

CIGARETTE TAX CONTRACT
Between
THE SWINOMISH INDIAN TRIBAL COMMUNITY
and
THE STATE OF WASHINGTON

PREAMBLE

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

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

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

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

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

WHEREAS, the parties first adopted a Cigarette Tax Contract in 2003;

WHEREAS, the parties also entered into a Memorandum of Agreement concerning the Wholesaling by the Tribe of Cigarettes to Member Retailers and the Purchase of Cigarettes from Wholesalers Not Licensed by the State of Washington and the Entry of Such Cigarettes Into the State of Washington ("Wholesalers MOA") in 2004;

WHEREAS, the parties adopted a revised Cigarette Tax Contract in 2009 that has incorporated, among other revisions, the terms of the 2004 "Wholesalers MOA" and that has remained in place since that time; and

WHEREAS, these Contracts resolved 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 have benefited from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of the Cigarette Tax Contract; and

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

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

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

WHEREAS, this contract is authorized, on the part of the State, by legislation, including House Bill 5372, enacted by the 2001 Regular Session of the 57th Legislature and signed by the Governor, effective July 22, 2001, and House Bill 2553, enacted by the 2002 Regular Session of the 57th Legislature and signed by the Governor, effective June 13, 2002, as codified in RCW 43.06.450, RCW 43.06.455, RCW 43.06.460, and RCW 82.24.295; and on the part of the Tribe, by a Tribal Ordinance duly adopted by the Swinomish Indian Tribal Community Senate and signed by the Tribal Chair.

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

PART I **Definitions**

- (1) "Allocation" means the number of cigarettes available to be sold to Indians free of all taxes, and is based on a formula that includes consumption data and tribal service area population as defined by the Indian Health Service for the Swinomish Indian Tribal Community.
- (2) "Auditor" means the auditor selected pursuant to Part VII of this Contract.
- (3) "Biennial" means every two years.
- (4) "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
- (5) "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.

- (6) "Contract" means this contract entered into by the State of Washington and the Swinomish Indian Tribal Community.
- (7) "Days" means calendar days, unless otherwise specified.
- (8) "Department" means the Washington State Department of Revenue.
- (9) "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.
- (10) "Indian country," consistent with the meaning given in 18 U.S.C. 1151 means:
 - (a) All land within the limits of the Swinomish Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation; and
 - (b) All Indian allotments or other lands held in trust for a Swinomish Tribal member or the Tribe, or otherwise subject to a restriction against alienation imposed by the United States, the Indian titles to which have not been extinguished, including rights of way running through the same.
- (11) "Liquor control board" means the agency of the state responsible for enforcement of chapter 82.24 RCW pursuant to RCW 82.24.550.
- (12) "Local retail sales tax" means the combined Washington local retail sales taxes applicable in the area.
- (13) "NonIndian" means an individual who is neither a Tribal member nor a nonmember Indian.
- (14) "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Swinomish Indian Tribal Community.
- (15) "Parties to the agreement" or "parties" mean the Swinomish Indian Tribal Community and the state of Washington.
- (16) "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.
- (17) "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.

- (18) "Self-certified wholesaler" means an out-of-state wholesaler who is not a self-certified tribal wholesaler.
- (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 product" does not include cigarettes.
- (21) "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.
- (22) "Tribal member" or "member" means an enrolled member of the Swinomish Indian Tribal Community.
- (23) "Tribal retailer" means a cigarette retailer wholly owned by the Swinomish Indian Tribal Community and located in Indian country.
- (24) "Tribeally licensed retailer" means a member owned smokeshop located in Indian country and licensed by the Swinomish Indian Tribal Community.
- (25) "Tribal tax stamp" means the stamp or stamps that indicate the Swinomish Indian Tribal Community's cigarette tax imposed under this Contract is paid or that identify those cigarettes with respect to which no tax is imposed.
- (26) "Tribe" or "Tribal" means or refers to the Swinomish Indian Tribal Community, a federally recognized Tribe.
- (27) "Swinomish Indian Reservation" or "reservation" means the area recognized as the Swinomish Indian Reservation by the United States Department of the Interior.
- (28) "Wholesaler" means every person who purchases, sells, or distributes cigarettes to retailers for the purpose of resale only.

PART II

Applicability of the Contract

(1) Execution of Contract

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

(2) Application

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

(3) Scope Limited

This Contract does not apply to:

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

(4) Mail Order Type Sales

During the term of this Contract the Tribe agrees to not engage in mail order type sales, such as internet, catalog, and telephone sales, to Washington residents outside of Indian country, unless and until the State and the Tribe have entered into a memorandum of agreement in regard to the taxability of such sales.

PART III
Imposition of Tribal Cigarette Taxes

(1) Tribal Retailers

- (a) The Tribe agrees to notify the Department 30 days prior to the start-up of cigarette sales by any Tribal retailer other than a retailer in existence on the effective date of this Contract.
- (b) The Tribe agrees that any cigarette retailer wholly owned by the Swinomish Indian Tribal Community is subject to this Contract.
- (c) The Tribe acknowledges that Swinomish law currently prohibits cigarette sales on Reservation by anyone other than Tribal retailers. The Tribe agrees to notify the Department of any change in law that allows sales by anyone other than Tribal retailers prior to implementation, but no longer than 20 days from receipt of the approval of the change in the law from Bureau of Indian Affairs.
- (d) In the event that sales by anyone other than Tribal retailers are allowed by future changes in Tribal law, the Tribe agrees that it will require any Tribally licensed retailers located in Indian country to comply with the terms of this Contract. In addition, the Tribe agrees that it will maintain and enforce a requirement that any such member-owned smoke shop obtain a license from the Tribe and that a condition of such license is access by the Department to observe sales pursuant to Section IX.1 of this Contract.
- (e) In the event that sales by anyone other than Tribal retailers are allowed by future changes in Tribal law, the Tribe agrees to enact ordinances regarding Auditor access to records of Tribally licensed retailers selling cigarettes in Indian Country.

(2) Tax Imposed on Sales by Tribal Retailers

- (a) The Tribe shall impose by ordinance taxes pursuant to the requirements of this Part III on all sales by Tribal retailers of cigarettes to non-Indian and nonmember Indian purchasers within Indian country. Such ordinance may provide for compensation for wholesalers for their services in affixing the Tribal tax stamp.
- (b) The tax on the retail sale of cigarettes shall equal 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. The Tribe shall maintain such tax on the retail sale of cigarettes provided that
 - (i) 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; and
 - (ii) 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.

- (c) Pursuant to RCW 43.06.455 and RCW 82.24, during the term of this Contract, the State and the Tribe agree that the State shall not pursue collection of these state cigarette taxes for cigarettes sold in compliance with this Contract.

PART IV
Purchase of Cigarettes by Tribal Retailers

(1) Wholesale Purchases – Requirements

The Tribe has adopted and agrees to maintain in effect a requirement under tribal law that Tribal retailers purchase cigarettes only from sources authorized pursuant to this Contract.

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

Cigarettes bearing the Swinomish Indian Tribal Community's Tribal tax stamp required by this Contract may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a Tribal retailer. Such cigarettes must be accompanied by invoices identifying the cigarettes as the Swinomish Indian Tribal Community's cigarettes.

PART V
Tribal Tax Stamps

(1) Tribal Tax Stamp Required

- (a) All cigarettes sold by a Tribal retailer shall bear a Tribal tax stamp.
- (b) If the Tribe chooses to tax its members, the state shall apply the allocation allowance described in WAC 458-20-192 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 in Section XII.8, from funds that are not.
- (c) The Tribe may by ordinance allow for an exemption from the tax imposed under Part III of this Contract for Tribal members. If the Tribe provides for such tax exemption in the future, the following shall apply:

The Tribe agrees that members will be exempted from all or a specified portion of the cigarette tax and sales tax at the point of sale. Such cigarettes shall bear the Tribal tax stamp; however, the non-applicable tax value of the stamp shall be deducted from the selling price at the time of sale. The books and records of the Tribal retailer must indicate the sales made to members. The Tribe agrees that it will enact an ordinance requiring that eligibility for the exemption is conditioned on members providing documentation substantiating enrolled status. The Tribe agrees that the ordinance will establish a reasonable limit on purchases by Tribal members and shall provide a penalty for violation of the ordinance, the objective being to preclude resales of untaxed cigarettes by members.

(2) Creation and Supply of Tribal Tax Stamps

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

(3) Stamp Vendor Contract

- (a) The Tribe shall contract with a bank or other stamp vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal cigarette tax by the wholesaler, and remit the collected taxes to the Tribe. The contract shall provide that the stamp vendor shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service or some other third party stamp vendor satisfactory to both the Tribe and the Department. The Tribe shall require the stamp vendor to remit to the Tribe all revenue collected pursuant to the Tribal cigarette tax. The Tribe shall require that the stamp vendor provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department.
- (b) If the Tribe, at a later date, and as part of its tax administration function, chooses to maintain and distribute tax stamps, it shall be deemed the “stamp vendor” for purposes of this Contract. Upon so choosing, the Tribe shall
- (i) enact an ordinance establishing verifiable procedures for ordering, receiving, and inventorying tax stamps. The Tribe agrees that such procedures will include the following:
 - a. The Tribe shall maintain the tax stamps in a secure location under 24 hour video surveillance.
 - b. The Tribe shall only distribute tax stamps to wholesalers authorized to receive and affix stamps under this Contract.
 - (ii) enact an ordinance requiring that both the Tribe and any self-certified Tribal wholesaler or self-certified wholesaler shall maintain records with respect to the tax stamps, which records shall be subject to the audit procedures set forth in this Contract.
 - a. The Tribe agrees that its contract with the stamp manufacturer shall require that on an annual basis the stamp manufacturer provide the Department with the number of stamps provided to the Tribe.
 - b. The Tribe agrees that it will direct the Auditor to provide on a bi-annual basis a count of the stamps that have been distributed by the Tribe to wholesalers during the preceding year and a count of the stamps in the Tribe's possession.
 - (iii) invite the Department to view its security system and stamp storage area.
- (c) The Department and the Tribe agree to share technical assistance and advice in the area of tax administration.

(4) Requirements for Affixation of Stamps by Wholesalers

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

(5) Wholesaler Obligation under State Law

Collection of the Tribal cigarette tax (unless prepaid to the stamp vendor by the Tribal retailer), affixing of the Tribal tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Contract, and compliance with other requirements in this Contract, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

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

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

**PART VI
Wholesalers**

(1) Wholesalers Licensed by the State

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted there under, and therefore must maintain adequate records detailing which cigarettes are subject to state tax and which cigarettes are subject to the Swinomish Indian Tribal Community's cigarette tax.

(2) Self-Certified Tribal Wholesalers and Self Certified Out of State Wholesalers

The State agrees that, in addition to purchases from wholesalers licensed with the State, the Tribe may purchase cigarettes from self-certified tribal wholesalers or self-certified wholesalers, as those phrases are defined in this Contract, subject to the following conditions and limitations:

- (a) Cigarettes purchased from a self-certified tribal wholesaler or self-certified wholesaler will be stamped with the Swinomish Indian Tribal Community's tax stamp by the wholesaler and sold at retail by Tribal retailers under the terms of the Contract.
- (b) The Tribe agrees 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 laws to be licensed, but who have agreed to comply with the terms of this Contract, must certify by letter to the Tribe that they will and can meet the terms of this Contract. The Tribe agrees to furnish a copy of such certification to the Department.

- (c) The Tribe agrees out-of-state wholesalers who are not licensed to do business within the state of Washington, and are not required by state law to be licensed, but who have agreed to comply with the provisions of this section and the Contract, must certify by letter to the Tribe that they will and can meet the terms of this Contract. The Tribe agrees to furnish a copy of such certification to the Department. The Tribe further agrees that the out-of-state wholesaler must be licensed to do business in the state in which the wholesaler resides.
- (d) The Tribe agrees it shall require compliance with this Contract in its agreements with any such tribal or out-of-state wholesalers and shall provide copies of such agreements to the Auditor for its review. An agreement between the Tribe and a Tribal wholesaler or out-of-state wholesaler will also include a requirement that:
 - (1) The cigarettes transported in the State of Washington will be accompanied by invoices detailing the quantity and brand of cigarettes destined for the Tribe. Such invoices shall provide an order number that matches the order number in the notice filed pursuant to RCW 82.24.250 and shall identify the seller of the cigarettes; and
 - (2) The wholesaler will allow a third party 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.

(3) Tribe as Own Wholesaler – Memorandum of Agreement

This Contract contemplates that the Swinomish Indian Tribal Community will, at some future date, act as its own wholesaler. In the event that the Tribe decides to act as its own wholesaler in regards to sales to the Tribal retailers, it agrees to first enter into a memorandum of agreement with the Department regarding this activity. The memorandum of agreement shall reference any applicable requirements of this Contract. If the Tribe, by itself or through a Tribal enterprise, manufactures and wholesales to Tribally licensed retailers, that wholesale activity shall not require a memorandum of agreement.

**PART VII
Audit Process**

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

(1) Selection of Auditor

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

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

(2) **Audit Protocol**

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

- (a) **Review of records:** To verify the requirements of this Contract, the Auditor must review at a minimum the records specified below. In all situations, the Auditor is not responsible for examining records that do not relate to the stamping, selling, or taxing of cigarettes by the Tribe unless a review of the records is necessary for an internal reconciliation of the books.
 - i) **Tribal retailers:** financial statements or purchase invoices relating to purchases of cigarettes from licensed wholesalers or other wholesalers noted under Part VI, financial statements or sales invoices relating to sales of stamped cigarettes, sales of exempt cigarettes, cigarette inventory, records to verify whether Tribal cigarette and sales taxes were remitted to the Tribe for deposit into Tribal accounts, and records to verify that the retail selling price included the applicable tribal taxes.
 - ii) **Tribe:** records such as account records and contract invoices necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services described in Section XII. 8 of this Contract.
 - iii) **Self-certified out-of-state wholesaler, self-certified Tribal wholesaler:** the records subject to review, at a minimum, are records and invoices of stamp purchases, records and invoices of sales of stamped cigarettes, stamp inventory, and the stamping process. The Parties further agree that that the Auditor, in addition to what is required under this section, will review the account records, contract invoices, and inventory of the Tribe as is necessary to reconcile the purchases by the Tribe with sales by Tribal retailers, to verify that only stamped cigarettes are sold, and that cigarettes are only purchased from the sources specified in this Contract.
 - iv) **Tribe as own wholesaler:** records noted as subject to audit in Section VI.2 and 3 of this Contract.
- (b) **Period under review:** To verify the requirements of this Contract, the Auditor may review records for all years during the current appropriate audit cycle. Records relating to the period before the effective date of the Tribal cigarette tax are not open to review under this Part VII.

(c) **Audit cycle:**

- a biennial DC 09*
- i) The Auditor will review records on ~~bi-annual~~ basis, ~~consistent with the Tribe's fiscal year,~~ to verify the requirements of this Part unless otherwise specified. If at any time there is an audit finding or if the tribe permits tribal members to act as Tribally licensed cigarette retailers, the audit review process shall revert to an annual review process until the contract renews.
 - ii) **Review dates:** The required reviews must cover the Tribe's entire fiscal year or audit period. The Auditor must provide its findings no later than 120 days after fiscal year or audit period ends.
 - iii) **Use of Tribal cigarette tax revenue:** The auditor will review records of the Tribe on an annual basis, consistent with the Tribe's fiscal year, to verify that all Tribal cigarette tax revenue was used to fund essential government services.

(3) Format of Auditor Report

- (a) The Auditor shall provide the Department with a certified statement that, after full audit, the Auditor finds the Tribe to be in compliance with the terms of this Contract. The Department may view the full audit and any other audit report at the Tribal Offices, but may not copy the same. The audit report must indicate what types of records were examined for each party audited, what periods were reviewed, and must include a statement regarding verification of the specific requirement listed in sections 4 and 5 of this Part VII. In addition, if a statistical sampling process was used, then the report must indicate the sampling method.

(4) Tribal Retailers

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

(5) Essential Government Services

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

(6) Communication between Auditors – Confidentiality

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

(7) Dispute Resolution

In the event that either the Tribe or the Department disagrees with the Auditor's final report, either party may notify the other of the disagreement and follow the procedures for resolution of the disagreement in Sections VIII.1 and .2 of this Contract.

(8) Joint Audit Review

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.

**PART VIII
Dispute Resolution**

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

Violations of sales to minors shall be governed by Section VIII.8 of this Contract only.

(1) Informal resolution of alleged violations

- (a) If either party believes a violation of this Contract 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, and a proposed date, time and place for a meeting within fourteen (14) days of the date of receipt of the Notice of Alleged Violation. The parties agree to meet within fourteen (14) days of the date of receipt of the Notice of Alleged Violation, unless a different date is agreed to by the parties. The purpose of the meeting will be to attempt to (i) resolve, between the parties, the issue(s) identified in the Notice of Alleged Violation, and (ii) provide an opportunity to implement any agreed corrective action(s).
- (b) The party receiving notice shall have ten (10) days from the date of receipt of the Notice of Alleged Violation to respond in writing, 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.

- (c) If the parties cannot agree on whether a violation has occurred or cannot agree upon appropriate corrective action within forty (40) days of the date of receipt of the Notice of Alleged Violation, unless such time is extended by the parties, they shall submit the unresolved issue(s) to mediation pursuant to Section VIII.2.

(2) Mediation

- (a) If the parties are unable to resolve the disputed issues through the informal resolution above, either party may request mediation by sending a written mediation demand to the other party no later than forty (40) days of the date of receipt of the Notice of Alleged Violation.
- (b) The rules of the International Institute for Conflict Resolution and Prevention (CPR) for mediation shall apply, to the extent not inconsistent with this Contract.
- (c) The parties shall first attempt to agree on a mediator. If the parties cannot agree on a mediator within twenty (20) days of the date of the written mediation demand, a mediator shall be selected using the process set forth in the rules of the CPR Institute.
- (d) 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. The parties will work with the mediator to resolve their differences. If the parties are unable to reach agreement within eighty (80) days from the date of the receipt of the demand for mediation, the mediator shall render a recommendation on the unresolved issue(s) no later than ninety (90) days from the date of the receipt demand.
- (e) Following the receipt of the recommendation, the parties shall meet and may: (i) agree to accept the mediator's recommendation, in whole or in part; (ii) agree to continue their discussions in light of the mediator's recommendation; or, (iii) if they cannot agree within ten (10) days following receipt of the recommendation, either party may initiate binding arbitration, where appropriate.
- (f) The mediator shall not render an independent recommendation on issues on which the parties have reached agreement.

(3) Arbitration

- (a) If either party refuses to mediate in good faith, fails to follow the procedures in Section VIII. 2, or terminates the mediation process before its completion, or if the mediator determines that the issue(s) set forth in the Notice of Alleged Violation cannot be resolved in the mediation process, or if the dispute is not resolved within 180 days of the receipt of the Notice of Alleged Violation, either party may initiate a binding arbitration proceeding under the rules of the American Arbitration Association to determine whether there is cause for termination. The Arbitrator shall only have

jurisdiction to determine whether there is a cause for termination as defined in Section VIII.8 for which there is no cure.

- (b) The intent of this Section VIII.3 is to prevent the unsubstantiated unilateral termination of this Contract without cause. If the Arbitrator determines that there is a cause for termination as defined in Section VIII.8 and such violation has not been cured and cannot be cured within thirty (30) days of the Arbitrator's decision, then the party that initially alleged the violation may terminate this Contract by giving written notice to the other Party as required by Section VIII.11.
- (c) If the Arbitrator determines that there is not a cause for termination as defined in Section VIII.8, or that the cause for termination has been cured, then the Contract shall remain in full force and effect.
- (d) If the Arbitrator determines that there is a cause for termination as defined in Section VIII.8, but the cause for termination can be cured within thirty (30) days of the Arbitrator's decision, then the Contract shall remain in full force and effect for thirty (30) days. If the cause for termination is not cured within the thirty (30) day period, unless that period is extended by agreement of the parties, the Contract may be deemed terminated on the thirty-first (31st) day. In the event that the thirty (30) day period is extended by agreement, but the cause for termination is not cured during the extension, the Contract may be deemed terminated as of the day following the end of the extension period.

(4) Extension and Costs

- (a) To continue dispute resolution under this Part VIII past 180 days, both parties must agree in writing.
- (b) The parties shall share equally the costs of dispute resolution, except that the Parties shall bear their own attorney's fees.

(5) Remedies

Whenever an issue is submitted to mediation or arbitration under Section VIII.2 or .3, the mediator or arbitrator may recommend corrective action to remedy any violation that has occurred. Recommended remedies may include: interpretation of Contract terms; changes in reporting, record keeping, enforcement practices, or business practices; or similar actions. Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Contract.

(6) Termination of Contract

If, after no more than eight months from the receipt of 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 Part, or

if a party continues to violate the Contract term alleged to have been violated in the Notice of Alleged Violation after the Arbitrator has issued its finding of cause for termination, this Contract may be terminated by either party for cause. The parties may, after no less than 180 days following any such termination, enter into a new Contract. The termination provisions of this subsection shall not apply in the case of a disagreement that does not involve a violation of a term of this Contract for cause.

(7) Notification of For Cause Termination

- (a) Subject to the dispute resolution provisions of this Part VIII, either party may terminate the Contract for cause. For the purposes of this section, “for-cause” shall mean only the following violations:
- i) Retail sales of unstamped cigarettes during the effective period of a Tribal cigarette tax;
 - ii) Failure to submit to dispute resolution as required by this Part VIII;
 - iii) A breach of the confidentiality provisions of Part XI; or
 - iv) Failure to conduct an audit as required by Part VII
 - v) Use of tax proceeds in violation of the terms of this Contract.

- (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 this Contract. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal ordinance. Upon the third or subsequent violation within any rolling one-year period of the “sales to minors” provisions of this Contract, the provisions of Section VIII.1 shall apply.

(9) Notice Requirements

For the purposes of this Contract, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be received three (3) days after mailing of the written notice. Notice shall be given as follows:

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

To the Tribe: Chair, Swinomish Indian Tribal Community
 11404 Moorage Way
 La Connor, Washington 98257

With a copy to: Director, Office of the Tribal Attorney
 Swinomish Indian Tribal Community
 11404 Moorage Way
 La Conner, Washington 98257

(10) Sovereign Immunity

Nothing in this Contract shall be construed as a waiver, in whole or in part, of either party's sovereign immunity except for the narrow provision in Section VIII.3.

PART IX

Responsibilities of the Swinomish Indian Tribal Community, the Department of Revenue, and the Liquor Control Board

(1) Swinomish Indian Tribal Community

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

(2) Liquor Control Board

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

(3) Department of Revenue

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

PART X

Term of this Contract – Amendment

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

PART XI

Confidentiality

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

PART XII
Miscellaneous Provisions

(1) Tribe Does Not Submit to State Jurisdiction

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

(2) State Does Not Concede Tribal Immunity

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

(3) Contract Does Not Create any Third Party Beneficiaries

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

(4) Land Status

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

(5) Tobacco Master Settlement Agreement

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

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

(c) Nothing in this Contract supersedes or replaces chapter 70.157 RCW.

(6) Periodic Review of Contract Status

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

(7) Sales to Minors

The Tribe or a Tribal retailer shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of 18 years.

(8) Essential Government Services

- (a) Tribal cigarette tax revenue shall be used for essential government services. The Auditors shall certify the use of such revenue under the process set forth in Part VIII of this Contract.

- (b) Tribal cigarette tax revenue may not be used to subsidize Tribal cigarette and food retailers. "Subsidize" means that proceeds from the Tribal cigarette tax or taxes pursuant to this Contract cannot be expended on the 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 the Enterprise activities of 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's operating expenses and overhead;
 - ii) "Essential government services" includes, but is not limited to: government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering the Tribal cigarette tax stamp program under this Contract, including all deductions and exemptions similar to those available to retailers, wholesalers and others under state law; Tribal administration activities such as tax functions, contracting for health benefits, economic development, natural resources, and the provision of job services; distribution of moneys related to trust funds, education, general assistance; such activities as land and building acquisitions, and building development and construction; activities such as child care, youth care, and elder care, the provision of recreation opportunities and services; the provision of spiritual care; and cultural programs.

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

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

(10) Rule 192 – Application

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

(11) Subsequent State Legislative Enactments or a State or Federal Court Orders

Should the Legislature enact a law, or a court interpret the law, that would provide more favorable terms for the Tribe, the parties shall amend the Contract to reflect such terms.

(12) Jurisdiction

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

(13) Severability

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

THUS AGREED THIS 15th day of January, 2013.

SWINOMISH INDIAN TRIBAL COMMUNITY

STATE OF WASHINGTON

By: Brian Cladoosby
M. Brian Cladoosby, Chair

By: Christine Gregoire
Christine Gregoire, Governor