

MOORAGE AGREEMENT BETWEEN SUQUAMISH INDIAN TRIBE AND THE PORT OF ILLAHEE

This **MOORAGE AGREEMENT** (Agreement) is entered into between the Suquamish Indian Tribe (Tribe), a federally recognized Indian tribe and the Port of Illahee (“Port”), a municipal corporation of the State of Washington. The Tribe and the Port are hereinafter collectively referred to as the “Parties” or singly as “Party.”

I. RECITALS

WHEREAS, the Port operates the Illahee Dock located in Illahee, Kitsap County Washington, located near Port Orchard Bay (the “Dock”), which serves recreational vessels. The Port applied for a permit from the U.S. Army Corps of Engineers (the “Corps”), referenced as permit application number NWS-2021-861 as modified by NWS-2021-861-A, to replace the floating docks, remove portion of the pier, and other waterfront access improvements as described generally in the Port’s Joint Aquatic Resources Permit Application for the project named “Port of Illahee Public Pier and Float Rehabilitation” and associated application materials (the “Project”);

WHEREAS, the proposed Project area lies within the traditional fishing and ancestral territory of the Tribe. The Tribe has a strong pre-historical, historical, and contemporary connection in Illahee and Port Orchard Bay that is significant and well documented. Ethnographic and archaeological evidence demonstrates that the Suquamish People have lived, gathered food stuffs, ceremonial, and spiritual items, and hunted and fished for thousands of years throughout the proposed Project area. The Tribe seeks protection of all treaty-reserved natural resources through avoidance of impacts to habitat and natural systems. The Tribe has taken a leadership position in efforts to protect, restore, and enhance the marine waters of Kitsap County to ensure protection of the Tribe’s treaty and cultural resources;

WHEREAS, the Tribe is a signatory to the 1855 Treaty of Point Elliott. In the Treaty of Point Elliott, the Tribe ceded its ancestral territory, including the Port of Illahee and surrounding project area, to the United States, but reserved rights to fish at usual and accustomed grounds and stations (“U&A”) and to hunt and gather on open and unclaimed lands. Federal adjudication of the Tribe’s U&A has affirmed that Illahee, Port Orchard Bay and other areas within Puget Sound constitute reserved fishing areas within the Tribe’s U&A;

WHEREAS, the Port recognizes and supports the Tribe’s treaty reserved fishing rights and supports the Tribe’s leadership position in efforts to protect, restore, and enhance the marine waters of Kitsap County. This Agreement will contribute to that effort;

WHEREAS, the Project yet to be constructed includes the following items and associated work as shown in *EXHIBIT A – DEDICATED MOORAGE LOCATION*:

- a. The removal and disposal of two existing floats, two gangways, and a portion of the fixed pier, including the removal of 24 existing creosote piles (8 x 12-inch diameter and 16 x 12-20-inch diameter);
- b. Installation of a new 50’ long by 4’6” grated gangway with a new 7’ by 9” grated gangway landing float;
- c. Installation of a new 91’ long by 7’ wide access float;
- d. Installation of eight new 26’ deep moorage slips and new recreational float;
- e. Installation of four new 26’ long by 4’ wide finger piers;
- f. Installation of a new 7’ wide by 89’ long non-motorized recreation float;

- g. Installation of 15 new 16-inch diameter steel piles; and
- h. Upland work which will include the installation of new sidewalks, stormwater drainage improvements, vehicular access roadways, parking, among other upland enhancements.

WHEREAS, the Parties acknowledge the mutual interest in completing the Project. This Agreement is necessary to resolve the short-term and long-term impacts to the Tribe's treaty fishing activities associated with the full scope of the Project. The Parties acknowledge that Tribal fishers often have to avoid an area or alter the time, manner, and place of fishing due to existing in-water physical structures, like docks and marinas, and due to vessel traffic to and from these facilities. Fishing gear is often damaged or lost due to interference from construction activities;

WHEREAS, the Tribe and the Port have negotiated this Agreement that ensures that Tribal concerns are addressed, and the full scope of the proposed Project can move forward and receive all required authorizations from the Corps. This Agreement fully addresses the Tribe's concerns regarding the Project and the Port's proposed activities associated with the Project; and

WHEREAS, the purpose of this Agreement is to exchange certain obligations and commitments of the Port and of the Tribe, as outlined herein. Therefore, the Port's obligations are contingent on the Tribe fulfilling the Tribe's obligations. Likewise, the Tribe's obligations are contingent on the Port fulfilling the Port's obligations. Generally, this Agreement is intended to provide for vessel and fishing coordination during certain construction activities undertaken by the Port during completion of the Project, to provide certain moorage rights to Tribal members, and to provide for the withdrawal of the Tribe's objections to the existing permit application to the Corps submitted by the Port for the Project.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein and in order to continue to foster the cooperative efforts of the Tribe and the Port to protect, restore, and enhance the marine waters of Kitsap County, the Tribe and the Port agree that the following rights and obligations shall arise and be effective upon the Effective Date of this Agreement.

II. TERMS AND CONDITIONS

1. **EFFECTIVE DATE.** This Agreement shall be effective on the date executed by the Tribe and the Port (the "Effective Date"), subject to the condition precedent that the Tribe's Tribal Council and the Port Commission has approved this Agreement.

2. **AGREEMENT, VESSEL AND FISHING COORDINATION.** The contact listed below (the "Agreement Contact") shall be the initial contact point between the Port and the Tribe for any issues related to the Agreement, the Project and vessel and fishing coordination. The Agreement Contact may be changed from time-to-time by either Party by providing notice in accordance with Section 4 below.

PORT AGREEMENT CONTACT:

James Aho
P.O. Box 2357
Bremerton, WA 98310
Telephone: (360) 649-1049
llaheeporthree@gmail.com

TRIBE AGREEMENT CONTACT:

Rod Malcom
Suquamish Indian Tribe Fisheries Department
P.O. Box 498
Suquamish, WA 98392
(360) 394-8449
rmalcom@suquamish.nsn.us

3. **COORDINATION OF IN-WATER WORK.** For in-water construction work associated with the Project, the Tribe and the Port agree to exchange accurate and specific fishing and/or related activity and vessel traffic information with the objective of avoiding and minimizing potential conflicts.

a. To facilitate this coordination, the Port will provide accurate and specific Project-related vessel traffic information, including the schedule of arrivals, departures, and locations for Project related vessels for any remaining construction activities, to the Tribe based on a mutually agreeable date but no less than two weeks prior to any activities.

b. The Tribe will provide the Port with a description of the Tribe's fishing management periods when they become available and a description of the anticipated specific times and locations for Suquamish fishery openings through the course of the year.

c. The Tribe will provide the Port with a list of active Suquamish Tribal registered fishing vessel owners. The list shall include the name and length of the vessel and registered fishing vessel owner's name. The Tribe will update the list of registered fishing vessel owners whenever there is an addition or deletion of a registered owner.

d. For remaining in-water construction work associated with the Project, the Tribe and the Port agree to work together cooperatively to coordinate activities of the Tribe and the Port and minimize conflicts. For this purpose, the Port will send the specified information in advance to the Tribe Agreement Contact for the Tribe and the Tribe will send specified information in advance to the Port Agreement Contact for the Port.

4. **NOTICES.** All written notices required to be given pursuant to the terms of this Agreement shall be (a) delivered personally; (b) deposited in the United States mail, Certified mail, return receipt requested, postage prepaid; or (c) overnight courier service, to the Parties at the following addresses:

FOR THE PORT: Port of Illahee
P.O. Box 2357
Bremerton, WA 98310
Telephone: (360) 649-1049
Attn: Jim Aho, Jennifer Olson, and John Piccone.

FOR THE TRIBE: Suquamish Indian Tribe
PO Box 498
Suquamish, WA 98392
Telephone: (360) 598-3311
Attn: Office of Tribal Attorney

5. **TRIBE MOORAGE.** The Port shall provide the Tribe's fishers with twenty-six feet (26 ft.) of dedicated transitory moorage without any fees or costs to the Tribe or Tribal members ("Dedicated Moorage"). Dedicated Moorage shall be provided solely to Tribal members and Tribal entities to moor Tribal Vessels being used for treaty fishing activities, which constitute a traditional Tribal function. As used in this Agreement, the term "Tribal Vessel" means a vessel owned by a Suquamish Tribal member or Suquamish Indian Tribe entity and bearing the unique Suquamish Indian Tribe vessel registration number which signifies that the vessel is used exclusively for treaty fishing activities. The Dedicated Moorage locations are hereby designated and specifically depicted in **Exhibit A**, which is attached hereto and incorporated by this reference, and described generally follows: The inland side of the outermost 26' finger pier.

a. Notwithstanding the dedicated moorage described above and depicted in *Exhibit A*, Tribal Vessels may use other slips at the Dock on a transient basis;

b. The moorage shall be provided continuously until such time as the Dock is no longer operated by the Port.

c. All Dock users, including those provided moorage under this Agreement, are expected to comply with the Illahee Port Use and Moorage Rules and Regulations as revised from time to time and to follow the Port's standards of operation ("Port Regulations and Standards"). Any Tribal members or their guests who do not abide by Port Regulations and Standards will be reported to the Suquamish Indian Tribe's Fisheries Department.

d. The Tribe's Fisheries Department point of contact is: Rob Purser, (360) 394-8436 or at rpurser@suquamish.nsn.us. The Tribe will provide an updated point of contact as needed.

e. The Port reserves the right to trespass or otherwise exclude from Port property any Tribal member or guest that engages in repeated or serious violations of Port Regulations and Standards in the same manner as the Port enforces its Port Regulations and Standards generally, provided that prior to issuing any notice of trespass or exclusion, the Port will first report the member or their guest to the Tribe's Fisheries Department, unless the Port determines that immediate action is necessary.

f. Neither the Tribe nor individual Tribal members shall sublease or otherwise assign any of the rights to use Dedicated Moorage provided in this Agreement;

g. The Port shall post signage advising Dock users that the inland side of the outermost 26' finger pier is reserved for Tribal Vessels;

h. The Port shall not install any gates that impair access to the pier, without the concurrence of the Tribe;

i. The Port and Tribe shall work together to develop educational signage at the pier, with the purpose of educating the public about the Tribe and tribal treaty fishing;

6. **TRIBE'S WITHDRAWAL OF OBJECTIONS TO AND SUPPORT OF EXISTING PERMITS.** The Tribe will, without delay or condition, inform the Corps that the Tribe has reached an agreement with the Port and hereby withdraws its objections and supports all

Corps approvals and authorizations related to the Project, including for the permit application identified as NWS-2021-861, as modified by NWS-2021-861-A.

7. **DURATION OF AGREEMENT.** This Agreement, including the right to moorage for the Tribe provided in this Agreement, shall be effective so long as the Port operates the Dock and shall terminate at such time as the Port ceases to operate the Dock. If the Port were to ever transfer ownership or operation of the Dock, the obligations contained herein shall be a covenant running with the Dock in favor of the Tribe and binding on the successor to the Port.

8. **AMENDMENT OF AGREEMENT.** No amendment or modification of this Agreement is valid unless it is in writing and signed by both Parties.

9. **AUTHORITY TO SIGN AND CONSTRUCTION.** The Parties acknowledge that the terms of this Agreement were reached after government-to-government consultations and have been reviewed by and discussed with respective counsel for each of the Parties. The Parties further agree that this Agreement shall not be construed in favor of or against either Party. Rather, in any dispute between the Parties, the language of this Agreement shall be construed as a whole according to its fair meaning. The undersigned warrant and represent that they have complete and proper authority to execute this Agreement on behalf of their respective Party, that they have read this Agreement and understand its contents, and that upon the Effective Date each Party has an enforceable obligation to undertake the actions, terms, conditions, and covenants thereof.

10. **DISPUTE RESOLUTION.** The Parties agree to attempt to settle any disputes under this Agreement through good faith negotiation between the Parties and according to the following ordered steps.

a. The Agreement Contacts should meet and confer to resolve the dispute.

b. If the Agreement Contacts are unable to resolve the dispute, the manager of the Port and the Tribe's chairperson (the "Leaders") shall meet and confer to resolve the dispute.

c. If the Port Manager and Leaders are unable to resolve the dispute, the Parties will pursue resolution of the dispute through non-binding mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. The mediator shall have at least ten years' experience in contractual disputes and preferably Indian law and port district law expertise. If an agreement on a mediator cannot be achieved within fifteen (15) business days, then the Parties shall in a joint letter, provide four names (two by each Party) of qualified candidates for mediator to the American Arbitration Association and the American Arbitration Association shall be asked to select such mediator. The Parties shall split equally the cost of mediation and bear their own costs and attorneys' fees. Either Party may end the mediation at any time upon written notice to the other Party and the mediator.

d. If the Parties are unable to resolve the dispute through direct discussions or through mediation, the dispute shall be resolved by binding arbitration to be conducted at a location agreeable to both Parties. Within ten (10) business days after either party invokes arbitration, the Parties shall select a single arbitrator by mutual agreement, and, if no agreement can be reached within sixty (60) days, then the Parties shall in a joint letter, provide four names (two by each Party) of qualified candidates for arbitrator to the American Arbitration Association and the American Arbitration Association shall be asked

to select such arbitrator. The arbitrator shall have at least ten years' experience in general contract principles, and, preferably, expertise in the laws applicable to port districts and Indian law including Tribal reserved treaty rights. The arbitration proceeding shall allow for only abbreviated discovery with no more than two short depositions, one request for interrogatories that do not exceed twenty questions, the production of relevant documents, and timely identification of fact and expert witnesses. The authority of the arbitrator is limited to enforcing the terms and conditions of this Agreement, the judgment on the award rendered by the arbitrator may be enforced in a court of competent jurisdiction; provided, however, that the Parties agree that the selected court shall have only the power to enter and enforce, but not to review or modify, the arbitrator's award. Both Parties agree to accept and be bound by the award of the arbitrator or judgment, ruling or order enforcing the arbitration award which is final (because either the time for appeal has expired or the judgment or order is issued by the court having final appellate jurisdiction over the matter and is not subject to collateral attack). Except to the limited extent set forth in this Section 11, the Tribe is not waiving its sovereign immunity. Each Party shall bear its own costs and attorneys' fees and shall share equally the cost of the arbitrator.

11. **APPLICABLE LAW.** This Agreement shall be interpreted using generally recognized principles of contract law, considering the applicable laws of the United States and the Suquamish Indian Tribe.

12. **NO THIRD PARTY BENEFICIARIES/ENFORCEMENT.** This Agreement will not be construed to create any enforceable obligation of either the Tribe or the Port in favor of any non-party to this Agreement. The Parties to this Agreement recognize incidental benefit to Tribal fishers and others, but such Tribal fishers and others are not entitled to enforce this Agreement independently from the Parties.

13. **FORCE MAJEURE.** Neither Party will be liable to the other for any failure of performance under this Agreement due to causes beyond its control which such Party was unable to avoid or overcome through the exercise of reasonable diligence, including, but not limited to: acts of God, fire, flood, earthquake or other catastrophes; material or facility shortages or unavailability not resulting from such Party's failure to timely place orders therefore; lack of transportation; the imposition of any governmental codes, ordinances, laws, rules, regulations or restrictions; national emergencies; terrorism; insurrections; riots; wars; or third party strikes, lockouts, work stoppages or other labor difficulties (collectively, "Force Majeure Events").

14. **SURVIVABILITY.** All covenants, promises, and performance which are not fully performed as of the date of termination shall survive termination as binding obligations.

15. **WAIVER.** No failure by either Party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof, shall constitute a waiver of any such breach or any other covenant, agreement, term, or condition.

16. **FACSIMILE OR ELECTRONIC PDF FILE TRANSMISSION.** This Agreement and all subsequent notices or modifications may be executed by the Parties and transmitted by facsimile or electronic transmission of a PDF file and, if so executed and transmitted, this and all subsequent notices or modifications will be, for all purposes, as effective as if the Parties had delivered an executed original.

17. **ENTIRE AGREEMENT.** This Agreement (including the Recitals) represents the entire and complete agreement between the Parties and supersedes all prior negotiations, representations, or agreements, either written or oral, and may be amended or modified only in writing signed by both Parties.

IN WITNESS WHEREOF, the Parties hereto agree to the terms and conditions of this Agreement.

PORT OF ILLAHEE

SUQUAMISH INDIAN TRIBE



By: James Aho
Commission Chair
Date: _____

7/2/24

Leonard Forsman
Chairman
Date: _____

7-16-2024

