

Lake Tapps Reservoir Water Rights Settlement Agreement

This Lake Tapps Reservoir Water Rights Settlement Agreement (hereinafter "Settlement Agreement") is entered into by and between the Muckleshoot Indian Tribe ("Muckleshoot Tribe") and Cascade Water Alliance ("Cascade"). The Muckleshoot Tribe and Cascade are collectively referred to as the "Parties."

I. RECITALS

WHEREAS, Cascade has joined with Puget Sound Energy ("PSE") in pursuing water right applications Nos. S2-29934 and 29920, storage application No. 29935, and water right change application No. CS2 160822CL (collectively, the "Municipal Water Right") to develop a municipal water supply project meeting the demands of Cascade's service area.

WHEREAS, in June 2003, the Washington State Department of Ecology ("Ecology") issued a Report of Examination ("ROE") approving water right application Nos. S2-29934 and 29920, and storage application No. 29935.

WHEREAS, the ROE was appealed to the Washington State Pollution Control Hearings Board ("PCHB") by various parties, including the Muckleshoot Tribe and the Puyallup Tribe.

WHEREAS, in January 2004, PSE ceased operation of the White River Hydroelectric Project.

WHEREAS, in August of 2004 the PCHB remanded the appeals of the ROE back to Ecology for further consideration.

WHEREAS, Cascade is in the process of acquiring the Lake Tapps Reservoir and other assets of the White River Hydroelectric Project from PSE, including PSE's water rights and the pending Municipal Water Right applications.

WHEREAS, the Parties, together with the Puyallup Tribe have reached agreement on a White River Management Agreement that establishes an Agreed Flow Regime, that limits diversions to maintain instream flows in the White River, and contains other provisions with respect to the operation and maintenance of the Lake Tapps Reservoir that address concerns of the two Tribes.

WHEREAS, Cascade now seeks to resolve certain additional concerns raised by the Muckleshoot Tribe with regard to the Municipal Water Right and proposed diversions of water from the White River and Lake Tapps Reservoir.

WHEREAS, the Parties desire to avoid further litigation and establish a process to cooperatively address future issues related to the interpretation, implementation or enforcement of this Agreement in a manner consistent with their above-stated interests.

NOW, THEREFORE, in consideration of the mutual covenants and representations herein, together with those contained in the contemporaneous White River Management Agreement between and among the Parties and the Puyallup Tribe, and for other good and valuable consideration as set forth below, the Parties agree as follows:

II. TERMS AND CONDITIONS

A. Diversions and Streamflow

Cascade shall comply with all provisions of the White River Management Agreement and shall limit diversions for water supply purposes from the White River and Lake Tapps Reservoir to an annual quantity of no more than 72,400 acre/feet and an instantaneous quantity of no more than 150 cfs. Cascade will not seek future increases in either the annual or instantaneous quantity of water diverted and will dedicate the portion of PSE's perfected water right claim that is no longer diverted into Lake Tapps to maintenance of instream flow values in the Reservation Reach of the White River as provided in the White River Management Agreement. Cascade and the Muckleshoot Tribe shall take all necessary actions to prevent the appropriation of water so dedicated by third parties.

B. Mitigation Funding

Cascade shall contribute \$600,000.00 to the Tribe within 10 days of the closing of Cascade's acquisition of White River Project assets from Puget Sound Energy. Cascade shall contribute an additional \$6,200,000.00 to the Tribe within 60 days after a Report of Examination granting Cascade the right to divert 72,400 acre feet of water annually from the White River and the Lake Tapps Reservoir for municipal water supply purposes becomes final, following the completion of any direct administrative and judicial appeals therefrom.

Funds contributed by Cascade shall be placed in a segregated fund to be managed by the Muckleshoot Tribe, the principal and investment income from which may be utilized by the Tribe for fishery mitigation purposes and activities benefiting the White River watershed, including but not limited to, hatchery capital expenses, operations and maintenance, habitat acquisition or restoration, or other fishery enhancement or mitigation activities.

Each year by February 28, the Tribe shall provide Cascade with a workplan outlining proposed expenditures from the fund in the coming year and a brief report of activities funded in the past year. Notwithstanding the foregoing the Tribe shall not be required to make expenditures from the fund in any given year. Cascade at its own expense upon reasonable notice to the Tribe shall have the right

to audit the fund and expenditures therefrom to insure that the management of the fund and expenditures are consistent with this Agreement. Any unexpended funds remaining after December 31, 2060, shall be the unrestricted property of the Tribe.

Commencing in 2057, Cascade and the Tribe will reevaluate the impact of Cascade's municipal water supply project on aquatic resources of the White River and shall seek agreement on further mitigation funding beyond 2060 to compensate for continuing project impacts. In the event that the Parties are unable to reach agreement on further mitigation funding by December 31, 2060, the provisions of the Release contained in Section II.F. of this Agreement shall expire and the Tribe shall be free to make claims with respect to project impacts occurring or continuing after 2060.

C. Support for Federal Funding of Replacement of Corps of Engineers Fish Trap and Buckley Dam Mitigation

Cascade shall use its best efforts to support federal funding of replacement of the Corps of Engineers fish trap and Muckleshoot mitigation requests in connection with the replacement of the Buckley dam.

D. Surplus Land

In the event that Cascade acquires land on the north side of the White River adjacent to the Tribe's White River Hatchery from PSE, following completion of the replacement of the Buckley dam Cascade shall convey said land to the Tribe subject to a reservation of easements necessary to maintain and operate the dam. The Tribe agrees that the land conveyed to it under this provision shall be used for fish enhancement or noncommercial purposes.

E. Source Exchange

In the event that the Municipal Water Rights obtained by Cascade require application of a portion of the water diverted from the White River or Lake Tapps to a source exchange program, Cascade shall utilize such source exchange water in a manner that benefits streamflows in the White, Green, Cedar River, or Lake Washington Watersheds and shall consult with the Muckleshoot Tribe to maximize the benefit of the program to fishery resources of interest to the Tribe.

F. Release

This Settlement Agreement and the contemporaneous White River Management Agreement settle and resolve all claims that the Tribe may have

either now or in the future with respect to diversion of water by Cascade from the White River in the amounts and under the conditions provided for in this Settlement Agreement and the White River Management Agreement. So long as this Agreement and the White River Management Agreement remain in effect and Cascade complies with the terms of the two agreements, the Tribe will not seek to increase the agreed minimum flows or challenge diversions by Cascade in the amounts agreed in this Settlement Agreement and the White River Management Agreement. Nothing in the foregoing release precludes the following claims:

- 1) claims expressly reserved in the White River Management Agreement; and,
- 2) claims that do not arise directly out of the agreed diversions, including claims that may arise with respect to the design or impact of Buckley Dam replacement project, or claims with respect to design or impact of pipelines and related infrastructure built to convey water diverted under this Settlement Agreement and the White River Management Agreement.

G. Governance

The Parties shall establish a Joint Cascade Muckleshoot Policy Committee composed of one representative of Cascade and one representative of the Muckleshoot Tribe. The Joint Committee's purpose shall be to monitor implementation of this Settlement Agreement and to provide a forum for the amicable resolution of any disputes that may arise.

H. Dispute Resolution

1. Any dispute or claim arising between the Parties regarding the interpretation, implementation, or enforcement of this Agreement or its performance or nonperformance, including either Party's alleged failure to comply with any provision of this Agreement ("Dispute"), shall be settled by the procedures set out in this Section H of this Agreement and not by court action except as provided in this Section.
2. Statement of Positions and Request for Joint Cascade Muckleshoot Policy Committee Meeting. In the event of a Dispute, a Party shall first promptly provide the other Party with a general written statement of its claim(s) and position(s) and request a meeting of the Joint Cascade Muckleshoot Policy Committee to resolve the dispute. This statement need not be complete and will not limit the claims of a Party in any further procedure. If the Parties cannot resolve the Dispute within 30 days of receipt of these written statements, a claimant may proceed as set forth in subsection 3 below.

3. Binding Arbitration. If the parties do not resolve a Dispute pursuant to subsection 2 above, the Dispute shall be resolved by binding arbitration in King County, Washington, as follows:

- a. AAA Rules Apply. The arbitration shall be under the then existing Commercial Arbitration Rules of the AAA or a like successor organization.
- b. Arbitrators. The Parties shall attempt to agree on a single arbitrator with relevant expertise with respect to water projects or related dispute resolution. If they cannot so agree, then the selection of the arbitrator shall be determined by Judicial Arbitration and Mediation Services (“JAMS”) or a comparable organization who shall select a qualified arbitrator with experience in the subject matter of the dispute. After the appointment of the arbitrator, and before any hearings or conferences with the arbitrator, the arbitrator shall take an oath of impartiality, and the Parties may communicate directly with the arbitrators only by using the same procedures as would be proper for the parties or their representatives to communicate with a superior court judge relating to litigation pending in the Superior Court for the State of Washington for King County. The arbitrator’s fees shall be jointly shared by the Parties. Any attempt by a Party to assert a position solely for the purpose of causing delay, increasing costs or vexing the other Party shall be subject to Rule 11 sanctions as would be available to a party in a federal court proceeding and the party subject to sanctions shall be responsible for paying all costs and fees incurred by the other party as a result, direct or indirect, of the sanctioned party’s efforts.
- c. Discovery. The Parties shall be permitted to obtain discovery from each other of documents and other tangible evidence at a time reasonably prior to the arbitration hearing. No more than two depositions shall be permitted per Party.
- d. Governing Rules and Awards. To the extent applicable, the Washington Arbitration Act, Chapter 7.04A RCW, as amended at the time of the arbitration, shall govern any judicial proceedings, resolve any issue of arbitration, and procedurally govern arbitration under or related to this Agreement. The arbitrator shall resolve any Dispute in accordance with this Agreement, including the applicable law designated by the Parties in Section II.H.5. Unless otherwise agreed to by the Parties, the arbitrator shall not decide the Dispute on summary disposition. The Parties agree that the arbitrator shall have authority, without resort to any court, to award any remedy, order or relief, including without limitation awards, orders granting preliminary and permanent affirmative,

mandatory, prohibitory injunctive, or specific performance relief relating to any obligation under this Agreement, compensatory damages (but expressly excluding punitive or exemplary damages), and sanctions for abuse or frustration of the arbitration process to the same extent that a court with personal and subject matter jurisdiction could award, order or issue or any other specific performance of any obligation. The Parties agree that the obligation to arbitrate under this Agreement and any award, order or judgment of the arbitrator under this Agreement shall be final and may be specifically enforced in the Superior Court of the State of Washington for King County. Each Party shall bear its own attorney, expert and other fees and costs associated with the arbitration, except that the prevailing Party or Parties in any action brought to enforce this arbitration clause shall be entitled to recovery of its reasonable attorney's fees from the other Party or Parties.

4. Muckleshoot Tribe Limited Waiver of Sovereign Immunity. The Muckleshoot Tribe voluntarily grants Cascade a limited waiver of its sovereign immunity, and that of its officers and employees acting for the Muckleshoot Tribe in their official capacities, and consents to binding and mandatory arbitration for the limited purpose of claims by Cascade regarding the interpretation, implementation, and enforcement of this Settlement Agreement, the enforcement of the obligation to arbitrate, and the enforcement of any award, order or judgment of the arbitrator(s) in any arbitration authorized by this Section H. The Muckleshoot Tribe consents to suit by Cascade for the purpose of judicial enforcement of an arbitration award in accordance with this Section H in a suit brought in the United States District Court for the Western District of Washington, at Seattle or, if jurisdiction is not available in the United States District Court, in the Superior Court of the State of Washington for King County. The Muckleshoot Tribe agrees that it will not raise sovereign immunity as a defense in any judicial action brought by Cascade to enforce an arbitration award in accordance with this Section H. This limited waiver shall expire upon the expiration or termination of this Agreement, or when Cascade has received all benefits to which it is or may become entitled under this Agreement, whichever occurs later. The limited waiver of sovereign immunity granted to Cascade herein shall not extend to any monetary award or judgment, other than for mediator or arbitrator fees, and costs, and attorney fees expressly authorized in this Section.

5. Governing Law. The Parties agree that this Agreement and all questions concerning the performance of this Agreement shall be interpreted, construed and enforced in all respects in accordance with applicable laws of the State of Washington, without reference to rules relating to choice of law.

6. No Jurisdiction in Tribal Court. This Agreement and actions taken pursuant to this Agreement shall not be interpreted under any circumstances as consent by Cascade to jurisdiction in a Tribal Court over any claims or disputes arising under this Agreement. The Muckleshoot Tribe expressly waives any right it may have to require Cascade to exhaust its remedies in a Tribal Court before bringing an enforcement action under this Agreement. The Muckleshoot Tribe agrees that it will not prosecute, maintain, or institute any action, suit, administrative action or proceeding of any kind or nature against Cascade in a Tribal Court for any matter within the scope of this Agreement.

7. Specific Performance. The Parties agree that there is no adequate remedy at law with respect to their respective undertakings and obligations under this Agreement and that the Parties shall be entitled to specific performance of those undertakings and obligations in any arbitration or action authorized under this Agreement.

I. Good Faith Commitment to Support Agreement

1. The Parties covenant and agree to act in good faith and to support the terms and validity of this Agreement.
2. Cascade shall, during the term of this Agreement, support and defend the validity of the Agreement and shall not seek, either directly or indirectly, to invalidate the Agreement or undermine or modify its terms and conditions through administrative, legislative, judicial or other means.

J. Reservation of Rights

Each Party reserves all of its rights and interests except as explicitly addressed by the terms of this Agreement. In particular, but without limitation, except as explicitly spelled out in the Agreement, the Agreement does not in any way define, affect, limit or modify the inherent or treaty-reserved fishing, hunting, gathering or water rights of the Muckleshoot Tribe and does not in any way define, limit or modify the inherent sovereign rights, or rights reserved by treaty or provided by executive order, statute or common law of the Muckleshoot Tribe.

K. Successors and Assigns

1. This Agreement shall be binding upon and inure to the benefit of the Parties' respective successors and assigns.
2. The Parties agree that Cascade may, with the written permission of the Muckleshoot Tribe, assign or transfer its respective rights and obligations under the Agreement to a third party; provided that the assignee or transferee assumes in writing all of the obligations under this Agreement.

3. The Parties finally agree that any attempt by Cascade to transfer or assign this Agreement (or any amendment to this Agreement) in violation of this Section II.K. is void. A change of corporate form by Cascade shall not be considered an assignment for the purposes of this Section; provided, that Cascade gives the Muckleshoot Tribe reasonable prior notice of such change and the reasons for it; and provided further that the new entity is obligated by law or by written Agreement to assume all of the rights and obligations of this Agreement. Notwithstanding the dispute resolution provisions of this Agreement, the Muckleshoot Tribe may seek judicial relief with respect to any proposed change in Cascade's corporate form.

L. Construction and Interpretation

1. The headings, titles, and captions contained in this Agreement are merely for reference and do not define, limit, extend, or describe the scope of this Agreement or any provision herein.

2. The word "include(s)" means "including, without limitation."

3. Neither this Agreement nor any provision herein shall be construed against any Party due to the fact that said Agreement or any provision herein was drafted by said Party.

M. Modification

This Agreement may only be modified by written agreement of the parties duly approved by resolution or ordinance of the Muckleshoot Tribe and Cascade.

N. No Third Party Beneficiaries

No third party is intended to, or shall have any rights under this Agreement. The parties to this Agreement are the only ones with any right to enforce its terms.

O. Equal Participation in Drafting

The parties have participated equally in drafting this Agreement and have been represented by legal counsel. No party shall be deemed to have more responsibility than any other for any ambiguous language.

P. Notice

Each party shall designate, in writing, within ten (10) days of the Effective Date of this Agreement a person or persons to receive on behalf of that party of any notices pursuant to this Agreement. Notice shall be deemed to have been made when personally served on the party's designee(s), or on the third business day after notice is sent by first class mail, or an equivalent method of transmittal. A party may change its designee(s) by providing notice of the change in writing to the other party.

Q. Effective Date and Term of the Agreement

This Agreement shall be effective upon completion of the following three events; approval and execution of this Agreement by the Parties; approval and execution of the White River Management Agreement by the Parties and the Puyallup Tribe of Indians; and, approval and execution of a binding agreement between Cascade and PSE for the transfer of PSE's White River water rights and pending applications for the Municipal Water Right to Cascade. The Agreement shall continue so long as Cascade or any successor or assign diverts water from the White River. The Agreement shall terminate only upon written agreement of the Parties duly approved by resolution or ordinance of the Muckleshoot Tribe and Cascade, or upon permanent cessation of diversions from the White River into the Lake Tapps Reservoir and surrender or other final extinguishment of the water rights authorizing said diversions.

R. Non-waiver.

Waiver of any provision herein shall not be deemed a waiver of any other provision herein, nor shall waiver of any breach of this Agreement be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement.

S. Severability

If any provisions of this Agreement are determined to be unenforceable or invalid by a court of law, then this Agreement shall thereafter be modified to implement the intent of the Parties to the maximum extent allowable under law

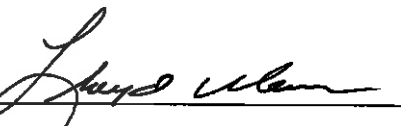
T. Power of the Parties

Each party by executing this Agreement warrants that it duly approved this Agreement and has the power to enter into the Agreement and to enforce its terms.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of this 6th day of August, 2008.

CASCADE WATER ALLIANCE

MUCKLESHOOT INDIAN TRIBE

By: 
Lloyd Warren, Chairperson

By: 
Charlotte Williams, Chairperson

