

INCREMENTAL TREATY AGREEMENT
Private Land Acquisition Funding

This Agreement is dated for reference January 16, 2020

BETWEEN:

Her Majesty the Queen in right of the Province of British Columbia, as
represented by the Minister of Indigenous Relations and Reconciliation

(the “Province”)

AND:

Penelakut Tribe, on behalf of itself and its Members, as represented by the
Chief and Council

(the “Penelakut Tribe”)

WHEREAS:

- A. The Penelakut Tribe, through its Chief and Council, asserts that it has used, occupied and governed its Traditional Territory from time immemorial;
- B. The Penelakut Tribe is engaged with the Province and Canada and is negotiating to finalize a treaty in accordance with Stage 5 of the British Columbia Treaty Commission process;

- C. The Province introduced Draft Principles that guide the Province of British Columbia's Relationship with Indigenous Peoples on May 22, 2018 to help guide the Province on a path of respect, partnership and collaboration, as the Province implements the UN Declaration and the Truth and Reconciliation Commission of Canada's Calls to Action;
- D. The UN Declaration is a statement of the rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world. Among other things, the UN Declaration recognizes the right to self-determination and self-government, and to the preservation, practice and revitalization of Indigenous cultures and traditions;
- E. The UN Declaration provides that states shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploration of mineral, water or other resources;
- F. Implementation of the UN Declaration requires transformative change in the Province's relationship with Indigenous peoples, including with the Penelakut Tribe;
- G. The Province is committed to true, lasting reconciliation with the Penelakut Tribe through a renewed Government-to-Government relationship based on recognition of rights, respect, cooperation and partnership, and as part of that commitment will be fully adopting and implementing the UN Declaration, the Calls to Action of the Truth and Reconciliation Commission, and the Supreme Court of Canada's decision in *Tsilhqot'in Nation*;
- H. Through its Designated Company, the Penelakut Tribe intends to acquire fee simple ownership of certain privately-owned lands within its Traditional Territory that are of special significance to the Penelakut Tribe;
- I. In furtherance of the Province's reconciliation goals and to create momentum in the Treaty negotiations in order to conclude a Treaty, the Province has agreed to provide funding to the Penelakut Tribe for the purchase of the Lands;
- J. This Agreement will provide the Penelakut Tribe with transitional benefits in advance of a Treaty and is in the spirit and vision of the New Relationship and lasting reconciliation.
- K. The Parties acknowledge the support of Canada in facilitating this Agreement, including its agreement to cost-share the acquisition of the Lands described in this Agreement with British Columbia.

NOW THEREFORE the Parties agree as follows:

ARTICLE 1 - INTERPRETATION

1.1 **Definitions.** In this Agreement:

“Aboriginal Rights” means asserted or determined aboriginal rights, including without limitation aboriginal title, which are or may be recognized and affirmed by section 35 of the *Constitution Act, 1982*;

“Acquisition of Lands” means the acquisition of the Lands in fee simple by the Designated Company for the sole benefit and on behalf of the Penelakut Tribe;

“Acquisition Closing Date” means the date set out in the Purchase and Sale Agreement on which the documents for the Acquisition of the Lands are to be submitted electronically to the LTSA for registration;

“Chief” means, in respect of the Penelakut Tribe, “chief” within the meaning of the *Indian Act*;

“Council” means, in respect of the Penelakut Tribe, the elected “council” within the meaning of the *Indian Act*;

“Penelakut Tribe Lands” means those lands identified in the Treaty which form part of Penelakut Tribe Lands;

“Penelakut Tribe” means the “band”, as that term is defined in the *Indian Act*, named the “Penelakut Tribe” and includes all Members;

“Designated Company” means a company incorporated under federal or provincial law, all the shares of which are wholly owned directly or indirectly, legally and beneficially, by the Penelakut Tribe and which the Penelakut Tribe has designated to take fee simple title on behalf of the Penelakut Tribe to the Lands;

“Designated Company’s Solicitor” means the lawyer retained by the Designated Company to act on its behalf;

“Effective Date” means the date on which the Treaty takes effect;

“Existing Legal Proceedings” means the following legal action of which Penelakut Tribe is a plaintiff:

(a) Cowichan Tribes et al. v. AG Canada et al. HMTQBC, City of Richmond, Vancouver Fraser Port Authority, Musqueam Indian Band and Tsawwassen First Nation, Victoria Registry No. 14 1027 (BCSC).

“Environmental Liability” means any and all environmental liabilities relating to the Lands including, without limitation, all liability for the clean-up of any contamination or any other toxic, hazardous, dangerous or potentially dangerous substances or conditions on or under the Lands or migrating from the Lands (including without limitation surface water and groundwater);

“Governmental Action” means all processes, decisions, approvals, authorizations, permits, licences, approvals, Crown land dispositions, agreements and other actions whatsoever issued, granted, entered into or otherwise taken by a Provincial Official either before or after the date of this agreement;

“LTSA” means the Land Title and Survey Authority of British Columbia;

“Lands” means the lands legally described as follows:

- a) Lot 1 Plan VIP303 Section 18 Range 5 Land District 08 Portion & RGE 6 Except Plan RW2731 RW1207 (PID: 002-620-685)
- b) Lot 8 Plan VIP6565 Section 18 Range 5 Land District 08 (PID: 002-629-348)

“Member” means any person who is a “member of the band”, as that phrase is defined in the *Indian Act*, of the Penelakut Tribe;

“New Relationship” means the vision developed in March 2005 by the Province and the First Nations Leadership Council, representing the Assembly of First Nations-BC Region, First Nations Summit and Union of BC Indian Chiefs, that resulted in a new relationship founded on principles of mutual respect, recognition and reconciliation of Aboriginal rights;

“Other Penelakut Tribe Lands” means those lands identified in the Treaty which form part of the Other Penelakut Tribe Lands;

“Proceeding” includes any claim, demand, cause of action, action, suit or other proceeding, including any expenses, legal fees, damages, costs or other liability, incurred, directly or indirectly, arising out of or in connection with the foregoing;

“Provincial Official” means:

- a) the Province or any minister, public official, employee, contractor, agent or representative of the Province;
- b) any government corporation or any director, officer, employee, contractor, agent or representative of a government corporation; or
- c) any person acting as a decision maker under any enactment of the Province;

“Purchase and Sale Agreement” means the executed purchase contract for the purchase and sale of the Lands between the vendor and the Designated Company made on November 7, 2019;

“Traditional Territory” means, for the purposes of this Agreement, the statement of intent area filed by the Hul'qumi'num Treaty Group with the British Columbia Treaty Commission;

“Transaction Funds” means the funds described at article 3;

“Transfer” means the completion of the transfer of the Lands to the Designated Company;

“Treaty” means the agreement to be concluded by the Parties and Canada at the conclusion of Stage 5 of the British Columbia Treaty Commission process; and,

“UN Declaration” means the United Nations Declaration on the Rights of Indigenous Peoples.

1.2 **Interpretation.** For the purposes of this Agreement:

- (1) “this agreement” means this Incremental Treaty Agreement, and includes the schedule and any agreement, document or instrument executed or delivered pursuant to this Agreement;
- (2) the recitals and headings are for convenience only, do not form a part of this agreement and in no way define, limit, alter or enlarge the scope or meaning of any provision of this Agreement;
- (3) words importing gender include the masculine, feminine or neuter gender and words in the singular include the plural and vice versa;
- (4) any reference to a corporate entity includes and is also a reference to any corporate entity that was a predecessor to, or that is a successor to, such entity;
- (5) a reference to a statute includes every amendment to it, every regulation made under it, every amendment made to a regulation made under it and any law enacted in substitution for, or in replacement of, it;
- (6) any reference to the delivery of an agreement, document or instrument “in the form” of an attached schedule means an agreement, document or instrument substantially in that form with such changes, additions or deletions as may be agreed by the representatives of the parties;
- (7) each and every acknowledgement, agreement, release or other covenant given, and action to be taken, by the Penelakut Tribe under this agreement means the Penelakut Tribe acting by and through its Chief and Council, and will be conclusively deemed to have been given, or taken, by the Penelakut Tribe on its own behalf, and for and on behalf of its Members; and
- (8) there will be no presumption that doubtful expressions, terms or provisions in this agreement are to be resolved in favour of any party.

ARTICLE 2 – RECONCILIATION AND PURPOSE

- 2.1 **Reconciliation.** The Penelakut Tribe acknowledges and agrees that, in the spirit of the reconciliation and to advance Treaty negotiations, Transaction Funds provided under this agreement constitute a contribution by the Province towards the reconciliation of the Province's and the Penelakut Tribe's interests and the settlement of the Penelakut Tribe's Aboriginal Rights within the Traditional Territory through Treaty negotiations. As such, the benefits provided to the Penelakut Tribe under this agreement will be counted as a portion of the Province's contribution towards the Treaty settlement.
- 2.2 **Purpose.** The purpose of this agreement is to:
- (1) demonstrate the commitment of the Parties to concluding a Treaty; and
 - (2) in the spirit of reconciliation and as an incremental Treaty benefit in advance of a Treaty, provide the Penelakut Tribe with funds to facilitate the acquisition of Lands the Traditional Territory which will, on the Effective Date, become an element of the Treaty.

ARTICLE 3 – TRANSACTION COSTS

- 3.1 **Amount.** On the terms of this agreement, the Province will provide the Transaction Funds to the Penelakut Tribe for the Acquisition of Lands to a maximum amount of \$ 1,588,500.
- 3.2 **Covenant of the Penelakut Tribe.** The Penelakut Tribe covenants that the Transaction Funds will be used solely for the purchase of acquiring the Lands in accordance with the terms of this agreement and will direct and instruct the Designated Company accordingly.
- 3.3 **Costs Included.** Transaction Funds will include:
- (1) the purchase price of the Lands as set out in the Purchase and Sale Agreement; and
 - (2) the following closing costs associated with the Acquisition of Lands:

- (a) the cost associated with ensuring the Lands have a survey which meets the requirements for registration with the LTSA,
 - (b) reasonable costs or fees associated with the preparation of any documents required to register the Lands,
 - (c) any fees charged by the LTSA relating to the registration of the Lands,
 - (d) property transfer tax payable under the *Property Transfer Tax Act*, and
 - (e) goods and services tax under the *Excise Tax Act (Canada)* and sales tax under the *Provincial Sales Tax Act*.
- (3) The closing costs described in 3.3(2)(d), do not contribute to the Treaty benefit described by this agreement.

3.4 **Transaction Deliveries by Penelakut Tribe.** No later than 30 days prior to the Acquisition Closing Date, the Penelakut Tribe will provide to the Province the following:

- (1) an executed copy of the Designated Company Agreement (Schedule A);
- (2) notice of the Designated Company's Solicitor and contact information;
- (3) a letter to the Province signed by the Designated Company's Solicitor providing a reasonable estimate of the closing costs at subsection 3.3(2) and, with respect to all Transaction Funds received by the Designated Company's Solicitor, undertaking to:
 - (a) use the funds solely in accordance with the terms of this agreement;
 - (b) following the Acquisition of the Lands, promptly provide to the Province proof of disbursement of the Transaction Funds (with solicitor-client information redacted as appropriate) and return any unused funds to the Province;
 - (c) if the Lands are not transferred to the Designated Company in accordance with the Purchase and Sale Agreement, immediately return all Transaction Funds received by the Designated Company's Solicitor to the Province;
 - (d) hold the funds in trust and not disburse them until:
 - (i) the registrable freehold transfer transferring the Lands to the Designated Company has been accepted for registration by the LTSA, and

- (ii) a post-filing search conducted by the Designated Company's Solicitor confirms that, in the normal course of the LTSA procedure, the Designated Company will be registered as owner in fee simple of the Lands.

3.5 **Transaction Deliveries by Province.** The Province will deliver the Transaction Funds in trust to the Designated Company's Solicitor after satisfaction by Penelakut Tribe of its obligations under section 3.4 and no later than 5 days prior to the Acquisition Closing Date. Subject to section 3.1, if the actual closing costs under subsection 3.3(2) exceed the estimate provided by the Designated Company's Solicitor, the Province will reimburse such difference to the Designated Company.

ARTICLE 4 – TERM AND TERMINATION

4.1 **Termination.** The Province or the Penelakut Tribe may terminate this agreement on 30 days notice in the event either party is in breach of this agreement.

4.2 **Survival of Conditions.** Subject to the Treaty, with respect to any Transaction Funds transferred under this agreement and to the Lands for which they were transferred, Articles 5, 7, 8, 9, 10 and 11 will survive the completion of the Transfers or the termination of this agreement.

ARTICLE 5- REPRESENTATIONS AND WARRANTIES

5.1 **Penelakut Tribe Representations.** The Penelakut Tribe represents and warrants to the Province, with the intent and understanding that they will be relied on by the Province in entering into this agreement, that:

- (1) it enters into this agreement for, and on behalf of, its Members;
- (2) its Members have provided it with a mandate to negotiate a Treaty;
- (3) it, as represented by its Chief and Council, has the legal power, capacity and authority to enter into and to carry out its obligations under this agreement on behalf of the Penelakut Tribe and its Members;

- (4) any company designated by the Penelakut Tribe for the purposes of this agreement will be a Designated Company; and
- (5) any Designated Company has the legal power, capacity and authority to enter into and to carry out its obligations under each agreement and transaction to which it is a party in accordance with this agreement;

5.2 **Provincial Representations.** The Province represents and warrants to the Penelakut Tribe, with the intent and understanding that they will be relied on by the Penelakut Tribe in entering into this agreement, that it has the legal power, capacity and authority to enter into this agreement.

ARTICLE 6 – CONDITIONS PRECEDENT

6.1 **Conditions Precedent.** The obligation of the Province to provide Transaction Funds under section 3.5 is subject to:

- (1) the Penelakut Tribe having fully satisfied its obligations under section 3.4;
- (2) there being sufficient monies available in an appropriation, as defined in the *Financial Administration Act*, to enable the Province in any fiscal year, when any expenditure in respect of an obligation may be required, to make that expenditure;
- (3) the Province and Canada having reached an agreement satisfactory to the Province, in its sole discretion, on cost sharing the Transaction Funds for Treaty settlement purposes;
- (4) the representations and warranties of the Penelakut Tribe under this agreement being true and correct at all times; and
- (5) all obligations of the Penelakut Tribe and the Designated Company having been fully performed in accordance with this agreement.

6.2 **Waiver of Conditions Precedent.** The conditions precedent set out in 6.1 are for the sole benefit of the Province and may be waived by the Province on written notice to the Penelakut Tribe.

ARTICLE 7 – CONDITION OF LANDS

7.1 **Liability for the Lands.** The Penelakut Tribe acknowledges and agrees that the Lands are privately owned and have not been within the control or possession of

the Province at any material time. For greater certainty, the Penelakut Tribe releases the Provincial Officials from and against any and all Proceedings with respect to the Lands, including without limitation, Environmental Liabilities. This release does not apply with respect to Proceedings which result from the acts or omissions of the Province after the Acquisition of the Lands.

7.2 **Indemnity.** The Penelakut Tribe will indemnify and save harmless the Provincial Officials from and against any and all Proceedings arising out of or in connection with the Lands, including without limitation, Environmental Liabilities. This indemnity does not apply with respect to Proceedings which result from the acts or omissions of the Province after the Acquisition of the Lands.

7.2 **Due Diligence.** The Penelakut Tribe is solely responsible for any due diligence that may be required or advisable with respect to the Acquisition of Lands including, without limitation, matters relating to:

- (1) physical access to the Lands;
- (2) the economic feasibility of the development of the Lands;
- (3) the fitness of the Lands for any particular use, including without limitation the intended use of it by the Penelakut Tribe or by a Designated Company;
- (4) the provisions of any enactments or bylaws of any governmental body which relate to the development, use and occupation of the Lands; and
- (5) the environmental condition of the Lands (including without limitation surface water and groundwater), including without limitation the presence or absence of any toxic, hazardous, dangerous or potentially dangerous substances on or under the Lands or on or under any surrounding or neighbouring land or the current and past uses of the Land or any surrounding or neighbouring land.

ARTICLE 8 - OTHER COVENANTS

8.1 **Release.** The Penelakut Tribe releases and forever discharges the Province and all Provincial Officials from all claims of infringement of its Aboriginal Rights in respect of the Lands.

- 8.2 **Restriction on Transfer.** The Penelakut Tribe acknowledges and agrees that in order to preserve the possibility of the Lands becoming Penelakut Tribe Lands in accordance with the Treaty, the Penelakut Tribe will not permit the Designated Company to dispose of its fee simple estate in the Lands, without the agreement of the Province, for a period of time commencing on the applicable Acquisition Closing Date and ending on the earlier of:
- (1) the 10 year anniversary of this agreement; or
 - (2) the Effective Date;
- 8.3 **Interests in Lands.** Notwithstanding section 8.2, the Penelakut Tribe may permit the Designated Company to charge or encumber the Lands provided that the Designated Company advises the intended charge or encumbrance holder in writing that, on the Effective Date:
- (1) ownership of the Lands may transfer from the Designated Company to the Penelakut Tribe; and
 - (2) the Lands may become Penelakut Tribe Lands.
- 8.4 **Indemnity for Charges.** The Penelakut Tribe will indemnify and save harmless the Province and all Provincial Officials from and against any and all Proceedings arising out of or in connection with any charge or encumbrance granted by the Penelakut Tribe under 8.3, the transfer of the fee simple estate in the Lands to the Penelakut Tribe or the Lands becoming Penelakut Tribe Lands.
- 8.5 **Failure to Ratify.** If a Treaty is not concluded, sections 8.2 and 8.3 will cease to apply on the date on which the Penelakut Tribe formally withdraws from the Treaty negotiation process and its withdrawal is accepted and confirmed in writing by the British Columbia Treaty Commission.

ARTICLE 9 – STATUS OF LANDS ON EFFECTIVE DATE

- 9.1 **Status of Lands on Effective Date.** As part of Treaty negotiations, the Parties will negotiate the status of the Lands transferred under this agreement to the Penelakut Tribe as “Penelakut Tribe Lands” or “Other Penelakut Tribe Lands” within the meaning of the Treaty.

ARTICLE 10 – EXISTING LITIGATION

- 10.1 **Existing Legal Proceedings.** The Parties will address the Existing Legal Proceedings as follows:

(1) Penelakut Tribe acknowledges that the Province does not intend to conclude a Treaty with the Penelakut Tribe when active litigation is outstanding including:

(a) *Cowichan Tribes et al. v. AG Canada et al. HMTQBC, City of Richmond, Vancouver Fraser Port Authority, Musqueam Indian Band and Tsawwassen First Nation*, Victoria Registry No. 14 1027 (BCSC).

10.2 **New Litigation.** Subject to an urgent time-sensitive matter, before commencing any Proceeding relating to any Government Action within the Traditional Territory, the Penelakut Tribe will:

(1) notify the Province of any interests it may have that may be impacted by the Government Action; and

(2) participate in a good faith dispute resolution process set out in sections 11.

ARTICLE 11 - DISPUTE RESOLUTION

11.1 **Representatives.** If a dispute arises between the Province and the Penelakut Tribe regarding the interpretation of a provision of this agreement, the Parties or their duly appointed representatives will meet as soon as is practical and in to attempt to resolve the dispute.

11.2 **Senior Representatives.** If the Parties are unable to resolve differences at the appropriate level, the interpretation issue will be raised to more senior levels of the Province and the Penelakut Tribe.

11.3 **Other Means.** The Parties may choose other appropriate approaches to assist in reaching resolution of the interpretation issue.

ARTICLE 12 - NOTICES

12.1 **Notices.** Any notice, document, statement, report, demand or grant that any Party may be required or may desire to give to any other Party under this agreement must be in writing, unless otherwise specified in this agreement, and will be deemed validly given to and received by the addressee, if served

personally, on the date of personal service or, if delivered by mail, e-mail (provided that receipt is acknowledged by the recipient) or facsimile copier, when received as follows:

if to the Province:

Deputy Minister
Ministry of Indigenous Relations and Reconciliation
P.O Box 9100 Stn. Prov. Govt.
Victoria, B.C. V8W 9B1

Fax: (250) 387-6073

and if to the Penelakut Tribe:

Penelakut Tribe
PO Box 360
Chemainus, B.C. V0R 1K0
Attention: Chief Joan Brown

Fax: (250) 246-2725

- 12.2 **Change of Address.** Either party may, from time to time, give notice to the other party of any change of address, email address or facsimile number of the party giving such notice and after the giving of such notice, the address, email address or facsimile number will, for purposes of this agreement be conclusively deemed to be the address, email address or facsimile number of the party giving such notice.

ARTICLE 13 - GENERAL

- 13.1 **Entire Agreement.** This agreement is the entire agreement between the parties in respect of the subject matter of this agreement and, except as set out in this agreement, there is no representation, warranty, collateral agreement, condition, right or obligation affecting this agreement.
- 13.2 **Further Acts and Assurances.** Each of the parties will, upon the reasonable request of the other party, do such further lawful acts or deliver such further


documents in a timely fashion as are reasonably required in order to fully perform and carry out the terms of this agreement.

- 13.3 **No Implied Waiver.** Any waiver of a provision of this agreement, the performance by a party of an obligation under this agreement or a default by a party of an obligation under this agreement will be in writing and signed by the party giving the waiver and will not be a waiver of any other provision, obligation or subsequent default.
- 13.4 **Successors.** This agreement will enure to the benefit of and be binding on the Penelakut Tribe and its successors and the Province.
- 13.5 **No Admissions.** Nothing in this agreement will be construed as an:
- (1) admission by the Province of the validity of any claim by the Penelakut Tribe to a specific Treaty or aboriginal right or aboriginal title within the meaning of section 35 of the *Constitution Act, 1982*; or
 - (2) acknowledgment by the Province that it has an obligation to provide financial or economic accommodation to the Penelakut Tribe.
- 13.6 **Not a Treaty.** This agreement does not:
- (1) constitute a Treaty or land claims agreement within the meaning of section 25 or 35 of the *Constitution Act, 1982* (Canada); or
 - (2) recognize, affirm, define, deny, limit or amend any aboriginal rights or titles or any responsibilities of the Parties except as set out in this Agreement.
- 13.7 **No Fettering.** Nothing in this agreement will be interpreted in a way that fetters the discretion given to any Provincial Official in an enactment.
- 13.8 **Governing Law.** This agreement will be governed by and construed in accordance with the laws of the Province of British Columbia.

13.9 **Execution in Counterpart.** This agreement may be entered into by each party signing a separate copy of this agreement (including a photocopy, email or facsimile copy) and delivering the signed copy in its entirety to the other party in accordance with article 12.

IN WITNESS WHEREOF the parties have executed this agreement as set out below:

**Signed on behalf of the Penelakut Tribe
by**


_____ Dec 18, 2019

**Signed on behalf of Her Majesty the
Queen In Right of the Province of
British Columbia by**


_____ January 16, 2020