

AGREEMENT FOR WHOLESALE SUPPLY OF WATER
CITY OF LYNDEN AND BERTHUSEN ROAD WATER ASSOCIATION

This agreement for the wholesale supply of water ("Agreement") between the City of Lynden ("City") and the Berthusen Road Water Association ("Association") is effective this ____ day of _____, 2023.

ARTICLE 1. RECITALS

1.01 Pursuant to Title 35 and 35A RCW, the City is authorized to contract for the wholesale provision of water to an association outside city limits; and

1.02 The City has supplied the Association with treated potable water for several decades; and

1.03 The Association holds certain groundwater rights evidenced by Certificate of Water Right No. G1-20260C ("Association Water Right") stating production well authorization to produce a maximum of 30 gallons per minute and 48 acre-feet per year; and

1.04 The Association groundwater right will be placed into trust to preserve its potential for future use and to be potentially utilized in accordance with this Agreement; and

1.05 The Association is a validly existing water association which distributes the wholesale water provided by the City to its members through its own water distribution system in compliance with all Federal, State, and local laws for water associations; and

1.06 It is the intent of the Parties that the City shall supply potable water; and

1.07 It is the intent of the Parties that the City shall supply existing fire flow water where existing piping adjacent to Association properties is adequate for that purpose. The provision of that supply is at the point of connection(s) to the Association, subject to the terms and conditions herein; and

1.08 The foregoing recitals are a material part of this Agreement.

ARTICLE 2. AGREEMENT

The City shall sell, and the Association shall purchase a wholesale supply of potable water according to the terms and conditions herein.

ARTICLE 3. DEFINITIONS

3.01 "Calendar year." The entire twelve-month period beginning on January 1 and ending on December 31.

3.02 "City Master Meter(s)." City-owned meter(s) located at the Main Wholesale Connections and any other additional or alternate connection(s) hereafter established,

which will measure the quantity and flow of water provided to the Association by the City pursuant to this Agreement.

3.03 "Contract Annual Quantity." The maximum quantity of potable water the City shall make available to supply the Association during a Calendar year. The Contract Annual Quantity shall be expressed in acre feet per year ("af/yr").

3.04 "Contract Demand." The maximum quantity of potable water the City shall make available to supply the Association on an annual basis and the maximum number of connections served in any Calendar year or portion thereof during which this Agreement is in effect, subject to any required Shared Reduction in Use. Water is made "available to supply the Association" when it is delivered by the City and withdrawn by the Association at the Main Wholesale Connections and any additional or alternate connections established pursuant to this Agreement. Contract Demand shall include two components: Contract Annual Quantity and Contract Maximum Connections. The Contract Demand will not change from year to year, except by amendment to this Agreement.

3.05 "Contract Maximum Connections." The maximum number of water utility connections in the Association served with potable water supplied by the City pursuant to this Agreement.

3.06 "Declaration of Supply Shortage." A written statement from the City to the Association declaring the existence of a Supply Shortage, the factual basis therefor, the new water quantities available after each Parties' Shared Reduction in Use, and the expected duration that Shared Reduction in Use shall be required, if known. A Declaration of Supply Shortage may be for a defined period of time, indefinite, or even permanent in duration.

3.07 "Main Wholesale Connections." Wholesale water service to the Association is provided through City meters as shown in the table below:

Service Type	Address	Account ID
4" Master Meter	2100 Main St	M1582
2" Service Meter	586 Birch Bay Lynden Rd	M5884
2" Service Meter	576 Birch Bay Lynden Rd	M5885
¾" Service Meter	8174 Berthusen Rd	M5886
¾" Service Meter	8205 Berthusen Rd	M5887
2" Service Meter	8291 Berthusen Rd	M5888
¾" Service Meter	8367 Berthusen Rd	M5889
¾" Service Meter	8371 Berthusen Rd	M5890
¾" Service Meter	8393 Berthusen Rd	M5891
¾" Service Meter	2350 Main St	M5892
¾" Service Meter	2208 Main St	M5893

3.08 "Party" or "Parties" The City and/or the Association

3.9 "Reduced City Demand" or "Reduced Demand" of the City. The quantity of water from the Water Supply System available for use by the City on a maximum month, annual quantity, or instantaneous basis following Declaration of a Supply Shortage.

3.10 "Reduced Association Demand" or "Reduced Demand" of Association. The quantity of water from the Water Supply System available for use by the Association on a maximum month, annual quantity, or instantaneous basis following Declaration of a Supply Shortage.

3.11 "Regulatory approval(s)" Any and all approvals, authorizations or permits from local, state or federal agencies, including any administrative or judicial appeals/litigation thereon, required to lawfully allow for the purchase, sale and use of potable water as described in this Agreement.

3.12 "Shared Reduction in Use" Contemporaneous reductions in water usage over periods of time such as annually, monthly, or instantaneous by the City and the Association, in equal proportion, as required by this Agreement due to a Supply Shortage.

3.13 "Stranded Costs" Capital costs of the Water Supply System which benefit the Association and are not fully depreciated on the date water service is terminated, if ever.

3.14 "Supply Shortage." Any circumstances under which the City determines, pursuant to Section 6.04, that it is unable to deliver water to the Association under the terms of this Agreement, and which do not fall directly within the force majeure provisions in Section 12.13 or temporary emergencies as described in Section 6.07. Circumstances under which a Supply Shortage may result, include without limitation, (a) environmental factors such as low flow, declining water tables, or pollution of water source; (b) determination made or agreed settlement in a water right adjudication which results in the City having less valid water rights than stated as the City position on its water rights in its approved Water System Plan in place on the effective date of this Agreement; (c) conditions imposed on City water rights and intake facilities by federal or state agencies relating to Endangered Species Act ("ESA") compliance; (d) conditions imposed pursuant to the National Environmental Policy Act ("NEPA") or the State Environmental Policy Act ("SEPA"); or (e) the entry of habitat conservation plans, watershed plan agreements, water system plan agreements, or water right agreements, of any kind, between the City and local municipalities, state, or federal agencies, or Indian Tribes. The Association expressly acknowledges that the City may, in its discretion, negotiate such agreements, which may on a temporary or permanent basis reduce the availability of water over a defined period of time, e.g., annual, monthly, or instantaneous, under this Agreement.

3.15 "Water Rights." Any and all permit applications, claims, permits, or certificates for any quantity of water on file with the State Department of Ecology now or in the future.

3.16 "Water Supply System." The City-owned and operated system that supplies potable water to the Association, City, and other City wholesale customers. The Water Supply System includes all Water Supply System Assets.

3.17 "Water Supply System Assets." City owned and operated Water Supply System infrastructure, including without limitation, pumps, transmission mains, water lines,

treatment facilities, telemetry, production meters, wells, land, equipment, vehicles. and certain storage reservoirs and planning documents, which are used in supplying potable water to the Association, City and other City wholesale customers.

3.18 "Water System Plan." The comprehensive water system plan of the City and/or the Association, including amendments thereto, required by State law and subject to approval by Whatcom County and the State Department of Health. An approved Small Water System Management Program may serve as all or part of a Water System Plan for the Association.

ARTICLE 4. SUPPLY AND PURCHASE OF WATER

4.01 The City shall treat and annually supply to the Association the Association's Contract Demand, or such portion thereof utilized by the Association, according and subject to the terms and conditions herein.

4.02 The Association shall annually purchase from the City the Association's Contract Demand, or such portion thereof as is needed by the Association, subject to the terms and conditions herein.

4.03 The Association shall be allowed to purchase and use water from the City in quantity less than its Contract Demand without penalty and without prejudice to its ability to purchase water in future years.

4.04 The Association shall have the ability to utilize City water and water storage for existing fire flow and fire protection purposes and shall purchase the actual water, if any, drawn from the system for this purpose; provided that, the City shall have no obligation to provide the Association with additional fire flow or fire flow capacity beyond that which currently exists and is made available as of the effective date of this Agreement.

ARTICLE 5. CONTRACT DEMAND

5.01 Contract Demand is established as follows. Contract Annual Quantity shall be **126 acre-feet per year** ("af/yr"). Contract Maximum Connections shall be equal to the maximum number of connections the Association is approved for by the State Department of Health provided that new connections do not cause the Association to exceed Contract Annual Quantity. Addition of new connections is also governed by Section 12.02. These maximums shall be reduced on a pro rata basis upon any annexations of property within the Association to include all water servicing Association members under this Agreement. Except pursuant to a Supply Shortage, these components of Contract Demand may be adjusted only by written amendment of this Agreement.

5.02 The City shall be obligated to supply a quantity of water sufficient to meet the Association's Contract Demand, subject to all terms and conditions herein. The Parties may by mutual agreement amend this Agreement to reduce the Contract Demand on a temporary or permanent basis.

5.03 The quality of water supplied to the Association under this Agreement shall meet or exceed all applicable federal, state, and local rules and regulations governing water quality for Group A water systems.

5.04 The Association shall have the right to use the City's water and water storage for fire flow and fire protection purposes at the level of availability and capacity existing on the effective date of this Agreement. The Association shall have no right to increased or additional fire flow or fire flow capacity under this Agreement.

5.05 The Association shall have the right to identify the City water as available water for planning documents for storage capacity purposes.

ARTICLE 6. CONDITIONS OF SERVICE —CITY

6.01 The City shall furnish such potable water as the Association demands within its Contract Demand or reduction thereof pursuant to a Shared Reduction in Use. Delivery by the City and withdrawal by the Association of said potable water shall be at the Main Wholesale Connections. Flows shall be measured through the City's Master Meter(s) at the Main Wholesale Connections. The flow measurement will include all water servicing Association members under this Agreement.

6.02 The City shall install, own, and operate the City Master Meter(s). The City Master Meter(s) shall be calibrated and tested by a certified tester as required. Calibration may be requested by the Association no more than bi-annually. The City shall maintain the City Master Meter(s) to have a registration accuracy within the limits established in AWWA Standards for the corresponding type and size of meter used for the City Master Meters(s).

6.03 The City shall provide continuous supply and transmission service to the Association, subject to the terms of this Agreement.

6.04 The Association recognizes the obligation of the City to meet the needs of its citizens; therefore, if the City issues a Declaration of Supply Shortage, the Association and the City's other water customers will share, in equal proportion, a reduction in water usage ("Shared Reduction in Use") for the periods of use determined by the City, e.g., annual, monthly, or instantaneous. The City may in its discretion issue a Declaration of Supply Shortage and implement a Shared Reduction in Use for multiple periods of use. The City may issue a Declaration of Supply Shortage when, in its discretion, it determines that the requested reduction is necessary to properly manage the Water Supply System. A Declaration of Supply Shortage must be issued before any Shared Reduction in Use may be required or implemented. A Shared Reduction in Use may be required immediately upon issuance of a Declaration of Supply Shortage.

6.05 The Parties intend that any Shared Reduction in Use be applied in equal proportion to the Association and City customers. A Shared Reduction in Use for any Supply Shortage shall mean that the Association will reduce its water use in the same or similar percentage as is required of the City's industrial water class, which both parties agree is the class of customers which Association water use most closely resembles. In the event the industrial class no longer exists in the City's water use system, the parties will mutually determine which class or classes most closely resembles the Associations customer class or classes. In the event of a disagreement on which class or classes most closely resembles the Associations customer class or classes, the City shall make the final decision so long as it does not abuse its discretion.

6.06 Following a Declaration of Supply Shortage and implementation of Shared Reduction in Use, the City shall periodically review and evaluate whether to maintain in place the Declaration of Supply Shortage.

- (a) If in the City's discretion it appears that a Declaration of Supply Shortage more severe than previously issued and a larger Shared Reduction in Use requirement is necessary, a new Declaration of Supply Shortage may be issued and a larger Shared Reduction in Use requirement may be implemented
- (b) If in the City's discretion it appears that circumstances no longer exist to support the Declaration of Supply Shortage, the Declaration of Supply Shortage and Shared Reduction in Use requirements may be amended to a lesser Shared Reduction in Use, or if there is no longer reason to support any Supply Shortage, the Declaration of Supply Shortage and Shared Reduction in Use shall promptly be rescinded and dissolved.

6.07 The City may temporarily interrupt or temporarily reduce delivery of water to the Association, if the City determines that system emergencies or maintenance and repair so require. Except for in emergencies, the City shall notify the Association forty-eight hours (48) in advance of a service interruption or reduction. The City shall attempt to provide as much notice as possible to ensure the Association can provide timely notice to its customers.

ARTICLE 7. CONDITIONS OF SERVICE —THE ASSOCIATION

The Association's demand upon the City's water supply shall not exceed the Association's Contract Demand provided for in Section 5.01 herein, nor shall it exceed any amount established pursuant to a Declaration of Supply Shortage and Shared Reduction in Use as provided in Sections 6.04-6.06 herein.

7.01 Exceedance of Contract Demand or required Shared Reduction in Use by the Association shall result in a fifty percent (50%) surcharge in addition to the regular charge on the overage represented by the quantity of water taken by the Association in excess of Contract Demand or a required Shared Reduction in Use, whichever is the greater quantity.

7.02 The Association shall timely pay the City for all water supplied to it pursuant to Article 8 of this Agreement, including any imposed surcharge.

7.03 Should the Association's water use exceed Contract Demand or a required Shared Reduction in Use at any time during the term of this Agreement, the City may, in its discretion, require that the Association install flow limiting devices acceptable to the City.

7.04 Nothing herein shall limit the rights remedies available to the City in the event the Association exceeds its Contract Demand or a required Shared Reduction in Use. The City shall have all rights and remedies available in law and equity, including without limitation the right to obtain an order of abatement and injunctive relief.

ARTICLE 8. RATES AND BILLING

For water supplied by the City to the Association, the Association shall pay to the City in accordance with the City water rates for water associations as set by resolution or

by adoption of the annual budget. Each month's payment shall be made on or before the 25th day of the succeeding month for the preceding month's water used. Delinquent and unpaid balances shall bear interest at the prime rate plus four (4) percent, as published in the Wall Street Journal, compounded annually.

ARTICLE 9. ASSOCIATION WATER RIGHT

The Association holds the Association Water Right, as described under Article 1 herein. The Association shall reasonably cooperate with City initiated and funded projects to allow the City a temporary right to use the allocation of water under the Association Water Right so long ownership of the Association Water Right is retained by the Association and so long as the water use needs of the Association members are met by the City in accordance with the terms of this Agreement. In addition, the City's use of the Association Water Right shall not restrict or compromise the future availability of water for the Association Water Right for its stated purposes. Notwithstanding the foregoing, in the event of annexation to the City of all or part of the land within the Association, all or part of the Association Water Right shall be transferred to the City in accordance with Section 12.04 herein.

ARTICLE 10. CONSERVATION PLANNING AND SHORTAGE MANAGEMENT

10.01 The City shall adopt a Water System Plan and the Association shall adopt a Small Water System Management Program approved by Whatcom County and the State Department of Health. Each Party shall adopt a conservation program as part of their respective plans. Conservation program efforts shall be communicated and coordinated between the Parties. The Association specifically agrees to abide by and enforce compliance with the City's water conservation plan and any conservation requirements required by State law.

10.02 The Association shall annually monitor its Water Use Efficiency Program and maintain distribution system leakage below the industry standard of 10%. In the event system's distribution leakage increases above the 10% threshold the Association agrees to take leak detection actions to reduce system leakage below this standard.

10.03 The Association and its members shall be bound by the water restriction provisions in Chapter 13.04 Lynden Municipal Code now in place (including without limitation 13.04.300, 13.04.301, 13.04.302, 13.04.303, 13.04.320, and 13.04.330) and as hereafter may be amended in the same manner and degree as City residents. The Association shall fully enforce compliance with said water restriction provisions by its members.

10.04 Each Party retains the responsibility for shortage management within its own service area and retains authority to make decisions concerning implementation of its shortage management plan, subject to restrictions on water availability during Supply Shortages, general emergencies pursuant to Section 6, or water restrictions implemented pursuant to Chapter 13.04 of Lynden Municipal Code.

ARTICLE 11. TERM AND TERMINATION

11.01 Unless otherwise agreed in writing between the Parties, this Agreement shall remain in effect for a term of sixty years (60) years.

11.02 The Parties may, by mutual agreement, elect to extend this Agreement for an additional term of twenty-five (25) years from the date of the expiration of the initial twenty-five (25) year term, and may do so for up to a total of three (3) separate and successive twenty-five (25) year extensions. Any extension or successive extensions of this Agreement shall be automatic unless one party notifies the other that they do not intend to extend the term no later than three (3) year before this Agreement would otherwise terminate.

ARTICLE 12. ADMINISTRATIVE; OTHER PROVISIONS

12.01 Any dispute arising out of the terms and conditions of this Agreement, shall be subject to the following mediation process, as a condition precedent to filing any legal cause of action. If a dispute shall arise, a meeting shall be held promptly between the Parties to attempt in good faith to negotiate a resolution to the dispute. For purposes of this Section 12.01, "promptly" shall mean within fourteen (14) calendar days of a Party requesting a meeting to resolve a dispute. If within ten (10) days after such meeting the Parties have not succeeded in resolving the dispute, the dispute shall be mediated. Either Party may provide written notice to the other that the dispute shall be submitted to mediation and a mediator shall be selected. If within seven (7) days of receipt of said written notice the Parties are unable to agree on a mediator, either Party may request appointment of a mediator by any Judge of the Whatcom County Superior Court, sitting in Chambers, and the Judge is hereby authorized to select a mediator. Both Parties shall cooperate to assure that mediation occurs in a timely manner and both Parties shall supply all materials provided to the mediator to the other Party at least two (2) days before mediation. Engaging in mediation shall not affect any claim, right, remedy, or defense of either Party. Should mediation prove unsuccessful, all claims, rights, remedies and defenses of each Party shall be preserved. Mediation shall be terminated upon (a) successful resolution of the dispute; (b) written declaration by the mediator of an impasse between the Parties; or (c) following completion of two or more mediation sessions held on separate days, written declaration by one of the Parties of an impasse. Each Party shall share equally in the fees and expenses associated with mediation, including fees and expenses of the mediator; provided that, each Party shall bear its own costs, including witness fees, and costs, associated with mediation.

12.02 The Association shall not allow or approve any new connections to its water system prior to (a) notification to the City of the Association's plans to add a service connection no later than one (1) month prior to making a new service connection; and (b) the Association must verify that payment in full was made by the potential new member to the City for current City facility charges for new connections prior to making said new connection. Any existing connections for which general facilities charges have not been collected shall be paid to the City within thirty (30) days of the date of this Agreement at the City's current general facilities connection charge. The addition of new connections shall be subject to compliance with Section 5.01.

12.03 The Association shall perform regular maintenance and repair of its water delivery system and at all times keep said system in good working order and in compliance with its own Water System Plan and all regulations governing the operation of such system.

12.04 In the event the City annexes all or part of the land area now serviced by the Association, the Association shall convey to the City all its right, title, and interest in all real and personal property, including easements and appurtenances, comprising that portion of the Association water system required to serve the land being annexed, along with a pro

rata share of the Association Water Rights. Said pro rata share of the Association Water Rights to be conveyed to the City as a condition of annexation shall be determined by looking at the actual water use for the connections within the area annexed in comparison to the total Association Water Rights. after which said property shall become part of the City's Water Supply System. Provided, however, in the event that the Association's then current water use exceeds the Association Water Right then no conveyance of any portion of the Association Water Rights shall be required. Notwithstanding the foregoing, the City retains the right to deny any annexation request if it determines in its discretion that the Association or any other person has failed to commit to convey to the City adequate real or personal property such as easements for infrastructure or water rights, or for any other lawful reason.

12.05 The Association and its members shall be obliged to pay their fair pro-rata share for capital improvements made to the City Water Supply System, as incorporated in the City water rate structure. Capital improvements shall include without limitation all associated studies, designs, plans, engineering, surveying, construction, mitigation, legal fees and other costs associated with making improvements and betterments to the City Water Supply System, all of which are captured in the City's water rate structure adopted in accordance with the Lynden Municipal Code.

12.06 The City shall indemnify, defend and hold the Association, its officers, agents and employees harmless from all suits, claims or liabilities of any nature, including attorney fees, costs and expenses, for or on account of injuries or damages sustained by any person or property resulting from the negligent acts or omissions of and to the extent harm is caused by the City, its agents or employees in connection with the provision of water under this Agreement. If suit in respect to the above is filed and judgment is rendered or settlement made requiring payment of damages by the Association, its officers, agents or employees, the City shall pay the same.

12.07 The Association shall indemnify, defend and hold the City, its officers, agents and employees harmless from all suits, claims or liabilities of any nature, including attorney fees, costs and expenses, for or on account of injuries or damages sustained by any person or property resulting from the negligent acts or omissions of and to the extent harm is caused by the Association, its agents or employees in connection with its use of water under this Agreement. If suit in respect to the above is filed and judgment is rendered or settlement made requiring payment of damages by the City, its officers, agents or employees, the Association shall pay the same.

12.08 All notices and other communications required or permitted to be given by this Agreement must be in writing and must be given and will be deemed received if and when either hand delivered, faxed or mailed to:

Berthusen Road Water Association
President
Berthusen Road Water Association
PO Box 529
Lynden, Washington 98264

City of Lynden
Public Works Director
City of Lynden City Hall
300 4th Street
Lynden, Washington 98264

or to such other address as the Parties hereto may from time-to-time designate in writing

and deliver in a like manner. Facsimile transmission of any signed original document and retransmission of any signed facsimile transmission shall be the same as delivery of an original document.

12.09 Failure of either Party at any time to require performance of any provision of this Agreement shall not limit such Party's right to enforce such provision, nor shall any waiver of any breach of any provision of this Agreement constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.

12.10 If any term or provision of this Agreement or the application thereof to any person, entity or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement and the application of such term or provision to persons, entities or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

12.11 The laws of the State of Washington shall govern any disputes arising under this Agreement.

12.12 Subject to Section 12.01, any disputes shall be adjudicated in the Superior Court for Whatcom County, Washington, unless otherwise agreed.

12.13 Neither Party shall be liable for any failure to perform any part of this Agreement due to circumstances beyond a Party's reasonable control, including, but not limited to, drought, flood, fire, wind, lightning, quarantine, war, sabotage, act of a public, foreign or domestic enemy, earthquake, civil disturbance, restraint by court order, or restraint by other governmental authority for insufficient or inadequate regulatory approval(s). The Party claiming force majeure under this provision shall provide the other Party such prompt notice of the force majeure condition(s) as is reasonably necessary under the circumstances. The obligations of a Party asserting a force majeure condition(s) under this Agreement shall be suspended to such a degree and for such a period as is reasonable under the circumstances; provided that the Party asserting the force majeure condition(s) works in good faith to remedy the condition(s) with all reasonable dispatch, to the extent it is within its control; and provided further that, any shortage in water availability resulting from said force majeure condition(s) shall be shared by the Parties in equal proportion as required for sharing Short-Term Supply Shortages, described in Section 6.05.

12.14 The Parties recognize and acknowledge that damages may be an insufficient or inadequate remedy for a breach of this Agreement. Accordingly, this Agreement shall also be enforceable by and through any other remedy available in law and equity, including specific performance.

12.15 This Agreement may be recorded by either Party and shall be binding upon the successors and assigns of each Party. This Agreement shall run with the Water Supply System and the land on which they are located, for so long as this Agreement remains in effect.

12.16 This Agreement constitutes the entire agreement between the City and the Association as to the matters contained herein and supersedes all prior agreements. No oral or written statements made by either Party prior to or following entry of this Agreement shall be considered a part of this Agreement unless expressly incorporated herein in writing.

This Agreement may be modified in writing only, upon mutual agreement of the Parties.

Dated this _____ day of _____, 2023.

CITY OF LYNDEN:

BERTHUSEN ROAD WATER
ASSOCIATION:

Scott Korthuis, Mayor

Attested:

City Clerk

Approved as to form:

Robert A. Carmichael, City Attorney

