

**JOHN E. THORSON
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LUMMI DECREE
U.S. DISTRICT COURT (W.D. WASH.)
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June 25, 2014

Sent by e-mail

Hon. Thomas S. Zilly
Senior Judge
United States District Court
Western District of Washington
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Re: Water Master Budget (2014-2015), *United States & Lummi Indian Nation v. Department of Ecology*, No. C01-0047Z

Dear Judge Zilly:

Pursuant to section IV(G)(4) of the Lummi Settlement Agreement (Settlement Agreement), the Water Master is required to confer with the Washington Department of Ecology and the Lummi Nation before June 1st of each year on a draft Water Master budget for the next fiscal year. Section IV(G)(4) also indicates that Ecology and the Lummi Nation will adopt a final budget by an agreement entered into by July 1st.

Last year, as set forth in our June 25, 2013, letter to you, we agreed to continue the original arrangement set forth in your August 7, 2008, order and, accordingly, adopted a budget of \$100,000 for the 2012-2013 fiscal year. The Water Master's hourly rate remained at \$200 per hour.

We have completed the required discussions for the upcoming fiscal year, and the Department of Ecology and the Lummi Nation have agreed on a final Water Master budget for fiscal year July 1, 2014, to June 30, 2015 (the Lummi Nation reserves the right to revisit this budget approach for future years). We adopt a budget of \$100,000 for the 2014-2015 fiscal year. The Water Master's hourly rate will remain unchanged at \$200 per hour and he will continue his efforts to minimize his time and costs.

Background

The Water Master's work during the 2013-14 fiscal year has included continued implementation of the previous special proceeding involving the accuracy of the service list, enforcement proceedings, efforts to secure payment of the annual "Eligible Landowner Fees," his annual report, and routine matters (including maintenance of the web site).

The attached spreadsheet (FederalWaterMasterExpenses061814.xlsx), with estimated May and June data, reflects the Water Master's time (in dollars at \$200 per hour) and expenses for this fiscal year and the previous five years. As you can see, the average monthly fee during 2013-14 has been \$771 and the average monthly expenses have been \$52.

SueLynn Vasquez, the Financial Specialist for the U.S. District Court Clerk, reported that, as of June 18, 2014, we had a balance in the Water Master's account of \$220,079. At the conclusion of the fiscal year, the Water Master estimates the Water Master's account will have a balance of approximately \$214,497 (June 18 balance less Master's pending and estimated claims for May and June).

Since this year-end balance is less than the adjusted \$226,380 ceiling for the Water Master account anticipated by the Settlement Agreement (*see* discussion, *infra*), the Lummi Nation, Eligible Landowners, and (depending on the circumstances) Ecology will need to pay an additional amount for fiscal year 2014-2015 (*see* Settlement Agreement section IV(G)(2)).

Adjusted Ceiling for Water Master Account

Section IV(G)(2) provides, "[T]he amount the Lummi Nation and state defendants pay shall be reduced proportionally so that the total amount in the Water Master's account does not exceed Two Hundred Thousand Dollars (\$200,000), *adjusted by the Implicit Price Deflator*" (emphasis added). Thus, the Settlement Agreement contemplates a periodic inflation adjustment to this cap.

The U.S. Bureau of Economic Analysis maintains the Implicit Price Deflator, but Washington State's Economic and Revenue Forecast Council publishes annual reports of several inflation indices for the Seattle area. The Council staff advised the Water Master to use Table A4.1, "Selected Inflation Indicators," found this year on p. 98 of the Council's *Washington State Economic and Revenue Forecast* (Feb. 2014) (<http://www.erfc.wa.gov/publications/documents/feb14pub.pdf>).

According to Council staff, the "Price Deflator" increase over a series of years is calculated by determining the difference between the index figures for the beginning and ending years and expressing that change as a percentage of increase

or decrease over the base year. In our case, the 2006 index is 0.947 and the 2013 index is 1.072 (the 2014 index is not used since it is a forecast). The percentage of change 2006-2013 is 13.19%.

Thus, to comply with section IV(G)(2) of the Settlement Agreement, the ceiling on the Water Master's account should be adjusted by 13.19% over the 2006 base year to \$226,380 (as compared to last year's \$225,500 ceiling).

Amounts to be Paid by Lummi Nation, Eligible Landowners & Dep't of Ecology

During the 2013-14 fiscal year, the Lummi Nation paid \$7,000 representing its 50% of the amount needed to bring the balance in the Water Master's account to \$225,500—the maximum permitted at that time under the Settlement Agreement. Eligible Landowners paid \$7,310 or somewhat more than their 50% allocation (which amount offsets a \$312 underpayment by Eligible Landowners in the previous year). Under the Settlement Agreement, the Department of Ecology was not required to make a payment this fiscal year (*see* examples set forth in section IV(G)(2) of Settlement Agreement).

At the beginning of the next fiscal year (2014-2015), we estimate a total of \$11,883 (\$226,380-\$214,497; rounded to \$11,800) will be necessary to bring the Water Master's account up to the maximum amount of \$226,380 allowed by Settlement Agreement section IV(G) and as adjusted for inflation as previously discussed. Of the \$11,800, the Lummi Nation will pay \$5,940. Pursuant to section IV(G)(1) of the Settlement Agreement, the Eligible Landowner fee will be \$23 for the basic parcel in order to raise the \$5,940 required of the state parties.¹ This is considerably less than the annual \$100 fee imposed when the Decree was first issued. The Department of Ecology will pay nothing for the 2014-2015 fiscal year (*see* examples set forth in section IV(G)(2) of Settlement Agreement).

Sufficiency of Water Master Account

During our discussions, counsel for the Lummi Nation raised the issue of whether the terms of the Settlement Agreement have resulted in the Nation and Eligible Landowners paying an unnecessary amount of money into the registry of the court—given the modest level of expenditures since the Water Master has been appointed. A modest return (5%) on the running balance usually in excess of \$200,000 could almost completely defray the Master's annual expenses, but the Water Master Account produces annual interest income of less than \$100.

We learned from the Clerk's Office that such a large, perpetual cash account is

¹ Calculated as follows: $x/5940 = 28/7310$, where x is the basic 2014-15 Eligible Landowner fee, 5940 is the amount to be raised for 2014-15, 28 is the 2013-14 basic fee, and 7310 is the amount actually raised from Eligible Landowner fees during 2013-14. This formula produces an annual, basic fee of \$22.75, rounded to \$23.

somewhat unique. The Clerk can only use certain qualified depositories for these funds. The Clerk's financial staff would be unable to regularly monitor and report on funds deposited with other entities in an effort to increase interest. Also, the Clerk's financial systems are in transition due to efforts by the Administrative Office of the United States Courts to develop national, uniform procedures. Some of these changes may result in increased interest being paid on registry funds, but we need to await complete implementation of the new systems to see if this is the case.

Changes in amounts paid each year and the balance of the Water Master Account would likely require an amendment to the Settlement Agreement and Decree.

Based on this information, we agreed to revisit the issue during our discussions next year.

Federal Water Master Budget

As previously mentioned, under your August 7, 2008, order, the Water Master operated under a \$100,000 budget for the 2008-2009 fiscal year. This arrangement apparently was based on section IV(B)(2) of the Settlement Agreement which indicates that the "Water Master's office shall be funded at the initial rate in 2006 of One Hundred Thousand Dollars (\$100,000) per year." We have agreed to this same arrangement for all subsequent fiscal years including the current fiscal year. We now agree to a budget of \$100,000 for the 2014-2015 fiscal year with the Water Master's hourly rate still at \$200. The Lummi Nation reserves the opportunity to revisit this budget methodology in the future.

Unless you conclude otherwise, we do not believe you need to take any action at this time on these Water Master budget matters. While the Settlement Agreement does provide that the Court may resolve a budget dispute between the Lummi Nation and the Department of Ecology, we are fortunately in agreement on the budget this year.

Your August 7, 2008, order (in paragraph 3) specifies that "[i]n subsequent years [beyond 2008-2009], Lummi Nation shall pay its share of the Water Master budget on or before August 1st of the fiscal year." Similarly, the order (in paragraph 4) provides that the Department of Ecology will pay its share of the Water Master budget by August 1st (however, no payment is required for the 2014-2015 fiscal year) and also send Water Master fee notices by August 1st.

These provisions and our budgetary agreement appear to address all outstanding financial matters. This information will be set forth in the Water Master's annual report, to be filed by June 30th.

Please contact us if you have any questions. Thank you for your consideration of this matter.

Sincerely,

/s/ Travis H. Burns

Mr. Travis H. Burns*
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/s/ Charles N. Hurt, Jr.

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Federal Water Master, Lummi Decree

* Mr. Burns and Mr. Hurt, the new attorney of record for the Lummi Nation, have authorized the Water Master to sign and submit this letter in their behalf.

Attachment: FederalWaterMasterExpenses061814.xlsx