

When recorded return to:
City of Olympia
PO Box 1967
Olympia, WA 98507-1967

**INTERLOCAL AGREEMENT BETWEEN
THE CITIES OF OLYMPIA, LACEY AND YELM
(THE CITIES)
FOR IMPLEMENTING DESCHUTES WATER RIGHTS
MITIGATION STRATEGY – PHASE V**

Whereas, RCW 39.34.010 permits local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities; and

Whereas, pursuant to RCW 39.34.080, each party is authorized to contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized by law to perform: provided, that such contract shall be authorized by the governing body of each party to the contract and shall set forth its purposes, powers, rights, objectives and responsibilities of the contracting parties; and

Whereas, the Cities have submitted applications for water rights to Washington Department of Ecology (WDOE); and

Whereas, in order to secure approvals of those water rights, the Cities have cooperatively developed a mitigation strategy for the Deschutes River that has been accepted by the WDOE; and

Whereas, the mitigation strategy includes restoration of 200 acres of farmland jointly purchased by the Cities in the Deschutes River watershed (Deschutes River property). Habitat restoration mitigation actions will take place over several years on the property and include: riparian planting along 1 mile of river frontage, stream channel and wetland restoration, and ongoing land management responsibilities; and

Whereas, by Interlocal Agreement effective November 14, 2007, the Cities completed Phase I of a water rights acquisition strategy by identifying potential water rights for acquisition; and

Whereas, by amended Interlocal Agreement effective January 19, 2010, the Cities completed Phase II of a water rights acquisition strategy for mitigation purposes by jointly acquiring water rights and property in the Deschutes River basin and developing a habitat restoration assessment for that property; and

Whereas, Olympia's water rights were issued by WDOE in December 2011 and Lacey's water rights were issued by May 2012, and Yelm's water right was approved but appealed in November 2011; and

Whereas, through Interlocal Agreement effective August 23, 2012, the Cities completed Phase III of the Deschutes Mitigation Strategy by retiring water rights; fencing the Deschutes River property; developing a 60% design for habitat restoration mitigation actions, project schedule and costs for habitat restoration mitigation actions identified in the cities' mitigation plans; and contracting for the services of a project manager to coordinate and lead this effort; and

Whereas, through a letter of agreement dated October 30, 2014 the City of Olympia planted a 50-foot wide riparian buffer along the Deschutes River on the Deschutes River property; and

Whereas, through Interlocal Agreement effective April 27, 2015, the Cities completed Phase IV of the Deschutes Mitigation Strategy by advancing to 100% the design and bid specifications for the habitat enhancement projects that were designed to 60% under Phase III, applying for and obtaining necessary project permits, and hiring consultants to help support this effort and to oversee ongoing property management; and

Whereas, on October 8, 2015, WDOE's approval of Yelm's water right application was overturned by the Washington State Supreme Court thereby eliminating any immediate benefit Yelm would receive from habitat enhancement mitigation projects but not diminishing Yelm's interests as a joint owner of the Deschutes River property; and

Whereas, the Cities of Olympia and Lacey are required as a condition of their water rights to continue implementation of the Deschutes Mitigation Strategy by constructing habitat restoration projects designed under Phase IV, by completing riparian revegetation projects described in approved mitigation plans, and by hiring consultants to support this effort and to oversee ongoing property management; and

Whereas, the Cities may be doing other restoration work on the Deschutes River Farm property not related to this Interlocal Agreement, but through a Memorandum of Understanding (MOU) with the Squaxin Island Tribe signed November 29, 2011. In this MOU the cities have agreed to form the Budd/Deschutes Watershed Environmental Stewardship Coalition and provide additional funding for habitat restoration activities; and

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Cities agree as follows:

I. Purpose/Objective

The Cities have jointly purchased property on the Deschutes River for the purpose of cooperatively implementing the Deschutes Mitigation strategy that was approved by WDOE. Implementation of that plan is required by water rights issued to the Cities of Olympia (ROEs CS2-SWC8030, CS2-01105, CS2-SWP10191) and Lacey (ROEs G2-29165, G2-29304, G2-30250, G2-30251, G2-30248, G2-30249).

The purpose of this Agreement is to allow the Cities of Olympia and Lacey to continue with implementation of projects identified in their mitigation plans in order to meet conditions of final water rights approval by WDOE, to make provisions for the future participation of the City of Yelm in mitigation plan implementation in the event the City of Yelm receives approval of a water right from WDOE conditioned with mitigation provisions, and to outline the Cities of Olympia, Lacey and Yelm responsibilities as joint owners of the Deschutes River property.

II. Scope of Agreement/Work

City of Yelm

The City of Yelm will not be a party to the construction, monitoring and management of the habitat restoration mitigation actions described in this Agreement. However, Yelm agrees to reimburse Lacey and Olympia for its pro-rata share of the construction, monitoring and management costs as described in Sections IV and V of this Agreement if mitigation credit for these habitat restoration mitigation actions is allowed in the future.

As a joint landowner, the City of Yelm agrees to participate in property management and stewardship planning expenses as described in Section IV.c of this Agreement. The City of Yelm agrees that the Cities of Olympia and Lacey will jointly select a consultant, organization, or agency to conduct property management and stewardship activities and enter into a professional service agreement with the selected consultant, organization or agency as described in Section II of this Agreement and that such consultant, organization, or agency selected may perform other habitat restoration mitigation activities for which the City of Yelm has not yet agreed to cost-share.

As a joint landowner, the City of Yelm agrees to coordinate with the Cities of Olympia and Lacey on future long term management and stewardship decisions for the Deschutes River property through involvement in a separate agreement following the completion of the habitat restoration mitigation construction work jointly carried out by the Cities of Olympia and Lacey.

The City of Yelm acknowledges that the City of Olympia managed planting of the 50-foot riparian buffer, including payment of all costs, for the mutual benefit of the Cities and agrees to participate in cost sharing of this expense as described in sections IV and V of this Agreement.

The Cities of Olympia and Lacey

The Cities of Olympia and Lacey will jointly install, construct and monitor habitat restoration mitigation actions as a condition of their water rights.

This Agreement provides authority for the City Managers of the Cities of Olympia and Lacey to enter into the necessary agreements to accomplish all tasks necessary for completion of Phase V work. Specific Phase V work to be accomplished under this agreement includes contracting for construction services of habitat restoration mitigation projects, construction project management, riparian and wetland area planting and maintenance through 2020 and property management activities through 2020.

The Cities of Olympia and Lacey agree to jointly engage the services of one or more consultants, contractors, organizations, or agencies to assist the Cities in services related to implementation of the Deschutes Mitigation strategy as approved by WDOE.

The Cities of Olympia and Lacey will jointly enter into a professional services agreement with one or more consultants, organizations, or agencies agreed upon by the parties for Phase V development and implementation. Work to be included under a professional services agreement may include construction and inspection of restoration projects, riparian monitoring and maintenance, project management, permitting assistance, property management activities, and legal analysis and review services.

The Cities of Olympia and Lacey will jointly enter into a construction contract with one or more contractor agreed upon by the parties for Phase V construction of habitat restoration mitigation projects, and riparian buffer and wetland planting, as needed.

The Cities of Olympia and Lacey will jointly direct the work of contractors, consultants, organizations, or agencies through a consensus-based decision making process. Firms providing professional services will be chosen through the standard selection process for professional services as required by the laws of the State of Washington and the Cities of Olympia and Lacey will jointly develop and issue the Request for Qualifications (RFQ), including the general scope and nature of the project or work, when required by law for contracted work and will make a unified recommendation for selection of the firm. Construction contracts shall be awarded to the lowest, responsive, qualified bidder.

The selection process for professional services shall include one or more project managers or engineers familiar with the municipal public work construction process. In

addition to other criteria as may be agreed to by the Cities of Olympia and Lacey, consultants shall be evaluated on their ability to provide municipal construction support which may include but not be limited to bid award support, inspections, documentation, project management, and submittal review. Once the consultants are selected, the Cities of Olympia and Lacey shall coordinate with the selected consultant(s) to develop any final Scope of Work and Professional Services Agreements amenable to each Party.

In recognition that one City will need to approve change orders, make payments, and keep track of insurance, bond and other legal requirements, the firm that is hired will be instructed to use Olympia's project specifications with the Olympia City Engineer or designee as the approver of change orders, pay estimates and related construction decisions.

This agreement also allows the Cities of Olympia and Lacey to coordinate on decision-making related to contract management, consultant communication and dissemination of project information to appropriate staff within their own jurisdiction.

The Cities of Olympia and Lacey may also jointly hire legal counsel on issues related to property management and habitat enhancement for the purpose of mitigation and other related topics. Legal advice provided to the Cities of Olympia and Lacey shall be considered attorney client privileged not subject to disclosure.

The Cities of Olympia, Lacey and Yelm

Within 30 days of receiving approval of a water right, with no appeals filed, from WDOE, conditioned with mitigation provisions, the City of Yelm will inform the Cities of Olympia and Lacey in writing of its desire to participate in construction and monitoring of habitat restoration mitigation activities at the Deschutes River property, including costs. Following receipt of such notice, the Cities of Olympia and Lacey will coordinate project decisions and activities with the City of Yelm consistent with section II of this Agreement, provided that if a construction and/or professional services contract is in place, such a contract(s) will not be amended to include the City of Yelm.

As joint land owners, the Cities of Olympia, Lacey and Yelm agree to share in property management and stewardship planning expenses as described in Section IV.c of this Agreement. The City of Yelm agrees that the Cities of Olympia and Lacey will jointly select a consultant, organization, or agency to conduct property management and stewardship activities and enter into a professional service agreement with the selected consultant, organization or agency as described in Section II of this Agreement and that such consultant, organization, or agency selected may perform other habitat restoration mitigation work for which the City of Yelm has not yet agreed to cost-share. The Cities of Olympia and Lacey agree that any final Scope of Work for professional services shall

separate tasks and budgets for property management and stewardship activities from any other tasks to be accomplished under the professional services agreement.

The Cities of Olympia, Lacey and Yelm will accomplish future long term management and stewardship (e.g. land conservancy trust) of the property through a separate agreement after habitat restoration construction work is completed.

III. Property Access

This agreement grants the Cities and their contractors, individually or in collaboration, access to the Deschutes River property to install, construct and monitor habitat restoration mitigation projects outlined in the Deschutes Mitigation Strategy and to perform property management activities.

IV. Cost Sharing

- a. Construction and Monitoring of Habitat Restoration Mitigation Actions
 - i. The Cities of Olympia and Lacey will equally divide costs for construction and monitoring of habitat restoration mitigation actions. Total costs for such services under this agreement are not to exceed \$1,235,365 outlined as follows:

1. Wetland Habitat Restoration Construction	\$ 759,515
2. 50- to 200-foot Riparian and Wetland Buffer Planting, Monitoring and Management	\$ 475,850

- ii. In the event the City of Yelm informs the Cities of Olympia and Lacey in writing of its desire to participate in construction and monitoring of habitat restoration mitigation actions at the Deschutes River property, the City of Yelm will immediately begin to share equally in the construction and monitoring of habitat restoration mitigation actions costs listed above not yet incurred as of the date of the City of Yelm's written notice consistent with Section V.a and Section V.c of this Agreement. Expenditures incurred prior to the date of the City of Yelm's notice will be reimbursed by the City of Yelm to the City of Olympia and the City of Lacey individually as described in Section V.d of this Agreement.

- b. 50' Riparian Buffer Planting

This Phase V Agreement confirms that the City of Olympia managed planting of the 50-foot riparian buffer, including payment of all costs, for the mutual benefit of the Cities. The Cities will equally divide costs for planting of the 50-foot riparian buffer in accordance with the letter of agreement dated October 30, 2014. Total costs to be divided shall not exceed \$31,372.22.

c. Property Management Expenses

The Cities of Olympia, Lacey and Yelm agree to equally divide costs for property management expenses. Property management work may include the removal of material (ie TV's, tires) and fences from the property, weed control, installation of new wire fencing, and pasture management through 2020. Prior to authorizing material or fence removal or fence construction, the Cities of Olympia and Lacey agree to consult with the City of Yelm. Total costs for such services under this agreement are not to exceed \$133,997 as outlined as follows:

Stewardship Planning	\$73,308
Pasture Management	\$60,688

d. Future Stewardship and Property Management.

Costs for future stewardship and property management work will be established in a future agreement based on monitoring work conducted in this Agreement. Proportionate cost sharing shall be determined at that time.

V. Method of Payment

a. Professional Services – Habitat Restoration Mitigation Actions

- i. Consultants will invoice each Olympia and Lacey separately on a monthly basis.
- ii. Payment will be made separately by each City to the consultants upon receipt of an acceptable invoice, after completion of each task agreed upon in the professional services agreement.

b. Professional Services – Property Management Activities

- i. Consultants will invoice each Olympia, Lacey and Yelm separately on a monthly basis.
- ii. Payment will be made separately by each City to the consultants upon receipt of an acceptable invoice, after completion of each task agreed upon in the professional services agreement.

c. Construction Services

- i. Olympia will manage the construction contract for the mutual benefit of both itself and the City of Lacey, and will invoice the City of Lacey its half share of costs based on actual contract expenses plus its half share of Olympia's administrative costs. The invoice will provide a detailed breakdown of costs. Lacey will pay its share of the undisputed items within thirty (30) days of receipt of invoices from Olympia.

- d. Pro Rata Reimbursement of Professional Services-Habitat Restoration Mitigation Actions and Construction Services by the City of Yelm
 - i. Within 90 days of receiving written notice from the City of Yelm of its desire to participate in construction and habitat restoration monitoring actions at the Deschutes River property, the City of Olympia will prepare an invoice of the professional and construction services expenditures detailed in Section IV.a of this Agreement incurred prior to the date written notice was received from the City of Yelm. The invoice will provide a detailed breakdown of costs and the reimbursement amount due to each the City of Olympia and the City of Lacey. The City of Yelm will pay the undisputed amount due individually to Olympia and Lacey within thirty (30) days of receipt of the invoice from Olympia.
- e. 50' Riparian Buffer Planting
 - i. Olympia managed planting of the 50-foot riparian buffer for the mutual benefit of the Cities. Olympia will invoice the City of Lacey and the City of Yelm their share of costs based on actual expenses. The invoice will provide a detailed breakdown of costs. Lacey and Yelm will pay their share of the undisputed items within thirty (30) days of receipt of invoices from Olympia.

VI. Indemnification & Insurance

Each City agrees to defend, indemnify and hold the other cities, their officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including reasonable attorney fees, arising out of or in connection with the indemnifying City's performance of this Agreement, including injuries and damages caused by the negligence of the indemnifying City's officers, officials and employees.

VII. No Separate Legal Entity Created

This Agreement creates no separate legal entity.

VIII. Duration of Agreement

This Agreement shall be effective on the date of the last signature affixed hereto and shall terminate upon completion of the tasks necessary to accomplish the purpose of the agreement, unless sooner terminated by the Cities as provided herein.

IX. Dispute Resolution

- a. Step One – Negotiation. In the event of a dispute concerning any matter pertaining to this Agreement, the Parties involved shall attempt to address their differences by informal negotiation. The Party perceiving a dispute or disagreement persisting after informal attempts at resolution shall notify the other Parties in writing of the general

nature of the issues. The letter shall be identified as a formal request for negotiation and shall propose a date for representatives of the Parties to meet. The other Parties shall respond in writing within ten (10) business days. The response shall succinctly and directly set out that Party's view of the issues or state that there is no disagreement. The Parties shall accept the date to meet or shall propose an alternate meeting date not more than ten (10) business days later than the date proposed by the Party initiating dispute resolution. The representatives of the Parties shall meet in an effort to resolve the dispute. If a resolution is reached the resolution shall be memorialized in a memorandum signed by all Parties which shall become an addendum to this Agreement. Each Party will bear the cost of its own attorneys, consultants, and other Step One expenses. Negotiation under this provision shall not exceed 90 days. If a resolution is not reached within 90 days, the Parties shall proceed to mediation.

- 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. The mediator shall be chosen by agreement. Each Party will bear the cost of its own attorneys, consultants, and other Step Two expenses. The parties to the mediation will equally share the cost of the mediator. A successful mediation shall result in a memorandum agreement which shall become an addendum to this Agreement. Mediation under this provision shall not exceed 90 days. If the mediation is not successful within 90 days, the Parties may proceed to litigation.
- c. Step Three – Litigation. Unless otherwise agreed by the Parties in writing, Step One and Step Two must be exhausted as a condition precedent to filing of any legal action. 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.

X. Termination of Agreement

This Agreement may be terminated upon mutual agreement of the Cities.

XI. Interpretation and Venue

This Agreement shall be governed by the laws of the State of Washington as to interpretation and performance. The parties hereby agree that venue for enforcement of any provisions shall be the Superior Court of Thurston County.

XII. Entire Agreement

This Agreement sets forth all terms and conditions agreed upon by the Cities and supersedes any and all prior agreements oral or otherwise with respect to the specific subject matter addressed herein.

XIII. Recording

Prior to its entry into force, this Agreement shall be filed with the Thurston County Auditor's Office or posted upon the Cities' websites as provided by RCW 39.34.040.

XIV. Counterparts

This Agreement may be executed in counterparts, and all such counterparts once so executed shall together be deemed to constitute one final agreement, as if one document had been signed by all Parties, and each such counterpart, upon execution and delivery, shall be deemed a complete original, binding on the parties. A faxed or email copy of an original signature shall be deemed to have the same force and effect as the original signature.

XV. Notice

Any notice required under this Agreement shall be to the party at the address listed below and shall become effective three days following the date of deposit with the United States Postal Service.

CITY OF OLYMPIA:

Attn: Susan Clark, Senior Planner
Re: Water Rights Mitigation/Deschutes Basin
PO Box 1967
Olympia, WA 98507-1967

CITY OF LACEY:

Attn: Peter Brooks, Water Resource Manager
Re: Water Rights Mitigation/Deschutes Basin
420 College St SE
Lacey, WA 98503

CITY OF YELM:

Attn: Chad Bedlington, Public Works Director
Re: Water Rights Mitigation/Deschutes Basin
105 Yelm Ave. W
Yelm, WA 98597

This Agreement is hereby entered into between the Cities and shall take effect on the date of the last authorizing signature affixed hereto:

CITY OF OLYMPIA

Steven R. Hall, City Manager

Date: _____

Approved as to form:

Darren Nienaber

Darren Nienaber, Deputy City Attorney

CITY OF YELM

JW Foster, Mayor

Date: _____

Approved as to form:

P. Stephen DiJulio, Attorney

CITY OF LACEY

Scott Spence, City Manager

Date: _____

Approved as to form:

David Schneider, City Attorney