



WASHINGTON STATE DEPARTMENT OF  
**Natural Resources**  
Peter Goldmark - Commissioner of Public Lands

**AQUATIC LANDS CONSERVATION LICENSE**

**License No. 23-094251**

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and NOOKSACK INDIAN TRIBE, a government agency ("Licensee").

THE Parties agree as follows:

**SECTION 1 GRANT OF PERMISSION**

**1.1 Permission.** Subject to the terms and conditions set forth below, State grants Licensee a revocable, nonexclusive license to enter upon the real property described in Exhibit A (the "Property"). In this agreement, the term "License" means this agreement and the rights granted.

**1.2 Other Interests and Rights.** This License is subject to all valid interests of third parties noted in the records of Whatcom County, or on file in the Office of the Commissioner of Public Lands, Olympia, Washington. Licensee is responsible for obtaining approvals from other persons, if any, who have an interest in the Property. This License is subject to the rights of the public under the Public Trust Doctrine or federal navigation servitude and treaty rights of Indian Tribes.

**SECTION 2 USE**

**2.1 Authorized Activities.**

(a) Licensee shall enter the Property only for the purpose of:

conducting the conservation activities described in Exhibit B (the "Activities")

and for no other purpose. Licensee shall not conduct any other activities on the Property without the prior written permission of State.

(b) Warranties on Activities.

(1) Licensee warrants that no permit, law, or regulatory authority obligates Licensee to conduct the Activities.

- (2) Licensee warrants that Licensee will not receive or gain compensatory mitigation or natural resource damage credits because of the Activities.
- (c) Licensee's breach of any warranty under Paragraph 2.1(b) is cause for Termination resulting from breach under Paragraph 9.3.

**2.2 Restrictions on Activities.** The following limitations apply to the Property and adjacent state-owned aquatic land. Licensee shall not cause or permit:

- (a) Damage to natural resources,
- (b) Waste, or
- (c) Deposit of material, unless approved by State in writing and except to the extent expressly prohibited in Exhibit B. This prohibition includes deposit of fill, rock, earth, ballast, wood waste, refuse, garbage, waste matter, pollutants of any type, or other matter.

**2.3 Conformance with Laws.** Licensee shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding its activities on the Property.

**2.4 Interference with Other Uses.**

- (a) Licensee shall exercise Licensee's right of entry under this License in a manner that minimizes or avoids interference with the rights of State, the public or others with valid right to use or occupy the Property or surrounding lands and water.
- (b) Licensee and its agents, contractors, and subcontractors shall provide State with at least two (2) weeks' notice before commencing any Activities. Licensee shall promptly notify State of any modifications in the schedule.

### SECTION 3 TERM

**3.1 Term Defined.** This License is effective on the 1<sup>st</sup> day of July, 2016 (the "Effective Date"), and ending on the 30<sup>th</sup> day of June, 2021 (the "Termination Date"), unless terminated sooner under the terms of this License.

**3.2 End of Term.** Upon termination of this License and except as otherwise provided in Exhibit B, Licensee shall restore the Property to a condition substantially like its natural state before Licensee's Activities, except for alterations necessary under the Activities or otherwise authorized by State.

### SECTION 4 CONSIDERATION

The consideration is a fee in the amount of Nine Hundred Dollars (\$900.00), which is due and payable on or before the Effective Date.

## SECTION 5 IMPROVEMENTS

### 5.1 Improvements Defined.

- (a) "Improvements," consistent with RCW 79.105 through 79.145, are additions within, upon, or attached to the land. This includes, but is not limited to, fill, structures, and fixtures.
- (b) "Personal Property" means items that can be removed from the Property without (1) injury to the Property, adjacent state-owned lands or Improvements or (2) diminishing the value or utility of the Property, adjacent state-owned lands or Improvements.
- (c) "Improvements Owned by Others" are Improvements made by Others with a right to occupy or use the Property or adjacent state-owned lands.

**5.2 Existing Improvements.** On the Commencement Date, no Improvements are located on the property.

### 5.3 Construction, Major Repair, Modification, and Demolition.

- (a) Licensee shall construct no Improvements and make no modification of the Property ("Work") except as described in Exhibit B.
- (b) Licensee shall preserve and protect Improvements Owned by Others, if any.
- (c) Before completing Work, Licensee shall remove all debris and restore the Property, as nearly as possible, to a substantially natural state, except for alterations necessary under the Activities or otherwise authorized by State.
- (d) Upon completing Work, Licensee shall promptly provide State with as-built plans and specifications.

### 5.4 Standards for Work.

- (a) Licensee shall not use or install treated wood at any location above or below water.
- (b) Licensee shall not use or install tires (for example, floatation or fenders) at any location above or below water.
- (c) Licensee shall install only floatation material encapsulated in a shell resistant to ultraviolet radiation and abrasion. The shell must be capable of preventing breakup and loss of flotation material into the water.

**5.5 Improvements at End of Term.** Improvements installed by Licensee merge with the Property upon termination of the License, unless the Parties agree otherwise.

**5.6 Disposition of Personal Property.** Licensee shall remove Personal Property from the Property before termination of the License.

## SECTION 6 ENVIRONMENTAL LIABILITY

### 6.1 Definitions.

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup.
- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any law described in Paragraph 6.1(a).
- (c) "Utmost care" means such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances; the standard of care applicable under the Washington State Model Toxics Control Act ("MTCA"), Chapter 70.105 RCW, as amended.
- (d) "Licensee and affiliates" when used in this Section 6 means Licensee or Licensee's subcontractors, agents, employees, guests, invitees, or any person on the Property with the Licensee's permission.

**6.2 General Conditions.** Licensee shall exercise the utmost care with respect to Hazardous Substances.

### 6.3 Use of Hazardous Substances.

- (a) Licensee and affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws.
- (b) Licensee shall not undertake, or allow others to undertake by Licensee's permission, acquiescence, or failure to act, activities that result in a release or threatened release of Hazardous Substances.

### 6.4 In the Event of a Release or Threatened Release.

- (a) Licensee shall immediately notify State if the Licensees become aware of any release or threatened release of Hazardous Substance on the Property.
- (b) If a Licensee's act or omission results in a release of Hazardous Substances, Licensee, at its sole expense, shall promptly take all actions necessary or advisable to clean up, contain, and remove the Hazardous Substances in accordance with applicable laws.

## SECTION 7 ASSIGNMENT

Licensee shall not assign this License.

## SECTION 8 INDEMNITY AND INSURANCE

### 8.1 Indemnity.

- (a) Licensee shall indemnify, defend, and hold State, its employees, officers, and agents harmless from any Claims arising out of the Activities or related activities by Licensee, its contractors, agents, invitees, guests, employees or affiliates.
- (b) "Claim" as used in this Subsection 8.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys' fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. "Damages to tangible property" includes, but is not limited to, physical injury to the Property, including damage resulting from Hazardous Substances, and damages resulting from loss of use of the Property.
- (c) State shall not require Licensee to indemnify, defend, and hold State harmless for claims that arise from State's sole or concurrent negligence.
- (d) Licensee and its workers are covered by Licensee's own Workers Compensation Program and will continue such coverage during the term of this License. To the extent that Licensee has any contractors performing work allowed by this License, Licensee agrees to insert the following clause in any contract and ensure such clause is required for any further subcontracts:

"Contractor (or subcontractor) waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless."

### 8.2 Insurance Terms.

- (a) Insurance Required.
  - (1) At its own expense, Licensee shall procure and maintain during the Term of this License, the insurance coverages and limits described in this Subsection 8.2 and in Subsection 8.3, Insurance Types and Limits. State may terminate this License under Paragraph 8.3 if Licensee fails to maintain required insurance.
  - (2) Unless State agrees to an exception, Licensee shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Licensee may submit a request to the risk manager for the Department of Natural Resources to approve an exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies shall comply with Chapter 48.15 RCW and 284-15 WAC.
  - (3) All insurance policies must name the State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees as an additional insured.
  - (4) All insurance provided in compliance with this License must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.

- (b) **Waiver.**
  - (1) To the extent not the result of the negligence of the State, Licensee waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this License covers these damages.
  - (2) Except as prohibited by law, and not the result of the negligence of the State, Licensee waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this License.
- (c) **Proof of Insurance.**
  - (1) Licensee shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this License and, if requested, copies of policies to State.
  - (2) The certificate(s) of insurance must reference additional insureds and the License number.
  - (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.
- (d) State must receive written notice before cancellation or non-renewal of any insurance required by this License, as follows:
  - (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.
  - (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.
- (e) **General Terms.**
  - (1) State does not represent that coverage and limits required under this License are adequate to protect Licensee.
  - (2) Coverage and limits do not limit Licensee's liability for indemnification and reimbursements granted to State under this License.
  - (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to property first to restore the real property covered by this License, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Licensee.

### **8.3 Insurance Types and Limits.**

- (a) **General Liability Insurance.**
  - (1) Licensee shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Property and/or arising out of Licensee's use, occupation, or control of the Property and, if necessary, commercial umbrella insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence. If such CGL or MGL insurance

contains aggregate limits, the general aggregate limit must be at least twice the "each occurrence" limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the "each occurrence" limit.

- (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance must cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract) and contain separation of insured (cross-liability) condition.
  - (3) MGL insurance must have no exclusions for non-owned watercraft.
- (b) Workers' Compensation.
- (1) State of Washington Workers' Compensation.
    - (i) Licensee and its workers are covered by Licensee's own Workers Compensation Program and Licensee will continue such coverage through the term of this License.
    - (ii) Licensee's contractors and subcontracts shall comply with all State of Washington workers' compensation statutes and regulations. Said contractors and subcontractors shall provide workers' compensation coverage for all employees of Licensee. Coverage must include bodily injury (including death) by accident or disease, which arises out of or in connection with Licensee's use, occupation, and control of the Property.
    - (iii) If Licensee fails to maintain its coverage and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Licensee shall indemnify State. Indemnity shall include all fines; payment of benefits to Licensee, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
  - (2) Longshore and Harbor Workers' and Jones Acts. Longshore and Harbor Workers' Act (33 U.S.C. Section 901 *et seq.*) and/or the Jones Act (46 U.S.C. Section 688) may require Licensee to provide insurance coverage in some circumstances. Licensee shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with law. Licensee is responsible for all civil and criminal liability arising from failure to maintain such coverage.
  - (3) Auto Policy Insurance. If Licensee operates, maintains, loads, or unloads vehicles as part of the Activities, Licensee shall maintain auto liability insurance and, if necessary, commercial umbrella liability insurance with a limit not less than One Million Dollars (\$1,000,000) per accident. Such insurance must cover liability arising out of "Any Auto".

## SECTION 9 TERMINATION

**9.1 Termination by Revocation.** State may terminate this License at any time upon thirty (30) days' notice to the Licensee.

**9.2 Termination by Completion of Activities.** If Licensee completes Activities prior to the Termination Date, this License terminates upon Licensee's completion of all Activities, including restoration of the Property under Subsection 3.2.

**9.3 Termination Resulting from Breach.** If Licensee breaches any terms of this License, State may terminate this License immediately upon notice to Licensee. If the breach arises from Licensee's failure to comply with restrictions on use under Paragraph 2.2 or results in damage to natural resources or the Property, State may restore the natural resources or Property and charge Licensee restoration costs and/or charge Licensee for damages. On demand by State, Licensee shall pay all costs and/or damages.

#### **SECTION 10 NOTICE**

Following are the locations for delivery of notice and the Contact Person. Any Party may change the location of notice and/or the Contact Person upon reasonable notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES  
Orca-Straits District  
919 North Township Street  
Sedro-Woolley, WA 98284

Licensee: NOOKSACK INDIAN TRIBE  
Attn: Tribal Council Chairman  
PO Box 157  
Deming, WA 98244

And

NOOKSACK INDIAN TRIBE  
Attn: Office of Tribal Attorney  
PO Box 63  
Deming, WA 98244

## SECTION 11 MISCELLANEOUS

**11.1 Headings.** The headings used in this License are for convenience only and in no way define, limit, or extend the scope of this License or the intent of any provision.

**11.2 Invalidity.** The invalidity, voidness, or illegality of any provision of this License does not affect, impair, or invalidate any other provision of this License.

**11.3 Applicable Law and Venue.** This License is to be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute means that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this License is in the Superior Court for Thurston County, Washington.

**11.4 Modification.** No modification of this License is effective unless in writing and signed by the Parties. Oral representations or statements do not bind either Party.

**11.5 Survival.** Any obligations of Licensee not fully performed upon termination of this License do not cease, but continue as obligations of the Licensee until fully performed.

**11.6 Exhibits.** All referenced exhibits are incorporated in this License unless expressly identified as unincorporated.

**11.7 Limited Waiver of Sovereign Immunity.** Nothing in this License shall be deemed or construed to be a waiver of the sovereign immunity of the Nooksack Indian Tribe, its officials, its entities, or employees acting within their official or individual capacities except to the extent provided herein.

Notwithstanding the above provision, the Nooksack Indian Tribe hereby grants an irrevocable limited waiver of its sovereign immunity in favor of the state of Washington for the sole purpose of securing a judgment as specifically authorized by a term of this License, for the specific performance of a term of this License, a declaration of breach, or other enforcement specifically provided for within this License. This waiver is not for the benefit of any third party and shall not be enforceable by any third party or by any assignee of the parties. In any enforcement action, the parties shall bear their own enforcement costs, including attorney's fees.

This limited waiver of the Nooksack Indian Tribe's sovereign immunity shall be subject to enforcement exclusively in a United States District Court for Western Washington (including any appeal therefrom), except in the event the Federal Court (including any appeal therefrom) determines that it lacks subject matter jurisdiction to resolve the dispute between the Nooksack Indian Tribe and the state of Washington, then it shall be subject to jurisdiction of the Whatcom County Superior Court.

Licensee hereby expressly and irrevocably waives any application of the exhaustion of tribal remedies or abstention doctrine and any other law, rule, regulation or interpretation that might otherwise require, as a matter of law or comity, that resolution of any of the matters to which this limited waiver of sovereign immunity applies be heard first in a tribal court or any other dispute resolution process of Licensee.

Licensee certifies it has authorized approval of this limited waiver of sovereign immunity, and that the signatory has been authorized to sign such on behalf of Licensee.

In any suit commenced pursuant to this provision, service of the Summons and Complaint shall be sent by certified mail, return receipt to:

Nooksack Indian Tribe  
Attn: Chairman  
PO Box 157  
Deming, WA 98244

And

Nooksack Indian Tribe  
Attn: Office of Tribal Attorney  
PO Box 63  
Deming, WA 98244.

THIS AGREEMENT requires the signature of all Parties and is effective on the date of the last signature below.

NOOKSACK INDIAN TRIBE

Dated: 7/20, 2016

  
By: Katherine Canete  
Title: Council member / B.M.  
Address: PO Box 157  
Deming, WA 98244  
Phone: 360-592-5176

STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES

Dated: July 20, 2016

  
By: KRISTIN SWENDDAL  
Title: Aquatic Resources Division Manager  
Address: PO Box 47027  
Olympia, WA 98504-7027

Approved as to form this  
13 day of June 2014  
Edward D. Callow, Assistant Attorney General



## EXHIBIT B

### 1. DESCRIPTION OF ACTIVITIES.

#### A. Existing Conditions.

The Farmhouse Reach is one of the widest on the North Fork Nooksack River, averaging 278 meters over the entire reach and varying between 135 meters at the upstream end near the Maple Canyon and more than 300 meters downstream. The mainstem habitat in the reach is predominately riffle (56%), followed by braid (15%), glide (6%), and pool (<1%).

The mainstem channel exits Maple Canyon, flows along the base of a high bluff and a large deflection levee at The Glen, a private development on the right bank, and then spills onto the floodplain as multiple channels and braids. These channels shift inter-annually, with little in the way of channel islands or logjams to anchor the channel anywhere on the floodplain. In the lower half of the reach are two significant back-channels and several small channel islands. The low pool counts in the mainstem likely reflect reduced availability through time of pool-forming large woody debris (LWD). The Farmhouse reach has one of the lowest concentrations of LWD in the North Fork, due in part to the large active channel area.

Channel migration and turnover in the North Fork are rapid, with some channels shifting multiple times each year, and only a few offering stable habitat areas for salmonid spawning, rearing, and flood refuge. Higher flood intensities in the past two decades combined with wood removal and depleted riparian forests have resulted in a dearth of large stable logjams in the North Fork and a shift from an island-braided channel pattern to a less stable braided pattern. Chinook spawning in the reach occurs primarily in August, and is strongly tied to the edge of the historic migration area but is limited by flow. Channel areas such as Wicks Slough, Levitt's Slough, The Falls Creek Side Channel, and Bear Creek Slough have seen high levels of use by Chinook in the recent past, depending on flow connectivity. Wicks Slough also supports very strong chum salmon spawning.

#### B. Proposed Conditions.

Nooksack Indian Tribe Natural Resource Department proposes to construct twenty (20) engineered log jams (ELJs) on the North Fork Nooksack between river miles 48.8 and 48.2 as part of the Farmhouse Phase 2b project. The purpose of the reach-scale, multi-phase Farmhouse Restoration Project is to address early Chinook salmon habitat limiting factors of high channel instability, lack of key habitat, and reduced habitat diversity by restoring habitat conditions and addressing the root causes of habitat degradation in the Farmhouse Reach of the North Fork Nooksack River. The Phase 2b project focuses on increasing habitat diversity, protecting, and encouraging growth of forested islands and encouraging connectivity of existing side channels in the reach. Increasing low-flow

connectivity of existing side channels, while protecting and encouraging growth of forested channel islands will ultimately increase the availability of stable spawning habitat, thereby improving spawning-to-emergence success in the North Fork Nooksack.

Sixteen (16) "Timber Gnarl" ELJ structures will be constructed by excavating alluvium to enable placement and partial burial of vertical logs to form V-shaped frames. Horizontal logs will be layered and lashed to the vertical structure with wire cable and/or manila rope and stabilized by ballast rocks. Slash and racking logs will be placed to fill voids in the structure and then the entire structure will be backfilled with native alluviums. Structures are designed to be overtopped and still maintain stability.

Four (4) additional structures are proposed that incorporate large U.S. Forest Service (USFS) logs. The USFS log structures will be constructed along the Falls Creek side channel with the back end of the large logs buried and small rootwads extending into the low-flow channel. The large USFS logs will form a "roof" over the smaller rootwad logs to be wedged beneath them. These are considered "safe fail" structures, as no lashing material, rock, or other unnatural materials are included in the design and the structure is designed to break up into single logs consistent with naturally occurring wood in the river in the event of structural failure.

All ELJ construction will be within the active channel area of the NF Nooksack River. ELJs will be constructed on the gravel bars of the river. Multiple temporary bridges will be installed to access the Phase 2b construction area. Bridge locations are shown in Attachment B-1 to the Exhibit B. Temporary bridges will likely be constructed using old rail car flat racks with steel plates placed on top. The bridges will be placed bank to bank where feasible. Two of the bridges will be 2-span bridges and will require welded feet on the bridges or ecology blocks to be placed within the wetted channel when placing the mid-section of the bridges. Bridge #1 will be in place for most of the duration of the project. Bridge #2 will be in place for the amount of time needed to construct the 4 ELJ's on the north side of the project, approximately 7-15 days. Bridges #3 and #4 will only be in place for the amount of time needed to construct the two ELJs on the southwest side of the project area, approximately 2-7 days.

Post construction on-site activities include documenting as-built conditions, re-vegetating the log jams and other disturbed areas, effectiveness monitoring, and the installation and maintenance of yellow warning signs on the ELJs.

Licensee has submitted to State plans and specifications for Work shown in Attachment B-1 to the Exhibit B, which is not incorporated in this license.

**2. ADDITIONAL OBLIGATIONS**

- A.** Reflective warning signs shall be installed on the structures after construction to increase the visibility of the structures to boaters and other recreational users.
- B.** Licensee shall assess the project annually for the term of this agreement. Licensee shall inspect the site to assess whether any damage has occurred, or whether changes have occurred that may pose a hazard to public safety. Licensee shall submit to DNR a technical memorandum by December 1<sup>st</sup> of each year of the authorization that summarizes physical changes to the reach and includes photographic documentation. In the event that annual inspections indicate a potential safety hazard, the Licensee shall notify DNR immediately and make all necessary repairs or corrections to the project.

