

CIGARETTE TAX AGREEMENT

Between

THE YAKAMA NATION

And

THE DEPARTMENT OF REVENUE

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PREAMBLE

WHEREAS, the Yakama Nation is a federally recognized Nation, pursuant to Treaty with the United States of America (12 Stat. 951), possessed of the full inherent sovereign powers of a government; and

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

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

WHEREAS, the State has committed to the political integrity of the federally recognized 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, a long-standing disagreement exists between the Yakama Nation and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and the Yakama Nation 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 Agreement; and

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

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

WHEREAS, both the Yakama Nation and 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 State and the Yakama Nation brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, nothing herein shall waive the sovereign immunity from suit of the Yakama Nation or the state of Washington, nor shall anything herein waive, alter, or diminish any rights, privileges, or immunities guaranteed by the Treaty with the Yakamas, 1855; and

WHEREAS, this Agreement 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 Resolution duly adopted by the Yakama Nation and signed by the Tribal Chairman.

NOW THEREFORE, the Yakama Nation by and through its Chairman, and the State by and through its Governor, do hereby enter into this Agreement for their mutual benefit.

PART I Recitals

1. Sovereign Immunity

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

2. Tribe Does Not Submit to State Jurisdiction

By entering into this Agreement, the Tribe does not concede that the laws of the State, including its tax and tax collection provisions, apply to the Tribe, its members or agents regarding activities and conduct within or outside of Indian country.

3. Agreement Does Not Create any Third Party Beneficiaries

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

4. Tobacco Master Settlement Agreement

This Agreement 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. 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. Nothing in this Agreement supercedes or replaces chapter 70.157 RCW.

5. Jurisdiction

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

PART II Definitions

1. "Auditor" means an independent third party auditor selected pursuant to Part IX, Section 2 of this Agreement.
2. "Allocation" means the number of Cigarettes available to be sold to Tribal members free of all State cigarette and sales taxes. The Allocation is based on a formula that includes consumption data and Tribal service area population.

3. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
4. "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.
5. "Agreement" means this Agreement entered into by the State and the Yakama Nation.
6. "Department" means the Washington State Department of Revenue.
7. "Essential government services" means services provided by the Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development, and as more fully defined in Part XIV, Section 3.
8. "Indian country," consistent with the meaning given in 18 U.S.C. 1151, means:
 - All land within the limits of the Yakama 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 an enrolled Tribal member or the Tribe, the Tribal titles to which have not been extinguished, including rights of way running through the same.
9. "Liquor Control Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.
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 Yakama Nation.
12. "Parties to the Agreement" or "parties" means the Yakama Nation and the State.
13. "Yakama Reservation" or "Reservation" means the area recognized as the Yakama Reservation by the United States Department of the Interior.
14. "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package or carton of cigarettes, which price includes the Tribal cigarette tax.
15. "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 that it will abide by the terms of this Agreement and who has signed an agreement with the Tribe requiring it to abide by the terms of this Agreement.

16. "Self-certified wholesaler" means an out-of-state wholesaler who is not a self-certified Tribal wholesaler and who has by letter certified that it will abide by the terms of this Agreement and who has signed an agreement with the Tribe requiring it to abide by the terms of this Agreement.
17. "State cigarette tax" means the State tax imposed on each cigarette, which is expressed in cents per cigarette.
18. "State taxes," in this Agreement only, means a combination of the taxes referenced in RCW 43.06.455 (3).
19. "State" means the state of Washington.
20. "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 products" do not fall within the definition of "cigarettes."
21. "Tribal member" means an enrolled member of the Yakama Nation. For purposes of this Agreement, a member of another federally recognized Tribe who is the spouse of an enrolled Yakama shall be treated the same as an enrolled member of the Yakama Nation.
22. "Tribal retailer" means a cigarette retailer wholly owned by the Yakama Nation and located in Indian country or a member-owned smokeshop located in Indian country and licensed by the Tribe.
23. "Tribal cigarette tax" means the tax or taxes enacted as a provision of Tribal ordinance on the units of cigarettes sold, expressed in cents per cigarette, and on the sales of cigarettes to retail buyers, expressed in terms of a percentage of the sales price of the unit of cigarettes.
24. "Tribe," "Tribal," or "Nation" means or refers to the Yakama Nation, a federally recognized Tribe.
25. "Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale only.

PART III Applicability of the Agreement

1. Execution of Agreement

This Agreement shall become effective when approved by both the Tribal Council as indicated by the signature of the Tribal Chairman, and by the State when signed by the

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

2. Application

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal resolution meeting the terms of Part IV of this Agreement, this Agreement shall apply to the retail sale of cigarettes by Tribal retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Agreement 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 Tribe desires to pursue mail order and/or internet sales of cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.

3. Scope Limited

This Agreement does not apply to:

- a. Cigarettes sold at retail by NonIndians or Nonmember Indians;
- b. Tobacco Products as defined in Part II of this Agreement; and
- c. Cigarettes manufactured by the Tribe or its enterprises within Indian country.

PART IV

Imposition of Tribal Cigarette Taxes

1. Tribal Retailers

- a. The Tribe agrees to notify the Department thirty (30) days prior to the start up of cigarette sales by any Tribal retailer who begins selling cigarettes after the effective date of this Agreement.
- b. The Tribe agrees that any cigarette retailer wholly owned by the Tribe is subject to this Agreement.
- c. The Tribe agrees that it will require any tribal member selling cigarettes in Indian country to be in compliance with the terms of this Agreement. In addition, the Tribe agrees that it will maintain and enforce a requirement that any such member obtain a license from the Tribe and that a condition of such license is access of the Department, accompanied upon request by Yakama Nation staff, to observe sales pursuant to Part XI, Section 1 of this Agreement.
- d. The Tribe agrees to enact policies regarding Auditor access to records of tribal members selling cigarettes in Indian country.

2. Tax Imposed on Sales by Tribal Retailers

- a. Subject to Part VI, Section 1, concerning retail sales to Tribal members, the Tribe, by ordinance and in accord with the requirements of this Part, shall impose Tribal cigarette taxes on all sales by Tribal retailers of cigarettes to retail purchasers within Indian country.
- b. Beginning no sooner than the date this Agreement is signed by both parties, and subject to enactment of a Tribal ordinance authorizing the imposition of a Tribal cigarette tax, 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 cigarette tax, which is expressed in cents per cigarette, plus an amount equal to 80 percent of the retail sales and use taxes, as referenced in RCW 43.06.455 (3).

- c. During the term of this Agreement, upon any future increase in the taxes referenced in RCW 43.06.455 (3), the Tribal cigarette tax shall increase by no less than 100 percent of the increase in such taxes. Notwithstanding the foregoing sentence, so long as the Tribe is entitled to apply the 80 percent formula set forth above to cigarette sales, the increase in such taxes shall trigger an increase in the corresponding Tribal cigarette tax of 80 percent of the increased amount.
- d. Upon any future decrease in the taxes referenced in RCW 43.06.455 (3), the Tribal cigarette tax may decrease to no less than 100 percent of the State taxes. Notwithstanding the foregoing sentence, if such decrease in such taxes occurs while the Tribe is entitled to apply the 80 percent formula set forth above to cigarette sales the Tribal cigarette tax may decrease to no less than 80 percent of such taxes.
- e. The State will give written notice to the Tribe at least thirty (30) days prior to the effective date of any increases or decreases in State taxes.
- f. Pursuant to RCW 43.06.455(3) and RCW 82.24.295, during the term of this Agreement the State waives its right to collect the State taxes against the Tribe, its wholesalers, or retail buyers. In addition, the State agrees that enforcement of this Agreement shall be done in accordance with the conditions set forth in this Agreement.

3. Phase-In Tax Rate

The Tribe shall impose and maintain in effect a Tribal cigarette tax equaling no less than the sum of an amount equal to 80 percent of the taxes referenced in RCW 43.06.455. The Tribe shall provide the Department with written notice as to the date of imposition.

4. Final Tax Rate

No later than 36 months after the initial imposition of Tribal cigarette tax under this Agreement and subject to the phase-in reduction under this Part, the Tribe shall impose and maintain in effect a Tribal cigarette tax equaling no less than the sum of an amount equal to 100 percent of the taxes referenced in RCW 43.06.455. The length of time during which the Tribe may impose a tax at a rate less than 100 percent of the State taxes must be adjusted as provided in RCW 43.06.460.

PART V

Purchase of Cigarettes by Tribal Retailers

1. Wholesale Purchases – Requirements

By Tribal ordinance, the Tribe agrees to maintain and enforce a requirement that the Tribal retailers acquire cigarettes only from the following sources:

- a. Wholesalers or manufacturers licensed to do business in the State;
- b. Self-certified wholesalers, subject to the requirements of Part VII, Section 2 of this Agreement;
- c. Self-certified tribal wholesalers, subject to the requirements of Part VII, Section 3 of this Agreement; or

d. The Tribe.

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

Cigarettes bearing the tax stamp required by this Agreement may be delivered or transferred within or outside of Indian country by a wholesaler to the Tribe or a Tribal retailer, subject to meeting any notification requirements of this Agreement. Deliveries may be made by commercial carriers. Invoices identifying the cigarettes as Yakama Nation cigarettes must accompany such cigarettes.

**PART VI
Tax Stamps**

1. Tax Stamp Required

- a. All cigarettes sold by Tribal retailers shall bear a Tribal tax stamp meeting the requirements below.
 - i) The Tribe agrees to require Tribal retailers to post a notice advising that cigarettes may not be purchased for resale.
 - ii) The Tribe may allow for an exemption from the Tribal cigarette tax for enrolled Tribal members over the age of 18 years old, in which case the cigarette allocation allowance under WAC 458-20-192 shall apply during the term of this Agreement.
- b. If the Tribe elects to use the State's generic tribal stamp to be used in lieu of its own cigarette stamp, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the use of such stamps.

2. Creation and Supply of Tribal Tax Stamp

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

3. Stamp Vendor Contract

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 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 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. 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 tax

has been prepaid to the stamp vendor by the Tribal retailer. 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. This agreement contemplates that the Tribe may at some point in the future act as its own stamp vendor. In the event that the Tribe decides to act as its own stamp vendor, it agrees to first enter into a memorandum of agreement with the Department regarding this activity.

4. Requirements for Affixation of Stamps by Wholesalers

- a. Wholesalers shall affix 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.
- b. 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 (excluding Saturdays, Sundays, and Holidays) is in contravention of this Agreement. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.
- c. For the purposes of this Section 4 of Part VI, the Tribe is not a wholesaler. The Tribe agrees to purchase and sell only stamped cigarettes acquired from the sources listed in Section 1(a) through (c) of Part V of this Agreement.

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 Agreement (in the case of self-certified wholesalers or self-certified Tribal wholesalers), and compliance with other requirements in this Agreement, shall be deemed to satisfy the State cigarette excise tax obligation of a wholesaler.

6. State Agreement Regarding Compliance with State and Federal Law

The State agrees that all transactions that conform with the requirements of this Agreement do not violate state law and 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 VII
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 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 Agreement, must certify by letter to the Yakama Nation that they will and can meet the terms of this Agreement. The Yakama Nation will provide a copy of the letter to the State prior to any purchase by a Tribal retailer from the wholesaler.

- b. The out-of-state wholesaler must be licensed to do business as a cigarette wholesaler with the state in which they reside.
- c. The Yakama Nation shall require compliance with this Agreement in its agreements with any such out-of-state wholesalers and shall provide copies of such agreements to the Auditor for its review. The agreement 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 Yakama Nation. Such invoices shall provide an order number that matches the order number provided under Part VIII of this Agreement 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 Yakama Nation and who has an agreement with the Tribe, in which agreement the wholesaler agrees to abide by the terms of this Agreement, 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 Agreement, must certify by letter to the Yakama Nation that they will and can meet the terms of this Agreement. The Yakama Nation will provide a copy of the letter to the State prior to any purchase by a Tribal retailer from the wholesaler.
- b. The Yakama Nation shall require compliance with this Agreement in its agreements with any such Tribal wholesalers and shall provide copies of such agreements to the Auditor for its review. The agreement 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 Yakama Nation. Such invoices shall provide an order number that matches the order number provided under Part VIII of this Agreement 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 to the Yakama Nation and who has a agreement with the Tribe, in which agreement the wholesaler agrees to abide by the terms of this Agreement, shall be referred to as a "self-certified tribal wholesaler."

4. Tribe as Own Wholesaler

The Tribe may sell stamped cigarettes to Tribal retailers for sale at retail under the terms of this Agreement. If the Tribe, by itself or through a wholly owned and operated Tribal enterprise, manufactures and wholesales to the Tribal retailers, that wholesale activity does not require a memorandum of agreement under this Section.

PART VIII

Enforcement Authority and Responsibility of Liquor Control Board

1. Intent

The State authorizing legislation for this Agreement states that it is the intent of the Legislature that the Liquor Control Board and the Department continue the division of duties and shared authority under Chapter 82.24 RCW and therefore the Liquor Control Board is responsible for enforcement activities that come under the terms of Chapter 82.24 RCW.

2. Commercial Carriers

The State recognizes that wholesalers who meet the requirements of this Agreement may make shipments of cigarettes by commercial carrier. Such shipments must be accompanied by documents required under this Agreement and are subject to advance notice requirements.

3. Notification

The Yakama Nation or its designee shall notify the Department 72 hours in advance of all shipments of cigarettes by a self-certified wholesaler or self-certified tribal wholesaler to the Tribe or to a Tribal retailer. 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 the requisite criteria are in order such lack of notice does not subject the Yakama Nation Tribal cigarettes to seizure unless the immediately previous order of Yakama Nation Tribal cigarettes also lacked the requisite notice.

PART IX

Independent Third Party Auditor

1. General

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

2. Selection of Auditor

- a. The Tribe and the State agree that, for the purposes of verifying compliance with this Agreement, the Tribe will 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 Auditor must be a certified public accountant licensed by the State and in good standing as confirmed by the licensing board through which the

Auditor is licensed. 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. The Tribe will retain the Auditor and bear the costs of the auditing services. The Tribe shall be entitled to communicate freely with the Auditor.

- b. Alternatively, the parties may mutually agree that the Tribe may utilize its own internal auditor provided that the auditor is duly qualified as an auditor under the definitions of this agreement, the auditor completes the audit using the standards and procedures set forth in this Part IX (including the certification under Section 4), and the method and/or results are available upon request of the Department for inspection by an independent third party auditor to be provided by the Tribe. The Parties agree that during the first audit cycle in which an internal auditor is used, the Department and the Tribe will communicate frequently and work together to develop standards and procedures acceptable to both parties.

3. Audit Protocol

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

- a. **Period under Review:** To verify the requirements of this Agreement, the Auditor shall review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Agreement only as necessary for an internal reconciliation of the Tribe's books.
- b. **Records Examined:** To verify the requirements of this Agreement, the Auditor shall 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 Tribe's cigarette stamping, selling, or taxing activities, unless a review of the records is reasonably necessary for an internal reconciliation of the books:
 - i) **Tribal Retailers:** Records and invoices of cigarettes purchased, 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 XIV, Section 3 of this Agreement and records to verify that the retail selling price included the applicable Tribal cigarette tax; and
 - ii) **Tribe:** Records, invoices, and cigarette inventory as necessary to verify that the Tribe used all Tribal cigarette tax revenue for essential government services, to reconcile purchases by the Tribe as a wholesaler with sales by Tribal retailers, to verify that only stamped cigarettes are sold, and to verify that cigarettes are only purchased from sources authorized under this Agreement.
 - iii) **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.

4. Audit 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 Agreement. The Department may view the audit report at the Tribal Offices, but may not copy the same.

5. Tribal Retailer

The Auditor will be responsible for reviewing the records, identified in Section 3(b) 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 Agreement, that any exemptions from tax are documented, and that the Tribe used the Tribal cigarette tax revenues for essential government services.

6. Essential Government Services and Tribal Wholesaling Function

The Auditor shall annually review the records, invoices, and cigarette inventory of the Tribe and the Tribal retailer to certify that Tribe used the Tribal cigarette tax revenues for essential government services in accordance with the requirements of Part XIV, Section 3 of this Agreement, and to reconcile purchases by the Tribe as a wholesaler with sales by Tribal retailers, to verify that only stamped cigarettes are sold, and that cigarettes are only purchased from sources specified in this Agreement.

7. Self-certified Wholesalers and Self-certified Tribal Wholesalers

The Auditor will be responsible for reviewing the records, identified in Section 3(b) of this Part, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to the Tribe to verify sales invoices and payments.

8. Phase-In Period

The Auditor will be responsible for reviewing the records of each Tribal retailer to establish the information necessary to calculate the adjustment under Part IV, Section 4 of this Agreement. During the period of time in which the Tribe may impose a tax at a rate less than 100 percent of equivalent taxes, the Auditor will review the records of each Tribal retailer on no less than a semi-annual basis and will notify the Tribe and the Department if an adjustment is required by the standard referenced in Part IV, Section 4 of this Agreement. An adjustment will be made based on the findings of the Auditor.

9. Audit Frequency and Cycle

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 March 31, 2005.

Thereafter, the Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part except as otherwise specified in this Part.

PART X
Dispute Resolution

1. General

- a. 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. It is the parties' expectation that most disagreements and violations should and will be resolved most effectively through informal discussion. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.
- b. As used in this Part "days" means business days, unless otherwise specified.

2. Notification of Violation

Any party that believes a violation of the Agreement has occurred shall notify the other party in writing, stating the nature of the alleged violation and any proposed corrective action or remedy ("Notice of Violation"). The parties shall meet within 14 days of sending of the Notice of Violation, unless the parties agree on a different date, to attempt to resolve between themselves the issues raised by the Notice of Violation, and provide an opportunity to implement any agreed corrective action.

3. Mediation

- a. 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 the other party a written mediation demand ("Mediation Demand"). The parties shall attempt to agree on a mediator. If they cannot agree on a mediator within 30 days of the Mediation Demand, each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator. Mediation shall occur within a reasonable time of selection of the mediator(s). The parties shall bear their own attorneys fees but shall share equally the other costs of conducting the mediation, including the fees of the mediator.
- b. The parties recognize that disagreements and violations of the terms of the agreement involving member retailers may take longer to resolve. With respect to that part of a disagreement or dispute involving a member retailer, the parties must wait at least 45 days after the sending of the Notice of Violation before delivering a Mediation Demand. It is the expectation of the parties that the parties will work together diligently during this period to arrive at a solution.

4. Remedies

Whenever an issue is submitted to mediation pursuant to a Mediation Demand, the mediator(s) shall render an opinion as to whether a violation has occurred and may recommend corrective action to remedy such violation. The mediator(s) shall not render an independent recommendation on any issue on which the parties reach agreement. Recommended remedies may include audit of relevant Tribal records, interpretation of Agreement terms, changes in reporting, recordkeeping, enforcement practices, business practices, or similar actions. Recommended 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 Agreement.

5. Termination of Agreement

If, after no more than twenty-four (24) months from the Notice of Violation, (a) the parties are unable to resolve a disagreement using the dispute resolution methods authorized in this Part, either party may terminate this Agreement or (b) if a party continues to violate a Agreement term after completion of mediation, the other party may terminate this Agreement. The parties may, after no less than six (6) months following any such termination, enter into a new Agreement.

6. Disagreements Regarding Reports of the Auditor

If either party has a concern about a report from the Auditor, such party may choose to resolve the concern through the use of a mediator under the procedures set forth in Part X, Sections 2 through 5 of this Agreement. Failure of either party to grant the mediator access to relevant records the mediator deems reasonably necessary to review the report is a violation of this Agreement. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

7. Termination For Cause

- a. Either party may terminate the Agreement for cause. For the purposes of this Section, "cause" shall mean only the following violations ("For Cause Violations"):
 - i) Retail sales of unstamped cigarettes during the term of this Agreement;
 - ii) Failure to submit to mediation as required by this Part X;
 - iii) A breach of the confidentiality provisions of Part XIII of this Agreement;
 - iv) Use of Tribal cigarette tax proceeds in violation of the terms of this Agreement;
 - v) The State's violation of Part IV, Section 2(f) or Part VI, Section 6 of this Agreement; and
 - vi) The Tribe's refusal to allow or require the Department's reasonable access to the reservation or Tribal retailers.
- b. The party seeking the termination for cause shall notify the other party in writing stating the facts constituting the alleged For Cause Violation ("Termination Notice"). The parties shall, within ten (10) days of giving the Termination Notice, use the procedures of Part X, Section 3 of this Agreement to select a mediator(s) to review the facts upon which the Termination Notice is based. The responding party has ten (10) days to provide its facts to the mediator(s).
- c. If the mediator issues an opinion that the alleged For Cause Violation has not occurred, the Termination Notice shall be deemed withdrawn. If the mediator issues an opinion that the alleged For Cause Violation has occurred, the Agreement shall be deemed terminated; provided that the party that gave the Termination Notice may elect to maintain the Agreement pending discussion of a remedy within the time limit of Part X, Section 7(d) below. The parties shall use their best efforts to resolve the dispute. If the parties reach agreement, or the For Cause Violation is corrected within such time limit, the Agreement shall not be terminated.

d. If the parties fail to reach agreement, or the For Cause Violation is not corrected, within one hundred eighty (180) days from the date of giving the Termination Notice, the Agreement shall be terminated.

8. 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 Part XIV, Section 2 of this Agreement. 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 Part XIV, Section 2 of this Agreement, the provisions of Sections 2 through 5 of this Part shall apply.

9. Notice Requirements

For the purposes of this Agreement, 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 three (3) working days after the date written notice is sent. 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: Chairman
Yakama Tribal Council
P.O. Box 151
Toppenish, WA 98948

With a copy to: Special Prosecutor
Yakama Nation Justice Services
P.O. Box 151
Toppenish, WA 98948

PART XI
Responsibilities of the Tribe, the Department of Revenue,
and the Liquor Control Board

The Parties recognize that this Agreement describes a mutual undertaking with shared responsibilities and further recognize the responsibilities of the Parties and the Liquor Control Board to be as follows:

1. Tribe

The Yakima Nation is responsible for both enforcement of the terms of this Agreement and administration of the Agreement, audit procedures and recordkeeping, and dispute resolution.

Upon the proper disclosure and identification to the Tribe by Department personnel, such Department personnel may enter the Tribal retail store(s) during regular business hours to observe the purchase and sale of cigarettes pursuant to this Agreement and may also purchase cigarettes. Yakama Nation personnel will accompany Department personnel on any such visit, unless the Tribe gives permission for Department personnel to enter or purchase cigarettes unaccompanied. Yakama Nation personnel must be reasonably available to accompany Department personnel on such visits and the Department must be reasonable in the timing and frequency of its requests.

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 administration of the Agreement, audit procedures and recordkeeping, and dispute resolution, as well as negotiation of its terms, on behalf of the State.

PART XII

Term of this Agreement – Amendment

This Agreement may remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions of Part X of this Agreement. Amendments or extensions to the Agreement shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Agreement shall be subject to the dispute resolution process in Part X of this Agreement.

PART XIII

Confidentiality

All information under the terms of this Agreement 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 or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

PART XIV

Miscellaneous Provisions

1. Periodic Review of Agreement Status

- a. Representatives of the Tribe and the Department agree to meet at mutually agreeable times and places upon the reasonable request of either party to review the status of this Agreement and any issues that have arisen under the Agreement.

- b. It is the expectation of the parties that the Department will schedule a meeting between the Tribe, the Department and the Liquor Control Board to discuss jurisdictional issues, expectations, and protocols, and to share enforcement and compliance information.

2. 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 eighteen (18) years.

3. 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 IX of this Agreement.
- b. The Tribe may not use Tribal cigarette tax revenue to subsidize Tribal cigarette and food retailers. "Subsidize" means that proceeds from the Tribal cigarette tax cannot be expended on the direct business activities of the Tribal retail cigarette business. For the purposes of this Agreement, it will be presumed that any maintenance and operation expenditures in regard to a Tribally-owned facility that has tenants in addition to the Tribal cigarette retailer do not subsidize the Tribal cigarette retailer.
- c. The following definitions shall apply to this Part:
 - i) "Direct business activities" shall be limited to paying wages, benefits, bonuses, or expenses directly related to the maintenance and operation of the Tribal retail cigarette business;
 - 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 Agreement, including all deductions and exemptions similar to those available to retailers, wholesalers, and others under state law, further including transportation vehicles and related costs; 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.

4. State Does Not Concede Tribal Immunity

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

5. Other Retail Sales within Indian Country by Tribal Members

Only Tribal retailers are permitted to make retail cigarette sales within Indian country.

6. Rule 192 – Application

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

7. Subsequent State Legislative Enactments

If the State Legislature enacts a law that provides more favorable terms for the Tribe, the parties shall amend the Agreement to reflect such terms.


8. Severability

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

THUS AGREED THIS 20th day of July, 2004.

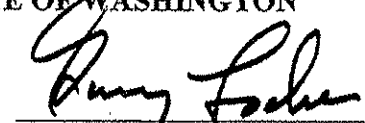
YAKAMA NATON

By:


Jerry Meninick,
Chairman
Yakama Tribal Council

STATE OF WASHINGTON

By:


Gary Locke,
Governor
State of Washington