

# HOUSE BILL REPORT

## SHB 2803

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**As Passed House:**  
February 18, 2020

**Title:** An act relating to authorizing the governor to enter into compacts with Indian tribes addressing certain state retail sales tax, certain state use tax, and certain state business and occupation tax revenues, as specified in a memorandum of understanding entered into by the state, Tulalip tribes, and Snohomish county, in January 2020, and including other terms necessary for the department of revenue to administer any such compact.

**Brief Description:** Authorizing the governor to enter into compacts with Indian tribes addressing certain state retail sales tax, certain state use tax, and certain state business and occupation tax revenues, as specified in a memorandum of understanding entered into by the state, Tulalip tribes, and Snohomish county, in January 2020, and including other terms necessary for the department of revenue to administer any such compact.

**Sponsors:** House Committee on Finance (originally sponsored by Representatives Tarleton, Robinson, Sells, Lekanoff, Gregerson, Chapman, Orwall, Peterson, Tharinger and Pollet; by request of Department of Revenue).

**Brief History:**

**Committee Activity:**

Finance: 1/30/20, 2/7/20 [DPS].

**Floor Activity:**

Passed House: 2/18/20, 98-0.

**Brief Summary of Substitute Bill**

- Authorizes the Governor to negotiate and execute compacts with federally recognized Indian tribes regarding the distribution of the proceeds of state business and occupation taxes, state retail sales taxes, and state use taxes on qualified transactions and a tribal commitment for a qualified capital investment.

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**HOUSE COMMITTEE ON FINANCE**

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Tarleton, Chair; Walen, Vice Chair; Young,

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Assistant Ranking Minority Member; Chapman, Frame, Macri, Orwall, Springer, Stokesbary, Vick and Wylie.

**Minority Report:** Without recommendation. Signed by 1 member: Representative Orcutt, Ranking Minority Member.

**Staff:** Tracey O'Brien (786-7152).

### **Background:**

#### Business and Occupation Tax.

Washington's major business tax is the business and occupation (B&O) tax. The B&O tax is imposed on the gross receipts of business activities conducted within the state, without any deduction for the costs of doing business. Businesses must pay the B&O tax even though they may not have any profits or may be operating at a loss.

A taxpayer may have more than one B&O tax rate, depending on the types of activities conducted. Major B&O tax rates are 0.471 percent for retailing; 0.484 percent for manufacturing, wholesaling, and extracting; and 1.5 percent for services and for activities not classified elsewhere. Several preferential rates also apply to specific business activities.

In addition, a taxpayer may be eligible to utilize other tax preferences, including credits and deductions, to reduce their tax liability. For example, a taxpayer engaging in activities subject to different B&O tax rates may be eligible for a multiple activities tax credit. A taxpayer may also be eligible for a small business credit that will either eliminate or reduce their B&O tax liability. In general, the credit is \$70 per month for service businesses and \$35 per month for all other businesses, multiplied by the number of months in the reporting period. The amount of the credit available phases out based on the business's gross receipts.

A business does not have to file an annual B&O tax return if the business does not owe other taxes or fees to the Department of Revenue (DOR) and has annual gross proceeds of sales, gross income, or value of products for all B&O tax classifications of less than \$28,000 per year, or less than \$46,667 if at least 50 percent of its taxable income is from services or activities not classified elsewhere.

#### Retail Sales and Use Tax.

Retail sales taxes are imposed on retail sales of most articles of tangible personal property, digital products, and some services. A retail sale is a sale to the final consumer or end user of the property, digital product, or service. If retail sales taxes were not collected when the user acquired the property, digital products, or services, then use tax applies to the value of property, digital product, or service when used in this state. The state, all counties, and all cities levy retail sales and use taxes. The state sales and use tax rate is 6.5 percent; local sales and use tax rates vary from 0.5 percent to 3.9 percent, depending on the location.

#### Federally Recognized Indian Tribes.

There are 29 federally recognized Indian tribes in Washington: Chehalis, Colville, Cowlitz, Hoh, Jamestown, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble, Puyallup, Quileute, Quinault, Samish, Sauk-Suiattle, Shoalwater,

Skokomish, Snoqualmie, Spokane, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, Upper Skagit, and Yakama.

Recognition as a tribe empowers the tribe to exercise certain powers of a sovereign government. This includes self-government, sovereign immunity, control of Indian trust land, and access to federal services.

#### Taxation in Indian Country.

Indian country consists of all land set aside primarily for the use of Indians, including all land within an Indian reservation and all land outside a reservation that is under federal jurisdiction and designated primarily for Indian use. The federal government has the authority to tax all persons in Indian country. In Indian country, tribal governments have the authority to tax all tribal members, nonmembers on trust land, and nonmembers on fee land in certain circumstances.

State powers of taxation are limited in Indian country, particularly where Indian interests are affected. Federal law and policies preempt states from taxing the reservation income of tribal members domiciled on the tribe's reservation. When examining the ability to tax on-reservation activities by, or property of, nonmembers, the United States Supreme Court has identified two potential barriers to the state's taxation. First, the state authority to impose a tax may be preempted by federal law. Second, it may infringe on the right of the reservation Indians to make their own laws and be ruled by them.

#### Tribal Compacts.

The Legislature has authorized the Governor to enter into state and tribal compacts and agreements in specific circumstances. For example, there are contracts authorized by statute for all federally recognized tribes that cover the imposition of cigarette taxes by tribes and the use of those funds for essential government services. All the tribes have a Class III gaming compact with the state. A tribe may also initiate an educational compact with the Superintendent of Public Instruction. Two tribes have entered into a marijuana agreement with the state. The Quinault Nation has a timber harvest excise tax agreement with the state.

#### **Summary of Substitute Bill:**

The Governor is authorized to enter into compacts with federally recognized Indian tribes to share the revenue generated by the imposition of state sales and use taxes and certain B&O taxes on qualified transactions, subject to certain requirements.

The Governor may delegate the ability to negotiate the terms of the compact to the DOR, except for the qualified capital investment.

#### Qualified Capital Investment.

A compact must include a qualified capital investment, which is a contribution to the development and construction of a project agreed to by the Governor and the compacting tribe.

The Governor must be satisfied that the compacting tribe's qualified capital investment is substantially proportionate to the compacting tribe's estimated tax revenue, excluding tax

revenue from new development, as compared with other tribe's compacting qualified capital investments.

Tax Revenues.

Beginning on the compact's implementation date, a compacting tribe must receive 100 percent of all B&O tax proceeds collected on qualified transactions and received by the state.

In addition, the compacting tribe must receive the first \$500,000 in state sales and use tax revenues collected during each calendar year from taxpayers, regardless of whether the taxpayers meet the requirements of a new development. If the \$500,000 cap is reached during a calendar year, any amounts collected from taxpayers that do not meet the requirements of a new development will be deemed to have been collected and applied to the cap first, but only in the calendar month in which the cap is reached.

Once the \$500,000 cap is met, 25 percent of sales and use taxes collected each calendar year from taxpayers meeting the requirements of a new development will be distributed to the compacting tribe. However, if the compacting tribe has completed a qualified capital investment, the compacting tribe will receive 60 percent of the sales and use taxes collected each calendar year from taxpayers meeting the requirements of a new development once the \$500,000 cap is met.

The distributions for the sales and use tax collected above the \$500,000 cap each calendar year from taxpayers not meeting the requirements of new a development are changed beginning January 1 of the fourth calendar year following the signing of the compact. The compacting tribe will receive 25 percent of any amount above the cap or 50 percent of any amount over the cap if the compacting tribe has completed a qualified capital investment.

All refunds and credits the DOR issues to taxpayers of amounts previously paid to the compacting tribe will be charged to the compacting tribe.

The tax revenues must be paid to the compacting tribe on a monthly basis within 60 days after the DOR receives the tax amounts.

"Qualified transaction" means a retail sale subject to state sales tax, involving a seller and a purchaser who are both nonmembers, which is sourced to a location within the compact covered area or any use by a nonmember upon which the state use tax is imposed and which is sourced to a location within the compact covered area.

"New development" means a person that is subject to state sales tax or state use tax collection or payment obligation as a result of business activity within the compact covered area, conducts business operations in a structure within the compact covered area and construction of that structure began on or after the date the compact was signed, and has not previously been subject to state sales tax or state use tax collection or payment obligations as the result of that same business activity operated within a different structure located elsewhere within the compact covered area. "New development" does not include business operations in a structure within the compact covered area if the construction involves the renovation of or an addition to a structure existing before the date the compact is signed.

### Compact Provisions.

A compact must include a process for determining when a qualified capital investment is complete, a process to verify compliance with the compact's terms, a delineation of roles and responsibilities of the tribe and the DOR, and a process to resolve disputes, including a nonjudicial process. The compact must also include the agreement that resolves all current and future disputes relating to revenues from transactions between nonmembers, state and local taxes imposed on nonmembers and sourced to a location within the Indian country of the compacting tribe, and personal property taxes imposed on nonmembers.

In addition, the compact must include an agreement that in the event of a change in state tax laws that affects the negotiated terms of a compact, or a change in the DOR's interpretation regarding the property taxation of nonmember-owned improvement on Indian trust land, the parties must discuss in good faith any changes in the compact or this act that may be appropriate to preserve the intended benefits. However, the compacting tribe may terminate the compact if good faith discussion does not result in a mutually satisfactory resolution.

The DOR must perform all functions related to the administration and collection of the taxes collected on qualified transactions. The DOR may not impose any charge on the compacting tribe for these services. However, the DOR may seek legislative appropriations to cover its administrative costs associated with compact negotiations and administration. The compacting tribe must provide information that the DOR determines is necessary to fulfill its tax administration obligations under the compact.

The compacting tribe may examine the DOR's records related to the payment of tax amounts to the compacting tribes. However, the compacting tribe must agree to keep such information obtained from the DOR confidential to the same extent the DOR is required to keep it confidential under law.

Information received by the state or open to state review under the terms of a compact is deemed to be tax information and subject to the confidentiality requirements.

The compact must include the duration of the compact and any related terms.

### Additional Administrative Provisions.

State sales and use tax proceeds dedicated to the performance audits of governments account are not reduced by any payment to the compacting tribe. There are no changes to the depositing of state sales and use tax and B&O tax into the State General Fund as required by law.

The DOR may adopt rules necessary for the administration of this bill.

"Compact covered area" means Indian trust land, whether located within or outside of the compacting tribe's reservation and fee land within the boundaries of the compacting tribe's reservation and under tribal or tribal-member ownership. Tribal or tribal-member ownership means fee land with a greater than 50 percent ownership interest being held by any combination of the compacting tribe or its tribal members. "Compact covered area" does not include any land that, as of the effective date of this bill, was fee land in which one or more nonmembers held a majority interest in, but only in respect to a business that was in

operation on that land as of the effective date of this bill and continues to be in operation on that same land or a substantially similar successor business is in operation on the same land.

"Nonmember" means a natural person who is not a tribal member of the compacting tribe, a tribe that is not the compacting tribe, or any entity where not more than 50 percent of the ownership interest is held by any combination of the compacting tribe or any tribal member of the compacting tribe.

"Tribal member" means an enrolled member of a federal recognized tribe, or in the context of a marital community, the spouse of a tribal member of the compacting tribe.

"Indian tribe" or "tribe" means a federally recognized Indian tribe located at least partially within the geographical boundaries of Washington and includes its enterprises, subsidiaries, and constituent parts.

The delegation of power to negotiate a compact with a federally recognized Indian tribe does not affect any local taxes.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) This is a historic occasion. The state has been wrestling with taxation in Indian country for decades. The bill before you finally places federally recognized Indian tribal governments on the same level as state and local governments when it comes to taxes. It promotes tribal self-sufficiency and self-development. Moreover, local governments are held harmless and very likely to benefit in increased local tax revenues as the tribe in their community grows their economies.

The taxation of Indian country is one of the most litigated areas of tax law. This legislation reflects the agreement between the state and the Tulalip Tribe as a result of the court-order mediation in the Quil Ceda Village case that was originally filed in 2015. That pending litigation poses serious risk for all parties. Unlike legislation, courts cannot create compromise, only choose winners and losers. This legislation also protects the state from future litigation. It implements a compromise settlement within innovative solutions that creates more revenue for all parties if there is new development. Under the agreement, the Tulalip Tribe has committed to a capital investment of \$35 million to build a state civil commitment medical center with 48 beds to address the mental health crisis.

The bill also will help smaller tribes with the first \$500,000 of state sales and use tax revenues directed to the tribe. Without this bill, a state loss in court could result in 29 tax free or lower tax zones throughout Washington.

Over the two decades since Quil Ceda Village broke ground, 6,000 jobs have been created for the local community. Many of these jobs are held by non-tribal community members. It shows that economic development in Indian country benefits everyone—the state, the local governments, communities, and the tribes.

Compacts exist in different areas with various tribes. These agreements help create certainty and allow all the various parties to engage in long-term planning. This legislation empowers other tribes to negotiate a compact with the state to reinforce the government to government relationship, enhance our communities through capital investments and economic development, and expand the services the tribes can provide their members and their communities.

(Opposed) None.

**Persons Testifying:** Representative Tarleton, prime sponsor; Gil Brewer, Department of Revenue; Teri Gobin and Lisa Koop, Tulalip Tribes; Dave Burnett, Chehalis Tribe; Brian Cladoosby, Swinomish Indian Tribe; Bill Iyall, Cowlitz Indian Tribe; and Josh Weiss, Snohomish County.

**Persons Signed In To Testify But Not Testifying:** None.