

EXHIBIT D
Form of Easement Agreement

After Recording Return to:

Legal Department
City of Olympia
PO Box 1967
Olympia, WA 98507-1967

EASEMENT AGREEMENT

Grantor: **Nisqually Indian Tribe**, a federally recognized Indian Tribe

Grantee: **City of Olympia**, a Washington municipal corporation

Legal Description of Burdened Property: Parcel "A" and Parcel "C" of Thurston County Boundary Line Adjustment No. 15-118253 TC, recorded under Auditor's File No. 4495088.

Complete legal description is on Exhibit A attached to this document.

Tax Parcel Nos.: A portion of Tax Parcel Nos. 21819130101 and 21819430100

Reference No.: None

EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT (the “**Agreement**”) is made this _____ day of _____, 2017, by and between the **Nisqually Indian Tribe**, a federally recognized Indian Tribe (the “**Nisqually Tribe**”), Grantor, and the **City of Olympia**, a Washington municipal corporation (the “**City**”), Grantee; the City and the Nisqually Tribe are each sometimes referred to herein as a “**Party**,” and collectively as the “**Parties**,” based upon the following:

RECITALS

A. WHEREAS, the Nisqually Tribe is the owner of that certain real property situate in Thurston County, Washington and legally described in attached **Exhibit A** which is incorporated herein by reference (the “**Burdened Property**”); and

B. WHEREAS, the Easement granted herein is located upon real property depicted in Boundary Line Adjustment (BLA) No. 15-118253 TC, recorded under Auditor’s Number 4495088; and

C. WHEREAS, the City and the Nisqually Tribe are parties to a Memorandum of Agreement dated as of May 14, 2008 (as amended and as it may hereafter be amended, the “**MOA**”), a copy of which is attached hereto and incorporated herein by reference as **Exhibit B**; and

D. WHEREAS, among other things, the MOA contemplates the City’s desire to work cooperatively with the Nisqually Tribe on shared issues of water conservation and availability, and the Nisqually Tribe’s similar desire to collaborate with the City; and

E. WHEREAS, the City and the Nisqually Tribe want to provide for an easement for the inspection, construction, repair, operation, preservation and protection, and maintenance of the City’s well, well house, pumps, water lines and fire hydrant for fire suppression and to provide water service for single family residential water supply for neighboring Tax Parcels 21819310201 and 21819310202; and

NOW, THEREFORE, in consideration of the recitals, grants and covenants contained herein, and which recitals are incorporated into this Agreement and made part hereof, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. **Grant of Facility Easement.** The Nisqually Tribe grants to the City a perpetual, exclusive easement (the “**Potable Water Well and System Easement**”) for the sole purpose of inspection, maintenance, construction, repair, replacement, preservation and protection, and operation of the water well, well house, well pumps, electrical or other power source related thereto, water lines emanating therefrom, as described in **Exhibit A** attached hereto, fire

suppression water lines and the fire hydrant associated therewith, on, over, in, under and across that portion of the Burdened Property described in attached **Exhibit A** and upon real property depicted in Boundary Line Adjustment (BLA) No. 15-118253 TC, recorded under Auditor's Number 4495088; (the "**Potable Water Well and System Easement Area**"). The Nisqually Tribe shall not install any above-ground improvements in the Facility Easement Area.

2. **Grant of Access Easement.** The Nisqually Tribe hereby grants to the City a non-exclusive easement for vehicular and pedestrian ingress and egress to the Facility Easement Area ("**Access Easement**"), as reasonably necessary for the inspection, maintenance, construction, repair, replacement, preservation and protection, and operation, of the water well-field, well pumps, electrical or other power source related thereto, water lines emanating therefrom, fire suppression water lines and the fire hydrant associated therewith on, over, in, under and across the Burdened Property.

The Nisqually Tribe acknowledges that the City uses the Existing Paved Road, as depicted in Boundary Line Adjustment (BLA) No. 15-118253 TC, recorded under Auditor's Number 4495088, and the Parties shall reasonably coordinate their use of the Existing Paved Road so as to minimize interference with each other's activities. The Nisqually Tribe shall not alter the Existing Paved Road or perform any construction in or around the Existing Paved Road that will interfere with the City's easement rights granted herein without the express written consent of the City. The City is not required to maintain or improve the Existing Paved Road.

3. **Grant of Easement for Educational and Scientific Purposes.** The Nisqually Tribe hereby grants to the City a non-exclusive easement for vehicular and pedestrian ingress and egress to the Burdened Property, upon reasonable prior notice to the Nisqually Tribe, for education and scientific purposes. Said access shall be coordinated with the Grantor to avoid conflicts with events by the Nisqually Tribe.

4. **As-Is Grant.** The City accepts the Easements on an as-is basis, and acknowledges that the Nisqually Tribe has made no representations whatsoever as to the condition of the Easement Areas.

5. **Use of Easement Areas.** The City, at its sole cost and expense, shall be responsible for the inspection, maintenance, construction, repair, replacement, preservation and protection, and operation, of the Facility Easement Area. Without limiting the foregoing, the City shall be solely responsible for establishing and paying for any utility services required in connection with the Facility Easement Area. The City shall not permit waste, damage or injury to the Easement Areas, shall comply with all applicable laws, statutes, orders, regulations, codes, rules and permit requirements, and shall be solely responsible for any restoration or reconstruction of the Facility and Easement Areas if any damage occurs in connection with the City's use of the Easement Areas or the inspection, maintenance, construction, repair, replacement, preservation and protection, and operation, of the Facility Easement Area. The owner of the Burdened Property may post notices in accordance with applicable laws. The City shall secure all appropriate governmental approvals and permits for

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any construction on the Easement Areas, and shall complete all work with due diligence and in a good and workmanlike manner.

6. **Liens.** The City shall keep the Easement Areas and the Burdened Property free from any liens arising out of any work performed for, materials furnished to, or obligations incurred by the City and shall indemnify, defend, and hold the owner of the Burdened Property harmless against the same.

7. **Indemnification; Release.** Each Party (“**Indemnitor**”) shall indemnify, defend and hold the other party harmless from and against any and all liability, damages, claims, costs or expenses, including attorneys' fees, arising from any negligent act or omission of Indemnitor or its officers, contractors, licensees, agents, servants, employees, guests, invitees or visitors in connection with this Agreement. With respect to all or any portion of the foregoing obligation that may be held to be within the purview of RCW 4.24.115, such obligation shall apply only to the maximum extent permitted by RCW 4.24.115. The foregoing indemnity is specifically and expressly intended to, constitute a waiver of Indemnitor’s immunity under Washington's Industrial Insurance Act, RCW Title 51, if applicable, to the extent necessary to provide the other party with a full and complete indemnity from claims made by Indemnitor and its employees, to the extent provided herein. Except as otherwise provided in this Section 7, the City agrees to use and occupy the Easement Areas at its own risk and hereby releases the owner of the Burdened Property, its agents and employees from all claims for any damage or injury to the fullest extent permitted by law.

8. **Insurance.** The City shall at all times, at its sole cost and expense, keep in full force and effect, through a municipal risk insurance pool, and/or shall cause its prime contractor and subcontractors to maintain in full force and effect, a policy of commercial general liability insurance insuring against any and all claims or liability arising out of the construction, use or maintenance of the Easement Areas or the Facility Easement Area, in an amount not less than One Million Dollars (\$1,000,000) per occurrence and not less than Five Million Dollars (\$5,000,000) in the aggregate, covering bodily injury to persons, including death, and damage to property, and including automobile liability coverage and contractual liability endorsement covering the indemnification covenant herein; and shall insure the hazards of the Easement Areas and the insured party’s operations thereon, including the acts of its independent contractors. All such insurance shall (a) be issued by an insurance company rated at least A X by Best’s insurance; (b) in the case of liability insurance, name the owner of the Burdened Property and its employees and agents as additional insureds; (c) provide that it shall not be cancelled without at least thirty (30) days prior written notice by the insurer to the owner of the Burdened Property; (d) in the case of liability insurance, include contractual liability coverage, including without limitation, the indemnification, defense and hold harmless agreements required by this Agreement; and (e) state that the insurance is primary over any policies carried by the owner of the Burdened Property with any policy carried by the owner of the Burdened Property excess and noncontributory. Prior to commencing any activity on or about the Easement Areas, the City shall provide a certificate of insurance (on an ACORD 27 form) or similar form, evidencing that the

foregoing policies or participation in a municipal risk insurance pool are in full force and effect.

9. **Access.** The owner of the Burdened Property shall have the right to enter the Facility Easement Area at all reasonable times, and upon reasonable prior notice to the City, for the purpose of inspecting the Facility Easement Area.

10. **Dispute Resolution.** In the event of a dispute between the Parties with respect to this Easement Agreement, the following procedures and remedies shall apply:

(a) **Step One – Negotiation.** The Parties shall attempt to adjust their differences by informal negotiation as described in Section 18(a) (“Dispute Resolution”) of the MOA, attached hereto as **Exhibit B**. Section 18(a) of the MOA is hereby incorporated into this Agreement as if fully set forth herein.

(b) **Step Two – Mediation.** If the dispute has not been resolved by negotiation within ninety (90) days of the initial letter proposing negotiation, any Party may demand mediation, which shall be conducted as described in Section 18(b) (“Dispute Resolution”) of the MOA. Section 18(b) of the MOA is hereby incorporated into this Agreement as if fully set forth herein.

(c) **Step Three – Litigation and Other Remedies.** Unless otherwise agreed by the Parties in writing, Step One and Step Two must be exhausted as a condition precedent to filing of any action in Thurston County Superior Court or the United States District Court for the Western District of Washington in Tacoma. A Party may initiate an action without exhausting Steps One or Two if the statute of limitations is about to expire and the Parties cannot reach a tolling agreement, or if either Party determines the public health, safety, or welfare is threatened.

11. **Waiver of Sovereign Immunity.** So that the City and Nisqually Tribe will be sure that each of them may enforce the terms and conditions of this Agreement, each of the Parties hereby covenants and agrees that each of them may sue or be sued to enforce or interpret the terms, covenants and conditions of this Agreement or to enforce the obligations or rights of the Parties under this Agreement in accordance with the terms and conditions set forth in this Section.

(a) **Forum.** Any dispute, claim, or action arising out of or relating to this Agreement, or any breach hereof, shall be brought in the State of Washington, Thurston County Superior Court or the United States District Court for the Western District of Washington at Tacoma. For such purpose, each of the Parties hereby irrevocably submits to the jurisdiction of such court, and the Parties agree that there is no jurisdiction over this Agreement in any Tribal Court or Tribal administrative proceeding.

(b) **Limited Waiver of Sovereign Immunity.** The Nisqually Tribe hereby specifically, expressly, and irrevocably waives its sovereign immunity as to the City as to any

dispute arising out of or relating to this Agreement. The Nisqually Tribe irrevocably waives any claim of sovereign immunity as to actions at law and in equity and enforcement proceedings brought by the City to interpret or enforce the Agreement. The Nisqually Tribe expressly limits the waiver of immunity to the narrow purpose of interpreting or enforcing this Agreement or resolving a dispute relating to the foregoing, and said waiver shall not extend or apply to any other subject matter whatsoever.

(c) The Nisqually Tribe further consents to service of process out of such aforementioned courts by the mailing of copies thereof by certified or registered mail, postage prepaid, to the Nisqually Tribe at the address set forth in Section 12 below.

(d) Nothing contained in this Agreement shall be construed as waiving sovereign immunity in any suit for payment of damages from lands or funds held in trust for the Nisqually Tribe by the United States. Nothing contained in this Agreement shall be construed as waiving sovereign immunity in any suit by any party other than the City.

12. **Notice.** Unless otherwise specified, all notices hereunder shall be in writing and shall be effectively given when delivered personally on the date of delivery or, if mailed, seven (7) days after deposit in the United States mail, first-class postage prepaid, certified or registered. For purposes of notice, the addresses of the Parties shall be:

To Nisqually Tribe:

Chairperson
Nisqually Indian Tribe
4820 She Nah Num Dr SE
Olympia, WA 98513

To City of Olympia:

City Manager
City of Olympia
601 4th Ave E
PO Box 1967
Olympia, WA 98507-1967

With a required copy to:

Office of the Tribal Attorney
Nisqually Indian Tribe
4820 She Nah Num Dr SE
Olympia, WA 98513

With a required copy to:

City Attorney
City of Olympia
601 4th Ave E
PO Box 1967
Olympia, WA 98507-1967

13. **Governing Law; Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington, except to the extent preempted by federal law. Venue for any claim, dispute or action arising out of or relating to this Agreement shall lie in the Superior Court for the State of Washington at Thurston County or in the United States District Court for the Western District of Washington at Tacoma. Each Party agrees that venue will lie in the forum in which a claim or action arising from or relating to this Agreement is commenced and will remain in that forum until its ultimate resolution. Each Party further waives its right to seek removal or remand from the forum in which a claim or action arising from or relating to this Agreement is commenced. The Nisqually Tribe hereby acknowledges that the provisions of Section 19 ("Waiver of Sovereign

Immunity”) of the MOA (**Exhibit B**, attached hereto and incorporated herein by reference) shall apply to this Agreement as if fully set forth herein.

14. **Runs With the Land; Assignment.** This Agreement constitutes a covenant running with the Burdened Property and shall be binding upon and inure to the benefit of the owner of the Burdened Property and its successors and assigns. The Easement is “in gross” with respect to the City, meaning that the City’s benefits and burdens under this Agreement are personal to the City and do not run to the successors and assigns of any property owned by the City. The City shall not transfer any rights or obligations under this Agreement (including without limitation the Easement), except that the City may transfer its rights and obligations under this Agreement to a governmental entity with the advance written consent of the Burdened Property owner, which shall not be unreasonably withheld. As a condition to any transfer of any rights or obligations hereunder, the Burdened Property owner may require the transferee to execute a written acknowledgment of the foregoing.

15. **Integration; Amendments.** The Parties hereto agree that this Agreement supersedes all prior and contemporaneous understandings and agreements with respect to the subject matter of this Agreement (but does not supersede or otherwise affect the MOA or any agreement contemplated by the MOA) and the provisions of this Agreement are intended by the Parties as the final expression of their agreement regarding the easements set forth herein.

16. **No Waiver of Covenants.** Failure of the Burdened Property owner to insist upon strict performance of any of the covenants and agreements of this Agreement, or to exercise any option herein conferred in any one or more instance, shall not be construed to be a waiver or relinquishment of any such or other covenants or agreements, but the same shall be and remain in full force and effect.

17. **No Third Party Beneficiaries.** The Parties expressly do not intend to create any right, obligation or liability, or promise any performance, to any third party. The Parties have not created, and do not intend to give rise to, any right for any third party to enforce this Agreement.

[Signatures on following pages.]

DATED this ____ day of _____, 2017.

Grantor:

NISQUALLY INDIAN TRIBE, a federally
recognized Indian tribe

By: _____

Signature

Name [print]: _____

Its: Chairperson

Grantee:

CITY OF OLYMPIA, a Washington municipal
corporation

By: _____

Signature

Name: [print] _____

Its: Mayor

By: _____

Signature

Name: [print] _____

Its: City Manager

Acknowledgements

STATE OF WASHINGTON)

: ss.

COUNTY OF THURSTON)

On the _____ day of _____ 2017, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Farron McCloud, to me known to be the Chairperson of the Nisqually Indian Tribe, a federally recognized Indian tribe, who executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said municipal corporation for the uses and purposes therein mentioned and on oath states that he is authorized to execute the said instrument.

WITNESS my hand and official seal the day and year first above written.

Signature

Print Name: _____

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

STATE OF WASHINGTON)

: ss.

COUNTY OF THURSTON)

On the _____ day of _____ 2017, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Cheryl Selby, to me known to be the Mayor of the City of Olympia, a municipal corporation, who executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said municipal corporation for the uses and purposes therein mentioned and on oath states that she is authorized to execute the said instrument.

WITNESS my hand and official seal the day and year first above written.

Signature

Print Name: _____

NOTARY PUBLIC in and for the State
of Washington, residing at _____

My commission expires _____

STATE OF WASHINGTON)

: ss.

COUNTY OF THURSTON)

On the _____ day of _____ 2017, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Steven R. Hall, to me known to be the City Manager of the City of Olympia, a municipal corporation, who executed the foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said municipal corporation for the uses and purposes therein mentioned and on oath states that he is authorized to execute the said instrument.

WITNESS my hand and official seal the day and year first above written.

Signature

Print Name: _____

NOTARY PUBLIC in and for the State of
Washington, residing at _____

My commission expires _____

EXHIBIT A

Legal Description of the Burdened Property

Tract 1:

Parcel "A" of Thurston County Boundary Line Adjustment No. 15-118253 TC, recorded under Auditor's File No. 4495088, being more particularly described as follows:

A portion of the South half of Section 19, Township 18 North, Range 1 East, Willamette Meridian, Washington, described as follows;

Commencing at the Southwest corner of said Section 19; thence North 1°58'24" East, 2657.49 feet along the West line of said Section to the West Quarter corner of said Section; thence along the east-west center Section line South 88°29'02" East, 1319.53 feet to the CW 1/16 corner, being the **POINT OF BEGINNING**;

Thence continuing along said line South 88°29'02" East, 3371.91 feet to the centerline of Old Pacific Highway;

Thence along said Highway centerline the following five courses;

Along a curve to the left 104.60 feet, said curve having a radius of 818.51 feet, a delta angle of 7°19'20", and a chord bearing and distance of South 26°30'45" East, 104.53 feet;

Thence South 30°10'24" East, 718.60 feet to a point of curvature;

Thence along a curve to the right 951.43 feet, said curve having a radius of 819.02 feet, a delta angle of 66°33'31", and a chord bearing and distance of South 3°08'50" West, 898.83 feet;

Thence South 36°25'36" West, 247.60 feet to a point of curvature;

Thence along a curve to the right 623.20 feet, said curve having a radius of 819.02 feet, a delta angle of 43°35'50", and a chord bearing and distance of South 58°15'53" West, 608.28 feet;

Thence leaving said centerline North 59°36'57" West, 81.12 feet to the northerly Right-of-Way of said Highway;

Thence continuing North 59°36'57" West, 396.95 feet;

Thence North 66°00'17" West, 636.93 feet;

Thence South 86°13'21" West, 314.20 feet;

Thence North 83°34'34" West, 1144.87 feet to the East line of Short Plat SS-2203, AFN 8709110024, records of Thurston County, Washington;

Thence tracing said Short Plat boundary North 1°29'22" East, 547.61 feet;

Thence North 88°30'38" West, 410.98 feet to the easterly Right-of-Way line of Old Pacific Highway;

Thence continuing North 88°30'38" West, 30.42 feet to the centerline of said Highway;

Thence along said centerline North 8°05'22" West, 173.99 feet to a point of curvature;

Thence along a curve to the left 561.85 feet, said curve having a radius of 1534.98 feet, a delta angle of 20°58'19", and a chord bearing a distance of North 18°34'59" West, 558.72 feet to the West line of the Northeast Quarter of the Southwest Quarter of said Section;

Thence along said West line North 1°39'26" East, 351.81 feet to the **POINT OF BEGINNING**.

EXCEPTING THEREFROM: Old Pacific Highway and Burlington Northern Railroad Rights-of-Way.

Tract 2:

Parcel "C" of Thurston County Boundary Line Adjustment No. 15-118253 TC, recorded under Auditor's File No. 4495088 , being more particularly described as follows:

A portion of the South half of Section 19, Township 18 North, Range 1 East, Willamette Meridian, Washington, described as follows;

Commencing at the Southwest corner of said Section 19; thence South 88°40'06" East, 2668.42 feet along the South line of said Section to the South quarter corner; thence along the North-South center Section line North 1°20'25" East, 936.21 feet to the **POINT OF BEGINNING;**

Thence South 83°34'34" East, 479.66 feet;

Thence North 86°13'21" East, 304.72 feet;

Thence South 66°00'17" East, 618.75 feet;

Thence South 59°36'57" East, 394.56 feet to the centerline of Old Pacific Highway;

Thence along said Highway centerline the following five courses;

Along a curve to the right 162.31 feet, said curve having a radius of 819.02 feet, a delta angle of 11°21'17", and a chord bearing and distance of North 87°15'03" West, 162.04 feet;

Thence North 81°34'24" West, 654.30 feet to a point of curvature;

Thence along a curve to the left 295.80 feet, said curve having a radius of 955.37 feet, a delta angle of 17°44'23", and a chord bearing and distance of South 89°32'47" West, 294.62 feet;

Thence South 80°40'36" West, 584.10 feet to a point of curvature;

Thence along a curve to the right 706.22 feet, said curve having a radius of 990.00 feet, a delta angle of 40°52'19", and a chord bearing and distance of North 78°53'15" West, 691.34 feet;

Thence leaving said centerline North 1°29'22" East, 419.42 feet;

Thence South 83°34'34" East, 665.38 feet to the **POINT OF BEGINNING.**

EXCEPTING THEREFROM: Old Pacific Highway Right-of-Way.

Potable Water Well and System Easement:

An access and maintenance easement over and across Parcels "A" and "C" of Thurston County Boundary Line Adjustment No. 15-118253 TC, recorded under Auditor's File No. 4495088, Thurston County records, for the purpose of maintaining the potable water well and system located on said Parcel "C" that provides water service to Lots 2 and 3 of Short Plat No. SS-2203 recorded in Volume 22, Page 367, Thurston County records, the easement area consists of the existing driveways from Old Pacific Highway, well site, and additional area as may be necessary for the maintenance of said water system, over and across Parcels "A" and "C" as shown on said Boundary Line Adjustment.

EXHIBIT B

2008 Memorandum of Agreement