

**WHATCOM COUNTY COUNCIL AGENDA BILL**

NO. 2011-238

CLEARANCES	Initial	Date	Date Received in Council Office	Agenda Date	Assigned to:
Originator:	DLG	6/30/11	<div style="border: 1px solid black; padding: 10px; width: fit-content; margin: auto;"> <p>RECEIVED</p> <p>JUL 05 2011</p> <p>WHATCOM COUNTY COUNCIL</p> </div>	7/12/11	INTRO
Division Head:				7/26/11	Hearing
Dept. Head:	FMA	<i>FF 6/30/11</i>			
Prosecutor:	DLG <i>DL</i>	06/30/11			
Purchasing/Budget:					
Executive:	PK	<i>PKS-11</i>			

**TITLE OF DOCUMENTS:** *Intergovernmental Framework Agreement, Uplands and Tidelands Lease Agreements for Lummi Island Ferry Use at Gooseberry Point*

**ATTACHMENTS:**

*Memo; Intergovernmental Framework Agreement, Lease for Uplands usage and Lease for Tidelands Usage at Gooseberry Point*

SEPA review required?	( ) Yes	( <b>XX</b> ) NO	Should Clerk schedule a hearing?	( <b>XX</b> ) Yes	( ) NO
SEPA review completed?	( ) Yes	( ) NO	Requested Date: July 26 , 2011		

**SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE:** *(If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)*

*Approve an Intergovernmental Framework Agreement as well as two associated Lease Agreements for the Uplands and the Tidelands in order to ensure continued Lummi Island Ferry usage of Gooseberry Point.*

*These three Agreements (Framework, Uplands and Tidelands Leases) are the product of years of negotiation between Whatcom County and the Lummi Nation. The leases' terms are thirty-five years, incepting on the date of execution by the necessary parties in 2011 and extending through that date in 2046.*

**COMMITTEE ACTION:**

**COUNCIL ACTION:**

Related County Contract #:

Related File Numbers:

Ordinance or Resolution Number:

**Please Note:** *Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County's website at: [www.co.whatcom.wa.us/council](http://www.co.whatcom.wa.us/council).*



RECEIVED

MEMORANDUM

JUN 30 2011

PETE KREMEN  
COUNTY EXECUTIVE

**TO:** The Honorable Pete Kremen, County Executive,  
Honorable Members of the Whatcom County Council

**FROM:** Daniel L. Gibson, Asst. Chief Civil Deputy Prosecuting Attorney

**RE:** Lummi Island Ferry dock lease agreements

**DATE:** June 30, 2011

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▪ **Requested Action**

Approve an Intergovernmental Framework Agreement as well as two associated Lease Agreements for the Uplands and the Tidelands in order to ensure continued Lummi Island Ferry usage of Gooseberry Point pursuant to the terms contained in the agreements.

▪ **Background and Purpose**

These three Agreements (Framework, Uplands and Tidelands Leases) are the product of years of negotiation between Whatcom County and the Lummi Nation. The leases' terms are thirty-five years, incepting on the date of execution in 2011 and extending through that same date in 2046.

The tidelands lease covers the area of tidelands over which a portion of the ferry dock is constructed, owned and held in trust by the U.S. in trust for the Lummi Nation. The negotiated payment amount is \$16,667 per month with annual adjustments for CPI. Because of the current trust status of the property, the approval of both the Lummi Nation and the designee of the Secretary of the Dept. of the Interior (the regional official for the Bureau of Indian Affairs) are needed for this lease.

The uplands lease covers the portions of the uplands owned by the Lummi Nation in the staging area for the ferry operation. The property owned by Lummi Nation in this area is interspersed with property owned by the County, and it is the intent of the parties to have the lease cover those portions of the property owned by Lummi Nation. Consideration for this lease will be provided by the dedication by the County of 3 installments of \$2 million

each (during year 1 and at years 6 and 15 of the lease), for County road and traffic/pedestrian safety improvements agreed upon by the parties, with those funds to be matched at least dollar for dollar from non-County funds sources, and the completion of several short-term safety improvement projects in the near-term (reduced speed limits, installation of several speed monitoring devices, traffic calming measures, and provision for off-road traffic queuing of vehicles waiting for the ferry).

Please contact Dan Gibson at extension 50703 if you have any questions or concerns regarding the terms of this agreement.

Encl.

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

**THIS AGREEMENT** is made this \_\_\_\_\_ day of July, 2011, between Whatcom County, a Washington municipal corporation, hereinafter referred to as the "County," and the Lummi Nation, a federally recognized Indian Tribe, hereinafter referred to as the "Lummi Nation" or "the Nation."

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

**WHEREAS**, the Lummi Nation and the County share common interests, including:

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

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

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

**WHEREAS**, this Agreement encourages and provides the foundation and framework for mutual respect and cooperation between the parties which will benefit all the people of the Whatcom County community, particularly those who reside at Lummi Island and the Lummi Indian Reservation; encourages a cooperative relationship which will reduce future conflicts; and provides greater certainty to the County and the Lummi Nation;

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

## **I. PURPOSE OF THE AGREEMENT**

The purpose of this document is to formally memorialize the agreement of the Parties to implement in good faith the goals and objectives identified by the Parties in order to establish terms for continuing ferry service to Lummi Island from Gooseberry Point on the Lummi Indian Reservation, to jointly pursue future safety improvements that benefit the ferry and Reservation, and to accommodate the Nation's plans to develop a marina at Gooseberry Point with continued operation of the Lummi Island ferry.

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

This Agreement is intended, among other things, to provide guidance in the preparation of written leases for the tidelands and uplands utilized in the ferry operation and implementation agreements pertaining to the same that are legally binding between the Parties and enforceable in accordance with the terms set forth below. Each such executed lease and implementation agreement shall become a separate stand alone agreement, with respect to every other lease and implementation agreement, and each lease and implementation agreement shall be an addendum to this Agreement. The Parties agree to act in good faith and to use their best efforts to negotiate lease and implementation agreements appropriate to specific goals and time frames identified by the Parties.

## **II. BACKGROUND**

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

The County has a rich history, beginning with its formation in 1854 (by the Washington territorial government pursuant to state law) and continuing to present

day. The County's mission is that *"Whatcom County government will strive to promote, enrich and enhance the freedoms, opportunities and safety of its citizens. It will provide essential and desirable public services in a cost effective and accountable manner. It will provide vision, leadership and responsiveness while addressing community issues and conducting the business of the people. It will encourage community involvement in public issues while protecting the rights of the individual and encouraging respect for diversity. It shall serve as an active catalyst for individuals and other entities to participate in achieving a positive vision for the future of Whatcom County."* This mission entails rendering appropriate types and levels of support to achieve Lummi Reservation's public safety needs and encourage achievement of the Lummi Nation's economic development goals.

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

### **III. GEOGRAPHIC SCOPE OF THE AGREEMENT**

The primary geographic scope of this Agreement includes the current Lummi Island Ferry area from the Slater Road-Haxton Way intersection to the north (where most vehicle traffic to and from the ferry enters and leaves the reservation), to the current Ferry Terminal at Gooseberry Point to the south, and the water and shoreline east and west from the current Ferry Terminal. Other County roadways on and roadway sections adjacent to the Lummi Reservation are also included within the scope of this agreement.

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

#### IV. FRAMEWORK PRINCIPLES

The Parties agree that the principles set forth below will assist them in implementing mutually agreeable lease agreements.

- A. Use face-to-face meetings to identify, discuss, and attempt to resolve issues affecting and/or of interest to either party;
- B. Continue building a relationship that is based on consistent contact, mutual respect, and constructive dialogue;
- C. Establish a process for coordination between the Parties prior to inception of projects, development, and resource management involving the Nation and the County;
- D. Seek to achieve collective understandings, stability, certainty, and long-term cooperation between the Parties;
- E. Establish a method for sharing information at a technical level about the public works existing and occurring within the Geographical Scope of the Agreement as identified in Section III;
- F. Work to address any cultural resources and/or cultural practices affected by activities carried out under this Agreement within the Geographical Scope of the Agreement;
- G. Understand, respect, and support each Party's processes for securing formal governmental approval from their respective governing authorities for this Agreement and all implementation agreements;
- H. Subject to the County's commitment to abide by the Washington Public Records Act and the Washington Open Meetings Act, in order to foster honest and frank discussion, meetings shall be conducted solely between the parties and any sharing of information with individuals outside the respective governing authorities shall be subject to the principles set forth in I, below.
- I. Any potential media announcements or discussions regarding this Agreement and the implementation of this Agreement will be jointly discussed with the goal of agreement by the Parties in advance to ensure that the sentiments expressed represent an accurate and balanced description of the subject matter involved. The Parties will discuss foreseeable public events or open public meetings where media may be

present and/or where communications on the Parties' discussions may occur with other parties – with the intent to avoid surprises if at all possible. Neither Party will make a statement characterizing the positions of the other Party to any media relating to the substantive issues under discussion. Statements to the media by the individual parties apart from those referenced above should be limited to acknowledgement that discussions are ongoing between the Parties with a view towards reaching agreement on issues concerning the Project Area, or other matters as may be appropriate;

- J. All notices related to face-to-face meetings, this Agreement, or any implementation agreement shall be transmitted to the following, or their successors:

For the Lummi Nation:

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

For Whatcom County:

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

## V. DISPUTE RESOLUTION

All disputes between the Parties relating to or arising from this Agreement, including the Tidelands and Uplands Agreements, or any implementation agreement, shall be conducted as set forth herein:

- A. Whenever during the term of this Agreement, any disagreement or dispute arises between the Parties as to the interpretation of this Agreement (including the Tidelands Agreement and the Uplands Agreement), or an implementation agreement, or any rights or obligation arising hereunder or thereunder, such matter shall be resolved whenever possible by the Parties first meeting in person and conferring in a good faith attempt to resolve the dispute through negotiations not later than ten (10) days after receipt of written notice describing the dispute, unless both Parties agree in writing to an extension of time.
- B. If the dispute is not resolved to the satisfaction of the Parties within thirty (30) days after the first meeting as set out in this Section, then either party may seek a resolution by arbitration in accordance with the procedures set



forth herein. The Parties are required to participate in arbitration. Any claim, controversy or dispute arising out of or relating to this Agreement (including the Tidelands Agreement and the Uplands Agreement), or any implementation agreement, shall be submitted to binding arbitration conducted by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules of the AAA then in effect, and to the maximum extent applicable, the Federal Arbitration Act (Title IX of the United States Code) will govern such arbitration except no rule or provision which may be construed to broaden the Nation's limited waiver of sovereign immunity shall apply. Such arbitration shall be held in Bellingham or such other place as the Parties agree. The arbitrator shall be empowered to impose sanctions and take such other actions as he or she deems necessary to the same extent a judge could impose sanctions or take such other actions pursuant to the Federal Rules of Civil Procedure and applicable law. The arbitration shall be conducted subject to the Federal Rules of Evidence. Judgment on any arbitration award may be confirmed by and entered in the United States District Court for the Western District of Washington or in the event that such court has determined that it lacks jurisdiction, the courts of the State of Washington; provided, however, such award is consistent with this Agreement and the Nation's limited waiver of sovereign immunity. Appeal may be taken from a decision of such court regarding confirmation and/or enforcement of the decision in arbitration. Further, the mutual commitment by the Parties to resolve disputes through arbitration shall not prevent either Party from seeking injunctive relief to enforce arbitration and/or maintain the status quo pending resolution of the arbitration proceeding, through application to the federal District Court for the Western District of Washington; provided, however, that in the event such federal court declines jurisdiction over such claim for injunctive relief, such relief may be sought in the courts of the State of Washington, provided, however, such relief is consistent with this Agreement and the Nation's limited waiver of sovereign immunity.

- C. The arbitration shall be heard by a single arbitrator determined by the Parties. If the Parties cannot agree on an arbitrator, then the American Arbitration Association shall appoint one. The arbitrator should be a retired federal judge, if available. If such a person is not available, the arbitrator must be a licensed attorney or retired judge with some knowledge of federal Indian law and real property transactions involving Indian trust lands. The arbitrator must be unbiased and neutral.
- D. The arbitration hearing shall be conducted within ninety (90) days after an arbitrator is appointed unless the parties agree to an extension of this period. The decision of the arbitrator shall be final and binding upon the Parties, self-executory, and without further appeal or any judicial

confirmation, recourse, or other process other than for confirmation and enforcement of the arbitration judgment. Each side shall bear its own costs, attorney's fees and one half of the costs and expenses of the arbitrator. The arbitration judgment shall be in writing and give reasons for the decision.

- E. Likewise, no causes of action or claims in law or equity are cognizable against the County except actions against the County itself for specific performance or injunctive relief arising out of this Agreement, or any implementation agreement. Lummi Nation's remedy against the County in case of an uncured breach of the agreement(s) by the County shall be termination of the lease agreement(s) and vacation of the leased premises by the County. The Nation shall not bring any action arising from this Agreement, or any implementation agreement, against the County's council members, employees, agents or attorneys, except in official capacity for the sole purpose of effectuating on behalf of Lessee any and all court orders that may be issued pertaining to this agreement.
  
- F. The Nation hereby grants a limited waiver of its sovereign immunity from suit solely for actions brought by the County or its approved successor in interest (and no other person or entity) to enforce the terms of this agreement, including specific performance and/or injunctive relief if warranted, consistent with the procedures for dispute resolution provided herein. This limited waiver is to be strictly and narrowly construed in favor of the Nation and may be enforced only under the conditions set forth herein. No causes of action or claims in law or equity are cognizable against the Nation except actions against the Nation itself for specific performance or injunctive relief arising out of this Agreement, including the Tidelands Agreement, the Uplands Agreement, or any implementation agreement. In the event the County or its successors obtain a judgment or arbitration award as provided in this Article V and seeks to enforce such award, the Nation hereby agrees, if the federal district court declines to exercise jurisdiction, to submit to the jurisdiction of the state courts of Washington for the sole purpose of execution of the arbitration award of judgment. The Nation does not waive its sovereign immunity with respect to actions by third parties or disputes between the Nation and the County not arising out of this Agreement, including the Tidelands Agreement, the Uplands Agreement, or an implementation agreement. This limited waiver does not allow any actions to be brought against the tribal council, tribal officers, tribal attorneys, tribal employees, tribal agents, tribal members, or any other person or entity acting on behalf of the Nation, except in official capacity for the sole purpose of effectuating on behalf of Lessor any and all court orders that may be issued pertaining to this agreement. The Nation's limited waiver of sovereign immunity shall be further evidenced by a

resolution from the Lummi Nation Indian Business Council, which shall also waive any requirement for exhaustion of tribal remedies and jurisdiction in the Lummi Nation Tribal Court. In the event of a lawsuit involving this Agreement, venue shall be proper only in the U.S. Federal District Court for the Western District of Washington, except as provided in Section B, above. The Nation, by execution of this Agreement, acknowledges the jurisdiction of the courts of the United States in this matter.

- G. The Parties agree that any dispute resolution meetings or communications, arbitration proceedings, or agreements among the Parties settling or otherwise relating to any claims arising from or related to this Agreement or an implementation agreement shall be and remain confidential to the extent permitted by applicable law, except as otherwise mutually agreed by the Parties.
- H. The Parties agree that during any kind of controversy, claim, disagreement or dispute, including a dispute as to the validity of this Agreement or an implementation agreement, the Parties shall continue to possess the rights, duties, and obligations set forth in this Agreement, and the Parties shall continue their performance of the provisions of this Agreement.

#### **VI. AMENDMENT AND WAIVER**

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

#### **VII. GOVERNING LAW AND INTERPRETATION**

This Agreement shall be governed and construed in accordance with the laws of the State of Washington notwithstanding any choice of law provisions. This Agreement shall not be construed for or against any party based on drafting or preparation. Captions in this Agreement are included for convenience only and in no way define or limit the meaning or intent of any provision herein.

#### **VIII. PERSONS BOUND**

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

## **IX. ROLE OF THE UNITED STATES**

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

## **X. FURTHER ASSURANCES**

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

## **XI. SEVERABILITY**

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

## **XII. ENTIRE AGREEMENT**

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

## **XIII. SIGNATURES AND AUTHORITY**

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

## **XIV. NO THIRD PARTY BENEFICIARIES**

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

### XV. INDIVIDUAL RESPONSIBILITY

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

### XVI. SIGNATURES

**APPROVED** by the Lummi Indian Business Council Resolution # 2011 - \_\_\_\_\_  
(July\_\_\_\_\_, 2011).

**LUMMI NATION**

\_\_\_\_\_  
*Chairman*

Date \_\_\_\_\_

**Approved as to form:**

\_\_\_\_\_  
**Mary M. Neil, Reservation Attorney**

**WHATCOM COUNTY EXECUTIVE**

\_\_\_\_\_  
**Pete Kremen, County Executive**

Date \_\_\_\_\_

Approved as to form:



\_\_\_\_\_

Daniel L. Gibson

**Whatcom County Asst. Chief Civil Deputy Pros. Atty.**

**ADOPTED** by Whatcom County Council in an open public meeting on the \_\_\_\_\_ date of July, 2011.

**WHATCOM COUNTY COUNCIL**

\_\_\_\_\_

Sam Crawford, Council Chair

Date \_\_\_\_\_

Attested by:

\_\_\_\_\_

Dana Brown-Davis, Clerk of the Council

## **Tidelands Lease Agreement for Lummi Island Ferry Use at Gooseberry Point**

This lease agreement is made on this \_\_\_\_\_ day of July, 2011 and entered into between the Lummi Nation, acting by and through its governing body, the Lummi Indian Business Council, (hereafter identified as "Lessor"); with approval by the United States Secretary of the Department of the Interior or his duly authorized representative within the Bureau of Indian Affairs; and Whatcom County, a municipal corporation and political subdivision of the State of Washington, (hereafter identified as "Lessee"), acting through its chief executive officer, the Whatcom County Executive, with approval of the County Council.

**History:** On February 14, 1963, the parties first executed a lease for the County's use of the tidelands held in trust by the United States for Lummi Nation and its members. The lease was also approved by the Secretary of the Department of the Interior through his designee at the Bureau of Indian Affairs as required by federal law for lands held in trust, and by its terms was a lease for 25 years. On May 12, 1988, the Lummi Nation and Whatcom County executed a new lease for a term of twenty-five years with a renewal option, with a beginning date of February 14, 1985, for certain uplands and tidelands located on the Lummi Indian Reservation, the tidelands portion of which are held by the United States in trust for the Lummi Nation and its members. The purpose of the lease was to allow the County to use Lummi tidelands and Lummi Nation-owned uplands to continue operating the Lummi Island Ferry from Gooseberry Point.

The uplands portion of the lease addressed use of fee-lands in the staging area for the ferry operation, a portion of which are owned by Lessor. The tidelands portion of the lease addressed use of tidelands held in trust by the United States for the Lummi Nation and its members, requiring approval by the Secretary of the Department of the Interior or his authorized designee in order to have a valid lease. The Secretary never approved the tidelands portion of the lease. In spite of the absence of Secretarial approval, the parties carried out their promises and obligations under the 1988 lease for the initial 25 year term. The initial term provided in the agreement not signed by the Bureau of Indian Affairs expired on February 14, 2010. The Lummi Nation declined to further renew or extend under the terms of the 1988 lease that had not been signed by the Bureau of Indian Affairs. Thereafter the parties negotiated new lease terms for both pertinent tidelands and uplands, the negotiated tidelands lease terms being contained herein.

**Lease Terms:** This lease agreement is entered into pursuant to the provisions of existing law and is subject to restrictions on alienation by the Lummi Nation and subject to regulation under the provisions of 25 CFR Section 162, as presently existing or hereafter amended.

In consideration for rents and covenants, and agreements hereinafter provided for, Lessor grants this lease to Lessee for the land and premises described as follows:

Lummi tribal tidelands fronting Lot 2, Section 3, Township 37 North, Range 1 East, Willamette Meridian, Whatcom County, Washington, as more expressly shown on the attached map.

This lease agreement addresses only the tidelands portion of the overall agreement between the parties. Terms in this agreement apply only to the tidelands portion of the overall agreement. The terms of this agreement are to be supplemented by the Intergovernmental Framework Agreement which was executed on July \_\_\_\_\_, 2011 by the Lummi Nation and Whatcom County, the terms of which are incorporated here by reference as if fully set forth herein, with the approvals given here fully extending to the substantive provisions thereof, including but not limited to Section V. Dispute Resolution, and the provisions set forth therein, as if they were contained and set forth herein, and an Uplands Lease Agreement executed on June \_\_\_\_, 2011.

**1. Use of premises.** It is agreed by Lessor and Lessee that the property herein described shall be used for the purpose of operating a public ferry landing dock or slip. In using the leased premises it is expressly agreed that Lessee must:

- a. Comply with all applicable federal, state, and local laws, ordinances and regulations, including environmental requirements that are in force or which may hereafter be in force;
- b. Secure and keep up to date all necessary permits and licenses; and
- c. Cooperate with Lessor with necessary design requirements for the Ferry dock in the event Lessor develops a marina at the Gooseberry Point area. The parties agree that while the dock may remain in its current location, it may become necessary for the County to develop a different angle of approach for the ferry to the waterward end of the dock, consistent with technical feasibility, if and when a marina is developed by Lummi Nation in the area of the current ferry route to the dock. The costs associated with dock reconfiguration, redesign and any other type of modification of the dock shall be the full responsibility of the Lessee.

In the event Lessee shall discontinue use of the leased premises for the purposes enumerated herein, with the exception of brief discontinuances due to weather or suspension of service due to operational issues promptly addressed (such as repairs, maintenance or construction), this lease shall terminate and the lease premises shall revert to Lessor, pursuant to the provisions of Section 10. Violations of Lease, below.

**2. Term.** The term of this lease shall be for a period of thirty-five years, with the commencement date being the date this document is executed between Lessor



and Lessee. This agreement is for a total term of 35 years. The first part of the term is twenty-five (25) years and will be immediately followed by a ten (10) year extension period. The approval and authorization for the entire thirty-five years is granted herein by both the Lummi Nation and the Secretary of the Department of the Interior through his designee within the Bureau of Indian Affairs. No further approvals shall be necessary in order for Lessee to derive the full benefit of this agreement and enforce this agreement under these terms during the period of renewal for ten years beyond the initial twenty-five year term. The term of this lease shall terminate on that same day of document execution during the year 2046. The period of this lease shall be identified as the "lease term."

**3. Consideration for lease.** Consideration for this lease reflects both the lease cost for the tidelands and mitigation for the community impacts of the ferry operations including impacts of the ferry operation at the usual and accustomed fishing places that support the Lummi Nation's tribal treaty rights to fish and shall consist of the following component:

- a. Lessee covenants and agrees to pay \$200,000 per year, in U.S. Funds, or \$16,666.67 per month, adjusted throughout the lease term as outlined in Section 4 below, for monthly rent in advance on or before the 1<sup>st</sup> day of each and every month during the lease term. The payment amount stated here is a total amount which includes any applicable leasehold tax that may be imposed by the Lummi Nation in the future so that the amount owing, including any tax, shall not exceed the \$200,000 per year with appropriate adjustments for CPI. Payments will be submitted at Lessor's address set forth below.
- b. Parties agree that Lessee may make quarterly payments, paid in advance on the fifteenth day of the first month of the quarter.

**4. Rent Adjustment.** During the lease term, the consideration for the lease will increase annually using the following formulas based on the Consumer Price Index, using the CPI-U National Index with the index base period being 1982-1984 = 100.

Step One: To be completed every five years. Establish the CPI-U Average Annual Growth (CPI-U AAG). The reference points for measuring the change in the CPI-U will be the following intervals:

- 2006– 2010 for lease period 2011 – 2015
- 2011 – 2015 for lease period 2016 – 2020
- 2016 – 2020 for lease period 2021 – 2025
- 2021 – 2025 for lease period 2026 – 2030
- 2026 – 2030 for lease period 2031 – 2035
- 2031 -- 2035 for lease period 2036 -2040
- 2036 -- 2040 for lease period 2041 --2046

CPI-U AAG formula: December points (later year) – December points (earlier year) = Index Point Change. Divide Index Point Change by earlier year index amount.. Divide by 5. Here is the formula:

$$\text{CPI-U AAG} = \left( \frac{(\text{CPI-U later year}) - (\text{CPI-U earlier year})}{(\text{CPI-U earlier year})} \right) \div 5$$

Step Two: To be completed annually. The annual payment will be calculated by taking the prior year's annual payment and increasing that at the rate of the CPI-U AAG for the preceding five-year period. Here is the formula:

$$\text{Annual Payment} = (1 + \text{CPI-U AAG}) \times (\text{Prior year's payment})$$

**5. Lummi Passage Upon the Ferry.** During the term of the lease, Lessee shall grant free foot and non-commercial passenger vehicle passage upon and across the ferry operated by Lessee between Gooseberry Point and Lummi Island to all enrolled members and employees of the Lummi Nation who present appropriate identification issued by the Nation, including Lummi Indian Business Council Identification cards or current fishing cards/licenses as issued by the Lummi Nation.

**6. Improvements.** Any buildings, docks, or other structures or improvements placed upon the leased premises by Lessee shall become the property of Lessor upon termination or within 90 days of the expiration of this lease, provided however, that Lessee shall have the right to remove any such improvement at its sole expense prior to the expiration of this lease. If Lessee elects to remove the improvements, it shall return the leased premises to Lessor in good condition and restore the surface of the ground, including areas underwater, to a pre-project condition.

**7. Unlawful Conduct.** Lessee agrees that it will not use or cause to be used any part of the leased property for any unlawful conduct or purpose.

**8. Subleases and Assignments.** No sublease, assignment, or amendment of this lease may be made without agreement of the parties. This agreement is based on a government-to-government relationship between the Lummi Nation and Whatcom County. Any entity operating a ferry under contract for such service with the County shall not be precluded from doing so by this clause, provided that such party shall act consistently with the terms and conditions set forth herein.

**9. Interest of Members of Congress.** No Member of, or Delegate to Congress shall be admitted to share any or part of this contract or any benefit that may arise herefrom.

**10. Violations of Lease.** Any violations of this lease may be acted upon in accordance with the Intergovernmental Framework Agreement and applicable provisions of law, including but not limited to the provisions of 25 CFR 162, as presently existing or hereafter modified. Default and abandonment shall be violations of this lease.

- a. Notice of Violation, Default and Abandonment. Upon any occurrence of a violation, default or abandonment under this lease, Lessor shall provide written notice directed to Lessee and give Lessee 30 days to cure or correct the violation or default or to prove it has not abandoned the premises. At the end of the 30-day period, if the violation or default has not been corrected or Lessee has not proved that it has not abandoned the premises, Lessor shall be permitted to give written notice of termination of the lease to Lessee.
- b. Notice of Termination. If one or more violations or defaults described above are not cured to the satisfaction of Lessor within 30 days, Lessor reserves the right to terminate this agreement with written notice to Lessee. In the event of a termination under this provision, Lessee shall have 90 days from receipt of notice of termination to remove improvements in conformance with Section 6 of this Agreement. Lessor's recourse in case of termination shall be its repossession of its property as set forth in d, below.
- c. Waiver or acceptance. A waiver or acceptance by Lessor of any violation, default or abandonment under the terms of this agreement shall not operate as a release of Lessee's responsibility for any prior to subsequent violation or default. No asset, express or implied, to any breach of Lessee's duties or covenants shall be deemed a waiver or any other breach, either former or subsequent, of Lessee's duties and covenants.
- d. If the Lessee shall cease using the leased premises, it shall give prompt written notice of the same to Lessor. Lessor's remedy in that instance shall be its retaking possession of the premises that had been under lease to Lessee, in addition to collection of any rent established herein that remains owing for the period of use prior to vacation by Lessee. If Lessee exercises this option, it shall leave the premises in reasonable order and good condition.

**11. Hold Harmless/Indemnification.** Lessee, its successors and assigns, will protect, save, and hold harmless, Lessor, its authorized agents, and employees from all claims, actions, costs, damages or expenses of any nature whatsoever by reason of the acts or omissions of Lessee, its assigns, agents, contractors, licensees, invitees, and employees, arising out of or in connection with any acts

or activities on the lease premises and authorized by this lease. Lessee further agrees to defend Lessor, its agents or employees, in any litigation arising by reason of the acts or omissions of Lessee, its assigns, agents, contractors, licensees, invitees, and employees, including payment of any costs or attorneys' fees.

This obligation shall not include such claims, costs, damages, or expenses which may be caused by the sole negligence of Lessor or its authorized agents or employees; provided, that if the claims or damages are caused by or result from the concurrent negligence of (a) Lessor, its agents or employees, and (b) Lessee its agents or employees and involves those actions covered by RCW 4.24.115, this indemnity provision shall be valid and enforceable only to the extent of the negligence of Lessee or Lessee's agents or employees.

**12. Binding Contract.** This lease agreement shall not become binding upon Lessee unless and until accepted and approved by Lessee and by the County Executive or his duly authorized representative. This lease agreement shall not become binding upon Lessor unless and until accepted and approved for Lessor by the Chairperson of the Lummi Nation or his duly appointed representative with approval from the Lummi Indian Business Council. Further, this lease agreement is not binding on either party unless and until approved by the Secretary of the Department of the Interior, or his duly appointed representative. The covenants and agreements herein shall extend to and be binding upon the heirs, successors, and assigns of the parties to this lease. All of Lessee's obligations under this lease are to the United States as well as to Lessor.

**13. Approval.** This lease shall be valid and binding only after approval by the Secretary of the Department of the Interior or his duly authorized representative. Lessor covenants and agrees to present this lease promptly after execution by Lessor and Lessee to the Secretary or his duly authorized representative for approval, and to actively support and seek such approval. Failure to do so shall be deemed a breach of Lessor's duty, the foregoing requirement for Secretarial approval notwithstanding, and Lessee may seek enforcement of the duty to present, support, and seek such approval with a remedy of specific performance by Lessor, and the waiver of sovereign immunity by Lessor included in the Framework Agreement and incorporated in this agreement by reference is intended to extend to this circumstance.

**14. Attorneys' Fees.** In the event of any controversy, claim or dispute arising out of this lease, the substantially prevailing party shall, in addition to any other remedy, be entitled to recover any reasonable costs or attorneys' fees that it incurs.

**15. Modifications.** This instrument contains all the agreements and conditions made between the parties with respect to the tidelands at the Gooseberry Point

Ferry Terminal and may not be modified orally or in any manner other than by an agreement in writing signed by all parties thereto.

**16. Interpretation.** This lease shall be governed by and interpreted in accordance with the laws of the United States of America and the State of Washington. The titles to paragraphs or sections of this lease are for convenience only and shall have no effect on the construction or interpretation of any part hereof.

**17. Notices.** All notices required to be given under this lease shall be made in writing and shall be delivered or sent by certified or overnight mail addressed to the parties or their successors at the address listed below, unless a different address has been designated in writing and delivered to the other party.

For the Lummi Nation:

For Whatcom County:

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

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

**18. Signatures.**

**APPROVED** by the Lummi Indian Business Council Resolution # 2011 - \_\_\_\_\_ (July \_\_\_\_\_, 2011).

**LUMMI NATION**

\_\_\_\_\_  
*Clifford Cultee, Chairman*

Date \_\_\_\_\_

Approved as to form

\_\_\_\_\_  
*Mary M. Neil, Reservation Attorney*

STATE OF WASHINGTON)  
COUNTY OF WHATCOM) ss:

On this \_\_\_\_\_ day of \_\_\_\_\_ 2011, before me personally appeared \_\_\_\_\_, to me known to be \_\_\_\_\_ of the Lummi Indian Business Council, the federally-recognized Indian tribe that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said Indian tribe, for the uses and purposes herein mentioned, and on oath stated that he was

authorized to execute said instrument on behalf of the Lummi Indian Business Council.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_.

**ADOPTED** by Whatcom County Council in an open public meeting on the \_\_\_\_\_ day of July, 2011.

**WHATCOM COUNTY COUNCIL**

\_\_\_\_\_  
*Pete Kremen, County Executive* Date \_\_\_\_\_

Approved as to form

*DG*  
\_\_\_\_\_  
*Daniel L. Gibson, Asst. Chief Civil Deputy Prosecuting Attorney*

STATE OF WASHINGTON)  
COUNTY OF WHATCOM) ss:

On this \_\_\_\_\_ day of \_\_\_\_\_ 2011, before me personally appeared \_\_\_\_\_, to me known to be \_\_\_\_\_ of Whatcom County, the public body that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said public body, for the uses and purposes herein mentioned, and on oath stated that he was authorized to execute said instrument on behalf of the Whatcom County Council.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Notary Public  
My Commission Expires:\_\_\_\_\_.

**APPROVAL BY THE UNITED STATES.** This lease, together with all provisions incorporated by reference therein, is approved by the United States Department of the Interior, Office of the Secretary of the Interior, pursuant to the authority contained in \_\_\_\_\_

The undersigned attests to and warrants his/her authority to sign this agreement as the duly authorized designee of the Secretary of the Interior.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Northwest Regional Director  
Bureau of Indian Affairs, for the  
Secretary of the Interior, acting  
delegated authority.

Approved as to form:

\_\_\_\_\_  
Colleen Kelley, Regional Solicitor for  
Bureau of Indian Affairs, Northwest Region

## **Uplands Lease Agreement for Lummi Island Ferry Use at Gooseberry Point**

This lease agreement is made on this \_\_\_\_\_ day of July, 2011 and entered into between the Lummi Nation, acting by and through its governing body, the Lummi Indian Business Council, (hereafter identified as "Lessor"); and Whatcom County, a municipal corporation and political subdivision of the State of Washington, (hereinafter identified as "Lessee"), acting through its chief executive officer, the Whatcom County Executive, with the approval of the County Council.

**History:** On February 14, 1963, the parties first executed a lease for the County's use of the tidelands held in trust by the United States for Lummi Nation and its members. The lease, as required, was also approved by the Bureau of Indian Affairs, and by its terms was a lease for 25 years. On May 12, 1988, the Lummi Nation and Whatcom County executed a new lease for a term of twenty-five years with a renewal option, with a beginning date of February 14, 1985, for certain uplands and tidelands located on the Lummi Indian Reservation, the tidelands portion of which is held by the United States in trust for the Lummi Nation and its members. The purpose of the lease was to allow the County to use pertinent portions of the Lummi Nation tidelands and the Lummi Nation-owned uplands to continue operating the Lummi Island Ferry from Gooseberry Point.

The uplands portion of the lease addressed use of fee-lands in the staging area for the ferry operation, a portion of which are owned by Lessor. The tidelands portion of the lease addressed use of trust lands held by the United States for the Lummi Nation and its members, requiring approval by the Secretary of the Department of the Interior or authorized designee in order to have a valid lease. The Secretary never approved the tidelands portion of the lease. In spite of the absence of Secretarial approval, the parties carried out their promises and obligations under the 1988 lease for the initial 25 year term. The initial term provided in the agreement not signed by the Secretary or designee expired on February 14, 2010. The Lummi Nation declined to further renew or extend under the terms of the 1988 lease that had not been signed as required by law for validation. Thereafter the parties negotiated new lease terms for both pertinent tidelands and uplands, the negotiated upland lease terms being contained herein.

**Lease Terms:** This lease agreement is entered into pursuant to the provisions of existing law. In the future, should the leased portions of the uplands become federally-held trust lands, these lands may then be subject to restrictions on alienation by the Lummi Nation and subject to regulation under the provisions of 25 CFR Section 162, as presently existing or hereafter amended. At this time, however, the uplands that belong to the Lummi Nation and are covered by this agreement are held in fee status by it, and are not held in trust by the U.S. government. Thus, the Lummi Nation represents and warrants that no approval is needed by the Secretary of the Department of the Interior or authorized



designee for the lease agreement covering the upland properties related to the ferry operation. If approval by the Secretary or other government agency is ever required during the term of this lease, the Lummi Nation hereby agrees that it will recommend such approval under the terms contained herein.

In consideration for covenants and agreements hereinafter provided for, Lessor grants this lease to Lessee for the land and premises described as follows in attached Exhibit A [legal description of pertinent uplands owned by the Lummi Nation, to be supplied by Whatcom County].

This lease agreement addresses only the uplands portion of the overall agreement between the parties. Terms in this agreement apply only to the uplands portion of the overall agreement. The terms of this agreement are to be supplemented and governed by the Intergovernmental Framework Agreement which was executed on July \_\_\_\_\_, 2011 by the Lummi Nation and Whatcom County, the terms of which are incorporated here by reference as if fully set forth herein, with the approvals given here fully extending to the substantive provisions thereof, including but not limited to Section V. Dispute Resolution, and the provisions set forth therein, as if they were contained and set forth herein, and supplemented by a Tidelands Lease Agreement executed on July \_\_\_\_, 2011.

**1. Use of premises.** It is agreed by Lessor and Lessee that the property herein described shall be used for the purpose of operating a public ferry landing,, together with approaches, roads and related facilities necessary for that purpose. In using the leased premises it is expressly agreed that Lessee must:

- a. Comply with all applicable federal, state and local laws, ordinances and regulations, including environmental requirements that are in force or which may hereafter be in force;
- b. Secure and keep up to date all necessary permits and licenses; and
- c. If and when Lummi Nation develops a marina at Gooseberry Point, the County shall, if and as necessary and consistent with technical feasibility, alter the angle of the ferry's approach to the waterward end of its dock in order to minimize interference with the construction and operation of the marina. These actions of the County may include alteration of the waterward end of its dock as presently located for loading and unloading so as to accommodate a different angle of approach by the ferry. The parties shall fully cooperate with each other in the construction phase and in all permit processes that may be necessitated by application for and construction of such a dock reconfiguration and marina, with the goal of reducing environmental impact, reducing the need for environmental mitigation, and reducing costs to the parties.

In the event Lessee shall discontinue use of the leased premises for the purposes enumerated herein, with the exception of brief periods of interruption in use due to weather or operational issues promptly addressed (such as repairs or other maintenance or construction), this lease shall terminate and the leased upland premises shall revert to Lessor, pursuant to the provisions of Section 11, Violations, other Termination of Lease, below.

**2. Term.** The term of this lease shall be for a period of thirty-five years, with the commencement date being the date this document is executed between Lessor and Lessee. The term of this lease shall terminate on that same day of document execution during the year 2046. The period of this lease shall be identified as the "lease term."

**3. Consideration for lease.** Consideration for this uplands lease shall consist of the following components:

- a. Lessee covenants and agrees to initiate and complete a number of "short-term" road and/or traffic safety improvements that are to be completed within one year of the execution of this agreement and are listed on Exhibit B, attached hereto and incorporated by reference herein.
- b. Lessee covenants and agrees to dedicate \$6 million from County road funds in three installments of \$2 million each, during year 1, at year 6, and at year 15 of this lease, for expenditure upon road and/or safety improvements, subject to the terms and conditions set forth in Exhibit C, attached hereto and incorporated by reference herein.

**4. Adjustment Of Third Installment for CPI.** The first two installments of \$2 million each shall bear a face value in that amount at the time of dedication and use. The third installment of \$2 million, made available under the terms and conditions stated under Section 3 and Exhibit B, shall be adjusted to reflect the CPI for the time from the execution of this agreement to the time of its use. The CPI shall be calculated as follows: [language to be provided by the Lummi Nation prior to execution, with the formula consistent in practical effect with that for the CPI on the tidelands lease].

**5. Lummi Passage Upon the Ferry.** During the term of the lease, Lessee shall grant free foot and non-commercial passenger vehicle passage upon and across the ferry operated by Lessee between Gooseberry Point and Lummi Island to all enrolled members and employees of the Lummi Nation who present appropriate identification issued by the Nation, including Lummi Indian Business Council Identification cards or current fishing cards/licenses as issued by the Lummi Nation.

**6. Improvements.** Any buildings or other structures or improvements placed upon the leased premises by Lessee shall become the property of Lessor ninety days after termination or expiration of this lease, provided however, that Lessee

shall have the right to remove any such improvement at its sole expense prior to the expiration of this lease or within the 90-day time period following the termination or expiration of the lease. If Lessee elects to remove the improvements, it shall return the leased premises to Lessor in good condition and restore the surface of the ground to a pre-project condition.

**7. Unlawful Conduct.** Lessee agrees that it will not use or cause to be used any part of the leased property for any unlawful conduct or purpose.

**8. Subleases and Assignments.** No sublease, assignment, or amendment of this lease may be made without agreement of the parties. This agreement is based on a government-to- government relationship between the Lummi Nation and Whatcom County. Any entity operating a ferry under contract with the County shall not be precluded from doing so by this clause, provided that such party shall act consistently with the terms and conditions set forth herein.

**9. Interest of Members of Congress.** No Member of, or Delegate to Congress or Resident Commissioner shall be admitted to share any or part of this contract or any benefit that may arise herefrom.

**10. Federal Fee to Trust Process.** Lessor will be making an application to the United States Secretary of the Interior to take the Lummi Nation-owned uplands as identified in Exhibit B into Indian Trust Status pursuant to 25 CFR 151. Lessee shall refrain from opposing, contesting and objecting to the application for restricted status lands. Lessee shall notify the United States Department of the Interior that it has no objection to the acceptance of the above-described property owned by Lummi Nation into trust or restricted status by the United States pursuant to 25 CFR 151 and any other applicable law or regulation, subject in any event to the lease granted herein.

**11. Violations, other Termination of Lease.** Any violations of this lease may be acted upon in accordance with the Intergovernmental Framework Agreement and applicable provisions of law, including but not limited to the provisions of 25 CFR 162, should the leased premises become restricted trust lands, as presently existing or hereafter modified. Default and abandonment shall be violations of this lease.

- a. Notice of Violation, Default and Abandonment. Upon any occurrence of a violation, default or abandonment under this lease, Lessor shall provide written notice directed to Lessee and give Lessee 30 days to cure or correct the violation or default or to prove it has not abandoned the premises. At the end of the 30-day period, if the violation or default has not been corrected or Lessee has not proved that it has not abandoned the premises, Lessor shall be permitted to give written notice of termination of the lease to Lessee.
- b. Notice of Termination. If one or more violations or defaults described above are not cured to the satisfaction of Lessor within 30 days,

Lessor reserves the right to terminate this agreement with notice to Lessee. In the event of a termination under this provision, Lessee shall have 90 days to remove improvements in conformance with Section 7 of this Agreement. Lessor's recourse in case of termination shall be its repossession of its property as set forth in d, below.

- c. Waiver or acceptance. A waiver or acceptance by Lessor of any violation, default or abandonment under the terms of this agreement shall not operate as a release of Lessee's responsibility for any prior or subsequent violation or default. No assent, express or implied, to any breach of Lessee's duties or covenants shall be deemed a waiver of any other breach, either former or subsequent, of Lessee's duties and covenants.
- d. If the Lessee shall cease using the leased premises, it shall give prompt written notice of the same to Lessor. Lessor's remedy in that instance shall be its retaking possession of the premises that had been under lease to Lessee. If Lessee exercises this option, it shall leave the premises in reasonable order and good condition.

**12. Hold Harmless/Indemnification.** Lessee, its successors and assigns, will protect, save and hold harmless Lessor, its authorized agents and employees from all claims, actions, costs, damages or expenses of any nature whatsoever by reason of the acts or omissions of Lessee, its assigns, agents, contractors, licensees, invitees, and employees, arising out of or in connection with any acts or activities of Lessee, its assigns, agents, contractors, licensees, invitees, and/or employees on the lease premises and authorized by this lease. Lessee further agrees to defend Lessor, its agents or employees, in any litigation arising from such acts or omission of Lessee, its assigns, agents, contractors, licensees, invitees, and employees, including payment of any costs or attorneys' fees.

This obligation shall not include such claims, costs, damages, or expenses which may be caused by the sole negligence of Lessor or its authorized agents or employees; provided, that if the claims or damages are caused by or result from the concurrent negligence of (a) Lessor, its agents or employees, and (b) Lessee its agents or employees and involves those actions covered by RCW 4.24.115, this indemnity provision shall be valid and enforceable only to the extent of the negligence of Lessee or Lessee's agents or employees.

**13. Binding Contract.** This lease agreement shall not become binding upon Lessee unless and until accepted and approved by Lessee through the County Council, and signature by the County Executive or his duly authorized representative. This lease agreement shall not become binding upon Lessor unless and until accepted and approved for Lessor by the Chairperson of the Lummi Nation or his duly appointed representative with Lummi Indian Business Council approval. Further, this lease agreement is not binding on either party unless and until the tidelands lease is approved by the Secretary of the

Department of the Interior, or his duly appointed representative. The covenants and agreements herein shall extend to and be binding upon the heirs, successors and assigns of the parties to this lease.

**14. Attorneys' Fees.** In the event of any controversy, claim or dispute arising out of this lease, the substantially prevailing party shall, in addition to any other remedy, be entitled to recover any reasonable costs or attorneys' fees that it incurs.

**15. Modifications.** This instrument contains all the agreements and conditions made between the parties with respect to the uplands at Gooseberry Point Ferry Terminal and may not be modified orally or in any manner other than by an agreement in writing signed by all parties thereto.

**16. Interpretation.** This lease shall be governed by and interpreted in accordance with the laws of the United States of America and the State of Washington. The titles to paragraphs or sections of this lease are for convenience only and shall have no effect on the construction or interpretation of any part hereof.

**17. Notices.** All notices required to be given under this lease shall be made in writing and shall be delivered or sent by certified or overnight mail addressed to the parties or their successors at the address listed below, unless a different address has been designated in writing and delivered to the other party.

For the Lummi Nation:

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

For Whatcom County:

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

**18. Signatures.**

**APPROVED** by the Lummi Indian Business Council Resolution # 2011 - \_\_\_\_\_ (July \_\_\_\_\_, 2011).

**LUMMI NATION**

\_\_\_\_\_  
*Cliff Cultee, Chairman*

Date \_\_\_\_\_

Approved as to form

\_\_\_\_\_  
*Mary M. Neil, Reservation Attorney*

STATE OF WASHINGTON)  
COUNTY OF WHATCOM) ss:

On this \_\_\_\_\_ day of \_\_\_\_\_ 2011, before me personally appeared \_\_\_\_\_, to me known to be \_\_\_\_\_ of the Lummi Indian Business Council, the federally-recognized Indian tribe that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said Indian tribe, for the uses and purposes herein mentioned, and on oath stated that he was authorized to execute said instrument on behalf of the Lummi Indian Business Council.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_.

**ADOPTED** by Whatcom County Council in an open public meeting on the \_\_\_\_\_ date of July, 2011.

**WHATCOM COUNTY COUNCIL**

\_\_\_\_\_  
*Pete Kremen, County Executive* Date \_\_\_\_\_

Approved as to form

  
\_\_\_\_\_  
*Daniel L. Gibson, Asst. Chief Civil Deputy Prosecuting Attorney*

STATE OF WASHINGTON)  
COUNTY OF WHATCOM) ss:

On this \_\_\_\_\_ day of \_\_\_\_\_ 2011, before me personally appeared \_\_\_\_\_, to me known to be \_\_\_\_\_ of Whatcom County, the public body that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said public body, for the uses and purposes herein mentioned, and on oath stated that he was authorized to execute said instrument on behalf of the Whatcom County Council.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

SUBSCRIBED AND SWORN to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_

**EXHIBIT B**

The short-term improvements for which provision is made in Section 3. a, Consideration for Lease, shall be completed within one year from the execution of this document by the County as follows:

- 1) purchase and placement of four electronic speed monitoring signs;
- 2) reduction of speed limits, after due public process, in agreed, specified locations;
- 3) installment of traffic calming measures at agreed, key locations;
- 4) implementation of traffic queuing measures at the ferry landing area at Gooseberry Point in order to reduce backup of vehicles waiting to use the ferry and resulting congestion on Haxton Way/Lummi View Drive, to be operational by (date)



## EXHIBIT C

The long-term road and traffic safety improvements, and funding for such improvements, for which provision is made in Section 3. b, Consideration for Lease, shall be administered as follows:

- i. The County shall make the \$6 million available for use in \$2 million increments during year 1, at year 6, and at year 15 (the latter installment subject to CPI) of the agreement;
- ii. While the money shall be dedicated by the County in the amounts and at the times stated above, expenditure of the dedicated funds shall be contingent upon the commitment and receipt of matching funds from non-County sources at least dollar for dollar with dedicated County funds for each project;<sup>1</sup> and the County and Lummi Nation shall fully cooperate in the effort to obtain non-County matching funds for which the agreed projects are eligible;
- iii. The projects to be financed and undertaken with these County funds shall be agreed upon by the parties and agreement by the parties on the projects to be undertaken shall not be unreasonably withheld.<sup>2</sup>
- iv. The expenditures of these County funds shall be subject to and consistent with the restrictions placed by state law upon the expenditure of road funds as is presently in effect or as hereafter amended;
- v. The projects shall be so designed and selected as to maximize their respective value to Lummi Nation as well as to the County consistent with the requirements stated in iv, above;
- vi. The projects to be funded with the funds dedicated hereunder shall not include County expenditures for parking or for alterations to the dock itself as may potentially occur pursuant to Section 1.c in the agreement to which this exhibit is appended;
- vii. The County shall list the agreed projects on its six-year transportation improvement program and reflect

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<sup>1</sup> The receipt of matching funds may not always coordinate precisely with the performance of work. It is the intention of the parties that for any project executed under this Agreement, the non-County funds received shall, by the completion of the project match at least dollar for dollar the expenditure of County funds. The effect of this is that County funds may be advanced to pay for costs incurred on a project upon adequate commitment from a granting agency of match funds in the necessary amount.

<sup>2</sup> The parties agree that the improvements to be performed with the funds, dedicated and matching, for the first term shall be sidewalk improvements along the route generally followed by vehicles going to and from the County's ferry operation. Further details will be developed jointly by the parties.

- the commitment of County funds there in order to compete for grant funding;
- viii. County engineering staff shall perform preliminary engineering necessary in order to create a scope of work and budget for the agreed projects so that the projects may compete for matching funds from non-County sources;
  - ix. If there are instances in which the parties are not able to reach agreement as provided, the parties shall, upon request of either one of the parties, submit the matter to third-party dispute resolution as incorporated by reference into the Uplands Lease Agreement from, and as provided in the Framework Agreement of which the Uplands Lease Agreement to which this exhibit is appended is a part.