

ORIGINAL

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WHATCOM COUNTY
CONTRACT NO.
20111022

**INTERGOVERNMENTAL FRAMEWORK AGREEMENT BETWEEN THE
LUMMI NATION AND WHATCOM COUNTY**

THIS AGREEMENT is made this 27th of October, 2011, between the "Parties" (Whatcom County, a Washington municipal corporation, hereinafter referred to as the "County," and the Lummi Nation, a federally recognized Indian Tribe, hereinafter referred to as the "Lummi Nation" or "the Nation").

WHEREAS, the people of the Lummi Nation have lived in and around the area that is now Whatcom County, Washington, since time immemorial and the County was formed in 1854; and

WHEREAS, the Lummi Nation and the County share respective interests, including:

1. Preserving the rich cultural and natural resources history of the area in and around the Lummi Reservation ("Reservation"), for generations to come;
2. Improving traffic safety and transportation options for the Lummi Reservation and the Lummi Island communities;
3. Resolving differences in how their respective goals are to be achieved and avoiding the cost and uncertainty of litigation through a mutually beneficial resolution of the issues addressed by this Agreement;
4. Providing a framework to resolve known issues that relate to this subject matter, address short term needs, and create significant new long-term opportunities to implement the goals of this Agreement; and

WHEREAS, this Agreement recognizes that the Lummi Nation seeks increased safety within the boundaries of the Reservation, to obtain fair compensation for uses of tribally-owned land, and to maintain space for future waterfront development at Gooseberry Point; and

WHEREAS, this Agreement recognizes that the County desires to maintain ferry service to Lummi Island from the current dock location at Gooseberry Point; and

WHEREAS, this Agreement encourages and provides the foundation and framework for mutual respect and cooperation between the Parties which will benefit all the people of the Whatcom County community, particularly those who reside at Lummi Island and the Lummi Reservation; encourages a cooperative relationship which will reduce future conflicts; provides a framework of principles for implementing the

provisions of leases executed by the Parties for the Lummi Island ferry; and provides greater certainty to the County and the Lummi Nation;

NOW, THEREFORE, we, the undersigned, for consideration provided in the Tidelands Lease and Uplands Lease appended hereto, enter into this Agreement between the Lummi Nation and Whatcom County to work cooperatively into the future to achieve the purposes of the agreements for tidelands and uplands leases that have been appended hereto and made a part hereof.

I. DEFINITIONS

“Agreement” as referred to herein means the content of this document, its attachments, which include the “Tidelands Lease” and “Uplands Lease”, and all amendments thereto, including any further implementation agreements.

“Tidelands Lease” means the agreement signed by the Parties and the Secretary of the Department of the Interior or his authorized representative, governing the use of the tidelands at Gooseberry Point that are held in trust by the United States government. The Tidelands Lease is attached to this Agreement and is deemed to be part of it.

“Uplands Lease” means the agreement signed by the Parties governing the use of lands owned by Lummi Nation within the staging area for the County ferry operation lying between the County road known as Haxton Way or Lummi View Drive and the tidelands south of that upland area. The Uplands Lease is attached to this Agreement and is deemed to be part of it.

“Parties” as used herein refers to the Lummi Nation, also designated herein as “Lessor”, and Whatcom County, also designated herein as “Lessee” and “County”.

“Secretary” means the Secretary of the Department of the Interior of the United States, or his or her authorized representative.

II. PURPOSE OF THE AGREEMENT

The purpose of this document is to formally memorialize the agreement of the Parties to implement in good faith the goals and objectives identified by the Parties in order to establish terms for continuing ferry service to Lummi Island from Gooseberry Point on the Lummi Indian Reservation, to jointly pursue immediate and future safety improvements that benefit the ferry passengers and Reservation residents, and to

accommodate the Nation's plans to develop a marina at Gooseberry Point with continued operation of the Lummi Island ferry.

The County's ability to continue providing ferry service from Gooseberry Point to Lummi Island is contingent upon its ability to ensure traffic safety improvements and traffic mitigation efforts, to provide fair compensation for use of Lummi tribally-owned lands, and to maintain and enhance the Gooseberry Point area as a viable economic development area for the Lummi Nation.

This Agreement provides a framework for implementation of two land leases between the Parties that are executed simultaneously with this Agreement, and also resolves claims between the Parties regarding prior use by the County of the tribal lands described in the those leases.

The Parties have reached agreement on a tidelands lease and a lease of adjoining uplands, both of which are necessary for the County to continue to operate the Lummi Island ferry from its current location at Gooseberry Point on the Lummi Reservation. The leases, and more particularly the uplands lease, require the County to take certain actions in the future regarding the operation of the ferry and the undertaking of traffic safety and road improvement projects within the Lummi Reservation. These actions include, but are not limited to, identifying, prioritizing, funding and constructing traffic safety projects, and operating the ferry facilities in a manner that accommodates Lummi's future economic development and fisheries interests in the Gooseberry Point/Hales Passage area.

Because the nature and scope of the County's undertakings cannot be presently determined beyond that already presented in the Tidelands Lease and Uplands Lease, implementation of the County's commitments under the leases shall be addressed in a series of "implementation agreements" that will be negotiated and executed by the Parties in the future. The Parties now agree that the principles set out in this Framework Agreement shall guide those future negotiations. In addition, the Parties agree that this Framework Agreement provides the context within which the Tidelands and Uplands Leases were negotiated. To the extent that those leases may require implementation, interpretation or construction in the future, this Framework Agreement shall be used as an aid and resource by the Parties and by any person charged with responsibility for resolving disputes that may arise under the leases.

The Parties also resolve in this Framework Agreement all disputes between them that have arisen or could have arisen regarding the County's operation of the Lummi Island ferry from the Gooseberry Point facilities between February 14, 1985 and the date of execution of this Agreement. The County has tendered to the Lummi Nation

deeds to certain lands within the Lummi Reservation as described in that certain Consent Decree (Docket No. 479) dated October 28, 1982 in Civil Action No. C79-682R, United States District Court, Western District of Washington, captioned "Lummi Indian Tribe, et al v. Hallauer, et al" and has paid to the Lummi Nation the sum of \$16,667 per month beginning in February 2010 and continuing through the date of execution of this Agreement. The Lummi Nation has allowed the County to continue to operate the Lummi Island ferry from the Gooseberry Point facilities during this period despite its position that no valid leases existed authorizing such use. The Parties now agree that those transfers and payments and the Nation's forbearance of any action to interrupt or terminate the County's use of the tribal lands, together with the execution of the new tidelands and uplands leases referenced herein when approved by the United States where necessary, fully and completely resolve any and all claims regarding that prior period of use that each Party could have asserted against the other regarding the existence, validity or necessity of tribal permission for the County's use of the tribal lands, and the adequacy of the consideration paid to the Nation for such use.

The Parties agree to act in good faith and to use their best efforts to negotiate the implementation agreements appropriate to specific goals and time frames identified by the Parties.

III. BACKGROUND

The Lummi people have lived, fished, hunted, gathered, and conducted cultural practices and commerce in and around present day Whatcom County since time immemorial. The Lummi people reserved the ability to continue their way of life throughout Washington, including but not limited to Whatcom County, as part of their treaty with the United States in 1855. In *United States v. Washington* 384 F. Supp. 312 (W.D. Wash.) *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976), the federal court affirmed the Lummi Nation's treaty right to take fish throughout the Nation's pre-treaty usual and accustomed areas (known as the Lummi U & A) including Hales Passage and the Gooseberry Point area.

The County has a rich history, beginning with its formation in 1854 (by the Washington territorial government pursuant to territorial law) and continuing to present day. The County's mission is that: *Whatcom County government will strive to promote, enrich and enhance the freedoms, opportunities and safety of its citizens. It will provide essential and desirable public services in a cost effective and accountable manner. It will provide vision, leadership and responsiveness while addressing community issues and conducting the business of the people. It will encourage community involvement in public issues while protecting the rights of the individual and encouraging respect for diversity. It shall serve as an active catalyst*

for individuals and other entities to participate in achieving a positive vision for the future of Whatcom County. This mission entails rendering appropriate types and levels of support to achieve public safety needs of the Lummi Reservation and to encourage achievement of the Lummi Nation's economic development goals.

The private Lummi Island Ferry Company began operating a ferry to Lummi Island from a dock constructed at Gooseberry Point during 1921. Whatcom County purchased the docks and associated upland properties on Lummi Island and at Gooseberry Point from the Lummi Island Ferry Company in 1924. There is no known record of a tidelands lease agreement between the Lummi Nation and either the Lummi Island Ferry Company or Whatcom County before 1963. This first lease (No. 4182) was for a 25 year period beginning on January 1, 1963. A second lease with a 25-year term was entered into between the Lummi Nation and Whatcom County on May 12, 1988, effective on February 14, 1985, the provisions of which were directed by the 1982 consent decree for a civil rights lawsuit (*Lummi Indian Tribe v. Hallauer, et al.* Civ. No. C79-682R [W.D. Wash.]). However, because that 1988 agreement was never approved by the Secretary of Interior or his authorized representative as required in the lease and the consent decree, the agreement was not legally valid or binding. Nonetheless, in consideration of the County's conveyance to the Nation of property identified in that agreement as payment for the term, the Nation extended use of the tidelands to the County through February 14, 2010.

IV. GEOGRAPHIC SCOPE OF THE AGREEMENT

The road improvement and traffic safety projects contemplated by the uplands lease agreement between the Parties shall be identified and performed within the three geographic areas set out herein. The primary geographic area shall be from the Slater Road-Haxton Way intersection in the north (where most vehicle traffic to and from the ferry enters and leaves the Reservation), to the current Ferry Terminal at Gooseberry Point in the south, together with the waters and shorelines adjacent to the current Ferry Terminal. The secondary geographic area shall be all other portions of the Lummi Reservation. The third geographic area shall be all other County roadways and roadway sections adjacent to the Lummi Reservation. In identifying road improvement and traffic safety projects as required by the uplands lease, priority shall be given first to projects within the primary geographic area, and then to projects in the secondary geographic area. Projects in the third geographic area shall be given priority only by mutual agreement of Parties, and agreement to such projects may be withheld without regard to the Party's reasons. Nothing in this Agreement shall prevent the Parties from mutually agreeing to pursue a project that would not otherwise have priority under the principles of this paragraph.

Elements of this Agreement are based on resolving issues between the County and the Lummi Nation within these areas. The County and the Lummi Nation do not relinquish their rights to resolve issues with other parties, either private or public, in other forums.

V. FRAMEWORK PRINCIPLES

The Parties agree that the principles set forth below will assist them in implementing the mutually beneficial lease agreements they have negotiated and executed. In implementing those leases, the Parties will:

- A. Use face-to-face meetings to identify, discuss, and attempt to resolve issues affecting and/or of interest to either party;
- B. Continue building a relationship that is based on consistent contact, mutual respect, and constructive dialogue;
- C. Establish a process for coordination between the Parties prior to inception of projects, development, and resource management involving the Nation and the County;
- D. Seek to achieve collective understandings, stability, certainty, and long-term cooperation between the Parties;
- E. Establish a method for sharing information at a technical level about the public works existing and occurring within the Geographical Scope of the Agreement as identified in Section IV;
- F. Work to address any cultural resources and/or cultural practices affected by activities carried out under this Agreement within the Geographical Scope of the Agreement;
- G. Understand, respect, and support each Party's processes for securing formal governmental approval from their respective governing authorities for this Agreement and all implementation agreements;
- H. Subject to the County's commitment to abide by the Washington Public Records Act and the Washington Open Meetings Act, in order to foster honest and frank discussion, meetings shall be conducted solely between the parties and any sharing of information with individuals outside the

respective governing authorities shall be subject to the principles set forth in I, below.

- I. Jointly discuss any potential media announcements or discussions regarding this Agreement and the implementation of this Agreement with the goal of agreement by the Parties in advance to ensure that the sentiments expressed represent an accurate and balanced description of the subject matter involved. The Parties will discuss foreseeable public events or open public meetings where media may be present and/or where communications on the Parties' discussions may occur with other parties – with the intent to avoid surprises if at all possible. Neither Party will make a statement characterizing the positions of the other Party to any media relating to the substantive issues under discussion. Statements to the media by the individual parties apart from those referenced above should be consistent with the principles stated herein and made with a view towards reaching agreement on issues within the scope of the Agreement, or other matters as may be appropriate;
- J. All notices related to face-to-face meetings, this Agreement, or any implementation agreement shall be transmitted to the following, or their successors:

For the Lummi Nation:

Lummi Nation Chairman
2616 Kwina Road
Bellingham, WA 98226
Telephone: 360-384-2140

For Whatcom County:

Whatcom County Executive
311 Grand Avenue, Suite 108
Bellingham, WA 98225
Telephone: 360-676-6717

VI. DISPUTE RESOLUTION

All disputes between the Parties relating to or arising from this Framework Agreement, the Tidelands Lease, the Uplands Lease, or any future agreement implementing any of the foregoing, shall be conducted as set forth herein, and the language below shall be incorporated within those agreements, either explicitly or by reference:

- A. Any disagreement or dispute that arises between the Parties as to the interpretation, violation, or performance of any of the agreements to which this provision applies, or any rights or obligations arising thereunder, shall

be resolved whenever possible by the Parties first meeting in person and conferring in a good faith attempt to resolve the dispute through negotiations. The Party initiating the resolution process shall serve on the other Party a written notice describing the dispute and invoking the dispute resolution process. The first meeting of the Parties shall occur not later than ten (10) days after receipt of written notice describing the dispute, unless both Parties agree in writing to an extension of time.

- B. If the dispute is not resolved to the satisfaction of the Parties within thirty (30) days after the first meeting as set out in this Section, then either Party may seek a resolution by arbitration in accordance with the procedures set forth herein. The Parties are required to participate in arbitration. Any claim, controversy or dispute subject to dispute resolution under this provision shall be submitted to binding arbitration conducted by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules of the AAA then in effect. To the maximum extent applicable, the Federal Arbitration Act (Title IX of the United States Code) will govern such arbitration. No rule or provision which may be construed to broaden the Nation's limited waiver of sovereign immunity beyond that contained in this Agreement shall apply. Such arbitration shall be held in Bellingham or such other place as the Parties agree. The arbitrator shall be empowered to impose sanctions and take such other actions as he or she deems necessary to the same extent a judge could impose sanctions or take such other actions pursuant to the Federal Rules of Civil Procedure and applicable law. The mutual commitment by the Parties to resolve disputes through arbitration shall not prevent either Party from seeking injunctive relief to compel arbitration and/or maintain the status quo pending resolution of the arbitration proceeding, through application to the federal District Court for the Western District of Washington; provided, however, that in the event such federal court declines jurisdiction over such claim for injunctive relief, such relief may be sought in the courts of the State of Washington, provided, however, such relief is consistent with this Agreement and the Nation's limited waiver of sovereign immunity.
- C. The arbitration shall be heard by a single arbitrator determined by the Parties. If the Parties cannot agree on an arbitrator, then the American Arbitration Association shall appoint one. The arbitrator should be a retired

federal judge, if available. If such a person is not available, the arbitrator must be a licensed attorney or retired judge with some knowledge of federal Indian law and real property transactions involving Indian trust lands. The arbitrator must be unbiased and neutral.

- D. The arbitration hearing shall be conducted within ninety (90) days after an arbitrator is appointed unless the parties agree in writing to an extension of this period. The arbitration provisions hereof shall be self-executing, and the decision of the arbitrator shall be final and binding upon the Parties, and without further appeal or any judicial confirmation, recourse, or other process other than for confirmation and enforcement of the arbitration judgment, except as provided in 9 U.S.C. §10. The arbitration judgment shall be in writing and give reasons for the decision. Each side shall bear its own costs, attorney's fees, and one half of the costs and expenses of the arbitrator. Judgment on any arbitration award may be confirmed by and entered in the United States District Court for the Western District of Washington. In the event that the District Court determines that it lacks jurisdiction, the award may be confirmed by and entered in the courts of the State of Washington; provided, however, such award is consistent with this Agreement and the Nation's limited waiver of sovereign immunity. Appeal may be taken from a decision of such court regarding confirmation and/or enforcement of the decision in arbitration.
- E. No causes of action or claims in law or equity are cognizable against the County except actions against the County itself for specific performance or injunctive relief arising out of this Agreement, or any implementation agreement. Lummi Nation's remedy against the County in case of an uncured breach of the agreement(s) by the County shall be termination of the lease agreement(s) and vacation of the leased premises by the County. The Nation shall not bring any action arising from this Agreement, or any implementation agreement, against the County's council members, employees, agents or attorneys, except in official capacity for the sole purpose of effectuating on behalf of the County any and all court orders that may be issued pertaining to this agreement.
- F. The Nation hereby grants a limited waiver of its sovereign immunity from suit solely for actions brought by the County or its approved successor in

interest (and no other person or entity) to enforce the terms of this Agreement, including an action to compel arbitration, specific performance and/or injunctive relief if warranted, consistent with the procedures for dispute resolution provided herein. This limited waiver is to be strictly and narrowly construed in favor of the Nation and may be enforced only under the conditions set forth herein. No causes of action or claims in law or equity are cognizable against the Nation except actions against the Nation itself for specific performance or injunctive relief arising out of this Agreement, including the Tidelands Lease, the Uplands Lease, or any agreement implementing those agreements. In the event the County or its successors obtain a judgment or arbitration award as provided in this Article VI and seeks to enforce such award, the Nation hereby agrees, if the federal district court declines to exercise jurisdiction, to submit to the jurisdiction of the state courts of Washington for the sole purpose of execution of the arbitration award of judgment. The Nation does not waive its sovereign immunity with respect to actions by third parties or disputes between the Nation and the County that do not arise out of this Agreement, the Tidelands Lease, the Uplands Lease, or any agreement implementing those agreements. This limited waiver does not allow any actions to be brought against the tribal council, tribal officers, tribal attorneys, tribal employees, tribal agents, tribal members, or any other person or entity acting on behalf of the Nation, except in official capacity for the sole purpose of effectuating on behalf of Lessor any and all court orders that may be issued pertaining to this Agreement. The Nation's limited waiver of sovereign immunity shall be further evidenced by a resolution from the Lummi Nation Indian Business Council, which shall also waive any requirement for exhaustion of tribal remedies and jurisdiction in the Lummi Nation Tribal Court. In the event of a lawsuit involving this Agreement, venue shall be proper only in the U.S. Federal District Court for the Western District of Washington, except as provided in Section D, above. The Nation, by execution of this Agreement, acknowledges the jurisdiction of the courts of the United States in this matter.

- G. The Parties agree that any dispute resolution meetings or communications, arbitration proceedings, or agreements among the Parties settling or otherwise relating to any claims arising from or related to this Agreement or an implementation agreement shall be and remain confidential to the extent permitted by applicable law, except as otherwise mutually agreed by the Parties. The Parties recognize that the County is subject to Washington State's Open Meetings Act and Public Records Act, and both

settlement agreements and arbitration outcomes are subject to public disclosure by the County to those making such requests.

- H. The Parties agree that during any kind of controversy, claim, disagreement or dispute, including a dispute as to the validity of this Agreement or any implementation agreement, the Parties shall continue to possess the rights, duties, and obligations set forth in this Agreement, and the Parties shall continue their performance of the provisions of this Agreement.

VII. AMENDMENT AND WAIVER

This Agreement may not be amended, modified, or supplemented except by written agreement between the Parties. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision.

VIII. GOVERNING LAW AND INTERPRETATION

This Agreement shall be governed and construed in accordance with the laws of the State of Washington, except where matters exclusively of federal law are concerned (such as the provisions regarding lease of restricted Indian lands), notwithstanding any choice of law provisions. This Agreement shall not be construed for or against any party based on drafting or preparation. Each Party has been represented by legal counsel of its choosing throughout the negotiation of this Agreement and the uplands and tidelands leases. Captions in this Agreement are included for convenience only and in no way define or limit the meaning or intent of any provision herein.

IX. PERSONS BOUND

This Agreement shall bind and inure to the benefit of the Parties and their respective heirs, successors, and assigns. Neither this Agreement nor any interest herein may be assigned without the prior written approval of the other Party. Such approval shall not be unreasonably withheld and shall be provided within thirty days of a request without prior written consent to a longer period of time.

X. ROLE OF THE UNITED STATES

The United States will have the role it has retained for itself in approving leases of tribal trust lands. The role of the United States is one of trustee for the Nation with regard to lands and other tribal assets held in trust by the United States for the Lummi Nation and its members.

XI. FURTHER ASSURANCES

Each party agrees to in good faith do all acts and things and to make, execute, and deliver such written instruments as shall be reasonably necessary to carry out the terms and provisions of this Agreement, and all lease and any implementation agreements, and to implement the transactions contemplated herein and therein.

XII. SEVERABILITY

In case any one or more of the provisions contained in this Agreement, or any implementation agreement, or any application thereof, shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein or therein and any other application thereof, shall not in any way be affected or impaired thereby.

XIII. ENTIRE AGREEMENT

This Agreement, together with the associated Tidelands and Uplands Lease Agreements and attachments thereto, constitutes the entire agreement between the Parties with respect to the subject matter herein and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the Parties to this Agreement with respect to the subject matter of this Agreement.

XIV. SIGNATURES AND AUTHORITY

Each of the signatories below represents and warrants on behalf of the entity he purports to represent that he has been duly authorized to enter into and execute this Agreement and to commit to the performance of the obligations herein. This Agreement, together with any subsequent amendments or changes to this Agreement, and any subsequent implementation agreements, shall be approved by the Lummi Indian Business Council and the Whatcom County Council.

XV. NO THIRD PARTY BENEFICIARIES

This Agreement is exclusively for the benefit of the Parties hereto and may not be enforced by any party other than a party hereto and shall not give rise to liability to any third party other than as provided herein.

XVI. INDIVIDUAL RESPONSIBILITY

The rights, duties, obligations, and liabilities of the Parties under this Agreement shall be individual, not joint or collective. It is not the intention of the Parties to create, nor shall this Agreement be deemed or construed to create, a partnership or a joint venture. This Agreement shall not be deemed or construed to authorize any Party to act as an agent, servant, or employee for any other Party for any purpose whatsoever except as explicitly set forth in this Agreement or as mutually agreed in writing. In their relations with each other under this Agreement, the Parties shall not be considered fiduciaries except as expressly provided herein.

XVII. SIGNATURES

APPROVED by the Lummi Indian Business Council Resolution # 2011 – 116, July 26, 2011.

LUMMI NATION



Chairman

Date October 27, 2011

Approved as to form:



Mary M. Neil, Reservation Attorney

WHATCOM COUNTY EXECUTIVE

Pete Kremen

Date 11-15-11

Pete Kremen, County Executive

Approved as to form:

Daniel L. Gibson 10/28/11

Daniel L. Gibson

Whatcom County Asst. Chief Civil Deputy Pros. Atty.

ADOPTED by Whatcom County Council in an open public meeting on the 13th day of September, 2011.

WHATCOM COUNTY COUNCIL

Sam Crawford
Council Chair

Date 10/28/11

Attested by:
Dana Brown-Davis
Clerk of the Council