

**Untreated Water Services Agreement
between the City of Lincoln City
and the Confederated Tribes of Siletz Indians of Oregon**

THIS AGREEMENT, made and entered into this ____ day of _____, 2010, by and between the CITY OF LINCOLN CITY, (hereinafter called “the City”) and the CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON (hereinafter called “the Siletz Tribe”),

W I T N E S S E T H:

WHEREAS, the Siletz Tribe owns and operates the Chinook Winds Casino Resort in Lincoln City which includes a golf course; and

WHEREAS, the City provides the Siletz Tribe with treated water to irrigate the golf course pursuant to a Water Services Agreement dated December 19, 1991; and

WHEREAS, the Siletz Tribe plans to expand the golf course from an “Executive Level Course” to a “Resort Level Course” and needs additional irrigation water for the golf course expansion; and

WHEREAS, the Siletz Tribe prefers to use untreated water in the golf course irrigation operations both because the rate for untreated water is lower and also because such water contains beneficial nutrients and does not contain chlorine; and

WHEREAS, the City holds Water Right Certificate 21779 for the use of 1.5 cubic feet per second (“cfs”) of water from Rock Creek, a tributary of Devil’s Lake, part of which the City is willing to access to provide untreated water to the Siletz Tribe for use in the Golf Course irrigation operations; and

WHEREAS, the City recognizes that during the term of this Agreement it will no longer have access to 0.5 cfs of water under Certificate 21779;

WHEREAS, transitioning from provision of treated to untreated water under this Agreement will reduce demand on the City’s treated water supply infrastructure and enable the City to meet expected long-term growth demands; and

WHEREAS, the City believes that planning for long-term needs in this manner, although it may reduce net revenue to the City in the short-term, is necessary and in the best interest of the public; and

WHEREAS, the City and the Siletz Tribe are also mutually interested in exploring the re-use of water in the golf course irrigation operations;

NOW, THEREFORE, in consideration of the mutual covenants and conditions herein contained, it is agreed as follows:

1. Scope of Agreement

This Agreement covers the use by the Siletz Tribe of City untreated water in its golf course irrigation operations. All other agreements between the City and the Siletz Tribe shall remain in full force and effect except as provided in Sections 3, 8 and 11 below.

2. Definitions

The “Siletz Point of Diversion and Place of Use” shall mean the point of diversion and place of use that will be added to the City’s Water Right Certificate 21779 on Rock Creek, pursuant to the terms of this Agreement, for provision of untreated water to the Siletz Tribe for use in the Golf Course irrigation operations. The Siletz Point of Diversion and Place of Use shall be for a maximum of 0.5 cfs.

The “Siletz Untreated Water Rate” shall mean fifty (50) percent of the lowest commercial treated water rate paid by commercial customers to the City.

3. Existing Water Services Agreement Remains in Effect Until Siletz Point of Diversion and Place of Use is Operational

Subject to Sections 8, 10 and 11 below, the existing Water Services Agreement between the City and the Siletz Tribe’s predecessor, WDI Systems USA, Inc. DBA Lakeside Golf and Racquet Club, for treated water is hereby incorporated by reference and shall remain in full force and effect until such time as the Siletz Point of Diversion and Place of Use is operational and the City begins providing untreated water to the Siletz Tribe for use in its golf course irrigation operations.

4. Siletz Point of Diversion and Place of Use

The Siletz Tribe will identify the location of the Siletz Point of Diversion and Place of Use and inform the City of the respective legal descriptions within thirty (30) days after the Effective Date of this Agreement.

The City agrees to take all steps necessary to facilitate the addition of the Siletz Point of Diversion and Place of Use for a maximum of 0.5 cfs under its existing Rock Creek Water Right Certificate 21779. These steps include, but are not limited to, submitting to the Oregon Water Resources Department (“OWRD”) the required application to add the Siletz Point of Diversion and Place of Use pursuant to ORS 540.520. The Parties understand and agree that this Agreement relates to the addition of a point of diversion, and not a change in the point of diversion under Certificate 21779.

The Siletz Tribe agrees to prepare the required application(s), which will be made in the name of the City, for the City’s review within thirty (30) days of the Effective Date of this Agreement. The City agrees to review, sign and return the application(s) to the Siletz Tribe for submittal to OWRD within forty-five (45) days of the Effective Date of this Agreement. The Siletz Tribe

agrees to pay all OWRD application processing fees, including the fee for expedited review and action (Reimbursement Authority) on the required application(s) pursuant to ORS 536.055.

The Siletz Tribe agrees to facilitate OWRD review of the application by reviewing draft documents provided by OWRD. All such documents will also be provided to the City for its review. The Siletz Tribe agrees to coordinate completion of and pay the costs for any public notices required by OWRD.

Copies of the required application(s) will be attached to this Agreement as Exhibit "A" when completed. The Siletz Tribe and the City agree to confer monthly regarding the status of the Siletz Point of Diversion and Place of Use application(s).

The Siletz Tribe agrees to publicly and privately support the City in its efforts to obtain OWRD approval for the Siletz Point of Diversion and Place of Use application(s) and to undertake any activities necessary to support the application(s) that are within the control of the Siletz Tribe.

If any Proposed Order ("PO") issued by the OWRD pursuant to ORS 540.530 related to the Siletz Point of Diversion and Place of Use application(s) is challenged by a third party or parties, the City and the Siletz Tribe agree to meet and confer regarding the process for jointly defending the challenge. The City agrees to take the lead in defending any such PO. Selection and retention of legal representation for the City shall be in the sole discretion of the City. The Parties agree to evenly split the cost of all reasonable legal fees and costs incurred in connection with the defense of any PO. Any dispute regarding the reasonableness of attorney fees or costs shall be resolved pursuant to Section 14.

Both Parties recognize and understand that flows in Rock Creek fluctuate due to natural variability and therefore the City cannot guarantee that the 0.5 cfs contemplated for the Siletz Point of Diversion and Place of use will always be available.

5. Construction of the Siletz Point of Diversion

The Siletz Tribe agrees to pay the engineering, design and construction costs of the additional point of diversion and associated works known as the Siletz Point of Diversion and Place of Use. The Siletz Tribe agrees to provide the City with a copy of the final design plans related to the Siletz Point of Diversion. As much as practicable, the final design shall be for works designed to divert a maximum of 0.5 cfs only. In addition, the design, including gauging, shall conform to all applicable OWRD requirements and the meter design must comply with the City's specifications.

The Siletz Tribe agrees to indemnify, defend, reimburse, and hold harmless the City, including its officers, employees and agents, from and against any and all claims, demands, fines, damages, losses, obligations, liabilities, costs and expenses related to the construction of the Siletz Point of Diversion and Place of Use, including the actions, negligence or fault of the Siletz Tribe's contractors.

6. Fees

The Siletz Tribe shall pay to the City the Siletz Untreated Water Rate for all untreated water

obtained through this Agreement. The volume of water obtained will be measured by a meter located at the Siletz Point of Diversion.

The Siletz Tribe agrees to provide the City with a written license to access the Siletz Point of Diversion in order to read the meter, and for other appropriate purposes.

The Parties recognize that the Siletz Untreated Water Rate may increase over time if the commercial treated water rate increases. The City shall notify the Siletz Tribe in writing of any rate increase thirty (30) days before such increase takes effect.

In no event shall the Siletz Untreated Water Rate be higher than the rate paid by other customers of the City for untreated water.

The City shall administer the billing and collection of all fees and charges for untreated water to the Siletz Tribe in the same manner the City bills and collects fees and charges within City boundaries.

7. Reuse Task Force

The City and the Siletz Tribe hereby agree to create a Reuse Task Force to study and confer regarding potential alternatives for the reuse of untreated water in golf course operations. The Reuse Task Force will also investigate and suggest potential funding sources. The Reuse Task Force shall be comprised of two (2) representatives of the City and two (2) representatives of the Siletz Tribe. The City and the Siletz Tribe shall notify each other in writing of their designated representatives by no later than sixty (60) days after the Effective Date of this Agreement.

The Reuse Task Force shall meet as mutually agreed upon, and not less than 3 times per year.

The Reuse Task Force shall prepare written status updates semi-annually and send such updates pursuant to the notice provisions in Section 16 by no later than June 1 and January 1 of each year throughout the term of this Agreement.

8. Term of Agreement

This Agreement shall remain in full force and effect for fifteen (15) years after the Effective Date unless terminated earlier in accordance with Section 11 below.

The Siletz Tribe shall have the option to renew this Agreement for an additional fifteen (15) year term. If the Siletz Tribe elects to exercise that option, it shall notify the City in writing no later than three (3) months prior to the expiration of the first term.

9. Effective Date of Agreement

This Agreement will become effective immediately upon execution of this Agreement by both parties.

10. Amendment of Agreement

Either the City or the Tribe at any time may give the other party written notice requesting negotiations to amend or replace this Agreement. In such event, the parties will enter into good

faith negotiations regarding the proposed amendment or replacement. This Agreement shall remain unchanged until written agreement has been reached with regard to a proposed amendment or replacement.

11. Termination of Agreement

If the OWRD does not issue a Final Order approving the Siletz Point of Diversion and Place of Use application(s) within two (2) years from the Effective Date of this Agreement, the Agreement shall terminate and the City and the Siletz Tribe agree to renegotiate the terms of the existing Water Services Agreement for use of treated City water in the golf course irrigation operations.

If the OWRD denies the Siletz Point of Diversion and Place of Use application(s), the City and the Siletz Tribe agree to confer in good faith regarding alternative arrangements for the use by the Siletz Tribe of untreated City water.

This Agreement may also be terminated by either party if the other party fails to comply with any material provision of this Agreement. In such an event, the party seeking to terminate the Agreement must provide written notice to the other party describing such non-compliance. If the non-compliance is not cured at the end of a period of sixty (60) days, or in the event that non-compliance cannot reasonably be cured within sixty (60) days and the non-compliant party has not made substantial, good faith efforts to achieve compliance within such period, the parties agree to engage in mediation and arbitration pursuant to Section 14 regarding the termination.

12. Water Rights

The Siletz Tribe agrees that it will not apply for any new or additional water rights on Rock Creek during the term of this Agreement.

The Siletz Tribe agrees to continue the administrative hold on pending surface water application S-87042 (unnamed stream tributary to Devils Lake commonly referred to as “Neotsu Creek”) until after the OWRD issues a Final Order approving the Siletz Point of Diversion and Place of Use application(s) and any and all appeals of that Final Order are resolved. The Siletz Tribe agrees to withdraw pending surface water application S-87042 after the OWRD issues a Final Order approving the Siletz Point of Diversion and Place of Use application(s) and any and all appeals of that Final Order are resolved.

This prohibition on the Siletz Tribe pursuing surface water application S-87042 on Neotsu Creek shall expire if the OWRD denies the Siletz Point of Diversion and Place of Use application(s) or the City gives the Siletz Tribe notice of termination of this Agreement.

The City agrees that it will not apply for any new or additional water rights on Neotsu Creek during the term of this agreement without the written consent of the Siletz Tribe.

13. Tribal Sovereignty

The Siletz Tribe waives its sovereign immunity from suit only with respect to the terms of this Agreement and any interpretation and/or the resolution of any dispute relating to or arising from the same, provided this waiver shall be limited only to the payment of amounts due under, and the specific performance of the terms of, this Agreement and shall not, under any circumstances, create any rights in persons not a party to this Agreement. Such waiver shall only apply recourse

to the non-trust and non-restricted assets of the Siletz Tribe up to but not exceeding the maximum amount payable to City under this Agreement and not to any other property whatsoever of the Siletz Tribe or to any of its related entities, including the Chinook Winds Casino Resort. The Siletz Tribe's limited waiver of sovereign immunity in this Agreement shall not extend to punitive damages.

Except as specifically and expressly set out in this Section 13, nothing in this Agreement will in any way alter or diminish the sovereign authority of the Siletz Tribe or the jurisdiction and authority of the Siletz Tribe over the Chinook Winds Casino Resort Golf Course operations or authorize the City to regulate in any manner the government or activities of the Siletz Tribe.

14. Dispute Resolution

Any dispute between the parties relating to the interpretation of their rights and obligations under this Agreement will be resolved solely by mediation and arbitration in accordance with the provisions of this Section 14.

14.1 Initial Mediation. The parties will attempt in good faith first to mediate the dispute and use their best efforts to reach agreement on the matters in dispute. In the event that the parties are unable to resolve the dispute or controversy within thirty (30) days of the date a controversy arises, either party may, by delivering five (5) days written request to the other party, employ the services of a third person mutually acceptable to the parties to conduct and commence mediation within fifteen (15) days of the employment. If the parties are unable to agree on such a third person, or, if on completion of such mediation, the parties are unable to agree and settle the dispute, then the dispute will be referred to arbitration in accordance with Section 14.2.

14.2 Arbitration. Any dispute between the parties that is to be resolved by arbitration as provided in this Section 14.2 will be settled and decided by arbitration conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association as then in effect (the "Arbitration Rules"), except as provided below. Any such arbitration will be held and conducted in Lincoln City, before one (1) arbitrator who will be selected by mutual agreement of the parties; if agreement is not reached on the selection of an arbitrator within fifteen (15) days of receipt of a written demand for arbitration as set forth below, then an arbitrator will be appointed by the presiding judge of the Lincoln County Circuit Court. The provisions of the Arbitration Rules will apply and govern the arbitration subject, in accord with the following:

14.2(1) Any demand for arbitration must be in writing and must be made within ninety (90) days after the claim, dispute, or other matter in question has arisen. The arbitration proceeding must commence within thirty (30) days of appointment of the arbitrator, and all document exchanges and other discovery of evidence must be completed within twenty (20) days of the appointment.

14.2(2) The arbitrator appointed must be a former or retired judge or practicing attorney with at least ten years experience in water law, tribal law and municipal law.

14.2(3) The arbitrator will resolve the controversy in accordance with the Arbitration Rules, applicable Law, and the terms and conditions of this Agreement. Thereafter, the arbitrator will prepare in writing and provide to the parties his or her decision, including factual findings and reasons on which the decision is based.

14.2(4) The arbitration proceeding must be conducted and completed within five (5) days after its commencement, and the decision of the arbitrator must be made within sixty (60) days from the date of receipt of the written demand for arbitration.

14.2(5) The prevailing party will be awarded reasonable attorneys' fees, expert and non-expert witness costs and expenses, and other costs and expenses incurred in connection with the arbitration, unless the arbitrator, for good cause, determines otherwise.

14.2(6) Costs and fees of the arbitrator will be shared equally by the parties.

14.2(7) The decision of the arbitrator, which may include equitable relief, will be final, and judgment may be entered on the decision in accordance with applicable law in any court having jurisdiction over the matter.

15. Rights Limited to Parties

This Agreement is for the sole benefit of the Siletz Tribe and the City. No provision or language in this Agreement confers standing or grants any substantive or procedural legal rights to any other person, government, or entity.

16. Notices

All notices provided for in this Agreement will be deemed given when deposited in the United States mail, first class certified, return receipt requested, postage prepaid, addressed to the following addresses or such alternative addresses as are provided for in a written notice given in accord with the provisions of this Section:

City Recorder City of Lincoln City Oregon P.O. Box 50 Lincoln City, OR 97367	Tribal Council Confederated Tribes of Siletz Indians of P.O. Box 549 Siletz, OR 97380
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17. Severability

In the event any section, provision or language of this Agreement is held invalid, either party may initiate negotiations under Section 10 of this Agreement to amend or replace this Agreement to cure the invalidity. Otherwise, it is the intent of the parties that the remaining sections and provisions of this Agreement will remain in full force and effect.

18. Assignment

This Agreement is not assignable by either the City or the Siletz Tribe without the written consent of the other party.

19. Authorization to Execute Agreement

The authorization of the Mayor of Lincoln City and the Chairman of the Siletz Tribe to execute this Agreement will be evidenced by a resolution of the appropriate governing body and will be appended hereto as Exhibits.

20. Integration

This Agreement is the complete and exclusive expression of the City and the Siletz Tribe's intent regarding the use by the Siletz Tribe of City untreated water in its golf course irrigation operations.

[Signatures follow]

IN WITNESS HEREOF, the Parties have caused this instrument to be executed on the date(s) shown below and mutually agree that this instrument will be in full force and effect upon the date that it has been executed by both the City and the Siletz Tribe, as provided for herein.

CITY OF LINCOLN CITY:
SILETZ

CONFEDERATED TRIBES OF
OF OREGON:

