



SQUAXIN ISLAND TRIBE

RESOLUTION NO. 11- 82

of the

SQUAXIN ISLAND TRIBAL COUNCIL

WHEREAS, the Squaxin Island Tribal Council is the Governing Body of the Squaxin Island Tribe (Tribe), its members, its lands, its enterprises and its agencies by the authority of the Constitution and Bylaws of the Squaxin Island Tribe, as approved and adopted by the General Body and the Secretary of the Interior on July 8, 1965; and

WHEREAS, under the Constitution, Bylaws and inherent sovereignty of the Tribe, the Squaxin Island Tribal Council is charged with the duty of protecting the health, security, education and general welfare of tribal members, and of protecting and managing the lands and treaty resources and rights of the Tribe; and

WHEREAS, the Tribe is a federally-recognized Indian Tribe possessing reserved powers, including the powers of self-government; and

WHEREAS, the Squaxin Island Tribal Council has been entrusted with the creation of ordinances and resolutions in order to fulfill their duty of protecting the health, security, education and general welfare of tribal members, and of protecting and managing the lands and treaty resources of the Tribe; and

WHEREAS, for years the Port of Shelton (Port) has claimed and pumped far more groundwater than the Tribe believes it is entitled to, which intercepts Johns Creek's water and harms coho and chum fisheries; and

WHEREAS, in 2010, Ecology ordered the Port to cut down its water use from about 60 acre feet per year (AFY) to 5.6 AFY; and

WHEREAS, the Port appealed Ecology's order in *Port of Shelton v. Ecology*, PCHB No. 10-173, the Tribe intervened, and the parties began settlement discussions; and

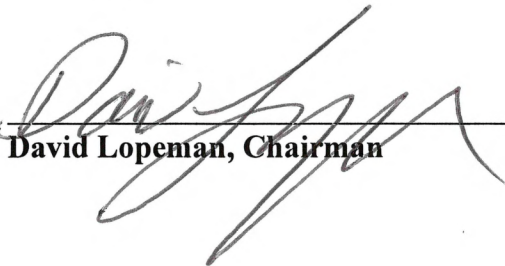
WHEREAS, in late 2011 the Port and City of Shelton executed a wholesale water agreement, which is the precursor to hooking up to City water that the Port will use in lieu of basin groundwater; and

WHEREAS, the parties' have reached agreement on settlement terms, including among other things that: (1) the Port will hook up to City water by March 13, 2013; (2) the Tribe may offer it technical help related to the hook up; (3) the Port by specified deadlines will relinquish a significant portion of its claims to basin groundwater and abandon one of its two wells, regardless of whether or when it hooks up to City water; (4) the Tribe expressly does not stipulate as to the Port's groundwater rights in the Johns Creek basin; and (5) the Port dismisses its challenge to Ecology's order.

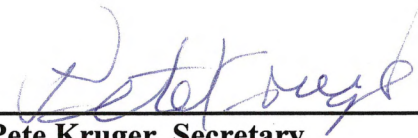
NOW THEREFORE BE IT RESOLVED, that the parties' settlement, as embodied in the attached Stipulation and Agreed Order of Dismissal, is hereby approved.

CERTIFICATION

The Squaxin Island Tribal Council hereby certifies that the foregoing Resolution was adopted at a special meeting of the Squaxin Island Tribal Council, held on this 11th day of December 2011, at which time a quorum was present and was passed by a vote of 6 for and 0 against, with 0 abstentions.



David Lopeman, Chairman

Attested by: 

Pete Kruger, Secretary



Arnold Cooper, Vice Chairman

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

PORT OF SHELTON, a Washington municipal corporation,

Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent,

And

SQUAXIN ISLAND TRIBE,

Intervenor.

PCHB No. 10-173

STIPULATION AND AGREED ORDER OF DISMISSAL

I. INTRODUCTION

Appellant Port of Shelton (“Appellant” or “Port”), through its attorneys, Tom McDonald and Joe Rehberger of Cascadia Law Group PLLC, and Respondent, State of Washington, Department of Ecology (“Ecology), through its attorney, Stephen North, and the Intervenor Squaxin Island Tribe (“Tribe”), through its attorneys, Sharon Haensly and Kevin Lyon (collectively, “Parties”), submit this Stipulation and Agreed Order of Dismissal (“Stipulation”) in full settlement of all issues pertaining to the above-referenced appeal, and request that the Pollution Control Hearings Board dismiss the appeal with prejudice.

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2 **II. RECITALS**

3 1. On November 19, 2010, Ecology issued to the Port Administrative Order Docket
4 No. DE 8109 (“Order”). The Order provides for the Port to cease and desist the use of water at its
5 industrial park site referred to as Johns Prairie Industrial Park (“Industrial Park”) in Mason
6 County, Washington. The Order provided that the water use must cease by May 1, 2011, except
7 for that quantity authorized under the ground water permit exemption under RCW 90.44.050.

8 2. The Order is based on the determination by Ecology that water right Claim No.
9 014248 filed by the Port under Chapter 90.14 RCW for industrial use of water for 60 acre feet per
10 year did not represent a valid water right because the claim stated first use of water was “Aug
11 1964.”

12 3. The Port and Ecology stipulated to intervention by the Squaxin Island Tribe based
13 on the Tribe’s interest and rights in the Johns Creek watershed.

14 4. The Parties entered into negotiations for terms to stay the enforcement of the Order
15 pending the appeal of the Order before this Board. On April 22, 2011, the Parties agreed to a
16 30-day stay until June 1, 2011 to allow for additional negotiations. On May 26, 2011, the Parties
17 agreed to a stay of enforcement of the Order under the terms set forth therein.

18 5. On September 17, 2011, the Port filed a Motion for Stay, asserting that Ecology
19 acted beyond its authority in issuing the Order and that evidence would support a water right in
20 the context of an adjudication. The briefing on that Motion has been extended by agreement of
21 the Parties and the Order is currently stayed by agreement of Ecology until December 30, 2011.

22 **III. STIPULATION**

23 For and in consideration of the above recitals that are incorporated as terms of this
24 stipulation by reference, and to avoid the time and cost of further litigation, the Parties stipulate
25 and agree to dismissal of this appeal based on the following:

26 1. The Port has executed a Wholesale Water Supply Agreement with the City of
27 Shelton (“City”) for the purpose of the City providing water to the Industrial Park (“Wholesale
Agreement”).

1 2. The Port will take all reasonable efforts to timely fix the leak in its current system,
2 estimated to be 18 acre-feet per year in loss of water.

3 3. By March 1, 2013, the Port shall serve all customers within the service area of the
4 Industrial Park with City water under the Wholesale Agreement with the City. Upon entry of this
5 Stipulation and Agreed Order of Dismissal, the Port shall provide notice to its customers in the
6 Industrial Park about the Wholesale Agreement and connection on March 1, 2013.

7 4. The expected schedule for delivery of water from the City to the Industrial Park,
8 including but not limited to the design, engineering, permitting, purchase of supplies, and
9 construction (“Project”), is as follows:

10 a. Phase 1. The Port shall allocate funds for the following elements of the
11 Project:

12 i. By January 10, 2012, a Request for Qualifications (RFQ) will be
13 issued by the Port for the engineering and design of the Project.

14 ii. By March 15, 2012, an engineering firm will be selected by the Port
15 based on the RFQ process.

16 iii. The contract with the engineering firm shall provide that the final
17 plans and specifications for the Project are to be completed by
18 June 15, 2012.

19 iv. By August 1, 2012, bid solicitations will be issued for construction
20 of the Project.

21 b. Phase 2. The following elements of the Project are dependent upon the
22 Port obtaining funding by September 1, 2012 for the cost of the
23 construction of the Project:

24 i. By September 30, 2012, the bid will be awarded to the contractor
25 who meets the requirements of the contract for construction of the
26 Project.
27

- 1 ii. By October 15, 2012, construction shall be commenced on the
2 Project.
3 iii. The contract for construction shall provide for completion by
4 February 1, 2013.
5 iv. The Port will work with the City to have all necessary approvals
6 and tests completed to provide actual water delivery to the
7 Industrial Park by March 1, 2013.

8 5. The Port will continue to diligently seek funding for the second phase of the
9 Project. The Port will consider all potential sources for funding, including any options provided
10 by Ecology and the Tribe. In this regard, the Port will seek the assistance of the Tribe and may in
11 its discretion invite the Tribe to be involved in providing technical and contracting resources to
12 support the Project.

13 6. The Port will provide the Tribe and Ecology with quarterly updates on the progress
14 of the Project including its ability to meet the dates in Paragraph 4 above and a detailed
15 description of its efforts to obtain funding as provided in Paragraph 5 above. In the reports the
16 Port will provide an estimated completion date and disclose whether there are any reasons the
17 March 1, 2013 date for connection with the City cannot be met. If the Port reports that the
18 March 1, 2013 date is unachievable, then the Port will promptly revise its current schedule and
19 seek the most economical and expedient path to engineer a connection to the City.

20 7. During the pendency of the Project, the Port will not withdraw any more than 5
21 acre feet per month of water, not to exceed a maximum 50 acre feet over a 12-month period.
22 During the critical months for fish flows, August 15 to November 15, the Port shall conserve
23 water use as much as possible. The Port will record water use weekly from the meters at two
24 wells, designated JP 1 and JP 2, and report the data to Ecology and the Tribe in its quarterly
25 report.

26 8. a. The Port will diligently seek to complete the Project prior to the scheduled
27 dates set forth in Paragraph 4 above.

1 b. In addition to the Port’s quarterly reporting obligations under this
2 agreement and the additional notices required under Paragraph 6 above, by
3 February 1, 2013, the Port shall provide written notification to Ecology and
4 the Tribe regarding its efforts to comply with the March 1, 2013 deadline
5 for the completion of the Project. (“February 1 Notification”).

6 c. All reports and notices under this Stipulation, including the February 1
7 Notification may be provided by email or U.S. mail and shall be provided
8 to the following persons:

9 Ecology: Water Resources Section Manager
10 Southwest Regional Office
11 Department of Ecology
12 Water Resources Program
13 PO Box 47775
14 Olympia, WA 98504-7775
15 mgal461@ecy.wa.gov

16 Tribe: Director
17 Squaxin Island Natural Resources Department
18 2952 SE Old Olympic Hwy.
19 Shelton, WA 98584

20 Port: John Dobson
21 Executive Director
22 Port of Shelton
23 21 W. Sanderson Way
24 Shelton, WA 98584
25 johnd@portofshelton.com

26 d. If the February 1 Notification provides that the Project will not be
27 completed with delivery of City water by March 1, 2013:

28 i. The Port shall provide notice to its existing customers that they will
29 be limited in their water supply to 10 afy by December 30, 2013
30 such that the total water use at the Industrial Park shall not exceed
31 10 afy unless the connection is made to the City prior to
32 December 30, 2013.

1 ii. The Port shall pay to a fund established for groundwater studies in
2 the Johns Creek basin or to such fund agreed upon by the Tribe and
3 the Port the sum of \$100/day for every day the Project is not
4 completed after September 1, 2013, not to exceed total payments of
5 \$75,000.

6 iii. If the Tribe or Ecology determines that the Port's failure to meet the
7 March 1, 2013 date for delivery of City water is the result of the
8 Port's lack of good faith and diligence, they may declare the Port in
9 breach, which shall terminate the Stipulation, and Ecology may
10 thereafter seek all available legal remedies, including such orders as
11 it deems appropriate.

12 e. If the Port fails to comply with subparagraphs d.i and d.ii above, Ecology
13 may issue such orders as it deems appropriate.

14 f. Nothing in this Stipulation forecloses the Parties from agreeing to extend
15 the date for completion of the Project beyond March 1, 2013.

16 9. The Port shall voluntarily relinquish all water rights under Claim No. 014248
17 above 10 afy upon completion of the Project, but no later than December 30, 2013. Ecology will
18 provide the proper paperwork to the Port, which the Port agrees to promptly execute. Subject to a
19 final adjudication or an action filed by the Tribe under Paragraph 10, the Port's future use of
20 water claimed shall be limited to a maximum 10 afy. When the Project is completed and the Port
21 is serving the Industrial Park with water from the City, the 10 afy shall only be available when the
22 water supply from the City is curtailed pursuant to a loss of water supply emergency. A loss of
23 supply emergency is defined as any unforeseen supply disruption that will take longer than two
24 (2) hours to resolve. The parties agree that this Stipulation does not determine the extent and
25 validity of water right claimed under Claim No. 014248, and by executing this Stipulation, the
26 parties do not waive and specifically reserve their respective arguments and positions regarding
27 the validity and extent of the Claim in any future adjudication. Ecology's position is that the

1 Port's right to use ground water may be limited to quantities authorized for industrial use under
2 the ground water permit exemption, RCW 90.44.050.

3 10. Nothing in this Stipulation forecloses the Tribe or Ecology from filing an action in
4 state superior court or federal court to enforce the terms of this stipulation and to determine the
5 extent and validity of Claim No. 014248.

6 11. The Port shall cap well JP 2 (well tag number Tag #AAF328) pursuant to the
7 requirements of Chapter 173-160 WAC by December 13, 2013. The Port may continue to
8 maintain well JP 1, provided that it shall be used only as provided in Paragraph 9 above.

9 12. Upon the Board's dismissal of this appeal, Ecology shall withdraw its Order
10 pursuant to the terms of this Agreement without waiving its position regarding the validity and
11 extent of water right Claim No. 014248.

12 13. Nothing herein forecloses the Port from seeking other water supplies for the
13 Industrial Park, including pursuing water right applications No. G2-28520 and No. G2-28545.

14 14. The Parties agree to have the Pollution Control Hearings Board enter the following
15 Order of Dismissal pursuant to the terms of the Agreement.

16 DATED this _____ day of December, 2011.

17
18 CASCADIA LAW GROUP PLLC

ROBERT M. MCKENNA
Attorney General of Washington

19
20 _____
21 Tom McDonald, WSBA No. 17549
Joseph A. Rehberger, WSBA No. 35556

Stephen H. North, WSBA No. 31545
Assistant Attorney General

22 Attorneys for Appellant Port of Shelton

Attorneys for Respondent
State of Washington
Department of Ecology

23 Dated: _____

24
25 Dated: _____

1 SQUAXIN ISLAND LEGAL DEPARTMENT

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Sharon I. Haensly, WSBA No. 18158
Kevin R. Lyon, WSBA No. 15076

Attorneys for Intervenor Squaxin Island Tribe

Dated: _____

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1 **ORDER OF DISMISSAL**

2 This matter having come before the Pollution Control Hearings Board upon stipulation of
3 the parties for settlement and dismissal of this appeal, and the Pollution Control Hearings Board
4 having reviewed the foregoing Stipulation and the records and files herein, and having determined
5 that the parties have agreed to a full and complete settlement of this appeal, now, therefore,

6 **IT IS ORDERED:**

7 1. *Port of Shelton v. State of Washington, Department of Ecology*, and PCHB No. 10-
8 173 shall be and is hereby DISMISSED with prejudice, each party to bear its own costs.

9 DATED this _____ day of _____, 2011.

10 POLLUTION CONTROL HEARINGS BOARD

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17 _____
18 Kay M. Brown
19 Administrative Appeals Judge, Presiding

20 Presented by:
21
22 CASCADIA LAW GROUP PLLC

23 _____
24 Tom McDonald, WSBA No. 17549
25 Joseph A. Rehberger, WSBA No. 35556
26 Attorneys for Appellant Port of Shelton