

**CIGARETTE TAX CONTRACT**  
**Between**  
**THE NOOKSACK TRIBE**  
**and**  
**THE STATE OF WASHINGTON**

**PREAMBLE**

WHEREAS, the Nooksack Tribe is a federally recognized Indian Tribe, possessed of the full inherent sovereign powers of a government; and

WHEREAS, the state of Washington is a state within the United States of America, possessed of full powers of state government; and

WHEREAS, the body of Federal Indian law and policy recognizes the right and the importance of self-determination for Indian Tribes, the authority of a Tribe to tax certain activities, and the need for economic development in Indian country by Indian Tribes; and

WHEREAS, the state of Washington has committed, through the Centennial Accord and Millennium Agreement, to the political integrity of the federally recognized Indian Tribe within the state of Washington and has formally recognized that the sovereignty of each Tribe provides paramount authority for the Tribe to exist and to govern; and

WHEREAS, the imposition of the State cigarette taxes on Nooksack Reservation sales of cigarettes from Tribal retailers to nonmember purchasers has the practical effect of limiting the Tribe's ability to impose cigarette taxes on such sales for essential Tribal governmental purposes; and

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of this cigarette tax Contract; and

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Contract will enable, taxation being an essential attribute of sovereignty and a tool of self-sufficiency; and

WHEREAS, the State and Tribe will also benefit by the exercise of the attributes of Tribal sovereignty and from the improved well-being of members of the Tribe that will result from economic development by the Tribe and its members; and

WHEREAS, both the Tribe and the State desire a positive working relationship in matters of mutual interest and disagreements by conducting discussions on a government-to-government basis; and

WHEREAS, the mutual interests of the Nooksack Tribe and the state of Washington brought these two governments together to pursue their common interest; and

WHEREAS, both governments worked diligently to gain for the Governor of the state of Washington the authority to enter into a tax contract regarding cigarettes with the Nooksack Tribe; and

WHEREAS, Engrossed Substitute Senate Bill 5372 was enacted by the 57<sup>th</sup> Legislature and signed by the Governor, authorizing the signing of contracts such as this, such authority effective July 22<sup>nd</sup>, 2001; and

NOW THEREFORE, the Tribe by and through its Tribal Council and the state of Washington by and through its Governor, do hereby enter into this Contract for the mutual benefit of the Tribe and the State to wit:

**PART I**  
**Definitions**

- (1) "Auditor" means the auditor selected pursuant to Part VII of this Contract.
- (2) "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
- (3) "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.
- (4) "Contract" means this contract entered into by the state of Washington and the Nooksack Tribe.
- (5) "Department" means the Washington State Department of Revenue.
- (6) "Essential government services" means services such as Tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
- (7) "Indian country," consistent with the meaning given in 18 U.S.C. 1151 means:
  - (a) All land within the limits of the Nooksack Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation; and
  - (b) All Indian allotments or other lands held in trust for a Nooksack Tribal member or the Tribe, or otherwise subject to a restriction against alienation imposed by the United States, the Indian titles to which have not been extinguished, including rights of way running through the same.

- (8) "Local retail sales tax" means the combined Washington local retail sales taxes applicable in the area.
- (9) "Non-Indian" means an individual who is neither a Tribal member nor a nonmember Indian.
- (10) "Non-member Indian" means an enrolled member of a federally recognized Indian Tribe other than the Nooksack Tribe.
- (11) "Nooksack Indian Reservation" or "reservation" means the area recognized as the Nooksack Indian Reservation by the United States Department of the Interior.
- (12) "Parties to the agreement" or "parties" means the Nooksack Tribe and the state of Washington.
- (13) "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package of cigarettes, which price includes the Tribal cigarette tax.
- (14) "Self-certified tribal wholesaler" means a wholesaler who is a federally recognized Indian Tribe or a member of such a Tribe, who is not required to be licensed under any state law.
- (15) "Self-certified wholesaler" means an out-of-state wholesaler who is not a self-certified tribal wholesaler.
- (16) "State" means the state of Washington.
- (17) "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco product" does not include cigarettes.
- (18) "Tribal cigarette tax" means the tax or taxes enacted as a provision of Tribal law on the units of cigarettes sold and on the purchase of cigarettes by retail buyers.
- (19) "Tribal member" or "member" means an enrolled member of the Nooksack Tribe.
- (20) "Tribal retailer" means a cigarette retailer wholly owned by the Nooksack Tribe and located in Indian country or a member-owned smokeshop located in Indian country and licensed by the Tribe.
- (21) "Tribal tax stamp" means the stamp or stamps that indicate the Nooksack Tribal cigarette tax imposed under this Contract is paid or that identify those cigarettes with respect to which no tax is imposed.
- (22) "Tribe" or "Tribal" means or refers to the Nooksack Tribe, a federally recognized Tribe.

(23) "Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale only.

## **PART II**

### **Applicability of the Contract**

#### **(1) Execution of Contract**

This Contract shall become effective when approved by the Tribal Council and signed by the authorized signatory for the Tribe, and signed by the Governor of the state of Washington.

This Contract shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Contract.

#### **(2) Application**

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal ordinance meeting the terms of Part III of this Contract, this Contract shall apply to the retail sale of cigarettes by Tribal retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Contract are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. "Delivery and physical transfer of possession" within Indian country does not include mail order type sales, including internet, catalog, and telephone sales, unless the cigarettes are delivered to the buyer within Indian country.

#### **(3) Scope Limited**

This Contract does not apply to:

- (a) Cigarettes sold at retail by non-Indians or non-member Indians; and
- (b) Tobacco products as that term is defined in Part I of this contract.

## **PART III**

### **Imposition of Tribal Cigarette Taxes**

#### **(1) Tribal Retailers**

- (a) The Tribe agrees to notify the Department thirty days prior to the start up of cigarette sales by any Tribal retailer other than a retailer in existence on the effective date of this Contract.
- (b) The Tribe agrees that any cigarette retailer wholly owned by the Nooksack Tribe is subject to this Contract.
- (c) The Tribe agrees that it will require that any member-owned smokeshop located in Indian country be in compliance with the terms of this Contract. In addition the Tribe agrees that it will maintain and enforce a requirement that any such member-owned smokeshop obtain a license from the Tribe.

**(2) Tax Imposed on Sales by Tribal Retailers**

- (a) The Tribe, by ordinance and in accord with the requirements of this Part, shall impose taxes on all sales by Tribal retailers of cigarettes to nonIndian and nonmember Indian purchasers within Indian country.
- (b) During the term of this Contract, upon any future increase in the state cigarette tax, state retail sales tax or local retail sales tax, the Tribal tax on cigarettes shall increase by no less than 100 percent of the increase in the combined state and local tax rates; provided however that during the phase-in period the Tribal tax rate shall be set so that it is at least equal to 80 percent of the then current combined state cigarette tax and state and local sales tax.
- (c) Upon any future decrease in the state cigarette tax, state retail sales tax or local retail sales tax, the Tribal tax on cigarettes may decrease to a minimum of no less than 100 percent of the combined state and local tax rates provided however that during the phase-in period the Tribal tax rate shall be set so that it is at least equal to 80 percent of the then current combined state cigarette tax and state and local sales tax.
- (d) Pursuant to RCW 43.06.455, the state retrocedes from its tax during the time this Contract is in effect.

**(3) Phase-In Tax Rate**

Beginning no later than March 15, 2003, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than the sum of an amount equal to 80 percent of the state cigarette tax, which is expressed in cents per cigarette, plus an amount equal to 80 percent of the state and local retail sales taxes (the "Commencement Date").

**(4) Final Tax Rate**

No later than 36 months after the Commencement Date under this Contract and subject to the phase-in reduction under this Part, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than the sum of: an amount equal to 100 percent of the state cigarette tax, which is expressed in cents per cigarette, plus an amount equal to 100 percent of the state and local retail sales taxes.

**(5) Reduction in Three Year Phase-In – How to Determine**

Commencing one year from the Commencement Date, if during any quarter, the number of cartons of cigarettes, excluding those manufactured by the Nooksack Indian Tribe or its enterprises, that are sold at retail exceeds by at least 10 percent the quarterly average sales of the six months preceding the end of the first year after the commencement date of the Tribal tax, the 36 month period noted above shall be reduced by three months. The quarterly average sales baseline shall be determined by the Auditor. The Auditor shall notify the Tribe and the Department when the retail sales for any one quarter exceed the baseline by at least ten percent. These reductions will be cumulative. For the purposes of this provision:

- (a) "Quarter" means a three-month period, each quarter immediately succeeding the next. The first quarter begins March 1, 2003; and
- (b) The "quarterly average sales" means the sum of the retail sales made during the two quarters divided by two.

**(6) Phase-in Audit requirements**

- (a) One year after the Commencement Date, the Auditor will be responsible for reviewing the records of each Tribal retailer to establish the quarterly average sales baseline for the six month period preceding the end of the first year after the Commencement Date of the Tribal cigarette tax. Once this baseline has been established, the Auditor is not required to recalculate this information.
- (b) During the phase-in period, the Auditor will be responsible for reviewing the records of each Tribal retailer to determine the retail sales volume for each quarter. This review must take place on no less than a semi-annual basis. The Auditor will notify the Tribe and the Department when the retail sales for any one quarter exceeds the quarterly average sales baseline by at least ten percent. Based on the findings from the Auditor, the phase-in period will be adjusted according to the provisions in this Part III of this Contract.
- (c) The first required review must cover the six-month period ending July 1, 2004. If the retail sales for both of these quarters exceed the quarterly average sales baseline by at least ten percent, the second required review must take place in December 2004. The Auditor may calculate a projected sales volume for the remainder of the quarter in order to determine whether the retail sales for that quarter exceed the baseline by at least ten percent. If the retail sales in both quarters prior to July 1, 2004, do not exceed the baseline, the second required review may take place in December 2005.

**PART IV**

**Purchase of Cigarettes by Tribal Retailers**

**(1) Wholesale Purchases – Requirements**

The Tribe agrees to add to Tribal law, and maintain in effect, a requirement that Tribal retailers purchase cigarettes only from wholesalers or manufacturers licensed to do business in the state of Washington, subject to any memoranda of agreement entered into between the Tribe and the Department pursuant to Part VI of this Contract.

**(2) Delivery of Cigarettes to the Tribal Retailer Outside of Indian Country**

Cigarettes bearing the tax stamp required by this Contract may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a Tribal retailer, subject to meeting any notification requirements of this Contract. Deliveries may be made by commercial carrier. Cigarettes must be accompanied by invoices identifying the cigarettes as Nooksack Tribe's cigarettes.

**PART V**

**Tribal Tax Stamps**

**Tax Stamp Required**

(a) All cigarettes sold by Tribal retailers shall bear a Washington State tax stamp. The Tribe may elect in the future to institute its own stamp. In such case, the parties agree to modify this agreement to cover such eventuality before any change is made in the tax stamp procedures outlined in the current agreement.

(b) The Tribe may by ordinance allow for an exemption from the tax imposed under Part III of this Contract for Tribal members. If the Tribe provides for such tax exemption, the following shall apply:

The Tribe agrees that members will be exempted from all or a specified portion of the cigarette tax and sales tax at the point of sale. Such cigarettes shall bear the tax stamp, however, the non-applicable tax value of the stamp shall be deducted from the selling price at the time of sale. The books and records of the Tribal retailer must indicate the sales made to members. The Tribe agrees that it will enact an ordinance requiring that eligibility for the exemption is conditioned on members providing documentation substantiating enrolled status. The Tribe agrees that the ordinance will establish a reasonable limit on purchases by Tribal members and shall provide a penalty for violation of the ordinance, the objective being to preclude resales of untaxed cigarettes by members. The State and the Tribe agree that the Tribe may reimburse the Tribal retailer for tax stamps on cigarettes purchased by the retailer, but not subject to tax due to the exempt nature of a sale.

**(2) Creation and Supply of Tribal Tax Stamps**

The Tribe will use Washington State tax stamps, which are provided by the State through its stamp vendor.

The State agrees that the Tribe will purchase cigarettes with the state stamp affixed after the effective date of the Tribal cigarette tax, until such time as the Tribe chooses to use a Tribal stamp. The State will refund to the Tribe on a minimum of a monthly basis the tax attributable to such cigarettes, provided that the invoices from the wholesaler to the tribal retailer indicate that the cigarette tax was passed on to the tribal retailer.

**(4) Requirements for Affixation of Stamps by Wholesalers**

(a) Wholesalers shall be responsible for affixing the tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribal retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp. Stamps shall be affixed so that it may be readily ascertained by inspection that the tax has been paid.

(b) The State agrees that it will refund tax attributable to cigarette tax on those cigarettes that bear the state stamp and that on the effective date of the Tribal cigarette tax are in the inventory of the Tribal retailer. The Tribe agrees to allow the Department access to its inventory and floor stock so that an accounting of taxed cigarettes may be made.

(c) The State agrees that the Tribe may continue to purchase cigarettes with the state stamp affixed after the effective date of the Tribal cigarette tax until such time as the Tribe chooses to use a Tribal stamp. The State will refund to the Tribe on a monthly basis the tax attributable to such cigarettes, provided that the invoices from the wholesaler to the tribal retailer indicate that the cigarette tax was passed on to the tribal retailer.

**(5) Wholesaler Obligation Under State Law**

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Contract (in the case of self-certified out-of-state or self-certified tribal wholesalers), and compliance with other requirements in this Contract, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale. It is presumed that any such possession in excess of seventy-two (72) hours is in contravention of this Contract.

**(6) State Agreement Regarding Compliance with State and Federal Law**

As to all transactions that conform with the requirements of this Contract, such transactions do not violate state law, and the State agrees that it will not assert that any such transactions violate state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws.

**PART VI  
Wholesalers**

**(1) Wholesalers Licensed by the State**

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to state tax and which cigarettes are subject to the Nooksack Tribe cigarette tax.

**(2) Self-Certified Out-of-State Wholesalers – Memorandum of Agreement**

Should the tribe wish to do business with an out-of-state wholesaler that is not licensed by the state of Washington, the tribe must first enter into a memorandum of agreement with the Department in regard to such business. The memorandum of agreement must at a minimum include:

- (a) An assurance that the out-of-state wholesaler can and will meet the terms of this Contract;
- (b) A means to determine if the out-of-state wholesaler is licensed to do business with the state in which they reside;
- (c) A requirement that cigarettes transported in the state of Washington be accompanied by invoices; and
- (d) An agreement by the out-of-state wholesaler that the Auditor have access to its records.

**(3) Self-Certified Tribal Wholesalers – Memorandum of Agreement**

Should the tribe wish to do business with Tribal wholesaler(s) who are not licensed to do business within the state of Washington or any other state, and who are not required by state law to be licensed, the tribe must first enter into a memorandum of agreement with the Department in regard to such business. The memorandum of agreement must at a minimum include:



- (a) An assurance that the tribal wholesaler can and will meet the terms of this Contract;
- (b) A requirement that cigarettes transported in the state of Washington be accompanied by invoices; and
- (c) An agreement by the Tribal wholesaler that the Auditor have access to its records.

**(4) Tribe as Own Wholesaler – Memorandum of Agreement**

This Contract contemplates that the Nooksack Tribe may, at some future date, act as its own wholesaler. In the event that the Nooksack Tribe decides to act as its own wholesaler in regards to sales to the Tribal retailer, it agrees to first enter into a memorandum of agreement with the Department regarding this activity. The memorandum of agreement shall reference any applicable requirements of this Contract.

**PART VII  
Audit Process**

The Tribe wishes to provide assurance that all parties to this Contract and persons named in this contract are in compliance with the spirit and terms of this Contract. The purpose of this Part is to provide a process for regular verification of the requirements of this Contract. The verification process is intended to reconcile data from all sources that make up the stamping, selling, and taxing activities under this Contract.

**(1) Selection of Auditor**

The Tribe and the State agree that, for the purposes of verifying compliance with this Contract, the Tribe may choose to contract with an independent third party auditor or may choose to use the auditing services of the Department for all or part of the verification requirements of this Part. The Tribe agrees that the third party auditor will be a certified public accountant in good standing.

- (a) Independent third party auditor: If the Tribe contracts with an independent third party auditor, the Auditor will be retained by the Tribe and the Tribe shall bear the cost of the auditing services. The Tribe shall be allowed to freely communicate with the Auditor.
- (b) Department auditor: If the Tribe uses the Department's auditing services, the Tribe agrees to allow the Department access to its books and records for the sole purpose of verifying compliance with this Contract. Department access to records shall be coordinated in advance with the Tribe. The Department of Revenue shall bear all the costs of the auditing services. The Tribe shall be allowed to freely communicate with the Auditor.

**(2) Audit Protocol**

To ensure compliance with this Contract, the Auditor must adhere to the following protocol:

- (a) Review of records: To verify the requirements of this Contract, the auditor must review at a minimum the records specified below.
  - (i) Tribal retailer: financial statements or purchase invoices relating to purchases of cigarettes from licensed wholesalers or other wholesalers noted under a memorandum of agreement under Part VI, financial statements or sales invoices

relating to sales of stamped cigarettes, sales of exempt cigarettes, cigarette inventory, records to verify whether Tribal cigarette and sales taxes were remitted to the Tribe for deposit into Tribal accounts, and records to verify that the retail selling price included the applicable tribal taxes.

(ii) Tribe: records such as account records and contract invoices necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services described in Part XIII, section 8 of this Contract.

(iii) Self-certified out-of-state wholesaler, self-certified Tribal wholesaler, or Tribe as own wholesaler: records noted as subject to audit in a memorandum of agreement under Part VI of this Contract.

(b) Period under review: To verify the requirements of this Contract, the auditor may review records for all years during the current appropriate audit cycle. Records relating to the period before the effective date of the Tribal cigarette tax are not open to review under this Part.

(c) Audit cycle: The audit cycle shall be no more frequently than once every four years, unless otherwise specified below.

(i) Initial review: The first required review must cover the period starting on the effective date of the tax and ending December 31, 2004. The Auditor must provide its findings by April 1, 2005. This initial review shall include all of the activities covered by the protocol. Thereafter, reviews shall take place on the regular audit cycle.

(ii) Use of Tribal cigarette tax revenue: The auditor will review records of the Tribe on an annual basis, consistent with the Tribe's fiscal year, to verify that all Tribal cigarette tax revenue was used to fund essential government services.

### **(3) Format of Auditor Report**

The Auditor must submit its findings in final written reports to the Tribe, with a copy to the Department. The report must indicate what types of records were examined for each party audited, what periods were reviewed, and must include a statement regarding verification of the specific requirement listed in sections 4 and 5 of this Part. In addition, if a statistical sampling process was used, the report must indicate the sampling method used.

### **(4) Tribal Retailers**

The Auditor will be responsible for reviewing the records of the Tribal retailer to verify that only stamped cigarettes are sold, that cigarettes are only purchased from licensed wholesalers or from wholesalers specified in agreements under Part VI of this Contract, that exempt sales are not made to nonmembers, that the retail selling price included the applicable Tribal taxes, and that the cigarette and sales taxes are remitted to the Tribe for deposit into Tribal accounts.

### **(5) Essential Government Services**

The Auditor will be responsible for reviewing the relevant records of the Tribe to verify that Tribal cigarette tax revenue was used for essential government services in accordance with the requirements of Part XIII section 8 of this Contract.

**(6) Communication between Auditors – Confidentiality**

In the event that the Tribe chooses to contract with an independent third party auditor to verify only part of the requirements of this Contract, the Department shall verify the remaining requirements as described above. The independent third party auditor and the Department shall share information as necessary to jointly verify the requirements of this Contract. Information and/or records shared between the auditors are confidential under the provisions of Part XI of this Contract.

**(7) Dispute Resolution**

In the event that either the Tribe or the Department disagrees with the Auditor's final report, either party may notify the other of the disagreement and follow the procedures for resolution of the disagreement in Part VIII of this Contract.

**(8) Joint Audit Implementation and Review**

The Tribe and the State shall meet jointly with the Auditor prior to the beginning of an audit cycle. The purpose of such meeting is to discuss the objectives of the upcoming audit, the expectations of both the Tribe and the State, the audit standards to be used in such audit, and any issues regarding detail of the audit, records pertinent to the review, or substance of the Auditor's report. As soon as possible after the issuance of the Auditor's final report, the Tribe and the State shall meet jointly with the Auditor to review the report and discuss any issues of concern. For the purposes of this section 8, "audit cycle" refers to the reoccurring scheduled audit of an entity.

**PART VIII  
Dispute Resolution**

The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part. The Tribe and the State agree to consult with each other and work together to address issues raised by persons not party to this agreement regarding the implementation of this Contract.

As used in this Part "days" means calendar days, unless otherwise specified.

**1. Notification of Violation**

If either party believes a violation of the agreement has occurred, it shall notify the other party in writing. The notice shall state the nature of the alleged violation and any proposed corrective action or remedy. The parties agree to meet within 14 days of receipt of the notice, unless a different date is agreed to by the parties. The purpose of the meeting will be to attempt to resolve between themselves the issues raised by the notice of possible violation, and provide an opportunity to implement any agreed corrective action.

**2. Mediation**

If the parties are unable to resolve the disputed issues through joint discussions under section

1 of this Part, either party may request mediation by giving a written mediation demand to the other party. The parties shall first attempt to agree on a mediator. If the parties cannot agree on a mediator within 30 days of written demand, a three person mediation panel shall be used and shall be selected as follows: each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator.

The parties shall share equally the costs of mediation.

**3. Remedies**

Whenever an issue is submitted to mediation under this section, the mediators may recommend corrective action to remedy any violation that has occurred. In no case shall a mediator render an independent recommendation or decision on any issue on which the parties reach agreement. Remedies may include: audit of relevant tribal records, interpretation of Contract terms, changes in reporting, record keeping, enforcement practices, business practices, or similar actions. Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Contract.

**4. Termination of Contract**

If, after no more than eight months from the initial Notice of Violation, the parties are unable to resolve a disagreement regarding an alleged violation and/or the appropriate corrective action using the dispute resolution methods authorized in this section, or if a party continues to violate a Contract term after the completion of the mediation process authorized in this section, this Contract may be terminated. The parties may, after no less than six (6) months following any such termination, enter into a new Contract.

**5. Disagreements Regarding Reports of the Auditor**

Should either party have a concern about a report from the Auditor, which cannot be resolved through the joint audit review process described in Part VIII of this Contract, that party may choose to resolve the concern through the use of a mediator. Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Contract. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

**6. Notification of For Cause Termination**

Upon forty-five (45) days written notice, either party may terminate the Contract for cause. For the purposes of this section, "for-cause" shall mean only the following violations:

- a. Retail sales of unstamped cigarettes during the effective period of a Tribal cigarette tax;
- b. Failure to submit to mediation as required by this Part IX;
- c. A breach of the confidentiality provisions of Part XII of this Contract; or
- d. Use of tax proceeds in violation of the terms of this Contract.

The party seeking the termination for cause shall notify the other party and the mediation organization, who shall select a mediator to review the facts upon which the for cause

termination notice is based. The party making the allegation must provide a written recitation of the facts with the notice of termination. The responding party has ten days to provide its facts to the mediator. If the mediator determines that the alleged event has occurred, the Contract is terminated, however the party making the allegation may choose to go through the regular dispute resolution process in regard to the issue.

The parties shall use their best efforts to resolve the dispute within the forty-five (45)-day notice period. If the parties reach agreement, or the for cause violation is corrected during the notice period, the Contract shall not be terminated.

**7. Notification of Sales to Minors Violation**

The Department shall immediately notify the Tribe if an allegation is made that the Tribe has made sales to minors in violation of this Contract. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal ordinance. Upon the third or subsequent violation within any rolling one-year period of the sales to minors provisions of this Contract the provisions of section 1 of this Part shall apply.

**8. Notice Requirements**

For the purposes of this Contract, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be given on the date of actual receipt. Notice shall be given as follows:

To the Department: Director  
Department of Revenue  
P.O. Box 47454  
Olympia, WA 98504-7454

To the Tribe: Chair, Nooksack Tribe  
5047 Mount Baker Highway  
P.O. Box 157  
Deming, WA 98244

With a copy to: Office of the Tribal Attorney  
5047 Mount Baker Highway  
P.O. Box 157  
Deming, WA 98244

**(10) Sovereign Immunity**

Nothing in this Contract shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

## **PART IX**

### **Responsibilities of the Nooksack Tribe, the Department of Revenue, and the Liquor Control Board**

#### **(1) Nooksack Tribe**

The Nooksack Tribe is responsible for both enforcement of the terms of this Contract and administration of the Contract, audit procedures and record keeping, and dispute resolution. The Nooksack Tribe agrees to allow the Department entry into the retail store, the purpose of such entry being limited to (a) visual observation of the retail sales taking place at the store and (b) the purchase of cigarettes by the Department.

#### **(2) Liquor Control Board**

This agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW.

#### **(3) Department of Revenue**

The Department is responsible for the enforcement and administration of the Contract, audit procedures and record keeping, and dispute resolution, as well as negotiation of its terms, on behalf of the Governor of the state of Washington.

## **PART X**

### **Term of this Contract – Amendment**

This Contract shall remain in effect no longer than eight years from its effective date, subject to the termination provisions under Part VIII of this Contract. The Contract shall be automatically renewed for successive periods of eight years, unless either party objects in writing at least 30 days prior to the expiration date. Amendments to the Contract shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Contract shall be subject to the dispute resolution process in Part VIII of this Contract.

## **PART XI**

### **Confidentiality**

All information under the terms of this Contract received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor, review by the mediator or certified public accountant, or review by the arbitrator is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

**PART XII**  
**Miscellaneous Provisions**

**(1) Tribe Does Not Submit to State Jurisdiction**

By entering into this Contract, the Tribe does not concede that the laws of the state of Washington, including its tax and tax collection provisions, apply to the Tribe, its members or agents regarding activities and conduct within or without Indian country.

**(2) State Does Not Concede Tribal Immunity**

By entering into this Contract, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

**(3) Contract Does Not Create any Third Party Beneficiaries**

No third party shall have any rights or obligations under this Contract.

**(4) Land Status**

The Tribe shall provide information regarding the status of land upon which any Tribal retailer is located at least 30 days prior to the startup of any new cigarette sales by such retailer.

**(5) Tobacco Master Settlement Agreement**

This Contract is not intended to impact the State's share of proceeds under the master settlement agreement entered into by the State on November 23, 1998.

(a) The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the master settlement agreement. The Tribe agrees to not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters.

(b) Nothing in this Contract supercedes or replaces chapter 70.157 RCW.

**(6) Periodic Review of Contract Status**

Appropriate representatives of the Tribe and of the Department shall hold periodic meetings to review the status of this Contract and any issues that have arisen under the Contract. Those meetings shall be held no less frequently than once every 12 months, but may be held more frequently.

**(7) Sales to Minors**

The Tribe or a Tribal retailer shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of 18 years. The Tribe is responsible for the enforcement of this provision. The Tribe agrees to maintain an ordinance prohibiting sales of cigarettes to persons under the age of 18 years.

**(8) Essential Government Services**

Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall certify the use of such revenue under the process set forth in Part VIII of this Contract. Tribal cigarette tax revenue may not be used to subsidize Tribal cigarette and food retailers.

"Subsidize" means that proceeds from the Tribal cigarette tax or taxes pursuant to this Contract cannot be expended on the direct business activities of the Tribal retail cigarette business. In addition, where the cigarette business is collocated with a retail food business, the proceeds cannot be expended to support the direct business activities of that business.

(a) "Direct business activities" include paying wages, benefits, bonuses, or expenses, related to the maintenance and operation of the retail facility or typically considered to be part of a business's operating expenses and overhead;

(b) "Essential government services" includes, but is not limited to: government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering the Tribal cigarette tax stamp program under this Contract, including all deductions and exemptions similar to those available to retailers, wholesalers and others under state law; Tribal administration activities such as tax functions, contracting for health benefits, economic development, natural resources, and the provision of job services; and distribution of moneys related to trust funds, education, general assistance, such activities as land and building acquisitions, and building development and construction.

**(9) Other Retail Sales within Indian Country by Tribal Members**

Under Nooksack Tribal law, only Tribal retailers are permitted to make retail cigarette sales within Indian country.

**(10) Rule 192 – Application**

This Contract is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

**(11) Subsequent State Legislative Enactments**

Should the Legislature enact a law that provides more favorable terms for the Nooksack Tribe, the parties shall amend the Contract to reflect such terms.

**(12) Jurisdiction**

This Contract does not expand or limit the jurisdiction of either the Tribe or the State.

**(13) Severability**

If any provision of this Contract or its application to any person or circumstance is held invalid, the remainder of the Contract is not affected.

**THUS AGREED THIS 4th day of March, 2003.**

**NOOKSACK TRIBE OF INDIANS**

**STATE OF WASHINGTON**

By: *Narcisco Cunanan*  
Narcisco Cunanan, Chairman

By: *Gary Locke* 3/12/03  
Gary Locke, Governor