

TITLE 33
LUMMI NATION CODE OF LAWS
UTILITY REGULATING CODE

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TITLE 33
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UTILITY REGULATING CODE

Chapter 33.01 Jurisdiction and Purpose

33.01.001 Jurisdiction

The provisions of this Title and all rules and regulations under it shall apply within the exterior boundaries of the Lummi Reservation and within the exterior boundaries all lands held in trust for the Lummi Nation by the United States regardless of location.

33.01.010 Purpose.

The Lummi Reservation and trust lands are now largely undeveloped. The Reservation and trust lands are in need of regulations for an orderly means of economic development. In order to regulate present growth and to direct it in a manner harmonious to the ultimate goals of the residents of the Lummi Reservation and trust lands, an interim utility ordinance is needed.

33.01.020 Intent.

The Lummi Tribe intends that in the best interests of all persons residing on the Lummi Reservation or trust lands, the Tribe from this day on will control all utilities on the Reservation and trust lands, issuing permits and approving rates that are charges. This Ordinance shall govern three main groups of utilities: electrical; water and gas; and roads, highways, trails and accesses.

Chapter 33.02 Regulated Areas

33.02.010 Electrical.

This Section shall deal with any and all electrical transmission and/or distribution within the Reservation or trust lands and in no way intends to hinder the growth and use for this service. From this day on, any and all electrical transmission and/or distribution organizations shall furnish to the Lummi Indian Business Council (LIBC) for approval, filing, and public notice, the rates that they plan to charge. Amendments to the original approved rates are subject to the approval of the LIBC after a public hearing, at which time the Tribe will either approve or reject the new or proposed rates. If rejected, the Tribe will state

what they consider appropriate rates, and why they rejected the application.

33.02.020 Roads.

This Section shall deal with any and all roads that are to be constructed on the Reservation or trust lands and any and all present or future roads, highways, trails, or access to the Reservation or trust lands. The plans for construction and/or tolls to be charged must first be presented to the Lummi Planning Commission for recommendation and then to the LIBC for action. The request for approval of tolls must include the information as to the reason for the charge and a breakdown of said charges, (i.e. amount for general maintenance, and amount for amortization or reasonable profit on investment), if the said road, highway, trail, and access has been previously amortized. (Schedules of amortization will become a part of the said application for rate approval.) These rates or tolls cannot be charged without the approval of the LIBC. All approved rates must be kept on file at the Lummi Tribal Office; therefore becoming available to all interested parties. Amendments to the original approved rates are subject to the approval of the LIBC after a public hearing at which time the Tribe will either approve or reject the new or proposed rates. If rejected, the Tribe will state what they consider appropriate rates and why they rejected the application.

33.02.030 Water and Gas.

This Section shall deal with the placement of pipe lines for the transmission and/or distribution of water, gas and other pipe solutions within the boundaries of the Reservation or trust lands. All future installations and/or construction plans of said lines shall be subject to the approval of the LIBC. The Council will also be the approving body for the charging of certain rates. A complete breakdown of said rates shall be supplied the Council, with charges broken down as to complete amortization, maintenance and reasonable fair profit. Amendments to the original approved rates are subject to the approval of the LIBC after a public hearing, at

which time the Tribe will either approve or reject the new or proposed rates. If rejected, the Tribe will state what they consider appropriate rates and why they rejected the application.

Chapter 33.03 Enforcement and Penalties

33.03.010 Enforcement.

The LIBC shall have the power and duty to enforce this Ordinance through the legal process of injunction.

33.03.020 Penalties.

Any persons, firm, or corporation violating any of the provisions of this Code shall, upon conviction thereof, be guilty of a misdemeanor. Every person, firm or corporation violating the provisions of this Code is guilty of a separate offense for each day during which the violation continues. The Tribe may institute any appropriate action or proceeding to enjoin further violation of the ordinance.

Chapter 33.04 Effective Date

33.04.010 Effective Date.

In as much as this Ordinance is necessary for the preservation of the public health, peace, safety, and general welfare of the Lummi Community, in order that the main purpose for a comprehensive plan of development shall not be defeated prior to its adoption, an emergency is declared to exist and this Ordinance shall be in full force and effect from and after its passage by the LIBC. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Chapter 33.05 Franchises For Public Utilities Upon Public Roadways

33.05.010 Definitions.

As used in this Title, each of the following terms shall have its corresponding meaning:

(a) "Lummi Indian Business Council" (LIBC) shall mean the governing body of the Lummi Indian Tribe, as established under the Constitution of the Lummi Tribe, as now in effect or as amended.

(b) "Roadway dedicated to the public use" shall mean any road, right-of-way, easement, or other established access which shall be open and formally established for the use and benefit of the public at large, including, but not limited to, any road maintained as a public road by the Lummi Indian Tribe, by the Bureau of Indian Affairs, by any agency or municipal corporation created by the State of Washington, or by any other agency of the United States government, and shall include the entire width of such road, right-of-way, easement or other established access.

(c) "Public utility" shall mean any person, government, agency, or private or municipal corporation which is organized to provide utilities service to the general public, including but not limited to provision for water, sewers, gas pipes, telephones, telegraph, electricity, railroads, and petroleum products; provided that no municipal corporation chartered under the laws of the State of Washington shall be deemed a public utility under this Chapter except in accordance with LCL §33.05.080 of the Lummi Code of Laws.

(d) "Franchise" shall mean formal and official permission to construct facilities of a public utility across and along a roadway dedicated to the public use.

(e) "Trust Land" means all lands held in trust for the Lummi Nation by the United States regardless of location.

33.05.020 Authority to Grant Franchise.

The LIBC may grant franchises to public utilities along and across roadways dedicated to the public use for the construction and maintenance of waterworks, sewers, gas pipes, telephones, telegraphs, electricity, and petroleum products, and other such similar facilities.

33.05.030 Cattleguards, Tramroads, and Railway Rights.

The LIBC may grant to any public utility the right to build and maintain tramroads and railroads upon and along roadways dedicated to the public use under such regulations and conditions as the LIBC may prescribe, and may grant to any person the right to build and maintain cattleguards and stockguards across any such roadway dedicated to the public use

under such regulations and conditions as the LIBC may prescribe; provided that such tramroad or railroad shall not occupy more than eight (8) feet of roadway dedicated to the public use or in such a way as to interfere with the public travel thereon.

33.05.040 Franchises Upon Bridges.

The LIBC may grant franchises upon bridges, trestles, and other structures dedicated to the public use in the same manner and under the same provisions as govern the granting of franchises on roadways dedicated to the public use.

33.05.050 Application - Notice of Hearing.

Upon application being made to the LIBC for a franchise, the LIBC shall set a time and place for hearing the same, and shall appoint three (3) of their number to conduct such hearing. This committee shall give public notice of the hearing at the expense of the applicant by posting notice in three (3) public places upon the Lummi Reservation or trust lands at least fifteen (15) days before the date fixed for the hearing, and shall also publish a similar notice at least twice in some daily newspaper delivered to the Lummi Reservation or trust lands, the date of the last publication to be at least five (5) days prior to the date of the hearing. The notice shall state the name or names of the applicant or applicants; a description of the roadway dedicated to the public use by reference to section, township, and range, which description shall be included in the application for franchise; and the time and place set by the committee for the hearing.

33.05.060 Hearing - Order.

The hearing may be adjourned from time to time by order of the committee. At the conclusion of the hearing, the committee shall make findings and a recommendation to the LIBC regarding the decision of the committee as to whether or not the granting of the franchise would be in the public interest. The LIBC shall consider these findings and recommendations at a properly called meeting of the LIBC and shall then adopt a resolution granting the franchise in whole or in part, or denying the franchise. Any person dissatisfied with the findings and recommendation of the

committee may, at his or her or its expense, cause a full transcript of the record of the hearing to be made, and then present such written objections as he, she, or it shall have to the LIBC at the meeting in which the findings and recommendations shall be considered. Such persons shall be permitted to introduce evidence and testimony in support of the objections, and any persons shall be permitted to rebut such evidence or testimony. Any such objections must be filed within ten (10) days of the receipt of the findings and recommendations by the applicant. After the receipt of such new evidence and testimony, the LIBC shall proceed to adopt a resolution granting the franchise in whole or in part, or denying the franchise in whole or in part, or denying the franchise.

33.05.070 Limitations Upon Franchises.

(a) Any public utility or person constructing or operating a utility under a franchise received under this Code shall be liable to the Lummi Indian Tribe, and to the owner of the roadway dedicated to the public use, for all necessary expenses incurred in restoring the roadway dedicated to the public use to a suitable condition for travel, and shall also indemnify the Lummi Indian Tribe for the costs of any action brought against the Lummi Indian Tribe resulting from a grant of such franchise.

(b) No franchise shall be granted for a period of longer than fifty (50) years.

(c) No exclusive franchise or privilege shall be granted, provided that the LIBC may require utilities to share facilities.

(d) The facilities of the holder of any such franchise shall be removed at the expense of the holder thereof, to some other location on such roadway dedicated to the public use in the event such roadway is to be constructed, altered, or improved, and such removal is reasonably necessary for the construction, alteration, or improvement.

(e) No franchise shall be granted to any public utility or to any municipal corporation chartered under the laws of the State of Washington if such utility or corporation shall propose facilities which shall or might reasonably compete or conflict with a tribally operated or chartered utility.

33.05.080 Validation of Existing Franchises.

All rights, privileges, or franchises granted or attempted to be granted by the Board of County Commissioners or the State of Washington prior to the date of enactment of this Code by the LIBC and recognized under the laws of the State of Washington, RCW Chapter 33.06.55, may be validated in the following manner:

(a) The holder of such franchise shall, within ninety (90) days of the effective date of this Code, file with the Planning Office of the Lummi Indian Tribe, a complete record of the franchise and all facilities constructed pursuant to that franchise.

(b) The Planning Office shall cause a list of the holders of these existing franchises to be published and a brief description of the franchise to be published in the manner provided in LCL §33.05.050, of the Lummi Code of Laws.

(c) The LIBC shall hold a special meeting to consider whether or not any or all of these existing franchises shall be recognized. At such meeting any person may appear and introduce evidence and testimony in support for or against the confirmation of any franchise. The meeting may adjourn from time to time at the pleasure of the LIBC. After consideration of each existing franchise, the LIBC shall pass a resolution validating such franchise in whole or in part, or invalidating such franchise. In the case of invalidation of such franchise, the holder of the then invalid franchise shall have the right to reapply for a franchise pursuant to this Chapter, and such reapplication must be made and completed pursuant to this Chapter prior to resorting to the remedies of judicial review provided for in LCL §33.05.110 and LCL §33.05.120 of the Lummi Code of Laws. The LIBC shall validate all preexisting franchises found by a preponderance of the evidence to be in the public interest, but the LIBC shall not be bound to consider only evidence and testimony contained in the application and introduced at the special meeting called for the purpose of consideration of validation of the franchise.

33.05.090 Record of Franchise.

The LIBC shall direct the applicant for a franchise to cause to be recorded in the

Planning Office of the Lummi Indian Tribe a record of all existing franchises upon the roadway dedicated to the public use upon the Lummi Reservation or trust lands. The Planning Office shall maintain a current record of all such franchises, the purpose thereof, the portion of roadway dedicated to the public use over or along which or under which granted, the date of granting, the term for which granted, the date of expiration, and any other information with reference to any special provisions of such franchise. The franchise holder shall also file 'as built' plans when appropriate with the Planning Office. The franchise holder shall also file the same materials with the Auditor of Whatcom County, and the owner of a roadway dedicated to the public use, in order to maintain accurate records within other governmental agencies.

33.05.100 Exercise of Powers.

(a) The granting of franchises under this Chapter shall be deemed an exercise of the inherent sovereign police power of the Lummi Indian Tribe.

(b) In addition to the exercise of the police power, when a franchise is granted across non-tribally owned roadways dedicated to the public use, this grant shall, if necessary, also be deemed an exercise of the inherent, sovereign domain power of the Lummi Indian Tribe.

33.05.110 Judicial Review.

(a) Any person aggrieved by the final decision of the LIBC in granting a franchise in whole or in part, or in denying a franchise application under LCL §33.05.060, LCL §33.05.070, or LCL §33.05.080 of the Lummi Code of Laws, shall have the right to appeal to the Lummi Tribal Court for review of the grant, provided that the Petition for Review is filed within ten (10) calendar days of the approval of the minutes of the meeting at which the resolution of the LIBC granting or denying the franchise application is approved.

(b) No injunction shall be granted against the operation of any franchise which has been approved until a trial upon the merits of the case shall have been completed and judgment entered, provided that the rules on appeal may stay the operation of any judgment according to

those rules contained in the Lummi Code of Laws.

(c) Any person challenging the resolution and decision of the LIBC shall prove by clear, cogent, and convincing evidence the error complained of; provided that any question of valuation involved in an alleged taking shall be decided by a preponderance of the evidence.

(d) The Court in its final judgment may

(1) reverse the decision of the LIBC in whole or in part and enter a final judgment;

(2) remand the issue back to the LIBC for further proceedings;

(3) dismiss the appeal and sustain the resolution and decision of the LIBC;

(4) enter any judgment in the appeal which, the appellant having sustained his, her or its burden of proof, accords substantial justice to the parties.

(e) No final judgment shall be entered against the LIBC, its members, employees, or the Lummi Indian Tribe which shall award damages other than just compensation for property, costs, disbursements, or attorneys fees against the Lummi Indian Tribe.

33.05.120 Attorney Fees.

In any appeal filed pursuant to LCL §33.05.110 of the Lummi Code of Laws, or filed under the Indian Civil Rights Act, the Lummi Constitution, or any other statute or ordinance, the person challenging the action of the LIBC shall be liable for attorneys fees expended in the defense of the appeal by the LIBC, unless the person filing the appeal shall be substantially upheld in the judgment entered, provided that no such attorneys fees shall be awarded the LIBC if the sole ground of appeal is a challenge to the valuation of any alleged taking.

33.05.130 Penalty for Operating Without a Franchise.

Any person, government agency, private or municipal corporation, or public utility which shall willfully operate, construct, or maintain any utilities service as defined in LCL §33.05.010, without first having obtained a franchise in accordance with this Chapter shall be subject to a fine of not more than five

hundred dollars (\$500), or imprisonment for not more than one hundred eighty (180) days; provided that each continued day of non-compliance with this Code shall be construed to be a separate offense under this Section; and provided further that in addition to the criminal penalties provided herein, the LIBC shall be entitled to injunctive relief of both a temporary and permanent nature and a maximum civil penalty of one thousand dollars (\$1,000) per day for each day of continued non-compliance. The LIBC shall be entitled to these civil remedies for any failure to obtain a franchise as required by this Chapter.

33.05.140 Severability.

If any provision of this Code or the application thereof to any person or public utility or circumstance is held invalid, and the Code can be given effect without the invalid provision or application, then to this end the provisions of this Code are declared to be severable.

Title 33.Res2016-014