

RESOLUTION NO. 08-552

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, KING COUNTY, WASHINGTON AUTHORIZING THE MAYOR TO EXECUTE AN AGREEMENT FOR PROPERTY ACCESS, OCCUPANCY AND USE WITH NESTLE WATERS NORTH AMERICA, INC.

WHEREAS, the City Council of Black Diamond has expressed an interest in exploring the sale of water to Nestle Waters North America, Inc.; and

WHEREAS, the Nestle Water North America, Inc. needs access to the City's spring site and other properties in order to determine if the City's water supply will meet their needs; and

WHEREAS, the City desires to formalize the terms and conditions of such access;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, DOES RESOLVE AS FOLLOWS:

Section 1. The Mayor is hereby authorized to execute an agreement for property access, occupancy and use with Nestle Waters North America, Inc. substantially in the form attached as Exhibit A.

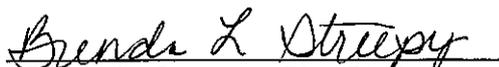
PASSED BY THE CITY COUNCIL OF THE CITY OF BLACK DIAMOND, WASHINGTON, AT A REGULAR MEETING THEREOF, THIS 6TH DAY OF NOVEMBER, 2008.

CITY OF BLACK DIAMOND:



Howard Botts, Mayor

Attest:


Brenda L. Streepy, City Clerk

RETURN ADDRESS:

City of Black Diamond
Department of Public Works
P.O. Box 599 – 24301 Roberts Drive
Black Diamond, Washington 98010

AGREEMENT FOR PROPERTY ACCESS, OCCUPANCY AND USE

1. Date and Parties. This agreement (“Agreement”) for reference purposes only, is dated the 6th day of ~~November~~ 2008 (“Agreement Date”), and is entered into by and between the City of Black Diamond, a Municipal Corporation (“Property Owner”), and Nestlé Waters North America, Inc., a Delaware Corporation (“NWNA”), each a “Party” and collectively the “Parties.”

2. Property. Property Owner is the owner of certain real property described by King County, Washington Tax Parcel Identification Numbers (PIN) 1921079058 and 1921079022 and shown on EXHIBIT “A” attached and has access to the parcels identified by PIN 1921079030 and 1921079032 for the maintenance of the North Shore Pump Station and pipeline bridge (collectively, the “Property”).

3. General Recitals and Agreement Purpose.

3.1 NWNA is in the business of bottling and distributing spring water to consumers under its specific brand names.

3.2 The Property Owner owns and operates a municipal water supply system, one of the sources of water for which is spring water from a spring located on the Property.

3.3 The Property Owner has not determined whether it will sell water from its spring water source to NWNA, and NWNA has not determined whether or not it will buy water from the Property Owner.

3.4 In order for the Parties to determine whether or not it would be in their collective best interests to pursue an Agreement for the Property Owner to provide NWNA with spring water from the Property Owner, additional data needs to be collected to determine whether or not the Property Owner’s spring water source will meet the criteria that NWNA requires.

3.5 The Agreement Purpose is to allow NWNA to conduct tests on the Property in a manner that will:

- (1) protect the Property Owner’s spring water source;
- (2) provide each Party with additional information so that each Party may make its own determination whether or not further negotiations are warranted; and
- (3) allow each Party additional time to assess the potential environmental and economic effects and benefits of proceeding to consider a detailed proposal.

4. Effective date and Agreement. The rights of access and use granted by Property Owner to NWNA under this Agreement, and the mutual obligations, benefits and responsibilities from and to each Party shall commence on the Agreement Date and will

Access and Use Agreement

Page 1 of 10

103008-1

continue for a period of 365 days unless the Agreement is terminated early or extended as authorized herein..

5. **Extensions.** This Agreement may only be extended with the written consent of Property Owner which consent can be withheld in the Property Owner's sole discretion.

6. **Limits on Property Owner's use.** During the term of this Agreement, Property Owner may use the Property for the continued operation, maintenance and repair of its water system, and for any purposes not inconsistent with the rights herein granted, provided that Property Owner agrees not to build, create or construct any obstruction, building, engineering works, or other structures on or over the Property, in a manner that would materially interfere with NWNA's rights hereunder, unless the Property Owner, in its reasonable discretion, determines that it is necessary in order to adequately protect or maintain its water system, and water source. Property Owner reserves all rights with respect to the Property including, without limitation, the right to grant easements, licenses and permits to others subject to the rights granted herein.

7. **Limits on NWNA's use.** The Property may be entered, occupied and used by NWNA, its agents, employees, contractors and subcontractors solely for the purpose of evaluating environmental conditions, collecting samples, field mapping, drilling and performing geophysical work to accomplish the tasks described in this Agreement. Some clearing of brush and other vegetation may be required in order to complete these tasks. However no significant trees greater than two inches in diameter shall be removed, or their root structure damaged, without the Property Owner's prior written consent. Non-significant trees of three inches or less can be removed without the Property Owner's consent. These are listed as non-significant trees in the Property Owner's tree preservation ordinance: Black locust (*Robinia pseudoacacia*); Cottonwood (*Populus freemontii*); Native alder (Native *Alnus* only); Native willow (Native *Salix* only); and Lombardy poplar (*Populus nigra*). All other trees are considered significant for purposes of this Agreement. Before clearing any land NWNA shall submit a clearing plan, as required by City code, and shall comply with the City code with regards to erosion control. NWNA shall also provide a landscape plan in order to comply with the City's tree preservation ordinance and landscape code regarding all cleared areas. NWNA shall replant the Property in accordance with the approved plan at the conclusion of the Work, and prior to the Agreement termination date.

In addition, NWNA, its agents, employees, contractors and subcontractors shall at all times exercise their rights and obligations under this Agreement in accordance with the requirements of all applicable statutes, laws, orders, rules, and other regulations of any public authority having jurisdiction and shall not interfere with the Property Owner's ability to operate and maintain its municipal water system.

8. **Description of planned use.** Work by NWNA shall be performed in phases. The purpose of the work is to accomplish the following tasks (the "Work"):

- Inspect the existing spring collector
- Collect water quality samples

- Review local geology and hydrologic features
- Review pipeline alignment, pump stations, and other Property Owner infrastructure
- Complete geophysical surveys
- Install exploratory/monitoring wells *on real property owned by the Property Owner*
- Install test wells and perform hydraulic and water quality testing *on real property owned by the Property Owner*
- Install and operate instrumentation to document water level and water quality trends relative to spring flow and precipitation trends
- Complete elevation surveys

Property Owner JB
 NWNA CK

9. Installation of Monitoring Wells. NWNA will design monitoring equipment in a manner to prevent obstructions and that comports to the Property Owner's goals of maximizing security and visual obscurity for the monitoring equipment. Prior to construction, NWNA will provide the Property Owner a copy of the geophysical survey prepared to site the monitoring wells and will meet with the Property owner to review monitoring well locations and designs. NWNA may not install any monitoring wells until the Property Owner approves the design and location which approval shall not be unreasonably withheld. The Property Owner's approval of the location and design of monitoring wells does not waive any obligation of NWNA under this Agreement. After installation of the monitoring equipment, NWNA will secure the equipment to prevent tampering. Once the Work is complete (meaning that all of the required evaluations and data collection activities are complete), ownership of the installed fixtures will be transferred to the Property Owner without charge. At such time, the Property Owner may replace the security devices on the monitoring wells. NWNA will retain ownership of all removable personal property used during the Work and will remove the same from the Property following the Work.

Property Owner JB
 NWNA CK

10. Notice of sampling and access to work accomplished. At least two business days prior to entering on the Property for any reason, NWNA will provide the Property Owner with a written list of all authorized personnel that will enter onto the Property and the Work tasks, if any, that they will be performing. NWNA will meet with Property Owner's representative prior to any entry on the Property. The Property Owner's representative may, in the Property Owner's discretion, observe any of the Work. NWNA will provide a weekly schedule describing the actual, specific schedule of Work to be performed on the Property in the coming week to the Property Owner's representative for review. Any deviation from or refinements to the weekly schedule will be provided by NWNA to the Property Owner as soon as practical and no later than 8:00 a.m. on the affected work day.

NWNA shall pay to the Property Owner when billed, the amount equal to its normal billing rate for the time the Property Owner's representative devotes to performing the tasks set forth in this paragraph, and in observing the Work. The Property Owner's invoice shall set forth the hours worked, the date the work was performed, and the name of the representative performing the work. When the Property Owner's representative enters the Property for the purpose of observing the Work, the Property Owner's representative shall check in and out with the NWNA contractor or subcontractor performing the Work, and shall not charge NWNA for time spent performing his or her customary duties.

NWNA shall provide the Property Owner with a copy of all data and non-proprietary analyses developed during the performance of the Work authorized by this Agreement within 90 days of the date on which NWNA completes quality assurance and quality control for the data and analyses.

11. Disruption of access to the Property. It is understood and agreed that it may be necessary for NWNA to prevent access by others to portions of the Property for brief periods of time. NWNA will use good faith efforts to minimize disruption of access during those times and shall coordinate its activities with the Property Owner to minimize such disruptions. NWNA may not prevent access to the Property by the Property Owner when access by the Property Owner is deemed necessary by the Property Owner to maintain and operate the Property Owner's municipal water system.

12. Reasonable care and duty to restore Property. All Work performed by NWNA pursuant to this Agreement will comply with all applicable industry standards and shall not damage, disturb, or destroy improvements and land contours existing on the Property. NWNA will document the condition of the Property prior to commencing the Work and provide a copy of the report documenting the condition of the Property to the Property Owner prior to the commencement of the Work. Prior to commencing the Work, the Property owner and NWNA will agree on the existing condition of the Property. In the event that the existing improvements and land contours are damaged, disturbed, or destroyed, including damage to existing roads in the course of the Work, NWNA shall restore the damaged, destroyed or disturbed improvements and land contours with equivalent quality materials and workmanship to their condition prior to the Work to the reasonable satisfaction of the Property Owner or, alternatively, to a condition mutually agreeable to Property Owner and NWNA.

13. Assumption of risk and indemnification. NWNA expressly assumes all risks for its employees, agents, contractors and subcontractors who enter upon the Property to perform the Work. NWNA also expressly agrees to release, indemnify and promise to defend and save harmless Property Owner from and against any and all liability, loss, damage, expense, actions and claims, including costs and reasonable attorneys' fees incurred by Property Owner in connection therewith (collectively "Damages"), arising out of the exercise by NWNA and its agents, employees, contractors and subcontractors of the rights and obligations contained in this Agreement, to the extent those Damages result from the negligent acts or omissions or willful misconduct of NWNA, its agents, employees, contractors and subcontractors and those Damages arising out of a breach of this Agreement by NWNA. Nothing in this agreement shall require NWNA to defend or protect Property Owner from Damages attributable to the sole negligence or willful misconduct of Property Owner.

14. Insurance. NWNA shall require each of its contractors and subcontractors to provide a certificate of insurance to the Property Owner for its inspection prior to that contractor or subcontractor entering the Property, and such insurance shall include:

- A. Automobile Liability insurance with limits no less than \$1,000,000 Combined Single Limit per occurrence for bodily injury and property damage; and

- B. Commercial General Liability insurance, written on an occurrence basis with limits no less than \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage. Coverage shall include, but not be limited to: blanket contractual; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.
- C. Pollution Liability insurance with limits no less than \$1,000,000 per occurrence.

The insurance policies obtained by NWNA's contractors and subcontractors shall name the Property Owner as an additional insured with regard to activities performed by or on behalf of NWNA on the Property. This insurance requirements described above shall not apply to NWNA itself or to any of its contractors or subcontractors that are not bringing vehicles or other equipment onto the Property.

15. Independent status. In conducting activities pursuant to this Agreement, NWNA its agents, employees, contractors and subcontractors, shall at all times not be acting as agents of the Property Owner and must not represent, imply or suggest by word or deed to be employees or agents of Property Owner.

16. Waiver of lien rights required. Prior to allowing the commencement of work by any person or other legal entity which would have a right to file a lien upon the Property if not paid for services, NWNA shall obtain from the service provider, and tender to Property Owner, a duly executed waiver of lien rights in the form attached hereto as Exhibit "B". There shall be no right of entry under this agreement for each of said entities until the signed waiver is received by Property Owner.

17. Termination. Either Party may terminate this Agreement by giving written notice to the other, specifying the date of termination, such notice to be given not less than 20 days prior to the date specified in such notice. On termination or expiration of this Agreement, NWNA shall quit the Property and shall remove all personal property from the Property. Ownership of fixtures installed on the Property will transfer to the Property Owner upon termination.

18. Remedies for Breach. If any violation of the Agreement occurs, then either Party may institute and prosecute any proceeding at law or in equity to abate, prevent or enjoin any such violation or to compel specific performance of the obligations hereunder. The previous sentence notwithstanding, and as an additional remedy as well as a reserved right, the Property Owner may immediately prohibit access to the Property, and stop all work on the Property, without court intervention, if it reasonably believes that NWNA or anyone acting on its behalf, has, or is about to take action that would jeopardize the spring water source or damage any trees, the removal of which are not authorized pursuant to Paragraph 7 above, or Property Owner improvements on the Property.

19. Governing Law and Venue. It is agreed that this Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Washington and venue for all litigation arising out of this Agreement shall be brought in the Superior Court of King County, Washington State.

20. Entire Agreement. This Agreement constitutes the entire agreement between the Parties and any prior understanding or representation of any kind preceding the date of this agreement shall not be binding on either Party except to the extent incorporated in this Agreement.

21. Modification of Agreement. Any modification of this Agreement or additional obligation assumed by either Party in connection with this Agreement shall be binding only if evidenced in writing signed by each Party or an authorized representative of each Party.

22. Notices. Any notice provided for or concerning this Agreement shall be in writing and shall be deemed sufficiently given when received by certified or registered mail if sent to the respective address of each Party, when personally served upon the Party's representative listed below, or in the case of the notice copies, when delivered to the business address for the listed attorney. The Property Owner's address for purposes of any notice provided for or concerning this Agreement is as follows:

Gwendolyn Voelpel
City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010

With a copy to:
Loren D. Combs
VSI Law Group PLLC
3600 Port of Tacoma Road
Tacoma, WA 98424

NWNA's address for purposes of any notice provided for or concerning this Agreement is as follows:

Christopher Kemp
Project Manager Pacific Northwest
Nestlé Waters North America, Inc.
777 West Putnam Avenue
Greenwich, CT 06830

With a copy to:

William H. Chapman
K&L Gates LLP
925 Fourth Avenue, Suite 2900

Seattle, WA 98104

23. Assignment of Rights. The rights of each Party under this Agreement are personal to that Party and may not be assigned or transferred to any other person, firm or corporation or other entity without the prior, express and written consent of the other Party which consent can be withheld in each Party's sole discretion.

24. Authority to Execute Agreement.

24.1 The Mayor for the City of Black Diamond was authorized to execute this agreement on behalf of the Property Owner by the adoption of Resolution 08-562.

24.2 NWNA represents that the undersigned has the authority to bind NWNA to the terms and conditions set forth herein.

IN WITNESS WHEREOF, the parties have executed this Agreement as follows:

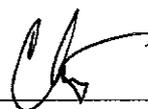
City of Black Diamond

By: 

Its: MAYOR

Date: 11-6-08

Nestlé Waters North America, Inc.

By: 

Its: Project Manager, Pacific Northwest

Date: November 6, 2008

REPRESENTATIVE ACKNOWLEDGMENT

STATE OF WASHINGTON)
) :ss.
County of King)

I certify that I know or have satisfactory evidence that Howard Botts
signed this instrument, on oath stated that (he/she/they) (was/were) authorized to execute the
instrument and acknowledged it as the Mayor
of the City of Black Diamond to be the free and voluntary act of such party for the uses and
purposes mentioned in the instrument.

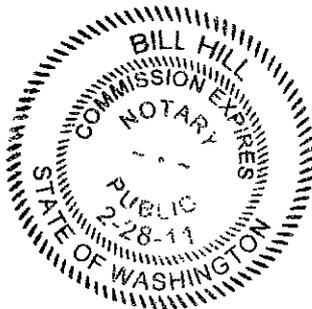


Dated: November 7, 2008
Signature of Rachel Pitzel
Notary Public: Rachel Pitzel
Notary (print name) Rachel J. Pitzel
Residing at Black Diamond, WA
My appointment expires: 8/13/2012

REPRESENTATIVE ACKNOWLEDGMENT

STATE OF WASHINGTON)
) :ss.
County of King)

I certify that I know or have satisfactory evidence that Chris Kemp
signed this instrument, on oath stated that (he/she/they) (was/were) authorized to execute the
instrument and acknowledged it as the Project Manager
of Nestlé Waters North America, Inc. to be the free and voluntary act of such party for the
uses and purposes mentioned in the instrument.



Dated: 11/6/08
Signature of Bill Hill
Notary Public: Bill Hill
Notary (print name) Bill Hill
Residing at Seattle, WA
My appointment expires: 2/28/11

EXHIBIT A

PROPERTY DESCRIPTION

Legal description 1921079058

POR OF S 1/2 OF SEC 19-21-7 DAF- BEG AT SE COR OF SD SEC TH NLY ALG E LN THOF 1309.71 FT TH S 89-58-37 W 1421.40 FT TO TPOB TH S 87-45-18 W 102 FT TH N 67-51-42 W 29 FT TH N 06-05-42 W 118 FT TH N 04-18-42 W 237 FT TH N 02-37-42 W 280 FT TH N 47-51-15 W 3.52 FT TH N 88-07-49 W 131.73 FT TH N 86-22-21 W 215.56 FT TH S 31-14-18 W 168 FT TH S 42-18-18 W 61.55 FT TH S 44-25-15 W 214.86 FT TH S 50-41-18 W 23.09 FT TAP ON TANGENT CRV TO RGT WITH RAD 230.69 FT TH SWLY ALG SD CRV & THRU C/A 27-49 AN ARC DIST OF 112 FT TH S 78-30-18 W 52 FT TH S 82-43-18 W 133.32 FT TH S 89-37-10 W 59.22 FT TH S 01-46-28 W 17.20 FT TH S 40-47-06 W 464.62 FT TH N 89-00-27 E 300 FT TH N 01-02-05 E 349.87 FT TH N 89-01-51 E 649.87 FT TH S 01-25-03 W 248.80 FT TH N 89-07-46 E 369.67 FT TH N 82-57-09 E 146.38 FT TO TPOB- PER DEED WITH REC #20041223001162

Legal description 1921079022

SW 1/4 OF SE 1/4 LY W OF CO RD # 1018 ALSO SE 1/4 OF SW 1/4 LESS N 100 FT OF NE 1/4 OF SE 1/4 OF SW 1/4 LESS POR SE 1/4 OF SW 1/4 LY NWLY OF GREEN RIVER LESS THAT POR LY WLY & SLY OF FOLG DESC LN BAAP ON S LN SD SE 1/4 OF SW 1/4 411.55 FT W OF SE COR TH N 29-32-01 W 219.69 FT TH N 44-21-27 W 308.09 FT TH N 60-55-52 W 263.22 FT TH N 55-26-16 E 190.90 FT TH N 46-10-59 E 257.79 FT TH N 59-27-57 E 216.83 FT TH N 35-41-47 E 279.50 FT TH N 57-45-35 E TO S LN OF N 100 FT OF SD SE 1/4 OF SW 1/4 TH WLY ALG SD S LN TO SELY SH LN OF GREEN RIVER TH SWLY ALG SD SH LN TO W LN SD SE 1/4 OF SW 1/4 & TERMINUS SD DESC LN TGW S 250 FT OF SW 1/4 OF NW 1/4 OF SE 1/4 LESS POR OF SD S 250 FT LY WITHIN LOT 6 OF 20-ACRE SEG WITH REC #19990817900015 AS APPROVED PER KC SUBD EXEMPTION #L98M0093 DATED 8-30-99 & LESS POR IF ANY LY WITHIN PCL DEEDED TO CITY OF BLACK DIAMOND PEC REC #20041223001162 & LESS C/M RGTS

EXHIBIT B

Page 1 of 2

WAIVER OF LIEN RIGHTS

The undersigned has been requested to assist Nestlé Waters North America, Inc. (“NWNA”) regarding work to be performed on real property identified by King County Assessor’s Tax Parcel numbers 1921079058 and 1921079022, the legal description to which is attached hereto as Exhibit A (the “Property”).

The undersigned acknowledges that NWNA has no authority to obligate the Property nor to authorize anyone to enter upon the Property except within the terms of that certain “Property Access, Occupancy and Use Agreement” dated _____, 2008, the terms of which are incorporated by reference herein.

The undersigned has been requested by NWNA to conduct _____ . The undersigned acknowledges that they would normally have the right to file a Mechanics’ and Materialmen’s Lien under RCW Chapter 60.04 for said work. However, the undersigned acknowledges that unless they waive their lien rights they are not authorized to enter upon the Property in order to conduct their studies and provide their professional services.

In consideration for NWNA contracting with the undersigned to perform the professional services contemplated hereunder, the undersigned on behalf of itself and anyone working at their request, does hereby waive its Mechanics’ and Materialmen’s Lien rights under Chapter 60.04 RCW. The undersigned will not assert lien rights against the Property and does hereby knowingly and intentionally waive its lien rights as a material and substantial consideration for being allowed to assist NWNA in conducting its study.

THIS DOCUMENT RESULTS IN THE WAIVER OF A MATERIAL AND SUBSTANTIAL RIGHT. BY SIGNING THIS DOCUMENT YOU ARE KNOWINGLY AND INTELLIGENTLY GIVING UP THE IMPORTANT RIGHT OF BEING ABLE TO FILE A LIEN AGAINST THE REAL PROPERTY. YOU SHOULD SEEK THE ADVICE OF AN ATTORNEY IF YOU HAVE ANY QUESTIONS AS TO WHETHER OR NOT SIGNING THIS DOCUMENT IS IN YOUR BEST INTERESTS.

EXHIBIT B

Page 2 of 2

WAIVER OF LIEN RIGHTS

If either party commences legal action to enforce any terms of this Agreement then the prevailing party shall be entitled to an award of reasonable attorneys fees incurred in the legal action.

Dated this ____ day of _____, 20____.

Company Name : _____

[PRINT COMPANY NAME]

By: _____

Its: _____

Address: _____

Telephone: _____

STATE OF WASHINGTON)

County of _____)

ss.

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath, stated that he/she was authorized to execute the instrument and acknowledged it as the _____ of _____ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: _____.

NOTARY PUBLIC

Print Name:

My appointment expires: _____