

OFFICE OF THE GOVERNOR  
BUDGET AND PROGRAM PLANNING  
STATE OF MONTANA

BRIAN SCHWEITZER  
GOVERNOR



PO BOX 200802  
HELENA, MONTANA 59620-0802

Date: December 13, 2005

TO: Revenue and Transportation Interim Committee

From: *[Signature]* David Ewer, Chair of Governor's American Indian Nations Council (GAIN)  
*[Signature]* Anna Whiting-Sorrell, Co-Chair of GAIN  
*[Signature]* Jim Lynch, Director of Montana Department of Transportation

Subject: State and Chippewa Cree Tribe Gasoline Tax Revenue Sharing Agreement

### BACKGROUND

Under 18-11-103 and 15-70-234, MCA, the State is authorized to enter into agreements with tribal governments to collect gasoline license taxes that are lawfully imposed by the State and Tribal government and to share those gasoline revenues collected on reservations. The purpose of revenue sharing agreements is to promote cooperation between the State or a public agency and a sovereign Tribal government in mutually beneficial activities and services. It is the goal of the legislature to prevent the possibility of dual taxation by governments while promoting State, local, and Tribal economic development.

The State and the Chippewa Cree Tribe have had a gasoline tax revenue sharing agreement since 1992. Recently, the Chippewa Cree Tribe and the State agreed to update the agreement. The Governor's American Indian Nations (GAIN) Council, in cooperation with the Department of Transportation, renegotiated the terms of the revenue sharing agreement.

The changes from the prior revenue sharing agreement are minor in nature and simply: 1) set out a new manner for determining the number of enrolled tribal members residing on the Rocky Boy's Reservation; and 2) make the formula for determining the revenue to be shared more straightforward.

Revenue & Transportation Committee Meeting  
December 16, 2005

Exhibit #1

## **PURPOSE OF THIS REPORT**

Section 15-70-234, MCA states in part: "...The department of transportation shall report the status of cooperative agreement negotiations to the revenue and transportation interim committee. After negotiations are complete and if the legislature is not in session, the agreement must be presented to the committee for review and comment before the final agreement is submitted to the attorney general for approval pursuant to 18-11-105, MCA." This report presents a summary of the major points of the gasoline agreement to facilitate your review and comments in compliance with the law.

## **SUMMARY OF THE AGREEMENT**

### **Gasoline Tax**

The Tribal and State gasoline tax rate and application are the same. The consumer only pays one tax and sees no distinction between the Tribal and the State tax. Nothing changes for the consumer under this agreement.

### **Collection of Tax**

The State agrees to collect both the Tribal and the State gasoline tax.

### **Determination of Number of Enrolled Tribal Members Residing on the Reservation**

The previous agreement relied on the Bureau of Indian Affairs (BIA) to certify the number of enrolled Tribal members residing on the reservation. The BIA is no longer able to certify this number for the Tribe; therefore, the State and the Tribe have agreed:

- to use 3,519 as the enrolled Tribal members residing on the reservation for calendar year 2006, and
- to use a number certified by the Tribe under a methodology determined by the Tribe and audited by the State to determine if the methodology is sufficient to provide an accurate count of the enrolled Tribal members living on the reservation for future years.

### **Formula for Sharing the Tax Revenue**

Previously, the formula for determining the Tribe's share of the gasoline tax was stated in the agreement as 85% of the per capita tax collected less the average agricultural refund times the enrolled Tribal members residing on the reservation. The 85% was the final figure which appeared in the agreement, but it was based on non-supportable estimates of the miles traveled on and off reservations by the enrolled Tribal members

residing on the reservation less the gas tax allocated to local governments. All elements of the formula under the new agreement are contained in the agreement. The formula used is the per capita amount of net gasoline tax the State collects minus 16% which approximates the gasoline tax paid to local governments, multiplied by the number of enrolled Tribal Members residing on the reservation.

### **Tax Remitted To Tribe**

For fiscal year 2006, the Chippewa Cree Tribe will receive approximately \$401,934. This amount is the statewide fiscal year 2005 average gasoline tax collected per capita after refunds, local government distributions, and a one percent administration fee times the enrolled Chippewa Cree tribal members residing on the reservation. The Chippewa Cree Tribe gasoline tax revenue is remitted to the Tribe no later than 30 days after the end of each calendar quarter.

### **Term**

The agreement's term is through December 31, 2016, with a ten-year renewal clause.

### **Effective Date**

Section 18-11-105, MCA, states: "**Submission of agreement to attorney general.**

(1) As a condition precedent to an agreement made under this chapter becoming effective, it must have the approval of the attorney general of Montana.

(2) The attorney general shall approve an agreement submitted to him under this chapter unless he finds it is not in proper form or does not meet the requirements set forth in this chapter or otherwise does not conform to the laws of Montana. If he disapproves an agreement, he shall provide a detailed, written statement to the governing bodies of the public agency and tribal government concerned, specifying the reasons for his disapproval

(3) If the attorney general does not disapprove the agreement within 30 days after its submission to him, it shall be considered approved by him."

Upon consideration of the review and comment by the Revenue and Transportation Interim Committee, the agreement will be submitted to the Attorney General's Office. If the agreement is acceptable to the Attorney General's Office, the goal is to have the agreement effective January 1, 2006.

### **Termination**

There are three ways this agreement can be canceled: 1) for cause, with a 30-day written notice by either the Tribe or the State; 2) without cause, upon 180-day written notice by either the Tribe or the State; or 3) the Tribe and the State do not agree that

the methodology for determining the enrolled Tribal members residing on the reservation is accurate—then the agreement terminates December 31, 2006.

**Attachments**

Attached are the agreement and a sheet which shows how both the current and the proposed gasoline tax revenue sharing agreement formula is calculated.

**CHIPPEWA CREE TRIBE- MONTANA  
GASOLINE TAX  
AGREEMENT**

The Chippewa Cree Tribe – Montana Gasoline Tax Agreement (“Agreement”) is entered into by and between the State of Montana (“State”) and the Chippewa Cree Tribe of the Rocky Boy’s Reservation (“Tribe”). The Chippewa Cree Business Committee (“Business Committee”) is the governing body of the Tribe and is authorized to enter into this Agreement by Article VI, Section 1, Subsections (a), (f) and (j) of the of the Constitution and By-Laws of the Chippewa Cree Indians of the Rocky Boy’s Reservation of Montana.

The State is authorized pursuant to Mont. Code Ann. § 15-70-234, *et seq.*, and the State-Tribal Cooperative Agreements Act, Mont. Code Ann. § 18-11-101, *et seq.*, to enter into this Agreement.

The State and the Tribe agree as follows:

1. General Purposes of Agreement. The purposes of this Agreement are to avoid legal controversy and possible litigation over the taxation of gasoline within the exterior boundaries of the Rocky Boy’s Reservation (“Reservation”), to avoid dual taxation of gasoline by both the Tribe and the State, to ensure that the same level of taxation is imposed on distribution of gasoline both within and outside the boundaries of the Reservation, and to provide an effective means by which revenues generated by the state and tribal taxes on gasoline may be shared and distributed.

2. Recitals. This Agreement is made by and between the Tribe, acting through its Business Committee, and the State. The parties hereto, having conferred together, desire to collect the gasoline license tax on all gallons of gasoline delivered onto the Reservation for the mutual benefit of all the people of Montana including the residents of the Reservation. The Tribe agrees to allow the Department of Transportation the authority to enforce state and tribal

law in relation to taxation of gasoline motor fuels on the Reservation subject to the terms and conditions herein.

3. State Law. The State imposes a tax on gasoline distributed within the State's jurisdiction under Title 15, Chapter 70, Part 2, Montana Code Annotated. The State shall notify the Tribe in writing of any changes or amendments to state law which the State believes may impact this Agreement or necessitate an amendment to tribal law under this Agreement within sixty (60) days of any amendment to applicable state law.

4. Tribal Law. While this Agreement is in effect, the Tribe shall adopt and keep in force an ordinance imposing taxes equal to the Montana gasoline license tax, which tax shall apply to gasoline sold to all persons within the Tribe's jurisdiction on the Reservation in a manner similar to the Montana taxes. The Tribe shall supply the State with a current copy of this ordinance as it may be amended from time to time within sixty (60) days of the enactment or amendment of the ordinance.

5. Collection, Administration, and Enforcement of Taxes. The State and the Tribe agree that gasoline sold on the Reservation shall not be subject to both the state tax and the tribal tax, but shall be subject to one tax. The State agrees to assist the Tribe by collecting all gasoline taxes on gasoline sold on the Reservation and to remit to the Tribe the tribal gasoline tax collected as determined by the formulas described below.

a. For each fiscal year, the Tribe shall receive an amount of gasoline license taxes collected for estimated sales on the Reservation. The amount of gasoline license taxes that the Tribe receives shall be determined by multiplying the Montana per capita gasoline license tax times the number of enrolled Chippewa Cree tribal members living on the Reservation less

a 1% administration fee. The Montana per capita gasoline license tax is based on the prior fiscal year's gross sum of gasoline license taxes collected, adjusted by any refunds, credits, corrections, and audits, minus a 16% set aside and divided by the Montana state population.

For the calendar year beginning January 1, 2006 only, the parties agree that the number of Chippewa Cree tribal members residing on the Reservation shall be 3,519. The parties further agree that, for the calendar year beginning January 1, 2007, the total number of Chippewa Cree tribal members residing on the Reservation shall be determined by using the Chippewa Cree tribal enrollment population as well as the member's place of residence as determined by a methodology set out by the Business Committee. The methodology developed by the Business Committee shall be provided to the State by June 30, 2006.

The Business Committee authorizes the State to review the enrollment records maintained by the Tribe and any other information the Tribe uses to establish the number of enrolled members residing on the Reservation in order that the State may audit the methodology used by the Tribe as provided in Section 7 of this Agreement. If no methodology is provided by June 30, 2006, or if the State finds the methodology to be inadequate to determine the number of Chippewa Cree tribal members residing on the Reservation and the parties cannot correct the inadequacy prior to December 31, 2006, this agreement shall terminate on December 31, 2006.

For the calendar year beginning on January 1, 2008, and for each calendar year remaining in the term of this Agreement, the Business Committee shall certify to the State by March 31st of each year the number of enrolled Chippewa Cree tribal members residing on

the Reservation as of January 1 of that calendar year. In the event the Business Committee does not issue a recertification by March 31, the State may use the previous year's certification. The Business Committee authorizes the State to review the enrollment records maintained by the Tribe and any other information the Tribe uses to determine place of residency should the State wish to conduct an audit as provided in Section 7 of this Agreement.

b. The State shall distribute one-fourth of the monies due to the Tribe under this Agreement no later than thirty (30) days from the end of each calendar quarter after the effective date of this Agreement. The State will include with each distribution a statement showing how the distribution was determined for that quarter. Distributions shall continue until the expiration or the termination of this Agreement as provided in Section 10 or required by law. For the purposes of this Agreement a calendar quarter begins on January 1, April 1, July 1 and October 1 of each year.

c. The remittance amount payable to the Tribe shall be remitted to the Business Committee unless the Business Committee otherwise instructs the State. Said instruction will be in writing and will include the appropriate authorization from the Business Committee.

d. The Tribe and State agree to cooperatively enforce the gasoline license tax as provided in Title 15, Chapter 70, Part 2, Montana Code Annotated. Enforcement procedures, if needed, will be established by mutual written agreement.

6. Term. This Agreement shall be for a term of ten (10) years, commencing January 1, 2006, and terminating December 31, 2016, subject to the conditions precedent and the renewal provision below.

7. Audits. Either party may examine or audit the records of the other party to determine the accuracy of the statements or representations called for in this Agreement. The right of examination or audit shall exist during the term of the Agreement and for a period of one year after the date of any termination or expiration of this Agreement. To the extent permitted by applicable law, the parties agree to maintain the confidentiality of any confidential information obtained from the other party.

8. Effective Date. This Agreement is effective January 1, 2006, 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 4 above which ordinance will be in effect for the duration of the Agreement; the Agreement has received the final approval of the Business Committee; the Agreement has been approved by the Superintendent of the Rocky Boy's Indian Agency, Bureau of Indian Affairs, United States Department of Interior; and, the Agreement has been approved by the State Attorney General as required by § 18-11-105, MCA.

9. Amendments, Renegotiation and Renewal.

a. This Agreement may be amended only by written instrument signed by both parties.

b. Six months prior to expiration of the initial term provided in this Agreement, the parties shall meet to negotiate in good faith a renewal of the Agreement for an additional ten (10) year term, and thereafter shall meet to negotiate successive ten (10) year renewals of the Agreement.

The parties in each negotiation of a renewal term shall seek to agree on a distribution of tax revenues on substantially the same basis as the one provided above, in light of the circumstances existing at that time. If this Agreement expires because the term has run, the parties agree that all of its terms, except provision 10a, will remain in full force and effect until a new agreement is reached or either party gives 30 days written notice that it is cancelled.

10. Termination

a. This Agreement may be terminated by either party upon one hundred eighty (180) days 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.

b. The Chippewa Cree Tribes of the Rocky Boy's Reservation Fuel Tax Cooperative Agreement with the State of Montana entered into on the 14<sup>th</sup> day of October 1997 terminates on the effective date of this Agreement. This Agreement supercedes all gasoline agreements and amendments thereto entered into between the parties prior to the effective date of this Agreement.

11. Representations and Warranties. The parties represent and warrant to each other as follows:

a. That each has the authority to enter into and fully perform all of the terms and conditions of this Agreement in accordance with all applicable tribal, state, and federal law,

b. That the individuals executing this Agreement are duly authorized to do so on behalf of each party.

12. 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. 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's 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.

13. 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, and shall only extend to the State and no other parties. Neither party waives its sovereign immunity except as provided in this Agreement.

14. 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 regarding Montana gasoline motor fuels taxation of fuels sold on the Reservation. For so long as this Agreement remains in effect, the parties will not engage in litigation over this subject. 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 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, conduct pursuant thereto, or conduct in the negotiations or renegotiations of this Agreement, shall not 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 as specifically provided in 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 gasoline license tax as provided in Mont. Code Ann. §§ 15-70-201 through 15-70-236, 1999 *et seq.* It does not apply to any other taxes or fees of any nature collected by the State. This Agreement does not apply to any other tax collected by any other agency or subdivision of the State.

15. Notices. All notices and other communications required to be given under this Agreement by the Tribe and the State shall be deemed to have been duly given when delivered in person or posted by United States certified mail, return receipt requested, with postage prepaid, addressed as follows:

(i) To the Tribe:

Chairman  
Chippewa Cree Business Committee  
Rocky Boy Route  
P.O. Box 544  
Box Elder, MT 59521

(ii) To the State:

Governor's Office  
P.O. Box 200801  
State Capitol  
Helena, MT 59620-0801

With Copies to:

Director of Transportation  
Department of Transportation  
2701 Prospect Avenue  
Helena, MT 59620-1001

Attorney General of the State of Montana  
215 North Sanders  
Helena, MT 59620-1401

Notice shall be considered given on the date of mailing.

This Contract consists of nine (9) pages.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2005.

STATE OF MONTANA

CHIPPEWA CREE TRIBE OF THE ROCKY  
BOY'S RESERVATION

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

\_\_\_\_\_  
John Houle, Chairman  
Chippewa Cree Business Committee

\_\_\_\_\_  
Jim Lynch, Director  
Department of Transportation

\_\_\_\_\_  
United States Department of Interior  
Bureau of Indian Affairs

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

\_\_\_\_\_  
Mike McGrath, Attorney General

## Gasoline Revenue Sharing Comparison

6-Dec-05

### Proposed Calculation

	<u>Rocky Boy</u>
Gasoline Tax Received for FY 2006	\$ 130,591,422
Less: Gas Tax Refunds	2,742,387
Less: City/County Distribution (16%)	20,455,846
Net State Retained Gas Tax	<u>\$ 107,393,189</u>
Divide By: MT Population on July 1, 2005 (FY06)	930,843
Gasoline Tax Dollars Paid per capita	<u>\$ 115.37</u>
Times: Enrolled Tribal Members Living on Reservation	3,519
Tribe Share of Gas Tax Before Administration Costs	<u>\$ 405,994</u>
Less: 1% Administrative Fee	0.99
Tribal Share of Gas Tax	<u><u>\$ 401,934</u></u>

### Current Agreement Calculation

Gasoline Tax Received for FY 2006	\$ 130,591,422
Less: Gas Tax Refunds	2,742,387
Net Gas Tax less Gas Refunds	<u>\$ 127,849,035</u>
Divide By: MT Population on July 1, 2005 (FY06)	930,843
Gasoline Tax Dollars Paid per capita	<u>\$ 137.35</u>
Times 85% (.85)	\$ 116.75
Enrolled Tribal Members Living on Reservation	3,442
Tribal Share of Gas Tax	<u><u>\$ 401,838</u></u>

### Comparison of Per Capita Analysis Versus Current

Proposed Tribal Share of Gas Tax - New Formula	\$ 401,934
Estimated FY 06 Tribal Payment Under Current Agreement	\$ 401,838
Difference - Proposed vs. Estimated	<u><u>\$ 96</u></u>