

CIGARETTE TAX CONTRACT
Between
THE UPPER SKAGIT INDIAN TRIBE
and
THE STATE OF WASHINGTON

PREAMBLE

WHEREAS, the Upper Skagit Indian Tribe is a federally recognized Indian Tribe, possessed of the full inherent sovereign powers of a government; and

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

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

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

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of this cigarette tax Contract; and

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

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

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

WHEREAS, the mutual interests of the Upper Skagit Indian Tribe and the state of Washington brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, legislation was enacted by the 57th Legislature and signed by the Governor, authorizing the signing of contracts such as this, such authority effective July 22nd, 2001; and

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

PART I Definitions

- (1) “Auditor” means an independent third party auditor selected pursuant to Part VIII section 1 of this Contract.
- (2) “Carton” or “carton of cigarettes” means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
- (3) “Cigarette” means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.
- (4) “Contract” means this contract entered into by the state of Washington and the Upper Skagit Indian Tribe.
- (5) “Department” means the Washington State Department of Revenue.
- (6) “Essential government services” means services such as Tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
- (7) “Indian country,” consistent with the meaning given in 18 U.S.C. 1151 means:
 - (a) All land within the limits of the Upper Skagit 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 an Upper Skagit Indian Tribal member or the Tribe, the Indian titles to which have not been extinguished, including rights of way running through the same.
- (8) “Local retail sales tax” means the combined Washington local retail sales taxes applicable in the area.

- (9) “NonIndian” means an individual who is neither a Tribal member nor a nonmember Indian.
- (10) “Nonmember Indian” means an enrolled member of a federally recognized Indian Tribe other than the Upper Skagit Indian Tribe.
- (11) “Parties to the agreement” or “parties” means the Upper Skagit Indian Tribe and the state of Washington.
- (12) “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.
- (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.
- (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.
- (15) “Upper Skagit Indian Reservation” or “Reservation” means the area recognized as the Upper Skagit Indian Reservation by the United States Department of the Interior.
- (16) “State” means the state of Washington.
- (17) “Tobacco products” means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. “Tobacco product” does not include cigarettes.
- (18) “Tribal member” means an enrolled member of the Upper Skagit Indian Tribe.
- (19) “Tribal retailer” means a cigarette retailer wholly owned by the Upper Skagit Indian Tribe and located in Indian country.
- (20) “Tribal cigarette tax” means the tax or taxes enacted as a provision of Tribal law on the units of cigarettes sold and on the purchase of cigarettes by retail buyers.
- (21) “Tribal tax stamp” means the stamp or stamps that indicate the Upper Skagit Indian Tribal cigarette tax imposed under this Contract is paid or that identify those cigarettes with respect to which no tax or another Tribal tax is imposed.

- (22) “Tribe” or “Tribal” means or refers to the Upper Skagit Indian Tribe, a federally recognized Tribe.
- (23) “Wholesaler” means every person who purchases, sells, or distributes cigarettes for the purpose of resale only.

PART II

Applicability of the Contract

(1) Execution of Contract

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

(2) Application

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

(3) Scope Limited

This Contract does not apply to:

- (a) Cigarettes sold at retail by nonIndians or nonmember Indians;
- (b) Tobacco products as that term is defined in Part I of this contract; and
- (c) Cigarettes manufactured by the Upper Skagit Indian 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

The Tribe agrees to notify the Department thirty days prior to the start up of cigarette sales by any Tribal retailer who begins selling cigarettes after the effective date of this Contract. The Tribe agrees that any cigarette retailer wholly owned by Upper Skagit Tribe is subject to this Contract.

(2) Tax Imposed on Sales by Tribal Retailers

- (a) The Tribe, by ordinance and in accord with the requirements of this Part, shall impose taxes on all sales by Tribal retailers of cigarettes to nonIndian and nonmember Indian purchasers within Indian country. Such ordinance may provide for compensation for wholesalers for their services in affixing the Tribal tax stamp.
- (b) 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; provided however that during the phase-in period the Tribal tax rate shall be set so that it is at least equal to 80 percent of the then current combined state cigarette tax and state and local sales tax.
- (c) Upon any future decrease in the state cigarette tax, state retail sales tax or local retail sales tax, the Tribal tax on cigarettes may decrease to a minimum of no less than 100 percent of the combined state and local tax rates provided however that during the phase-in period the Tribal tax rate shall be set so that it is at least equal to 80 percent of the then current combined state cigarette tax and state and local sales tax.
- (d) Pursuant to RCW 43.06.455, the state retrocedes from its tax during the time this Contract is in effect.

(3) Phase-In Tax Rate

Beginning no later than June 1, 2002, 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 state cigarette tax, which is expressed in cents per cigarette, plus an amount equal to 80 percent of the state and local retail sales taxes (the “Commencement Date”).

(4) Final Tax Rate

No later than 36 months after the Commencement Date under this Contract and subject to the phase-in reduction under this Part, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than the sum of: an amount equal to 100 percent of the state cigarette tax, which is expressed in cents per cigarette, plus an amount equal to 100 percent of the state and local retail sales taxes.

(5) Reduction in Three Year Phase-In – How to Determine

Commencing one year from the Commencement Date, if during any quarter, the number of cartons of cigarettes, excluding those manufactured by the Upper Skagit Indian Tribe or its enterprises, that are sold at retail exceeds by at least 10 percent the quarterly average sales of the six months preceding the end of the first year after the commencement date of the Tribal tax, the 36 month period noted above shall be reduced by three months. The quarterly average sales baseline shall be determined by the Auditor. The Auditor shall notify the Tribe and the Department when the retail sales for any one quarter exceed the baseline by at least ten percent. These reductions will be cumulative. For the purposes of this provision:

- (a) “Quarter” means a three-month period, each quarter immediately succeeding the next. The first quarter begins June 1, 2002; and

- (b) The “quarterly average sales” means the sum of the retail sales made during the two quarters divided by two.

(6) Phase-in Audit requirements

- (a) One year after the Commencement Date, the Auditor will be responsible for reviewing the records of each Tribal retailer to establish the quarterly average sales baseline for the six month period preceding the end of the first year after the Commencement Date of the Tribal cigarette tax. Once this baseline has been established, the Auditor is not required to recalculate this information.
- (b) During the phase-in period, the Auditor will be responsible for reviewing the records of each Tribal retailer to determine the retail sales volume for each quarter. This review must take place on no less than a semi-annual basis. The Auditor will notify the Tribe and the Department when the retail sales for any one quarter exceeds the quarterly average sales baseline by at least ten percent. Based on the findings from the Auditor, the phase-in period will be adjusted according to the provisions in this Part III of this Contract.
- (c) The first required review must cover the six-month period ending December 1, 2003. This review may take place with the regularly scheduled audit at the end of the tribe’s fiscal year on December 31, 2003. If the retail sales for both of these quarters exceed the quarterly average sales baseline by at least ten percent, the second required review must take place in May 2004. The Auditor may calculate a projected sales volume for the remainder of the quarter in order to determine whether the retail sales for that quarter exceed the baseline by at least ten percent. If the retail sales in both quarters prior to December 1, 2003, do not exceed the baseline, the second required review may take place in June 2004.

PART IV

Purchase of Cigarettes by Tribal Retailers

(1) Wholesale Purchases – Requirements

The Tribe agrees to add to Tribal law, and maintain in effect, a requirement that the Tribal retailers purchase cigarettes only from:

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

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

Cigarettes bearing the Upper Skagit Indian Tribe Tribal tax stamp required by this Contract may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a Tribal retailer, subject to meeting any notification requirements of this Contract. Such cigarettes must be accompanied by invoices identifying the cigarettes as Upper Skagit Indian Tribe cigarettes.

PART V
Tribal Tax Stamps

(1) Tribal Tax Stamp Required

All cigarettes sold by the Tribal retailer shall bear a Tribal tax stamp. The Tribe may by ordinance allow for an exemption from this tax for enrolled Upper Skagit 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 Contract.

(2) Creation and Supply of Tribal Tax Stamps

- (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 Procedures

- (a) The Tribe, as part of its tax administration function, shall maintain and distribute tax stamps, and is deemed the “stamp vendor” for purposes of this Contract. The Tribe, by ordinance, shall establish verifiable procedures for ordering, receiving, and inventorying tax stamps. The Tribe agrees that such procedures will include the following:
 - (i) The Tribe shall maintain the tax stamps in a secure location under 24 hour video surveillance.
 - (ii) The Tribe shall only distribute tax stamps to wholesalers authorized to receive and affix stamps under this Contract.
- (b) The Tribal ordinance shall also require 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.
- (c) The Tribe agrees that its contract with the stamp manufacturer shall require that on a quarterly basis the stamp manufacturer provide the Department with the number of stamps provided to the Tribe.
- (d) The Tribe agrees that it will direct the Auditor to provide on a quarterly basis a count of the stamps that have been distributed by the Tribe to wholesalers during the preceding quarter and a count of the stamps in the Tribe’s possession.
- (e) The Tribe agrees to invite the Department to view its security system and stamp storage area.
- (f) 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

- (a) Wholesalers shall be responsible for affixing the Tribal tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribal retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp. Stamps shall be affixed so that they may be readily viewed by inspection.

(b) Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix Tribal tax stamps to the packages for sale. It is presumed that any such possession in excess of 72 hours is in contravention of this Contract.

(5) Wholesaler Obligation Under State Law

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

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

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

**PART VI
Wholesalers**

(1) Wholesalers Licensed by the State

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to state tax and which cigarettes are subject to the Upper Skagit Indian Tribe 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 Contract, must certify by letter to the Department that they will and can meet the terms of this Contract.
- (b) The out-of-state self-certified wholesaler must be licensed to do business as a cigarette wholesaler with the state in which they reside.
- (c) The Upper Skagit Indian Tribe shall require compliance with this Contract in its contracts with any such out-of-state self-certified wholesalers and shall provide copies of such contracts to the Auditor for its review. The contract between the Tribe and the out-of-state self-certified 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 Upper Skagit Indian Tribe. Such invoices shall provide an order number that matches the order number provided under Part VII section 2 of this Contract 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 tax stamps are properly affixed to the cigarette containers.

- (d) An out-of-state self-certified wholesaler who has provided a letter of certification to the State and who has a contract with the Tribe, in which contract the wholesaler agrees to abide by the terms of this Contract, shall be referred to as a “self-certified wholesaler.”
- (e) The Tribe recognizes the State’s interest in having access to verifiable information regarding stamped cigarettes. The State recognizes the Tribe’s interest in procuring cigarettes at favorable prices and understands that the Tribe will seek out such pricing. The Tribe agrees that it will provide a letter to the Department setting forth its policy regarding purchases from self-certified wholesalers. The Tribe agrees that it will purchase cigarettes from self-certified wholesalers only if it cannot obtain the same cigarettes at the same or lower prices from in-state licensed wholesalers.

(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 Contract, must certify by letter to the Department that they will and can meet the terms of this Contract.
- (b) The Upper Skagit Indian 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. The contract 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 Upper Skagit Indian Tribe. Such invoices shall provide an order number that matches the order number provided under Part VII section 2 of this Contract 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 tax stamps are properly affixed to the cigarette containers.
- (c) A Tribal wholesaler who has provided a letter of certification to the State and who has a contract with the Tribe, in which contract the wholesaler agrees to abide by the terms of this Contract, shall be referred to as a “self-certified tribal wholesaler.”
- (d) The Tribe recognizes the State’s interest in having access to verifiable information regarding stamped cigarettes. The State recognizes the Tribe’s interest in procuring cigarettes at favorable prices and understands that the Tribe will seek out such pricing. The Tribe agrees that it will provide a letter to the Department setting forth its policy regarding purchases from self-certified tribal wholesalers. The Tribe agrees that it will purchase cigarettes from self-certified tribal wholesalers only if it cannot obtain the same cigarettes at the same or lower prices from in-state licensed wholesalers.
- (e) This Contract contemplates that the Upper Skagit Indian Tribe may, at some future date, act as its own wholesaler. In the event that the Upper Skagit Indian 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 the Tribal retailers, that wholesale activity does not require a memorandum of agreement under this subsection (e).

PART VII
Enforcement Authority and Responsibility of Liquor Control Board

(1) Intent

Engrossed Substitute Senate Bill (ESSB) 5372 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) Notification

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

PART VIII
Independent Third Party Auditor

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 in 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) Tribe to Contract with Third Party Auditor

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. The Auditor will be retained by the Tribe and the Tribe shall bear the costs of the auditing services. The Tribe shall be entitled to freely communicate with the Auditor. The Auditor must be a certified public accountant licensed by the state of Washington and in good standing, such good standing subject to confirmation 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.

(2) Audit Protocol

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

- (a) Period under review: To verify the requirements of this Contract, the Auditor must review records for all years during the current appropriate audit cycle, and may review records for earlier years only as necessary for an internal reconciliation of the person's

books. However, records relating to the period before the effective date of the Tribal cigarette tax are not open to review except to verify the quarterly average sales baseline as described in section 7 of this Part. In situations where the Auditor is responsible for verifying records on less than an annual basis, the period under review shall not include years previously reviewed by the Auditor, except when a violation is alleged to have occurred during the period previously reviewed.

- (b) Records to be examined: To verify the requirements of this 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 activities of the Upper Skagit Indian Tribe, unless a review of the records is necessary for an internal reconciliation of the books.
 - (i) Self-certified wholesaler and self-certified tribal wholesaler: records and invoices of stamp purchases, records and invoices of sales of stamped cigarettes, stamp inventory, and the stamping process.
 - (ii) 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.
 - (iii) Tribal retailers: records and invoices of cigarettes purchased from licensed wholesalers, self-certified wholesalers, self-certified tribal wholesalers and manufacturers, records and invoices of cigarettes sold, cigarette inventory, and additional records necessary to verify whether Tribal cigarette tax revenue was used in accordance with the requirements of Part XIII section 8 and records to verify that the retail selling price included the applicable tribal taxes.
 - (iv) Tribe: records necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services of the Tribe.

(3) Report Format

- (a) Until such time as a court orders disclosure of the Auditor's report, the Auditor must submit its findings in final written reports to the Tribe, with a copy to the Department. The report must indicate what types of records were examined for each party audited, what periods were reviewed, and must include a statement regarding verification of the specific requirement identified in sections 5-8 of this Part. In addition, if a statistical sampling process was used, the report must indicate the sampling method used.
- (b) In the event that the Department either voluntarily or under court order discloses any information with respect to any Audit or other financial information provided by the Tribe, then from that point forward the Auditor shall merely 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 audit at the Tribal Offices, but may not copy the same.

(4) Initial Review

The first required review must cover the period starting on the effective date of the tax and ending December 31, 2002, and the Auditor must report its findings to the Tribe by April 1, 2003.

(5) Self-Certified Wholesalers and Self-Certified Tribal Wholesalers

- (a) The Auditor will be responsible for reviewing the records, identified in subsection (2)(b)(i) of this Part, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to a Tribal retailer to verify that the Tribal cigarette tax was paid by the wholesaler, unless paid to the stamp vendor by the Tribal retailer, and that the stamps were correctly affixed to containers of cigarettes.
- (b) The Auditor must review the records, identified in subsection (2)(b)(i) of this Part, of all self-certified wholesalers and self-certified tribal wholesalers that sell cigarettes to a Tribal retailer no less than once every four years. If a wholesaler that previously sold cigarettes to a Tribal retailer stops making such sales, the Auditor must review the records of that wholesaler during the next regularly scheduled annual audit.

(6) Stamp Vendors

- (a) The Auditor will be responsible for reviewing the records, identified in subsection (2)(b)(ii) of this Part, of the stamp vendor to verify that Tribal cigarette taxes paid by wholesalers, or other party responsible under this Contract, were remitted to the Tribe.
- (b) The review required under this section must take place no less than once every four years.

(7) Tribal Retailer – Phase-In Period

See Part III section (6).

(8) Essential Government Services

The Auditor will be responsible for reviewing the records of the Tribe and the Tribal retailer to certify that Tribal cigarette tax revenue is used for essential government services. The Auditor will also be responsible for certifying that the Tribal cigarette tax revenues are used in accordance with the requirements of Part XIII section 8 of this Contract. The review under this section shall take place on an annual basis.

(9) Joint Audit Implementation and Review

The Tribe and the State shall meet jointly with the Auditor prior to the beginning of an audit cycle. The purpose of such meeting is to discuss the objectives of the upcoming audit, the expectations of both the Tribe and the State, the audit standards to be used in such audit, and any issues regarding detail of the audit, records pertinent to the review, or substance of the Auditor’s report. As soon as possible after the issuance of the Auditor’s final report, the Tribe and the State shall meet jointly with the Auditor to review the report and discuss any issues of concern. For the purposes of this section 9, “audit cycle” refers to the reoccurring scheduled audit of an entity. For example the audit cycle of a self-certified wholesaler is four years.

(10) Dispute Resolution

In the event that either the Tribe or the Department disagrees with the Auditor’s final report, either party may notify the other of the disagreement and follow the procedures for resolution of the disagreement in Part IX section 6 of this Contract.

PART IX Dispute Resolution

The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.

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

(1) Notification of Violation

If either party believes a violation of the agreement has occurred, it shall notify the other party in writing. The notice shall state the nature of the alleged violation and any proposed corrective action or remedy. The parties agree to meet within 14 days of receipt of the notice, unless a different date is agreed to by the parties. The purpose of the meeting will be to attempt to resolve between themselves the issues raised by the notice of possible violation, and provide an opportunity to implement any agreed corrective action.

(2) Mediation

(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 a written mediation demand to the other party. Mediation shall be a condition precedent to dispute resolution by arbitration. The parties shall first attempt to agree on a mediator. If the parties cannot agree on a mediator within 30 days of written demand, a three person mediation panel shall be used and shall be selected as follows: each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator.

(b) The parties shall share equally the costs of mediation.

(3) Arbitration

If mediation does not resolve the disputed issues within 90 days of the mediation demand, either party may request that any unresolved issues be submitted to binding arbitration by submitting a written arbitration demand to the other party. Upon receipt of an arbitration demand, the parties shall proceed to select an arbitrator by the same method as mediators are selected. The arbitrator shall establish a timeline to ensure an arbitration decision is reached no later than four months from the date of the arbitration demand. Any corrective action ordered by the arbitrator must be taken no later than 30 days after issuance of the arbitrator’s decision, unless a different time for compliance is specified in the arbitrator’s decision. The parties shall share equally the costs of arbitration.

(4) Remedies

Whenever an issue is submitted to mediation or arbitration under this section, the mediators may recommend, or the arbitrators may direct, corrective action to remedy any violation that has occurred. In no case shall a mediator or arbitrator render an independent recommendation or decision on any issue on which the parties reach agreement. Remedies may include: audit of relevant tribal records, interpretation of Contract terms, changes in

reporting, record keeping, enforcement practices, business practices, or similar actions. Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Contract.

(5) Termination of Contract

If, after no more than eight months from the initial Notice of Violation, the parties are unable to resolve a disagreement regarding an alleged violation and/or the appropriate corrective action using the dispute resolution methods authorized in this section, or if a party continues to violate a Contract term after the completion of the arbitration process authorized in this section, this Contract may be terminated. The parties may, after no less than six months following any such termination, enter into a new Contract.

(6) Disagreements Regarding Reports of the Auditor

Should either party have a concern about a report from the Auditor, which cannot be resolved through the joint audit review process described in Part VII section 8 of this Contract, that party may choose to resolve the concern through the use of a mediator. Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Contract. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

(7) Notification of For Cause Termination

- (a) Upon 45 days written notice, either party may terminate the Contract for cause. For the purposes of this section, “for cause” shall mean only the following violations:
- (i) Retail sales of unstamped cigarettes during the effective period of a Tribal cigarette tax;
 - (ii) Failure to submit to mediation or arbitration as required by this Part VIII;
 - (iii) Failure to take action as required by an arbitrator’s decision reached in compliance with this Part VIII;
 - (iv) A breach of the confidentiality provisions of Part XI of this Contract;
 - (v) Use of tax proceeds in violation of the terms of this Contract.
- (b) The party seeking the termination for cause shall notify the other party and the mediation organization, who shall select a mediator to review the facts upon which the for cause termination notice is based. The party making the allegation must provide a written recitation of the facts with the notice of termination. The responding party has ten days to provide its facts to the mediator. If the mediator determines that the alleged event has occurred, the Contract is terminated, however the party making the allegation may choose to go through the regular dispute resolution process in regard to the issue.
- (c) The parties shall use their best efforts to resolve the dispute within the 45-day notice period. If the parties reach agreement, or the for cause violation is corrected during the notice period, the Contract shall not be terminated.

(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 1 of this Part 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 given on the date of actual receipt. Notice shall be given as follows:

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

To the Tribe: Chair, Marilyn Scott
25944 Community Plaza Way
Sedro Woolley, WA 98284

Doreen Maloney
Acting General Manager
25944 Community Plaza Way
Sedro Woolley, WA 98284

With a copy to: Harold Chesnin
1920- 32nd Avenue South
Seattle, WA 98144

(10) Sovereign Immunity

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

PART X

Responsibilities of the Upper Skagit Indian Tribe, the Department of Revenue, and the Liquor Control Board

(1) Upper Skagit Indian Tribe

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

(2) 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 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 XI

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 IX of this Contract. The Contract shall be automatically renewed for successive periods of eight years, unless either party objects in writing at least 30 days prior to the expiration date. Amendments to the Contract shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Contract shall be subject to the dispute resolution process in Part IX of this Contract.

PART XII

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 XIII

Miscellaneous Provisions

(1) Tribe Does Not Submit to State Jurisdiction

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

(2) State Does Not Concede Tribal Immunity

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

(3) Contract Does Not Create any Third Party Beneficiaries

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

(4) Land Status

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

(5) Tobacco Master Settlement Agreement

- (a) This Contract is not intended to impact the State's share of proceeds under the master settlement agreement entered into by the State on November 23, 1998.
- (b) The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the master settlement agreement. The Tribe agrees to not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters.
- (c) Nothing in this Contract supercedes or replaces chapter 70.157 RCW.

(6) Periodic Review of Contract Status

Appropriate representatives of the Tribe and of the Department shall hold periodic meetings to review the status of this Contract and any issues that have arisen under the Contract. Those meetings shall be held no less frequently than once every 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 Auditor 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 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) "Non-enterprise activities" include, but are not limited to: government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering the Tribal cigarette tax stamp program under this 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; and distribution of moneys related to trust funds, education, and general assistance.

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

Upper Skagit under Upper Skagit Indian Tribal law, only Tribal retailers are permitted to make retail cigarette sales within Indian country.

(10) Rule 192 – Application

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

(11) Subsequent State Legislative Enactments

Should the Legislature enact a law that provides more favorable terms for the Upper Skagit Indian 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 _____ day of _____, 2002.

UPPER SKAGIT INDIAN TRIBE

STATE OF WASHINGTON

By: _____
Marilyn Scott, Chairman

By: _____
Gary Locke, Governor