

**THIRD AMENDMENT TO CHIPPEWA CREE TRIBE – MONTANA  
TOBACCO TAX AGREEMENT**

This **THIRD AMENDMENT TO CHIPPEWA CREE TRIBE – MONTANA TOBACCO TAX AGREEMENT** is entered into between the State of Montana, Department of Revenue (“State”) and the Chippewa Cree Tribe of the Rocky Boy’s Reservation (“Tribe”).

**RECITALS**

WHEREAS, the State and the Tribe entered into the Chippewa Cree Tribe - Montana Tobacco Tax Agreement (“Agreement”) on December 23, 2005;

WHEREAS, the State and the Tribe entered into the First Amendment to the Chippewa Cree Tribe - Montana Tobacco Tax Agreement on May 24, 2006;

WHEREAS, the State and the Tribe entered into the Second Amendment to the Chippewa Cree Tribe – Montana Tobacco Tax Agreement on September 28, 2011;

WHEREAS, the Agreement may be amended by the parties pursuant to Section 9 of the Agreement;

WHEREAS, the parties desire to amend certain parts of the Agreement; and

THEREFORE, the State and the Tribe agree to amend the Agreement as follows:

Section 1 of the Agreement is amended to read as follows:

1. General Purposes of Agreement. The purposes of this Agreement are to minimize legal controversy and possible litigation over the taxation of tobacco within the exterior boundaries of the Rocky Boy’s Reservation (“Reservation”), to mitigate the effects of dual taxation of tobacco by both the Tribe and the State, to assist in the enforcement of state and tribal tax laws and collection of state and tribal taxes, and to provide an effective means by which revenues generated by the state and tribal taxes on tobacco products may be shared and distributed. In order to accomplish these purposes, the State and the Tribe agree that the same level of taxation shall be imposed on tobacco sales both within and outside the boundaries of the Reservation. For purposes of this Agreement, the term “tobacco” shall mean tobacco and tobacco products. This section shall be interpreted consistently with the terms and conditions set forth in Section 13 of this Agreement.

Section 2 of the Agreement is amended to read as follows:

2. Recitals. This Agreement is made by and between the Chippewa Cree Tribe of the Rocky Boy's Reservation, acting through its Business Committee and the State of Montana. The parties hereto, having conferred together, desire to collect the tobacco tax on all tobacco or tobacco products sold or consumed on the Reservation for the mutual benefit of all the people of Montana including members of the Tribe. The parties enter into this Agreement to share tobacco tax revenues collected pursuant to this Agreement in relation to taxation of tobacco sales on the Reservation. The parties agree that, under existing federal and state law, the State is responsible for enforcing state tobacco tax laws related to non-Indians and non-members. Correspondingly, the parties agree that, under existing federal and tribal law, the Tribe is responsible for enforcing tribal tobacco tax laws related to Chippewa Cree tribal members. The parties also agree that they will fully enforce their respective tobacco tax laws.

Section 5 of the Agreement is amended to read as follows:

5. Collection and Administration of Taxes. The State and Tribe agree that tobacco sold on the Reservation shall not be subject to both the state and the tribal tax, but shall be subject to one tax. The State agrees to assist the Tribe by pre-collecting tobacco taxes for sales on the Reservation from the tobacco wholesalers distributing tobacco products on the Reservation and to remit to the Tribe the tribal tobacco tax collected as determined by the formulas described below. All cigarettes sold on the Reservation shall have the state tax insignia affixed and all other tobacco products shall be taxed.

a. For each calendar quarter, the Tribe shall receive an amount of tobacco taxes pre-collected for tobacco sales on the Reservation, which approximates the sales to enrolled Chippewa Cree tribal members living on the Reservation. The amount of tobacco taxes that the Tribe receives shall be determined by multiplying 150 percent of the Montana per capita tobacco tax collected for the calendar quarter, times the total number of all enrolled Chippewa Cree tribal members living on the Reservation.

Subject to the provisions below, the Tribe, through affidavit (in the form attached hereto as Exhibit A) of the Director ("Tribal Enrollment Director") of the Tribe's Enrollment Office ("Tribal Enrollment Office") established by the Chippewa Cree Business Committee, shall certify by March 31 of each calendar year during the term of this Agreement the number of all enrolled Chippewa Cree tribal members physically then residing within the Reservation's boundaries ("Total Resident Enrollment"). As shown in Exhibit B attached hereto, the Total Resident Enrollment for 2011 is 3,800. The Total Resident Enrollment shall be determined by using the Tribe's then current enrollment list, the most recent voting list for Tribal elections (which list is a partial list because it includes only adult tribal members), and other written sources as appropriate. Enrolled Chippewa Cree members physically residing on the Reservation who have off-Reservation mail addresses (e.g., in cities that are directly adjacent to the Reservation) shall be included in the "Total Resident Enrollment." In the event the Tribal Enrollment Director does not issue a certification by March 31 of any year subsequent to 2011, the State will use the previous year's number, unless information exists to demonstrate that

the certified number has decreased or increased. In such case, the parties shall meet and negotiate the certified number before July 1 of such calendar year, utilizing the best information available. The Chippewa Cree Business Committee authorizes the State to review and verify the enrollment records, voting records, and other records as appropriate that are maintained by the Tribe, and any other information the Tribe uses, should the State wish to verify the Total Resident Enrollment for the calendar year. If there is a dispute between the State and the Tribe regarding the proper actual Total Resident Enrollment for any year, the Tribe and the State shall have 30 days to resolve the issue by agreement. If the issue is not resolved within 30 days, the State may use the Total Resident Enrollment figure used for the prior calendar year until a revised Total Resident Enrollment figure is agreed on by both parties. Any revised Total Resident Enrollment figure agreed to by the parties shall be retroactively calculated from January 1 of the current calendar year. To account for the retroactive calculation, a one-time payment adjustment will be included with the payment due for the next full calendar quarter payment.

b. The 2011 Total Resident Enrollment number of 3,800 will be used in calculating distributions beginning the calendar quarter this amendment is executed using the formula set forth under subsection a. The 2011 Total Resident Enrollment number of 3,800 will also be used to calculate an additional one-time payment adjustment in the amount of \$27,559 to account for the retroactive application of the 2011 Total Resident Enrollment number back to January 1, 2011. This amount shall be paid to the Tribe with the regular revenue sharing distribution due under the Agreement for the calendar quarter this amendment is executed. The amount of the one-time payment adjustment represents the difference between what would have been paid using the 2011 enrollment number and what was actually paid from January 1, 2011, through September 30, 2011. This additional one-time 2011 payment adjustment will only be paid once and there will be no right to future payment adjustments.

c. The State shall distribute the monies due to the Tribe under this Agreement no later than 30 days from the end of each calendar quarter. The State will include with each distribution a statement showing how the distribution was determined for that quarter. This distribution shall be sent to the Business Committee unless the Business Committee otherwise instructs the State. Said instruction will be in writing and will include an authorizing resolution of the Business Committee. Distributions shall continue until the expiration or termination of this Agreement as provided below or required by law. For the purposes of this Agreement, the calendar quarters begin on January 1, April 1, July 1, and October 1 of each year.

d. In the event of termination by either party prior to the end of the term, the State shall remit the full amount payable to the Tribe provided for in this Agreement for that period of time up to and including the effective date of the termination. This obligation of the State shall survive any termination of this Agreement.

Section 6 of the Agreement is amended to read as follows:

6. Term. This Agreement shall commence on January 1, 2011, and terminate December 31, 2021, subject to Section 8 and 9 below.

Section 7 of the Agreement is amended to read as follows:

7. Audits. Either party has the right to request a third-party audit of the revenue collection and allocation records of the parties to determine the accuracy of the statements or representations called for in this Agreement for the five years immediately preceding the date of the request. The right of a third-party audit shall exist during the term of this Agreement and for a period of one year after the date of any termination or expiration of this Agreement. The parties shall mutually agree upon a third-party auditor, and each shall pay 50% of the costs of the third-party auditor up to a reasonable amount as determined mutually by the parties. The auditor shall be a certified public accountant. The auditor shall be subject to state, federal, and tribal law with regard to the confidentiality of tax information. The auditor shall have no authority to audit taxpayers.

Section 8 of the Agreement is amended to read as follows:

8. Effective Date. This Agreement is effective January 1, 2011, so long as the following conditions precedent are met: the Tribe has adopted and provided a copy to the State of an ordinance as required by Section 3 of the original Agreement, signed December 23, 2005; the Agreement has been approved by the Business Committee; and the Agreement has been approved by the State Attorney General, as required by § 18-11-105, MCA.

Section 10.a of the Agreement is amended to read as follows:

10. Termination.

a. This Agreement may be terminated by either party upon five (5) years' written notice to the other party for circumstances not constituting cause, or upon thirty (30) days' written notice for circumstances constituting cause. "Cause" means any material change in circumstances that alters or affects the terms of the Agreement, whether express or implied, foreseen or unforeseen.

Section 11 of the Agreement is amended to read as follows:

11. Jurisdiction and Venue. The parties agree and stipulate that venue and jurisdiction for enforcement of the terms hereof lie in the United States District Court, Great Falls Division, Great Falls, Montana, or, if the U.S. District Court lacks jurisdiction, a Montana state district court. In the event of a breach by either party of any of the terms hereof, upon written notice to the breaching party of the substance of the alleged breach and the remedies sought, the non-breaching party shall be entitled to suspend any of the non-breaching party's obligations hereunder to the extent of the

breach and petition the court for the appropriate relief. Appropriate relief shall be limited to monetary judgment against the breaching party, including costs and attorney fees, arising from the breach, and such other relief as is necessary to put the non-breaching party in the same position they would have been in had the breaching party fully performed. The failure to pursue a remedy for one or more breaches is not a waiver of any right to enforce a subsequent breach of the same or a different term hereof.

Section 12 of the Agreement is amended to read as follows:

12. Mutual Limited Waiver of Sovereign Immunity. The State has waived its sovereign immunity from suit for contract actions arising under the Agreement, see, Title 18, chapter 1, part 4, MCA, and for tort actions, see Title 2, chapter 9, part 1, MCA. The Tribe expressly grants a limited waiver of sovereign immunity from suit for litigation pertaining to this Agreement, provided that the Tribe's waiver shall be no more extensive than the State's waiver pursuant to Title 18, chapter 1, part 4, MCA, and Title 2, chapter 9, part 1, MCA. Neither party waives its sovereign immunity except as provided in this Agreement.

Section 13 of the Agreement is amended to read as follows:

13. Reservation of Rights and Negative Declaration. The State and Tribe have entered into this Agreement in part to resolve any potential legal disputes and avoid litigation. The parties agree that by entering into this Agreement, neither the State nor the Tribe shall be deemed to have waived any rights, arguments, or defenses available in litigation on any subject, except as specifically provided for in this Agreement. This Agreement is specifically not intended to reflect or be viewed as reflecting in this or any context either party's position with respect to the jurisdictional authority of the other. Nothing in this Agreement or in any conduct undertaken pursuant thereto shall be deemed as enlarging or diminishing the jurisdictional authority of either party except to the extent necessary to implement and effectuate the Agreement's terms. This Agreement may be introduced into evidence in any proceeding involving this Agreement. Neither this Agreement, nor conduct pursuant thereto or conduct in the negotiations or renegotiations of this Agreement, shall be offered as evidence, otherwise referred to in any present or future litigation, or used in any way to further either party's equitable or legal position in any litigation except to the extent such introduction is permitted by the parol evidence rule in litigation seeking to enforce this Agreement. By entering into this Agreement, neither the State nor the Tribe is forfeiting any legal rights to apply their respective taxes except as specifically set forth in this Agreement. This Agreement does not apply to any state tax collected other than the tax on tobacco as provided in §§ 16-11-101 through -206, MCA.

The Agreement is amended to add Section 15 as follows:

15. Future Legislatures. As provided in § 15-1-211, MCA, nothing in this Agreement shall be construed as binding any future Legislature.

As required by Section 9 of the Agreement, the parties' signatures are set forth below. Except as expressly amended hereby, all terms and conditions of the Agreement remain in full force and effect.

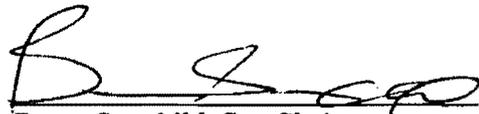
This Amendment consists of five (5) pages.

DATED this 30 day of December, 2011.

STATE OF MONTANA

CHIPPEWA CREE TRIBE OF  
THE ROCKY BOY'S  
RESERVATION

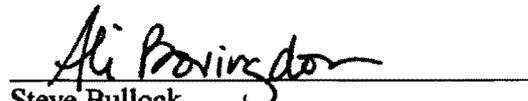
  
\_\_\_\_\_  
Brian Schweitzer  
Governor

  
\_\_\_\_\_  
Bruce Sunchild, Sr., Chairman  
Chippewa Cree Business Committee

(pursuant to authorizing resolution of  
the Business Committee)

  
\_\_\_\_\_  
Dan Bucks  
Director of Revenue

Approved pursuant to Mont. Code Ann. § 18-11-105

*for*   
\_\_\_\_\_  
Steve Bullock  
Attorney General

**Exhibit A**

STATE OF MONTANA        }  
  : ss  
County of \_\_\_\_\_        }

**AFFIDAVIT**

I, \_\_\_\_\_, being of lawful age, and being first duly sworn, upon oath, depose and say:

1. I am the enrollment clerk for the \_\_\_\_\_ tribal government, responsible for maintaining the record of enrolled tribal members for the \_\_\_\_\_ Tribe of the \_\_\_\_\_ Reservation.
  
2. I have been the enrollment clerk for the \_\_\_\_\_ Tribal Council since \_\_\_\_\_.
  
3. In my capacity as enrollment clerk for the \_\_\_\_\_ Tribal Council, I am responsible for maintaining and continually updating the record of those tribal members living on the reservation, off the reservation, and immediately adjacent to the reservation.
  
4. These records are maintained for a variety of purposes, including registration for tribal elections, state-tribal revenue sharing agreements, and the distribution of treaty monies and other payments to tribal members.
  
5. On \_\_\_\_\_, I reviewed the tribal records concerning the enrolled tribal members currently residing on the \_\_\_\_\_ Reservation.
  
6. Based upon my experience and expertise as enrollment clerk for the \_\_\_\_\_ Tribal Council, and based upon the records at my disposal, I conclude that there are \_\_\_\_\_ enrolled tribal members that reside on the \_\_\_\_\_ Reservation, as of \_\_\_\_\_.

I, \_\_\_\_\_, have read the foregoing affidavit and know the contents thereof, and state that the facts and matters contained therein are true, accurate, and complete to the best of my knowledge, information, and belief, subject to penalties for perjury and false swearing.

DATED this \_\_\_\_\_ day of (month), (year).

By: \_\_\_\_\_  
Affiant

SUBSCRIBED AND SWORN to me this \_\_\_\_\_ day of (month), (year).

\_\_\_\_\_  
Notary Public for the State of Montana

\_\_\_\_\_  
Printed Name of Notary

Residing at \_\_\_\_\_

My commission expires \_\_\_\_\_