

CIGARETTE TAX CONTRACT
Between
THE LOWER ELWHA KLALLAM TRIBE
and
THE STATE OF WASHINGTON

1.0 PREAMBLE

1.1 WHEREAS, the Lower Elwha Klallam Tribe is a federally recognized Indian Tribe that occupies and governs the Lower Elwha Reservation and contiguous lands held in trust for the Tribe and its members by the United States, and is, possessed of the full inherent sovereign powers of a government; and

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

1.3 WHEREAS, 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

1.4 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

1.5 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

1.6 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

1.7 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

1.8 WHEREAS, the State and Tribe will 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

1.9 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

1.10 WHEREAS, the mutual interests of the Lower Elwha Klallam Tribe and the state of Washington brought these two governments together to pursue their common Interest in resolving this tax disagreement; and

- 1.11** WHEREAS, chapter 43.06 RCW, authorizes the Governor of the state of Washington to enter into cigarette contracts with certain Washington state Indian Tribes identified as eligible to enter into such contracts by specific state legislation; and
- 1.12** WHEREAS, legislation was enacted by the 60th legislature and signed by the Governor, authorizing the Governing to enter into a cigarette contract with the Lower Elwha Klallam Indian Tribe.
- 1.13** NOW THEREFORE, the Tribe by and through its Tribal Council, and the state of Washington by and through its Governor, do hereby enter into this Contract for the mutual benefit of the Tribe and the State.

2.0 DEFINITIONS

- 2.1** "Auditor" means an independent third party auditor selected pursuant to section 9 of this Contract.
- 2.2** "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
- 2.3** "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective whether the tobacco is 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.
- 2.4** "Contract" means this contract entered into by the state of Washington and the Lower Elwha Klallam Tribe.
- 2.5** "Department" means the Washington state Department of Revenue.
- 2.6** "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, economic development, and administrative and enforcement costs specifically incurred by the Tribe to comply with and enforce this Agreement.
- 2.7** "Indian country," consistent with the meaning given in 18 USC 1151, means:
- 2.7.1 all land within the limits of the Lower Elwha Klallam 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
 - 2.7.2 all Indian allotments or other lands held in trust for a Lower Elwha Klallam Tribal Member or the Tribe, including rights of way running through the same.
- 2.8** "NonIndian" means an individual who is neither a Tribal member nor a nonmember Indian.
- 2.9** "Nonmember Indian" means a member of a federally recognized Indian Tribe other than the Lower Elwha Klallam Tribe.

- 2.10** Parties to the agreement” or “parties” means the Lower Elwha Klallam Tribe and the state of Washington.
- 2.11** “Retail sales tax” means the combined Washington state and local retail sales taxes applicable in the area.
- 2.12** “Retail selling price” means the ordinary, customary, or usual price paid by the consumer for each package of cigarettes, which price includes the Tribal taxes.
- 2.13** “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 Contract and who has signed a contract with the Tribe requiring it to abide by the terms of this Contract.
- 2.14** “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 Contract and who has signed a contract with the Tribe requiring it to abide by the terms of this Contract.
- 2.15** “Lower Elwha Klallam Reservation” or “reservation” means the area recognized as the Lower Elwha Klallam Reservation by the United States Department of the Interior.
- 2.16** “State” means the state of Washington.
- 2.17** “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.
- 2.17.1 “Tobacco products” do not include cigarettes.
- 2.18** “Tribal 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.
- 2.19** “Tribal member” means a member of the Lower Elwha Klallam Tribe.
- 2.19.1 For purposes of this Contract, a member of a Tribe recognized by the United States or Canada who is the spouse of a member of the Lower Elwha Klallam Tribe shall be treated the same as a member of the Lower Elwha Klallam Tribe.
- 2.20** “Tribal retailer” means a cigarette retailer wholly owned by the Lower Elwha Klallam Tribe and located in Indian country.
- 2.21** “Tribal tax stamp” means the stamp or stamps that indicate the Tribal taxes imposed under this Contract have been paid.
- 2.22** “Tribe” or “Tribal” means or refers to the Lower Elwha Klallam Tribe, a federally recognized Tribe.
- 2.23** “Wholesaler” means every person who purchases, sells, or distributes cigarettes only for

the purpose of resale to retailers.

3.0 Applicability of the Contract

3.1 Execution of Contract

- 3.1.1 This Contract shall become effective when approved by the Lower Elwha Klallam Tribal Council and signed by the authorized signatory for the Tribe, and signed by the Governor of the state of Washington.
- 3.1.2 This Contract shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Contract.

3.2 Application

- 3.2.1 From its execution, and contingent on the imposition of the Tribal taxes pursuant to a Tribal ordinance meeting the terms of section 4 of this Contract, this Contract shall apply to the retail sale of cigarettes by Tribal retailers.
- 3.2.2 Sales subject to the Tribal taxes 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.
- 3.2.3 "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.

3.3 Scope Limited. This Contract does not apply to:

- 3.3.1 Cigarettes sold at retail by nonIndians or nonmember Indians;
- 3.3.2 Tobacco products as that term is defined in subsection 2.17 of this Contract; and
- 3.3.3 Cigarettes manufactured by the Lower Elwha Klallam Tribe or its enterprises within Indian country, such treatment conditioned on an agreement with the Department of Revenue as to the status of such cigarettes, such agreement to not be unreasonably withheld and to be negotiated in good faith.

3.4 Mail Order Type Sales. If the Tribe desires to pursue mail order, telephone, or internet sales of Cigarettes the parties will negotiate in good faith a memorandum of understanding concerning the taxation, if any, of such sales.

4.0 Imposition of Tribal Taxes

4.1 Tribal Retailer

- 4.1.1 Tribal retailer refers to the Elwha River Casino of the Lower Elwha Klallam Tribe and the Tribal Store.
- 4.1.2 The Tribe agrees to notify the Department 30 calendar days prior to the start up of cigarette sales by any other Tribal retailer. Such notice shall include information regarding the status of land upon which any retailer is located.

- 4.1.3 The notice to be provided under 4.1.2 above shall be deemed to be an addendum to this Contract and the Tribal retailer shall be subject to this Contract.

4.2 Tax Imposed on Sales by Tribal Retailers

- 4.2.1 The Tribe shall impose by ordinance taxes pursuant to the requirements of this section on all sales by Tribal retailers of cigarettes to purchasers within Indian country.
- 4.2.2 The Tribe's ordinance required by this section may impose the tax provided for herein on all Tribal members, or it may allow for an exemption from this tax for Tribal members. If the Tribe imposes the tax on sales to its members, it will not be required to keep exact records of such sales but instead may utilize evidence of approximate sales to its members (the "allocation allowance") as set out in Washington Administrative Code (WAC) 458-20-192(9)(a)(ii). This allocation figure will be used to distinguish funds subject to the requirements in section 15.7 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 and the allocation allowance does not apply.
- 4.2.3 All cigarettes sold by the Tribal retailer shall bear a Tribal tax stamp. The Tribe's ordinance may provide for compensation for wholesalers for their services in affixing the Tribal tax stamp.
- 4.2.4 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.
- 4.2.5 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.
- 4.2.6 During the term of this Contract, the taxes imposed under chapter 82.24 RCW do not apply to the sale, use, consumption, handling, possession, or distribution of cigarettes by a Tribal retailer, pursuant to chapter 43.06 RCW.

- 4.3 Tax Rate.** 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.

5.0 Purchase of Cigarettes by Tribal Retailers

- 5.1 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:

- 5.1.1 Wholesalers or manufacturers licensed to do business in the state of Washington;
- 5.1.2 Self-certified out-of-state wholesalers who meet the requirements of subsection 7.2 of this contract; or
- 5.1.3 Self-certified tribal wholesalers who meet the requirements of subsection 7.3 of this contract.

5.2 Delivery of Cigarettes to the Tribal Retailer Outside of Indian Country

- 5.2.1 Cigarettes bearing the Lower Elwha Klallam 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.
- 5.2.2 Commercial carriers may make deliveries.
- 5.2.3 Such cigarettes must be accompanied by invoices identifying the cigarettes as Lower Elwha Klallam Tribe cigarettes.

6.0 Tribal Tax Stamps

6.1 Tribal Tax Stamp Required

- 6.1.1 The Tribe shall not possess unstamped cigarettes. All cigarettes purchased, possessed, or sold by the Tribal retailer shall bear a Tribal tax stamp.
- 6.1.2 The Tribe may arrange for the creation of a Tribal tax stamp by 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. The Tribe agrees to purchase stamps from a nationally recognized stamp manufacturer. The Department agrees to work with the tribe to obtain a suitable stamp.

6.2 Stamp Vendor Contract

- 6.2.1 The Tribe shall contract with a bank or other stamp vendor to distribute tax stamps. 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.
- 6.2.2 The contract with the stamp vendor shall provide that:
 - (a) The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal taxes by the wholesaler, and remit the collected taxes to the Tribe.
 - (b) The stamp vendor shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase.
 - (c) The stamp vendor shall remit to the Tribe all revenue collected from the Tribal taxes.

- (d) The stamp vendor shall 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.

6.2.3 The Tribe may include all the requirements of the stamp vendor contract set out in subsection 6.2.2 above in its ordinance.

6.3 Requirements for Affixation of Stamps by Wholesalers

6.3.1 The Tribe shall ensure that:

- (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.
- (b) Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp.
- (c) Stamps shall be affixed so that it may be readily ascertained by inspection that the tax has been paid.
- (d) Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix Tribal tax stamps to the packages for sale.

6.3.3 The Tribe agrees that it will not possess any unstamped inventory, subject to entering into an agreement with the Department to act as its own wholesaler.

6.4 Wholesaler Obligation Under State Law. Collection of the Tribal taxes, affixing of the Tribal tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) or by this Contract (in the case of self-certified out-of-state or self-certified Tribal wholesalers), and compliance with other requirements in this Contract, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

6.5 State Agreement Regarding Compliance with State and Federal Law. All transactions that conform with the requirements of this Contract do not violate state law, and the State agrees that it will not assert that any transactions in conformity with this Contract violate state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws.

7.0 Wholesalers

7.1 Wholesalers Licensed by the State. The parties acknowledge that 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 Lower Elwha Klallam Tribal taxes, as evidenced by the proper stamp and tax rate.

7.2 Self-Certified Out-of-State Wholesalers.

- 7.2.1 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 Contract, must certify by letter to the Department and to the Tribe that they will and can meet the terms of this Contract.
- 7.2.2 The Lower Elwha Klallam Tribe shall require compliance with this Contract in its contracts with any such out-of-state wholesalers and shall provide copies of such contracts to the Auditor for its review.
- 7.2.3 Any out-of-state wholesaler must be licensed or authorized to do business as a cigarette wholesaler with the state in which it resides.
- 7.2.4 The contract between the Tribe and the out-of-state wholesaler will also include a requirement that:
 - (a) The cigarettes transported in the state of Washington will be stamped and accompanied by invoices detailing the quantity and brand of cigarettes destined for the Lower Elwha Klallam Tribe.
 - (b) Such invoices shall provide an order number and shall identify the seller of the cigarettes as well as the buyer of the cigarettes; and
 - (c) The wholesaler will allow the Auditor access to its records for the purpose of determining whether the Tribal tax has been paid and whether Tribal tax stamps are properly affixed to the cigarette containers.

7.3 Self-Certified Tribal Wholesalers

- 7.3.1 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 Contract, must certify by letter to the Department and to the Tribe that they will and can meet the terms of this Contract.
- 7.3.2 The Lower Elwha Klallam Tribe shall require compliance with this Contract in its contracts with any such Tribal wholesalers and shall provide copies of such contracts to the Auditor for its review.
- 7.3.3 The contract between the Tribe and the Tribal wholesaler will also include a requirement that:
 - (a) The cigarettes transported in the state of Washington will be stamped and accompanied by invoices detailing the quantity and brand of cigarettes destined for the Lower Elwha Klallam Tribe, and which shall provide an order number and shall identify the seller of the cigarettes as well as the buyer of the cigarettes; and
 - (b) The wholesaler will allow the Auditor access to its records for the purpose of determining whether the Tribal tax has been paid and whether Tribal tax stamps are properly affixed to the cigarette containers.

8.0 Enforcement Authority and Responsibility of Liquor Control Board

8.1 Intent.

- 8.1.1 The state authorizing legislation for this Contract 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.
- 8.1.2 The Tribe shall have primary responsibility for enforcement against Tribal retailers.
- 8.1.3 The parties shall work cooperatively by providing each other with relevant information and in other necessary ways to facilitate their respective enforcement responsibilities.

8.2 Commercial Carriers

- 8.2.1 The State recognizes that shipments of cigarettes both from in state and from out-of-state wholesalers, who meet the requirements of this Contract, may be made by commercial carrier.
- 8.2.2 Such shipments must be accompanied by documents as required under this Contract.

9.0 Independent Third Party Auditor

9.1 Purpose

- 9.1.1 The Tribe agrees 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 in accordance with this section.
- 9.1.2 The purpose of this Part is to provide a process for regular verification of the requirements in this Contract.
- 9.1.3 The verification process is intended to reconcile data from all sources that make up the stamping, selling, and taxing activities under this Contract.

9.2 Tribe to Contract with Third Party Auditor

- 9.2.1 The Tribe and the State agree that, for the purposes of verifying compliance with this Contract, the Tribe will contract with an independent third party auditor.
- 9.2.2 The Auditor will be retained by the Tribe and the Tribe shall bear the costs of the auditing services.
- 9.2.3 The Tribe shall be entitled to freely communicate with the Auditor.

- 9.2.4 The Auditor must be a certified public accountant licensed by the state of Washington.
- 9.2.5 The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part.

9.3 Audit Protocol. To ensure compliance with this Contract, the Auditor must adhere to the following protocol:

9.3.1 Period under review

- (a) To verify the requirements of this Contract, the Auditor must review records during the appropriate audit cycle, and may review records for earlier years only as necessary for an internal reconciliation of the person's books, except that records relating to the period before the effective date of the Tribal tax are not open to review.
- (b) In situations where the Auditor is responsible for verifying records less frequently than annually, 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.

9.3.2 Records to be examined. To verify the requirements of this Contract, the Auditor must review at a minimum the following records:

- (a) Stamp vendor: records and invoices of stamps purchased from the stamp manufacturer, records and invoices of sales of stamps to licensed wholesalers, manufacturers, self-certified wholesalers and self-certified tribal wholesalers, or Tribal retailers, and stamp inventory.
- (b) 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 tax revenue was used in accordance with the requirements of subsection 15.7 and records to verify that the retail selling price included the applicable tribal taxes.
- (c) Tribe: records necessary to verify that all Tribal tax revenue was used in accord with this Contract.
- (d) 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.
- (e) In all situations, the Auditor is not responsible for examining records that do not relate to the stamping, selling, or taxing activities of the Lower Elwha Klallam Tribe, unless a review of the records is necessary for an internal reconciliation of the person's books.

9.4 Report Format

- 9.4.1 The Auditor must submit its findings in final written reports to the Tribe, with a

copy to the Department.

- 9.4.2 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 requirements identified in subsection 9.3.2.
- 9.4.3 In addition, if a statistical sampling process was used, the report must indicate the sampling method used.

9.5 Self-Certified Wholesalers and Self-Certified Tribal Wholesalers

- 9.5.1 The Auditor will be responsible for reviewing the records, identified in subsection 9.3.2(d) of this section, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to Tribal retailers to verify that the Tribal 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.
- 9.5.2 The Auditor must review the records, identified in subsection 9.3.2(d) of this section, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to a Tribal retailer annually.
- 9.5.3 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.

9.6 Stamp Vendors

- 9.6.1 The Auditor will be responsible for reviewing the records, identified in subsection 9.3.2(a) of this section, of the stamp vendor to verify that Tribal taxes paid by wholesalers, or other party responsible under this Contract, were remitted to the Tribe.
- 9.6.2 The review required under this section must take place annually.

9.7 Joint Audit Implementation and Review

- 9.7.1 The Tribe and the State may meet jointly with the Auditor prior to the beginning of an audit cycle.
- 9.7.2 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.
- 9.7.3 As soon as possible after the issuance of the Auditor's final report, the Tribe and the State may meet jointly with the Auditor to review the report and discuss any issues of concern.

- 9.8 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 section 10 of this Contract.

10.0 Dispute Resolution

10.1 Intent

- 10.1.1 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.
- 10.1.2 The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this section.

10.2 Notice of Violation

- 10.2.1 If either party believes a violation of this Contract has occurred, it shall notify the other party in writing.
- 10.2.2 The notice shall state the nature of the alleged violation and any proposed corrective action or remedy.
- 10.2.3 The party receiving notice shall have 10 calendar days to respond, unless the time to respond is extended by agreement of both parties, which agreement shall not be unreasonably withheld, in order to allow a complete and accurate response.
- 10.2.4 The parties shall meet within 14 calendar days of the receipt of the response to the notice of violation, unless the parties agree in writing to a different date.
- 10.2.5 The purpose of the meeting will be to attempt to resolve between them the issues raised by the notice of violation, and provide an opportunity to implement any agreed corrective action.
- 10.2.6 If, after 40 calendar days from the date of the initial Notice of Violation, the parties cannot agree on whether a violation has occurred or cannot agree on appropriate corrective action, then unless otherwise agreed upon by the parties, they shall submit the unresolved issue(s) to mediation pursuant to subsection 10.3.

10.3 Mediation

- 10.3.1 If the parties are unable to resolve a dispute through the process set forth in subsection 10.2, either party may request mediation by giving a written mediation demand to the other party.
- 10.3.2 The rules of the International Institute for Conflict Resolution and Prevention (CRP) for mediation shall apply, to the extent not inconsistent with this Contract.
- 10.3.3 The parties shall first attempt to agree upon a mediator. If the parties can not agree on a mediator within 30 calendar days of the written demand, a mediator shall be selected using the process set forth in the rules of the CRP institute.
- 10.3.4 The parties shall have an opportunity to submit both written materials and argument to the mediator, with timelines for such submissions to be set by the

mediator.

- 10.3.5 The parties will work with the mediator to resolve their differences.
- 10.3.6 If the parties are unable to reach agreement no later than 80 calendar days from the date of the initial Notice of Violation, the mediator shall render a recommendation on the unresolved issue(s) no later than 90 calendar days from the date of the initial Notice of Violation.
- 10.3.7 The mediator shall not render an independent recommendation on issues on which the parties have reached agreement. If the mediator is required to render a recommendation, no more than 10 calendar days following receipt of the recommendation, the parties shall meet and may: agree to accept the mediator's recommendation, in whole or in part; agree to continue their discussions in light of the mediator's recommendation; or, if they cannot agree within 15 calendar days following receipt of the recommendation, either party may seek Contract termination.
- 10.3.8 The parties shall equally share the costs of mediation.

10.4 Remedies

- 10.4.1 Whenever an issue is submitted to mediation under the subsection 10.3 the mediators may recommend corrective action to remedy any violation that has occurred.
- 10.4.2 In no case shall a mediator render an independent recommendation or decision on any issue on which the parties reach agreement.
- 10.4.3 Remedies may include: interpretation of Contract terms, changes in reporting, record keeping, enforcement practices, business practices, and/or similar changes.
- 10.4.4 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.

10.5 Termination of Contract Under subsections 10.2, 10.3, and 10.4

- 10.5.1 If, after no more than 240 calendar days 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.
- 10.5.2 The parties may, after no fewer than 180 calendar days following any such termination, begin negotiation of a new Contract.
- 10.5.3 The termination provisions of this subsection shall not apply in the case of a Notice of Disagreement that does not involve a violation.

10.6 Disagreements Regarding Reports of the Auditor

- 10.6.1 Should either party have a concern about a report from the Auditor that cannot be resolved through the joint audit review process described in subsection 9.8 of this Contract, that party may choose to resolve the concern through the use of a mediator, pursuant to subsection 10.3.
- 10.6.2 The provisions of subsection 10.2 shall apply, except that the initial 40-day timeline set forth in subsection 10.2.6 shall not apply.
- 10.6.3 Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Contract.
- 10.6.4 Records of the State or the Tribe reviewed by the mediator or its agent(s) under this subsection, and the information contained in such records, are not disclosable to anyone, in any forum, for any purpose.
- 10.6.5 The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

10.7 Termination of Contract For Cause

- 10.7.1 Upon 45 calendar days written notice, either party may terminate the Contract for cause.
- 10.7.2 For the purposes of this section, "for cause" shall mean only the following violations:
 - (a) Retail sales of cigarettes with improper stamps or unstamped cigarettes during the effective period of a Tribal tax;
 - (b) Failure to submit to mediation as required by subsections section 10.3;
 - (c) Failure to complete a required audit;
 - (d) A seizure of Tribal cigarettes in violation of section 8 of this Contract;
 - (e) A breach of the confidentiality provisions of section 14 of this Contract;
or
 - (g) Use of tax proceeds in violation of the terms of this Contract.
- 10.7.3 The party seeking termination for cause shall notify the other party and the parties shall agree upon a mediator within 10 calendar days to review the facts upon which the for cause termination notice is based.
- 10.7.4 The party making the allegation must provide a written recitation of the facts with the notice of termination. This notice of termination starts the running of the 45-day period.
- 10.7.5 The responding party has 10 calendar days to provide its facts to the mediator.
- 10.7.6 If the mediator determines that the alleged event has occurred, the Contract is

terminated, however the party may choose to go through the regular dispute resolution process in regard to the issue.

10.7.7 The parties shall use their best efforts to resolve the dispute within the 45-day notice period.

10.7.8 If the parties reach agreement, or the violation is corrected during the 45-day notice period, the Contract shall not be terminated.

10.8 Continuity

10.8.1 The parties agree that to the greatest extent possible the individual selected as mediator shall be used for future dispute resolutions.

10.8.2 The parties may agree to select such a person in advance.

10.9 Notice Requirements

10.9.1 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.

10.9.2 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: Chairman
 Lower Elwha Klallam Tribal Council
 Lower Elwha Klallam Tribe
 2851 Lower Elwha Road
 Port Angeles, WA 98363

With a copy to: Office of General Counsel
 Lower Elwha Klallam Tribe
 2851 Lower Elwha Road
 Port Angeles, WA 98363
 360-452-8471, ext. 117 -- phone
 360-452-3428 -- facsimile

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

12.0 Responsibilities of the Lower Elwha Klallam Tribe, the Department of Revenue, and the Liquor Control Board

12.1 Lower Elwha Klallam Tribe

12.1.1 The Lower Elwha Klallam 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.

12.1.2 The Lower Elwha Klallam Tribe agrees to allow the Department entry into the retail store, the purpose of such entry being limited to (a) visual observation of retail sales taking place at the store and (b) the purchase of cigarettes by the Department.

12.2 Liquor Control Board. The Liquor Control Board is responsible for enforcement of RCW chapter 82.24. It is the practice of the Department to regularly share information with the Liquor Control Board in regard to cigarette matters, and it is the intent of the Parties that such practice continue under this Contract. However, this practice and any actions taken in regard to such information must be in conformity with the processes in this Contract. Nothing in this Contract shall be interpreted as authorizing the Liquor Control Board to enter the premises of a tribal retailer without the Tribe's prior consent.

12.3 Department of Revenue. The Department is responsible for the 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.

13.0 Term of this Contract – Amendment

13.1 This Contract shall remain in effect no longer than eight years from its effective date, subject to the termination provisions under section 10.5 of this Contract.

13.2 The Contract shall be automatically renewed for successive periods of eight years, unless either party objects in writing at least 30 calendar days prior to the expiration date.

13.3 Except as provided in section 4.1.3, amendments to this Contract shall be considered upon the written request of either party.

13.4 Disputes regarding requests for amendment of this Contract shall be subject to the dispute resolution process set forth in section 10 of this Contract.

14.0 Confidentiality

14.1 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."

14.2 All other information that is subject to review by the Auditor, review by the mediator or certified public accountant, is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

15.0 Miscellaneous Provisions

15.1 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.

15.2 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.

15.3 Contract Does Not Create any Third Party Beneficiaries. No third party shall have any rights or obligations under this Contract.

15.4 Tobacco Master Settlement Agreement

15.4.1 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.

15.4.2 The Tribe recognizes the State has an interest regarding nonparticipating manufacturers.

15.4.3 The State recognizes the Tribe has an interest in the master settlement agreement.

15.4.4 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.

15.4.5 Nothing in this Contract supercedes or replaces chapter 70.157 RCW.

15.5 Periodic Review of Contract Status

15.5.1 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.

15.5.2 Those meetings shall be held no less frequently than once every 24 months, but may be held more frequently.

15.6 Sales to Minors

15.6.1 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.

15.6.2 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.

15.6.3 Upon such notification, the Tribe shall take appropriate enforcement action pursuant to Tribal law.

15.7 Essential Government Services

15.7.1 Tribal tax revenue shall be used for essential government services.

15.7.2 The allocation allowance described in Washington Administrative Code (WAC) 458-20-192, and referred to in section 4.2.2 above, is not required to be used for essential government services.

15.7.3 The Auditor shall certify the use of such revenue under the process set forth in section 9.

- 15.7.4 Tribal tax revenue may not be used to subsidize Tribal cigarette and food retailers.
- 15.7.5 "Subsidize" means that proceeds from the Tribal tax or taxes pursuant to this Contract cannot be expended on the enterprise activities of the Tribal retail cigarette business.
- 15.7.6 Where the cigarette business is co-located with a retail food business, the proceeds cannot be expended to support that business.
- 15.7.7 "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.
- 15.7.8 "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 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, and general assistance; and activities such as land and building acquisitions, building development and construction.

15.8 Other Retail Sales within Indian Country. Under Lower Elwha Klallam Tribal law, only Tribal retailers are permitted to make retail cigarette sales within Indian country.

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

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

15.11 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.

AGREED THIS _____ day of _____, 2010.

LOWER ELWHA KLALLAM TRIBE

STATE OF WASHINGTON

By: _____
Frances G. Charles, Chairwoman

By: _____
Christine Gregoire, Governor