

CIGARETTE TAX COMPACT
Between
THE LUMMI NATION
and
THE STATE OF WASHINGTON

PREAMBLE

WHEREAS, the Lummi Nation 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 the Lummi Indian 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 Compact; and

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Compact 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 seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis; and

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

WHEREAS, the mutual interests of the Lummi Nation 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 compact regarding cigarettes with the Lummi Nation; and

WHEREAS, legislation was enacted by the 57th Legislature and signed by the Governor, authorizing the signing of compacts such as this, such authority effective July 22nd, 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 Compact for the mutual benefit of the Tribe and the State to wit:

PART I
Definitions

1. "Auditor" means an independent third party auditor selected pursuant to Part VIII section 1 of this Compact.
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. "Compact" means this compact entered into by the state of Washington and the Lummi Nation.
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 Lummi Nation 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 Lummi Nation Tribal member or the Tribe, 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. "NonIndian" means an individual who is neither a Tribal member nor a nonmember Indian.
10. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Lummi Nation.
11. "Parties to the agreement" or "parties" means the Lummi Nation and the state of Washington.
12. "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.
13. "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, and who has by letter certified to the Department that it will abide by the terms of this Compact and who has signed a compact with the Tribe requiring it to abide by the terms of this Compact.
14. "Self-certified wholesaler" means an out-of-state wholesaler who is not a self-certified tribal wholesaler and who has by letter certified to the Department that it will abide by the terms of this Compact and who has signed a compact with the Tribe requiring it to abide by the terms of this Compact.
15. "Lummi Nation Indian Reservation" or "reservation" means the area recognized as the Lummi Nation Indian Reservation by the United States Department of the Interior.
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 member" means an enrolled member of the Lummi Nation.

19. "Tribal retailer" means a cigarette retailer wholly owned by the Lummi Nation and located in Indian country.
20. "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.
21. "Tribal tax stamp" means the stamp or stamps that indicate the Lummi Nation Tribal cigarette tax imposed under this Compact is paid or that identify those cigarettes with respect to which no tax or another Tribal tax is imposed.
22. "Tribe" or "Tribal" means or refers to the Lummi Nation, a federally recognized Indian Tribe.
23. "Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale only.

PART II

Applicability of the Compact

1. Execution of Compact

This Compact shall become effective when approved by the Lummi Indian Business Council and signed by the authorized signatory for the Tribe, and signed by the Governor of the state of Washington. This Compact shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Compact.

2. Application

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal code meeting the terms of Part III of this Compact, this Compact shall apply to the retail sale of cigarettes by Tribal retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Compact are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Nation desires to pursue mail order and/or internet sales of Cigarettes, the Nation and the State agree to negotiate a Memorandum of Understanding regarding the taxation of such sales in a Memorandum of Understanding.

3. Scope Limited

This Compact does not apply to:

- (a) Cigarettes sold at retail by non-Indians or nonmember Indians;
- (b) Tobacco products as that term is defined in Part I of this Compact; and
- (c) Cigarettes manufactured by the Lummi Nation or its enterprises within Indian country.

PART III
Imposition of Tribal Cigarette Taxes

1. Tribal Retailers

Tribal retailer refers to the Lummi Mini Mart and Fisherman's Cove convenience stores, as well as the Silver Reef Casino. The Tribe agrees to notify the Department within a reasonable time prior to the start up of cigarette sales by any other Tribal retailer. Such notice is deemed to be an addendum to this Compact. Should, at any time, individual tribal members be licensed or otherwise allowed to retail cigarettes under the laws of the Lummi Nation, the Tribe agrees to enact ordinances ensuring compliance with this Compact.

2. Tax Imposed on Sales by Tribal Retailers

- (a) The Tribe shall impose, by code, taxes pursuant to the requirements of this Part on all sales by Tribal retailers of cigarettes to non-Indian and nonmember Indian purchasers within Indian country. Should the Tribe use a tribal tax stamp, such code may provide for compensation for wholesalers for their services in affixing the Tribal tax stamp.
- (b) During the term of this Compact, 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. The State shall provide the Tribe written notice at least 30 days prior to the effective date of any increases or decreases in the state cigarette tax or the combined 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 Compact is in effect.

3. Phase-In Tax Rate

Subsequent to the Execution of this Compact, the Lummi Nation agrees to 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 Lummi Nation also agrees to maintain the 80 percent or greater tax rate for a maximum of 36 months unless modification is required per the Phase-In Reduction provisions detailed in §5 below.

4. Final Tax Rate

No later than 36 months after the initial imposition of tax under this Compact 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 enactment of the Tribal Tax, if during any quarter, the number of cartons of cigarettes, excluding those manufactured by the Lummi Nation or its enterprises, that are sold at retail exceeds by at least 10 percent the quarterly average sales of the six months preceding the imposition of the Tribal cigarette 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 10 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 the first day of the first month the Tribal cigarette tax is imposed, if the imposition of the tax is on or before the 15th of the month, or begins the first day of the second month the Tribal cigarette tax is imposed, if the imposition of the tax is after the 15th of the month; and
- (b) The "quarterly average sales" means the sum of the retail sales made during the two quarters divided by two.

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 the Tribal retailers purchase cigarettes only from:

- (a) Wholesalers or manufacturers licensed to do business in the state of Washington;
- (b) Self-certified wholesalers who meet the requirements of Part VI section 2 of this compact;
- (c) Self-certified tribal wholesalers who meet the requirements of Part VI section 3 of this compact; and
- (d) The Tribe or its enterprises as a Tribal manufacturer.

2. Delivery of Cigarettes Bearing the Lummi Tax Stamp

Cigarettes bearing the Lummi tax stamp required by this Compact may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a Tribal retailer. When such cigarettes are delivered or transferred, they must be accompanied by invoices identifying the cigarettes as Lummi cigarettes.

**PART V
Tax Stamps**

1. Tax Stamp Required

All cigarettes sold by tribal retailers shall bear either a Washington State Tribal Compact Stamp or Lummi Tribe tax stamp. The Tribe may allow for an exemption from this tax for enrolled members who are over the age of 18 years. The expectation of both Parties is that if the Tribe chooses to tax its members that the allocation allowance described in WAC 458-20-192 will be used as an approximation of sales to members and the Tribe will not be required to keep exact records of such sales. This allocation figure will be used to distinguish funds subject to the requirements of Part XIII Section 7, from funds that are not. If the Tribe chooses to exempt its members from tax, the Tribe agrees to keep exact records of such sales.

2. Creation and Supply of Tax Stamps

- (a) The Tribe will use either Washington State Tribal Compact Tax Stamps, which are provided by the State through its stamp vendor, or tribal tax stamps.
- (b) If the Tribe elects to use the Washington State Tribal Compact Tax Stamps it will purchase cigarettes with the 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. If the Tribe makes this election, the wholesaler shall obtain the stamps from the State's stamp vendor. The wholesaler shall affix the stamps to the cigarettes, sell the cigarettes to the Tribe without tax included in the price, and the Tribe in turn shall institute an accounting and pricing protocol that assures the cigarette tax is included in the price of the cigarettes. The State and the Tribe may agree to an alternative method of obtaining the stamps and accounting for tax revenue, such method to be agreed to by both parties and memorialized in writing.
- (c) If the Tribe elects to use the tribal tax stamps, the stamps will have a serial number or some other discrete identification. The Tribe agrees to purchase stamps from a nationally recognized stamp manufacturer unless it decides to manufacture its own stamps. If the Tribe decides to manufacture its own stamps, it agrees to meet with the Department to discuss the stamp product, and to institute practices that address counterfeiting and security.
- (d) The Tribe may contract with a bank or other stamp vendor to distribute tribal tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal cigarette tax by the wholesaler or Tribal retailer, 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 parties. 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. The Tribe's contract with the stamp vendor shall specify a process by which the Tribe is assured that all wholesalers who sell cigarettes to Tribal retailers are paying the applicable Tribal taxes, unless the Tribal retailer has prepaid the tax to the stamp vendor. This process may include a requirement that wholesalers agree to provide documentation such as invoices of sales to verify to the Tribe that the Tribal taxes were paid.

3. Requirements for Affixation of Stamps by Wholesalers

Wholesalers or the Tribe 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 they may be readily viewed by inspection.

Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale or to ship to the Tribe. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Compact. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.

4. 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 Compact (in the case of self-certified out-of-state or self-certified tribal wholesalers), and compliance with other requirements in this Compact, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

5. State Agreement Regarding Compliance with State and Federal Law

As to all transactions that conform to the requirements of this Compact, such transactions do not violate state law, and the State agrees that it will not assert that any such transaction violates 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 Lummi Nation Tribal cigarette tax.

2. Self-Certified Out-of-State Wholesalers

- (a) Wholesalers who are not licensed to do business within the state of Washington, and who are not required by state law to be licensed, but who have agreed to comply with the provisions of this Compact, must certify by letter to the Tribe that they will and can meet the terms of this Compact. The Tribe shall notify the Department of the name and address of such wholesaler.
- (b) The out-of-state wholesaler must be licensed to do business as a cigarette wholesaler with the jurisdiction in which they reside.
- (c) The Lummi Nation shall require compliance with this Compact in its agreements with any such out-of-state wholesalers and shall provide copies of such agreements to the Auditor for its review. The compact between the Tribe and the out-of-state wholesaler will also include a requirement that:
 - (i) The cigarettes transported in the state of Washington will be accompanied by invoices detailing the quantity and brand of cigarettes destined for the Lummi Nation. Such invoices shall provide an order number that matches the order number provided under Part VII section 2 of this Compact and shall identify the seller of the cigarettes as well as the buyer of the cigarettes; and
 - (ii) The wholesaler will allow the Auditor access to its records for the purpose of determining whether the Tribal cigarette tax has been paid and whether Tribal tax stamps are properly affixed to the cigarette containers.
- (d) An out-of-state wholesaler who has provided a letter of certification to the Tribe and who has an agreement with the Tribe, in which agreement the wholesaler agrees to abide by the terms of this Compact, shall be referred to as a "self-certified wholesaler."

3. Self-certified Tribal Wholesalers

- (a) Tribal wholesalers 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, but who have agreed to comply with the terms of this Compact, must certify by letter to the Lummi Nation that they will and can meet the terms of this Compact. The Tribe shall notify the Department of the name and address of such wholesaler.
- (b) The Lummi Nation shall require compliance with this Compact in its agreements with any such Tribal wholesalers and shall provide copies of such compacts to the Auditor for its review. The compact between the Tribe and the Tribal wholesaler will also include a requirement that:

- (i) The cigarettes transported in the state of Washington will be accompanied by invoices detailing the quantity and brand of cigarettes destined for the Lummi Nation. Such invoices shall provide an order number that matches the order number provided under Part VII section 2 of this Compact and shall identify the seller of the cigarettes as well as the buyer of the cigarettes; and
 - (ii) The wholesaler will allow the Auditor access to its records for the purpose of determining whether the Tribal cigarette tax has been paid and whether Tribal tax stamps are properly affixed to the cigarette containers.
- (c) A Tribal wholesaler who has provided a letter of certification and who has an agreement with the Tribe, in which compact the wholesaler agrees to abide by the terms of this Compact, shall be referred to as a “self-certified tribal wholesaler.”
- (d) This Compact contemplates that the Lummi Nation will, at some future date, act as its own wholesaler. In the event that the Lummi Nation 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 Compact. If the Tribe, by itself or through a Tribal enterprise, manufactures and wholesales to the Tribal retailers, that wholesale activity does not require a memorandum of agreement under this subsection (d).

PART VII

Enforcement Authority and Responsibility of Washington State Liquor Control Board

1. Intent

Engrossed Substitute Senate Bill (ESSB) 5372 states that it is the intent of the Legislature that the Washington State Liquor Control Board and the Department continue the division of duties and shared authority under chapter 82.24 RCW and therefore the Washington State Liquor Control Board is responsible for enforcement activities that come under the terms of chapter 82.24 RCW.

2. Notification

The Lummi Nation or its designee shall notify the Department 72 hours in advance of all shipments of unstamped cigarettes by the self-certified wholesaler or self-certified tribal wholesaler to the Tribe or Tribal retailers. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the cigarettes to seizure. If all other requisite criteria are in order, such lack of notice does not subject the Lummi Nation cigarettes to seizure unless the immediately previous order of Lummi Nation cigarettes also lacked the requisite notice.

PART VIII
Independent Third Party Auditor

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

1. Tribe to Compact with Third Party Auditor

The Tribe and the State agree that, for the purposes of verifying compliance with this Compact, the Tribe will contract with an independent third party auditor. The Auditor will be retained by the Tribe and the Tribe shall bear the costs of the auditing services. The Tribe shall be entitled to freely communicate with the Auditor. The Auditor must be a certified public accountant either licensed by the state of Washington or approved for A133 Tribal audits. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified.

2. Audit Protocol

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

- (a) **Period under review:** To verify the requirements of this Compact, the Auditor must review records for all years during the current appropriate audit cycle, and may review records for earlier years only as necessary for an internal reconciliation of the Tribe's books. However, records relating to the period before the effective date of the Tribal cigarette tax are not open to review except to verify the quarterly average sales baseline as described in Part III of this Part. In situations where the Auditor is responsible for verifying records on less than an annual basis, the period under review shall not include years previously reviewed by the Auditor, except when a violation is alleged to have occurred during the period previously reviewed.
- (b) **Records to be examined:** To verify the requirements of this Compact, the Auditor must review at a minimum the records specified below. In all situations, the Auditor is not responsible for examining records that do not relate to the stamping, selling, or taxing activities of the Lummi Nation, unless a review of the records is necessary for an internal reconciliation of the Nation's books.
 - (i) Self-certified wholesaler and self-certified tribal wholesaler: records and invoices of stamp purchases, records and invoices of sales of stamped cigarettes, stamp inventory, and the stamping process.
 - (iii) Tribal retailers: records and invoices of cigarettes purchased from licensed wholesalers, self-certified wholesalers, self-certified tribal wholesalers and manufacturers, records and invoices of cigarettes sold, cigarette inventory, and additional records necessary to verify whether Tribal cigarette tax revenue was

used in accordance with the requirements of Part XIII Section 7 and records to verify that the retail selling price included the applicable tribal taxes.

- (iv) Tribe: records necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services of the Tribe.

3. Report Format

The Auditor shall provide the Department with a certified statement that, after each audit, the auditor finds the Tribe to be in compliance with the terms of this Compact. The Department may view the audit report at the tribal offices, but may not make copies.

4. Initial Review

(a) The first required review must cover the period starting on the effective date of the tax and ending December 31, 2005, and the Auditor must report its findings to the Tribe by April 1, 2006. This initial review shall include all of the activities covered by the protocol. Thereafter, reviews shall take place on the regular audit period, which follows the Tribe's fiscal year, with an audit report submitted within three months of each audit. The Tribe and the Department may by prior joint agreement select or vary the audit cycle depending on the on-going audit activity of the Tribe, in order to be efficient and effective in the use of auditor resources. The Tribe's fiscal year is on a calendar year basis.

(b) The Tribe and the State shall confer prior to the beginning of the first audit. The purpose will be 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 details of the audit, records pertinent to the review, or substance of the Auditor's report. Subsequent audit meetings will be held as deemed necessary by the parties. If warranted by the findings in the 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, "audit cycle" refers to the reoccurring scheduled audit of an entity.

5. Self-Certified Wholesalers and Self-Certified Tribal Wholesalers

(a) The Auditor will be responsible for reviewing the records, identified in subsection (2)(b)(i) of this Part, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to a Tribal retailer to verify that the Tribal cigarette tax was paid by the wholesaler, unless prepaid to the stamp vendor by the Tribal retailer, and that the stamps were correctly affixed to containers of cigarettes.

(b) The Auditor must review the records, identified in subsection (2)(b)(i) of this Part, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to a Tribal retailer no less than once every four years. If a wholesaler that previously sold cigarettes to a Tribal retailer stops making such sales, the Auditor must review the records of that wholesaler during the next regularly scheduled annual audit.

6. Tribal Retailer

The Auditor will be responsible for reviewing the records, identified in Section 2 of this Part, of the tribal retailer to certify that the tribal taxes were collected, that all cigarettes are properly stamped, that cigarettes were obtained from wholesalers authorized under this Compact, that any exemptions from tax are documented, and that revenue from the tribal tax under this Compact are not used to subsidize the tribal retailer.

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 IX section 5 of this Compact.

**PART IX
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.

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

1. Notification of Violation

If either party believes a violation of this Compact 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 the parties agree to a different date. The purpose of the meeting will be to attempt to resolve between them 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 Compact 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 Compact.

4. Termination of Compact

If, after no more than eight months from the initial Notice of Violation or notice of other disagreement, the parties are unable to resolve the disagreement or 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 Compact term after the completion of the mediation process authorized in this section, this Compact may be terminated. The parties may, after no less than 6 months following any such termination, enter into a new Compact.

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 Compact; that party may choose to resolve the concern through the use of a mediator chosen under the provisions of Part IX, paragraph 2. Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Compact. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

6. Notification of For Cause Termination

Either party may terminate the Compact 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 Compact;
- (d) Use of tax proceeds in violation of the terms of this Compact.

The party seeking the termination for cause shall notify the other party and the mediator selected under Part IX, Section 2 of this Compact, who shall 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 Compact is terminated, however the party making the allegation may choose to go through the regular dispute resolution process in regard to the issue.

If the parties fail to reach agreement, or the for cause violation is not corrected, within 180 days from the date of giving the Termination Notice, the Compact shall be terminated. If the parties reach agreement, or the for-cause violation is corrected during the notice period, the Compact 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 Compact. Upon such notification, the Tribe shall take enforcement action according to the provisions of tribal law. Upon the third or subsequent violation within any rolling one-year period of the sales to minors provisions of this Compact the provisions of section 1 of this Part shall apply.

8. Notice Requirements

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

To the Department:

Director
Washington State Department of Revenue
P O Box 47454
Olympia, WA 98504-7454

To the Tribe:

Lummi Nation Chairman
2616 Kwina Rd.
Bellingham, WA 98226

9. Sovereign Immunity

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

PART X

Responsibilities of the Lummi Nation, the Department of Revenue, and the Washington State Liquor Control Board

1. Lummi Nation

The Lummi Nation is responsible for both enforcement of the terms of this Compact and administration of the Compact, audit procedures and record keeping, and dispute resolution. The Lummi Nation 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. Washington State Liquor Control Board

The Washington State Liquor Control Board is responsible for enforcement of chapter 82.24 RCW.

3. Department of Revenue

The Department is responsible for the administration of the Compact, 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 XI

Term of this Compact – Amendment

This Compact shall remain in effect no longer than eight years from the date of its execution, subject to the termination provisions under Part IX of this Compact. The Compact 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 Compact shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Compact shall be subject to the dispute resolution process in Part IX of this Compact.

PART XII

Confidentiality

All information under the terms of this Compact 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 XIII

Miscellaneous Provisions

1. Tribe Does Not Submit to State Jurisdiction

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

3. Compact Does Not Create any Third Party Beneficiaries

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

4. Tobacco Master Settlement Agreement

(a) This Compact 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 Compact supersedes or replaces chapter 70.157 RCW.

5. Periodic Review of Compact Status

Appropriate representatives of the Tribe and of the Department shall hold periodic meetings to review the status of this Compact and any issues that have arisen under the Compact

6. 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.

7. Essential Government Services

- (a) 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 Compact.

- (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 Compact cannot be expended on the enterprise 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 that business.

- (i) "Enterprise 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' operating expenses and overhead.

- (ii) "Non-enterprise activities" include, but are 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 Compact, including all deductions and exemptions similar to those available to retailers, wholesalers and others under state law; Tribal administration activities such as tax functions, compacting for health benefits, economic development, natural resources, and the provision of job services; distribution of moneys related to trust funds, education, and general assistance; and distribution of moneys to individual tribal members from the proceeds of its gaming and gaming related enterprises.

8. Other Retail Sales within Indian Country by Tribal Members

Under the Law of the Lummi Nation, only Tribal retailers are permitted to make retail cigarette sales within Indian country.

9. Rule 192 – Application

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

10. Subsequent State Legislative Enactments

Should the Legislature enact a law that provides more favorable terms for the Lummi Nation, the parties shall amend the Compact to reflect such terms.

11. Jurisdiction

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

12. Severability

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

THUS AGREED

LUMMI NATION

By: Darrell Hillaire
Darrell Hillaire, Chairman

10/15/04
Date

STATE OF WASHINGTON

By: Gary Locke
Gary Locke, Governor

11-1-04
Date