



STATE OF WASHINGTON
DEPARTMENT OF REVENUE
OFFICE OF THE DIRECTOR

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December 1, 2020

TO: The Honorable Annette Cleveland,
 Chair
 The Honorable Steve O'Ban
 Health & Long Term Care
 Committee
 Washington State Senate

 The Honorable Sam Hunt, Chair
 The Honorable Hans Zeiger
 State Government, Tribal Relations
 & Elections Committee
 Washington State Senate

 The Honorable Eileen Cody, Chair
 The Honorable Joe Schmick
 Health Care & Wellness Committee
 Washington State House of
 Representatives

 The Honorable Mia Gregerson, Chair
 The Honorable Jim Walsh
 State Government & Tribal Relations
 Committee
 Washington State House of
 Representatives

 Keith Phillips, Executive Policy Director
 Office of the Governor

FROM: Vikki Smith, Director *Vikki Smith*
 Washington State Department of Revenue

SUBJECT: REPORT ON THE STATUS OF CONSULTATIONS UNDER RCW 43.06.468

The Department of Revenue is submitting this report, on behalf of the Governor's Office, to the Legislature as required by [Section 11, Chapter 15, Laws of 2019](#).

The legislation required a report on government-to-government consultations with federally recognized Indian tribes regarding raising the minimum legal age of sale in cigarette tax compacts entered into pursuant to RCW 43.06.455 through 43.06.466. The report contains a summary of the consultations and outreach. While not required in statute, the report contains a recommendation.

If you have any questions or need the report in an alternate format, please contact Michael Bailey, Legislative and External Affairs Liaison, Executive Division, at (360) 534-1545 or MichaelBa@dor.wa.gov.

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Members, House Health Care & Wellness Committee
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Report on the Status of Consultations under RCW 43.06.468

December 2020
Washington State Department of Revenue
Washington State Department of Health

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Summary

The Department of Revenue (department) submits this report to the Legislature on behalf of the Governor's Office and in accordance with [RCW 43.06.468](#). This statute requires the Governor to report on efforts to consult with federally-recognized tribes with cigarette tax contracts located in Washington (the Tribes) to raise the minimum legal age of sale of cigarettes from 18 to 21.

Under [Chapter 43.06 RCW](#), the Governor is authorized to enter into tribal cigarette tax contracts concerning the sale of cigarettes (cigarette tax compacts). The Governor may delegate the authority to negotiate cigarette tax compacts to the department. Of the 29 federally-recognized tribes located in Washington, the department has negotiated cigarette tax compacts with 27 tribes.

It is a priority for the Governor to adopt the Tobacco 21 standard (T21), which raises the minimum legal age of sale in Washington from 18 to 21. This report includes a summary of the outreach conducted by the Department of Revenue and the Department of Health (DOH) with the tribes concerning adopting T21.

In short, ten tribes have adopted T21 (see Appendix B). While multiple overtures have been made to the Tribes, they have not wanted to not reopen cigarette tax compacts to raise the minimum legal age to 21.

Trying to negotiate T21 with the Tribes through the cigarette tax compact process has not been fruitful. We recommend supporting DOH's outreach and assistance to tribal health officials. This approach reframes the issue as one of human health. After a compacting tribe adopts T21 in a health ordinance, it may then be advisable to revisit the issue of amending a cigarette tax compact with that tribe.

Background

In 2019, the Legislature passed and the Governor signed [Engrossed House Bill \(EHB\) 1074](#) into law. This bill, among other provisions, raises the legal age to buy cigarettes, cigars, cigarette paper or wrapper, tobacco in any form, or vapor products in Washington from 18 to 21.

[Chapter 43.06 RCW](#) provides the Governor with statutory authority to delegate the power to negotiate cigarette tax contracts to the department (see [RCW 43.06.455\(10\)](#), [43.06.465\(1\)](#), and [43.06.466\(3\)](#)). Cigarette tax contracts are also known as cigarette tax compacts. The department has negotiated all existing 27 cigarette tax compacts on behalf of the Governor. Because these compacts predate T21, however, each explicitly sets the legal age for the sale of cigarettes at 18. Accordingly, Section 11 of EHB 1074, codified at [RCW 43.06.468](#), provides:

In recognition of the sovereign authority of tribal governments, the governor may seek government-to-government consultations with federally recognized Indian tribes regarding raising the minimum legal age of sale in compacts entered into pursuant to RCW 43.06.455 [(Cigarette tax contracts)], 43.06.465 [(Cigarette tax agreement with Puyallup Tribe of Indians)], and 43.06.466 [(Cigarette tax agreement – Yakama Nation)]. The office of the governor shall report to the appropriate committees of the legislature regarding the status of such consultations no later than December 1, 2020.

In describing the nature of such government-to-government consultations, [RCW 43.376.020\(1\)](#) provides that the State must “[m]ake reasonable efforts to collaborate with Indian tribes in the development of policies, agreements, and program implementation that directly affect Indian tribes and develop a consultation process that is used by the agency for issues involving specific Indian tribes[.]” The Governor’s Office of Indian Affairs further describes, in the Centennial Accord, the collaborative relationship that exists between the State and the Tribes as one that “respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.”

Fostering such relationships with the Tribes is a priority of the Governor.

This report includes not only a summary of the Department of Revenue’s outreach with the Tribes to adopt T21, but also the DOH’s T21 tribal outreach efforts.

Consultations & Outreach

Department of Revenue

The department's efforts to engage the Tribes to adopt T21 began even before the legislation adopting T21, [EHB 1074](#), was introduced during the 2019 Legislative Session. At the direction of the Governor's Office, the department began reaching out in early 2018 in an effort to gauge the Tribes' interest in raising the legal age for the sale of tobacco products from 18 to 21. During this outreach, tribal leaders informed the department that, in order to change the legal age, *each tribe's government would need to change their laws*. The general consensus from tribal input was that the Tribes were not interested in raising the age of sale of tobacco products.

The department recommended communicating the health benefits that would inure to the Tribes as a result of raising the legal age through the smoking cessation and cancer prevention programs that each tribe currently has in place. The department also recommended, in collaboration with the DOH, the facilitation of workshops between DOH, the department, and the Tribes addressing the issue of raising the legal age for the sale of tobacco products.

In each cigarette tax compact, the department is required to conduct regular visits with the compacting tribe. At a minimum, these visits must typically be conducted on an annual or biennial basis. The department continued to discuss the legal age of sale requirement with individual tribes during its regular visits through 2018 and into 2019.

The department regularly convenes a Tribal Tax Advisory Group (TTAG), which is co-chaired by the department's director and a representative of the Tribes. Members of the group include representatives from the Tribes. Included within TTAG are several subgroups, one of which, the Cigarette Subgroup, makes recommendations to all of TTAG regarding cigarette taxation and cigarette tax compact issues.

During the May 6, 2019, TTAG meeting, tribal representatives shared that they would convene a meeting at the 30th Centennial Accord held in November 2019 to discuss legislation raising the minimum legal age to purchase tobacco products. At the Centennial Accord, the HohTribe orally acknowledged that it would adopt the Tobacco 21 age provision. Around this same time, the Muckleshoot Indian Tribe sent a letter to the Governor confirming that it, too, would adopt the legal age of 21.

In late 2019, TTAG convened its Cigarette Subgroup to discuss this matter further. The Confederated Tribes of the Chehalis Reservation announced that its legal age for purchasing tobacco products would be raised to 21.

In early 2020, the Cigarette Subgroup prepared a report to share with members of TTAG during its July 23, 2020, meeting. The report states that the Tribes, in general, do not

wish to open cigarette tax compacts to raise the legal age. It was shared that they were in discussions with the federal Food & Drug Administration (FDA) over the applicability to the Tribes of federal legislation passed in December 2019 that adopted a T21 standard. Following is a relevant excerpt from that report:

The Washington State Legislature authorized cigarette compacts in 2001. The Department of Revenue (DOR) currently has compacts with [27] of the tribes in the state. All the compacts reflect 18 as the age at which cigarettes may be purchased because that was the federally-prescribed minimum age at the time of the authorizing legislation.

In early 2019 the Legislature changed the age at which cigarettes can be legally purchased to 21 in the state.

While the federal government passed on Dec. 20, 2019 a law making it illegal for retailers to sell tobacco to anyone under 21 years of age, the issue of regulations addressing the statutory change's applicability to tribal retailers is under discussion by tribes with the FDA.

Notwithstanding the above, the Compacts, which represent government-to-government binding agreements negotiated separately by each tribe with the State, unequivocally provide that the Tribes are bound to prevent tobacco sales to anyone under 18. The Compacts, furthermore, do not have a provision that would adjust the Compacts should state law change.

The only potential provision for change is for both parties to agree to open a tribe's Compact for revision. It seems unlikely that the Department would get agreement from tribes to do this.

Compliance with the Compacts is required of both parties and, therefore, the tribal representatives on this subgroup call on the Department of Revenue and the State, just like the Tribes, to follow the Compacts as agreed and not seek to change them.

For informational purposes only, while the issue of federal applicability is in question, we are aware that a number of tribes are voluntarily limiting the sales to 21 years and older.

See Appendix B for a list of tribes that have voluntarily limited their sales of tobacco products to persons who are at least 21 years of age.

In addition, it was also announced at this meeting that Craig Bill, Executive Director of the Governor's Office of Indian Affairs, would reach out to each tribe, individually, to discuss raising the legal minimum age of sale. This effort is ongoing.

In addition to its report, the TTAG Cigarette Subgroup made the following commitments to the department relevant to T21:

- Keeping a log of tribes that change the minimum age of sale.
- Reporting on the tribal outreach to the FDA.
- Advising the department on T21.
- Advising the department on vapor products tax and compact issues.

Department of Health

At the direction of the Governor's Office, the DOH also reached out to the Tribes with a focus on three policy goals that could be achieved by increasing the minimum age of sale of tobacco and vapor products:

- Reducing kids' access to commercial tobacco and vapor products from their peers under 21.
- Reducing the negative impact mothers' tobacco use has on newborns.
- Reducing the healthcare costs of tobacco-related diseases.

Secretary Wiesman held a tribal roundtable on August 15, 2019, in conjunction with the American Indian Health Commission (AIHC) on the benefits of a policy change to support T21.

On September 23, 2019, Secretary Wiesman sent a letter to all tribal chairs regarding the benefits of a policy change to support T21.

The DOH's Prevention and Community Health division's Tobacco Prevention Program contracted with the AIHC to conduct tribal decision-maker outreach on T21 at least eight times during Fiscal Year 2020.

The DOH's outreach was never intended to target a direct change in cigarette tax compacts. Rather, its outreach has been focused on educating leaders in tribal health to inform tribal leadership about the health benefits of a policy change to raise the minimum legal age of sale.

Recommendation

While [RCW 43.06.468](#) does not require this report to contain recommendations, the Department of Revenue, DOH, and Governor’s Office of Indian Affairs jointly recommend pursuing a long-term strategy that continues to:

- Respect the government-to-government relationship with the Tribes.
- Engage tribal health leaders and provide education, technical, and other support to assist them in their efforts to convince tribal councils to make a T21 policy change on health grounds.

Seeking a policy change through a negotiated cigarette tax compact process will likely not bear fruit, at least in the short-term. Generally speaking, reopening a compact to negotiate a change succeeds *when both sides bring something to the table*.

A change in a tribe’s laws adopting T21 for health reasons might eventually remove the barriers to updating their cigarette tax compact to raise the minimum legal age.

Appendix A: RCW 43.06.468

 WASHINGTON STATE LEGISLATURE <input type="text" value=""/> 	
Legislature Home	RCWs > Title 43 > Chapter 43.06 > Section 43.06.468 Print
House of Representatives	
Senate	43.06.466 << 43.06.468 >> 43.06.475
Find Your District	RCW 43.06.468
Laws & Agency Rules	Raising the minimum legal age of sale in certain compacts—Consultations with federally recognized Indian tribes—Report to legislature.
Bill Information	In recognition of the sovereign authority of tribal governments, the governor may seek government-to-government consultations with federally recognized Indian tribes regarding raising the minimum legal age of sale in compacts entered into pursuant to RCW 43.06.455 , 43.06.465 , 43.06.466 , and 43.06.505 through 43.06.515 . The office of the governor shall report to the appropriate committees of the legislature regarding the status of such consultations no later than December 1, 2020.
Agendas, Schedules, and Calendars	[2019 c 445 § 307 ; 2019 c 15 § 11 .]
Legislative Committees	NOTES:
Coming to the Legislature	Reviser's note: 2019 c 445 § 307 takes effect October 1, 2019; however, this session law amended 2019 c 15 § 11, which takes effect January 1, 2020.
Legislative Agencies	Conflict with federal requirements—Effective date—2019 c 445: See RCW 82.25.900 and 82.25.901 .
Legislative Information Center	Automatic expiration date and tax preference performance statement exemption—2019 c 445: See note following RCW 82.08.0318 .
Email Updates (GovDelivery)	Effective date—2019 c 15: See note following RCW 26.28.080 .
View All Links	

Appendix B: List of Tribes Adopting T21

The following tribes have voluntarily raised the minimum legal age of sale to 21:

- Confederated Tribes of the Chehalis Reservation
- Cowlitz Indian Tribe
- Hoh Tribe
- Kalispel Tribe of Indians
- Lummi Nation
- Muckleshoot Indian Tribe
- Nooksack Indian Tribe
- Shoalwater Bay Tribe
- Tulalip Tribes
- Upper Skagit Indian Tribe