

**AQUATIC LANDS**  
**Aquatic Lease Renewal**

Application and Lease No. 20-A13012

Region: Olympic

To lease the beds of navigable water of Dungeness Harbor in Clallam County.

Date Filed: January 12, 2005

Description: For the purpose of continued use of commercial oyster cultivation and harvesting.

In front of portion of Government Lots 1 & 2 located within Section 23, Township 31 North, Range 4 West, Willamette Meridian.

Name: Jamestown S'Klallam Tribe

Address: 1033 Old Blyn Highway

City: Sequim

State: Wa.

Zip: 98382

Plate No. TS05-062 (Note 10)

**No Encumbrances of Record**

**Special Notations**

This renewal excludes parcel 2 of the original lease (Government Lots 4 & 5 in Section 24) per request of applicant.

Title Examiner: Erik Nedergard

**Application**

Register: \_\_\_\_\_

Plate: \_\_\_\_\_

**Instrument**

Register: \_\_\_\_\_

Plate: \_\_\_\_\_

*Erik Nedergard*  
*1/12/2005*

*Erik Nedergard*  
*1/11/2007*







STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES  
DOUG SUTHERLAND, Commissioner of Public Lands

**AQUATIC LANDS OYSTER AND GEODUCK AQUACULTURE LEASE**

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**STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES  
DOUG SUTHERLAND, Commissioner of Public Lands**

**AQUATIC LANDS OYSTER AND GEODUCK AQUACULTURE LEASE**

**AQUATIC LANDS OYSTER AND GEODUCK AQUACULTURE LEASE NO. 20-A13012**

THIS LEASE is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources ("State"), and JAMESTOWN S'KLALLAM TRIBE, a government entity ("Tenant").

**BACKGROUND**

Tenant desires to lease the aquatic lands commonly known as Dungeness Bay, which are tidelands located in Clallam County, Washington, from State, and State desires to lease the property to Tenant pursuant to the terms and conditions of this Lease. Tenant and State acknowledge and recognize that the property to be leased hereunder is the subject of a Consent Decree and Settlement Agreement ("Settlement Agreement") in *U.S. v. Washington*, Case No. C70-9213, Subproceeding No. 89-3 (Shellfish), United States District Court, Western District of Washington at Seattle. Under the terms of the Settlement Agreement, the property leased hereunder is to be free from tribal shellfish harvesting while this Lease is in effect. However, the Settlement Agreement also provides that if the signatory tribes do not receive the monetary compensation they seek, the Settlement Agreement will be null and void. The parties acknowledge that, in the event the Settlement Agreement is nullified, the property leased hereunder will become subject to the Stipulation and Order Amending Shellfish Implementation Plan ("Revised Shellfish Implementation Plan") and any subsequent amendments in the above-referenced case. Pursuant to Section 6 of that Implementation Plan, the leased area may then be evaluated to determine if there is a treaty right to harvest from the leased area, and a treaty harvest conducted pursuant to Section 6 of the Implementation Plan may result.

The property Tenant desires to lease is the subject of a tentative Consent Decree and Settlement Agreement ("Settlement Agreement") in *U.S. v. Washington*, Case No. C70-9213,

Subproceeding No. 89-3 (Shellfish), United States District Court, Western District of Washington at Seattle. Under the Settlement Agreement, the signatory tribes agree to not conduct tribal shellfish harvest on the property while this Lease is in effect. However, the Settlement Agreement provides that if the signatory tribes do not receive the monetary compensation they seek through the Settlement Agreement, the Settlement Agreement will be null and void. If the Settlement Agreement is rendered null and void, the property will become subject to the Stipulation and Order Amending Shellfish Implementation Plan as revised and/or amended ("Implementation Plan") and any subsequent amendments in the above-referenced case. Pursuant to Section 6 of the Implementation Plan, the leased area may then be evaluated to determine if there is a treaty right to harvest from the leased area, and a treaty harvest pursuant to Section 6 of the Implementation Plan may result.

THEREFORE, the parties agree as follows:

## **SECTION 1 PROPERTY**

### **1.1 Property Defined.**

- (a) State leases to Tenant and Tenant leases from State the real property described in Exhibit A together with all the rights of State, if any, to improvements on and easements benefiting the Property, but subject to the exceptions and restrictions set forth in this Lease (collectively the "Property").
- (b) This Lease is subject to all valid interests of third parties noted in the records of Clallam County, or on file in the office of the Commissioner of Public Lands, Olympia, Washington; rights of the public under the Public Trust Doctrine or federal navigation servitude; and treaty rights of Indian Tribes.
- (c) Not included in this Lease are any right to harvest, collect or damage any natural resource, including aquatic life or living plants, any water rights, or any mineral rights, including any right to excavate or withdraw sand, gravel, or other valuable materials.
- (d) State reserves the right to grant easements and other land uses on the Property to others when the easement or other land uses will not unreasonably interfere with Tenant's Permitted Use.

### **1.2 Survey and Property Descriptions.**

- (a) Tenant prepared Exhibit A, which describes the Property. Tenant warrants that Exhibit A is a true and accurate description of the Lease boundaries and the improvements to be constructed or already existing in the Lease area.
- (b) Tenant shall not rely on any written legal descriptions, surveys, plats, or diagrams ("property description") provided by State. Tenant shall not rely on State's approval or acceptance of Exhibit A or any other Tenant-provided property description as affirmation or agreement that Exhibit A or other property description is true and accurate. Tenant's obligation to provide a true and accurate description of the Property boundaries shall be a material term of this

Lease. Tenant shall also provide a copy of the property description to the Director of the Department of Fish and Wildlife.

- (c) State agrees to accept a preliminary Exhibit A upon the Commencement Date of this Lease. Tenant shall submit a final Exhibit A for State's approval within Three Hundred Sixty Five (365) days of the Commencement Date. Upon State's written approval, the final Exhibit A shall supersede the preliminary Exhibit A. Until superseded, the preliminary Exhibit A shall have full legal effect.

**1.3 Inspection.** State makes no representation regarding the condition of the Property, improvements located on the Property, the suitability of the Property for Tenant's Permitted Use, compliance with governmental laws and regulations, availability of utility rights, access to the Property, or the existence of hazardous substances on the Property. Tenant has inspected the Property and accepts it "AS IS."

## SECTION 2 USE

**2.1 Permitted Use.** Tenant shall use the Property for Oyster and Geoduck Cultivation with Limited Commercial Harvest (the "Permitted Use"), and for no other purpose. The Permitted Use is described or shown in greater detail in Exhibit B, the terms and conditions of which are incorporated by reference and made a part of this Lease. This is a water-dependent use.

- (a) As indicated above, if the tribes signing the Settlement Agreement identified above do not receive the monetary compensation they seek, the Settlement Agreement will become null and void, and the Property may become subject to tribal treaty shellfish harvesting under the Implementation Plan. In the event the Settlement Agreement becomes null and void, State will provide Tenant with notice that the Property is thereafter subject to tribal assertions of treaty shellfishing rights on the Property.
- (b) The parties to this Lease acknowledge that if the contingency identified in subsection (a) occurs, the Implementation Plan will then govern the tribes' exercise of their treaty shellfishing rights on the Property. The Implementation Plan specifies the manner in which adjudicated tribal shellfish harvesting treaty rights shall be undertaken. Among other things, the plan allows a treaty tribe to assert that lands leased by the State contain beds of shellfish subject to tribal harvest. The plan provides the notification requirements that must be met for tribes asserting a treaty right and the effect of a tribe's failure to assert a treaty right prior to the issuance of a lease. It further specifies that a treaty right to harvest may be asserted after the initial term of this Lease or after ten years, whichever is shorter.
- (c) Tenant agrees to hold State harmless from any damage to Tenant arising from any assertion of a tribal treaty right to harvest shellfish from within the Property and agrees that its sole recourse in the event that the tribal harvesting materially interferes with Tenant's economic use of the Property remedy shall be the ability to terminate the Lease. The State shall not be obligated to defend against any assertion of a tribal treaty right to harvest from the Property.



## **2.2 Restrictions on Use.**

- (a) Tenant shall not cause or permit any damage to natural resources on the Property.
- (b) Tenant shall also not cause or permit any filling activity to occur on the Property or adjacent state-owned aquatic land. This prohibition includes any deposit of rock, earth, ballast, wood waste, refuse, garbage, waste matter (including chemical, biological, or toxic wastes), hydrocarbons, any other pollutants, or other matter in or on the Property, except as approved in writing by State.
- (c) Tenant shall neither commit nor allow waste to be committed to or on the Property or adjacent state-owned aquatic land.
- (d) Failure to Comply with Restrictions on Use.
  - (1) If State gains actual knowledge of Tenant's failure to comply with any of the restrictions set out in this Subsection 2.2, State may notify Tenant and provide Tenant a reasonable time to take all steps necessary to remedy the failure and restore the Property to the condition before the failure occurred.
  - (2) If Tenant fails to restore the Property in a timely manner, then State may take any steps reasonably necessary to restore the Property. Upon demand by State, Tenant shall pay all costs of any remedial action, including but not limited to the costs of removing and disposing of any material deposited improperly on the Property.
- (e) State's failure to notify Tenant of Tenant's failure to comply with all or any of the restrictions set out in this Subsection 2.2 does not constitute a waiver of any remedies available to State.
- (f) This section shall not in any way limit Tenant's liability under Section 8, below.

**2.3 Conformance with Laws.** Tenant shall, at all times, keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding its use or occupancy of the Property.

**2.4 Liens and Encumbrances.** Tenant shall keep the Property free and clear of any liens and encumbrances arising out of or relating to its use or occupancy of the Property.

## **SECTION 3 TERM**

**3.1 Term Defined.** The term of this Lease is Six (6) years (the "Term"), beginning on the 1<sup>st</sup> day of August, 2007 (the "Commencement Date"), and ending on the 31<sup>st</sup> day of July, 2013 (the "Termination Date"), unless terminated sooner under the terms of this Lease.

**3.2 Renewal of the Lease.** Tenant shall have the option to renew this Lease for One (1) additional term of Four (4) years. The initial Term of this Lease, and all renewal terms, shall not exceed Ten (10) years in the aggregate. Tenant shall exercise this option by providing written notice of its election to renew at least ninety (90) days prior to the Termination Date of the initial Term or any renewal term of this Lease. Tenant shall not be entitled to renew if it is in default under the terms of this Lease at the time the option to renew is exercised. The terms and conditions of any renewal term shall be the same as set forth in this Lease, except that rent shall

be recalculated, the required amounts of financial security may be revised, and provisions dealing with hazardous waste, impacts to natural resources or Plan of Operations/Best Management Practices may be changed at the time of the renewal. Renewal of the Lease by State does not constitute a waiver of any action for breaches under a previous lease or a succession of previous leases.

**3.3 Preference Right to Re-lease** At the expiration of this Lease, Tenant, or an approved assignee, shall have a preference right to re-lease all or part of the Property if the State deems it to be in the best interest of the State to re-lease the Property. Tenant shall not have a preference right to re-lease if it is in default under the terms of this Lease at the time the re-lease application is pending with the State. To exercise its preference-right to re-lease, Tenant should submit its application to re-lease at least ninety (90) days prior to the Termination Date of this Lease. If the State determines a re-lease is appropriate, the State shall fix the terms and conditions upon which the re-lease shall be granted and offer the re-lease to the Tenant. The Tenant shall have ninety (90) days to accept the State's offer of re-lease. If the Tenant rejects the State's offer, the State shall be free to lease the Property to others, subject to the conditions in Section 7.4.

The parties acknowledge that if Tenant elects to terminate this Lease pursuant to one of the provisions of the Lease, or if Tenant chooses not to renew or re-lease upon termination or expiration of this Lease, the Settlement Agreement provides certain tribes (those whose usual and accustomed fishing grounds overlap the Property) with an opportunity to lease the Property. Tenant agrees to execute any documents that may be required to waive any preferential leasing rights, or to issue any consent, that may be necessary to facilitate the issuance of such lease pursuant to the provisions of RCW Title 79.

**3.4 End of Term.**

- (a) Upon the expiration or termination of this Lease, Tenant shall surrender the Property to State in the same or better condition as on the Commencement Date, reasonable wear and tear excepted.
- (b) Definition of Reasonable Wear and Tear.
  - (1) Reasonable wear and tear is defined as deterioration resulting from the intended use of the leasehold that has occurred without neglect, negligence, carelessness, accident, or abuse of the premises by Tenant or any other person on the premises with the permission of Tenant.
  - (2) Reasonable wear and tear shall not include any deposit of rock, earth, ballast, wood waste, refuse, garbage, waste matter (including chemical, biological or toxic wastes), hydrocarbons, any other pollutants, or other matter in or on the Property that State has not expressly approved of in writing regardless of whether the deposit is incidental to or the byproduct of the intended use of the leasehold.
- (c) If Property is in worse condition, excepting for reasonable wear and tear, on the surrender date than on the Commencement Date, the following provisions apply.
  - (1) State shall provide Tenant a reasonable time to take all steps necessary to remedy the condition of the Property. State, at its option, may require

- Tenant to enter into a right-of-entry or other use authorization prior to the Tenant entering the Property to remedy any breach of this Subsection 3.3.
- (2) If Tenant fails to remedy the condition of the Property in a timely manner, then State may take any steps reasonably necessary to remedy Tenant's failure. Upon demand by State, Tenant shall pay all costs of such remedial action, including but not limited to the costs of removing and disposing of any material deposited improperly on the Property, lost rent resulting from the condition of the Property prior to and during remedial action, and any administrative costs associated with the remedial action.

### **3.5 Holdover.**

- (a) If Tenant remains in possession of the Property after the Termination Date, the occupancy shall not be an extension or renewal of the Term. The occupancy shall be a month-to-month tenancy, on terms identical to the terms of this Lease, which may be terminated by either party on thirty (30) days' written notice.
- (1) The monthly rent during the holdover shall be the same rent that would be due if the Lease were still in effect and all adjustments in rent were made in accordance with its terms.
- (2) Payment of more than the monthly rent shall not be construed to create a periodic tenancy longer than month-to-month. If Tenant pays more than the monthly rent and State provides notice to vacate the property, State shall refund the amount of excess payment remaining after the Tenant ceases occupation of the Property.
- (b) If State provides a notice to vacate the Property in anticipation of the termination of this Lease or at any time after the Termination Date and Tenant fails to do so within the time set forth in the notice, then Tenant shall be a trespasser and shall owe the State all amounts due under RCW 79.02.300 or other applicable law.

## **SECTION 4 RENT**

**4.1 Annual Rent.** Until adjusted as set forth below, Tenant shall pay to State an annual rent in the amount of Five Hundred Dollars and 00/100 (\$500.00). The annual rent, as it currently exists or as adjusted or modified (the "Annual Rent"), shall be due and payable in full on or before the Commencement Date and on or before the same date of each year thereafter. In addition to the annual minimum base rent, Tenant shall also pay a production based rent as detailed in Section 4.2, below.

### **4.2 Rent Adjustment**

- (a) **Oyster Inflation Adjustment.** State shall adjust the rent annually according to the change in the Producer Price Index ("PPI") for Oysters (code 2092-224) as published by US Department of Commerce, Bureau of Labor Statistics. The adjustment is calculated by using the annual average adjustment averaged over the preceding five years. If publication of the PPI is discontinued, a reliable

governmental or other non-partisan publication evaluating the information used in determining the PPI shall be used.

(b) **Geoduck Rent Adjustment.**

- (1) **Production Based Rent.** When the Tenant commences harvest of cultured geoduck, Tenant shall pay to State, in addition to the annual minimum base rent, a quarterly Production Based Rent. The Production Based Rent shall be computed as follows: the total quarterly volume of geoduck harvested in pounds multiplied by the current average wholesale price per pound, multiplied by the royalty rate of Ten (10) percent.
- (2) **Quarterly Reports and payment of Production Based Rent.** At the same time Tenant submits its quarterly aquaculture production report to the Washington State Department of Fish and Wildlife, Tenant shall submit a copy of the same report to State along with the Production Based Rent as calculated in Section 4.2(a). The quarterly aquaculture production report must include the poundage or other unit of measure and price received for geoduck harvested and sold. If Tenant makes no sales in any quarter, Tenant shall so report.

**4.3 Payment Place.** Payment is to be made to Financial Management Division, 1111 Washington St SE, PO Box 47041, Olympia, WA 98504-7041.

**4.4 Audit.** State shall be allowed to inspect and audit the books, contracts, and accounts of Tenant to determine whether or not State is being paid the full amount owed to it under this Lease. If the audit discloses that Tenant has underpaid the amount due to State by two percent (2%) or more, Tenant shall pay to State, on demand, the cost of the audit. Any deficiency shall be paid to State within thirty (30) days of delivery of the audit to Tenant.

## **SECTION 5 OTHER EXPENSES**

During the Term, Tenant shall pay the following additional expenses:

**5.1 Utilities.** Tenant shall pay all fees charged for utilities in connection with the use and occupancy of the Property, including but not limited to electricity, water, gas, and telephone service.

**5.2 Taxes and Assessments.** Tenant shall pay all taxes (including leasehold excise taxes), assessments, and other governmental charges, of any kind whatsoever, applicable or attributable to the Property, Tenant's leasehold interest, the improvements, or Tenant's use and enjoyment of the Property.

**5.3 Right to Contest.** Tenant may, in good faith, contest any tax or assessment at its sole cost and expense. At the request of State, Tenant shall furnish reasonable protection in the form of a bond or other security, satisfactory to State, against any loss or liability by reason of such contest.

**5.4 Proof of Payment.** Tenant shall, if required by State, furnish to State receipts or other appropriate evidence establishing the payment of any amounts required to be paid under the terms of this Lease.

**5.5 Failure to Pay.** If Tenant fails to pay any of the amounts due under this Lease, State may pay the amount due, and recover its cost in accordance with the provisions of Section 6.

## **SECTION 6 LATE PAYMENTS AND OTHER CHARGES**

**6.1 Late Charge.** If any rental payment is not received by State within ten (10) days of the date due, Tenant shall pay to State a late charge equal to four percent (4%) of the amount of the payment or Fifty Dollars (\$50), whichever is greater, to defray the overhead expenses of State as a result of the delay.

**6.2 Interest Penalty for Past-Due Rent and Other Sums Owed.**

- (a) If State does not receive rent within thirty (30) days of the date due, then Tenant shall pay interest on the amount outstanding at the rate of one percent (1%) per month until paid, in addition to paying the late charges determined under Subsection 6.1, above.
- (b) If State pays or advances any amounts for or on behalf of Tenant, including but not limited to leasehold taxes, taxes, assessments, insurance premiums, costs of removal and disposal of unauthorized materials pursuant to Subsection 2.2 above, costs of removal and disposal of improvements pursuant to Section 7 below, or other amounts not paid when due, Tenant shall reimburse State for the amount paid or advanced and shall pay interest on that amount at the rate of one percent (1%) per month from the date State notifies Tenant of the payment or advance.

**6.3 No Accord and Satisfaction.** If Tenant pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. In the absence of an election, the payment or receipt shall be applied first to accrued taxes which State has advanced or may be obligated to pay, then to other amounts advanced by State, then to late charges and accrued interest, and then to the earliest rent due. State may accept any payment in any amount without prejudice to State's right to recover the balance of the rent or pursue any other right or remedy. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment shall constitute or be construed as accord and satisfaction.

**6.4 No Counterclaim, Setoff, or Abatement of Rent.** Except as expressly set forth elsewhere in this Lease, rent and all other sums payable by Tenant pursuant to this Lease shall be paid without the requirement that State provide prior notice or demand, and shall not be subject to any counterclaim, setoff, deduction, defense or abatement.

**6.5 Referral to Collection Agency and Collection Agency Fees.** If State does not receive payment within thirty (30) days of the due date, State has discretion to refer the unpaid amount to a collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral,



Tenant shall pay collection agency fees in addition to the unpaid amount. Under RCW 19.16.500, a collection agency fee of up to fifty percent (50%) of the first One Hundred Thousand Dollars (\$100,000) of unpaid debt and up to thirty-five percent (35%) of unpaid debt over One Hundred Thousand Dollars (\$100,000) is reasonable.

## **SECTION 7 IMPROVEMENTS**

### **7.1 Improvements Defined.**

- (a) Improvements. Consistent with RCW 79.105 through 79.145, Improvements are additions within, upon, or attached to the land. This includes, but is not limited to, fill, structures, bulkheads, docks, pilings, and other fixtures.
- (b) Personal Property. Personal property is defined as items that can be removed from the Property without (1) injury to the Property or Improvements or (2) diminishing the value or utility of the Property or Improvements.
- (c) State-Owned Improvements. State-Owned Improvements are Improvements made or owned by State. State-Owned Improvements includes any construction, alteration, or addition to State-Owned Improvements made by Tenant.
- (d) Tenant-Owned Improvements. Tenant-Owned Improvements are Improvements made by Tenant with State's consent or acquired by Tenant from former tenant in accordance with RCW 79.125.300 or 79.130.040.
- (e) Unauthorized Improvements. Unauthorized Improvements are Improvements made on the Property without State's prior consent or Improvements made by Tenant that are not in conformance with plans submitted to and approved by the State.

**7.2 Existing Improvements.** On the Commencement Date, the following Improvements are located on the Property: Boundary Markers, Cultivation Equipment, and Scientific Measurement Instruments. The Improvements are Tenant-Owned Improvements.

### **7.3 Construction, Alteration, Replacement, and Modification.**

- (a) Tenant shall not place, construct, remove, or demolish Improvements without State's prior written consent. State may deny consent if State determines that denial is in the best interests of the State. State's consent is not required for routine maintenance or repair to Improvements made by the Tenant pursuant to its obligation to maintain the Property in good order and repair. Routine maintenance or repair does not include alteration, replacement, removal, or major repair of any Improvements on the Property. Subsection 7.4 shall govern removal of Improvements at end of Lease.
- (b) Prior to any placement, construction, alteration, replacement, removal, or major repair of any Improvements (whether State-Owned or Tenant-Owned), Tenant shall submit to State plans and specifications that describe the proposed activity. If State does not notify Tenant of its grant or denial of consent within sixty (60) days of submittal, State waives the requirement for State's written consent with regards to Tenant's proposed plans or activity.

- (c) Construction shall not commence until Tenant has obtained a performance and payment bond in an amount equal to One Hundred Twenty Five percent (125%) of the estimated cost of construction. The performance and payment bond shall be maintained until the costs of construction, including all laborers and material persons, have been paid in full.
- (d) Upon completion of construction, Tenant shall promptly provide State with as-built plans and specifications.
- (e) State shall not charge rent for authorized Improvements installed by Tenant during this Lease, but State may charge rent for such Improvements when and if the Tenant or successor obtains a subsequent use authorization for the Property and State has waived the requirement for Improvements to be removed as provided in Subsection 7.4.

#### **7.4 Disposition and Removal of Tenant-Owned Improvements at End of Lease.**

- (a) Disposition
  - (1) Tenant shall remove Tenant-Owned Improvements upon the expiration, termination, or cancellation of the Lease unless State waives the requirement for removal.
  - (2) Tenant-Owned Improvements remaining on the Property on the expiration, termination or cancellation date shall become State-Owned Improvements without payment by State, unless State elects otherwise. State may refuse or waive ownership.
  - (3) If Tenant-Owned Improvements remain on the Property after the expiration, termination, or cancellation date without State's actual or deemed consent, Tenant-Owned Improvements, State may remove all Improvements and Tenant shall pay the costs of removal and disposal.
- (b) Conditions Under Which State May Waive Removal of Tenant-Owned Improvements.
  - (1) State has option to waive removal of any or all Tenant-Owned Improvements whenever State determines that it is in the best interests of the State and regardless of whether Tenant re-leases the Property.
  - (2) If Tenant re-leases the Property, State may waive requirement remove Tenant-Owned Improvements. State also may consent to Tenant's continued ownership of Tenant-Owned Improvements.
  - (3) If Tenant does not re-lease the Property, State has option to waive requirement to remove Tenant-Owned Improvements upon consideration of a timely request from Tenant, as follows:
    - (i) Tenant must notify State at least one (1) year before the Termination Date of its request to leave Tenant-Owned Improvements.
    - (ii) State, within ninety (90) days, shall notify Tenant whether State consents to any or all Tenant-Owned Improvements remaining. State has no obligation to grant consent.

- (iii) State's failure to respond to Tenant's request to leave Improvements within ninety (90) days shall be deemed a denial of the request.
- (c) Removal.
  - (1) Tenant shall not remove or demolish Tenant-Owned Improvements without State's prior written consent.
  - (2) At least ninety (90) days prior to planned removal and/or demolition, Tenant shall submit to State plans and specifications that describe the proposed activity. If regulatory permits are required for removal and/or demolition of Improvements, Tenant shall submit plans and specifications at least sixty (60) days before submitting permit applications to the regulatory agencies unless Tenant and State otherwise agree to coordinate permit applications.
  - (3) Within sixty (60) days of receiving Tenant's plans and specifications, State shall notify Tenant that State grants consent for removal and/or demolition as proposed. State may impose additional conditions reasonably intended to protect and preserve the Property. State also may waive removal of any or all Improvements.
  - (4) State's failure to respond to Tenant's submittal within sixty (60) days shall be a waiver of the requirement for State's consent and Tenant may commence with the proposed activity.
- (d) Tenant's Obligations if State Waives Removal.
  - (1) Tenant shall not remove Improvements if State waives the requirement for removal of any or all Tenant-Owned Improvements.
  - (2) Tenant shall maintain such Improvements in accordance with this Lease until the expiration, termination, or cancellation date. Tenant shall be liable to State for cost of repair if Tenant causes or allows damage to Improvements State has designated to remain.

## **7.5 Disposition of Unauthorized Improvements.**

- (a) Unauthorized Improvements shall be the property of State, unless State elects otherwise.
- (b) State, at its option, may either:
  - (1) Consent to Tenant ownership of the Improvements, or
  - (2) Charge rent for use of the Improvements from the time of installation or construction and
    - (i) Require Tenant to remove the Improvements, in which case Tenant shall pay rent for the Improvements until removal,
    - (ii) Consent to Improvements remaining and Tenant shall pay rent for the use of the Improvements, or
    - (iii) Remove Improvements and Tenant shall pay for the cost of removal and disposal, in which case Tenant shall pay rent for use of the Improvements until removal and disposal.

#### **7.6 Disposition of Personal Property.**

- (a) Tenant retains ownership of Personal Property unless Tenant and State agree otherwise in writing.
- (b) Tenant shall remove Personal Property from the Property by the Termination Date. Tenant shall be liable for any and all damage to the Property and any Improvements that may result from removal of Personal Property.
- (c) State, at its option, may sell or dispose of all Personal Property left on the Property after the Termination Date.
  - (1) If State conducts a sale of Personal Property, State shall apply proceeds first to the State's administrative costs in conducting the sale, second to payment of amount that then may be due from the Tenant to the State, and State shall pay the remainder, if any, to the Tenant.
  - (2) If State disposes of Personal Property, Tenant shall pay for the cost of removal and disposal.

**7.8 Payment for Value of Aquaculture Product Left on Leasehold.** All planted geoduck clams resulting from Tenant's aquaculture operation shall be tenant-owned during the term of this Lease. If Tenant leaves planted geoduck clams on the Property at expiration of the Lease, and if DNR subsequently leases the Property within three years of expiration to another person for the purpose of harvesting geoduck clams or conducting further geoduck aquaculture, that new tenant shall pay the Tenant the value of planted geoduck remaining on the Property at the time the new tenant begins its occupancy.

### **SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION**

#### **8.1 Definitions.**

- (a) "Hazardous Substance" means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup, including, but not limited to, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et. seq.*, as amended; Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9601 *et seq.*, as amended; Washington's Model Toxics Control Act ("MTCA"), Chapter 70.105 RCW, as amended; and Washington's Sediment Management Standards, WAC Chapter 173-204.
- (b) "Release or threatened release of Hazardous Substance" means a release or threatened release as defined under any law described in Paragraph 8.1(a) or any similar event defined under any such law.
- (c) "Utmost care" means such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances; the standard of care established under MTCA, RCW 70.105D.040.

## **8.2 General Conditions.**

- (a) Tenant's obligations under this Section 8 extend to the area in, on, under, or above:
  - (1) The Property and
  - (2) Adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances arises from Tenant's use of the Property.
- (b) Standard of Care.
  - (1) Tenant shall exercise the utmost care with respect to Hazardous Substances.
  - (2) Tenant shall exercise utmost care for the foreseeable acts or omissions of third parties affecting Hazardous Substances, and the foreseeable consequences of those acts or omissions, to the extent required to establish a viable, third-party defense under the law, including – but not limited to – RCW 70.105D.040.

## **8.3 Current Conditions, Duty of Utmost Care, and Duty to Investigate.**

- (a) State makes no representation about the condition of the Property. Hazardous Substances may exist in, on, under, or above the Property.
- (b) This Lease does not impose a duty on State to conduct investigations or supply information to Tenant about Hazardous Substances.
- (c) Tenant is responsible for conducting all appropriate inquiry and gathering sufficient information concerning the Property and the existence, scope, and location of any Hazardous Substances on the Property, or adjacent to the Property, that allows Tenant to meet Tenant's obligations under this Lease.

## **8.4 Use of Hazardous Substances.**

- (a) Tenant, its subtenants, contractors, agents, employees, guests, invitees, or affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws.
- (b) Tenant shall not undertake, or allow others to undertake by Tenant's permission, acquiescence, or failure to act, activities that:
  - (1) Result in a release or threatened release of Hazardous Substances, or
  - (2) Cause, contribute to, or exacerbate any contamination exceeding regulatory cleanup standards whether the regulatory authority requires cleanup before, during, or after Tenant's occupancy of the Property.

## **8.5 Management of Contamination.**

- (a) Tenant shall not undertake activities that:
  - (1) Damage or interfere with the operation of remedial or restoration activities;
  - (2) Result in human or environmental exposure to contaminated sediments;
  - (3) Result in the mechanical or chemical disturbance of on-site habitat mitigation.
- (b) If requested, Tenant shall allow reasonable access to:



- (1) Employees and authorized agents of the Environmental Protection Agency, the Washington State Department of Ecology, health department, or other similar environmental agencies; and
- (2) Potentially liable or responsible parties who are the subject of an order or consent decree that requires access to the Property. Tenant may negotiate an access agreement with such parties, but Tenant may not unreasonably withhold such agreement.

#### **8.6 Notification and Reporting.**

- (a) Tenant shall immediately notify State if Tenant becomes aware of any of the following:
  - (1) A release or threatened release of Hazardous Substances;
  - (2) Any new discovery of or new information about a problem or liability related to, or derived from, the presence of any Hazardous Substance;
  - (3) Any lien or action arising from the foregoing;
  - (4) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances;
  - (5) Any notification from the US Environmental Protection Agency (EPA) or the Washington State Department of Ecology (DOE) that remediation or removal of Hazardous Substances is or may be required at the Property.
- (b) Tenant's duty to report under Paragraph 8.6(a) extends to the Property, adjacent state-owned aquatic lands where a release or the presence of Hazardous Substances could arise from the Tenant's use of the Property, and any other property used by Tenant in conjunction with Tenant's use of the Property where a release or the presence of Hazardous Substances on the other property would affect the Property.
- (c) Tenant shall provide State with copies of all documents concerning environmental issues associated with the Property, and submitted by Tenant to any federal, state or local authorities. Documents subject to this requirement include, but are not limited to, applications, reports, studies, or audits for National Pollution Discharge and Elimination System Permits; Army Corps of Engineers permits; State Hydraulic Project Approvals (HPA); State Water Quality certification; Substantial Development permit; and any reporting necessary for the existence, location, and storage of Hazardous Substances on the Property.

#### **8.7 Indemnification.**

- (a) "Liabilities" as used in this Subsection 8.7 means any claims, demands, proceedings, lawsuits, damages, costs, expenses, fees (including attorneys' fees and disbursements), penalties, or judgments.
- (b) Tenant shall fully indemnify, defend, and hold State harmless from and against any liabilities that arise out of, or are related to:
  - (1) The use, storage, generation, processing, transportation, handling, or disposal of any Hazardous Substance by Tenant, its subtenants,

- contractors, agents, invitees, guests, employees, affiliates, **licensees**, or permittees regardless of whether the act occurs before, during, or after the Term of this Lease;
- (2) The release or threatened release of any Hazardous Substance, or the exacerbation of any Hazardous Substance contamination resulting from any act or omission of Tenant, its subtenants, contractors, agents, employees, guests, invitees, or affiliates regardless of whether the release, threatened release, or exacerbation occurs before, during, or after the Term of this Lease.
- (c) Tenant shall fully indemnify, defend, and hold State harmless for any and all liabilities that arise out of or are in any way related to Tenant's breach of obligations under Subsection 8.5.
  - (d) Third Parties.
    - (1) Tenant has no duty to indemnify State for acts or omissions of third parties unless Tenant fails to exercise utmost care with respect to the foreseeable acts or omissions of the third party and the foreseeable consequences of those acts or omissions to the extent required to establish a viable third-party defense under the law, including – but not limited to – RCW 70.105D.040. Tenant's third-party indemnification duty arises under the conditions described in Subparagraph 8.7(d)(2).
    - (2) If an administrative or legal proceeding arising from a release or threatened release of Hazardous Substances finds or holds that Tenant failed to exercise care as described in Subparagraph 8.7(d)(1), Tenant shall fully indemnify, defend, and hold State harmless from and against any liabilities arising from the acts or omissions of third parties in relation to the release or threatened release of Hazardous Substances. This shall include any liabilities arising before the finding or holding in the proceeding.

## **8.8 Reservation of Rights.**

- (a) For any environmental liabilities not covered by the indemnification provisions of Subsection 8.7, the parties expressly reserve and do not waive or relinquish any rights, claims, immunities, causes of action, or defenses relating to the presence, release, or threatened release of Hazardous Substances that either party may have against the other under federal, state, or local laws, including, but not limited to, CERCLA, MTCA, and the common law.
- (b) This Lease affects no right, claim, immunity, or defense either party may have against third parties, and the parties expressly reserve all such rights, claims, immunities, and defenses.
- (c) The provisions under this Section 8 do not benefit, or create rights for, third parties.
- (d) The allocations of risks, liabilities, and responsibilities set forth above do not release either party from, or affect the liability of either party for, claims or actions by federal, state, or local regulatory agencies concerning Hazardous Substances.

## **8.9 Cleanup.**

- (a) If Tenant's act, omission, or breach of obligation under Subsection 8.4 results in a release of Hazardous Substances, Tenant shall, at Tenant's sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substances in accordance with applicable law. Cleanup actions shall include, without limitation, removal, containment, and remedial actions.
- (b) Tenant's obligation to undertake a cleanup under Section 8 shall be limited to those instances where the Hazardous Substances exist in amounts that exceed the threshold limits of any applicable regulatory cleanup standards.
- (c) At the State's discretion, Tenant may undertake a cleanup of the Property pursuant to the Washington State Department of Ecology's Voluntary Cleanup Program, provided that Tenant cooperates with State (DNR) in development of cleanup plans. Tenant shall not proceed with Voluntary Cleanup without State (DNR) approval of final plans. Nothing in the operation of this provision shall be construed as an agreement by State (DNR) that the Voluntary Cleanup complies with any laws or with the provisions of this Lease. Tenant's completion of a Voluntary Cleanup shall not be a release from or waiver of any obligation for Hazardous Substances under this Lease.

## **8.10 Sampling by State, Reimbursement, and Split Samples.**

- (a) State may conduct sampling, tests, audits, surveys, or investigations ("Tests") of the Property at any time to determine the existence, scope, or effects of Hazardous Substances.
- (b) If such Tests, along with any other information, demonstrate the existence, release, or threatened release of Hazardous Substances arising out of any action, inaction, or event described or referred to in Subsection 8.4, above, Tenant shall promptly reimburse State for all costs associated with such Tests.
- (c) State shall not seek reimbursement for any Tests under this Subsection 8.10 unless State provides Tenant written notice of its intent to conduct any Tests at least thirty (30) calendar days prior to undertaking such Tests, except when such Tests are in response to an emergency. Tenant shall reimburse State for Tests performed in response to an emergency if State has provided such notice as is reasonably practical.
- (d) Tenant shall be entitled to obtain split samples of any Test samples obtained by State, but only if Tenant provides State with written notice requesting such samples within twenty (20) calendar days of the date Tenant is deemed to have received notice of State's intent to conduct any non-emergency Tests. Tenant solely shall bear the additional cost, if any, of split samples. Tenant shall reimburse State for any additional costs caused by split sampling within thirty (30) calendar days after State sends Tenant a bill with documentation for such costs.
- (e) Within sixty (60) calendar days of a written request (unless otherwise required pursuant to Paragraph 8.6(c), above), either party to this Lease shall provide the other party with validated final data, quality assurance/quality control information,

and chain of custody information, associated with any Tests of the Property performed by or on behalf of State or Tenant. There is no obligation to provide any analytical summaries or expert opinion work product.

## **SECTION 9 ASSIGNMENT AND SUBLETTING**

**9.1 State Consent Required.** Tenant shall not sell, convey, mortgage, assign, pledge, sublet, or otherwise transfer or encumber all or any part of Tenant's interest in this Lease or the Property without State's prior written consent, which shall not be unreasonably conditioned or withheld.

- (a) In determining whether to consent, State may consider, among other items, the proposed transferee's financial condition, business reputation and experience, the nature of the proposed transferee's business, the then-current value of the Property, and such other factors as may reasonably bear upon the suitability of the transferee as a tenant of the Property. Tenant shall submit information regarding any proposed transferee to State at least thirty (30) days prior to the date of the proposed transfer.
- (b) State reserves the right to condition its consent upon (1) changes in the terms and conditions of this Lease, including the Annual Rent and other terms; and/or (2) the agreement of Tenant or transferee to conduct Tests for hazardous substances on the Property or on other property owned or occupied by Tenant or the transferee.
- (c) Each permitted transferee shall assume all obligations under this Lease, including the payment of rent. No assignment, sublet, or transfer shall release, discharge, or otherwise affect the liability of Tenant.
- (d) State's consent under this Subsection 9.1 does not constitute a waiver of any claims against Tenant for the violation of any term of this Lease.

**9.2 Rent Payments Following Assignment.** The acceptance by State of the payment of rent following an assignment or other transfer shall not constitute consent to any assignment or transfer.

### **9.3 Terms of Subleases.**

- (a) Tenant shall submit the terms of all subleases to State for approval.
- (b) All subleases shall meet the following requirements:
  - (1) The sublease shall be consistent with and subject to all the terms and conditions of this Lease;
  - (2) The sublease shall confirm that this Lease shall control if the terms of the sublease conflict with the terms of this Lease;
  - (3) The term of the sublease (including any period of time covered by a renewal option) shall end before the Termination Date of the initial Term or any renewal term;
  - (4) The sublease shall terminate if this Lease terminates, whether upon expiration of the Term, failure to exercise an option to renew, cancellation by State, surrender, or for any other reason;

- (5) The subtenant shall receive and acknowledge receipt of a copy of this Lease;
- (6) The sublease shall prohibit the prepayment to Tenant by the subtenant of more than the annual rent;
- (7) The sublease shall identify the rental amount to be paid to Tenant by the subtenant;
- (8) The sublease shall confirm that there is no privity of contract between the subtenant and State;
- (9) The sublease shall require removal of the subtenant's Improvements and trade fixtures upon termination of the sublease;
- (10) The subtenant's permitted use shall be within the Permitted Use authorized by this Lease; and
- (11) The sublease shall require the subtenant to meet all obligations of Tenant under Section 10, Indemnification and Insurance.

**9.4 Event of Assignment.** If Tenant is a corporation, a dissolution of the corporation or a transfer (by one or more transactions) of a majority of the voting stock of Tenant shall be deemed to be an assignment of this Lease. If Tenant is a partnership, a dissolution of the partnership or a transfer (by one or more transactions) of the controlling interest in Tenant shall be deemed an assignment of this Lease.

## **SECTION 10 INDEMNITY, FINANCIAL SECURITY, INSURANCE**

### **10.1 Indemnity.**

- (a) Tenant shall indemnify, defend, and hold State, its employees, officers, and agents harmless from any and all claims arising out of the use, occupation, or control of the Property by Tenant, its subtenants, contractors, agents, invitees, guests, employees, affiliates, licensees, or permittees.
- (b) "Claim" as used in this Subsection 10.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys' fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. "Damages to tangible property" includes, but is not limited to, physical injury to the Property and damages resulting from loss of use of the Property.
- (c) State shall not require Tenant to indemnify, defend, and hold State harmless for claims that arise solely out of the willful or negligent act of State or State's elected officials, employees, or agents.
- (d) Tenant waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless.
- (e) Section 8, Environmental Liability/Risk Allocation, exclusively shall govern Tenant's liability to State for Hazardous Substances and its obligation to indemnify, defend, and hold State harmless for Hazardous Substances.



## **10.2 Insurance Terms.**

- (a) Insurance Required.
  - (1) At its own expense, Tenant shall procure and maintain during the Term of this Lease, the insurance coverages and limits described in this Subsection 10.2 and in Subsection 10.3, Insurance Types and Limits. Failure to maintain the required insurance may result in termination of this Lease at the State's option.
  - (2) All insurance should be issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. State's risk manager shall review and approve any exception before acceptance by State. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies shall comply with Chapter 48.15 RCW and 284-15 WAC.
  - (3) The State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees shall be named as an additional insured on all general liability, excess, umbrella, property, builder's risk, and pollution legal liability insurance policies.
  - (4) All insurance provided in compliance with this Lease shall be primary as to any other insurance or self-insurance programs afforded to or maintained by State.
- (b) Waiver.
  - (1) Tenant waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Lease covers these damages.
  - (2) Except as prohibited by law, Tenant waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this lease.
- (c) Proof of Insurance.
  - (1) Tenant shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this Lease and, if requested, copies of policies to State.
  - (2) The certificate(s) of insurance shall reference additional insureds and the Lease number.
  - (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.
- (d) State shall be provided written notice before cancellation or non-renewal of any insurance required by this Lease, in accordance with the following:
  - (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, State shall be given ten (10) days' advance notice of cancellation; otherwise, State shall be provided forty-five (45) days' advance notice of cancellation or non-renewal.

- (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, State shall be given ten (10) days' advance notice of cancellation; otherwise, State shall be provided forty-five (45) days' advance notice of cancellation or non-renewal.
- (e) Adjustments in Insurance Coverage.
  - (1) State may impose changes in the limits of liability for all types of insurance as it deems necessary.
  - (2) New or modified insurance coverage shall be in place within thirty (30) days after State requires changes in the limits of liability.
- (f) If Tenant fails to procure and maintain the insurance described above within fifteen (15) days after Tenant receives a notice to comply from State, at its option, State shall either:
  - (1) Deem the failure an Event of Default under Section 14, or
  - (2) State shall have the right to procure and maintain comparable substitute insurance and to pay the premiums. Upon demand, Tenant shall pay to State the full amount paid by State, together with interest at the rate provided in Subsection 6.2 from the date of State's notice of the expenditure until Tenant's repayment.
- (g) General Terms.
  - (1) State does not represent that coverage and limits required under this Lease will be adequate to protect Tenant.
  - (2) Coverage and limits shall not limit Tenant's liability for indemnification and reimbursements granted to State under this Lease.
  - (3) Any insurance proceeds payable by reason of damage or destruction to property shall be first used to restore the real property covered by this Lease, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Tenant.

### **10.3 Insurance Types and Limits.**

- (a) General Liability Insurance.
  - (1) Tenant shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Property and/or arising out of Tenant's use, occupation, or control of the Property and, if necessary, commercial umbrella insurance with a limit of not less than One Million Dollars (\$1,000,000) per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit shall be at least twice the "each occurrence" limit. CGL or MGL insurance shall have products-completed operations aggregate limit of at least two times the "each occurrence" limit.
  - (2) CGL insurance shall be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance shall cover liability arising out of premises, operations, independent contractors, products completed operations,

- personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract) and contains separation of insured (cross-liability) condition.
- (3) MGL insurance shall have no exclusions for non-owned watercraft.
- (b) Workers' Compensation.
- (1) State of Washington Workers' Compensation.
    - (i) Tenant shall comply with all State of Washington workers' compensation statutes and regulations. Workers' compensation coverage shall be provided for all employees of Tenant. Coverage shall include bodily injury (including death) by accident or disease, which arises out of or in connection with Tenant's use, occupation, and control of the Property.
    - (ii) If Tenant fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Tenant shall indemnify State. Indemnity shall include all fines; payment of benefits to Tenant, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
  - (2) Longshore and Harbor Worker's Act. Certain work or services under this Lease may require insurance coverage for longshore and harbor workers other than seaman as provided in the Longshore and Harbor Worker's Compensation Act (33 U.S.C. Section 901 *et. seq.*). Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Tenant is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Tenant is responsible for all civil and criminal liability arising from failure to maintain such coverage.
  - (3) Jones Act. Certain work or services under this Lease may require insurance coverage for seamen injured during employment resulting from negligence of the owner, master, or fellow crew members as provided in 46 U.S.C. Section 688. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Tenant is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Tenant is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (c) Employer's Liability Insurance. Tenant shall procure employer's liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than One Million Dollars (\$1,000,000) each accident for bodily injury by accident or One Million Dollars (\$1,000,000) each employee for bodily injury by disease.

#### **10.4 Financial Security.**

- (a) At its own expense, Tenant shall procure and maintain during the Term of this Lease a corporate security bond or provide other financial security that State, at its option, may approve ("Security"). The Security shall be in an amount equal to Zero Dollars (\$0.00), which is consistent with RCW 79.105.330, and shall secure Tenant's performance of its obligations under this Lease, with the exception of the obligations under Section 8, Environmental Liability/Risk Allocation. Tenant's failure to maintain the Security in the required amount in force at all times during the Term of this Lease shall constitute a breach of this Lease.
- (b) All Security shall be in a form acceptable to the State.
  - (1) Bonds should be issued by companies admitted to do business within the State of Washington and have a rating of A-, Class VII or better, in the most recently published edition of Best's Reports. State's risk manager shall review and approve any exception before acceptance by State.
  - (2) Letters of credit, if approved by State, shall be irrevocable, allow State to draw funds at will, provide for automatic renewal, and comply with RCW 62A.5-101, *et. seq.*
  - (3) Savings account assignments, if approved by State, shall allow State to draw funds at will.
- (c) Adjustment in Amount of Security.
  - (1) State may require an adjustment in the amount of Security:
    - (i) At the same time as revaluation or adjustment of the Rent,
    - (ii) As a condition of approval of assignment or sublease of this Lease,
    - (iii) Upon a material change in the condition of any Improvements, or
    - (iv) Upon a change in the Permitted Use.
  - (2) Tenant shall deliver a new or modified form of Security to State within thirty (30) days after State has required adjustment of the amount of the Security.
- (d) Upon any default by Tenant in its obligations under this Lease, State may collect on the Security to offset the liability of Tenant to State. Collection on the Security shall not relieve Tenant of liability, shall not limit any of State's other remedies, and shall not reinstate or cure the default or prevent termination of the Lease because of the default.

### **SECTION 11 MAINTENANCE AND REPAIR**

**11.1 State's Repairs.** This Lease does not obligate State to make any alterations, maintenance, replacements, or repairs in, on, or about the Property, or any part thereof, during the Term.

#### **11.2 Tenant's Repairs, Alteration, Maintenance and Replacement.**

- (a) Tenant shall, at its sole cost and expense, keep and maintain the Property and all Improvements (regardless of ownership) in good order and repair, in a clean,

attractive, and safe condition. Tenant's obligations under this Subsection 11.2 shall be in addition to Tenant's obligations under Subsections 2.2 and 3.3 of this Lease.

- (b) Tenant shall, at its sole cost and expense, make any and all additions, repairs, alterations, maintenance, replacements, or changes to the Property or to any Improvements on the Property which may be required by any public authority.
- (c) Tenant shall make all additions, repairs, alterations, replacements, or changes to the Property and to any Improvements on the Property in accordance with Section 7, Improvements, above. Section 7 shall govern ownership.

## **SECTION 12 DAMAGE OR DESTRUCTION**

### **12.1 Notice and Repair.**

- (a) In the event of any damage to or destruction of the Property or any Improvements, Tenant shall promptly give written notice to State. Unless otherwise agreed in writing, Tenant shall promptly reconstruct, repair, or replace the Property and any Improvements as nearly as possible to its condition immediately prior to the damage or destruction.
- (b) State shall not be deemed to have actual knowledge of the damage or destruction of the Property or any Improvements without Tenant's written notice.

**12.2 State's Waiver of Claim.** State does not waive any claims for damage or destruction of the Property unless State provides written notice to Tenant of each claim waived. No claim is waived unless State waives with specificity.

**12.3 Insurance Proceeds.** Tenant's duty to reconstruct, repair, or replace any damage or destruction of the Property or any Improvements on the Property shall not be conditioned upon the availability of any insurance proceeds to Tenant from which the cost of repairs may be paid. The parties shall use insurance proceeds in accordance with Subparagraph 10.2(g)(3).

**12.4 Rent in the Event of Damage or Destruction.** Unless this Lease is terminated by mutual agreement, there shall be no abatement or reduction in rent during such reconstruction, repair, and replacement.

**12.5 Default at the Time of Damage or Destruction.** In the event Tenant is in default under the terms of this Lease at the time damage or destruction occurs, State may elect to terminate the Lease and State shall then have the right to retain any and all insurance proceeds payable as a result of the damage or destruction.

## **SECTION 13 CONDEMNATION**

### **13.1 Definitions.**



- (a) **Taking.** The term “taking,” as used in this Lease, means that an entity authorized by law exercises the power of eminent domain, either by judgment or settlement in lieu of judgment, over all or any portion of the Property and any Improvements. Taking includes any exercise of eminent domain on any portion of the Property and Improvements that, in the judgment of the State, prevents or renders impractical the Permitted Use. A total taking occurs when the entire Property is taken. A partial taking occurs when the taking does not constitute a total taking as defined above.
- (b) **Voluntary Conveyance.** The terms “total taking” and “partial taking” shall include a voluntary conveyance, in lieu of formal court proceedings, to any agency, authority, public utility, person, or corporate entity empowered to condemn property.
- (c) **Date of Taking.** The term “date of taking” shall mean the date upon which title to the Property or a portion of the Property passes to and vests in the condemnor or the effective date of any order for possession if issued prior to the date title vests in the condemnor.

**13.2 Effect of Taking.** If during the Term there shall be a total taking, the leasehold estate of Tenant in the Property shall terminate as of the date of taking. If this Lease is terminated, in whole or in part, all rentals and other charges payable by Tenant to State and attributable to the Property taken shall be paid by Tenant up to the date of taking. If Tenant has pre-paid rent, Tenant will be entitled to a refund of the pro rata share of the pre-paid rent attributable to the period after the date of taking. In the event of a partial taking, there shall be a partial abatement of rent from the date of taking in a percentage equal to the percentage of Property taken.

**13.3 Allocation of Award.**

- (a) In the event of any condemnation, the award shall be allocated between State and Tenant based upon the ratio of the fair market value of (1) Tenant’s leasehold estate and Tenant-Owned Improvements on the Property and (2) State’s interest in the Property; the reversionary interest in Tenant-Owned Improvements, if any; and State-Owned Improvements.
- (b) In the event of a partial taking, this ratio will be computed on the basis of the portion of Property or Improvements taken.
- (c) If Tenant and State are unable to agree on the allocation, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.

**SECTION 14 DEFAULT AND REMEDIES**

**14.1 Default Defined.** Tenant shall be in default of this Lease on the occurrence of any of the following:

- (a) Failure to pay Annual Rent or other expenses when due;
- (b) Failure to comply with any law, regulation, policy, or order of any lawful governmental authority;
- (c) Failure to comply with any other provision of this Lease;

- (d) Proceedings are commenced by or against Tenant under any bankruptcy act or for the appointment of a trustee or receiver of Tenant's property.

#### **14.2 Tenant's Right to Cure.**

- (a) A default shall become an event of default ("Event of Default") if Tenant fails to cure the default within the applicable cure period after State provides Tenant with written notice of default, which specifies the nature of the default.
- (b) The cure period shall be ten (10) days for failure to pay rent or other monetary defaults; for other defaults, the cure period shall be thirty (30) days.
- (c) State may elect to deem a default by Tenant as an Event of Default if the default occurs within six (6) months after a default by Tenant for which State has provided notice and opportunity to cure. This Paragraph 14.2 is effective regardless of whether the first and subsequent defaults are of the same nature.

#### **14.3 Remedies.**

- (a) Upon an Event of Default, State may terminate this Lease and remove Tenant by summary proceedings or otherwise.
- (b) Without terminating this Lease, State may also relet the Property on any terms and conditions as State in its sole discretion may decide are appropriate.
  - (1) If State elects to relet, rent received by it shall be applied: (1) to the payment of any indebtedness other than rent due from Tenant to State; (2) to the payment of any cost of such reletting; (3) to the payment of the cost of any alterations and repairs to the Property; and (4) to the payment of rent and leasehold excise tax due and unpaid under this Lease. State shall hold and apply any balance to Tenant's future rent as it becomes due.
  - (2) Tenant shall be responsible for any deficiency created by the reletting during any month and shall pay the deficiency monthly.
  - (3) At any time after reletting, State may elect to terminate this Lease for the previous Event of Default.
- (c) State's reentry or repossession of the Property under Paragraph 14.3(b) shall not be construed as an election to terminate this Lease or cause a forfeiture of rents or other charges to be paid during the balance of the Term, unless State gives a written notice of termination to Tenant or termination is decreed by legal proceedings.

### **SECTION 15 ENTRY BY STATE**

State shall have the right to enter the Property at any reasonable hour to inspect for compliance with the terms of this Lease. State's failure to inspect the Property shall not constitute a waiver of any rights or remedies under this Lease.

### **SECTION 16 DISCLAIMER OF QUIET ENJOYMENT**

**16.1 No Guaranty or Warranty.**

- (a) State believes that this Lease is consistent with the Public Trust Doctrine and that none of the third-party interests identified in Paragraph 1.1(b) will materially or adversely affect Tenant's right of possession and use of the Property, but State makes no guaranty or warranty to that effect.
- (b) State disclaims and Tenant releases State from any claim for breach of any implied covenant of quiet enjoyment. This disclaimer and release includes, but is not limited to, interference arising from exercise of rights under the Public Trust Doctrine; Treaty rights held by Indian Tribes; and the general power and authority of State and the United States with respect to aquatic lands and navigable waters.
- (c) Tenant shall be responsible for determining the extent of its right to possession and for defending its leasehold interest.

**16.2 In the Event of Eviction by Third Party.** In the event Tenant is evicted from the Property by reason of successful assertion of any of the rights of any third party, this Lease shall terminate as of the date of the eviction. In the event of a partial eviction, Tenant's rent obligations shall abate as of the date of the partial eviction, in direct proportion to the extent of the eviction, but in all other respects, this Lease shall remain in full force and effect.

**SECTION 17 NOTICE**

Any notices required or permitted under this Lease may be personally delivered, delivered by facsimile machine, or mailed by certified mail, return receipt requested, to the following addresses or to such other places as the parties may direct in writing from time to time:

State: DEPARTMENT OF NATURAL RESOURCES  
919 N Township St.  
Sedro Woolley, WA 98284

Tenant: JAMESTOWN S'KLALLAM TRIBE  
1033 Old Blyn Highway  
Sequim, WA 98382

A notice shall be deemed given and delivered upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after being mailed as set forth above, whichever is applicable. All notices must identify the lease number to which the notice pertains. Notices transmitted by facsimile machine shall state the number of pages contained in the notice, including the transmittal page, if any.

**SECTION 18 MISCELLANEOUS**

**18.1 Authority.** Tenant and the person or persons executing this Lease on behalf of Tenant represent that Tenant is qualified to do business in the State of Washington, that Tenant has full

right and authority to enter into this Lease, and that each and every person signing on behalf of Tenant is authorized to do so. Upon State's request, Tenant will provide evidence satisfactory to State confirming these representations. This Lease is entered into by State pursuant to the authority granted it in Chapters 79.105 to 79.140 RCW and the Constitution of the State of Washington.

**18.2 Successors and Assigns.** This Lease shall be binding upon and inure to the benefit of the parties, their successors and assigns.

**18.3 Headings.** The headings used in this Lease are for convenience only and in no way define, limit, or extend the scope of this Lease or the intent of any provision.

**18.4 Entire Agreement.** This Lease, including the exhibits and addenda, if any, contains the entire agreement of the parties. All prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Property, if any, are merged into this Lease.

**18.5 Waiver.**

- (a) The waiver by State of any breach or default of any term, covenant, or condition of this Lease shall not be deemed a waiver of such term, covenant, or condition; of any subsequent breach or default of the same; or of any other term, covenant, or condition of this Lease. State's acceptance of a rental payment shall not be construed to be a waiver of any preceding or existing breach other than the failure to pay the particular rental payment that was accepted.
- (b) The renewal of the Lease, extension of the Lease, or the issuance of a new lease to Tenant, shall not constitute waiver of State's ability to pursue any rights or remedies under the Lease.

**18.6 Cumulative Remedies.** The rights and remedies of State under this Lease are cumulative and in addition to all other rights and remedies afforded to State by law or equity or otherwise.

**18.7 Time is of the Essence.** TIME IS OF THE ESSENCE as to each and every provision of this Lease.

**18.8 Language.** The word "Tenant" as used in this Lease shall be applicable to one or more persons, as the case may be. The singular shall include the plural, and the neuter shall include the masculine and feminine. If there is more than one Tenant, their obligations shall be joint and several. The word "persons," whenever used, shall include individuals, firms, associations, and corporations.

**18.9 Invalidity.** If any provision of this Lease shall prove to be invalid, void, or illegal, it shall in no way affect, impair, or invalidate any other provision of this Lease.

**18.10 Applicable Law and Venue.** This Lease shall be interpreted and construed in accordance with the laws of the State of Washington. Any reference to a statute shall mean that statute as presently enacted or hereafter amended or superseded. Venue for any action arising out of or in connection with this Lease shall be in the Superior Court for Thurston County, Washington.

**18.11 Recordation.** Tenant shall record this Lease or a memorandum documenting the existence of this Lease in the county in which the Property is located, at Tenant's sole expense. The memorandum shall, at a minimum, contain the Property description, the names of the parties to the Lease, the State's lease number, and the duration of the Lease. Tenant shall provide State with recording information, including the date of recordation and file number. Tenant shall have thirty (30) days from the date of delivery of the final executed agreement to comply with the requirements of this Subsection. If Tenant fails to record this Lease, State may record it and Tenant shall pay the costs of recording upon State's demand.

**18.12 Modification.** Any modification of this Lease must be in writing and signed by the parties. State shall not be bound by any oral representations or statements.

**18.13 Survival.** Any obligations of Tenant which are not fully performed upon termination of this Lease shall not cease, but shall continue as obligations until fully performed.

THIS AGREEMENT requires the signature of all parties and is executed as of the date of the last signature below.

JAMESTOWN S'KLALLAM TRIBE,  
a government entity

Dated: 10/15/07

By:   
W. RON ALLEN

Title: Jamestown S'Klallam Tribal Chariman  
Address: 1033 Old Blyn Highway  
Sequim, WA 98382

Dated: 10/24/07

By:   
DAVID ROBERTS

STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES

Title: Aquatic Lands Assistant Region Manager  
Address: 919 N Township St  
Sedro Woolley, WA 98284

Approved as to Form in June, 2006  
by Janis L. Snoey  
Assistant Attorney General  
State of Washington

REPRESENTATIVE ACKNOWLEDGMENT

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF Challam )

I certify that I know or have satisfactory evidence that W. RON ALLEN is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Tribal Chairman of Jamestown S'Klallam Tribe to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: October 15, 2007



Susan Ann Stark  
(Signature)

Susan Ann Stark  
(Print Name)

Notary Public in and for the State of Washington,  
residing at Sequim, Washington

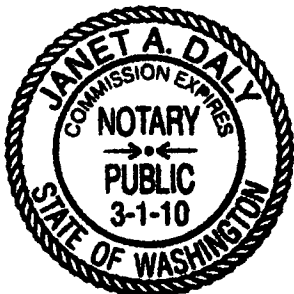
My appointment expires November 30, 2009

STATE ACKNOWLEDGMENT  
(Region Manager)

STATE OF WASHINGTON )  
 ) ss  
County of SRAgit )

I certify that I know or have satisfactory evidence that DAVID ROBERTS is the person who appeared before me, and said person acknowledged that she signed this instrument, on oath stated that she was authorized to execute the instrument and acknowledged it as the Aquatic Lands Assistant Region Manager of the Department of Natural Resources, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated: 10-24-07



Janet A. Daly  
(Signature)

Janet A. Daly  
(Print Name)

Notary Public in and for the State of Washington,  
residing at Burlington

My appointment expires 3-1-2010



# Exhibit A





**EXHIBIT "B"**  
**Plan of Operations**  
**Jamestown S'Klallam Tribe**  
**Oyster and Geoduck Aquaculture Lease No. 20-A013012**  
**Dungeness Bay**  
**July 14, 2007**

**Site Description:** The lease area is located on second class tidelands owned by the State of Washington, in front of and adjacent to, or abutting upon the southeasterly side of Government Lots 1, 2 and 3, Section 23, Township 31 North, range 4 West, WM. Clallam County, Washington comprising +/- 52 acres. The area is in the northern part of the bay and encompasses a rather narrow band of land that lies parallel and near the south side of the spit. The lease area is located within the boundaries of the Dungeness National Wildlife Refuge.

**Condition of Site at Present:**

**Flora and Fauna:**

The Dungeness NWR provides habitat for many wildlife species. More than 250 species of birds, 41 species of land mammals, and eight species of marine mammals have been recorded in the refuge. It provides critical habitat for a number of these species, some of them threatened or endangered, and is an important stop for many migratory birds.

The Black Brant, which depends on the refuge's eelgrass for its survival, is one of the refuge's most important inhabitants. The black brant is a true sea goose and is able to drink salt water and eat saltwater plants. Approximately 1,500 of these birds spend the winter in the area. In March, as a result of migrations, the number of brant increases to a peak of up to 8,000 birds in late April. Most of the brant can be found on the tideflats to the west and east of Graveyard spit.

At risk birds using Dungeness Bay include the bald eagle, western snowy plover, peregrine falcon, harlequin duck, and marbled murrelet. Other more common species that can be seen are pigeon guillemots, common murre, buffleheads, black oystercatchers, surf scoters, and northern shovelers.

Harbor seals are common in the bay, and can often be found hauled out on the beaches.

Dungeness Harbor is an important nursery habitat for a variety of types of fish, including anadromous salmonids such as pink, Chinook, coho, and chum salmon. It is especially important for the dwindling wild population of Dungeness River pink salmon. The eelgrass beds and shoreline provide escape cover for juvenile salmon. Other fish that use the harbor as a rearing area include: steelhead, cutthroat, lingcod, and Dolly Varden.

Littleneck and manila clams occur along the inside of Dungeness Spit. Other species occur in the upper portions of Dungeness Harbor. Dungeness Crab are found throughout the harbor area, east of Graveyard Spit and along the outside of Dungeness Spit.

Eel grass plants in loose clumps inhabit the lease area. There are no dense, continuous eelgrass beds in the lease area. During the summer months, sea lettuce becomes thick in some areas reducing visibility to the sand/mud bottom and has hampered commercial oyster harvest in past years.

**Brief Description on Area and Sediments:** Most of the refuge acreage is on the spits which are characterized by sand and cobble beaches surrounded by tidal mudflats and eelgrass beds. There are also two tidal ponds, a large one at the junction of the two spits and a smaller one about 1/2 mile east of Graveyard Spit on the Bay side of Dungeness Spit. Graveyard Spit is closed to the public and set aside as a Research Natural Area because of its unique vegetation. The tideflats within the lease area are composed of mud and fine sand sediments that are 1-2 feet in depth.

**Upland, Uses, and Ownership:** The leased tidelands are within the boundaries of the USFW Dungeness Wildlife Refuge, which provides critical habitat for wildlife and allows seasonal and limited recreational activities. The U. S. Fish and Wildlife (USFW) retains a use deed with DNR for tidelands in the bay and has consultation rights for any activity that occurs on tidelands included in the use deed.

**Survey:**

An updated survey will be provided to DNR from the Lessee by September 1, 2007.

**Access to Site:** Foot access to the tideland lease is possible via the Dungeness spit, however, because the distance to between the lease and parking is several miles, motorized boats will be used to access the lease.

**Past Uses:** In 1990, the Jamestown Tribe assumed the Dungeness Bay tideland leases previously held by commercial shellfish growers who maintained a lease with the Department of Natural Resources. The Jamestown Tribe has paid commercial lease rates, farmed and sold pacific oysters, and experimented with other types of oysters, clam and geoducks. The Tribe's commercial shellfish business was recently closed by economic infeasibility, health closures that affected the timing of harvest, increased costs associated with processing oysters that were marred by Denman's Island disease. Additionally, increases seasonal growth of sea lettuce during the summer complicated harvest operations and shortened harvest seasons. Subsequently, some 60, 000 stakes and related netting and lines used in the commercial cultivation were removed from the leased tidelands.

**Description of Uses Adjacent to the Site:** None

**Permits Required by the County:** None required

**Licenses/Certification:** DOH Shellfish License WA-0588-HA

## **Overview of Operations**

The goal of the continued cultivation of shellfish for the near future on this lease will be to assist in assessment and monitoring of the health and productivity of Dungeness Bay. The existence and productivity of shellfish are considered an indicator of clean water and a healthy ecosystem in the Straits of Juan de Fuca and adjacent waters. It is expected that the Washington State Dept of Health (DOH) will continue to test water quality in the bay for shellfish cultivation. The Tribe plans to implement an off-bottom oyster operation on the lease with the use of Aquapurses (See attached map). A two year grow out period is required for off-bottom culture. We will plant diploid oysters, which will reach harvestable size in two years, and triploid oysters which will be harvested at the end of one year. Although triploids can be harvested sooner, diploid oysters are more resilient than triploids in warm conditions. The culture area will encompass approximately 100x100 foot plot, roughly equivalent to one quarter acre within the lease area. It will entail using no more than three dozen metal fence posts, rope, and 60 aqua-purses. The size, location, and culture methods used to grow oysters will be discussed and approved by DNR and USFW prior to establishment. The Tribe will strive to recognize and plan work in the Bay from May 15 through July 30 when cultivation activities will be least disruptive to use of the Bay by Brant and other waterfowl. The Tribe will confer with USFW before conducting activities on the lease outside this window.

A small test plot of geoducks was planted in 1997 (about 50 x 100 feet) (see map). Since planting, the predator protection tubes have been removed. A small sample of geoducks will be harvested on a periodicity to observe the quality and size of the animals. Any plan to increase or change the number and cultivation of geoduck will be discussed and approved by the DNR and USFW prior to proceeding.

**PAYMENT SCHEDULE**  
**Jamestown S'Klallam Tribe**  
**Oyster and Geoduck Aquaculture Lease No. 20-A013012**  
**Dungeness Bay**  
**July 14, 2007**

### **Base Rate:**

Due to the experimental /operational nature of this lease, a base rate of \$10.00/ acre will be charged annually. \$10/acre times the number of acres (currently estimated to be 50 acres). Total \$500.00. The annual rent may be adjusted when a survey is completed and may increase or decrease dependent upon the number of acres reflected in the survey.

### **Remaining Cultivated Oysters:**

Any remaining oysters harvested from previous off ground cultivation will continue to be charged \$2.00/bushel until harvest is completed (expected in the next 1-2 seasons).

- 137 oysters/gal/bushel
- 11.5 dozen oysters in a bushel
- A billing will accompany the contract when it goes out for signature.

The billing will cover harvest for 2005 and for 2007 (until July 15). There was no harvest of oysters in 2006.

2005: 4,342 gall x \$2/bushel/gallon=\$8,684 plus \$746.82 (tax@ 8.6%production based LHT) = \$9430.82

2007: 1,504 gall x \$2/bushel/gallon=\$3,008 plus \$258.69 (tax@ 8.6% production based LHT) = \$3,266.69

**Aquaculture Rents will be production based rent:** It is currently anticipated that oyster and geoduck production will be experimental in nature for research/bay health monitoring. It is expected that a very small portion of the leased area will be encumbered at any time with anticipated low yields and limited quantities of oysters or geoduck. If the use moves to commercial production or products are sold, the price will be calculated using the following formulas:

If the oysters are sold commercially, the following calculation will be used to determine payment to the Department for the State's share of value: Total Annual Production in Gallons x \$2 bushel/gallon plus Lease Hold Tax.

**Off ground Culture:**

The annual rent will be calculated by multiplying:

Number of acres times the applicable off ground culture rate per acre per year = annual rent.

\*the rate for off ground culture was established by DNR with the input from the PCSGA and WDFW effective July 1989 and adjusted by the inflation rate (OPI) effective July 1<sup>st</sup> of each year.

**Floating Culture:**

Floating culture rent will be negotiated. The per acre per year rate, which was effective July 1989 and adjusted by the inflation rate (OPI) effective July 1<sup>st</sup> of each year, is the minimum rate to be charged for floating culture.

Number of acres times the floating culture rate for July 1-June 30 of the harvest year) = minimum annual rent.

**Geoduck:**

A small plot of geoduck was established for study purposes in 1997. If these are harvested for commercial purposes, they will be assessed at a rate of 10% of the wholesale price. Wholesale price per pound will be determined at the time of harvest.