



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

AQUATIC LANDS CONSERVATION LICENSE

License No. 23-094098

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources (“State”), and LUMMI INDIAN BUSINESS COUNCIL, 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 permitted 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 28th day of July, 2016 (the "Effective Date"), and ending on the 27th day of July, 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 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: LUMMI INDIAN BUSINESS COUNCIL
Attn: Executive Director
2665 Kwina Road
Bellingham, WA 98226

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 Whatcom 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 Lummi Nation, its officials, its entities, or employees acting within their official or individual capacities except to the extent provided herein.

Notwithstanding the above provision, the Lummi Nation 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 Lummi Nation'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 Lummi Nation 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:

LUMMI INDIAN BUSINESS COUNCIL
Attn: Executive Director
2665 Kwina Road
Bellingham, WA 98226

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

Dated: August 3, 2016 
By: TIMOTHY BALLEW II
Title: Chairman
Address: 2665 Kwina Road
Bellingham, WA 98226

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES
Dated: 5/4, 2016 
By: KRISTIN SWENDDAL
Title: Aquatic Resources Division Manager
Address: PO Box 47027
Olympia, WA 98504-7027

Approved as to form this
28 day of July 2016
Edward D. Callow, Assistant Attorney General

EXHIBIT A



**EXHIBIT B
PLAN OF OPERATIONS**

1. DESCRIPTION OF ACTIVITIES.

A. Existing Conditions.

This site is primarily occupied by the Middle Fork of the Nooksack River and its riparian edges. It is an alluvial system dominated vegetatively by a mix of native deciduous and conifer tree species and riparian shrubs. The Middle Fork historically supported a healthy population of anadromous fish that included spring Chinook, coho, chum, pink, and sockeye salmon as well as coastal cutthroat and bull trout. Currently, many of these species are listed as threatened or endangered under the Endangered Species Act (ESA). Human actions such as timber harvest, removal of natural logjams, clearing of floodplain forests, channel, confinement, bank armoring, loss of available side channels, and installation of road crossing structures have led to a general simplification of habitat within the Nooksack watershed and are attributed to the recent decline in salmon abundance in the Nooksack watershed. The primary disturbance to salmon habitat in the project reach is from historic logging of the floodplain forest and adjacent hillslopes. Logging in the reach have caused destabilization of the landscape from loss of soil root cohesion, reduction in large woody debris (LWD) loading, and clearing of LWD from the river channel. The average channel gradient is 1.14%. Mean bankfull width is 140-ft. The dominant substrate type in the project reach ranges from coarse gravel to cobble with bars comprise of sand and gravel. The project site is currently used passively for recreation. Access to the site will be achieved by use of an existing gravel road with primary staging to occur in a gravel parking lot. Both the road and parking lot are used by a steelhead acclimation pond facility operated by Washington State Department of Fish and Wildlife and the Northwest Steelheaders.

B. Proposed Conditions.

Grantee proposes to construct eleven (11) engineered log jams (ELJs) in the Middle Fork Nooksack River within 1500 feet downstream of the Mosquito Lake Road Bridge. The restoration approach for the Phase 1 project is to improve channel stability and habitat quality and quantity through the creation of stable accumulations of LWD. These accumulations will be established by constructing ELJs that will distribute flows in the channel forming stable forested islands downstream of ELJs over time. Conceptual designs and layouts for ELJ placement were developed within the project area. ELJ structure types were developed to mimic the size, form, and function of historic stable LWD within the Middle Fork, using observations from persistent LWD accumulations observed during field reconnaissance. The ELJs are to be constructed with a core of structural logs partially embedded into the channel and arranged to include a desired hydraulic and geomorphic effect. Each ELJ includes a large volume of smaller (racking) logs packed on the upstream end and flanks of the ELJs to

provide complex interstitial cover for fish and invertebrates and additional stability to the structure by forcing scour away from the core structure. Existing natural logjams within the project reach were used to size the proposed structures as well as emulate the ecological and geomorphic function currently contributing to beneficial habitat. ELJs will be excavated into the channel bed, backfilled with native alluvium, and supported with posts and cable lashing. Post construction on-site activities include documenting as-built conditions, re-vegetation of the log jams and other disturbed areas, effectiveness monitoring, and the installation and maintenance of yellow warning signs on the ELJs.

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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 1st each year that summarizes physical changes to the reach, including photo 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.

