

SULTAN CITY COUNCIL AGENDA ITEM COVER SHEET

ITEM NO: A-10

DATE: November 12, 2009

SUBJECT: Jackson Hydroelectric Project Off-License Agreement

CONTACT PERSON: Deborah Knight, City Administrator

ISSUE:

The issue before the city council is to authorize the Mayor to sign the Off-License Agreement with Snohomish County Public Utility District for the Henry M. Jackson Hydroelectric Project.

STAFF RECOMMENDATION:

1. Review the Off-License Agreement (Attachment A)
2. Ask questions regarding the impacts to Sultan and Sultan's obligations under the Agreement
3. Authorize the Mayor to sign the Off-License Agreement for the Henry M. Jackson Hydroelectric Project

SUMMARY:

The city council discussed the off-license agreement at the council meeting on October 22, 2009. The city council expressed concerns regarding the PUD proposal to have a 10-year option to purchase a habitat easement in Reese Park without compensating the city. The city council directed staff to work with Snohomish County Public Utility District No. 1 (PUD) to re-negotiate the easement option.

City staff and Fire Chief Merlin Halverson met with PUD representatives to discuss the option. The PUD agreed to shorten the option from 10-years to 3-years. The option will expire on October 31, 2012 unless the parties renegotiate the option term. Since the term was shortened to three years, and the value of the option is relatively low, the parties agreed no option payment was necessary. In exchange, the PUD would work in good faith to exercise the option as quickly as possible.

The PUD will pay the appraised value of the property at the time the option is exercised but not less than \$127,000 (.12/foot). PUD intends to move quickly to exercise the option. However, PUD needs the approval of the Aquatic Resource Committee (ARC)

to make this a top priority. The City of Sultan is represented on the ARC. The first ARC meeting is scheduled for November 16, 2009.

Summary Settlement Agreement

The PUD has been working with stakeholders including Sultan and Fire District 5 since 2005 to renew the federal license to operate the PUD hydroelectric dam on the Sultan River.

The Off-License Agreement has been negotiated separately between the City of Sultan and PUD. The Off-License Agreement addresses issues such as public safety and property easements and acquisitions that are unique to the Sultan community. The Off-License Agreement is different than the Settlement Agreement which included all the stakeholders in the process.

The city council has discussed the Settlement Agreement at a number of meetings throughout 2009. Most recently, the city passed Resolution 09-14 urging the PUD to consider the impacts on downstream property owners of the Culmback Dam. On October 8, 2009, the Council authorized the Mayor to sign the Settlement Agreement.

The Settlement Agreement will be filed with the Federal Energy Regulatory Commission (FERC) on Tuesday, October 13, 2009. FERC will then begin its internal review of the document and necessary federal public hearings. FERC may not issue a renewed license to operate the project until later in 2010. The Off-License Agreement is conditioned on PUD receiving regulatory approval from FERC and would be effective sixty (60) days after FERC issues its final order.

The city's off-license agreement with PUD was predicated on the city signing the Settlement Agreement.

Summary Off-License Agreement

There are five parts to the Off-License Agreement. The total package value is \$950,000 over the proposed 50- year life of the license to operate the hydroelectric project.

1. \$250,000 payment in cash within 90-days of PUD receiving regulatory approval from FERC. The Council has discussed using these funds to purchase and install a dam safety warning system.
2. \$250,000 payment on or prior to January 1, 2032 (approximately half-way through the 50-year license agreement). The purpose of the payment would be to upgrade the dam safety warning system for the remainder term of the license.
3. \$2,500 annual payment to maintain the dam safety warning system and providing emergency training. The annual payment will be increased annually by 3.0% (\$283,000 paid over 50 years).

4. \$127,000 to purchase easements in Reese Park and Osprey Park for habitat enhancement projects required by the Settlement Agreement. Note, PUD has amended the earlier proposal and will to execute an option to purchase the easement within three years.
5. \$40,000 to purchase a wetland parcel owned by the city adjacent to Osprey Park. The purchase would take place within 90-days of PUD receiving regulatory approval from FERC.

The Off-License Agreement includes the following negotiated terms:

- 3.1.1 Initial Payment. Within ninety days (90) days of the Effective Date, the District agrees to pay the City two hundred and fifty thousand dollars (\$250,000) in cash. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.
- 3.1.2 Second Payment. On or prior to January 1, 2032, the District agrees to pay the City two hundred and fifty thousand dollars (\$250,000) in cash. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.
- 3.1.3 Annual Payment. Starting on January 1 in the year after the Effective Date and annually thereafter on January 1 for the term of the Agreement, the District shall provide an annual payment to the City to reimburse the City for a portion of the City's expense incurred in participating in implementing the New License and enhancing public safety. The first annual payment shall be \$2,500. Thereafter, through the term of this Agreement, the annual payment shall be increased annually by 3.0%.
- 5.1 Easement Option. The City grants to the District the exclusive option ("Option") to establish permanent easement areas ("the FERC License Easement Areas") on and within portions of Parcel A (see Attachment A for map), for the purpose of constructing, and maintaining new or enhancing existing side channels to the Sultan River, large woody debris structures and other habitat improvements as may be required by the New License.
- 5.2 Option Term. The term of the Option shall be three (3) years from the Effective Date of this Agreement. In the event the District does not exercise the Option prior to the expiration of the Option Term, the Option shall automatically terminate and the Parties shall have no further obligations hereunder related to Parcel A.
- 5.4 Easement Purchase Price. The District and the City agree that the purchase price for establishing the FERC License Easement Areas on Parcel A shall not be less than twelve (12) cents per square foot, in year 2012 dollars, for the FERC License Easement Areas (up to a maximum of 24.3 acres) for a total maximum

purchase price of \$127,000 (the “Easement Purchase Price”), or such price adjusted to reflect the year in which the Option is exercised. The actual square footage of the FERC License Easement Areas shall be based upon the engineer-certified survey of the FERC License Easement Areas conducted pursuant to Section 5.1. The District shall pay the City the Easement Purchase Price, within ten (10) days of the effective date of the Easement Agreement. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.

- **6.1 Parcel Purchase Price.** Within sixty (60) days of the Effective Date, the City will transfer Parcel B to the District by statutory warranty deed. The District and the City agree that the purchase price for Parcel B shall be forty thousand dollars (\$40,000) in cash (the “Parcel Purchase Price”). The District shall pay the City the Parcel Purchase Price within ten (10) days of the Property Transfer, provided that the warranty deed will not be released to the District until the City has received all funds. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.

FISCAL IMPACT:

The city council should not expect to receive money from the PUD in 2010. The FERC licenses process is likely to take 12 months. If the license application is appealed the approval process could take several years or longer. The city will not receive any payments until the license is approved.

The city will receive payments from PUD valued at \$950,000 over the 50- year life of the license. In exchange, the city will need to work with local stakeholders to determine the best use of the funds. The council has indicated the funds should be used for protecting the public by providing a dam safety warning system.

If a dam safety warning system is installed, the city will have the responsibility for the next 50-years to ensure the system works and is maintained per the manufacturer’s standards.

The city will need to work cooperatively with other stakeholders such as the fire district and school district. These are not direct costs, but will involve staff time to coordinate efforts.

ALTERNATIVES:

1. Authorize the Mayor to sign the Off-License Agreement. This action implies the city council does not have serious concerns regarding material issues outlined in the Agreement.
2. Do not authorize the Mayor to sign the Off-License Agreement and direct staff to areas of concern. This action implies the city council has material concerns regarding the Agreement and would like to resolve the issues prior to approval.

RECOMMENDED ACTION:

Authorize the Mayor to sign the Off-License Agreement between the City and Snohomish County Public Utility District No. 1 for the Henry M. Jackson Hydroelectric Project.

ATTACHMENT

A – Jackson Project Off-License Agreement

**HENRY M. JACKSON HYDROELECTRIC PROJECT
OFF-LICENSE AGREEMENT BETWEEN
THE PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON AND CITY OF SULTAN,
WASHINGTON**

This Henry M. Jackson Off-License Agreement (“Agreement”) is entered into between the Public Utility District No. 1 of Snohomish County, Washington (“District”) and City of Sultan, Washington (“City”) (collectively, the “Parties”) in connection with the relicensing and operation of the Jackson Hydroelectric Project, FERC Project No. 2157 (“Project”).

RECITALS

WHEREAS,

- A. The Project is located on the Sultan River, approximately 24 miles east of Everett, Washington, in south central Snohomish County in the State of Washington.
- B. The current FERC Project License will expire on May 31, 2011. On May 29, 2009, the District filed with the Commission a complete and final application (“License Application”) for a new FERC License to continue operating the Project (“New License”).
- C. The District and the City are signatories to the Licensing Settlement Agreement for the Jackson Hydroelectric Project (“Settlement Agreement”) executed concurrently with this Agreement and made and entered into pursuant to FERC Rule 602, 18 C.F.R. § 385.602, by and among the District the City of Everett; Tulalip Tribes of Washington; United States Department of Commerce, National Marine Fisheries Service; United States Department of Agriculture, Forest Service; United States Department of the Interior, Fish and Wildlife Service; United States Department of the Interior, National Park Service; Washington Department of Fish and Wildlife; Washington Department of Ecology; Snohomish County; American Whitewater; and the City.
- D. The District and the City are entering into this Agreement as part of the overall settlement process leading to issuance by FERC of the New License and continued operation of the Project. The District and the City acknowledge that the creation of the Agreement is intended as an element of a comprehensive settlement for the Project; however, due to its independent nature, the Agreement is intended to operate on its own. Therefore, nothing in the administrative provisions for the Settlement Agreement are intended to, or shall be construed to, modify in any manner provisions in the Agreement. Likewise the Parties’ obligations under the Agreement shall be interpreted independently of the Settlement Agreement except as may be provided herein.
- E. The District and the City agree that FERC’s full adoption of the Settlement Agreement and the Parties adoption of this Agreement resolve all issues between the District and the City pertaining to the relicensing of the Project.
- F. The City is the fee simple owner of certain real property, Parcel A and Parcel B, both situated in Snohomish County, Washington. Parcel A, Snohomish County Parcel Numbers 27080600102900 and 28083100400200, located at Reese Park, and Parcel Numbers

28083100400700, 28083100400300, and 28083100401900, located at Osprey Park, comprises approximately 77.4 acres of which approximately 24.3 acres are of interest to the District. Parcel B, Snohomish County Parcel Number 00765600099900, comprises approximately 33.4 acres. Parcels A and B are more specifically shown on Exhibit A to this Agreement, and as more particularly described in Exhibit B to this Agreement (hereinafter the “Property”).

- G. The District desires to secure from the City, and City is willing to grant to the District, an exclusive option to establish an easement on Parcel A, for the purpose of constructing new Sultan River side channels, large woody debris structures and other habitat improvements as may be required by the New License, as shown on Exhibit A attached hereto, all subject to the specific terms and conditions set forth in this Agreement.

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. GENERAL PROVISIONS

1.1 Effective Date. This Agreement shall become effective upon the date that is sixty (60) days after the date upon which FERC issues the Final Order resulting in the issuance of a New License.

Accordingly, if any party to the FERC proceeding seeks administrative and/or judicial review of the issuance of the New License, the Effective Date shall be sixty (60) days after the completion of the administrative and/or judicial review which will result in the FERC order issuing the New License becoming a Final Order. A Final Order means an order for which there is no further opportunity or right for administrative or judicial review of such order. Until the Effective Date, there shall be no liability or obligation on the part of any Party (or any of their respective elected and appointed officials, officers, directors, employees, agents and attorneys), except as expressly provided in Sections 7 and 9.2.

1.1.1 Effect of Any Failure of FERC to Issue a New Project License to the District. The Agreement shall have no effect in the event that FERC declines or fails to issue to the District a New Project License and such determination becomes a Final Order.

1.1.2 Effect of Application for Surrender or Notice of Intent to Decommission Prior to Effective Date.

1.1.2.1 If, prior to the Effective Date, the District files an Application for Surrender pursuant to 18 C.F.R. § 6.1 with FERC or files an irrevocable notification with FERC that it declines to accept the New License and will decommission the Project and cease generation, the Effective Date shall be stayed.

1.1.2.2 If, following the District’s timely filing of an Application for Surrender or an irrevocable notification of intent to decommission pursuant to Section 1.1.2.1 above: (a) the District withdraws the Application for Surrender or notification described in Section 1.1.2.1 above, or (b) FERC denies or rejects the Application for Surrender or notification described in Section 1.1.2.1 above, the Effective

Date and all obligations under this Agreement shall commence upon issuance of a Final Order resulting in the issuance of a New Project License.

1.1.2.3 If, following the District's timely filing of an Application for Surrender or an irrevocable notification of intent to decommission pursuant to Section 1.1.2.1 above, the District ceases all generation and permanently decommissions the Project, the Effective Date shall not commence and this Agreement shall be null and void.

1.2 Term of the Agreement. Unless terminated as provided herein, the term of the Agreement shall commence on the Effective Date and shall continue through the term of the New License, including any subsequent annual license(s), or until the date of any FERC order approving surrender of the New License, whichever is earlier.

2. PURPOSE OF AGREEMENT

The purpose of the Agreement is to resolve all issues between the District and the City pertaining to the relicensing of the Project. To achieve this purpose, this Agreement (1) defines the District's obligations during the New License pertaining to enhancement of public safety, (2) creates an option for the District to acquire easements for Project habitat projects pursuant to the New License, and (3) transfers certain land owned by the City to the District.

3. THE DISTRICT PAYMENTS TO THE CITY TO ENHANCE THE CITY'S FLOOD PROTECTION AND NOTIFICATION MEASURES

3.1 District Payments. In consideration of the City's release specified in Section 4, the option specified in Section 5, and the other City commitments within this Agreement, the District will provide the following compensation to the City:

3.1.1 Initial Payment. Within ninety days (90) days of the Effective Date, the District agrees to pay the City two hundred and fifty thousand dollars (\$250,000) in cash. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.

3.1.2 Second Payment. On or prior to January 1, 2032, the District agrees to pay the City two hundred and fifty thousand dollars (\$250,000) in cash. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.

3.1.3 Annual Payment. Starting on January 1 in the year after the Effective Date and annually thereafter on January 1 for the term of the Agreement, the District shall provide an annual payment to the City to reimburse the City for a portion of the City's expense incurred in participating in implementing the New License and enhancing public safety. The first annual payment shall be \$2,500. Thereafter, through the term of this Agreement, the annual payment shall be increased annually by 3.0%.

3.2 Sole and Exclusive Means of Compensation. The City acknowledges that the District would not enter into this Agreement if this Agreement did not provide and incorporate the sole and exclusive means by which the District shall provide compensation to the City for the Release provided in Section 4. For the duration of the New License and any subsequent annual license, the City shall not, under any circumstance, seek in any forum any additional consideration or

compensation in connection with the District's obligation in regard to the new license regarding enhancements to public safety for the Project and the District's activities related thereto other than that consideration and compensation to the City which is expressly provided for in this Agreement.

4. CITY RELEASE

Except for those obligations and rights created by and arising out of this Agreement, in consideration of the compensation stated in Section 3, as of the Effective Date, the City hereby agrees that this Agreement releases and discharges the District from any additional requirements with respect to the provision of safety requirements for purposes of the new license.

5. PARCEL A EASEMENT OPTION AGREEMENT

5.1 Easement Option. The City hereby grants to the District the exclusive option ("Option") to establish permanent easement areas ("the FERC License Easement Areas") on and within portions of Parcel A, for the purpose of constructing, and maintaining new or enhancing existing side channels to the Sultan River, large woody debris structures and other habitat improvements as may be required by the New License. Immediately following the Effective Date of this Agreement, the District will obtain an engineer-certified survey of the FERC License Easement Areas within Parcel A. Within sixty days of the Effective Date, the District shall file and record the Option survey and a memorandum summary of this Agreement in Snohomish County, acceptable to both the District and the City.

5.2 Option Term. The term of the Option shall be ~~ten-three (103)~~ years from the Effective Date of this Agreement or October 31, 2012 whichever is sooner. In the event the District does not exercise the Option prior to the expiration of the Option Term, the Option shall automatically terminate and the Parties shall have no further obligations hereunder related to Parcel A.

5.2.1 The parties may by mutual agreement extend or modify Option Terms set forth in this agreement.

~~5.2.2~~ In the event the District does not timely exercise the Option, the District shall provide the City with any instruments that the City reasonably may deem necessary for the purpose of removing from the public record any cloud on the title to Parcel A which is attributable to the grant or existence of this Option. The District shall reimburse the City for all costs associated with removing any such cloud to Parcel A.

~~5.2.3~~ The District's Exercise of Option. In the event the District elects to exercise the Option during the Option Term, the District shall notify the City in writing of such election. Following such notice, the City and the District agree to execute the written agreement that sets forth the scope and other terms and conditions of the relevant easements on Parcel A (the "Easement Agreement"), a copy of which is attached hereto and identified as Exhibit C. The Easement Agreement shall include the following provisions:

~~5.2.4~~5.3.1 The City and/or its successors shall restrict its use within the FERC License Easement Areas within Parcel A. Such restrictions shall include, but not be limited to, restrictions on excavation or development, burning or any destruction of natural conditions, wetlands and vegetation within the FERC License Easement Areas.

~~5.2.25.3.2~~ The District shall establish reasonable access to portions of existing side channels located on Parcel A and will re-vegetate access routes after the District's projects are complete;

~~5.2.35.3.3~~ The District shall confer with the City on all proposed construction projects within Parcel A for purposes of enhancing the quality of the projects for public use. Such enhancements may include chain link fence around the ballpark outfield, pedestrian foot bridges, culverts under roads, restoration of facilities where existing improvements are disturbed, properly designed trails and native landscaping on disturbed areas. In designing projects within the FERC License Easement Areas, to the extent reasonably feasible, the District shall minimize the removal of existing trees, maximize the removal of the existing blackberry infestation, and improve aquatic and terrestrial habitat.

~~5.2.45.3.4~~ The District shall be responsible for any unanticipated negative effects relating to the District's projects affecting drainage to the existing baseball and soccer fields. The District, in cooperation with the City, shall perform baseline drainage studies to determine ground water depth and drainage characteristics of the fields. This study shall be relied upon to determine whether a construction project adversely affects drainage of the existing baseball and soccer fields.

The District shall maintain all District-installed structures on Parcel A for the Term of the Agreement, including responding to the City's reasonable requests for maintenance. This shall include maintaining all new fences, bridges or other structures built as part of any final design; selective project maintenance to ensure operations benefit aquatic and terrestrial resources; and other maintenance required specifically as part of these projects. If the District fails to respond to the City's reasonable requests for maintenance, the City may provide the District with a written, 30 day demand to perform said maintenance. If the District fails to act within said 30 days, the City may undertake such requested maintenance and the District shall reimburse the City for all costs associated with said maintenance, plus a 3% administrative fee, within 30 days of submittal of an invoice to the District. The City shall not undertake any maintenance under this provision that is estimated to exceed \$2,000.

5.4 Easement Purchase Price. The District and the City agree that the purchase price for establishing the FERC License Easement Areas on Parcel A shall be twelve (12) cents per square foot, in year ~~2011~~ 2012 dollars, for the FERC License Easement Areas (up to a maximum of 24.3 acres) for a total maximum purchase price of \$127,000 (the "Easement Purchase Price"), or such price adjusted to reflect the year in which the Option is exercised. In no event shall the purchase price be less than (12) cents per square foot. The actual square footage of the FERC License Easement Areas shall be based upon the engineer-certified survey of the FERC License Easement Areas conducted pursuant to Section 5.1. The District shall pay the City the Easement Purchase Price, within ten (10) days of the effective date of the Easement Agreement. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.

~~5.35.5~~ The City's Retained Rights in Parcel A. The Option granted by the City to the District under the terms of this Agreement shall not include, and for all purposes the City shall retain all other rights in, or associated with, Parcel A, including all rights of use which rights are not specifically limited by any easement established under the Easement Agreement, or which are not fundamentally inconsistent with the easement following exercise of the Option. Notwithstanding, the Easement Agreement shall grant, at no additional cost, the District the right to cross the City properties to access the FERC License Easement Areas for both construction of any improvements and for ongoing maintenance of projects within the FERC License Easement Areas.

6. PARCEL B TRANSFER

6.1 Property Transfer. Subject to Sections 7.4, within sixty (60) days of the Effective Date, the City will transfer Parcel B to the District by statutory warranty deed. The District shall pay all costs to effectuate said transfer.

6.2 Parcel Purchase Price. The District and the City agree that the purchase price for Parcel B shall be forty thousand dollars (\$40,000) in cash (the "Parcel Purchase Price"). The District shall pay the City the Parcel Purchase Price within ten (10) days of the Property Transfer, provided that the warranty deed will not be released to the District until the City has received all funds. Unless otherwise agreed, the payment shall be made by electronic fund transfer using mutually agreed upon procedures.

7. PROPERTY INFORMATION

7.1 Examination of Title. Within six (6) months after execution of this Agreement, the City shall order preliminary title reports for Parcel B. Within 30 days of receiving notice of the District's intent to exercise the Option for Parcel A the City shall provide the District with a preliminary title report for Parcel A. Upon receipt of the respective preliminary title reports, the City shall provide the District with up-to-date preliminary title reports or court proceeding certificates for Parcel A and Parcel B. Within thirty (30) days after execution of this Agreement or receipt of notice for Parcel A, the City shall also provide the following materials:

7.1.1 copies of any existing and proposed easements, covenants, restrictions, agreements or other documents that, to the City's knowledge, affect title to either Parcel A or Parcel B and that are not disclosed in the title reports;

7.1.2 all surveys, plats, or plans relating to either Parcel A or Parcel B;

7.1.3 all leases, licenses, or concessions for either Parcel A or Parcel B or any portion thereof;

7.1.4 all warranties and guarantees affecting either Parcel A or Parcel B or any portion thereof;

7.1.5 notice of any existing or threatened litigation affecting or relating to either Parcel A or Parcel B and copies of any pleadings with respect to that litigation;

7.1.6 all governmental permits and approvals obtained or held by the City with relation to either Parcel A or Parcel B; and

7.1.7 all environmental assessment reports with respect to either Parcel A or Parcel B; any known governmental correspondence, orders, requests for information or action and other legal documents that relate to the presence of hazardous materials or substances on, in, or under either Parcel A or Parcel B or any portion thereof; and any other information material to the environmental condition of either Parcel A or Parcel B.

7.2 Inspection of Property. Subsequent to the execution of this Agreement, the District shall have the right to enter and inspect the condition of either Parcel A or Parcel B, upon reasonable notice to the City.

- 7.3 Termination of Licenses. Upon or prior to the transfer of Parcel B, the City agrees that it shall provide notice of termination of any leases, licenses, or concessions applicable to Parcel B, unless directed otherwise by the District.
- 7.4 Right to Reject Acceptance. The District reserves the right, upon review of the due diligence materials and inspection of either Parcel A or Parcel B, to reject acceptance of the deed of either Parcel A or Parcel B. The District's acceptance of the deed of any property to be transferred is not a condition precedent to the other contractual obligations of the Parties within this Agreement; provided, however, that upon such rejection by the District of the deed of any property to be transferred in accordance with this Agreement, the City shall have no further obligation under this Section in respect to such property.
- 7.5 City's Representations, Covenants, and Warranties Related to Parcel A and Parcel B.
- 7.5.1 Beginning upon execution of this Agreement and until the earlier of (i) the date that the City and the District execute the Easement Agreement with respect to Parcel A or (ii) the date that the Option provided by Section 5 terminates, the City shall maintain such properties in good repair in accordance with City's current practices and shall not cause or allow waste or damage to the properties or any portions thereof, or transfer any interest or right in any of the properties to any third party.
- 7.5.2 Beginning upon execution of this Agreement and until the earlier of (i) the date that City conveys Parcel B to the District or (ii) the date that the District provides notice of rejection or acceptance of Parcel B, the City shall maintain such properties in good repair in accordance with the City's current practices and shall not cause or allow waste or damage to the properties or any portions thereof, or transfer any interest or right in any of the properties to any third party.
- 7.5.3 The City has full power and authority to grant easements in Parcel A and convey fee simple title to Parcel B to the District.
- 7.5.4 To the knowledge of the City, there is no litigation pending against the City that arises out of the ownership of, or relates in any way to, either Parcel A or Parcel B.
- 7.5.5 All property conveyance documents executed by the City and delivered to the District pursuant to this Agreement will be: (1) duly authorized, executed, and delivered by authorized representatives of the City; (2) legal, valid, and binding obligations of the City; and (3) with respect to Parcel B, sufficient to convey fee simple title to the District.
- 7.5.6 The City has received no notice of any failure of the City to comply with any applicable governmental requirements with respect to the use or occupation of either Parcel A or Parcel B, including, but not limited to, environmental, health, zoning, subdivision, or other land use requirements that have not been corrected to the satisfaction of the appropriate governmental authority, and the City has received no notice, and has no knowledge of, any non-corrected violations or investigation related to any such governmental requirement.
- 7.5.7 The City has received no notice of any default or breach by the City under any covenants, conditions, restrictions, rights of way or easements that may affect the City in respect to

either Parcel A or Parcel B or may affect either Parcel A or Parcel B (or any portion thereof) and no such default or breach now exists.

- 7.5.8 To the knowledge of the City, there are no leases, licenses, or concessions affecting any part of either Parcel A or Parcel B other than those delivered to the District pursuant to Section 7.1, and there are no written or oral promises, understandings, or agreements between the City and any lessee, licensee, or concessionaire that have not been disclosed by the City as part of the materials provided by the City.
- 7.5.9 To the knowledge of the City, there is no release, presence, or existence of any hazardous material on, in, from, or onto the properties or any portions thereof, and the City has not received any notice of any violation of any state, federal, or local environmental laws associated with either Parcel A or Parcel B.
- 7.5.10 All of the representations, covenants, and warranties contained in this Section 7.5 are true as of the date of execution of this Agreement and shall survive until the date of termination of this Agreement; provided, however, that all such representations, covenants, and warranties terminate on the date of termination of this Agreement and no claims based upon such representations, covenants, and warranties can be brought after that date.

8. TERMINATION OF AGREEMENT

8.1 Termination.

- 8.1.1 This Agreement may be terminated at any time by mutual written consent of the District and the City.
- 8.1.2 This Agreement may be terminated by the District, in its sole discretion, if, subsequent to the Effective Date of this Agreement, FERC or a regulatory agency imposes a new material obligation to the New License through a license amendment or a regulatory action, and for that reason, the District then terminates the Settlement Agreement. A material obligation shall mean individually or collectively, substantially affecting the District's obligations relating to Project operations, including but not limited to costs; power generation; regulatory responsibilities; or protection, mitigation, and enhancement measures.

- 8.2 Parties' Actions upon Termination. Upon termination, this Agreement shall become null and void and there shall be no future liability or obligation based upon this Agreement on the part of any Party (or any of their respective officers, directors, commissioners, employees, agents or other representatives or affiliates). Nothing in Section affects the effectiveness of the release and the discharge provided by the City to the District pursuant to Section 4.

9. MISCELLANEOUS

- 9.1 Entire Agreement. This Agreement contains the complete and exclusive agreement of the District and the City with respect to the subject matter thereof, and supersedes all discussions, negotiations, representations, warranties, commitments, offers, contracts, agreements in principle, and other writings prior to the Effective Date of this Agreement, with respect to its subject matter.

- 9.2 New License. Within thirty (30) days of execution of the Agreement, the City agrees to deliver a letter to FERC, executed by the City Council, notifying FERC of the City's full support for FERC's incorporation, without modification, of the Settlement License Articles as enforceable articles of the Project License with a Project License term of 45 years. The City will cooperate fully with the District to obtain a Project License which is consistent with the License Settlement Agreement. The City agrees that, so long as this Agreement remains in effect, it will refrain from taking any position publicly or privately that indicates the District's application should be denied or that the Settlement License Articles are deficient.
- 9.3 Permitting. The Parties recognize that the District, as the Project Licensee, shall apply for and obtain all applicable federal, state, regional, and local permits, licenses authorizations, certification, determinations, and other governmental approvals (collectively referred to as "permits") for purposes of implementing the New License. To the extent the City is responsible for issuing any of such permits, the City shall waive all fees and conditions associated with City-issued permits for the New License.
- 9.4 Periodic Meetings. The District will meet with the City every five years, or more frequently if requested by the City, to look at areas of mutual interest, including information and education relating to area recreational opportunities, public safety, newly constructed aquatic enhancements, or other areas of mutual interest.
- 9.5 Severability. Should any section, paragraph, sentence, clause or phrase of this Agreement be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Agreement pre-empted by state or federal law or regulation and if the rights or obligations of either Party will not be materially and adversely affected thereby, such decision or pre-emption shall not affect the validity of the remaining portions of this Agreement.
- 9.6 Dispute Resolution. In the event of any dispute between the Parties concerning the interpretation or implementation of any aspect of this Agreement, the Parties agree to engage in good faith negotiations for a period of at least thirty (30) days in an effort to resolve the dispute. Notification of the dispute must be in writing to the other Party, and the 30-day negotiating period will begin upon notification as described in paragraph 9.7. During the 30-day period, any Party may request the services of a professional mediator to assist in resolving the dispute, with such mediator to be selected by the disputing Parties. The Party requesting such services shall cover the costs unless there is an agreement among the disputing Parties to share costs. In the event that resolution cannot be reached within the 30-day negotiating period, then either Party may seek remedy for alleged violations as described in Section 9.6.
- 9.7 Remedy for Alleged Violations. No Party shall seek relief in any other forum for noncompliance with this Agreement unless and until the requirements of section 9.6 have been met. If dispute resolution is not successful, any Party may seek judicial enforcement of the terms of this Agreement. Each Party agrees that monetary damages shall not be a remedy for breach of this Agreement and that a Party shall be entitled to seek injunctive or other equitable relief to remedy any breach of this Agreement.
- 9.8 Notice. Unless otherwise provided herein, all notices given by any Party to the other in connection herewith shall be in writing and shall either be delivered in person or by facsimile to the facsimile number listed below with telephonic confirmation. Notice delivered in person shall be deemed to have been properly given and received on the date delivered, so long as delivered during normal business hours. Notice delivered by facsimile is complete on transmission when

made prior to 5:00 p.m. on a business day. Notice delivered by facsimile made on a Saturday, Sunday, holiday, or after 5:00 p.m. on any other day shall be deemed complete at 9 a.m. on the first business day thereafter. Notification of changes in the contact person must be made in writing and delivered to all other contact persons.

For the District:

Assistant General Manager, Water and Generation
2320 California Street
PO Box 1107
Everett, WA 98206-1107
Tel: (425) 783-1000

For the City:

City Administrator
319 Main Street, Suite 200
Sultan, WA 98294
Tel: (360) 793-2231

- 9.9 No Third Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, and shall not authorize any entity other than the District and the City to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations and responsibilities of the District and the City with respect to third parties shall remain as imposed under applicable law.
- 9.10 Expenses. Each Party shall use its own resources in asserting its rights and performing its obligations under this Agreement, and no Party shall be required to reimburse the other Party for any expense or cost incurred hereunder.
- 9.11 Successors and Assigns. This Agreement shall apply to, and be binding on, and inure to the benefit of the District and the City and their successors and assigns, unless otherwise specified in this Agreement.
- 9.12 Change in Ownership of Projects. No change in ownership of the Project or transfer of the New License by the District shall in any way modify or otherwise affect the City's interests, rights, benefits, responsibilities or obligations under this Agreement.
- 9.13 Notice of Delay or Inability to Perform – Force Majeure. No Party shall be in breach of its obligations or liable to any other Party for breach of this Agreement as a result of a failure to perform if said performance is made impracticable due to an event of Force Majeure. The term “Force Majeure” means any cause reasonably beyond the Party’s control, whether unforeseen, foreseen, foreseeable, or unforeseeable, including but not limited to: acts of God, fire, war, insurrection, civil disturbance, explosion; adverse weather conditions that could not be reasonably anticipated causing unusual delay in transportation and/or field work activities; restraint by court order or order of public authority; inability to obtain, after exercise of reasonable diligence and timely submittal of all applicable application, any necessary authorizations, approvals, permits, or licenses due to action or inaction of any governmental agency or authority; or labor disputes or strikes which are reasonably beyond the control of the Party seeking excuse from performance.

The Party whose performance is affected by Force Majeure shall notify the other Party as soon as reasonably practicable. This notice shall include: (1) a description of the event causing the delay or anticipated delay; (2) an estimate of the anticipated length of the delay; (3) a description of the measures taken or to be taken to avoid or minimize the delay; and (4) a proposed timetable for the implementation of the measures or performance of the obligation. The affected entity shall make all reasonable efforts to promptly resume performance of the obligation. It shall provide verbal and written notice when it resumes performance of the obligation.

- 9.14 Waiver. The failure of the District or the City to insist, on any occasion, upon strict performance of any provision of this Agreement shall not be considered a waiver of any obligation, right or duty of, or imposed upon, such entity.
- 9.15 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.
- 9.16 No Changes to Existing Contracts and Agreements. This Agreement is entirely separate from and independent of other contracts and agreements among the District and the City. This Agreement does not and will not be deemed to change any rights or obligations under previously executed contracts or agreements between or among the District and the City except as may be provided herein.
- 9.17 Section Titles for Convenience Only. The titles for the Sections of this Agreement are used only for convenience of reference and organization, and shall not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the District and the City. This Agreement has been jointly drafted by the District and the City and therefore shall be construed according to its plain meaning and not for or against any Party.

10. EXECUTION OF THE AGREEMENT

Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the entity he or she represents, and that such entity shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such entity.

IN WITNESS THEREOF,

The District and the City, through their duly authorized representatives, have caused this Agreement to be executed as of the date set forth in this Agreement.

Public Utility District No. 1 of Snohomish County, Washington

_____ Date: _____
by: Steven J. Klein, General Manager

City of Sultan, Washington

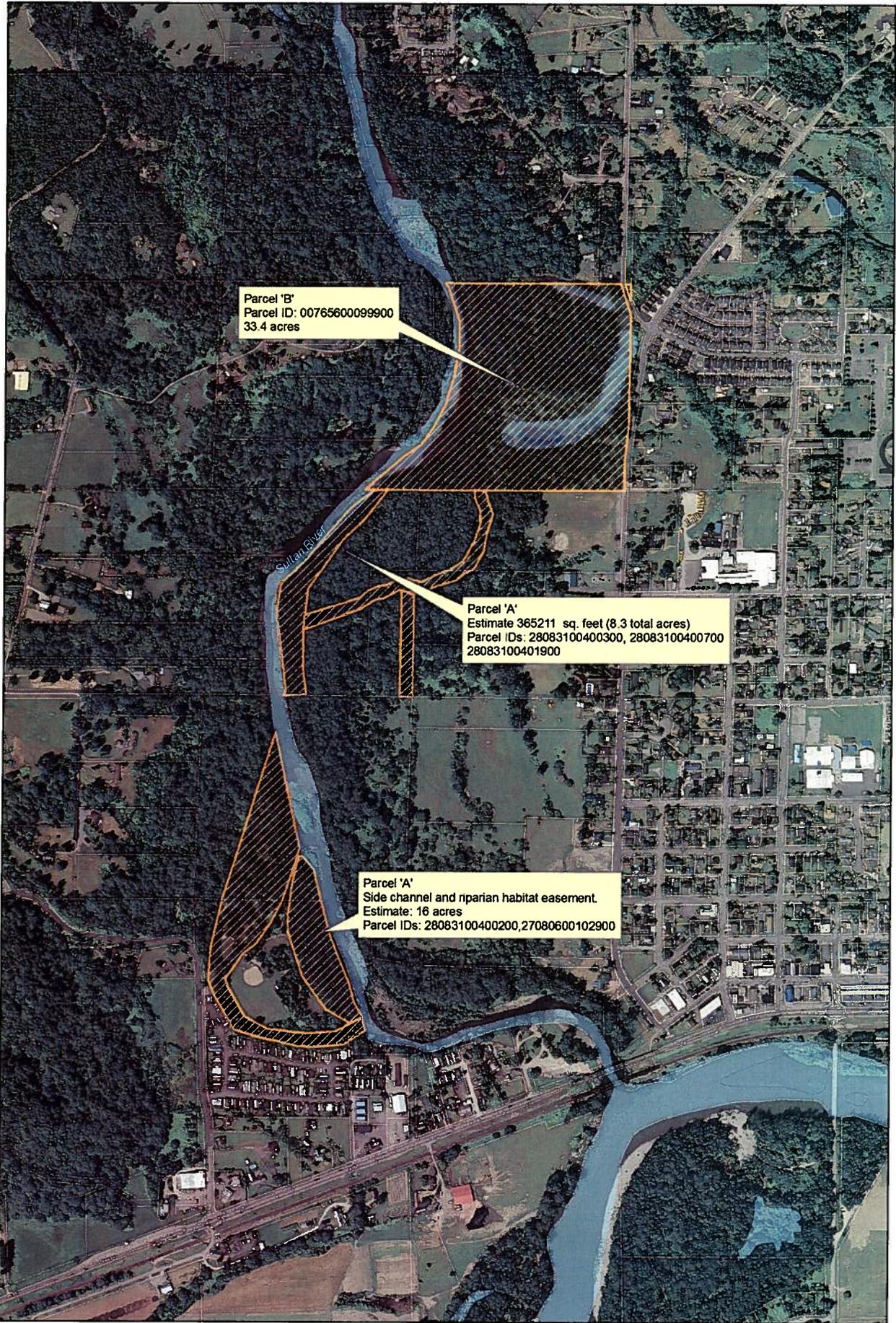
_____ Date: _____
by: Carolyn Eslick, Mayor

Attest:

_____ Date: _____
by: Laura Koenig, City Clerk

Approved as to form:

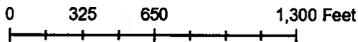
_____ Date: _____
by: Margaret King, City Attorney



Parcel 'B'
Parcel ID: 00765600099900
33.4 acres

Parcel 'A'
Estimate 365211 sq. feet (8.3 total acres)
Parcel IDs: 28083100400300, 28083100400700
28083100401900

Parcel 'A'
Side channel and riparian habitat easement.
Estimate: 16 acres
Parcel IDs: 28083100400200, 27080600102900



Sultan Easement Exhibit A



Off-License Agreement Parcel A and Parcel B Legal Descriptions

1. Off-License Agreement Parcel A

1.1 Snohomish County Parcel Number 27080600102900:

Parcel Legal Description

SEC 06 TWP 27 RGE 08 ALL TH PTN GOVT LOT 3 DAF - BEG NW COR SD GOVT LOT 3 TH S ALG W LN THOF TO AN INT WITH ELY LN OWEN CO RD THCONT S ALG SD ELY LN TO S LN OF N 625FT OF GOVT LOT 3 TH E 52FT TH S31*30 00E 270FT TH S73*00 00E 470FT TH N81*00 00E TO AN INT WITH W LN TR CONVYD TO VALLEY LUMBER CO INC PER AUD FILE NO. 1967188 BEING W LN OF E 375.6FT SD GOVT LOT 3 TH N TO NW COR SD TR SD PT BEING 519.3FT N & 375.6FT W OF SE COR GOVT LOT 3 TH E ALG N LN SD TR & ALG N LN TR CONVYD TO VALLEY LUMBER CO INC PER AUD FILE NO. 1799794 TO AN INT WITH R BK OF SULTAN RIV TH NLY ALG SD R BK TO N LN GOVT LOT 3 TH W ALG SD N LN TO POB

1.2 Snohomish County Parcel Number 28083100400200:

Parcel Legal Description

SEC 31 TWP 28 RGE 08 RT-17) GOVT LT 11

1.3 Snohomish County Parcel Number 28083100400700:

Parcel Legal Description

SEC 31 TWP 28 RGE 08 RT-4) GOVT LT 7 LESS BEG AT SE COR SD LOT 7 TH WLY 290FT ALG S LN SD GOVT LOT TH NLY 799.77FT PLT E LN SD GOVT LOT TH ELY PLT S LN SD LOT TO E LN OF GOVT LOT 7 TH SLY ALG SD E LN TO TPB

1.4 Snohomish County Parcel Number 28083100400300:

Parcel Legal Description

SEC 31 TWP 28 RGE 08 RT-1) NE1/4 SE1/4 LESS S 10 ACS & LESS BEG AT NE COR SD S 10 ACRES TH NLY ALG E LN SD NE1/4 SE1/4 469.77FT TH W LY PLT N LN SD S 10 ACRES TO W LN SD SUB TH SLY ALG W LN SD NE1/4 SE1/4 470FT M/L TO NW COR SD S 10 ACRES TH ELY ALG N LN SD S 10 ACRES TO POB LESS ANY PTN LY WHN 1ST ST

1.5 Snohomish County Parcel Number 28083100401900:

Exhibit B

Parcel Legal Description

SEC 31 TWP 28 RGE 08 BEG AT SE COR GOVT LOT 7 TH WLY 290FT ALG S LN SD SUB TH NLY 799.77FT PLT E LN SD GOVT LOT 7 TH ELY PLT S LN SD LOT TO E LN THOF TH SLY ALG SD E LN TO POB & TGW BEG AT NE COR OF S 10 ACRES OF NE1/4 SE1/4 AS DEEDED TO TOWN OF SULTAN IN VOL 5 DEEDS 848 TH NLY ALG E LN SD NE1/4 SE1/4 469.77FT TH WLY PLT N LN OF SD S 10 ACRES 510FT TO TPB TH CONT WLY PLT N LN SD S 10 ACRES TO W LN OF NE1/4 SE1/4 TH SLY ALG W LN SD SUB 470FT M/L TO NW COR SD S 10 ACRES TH ELY ALG N LN SD S 10 ACRES TO A PT SD PT BEING SW COR PPTY CONVYD TO CITY SULTAN BY AF NO. 8309080157 TH NLY ALG WLY LN SD SULTAN PPTY TO POB

2. Off-License Agreement Parcel B

Snohomish County Parcel Number 00765600099900:

Parcel Legal Description

TRACT 999 RIVERWOOD ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 48 OF PLATS PAGES 192-194 IN SNOHOMISH COUNTY WASHINGTON

DRAFT – CONFIDENTIAL SETTLEMENT DOCUMENT
SEPTEMBER 25, 2009

GRANT DEED OF EASEMENT

THIS GRANT DEED OF EASEMENT (the “Easement Agreement,”) is entered into this ___ day of _____, 20__ between the City of Sultan, Washington (the “Grantor”) and the Public Utility District No. 1 of Snohomish County, Washington (the “Grantee”).

RECITALS

WHEREAS, the Grantor is the owner of fee simple title to certain real property (the “Property”) located in Snohomish County, Washington, more particularly described in Exhibit A, attached hereto and incorporated herein by this reference;

WHEREAS, the Grantee is the operator of the Jackson Hydroelectric Project, FERC Project No. 2157 (“Project”). On _____, the Federal Energy Regulatory Commission (“FERC”) issued a new license to the Grantee for the continued operation of the Project (“New License”);

WHEREAS, the Grantee and Grantor are signatories to the Licensing Settlement Agreement for the Jackson Hydroelectric Project which was submitted to FERC on _____ (“FERC Settlement Agreement”);

WHEREAS, Grantee has obtained an option to acquire an easement (the “Easement”) on up to a maximum of 24.3 acres of the Property, for the purpose of constructing and maintaining new Sultan River side channels, large woody debris structures and other habitat improvements as may be required by the New License, under that certain Off-License Agreement between the Grantor and Grantee dated October __, 2009 (the “Option Agreement”); and

WHEREAS, on _____, Grantee exercised its option right to acquire the Easement on the Property in accordance with the terms set forth herein.

TERMS OF AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor and Grantee hereby agree as follows:

1. Recitals. The recitals set forth above are incorporated in this Easement Agreement as if fully set forth herein.
2. Conveyance. Grantor hereby grants and conveys to the Grantee a non-exclusive Easement in perpetuity on and within portions of the Property, as described in Exhibit A and as depicted in Exhibit B, attached hereto and incorporated herein by this reference (the “FERC License Easement Areas”). The scope of this Easement is set forth in this Easement Agreement.
3. Easement Purchase Price. Grantee shall pay Grantor the sum of [\$_____] for the Easement within ten (10) days of the effective date of this Easement Agreement as established in accordance with the terms of the Option Agreement.
4. Purpose of the Easement. Grantor is the fee simple title owner of the Property. Grantor and Grantee intend that the Easement located on the Property is for the purpose of constructing and maintaining new Sultan River side channels, large woody debris structures and other habitat improvements as may be required by the New License. The City and/or its successors in interest shall retain all other rights in, or associated with, Parcel A, including all rights that are not specifically limited by the easement restrictions or which are fundamentally consistent with such easement restrictions following the exercise of the Option.
5. Prohibited Actions. Except as otherwise stated herein, any activity on or use of the Easement that is detrimental to the Purpose of the Easement is expressly prohibited. By way of example, the following activities and uses are explicitly restricted:
 - a. *Development*. Except as otherwise agreed to by the Grantee, any excavation or development by the Grantor in the FERC License Easement Areas is prohibited.
 - b. *Vegetation*. Except as otherwise agreed to by the Grantee, the Grantor shall not remove or otherwise destroy any trees, plants, or other vegetation, or apply any pesticides or herbicides within the FERC License Easement Areas.
 - c. *Land Surface Alteration*. Except as otherwise agreed to by the Grantee, any topographic changes, extraction of subsurface materials, mining, construction, or widening of roads or driveways, construction of trails, or alteration of the natural landscape or wetlands of the property within the FERC License Easement Areas by excavating, filling, drainage, tilling, ditching, or any other means by the Grantor is prohibited.
 - d. *Dumping*. Except as otherwise agreed to by the parties, dumping or placement upon the FERC License Easement Areas of ashes, trash, garbage, sewage, sawdust, trees, brush, manure, discarded or salvageable materials including junk cars or any solid waste

material as defined by Chapter 70.95 RCW, or any offensive or hazardous materials is prohibited.

e. *Water Courses and Wetlands.* Except as otherwise agreed to by the Grantee, natural water courses, wetlands, streams, springs, lakes, ponds, marshes, sloughs, swales, swamps, or potholes now existing or hereafter occurring within the FERC License Easement Areas shall not be drained or otherwise altered including draining, ditching, tilling, filling in with earth or other material, or burning any areas covered by marsh vegetation by the Grantor.

f. *Division.* Any further division or subdivision of the Property or the Easement is prohibited without the advance written approval of the Grantee.

6. Rights and Obligations of the Grantee. The Grantor confers the following rights upon the Grantee regarding the Easement. The Grantee agrees to the following obligations regarding the Easement.

a. *Right to Enter.* The Grantee or Grantee's designee shall have the right to enter the Easement Areas. Grantor will set aside an access easement of minimum size so as to allow Grantee access to the FERC License Easement Areas. The Grantee may not, however, unreasonably interfere with the Grantor's use, development and quiet enjoyment of the Property.

b. *Access.* The Grantee shall establish reasonable access to portions of the existing side channels located on Parcel A and will re-vegetate access routes after the District's projects are complete;

c. *Confer with Grantor.* The Grantee shall confer with the Grantor on all proposed construction projects within the Property for purposes of enhancing the quality of the projects for public recreation and safety. Such enhancements may include a chain link fence around the ballpark outfield, pedestrian foot bridges, culverts under roads, restoration of facilities where existing improvements are disturbed, properly designed trails and native landscaping on disturbed areas. In designing projects within the FERC License Easement Areas, to the extent reasonably feasible, the Grantee shall minimize the removal of existing trees, maximize the removal of the existing blackberry infestation, and improve aquatic and terrestrial habitat.

d. *Drainage.* The Grantee shall be responsible for any unanticipated negative effects relating to the Grantee's projects affecting drainage to the existing baseball and soccer fields. The Grantee, in cooperation with the Grantor, shall perform baseline drainage studies to determine ground water depth and drainage characteristics of the fields. This study shall be relied upon to determine whether a construction project adversely affects drainage of the existing baseball and soccer fields.

e. *Right to Preserve.* The Grantee has the right to prevent any activity on or use of the FERC License Easement Areas that is inconsistent with the terms or purposes of this Easement Agreement.

f. *Right to Require Restoration.* The Grantee has the right to require restoration of the areas or features of the FERC License Easement Areas that are damaged by activity inconsistent with this Easement Agreement by the responsible party(ies).

g. *Signs.* The Grantee has the right to place signs on the Easement, which signs shall be acceptable to Grantor in its reasonable discretion, to identify the land areas that are protected by the Easement, provided the size and/or number of signs do not exceed those customarily used in the area for the intended purposes.

h. *Obligation to Develop and Maintain.* The Grantee shall maintain all Grantee-installed structures on the Property for the duration of the Easement, including responding to Grantor's reasonable requests for maintenance. This shall include maintaining all new fences, bridges or other structures built as part of any final design; selective project maintenance to ensure operations benefit aquatic and terrestrial resources; and other maintenance required specifically as part of these projects.

7. Grantor's Permitted Uses and Reserved Rights. The Grantor retains all ownership rights in the Property, including all rights of use which rights are not expressly restricted by this Easement Agreement, or which are not fundamentally inconsistent with the Easement. In particular, the following rights are reserved:

a. *Right to Convey.* The Grantor retains the right to sell, lease, transfer, develop, mortgage, bequeath, devise or donate the Property, as well as the right to establish real property tax relief. Any conveyance will remain subject to the terms and conditions of this Easement Agreement and Deed and the subsequent interest holder will be bound by the terms and conditions of this Easement Agreement and Deed. Any time the Property or a portion thereof is transferred by Grantor to any third party, Grantor shall notify Grantee in writing within five (5) business days after the closing using the form in Exhibit ____ attached hereto and made a part of this Easement Agreement and Deed. Notice of Transfer of Property shall expressly refer to this Easement Agreement and Deed and include a copy of the new ownership deed.

b. *Right to Maintain and Replace Existing Structures.* The Grantor retains the right to maintain, remove, renovate, and replace the existing structure(s) or construct new structures within the area allowed for development on the Property.

c. *Reserved Development Rights.* Grantor reserves the right to undertake any of the following activities and to grant to third parties the right to undertake any of the following activities, so long as such activities do not materially and adversely affect the uses and protection of the FERC License Easement Areas effected by this Easement Agreement: the right to subdivide, plat and adjust lot line boundaries within the Property from time to time, provided the perimeter legal description of the FERC License Easement Areas is not altered. Nothing contained in this instrument shall preclude Grantor from undertaking any development activities of any nature on adjacent parcels of land owned by Grantor or any other properties of Grantor from time to time, including the erection of viewing platforms on adjacent lands.

d. *Other Uses.* The Grantor may use the area encompassing the FERC License Easement Areas insofar as such use is consistent with the rights, privileges, restrictions and covenants contained herein.

8. Grantee's Remedies. This section addresses remedies of the Grantee and the limitations on these remedies.

a. *Delay in Enforcement.* A delay in enforcement shall not be construed as a waiver of the Grantee's right to enforce the terms of this Easement Agreement.

b. *Notice and Demand.* If the Grantee determines that the Grantor is in violation of this Easement Agreement, or that a violation is threatened, the Grantee may provide written notice to the Grantor unless the violation constitutes immediate and irreparable harm. The written notice will identify the violation and request corrective action to cure the violation.

c. *Failure to Act.* If the Grantor continues to violate this Easement Agreement following notice from the Grantee or Designee, the Grantee may bring an action in law or in equity to enforce the terms of the Easement Agreement. The Grantee is also entitled to enjoin the violation through injunctive relief, seek specific performance, declaratory relief, restitution, reimbursement of expenses or an order compelling restoration of the Easement Agreement. If a court determines that the Grantor has failed to comply with this Easement Agreement, then the Grantor also agrees to reimburse all reasonable costs and attorney fees incurred by the Grantee or Designee in compelling such compliance. If, on the other hand, a court determines that Grantor has not violated the Easement Agreement, Grantee or Designee shall immediately reimburse all reasonable costs and attorney's fees incurred by Grantor in defending any such action.

d. *Actual or Threatened Noncompliance.* Grantor acknowledges that actual or threatened events of noncompliance under this Easement Agreement may constitute immediate and irreparable harm. The Grantee is entitled to invoke the equitable jurisdiction of the court to enforce this Easement Agreement, provided Grantee is able to meet its burden of proof and all statutory requirements for an award of equitable relief.

f. *Cumulative Remedies.* The preceding remedies of the Grantee are cumulative. Any, or all, of the remedies may be invoked by the Grantee if there is an actual or threatened violation of this Easement Agreement.

9. Ownership Costs and Liabilities. In acquiring this Easement, the Grantee shall have no liability or other obligation for costs, liabilities, taxes, or insurance of any kind related to the Property, other than costs and expenses associated with any development or mitigation actions required to establish the Easement, as well as funding for maintenance, protection and access to the Easement during its existence. More specifically, and not by way of limitation, Grantor shall be solely responsible for the following liabilities and obligations.

a. *Taxes.* Grantor shall continue to be responsible for payment of all real property taxes and assessments levied against the Property. If Grantee is ever required to pay

any real property taxes or assessments on its Easement on the Property, Grantor will reimburse Grantee for the same. If for any reason, Grantor fails to pay any taxes, assessments, or similar requisite charges, Grantee may pay such taxes, assessments or similar requisite charges and may bring an action against Grantor to recover all such taxes, assessments and similar charges plus interest thereon at the rate charged delinquent property taxes by the Snohomish County Assessor's Office, or other entity charged with the collection of such taxes and assessments.

b. *Liabilities.* Grantor shall indemnify, defend and hold harmless Grantee and its members, directors, employees, agents, contractors and Designee(s) (collectively, the "Indemnified Parties") harmless from and against any and all loss, damage, costs or expense, including reasonable attorneys' fees, arising out of, or in any way related to: (i) injury to or death of any person, or damage to property, occurring on or about or related to the Property and caused by the Grantor, unless due solely to the negligent, willful or wanton act or omission of the Indemnified Parties; (ii) the obligations under this Section or (iii) the presence or release of hazardous materials or hazardous substances or dangerous wastes, as those terms are defined under federal and Washington laws and regulations, on, under, or about the Protected Property, during Grantor's ownership of the Property, or other failure to comply with any state, federal, or local law, regulation, or requirement, including CERCLA, MTCA and state dangerous waste statutes, by Grantor in any way affecting, involving, or relating to the Property. Grantee shall indemnify, defend and hold Grantor and its members, assigns, successors and heirs harmless from and against any and all loss, damage, costs or expense, including reasonable attorneys' fees, arising out of or in any way related to (i) injury to or death of any person, or damage to property or the Property, occurring on or about or related to the Property arising out the Indemnified Parties' actions on the Property; or (ii) the obligations of Grantee or the Indemnified Parties under this Easement Agreement.

10. Termination. The Easement may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Easement's purposes, or by exercise of eminent domain. If subsequent circumstances render all purposes of the Easement impossible to fulfill, then this Easement may be partially or entirely terminated by the parties' mutual agreement, or by judicial proceedings. Grantee shall have no compensable interest in this Easement under such circumstances and Grantee acknowledges the same. If the Easement Area is taken, in whole or in part, by power of eminent domain, Grantee shall not be entitled to any compensation and the entirety of any compensation award shall belong to Grantor. Should this Easement be terminated, Grantee shall have no obligation to remove any improvements constructed and/or maintained thereon.

11. Notices. Unless otherwise provided herein, all notices given by any Party to the other in connection herewith shall be in writing and shall either be delivered in person or by facsimile to the facsimile number listed below with telephonic confirmation. Notice delivered in person shall be deemed to have been properly given and received on the date delivered, so long as delivered during normal business hours. Notice delivered by facsimile is complete on transmission when made prior to 5:00 p.m. on a business day. Notice delivered by facsimile made on a Saturday, Sunday, holiday, or after 5:00 p.m. on any other day shall be deemed complete at 9 a.m. on the first business day thereafter. Notification of changes in the contact person must be made in writing and delivered to all other contact persons.

For Grantee:

2320 California Street
PO Box 1107
Everett, WA 98206-1107
Tel: (425) 783-1000
Fax:

For Grantor:

PO Box 1199
Sultan, WA 98294
Tel: (360-793-2231
Fax:

12. Severability. If any portion of this Easement Agreement is determined to be invalid, the remaining provisions shall remain in full force and effect.

13. Perpetual Duration; Successors. The Easement shall be a servitude running with the land in perpetuity. The provisions of this Easement Agreement that apply to Grantor and Grantee shall also apply to their respective agents, heirs, executors, administrators, assigns, and all other successors as their interests may appear. All subsequent owners of the Property are bound to all provisions of this Easement Agreement to the same extent as the current property owner.

14. Termination Rights and Obligations. A party's rights and obligations under this Easement Agreement terminate upon transfer of that party's interest in the Property or the Easement; provided, however, that all liability for acts or omissions occurring prior to transfer will survive the transfer.

15. Washington Law. This Easement Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

16. Entire Agreement. This Easement Agreement contains the complete and exclusive agreement of the Grantor and Grantee with respect to the subject matter thereof, and supersedes all discussions, negotiations, representations, warranties, commitments, offers, contracts, agreements in principle, and other writings prior to the Effective Date of this Easement Agreement, with respect to its subject matter.

17. Recording. Grantee shall record this Easement Agreement in a timely fashion in the official records of Snohomish County, Washington, and Grantee may re-record it at any time as may be required to preserve its rights in the Easement Agreement and Deed.

18. No Third Party Beneficiaries. Without limiting the applicability of rights granted to the public pursuant to applicable law, this Easement Agreement shall not create any right or

interest in the public, or any member thereof, as a third party beneficiary hereof, and shall not authorize any entity other than the Grantor and Grantee to maintain a suit at law or equity pursuant to this Easement Agreement. The duties, obligations and responsibilities of the Grantor and Grantee with respect to third parties shall remain as imposed under applicable law.

19. Joint and Several Liability. If Grantor at any time owns the Property in joint tenancy or tenancy in common, Grantor shall be jointly and severally liable for all obligations set forth in this Easement Agreement and Deed.

IN WITNESS THEREOF, the Grantor and Grantee, through their duly authorized representatives, have caused this Agreement to be executed as of the date set forth in this Agreement.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, Grantor and Grantee, intending to legally bind themselves, have set their hands on the date first written above.

GRANTOR:

By: _____
(Name)

STATE OF WASHINGTON)
)ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 20___, by _____(*Grantor's Name*)_____ in his/her individual capacity as a [Member of Willow Grove LLC][the owner of the Property].

Notary Public
Residing in _____
My commission expires _____

GRANTEE:

By: _____
(Name)

STATE OF WASHINGTON)
)ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 20___, by _____(Grantee)_____ in his/ her capacity as an officer of the Grantee, authorized to execute the foregoing document.

Notary Public
Residing in _____
My commission expires _____

EXHIBIT D

SAMPLE NOTICE OF TRANSFER OF PROPERTY BY GRANTOR

To: Grantee or Grantee's Designee or Assignee

From: **[Insert Name of fee owner of Property]** ("Grantor")

Pursuant to Section 8 of the Easement Agreement and Deed recorded _____[date]_____ under reception number _____, Grantee is hereby notified by Grantor of the transfer of the fee simple interest in the subject Property legally described in Exhibit A attached hereto effective as of [date of closing] to [insert name of new Grantor], who can be reached at [insert name, legal address, phone and fax number]. Also pursuant to Section 8 of the aforementioned Easement Agreement and Deed, a copy of the new ownership deed is attached.

GRANTOR:

By: _____
Name/Title

STATE OF WASHINGTON)

)ss.

COUNTY OF _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 200__, by _____ (*Grantor's Name*) _____ in his/her individual capacity as a [the current owner of the Property].

Notary Public
Residing in _____
My commission expires _____