

Memorandum of Agreement

Public Utility District No. 1 of Mason County and the Squaxin Island Tribe

This Agreement is between Public Utility District No. 1 of Mason County (“PUD”) and the Squaxin Island Tribe (“Tribe”) (collectively, “Parties”).

Sec. 1 – Recitals

1.1 The PUD is a public utility district organized under Washington law, with all the rights and responsibilities pertaining thereto. The PUD’s authority to enter into this Agreement arises under Title 54 RCW and Chapter 39.34 RCW (Interlocal Cooperation Act).

1.2 The Tribe is a federally-recognized Indian tribe and a signatory party to the Treaty of Medicine Creek, with all the rights and responsibilities pertaining thereto. The Tribe’s authority to enter into this Agreement arises under federal laws, the Treaty of Medicine Creek, the Tribe’s Constitution and laws, and Chapter 39.34 RCW (Interlocal Cooperation Act).

1.3 Anadromous fish are central to the Tribe’s culture and economy, and the Tribe is concerned that instream flows necessary for fish are unmet in numerous streams throughout Mason County, including in Schumacher Creek, all of which is encompassed within the Tribe’s usual and accustomed fishing area. The Tribe asserts Treaty rights to these fisheries, and to streamflows that support them.

1.4 The PUD’s mission as a public water purveyor is to provide safe and reliable water service to Mason County residents, including the area served by the Union, Highland Park, Vuecrest, Union Ridge, Alderbrook, and Hood Canal water systems. The PUD asserts that it has consolidated these water systems into the singular Union Regional Water System (“URWS”) approved by the Washington Department of Health, to provide an adequate and safe regional public water supply and to prevent the proliferation of permit-exempt groundwater wells.

1.5 The Tribe is concerned that the PUD’s expanded service area and connection of its Alderbrook system to other systems in the URWS will increase the consumption of groundwater and could result in an increased impact to Schumacher Creek’s instream flows and fisheries. The PUD’s expanded regional service area is described in the Union Regional Part B Water System Plan (“Plan”) approved by the Department of Health on November 19, 2020. The Tribe has appealed the Plan approval in *Squaxin Island Tribe v. Washington Department of Health, et al.*, Thurston County Superior Court Case No. 20-2-02481-34. The Tribe has also appealed the Department of Ecology’s June 3, 2020 permit extension for Water Right No. G2-26232 for the Alderbrook Water System in *Squaxin Island Tribe v. Washington Department of Ecology, et al.*, Pollution Control Hearings Board (“PCHB”) Case No. 20-054.

1.6 The PUD has installed stream monitoring stations in Schumacher Creek, Big Bend Creek, and Alderbrook Creek, and established a monthly streamflow monitoring program for those creeks. The Parties expect that flow monitoring in Big Bend and Alderbrook Creeks will contribute to their understanding of the hydrology of Schumacher Creek.

1.7 By entering into this Agreement, the Parties intend to establish improved communication and increase coordination; to foster the government-to-government relationship that exists between them; and to engage in cooperative planning that provides a long-term, environmentally sustainable water supply and protects and restores anadromous fish resources while accommodating population growth.

IN CONSIDERATION THEREOF, THE PARTIES hereby agree as follows:

Sec. 2 – Purposes. The purposes of this Agreement are:

2.1 To develop a scientific framework to evaluate the impacts of PUD URWS development on Schumacher Creek and recommend mitigation strategies for those impacts where necessary;

2.2 To establish the Parties' commitments regarding adopting and implementing an Agreed Mitigation Plan to be developed by the Parties' consulting hydrologists; and

2.3 To increase coordination and establish improved channels of communication between the Parties.

Sec. 3 – Data collection and application

3.1 Streamflow monitoring program. The PUD will maintain its existing monthly streamflow monitoring program throughout the term of this Agreement, covering Schumacher, Big Bend, and Alderbrook Creeks, augmented by groundwater and rain measurements in the Union area.

3.2 Tribe back-up assistance. If PUD streamflow monitoring staff become unavailable for more than 30 days, the Tribe will make best efforts to provide back-up personnel to collect monitoring data.

3.3 Data availability. The PUD will post monitoring data described in Paragraph 3.1 on the streamflow website accessible to the general public. At the Tribe's request, the PUD will provide copies of streamflow measurement data directly to the Tribe on a quarterly or semi-annual basis.

3.4 Work performed by Aspect Consulting LLC ("Consultant"). Within 30 days after execution of this Agreement, the PUD will engage Aspect Consulting LLC (the "Consultant") to undertake numerical groundwater flow modeling evaluation to assess potential impacts to instream flows of Schumacher Creek associated with future water supply within the URWS. Numerical groundwater flow models are computer simulations/representations of groundwater systems, and provide a tool to forecast changes to groundwater and associated surface waters in response to pumping withdrawals from wells under different water supply development scenarios. The existing Johns Creek and Goldsborough Creek numerical groundwater flow model (2014) will be modified/updated for this evaluation. The numerical groundwater model will be used to compare the relative potential impacts to instream flows under two different future water supply development scenarios (baseline scenarios), namely, no consolidation baseline scenario described in Paragraph 3.4.1(b)(1) and the consolidation baseline scenario described in Paragraph 3.4.1 (b)(2). A workplan will be developed as a first step in this evaluation and will outline proposed modifications to the groundwater flow model, updates to existing data inputs, and assumptions for each of the baseline scenarios. The results of the two baseline scenarios will be evaluated using a differential analysis, to quantify the relative impact to instream flow from future water supply development under the no consolidation versus consolidation scenario. The groundwater flow model will then be used to run additional scenarios to assess and inform potential mitigation strategies (e.g. change in the location of future water supply wells and/or pumping from the deep aquifer).

The PUD and the Tribe will each bear fifty percent (50%) of the Consultant's fees and costs, not to exceed an aggregate total of One Hundred Thousand Dollars (\$100,000.00). The Consultant will invoice the PUD directly for the services rendered and the Tribe will reimburse the PUD for the Tribe's share, up to a maximum of \$50,000. The Tribe will remit payment to the PUD in annual increments equal to one-fifth (1/5) of the Tribe's share, up to an annual maximum of \$10,000, starting on or before June 30, 2022 and continuing each June 30th thereafter through June 30, 2026. The Tribe may also elect to prepay all or any portion of the Tribe's share of the Consultant's fees and costs sooner than required under the annual schedule set forth in this paragraph.

The PUD's contract(s) with the Consultant, as described below, will require the Consultant to provide reasonable opportunity for review and feedback by the Tribe and its independent consultant within the specified timelines for each task.

3.4.1 Task 1: Develop a work plan. Within eight (8) weeks, the Consultant will develop a written work plan. The work plan will:

(a) outline proposed modifications to the Johns Creek/Goldsborough Creek steady state numerical groundwater flow model developed by Golder Associates in 2014 (the "Model"), updates to existing data inputs, and assumptions for each of the baseline scenarios that are necessary to perform the tasks outlined in this Agreement; and

(b) provide for use of the numerical groundwater model to compare the relative potential impacts to instream flows under two different future water supply development scenarios (baseline scenarios), namely:

1. No Consolidation baseline scenario – water supply to undeveloped parcels within the service area of each of the six separate (unconsolidated) PUD water systems will be served by the PUD and all undeveloped parcels outside the six unconsolidated service areas will be served by permit exempt wells. The baseline analysis will assume full buildout of all undeveloped parcels. A consistent water supply demand per parcel will be applied for all undeveloped parcels, whether served by the PUD or by exempt well. Additional pumping within each of the six unconsolidated PUD water systems will be determined by the total water supply demand of all undeveloped parcels within each of the separate service areas, not to exceed the annual maximum quantity of existing water rights for each of the separate unconsolidated water systems. In the area east of Alderbrook, this scenario will assume water supply by permit exempt wells for up to 100 undeveloped parcels. For purposes of the baseline scenario, any additional wells (e.g. Alderbrook Well 4) will be located within the authorized point of withdrawal under existing water rights.

2. Consolidation baseline scenario – water supply to all undeveloped parcels within the service area of the URWS will be served by the PUD. The baseline analysis will assume full buildout of all undeveloped parcels. A consistent water supply demand (equivalent to that assumed for the No Consolidation baseline scenario) will be applied for all undeveloped parcels. Additional pumping within the consolidated PUD water system will be determined by the total water supply demand of all undeveloped parcels, not to exceed the annual maximum quantity of the consolidated water system. In the area east of Alderbrook, this scenario will assume water supply by the PUD for cluster development comprising 192 undeveloped parcels consistent with the PUD's long-term URWS water supply planning. For purposes of the baseline scenario, any additional wells (e.g. Alderbrook Well 4) will be located within the authorized point of withdrawal under existing water rights.

3.4.2 Task 2: Update the Model. Within four (4) weeks after PUD approval of the work plan, the Consultant will complete modifications and updates to the Model and update the simulation of groundwater wells with current information on well locations and operations.

3.4.3 Task 3: Recalibrate the Model. Within four (4) weeks after completion of Task 2, the Consultant will recalibrate the Model.

3.4.4 Task 4: Use parcel data to estimate water demand. Within four (4) weeks after completion of Task 3, the Consultant will obtain and evaluate Mason County tax parcel data to identify assumptions for future water supply from the PUD and from permit-exempt wells under full buildout scenarios, consistent with subparagraph 3.4.1 involving URWS consolidation and no consolidation.

3.4.5 Task 5: Run Model simulations. Within twelve (12) weeks after completion of Task 4, the Consultant will complete Model simulations of the scenarios identified in the approved work plan.

3.4.6 Task 6: Report and recommendations. Within eight (8) weeks after completion of Task 5, the Consultant will submit its report on the comparative impacts on Schumacher Creek of groundwater pumping under the no-consolidation and consolidation scenarios. If the Model predicts impacts to Schumacher Creek streamflows under the consolidation scenario that exceed predicted impacts under the "no-consolidation" scenario, the Consultant's report will include potential strategies and recommendations to minimize increased future impacts to Schumacher Creek associated with groundwater pumping to serve the URWS.

Sec. 4 – Mitigation

4.1 If the PUD applies for any new water right permit or change or transfer of any existing water right, the Department of Ecology may require that the PUD conduct an empirically-based analysis of impacts to Schumacher Creek utilizing site-specific information and mathematical evaluations. If this empirically-based evaluation predicts impacts to the minimum instream flows in Schumacher Creek set in WAC 173-514-030, the PUD will develop a mitigation plan in connection with its application ("Required Mitigation Plan"). In the event Ecology reduces the Schumacher Creek instream flows established for Control Station No. 12-0740-00 in WAC 173-514-030, the PUD will base its Required Mitigation Plan on the instream flows in effect on the date of this Agreement. The PUD will invite the Tribe's feedback and input on mitigation concepts or proposals as the PUD develops its Required Mitigation Plan. The Tribe may provide such feedback and input but is not obligated to assist in developing the Required Mitigation Plan.

4.2 If the Model predicts impacts to Schumacher Creek streamflows under the consolidation scenario that exceed predicted impacts to Schumacher Creek streamflows under the "no-consolidation" scenario, the PUD agrees to develop and implement a mitigation plan in accordance with the process set out in this Paragraph 4.2 ("Agreed Mitigation Plan"). The Tribe agrees that the Agreed Mitigation Plan can include out-of-kind mitigation to address impacts to Schumacher Creek fisheries.

4.2.1 Consulting Hydrologists. Within twenty-four (24) months after receipt of the Consultant's Report and Recommendations under Paragraph 3.4.6, the PUD will

engage Aspect Consulting LLC (“Aspect”) and the Tribe will engage Keta Waters LLC (“Keta”) as consulting hydrologists to perform the additional task of developing the Agreed Mitigation Plan. Aspect and Keta will jointly designate a third consulting hydrologist to act as a tiebreaker. The PUD will be responsible for payment of Aspect’s fees. The Tribe will be responsible for payment of Keta’s fees. The Parties will share equally the responsibility for payment of the fees for the third consulting hydrologist.

4.2.2 Goals, Objectives, and Performance Standards. Aspect and Keta will jointly prepare (i) a list of goals and objectives for the Agreed Mitigation Plan addressing mitigation of impacts to Schumacher Creek; and (ii) a list of meaningful and measurable performance standards to implement those goals and objectives. If Aspect and Keta cannot agree on goals and objectives and/or performance standards, the Parties will consult and accept the recommendation of the third consulting hydrologist.

4.2.3 Mitigation Measures. Aspect and Keta will jointly prepare a list of recommended mitigation measures, including but not limited to feasible strategies for avoiding or minimizing impacts to Schumacher Creek streamflows. Each recommended mitigation measure will have an implementation schedule linked to specific URWS development projects triggering the need for mitigation. If Aspect and Keta cannot agree on the recommended mitigation measures and/or implementation schedule, the Parties will consult and accept the recommendation of the third consulting hydrologist. The PUD agrees to implement recommended mitigation measures within the identified implementation schedule. This obligation will survive the term of this Agreement.

4.2.4 Monitoring. Aspect and Keta will jointly prepare a recommended monitoring plan to assess the impact of the implemented mitigation measures. If Aspect and Keta cannot agree on a monitoring plan, the Parties will consult and accept the recommendation of the third consulting hydrologist. The PUD agrees to conduct monitoring in accordance with the recommended monitoring plan, and to share monitoring results consistent with Paragraph 3.3. This obligation will survive the term of this Agreement.

4.3 Grant Funding. The Tribe and PUD will cooperate on obtaining grant funding for the mitigation work described in Paragraph 4.2. The Tribe will endeavor to be supportive of the PUD’s efforts to obtain grant funding. The Parties share a duty to perform the tasks described herein regardless of whether such funding is available.

Sec. 5 – Government-to-Government Cooperation

5.1 The Parties will meet at least semi-annually to discuss any issues of concern.

5.2 The Parties will each designate a governing board/council member as well as an executive staff member to the negotiating committee.

5.3 The PUD will provide the Tribe with timely copies of formal submittals to state agencies and local governments regarding specific updates to the URWS Plan, applications for new water rights, and applications for changes to existing water rights. The Tribe shall provide the PUD with timely copies of formal correspondence to state agencies relating directly to specific PUD proposals.

5.4 Within 10 business days after the Effective Date of this Agreement, the Tribe will withdraw or voluntarily dismiss its appeal of the extension of Superseding Water Right Permit G2-26232P in PCHB No. 20-054.

5.5 Within 10 business days after the Effective Date of this Agreement, the Tribe will voluntarily dismiss its Petition for Judicial Review of Agency Action and Declaratory Judgment in Thurston County Superior Court Case No. 20-2-02481-34.

Sec. 6 – General Provisions

6.1 Term and Effect. This Agreement is binding on the Parties and shall remain in effect through June 30, 2026, unless earlier terminated under Paragraphs 6.3, 6.5, or 6.7 below.

6.2 Dispute Resolution. The Parties shall attempt in good faith to promptly resolve any dispute arising out of or relating to this Agreement by negotiation between executives and governing board/council members who have authority to settle the dispute. Any Party may give the other Party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving Party shall submit to the other a written response. The notice and response shall include with reasonable particularity (a) a statement of each Party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within 30 days after delivery of the notice, the executives of both Parties shall meet at a mutually acceptable time and place. Unless otherwise agreed in writing by the negotiating Parties, the above-described negotiation shall end at the close of the first meeting of executives described above. Such closure shall not preclude continuing or later negotiations, if desired.

6.3 Remedies in Event of Default. In the event of default, the Parties acknowledge that it may be difficult to measure the resulting damages and that damages may not provide an appropriate remedy. Accordingly, the judicial remedies for a non-defaulting Party are limited to injunctive relief and specific performance, if appropriate. Alternatively, in the event of a material breach by a Party, the non-defaulting Party may elect to terminate this Agreement by providing written notice to the other Party.

6.4 Reservation of Rights. Each Party hereby reserves each and every one of its rights, remedies, powers, recourses, and privileges at law, or in equity.

6.5 Severability. In the event any term or condition of this Agreement or application thereof to any person or circumstances is held invalid by a court of competent jurisdiction, any such invalid term or condition shall be severable and such invalidity shall not affect other terms, conditions, or applications of this Agreement that can be given effect without the invalid term, condition, or application.

6.6 Waiver. If any Party fails to exercise any of its rights under this Agreement, it will not be precluded from subsequent exercise of that right. A failure to exercise any right will not constitute a waiver of any other rights under this Agreement.

6.7 Amendment. Amendments to this Agreement for any purpose must be in writing and signed by authorized representatives of the Parties.

6.8 Presumption of Good Faith. The Parties to this Agreement will work cooperatively and in good faith to implement this Agreement.

6.9 Governing Law. This Agreement will be governed and enforced under the laws of the State of Washington.

6.10 Applicability. Nothing in this Agreement will be construed to: (a) establish a third-party beneficiary relationship or other right to or responsibility for any person or entity that is not a signatory to this Agreement; or (b) affect or modify any treaty or other rights of the Tribe, including its federally-reserved water rights.

6.11 Sovereign Immunity. The Tribe hereby agrees to a limited waiver of sovereign immunity for suit in state court exclusively for the limited purpose of allowing the PUD to enforce this Agreement solely through the equitable remedies of injunctive relief or specific performance. This limited waiver is not for the benefit of any third party or for any other action or any other forum or regarding any other matter and shall not be enforceable by any third party or by any assignee of the Parties. In any enforcement action, the Parties shall bear their own enforcement costs, including attorneys' fees.


6.12 Recording. The PUD will post this Agreement to its website as provided under RCW 39.34.040.

6.13 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter hereof.

6.14 Effective Date. The Effective Date of this Agreement shall be the later of the dates of the Parties' signatures.

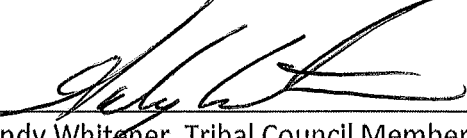
THIS AGREEMENT is effective upon signature by the Parties below.

Public Utility District No. 1 of Mason County

By: 
Mike Sheetz, Board President

Date: 7/12/2021

Squaxin Island Tribe

By: 
Andy Whitener, Tribal Council Member

Date: 7-12-21