

Preliminary Agreement  
Between  
The Lower Elwha Klallam Tribe and  
State of Washington Department of Ecology

THIS AGREEMENT is made and entered into by and between the Washington State Department of Ecology, hereinafter referred to as "Ecology," and the Lower Elwha Klallam Tribe, hereinafter referred to as "the Tribe. " The Environmental Protection Agency, Region 10, has recommended that the Rayonier Mill site be placed on the National Priority List for cleanup as a Superfund site. This recommendation is based, in part, on the EPA's federal trust responsibility to the Tribe, which has important cultural, historical, and natural resources at and in the area affected by releases from the mill site. Ecology has suggested that EPA not list the site in favor of a cleanup under state law. The Tribe has indicated that it will support deferral of NPL listing if it receives satisfactory assurance of sufficient resources for substantive Tribal participation and oversight of the project to ensure the Tribe's cultural and historical resources; commercial, ceremonial and subsistence fisheries; economic security; health and welfare; and such other governmental interests as may be affected by releases in the vicinity of the mill site are restored and protected from further physical or chemical damage. It is the purpose of this agreement to state the general undertakings of Ecology and the Tribe in arriving at those assurances.

THEREFORE, IT IS MUTUALLY AGREED THAT:

1. Cleanup of the Rayonier Mill Site shall be accomplished under Washington State Model Toxics Control Act (MTCA) procedures, consistent with other applicable law. The Tribe maintains its right to seek cleanup under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other applicable law if it determines that MTCA procedures will not restore and protect its governmental interests.
2. Ecology is the lead regulatory agency for implementation of the Model Toxics Control Act.
3. The Tribe has critical concerns regarding burials, traditional cultural properties,

and archaeological resources (cultural resources) at the mill site.

4. The Tribe has a strong governmental responsibility to safeguard the health of its member's families and protect them and others from releases of hazardous substances at the site through the aquatic food chain into crab, bottom fish, anadromous fish, and shellfish fisheries, and through direct contact during activities relating to cultural resources at the mill site. The Tribe also has a strong governmental interest in protection of the natural resources at the mill site, including habitat and populations of bottom fish, anadromous fish, and shellfish.
5. Ecology and the Tribe will require the following conditions. These conditions shall be included in agreements or orders for investigation and cleanup
  - a. A professional archaeologist, approved by the Tribe, will monitor disturbance of native soils and have stop work authority as provided by law or agreement pending suitable treatment of cultural resources. Disposition of cultural resources affected by investigation, cleanup, or related activities will require concurrence by the Tribe.
  - b. The Tribe may hire an environmental professional to provide on-site overview of the remedial investigation and cleanup activities. That person shall, to the extent agreed to between the Tribe and Rayonier, have full access to all portions of the cleanup area, subject to safety restrictions: all raw material, data, reports and other documentation; and such other information as is appropriate to ensure full protection of tribal interests.
  - c. As part of the Remedial Investigation/Feasibility Study additional organ-specific tissue data will be collected for shellfish and fin fish.
  - d. Cleanup standards shall take into account all potential exposure pathways and applicable state and federal requirements. Ecology shall consult with the Tribe in constructing a conceptual model describing the potential pathways for human and environmental exposure to contaminants.
  - e. Risk based assessments will be based on relevant consumption and exposure patterns, including subsistence and cultural exposure.
  - f. Definition of the site boundaries must include the area of influence of chemical contamination caused by activities at the Rayonier Mill facility.
  - g. Cleanup activities must not preclude physical and biological restoration of

Ennis Creek and its estuary. To the extent allowed by law, cleanup agreements for the site will incorporate restoration activities required under other laws or agreements.

- h. Ecology will consult the Tribe and seek the Tribe's concurrence at all major decision points in the cleanup process, including: negotiation of the agreement for conducting the Remedial Investigation/Feasibility Study (RI/FS); drafting of the RI/FS Workplan (includes Sampling and Analysis Plan, conceptual site model, and risk evaluation work plans); review of the draft RI/FS; review of final RI/FS; preparation of the draft Cleanup Action Plan; negotiation of the agreement to implement the Cleanup Action Plan; removal of the site from the Hazardous Sites List; and the negotiation and review of any agreements for interim actions at the site. The Tribe shall have the option of seeking review and technical assistance from the EPA in responding to proposed decisions. In the event that the Tribe does not concur with a proposed decision, Ecology will not move forward with the decision as proposed until completion of the dispute resolution process as described in this agreement.
- i. The Tribe's participation in the investigation and cleanup of the site is dependent on the Tribe receiving sufficient funding for its involvement as described in this agreement. Without sufficient funding, the Tribe will be unable to participate, evaluate, and concur with proposed decisions. Ecology will not move forward with a proposed cleanup decision without the Tribe's concurrence.

Subject to its other provisions, the period of performance of the Agreement shall commence on April 1, 1999, and be completed upon removal of the site from the Washington hazardous sites list as described under WAC 173-340-330, and concurrence by EPA and the Tribe.

This Agreement may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

In the event that a dispute arises under this Agreement, including the Tribe's nonconcurrence with a decision proposed by Ecology, it shall be determined by a Dispute Board in the following manner:

*Level 1 Dispute:* Ecology and Tribe Project Managers

*Level 2 Dispute:* Governor or designated representative and Tribal Chair or designated representative

*Level 3 Dispute:* The Tribe may request EPA to resume authority for cleanup of the site according to the Superfund process or take other appropriate actions under CERCLA or other applicable law.

This contract is entered into pursuant to and under the authority of the Centennial Accord of 1989, sovereign rights reserved under the Point No Point Treaty of 1855, applicable laws of the State of Washington and any applicable federal law. The provisions of this agreement shall be construed to conform to those laws. In the event of an inconsistency in the terms of this Agreement, or between its terms and any applicable treaty, statute or rule, the inconsistency shall be resolved by giving precedence in the following order:

- a. Applicable state and federal laws, regulations, treaties, and the federal policy of Indian self-determination.
- b. Statement of work; and
- c. Any other provisions of the agreement, including materials incorporated by reference.

A failure by either party to exercise its rights under this Agreement shall not preclude that party from subsequent exercise of such rights and shall not constitute a waiver of any other rights under this Agreement unless stated to be such in writing signed by an authorized representative of the party and attached to the original Agreement.


**SEVERABILITY**

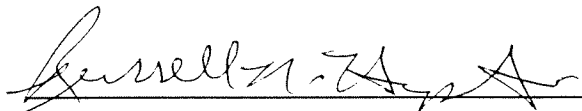
If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, if such remainder conforms to the requirements of applicable law and the fundamental purpose of this Agreement, and to this end the provisions of this Agreement are declared to be severable.

IN WITNESS WHEREOF, the parties have executed this Agreement;

State of Washington  
DEPARTMENT OF ECOLOGY

Lower Elwha Klallam Tribe

  
\_\_\_\_\_  
By: Tom Fitzsimmons  
Title: Director  
Date: 3-19-99

  
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By: Russell N. Hepfer  
Title: Tribal Chair  
Date: 18 March 1999

Approved as to form only:  
Christine O. Gregoire  
Attorney General