



FILED

OCT 15 2013

OKLAHOMA SECRETARY
OF STATE



TOBACCO TAX COMPACT BETWEEN THE STATE OF OKLAHOMA AND THE CITIZEN POTAWATOMI NATION

ARTICLE I **PURPOSE AND INTENT OF PARTIES**

WHEREAS, the Citizen Potawatomi Nation (hereinafter referred to as "Nation"), is a federally recognized Indian tribe¹ with inherent sovereign powers of self-government;

WHEREAS, the State of Oklahoma (hereinafter referred to as "State") is an independent sovereign state within the United States of America possessed of full powers of state government;

WHEREAS, both the State of Oklahoma and the Citizen Potawatomi Nation recognize that pursuant to applicable law each is a sovereign with dominion over their respective territories and governments. Entry into this contract is not intended nor shall it be construed to cause the sovereignty of either to be diminished;

WHEREAS, the Nation and its members² are in possession of various tracts of land in its jurisdiction within the State, known and commonly referred to as "Indian Country";

WHEREAS, the State, by and through the United States Supreme Court decision *Oklahoma Tax Commission vs. Citizen Band Potawatomi Indian Tribe of Oklahoma*, is

¹ "Federally recognized" tribe means any Indian tribe which has met the requirements established by the terms of the Indian Reorganization Act, 48 Stat. 984, as amended; the Oklahoma Indian Welfare Act, 49 Stat. 1967, as amended; or is one of those tribes listed in the Federal Register pursuant to 25 CFR Part 83 as recognized by and receiving services from the Bureau of Indian Affairs, as provided for in *Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 58 Federal Register 54364 (October 21, 1993).

² "Member" means an individual who meets the membership requirements of the Nation as set forth in its governing document or is listed on the tribal roll of the Nation as a member, see 25 CFR § 81.1(i) (1996) and 25 C.F.R. § 83.11 (1996).

046522

authorized to collect state taxes on cigarettes and other tobacco products sold by tribal businesses to non-tribal members;

WHEREAS, federal Indian law recognizes that tribal jurisdiction is extant in Indian Country regarding the rights of Indian Tribes to pass their own laws and be governed by them, including the right to sell cigarettes and other tobacco products to tribal members free from State taxation;

WHEREAS, both the State and the Nation recognize the financial, cultural, educational and economic contributions of each sovereign;

WHEREAS, both the State and the Nation recognize the need to develop and maintain good Tribal/State governmental relations;

WHEREAS, Article 6, Section 8 of the Oklahoma Constitution vests the power and authority to conduct the business of the State with other sovereign states and with the United States to the Governor of the State of Oklahoma; and,

WHEREAS, for the purposes of the Oklahoma Constitution and this Compact, the Citizen Potawatomi Nation does hereby constitute a sovereign state;

ARTICLE II

TERMS OF TAXATION ON SALE OF TOBACCO PRODUCTS

NOW, THEREFORE, the Citizen Potawatomi Nation, by and through its Chairman, John A. Barrett, and the State of Oklahoma, by and through its Governor, Mary Fallin, do hereby enter into this Compact, the terms of such Compact to commence on November 1, 2013, for the mutual benefit of the Nation and the State, to-wit:

- 1) The provisions of this Compact shall govern the rate of taxation and payment of taxes to the Nation and the State on the retail sales of cigarettes and other tobacco products in the Nation's Indian Country as defined by federal law, including 18 U.S.C. § 1151, hereinafter referred to as "Compact Jurisdiction" when said retail sales are made by (a) businesses owned by the Nation, (b) licensees who are members of the Nation, or (c) businesses licensed by the Nation in which the majority interest is owned by the Nation or members of the Nation, provided that nothing herein shall prohibit the Nation from enacting any laws and/or regulations regarding the retail sale, use, or possession of cigarettes and other tobacco products in the Nation's jurisdiction that would not be in conflict of the laws of the State of Oklahoma or the provisions set forth herein. The entities or groups described in clauses (a), (b), and (c) of this paragraph shall be collectively referred to as the "Retailers" or individually as a "Retailer." Nothing contained herein shall impair the ability of the Oklahoma Tax Commission to regulate cigarette manufacturers, importers, wholesalers, distributors, distributing agents, jobbers, or warehousemen ("Wholesalers"), provided such regulation shall not interfere with the rights of the Nation or its Retailers under this Compact.

- 2) The Nation agrees to:
 - a. Require as a condition to licensing and continuation of licensing that all Retailers comply with the provisions of this Compact; and
 - b. Furnish to the Oklahoma Tax Commission the following information with respect to each of the Retailers:
 - i. The owner's name(s) and address(es);
 - ii. A list of any tax-related permits held;
 - iii. Documentation or certification that its business premises are located within the Compact Jurisdiction, such as trust land documentation;
 - iv. The location of offices and business records;
 - v. A copy of any reports by any Wholesalers or Retailers to the Nation documenting all sales of cigarettes and other tobacco products within the Compact Jurisdiction;
 - vi. An annual list of all Wholesalers providing Retailers within the Compact Jurisdiction with cigarettes or tobacco products; and
 - vii. If available, any complaints, audit reports or concluded investigation findings related to the wholesale or retail sale of cigarettes or tobacco products within the Compact Jurisdiction.
- 3) The State agrees to provide the following information from the Oklahoma Tax Commission to the Nation's Tax Commission unless unavailable to the Oklahoma Tax Commission:
 - a. The name and address of Wholesalers licensed by the State;
 - b. The number and dollar amount of Compact stamps purchased by Wholesalers for sale to Retailers;
 - c. A copy of any reports by Wholesalers or Retailers to the State documenting wholesale or retail sales within the Compact Jurisdiction;
 - d. A current list of all Wholesalers providing the Retailers with cigarettes or tobacco products; and

- e. Any complaints, audit reports or concluded investigation findings related to the wholesale or retail sale of cigarettes or tobacco products within the Compact Jurisdiction.
- 4) The State and Nation stipulate and agree, for the sole purposes of the provisions of paragraph 3 hereof, the Nation is and shall be considered by the State as a "foreign country" for purposes of permissible disclosures to the Nation pursuant to 68 O.S. § 205 C.7 and the Nation is and shall be considered by the State as an "international authority" for purposes of 68 O.S. § 312.1.J.
- 5) The State and Nation further stipulate and agree, for the sole purposes of the provisions of paragraph 3 hereof, this Compact shall constitute a "contract" between the Nation and the Oklahoma Tax Commission for purposes of permissible disclosures to the Nation pursuant to 68 O.S. § 205.C.16. The Nation and the State, in consideration hereof, stipulate and agree that any information received from the records and files of the Oklahoma Tax Commission or the Citizen Potawatomi Nation's Tax Commission will be treated and considered as confidential and privileged, to be used for the Nation's or the State's purposes in the administration and collection of the Compact Tax, state tobacco taxes and collection of tobacco manufacturer escrow payments under 37 O.S. § 600.21 through 600.23, and enforcement under 68 O.S. § 360.1 through 360.9, which are the subject of this Compact, and not be disclosed to any third party, including, but not limited to the Nation's Retailers and any and all manufacturers, distributors and wholesalers of cigarettes and other tobacco products. A disclosure to a governmental agency for regulatory or enforcement purposes, to a court in response to a subpoena or other court order, for the State's collection of taxes or manufacturer's escrow payments and related actions, or to enforce the provisions of this Compact through arbitration or court action, shall not constitute a breach of this paragraph.
- 6) The State acknowledges that the Nation has the absolute right to tax its citizens on tribal lands and that the State tobacco tax does not apply to sales to members of the Nation that occur on tribal lands. Additionally, the Nation acknowledges that the State tobacco tax does apply to sales to non-members of the Nation, even if they occur on tribal lands and without the Nation's consent.
- 7) The State and Nation agree to waive their absolute taxation rights identified in ¶ 6 above and, instead, impose a Compact Tax, as described herein. The Compact Tax rate will apply on lands owned by the Nation and its members, which are held in trust by the United States, or which are owned by members of the Nation and are subject to restricted title, and are within the Nation's jurisdiction within the State, known and commonly referred to as "Indian Country." The State and Nation agree that the Compact Tax rate will apply to all sales of cigarettes and tobacco products by Retailers within the Compact Jurisdiction, without reference to the Tribal membership or non-membership status of the ultimate purchasing consumer.

- 8) The Compact Tax amount shall be one-hundred percent (100%) of all applicable State taxes on cigarettes and other tobacco products, in effect at the time of sale. The State and Tribe agree that the tax shall be collected pursuant to ¶ 9 and ¶ 11 of this Compact. The State and Nation shall divide all monies generated under the Compact Tax according to the following:
- a. From November 1, 2013, through December 31, 2016:
 - i. State Portion
 - 1. The State shall receive forty percent (40%) of all Compact Taxes collected on cigarettes and other tobacco products that are subject to this Compact.
 - ii. Tribal Portion
 - 1. The Tribe shall receive sixty percent (60%) of all Compact Taxes collected on cigarettes and other tobacco products that are subject to this Compact.
 - b. From January 1, 2016, through such time as this Compact is no longer in effect:
 - i. State Portion
 - 1. The State shall receive fifty percent (50%) of all Compact Taxes collected on cigarettes and other tobacco products that are subject to this Compact.
 - ii. Tribal Portion
 - 1. The Tribe shall receive fifty percent (50%) of all Compact Taxes collected on cigarettes and other tobacco products that are subject to this Compact.
- 9) The Nation agrees that the State may collect the Compact Tax directly from the Wholesaler, and that the Wholesaler must collect the Compact Tax directly from the Retailers. The Nation agrees to require the Retailers to: (A) pay the Compact Tax; and (B) refrain from selling, distributing, transporting, soliciting sales of or in any matter dealing with cigarette brands and products of manufacturers who do not fully comply with the requirements of 37 O.S. §§ 600.21-600.23 and 68 O.S. §§ 360.1-360.9 and only deal in tobacco products of complying manufacturers and brands, as evidenced by their names and list of brands as maintained on the Oklahoma Attorney General's website. If any Retailer purchases cigarettes or tobacco products from an unlicensed Wholesaler, or directly from a manufacturer, or fails to comply with any of its obligations under this paragraph, the Nation

shall take necessary enforcement measures to ensure compliance with this paragraph by the Retailer. If the Retailer continues to violate any obligations of this paragraph fifteen (15) days following notification to the Nation and Retailer from the State, the State may remove such Retailer from the list of Retailers entitled to benefits under this Compact, and/or take direct legal or equitable action in State Court against such Retailer, until such time as the Retailer is in compliance with its obligations hereunder, makes restitution and the Nation and State certifies the Retailer's compliance to the State. Upon such certification, the Retailer shall be returned to the list. The second time that a Retailer purchases cigarettes or tobacco products from an unlicensed Wholesaler, or directly from the manufacturer, or fails to comply with any of its obligations under this numbered paragraph, the State at its option, may require that the Nation permanently remove the Retailer from the list of Retailers entitled to the benefits under this Compact.

- 10) The State requires, and the Nation authorizes, all Wholesalers licensed by the State and selling cigarettes or tobacco products to any Retailer to:
 - a. Provide sufficient documentation to the Nation and to the Oklahoma Tax Commission to demonstrate that the appropriate Compact Taxes have been remitted. Such documentation shall be maintained by the Wholesalers for a period of at least five (5) years following distribution or sale of cigarettes or other tobacco products. If any Wholesaler selling cigarettes or tobacco products to a Retailer fails to properly collect and remit the Compact Tax, the State may take necessary enforcement measures to ensure compliance with this paragraph by the Wholesaler, including, but not limited to, entry and inspection of records within and without the Compact Jurisdiction.
 - b. Payment of the Compact Tax on cigarettes shall be evidenced by use of a single joint stamp, sometimes known as the "unity rate" stamp, which Oklahoma licensed Wholesalers shall purchase from the Oklahoma Tax Commission and affix to packs of cigarettes sold to the Nation's licensed Retailers. The Compact Tax shall be collected by the Oklahoma Tax Commission, by the sale of the single joint/unity rate stamp to Wholesalers.
- 11) The Oklahoma Tax Commission shall distribute to the Nation the Tribal Portion of the Compact Tax receipts not yet distributed to the Nation not later than thirty (30) days after the end of each calendar month.
- 12) The State shall notify the Nation in writing when a distribution is to be withheld and/or reduced and must state the reasons for withholding and/or reducing the distribution. Justifications which may be asserted for withholding and/or reducing distribution of the Tribal Portion of the Compact Tax include, but are not limited to:

- a. The notice and invocation of termination rights pursuant to Article III of this agreement, including the right of setoff;
 - b. Interference by the Nation in the collection of Compact Tax receipts; and
 - c. Receipt of duly authorized Court or Arbitration orders to withhold or enjoin payment.
- 13) The Nation agrees that it will require the Retailers to purchase cigarettes and other tobacco products only from Wholesalers that are duly licensed by the State of Oklahoma. The Nation agrees that the Compact Tax, provided for in this Compact, applies only to the Retailers' retail sales of cigarettes to the consumer, and the Nation agrees to require its Retailers not to sell or otherwise transfer cigarettes or tobacco products stamped with the tax stamp authorized under this Compact to anyone other than the consumer. Except for transfers between Retailers authorized to sell tobacco products at the designated Compact Tax rate for each location under this Compact, the Nation agrees to prohibit its Retailers from selling or otherwise transferring cigarettes or other tobacco products stamped with Compact tax stamps to anyone other than the consumer at retail outlets located in the Nation's Jurisdiction, including sales or transfers to other retailers outside the Nation's Jurisdiction.
- 14) All cigarettes sold by the Retailers shall bear a single joint use/unity rate stamp, evidencing that the Compact Tax has been paid by the Retailer.
- 15) The State and Nation further stipulate and agree, that
 - a. Unstamped cigarettes, counterfeited stamped cigarettes, mutilated stamped cigarettes, tobacco products and brands not approved (as reflected by publication on the Oklahoma Attorney General Website), and cigarettes and tobacco products on which the Compact Tax is required to be paid pursuant to this Compact and which has not been paid, are contraband and each party has the right to seize such contraband within its respective jurisdiction.
 - b. The State's prohibition against Cigarette Rolling Vending Machines, 68 O.S. § 380, shall also apply to all businesses, facilities, and retailers, regardless of tribal ownership and/or operation, that are within the Compact Jurisdiction.
 - c. The State shall exempt all sales of cigarettes and other tobacco products to and by the Nation's Retailers from sales and excise taxes imposed by Title 68 of the Oklahoma Statutes in consideration of the agreement by the Nation to require the Wholesalers to make the aforementioned tax payments to the Oklahoma Tax Commission.
- 16) The Nation agrees that the Nation and the Nation's Retailers will not sell, distribute, transport, solicit sales for, or in any manner deal with cigarette brands

and tobacco products of a manufacturer who does not fully comply with the requirements of 37 Okla. Stat. §§ 600.21 through 600.23 and 68 Okla. Stat. §§ 360.1 through 360.9, and will only deal in tobacco products of complying manufacturers, as evidenced by the placement of the manufacturer's name and its product brands on the list of complying manufacturers and brands maintained on the Oklahoma Attorney General's website.

ARTICLE III **GENERAL PROVISIONS**

- 17) The parties shall attempt to resolve all disputes amicably and voluntarily whenever possible. A party asserting noncompliance or seeking an interpretation of this Compact first shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual basis for the claim. Representatives of the State and the Nation shall meet within thirty (30) days of receipt of notice in an effort to resolve the dispute.
- a. Any and all disputes arising, whether directly or indirectly, out of the interpretation, performance or enforcement of this Compact, which are not resolved by good faith negotiations with thirty (30) days, shall be determined: (1) through litigation in the United States District Court for the Northern District of Oklahoma, and any courts to which appeals therefrom may be taken (the "Specified Courts"), which shall have the sole and exclusive jurisdiction of any and all such disputes; or (2) if the Specified Courts lack jurisdiction, through an arbitration, as set forth herein; or (3) by unilateral termination.
 - b. In any arbitration hereunder, a dispute shall, unless otherwise agreed upon by the parties, be resolved by three arbitrators, one of which shall be chosen by the State, one of which shall be chosen by the Nation, and one of which shall be chosen by the other two arbitrators selected. Such arbitration shall be conducted at a location to be agreed upon by the parties or, in the absence of such agreement, by the arbitrators. The arbitrators shall issue written findings of fact and conclusions of law, which may be confirmed in accordance with the Federal Arbitration Act, and reduced to a judgment. The party initiating arbitration shall be responsible for the payment of all costs associated with such filing. The parties each shall pay one-half of the fees and costs of the arbitrators.
 - c. The parties hereto mutually waive any claim of sovereign immunity they might have, including but not limited to, Eleventh Amendment immunity or exhaustion of tribal remedies, to the extent, and only to the extent, necessary for a determination of rights and liabilities, if any, by the Specified Courts or in an arbitration and for the enforcement of any determination upon its becoming a final, non-appealable judgment. The limited waiver of sovereign

immunity granted herein shall not be construed to allow any award of money damages, including direct, consequential, punitive, or exemplary damages against either party, and neither shall this waiver permit the allowance of any award of attorney's fees or costs.

- d. The parties agree that nothing herein is intended to create a direct right of action against the Nation or the State by any person or entity not a party hereto through court action, arbitration or otherwise for any matter related to this Compact, its interpretation or performance or nonperformance of the parties hereto, except as otherwise set forth herein, and the limited waiver of sovereign immunity set forth herein shall not extend to any person or entity or party other than the State and the Nation.
- 18) Either party may unilaterally terminate this Compact without cause by giving the other party one hundred and eighty (180) days' written notice in accordance with Paragraph 23 hereof. Such notice shall include a statement of basis for exercise of discretion. Both parties agree that should either invoke unilateral termination that the terminating party will meet at least twice within sixty (60) days of providing notice, if the non-terminating party so requests.
 - 19) Oklahoma law shall govern the resolution of any and all disputes relating to the interpretation, performance, or breach of this Compact, or any disputes otherwise arising under this Compact, regardless of venue.
 - 20) This agreement shall terminate on December 31, 2023. Nothing in this Compact shall prevent the parties by mutual agreement from establishing an earlier or later termination date or otherwise modifying this agreement.
 - 21) By entering into this Compact, the Nation does not concede that the laws of the State of Oklahoma, including its tax and licensing laws, apply to the Nation or its members regarding activities and conduct within the Nation's Jurisdiction.
 - 22) Neither party shall be deemed the drafter of this Compact in the event of any action to interpret its terms. Therefore, the rule of construction that in the case of an ambiguity, the ambiguity is construed against the author is not applicable. Furthermore, any rule of construction of ambiguities either in favor of or against a State or Tribal governmental entity is not applicable to this Compact.
 - 23) Notice shall be by United States mail, postage prepaid. Any notice required hereunder to the State shall be delivered to the Governor of the State of Oklahoma at 2300 N. Lincoln Blvd., Room 212, Oklahoma City, Oklahoma 73105-4890. Notification by the State shall be made by the Governor or designee in writing to the Chairman of the Citizen Potawatomi Nation 1601 S. Gordon Cooper Dr., Shawnee, OK 74801. Notification by the State and Nation shall also be filed with the Office of the Oklahoma Secretary of State.

- 24) The effective date of this Compact shall be November 1, 2013, when fully executed by all parties, and there is attached hereto the original, or a properly certified copy, of the properly prepared and approved resolution of the legislative body, or similar document of the Nation authorizing the Nation to enter into and execute this agreement. The approved resolution, or similar document, shall be accompanied by a letter from counsel for the Nation certifying that such resolution, or other tribal action, fully and regularly complies with tribal law and was obtained in accordance with all necessary legal and procedural requirements.
- 25) Nothing in this Compact shall be deemed to authorize the State to regulate the Nation's government or to interfere in any way with the Nation's election of its governmental officers. This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction, except as to waivers provided herein.
- 26) This Compact comprises the entirety of the agreement between the parties hereto. Any and all prior or contemporaneous representations, predictions, warranties or other inducements, however denominated, are merged within the terms of this Compact, and shall not survive its execution. There are no representations, promises, predictions, warranties, inducements or other agreements, however denominated, between the parties other than as set forth herein. This Compact may not be amended or modified except by written agreement, approved and executed by the parties hereto.

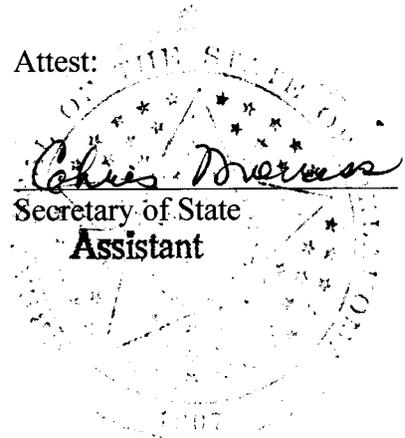
IT IS AGREED:

Each of the undersigned represents that they are duly authorized, and has the authority, to execute this agreement on behalf of the designated party.

IN WITNESS WHEREOF, the parties have executed this Amendment to the Compact effective November 1, 2013.

STATE OF OKLAHOMA

Mary Fallin 10/15/2013
MARY FALLIN, GOVERNOR DATE

Attest:

Chris Dorewicz
Secretary of State
Assistant

CITIZEN POTAWATOMI NATION

John A. Barrett Oct. 9, 2013
JOHN A. BARRETT, CHAIRMAN DATE