

AGREEMENT REGARDING GIFT OF FLUORIDATION SYSTEM

This Agreement Regarding Gift of Fluoridation System (the "Agreement") is entered into as of March 1, 2005 (the "Effective Date"), by and between Washington Dental Service Foundation, LLC, a Washington limited liability company ("WDSF"), and the City of Port Angeles, Washington, a municipality (the "City") (collectively referred to herein as the "Parties").

RECITALS

WHEREAS, WDSF is a single member limited liability company of which Washington Dental Service, an organization exempt from federal income tax within the provisions of Section 501(c)(4) of the Internal Revenue Code of 1986, as amended (the "Code"), is the sole member;

WHEREAS, WDSF is organized and operated for charitable purposes including improving the oral health of Washington residents by facilitating the implementation of community fluoridation projects throughout the State of Washington;

WHEREAS, the City is a political subdivision of the State of Washington within the meaning of Section 170(c)(1) of the Code;

WHEREAS, in furtherance of WDSF's charitable mission to improve the oral health of Washington residents, WDSF wishes to make a gift of a fluoridation system (the "System") to the City for the purpose of fluoridating the Port Angeles public water supply, in accordance with the terms and conditions set forth herein;

WHEREAS, the Port Angeles City Council (the "City Council") has determined that it is in the best interests of the City's residents to fluoridate the Port Angeles public water supply, to accept the gift of the System, and to proceed with implementation of a fluoridation system for the City's public water supply;

WHEREAS, the City desires to accept WDSF's gift of the System, in accordance with the terms and conditions set forth herein;

WHEREAS, contemporaneously with this Agreement, WDSF intends to enter into a design-build agreement (the "Design-Build Agreement") with CH2M Hill Constructors, Inc., a Washington corporation ("CH2M Hill"), for the design, construction and installation of the System on land owned by the City;

WHEREAS, WDSF will be responsible for paying the Contract Price for the cost of the design, construction and installation of the System;

WHEREAS, the City is not causing such design, construction and installation to be performed by CH2M Hill through any separate contract or agreement;

WHEREAS, the City is not causing the design, construction and installation of the System to be performed by WDSF through any separate contract or agreement;

WHEREAS, no part of the cost of the design, construction or installation of the System shall

ever become an obligation of the City; the design, construction and installation of the System will not be executed at the cost of the City and will not by law give rise to a lien or charge on any property of the City;

WHEREAS, it is the Parties' expectation that the System be operational no later than March 1, 2006; and

WHEREAS, WDSF and the City have determined that entering into this Agreement will further the charitable and public service missions of the Parties.

NOW, THEREFORE, in consideration of the mutual promises, covenants, conditions and performances set forth herein, the Parties recite, covenant and agree as follows:

AGREEMENT

ARTICLE I. PURPOSE

Section 1.1 Purpose. The purpose of this Agreement is to establish the terms and conditions of WDSF's gift of the System to the City, and the City's acceptance of the gift. The City will use the System to implement the City's community water fluoridation project.

ARTICLE II.

SYSTEM TRANSFER

Section 2.1 Gift of System. Subject to and upon the terms and conditions of this Agreement, WDSF agrees and covenants to give, donate, and transfer to the City, at no cost, all of WDSF's right, title and interest in and to the System. WDSF shall transfer the System to the City (a) upon Substantial Completion of the System by CH2M Hill, (b) or otherwise pursuant to Section 5.2 below; provided however, that WDSF shall have ensured prior to any transfer that the System is free of all liens, claims, demands or encumbrances of any kind, legal or equitable that prevent or could prevent WDSF from transferring the System to the City on a free and clear basis. For purposes of this Agreement, the term "Substantial Completion" shall have the same meaning as is assigned in the Design-Build Agreement.

Section 2.2 City's Acceptance of Gift. Subject to and upon the terms and conditions of this Agreement, and except as provided in Section 2.3, the City hereby accepts WDSF's gift of the System and from and after WDSF's transfer of the System to the City at Substantial Completion, or otherwise pursuant to Section 5.2 below, agrees to assume, perform, and fully discharge when due any and all of the liabilities and obligations relating to the operation and ownership of the System, other than those relating to WDSF's payment of the Contract Price, as that term is defined Section 6.2 below, for the costs of the design, construction and installation of the System (the "Assumed Liabilities"). The term "liabilities" includes, but is not limited to, any and all debts, liabilities, and obligations, whether accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, known or unknown, including those arising under any federal, state, local or foreign statute, law, ordinance, regulation, rule, code, order, writ, stipulation, permit, or other government requirement and those arising under any trade payable, other accounts payable, assigned contract, or

other contract.

Section 2.3 Excluded Liabilities. Assumed Liabilities shall not include WDSF's obligation to pay to CH2M Hill the Contract Price for the design, construction and installation of the System. This Section 2.3 does not, however, in any way limit WDSF's ability to recover any amounts due to WDSF from the City under Section 5.9 or Article VII of this Agreement.

Section 2.4 DISCLAIMER OF WARRANTIES. WDSF IS PROVIDING THE GIFT "AS IS" and "WHERE IS" and WITHOUT WARRANTY OF ANY KIND. WDSF EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT, AS WELL AS ANY WARRANTY WHATSOEVER WITH RESPECT TO THE MARKETABILITY OR SITE CLASSIFICATION OF THE SYSTEM.

Section 2.5 City Responsibility for System Results and Condition. The City acknowledges that, as between WDSF and the City, after transfer of the System to the City and acceptance of the System by the City, the City has full responsibility for the use and results obtained from the System, and that the entire risk of the System and any use, nonuse or failure of the System is with the City. Without limiting the generality of the foregoing, WDSF will have no liability with respect to: (A) the quality, nature, adequacy and physical condition of the System; (B) the existence, quality, nature, adequacy, and physical condition of utilities serving the System (C) the System's use, habitability, merchantability, or fitness, suitability, value or adequacy of the System for any particular purpose; (D) the zoning or other legal status of the System or any other public or private restrictions on use of the System; (E) the compliance of the assets or the System's operation with any applicable codes, laws, regulations, statutes, ordinances, of any governmental or quasi-governmental entity or any covenants, conditions and restrictions applicable to the System or the fluoridation of a water supply; (F) the presence or absence of hazardous materials on, under or about the System or the adjoining or neighboring property; (G) the quality of any labor and materials used in any improvements on or benefiting the System; (H) the condition of title to the System; (I) the economics of the present or future operation of the System; or (J) the health effects related to the operation of the System. As between WDSF and the City, the City assumes the responsibility and risks of all defects to and conditions in the System, including defects and conditions, if any, that cannot be observed by inspection. WDSF shall not be liable for any latent or patent defects in the System.

Section 2.6 Further Action. Each of the Parties shall execute and deliver such other documents and take such further actions as may be reasonably required or appropriate to carry out the purposes and intents of this Agreement, including but not limited to a transfer agreement and/or bill of sale to effectuate WDSF's transfer of the System to the City at Substantial Completion or pursuant to Section 5.2 below.

ARTICLE III. LICENSE TO ENTER PREMISES; TRANSFER COSTS

Section 3.1 License to Enter City Premises. The City hereby grants to WDSF and its contractors, including specifically CH2M Hill, a revocable, non exclusive license to enter upon property of the City at the City's landfill property located at 3501 W. 18th Street, Port Angeles, for

the purpose of designing, installing, constructing and testing the System pursuant to the Design-Build Agreement, but for no other purposes.

Section 3.2 Transfer of System to Permanent Facility. The parties recognize that, due to changes in the City's water system as a result of the Elwha dams removal project, the System may at first be installed in a temporary water treatment facility. If the System is installed in a temporary facility, it will be necessary to transfer the System to a permanent facility at some date in the future. The estimated cost to transfer the System is thirty thousand dollars (\$30,000). If the System is installed in a temporary facility, WDSF hereby agrees to reimburse the City for all costs incurred by the City in moving the System to a permanent facility, provided the amount of reimbursement shall not exceed thirty thousand dollars (\$30,000) (the "System Transfer Costs").

ARTICLE IV. CITY'S REPRESENTATIONS AND WARRANTIES

The City hereby represents and warrants as follows.

Section 4.1 The City has the full right, power and authority to enter into this Agreement, to accept WDSF's gift of the System, and to accept all of WDSF's right, title and interest in and to the System upon its transfer by WDSF at Substantial Completion or otherwise pursuant to Section 5.2 below.

Section 4.2 The City's performance hereunder does not violate any agreement between the City and any third party, any obligation owed by the City to any third party, or the rights of any third party.

Section 4.3 Other than litigation or claims that may arise directly as a result of the denial of Protect the Peninsula's Future, Clallam County Citizens for Safe Drinking Water, Barney Munger and Eloise Kailin's State Environmental Protection Act claim, there is no pending claim, action, suit, proceeding, litigation, arbitration, or investigation against the City, and the City is not subject to any continuing injunction, judgment or other order of any court, arbitrator or governmental agency that affects the City's ability to enter into this Agreement or to carry out its obligations set forth herein.

Section 4.4 The City will use the System exclusively for public purposes within the meaning of Section 170(c)(1) of the Code, and the City will not take or fail to take any action that would cause the System to be used for any other purposes.

ARTICLE V. CITY'S RESPONSIBILITIES

The City agrees and covenants as follows.

Section 5.1 The City shall accept WDSF's transfer of the System and will assume all of WDSF's right title and interest in and to the System at Substantial Completion in accordance with the terms and conditions of this Agreement.

Section 5.2 The City shall accept WDSF's transfer of the System and will assume all of

WDSF's right title and interest in and to the System, in whatever state of completion as the System may exist, in the event of any termination of the Design-Build Agreement prior to Substantial Completion of the System.

Section 5.3 The City shall not take or fail to take any action that will or could prevent its acceptance of WDSF's gift of the System or result in its rejection of the System prior to or after Substantial Completion, as the case may be

Section 5.4 The City shall, alone and in conjunction with CH2M Hill, as required under the Design Build Agreement, use reasonable and good faith efforts to obtain or provide for all consents, approvals or other action by or any registration with, notice to or filing with any person, entity, court or administrative or governmental body required in order to fluoridate the Port Angeles public water supply; and, not later than one hundred eighty (180) days after the earlier of (a) final termination of all legal challenges to fluoridation of the City's water supply or (b) Substantial Completion, the City shall have secured all licenses, permits, registrations and other authorizations required under federal, Washington, or local law necessary to fluoridate the Port Angeles public water supply.

Section 5.5 Upon Substantial Completion and transfer by WDSF of the System, the City shall fluoridate the Port Angeles public water supply for a continuous ten (10) year period, except for reasonable periods of time for normal maintenance or repair or any break in service necessary to switch-over to a future permanent water fluoridation system, and except in the event the City is prevented from fluoridating the Port Angeles public water supply as a result of a court order or other judicial decision.

Section 5.6 As between the City and WDSF, the City shall be responsible for investigating each and every aspect of the System's construction and future operation, including, without limitation: (i) all matters relating to the title, and all governmental and other legal requirements such as taxes, assessments, zoning, use permit requirements, building permit requirements, building codes, and other development requirements; (ii) the physical condition of the System, including, without limitation, the infrastructure available or unavailable to the System (as the case may be), access to the System, all other physical and functional aspects of the System, including the presence or absence of hazardous or toxic materials, substances or wastes of any kind; and (iii) all other matters of any significance affecting the System whether physical in nature or intangible in nature.

Section 5.7 The City hereby agrees, at its cost, to defend with due diligence any lawsuit filed by a third party that has as its goal the temporary or permanent injunction of the operation of the System, including any lawsuit filed as a result of the City's denial of Protect the Peninsula's Future, Clallam County Citizens for Safe Drinking Water, Barney Munger and Eloise Kailin's State Environmental Protection Act claim.

Section 5.8 The City shall designate one or more representatives to work with and to assist CH2M Hill with the design, construction, and installation of the System, as necessary, to ensure that the System meets the requirements of the City and all applicable laws concerning the fluoridation of a public water supply.

Section 5.9 In the event the City fails to meet any of its obligations under Article IV or Article V, after notice and a thirty (30) day opportunity to cure, the City hereby agrees and covenants to repay WDSF any and all amounts WDSF expends or has expended for or in connection with the design, construction and installation of the System, including without limitation all administrative costs and expenses, legal or other professional fees, personnel time and the System Transfer Costs (the "Repayment Amount"), such Repayment Amount not to exceed \$433,000; provided, however, that the foregoing limitation on the Repayment Amount shall not relieve or limit the City's obligations to indemnify and hold WDSF harmless under Article VII.

ARTICLE VI. CONDITIONS TO WDSF GIFT

The Gift is subject to and conditioned upon satisfaction of the conditions listed below, unless waived in writing by WDSF:

Section 6.1 WDSF and CH2M Hill shall have entered into the Design-Build Agreement for the design, construction and installation of the System.

Section 6.2 CH2M Hill and WDSF shall have agreed in writing that the System can and shall be designed, constructed and installed by CH2M Hill for a Contract Price of three hundred forty-three thousand dollars (\$343,000), plus Washington State sales taxes (the "Contract Price"). Notwithstanding anything herein to the contrary, in the event a legal proceeding suspends, delays or interrupts all or any part of the design, construction or installation of the System leading to increases in the Contract Price, WDSF hereby agrees to consider paying for all or a part of such increases to the Contract Price; provided, however, that in the event WDSF determines not to pay for such increases to the Contract Price, WDSF shall have no further obligation to the City or duty under this Agreement. In that event, WDSF shall have the right in its discretion to terminate the Design-Build Agreement and transfer the System to the City pursuant to Section 5.2 above.

Section 6.3 As of the Effective Date of this Agreement, the City shall have provided to WDSF written documentation evidencing formal action of the Port Angeles City Council authorizing and approving the City's entry into this Agreement.

Section 6.4 CH2M Hill and the City shall have secured all permits and complied with all requirements of any applicable governing bodies, including but not limited to the Washington State Department of Health, for the design, construction and installation of the System.

Section 6.5 There shall have been no significant breach or failure to perform under the Design-Build Agreement by CH2M Hill.

ARTICLE VII. INDEMNIFICATION

Section 7.1 Notwithstanding anything to the contrary contained in this Agreement, the City agrees and covenants to indemnify, defend and hold harmless WDSF and its trustees, officers, members, employees, agents and representatives from and against any and all causes of action, suits at law or equity or claims or demands and any costs, losses, liabilities, damages (including any special, indirect, incidental or consequential damages), judgments, lawsuits, claims and expenses

(including without limitation reasonable attorneys' fees and costs), of any nature, whether known or unknown, fixed or contingent, due or to become due, relating to, incurred in connection with, or arising out of any acts or omissions by the City or the operation of the System, including without limitation any breach of warranty or covenant hereunder. The City's obligations under this Section 7.1 shall not apply to the extent arising solely from WDSF's negligence or willful misconduct; provided, however, that to the extent that this Agreement constitutes a "covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property" within the meaning of RCW 4.24.115, the City's obligations under this Section 7.1 shall apply to the extent of the City's negligence.

Section 7.2 Notwithstanding anything to the contrary contained in this Agreement, to the maximum extent permitted by law, in no event shall WDSF be liable for any damages whatsoever (including, without limitation, direct, consequential, indirect, special, or incidental damages, or damages for loss of business profits, business interruption, loss of business information, or other pecuniary loss) arising out of the use or inability to use the System, under contract, tort (including negligence) or other cause of action and even if WDSF has been advised to the possibility of such damages.

Section 7.3 The foregoing indemnities specifically include, without limitation, claims brought by the City's employees against WDSF. THE FOREGOING INDEMNITIES ARE EXPRESSLY INTENDED TO CONSTITUTE A WAIVER OF THE CITY'S IMMUNITY UNDER WASHINGTON'S INDUSTRIAL INSURANCE ACT, RCW TITLE 51, TO THE EXTENT NECESSARY TO PROVIDE WDSF WITH A FULL AND COMPLETE INDEMNITY FROM CLAIMS MADE BY THE CITY AND ITS EMPLOYEES, TO THE EXTENT OF THEIR NEGLIGENCE. THE CITY AND WDSF ACKNOWLEDGE THAT THE INDEMNIFICATION PROVISIONS OF THIS ARTICLE WERE SPECIFICALLY NEGOTIATED AND AGREED UPON BY THEM.

ARTICLE VIII. GENERAL

Section 8.1 Choice of Law. This Agreement shall be governed and interpreted according to the laws of the State of Washington. The Parties agree that Clallam County, in the State of Washington, shall be the exclusive and proper forum for any action or proceeding, including arbitration, if any, brought under this Agreement. The Parties accept the personal jurisdiction of such courts.

Section 8.2 Dispute Resolution. The Parties shall use reasonable, good faith efforts to cooperatively resolve any disputes that arise in connection with this Agreement. When a bona fide dispute arises between the City and WDSF subject to this Section 8.2 the parties shall each notify the other of the dispute, with the notice specifying the disputed issues and the position of the Party submitting the notice. If the Parties are unable to resolve a dispute within ten (10) business days, pursuant to this Section 8.2 either Party may proceed with any remedy available to it at law or in

equity.

Section 8.3 Remedies. Except as otherwise provided for herein, no remedy conferred by any of the specific provisions of the Agreement or available to WDSF is intended to be exclusive of any other remedy, and each and every remedy shall be cumulative and shall be in addition to every other remedy given hereunder, now or hereafter existing at law or in equity or by statute or otherwise. The election of any one or more remedies by WDSF shall not constitute a waiver of the right to pursue other available remedies. The City's sole and exclusive remedy from the City's use or inability to use the System or any breach of this Agreement by WDSF shall be for the City to discontinue use of the System or to repair or modify the System at the City's election and sole expense or, when applicable, to pursue legal remedies under the Design-Build Agreement.

Section 8.4 Amendments. This Agreement may be amended, supplemented or modified only by a writing dated and signed by both Parties.

Section 8.5 Assignment. Except as specifically provided in this Agreement, neither Party may assign or transfer this Agreement or any of its rights hereunder, or delegate any of its duties hereunder, without the prior written consent of the other Party. Any attempted assignment, transfer, or delegation in contravention of this Section 8.5 shall be null and void. This Agreement shall inure to the benefit of and be binding on the Parties hereto and their permitted successors and assigns.

Section 8.6 Severability. If any provision of this Agreement is invalid or unenforceable, the other provisions herein shall remain in full force and effect in such jurisdiction and shall be liberally construed in order to effectuate the purpose and intent of this Agreement, and the invalidity or unenforceability of any provision of this Agreement in any jurisdiction shall not affect the validity or enforceability of any such provision in any other jurisdiction.

Section 8.7 Waiver. Any failure or delay by either Party to exercise or partially exercise any right, power or privilege hereunder shall not be deemed a waiver of any of the rights, powers or privileges under the Agreement. No term or condition of this Agreement shall be held to be waived, modified or deleted except by a written instrument signed by the Parties hereto. No such waiver, modification or deletion in any one instance shall be deemed to be a waiver, modification or deletion of a term or condition in any other instance, whether like or unlike. Waiver of any breach of any term or condition of this Agreement shall not be deemed a waiver of any prior or subsequent breach.

Section 8.8 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and is not subject to amendment or modification except as provided herein.

Section 8.9 Force Majeure. Neither party shall be deemed to be in violation of this Agreement if such party is prevented from performing any of its obligations hereunder for any reason beyond its control, including without limitation, acts of God or of any public enemy, elements, flood, strikes, or an injunction or other judicial decision.

Section 8.10 Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the Parties thereto and their respective successors and assigns.

Section 8.11 Section Headings. The headings of sections in this Agreement are for reference only and shall not affect the meaning of this Agreement.

Section 8.12 Survival. The terms and conditions contained in the Agreement that by their sense and context are intended to survive the performance of the Agreement by the Parties shall so survive the completion of the performance, cancellation or termination of the Agreement, including without limitation Section 2.4, Section 2.5, Article VII and Article VIII.

IN WITNESS WHEREOF, the Parties have caused their duly authorized representatives to execute this Agreement as of the date written below.

WASHINGTON DENTAL SERVICE
FOUNDATION, LLC

By: Tracy E. Garland
Name: Tracy E. Garland
Its: President and CEO
Date: 3/18/05

CITY OF PORT ANGELES, WASHINGTON

By: Richard A. Headrick
Name: Richard A. Headrick
Its: Mayor
Date: March 1, 2005

Approved as to form:

William E. Bloor
William E. Bloor
City Attorney

Attest:

Becky J. Upton
Becky Upton
City Clerk