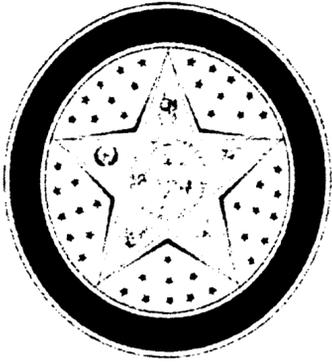


FILED

AUG 27 2014

OKLAHOMA SECRETARY
OF STATE



**FIRST AMENDED
TOBACCO TAX COMPACT BETWEEN
THE STATE OF OKLAHOMA AND
THE MUSCOGEE (CREEK) NATION OF
OKLAHOMA**

**ARTICLE I
PURPOSE AND INTENT OF PARTIES**

WHEREAS, the MUSCOGEE (CREEK) NATION of Oklahoma (hereinafter referred to as "Nation"), is a federally recognized Indian Tribe ¹ 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 MUSCOGEE (CREEK) 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 members ² are in possession of various tracts of land in its jurisdiction within the State, known and commonly referred to as "Indian Country";

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).

WHEREAS, the State, by and through the United States Supreme Court decision *Oklahoma Tax Commission vs. Citizen Band Potawatomi Indian Tribe of Oklahoma*, is 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 Muscogee (Creek) Nation does hereby constitute a sovereign state;

ARTICLE II

TERMS OF TAXATION ON SALE OF TOBACCO PRODUCTS

NOW, THEREFORE, the MUSCOGEE (CREEK) NATION of Oklahoma, by and through its Principal Chief, George Tiger, and the State of Oklahoma, by and through its Governor, Mary Fallin, do hereby enter into this Compact for the mutual benefit of the Nation and the State, to-wit:

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 with the provisions set forth herein. The entities or groups described in

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).

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.

- 1) 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;
 - 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.
- 2) The State agrees to provide the following information from the Oklahoma Tax Commission to the Muscogee (Creek) Nation 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.
- 3) The State and Nation stipulate and agree, for the sole purposes of the provisions of paragraph 2 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.
- 4) 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 Muscogee (Creek) Nation 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.
- 5) The State and Nation agree to 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. Nothing contained herein shall impair the ability of the Nation to assess and collect a tribal tobacco tax in addition to the Compact Tax.
- 6) 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 the terms of this Compact. The State and Nation shall divide all monies generated under the Compact Tax according to the following:

- a. From September 1, 2014, through December 31, 2016:
 - i. State Portion
 - 1. The State shall receive thirty percent (30%) of all Compact Taxes collected on cigarettes and all other tobacco products that are subject to this Compact.
 - ii. Tribal Portion
 - 1. The Tribe shall receive seventy percent (70%) of all Compact Taxes collected on cigarettes and all other tobacco products that are subject to this Compact.
 - b. From January 1, 2017 through April 30, 2018:
 - i. State Portion
 - 1. The State shall receive forty-five percent (45%) of all Compact Taxes collected on cigarettes and all other tobacco products that are subject to this Compact.
 - ii. Tribal Portion
 - 1. The Tribe shall receive fifty-five percent (55%) of all Compact Taxes collected on cigarettes and all other tobacco products that are subject to this Compact.
 - c. From May 1, 2018, through the end of the Compact term:
 - i. State Portion
 - 1. The State shall receive fifty percent (50%) of all Compact Taxes collected on cigarettes and all 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 all other tobacco products that are subject to this Compact.
- 7) The State shall use the State Portion of collected Compact Taxes in accord with Oklahoma law. The Nation will retain \$2.50 of the Tribal Portion per carton for all cigarettes sold and distribute the remaining Tribal Portion at its exclusive discretion, provided nothing shall prevent the Nation from otherwise modifying the amount retained.

- 8) 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 thirty (30) 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, upon notice to the Nation and the Retailer, may permanently remove the Retailer from the list of Retailers entitled to the benefits under this Compact.
- 9) 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 and the Nation 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.

- 10) 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. The Oklahoma Tax Commission must provide to the Nation all documentation necessary to allow the Nation to reconcile Compact Tax receipts and independently calculate the Tribal Portion of the Compact Tax.
- 11) The State shall notify the Nation in writing when a distribution is to be withheld, delayed and/or reduced. Said notice must state the reasons for the delay, withholding and/or reduction of any distribution.
- 12) 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.
- 13) 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.
- 14) 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's 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 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.
- 15) 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

TERMS OF SETTLEMENT OF HISTORICAL DISPUTE

NOW, THEREFORE, the MUSCOGEE (CREEK) NATION of Oklahoma, by and through its government, and the State of Oklahoma, by and through its Governor do also hereby enter into this Compact to resolve certain historical and legal disputes for the mutual benefit of the Nation and the State, to-wit:

1. The State of Oklahoma and the Muscogee (Creek) Nation have engaged in an historical dispute regarding appropriate taxing authority regarding cigarettes and other tobacco products during the period 2007 through 2010. This historical dispute has culminated in a pending litigation matter styled *State of Oklahoma v. Larkin et al*, in the Oklahoma District Court of Tulsa County with case number designation of CJ-2009-868. This litigation matter, and the facts and legal issues contained therein, shall be referred to herein as the "historical dispute."

2. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the historical dispute, and in consideration of the mutual promises and obligations of this Compact, the State and Nation agree and covenant as follows:

(a) The Tribe shall pay to the State of Oklahoma, a total of Eleven Million Five Hundred Thousand Dollars (\$11,500,000.00) which shall be referred to herein as the Settlement Amount. Such payment shall be paid to the State through the Oklahoma Attorney General's office. One Million Five Hundred Thousand Dollars (\$1,500,000.00) of the Settlement Amount shall be paid to the State at the time of the execution of the Compact by the Nation. Thereafter, payments of Two Million Dollars (\$2,000,000.00) shall be paid annually to the State, through the Oklahoma Attorney General's office on the anniversary of the execution of the Compact until the full Settlement Amount has been paid.

(b) In consideration of the obligations of the Nation in this Compact, and conditioned upon the Nation's initial payment of the Settlement Amount in the sum of One Million Five Hundred Thousand Dollars (\$1,500,000.00), the State of Oklahoma agrees to stay its pending action referred to herein as *State of Oklahoma v. Larkin et al*. Upon full payment of the Settlement Amount by the Nation, the State of Oklahoma agrees to dismiss all claims in *State of Oklahoma v. Larkin et al*, with prejudice, provided that all parties of the litigation agree to a full dismissal of all claims and actions with each party bearing their own fees and costs.

3. Upon the Nation's full payment of the Settlement Amount, the State of Oklahoma releases all named defendants in the *State of Oklahoma v. Larkin, et al.* lawsuit, the Nation, together with its current and former officers, directors, employees, agents, servants, affiliates, predecessors, successors, transferees and assigns, individually and collectively, from any claims, suits, demands, or liability it asserted, or could have asserted, in the *State of Oklahoma v. Larkin, et al.* lawsuit.

4. Notwithstanding the release given in paragraph 3 of this section (Article III), or any other term of this Compact, the following claims of the State of Oklahoma are specifically reserved and are not released:

(a) Any personal and individual income tax liability arising under the laws of Oklahoma;

(b) Any criminal liability, however any payment of the settlement sum may appropriately be used to offset any restitution claim;

(c) Any liability to the State of Oklahoma (or its agencies) for any conduct other than that alleged in the litigation arising from the historical dispute; or

(d) Any liability based upon obligations created by this Compact.

5. The Nation fully and finally releases the State of Oklahoma and its respective agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that the Nation has asserted, could have asserted related to the historical dispute or the State of Oklahoma's investigation and prosecution thereof.

6. This settlement of the historical dispute is made in compromise of disputed claims. This Agreement is neither an admission of facts or liability by the Nation nor a concession by the State of Oklahoma that its claims are not well founded.

7. With respect to the settlement payments due the State under Article III, the Nation waives its sovereign immunity with respect to suit, liability, judgment and collection of the settlement amount in the Oklahoma District Court of Tulsa County, and agrees that any suit brought to enforce the settlement shall be governed by Oklahoma law.

ARTICLE IV **GENERAL PROVISIONS**

1. Any dispute arising in the interpretation or performance of this compact, which is not resolved by good faith negotiation within thirty (30) days, or such longer period as mutually agreed in writing by both parties, shall be subject to the remedy of voluntary unilateral termination of this agreement. Additionally, upon termination, with regard to any dispute over sums owed to either the State or Nation pursuant to the terms of this Compact, the State and Nation waive their sovereign immunity with respect to suit,

liability, judgment and collection of the disputed sums. These mutual sovereign immunity waivers allow such enforcement actions to be brought in the Oklahoma District Court of Oklahoma County, and each party agrees that any suit brought to enforce the terms of the Compact regarding amounts due under this agreement shall be governed by Oklahoma law. Notwithstanding this provision, it is specifically understood that termination of this Compact regarding collection of revenues after the effective date of this agreement, shall not result in the abrogation of rights and obligations as provided in Article III, herein.

2. In the event that early termination of this agreement results in a determination by either party that the any breach of the terms hereof, which resulted in the early termination may have caused civil or administrative damage, the parties hereby agree to a limited waiver of their sovereign immunity from suit, liability, judgment, and collection in federal court for the limited purpose of determination of rights or damages caused by the early termination of this agreement. Should the federal court determine it lacks jurisdiction for such action, the Nation agrees to limited waiver of sovereign immunity from liability, judgment, collection and suit in Oklahoma County District Court.

3. This agreement shall terminate on December 31, 2024. Nothing in this Compact shall prevent the parties by mutual agreement from establishing an earlier or later termination date or otherwise modifying this agreement.

4. 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.

5. The Nation agrees to require the Retailers to maintain complete records of all purchases and sales of cigarettes and other tobacco products by brand, including information related to the payment of both the Tribal Tax and Additional Tribal Tax. Such records shall be maintained for a period of five (5) years from the date of purchase or sale. The State and Nation may take necessary enforcement measures to ensure compliance with this paragraph by the Retailers, including, but not limited to, entry and inspection of records.

6. 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.

7. 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 Nation to the Office of the Principal Chief, Muscogee (Creek) Nation, P.O. Box 580, Okmulgee, Oklahoma 74447. Notification by the State and Nation shall also be filed with the Office of the Oklahoma Secretary of State.

8. This Compact shall be effective 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.

9. 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 selection of its governmental officers. This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.

10. This Compact, as Amended in August, 2014, in no way effects or modifies either parties obligations under Article III, including the Nation's obligation to make an initial payment upon the execution of the original Compact. Said obligation having already been paid and received in full. All other installment payments paid to the State by the Nation as of the execution of this Amended Compact are hereby recognized as a paid annual obligation under Article III.

11. 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 representatives, 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.

Compact Signatories:

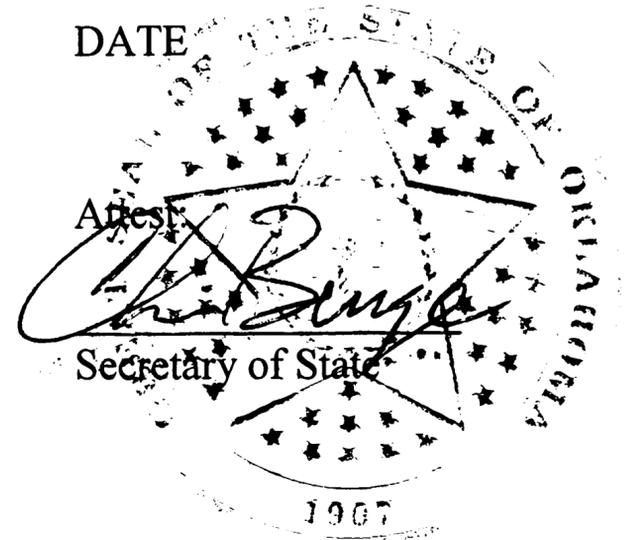
STATE OF OKLAHOMA

Mary Fallin

8-27-14

MARY FALLIN, GOVERNOR

DATE



Attest:

Secretary of State

MUSCOGEE (CREEK) NATION

George Tiger

8-27-14

GEORGE TIGER, PRINCIPAL CHIEF

DATE

Settlement Signatories:

STATE OF OKLAHOMA

E. SCOTT PRUITT, ATTORNEY GENERAL

DATE

MUSCOGEE (CREEK) NATION

George Tiger

8-27-14

GEORGE TIGER, PRINCIPAL CHIEF

DATE