

EVERETT CITY COUNCIL AGENDA ITEM COVER SHEET

PROJECT TITLE:

Wholesale Water Delivery
Contract with the Tulalip
Tribes for 2016-2066

- _____ Briefing
- _____ Proposed Action
- _____ Consent
- X Action
- _____ First Reading
- _____ Second Reading
- _____ Third Reading
- _____ Public Hearing
- _____ Budget Advisory

COUNCIL BILL # _____
 Originating Department Public Works
 Contact Person Jim Miller
 Phone Number 425-257-8880
 FOR AGENDA OF October 19, 2016

Initialed by:
 Department Head _____
 CAA _____
 Council President Jim

<u>Location</u>	<u>Preceding Action</u>	<u>Attachments</u>	<u>Department(s) Approval</u>
Smith Island	2005 Agreement	Contract	Public Works, Legal

Amount Budgeted	-0-	Account Number:
Expenditure Required	-0-	
Budget Remaining	-0-	
Additional Required	-0-	

DETAILED SUMMARY STATEMENT:

The City of Everett and the Tulalip Tribes entered into a settlement agreement in 2005 that provided for the construction of a water pipeline and the delivery of water through this pipeline. The Tulalip Water Pipeline has been built in segments between Everett's water transmission lines (near Highway 2) and Quilceda Village on the Tulalip Reservation. Segment 2 is the last segment and it is scheduled for completion in November 2016.

The 2005 agreement also provided that the City shall be prepared to deliver up to an annual average of 30 Million Gallons per day to the Tulalip tribes under a long term water contract. This 50-year wholesale water delivery contract has been negotiated with the Tulalip Tribes.

RECOMMENDATION (Exact action requested of Council):

Authorize the Mayor to sign a Wholesale Water Delivery Contract for 2016-2066 with the Tulalip Tribes.

CITY OF EVERETT AND THE TULALIP TRIBES

WHOLESALE WATER DELIVERY CONTRACT 2016 - 2066

THIS WHOLESALE WATER DELIVERY CONTRACT ("Contract,") is made and entered into by and between the City of Everett, a municipal corporation of the State of Washington, hereinafter referred to as "City, or "Everett," and THE TULALIP TRIBES OF WASHINGTON, successors-in-interest to the Snohomish, Snoqualmie, Skykomish and other allied Native American tribes and bands signatory to the 1855 Treaty of Point Elliott, a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, hereinafter referred to as "Tulalip". Each of Everett and Tulalip is a "Party,, and collectively, the "Parties,,.

WHEREAS, Everett owns and operates a water supply system located in Snohomish County, Washington; Said system has regional supply capability for domestic, commercial and industrial water consumption; and

WHEREAS, pursuant to RCW 35.92.170, RCW 35.92.200 and RCW 39.94, Everett is authorized to enter into contracts with other municipalities to supply said municipalities with water; Pursuant to WAC 248-54, Everett has prepared a Water System Plan identifying certain areas of Snohomish County as being within its long-range wholesale water supply service area; and

WHEREAS, Tulalip owns and operates a water supply system on the Tulalip Indian Reservation in Snohomish County, Washington, and distributes said water on a retail basis to domestic, commercial and industrial customers within a service area identified in its Water System Plan adopted pursuant to applicable law; and

WHEREAS, Tulalip and Everett entered a 2005 Agreement for Settlement, Water Supply and Water Delivery System ("2005 Agreement,,). The 2005 Agreement provides for the development of a 36-inch (now 36 and 42-inch) water transmission line for a new point of water delivery for Tulalip use ("Project,,). Subsequently, Everett and Tulalip entered a 2006 Interlocal Agreement to organize a Joint Board to oversee Project development. This Contract is to govern the terms of the relationship of the parties upon the availability of water to the Tribe from the Project; and

WHEREAS, this Contract is in addition to such other contracts that exist among Tulalip and Everett, such as the 2005 Agreement and the 1991 Everett and JOA Participants' Water

Supply Contract (the "1991 Contract,,"). Except as otherwise set forth in this Contract, other agreements and contracts between the Parties remain in effect.

NOW, THEREFORE, for the mutual benefits to be derived, the parties agree as follows:

1. Delivery of Water. Everett hereby agrees to deliver water to Tulalip and Tulalip agrees to pay Everett for the delivery and treatment of water.

2. Point of Delivery. Everett shall deliver water to Tulalip at agreed connection point along Everett's Transmission Pipeline at Everett's master meter system on the south side of Union Slough ("Point of Delivery,,"). The actual point of delivery at the connection point shall be deemed to be the upstream flange of the valve downstream of the master meter and check valve.

3. Quantity of Water. Everett and Tulalip agree that each have made, and will continue to make, significant capital investments in water delivery facilities which are interdependent and that coordinated planning will be required throughout the term of this contract to maximize public benefits and minimize costs. Everett shall not be responsible for storage for Tulalip's reservation system storage except as it relates to Everett's existing storage at Lake Chaplain and uninterrupted delivery of water at the Point of Delivery in accordance with the 2005 agreement and Sections 6 and 10 of this contract. It is understood that Tulalip and consumers of water from Tulalip may reach an average annual demand of 30.0 million gallons per day (MGD) and peak period demand of 36.0 million gallons per day (MGD) before the expiration of this Contract. Estimated average daily demands and peak day demands of Tulalip and its major customers for the near future are shown on Exhibit A attached hereto. Everett's facilities have, or will have in the future, the capacity to deliver water for Tulalip's water quantity demands as shown in Exhibit A or updated projections to be provided by the Tulalips at least every five years after the effective date of this contract. Once the Tulalip Water Pipeline is connected to the City's transmission pipelines, the maximum amount of water to be delivered by the City to the Tulalip under this Contract will in no case exceed 30 MGD average annual rate or 36 MGD during peak periods.

Nothing herein, however, shall be construed as obligating Tulalip to take or purchase any minimum quantity of water from Everett at any time.

4. Quality of Water. Everett shall be responsible for meeting state and federal standards for safe, high-quality drinking water at the point of delivery. All water supplied by Everett for use or sale by Tulalip shall be delivered upon the express condition that after it has passed the point of delivery the same is under the exclusive control of Tulalip, and Everett shall not be liable for any damages or loss resulting from degradation of water quality which may occur beyond said point. Everett shall not be responsible for changes in water quality or operating problems which may result from mixing of different sources of water in Tulalip's system or in systems served by Tulalip. Tulalip shall provide means to assure that water will not backflow into the Everett water system.

Everett shall make available to Tulalip, during Everett's regular business hours, all test and monitoring data and reports of Everett drinking water quality. Everett shall send to Tulalip its periodic reports of drinking water quality, prepared by Everett in conformance with requirements of the Safe Drinking Water Act or State Department of Health regulations.

5. Rates and Charges. Rates for water delivery service under this Contract shall be established by Everett ordinance, as may be amended. Tulalip will receive water service under the Everett's "east of river,, ordinance rate or successor rate. (For purposes of reference, this rate for 2016 is set forth in Section 14.16.713.B.2.b(1) of the Everett Municipal Code.) All rates shall be based on accepted standard practice for public water utility rate-making, such as AWWA M1 Rate Manual or successor manual or other commonly-used industry standards, provided:

A. Unless Everett is mandated to pay or otherwise remit a State utility tax by Washington State law, no rate or charge under this Contract shall include State utility tax or adjustment for State utility tax.

B. As of the date of this Contract, Everett, in accordance with City Council Resolution 2285, charges the Everett utility an annual PILOT payment equal to 6% of utility revenues. This PILOT is included in the "east of river,, ordinance rate, as it is included in all other wholesale water rates. With respect to the Everett PILOT, the parties agree:

1. The rate charged under this Contract may include such an Everett PILOT, so long as it is the same percentage included in the rate of other wholesale customers and so long as the PILOT (alone or in combination with any successor tax or fee to the PILOT or any other Everett taxes or fees on Utility revenues) included in the rate charged to Tulalip during the initial 50-year term of this Contract does not exceed six percent (6%).

2. For the entire term of the Contract (including the initial 50-year term of this Contract and renewal term) and subject to Section 5.D below, neither Tulalip nor Everett will, so long as the PILOT included in the Tulalip rate does not exceed 6%, challenge the binding character of the provisions made in this Section 5.B addressing the PILOT or otherwise seek to either eliminate or reduce the PILOT from the Tulalip rate or change the 50-year 6% cap that this Section B imposes on it. If after the initial 50-year term of this Contract, Everett increases the PILOT in the Tulalip rate in excess of 6%, then Tulalip may challenge the PILOT, but the remedy allowed in the challenge to the PILOT by Tulalip shall be solely limited to the remedy of reducing the PILOT to 6%, and no retroactive remedy shall be available.

C. Everett's outside rate multiplier is a percentage surcharge on water service outside of Everett city limits. As of the date of this Contract, this multiplier is 20% for the "east of river,, rate. Regardless of whether such multiplier is later increased in the Everett Municipal Code or elsewhere, the rate charged to Tulalip, regardless of whether it is the "east of river,, rate or successor rate, will never include such a multiplier in excess of 20%.

D. Everett contracts with customers other than Tulalip for the provision of water supply and/or water delivery services. If after the day this Contract is signed, Everett allows a wholesale customer (whether current or future Everett customer) who was charged the "east of river,, or successor ordinance rate during the term of this Contract to receive service substantially similar to that under this Contract at a lower rate and/or charge than charged now or in the future under this Contract, then such lower rate shall apply to this Contract so that the rate and/or charge to Tulalip under this Contract is equal to or less than the rate charged to such other Everett customer(s).

E. Everett shall not charge an Everett tax to the Tulalip Tribes for water delivered under this contract. Everett charges on Everett utility revenues are covered by 5.B. above.

6. Payment. On a monthly basis, Everett shall bill Tulalip for water delivered to Tulalip through pipeline master meter. Said bills shall be payable within thirty (30) days after receipt of the invoice. Delinquent bills shall accrue interest at the rate of twelve percent (12%) per annum, but not to exceed 1% per month, for any delinquency greater than sixty (60) days. If payments are delinquent by greater than 180 days, the matter shall be submitted to dispute resolution. If payments are delinquent by more than one year, the City has the right to shut off service until paid in full.

7. Resale or Distribution of Water. After water has passed the points of delivery and has entered Tulalip's connection transmission pipeline, said water becomes subject to Tulalip's exclusive authority, except as otherwise provided in this Contract:

A. After the water has passed the point of delivery and has entered the Tulalip's portion of the pipeline, Tulalip may, at its sole discretion, use the water delivered by the City for any purpose allowed under applicable law in the Tribal Service Area as shown in Exhibit B, now existing or as may be amended in the future. Tulalip shall have sole discretion over resale to Tribal enterprises and other users within the Tribal Service Area. If a planned new connection is for delivery of water outside of the Tribal Service Area, greater than 12 inches, and supplies more than one million gallons per day (1 MGD), then the Tulalip shall first obtain approval from Everett for said connection. Everett's approval shall not be unreasonably withheld and shall be based on the water supply impacts to Everett water system caused by said connection.

B. Tulalip will provide information to the City of Everett as may be needed to meet the City's reporting requirements approved by the Washington State Department of Health, if appropriate.

8. Term of Contract. The term of this Contract shall be fifty (50) years from the date of its mutual acceptance by the parties to be automatically renewed for an additional fifty (50) years unless (a) the Parties agree mutually not to renew this water contract, or (b) the City fails to

substantially succeed in the water application for the permitting of a 200 cfs water right (water right application No. 13219, dated 15 December 1954).

9. Construction, Operation and Maintenance of Capital Improvements. Tulalip shall construct or cause to be constructed all capital improvements to its water system and shall individually own all capital improvements downstream from the points of delivery. Tulalip shall assume exclusive responsibility for the operation, maintenance and repair of the same; all construction, operation, and maintenance and repairs shall be in strict compliance with standards approved by the US Public Health Service as relevant and applicable regulatory Washington State Department of Health authority.

Tulalip shall annually provide to Everett a water system report to include number of customers, peak use and other information useful in optimizing joint operations.

10. Continuity of Service.

A. Continuity of service to Tulalip shall be maintained by Everett in the same manner as service to the Everett's businesses and residences. In the event of a general emergency or water shortage affecting the Everett Water Supply System requiring restrictions on the delivery of water, general restrictions placed upon deliveries to Tulalip shall be determined by a similar method to that used for restricting deliveries to Everett's retail consumers. In the event of localized emergency problems, temporary service interruptions may result.

B. It is recognized by both parties that emergency conservation measures may have to be implemented by Everett on a regional basis in order to meet an emergency condition. Tulalip shall assist and support such emergency conservation measures.

C. Everett shall provide oral and electronic mail notice to Tulalip, and may temporarily interrupt or reduce deliveries of water to Tulalip, if Everett determines that such interruption or reduction is necessary or reasonable in case of system emergencies or in order to install equipment, make repairs, replacements, investigations and inspections or perform other maintenance work on Everett's water system or those parts of the system supplying Tulalip. Except in cases of emergency, and in order that Tulalip's operations not be unreasonably interfered with, Everett shall give Tulalip reasonable written notice of any such interruption or reduction, the reason therefore, and the probable duration thereof. Any such service interruption shall be for the shortest possible period in order that the public health and welfare of Tulalip is not jeopardized.

11. Indemnity.

A. Nothing herein shall be interpreted to create indemnity or cross indemnity agreements between the parties. In the event of claim, loss or liability alleged to have arisen out of the ownership or operation of Everett's water supply system or Tulalip's water supply facilities,

the parties agree that their liability shall be borne in accordance with and as determined under federal and Washington State laws.

B. Notwithstanding any other provision of this Contract, neither Tulalip nor Everett shall be liable under or pursuant to this Contract for indirect, incidental, special, exemplary or consequential damages, including but not limited to damages for lost profits or benefits, even if such party has been advised of the possibility or existence of such damages.

12. Uncontrollable Forces or State or Federal Law Changes. Neither of the parties hereto shall be considered to be in default in respect to any obligations hereunder if prevented from fulfilling such obligations by reason of uncontrollable forces or material changes in state or federal law. Parties rendered unable to fulfill any obligation hereunder by reason of an uncontrollable force or material change in state or federal law shall exercise due diligence to deal with such uncontrollable force with all reasonable dispatch and to take actions consistent with the purpose of this Contract.

13. Assignment; Successors Bound. Neither this Contract nor any right or privilege herein shall be assigned by any party without the written consent of the other party.

14. Notice. Formal notice and official communications between the parties regarding this Contract shall be sent by first class mail as follows:

TO: Everett
Mayor, City of Everett
2930 Wetmore Avenue
Everett, WA 98201

TO: Tulalip
Chairman, Tulalip Tribes of Washington
6406 Marine Drive
Marysville, WA 98-271-4032

15. Relationship of the Parties. This Contract and the Agreement for Settlement, Water Supply, and Water Delivery System Between the Tulalip Tribes of Washington, and the City of Everett dated 16 September 2005 describes the entire relationship of the parties with regard to the subject matter herein concerned. Except as maybe explicitly provided otherwise herein, the Parties are independent entities and shall not be deemed to be partners, joint ventures, principals, or agents of each other for any purpose whatsoever. Each party shall have and maintain sole and complete control over all of its employees, agents, and operations. Except as may otherwise be explicitly provided herein, or in separate agreement, each and all of the obligations, responsibilities, and liabilities of the parties under and in connection with this Contract are several, and not joint, and no separate legal or administrative entity will be created to fulfill the purposes of this Contract.

16. Dispute Resolution. Any dispute under or in connection with this Contract shall be governed by the General Governmental Dispute Resolution Process of Part K of the Agreement for Settlement, Water Supply, and Water Delivery System Between the Tulalip Tribes of Washington, and the City of Everett dated 16 September 2005; provided, that should

either party file suit in any judicial forum pursuant to that Part K, that party shall have recourse first to the Federal District Court for the Western District of Washington, and only if that Court rules that it lacks subject matter jurisdiction will any party seek relief in an alternative judicial forum.

17. Miscellaneous.

A. 1991 Contract. The 1991 Contract remains in full force and effect under its terms. Water received by Tulalip from Everett, through the Marysville system, shall continue to be available for use by Tulalip consistent with and subject to the terms of the 1991 Contract.

B. 2005 Agreement. Except as otherwise provided in this Contract, the 2005 Agreement shall apply to and be integrated with this Contract.

C. 2006 Interlocal Agreement. The 2006 Interlocal Agreement shall remain in effect only until Project completion, consistent with the terms of that Agreement.

D. Contract Controls. In the event of conflict, ambiguity or inconsistency, the provisions of this Contract shall control over other agreements and contracts in which Everett and Tulalip are both parties.

E. Headings. The headings used herein are for convenience of reference only and shall not affect the meaning or interpretation of this Contract.

F. No Third Party Beneficiaries. Except as expressly set forth in this Contract; none of the provisions of this Contract shall inure to the benefit of or be enforceable by any third party.

G. Waivers. Except as otherwise provided herein or as agreed by the parties, no provision of this Contract may be waived except as documented or confirmed in writing. Any waiver at any time by a party of its right with respect to a default under this Contract, or with respect to any other matter arising in connection therewith, shall not be deemed a waiver with respect to any subsequent default or matter. Either party may waive any notice or agree to accept a shorter notice than specified in this Contract. Such waiver of notice or acceptance of shorter notice by a party at any time regarding a notice shall not be considered a waiver with respect to any subsequent notice required under this Contract.

H. Invalid Provision. The invalidity or unenforceability of any provision of this Contract shall not affect the other provisions hereof, and this Contract shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

I. Amendment. No change, amendment or modification of any provision of this Contract shall be valid unless set forth in a written amendment to this Contract signed by

both parties.

J. Assignment and Subcontracts. Neither party may assign this Agreement, or assign or subcontract all or any part of such party's rights or obligations under this Contract, without the prior written consent of the other party, which consent shall not be unreasonably withheld. Without in any way limiting the foregoing, this Contract shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

K. Further Assurances. Each party hereto covenants and agrees to do all things necessary or advisable, including but not limited to the preparation, execution, delivery and recording of any instruments or agreements, in order to confirm and better assure the intent and purposes of this Contract.

L. Counterparts. This Contract may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

M. Signature Authority. Each of the undersigned signatories represents and warrants that he or she has all necessary and proper authorization to execute and deliver this Contract on behalf of the party on behalf of which he or she is signing.

N. Rule of Construction. No provision of the Contract shall be construed in favor of or against either of the parties hereto by reason of the extent to which any such party or its counsel participated in the drafting thereof or by reason of the extent to which such provision or any other provision or provisions of this Contract is or are inconsistent with any prior draft thereof.

Exhibits: A. Tulalip Water Demand Projections
 B. Tulalip Tribal Service Area

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the parties have caused this Contract to be executed by their proper officers on the _____ day of _____ 2016

CITY OF EVERETT,
a Washington municipal corporation

By: _____
Name: Ray Stephanson
Title: Mayor

Approved as to form:

Attest:

City Attorney

City Clerk

THE TULALIP TRIBES OF WASHINGTON

By: Melvin Sheldon

Name: Melvin Sheldon

Title: Chairman