



Quad Cities and the Office of Columbia River

Memorandum of Agreement (MOA): Securing New Water Supplies for the City of Kennewick, City of Pasco, City of Richland, and City of West Richland

Summary

1. Purpose
 - a. Coordinate Water Supply Development Projects
 - b. Resolve remaining uncertainty in the 2003 Settlement Agreement
2. Buckley Season of Use Transfer
 - a. Upon written request of the Quad Cities, Ecology will modify the rights to restore the historic season of use
3. Agreement on Trust Water Holdings for Mitigation of First 10 cfs under S4-30976
 - a. The Parties agree that Ecology's obligation is to mitigate total 8 cfs and 5,781.6 acre-feet.
 - b. The Parties agree the appropriate amount of mitigation for the first increment of growth is 6 cfs and 4,336.2 acre-feet (60% consumptive use).
 - c. The remaining 2 cfs and 1,445.4 acre-feet are available to the Quad Cities as mitigation for the future increments of growth.
 - d. Responsibility for costs are divided between Ecology (6 cfs portion) and Quad Cities (2 cfs portion).
4. Fulfillment of Ecology's obligation to provide 8 cfs and 5,781.6 acre-feet.
 - a. The difference between Ecology's Buckley and Byerly trust water holdings and the 8 cfs and 5,781.6 acre-feet described above, is 1 cfs and 4,014.37 acre-feet.
 - b. Ecology agrees to make 13.25 cfs and 4,014.37 acre-feet available from Lake Roosevelt Project to fulfill its mitigation obligations.
 - c. The Parties agree that the Lake Roosevelt water provides equivalent benefit to the McNary Pool per the 2003 Settlement Agreement
5. Filing of New Applications
 - a. City-specific applications may be filed that address specific projects.
 - b. Coordinated application shall be filed for regional growth needs. OCR may issue new rights as mitigation for S4-30976, or in substitution of S4-30976 if preferred by Quad Cities.
6. OCR and Quads will coordinate on future water supply projects to meet growth.
7. Pasco and West Richland pre-settlement "holes" are resolved.

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Parties: The undersigned Parties, the City of Kennewick, City of Pasco, City of Richland, and City of West Richland (Quad Cities) and the Washington State Department of Ecology (Ecology), acting through the Office of Columbia River (OCR), jointly support this Memorandum of Agreement (2011 Quads MOA).

Purpose: The undersigned Parties are committed to the following objectives:

1. Coordinate on water supply development projects that will assist the Quad Cities in meeting the mitigation requirements of Water Right Permit S4-30976P, or provide alternate, equivalent means of serving the projected growth for the Quad Cities.
2. Reach a common understanding of issues of uncertainty contained in the 2003 Stipulation, Settlement Agreement and Order of Dismissal of PCHB Appeal No. 02-216 (2003 Settlement Agreement), relating to Water Right Permit S4-30976P.

Recitals:

- Whereas OCR has a statutory mandate to pursue developing water supplies to meet pending municipal needs and develop sources of supply for interruptible water users on the Columbia River;

- Whereas Water Right Permit S4-30976P is subject to interruption associated with minimum instream flow requirements on the Columbia River.
- Whereas both Ecology and the Quad Cities are parties to the 2003 Settlement Agreement¹;
- Whereas Ecology and the City of Kennewick are partnering on an Aquifer Storage and Recovery (ASR) project, subject to a 2008 Memorandum of Understanding (2008 Kennewick MOU).
- Whereas Ecology and the City of Pasco are partnering on a water supply project, subject to a 2011 Memorandum of Understanding (2011 Pasco MOU).
- Whereas there is a need to coordinate future water supply development projects consistent with the terms of Water Right Permit S4-30976P.

Now, therefore, the Parties acknowledge and agree to the following:

1. **Buckley and Byerly Water Right Trust Transfers:** In partial fulfillment of obligations of the 2003 Settlement Agreement, Ecology acquired and placed water rights into the State Trust Program (RCW 90.42), termed the “Buckley” and “Byerly” water rights. Collectively, these water rights total 7 cfs and 1,767.23 acre-feet. A summary of the Buckley and Byerly water rights held in trust under the 2003 Settlement Agreement is provided in Appendix A.

The 2003 Settlement Agreement (Page 3) states in part that “*the intent . . . is*

¹ The Center for Environmental Law and Policy (CELP) is also a party to the 2003 Settlement Agreement. CELP is not a party to this MOA and is unaffected by its terms and conditions.

that trust water rights used for mitigation shall be from McNary Pool and of equivalent quantity and period as shown in Table 5 of the ROE' (referring to Table 5 of the Report of Examination, or ROE, for Permit S4-30976P). The referenced table identified the historic Buckley season of use as year-round, with water right specific quantities for each season (i.e., summer, fall and winter/spring). However, Ecology's 2002 ROE for the Buckley water rights altered the season of use inconsistent with Table 5 in response to comments from the Washington Department of Fish and Wildlife.

Under RCW 90.42.040, Ecology may modify a trust water certificate providing it does not impair existing water rights. Upon written request of the Quad Cities, Ecology will process a modification to the subject rights to return the season of use consistent with the historic exercise thereof, and with the terms and conditions of Table 5 of the ROE for Permit S4-30976P. While Ecology cannot prejudge this decision, a return to the historic season of use is not expected to impair existing water rights. In the event that Ecology's impairment analysis introduces constraints to the Quad-Cities' requested trust water certificate modifications other than a return to the historic season of use, Ecology shall 1) consult with the Quad-Cities to set the modified certificate to the Quad Cities' maximum benefit; and 2) consult with the Fish Flow Advisory Group to determine whether the available Lake Roosevelt mitigation can be used to offset such constraints.

2. **Trust Water Mitigation for the First 10 cfs of Diversions Under S4-**

30976P: The 2003 Settlement Agreement contains several statements that are unclear as to Ecology's obligation to hold trust water rights as mitigation for diversions under the first 10 cfs of Permit S4-30976P.

First, the 2003 Settlement Agreement (Page 4) states: *"To determine the amount of perpetual mitigation for the first increment of water use, Ecology has used an 80 percent consumptive use estimate". Permit S4-30976P identifies the first increment of water use as 10 cfs and 7,227 acre-feet. 80 percent of the first increment is 8 cfs and 5,781.6 acre-feet.*

Second, the 2003 Settlement Agreement (Page 3) references Table 5 of the ROE for Permit S4-30976P as *"the two groups of water rights Ecology intends to use as mitigation for the first increment of Quad Cities' water use"*. Table 5 identified diversions for a suite of water rights (Buckley and Simplot) ranging from 11 cfs to 20.8 cfs and totaling 6,476.7 acre-feet.

Third, the 2003 Settlement Agreement (Page 4) stated that concurrent with each 6-year Quad Cities planning update, Ecology *"will assure that the appropriate amount of water-for-water mitigation is in place"*. In 2008, the Quad Cities completed its 2008 Regional Water Forecast and Conservation Plan Update, which identified an annual consumptive use percentage of 48%, significantly less than the 80% assumption. The "appropriate amount of

water-for-water mitigation” based on 48% consumptive use to offset the first increment under Permit S4-30976P would be 4.8 cfs and 3,469 acre-feet.

The Parties agree that Ecology’s obligations to mitigate for the first increment of water use total 8 cfs and 5,781.6 acre-feet. The Parties further agree that, while consumptive use must be calculated during each 6-year planning effort, and while consumptive use may vary from year-to-year, that the 80% consumptive use assumption for the first 10 cfs is likely to be significantly higher than the Quad Cities’ actual consumptive use, even during drought years.

The Parties desire to maximize the trust water holdings for the benefit of the Quad Cities municipal uses. The trust water holdings will be maximized if 1) sufficient trust water holdings are maintained to offset consumptive uses in the first increment across a range of potential water years; and 2) if trust water holdings surplus to that objective, but within the 8 cfs and 5,781.6 acre-feet held for such purpose, are made available to the Quad Cities as mitigation to offset future increments of growth. To that end, the Parties agree “that the appropriate amount of water-for-water mitigation” for the first increment of growth is 6 cfs and 4,336.2 acre-feet (60% consumptive use). The remaining 2 cfs and 1,445.4 acre-feet are available to the Quad Cities as mitigation for the future increments of growth.

The Parties agree that Ecology is responsible for developing the 8 cfs and 5,781.6 acre-feet of water for the first increment. The Parties agree that Ecology is responsible for costs associated with the 6 cfs and 4,336.2 acre-feet of water for the first increment. The Parties agree that Quad Cities is responsible for costs associated with the 2 cfs and 1,445.2 acre-feet of water beyond the first increment. However, in the event that consumptive use in the future increases above 60%, Ecology agrees to assume responsibility for costs associated with that quantity. The Parties further agree that in the event that a future planning document estimates consumptive use above 60%, the Parties will meet and negotiate how such data will affect future increments of growth for which mitigation has already been secured. The Parties further agree that in the event that a future planning document estimates consumptive use at a percentage less than the percentage used to acquire mitigation that the Parties will negotiate a new and expanded permitted diversion amount commensurate with the lower consumptive use percentage.

3. **Simplot, Byerly and Lake Roosevelt Trust Water Rights:** When the ROE for Permit S4-30976P issued, Table 5 contained a summary of six water rights Ecology was negotiating with Mr. Buckley to acquire and three water rights that Ecology was negotiating to acquire from the Simplot Corporation. The Buckley water rights were secured, totaling 1,536.58 acre-feet. However, negotiations between Simplot and Ecology broke down and those rights were

not acquired.

Since that time, Ecology has acquired two water rights termed the "Byerly" water rights, totaling 230.65 acre-feet, bringing Ecology's trust water holdings to 7 cfs and 1,767.23 acre-feet. The difference between Ecology's Buckley and Byerly trust water holdings and the 8 cfs and 5,781.6 acre-feet described in Section 2 above, is 1 cfs and 4,014.37 acre-feet.

OCR is beginning a permitting effort for water made available through its Lake Roosevelt Incremental Storage Release Projects. Ecology holds 25,000 acre-feet of water in trust for municipal, domestic, and industrial purposes. Mitigation water is available from this project from April to August. Ecology agrees to make 13.25 cfs and 4,014.37 acre-feet available to fulfill its mitigation obligations under the Quad Cities permit. These quantities are shown in Appendix B. While permits issued based on the mitigation provided by the Lake Roosevelt project are permanent, the mitigation supply is not; Ecology must replace its 25,000 acre-feet of trust water holdings in the future with another supply source. In that event, Ecology will notify Quad Cities of opportunities to participate in the permitting and environmental review for such decisions. The Parties agree to amend Section 3 and Appendix B of this MOA at that time to reflect the change in mitigation source, and potentially the timing of availability; however, the quantities agreed to herein

are expected to remain unchanged.

4. **McNary Pool Defined:** The 2003 Settlement Agreement (Page 3) states that the Buckley water rights and Simplot water rights (if acquired) place of use were to be modified to “the McNary Pool of the Columbia River”. Further, if the Simplot rights were not acquired, then “other water rights from the McNary Pool” were to be acquired and put into trust. The Buckley and Byerly rights acquired to-date (and Simplot water not acquired) were originally diverted from the Walla Walla River, in a location such that the trust water benefit to McNary Pool accrued on the order of days later. The Parties agree that the Lake Roosevelt water described above provides equivalent benefit to the McNary Pool as contemplated in the 2003 Settlement Agreement. Lake Roosevelt authorizations used for Quad Cities mitigation will reflect delivery of water to the McNary Pool of the Columbia River from approximately River Mile 292 to River Mile 346.

5. **New Water Right Applications:** Section 9 (Page 5) of the 2003 Settlement Agreement required the Quad Cities to “*withdraw all pending applications for new water rights except for certain groundwater applications that are for supplemental rights for alternate places of withdrawal*”. However, since execution of the 2003 Settlement Agreement, the legislature passed RCW 90.90 and formed the Office of Columbia River, which created water supply development and permitting options not originally contemplated by the

Parties.

Under this 2011 Quads MOA, the Parties agree on the following framework for the submittal of new water right applications:

- a. **Project-Specific Applications:** Any individual city may file:
 - i. A project-specific water right application associated with a joint City-OCR water supply development partnership. An example of a project of this nature is the City of Kennewick – OCR Aquifer Storage and Recovery project, for which a reservoir application has been filed and a preliminary permit issued. In the event that new water supply is made available from such a project, such quantity in acre-feet shall be allocated in the same manner as for Non-Project-Specific Applications below.
 - ii. A new water right application for additional instantaneous capacity only (no additive annual allocation) without affecting annual allocations amongst the Quad Cities.
- b. **Non-Project-Specific Applications:** Unless partnering with OCR on specific projects or filing for source redundancy applications in Section 5a above, the Quad Cities shall file new water right applications jointly and consistent with the planning demands outlined in the Regional Water Forecast and Conservation Plan updates, and the 2000 Final Supplemental Environmental Impact Statement. As part of the

negotiation of this MOA, the Quad Cities will file the first of such applications. The Quad Cities shall reserve the right to allocate water awarded under such applications amongst themselves consistent with the planning objectives outlined in the Regional Water Forecast and Conservation Plan updates. If Project-Specific Applications for individual cities are also granted, then the Quad Cities shall coordinate how such individual water right permits affect regional water availability. Non-Project-Specific Applications are subject to the following guidelines:

- i. **Mitigation Water:** A new water right may be granted to provide mitigation water for consumptive use impacts associated with Permit S4-30976P. Such water right may be in the form of a new water right permit, a trust water certificate, a reservoir permit, or other appropriate authorization for the project.
- ii. **In-Lieu Water:** Ecology may develop water supplies with mitigation requirements that are deemed "superior" to those in Permit S4-30976P. In such cases, the Quad Cities may receive a permit in exchange for the voluntary cancellation of an equal amount of Permit S4-30976P.
- iii. **Priority Date:** Consistent with RCW 90.03.340, the priority date of such applications filed by the Quad Cities or individual cities that are a party to this 2011 Quads MOA is the date of the filing of the application. OCR shall follow WAC 173-152 in the

processing of water right applications filed. However, if OCR holds a trust water right, it reserves the right to assign portions thereof to Quad Cities as mitigation water so long as the objectives of RCW 90.90.020 are met.

6. Future Water Supply Development Partnership: The Parties agree to partner opportunistically on water supply development projects that meet the objectives of this 2011 Quads MOA. It is anticipated by the Parties that water supply development costs will be project-specific; if Quad Cities elects to receive water under the OCR Program beyond the 6 cfs and 4,336.2 acre-feet of water for the first increment described in Section 2, OCR may recover direct costs for such water supply from the Quad Cities consistent with RCW 90.90. The goal of the Parties is to ensure uninterrupted growth consistent with Permit S4-30976P, and to have a reasonable, non-speculative quantity of water in reserve to bridge the gap between water supply development alternatives.

7. City of Pasco and City of West Richland Water Right Deficits Resolved: In the past, Ecology, the City of Pasco, and the City of West Richland have disagreed about commitments to resolve water right deficits (aka "holes") that pre-dated the issuance of Permit S4-30976P and the 2003 Settlement Agreement. By virtue of a water supply project funded by OCR and the associated 2011 Pasco MOU, the City of Pasco agrees all "hole" issues have

been resolved to its satisfaction. The City of West Richland agrees all "hole" issues have been resolved to its satisfaction based on the following:

- a. Ecology's processing of numerous change decisions in 2008 providing for greater source flexibility amongst city sources and water rights.
- b. Ecology's issuance of new water right permit G4-35203P to the City in 2010 for 1,650 gpm (additive to existing rights) and 2,661 acre-feet (non-additive to existing rights).
- c. Ecology and the City's agreement in this MOA regarding pending City applications G4-32304 and G4-32395 as follows:
 - i. Ecology and the City agrees the intent of modifying application G4-32304 and G4-32395 to a supplemental designation was to provide an alternate, but non-additive source of water for the Quads permit (S4-30976P).
 - ii. If a quantity of water is approved by Ecology for application G4-32304 and G4-32395, then an equal quantity of Permit S4-30976P would be cancelled and a superseding permit issued.
 - iii. Ecology agrees it will begin processing application G4-32304 and G4-32395, or will otherwise modify existing Permit G4-35203P², to meet the goal of issuing 2,800 gpm and 4,531 acre-feet of water additive to the existing groundwater rights, but with a commensurate reduction of 2,800 gpm and 4,531 acre-feet from Permit S4-30976.

² If Permit G4-35203P is modified to accomplish this goal, then the face sheet of the permit will reflect that the 2,661 acre-feet authorized is now additive, so long as 2,661 acre-feet of water from Quads Permit S4-30976P is similarly reduced.

- iv. Consistent with RCW 90.03.290, Ecology can only approve applications where water is available, will not impair other rights or the public interest, and is for a beneficial use.
- v. West Richland understands that the groundwater being requested is in an area with uncertain recharge and with a history of complaints regarding declining water levels that have necessitated deepening of pump depths. If Ecology processes less than 2,800 gpm and 4,531 acre-feet in new groundwater applications or permit amendments, Ecology and West Richland agree to enter into negotiations for OCR-funding of a feasibility study for a potential aquifer storage and recovery project.

8. **Regulatory Actions Not Constrained:** To the extent this MOU contemplates Ecology taking regulatory action on any application, permit, certificate, or other document, the parties understand that Ecology must make decisions consistent with legal requirements, notwithstanding this MOU. The parties further understand that such decisions are subject to possible appeal by other parties, and that if an appeal alters or reverses a decision by Ecology, Ecology shall be relieved of any obligation to the contrary under this MOU.

9. **MOU Not a Binding Contract:** This MOU is intended only to improve intergovernmental coordination and is not intended to and does not create a legally binding contract or any right or benefit, substantive or procedural, enforceable at law or in equity by any party against another party, its

directors, officers, employees or other persons. This MOU does not constitute an explicit or implicit agreement by the parties to subject the other party to the jurisdiction of any federal or state court over and above any rights or procedures presently available to the parties. This MOU shall not be construed to create any right to judicial review involving the compliance or noncompliance of the parties with the MOU.

10. No Commitment Except as Authorized: Nothing in this MOU shall be construed as committing any party to actions for which it lacks authority. All actions and schedules called for by this MOU are subject to and contingent upon the availability and allocation of future appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals as needed.

11. Principle of Construction: This Agreement has been prepared jointly by the parties following negotiations between them. The parties were represented by legal counsel of their choosing. It shall be construed according to its terms and not for or against any of the parties.

MOU Acceptance By:

Representing the Washington State Department of Ecology:



Date 12/15/11

Derek Sandison, Director
Office of Columbia River

Representing City of Kennewick:

Peter M. Beaudry

Date 12/12/2011

Peter M. Beaudry
Director of Public Works
City of Kennewick

Representing City of Pasco:

Ahmad Qayoumi

Date 12/13/2011

Ahmad Qayoumi
Public Works Director
City of Pasco

Representing City of Richland:

Peter Rogalsky

Date 12/9/2011

Peter Rogalsky
Public Works Director
City of Richland

Representing City of West Richland:

Roscoe C. Slade III

Date 12/9/2011

Roscoe C. Slade III
Public Works Director
City of West Richland

Appendix A: Buckley and Byerly Water Rights Summary

Name	Water Right	Consumptive Use	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Buckley	4672-A	cfs	0.00	0.00	0.00	1.47	1.47	1.47	1.10	0.00	1.10	0.00	0.00	0.00	
		ac-ft	0.00	0.00	0.00	87.32	90.23	87.32	21.78	0.00	65.34	0.00	0.00	0.00	351.98
Buckley	8416-A	cfs	0.00	0.00	0.00	0.00	0.39	0.39	0.00	0.00	0.39	0.39	0.00	0.00	
		ac-ft	0.00	0.00	0.00	0.00	23.94	23.17	0.00	0.00	23.17	21.62	0.00	0.00	91.89
Buckley	1275-A(A)	cfs	0.00	0.00	0.00	1.39	1.39	1.39	0.00	0.00	1.02	2.13	0.00	0.00	
		ac-ft	0.00	0.00	0.00	49.54	85.32	41.28	0.00	0.00	32.31	126.52	0.00	0.00	334.98
Buckley	3099-A	cfs	0.00	0.00	0.00	0.85	0.85	0.85	0.00	0.00	0.85	0.85	0.85	0.00	
		ac-ft	0.00	0.00	0.00	50.49	52.17	50.49	0.00	0.00	50.49	52.17	13.46	0.00	269.28
Buckley	6417-A	cfs	0.00	0.00	0.00	0.00	0.76	0.76	0.00	0.00	0.76	0.76	0.00	0.00	
		ac-ft	0.00	0.00	0.00	0.00	46.65	45.14	0.00	0.00	24.08	46.65	0.00	0.00	162.52
Buckley	9537-A	cfs	0.00	0.00	0.00	0.00	1.77	1.77	0.00	0.00	1.77	1.77	0.00	0.00	
		ac-ft	0.00	0.00	0.00	0.00	108.64	52.57	0.00	0.00	56.07	108.64	0.00	0.00	325.93
Byerly	5283	cfs	0.356	0.356	0.356	0.303	0.303	0.303	0.231	0.231	0.231	0.356	0.356	0.356	
		ac-ft	21.85	19.74	21.85	17.99	18.59	17.99	14.33	14.19	13.73	21.61	21.15	21.85	224.87
Byerly	3605B	cfs	0.010	0.010	0.010	0.007	0.007	0.007	0.005	0.005	0.005	0.010	0.010	0.010	
		ac-ft	0.62	0.56	0.62	0.41	0.43	0.41	0.30	0.30	0.29	0.61	0.60	0.62	5.78
		Peak Rate (cfs)													7.00
		Monthly Total (ac-ft)	22.47	20.30	22.47	205.75	425.96	318.37	36.42	14.49	265.48	377.82	35.21	22.47	1767.23

Appendix B: Buckley, Byerly and Lake Roosevelt Water Rights Summary

Name	Consumptive Use	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Buckley and Byerly	cfs	0.37	0.37	0.37	4.02	6.94	6.94	1.34	0.24	6.13	6.27	1.22	0.37	6.94
	ac-ft	22.47	20.30	22.47	205.75	425.96	318.37	36.42	14.49	265.48	377.82	35.21	22.47	1767.23
Lake Roosevelt	cfs	0.00	0.00	0.00	13.25	13.25	13.25	13.25	13.25	0.00	0.00	0.00	0.00	13.25
	ac-ft	0.00	0.00	0.00	787.13	813.37	787.13	813.37	813.37	0.00	0.00	0.00	0.00	4014.37
Total	cfs	0.37	0.37	0.37	17.27	20.19	20.19	14.59	13.49	6.13	6.27	1.22	0.37	20.19
	ac-ft	22.47	20.30	22.47	992.88	1239.33	1105.50	849.79	827.86	265.48	377.82	35.21	22.47	5781.60