

THE HONORABLE THOMAS S. ZILLY

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

UNITED STATES, in its own right and on
behalf of the Lummi Nation,

Plaintiff,

LUMMI NATION,

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, et al.,

Defendants.

NO. C01-0047Z

SETTLING PARTIES' RESPONSE
TO ISSUES RAISED BY COURT
REGARDING MOTION TO
APPROVE SETTLEMENT
AGREEMENT

NOTE DATE: SEPTEMBER
14, 2007

Pursuant to this Court's Order dated August 21, 2007 (Dkt. 1231), Plaintiffs United States and the Lummi Nation, and defendants State of Washington Department of Ecology,

**RESPONSE TO ISSUES
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**U.S. Dept. of Justice
James B. Cooney
601 D. Street NW, Room 3017
Washington, D.C. 20004
(202) 514-5406**

1 Whatcom County, the Sunset, Georgia Manor and Harnden Island View Water Associations,
2 and those individual defendants represented by attorney Gene Knapp (the "Settling Parties")
3 submit this response to the issues raised by the Court at the June 26, 2007 hearing on the
4 Settling Parties' Joint Motion to Approve Settlement, (Dkt. 1056). The Settling Parties provide
5 the following corrections and changes to the Settlement Agreement and proposed Judgment
6 and Order to address the concerns raised by the Court. With these changes, the Settling
7 Parties again ask the Court to approve the proposed Settlement as being fair, reasonable and
8 adequate under all the circumstances of this case. Copies of the affected pages of the
9 proposed Settlement Agreement, with the changes highlighted, are filed with this response.
10

11 1. At Dkt. 1056, p. 13 (p. 14 of corrected Agreement), at the end of final sentence of
12 Paragraph 6, add the following: "and shall be governed by the Settlement Agreement".

13 2. At Dkt. 1056, p. 31 (p. 32 of corrected Agreement) Section VIII.B.1, add a
14 provision requiring Water Master candidates to disclose any relationship with any affected
15 party, regardless of whether the relationship involved employment.

16 3. To account for the effects of the Supplemental Agreement filed on June 19, 2007
17 (Dkt. # 1199), which added three additional water services to the Ecology Allocation, the
18 Supplemental Agreement shall be added to the Settlement Agreement as Exhibit I (with
19 appropriate changes to the Exhibit List and Table of Contents), and the first paragraph of
20

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Section III.A.1, Dkt. 1056, p.5 (p. 5 of corrected Agreement) shall be amended to read:

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.

In addition, Section III.A.2, Dkt. 1056, p.5 (p. 5 of corrected Agreement) shall be amended to read:

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".

In addition, the following provision tracking language from the Supplemental Agreement shall be inserted in the Settlement Agreement as new subsection V.B.3, Dkt. 1056, p.12 (p. 12 of corrected Agreement):

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

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1 action, with the goal of reducing the allocation of water under the Agreement to no
2 more than 120 afy. The Department of Ecology may also receive donations or gifts of
3 water rights from any person or parcel listed in Exhibits C or D. Any water rights so
4 obtained by Ecology shall be used to reduce the Ecology Allocation to 120 afy. No
5 additional well registration shall be approved by Ecology unless and until there is at
6 least 0.39 afy of unallocated water available for each such permit or registration within
7 Ecology's 120 afy Allocation or, if Ecology's 120 afy Allocation has been adjusted
8 pursuant to Section III.C of the Agreement, there is at least 0.39 afy of unallocated
9 water available within Ecology's adjusted Allocation.

10 Moreover, a definition of "Supplemental Agreement" shall be added to the definitions section of
11 the Settlement Agreement at Dkt. 1056, p.4 (p. 4 of corrected Agreement) as follows:

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

15 4. At Dkt. 1056, pp. 35 and 38 (pp. 36 and 39 of corrected Agreement), Sections
16 VIII. C.1.b.xi and VIII.C.2.e., add a provision requiring that all appeals from a Water Master
17 decision to the District Court shall be subject to a new filing fee in the amount required for the
18 filing of a new civil action.

19 5. At Dkt. 1056, pp. 35 and 38 (pp. 36 and 39 of corrected Agreement), Sections
20 VIII. C.1.b.xi and VIII.C.2.e., add a provision stating that the decision of the Court on an
21 appeal from the Water Master shall be a final judgment that may be appealed in the same
22 manner, and subject to the same rules, as any other judgment of a District Court.

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6. The following two typographical errors in the Settlement Agreement shall be corrected: (1) the words "being more fully described as follows" shall be deleted from the definition of Case Area, Dkt. 1056, p. 2 (p. 2 of corrected Agreement); and (2) on the fourth line of Section V.F.2, Dkt. 1056, p. 19 (p. 19 of corrected Agreement), the phrase "the water has been beneficially used" shall be corrected to read "the water has not been beneficially used."

7. To accommodate those existing homeowners who may use water in excess of 0.39 acre feet per year at a time when the Lummi Nation is not using its entire allocation of water, two additions shall be made to Section V.H.2., Dkt. 1056, pp. 21-22 (pp. 22-23 of corrected Agreement). The phrase "Except as provided in subsection c, below," shall be added to the beginning of the first sentence in Section V.H.2.a.

A new subsection c shall be added to Section V.H.2 reading as follows:

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

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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 timely made, Lummi 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.

8. An amended proposed Judgment and Order (in redline format, indicating where changes have been made) is filed herewith to reflect the above changes.

Therefore, the Settling Parties request the Court to conditionally approve the proposed corrections and changes to the Settlement Agreement and revised proposed Judgment and Order; direct the Settling Parties to file the revised final Settlement Agreement and exhibits with the Court; and upon filing by the Settling Parties of the revised Settlement Agreement, enter the revised proposed Judgment and Order in this case.

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Respectfully submitted this 12th day of September, 2007.

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