

WATER RIGHTS LEASE AGREEMENT

This Water Rights Lease Agreement ("Agreement") is entered into between the Washington State Department of Ecology ("Ecology") and the Port of Walla Walla ("Port"), a port district organized under the laws of the State of Washington, each a "Party" and collectively the "Parties." This Agreement takes effect on January 1, 2011. The purpose of this Agreement is for Ecology to lease water from the Port for the State's Columbia River program and to place the leased water in the Trust Water Rights Program, pursuant to Chapters 90.42 and 90.90 RCW.

RECITALS

A. A key priority of the Columbia River Water Management Act of 2006, Chapter 90.90 RCW, is the development of new water supplies in order to meet the economic and community development needs of people and the instream flow needs of fish. Under the State's Columbia River basin water supply development program, Ecology is to aggressively pursue the development of water supplies to benefit both instream and out-of-stream uses. To advance these purposes, Ecology's Columbia River program includes water rights acquisition and transfers.

B. The Trust Water Rights Program ("TWRP") program places water rights acquired by Ecology into trust for management by Ecology. Trust water rights acquired by Ecology shall be held or authorized for use for instream flows, municipal and industrial purposes, and irrigation, consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply problems. This Agreement establishes the terms and conditions under which the Port agrees to lease its beneficially used water rights on a temporary basis to the TWRP. The water leased by Ecology will be held by Ecology as a temporary trust water right under the terms of this Agreement.

C. The Port of Walla Walla owns Water Right Certificate Nos. G3-28146C, G3-28683C, G3-24791C, G3-21037C, G3-21308C, G3-21039C, and G3-21936C (together, the "Water Rights") that have historically been beneficially used for irrigation purposes. In furtherance of the Port's mission to promote economic development and job growth, the Port intends to change the use of the Water Rights to industrial and commercial purposes at its Wallula Gap business park located in the Attalia Industrial Urban Growth Area in western Walla Walla County. Accordingly, the Port has filed applications (the "Applications") for change of the Water Rights with the Walla Walla Water Conservancy Board (which applications will then be reviewed and finally decided by Ecology). The Port anticipates that it will require many years to put the Water Rights to full beneficial use for industrial and commercial purposes, but the Port must maintain flexibility to respond to offers from businesses seeking to locate in the business park while its Applications are pending and subsequent to Ecology's decisions on the Port's Applications. During this interim period, the Port desires to lease the Water Rights to Ecology to further the purposes of the Columbia River Act and to earn some revenue in lieu of putting the Water Rights to an interim irrigation use.

D. Ecology holds Certificates G3-24791C, G3-21037C, G3-21308C, G3-21039C, and G3-21936C as trust water rights. On September 13, 2010, Ecology acknowledged acceptance of the donated rights for the remainder of calendar year 2010. On December 20, 2010 Ecology received

a request for extension of these donations through December 31, 2011. Ecology acknowledged extension of these trust water rights on January 19, 2011.

E. The Port submitted forms to donate Certificates G3-28146C and G3-28683C to Ecology on December 28, 2011.

AGREEMENT

- 1. Period of Performance – Term of Lease.** The period of performance and Ecology’s lease of the Port’s Water Rights under this Agreement begins January 1, 2011 and shall continue for a term of ten (10) years ending on December 31, 2020, unless terminated sooner as provided in this Agreement. At the end of the Agreement, the leased Water Rights revert to the Port without any further action by Ecology. This Agreement shall take effect on the date it is executed by both Parties.
- 2. Leased Water Rights as Trust Water Rights.** The leased Water Rights will be held by Ecology as trust water rights as of the effective date of this Agreement.
- 3. Administration of Related Applications.**
 - a. When this Agreement takes effect, the one-year donation of Certificate Nos. G3-28146C, G3-28683C, G3-24791C, G3-21037C, G3-21308C, G3-21039C, and G3-21936C shall concurrently end.
 - b. When this Agreement takes effect, Ecology will complete an Application to Enter a Water Right into the Trust Water Rights Program to process this lease within the TWRP.
 - c. Applications for change pending before the Walla Walla Water Conservancy Board will continue to be processed to completion.
- 4. Trust Water Right Calculations.** The lease of the Port’s Water Rights under this Agreement will result in an estimated transfer to the TWRP of 4,769 acre-feet of consumptive water for use by Ecology for the purposes identified in Chapters 90.42 RCW and 90.90 RCW. Final determination of the amount of the Port’s Water Rights available for lease by Ecology under the terms of this Agreement will be made by Ecology’s Eastern Regional Office, Water Resources Program. Detailed information about the leased Water Right is contained in Appendix A to this Agreement. Appendix A is also incorporated into this Agreement by reference.
- 5. Reports of Examination.** Ecology’s decision on the Port’s Applications to transfer its Water Rights from irrigation to industrial and commercial purposes are pending and subject to evaluation by the Walla Walla Water Conservancy Board and final approval and decision by Ecology. When Ecology makes its final decision, these Reports of Examination (“ROE”) shall be appended to this Agreement and expressly incorporated by reference.
- 6. Administration of Leased Water Rights.** Ecology will administer the leased water as a trust water right under Chapter 90.42 RCW, in accordance with Ecology’s Trust Water Rights Program Guidelines. Ecology has the right to change the leased Water Rights’ purpose of use temporarily, subject to the term of this Agreement and the Port’s right of early withdrawal of Water Rights, discussed in Paragraph 7, below. Ecology will provide written notice to the Port

of any temporary change in purpose of use it makes to any of the leased water. Upon the expiration or termination of this Agreement or early Water Rights withdrawal by the Port, any such temporary change(s) in purpose of use shall expire and the Water Rights, in whole or part as the case may be, return to their status consistent with the final decisions on the Applications (as noted in Paragraph 3(c) above). Pursuant to Chapter 90.42 RCW, the leased Water Rights shall not be subject to relinquishment under Chapter 90.14 RCW.

7. Withdrawal of Water Rights by Port. During the term of this Agreement, the Port reserves the right to withdraw some or all of its leased Water Rights from the TWRP for use under the authorized purpose(s) of use. The Port may make such a withdrawal of Water Rights from TWRP, subject to providing Ecology with Notice (as defined in paragraph 20 below) as follows, and further subject to the terms and conditions described in this Agreement.

- a) The Port must provide nine (9) months written Notice to Ecology in advance of withdrawing any of its leased Water Rights from the TWRP; provided, however, that in no event shall a Port withdrawal of its leased Water Rights take effect during the irrigation season (defined as April 1 through October 15).
- b) However, during the October 15 to December 15 time period in any calendar year, the Port may withdraw any of its leased Water Rights from the TWRP with seven (7) days advance written Notice to Ecology.
- c) Any such Notice will specify the quantity of water (*e.g.*, number of acre-feet) withdrawn, the associated water right certificate from which the water is being withdrawn, and the date that said quantity of Water Rights is withdrawn from the TWRP and available for use by the Port.
- d) The Port may not provide Ecology with any Notice of withdrawal of any of its leased Water Rights before October 31, 2011.
- e) Ecology and the Port will confer before October 15 each year to exchange information about the following year's plans and to discuss any proposals regarding the Water Rights.

No action by Ecology is necessary to make a Port withdrawal effective.

8. Payment by Ecology to Port. For each year that some or all of the Water Rights are in the TWRP, Ecology will make an annual lease payment to the Port equal to \$105.00 per acre-foot of consumptive use quantity. Ecology will make the annual lease payment to the Port by November 1 of each year during the term of this Agreement. In order to receive payment, the Port by October 1 will submit an A-19-1A Invoice Voucher and an IRS Form W-9 to Ecology and Ecology will process the payment within thirty (30) days of receipt of the forms. Payment is subject to the availability of funds appropriated by the Legislature.

9. Early Withdrawal Fee by Port to Ecology. In the event that the Port withdraws from Ecology's TWRP its leased Water Rights for its use (under paragraph 7 above) that takes effect after the end of the irrigation season in a calendar year, then Ecology shall not owe the Port any lease payment as to the Water Rights quantity withdrawn for all subsequent years of the lease

term. In addition, during the second and third years of the term of this Agreement, the Port will pay an early withdrawal fee to Ecology as follows:

- In 2012, \$52.50 per acre-foot withdrawn.
- In 2013, \$26.25 per acre-foot withdrawn.

Notwithstanding the foregoing, in the event the Port makes a Water Rights withdrawal that takes effect before the end of the calendar year, the Port shall not owe any pro rata or partial year early withdrawal fee to Ecology so long as the withdrawal takes effect after the end of the irrigation season, *i.e.*, after October 15. In the event that the Port owes an early withdrawal fee to Ecology for withdrawing water under the terms of this Agreement or during the irrigation season, Ecology may choose to receive payment from the Port by check or to deduct the amount from the following year's lease payment to the Port for leased Water Rights remaining in the TWRP under the terms of this Agreement.

10. Interruption of Water Rights. Two of the Water Rights (Certificate Nos. G3-28146C and G3-28683C) leased under this Agreement contain regulatory provisions that subject the certificates to curtailment under Chapter 173-563 WAC. Curtailment may occur when the stated minimum weekly average flows at the McNary Dam control point are not met. The Certificates state that use of water "can be expected to be curtailed at least once in every 20 years," although in practice curtailment has historically occurred less often. If Water Right Certificate Nos. G3-28146C and G3-28683C are interrupted or curtailed under the low flow provisions to the detriment of the TWRP, then the following will apply:

- i. At the conclusion of the irrigation season, Ecology will calculate the total number of acre-feet "lost" to the TWRP during that year's irrigation season based on the number of weeks curtailed as a percentage of the total acre-feet under Certificate Nos. G3-28146C and G3-28683C leased to the TWP for that year. Ecology will then provide written Notice of said acre-foot calculation to the Port.
- ii. Within 60 days after receiving the written Notice from Ecology, the Port shall fully refund Ecology for that year's lease payment attributable to the "lost" acre-feet (*i.e.*, \$105.00 per acre-foot as stated in Ecology's Notice in (i) above).

In deciding whether to curtail Certificate Nos. G3-28146C and G3-28683C in a water-short year, Ecology will not treat said Certificates differently than other similar water rights on the Columbia River.

11. Records Maintenance. Ecology and the Port shall each maintain books, records, documents and other evidence that sufficiently and properly reflect any research completed on historical and beneficial use of the water rights, as well as irrigation and other property use records. These records shall be subject to inspection, review or audit, at reasonable times and places, and upon reasonable prior notice, by duly authorized personnel of Ecology, the Port, and the Office of the State Auditor. All books, records, documents, and other material relevant to this Agreement will be retained for six (6) years after agreement expiration. The Office of the State Auditor, and any person authorized by Ecology or the Port shall have the right to examine

any of these materials during this period, subject to the foregoing conditions. Records and other documents, in any medium, furnished by one party to the other parties, shall remain the property of the furnishing party, unless otherwise agreed. The receiving party shall not disclose or make this material available to any outside parties without first giving notice to the furnishing party and giving it a reasonable opportunity to respond. All parties shall utilize reasonable security procedures and protections to assure that records and documents provided by the other parties are not erroneously disclosed to outside parties.

12. Termination.

- a. If for any cause, any Party does not fulfill in a timely and proper manner its obligations under this Agreement, or if any Party violates any material term or condition of this Agreement, the aggrieved Party shall give the other Party Notice of such failure or violation. The responsible Party shall be given the opportunity to correct the violation or failure within fifteen (15) working days. If the failure or violation is not corrected, this Agreement may be terminated immediately by Notice of the aggrieved Party to the other Party.
- b. In the event that this Agreement is terminated, Ecology will transfer the leased water right back to the Port in its configuration immediately prior to the entry of the right into trust. The Port's Water Rights will retain their original priority dates as stated in the certificates. An adjudication may eventually make a final determination of water rights and priority dates.

13. Dispute Resolution. Ecology and the Port agree to make all reasonable efforts to resolve, through good-faith negotiation, any disputes concerning the terms and conditions of the agreement or any alleged breach. If negotiations are not successful, Ecology and the Port shall utilize non-binding mediation as an alternative dispute resolution process. Ecology and the Port will evenly split mediation costs. In the event that such non-binding mediation is not successful, Ecology and the Port agree that venue for any judicial action shall lie in the Superior Court of the State of Washington for Walla Walla County. The prevailing Party in any judicial proceeding shall be entitled to recover its reasonable attorney's fees and costs.

14. Governing Law. This Agreement is entered into pursuant to and under the authority granted by the laws of the State of Washington. The laws of the State of Washington shall govern any question or dispute regarding this Agreement.

15. Assignment. This Agreement, and any claim arising from this Agreement, may not be assigned by any party in whole or in part without the express prior written consent of the other party. Consent shall not be unreasonably withheld.

16. Waiver. If either Party fails to exercise its rights under this agreement, it shall not be precluded from subsequent exercise of its rights. A failure to exercise rights shall not constitute a waiver of any other rights under this Agreement, unless stated in a letter signed by an authorized representative of the Party and attached to the original Agreement.

17. Severability. If any term or other provision of this Agreement is invalid, illegal, or incapable of being enforced, all other terms or provisions of this Agreement shall nevertheless

remain in full force and effect so long as they conform to the requirements of applicable law and the economic or legal substance of the transactions contemplated hereunder is not affected in any manner materially adverse to any Party. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner in order that the transactions contemplated hereunder are consummated as originally contemplated to the greatest extent possible.

18. Agreement Amendments. This Agreement may be amended by mutual agreement of Ecology and the Port. Amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

19. No Third Party Beneficiaries. The Parties expressly disclaim any intent to create any third-party beneficiaries, and nothing in this Agreement is intended to confer upon any person or entity other than the Parties hereto any rights, benefits, or obligations hereunder.

20. Notice and Project Management. “Notice” in this Agreement means a letter delivered by a Party to the other Party’s Project Manager by electronic mail and first class US mail. The Project Manager for each Party shall be responsible for and shall be the contact person for all communications regarding the performance of this Agreement. The designated Project Manager for each Party is:

Ecology: Derek Sandison
Department of Ecology
Office of the Columbia River
303 S. Mission Street, Suite 200
Wenatchee, WA 98801
Email: dsandison@ecy.wa.gov
Phone: (509) 662-0516

Port: Jim Kuntz
Port Executive Director
Walla Walla Regional Airport
310 A Street
Walla Walla, WA 99362-2269
Email: jk@portwallawalla.com
Phone: (509) 525-3100

A Party may change the Project Manager by Notice to the other Party.

IN WITNESS WHEREOF, the authorized representatives of the Parties have duly executed this Agreement as of the date stated below.

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

By: Polly Zehm
[Name]

Title: Deputy Director

Date: February 15, 2011

PORT OF WALLA WALLA

By: James M. Kuntz
James M. Kuntz

Title: Executive Director

Date: January 27, 2011

Appendix A

Water Rights Summary -- Actual Beneficial Use

	Water Right Certificate	Annual Quantity (Qa – in acrefeet)	Instantaneous Quantity (Qi – in gpm)
1. & 2.	G3-28146C and G3-28683C (Wells 1-5; Shallow alluvium)	3,266 (2006)	6,515
3.	G3-21038C (Well 6; Shallow alluvium)	287 (2005)	531
4.	G3-24791C (Well 7; Shallow alluvium)	296 (2006)	597
5.	G3-21037C (Well 8; Shallow alluvium)	205 (2006)	308
6.	G3-21039C (Well 9; Shallow alluvium)	622 (2008)	1300
7.	G3-21936C (Well 10; Shallow alluvium)	344 (2006)	530
Total Beneficial Use		5,020 AF	9781 gpm
Total Consumptive Use		4,769 AF	

Notes:

- The Qa is based on meter data recorded and provided by Boise Cascade, who owned and/or exercised the Water Rights through 2009/2010.
- The Qi is based on the installed capacity of the wells and as confirmed in field measurements taken in 2002 and 2007.
- The Water Rights Certificates entered on lines #3 through #7 were enrolled in the Trust Water Rights Program in 2010.