

**SETTLEMENT AGREEMENT  
REGARDING USES OF GROUNDWATER  
ON LUMMI PENINSULA**

To resolve claims in federal district court action titled  
United States and Lummi Nation v. State of Washington,  
Department of Ecology, et al (W.D. Wash. C01-0047Z)

**TABLE OF CONTENTS**

I. RECITALS..... 1

II. DEFINITIONS..... 2

III. ALLOCATIONS..... 5

    A. State of Washington, Department of Ecology..... 5

    B. The Lummi Nation..... 6

    C. Transfer of Allocations..... 6

IV. OBLIGATIONS OF ALL PARTIES..... 7

    A. General Agreement..... 7

    B. No Withdrawals Except in Accordance with Agreement..... 7

    C. Good Faith Non-Interference Agreement..... 7

    D. Installation of Meters..... 7

    E. Decommissioning of Well..... 8

    F. User’s Responsibilities..... 8

    G. Payment of Costs..... 8

V. OBLIGATIONS OF ELIGIBLE LANDOWNERS AND ECOLOGY..... 10

    A. Allocation of water generally..... 10

    B. Allocation of Water to Existing Users..... 10

        1. Existing Users..... 10

            a. Water Associations..... 11

            b. Other State Water Users..... 11

        2. Allocated Water Unavailable for Appropriation..... 12

        3. Ecology Diligence in Reduction of Initial Allocation Exceeding 120 AFY ..... 12

    C. Water Permit Applications Submitted Prior to Entry of the Judgment and Order..... 12

        1. Processing..... 12

        2. Protests..... 12

        3. Voiding of Tentative Decisions..... 13

    D. Water Permit Applications and Well Registrations Submitted After Entry of the Judgment and Order..... 13

        1. Drilling Limitation..... 13

        2. Permit and Registration Applications..... 13

        3. Household Amounts..... 13

        4. Consultation..... 13

        5. Appeals to Water Master..... 14

        6. State Administrative Appeals..... 14

        7. Full Commitment – Notice to County..... 14

    E. Well Registration..... 14

        1. Registration for Exempt Wells Required..... 14

        2. Time Periods for Registration..... 15

        3. New Wells – Application..... 16

        4. New Wells – Decision on Preliminary Registration..... 17

        5. New Wells – Minimum Annual Quantities..... 17

        6. New Wells – Notice of Decision on Preliminary Registration and Appeals..... 17

        7. New Wells – Decision on Final Registration..... 18

        8. Shared Well..... 18

- F. Failure to Perfect or Relinquishment of Water..... 19
  - 1. Perfected Water..... 19
  - 2. Unperfected Water..... 19
  - 3. Limitation on Use of Meter Records or Other Information..... 20
- G. Tracking and Sharing Information on Permitted Water Uses..... 20
  - 1. Annual Well Report..... 20
  - 2. Additional Reports for Supply Wells..... 20
  - 3. Enforcement of Reports..... 20
  - 4. Database..... 21
- H. Enforcement..... 21
  - 1. Compliance Obligations, Enforcement, Assistance and Notice..... 21
  - 2. Overuse of Water..... 22
  - 3. Monitoring of Owner Reports..... 23
    - a. Wells to be Monitored..... 23
    - b. Investigation of Questioned Well Reports..... 23
    - c. Procedure for Monitoring Visits..... 24
    - d. Effect of Discrepancy..... 24
  - 4. Enforcement Appeals..... 24
  - 5. Enforcement Officer..... 24
- VI. OBLIGATIONS OF WHATCOM COUNTY..... 24
- VII. OBLIGATIONS OF THE LUMMI NATION AND THE UNITED STATES..... 25
  - A. Regulation of Water Generally..... 25
  - B. Existing Wells and Users..... 26
  - C. Water Permit Applications Submitted Prior to Entry of the Judgment and Order..... 26
    - 1. Processing..... 26
    - 2. Protests..... 26
  - D. Water Permit Applications Submitted After Entry of the Judgment and Order..... 26
    - 1. Permit Applications..... 26
    - 2. Consultation..... 27
    - 3. Appeals to Water Master..... 27
  - E. Tracking and Sharing Well Use Information..... 27
    - 1. Annual Well Report..... 27
    - 2. Supply Well Reporting..... 28
    - 3. Database..... 28
  - F. Enforcement..... 28
    - 1. No Use in Excess of Allocation Allowed..... 28
    - 2. Assistance to Landowners..... 28
    - 3. Monitoring of Owner Reports..... 29
      - a. Wells to be Monitored..... 29
      - b. Investigation of Questioned Well Reports..... 29
      - c. Procedure for Monitoring Visits..... 29
      - d. Effect of Discrepancy..... 30
    - 4. Enforcement Appeals..... 30
  - G. Payment of Water Master Costs..... 30
  - H. Non-Challenge Agreements..... 30
- VIII. THE OFFICE OF THE WATER MASTER..... 31

- A. Duties, Powers, and Funding..... 31
  - 1. Duties..... 31
  - 2. Powers..... 31
  - 3. Funding..... 32
- B. Selection, Qualifications, and Compensation..... 33
  - 1. Qualifications..... 33
  - 2. Nominations..... 33
  - 3. Selection..... 33
  - 4. Replacement..... 33
- C. Dispute Resolution..... 33
  - 1. Matters for Dispute Resolution..... 33
    - a. Protest of Decision by Ecology, the Lummi Nation, or the United States or Other Disputes..... 33
    - b. Review of Enforcement Inaction..... 35
  - 2. Procedures for Dispute Resolution..... 37
    - a. Relief..... 37
      - (i.) Temporary Restraining Order..... 37
      - (ii.) Preliminary Injunction..... 37
      - (iii.) Permanent Injunction..... 38
      - (iv.) Bond..... 38
    - b. Motions..... 38
    - c. Hearings..... 39
    - d. Judgment..... 39
    - e. Appeals of Water Master Decisions..... 39
    - f. Miscellaneous..... 39
- IX. JOINT UNIFORM TECHNICAL REQUIREMENTS..... 40
- X. CHLORIDES PROTOCOL..... 40
  - A. Goal of the Chlorides Protocol..... 40
  - B. The Chloride Base Level..... 41
  - C. The Chloride Trigger Level..... 42
  - D. Effect of Chloride Increases Below the Chloride Trigger Level..... 42
  - E. Effect of Chloride Measurements Reaching the Chloride Trigger Level..... 44
- XI. WELL SPACING PROTOCOL AND INTERFERENCE DISPUTES..... 46
  - A. Small Wells..... 46
  - B. Supply Wells..... 46
    - 1. New Wells..... 46
    - 2. Existing Wells..... 46
      - a. Status Quo is Preserved..... 46
      - b. Increased Withdrawals..... 46
      - c. Certain Claims Barred..... 46
    - 3. Spacing of Replacement or Additional Supply Wells..... 47
  - C. Well Interference Disputes..... 47
- XII. WAIVER AND RELEASE OF CLAIMS..... 47
- XIII. MISCELLANEOUS..... 49
- XIV. EFFECTIVE DATE..... 51
- LIST OF EXHIBITS:..... 51

A. Map of the Case Area and Legal Description.....	51
B. List of Signatory Parties .....	51
C. List of Existing State Well Owners .....	51
D. List of Eligible Landowners with Tentative Approval from Ecology.....	51
E. List of Applications for Groundwater Rights Currently Pending Before Ecology .....	51
F. List of Applications for Groundwater Rights Currently Pending Before the Lummi Nation.....	51
G. Uniform Joint Technical Requirements with Attachments. ....	51
H. Title 16 of the Lummi Code of Laws: Sewer and Water District Code .....	51
I. Supplemental Agreement .....	51

## SETTLEMENT AGREEMENT

This Agreement is entered into by and among the Lummi Nation, the State of Washington Department of Ecology, the United States in its capacity as trustee for the Lummi Nation and individual Indians for whom the United States owns land in trust or restricted fee status, Whatcom County, and certain defendant Case Area water claimants, in settlement of claims set forth in United States and Lummi Nation v. State of Washington, Department of Ecology et al (W.D. Wash. C01-0047Z).

### I. RECITALS.

A. Continued groundwater use within the Lummi Peninsula portion of the Lummi Reservation has been jeopardized by unresolved litigation over the rights to use groundwater within the Case Area pursuant to federal, state, and tribal law. The United States brought this action on behalf of the Lummi Nation and individual Indians for whom the United States owns land in trust or restricted fee status against the State of Washington, the Water Associations, and individual landowners and water users, in order to protect federal water rights. The Lummi Nation intervened as a plaintiff.

B. In this litigation, the Water Associations and individual landowners and water users claim rights to some of the groundwater underlying the Case Area pursuant to federal and state law. The State of Washington, through Ecology, claims the right to regulate some groundwater uses on the Case Area pursuant to state law.

C. The aquifer underlying the Case Area is in limited supply. There is insufficient potable water available from the aquifer to meet the future needs of every landowner or water claimant within the Case Area. The aquifer is susceptible to contamination through saltwater intrusion if over pumped or insufficiently regulated. The damaging effects of saltwater intrusion can be long term and often irreversible.

D. The effects of saltwater intrusion can be minimized or controlled through regulation of pumping regimes, withdrawal limits, well location, well depth, monitoring, and other cohesive water management techniques. The Signatory Parties recognize that cohesive regulation and oversight of the Case Area aquifer are essential for the long-term protection of the resource. At present, no single entity has the uncontested authority to regulate groundwater withdrawal and use within the Case Area. The Signatory Parties recognize that the litigation may not result in the establishment of a single regulatory authority for such matters. The Signatory Parties have concluded that a cooperative regulatory structure, implemented under the authority of the Federal Court, is preferable for all concerned, compared to continued litigation and uncertainty. The Signatory Parties have agreed that no construction of wells or withdrawal of groundwater from wells within the Case Area should be allowed, except in accordance with this Settlement Agreement.

E. For the purpose of this settlement, the defendants admit that evidence exists from which the Court could determine that the federal Indian reserved rights within the Case Area held in trust by the United States for the Lummi Nation and individual Indians for whom the United States owns land in trust or restricted fee status would not be protected if limits were not placed on the amount of groundwater withdrawals within the Case Area by persons who are not acting under the authority of the Lummi Nation or the United States, if exempt or other wells were permitted to be drilled without adequate regulatory control, and if the chloride levels in the aquifer were not limited as set forth herein.

F. The Signatory Parties have agreed to settle this case in order to avoid the expense and uncertainty of litigation.

These recitals are for the purposes of this Agreement only.

NOW, THEREFORE, THE SIGNATORY PARTIES AGREE AS FOLLOWS:

## II. DEFINITIONS.

The following definitions apply to terms used in this Agreement.

*afy* – Acre-feet per year. One acre foot of water equals 325,851 gallons.

*Allocation* – A right to use water in an amount to be accounted for pursuant to this Agreement.

*Business Day* – A day that is not a Saturday, Sunday, or a holiday observed by either the State of Washington or the Lummi Nation.

*Case Area* – That portion of the Lummi Indian Reservation indicated on the map attached hereto as Exhibit A.

*Ecology* – The Washington State Department of Ecology

*Ecology's Allocation* – The quantity of water over which Ecology has permitting and Registration authority under this Agreement and pursuant to state law for the use of the Eligible Landowners.

*Eligible Landowners* – Defendants, and their successors and assigns, owning Case Area land which as of October 22, 2005, is:

1. not covered by a previous water settlement agreement with the Lummi Nation, or
2. not being serviced by the Lummi Tribal Water District.

These defendants include individual owners of unrestricted fee land within the Case Area and the Water Associations.

*Exempt Well* – A groundwater well constructed or withdrawing water under the permit exemption authority of RCW 90.44.050.

*Fully Constructed* – A house, mobile home, or modular home that is ready for legal occupancy, which may be shown by passing the final building permit inspection or by a temporary occupancy permit.

*gpd* – Gallons per day. For the purposes of this Agreement, 350 gallons per day will be deemed equal to 0.39 acre feet per year.

*Household* – Persons sharing a single dwelling unit.

*Implicit Price Deflator* – Statistic published by the United States Department of Commerce in its most recent Survey of Current Business.

*Lummi* – The Lummi Nation, an enrolled member of the Lummi Nation, or any entity created or authorized by the Lummi Nation.

*Lummi Nation* – The federally recognized tribe included on the published list of recognized tribes, 70 Federal Register 71195, November 25, 2005, as the Lummi Tribe of the Lummi Reservation Washington.

*Lummi Nation's Allocation* – The quantity of water over which the Lummi Nation has regulatory authority under this Agreement.

*Mg/L* – Milligrams per liter. Equivalent to parts per million (ppm).

*Party* – Any person or entity bound by the attached Judgment and Order, and their heirs, successors, or assigns.

*Perfected* – That a right to an individual water allocation from Ecology's Allocation has been finalized through: 1) recognition in Section V.B.1. of this Agreement of a specific allocation which has already been put to beneficial use; or 2) issuance by Ecology of a water right permit pursuant to Sections V.C. or D. of this Agreement and subsequent beneficial use of the water; or 3) compliance with the procedures set out in Section V.E.1.b. of this Agreement.

*Register or Registration* – A process under this Agreement by which Ecology may authorize construction or use of a well that is exempt from Ecology's permitting requirements under RCW 90.44.050.

*Replacement Well* - A replacement well is a well constructed by an owner to replace an existing well.

*Responsible Regulator* – The regulatory authority (either Ecology or the Lummi Nation, depending on the circumstances) having the responsibility under this Agreement to regulate groundwater development and withdrawals within the Case Area. As to persons and entities that



seek to develop or withdraw water from Ecology's Allocation for use on a particular parcel, Ecology is the Responsible Regulator. As to all other groundwater development or withdrawals, the Lummi Nation is the Responsible Regulator.

*Settlement Agreement or Agreement* – This Settlement Agreement, including all exhibits.

*Shared Well* - A small well supplying 2 to 3 separately owned properties.

*Signatory Party* – Any party to this proceeding who has signed this Settlement Agreement, in person or through counsel, including the United States, the Lummi Nation, Ecology, Georgia Manor Water Association, Sunset Water Association, Harnden Island View Water Association, Whatcom County, and certain individual parties. A list of the Signatory Parties is attached as Exhibit B.

*Small Well* – Any well withdrawing from Ecology's Allocation, regardless of size, developed or used for the production of water for not more than 3 allocations of 0.39 afy under this Agreement, or a Lummi Well withdrawing not more than 1.50 afy to provide service to not more than 3 single family residences.

*State Well Owner* – Any person owning or operating a well withdrawing or authorized to withdraw water from Ecology's Allocation.

*Supplemental Agreement* – That document entitled "Supplemental Agreement Regarding Uses of Groundwater on Lummi Peninsula," filed June 19, 2007 (Dkt. 1199) and attached hereto as Exhibit I.

*Supply Well* – Any well, other than a Small Well.

*Trust Assignee* – An individual Indian for whom the United States owns land in the Case Area in trust or restricted fee status. References to "Trust Assignees" in this Agreement refer to such persons only in their capacity as beneficial owners of trust or restricted fee land within the Case Area.

*Uniform Technical Requirements* – A set of technical requirements pertaining to such matters as construction, decommissioning, and water sampling methods and procedures for use by all groundwater Regulators within the Case Area.

*Water Associations* — The Sunset Water Association, the Georgia Manor Water Association, and the Harnden Island View Water Association, or their successors or assigns.

*Water Master* – The official appointed by the Federal Court pursuant to this Agreement to fulfill the dispute resolution and other functions specified herein. The term does not refer to water masters appointed under Washington state statutes, who have functions and authority defined by state law.

*Water Year* – From October 1 through September 30 of consecutive calendar years.

### III. ALLOCATIONS.

#### A. State of Washington, Department of Ecology.

1. The exclusive right of the Eligible Landowners is hereby recognized as to 120 afy of groundwater in the Case Area, subject to the exclusive regulatory authority of the State of Washington, Department of Ecology ("Ecology's Allocation"). Ecology shall allocate the water within Ecology's Allocation among the Eligible Landowners within the Case Area as provided in Section V. of this Settlement Agreement. Notwithstanding the foregoing, in order to account for three additional parcels that were overlooked at the time this Settlement Agreement was executed, Ecology may initially allocate 120.89 afy among the Eligible Landowners as provided in the Supplemental Agreement and subsection V.B.3. of this Agreement.

This allocation does not mean that any particular landowner who has not previously used groundwater in the Case Area will receive an allocation of groundwater from Ecology's Allocation. There is insufficient groundwater available in Ecology's Allocation for every fee landowner to receive a portion of this allocation, or for every landowner to receive a right to all the groundwater the landowner might be able to put to beneficial use if a larger amount of groundwater were available.

In the event of conflict between the terms of this Agreement and state law, the terms of this Agreement shall control. Within the category of "Eligible Landowners" the doctrine of prior appropriation shall apply. The priority dates of the Eligible Landowners are unaffected by this Agreement. A defendant's allocation under this agreement cannot be reduced as a result of another defendant's breach of this agreement. Except as among the Eligible Landowners, the amount allocated to Ecology shall not be subject to reduction in the event of shortage, including under the prior appropriation doctrine or based on federal reserved rights. Notwithstanding this provision, withdrawals from individual wells may be curtailed if: 1) they exceed their chloride limits as set forth herein; or 2) they exceed their individual groundwater withdrawal limits established by state law, including any limits specified in water right documents issued by Ecology, or established by this Agreement.

2. Ecology's Allocation is subject to adjustment as described in Section III.C. of this Agreement, "Transfer of Allocations" and subsection V.B.3., "Ecology Diligence in Reduction of Initial Allocation Exceeding 120 AFY".

3. The amount of water in Ecology's Allocation is a legal ceiling on the total withdrawals of Case Area groundwater by Eligible Landowners claiming water from Ecology's Allocation. To the extent this quantity has not been allocated, Ecology may issue permits or Register wells for the amount so remaining; but in no event shall the amount of water permitted by Ecology for use in any one year by the Eligible Landowners, when added to the amount unused but permitted, certificated or Registered by Ecology, exceed this legal ceiling. Ecology will take all actions necessary to ensure that the total allocation to the Eligible Landowners is not exceeded.

Ecology's actions shall be taken pursuant to state law, to the extent that state law is not inconsistent with this Agreement.

4. Ecology's regulation of Case Area groundwater is subject to the conditions described in this Agreement, and subject to limitations imposed by state and federal law.

**B. The Lummi Nation.**

1. The Lummi Nation, through the Lummi Water Resources Protection Code, and the Secretary of the Interior, may authorize withdrawal of all groundwater within the Case Area not subject to allocation by Ecology, as described above, provided that such withdrawal is subject to the Lummi Nation's commitment to serve non-Lummi water users under other settlement agreements and service arrangements; and further provided that such withdrawal shall not violate the chloride protocols of Section X. of this Agreement ("Lummi Nation's Allocation"). Regulation by the Lummi Nation and the United States of Case Area groundwater is subject to the conditions described in Section VII. of this Agreement, and subject to limitations imposed by federal law. This water can be used for any purpose permitted under federal or tribal law.

2. Prior settlements negotiated by the Lummi Nation and the United States with defendant landowners or other entities in the Case Area are unaffected by this Settlement Agreement. The parties to those agreements shall continue to have the benefits and responsibilities of those agreements. The water rights assigned to the Lummi Nation in those settlements, or otherwise acquired by the Lummi Nation as of the date of this Settlement Agreement, shall not be included in Ecology's Allocation, regardless of the source or nature of those rights. The Lummi Nation shall continue to serve water to parcels in the Case Area with which it has previously reached settlement agreements in this case, or to which it has previously agreed to serve water, and to their successors and assigns. Water so served by the Lummi Nation shall not count against the 120 afy allocation to the Eligible Landowners.

3. The United States, as trustee, has the authority to bind to the terms of this Agreement Trust Assignees, including Lummi members, together with their successors or assigns. Therefore, the United States represents that all Trust Assignees are bound by this Agreement. In addition, the United States represents that it has conducted a diligent search of public records and, to the United States' best information and belief, has joined as defendants in this case all persons who, according to such records, own land in unrestricted fee status in the Case Area, including Lummi members and other Indians. All such defendants, along with their successors and assigns, will also be bound by the attached proposed Judgment and Order, as will all other parties to this case.

**C. Transfer of Allocations.**

**1. Effect of Land Transfers.**

Upon transfer of a parcel of land with an individual water right from Ecology's Allocation from a non-Lummi to the Lummi Nation or to an enrolled member of the Lummi Nation, regulation and monitoring of that withdrawal shall transfer from Ecology to the Lummi Nation, and the amount of Ecology's Allocation shall be reduced by the quantity authorized for that parcel of

land. Transfer of a parcel of land receiving water from a Water Association shall have no effect on the certificated right of the Water Association, or on other Association water rights recognized by this Agreement, or on Ecology's Allocation, unless the Water Association agrees in writing to transfer all or part of the right to the Lummi Nation. The allocation effects of other land transfers, including transfers from the Lummi Nation, a Lummi member, or other Trust Assignee to any person or entity, shall be determined by applicable law.

**2. Effect of Transfer of Service to the Lummi Tribal Water System**

Upon agreement between the Lummi Nation and the owner of a parcel of land with a perfected right to groundwater from Ecology's Allocation, that the subject parcel's water service will be provided by the Lummi Nation, regulation and monitoring of that withdrawal shall transfer from Ecology to the Lummi Nation, and Ecology's Allocation shall be reduced by the quantity authorized for that parcel of land.

**IV. OBLIGATIONS OF ALL PARTIES.**

**A. General Agreement.**

The Signatory Parties agree to support adoption by the Court of the attached Judgment and Order. The Signatory Parties further agree to take no action to challenge or contest the actions of Ecology, the Lummi Nation, or the United States in authorizing water uses on the Case Area, except insofar as such authorizations are not in conformance with this Agreement or the attached Judgment and Order, or as otherwise authorized by this Agreement.

**B. No Withdrawals Except in Accordance with Agreement.**

No person or entity bound by the Judgment and Order shall withdraw any groundwater from the aquifer underlying the Case Area except in accordance with this Agreement and accompanying Judgment and Order. No new well shall be drilled in the Case Area without prior express written authorization, in the form of a water right permit, preliminary permit, or well Registration from Ecology, the Lummi Nation, or the United States. Any unauthorized well found to exist in the Case Area is subject to decommissioning or other enforcement procedures.

**C. Good Faith Non-Interference Agreement.**

No person or entity bound by the Judgment and Order will interfere with the withdrawal and enjoyment of Case Area groundwater permitted under this Agreement, except to the extent that such interference occurs incidental to good faith exercise of the water rights described in this Agreement and accompanying Judgment and Order.

**D. Installation of Meters.**

All wells in the Case Area shall be metered. The Responsible Regulator shall install or shall require each well owner to install a meter capable of being read electronically as specified in the

Uniform Technical Requirements within 180 days after the Judgment and Order attached to this Agreement become final after all appeals. After that date, no well in the Case Area shall be operated without an operable meter. The specific meter requirements are described in the Uniform Technical Requirements. Wells with existing meters may continue to use those meters for as long as the meter continues to operate reliably and accurately.

All water wells constructed by or for parties claiming water from Ecology's Allocation must have an Ecology Unique Well ID tag attached to the casing.

**E. Decommissioning of Well.**

Any person or entity bound by the Judgment and Order who owns a well for which there is no water right under this Agreement, or which for any other reason cannot be used, shall decommission the well pursuant to the Uniform Technical Requirements of this Agreement.

**F. User's Responsibilities.**

Each person or entity bound by the Judgment and Order withdrawing groundwater bears primary responsibility for:

1. Managing their allocation in a manner consistent with the goals of keeping chloride levels in wells at no more than 100 mg/L, and maintaining the health of the aquifer;
2. Operating his or her well to avoid exceeding the Chloride Trigger Level for the well;
3. Operating the well to avoid exceeding any instantaneous or annual quantity authorized for that well, and to avoid interfering with other wells in the case area;
4. Filing an Annual Well Report with the Responsible Regulator;
5. Granting access to the Water Master, staff of the Responsible Regulator, or staff of the other Regulator when accompanied by staff of the Responsible Regulator for monitoring in accordance with Sections V.H.3. or VII.F.3. of this Agreement, as applicable. There is no responsibility to grant access to any person who is not either the Water Master (with reasonable notice) or accompanied by staff of the Responsible Regulator; and
6. Being aware of and complying with all other conditions of his or her withdrawal and the requirements of this Agreement.

**G. Payment of Costs.**

Each Party shall pay its respective share of the costs of the Water Master as set forth herein.

1. The Lummi Nation shall pay fifty percent (50%) of the budgeted costs of the Water Master's office, and the remaining fifty percent (50%) ("state defendants'" share) shall be paid as follows: Each Eligible Landowner household receiving a right to water from the allocation administered

by Ecology, including each household receiving water from a Water Association, shall pay One Hundred Dollars (\$100) per year to the Water Master's office, to be adjusted based on the Implicit Price Deflator every five (5) years after the Effective Date of this Agreement and reduced pursuant to Section IV.G.2. of this Agreement, regardless of whether the defendant withdraws or uses water in the year. Ecology shall pay the remaining portion of the state defendants' fifty percent (50%) of the costs of the Water Master's office. Payments pursuant to Sections IV.G.5. and 6. of this Agreement, payments of the cost of collections, of filing fees, and of fines or penalties shall not be counted in determining whether the Party paying those amounts has paid their appropriate share pursuant to this section, but will be additional fees to be paid. All monies paid pursuant to the Agreement shall be paid into an account with the Court.

2. The Water Master's office shall be funded at the initial rate in 2006 of One Hundred Thousand Dollars (\$100,000) per year. In any year when the funds for the Water Master's office exceeds the amount used, the excess will be carried forward to the next year, except that in any year that the amount carried forward is more than One Hundred Thousand Dollars (\$100,000), adjusted by the Implicit Price Deflator, the amount the Lummi Nation and state defendants pay shall be reduced proportionately so that the total amount in the Water Master's account does not exceed Two Hundred Thousand Dollars (\$200,000), adjusted by the Implicit Price Deflator.

For example, if the amount carried forward is \$150,000, the Lummi Nation would pay \$25,000, each Eligible Landowner household receiving a right to water from the Ecology Allocation would pay \$100, or less if the number of Eligible Landowners required to pay was greater than 250, and Ecology would pay the balance, if any. For another example, if no amount was carried forward and the budget was \$200,000, the Lummi Nation would pay \$100,000, each Eligible Landowner household receiving a right to water from the Ecology Allocation would pay \$100, and Ecology would pay the balance.

If the amount carried forward is Two Hundred Thousand Dollars (\$200,000), or more, adjusted by the Implicit Price Deflator, no Party would be required to pay anything to the Water Master's office, except for filing fees, collection fees, and costs pursuant to Sections IV.G.5. and 6. of this Agreement. The budget and amount owed by the Lummi Nation, Ecology, and Eligible Landowners shall be posted each year on an Ecology web site.

3. During any year when the funds for the Water Master's office are insufficient to pay for all the activities of the Water Master, the Water Master shall docket any petition filed and notify all parties that filing deadlines after the initial filing deadline are stayed pending availability of sufficient funds to resolve the dispute.

A petitioner may obtain a prompt hearing by advancing sufficient funds to cover the estimated Water Master's costs in hearing and resolving the dispute, including the reasonable cost of enforcement actions that may be necessary at the conclusion of the dispute. When sufficient funds become available, the Water Master shall refund the funds advanced by the petitioner, except as described in Sections IV.G. 5. and 6. of this Agreement.

4. In each year after 2006 by July 1, the Lummi Nation and Ecology will meet and confer with each other and the Water Master to adopt a budget for the next year, including the salary of the Water Master. The budget shall be set by agreement between the Lummi Nation and Ecology



with input from the Water Master. If the Lummi Nation and Ecology cannot agree, the dispute shall be resolved by the court. The budget shall not exceed Two Hundred Thousand Dollars (\$200,000) per year, adjusted by the Implicit Price Deflator. The budget shall show expenses for the previous and current years and anticipated expenses for the year to be budgeted. It is the intent of this Agreement that the Water Master position not be full time, and that the Water Master shall implement the terms of this Agreement as efficiently as possible, with the goal of reducing costs as much as possible while faithfully implementing the terms of this Agreement.

For example, in years where no disputes are brought to the Water Master, the Water Master's only costs should be the cost associated with bill collection and routine budgeting, accounting, and reporting.

In years where the Water Master must hear many disputes, however, the Water Master's workload will increase, and the Water Master may contract for services as described in this Agreement. When the need for the Water Master's participation in a particular matter ends, the Water Master will not participate further in that matter.

5. In a dispute which the Water Master must resolve pursuant to Section VIII.A.2.b. of this Agreement, the losing Party, as determined by the Water Master, shall pay to the Water Master the Water Master's costs incurred in determining the dispute, and post any bond or otherwise provide security as required. Such payment shall not be considered a fine or monetary penalty.

6. If the Water Master must take direct action to enforce or emergency action pursuant to Section VIII.A.2.b. or d. of this Agreement, the Responsible Regulator who should have, but did not take action, as determined by the Water Master, shall pay the costs of the Water Master in taking such direct action or emergency action. These costs shall include the cost to the Water Master for hiring such contractors as are needed to take the action. Payment of costs under this Section IV.G.6. shall not be considered a fine or monetary penalty.

7. The Water Master will collect from each Party any expense of collecting the fees from that Party, including, in the Water Master's discretion, the cost of hiring a collection agency.

## **V. OBLIGATIONS OF ELIGIBLE LANDOWNERS AND ECOLOGY.**

### **A. Allocation of water generally.**

From the date of the entry of the Judgment and Order accompanying this Agreement, Ecology agrees not to permit, Register, authorize, or allow any use of groundwater within the Case Area by any person or entity bound by the Judgment and Order, except as described in this section V.

### **B. Allocation of Water to Existing Users.**

#### **1. Existing Users.**

Water from Ecology's Allocation shall be allocated by Ecology to existing users as set out below. The rights and limitations set forth in this Agreement will control over any inconsistent

provisions set forth in a water Certificate issued by the State of Washington, or arising under the exempt well statute 90.44.050 RCW.

**a. Water Associations.**

i. The Georgia Manor Water Association shall be allocated 20 afy. The Sunset Water Association shall be allocated 35 afy. The Harnden Island View Water Association shall be allocated 4.29 afy. Each single family residence served by these Water Associations shall be deemed to require an average daily demand of 300 gallons per day. The Georgia Manor and Sunset Water Associations hold water Certificates issued by the State of Washington. The allocations herein represent the maximum each Water Association may use notwithstanding the Certificates. Harnden Island does not have a Certificate, but is deemed to have a Registered well for the purposes of this Agreement.

ii. The Signatory Parties acknowledge that a major objective of the Water Associations and one of their main requirements for settlement has been to secure an adequate water allocation to service all their existing members, including sufficient water to service new home construction. It is also acknowledged and agreed that the quantity of water allocated to each Water Association divided by the average daily demand of 300 gpd per household represents the number of homes that an Association has the right to serve with its allocation limited only by the Associations' ability to physically withdraw that amount of water from the aquifer, subject to the express limitations imposed by this Agreement, including the chloride limitations, and subject to generally applicable federal and state laws and rules. Finally, it is acknowledged and agreed that although 300 gpd is the minimum household allocation for purposes of determining how many homes can be serviced from a Water Association's total allocation, it shall not be used for any other purpose, including, but not limited to, calculating "peak demand" or "maximum daily demand" requirements imposed by the County or State Health Departments.

**b. Other State Water Users.**

Each other existing State Well Owner, or owner of property served by such a well, shall be allocated a quantity of an annual average of 350 gpd per household (0.39 afy) for domestic uses or for other approved uses, except that state certificate G1-23833C (the Bert Ooms certificate) shall be allocated 7.0 afy. The Signatory Parties acknowledge that a major objective of the Eligible Landowners and one of their main requirements for settlement has been to secure an adequate water allocation to service their existing homes, and sufficient water to service limited new home construction. In addition to the Water Associations listed in V.B.1.a., Exhibit C to this Agreement is a list of all other Eligible Landowners who are owners of property currently served by a well, together with the parcel number and water allocation for each owner.

Each Eligible Landowner who has had an application for groundwater approved by Ecology, subject to entry and final approval after all appeals of the attached Judgment and Order, is listed on Exhibit D.



**2. Allocated Water Unavailable for Appropriation.**

Water allocated under the provisions of this Section V.B. shall be considered in use and, therefore, not available for use or appropriation by others, regardless of whether the water is actually in use at any given time, except as provided in Section V.F. of this Agreement when there is a relinquishment or failure to perfect the water right.

**3. Ecology Diligence in Reduction of Initial Allocation Exceeding 120 AFY.**

As provided in Paragraph 4 of the Supplemental Agreement, in order to adjust Ecology's Allocation to 120 afy as initially agreed in the negotiation of this Agreement, the Department of Ecology shall enforce the diligent use requirements of this Settlement Agreement, and shall promptly take action to revoke or declare abandoned any right to water included on Exhibit D to this Agreement, where the circumstances warrant such action, with the goal of reducing the allocation of water under the Agreement to no more than 120 afy. The Department of Ecology may also receive donations or gifts of water rights from any person or parcel listed in Exhibits C or D. Any water rights so obtained by Ecology shall be used to reduce the Ecology Allocation to 120 afy. No additional well registration shall be approved by Ecology unless and until there is at least 0.39 afy of unallocated water available for each such permit or registration within Ecology's 120 afy Allocation or, if Ecology's 120 afy Allocation has been adjusted pursuant to Section III.C of the Agreement, there is at least 0.39 afy of unallocated water available within Ecology's adjusted Allocation.

**C. Water Permit Applications Submitted Prior to Entry of the Judgment and Order.**

**1. Processing.**

Ecology will on an expedited basis process and make conditional decisions on groundwater applications that are pending at the time this Agreement is signed, or that are submitted prior to entry of the Judgment and Order, so long as the applicants pay for the processing under the cost reimbursement statutes in Washington state law. A list of currently pending applications which have not been given an allocation under this Agreement is attached as Exhibit E. As additional applications are received, Ecology will add them to Exhibit E and provide notice of the applications to all Signatory Parties who have requested notice. Ecology's decision on these applications shall not be final until the attached Judgment and Order is entered and all appeals therefrom have been resolved.

**2. Protests.**

The Lummi Nation may protest any of the applications on any ground allowed by state or federal law, or claim of inconsistency with this Agreement. Upon entry of the attached Judgment and Order, and final resolution of any appeals therefrom, the Lummi Nation will withdraw any protests of Exhibit E applications to the extent that such protests are based on incompatibility with federal or state law. Protests or appeals based on inconsistency with this Agreement shall

not be affected by entry of the Judgment and Order. The remaining Lummi Nation appeals of decisions on the applications will be made to the Water Master, as described in Section VIII.C.1.a. below.

**3. Voiding of Tentative Decisions.**

If the attached Judgment and Order is not entered for any reason, any tentative decisions on the pending applications shall be void and of no force and effect, and Ecology shall not issue any water right permit or certificate based on those decisions.

**D. Water Permit Applications and Well Registrations Submitted After Entry of the Judgment and Order.**

**1. Drilling Limitation.**

No well drilling shall be authorized by Ecology, or actually be undertaken by any applicant under the terms of this Agreement until the attached Judgment and Order is entered and all appeals therefrom have been resolved, except that a permit for drilling a replacement well under emergency circumstances may be issued pursuant to state law.

**2. Permit and Registration Applications.**

Eligible Landowners within the Case Area may apply for a permit from Ecology in accordance with the requirements of Washington state law and this Agreement. Eligible Landowners who wish to Register a well under the provisions of this Agreement may do so under the provisions of Section V.E. of this Agreement. For the purpose of permit or Registration processing under state law, water is conclusively presumed to be unavailable if Ecology's Allocation has been fully allocated. No permit applications or well Registrations shall be approved if Ecology's Allocation is fully committed, whether or not the water is fully in use.

**3. Household Amounts.**

Except as provided in Section V.B.1.a. for homes served by the Sunset, Georgia Manor, and Harnden Island View Water Associations, Ecology shall not issue a permit or approve a Registration for a well in an average daily demand amount less than 350 gallons per day per household served by the well; provided, however, that if Whatcom County requires proof of an average daily amount greater than 350 gpd in order to comply with state law for issuance of a building permit, Ecology shall apply the amount Whatcom County actually requires (at the time of Ecology's decision) in all permitting and Registration decisions. Such requirement shall not allow Ecology to permit water withdrawals in excess of its allocation.

**4. Consultation.**

Before making a preliminary decision on a permit application (known as a Report of Examination, or ROE) for a right to groundwater within the Case Area, or an application to change or transfer a groundwater right within the Case Area, or before acting on a well

Registration application, Ecology shall consult with the Lummi Nation, providing all pertinent information to the Lummi Nation and allowing the Lummi Nation ten (10) business days to formally consult on contemplated decisions.

**5. Appeals to Water Master.**

Any person or entity wishing to appeal a permit, change, transfer, or Registration decision of Ecology on the basis, at least in part, of incompatibility with this Agreement and the associated Judgment and Order, or alleged conflict between this Agreement and state law, shall make such an appeal to the Water Master, as described in Section VIII.C.1.a. of this Agreement, within thirty (30) days after Ecology issues notice of its ROE or decision on a well Registration, even if the protest is also based in part on incompatibility with state law. No decision to issue or deny a permit, change, transfer, or Registration shall be final and effective while an appeal to the Water Master is pending.

**6. State Administrative Appeals.**

This Agreement controls over conflicting provisions of state law. Any protest of an Ecology permitting decision that arises outside of this Agreement and raises only issues of state law shall be determined under state law through state procedures. Protests that are based in any part on the provisions of this Agreement, or on a claim that state law supersedes or controls over this Agreement, or on a claim that a violation of the Judgment and Order has occurred, shall be brought before the Water Master and shall be governed by the terms of this Settlement Agreement.

**7. Full Commitment – Notice to County.**

Ecology shall notify the Lummi Nation, Whatcom County, and the Water Master when the Ecology Allocation is fully utilized or permitted. Ecology shall also notify the Lummi Nation, Whatcom County, and the Water Master if unperfected water is again available for allocation pursuant to Section V.F of this Agreement. There is no limit to the number of times these notifications may be required as water is fully allocated and subsequently becomes available for reallocation.

**E. Well Registration.**

**1. Registration for Exempt Wells Required.**

a. No well shall be constructed or used within the Case Area under the “exempt well” provisions of RCW 90.44.050, unless such well has been Registered with Ecology in accordance with the procedures set out in this Agreement. All Registered wells shall be operated strictly in accordance with the terms of the applicable well Registration document, and the terms of this Agreement. The Harnden Water Association’s well and the wells covered in Exhibit C shall be considered Registered for purposes of this Section V.E. The wells covered by Exhibit D shall be considered to have been granted a preliminary Registration pursuant to Section V.E.4 as of the date the Judgment and Order becomes final and any appeals have been resolved. Exhibit E is a

list of the remaining pending applications for water permits which shall be considered well Registration applications for the purposes of this Agreement. Well Registrations shall be processed in the order in which the applications were received. Priority of well Registration applications received at the same time shall be subject to a lottery by Ecology.

b. A person receiving a preliminary well Registration may perfect a right to an allocation of water in four (4) ways:

i. By complying with the well Registration requirements of Section V.E.2 through V.E.7.b. of this Agreement.

ii. By two or more preliminary well registrants joining together to develop a single shared well pursuant to the well Registration requirements of Section V.E.2 through V.E.7.b. of this Agreement, but each registrant must perfect his or her separate allocation by fully constructing a house and putting the water to beneficial use in accordance with the time requirements of this Agreement.

iii. By entering into a private Shared Well agreement with the owner(s) of an existing well that holds an allocation of water from Ecology's Allocation, and submitting a new chloride test to evaluate the likely impact of each increased use of the existing Shared Well, while a preliminary Registration is valid; and by fully constructing a house and putting the water to beneficial use while the final Registration is valid.

iv. By entering into a water service agreement with the Lummi Tribal Water District in accordance with the provisions of Section V.E.7.c. of this Agreement.

## **2. Time Periods for Registration.**

a. A preliminary well Registration shall be valid from thirty-one (31) days after the date Ecology mails the decision granting the preliminary Registration, or the day after the final appellate decision after timely appeal of the decision to grant the preliminary Registration, whichever is later, to five (5) years after that date. The preliminary well Registration will expire by its own terms if the registrant has not constructed the well and sent chloride analysis results pursuant to Sections X.B.3. and 4. of this Agreement to Ecology while the preliminary Registration is valid.

b. A final well Registration shall be valid from thirty-one (31) days after the date Ecology mails the decision granting the final Registration, or the day after the final appellate decision after timely appeal of the decision to grant the preliminary Registration, whichever is later, to five (5) years after that date. At the same time Ecology notifies the applicant of the decision, Ecology will mail notice of the final decision to anyone who has requested such notification. Upon application by a registrant, Ecology shall grant a single extension of up to one (1) year of the valid period of the final well Registration if construction of the house has begun, PROVIDED THAT the total period for the preliminary well Registration and the final well Registration shall not exceed ten (10) years.

i. For example, if a preliminary well Registration decision is issued by Ecology on April

1, 2007, and the decision is not appealed to the Water Master within thirty (30) days pursuant to Section VIII.C.1.a. of this Agreement, the preliminary Registration shall be valid from May 2, 2007, until May 2, 2012. If the registrant constructs the well and mails the chloride analysis results to Ecology on May 2, 2012, Ecology shall then determine whether the chloride analysis results are in the acceptable range pursuant to Sections X.B.3. and 4. of this Agreement. If Ecology mails a decision granting the final well Registration on May 10, 2012, and the decision is not appealed to the Water Master within thirty (30) days pursuant to Section VIII.C.1.a. of this Agreement, the final well Registration is valid from June 10, 2012, until June 10, 2017. There could be no extension of the final well Registration period, because the registrant had used the entire five (5) year period of the preliminary well Registration to construct the well and mail the chloride analysis results to Ecology.

ii. For a second example based on the facts above concerning (i) when the preliminary well Registration was valid, (ii) that Ecology mailed the decision on final well Registration within the same time frame, and (iii) there was no appeal: if the registrant had constructed the well and mailed the chloride analysis results to Ecology on May 2, 2011, and if the registrant had applied to Ecology for an extension and had begun construction of the house by June 10, 2016, Ecology would grant a one (1) year extension, and the final well Registration would be valid for six (6) years, from June 10, 2011, until June 10, 2017.

iii. For a third example based on the facts above concerning (i) when the preliminary well Registration was valid, (ii) that Ecology mailed the decision on final well Registration within the same time frame, and (iii) there was no appeal: if the registrant had constructed the well and mailed the chloride analysis results to Ecology by December 2, 2011, and if the registrant had applied to Ecology for an extension and had begun construction of the house by December 10, 2015, Ecology would grant a six (6) month extension, and the final well Registration would be valid for five and one half (5 ½) years, from December 10, 2011, until June 10, 2017.

iv. For a fourth example based on the facts above concerning (i) when the preliminary well Registration was valid, (ii) that Ecology mailed the decision on final well Registration within the same time frame, and (iii) there was no appeal: if the registrant had constructed the well and mailed the chloride analysis results to Ecology on May 2, 2010, and if the registrant had applied to Ecology for an extension and had begun construction of the house by June 10, 2015, Ecology would grant a single one (1) year extension, and the final well Registration would be valid for six (6) years, from June 10, 2010, until June 10, 2016.

### **3. New Wells – Application.**

A landowner within the Case Area may apply to Ecology to Register a proposed new well that would use a portion of Ecology's allocation of water. The application shall be on a form devised by Ecology, containing at least the following information: 1) The legal description of the land on which the well is to be constructed; 2) The location within the described parcel where the well is to be located; 3) The annual quantity of water proposed to be withdrawn from the well; 4) The purposes for which the water is proposed to be used; 5) If the well will be a Supply Well, the location of other existing wells within a radius of 200 feet of the proposed well.

**4. New Wells – Decision on Preliminary Registration.**

- a. Ecology may preliminarily grant an application to Register a well upon a finding that:
- i. There is at least 0.39 afy of unallocated water available within Ecology's Allocation for withdrawal by the proposed well.
  - ii. The proposed well is likely to have a Chloride Base Level in compliance with the requirements of Section X.B. of this Agreement.
  - iii. For new Supply Wells, the proposed well is consistent with the well spacing protocol described in Section XI. of this Agreement.
  - iv. The amount of water proposed to be withdrawn and the proposed uses of the water are consistent with the state permit exemption provisions of RCW 90.44.050 and the terms of this Agreement.

b. Ecology shall issue a written decision on the application, either granting or denying a preliminary Registration in whole or in part. If the decision grants the application, Ecology shall issue a preliminary Registration which shall specify: 1) the location where the well is authorized to be constructed; 2) notice that the well owner must comply with the requirements of this Agreement, including but not limited to requirements for chlorides, metering, reporting, maximum annual volume, and payments to the Water Master; and 3) the annual quantity of water which may be withdrawn.

**5. New Wells – Minimum Annual Quantities.**

Ecology shall set a minimum annual quantity of water for each Registered well of 350 gpd, or 0.39 afy, for each single family home served by the well; provided, however, that if Whatcom County at the time Ecology sets the annual minimum quantity requires proof of an average daily amount greater than 350 gpd in order to comply with state law for issuance of a building permit, Ecology shall apply the amount actually required by Whatcom County at the time of all well Registration decisions.

**6. New Wells – Notice of Decision on Preliminary Registration and Appeals.**

Ecology shall give notice of the preliminary well Registration decision to the registrant, the Water Master, and the Lummi Nation. Any Party aggrieved by a decision of Ecology may appeal the decision to the Water Master pursuant to Section VIII.C.1.a. of this Agreement. The preliminary well Registration shall be valid for the period of time specified in Section V.E.2.a. of this Agreement. When the well is completed, the applicant shall submit initial chloride test results to Ecology in accordance with Sections X.B.3 and 4 of this Agreement.



## 7. New Wells – Decision on Final Registration.

a. If the initial chloride results are within the acceptable range, Ecology shall issue a decision and a final well Registration document containing: 1) the location of the well and Ecology Unique ID tag number; 2) the maximum annual volume of water authorized to be withdrawn; 3) the purposes for which the water may be used; and 4) notice of the period of time that the final well Registration will be effective. Ecology shall give notice of the final well Registration decision to the registrant, the Water Master, and the Lummi Nation. Any Party aggrieved by a decision of Ecology may appeal the decision to the Water Master pursuant to Section VIII.C.1.a. of this Agreement. The final well Registration shall be valid for the period of time specified in Section V.E.2.b. of this Agreement.

b. The final Registration will expire without further action by Ecology at the time specified in the final Registration document, including any extension, unless: 1) both the well and the house have been fully constructed, if the well was to be used for domestic purposes, and the water has been put to beneficial use; or 2) the water has been put to beneficial use if the well was to be used for another purpose. Ecology shall notify the registrant, the Lummi Nation, and Whatcom County when the final well Registration has expired and request that Whatcom County revoke the building permit.

c. Water Service in Lieu of Well Development. Eligible Landowners entitled to preliminary Registration of a water allocation from Ecology (Exhibit D and, to the extent Ecology's Allocation allows, Exhibit E) who are unable to develop a well that complies with this Agreement, or who for other reasons desire to become single family residence customers of the Lummi Tribal Water District instead of developing a well, may negotiate a mutually satisfactory agreement with the District for water service ("service agreement"). The Lummi Nation may refuse to enter into a service agreement if it so chooses. The service agreement shall be entered into within the time period specified in Section V.E.2.a. for completion and testing of a Registered well, or the preliminary Registration shall lapse by its own terms. If an Eligible Landowner enters into a service agreement with the District under this section, the Eligible Landowner shall 1) connect to the system and begin using water; 2) obtain a building permit which, with any extensions, is current when ten (10) years have elapsed since the preliminary permit became valid; 3) complete construction of the foundation and bring utilities to the lot of the residence within ten (10) years of the date the preliminary Registration became valid. If those conditions are not satisfied, the service agreement shall become void, and the Eligible Landowner's allocation shall be considered unperfected under Section V.F.2. of this Agreement. If the conditions are satisfied, the allocation shall be considered perfected and automatically transferred to the Lummi Nation in accordance with Section III.C.2. of this Agreement.

## 8. Shared Well.

a. If an Eligible Landowner has received an allocation from Ecology's Allocation and is being supplied by a Shared Well, said allocation shall attach to the Shared Well user's parcel regardless of where the well is located.

b. If the owner of property on which a Shared Well is located enters into a separate water

settlement agreement with the Lummi Nation under which the owner is required to discontinue use of a Shared Well, any remaining non-settling users of that Shared Well have the option to:

- i. continue being supplied from the Shared Well on whatever terms the sharing parties agree upon; or
- ii. drill a well on their property; or
- iii. share a well with a different landowner.

In any of the above instances, the non-settling user is responsible to operate any well in compliance with this Agreement. Nothing in this Agreement alters the private agreement between the sharing parties. Contractual relationship disputes between the sharing parties shall not be subject to dispute resolution by the Water Master.

c. Eligible Landowners may apply to Ecology pursuant to state law for a transfer of point of withdrawal to a new well or to another existing well.

d. Nothing in this Agreement will prohibit an Eligible Landowner from transferring the point of withdrawal allotted in Exhibits C, D or E to another parcel.

**F. Failure to Perfect or Relinquishment of Water.**

**1. Perfected Water.**

Once an Eligible Landowner has put water to actual beneficial use in accordance with the applicable permit, certificate, or Registration document, the full amount of water authorized by the document shall be considered perfected for purposes of this Agreement, regardless of the amount actually used. No water relinquished by Ecology can be added back into the Ecology Allocation, except for any water which Ecology may relinquish from the Bert Ooms certificate. A partial relinquishment of a domestic water right cannot result in terminating all water access to an existing home, even if the water allocation remaining is less than 300 gpd.

**2. Unperfected Water.**

Water rights permits or Registrations that are granted but not perfected may be revoked by Ecology, or expire by a Registration's own terms, either if no well and house, if the water is for domestic use, have been fully constructed on the affected land within the time specified in the water rights document and the water has not been beneficially used, or if the water for another purpose has not been beneficially used within that time. In the event a water right is revoked or expires under this paragraph, the unperfected water may be made available to other applicants within Ecology's Allocation.



**3. Limitation on Use of Meter Records or Other Information.**

Neither Ecology nor any other person or entity may use meter records or any other information the disclosure of which is required by this Agreement as evidence in any relinquishment action.

**G. Tracking and Sharing Information on Permitted Water Uses.**

**1. Annual Well Report.**

The Eligible Landowners who are using water from Ecology's Allocation shall provide to Ecology an Annual Well Report by November 1 each year for the previous water year. The Annual Well Report shall be on a form developed jointly by Ecology and the Lummi Nation. Ecology shall mail the Annual Well Report form to the Eligible Landowners by August 1 of each year, and will inform the Eligible Landowner of the Water Master's fee for that year and where to submit the payment. The Annual Well Report shall contain:

- a. water meter readings on cumulative water use up to September 30 of each year;
- b. copies of lab analyses for chloride levels taken as of August of each year;
- c. identification information including the name of the well owner, the water right certificate number, if any, the number of homes served, what other uses the well is used for, and the Ecology Unique Well ID or Lummi Well Number for the well;
- d. a description of any problems the well or meter has had in that water year; and
- e. any changes in well operation in the water year.

**2. Additional Reports for Supply Wells.**

Eligible Landowners who are using Supply Wells shall also report to Ecology monthly meter readings by the 15<sup>th</sup> of the following month, and chloride lab analyses for December and April by the 15<sup>th</sup> of the following month.

**3. Enforcement of Reports.**

Ecology shall receive this information and provide it to the Lummi Nation within ten (10) business days of receiving it. Ecology shall maintain this information in a form and format adopted jointly by Ecology and the Lummi Nation. If the water user fails to deliver required monitoring information, or Ecology fails to enforce the water user's duty to collect and report such information, or fails to deliver it to the Lummi Nation, the Lummi Nation may file a complaint with the Water Master.

**4. Database.**

Ecology shall maintain a database of the following information in a form and format jointly adopted by Ecology and the Lummi Nation, and shall make this information available to the Lummi Nation within ten (10) days of receiving it:

- a. Allocation and authorized uses:
  - i. Total amount of water available to Ecology for allocation under Section III.A. of this Agreement, as adjusted pursuant to Section III.C. of this Agreement.
  - ii. Total amount of water allocated to Eligible Landowners within the Case Area to existing users or through the Ecology permitting or Registration process described in Sections V.B. through V.E. of this Agreement.
  - iii. Complete list of wells authorized to use water in Ecology's Allocation, including location, annual use limit, and Chloride Base Level and Chloride Trigger Level.
- b. Metering and monitoring information (provided on a summary and well-by-well basis):
  - i. Withdrawal quantity information.
  - ii. Chloride measurements.
- c. Information received from the Lummi Nation which it is required to provide to Ecology under this Agreement.
- d. Results of spot checking of wells performed under this Agreement.

**H. Enforcement.**

**1. Compliance Obligations, Enforcement, Assistance and Notice.**

- a. The persons or entities holding water rights or allocations of water from Ecology's Allocation under this Agreement shall have the primary obligation for compliance with the withdrawal and chloride limits, reporting, testing and spot checking requirements, and other well-specific requirements of this Agreement. Ecology shall enforce these requirements in a manner consistent with the requirements of state law, to the extent they are not inconsistent with this Agreement. Such enforcement action may include orders to stop or limit water use, injunctive relief through the Water Master, requiring repayment of the water in the next water year or years, or monetary penalties, or all of these.
- b. Ecology may provide education or consulting on water reduction, or otherwise assist Case Area Eligible Landowners in staying within the water use and chloride limits specified in Exhibit C, or on their permits, certificates, or Registrations. Ecology shall, consistent with state law, impose such fines and issue such regulatory orders as are necessary to bring water users into

compliance, and shall seek Water Master enforcement of such orders if necessary.

c. If metering information indicates that a water user, at current use levels, will exceed the annual water use specified in the user's permit, certificate or Registration, or in this Agreement, Ecology will notify the water user of this fact and suggest that its use be cut back. Ecology may impose interim limits on water users who have been so warned. Ecology's enforcement actions under this Agreement shall comply with state law, to the extent it is not inconsistent with this Agreement. For purposes of Ecology's enforcement of this Agreement, violations of this Agreement are deemed violations of chapters 90.03 and 90.44 RCW, as currently written or hereinafter amended.

## **2. Overuse of Water.**

a. Except as provided in subsection c, below, no water user claiming water from Ecology's Allocation may withdraw water in excess of the annual quantity limit specified in Exhibit C, or the applicable permit, certificate, or Registration document, unless the excess withdrawal is due to a pipeline break or other accident. Ecology shall require accidental overuse to be repaid in the following year, if feasible, although the repayment can be spread over more than one (1) year if repayment in a year is not feasible. For example, if a person with an allocation of 0.39 afy withdrew 0.50 acre feet in a year, in the following year the person would limit withdrawals to 0.28 acre feet to make up for, or repay, the excessive withdrawal in the amount of 0.11 acre feet. For another example, if a person with an allocation of 0.39 afy withdrew 1.0 acre feet in a year, in the following six (6) years the person might be required to limit withdrawals to approximately 0.29 acre feet per year to make up for, or repay, the excessive withdrawal in the amount of 0.61 acre feet. Upon appeal of a repayment order, the Water Master may consider equitable factors in determining the amount, if any, and the manner in which repayment shall be made.

b. If the water user fails to comply with use limit requirements, the water user shall be subject to enforcement action by Ecology and, if necessary to prevent overuse of water, the Water Master. Such enforcement action may include orders to stop or limit water use, injunctive relief through the Water Master, or requiring repayment of the water in the next water year or years, or monetary penalties, or all of these.

c. If a Small Well water user on Exhibit C withdraws water in excess of the annual quantity limit specified in Exhibit C at a time when the Lummi Nation determines that water remains available in the Lummi Nation allocation for its future use, neither the Lummi Nation nor the United States shall enforce their remedies under subsections (a) and (b) above, provided that the overdrawing Party shall compensate Lummi for the overuse in accordance with the following inclining block rate schedule: (1) For any water use up to 0.025 afy above the annual quantity limit the fee shall be \$50 per year (the equivalent of \$0.137 per day). (2) For any additional water use between 0.025 and 0.05 afy above the annual quantity limit the fee shall be \$100 per year (the equivalent of \$0.274 per day). (3) For any additional water use between 0.05 and 0.10 afy above the annual quantity limit the fee shall be \$150 per year (the equivalent of \$0.41 per day). (4) The rate shall progress in 0.05 afy and \$50 annual cost increments thereafter.

The fees shall be adjusted annually on the anniversary date of this agreement based on the Implicit Price Deflator, with 2007 as the base year. In the event payment is not made, the Lummi Nation or the United States may initiate an action before the Water Master seeking appropriate relief. In addition to the foregoing fees, Lummi may add its reasonable costs of billing and collection, including its costs and attorney fees in pursuing the action in front of the Water Master, if necessary. The action before the Water Master shall be the exclusive remedy for any overuse of water covered by this subsection c. Nothing herein shall authorize any use of water by any Small Well user for any purpose other than the single family domestic, irrigation or stock watering uses designated for each parcel in Exhibit C to this Agreement. Nothing herein authorizes the conveyance of any Lummi Nation water right to any person or entity. By July 1 of each year, the Lummi Nation shall inform Ecology whether water is available for use in the next water year under this subsection. If the Lummi Nation determines that no additional water remains available in its Allocation, the Lummi Nation shall have the option of requiring compliance with paragraphs V.H.2.a. and b. above as the remedy for overuse.

### **3. Monitoring of Owner Reports.**

#### **a. Wells to be Monitored.**

In order to determine if meters of persons withdrawing groundwater in the Case Area are working properly and the chloride tests are being done properly, Ecology shall join with the Lummi Nation annually in conducting monitoring visits in a combination of 1) supervision of the landowners' meter reading and chloride sampling as required in their well reports pursuant to Sections V.G.1. and 2. and VII.E.1. and 2. of this Agreement, and 2) independent meter reading and chloride sampling on selected wells ("spot checking"). Each year, Ecology and the Lummi Nation shall agree upon the minimum number of monitoring visits that shall be performed. In the absence of agreement in any year on the minimum number of monitoring visits, Ecology shall monitor all Supply Wells annually and, in addition, at least ten per cent (10%) of the remaining wells regulated by Ecology. If the Lummi Nation desires that a larger number of small well monitoring visits shall be performed by spot checking, and Ecology does not agree, the Lummi Nation will bear the cost of laboratory testing associated with any additional spot checks it desires.

#### **b. Investigation of Questioned Well Reports.**

In cases where Ecology, based on its knowledge of chloride levels in an area or other relevant information, has reasonable grounds to believe that particular well reports submitted to Ecology may be inaccurate (questioned well report), Ecology shall investigate each questioned well report and, if necessary, conduct tests to determine the accurate chloride and/or meter readings. Any actions taken to investigate questioned well reports shall count as part of Ecology's obligation to conduct either supervised reading and sampling or random spot checks on at least ten percent (10%) of non-Supply Wells regulated by Ecology. The fact that Ecology has met its obligation to conduct either supervised reading and sampling or spot checks on at least ten percent (10%) of non-Supply Wells regulated by Ecology during a particular year, however, does not relieve Ecology from its obligation under this Section V.H.3.b. to investigate

all questioned well reports, even if such reports exceed ten percent (10%) of non-Supply Wells regulated by Ecology.

**c. Procedure for Monitoring Visits.**

All monitoring shall be conducted by Ecology personnel, at reasonable times and on reasonable advance notice to the well owner. The Lummi Water Resources personnel may accompany Ecology on monitoring visits, but may not monitor wells withdrawing water from Ecology's Allocation when not accompanied by Ecology staff, unless with the express consent of the Eligible Landowner. Ecology and Lummi Nation personnel who participate in the monitoring shall carry and present appropriate identification and credentials. When accompanying Ecology Regulators on a supervised reading and sampling, or on a spot check of wells regulated by Ecology, the Lummi Nation may independently record meter readings and take a separate chloride sample for testing at its expense. All results of monitoring of wells performed under this Agreement will be posted on Ecology's website.

**d. Effect of Discrepancy.**

If either 1) a supervised reading and sampling or a spot check conducted pursuant to Section V.H.3.a., or 2) an investigation by Ecology pursuant to Section V.H.3.b. reveals that a meter is not functioning properly, a chloride sampling has not been properly performed, or the information and data submitted in annual report is, for any reason, incorrect, the well shall be subject to annual supervised readings and samplings or spot checks until Ecology reasonably determines that the cause of the inaccurate information or data in the annual report has been remedied and that the error is unlikely to be repeated. The cost of testing chloride samples shall be borne by the well owner, but the well owner shall not be responsible for any other costs associated with follow-up testing, including administrative or staff time. Such follow up supervised readings and samplings or spot checks shall be in addition to Ecology's obligation to monitor at least ten percent (10%) of non-Supply Wells it regulates in the Case Area.

**4. Enforcement Appeals.**

Any action taken by Ecology to enforce the requirements of this Agreement may be appealed to the Water Master.

**5. Enforcement Officer.**

Ecology shall employ an enforcement officer whose duties shall include sufficient time for enforcing compliance with the requirements of this Agreement by parties who are not regulated by the Lummi Nation.

**VI. OBLIGATIONS OF WHATCOM COUNTY.**

Whatcom County shall issue no building permits or any document necessary before the start of construction within the Case Area for properties relying on a Small Well, unless the applicant provides proof to Whatcom County that the applicant has obtained a final well permit or well

Registration from the Department of Ecology, valid at least until the expiration date of the proposed building permit, with an allocation of not less than 350 gpd, or for properties not relying on a Small Well, a letter of availability from a Water Association or a letter of authorization from the Lummi Nation. Such permit or Registration must evidence a right to a quantity of water sufficient to satisfy the County's water availability/adequacy standard required by RCW 19.27.097. Whatcom County recognizes 300 gpd for homes serviced by a Water Association and 350 gpd for homes not serviced by a Water Association as adequate amounts of water to support issuance of a County building permit for a single family residence and represents that there is no Whatcom County ordinance which would prevent issuance of a building permit based upon the foregoing water allocations. If Ecology notifies the County that a Well Registration or other water use authorization has expired or has been revoked by Ecology, the County shall revoke or amend the building permit accordingly

## **VII. OBLIGATIONS OF THE LUMMI NATION AND THE UNITED STATES.**

### **A. Regulation of Water Generally.**

From the date of the entry of the Judgment and Order accompanying this Agreement, the Lummi Nation and the United States agree not to permit, authorize, or allow any use of groundwater within the Case Area by any of the Lummi Nation's entities, Lummi members, or other Trust Assignees, except as described in this Agreement. The Lummi Nation and the United States shall abide by the chloride, well spacing, and withdrawal limits of this Agreement. The Lummi Nation and the United States shall not permit, authorize, or allow development of any well in any geographic area of the Case Area where the Chloride Base Level exceeds 100 mg/L, and shall not allow the operation of any well at a chloride level greater than 140 mg/L, with the following exceptions:

1. To the extent such development is allowed by the Nation's Water Resources Protection Code, the Nation or the United States may allow the development and use of wells producing less than 1.50 afy for single family domestic use on the same terms and conditions as are applicable to Small Wells under Section X.B.5. of this Agreement.
2. Wells intended to produce water with a chloride level greater than 250 mg/L for non-potable uses such as aquaculture, and not for domestic, commercial or municipal, may be developed in geographic areas of the Case Area where background chloride levels are 250 mg/L or greater and the owner can demonstrate that use of the well will not adversely affect the chloride levels in portions of the aquifer where groundwater is available at levels of 250 mg/L or less. Chloride Base and Trigger Levels shall not apply to such wells, but the well must be operated in a manner that does not cause degradation of the potable areas of the aquifer.
3. The Lummi Nation or the United States may authorize the construction of a well to be used for aquifer monitoring or other bona fide scientific investigation purposes only and not for production, provided that the owner can demonstrate that the well will not adversely affect the chloride levels in portions of the aquifer where groundwater is available at levels of 250 mg/L or less. Such wells must be operated in a manner that does not cause degradation of the potable areas of the aquifer. For example, a pump test of a well for scientific purposes to test for



chloride could not exceed the minimum duration necessary to obtain an accurate chloride test.

**B. Existing Wells and Users.**

Within 180 days of the exhaustion of appeals of the Judgment and Order attached to this Agreement, the Lummi Nation shall communicate to Ecology, in a form and format jointly adopted by Ecology and the Lummi Nation, the location and Chloride Base Level of each well withdrawing water in the Case Area from the Lummi Nation's Allocation.

**C. Water Permit Applications Submitted Prior to Entry of the Judgment and Order.**

**1. Processing.**

The Lummi Nation will process and make conditional decisions on groundwater applications that are pending at the time this Agreement is signed, or that are submitted prior to entry of the Judgment and Order. A list of currently pending applications is attached as Exhibit F. If additional applications are received prior to the entry of the Judgment and Order, the Lummi Nation will add them to Exhibit F and provide notice of the applications to all Signatory Parties who have requested notice.

**2. Protests.**

Ecology or any affected person may protest any of the pending applications on any ground allowed by law, or claim of inconsistency with this Agreement. Protests or appeals based on inconsistency with this Agreement shall be determined by the Water Master as described in Section VIII.C.1.a. below, or to the Court if no Water Master has been appointed. If an application is protested, the Water Master or the Court shall determine whether construction of the protested well shall proceed. Protests based on violation of the Lummi Nation's laws shall be determined under the procedures provided in those laws.

**D. Water Permit Applications Submitted After Entry of the Judgment and Order.**

**1. Permit Applications.**

Landowners within the Case Area wishing to apply for a permit for groundwater from the Lummi Nation's Allocation described at Section III.B.1. of this Agreement may do so in accordance with this Agreement and the requirements of the Lummi Water Resources Protection Code insofar as the Code is consistent with this Agreement. If the United States authorizes groundwater withdrawal in the Case Area, such authorization shall be in accordance with this Agreement and the requirements of federal law and regulations insofar as that law is consistent with this Agreement. Nothing in this Agreement creates a right under the Lummi Water Resources Code that would not otherwise exist in the absence of this Agreement.

**2. Consultation.**

Before making a preliminary decision on an application for a new well or groundwater use, the Lummi Nation or the United States, as applicable, shall consult with Ecology, providing all pertinent information to Ecology and allowing Ecology ten (10) business days to formally consult on contemplated decisions. In addition, the Lummi Nation shall provide notice by mail of the application to the owners of parcels of land that abut the proposed well location. Persons who wish to be notified of the final decision may request such notice by written request submitted to the decision maker.

**3. Appeals to Water Master.**

Any person or entity wishing to appeal a permit, well authorization, or change decision of the Lummi Nation or the United States on the basis of incompatibility with this Agreement and the associated Judgment and Order shall make such an appeal to the Water Master, as described in Section VIII.C.1.a. of this Agreement, within thirty (30) days after the Lummi Nation or the United States issues notice of its decision by mailing such notice to Ecology, the applicant, and to persons who have requested notice of the final decision. The Lummi Nation and the United States may not make a final decision to issue or deny a permit, well authorization, or change while an appeal to the Water Master is pending.

**E. Tracking and Sharing Well Use Information**

**1. Annual Well Report.**

In addition to any other information required by the Lummi Water Resources Protection Code, the Lummi Nation shall obtain or require owners of wells in the Case Area using groundwater from the Lummi Nation's Allocation to provide to the Nation an Annual Well Report by November 1 each year for the previous Water Year. The Annual Well Report shall be on a form developed jointly by Ecology and the Lummi Nation. The Annual Well Report shall contain:

- a. water meter readings on cumulative water use up to September 30 of each year;
- b. copies of lab analyses for chloride levels taken as of August of each year;
- c. identification information including the name of the well owner, the water right certificate number, if any, the number of homes served, what other uses the well is used for, and the Ecology Unique Well ID or Lummi Well Number for the well;
- d. a description of any problems the well or meter has had in that water year; and
- e. any changes in well operation in the water year.



**2. Supply Well Reporting.**

In addition to any other information required by the Lummi Water Resources Protection Code, the Lummi Nation shall require the owners or operators of Supply Wells withdrawing groundwater from the Lummi Nation's Allocation within the Case Area to report monthly meter readings by the 15<sup>th</sup> of the following month, and chloride lab analyses for December and April by the 15<sup>th</sup> of the following month.

**3. Database.**

The Lummi Nation shall maintain a database of the following information in a form and format jointly adopted by Ecology and the Lummi Nation, and shall make this information available to Ecology within ten (10) business days of receiving it:

a. Allocation and authorized uses:

i. Complete list of wells authorized to use water in the Lummi Nation's Allocation, including location, annual use limit, and Chloride Base Level and Chloride Trigger Level

b. Metering and monitoring information (provided on a summary and well-by-well basis):

- i. Withdrawal quantity information.
- ii. Chloride measurements.

c. The results of any spot checking of wells performed under this Agreement.

**F. Enforcement.**

**1. No Use in Excess of Allocation Allowed.**

No water user claiming water from the Lummi Nation's Allocation may withdraw water in excess of the amount allowed by the Lummi Nation or the United States. The Lummi Nation shall enforce this requirement consistent with the Lummi Nation's laws and this Agreement, whether a groundwater withdrawal from the Lummi Nation's Allocation has been permitted or authorized by the Lummi Nation or by the United States.

**2. Assistance to Landowners.**

The Lummi Nation may impose fines, provide education or consulting on water reduction, or otherwise assist Case Area landowners using water from the Lummi Nation's Allocation in staying within the chloride limits specified in this Agreement. The Lummi Nation shall issue such regulatory orders as are necessary to bring water users into compliance, and shall seek court enforcement of such orders if necessary, whether a groundwater withdrawal from the Lummi

Nation's Allocation has been permitted or authorized by the Lummi Nation or by the United States.

### **3. Monitoring of Owner Reports.**

#### **a. Wells to be Monitored.**

In order to determine if meters of persons withdrawing groundwater in the Case Area are working properly and the chloride tests are being done properly, the Lummi Nation shall join with Ecology annually in conducting monitoring visits in a combination of 1) supervision of the landowners' meter reading and chloride sampling as required in their well reports pursuant to Sections V.G.1. and 2. and VII.E.1. and 2. of this Agreement, and 2) independent meter reading and chloride sampling on randomly selected wells ("spot checking"). Each year, Ecology and the Lummi Nation shall agree upon the minimum number of monitoring visits that shall be performed for wells regulated by the Lummi Nation. If Ecology desires that a larger number of Small Well monitoring visits shall be performed by spot checking, and the Lummi Nation does not agree, Ecology will bear the cost of laboratory testing associated with any additional spot checks it desires. The Lummi Nation shall monitor all Supply Wells annually and, in addition, at least ten percent (10%) of the remaining wells regulated by the Lummi Nation.

#### **b. Investigation of Questioned Well Reports.**

In cases where the Lummi Nation, based on its knowledge of chloride levels in an area or other relevant information, has reasonable grounds to believe that particular well reports submitted to the Lummi Nation may be inaccurate (questioned well report), the Lummi Nation shall investigate each questioned well report and, if necessary, conduct tests to determine the accurate chloride and/or meter readings. Any actions taken to investigate questioned well reports shall count as part of the Lummi Nation's obligation to conduct either supervised reading and sampling or random spot checks on at least ten percent (10%) of non-Supply Wells regulated by the Lummi Nation. The fact that the Lummi Nation has met its obligation to conduct either supervised reading and sampling or spot checks on at least ten percent (10%) of non-Supply Wells regulated by the Lummi Nation during a particular year, however, does not relieve the Lummi Nation from its obligation under this Section VII.F.3.b. to investigate all questioned well reports, even if such reports exceed ten percent (10%) of non-Supply Wells regulated by the Lummi Nation.

#### **c. Procedure for Monitoring Visits.**

All monitoring shall be conducted by the Lummi Nation's personnel, at reasonable times and on reasonable advance notice to the well owner. Ecology personnel shall accompany the Lummi Nation on monitoring visits, but may not monitor wells withdrawing water from the Lummi Nation's Allocation when not accompanied by the Lummi Nation's staff, unless with the express consent of the landowner. Ecology and the Lummi Nation's personnel who participate in the monitoring shall carry and present appropriate identification and credentials. When accompanying the Lummi Nation's Regulators on a supervised reading and sampling or on a spot check of wells regulated by the Lummi Nation, Ecology shall, as to Supply Wells, and may,

as to Small Wells, independently record meter readings and take a separate chloride sample for testing at its expense. All results of monitoring of wells performed under this Agreement will be posted on Ecology's website.

**d. Effect of Discrepancy.**

If either 1) a supervised reading and sampling or a spot check conducted pursuant to Section VII.3.a., or 2) an investigation by the Lummi Nation pursuant to Section VII.3.b. reveals that a meter is not functioning properly, a chloride sampling has not been properly performed, or the information and data submitted in annual report is, for any reason, incorrect, the well shall be subject to annual supervised readings and samplings or spot checks until the Lummi Nation reasonably determines that the cause of the inaccurate information or data in the annual report has been remedied and that the error is unlikely to be repeated. The cost of testing chloride samples shall be borne by the well owner, but the well owner shall not be responsible for any other costs associated with follow-up testing, including administrative or staff time. Such follow up supervised readings and samplings or spot checks shall be in addition to the Lummi Nation's obligation to monitor at least ten percent (10%) of non-Supply Wells it regulates in the Case Area.

**4. Enforcement Appeals.**

Any enforcement action taken under the authority of this Agreement shall be appealed to the Water Master. Any claim that the Lummi Nation has failed to take enforcement action required by this Agreement shall be heard by the Water Master.

**G. Payment of Water Master Costs.**

The Lummi Nation agrees to pay fifty percent (50%) of the annual budget of the Water Master's office each year, and the other fees imposed by this Agreement, including filing fees and reimbursing the Water Master's office for the costs of performing actions that were the Lummi Nation's responsibility in the first instance.

**H. Non-Challenge Agreements.**

The Lummi Nation and the United States agree not to challenge, in the Case Area, the issuance of water right permits or Registrations, building permits, Department of Health system approval, funding applications or other similar actions on the basis that the household amounts specified in Sections V. B.1. and V.D.3., above, are not reasonable household usage levels for a full time residence.

## VIII. THE OFFICE OF THE WATER MASTER.

### A. Duties, Powers, and Funding.

#### 1. Duties.

The parties agree that, in order to protect their respective rights to the allocations set forth herein, and to protect the aquifer from saltwater intrusion, it is necessary for the Federal Court to appoint a Water Master with the following duties:

a. To resolve by written decision disputes between Parties regarding the proper interpretation of this Agreement and accompanying Judgment and Order, including disputes as to whether the Parties have fulfilled their monitoring and enforcement responsibilities under this Agreement.

b. To obtain performance or perform Ecology's or the Lummi Nation's functions should Ecology or the Lummi Nation fail to:

i. limit and/or shut down water withdrawal from wells that violate the conditions imposed under this Agreement and attached Judgment and Order, including, but not limited to, failure to install an approved meter within 180 days of the date the attached Judgment and Order become final after all appeals, or failure to comply with applicable chloride requirements or any annual use quantities,

ii. enforce against well owners who fail to report information required under this Agreement, or

iii. take emergency action pursuant to Section VIII.A.2.d. of this Agreement.

c. To issue an annual report of the activities of the Water Master's office, including requests for action, decisions or orders issued, and enforcement actions taken.

d. To collect fees from Parties pursuant to this Agreement.

e. To prepare a draft budget by June 1, and to confer with Ecology and the Lummi Nation in preparing a final budget.

f. Collect bills.

g. To take other actions as reasonably necessary to implement this Agreement.

#### 2. Powers.

The Signatory Parties agree that the fulfillment of the duties specified above will require that the Water Master have certain authorities, and the Signatory Parties therefore agree not to contest the

authority of the Water Master to act as provided in this Agreement or to dispute that the Water Master does have these authorities. The Parties retain the right to appeal any decision of the Water Master to the Court. Specifically, the authorities of the Water Master include:

a. The power to resolve disputes related to interpretation or implementation of this Agreement and attached Judgment and Order, including but not limited to determinations made by Ecology or the Lummi Nation that a decision authorizing a new well is compatible with the quantity, chloride, and well spacing requirements specified in this Agreement and accompanying Judgment and Order.

b. In the event the Responsible Regulator has failed to enforce as required by this Agreement, the power to regulate, by all means necessary, wells which have violated the quantity, chloride or other limits or requirements specified in this Settlement Agreement, the Uniform Technical Requirements, and the accompanying Judgment and Order, and the power to gather information required by this Agreement. This power includes the power to enter private property to gather this information directly, when necessary. The Procedures required to implement this power are described in Section VIII.C. of this Agreement.

c. The power to employ such experts and other assistants as are necessary to carry out the duties described above; provided, however, that this does not include the power to hire experts to resolve a dispute. The parties to the dispute shall provide whatever expert testimony they deem necessary for the Water Master to properly decide the dispute.

d. In case the Responsible Regulators have not acted within three (3) days after being alerted to the problem, the power to take emergency action where necessary to protect the aquifer or the health and safety of Case Area residents from an imminent threat.

e. The power to collect fees from Parties pursuant to this Agreement.

f. The power to issue temporary, preliminary and permanent injunctions when necessary, including requiring bonds as appropriate.

g. The power to levy fines and establish penalties as appropriate under the circumstances of each case, but not to exceed the maximum allowed by state law under similar circumstances, except that if Ecology or the Lummi Nation fail to enforce adequately the Water Master shall levy against the losing Party only costs pursuant to Sections IV.G.5. and 6. of this Agreement.

h. The power to file and enforce liens as appropriate.

i. The power to enforce Water Master decisions.

### **3. Funding.**

The Signatory Parties agree that the fulfillment of the duties specified above will require that the Water Master's office receive adequate funding. Therefore, the Signatory Parties agree not to

dispute the Water Master's authority to recover budgeted costs from the Lummi Nation and the state defendants, as described at Section IV.G. of this Agreement.

**B. Selection, Qualifications, and Compensation.**

**1. Qualifications.**

A candidate for the position of Water Master shall have professional certification or license as a hydrologist, hydrogeologist, geologist, civil engineer, or attorney with substantial experience in water rights and water regulation. A candidate shall disclose any past employment or other relationship with any Party.

**2. Nominations.**

Any Party may nominate candidates for the position of Water Master to the United States, Lummi Nation, and Ecology. The Parties will have a minimum of eight (8) weeks in which to develop names of candidates, to allow them to use a formal competitive process if they choose.

**3. Selection.**

If the United States, Lummi Nation, Ecology, and the Water Associations' representative agree on a candidate, they shall file a joint motion with the Court, with adequate notice to the Parties, proposing that the Court appoint that candidate as Water Master. The Court shall make the final selection. In the absence of an agreement on a candidate, any Party may separately file a motion proposing a candidate with the Court. Any Party may contest the motion seeking appointment.

**4. Replacement.**

For good cause, any Party may move the Court to replace the Water Master. If the Court grants the motion, the replacement Water Master shall be selected pursuant to Sections VIII.B.1., 2., and 3. of this Agreement.

**C. Dispute Resolution.**

**1. Matters for Dispute Resolution.**

**a. Protest of Decision by Ecology, the Lummi Nation, or the United States or Other Disputes.**

i. Any person or entity with standing may appeal:

(a) A decision under Section V.D. or E or VII.D. of this Agreement by Ecology, the Lummi Nation, or the United States denying, granting, or authorizing the construction of a well or the withdrawal or use of groundwater within the Case Area.

(b) Any other decision or other action taken by Ecology or the Lummi Nation to implement any terms of this Agreement, provided that any claim that either Ecology or the Lummi Nation has failed to take a required action to enforce the terms of this Agreement shall be governed by the terms of VIII.C.1.b. below.

(c) Any other dispute arising under this Agreement.

ii. Any appeal arising under VIII.C.1.a.i. of this Agreement shall be initiated by filing a notice of appeal with the Water Master as described below and serving by mail a copy of the notice on Ecology, the Lummi Nation, and any other Party to the dispute within thirty (30) days of the date of the official action being appealed, or within thirty (30) days of the date the appellant knew or should have known of the event giving rise to appeal.

iii. The person or entity filing the appeal (petitioner) shall pay to the Water Master a Two Hundred Fifty Dollar (\$250) filing fee. The notice of appeal shall:

(a) Identify the decision, action, or dispute which is being appealed.

(b) Include a copy of any decision being appealed, if the petitioner has access to a copy.

(c) Summarize the basis of the petitioner's objections or disagreements with the decision or other action.

(d) Identify the relief requested.

(e) Contain a declaration signed by the petitioner affirming that the petitioner understands the contents of the complaint and believes those contents to be true to the best of the petitioner's knowledge and information formed after reasonable inquiry and made subject to perjury.

(f) Provide proof that the notice of appeal has been mailed by both certified and first class mail to Ecology, the Lummi Nation, and any other Party to the dispute.

iv. Responses shall be due twenty-four (24) days after notice of the appeal has been mailed. Responses may include a counter-claim against the petitioner. A reply by the petitioner shall be due fourteen (14) days after the response is served. Responses and replies to counter-claims shall have the same time limitations as if they were a notice of appeal. The Water Master may adjust this filing schedule, and may order production of documents or other evidence, as is appropriate under the circumstances.

v. Upon filing of an appeal, a decision or action taken by Ecology, the Lummi Nation or the United States shall be automatically stayed, and any well construction or withdrawal of groundwater that has taken place under the authority of an appealed action or decision shall cease pending resolution of the appeal.



vi. The Water Master will consider written materials and, if necessary, may take oral testimony on whether the appealed decision is compatible with this Agreement and attached Judgment and Order. Specifically, the Water Master may examine all relevant matters including, but not limited to:

- Whether water is available from the Ecology Allocation.
- Whether a proposed permit is likely to comport with the maximum initial chloride level described in Section X.B of this Agreement.
- For proposed new or replacement Supply Wells, whether the proposed permit comports with the well spacing protocol described in Section X.I. of this Agreement.

vii. The Water Master may affirm the decision, modify the decision, reverse the decision, or issue other orders to resolve the dispute. Where the Water Master determines that the appealed decision is inconsistent with this Agreement or Judgment and Order, the decision shall be of no further effect. In such case, the Responsible Regulator shall take all steps necessary to assure that the reversed decision is not implemented.

**b. Review of Enforcement Inaction.**

i. Any person or entity with standing may seek a determination of whether a Responsible Regulator (the Lummi Nation or Department of Ecology) has failed to take any action required by this Agreement. This review includes, but is not limited to, the requirement that Responsible Regulators:

- (a) require meters on all wells, as required at Section IV.D.;
- (b) require all operating wells to have a valid permit or Registration, as required at Sections IV.B.; V.A.; and VII.A.;
- (c) require prompt disclosure of required well quantity and chloride-level information as required at Sections IV.F, V.G., and VII. E.; and
- (d) prevent operation of wells in violation of permitted quantity and chloride limits as required by this Agreement.

ii. Any petition for review arising under VIII..C.1.b.i. of this Agreement shall be initiated by filing a claim with the Water Master for failure to enforce and serving by mail a copy of the claim on Ecology, the Lummi Nation, and any owner of property subject to the required actions within thirty (30) days of the date of the official action being appealed, or within thirty (30) days of the date the appellant knew or should have known of the event giving rise to appeal.



iii. The person or entity filing the claim for failure to enforce (petitioner) shall pay to the Water Master a Two Hundred Fifty Dollar (\$250) filing fee. The claim for failure to enforce shall:

(a) Identify the section of this Agreement that requires the Responsible Regulator to take the disputed action.

(b) Summarize the basis of the petitioner's contention that a particular action was required, but not taken by the Responsible Regulator.

(c) Identify the relief requested.

(d) Contain a declaration signed by the petitioner affirming that the petitioner understands the contents of the complaint and believes those contents to be true to the best of the petitioner's knowledge and information formed after reasonable inquiry and made subject to perjury.

(e) Provide proof that the notice of appeal has been mailed by both certified and first class mail to Ecology, the Lummi Nation, and any other party to the dispute.

iv. Within ten (10) days of receiving notice of such a claim from the Water Master, the Lummi Nation and the Department of Ecology shall confer, and, if the petitioner is other than Ecology or the Lummi Nation, shall subsequently confer with the petitioner in an attempt to resolve the dispute. The parties will report to the Water Master whether their dispute have been resolved.

v. Upon notice that a dispute has not been resolved, the Water Master shall notify the parties that Responses to the claim of failure to enforce shall be due twenty-four (24) days after notice of the claim has been served. Responses may include a counter-claim against the petitioner. A reply by the petitioner shall be due fourteen (14) days after the response is served. The Water Master may adjust this filing schedule, and may order production of documents or other evidence, as is appropriate under the circumstances.

vi. Any person or entity filing a claim for failure to enforce may file a motion with the Water Master seeking a temporary restraining order or preliminary injunction. The Water Master shall dispose of any such motions pursuant to the provisions set forth in VIII.C.2. below

vii. The Water Master will consider written materials and, if necessary, may take oral testimony on whether the Responsible Regulator has failed to take an action required by this Agreement and attached Judgment and Order.

viii. If the Water Master determines that the Responsible Regulator should have taken the action at issue, the Water Master shall order the Responsible Regulator to take the required action.

ix. If the Responsible Regulator has not complied with such an order within three (3) business days, the Water Master shall perform the action that the Responsible Regulator has not performed. The Water Master has the power to regulate, by all means necessary, wells which have violated the quantity, chloride, or other limits specified in this Agreement. The Water Master may employ any of the powers described in Section VIII.A.2. of this Agreement in the process of performing the required action.

x. The Water Master shall order reimbursement of the Water Master's costs, including costs of hearings, as well as the cost of taking direct actions, as described in Sections IV.G.5. and 6. of this Agreement.

xi. Any Party may appeal a Water Master decision to the U.S. District Court for Western Washington within thirty (30) days of the date the decision is entered. The District Court filing fee schedule for initiation of a new civil action shall be applicable to all such appeals. Such appeal will be on the written record established before the Water Master. The decision of the Court shall be a final judgment that may be appealed in the same manner, and subject to the same rules, as any other judgment of a District Court.

## **2. Procedures for Dispute Resolution.**

### **a. Relief.**

The Water Master may issue injunctions or use other powers pursuant to Section VIII.A.2 of this Agreement as necessary to implement the Water Master's decisions, including decisions as to monies owed to the Water Master. For appeals filed with the Water Master pursuant to VIII.C.1.a., any injunctions issued by the Water Master are to be in addition to the automatic stay provisions of VIII.C.1.a.v.

#### **i. Temporary Restraining Order.**

(a) In situations where the petitioner demonstrates to the Water Master that immediate and irreparable damage is substantially certain to occur unless restrained, the Water Master may issue a temporary restraining order without notice to any potential responding Party, but may act in an emergency only in accordance with Section VIII.A.2.d. of this Agreement.

(b) A temporary restraining order will only be issued if the Water Master finds, based upon sworn evidence, that it is necessary to maintain the status quo to prevent likely irreparable harm to the petitioner pending a hearing for preliminary injunction.

(c) A temporary restraining order may be modified, vacated, or set aside by motion of any Party upon notice and opportunity for a hearing. A temporary restraining order shall not be valid for more than seven (7) days.

#### **ii. Preliminary Injunction.**

(a) Following a motion and opportunity for hearing, the Water Master may enter a preliminary injunction restraining a Party from taking certain action, or requiring a Party to take certain action, during the pendency of the complaint action. A preliminary injunction may be entered only after an appropriate written motion by a Party, after written notice to all affected Parties, and an opportunity to be heard by the opposing Party or Parties.

(b) A preliminary injunction will only be issued on a showing that:

(1) Immediate and irreparable damage will likely result to the Party requesting the relief during the pendency of the resolution of the dispute.

(2) From the specific facts proven on balance the Party requesting relief will be more likely to suffer a more serious and irreparable harm than the Party opposing the preliminary injunction.

(3) The Party requesting relief has demonstrated a substantial likelihood of prevailing on the merits.

iii. Permanent Injunction.

(a) Following the hearing on the merits, the Water Master may order a permanent injunction as necessary to implement its decision.

(b) Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the Parties to the action, their officers, agents, servants, successors, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

iv. Bond.

No temporary restraining order or preliminary injunction shall issue, except upon the giving of security by the applicant. The Water Master shall require a bond in an appropriate and adequate amount to protect the Party to be restrained in the event the relief requested is ultimately denied.

**b. Motions.**

All requests for action by the Water Master in a pending matter shall be made by written motion and notice to the opposing Party. The Party making the motion shall request the Water Master to set a hearing date. The responding Party may file a written response within twenty four (24) days after notice was sent.

**c. Hearings.**

The Water Master shall have discretion to conduct hearings in a manner that provides all interested Parties an opportunity to be heard, and is otherwise appropriate. The Water Master may administer oaths and shall provide for preserving a record of the proceedings. The Water Master may choose to use the following hearing format:

- i. The petitioner may give an opening statement.
- ii. The respondent may give an opening response.
- iii. Petitioner will present petitioner's evidence. Witnesses shall be subject to cross examination.
- iv. Following completion of the petitioner's case, the respondent may move to dismiss and/or the respondent shall present respondent's evidence. Witnesses shall be subject to cross examination.
- v. All Parties shall have an opportunity to make a closing argument to the Water Master.
- vi. The Party asking for action shall have the burden of proving all elements of their case by a preponderance of the evidence.
- vii. Promptly upon the close of evidence, the Water Master may give an oral decision and must file a written decision within five (5) days of the close of evidence.

**d. Judgment**

The judgment of the Water Master shall contain a statement of all relief, if any, granted to the prevailing Party, and may provide for enforcement of its ruling. Such relief may not include damages. The judgment shall assign costs as described in Sections IV.G. 5. and 6. of this Agreement.

**e. Appeals of Water Master Decisions.**

Any Party may appeal a Water Master decision to the U.S. District Court for Western Washington within thirty (30) days of the date the decision is entered. The District Court filing fee schedule for initiation of a new civil action shall be applicable to all such appeals. Such appeal will be on the written record established before the Water Master. The decision of the Court shall be a final judgment that may be appealed in the same manner, and subject to the same rules, as any other judgment of a District Court.

**f. Miscellaneous.**

- i. Time computation shall be as described in the applicable rules for the United

States Court for the Western District of Washington.

ii. After the initial service of notice of appeal or petition for review by mail as provided in Sections VIII.C.1.a.ii. and VIII.C.1.b.ii., notice and exchange of documents for Water Master disputes may be accomplished by email or fax.

iii. All Parties shall pay their own attorney's fees and costs, except the prevailing Party shall recover their filing fee from the non-prevailing Party.

## **IX. JOINT UNIFORM TECHNICAL REQUIREMENTS.**

The Signatory Parties agree that, in the unique circumstances of this case, cooperative management of the Case Area Aquifer is essential in order for all Parties to realize the maximum benefit from this Settlement Agreement. Therefore, the Signatory Parties have adopted initial joint Uniform Technical Requirements [Exhibit G] which shall control the groundwater management actions of the well owners and users, the Responsible Regulators, and the Water Master, where applicable, within the Case Area. The initial Uniform Technical Requirements shall be subject to revision from time to time, by agreement of the Lummi Nation and Ecology; provided, however, that such revisions shall not change the substantive rights of the Parties, and the terms of the Uniform Technical Requirements relating to Sections X. and XI. below shall not be altered except in accordance with the procedures for amending this Settlement Agreement. The well construction requirements contained in the Uniform Technical Requirements shall not apply to wells constructed prior to the effective date of this Agreement.

## **X. CHLORIDES PROTOCOL.**

### **A. Goal of the Chlorides Protocol.**

1. The Case Area Aquifer is threatened by saltwater intrusion, which can be measured, in part, by increases in chloride levels in wells. The goal of this chlorides protocol is to maintain the health of the Case Area Aquifer, and, where possible, to keep chloride levels below 100 mg/L. All Parties shall cooperate to achieve this goal to the maximum extent possible, consistent with the provisions of this Agreement. If chloride levels within a given geographic area of the aquifer have been increased as a result of well pumping and the levels cannot be reduced below 100 mg/L, the maximum safe yield for that area has been reached, and no new wells shall be allowed within that area.
2. To provide measuring tools and to control the threat of saltwater intrusion when intrusion occurs, each well in the Case Area will be assigned a Chloride Base Level and a Chloride Trigger Level, as described below. Except as provided in Section X.D. and E. below, no well shall be operated at a level above its Chloride Trigger Level.
3. In addition to generally applicable rules in this Agreement, specific rules for Small Wells are found in paragraphs X.B.3., X.B.5.b., X.C.1. and 2., X.E.1.a. and XI.A. These specific Small Well provisions control to the extent they conflict with the generally applicable rules.

## **B. The Chloride Base Level.**

1. Each well within the Case Area will be assigned a "Chloride Base Level," which will be on record with the Responsible Regulator and available to all Parties on request.
2. The owner of each existing well shall provide to the Responsible Regulator chloride testing results from samples taken from the well during the first August after the Judgment and Order accompanying this Agreement are entered, which shall be the Chloride Base Level for the well. Sampling and testing shall be performed in accordance with procedures specified in Attachment D to the Uniform Technical Requirements.
3. For new Small Wells, an initial chloride level will be determined by pumping a new well for a minimum of four (4) hours at the rate it will be pumped under normal operating conditions. Water samples shall be collected for chloride analysis at the beginning and at the end of the pump test. The pumping rate and water levels shall be recorded at the beginning (pre-pumping/static water level), every half hour for the duration of the test, and every half hour for one (1) hour after the test. Sampling and testing shall be performed in accordance with procedures specified in Attachment D to the Uniform Technical Requirements. The collected information shall be promptly reported to the Responsible Regulator and also included as part of the well owner's Annual Well Report. The Chloride Base Level shall be the measurement taken at the end of the initial pump test.
4. For new Supply Wells, the Chloride Base Level will be determined by pumping a new well for a minimum of twenty-four (24) hours at the rate it will be pumped under normal operating conditions. Water samples shall be collected for chloride analysis at the beginning and at the end of pumping. Sampling and testing shall be performed in accordance with procedures specified in the Uniform Technical Requirements. The collected information shall be promptly reported to the Responsible Regulator and also included as part of the well owner's Annual Well Report. The chloride measurement collected at the end of the pump test will be considered the Chloride Base Level.
5. All wells regulated by Ecology or the Lummi Nation shall be developed with a Chloride Base Level no greater than 100 mg/L, with the following exceptions:
  - a. Replacement Wells shall be allowed to be drilled notwithstanding that the chloride levels in the area are above 100 mg/L if:
    - i. the chloride level in the well being replaced was above 100 mg/L; or
    - ii. the Replacement Well was drilled deeper into the aquifer to avoid the problem(s) necessitating the need to drill a Replacement Well.

For example, an owner may wish to replace a well that was failing for reasons specific to the depth of the well, but not related to elevated chloride levels, such as the well screen being located in a layer of fine sand which was reducing the amount of water that could be produced from the well on an instantaneous basis. The Replacement Well could be drilled



deeper into the aquifer to avoid the layer of fine sand, even though drilling deeper results in chlorides higher than 100 mg/L.

b. In any portion of the Case Area where no groundwater exists with a natural chloride level less than 100 mg/L, but groundwater is available with a chloride level less than 250 mg/L, a Small Well can be developed or used for domestic purposes at the lowest feasible chloride level, if the owner can demonstrate that use of the well will not adversely affect the chloride levels in portions of the aquifer where groundwater is available at levels of 100 mg/L or less. The lowest feasible chloride level for the well shall be the Chloride Base Level for that well.

c. In addition, the Lummi Nation may have wells with a Base Level exceeding 100 mg/L under the limited exceptions of Section VII.A.2. and 3.

6. If the Chloride Base Level for a new well is 100 mg/L or above, the well cannot be used, except as provided above. The well owner will be given the opportunity to make any adjustments (e.g. pump intake, depth, pumping rate) in order to try to reduce the initial chloride concentration to an acceptable level. These adjustments will require additional pump tests to be performed. The well owner may also collect and submit a second sample for analysis to make sure that the high chloride measurement was not in error. If the second chloride concentration is also 100 mg/L or above, the well will be decommissioned following the procedures in the Uniform Technical Requirements.

7. For purposes of Chloride Base Levels, a Replacement Well shall be treated as a new well with new data. Chloride data from the well being replaced shall not be used for the Replacement Well. The Chloride Trigger Level for the well shall be the same as that for the well it replaces.

### **C. The Chloride Trigger Level.**

1. The Chloride Trigger Level is a tool used to regulate all wells in the Case Area Aquifer in order to limit salt water intrusion within the Aquifer. The Chloride Trigger Level shall be 140 mg/L, except that if, as provided in Section X.B.5.b. of this Agreement, the Chloride Base Level for a Small Well is greater than 100 mg/L, the Chloride Trigger Level shall be 40 mg/L higher than the Chloride Base Level, up to a maximum of 250 mg/L.

2. No well may be operated at a chloride level greater than its Chloride Trigger Level, except as provided in Section X.D. and E., below.

### **D. Effect of Chloride Increases Below the Chloride Trigger Level.**

1. The owner of a well that presents an increasing trend in its chloride concentration should take corrective action prior to reaching the Chloride Trigger Level in order to reduce the risk of salt water intrusion. The Responsible Regulator should issue a written warning to the owner of a well that reaches a chloride level within 20 mg/L of the well's Chloride Trigger Level. For example, if the Chloride Trigger Level for the well is 140 mg/L, the Responsible Regulator should send a written warning when the chloride level for the well reaches 120 mg/L; if the Chloride Trigger Level for the well is 250 mg/L, the Responsible Regulator should send a



written warning when the chloride level for the well reaches 230 mg/L. The written warning should notify the well owner of the increase, identify remedial measures that can be taken by the well owner to address the problem, and notify the well owner of the consequences of not taking proactive steps to address the problem. Remedial measures include, but are not limited to:

- a. Reduce pumping rate of the well (may require additional storage).
- b. Drill an additional or Replacement Well, following permitting procedures required by the Responsible Regulator.
- c. Raise the pump intake.
- d. Alter the pumping regime (e.g., tidal pumping, pumping during low use hours - may require additional storage).
- e. Reduce the annual quantity pumped.
- f. Reduce the depth of the well screen.
- g. Decommission the well and use another well, including a Shared Well.

2. If the chloride concentration can be maintained below the Chloride Trigger Level, no enforcement or management action will be taken.

3. Because of their larger volume and more concentrated impact on the aquifer, Supply Wells shall take and report chloride measurements in April, August, and December. In addition, at least annually, or more often if required by the Responsible Regulator, each Supply Well shall report:

- a. the number of households or residential equivalent units to which it currently supplies water;
- b. the number of households or residential equivalent units to which it has issued service commitments, but which are not currently supplied with water;
- c. the number of households or residential equivalent units which it anticipates applying for a service commitment in the coming year;
- d. the average daily amount of water withdrawn for delivery per household.

4. When the August chloride level in a Water Association well reaches 125 mg/L or greater, the Association shall not issue any new commitments to serve water for additional households, such as "letters of availability" for a period of one (1) year. If the August chloride level in the well at the end of one (1) year remains below 135 mg/L, the Association may issue up to three (3) additional "letters of availability," PROVIDED no more than three (3) unexpired letters of availability are outstanding at any one time. For each year where the August chloride level

remains below 135 mg/L, the Association may issue up to three (3) additional letters of availability provided the Association does not exceed its allocation under this agreement, AND PROVIDED no more than three (3) letters of availability are outstanding at any one time. If the August chloride level is between 135 mg/l and 140 mg/L, the Association shall issue no new letters of availability unless two (2) years pass with the August chloride levels being less than 140 mg/L, in which case the Association may issue one (1) additional letter of availability for each year where the chloride level remains below 140 mg/L. Once the chloride level in an Association well reaches 140 mg/L, the Association shall issue no new letters of availability nor shall it allow any new homes to be connected to its system, PROVIDED HOWEVER, the Association may connect to its system any home for which there is a building permit application pending at the time the 140 mg/L trigger is exceeded. In addition to the foregoing limitations, the Georgia Manor Water Association agrees that if, and when, its August chloride level reached 100 mg/L, it shall have no more than ten (10) unexpired letters of availability outstanding at any given point in time, PROVIDED it may honor all outstanding commitments existing at the time the 100 mg/L level is reached. A Water Association may continue to pump its well to service members, notwithstanding that the chlorides in the well exceed 140 mg/L provided that no withdrawals will be allowed once the chloride level reaches the maximum limit of 250 mg/L, and provided that all homes relying upon that well for water shall have the right to hook onto the Lummi Tribal Water system.

#### **E. Effect of Chloride Measurements Reaching the Chloride Trigger Level.**

1.

a. If any well, other than an Association Well, reaches its Chloride Trigger Level, the owner shall take those remedial measures listed in Section X.D.1., above, as the Responsible Regulator determines are economically reasonable, feasible, and most likely to address the problem. If a Small Well owner fails or refuses to take the required actions, the well shall not be operated above its Chloride Trigger Level. If the owner of the Small Well takes the required remedial measures, but the chloride levels are not reduced below the Chloride Trigger Level, the well shall be allowed to operate above its Chloride Trigger Level; provided, that no additional housing units or other services shall be connected to the well after the well reaches its Chloride Trigger Level, unless the chloride level for that well later declines below its Chloride Trigger Level, and no additional commitments for water service shall be issued by the well owner.

b. Where a Supply Well of an Eligible Landowner has exceeded its Chloride Trigger Level, total annual withdrawals from that well shall not exceed a "Calculated Service Level" equal to the number of homes receiving or eligible to receive service at the time the Chloride Trigger Level is reached times 0.39 acre feet per year. If the owner of the well elects to operate the well above the Chloride Trigger Level under the foregoing provision, the owner shall relinquish the right to use any water in excess of the Calculated Service Level, and the relinquished water shall be added to the Lummi Nation's Allocation. In no event shall any well for domestic purposes be allowed to operate at a chloride level greater than 250 mg/L.

2. Except as provided above, no well shall be operated at a chloride level greater than its Chloride Trigger Level.

a. If chloride levels in a well cannot be reduced below the well's Chloride Trigger Level, the owner of the well shall have the option to cease operations, in which case the homes served by the well shall have the right to be connected to the Lummi Tribal Water District system, provided the Eligible Landowners exercise this right within one (1) year of deciding to cease well operation, by notifying the Water District of their intent to do.

b. If, as provided above, a well is allowed to operate at levels in excess of the applicable Chloride Trigger Level, and the chloride level in that well exceeds 250 mg/L after all required or voluntary remedial actions have been implemented, then the owner of the well shall cease operation of the well. The homes served by the well shall have the right to be connected to the Lummi Tribal Water District system provided the Eligible Landowner exercises this right within one (1) year of being required to cease well operation, by notifying the Water District of their intent to do so.

c. Services connected under this Subsection E.2. shall pay the District's standard connection fee in effect at the time of connection, and a pro-rata share of any additional infrastructure and commodity costs of providing service under this section. Individual customers or Water Associations that transfer assets to the District at the time of connection shall receive credit for the value to the District system of the assets so transferred. Any disagreement over the value of the assets to the District system shall be resolved by the Water Master. All other terms of service shall be the same as for any other new customer. Upon connection to the Lummi Nation's system, the Lummi Nation may require the well to be decommissioned. As to Supply Wells, the Lummi Nation may maintain the well as an aquifer monitoring or management tool, or use the well for limited water production if and when the chloride levels are reduced below the applicable Chloride Trigger Level. Upon connection to the District, access to and control of the well and the well's associated infrastructure shall be transferred to the Lummi Nation. Connection to the Lummi tribal water system under the terms of this Agreement shall not be considered a consent to tribal jurisdiction for any purpose. Delivery of and payment for water as part of the operation of the water system shall be enforced on a contract basis.

Connections to the Lummi Tribal Water system under the terms of this Agreement will be solely in accordance with the terms of Title 16 of the Lummi Code of Laws: Sewer and Water District Code, attachment hereto. The Lummi Nation may amend Title 16 in the future, PROVIDED the amendments apply to all District customers equally, and PROVIDED no distinction in rates and charges shall be made on the basis of race, color, creed, religion, or tribal membership of the owner of the property served, nor shall any distinction be made on the basis of ownership of land, whether fee, trust, tribally, or individually owned. The arbitration provisions of Section 16.14.040 shall remain available to persons connecting to the water system under this provision as the ultimate forum for resolving disputes relating to such service, notwithstanding any future amendments to other sections of Title 16. However, no amendments shall subject the Eligible Landowners to the Lummi Nation's jurisdiction beyond what is provided in this Agreement. Other provisions of the Lummi Code of Laws shall not apply to this Agreement.

## **XI. WELL SPACING PROTOCOL AND INTERFERENCE DISPUTES.**

### **A. Small Wells.**

This Settlement Agreement does not limit or attach any presumptions to the location or replacement of Small Wells. The provisions of this Agreement do not supersede otherwise applicable well spacing requirements such as sanitary control zones.

### **B. Supply Wells.**

The following well spacing protocol applies only to Supply Wells. The provisions of this Agreement do not supersede otherwise applicable well spacing requirements such as sanitary control zones.

#### **1. New Wells.**

All new Supply Wells shall be constructed at least 100 feet from the nearest boundary between a parcel drawing water from the Lummi Nation's Allocation and a parcel drawing water from Ecology's Allocation, and at least 200 feet from an existing well of any size.

#### **2. Existing Wells.**

##### **a. Status Quo is Preserved.**

Regardless of whether they are located in accordance with the spacing requirements for new Supply Wells, existing Supply Wells withdrawing water at 2005 use levels or less are deemed in conformance with this Agreement. The operation of existing Supply Wells at such levels shall not be the basis for any claim of well interference by any person.

##### **b. Increased Withdrawals.**

Increased withdrawals from existing Supply Wells that are not in conformance with the spacing requirements for new Supply Wells may form the basis for a well interference claim, if the complaining Party can prove that the increased withdrawals are the cause of the alleged interference. No presumption or inference shall attach to the fact that the Supply Well is not located in conformity with the spacing requirements for a new Supply Well under this Agreement.

##### **c. Certain Claims Barred.**

Notwithstanding the foregoing, the Lummi Nation and the Water Associations mutually agree that, except as provided in this subsection, neither will assert a claim for well interference against the other based on increased withdrawals from Supply Wells existing on the date this Agreement is signed, provided that such wells are operated in accordance with the chloride and withdrawal limits specified in this Agreement. The Georgia Manor Water Association reserves the right to assert well interference claims against the Lummi Nation's West Shore well located on Lots 11-14, Block D Plat of Georgia Manor, if withdrawals from that well exceed 40 afy or a maximum instantaneous withdrawal rate of 30 gpm. In addition, the Lummi Nation agrees that it will not exceed an instantaneous withdrawal rate of 30 gpm nor withdraw more than 40 afy from the West Shore well for the first five (5) years following the approval of this Agreement by the Federal Court. The Lummi Nation reserves the right to assert well interference claims against the Georgia Manor Water Association's wells located adjacent to Lots 11-14, Block D Plat of Georgia Manor, if withdrawals from those wells exceed 20 afy or a maximum instantaneous

withdrawal rate of 20 gpm. The foregoing limitations relate solely to the Parties' right to bring a claim. They have no bearing on whether well interference is, in fact, occurring and shall not be offered in evidence by any Party to a well interference claim. The barring of claims in this subsection shall not affect any claim that may be asserted by any person other than the Lummi Nation or the Water Associations.

### **3. Spacing of Replacement or Additional Supply Wells.**

A replacement Supply Well is a well constructed by the owner of an existing Supply Well to take the place of that well. Replacement Supply Wells should attempt to conform to the well-spacing requirement of Section XI.B.1. The Responsible Regulator may require other conditions such as drilling depth changes or other measures not related to well spacing. If it is not feasible to comply with the new well spacing requirements, the well owner may construct a replacement well in substantially the same location as the well to be replaced. A Water Association may also drill an additional well which does not conform to the well spacing requirement PROVIDED the combined withdrawals from the two (2) wells do not exceed the Water Associations' applicable quantity limitations.

### **C. Well Interference Disputes.**

If a well is not in compliance with the chloride protocol set forth above, the exclusive remedies against such well are the dispute resolution actions set forth in Section VIII. of this Agreement. No Party or entity bound by this Agreement may bring a claim for well interference regarding chloride levels before the Water Master or any other tribunal against a well that is compliance with the chloride protocol set forth above in this Section X., with the exception of aquaculture or research wells as described in Section VII.A.2. and 3. The Water Master has concurrent jurisdiction to resolve well interference disputes that do not involve chloride concentrations, such as draw down, or water quality problems other than chloride. Such disputes shall be resolved pursuant to applicable state, tribal or federal law. The jurisdiction of other tribunals as to such disputes is not affected by this Agreement.

## **XII. WAIVER AND RELEASE OF CLAIMS.**

A. The Lummi Nation, on behalf of itself and its members, and the Secretary of the Interior, on behalf of the United States as trustee for the Lummi Nation and Trust Assignees, in consideration of benefits realized under this Settlement Agreement and the accompanying Judgment and Order, hereby waive and release:

1. all claims to rights to groundwater within the Case Area, that the Lummi Nation, on behalf of itself and its members, or the United States as trustee for the Lummi Nation and individual assignees for whom the United States owns land in trust or restricted fee status, asserted or could have asserted in United States and Lummi Nation v. Washington Department of Ecology et al., or in any other court proceeding; and

2. all claims for damages, losses or injuries to groundwater rights or claims of interference or taking of groundwater within the Case Area that accrued up to and including the date of entry of the Judgment and Order that accompanies this Agreement, that may or may not be fully known and may or may not be more numerous or more serious than it is now understood or expected, even though the injuries, damages, and losses may be now unanticipated, unexpected, or unknown, that the Lummi Nation, on behalf of itself or its members, or the United States as trustee for the Lummi Nation and Trust Assignees, asserted or could assert.

B. The State of Washington, Case Area Eligible Landowners, and their successors-in-interest, and Water Associations, in consideration of benefits realized under this Settlement Agreement and the accompanying Judgment and Order, hereby waive and release:

1. all claims, counterclaims, defenses, or causes of action related to rights to groundwater within the Case Area, that the State of Washington, Case Area Eligible Landowners, and their successors-in-interest, and Water Associations asserted or could have asserted in United States and Lummi Nation v. Washington Department of Ecology et al., or in any other court proceeding; and

2. all claims for damages, losses or injuries to groundwater rights or claims of interference or taking of groundwater within the Case Area that accrued up to and including the date of entry of the Judgment and Order that accompanies this Agreement, that may or may not be fully known and may or may not be more numerous or more serious than it is now understood or expected, even though the injuries, damages, and losses may be now unanticipated, unexpected, or unknown, that the State of Washington, undersigned individuals and water associations asserted or could assert.

C. The Lummi Nation on behalf of itself and its members (but not members in their capacity as assignees), hereby waives:

1. all causes of action that the Lummi Nation or its members (but not members in their capacity as assignees) may have against the United States, its agencies, or employees, arising out of claims of rights to groundwater in the Case Area, that the United States asserted, or could have asserted in United States and Lummi Nation v. Washington Department of Ecology et al.;

2. all claims for damages, losses or injuries to groundwater rights; claims of interference, diversion or taking of water; or failure to protect or acquire groundwater or rights to groundwater in the Case Area, that accrued up to and including the date of entry of the attached Judgment and Order, that may or may not be fully known and may or may not be more numerous or more serious than is now understood or expected, even though the injuries, damages, and losses may now be unanticipated, unexpected or unknown, that the Lummi Nation may have asserted; or could have asserted against the United States, its agencies, or employees; and

3. all claims arising out of, resulting from or relating in any manner to the negotiation, execution or adoption of the Settlement Agreement, exhibits or appendices to the Settlement Agreement, the Judgment and Order, or any specific terms and provisions thereof, that the Lummi Nation



may have against the United States, its agencies, or employees.

D. Notwithstanding the waivers and releases set forth in Sections XII.A, B and C of this Agreement, the Lummi Nation and its members (including members in their capacity as assignees) and the United States as trustee for the Lummi Nation and assignees, the State of Washington, and the Water Associations, and Eligible Landowners who have signed this Agreement shall retain:

1. all claims of water rights or injuries to water rights within the Case Area for water sources other than Case Area groundwater;
2. all claims of water rights or injuries to water rights for areas outside the Case Area from all water sources, except to the extent that such claims interfere with the exercise of groundwater rights described in this Agreement;
3. all claims for enforcement of this Settlement Agreement or the Judgment and Order through such legal and equitable remedies as may be available under this Agreement;
4. all claims relating to the quality of water, including groundwater, or relating to activities affecting the quality of water, including groundwater, except for issues related to chloride concentrations in groundwater that are specifically addressed in this Agreement;
5. all rights, remedies, privileges, immunities and powers not specifically waived and released under the terms of this Settlement Agreement or the Judgment and Order.

### **XIII. MISCELLANEOUS.**

A. Nothing in this Agreement shall create Lummi Nation jurisdiction over any Party or property where such jurisdiction would not otherwise exist. No consent to the Lummi Nation's jurisdiction is given or implied by this Agreement, except as may be necessary to enforce the water service obligations as customers of the Lummi Tribal Water District distribution system. This Agreement and accompanying Judgment and Order shall not be construed to affect jurisdiction as described in Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

B. The Signatory Parties hereby agree that a condition precedent of this Agreement is that, in the Judgment and Order issued by the Court, the Amended Order dated June 23, 2005, Docket No. 794, and its predecessor Order of May 20, 2005, Docket No. 779, shall be vacated in their entirety by the Court and shall be of no preclusive effect as to any Party.

C. Any dispute regarding the proper interpretation or implementation of this Settlement Agreement shall be submitted exclusively to the Water Master for resolution, subject to appeal to the District Court. Any dispute arising out of the implementation of this Agreement must be resolved pursuant to the procedures set forth herein.



D. This Settlement Agreement may be amended in writing at any time only by the signature of all Signatory Parties, who shall submit the amendment to the court for a modification of the attached Judgment and Order.

E. Each Party is responsible for the Party's own costs and attorney's fees in connection with this case and any dispute related to the proper interpretation or implementation of this Agreement, except the prevailing Party shall recover their filing fee from the non-prevailing Party, as provided in this Agreement.

F. The Court shall retain continuing jurisdiction of this case to resolve matters appealed to it from decisions of the Water Master, to modify the attached Judgment and Order upon motion of the Parties, or to consider motions to appoint or replace a Water Master.

G. The Lummi Nation expressly waives its immunity from suit for the limited purpose of enforcing the terms of this Agreement through the Dispute Resolution Procedures in this Agreement. This waiver is limited to persons or entities bound by the Judgment and Order and having standing as to the particular dispute under this Agreement.

H. Ecology expressly waives its immunity from suit for the limited purpose of enforcing the terms of this Agreement through the Dispute Resolution Procedures in this Agreement. This waiver is limited to persons or entities bound by the Judgment and Order and having standing as to the particular dispute under this Agreement.

I. The United States represents that, as the originating plaintiff in this case, it has the authority to enter into this Settlement Agreement and attached Judgment and Order and is bound by the terms of the Agreement, Judgment and Order, and acknowledges that the other Parties are relying upon the United States representations in entering into this Agreement.

J. If this Agreement, including exhibits, and the accompanying Judgment and Order do not become final, after all appeals, this Agreement and its exhibits, tentative decisions listed in Exhibit D and processing activities concerning them, and the Judgment and Order shall not be used by any Party as evidence or for any other purpose in further proceedings in this litigation. This paragraph shall be effective among the Signatory Parties even if the remainder of the Agreement does not become effective.

K. This Agreement shall be of no precedential value in any other matter. It is based on the unique circumstances of this case.

L. Generally applicable federal and state law shall apply to Ecology and the Eligible Landowners to the extent it is not in conflict with this Agreement. Generally applicable federal and Lummi Nation law shall apply to the Lummi Nation, its members, and Trust Assignees to the extent it is not in conflict with this Agreement. This Agreement does not supersede otherwise applicable federal environmental laws.

M. Each signer for the United States, Lummi Nation, Department of Ecology, Water Associations, and Whatcom County, by executing this Agreement, represents and states that the

signer has taken the necessary administrative and legal actions to procure the actual authority to bind the signer's principal.

N. This Agreement has been prepared jointly by the Signatory Parties following negotiations among them. All Signatory Parties were represented by, or had the opportunity to be represented by, legal counsel of their choosing. It shall be construed according to its terms and not for or against any of the Signatory Parties.

O. This Agreement may be entered into in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the parties to the aggregate counterparts had signed the same instrument. A photocopied or faxed signature shall have the same effect as an original signature.

#### **XIV. EFFECTIVE DATE.**

A. This Agreement, and the waiver of claims herein, shall be effective only when both of the following events have occurred:

1. This Agreement has been executed by the Signatory Parties and the United States District Court has approved it in a form substantially identical to the executed Agreement.
2. The proposed Judgment and Order has been entered by the United States District Court for Western Washington in substantially the same form as the attached Judgment and Order.

B. Notwithstanding any appeals that may be filed in this matter, the Lummi Nation shall comply with the chloride and well spacing requirements of this Agreement for any well constructed after the date this Agreement is executed by the Signatory Parties.

#### **LIST OF EXHIBITS:**

- A. Map of the Case Area and Legal Description**
- B. List of Signatory Parties**
- C. List of Existing State Well Owners**
- D. List of Eligible Landowners with Tentative Approval from Ecology**
- E. List of Applications for Groundwater Rights Currently Pending Before Ecology**
- F. List of Applications for Groundwater Rights Currently Pending Before the Lummi Nation**
- G. Uniform Joint Technical Requirements with Attachments.**
- H. Title 16 of the Lummi Code of Laws: Sewer and Water District Code**
- I. Supplemental Agreement**