

AGREEMENT GCA 5869
Between
THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
And
THE PORT GAMBLE S'KLALLAM TRIBE

This government to government Agreement is entered into between the Port Gamble S'Klallam Tribe, acting through the Tribal Chair, hereinafter the "TRIBE," and the State of Washington, Department of Transportation hereinafter the "STATE."

WHEREAS, the STATE has a Project for the replacement of the Hood Canal Bridge, and

WHEREAS, the STATE has moored bridge pontoons identified as pontoons R, S, and T within the confines of the Port Gamble Bay for an approximate twenty (20) year period for eventual use in the Project for the construction of the Hood Canal Bridge, and intends to continue doing so until June 30, 2009, and

WHEREAS, Port Gamble Bay is the STATE's proposed location to temporarily moor two transition trusses, temporarily moor new pontoons U, V, W, and X and for performing construction activities associated with the joining of pontoons R, S, and T to new pontoons U, V, W, and X, and

WHEREAS, the TRIBE objects to the aforementioned activities, citing that the approximate 20 year period of mooring pontoons R, S, and T has caused aquatic impacts within the TRIBE's usual and accustomed fishing area, including causing possible mortality of geoduck, impeding the harvest of geoduck, shading of approximately 1.2 acres of aquatic habitat including herring spawning beds, the general interference with treaty fishing rights, and the potential of similar impacts from the proposed added temporary pontoon moorage and construction activities, and

WHEREAS, the STATE and TRIBE wish to work cooperatively to monitor for potential impacts by the continued and added temporary pontoon moorings and proposed future construction activities, and

WHEREAS, the Tribal Council has, by Tribal Council Resolution or similar documentation, authorized the Tribal Chairman to be the TRIBE's signature authority to execute this Agreement and any and all documents necessary to its implementation which resolution or similar documentation is attached hereto as Exhibit A and incorporated herein by this reference,

NOW, THEREFORE, pursuant to chapter 39.34 RCW and in consideration of the terms, conditions, covenants, and performances contained herein, or attached and incorporated and made part hereof, IT IS MUTUALLY AGREED AS FOLLOWS:

1. GENERAL

1.0 The STATE shall provide a single one time lump sum payment to the TRIBE in the amount of FORTY-FIVE THOUSAND DOLLARS (\$45,000.00). This payment shall be inclusive of and provide for all costs for staff time and monitoring equipment needed for the TRIBE to conduct monitoring of the STATE's proposed mooring and construction activities aforementioned within Port Gamble Bay.

1.1 Tribal monitoring efforts include: (a) assistance in identification of a low impact area in Port Gamble Bay for the STATE to set a single anchor for both mooring pontoons U, V, W, and X and joining those pontoons with pontoons R, S, and T; (b) assistance to the STATE and the State Department of Ecology to identify low impact areas south of established geoduck beds to set anchors for mooring the transition trusses; (c) development of a baseline condition of Port Gamble Bay to be monitored during the STATE mooring and construction activities aforementioned for determining any impacts, and; (d) provision for the TRIBE's ongoing research and monitoring of the impacts of the mooring and construction through their Port Gamble Bay restoration efforts.

1.2 By acceptance of this one time lump sum payment of \$45,000.00, the TRIBE agrees to the following conditions:

A. The TRIBE will not object to the STATE mooring two transitional trusses in the Port Gamble Bay south of established geoduck beds until such time as needed for the construction of the Hood Canal Bridge Project or until the latest date of June 30, 2009.

B. The TRIBE will not object to the STATE mooring Pontoons R, S, and T and joining Pontoons R, S, and T to Pontoons U, V, W, and X in the Port Gamble Bay until June 30, 2009, when these components are needed for the construction of the Hood Canal Bridge Project.

C. The TRIBE agrees that the aforementioned payment constitutes full and complete mitigation of all tribal issues regarding all reasonably known past or future impacts to aquatic resources caused by the mooring of the aforementioned pontoons and transitional trusses; and construction work for the joining of Hood Canal Bridge components as identified in Section 1.2 B. within the Port Gamble Bay, exclusive of any impact commitments required to state or federal resource agencies or any unforeseeable conditions that may result from, but not be limited to, storm events, construction and/or navigational catastrophes, acts of negligence, or acts of terrorism.

1.3 This agreement is intended to augment, but not replace, ongoing cooperation and informal agreements between the STATE, the Department of Ecology, and the TRIBE necessary to implement the aforementioned activities in a manner that will cause the least impact to resources of Port Gamble Bay.

2. TERM AND TERMINATION OF AGREEMENT

2.0 The term of this Agreement, begins on the date of execution entered below, and ends upon the completion of the mooring and construction needs pursuant to terms of this Agreement.

2.1 Either the STATE or the TRIBE may terminate this Agreement for any reason with written notice to the other Party at the end of ninety (90) calendar days following receipt of notice.

2.2 In the event the TRIBE terminates this Agreement prior to June 30, 2009, the completion date of the STATE's need for temporary pontoon and transition truss moorage, and construction activities associated with joining the pontoons, the TRIBE shall return all funds paid by the STATE in association with this Agreement. Termination of this Agreement shall not begin, as defined in Section 2.1, until repayment of all funds by the TRIBE has been made.

3. RIGHT OF ENTRY

3.0 The STATE hereby grants to the TRIBE a right of entry upon all land in which the STATE has interest for the purpose of monitoring the STATE's mooring and construction activities aforementioned within Port Gamble Bay. In an effort to promote general safety, the TRIBE shall gain the written permission of the STATE's Construction Manager prior to entering any and all construction and/or mooring areas. The TRIBE's entry request shall be in writing and shall include: the date, time, duration, and intent of entry.

4. DISPUTE RESOLUTION

4.0 Any dispute, claim, or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation, or validity thereof, including the determination of the scope or applicability of this Agreement shall be remitted to a Dispute Resolution Board, which will consist of one member appointed by STATE, one member appointed by the TRIBE, and one member, not affiliated with either Party, appointed as mutually agreed upon by STATE and the TRIBE. Attempting to resolve any of the above issues via the dispute resolution board is a condition precedent prior to seeking litigation. The cost for the member appointed by STATE will be born by STATE, the cost for the member appointed by the TRIBE will be born by the TRIBE, and the cost for the member appointed by both Parties together will be born equally by STATE and the TRIBE.

5. INSURANCE

5.1 General Requirements

During the term of the Agreement, the TRIBE shall maintain in full force and at its own expense each insurance coverage or policy noted below, from insurance companies that are authorized to transact insurance and issue coverage in the State of Washington and are acceptable to WSDOT. The TRIBE shall pay for all deductibles.

5.2 Commercial General Liability

The TRIBE shall obtain, at its expense, and keep in effect during the term of this Agreement, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverage that is satisfactory to WSDOT. This insurance shall include personal injury liability, products and completed operations, and contractual liability coverage for the indemnity provided under this Agreement, and is made on an occurrence basis. Combined single limit per occurrence shall not be less than \$1,000,000. Each annual aggregate limit shall not be less than \$1,000,000.

5.3 Automobile Liability Insurance: Automobile Liability

The TRIBE shall obtain, at its expense, and keep in effect during the term of this Agreement, Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance. Combined single limit per occurrence shall not be less than \$1,000,000.

5.4 Additional Insured – Waiver of Reliance on Sovereign Immunity Defenses

5.4.1 The liability insurance coverage required for performance of the Agreement shall include the State of Washington, and its agencies, departments, divisions, commissions, branches, officers and employees as Additional Insureds but only with respect to the TRIBE' activities to be performed under this Agreement. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

5.4.2 The TRIBE's insurance policies required by this agreement must have a sovereignty endorsement providing that the insurer is not authorized or empowered to waive or otherwise limit the insured's sovereign immunity outside or beyond the scope of coverage or limits of the insurance policy.

5.5 Certificate(s) of Insurance

Prior to performing under the Agreement, as evidence of the insurance coverage required by this Agreement, the TRIBE shall furnish Certificate(s) of Insurance for all required insurance to the STATE prior to its commencement of work under this Agreement. The TRIBE' failure to present the required documents shall result in immediate Agreement termination. The Certificate(s) will specify all of the parties who are endorsed on the policy as Additional Insured (or Loss Payees).

6. WAIVER OF SOVEREIGN IMMUNITY AND VENUE

6.0 The TRIBE agrees to a limited waiver of sovereign immunity. The waiver is limited to (1) actions brought by the Parties to this Agreement (STATE and the TRIBE); (2) breach, termination, enforcement of contract provisions including specifically section 5 herein, interpretation, validity thereof, including the determination of the scope or applicability of this Agreement; (3) to the extent allowed by law, actual damages, that is, each Party waives the right to consequential or punitive damages; (4) determining applicable laws. This limited waiver is available solely to claims by STATE and not by any other entity, entities, or any individual or third party, not a Party to this Agreement. The Tribe agrees not to invoke sovereign immunity as a defense up to the limits of the insurance policy in connection with the enforcement of the rights of the State or WSDOT.

6.1 The TRIBE consents to the jurisdiction of the Washington State Superior Court in the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement if dispute resolution pursuant to Section 4 fails; the Parties further agree that any such action or proceedings shall be brought in the superior court situated in Thurston County, Washington.

7. INDEPENDENT CONTRACTOR LIABILITY

7.1 The TRIBE's relation to the STATE shall be at all times as an independent contractor. The TRIBE controls and directs work done by its employees, contractors, subcontractors, consultants and Tribal Members (hereinafter "employees") pursuant to this Agreement. All work performed pursuant to this Agreement, shall be considered work by employees of the TRIBE and not of the STATE.

7.2 All claims that arise on behalf of said employees of the TRIBE, and all claims made by a third party as a consequence of any act or omission on the part of the TRIBE's employees, shall be the sole obligation and responsibility of the TRIBE. No liability shall attach to the STATE for acts or omissions of TRIBE employees. The STATE will not defend or hold harmless the TRIBE or its employees for any claim or cause of action resulting from an act or omission of the TRIBE or its employees.

7.3 No Agreement between the TRIBE and its non-employee consultants, contractors, or Tribal members shall create any obligation or liability of the STATE with regard to the award of any such Agreement or sub-Agreement or the solicitation thereof. The TRIBE hereby agrees to include this provision in all Agreements it enters into for work with third party contractors, consultants or non-employee Tribal members.

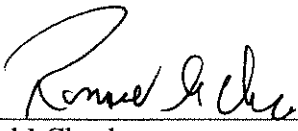
7.4 The TRIBE agrees to defend any and all actions against itself, its employees or Tribal members, arising out of or related to this Agreement in a court of competent jurisdiction in the state of Washington.


IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Party's date signed last below.

PORT GAMBLE S'KLALLAM TRIBE:

STATE OF WASHINGTON

DEPARTMENT OF TRANSPORTATION:

By: 
Ronald Charles,
Tribal Chairman

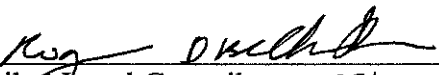
By: 
Kevin Dayton,
Region Administrator

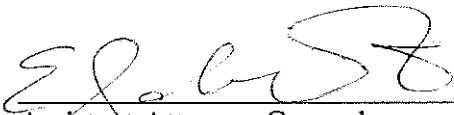
Date: 10/15/2008

Execution Date: 10/15/08

Approved as to form:

Approved as to form:


Tribal Legal Council COUNSEL


Assistant Attorney General

THE PORT GAMBLE)
S'KLALLAM TRIBAL)
COUNCIL)
OF THE)
PORT GAMBLE)
SKLALLAM TRIBE)

I.

WHEREAS, the Port Gamble S'Klallam Tribe entered into the Treaty of Point No Point with the United States of America on January 26, 1855, reserving sovereign and aboriginal rights in perpetuity; and

II.

WHEREAS, the Port Gamble S'Klallam Reservation was proclaimed on June 16, 1938 to be an Indian reservation, held in trust by the federal government "...for the benefit and use of the Port Gamble Band of Clallam Indians...", under the provisions of Section 5 of the Indian Reorganization Act, the purchase of which was paid in full by Tribe; and;

III.

WHEREAS, the Port Gamble S'Klallam Tribe's General Council delegated the Tribe's primary legislative authority to the Tribal Council under Article IV, Section 3 of the Constitution of the Port Gamble S'Klallam Tribe, approved by the Secretary of Interior on July 7, 2007; and

IV.

WHEREAS, the Port Gamble S'Klallam Tribe's Natural Resource Department has an interest in the preservation and protection of marine waters, streams, shorelines, forested areas and other important habitats within the Tribe's usual and accustomed areas; and

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V.

WHEREAS, the Port Gamble S'Klallam Tribe's Natural Resource Department works in collaboration with various agencies, educational, outreach and research organizations; and

VI.

WHEREAS, the Port Gamble S'Klallam Tribe's Natural Resource Department has worked out a mitigation agreement with Washington Department of Transportation (WSDOT) entitled "AGREEMENT GCA 5869" in order to provide compensation for various impacts from historic and current activities associated with their SR 104- Hood Canal Bridge Project; and

VII.

WHEREAS, the Port Gamble S'Klallam Tribe's attorney has reviewed said agreement and modified it to insure the Tribe's interests are secure and the language of the agreement is appropriate; and

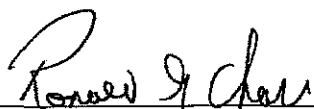
VIII.

NOW THEREFORE BE IT RESOLVED, the Port Gamble S'Klallam Tribe fully supports "AGREEMENT GCA 5869 Between The Washington State Department of Transportation and The Port Gamble S'Klallam Tribe" and authorizes Ron Charles it's Tribal Chairman to sign said agreement.

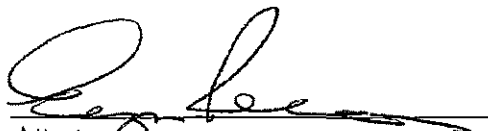
CERTIFICATION

WE HEREBY CERTIFY that on this date there was a regular meeting held of the Port Gamble S'Klallam Tribal Council on the Port Gamble S'Klallam Indian Reservation, at which time a quorum was present;

WE FURTHER CERTIFY, that the above numbered resolution, was at said meeting, introduced, evaluated, and was passed by a vote of 5 FOR, 0 AGAINST, 0 ABSTAIN dated this 14 day of October 2008.



Ronald G. Charles
Chairperson



Attest:
Council Member

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Exhibit A
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