

CIGARETTE TAX CONTRACT

Between

THE SWINOMISH TRIBE

And

THE STATE OF WASHINGTON

PREAMBLE

WHEREAS, the Swinomish 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 Tribes 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 Swinomish Indian Tribal Community 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 Swinomish Tribe and the state of Washington brought these two governments together to pursue their common interest; and

WHEREAS, this contract is authorized, on the part of the State, by legislation, including House Bill 5372, enacted by the 2001 Regular Session of the 57th Legislature and signed by the

Governor, effective July 22, 2001, and House Bill 2553, enacted by the 2002 Regular Session of the 57th Legislature and signed by the Governor, effective June 13, 2002, as codified in RCW 43.06.450, RCW 43.06.455, RCW 43.06.460, and RCW 82.24.295; and on the part of the Tribe, by a Tribal Ordinance duly adopted by the Swinomish Indian Community Senate and signed by the Tribal Chair.

NOW THEREFORE, the Tribe by and through the Swinomish Indian Community Senate, 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 Swinomish 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:
 - All land within the limits of the Swinomish 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
 - All Indian allotments or other lands held in trust for a Swinomish 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. "Liquor Control Board" means the agency of the state responsible for enforcement of chapter 82.24 RCW pursuant to RCW 82.24.550.

9. "Local retail sales tax" means the combined Washington local retail sales taxes applicable in the area.
10. "NonIndian" means an individual who is neither a Tribal member nor a nonmember Indian.
11. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Swinomish Tribe.
12. "Parties to the agreement" or "parties" mean the Swinomish 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 Swinomish Tribe.
20. "Tribal retailer" means a cigarette retailer wholly owned by the Swinomish 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 Swinomish 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 Swinomish Tribe, a federally recognized Tribe.
23. "Swinomish Indian Reservation" or "reservation" means the area recognized as the Swinomish Indian Reservation by the United States Department of the Interior.

24. "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 Swinomish Indian Community Senate 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 nonIndians or nonmember 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 30 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 Swinomish Tribe is subject to this Contract.
- c. The Tribe agrees that it will require any member-owned smokeshop located in Indian country to 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 and that a condition of such license is access of the Department to observe sales pursuant to section 1 of Part IX of this Contract.
- d. The Tribe agrees to enact ordinances regarding Auditor access to records of tribal members selling cigarettes in Indian Country.

2. Tax Imposed on Sales by Tribal Retailers

- a. The Tribe shall impose by ordinance taxes pursuant to the requirements of this Part on all sales by Tribal retailers of cigarettes to nonIndian and nonmember Indian purchasers within Indian country. Such ordinance may provide for compensation for wholesalers for their services in affixing the Tribal tax stamp.
- b. Beginning no sooner than the date this contract is signed, and subject to enactment of a Tribal ordinance authorizing the imposition of a tax on cigarettes, 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.
- c. 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.
- d. 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.
- e. Pursuant to RCW 43.06.455, the State retrocedes from its tax during the time this Contract is in effect.
- f. The Tribe shall provide advance notice to the Department regarding the date the tribal tax goes into effect.

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 sources authorized pursuant to this Contract.

2. Delivery of Cigarettes to the Tribal Retailer Outside of Indian Country

Cigarettes bearing the Swinomish Tribe Tribal 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. Such cigarettes must be accompanied by invoices identifying the cigarettes as Swinomish Tribe cigarettes.

PART V

Tribal Tax Stamps

1. Tribal Tax Stamp Required

- a. All cigarettes sold by the Tribal retailer shall bear a Tribal tax stamp.
- 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:
 - i. 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

Tribal 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 tax exempt cigarettes purchased by the retailer prior to the start of the Tribal tax.

2. Creation and Supply of Tribal Tax Stamps

The Tribe shall arrange for the creation and supply of a Tribal tax stamp from a nationally recognized stamp manufacturer. Tribal tax stamps will have a serial number or some other discrete identification so that stamps may be traced to the wholesaler.

3. Stamp Vendor Contract

- a. The Tribe shall contract with a bank or other stamp vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal cigarette tax by the wholesaler, and remit the collected taxes to the Tribe. The contract shall provide that the stamp vendor shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service, or some other third party stamp vendor satisfactory to both the Tribe and the Department. The Tribe shall require the stamp vendor to remit to the Tribe all revenue collected from the Tribal cigarette tax. The Tribe shall require that the stamp vendor provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department.
- b. The Tribe may, at a later date, and as part of its tax administration function, choose to maintain and distribute tax stamps, and be deemed the "stamp vendor" for purposes of this Contract. The Tribe and the State agree that should the Tribe choose to be its own stamp vendor that this shall be addressed in a memorandum of agreement between the Tribe and the Department of Revenue. The memorandum of agreement shall at a minimum address the following:
 - i. Verifiable procedures for ordering, receiving, and inventorying tax stamp, including holding stamps in a secure location.
 - ii. Distribution of stamps by the Tribe.
 - iii. Recordkeeping by the Tribe and its wholesalers.
 - iv. Audit protocols and access of the Auditor to stamping records of the Tribe and its wholesalers.
 - v. Reporting by the stamp manufacturer.

4. Requirements for Affixation of Stamps by Wholesalers

- a. Wholesalers shall be responsible for affixing the Tribal 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 retailers. The Tribe agrees to allow the Department access to its inventory and floor stock so that an accounting of taxed cigarettes may be made. The Tribe agrees to provide access or verification to the stock of its member retailers for an inventory of cigarettes on hand when the tax ordinance goes into effect for the purposes of providing refunds of cigarette taxes remitted to the state.
- 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 arranges for the use of 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. The Tribe agrees that it will require members to use the state stamp until such time as the Tribal stamp is available for use. The Tribe agrees that it will require the member retailers to provide a regular accounting of such stamps in order to facilitate the refund of tax to the Tribe.

5. Wholesaler Obligation under State Law

Collection of the Tribal cigarette tax (unless prepaid to the stamp vendor by the Tribal retailer), affixing of the Tribal tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Contract and any memorandum of agreement (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.

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 Swinomish Tribe Tribal cigarette tax.

2. Self-Certified Out-of-State Wholesalers – Memorandum of Agreement

The Tribe agrees that it will adopt a policy requiring that it, the Tribe, and any member retailers, will purchase cigarettes for resale only from wholesalers licensed with the state of Washington. If the Tribe chooses to change this policy to allow purchase from out of state wholesalers not licensed with the state of Washington, the Tribe agrees that it will enter into a memorandum of agreement that addresses the following concerns:

- 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

The Tribe agrees that it will adopt a policy requiring that it, the Tribe, and any member retailers, will purchase cigarettes for resale only from wholesalers licensed with the state of Washington. If the Tribe chooses to change this policy to allow purchase from out-of-state wholesalers not licensed with the state of Washington, the Tribe agrees that it will enter into a memorandum of agreement that addresses the following concerns:

- 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. A requirement 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 Swinomish Tribe will, at some future date, act as its own wholesaler. In the event that the Swinomish Tribe decides to act as its own wholesaler in regards to sales to the Tribal retailers, 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 and contain audit standards that at a minimum meet those set forth in 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 Tribes. 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 retailers: 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 XII, 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, such audit to be conducted by a third party auditor on behalf of the Tribe.
- 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 September 30, 2004. The Auditor must provide its findings by January 1, 2004.
 - 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 XII 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 fourteen 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 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, Swinomish Tribe
P.O. Box 817
La Connor, Washington 98257

With a copy to: Office of the Tribal Attorney
P.O. Box 817
La Connor, Washington 98257

9. 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 Swinomish Tribe, the Department of Revenue,
and the Liquor Control Board**

1. Swinomish Tribe

The Swinomish 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 Swinomish Tribe agrees to allow the Department entry into the retail stores, 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

- a. 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.
- b. 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.
- c. 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 twelve 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

- a. Tribal cigarette tax revenue shall be used for essential government services. The Auditors shall certify the use of such revenue under the process set forth in Part VIII of this Contract.
- b. 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.
 - i. "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;
 - ii. "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; distribution of moneys related to trust funds, education, general assistance; such activities as land and building acquisitions, and building development and construction; activities such as child care, youth care, and elder care, the provision of recreation opportunities and services; the provision of spiritual care; and cultural programs.

9. Other Retail Sales within Indian Country by Tribal Members

Under Swinomish Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Contract.

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 Swinomish 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 3rd day of October 2003.

SWINOMISH TRIBE OF INDIANS

STATE OF WASHINGTON

By: Brian Cladoosby
Brian Cladoosby, Chair

By: Gary Locke
Gary Locke, Governor