WHEREAS**, this Agreement is not intended to cover the sale of alternative fuels, such as propane and compressed natural gas, and aircraft fuels because the Tribes are not selling or distributing such fuels for the purpose of propelling vehicles on roadways or to be used in aircraft; **AND**

**WHEREAS**, if the Tribes start selling or distributing alternative fuels, such as propane and compressed natural gas, for the purpose of propelling vehicles on roadways and/or aircraft fuels, the Tribes and the Department shall amend this Agreement to cover such activities; **AND**

**WHEREAS**, nothing in this Agreement shall limit the Tribes from imposing a tribal MVF or Fuel tax for the sale, use, or distribution of MVF and Fuel within the Reservation; **AND**

**NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS AND THE MUTUAL COVENANTS, CONDITIONS AND PROMISES ON THE PART OF EACH PARTY TO BE KEPT AND PERFORMED, IT IS HEREBY AGREED AMONG THE PARTIES AS FOLLOWS:**

1. Definitions. The following definitions are to be used for this Agreement unless the context clearly indicates a different meaning:

(a) "Motor Vehicle Fuel" (MVF) as defined by ORS 319.010 (12).

(b) "Fuel" as defined by ORS 319.520 (4).

(c) "Motor vehicle" as defined by ORS 319.520 (7).

(d) "Dealer" as defined by ORS 319.010 (6). For purposes of this Agreement, the Tribes are Dealers. For purposes of the Tribal Statute, any Tribal member, non-Tribal Member Native American, or non-Native American who conducts any of the activities contemplated under ORS 319.010(6) on the Reservation is a Dealer.

(e) "Seller" as defined by ORS 319.520 (9). For purposes of this Agreement, Tribes are Sellers. For purposes of the Tribal Statute, any Tribal Member, non-Tribal Member Native American, or non-Native American who conducts any of the activities contemplated under ORS 319.520(9) on the Reservation is a Seller.

(f) "Reservation" means, solely for purposes of this agreement, the Umatilla Indian Reservation and is defined as Indian country as defined by 25 U.S.C. Section 1903(10) and 18 U.S.C. Section 1151, which includes all trust lands whether within the original reservation or subsequently acquired, all Indian allotments, and all lands located within the exterior boundaries of the Umatilla Indian Reservation, notwithstanding the issuance of any patent, and including rights-of-way.

(g) "Tribal Member" means an enrolled member of the Confederated Tribes of the Umatilla Indian Reservation.

(h) "Road" means every way and thoroughfare, of any nature, open to the use of the public for the purpose of vehicular travel.

(i) "Tribal Statute" means the Tribes' motor fuel tax statute contemplated under Section 4 of this Agreement.

2. Alternative Fuels. If the Tribes start selling or distributing alternative fuels, such as propane and compressed natural gas, for the purpose of propelling vehicles on roadways and/or aircraft fuels, the Tribes and the Department shall amend this Agreement to cover such activities.

3. Use of Refunds. All refunds of any MVF and Fuel taxes resulting from this Agreement to the Tribes shall be used for the sole purpose of funding essential governmental functions and are not intended for individual distribution.

4. Tribal Motor Fuels Tax Statute. The Tribes shall adopt and enforce a statute ("Tribal Statute"), providing that all sales of MVF and Fuel within the Reservation shall only be made by the Tribes or licensees as set forth in the Tribal Statute. The Tribes agree that the Tribal Statute shall provide Dealer and Seller licensing requirements and procedures for Tribal members, non-Tribal Member Native Americans, and non-Native Americans who conduct any of the activities contemplated under ORS 319.010(6) or ORS 319.520(9), or both, on the Reservation. The Tribal Statute shall provide that all Dealers and Sellers must be licensed to sell, use or distribute any MVF or Fuel on the Reservation and shall require of Dealers and Sellers subject to the Tribal Statute the same reporting and tax payment obligations under Section 6 of this Agreement, and audit obligations under Section 8 of this Agreement, as are required of the Tribes as Dealers and Sellers under this Agreement. The foregoing requirements of the Tribal Statute shall be effective as of April 29, 2002, pursuant to Tribal Resolution No. 02-042.

5. Collection of Future Taxes. All Dealers and Sellers shall, from the effective date of this Agreement forward, file the following reports with the Department and include any taxes due and owing.

(a) The *Motor Vehicle Fuel and Aircraft Fuel License Tax Report* (ODOT forms 1302, 1303, 1303A, 1304, 1305 and 1305X, as necessary), or its equivalent (as approved by the Department), on or before the 25<sup>th</sup> day of the month following the calendar month in which the Motor Vehicle Fuel was sold, used or distributed.

(b) The *Use Fuel Seller Tax Report* (ODOT form 1334), or its equivalent (as approved by the Department), on or before the 20<sup>th</sup> day of the month following the calendar month in which the Fuel was sold, used or distributed.

(c) The *Use Fuel User Tax Report* (ODOT form 1324), or its equivalent (as approved by the Department), on or before the 20<sup>th</sup> day of the month following the calendar month in which the Fuel was used by the Tribes.

(d) The forms referenced in this Section 6 are attached as exhibits 1 through 8 to this Agreement and are incorporated herein by this reference.

6. Collection of Back Taxes. For the period October 2, 2000 to the effective date of this Agreement, all Dealers and Sellers shall within 120 calendar days from the effective date of this Agreement, remit to the Department all Oregon MVF and Fuel taxes not previously paid, and file the appropriate tax reports as outlined in Section 10, below. All MVF purchased during this period was purchased "tax paid" in Washington State at a rate of 23 cents per gallon. Washington State has agreed to refund the Washington State tax to the Tribes' upon notification from the Department that a Fuels Tax Agreement has been signed by the Tribes and the Department. The Tribes agree to assign this refund to the Department as partial payment of their MVF tax obligation. The balance of the Tribes' MVF tax obligation, 1 cent per gallon, will be calculated based on the number of gallons imported from Washington State. The Tribes agree to submit copies of refund claims filed with Washington State as a means of determining gallons. The Tribes' further agree to calculate the Fuel tax liability for the same period and prepare year to date calendar year tax reports on forms 1334 and 1324 calculating the Fuel tax due the Department. The Tribes' and the Department agree that the tax need not be remitted at the time the reports are filed. The tax due will be deducted from the refund the Tribes will receive from the Department for the same period as provided in Section 10 of this Agreement.

7. Audit of Records. All Dealers and Sellers shall permit the State or its officers, agents, or designees to review the books and records supporting all MVF and Fuel transactions during normal business hours and with reasonable advance notice, and shall maintain the original books and records for a period of three years.

8. Confidentiality. The Department shall use its best efforts, within the limits of applicable State law, to keep any information provided by the Tribes, or its licensees, confidential and exempt from public inspection.

9. Refund. For the period October 2, 2000 through December 31, 2000, and continuing each calendar year thereafter, the Department agrees to refund to the Tribes an amount of money agreed to be a reasonable equivalent to the previously collected tax on sales of MVF and Fuel, by the Tribes or its licensees, used by Tribal Members on tribally maintained roads within the Umatilla Indian Reservation. The refund shall be calculated as follows:

**Refund = Tribal Member Population \* Tribal Member MVF and Fuel Consumption Rate \* MVF and Fuel Tax Rate**

(a) The Tribes shall provide, on a calendar year basis, to the Department (by June 30 of the following year) the total population figure for all Tribal Members living within Umatilla County, and this shall be the population figure used in the refund formula. This population figure shall be calculated using the Tribes' official enrollment list.

(b) The rate of fuel consumption shall be the annual Oregon fuel consumption rate computed by ODOT on a per capita basis multiplied by a 0.8 factor that is to be used as the basis for the gallons per Tribal Member consumed per year. For the year 2000 the Oregon consumption rate is 466 gallons.

(c) The Tribal Member MVF and Fuel per capita fuel consumption rate shall never be less than 300 gallons per year.

(d) The MVF and Fuel tax rates shall be those rates imposed by ORS Chapter 319. In the event that the tax rate changes during the calendar year, the Department shall prorate the refund calculation according to the number of days for which the MVF and Fuel tax rates were effective.

(e) In addition to the refund provided for in Sections 9(a)–9(d), taxes collected and paid to the Department on fuel used in the Tribes' operated motor vehicles that are owned, leased, or used for the purpose of providing essential governmental functions (no personal usage allowed) shall be 100% refundable to the Tribes, upon receipt of a refund claim application and certified copies of original sales receipts. The Tribes agree to use the *Fuels Tax Refund Claim* form (ODOT form 1200), or its equivalent (as approved by the Department), which is attached as exhibit 9 to this Agreement. Sales receipts will be issued at the time of sale and will include the date of the sale, type of fuel, gallons sold, vehicle license plate number, and the program to which the vehicle is assigned. For the period October 2, 2000 to the effective date of this Agreement, in the event the Tribes have not maintained the specific documentation referenced above, the Tribes agree to furnish detailed information that establishes to the satisfaction of the Department the amount of fuel used in the Tribally owned vehicles subject to refund.

(f) The Department agrees to provide the Tribes with the refund within sixty (60) calendar days from the receipt of the appropriate information necessary to make the refund calculation.

(g) Notwithstanding Section 9(c), in no event will the sum of the refund issued by the Department for the calendar year plus the Tribal refund allowed pursuant to Section 9(e) exceed the total MVF and Fuel taxes paid by the Tribes during the same calendar year.

(h) For the initial refund period, October 2, 2000 to the effective date of this Agreement, the refund to the Tribes will be reduced by the Fuel tax liability determined under Section 6.

10. Release. The Department agrees not to seek enforcement of any provisions of ORS Chapter 319 which may apply against the Tribes because of its failure to submit reports or its failure to remit any MVF or Fuel taxes, resulting from the Tribes' operation of its Arrowhead Truck Stop from the date of purchase of such facility, October 2, 2000, to the effective date of this Agreement. In addition, the Department agrees that this Agreement provides for payment by the Tribes of all MVF and Fuel taxes owing during that period and agrees, pursuant to ORS 319.090, to waive any penalty due.

11. Indemnification. The Tribes shall indemnify the Department for any motor fuels tax refund liability imposed against it by a regulatory or adjudicative body, having proper jurisdiction, as a result of any successful legal challenges by Tribal members as exempt from State taxation due to Tribal status. The Tribes shall indemnify the Department only for the actual tax refund imposed by the regulatory or adjudicative body, and not for any attorney fees, expenses or other costs beyond the actual tax imposed on the purchase of motor fuel for personal consumption. The Tribes indemnity does not include any refunds imposed due to qualifying uses under State law.

12. Notices. Any notices may be delivered by hand, facsimile, or certified mail postage prepaid through the United State Postal Service or sent by commercial overnight courier such as Federal Express. Such notices, if sent by mail, will be deemed given and received five (5) days after deposit in the United States mail. All other notices will be deemed given and received when delivered at the address set forth below, or such alternative address as a party may later designate:

**Oregon Department of Transportation  
355 Capital Street NE  
Salem, OR 97301  
Attn: Director  
Fax: (503) 986-3432**

**Confederated Tribes of the Umatilla Indian Reservation  
P.O. Box 638, 73239 Confederated Way  
Pendleton, OR 97801  
Attn: Office of Legal Counsel  
Fax: (541) 278-7462**

Any party may change the address or facsimile number to which notices are to be directed to it by notice to the other party in the manner specified above.

13. Dispute Resolution. The parties agree that, both during and after the performance of their responsibilities under this Agreement, each shall make bona fide efforts to resolve any dispute, claim or controversy arising between them by amicable negotiations, and agree to provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate resolution of any and all disputes.

The parties further agree to use their best efforts to conduct any dispute resolution procedures herein as efficiently and cost effectively as possible. The following progressive dispute resolution model shall be in place:

(a) Negotiation. The parties will attempt in good faith to first resolve through negotiation any dispute, claim or controversy arising out of or relating to this agreement. Either party may initiate negotiations by providing written notice in letter form to the other party, setting forth the subject of the dispute and the relief requested. The recipient of such notice will respond in writing within fourteen (14) days with a statement of its position on and recommendation for resolution of the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party with full settlement authority will meet at a mutually agreeable time and place within thirty (30) days of the date of the initial notice in order to exchange relevant information and perspective, and to attempt to resolve the dispute informally. If the dispute is not resolved by these good-faith negotiations, then the matter shall proceed to mediation.

(b) Mediation. The parties agree that - should attempts to resolve differences through informal negotiations be unsuccessful - they will engage in formal mediation of their differences.

(i) Either party may commence mediation by providing to the other party a written request for mediation, citing the failure of informal negotiations to resolve concerns, restating the specific issue(s) relative to the dispute, and specifying the relief requested. The parties will cooperate in selecting a mediator, according to the Mutual Selection Process outlined in the Oregon Department of Justice bulletin dated February 1999 and entitled "Hiring A Mediator", attached to this Agreement as exhibit 10.

(ii) The parties will cooperate with one another in mutually selecting a mediator from the Oregon State Mediator Roster (a pre-approved list of private sector mediators across Oregon who have successfully met minimum qualifications to allow expedited hire in cases under \$75,000 - with specific selection protocols as delineated in the DOJ bulletin referenced above).

(iii) The parties shall further cooperate in case assessment activities and in scheduling the mediation proceedings. The parties agree that they will participate in mediation in good faith, and that they will share equally in its costs.

(iv) All offers, promises, conduct and statements - whether written or oral- made in the course of mediation by any of the parties, their agents, employees, experts and attorneys, as well as by the mediator, are confidential and privileged. Such offers, promises, conduct and statements offered during mediation are, therefore, inadmissible for any purpose in any future arbitration, civil lawsuit or other proceeding involving the parties. It is specifically provided, however, that when the specific "evidence" is otherwise admissible or discoverable, it shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

(c) Non-Binding Arbitration. The parties agree that - should attempts to resolve differences through informal negotiations and mediation be unsuccessful - they will enter non-binding arbitration for resolution of their differences.

(i) Either party may commence arbitration - after failure of good-faith efforts to successfully mediate a resolution - by providing to the other party a written notice, citing the failure of mediation to resolve concerns, citing specific issue(s) relative to the dispute remaining to be resolved through arbitration, and specifying the relief requested.

(ii) Non-binding arbitration proceedings shall commence within forty-five (45) days after the service of the written notice.

(iii) An arbitrator will be selected in the following manner:

(A) The parties agree to obtain a list of qualified arbitrators from the U.S. Arbitration and Mediation of Oregon or any other arbitration panel agreed to by the parties.

(B) From the list of Arbitrators, both parties will mutually agree to an Arbitrator.

(C) The parties agree to divide the cost of the arbitration proceeding equally between them.

(d) Dispute Resolution Remedies Exhausted Prior to Litigation. No party shall initiate any legal actions in any court on any matter related to the subject of this Agreement, unless the party first exhausts the methods of dispute resolution pursuant to this Agreement.

14. Choice of Forum. After exhausting the methods of dispute resolution pursuant to this Agreement, either party may initiate legal action in any court of competent jurisdiction.

15. Governing Law. This Agreement shall be governed by applicable State, Tribal and Federal laws.



16. Sovereign Immunity. Nothing in this Agreement, except to the extent that the Tribes have agreed to indemnification, pursuant to Section 11, shall be construed as a waiver of the Tribes' sovereign immunity or as a waiver of the State's 11<sup>th</sup> Amendment sovereign immunity.

(a) However, the Tribes grant the State a limited waiver of sovereign immunity if all of the following five conditions are met:

(i) The dispute resolution provisions of Section 13 of this Agreement have been exhausted;

(ii) The claim is made by the State and not by any other party;

(iii) The claim alleges a breach by the Tribes of a specific obligation or duty expressly assumed by the Tribes under the terms of this Agreement;

(iv) The claim seeks either:

(A) Specific action by the Tribes to bring the Tribes into compliance with the obligation or duties expressly assumed by the Tribes in the Agreement;  
or

(B) Payment of a monetary obligation arising from such noncompliance shall be limited to the motor fuel taxes deemed by the court to be due and owing under this Agreement, and are payable only from the motor fuel taxes collected, the revenues of the Arrowhead tribal motor fuel enterprise or any other tribal enterprise which is marketing, distributing or dealing motor fuels and not from any other source, asset or property of the Tribes.

(v) The claim is brought in Umatilla Tribal Court.

(b) The Tribes agree to bring any claims against the State in State court only if the dispute resolution provisions of Section 13 of this Agreement have been exhausted.

17. Amendment. Any amendment or modification of this Agreement shall be effective or binding on the parties only if it is in writing and signed by all the Parties.

18. No Third-Party Beneficiaries. This Agreement is solely for the benefit of the parties and does not give any other third party, including any lender or other creditor, any remedy, claim, liability, reimbursement, cause of action or other right.

19. Severability. If a court finds any provision of this Agreement invalid or unenforceable under applicable law of any jurisdiction, the remaining provisions shall not be affected. Any such invalidity or unenforceability shall not invalidate or render unenforceable that provision in any other jurisdiction. In the event a court finds a provision invalid or unenforceable, the parties agree to amend the Agreement so as to affect the original intent of the parties as closely as possible.

20. Drafting Interpretation. Preparation of this Agreement has been a joint effort of the parties, and the resulting document shall not be construed more severely against one of the parties than against another. Nothing in this Agreement shall be interpreted to limit the Tribes from imposing Tribal motor fuel taxes for the sale, use, or distribution of motor fuels within the Reservation.

21. Effective Date. This Agreement shall become effective upon the execution by all parties.

22. Termination. Starting on the effective date, this Agreement shall automatically renew on a yearly basis, from January 1<sup>st</sup> through December 31<sup>st</sup> of each calendar year, unless one of the parties notifies the other party in writing at least thirty (30) days prior to the end of the calendar year of its intent to allow this Agreement to expire at the end of the calendar year and to not renew this Agreement for the following year. Any such termination notice shall only be effective for the subsequent year.

23. Signatory Authority.

(a) The Tribal representative certifies:

(i) That the Tribes have taken all acts necessary to authorize the execution of this Agreement;

(ii) That the undersigned has full power and authority to enter into this Agreement; and

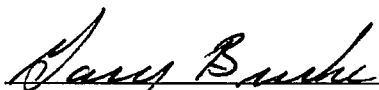
(iii) That this Agreement shall bind the Tribes to its terms.

(b) The Department representative certifies:


(i) That the Department has taken all acts necessary to authorize the execution of this Agreement;

(ii) That the undersigned have full power and authority to enter into this Agreement; and

(iii) That this Agreement shall bind the State to its terms.

  
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Gary Burke, Chair, Board of Trustees  
Confederated Tribes of the Umatilla Indian Reservation

9-9-02  
Date

  
\_\_\_\_\_  
Mike Marsh, Executive Deputy Director,  
Oregon Department of Transportation

9-11-02  
Date