

A Practitioner's Guide to Instream Flow Transactions in California

Appendix A – Forbearance Agreement Examples

Agreement for the Forbearance of Water for Fisheries Enhancement in the ----- River System, --
----- County, California

Agreement for Seasonal Forbearance of Diversion of Water, and for Construction, and Use of a
Water Supply System*

** Original forbearance agreement template courtesy of Sanctuary Forest.*

**AGREEMENT FOR THE FORBEARANCE OF WATER
FOR FISHERIES ENHANCEMENT
IN THE ----- RIVER SYSTEM
----- COUNTY, CALIFORNIA**

THIS AGREEMENT is made and entered into as of this ___ day of _____, 2013, by and between the ----- (“XYZ”) and the _____(hereinafter “Participant”), for the forbearance of use of decreed water on _____ in the ----- River System.

RECITALS

WHEREAS, the XYZ was formed for charitable purposes to acquire and manage water within the ----- River System for instream purposes, including flows for the migration, spawning, and rearing needs of the Chinook and coho salmon and steelhead trout, and is a California Nonprofit Public Benefit Corporation exempt under section 501(c)(3) of the Internal Revenue Code;

WHEREAS, Participant is the owner of particular decreed water right(s), [described in the _____ Decree,] and described therein as Diversion Number(s) _____ (“Water Rights”), as described and set forth in **Exhibit A** [excerpt of schedules and maps];

WHEREAS, XYZ desires to compensate Participant for forbearance of diversion of water otherwise available to Participant for diversion under the Water Rights;

WHEREAS, in exchange for compensation from the XYZ, Participant agrees to forbear diversion of water under the Water Rights and to leave said water instream for the purpose of improving habitat for Chinook and coho salmon and steelhead in _____ Creek / _____River;

WHEREAS, the XYZ agrees to administer Participant’s forbearance of diversion and to coordinate the activities under this Agreement;

NOW, THEREFORE, in consideration of the terms and conditions herein, the parties agree as follows:

AGREEMENT

1. Definitions. When used herein, unless otherwise expressly noted, the term:
 - a. “Forbearance” and “forbear” shall describe Participant’s deliberate act to not divert water otherwise available for diversion under Diversion Number _____ [of the -----Decree,] to allow said water to flow past the authorized point of diversion and remain instream.
 - b. “XYZ” shall include the XYZ and its employees, representatives and agents.

Appendix A - Forbearance Agreement Examples

- c. "Participant" shall mean the person named above who has a [decreed] water right [in the ---- Decree].
 - d. "Parties" shall mean Participant and XYZ.
 - e. ["Watermaster" shall mean the representative of the ---- Watermaster District designated to oversee the decree.]
2. Term. The term of this Agreement shall commence on the date first noted above, and shall end on _____20--, unless terminated as provided herein or amended pursuant to this Agreement. This Agreement may be renewed by the parties by a written agreement.
3. Agreement Contingent. This agreement is contingent on the availability of funding from the funding sources, and is further contingent upon no legal challenges to the Notice of Exemption ("NOE") from the California Environmental Quality Act ("CEQA") filed by the XYZ on _____20--, if needed. Should either of these contingencies occur, this Agreement shall become null and void.
4. Termination of Agreement. This Agreement may be terminated by the XYZ prior to completion the Agreement, upon the occurrence of any of the following:
- a. Failure of Participant to abide by the terms and conditions of this Agreement;
 - b. Refusal of Participant to allow the XYZ [or Watermaster] reasonable access to lands for inspection of Participant's diversion to monitor compliance with this Agreement;
 - c. Diversion and use, by Participant, of the Water Rights subject to this Agreement during the term of this Agreement.
- Prior to terminating this Agreement, the XYZ will provide Participant with written notice and the opportunity to cure violation within 5 days. Termination shall become effective within 5 days of the Notice, unless the violations have been cured to the satisfaction of XYZ.
5. Participant Forbearance. The Participant shall forbear or ensure the forbearance of Water Rights, as follows:
- a. Flow: ____cfs
 - b. Point of Diversion: [complete description of point of diversion]
 - c. Instream Benefit: _____
 - d. Date to begin: _____ Date to end: _____
6. Participant Warranties. Participant represents and warrants that it has the legal authority to enter into this Agreement, and that Participant has taken no action to encumber or otherwise adversely affect the Water Rights subject to this Agreement. Participant further warrants that it has reasonably and beneficially used water under the Water Rights during the period of forbearance during one or more of the previous five calendar years.

Appendix A - Forbearance Agreement Examples

7. No Effect on Participant Water Rights. This Agreement does not result in any waiver, relinquishment, modification, or change in Participant's water rights.
8. Compensation:
 - a. XYZ will pay Participant \$_____per acre-foot of water forborne per day, based on actual flows as measured at least weekly, estimated to be acre-feet per day or _____ ac-ft per week (1 cfs per day = 2 acre-feet per day). Water can be leased on a per week basis, as needed and mutually agreed upon, at an estimated cost of \$_____ per week. The total amount shall not exceed \$_____.
 - b. Payment shall be made in 2 amounts: 1) 25% of total cost, based on estimated total acre-feet for the period; 2) balance based upon actual total acre-feet up through Sept. 30th. The first payment shall be made within 30 days of receipt of initial invoice; the final payment shall be made after the completion of the forbearance, within about 45 days of receipt of invoice.
9. XYZ Oversight and Access. The XYZ shall have primary responsibility for facilitating implementation and completion of this Agreement. Participant shall provide XYZ reasonable access to diversion points and lands for the limited purpose of ensuring compliance with this Agreement, including such access reasonably necessary for water monitoring and measurement activities. Permission for access to Participant's property shall be requested of the Participant 24 hours in advance of the requested access by the XYZ. Monitoring data results shall be made available to the Participant, upon request.
10. Notices. All notices, approvals, acceptances, demands, or requests authorized or required under this Agreement, to be effective shall be in writing and shall be delivered by personal delivery or by U.S. mail (first class postage prepaid), or by commercial overnight delivery to the party to whom the notice is directed at the address of such party as follows:

To: Name:
Address:
Phone: Fax:
Email:

XYZ

To: Name:
Address: (mailing)
(physical)
Phone:
Email:

11. Successors and Assigns. The provisions of this Agreement shall apply to and bind the successors and assigns of the parties hereto. Participant shall not make any assignment or

Appendix A - Forbearance Agreement Examples

transfer of this Agreement or any right or interest therein until approved in writing by XYZ, which approval will not be unreasonably withheld.

12. Amendment. This Agreement shall not be modified except in writing executed by XYZ and Participant.
13. Entire Agreement. This Agreement sets forth the entire agreement of the parties as to the transaction described herein and supersedes all prior agreements, representations or understandings, written or oral.

IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

Participant
Social Security Number:_____

XYZ – Representative

Title

Exhibit A

- **Table [from Decree]**
- **Map [from Decree]**
- **Copy of Water Right**

**RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:**

[Organization]

[Address]

**AGREEMENT FOR SEASONAL FORBEARANCE OF DIVERSION OF WATER, AND
FOR CONSTRUCTION, AND USE OF A WATER SUPPLY SYSTEM**

This Agreement is made and entered into as of this ___ day of [month, year] by and between [Organization], _____ (hereinafter “Landowner”), for a Project consisting of: (1) the seasonal forbearance of diversion of water from _____Creek in [County], and (2) the construction and use of a Water Supply System consisting of [e.g., an agricultural storage pond].

RECITALS

- A. WHEREAS, the purpose of the Project (“Project Purpose”) is to (1) conserve water for beneficial uses, and (2) enhance instream flow in _____ Creek in order to improve habitat for native coho salmon and steelhead trout, while (3) providing a reliable water supply for the Irrigated Area of the Property;
- B. WHEREAS, [Organization] is a tax-exempt non-profit organization qualified under Section 501(c)(3) of the Internal Revenue Code of 1986 that seeks to protect instream flow within the _____ Creek watershed to benefit the migration, spawning and rearing needs of native coho salmon and steelhead trout;
- C. WHEREAS, Landowner is the owner of certain property in [County] which is more particularly described in **Exhibit B** (“Property”);
- D. WHEREAS, [Organization] and their partners have performed analysis of the hydrology and fisheries in the _____ Creek watershed, and have identified target flow objectives to protect and enhance fisheries habitat in the watershed;
- E. WHEREAS, [organization] and their partners have obtained state, federal, and other grant funding to design, construct and install water storage systems on private properties in the _____ Creek watershed, to provide public benefits including fishery enhancement and water conservation;

- F. WHEREAS, this Agreement arises out of a cooperative relationship among [organization] and Landowner to carry out a water forbearance and management program, and it is the parties' mutual intent to voluntarily improve the environment and stream flows of _____ Creek, and to conserve water for all beneficial uses.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and subject to the terms and conditions herein stated, the parties hereby agree as follows:

1. **Recitals and Exhibits Incorporated.** The foregoing recitals and referenced Exhibits are hereby incorporated by reference and are made part of this Agreement as if fully set forth herein.
2. **Term.** This Agreement shall become effective upon execution and shall remain in effect for the useful life of the pond, or for twenty (20) years, whichever is longer, from the date that the pond becomes operational (including the acquisition of all permits and approvals necessary for operation) (the "Start Date"). The Start Date shall be memorialized and acknowledged in writing by all parties within 10 days.
3. **Agreement to be Recorded.** [Organization] shall record this Agreement in the official records of Sonoma County, California, within thirty (30) days of the written acknowledgement of the Start Date. [Organization] may re-record this Agreement at any time as may be required to preserve its rights herein. For its Term, the obligations of this Agreement are agreed to be covenants running with the land within the meaning of California Civil Code §1468.
4. **Successors and Assigns.** This Agreement shall run with the Property and apply to and bind the successors and assigns of the parties hereto, as well as any tenants, lessees, or other third parties that use or are authorized to use the Water Supply System or the riparian water rights associated with the Property. Landowner shall provide [Organization] with reasonable notice prior to any assignment or transfer of this Agreement or any right or interest therein.
5. **Construction of Water Supply System.** [Organization] shall construct a Water Supply System in accordance with the final plans, specifications, and estimate (PSEs) attached to this Agreement as **Exhibit A**. Landowner shall use the Water Supply System to meet Landowner's water requirements during the Restricted Period, consistent with the requirements of this Agreement and any permits necessary to operate the Water Supply System.
 - (a) [Organization] will contract with licensed and qualified contractors to undertake the construction and installation of the Water Supply System and shall administer any such contract. Landowner shall have the right to approve the final selection of all contractors, such approval which shall not be unreasonably withheld. The parties anticipate that Landowner shall contribute additional labor, equipment, and or materials for project construction as agreed by the parties and reflected in the project budget, and that any such contributions will be counted as matching funds for grant purposes.

Appendix A - Forbearance Agreement Examples

[Organization]’s receipt of funds to construct and install the Water Supply System is a condition precedent to its obligation to install a Water Supply System on the Property.

- (b) [Organization] and partners will assist Landowner in obtaining any and all necessary permits and approvals, and Landowner shall obtain and be responsible for maintaining compliance with all terms and conditions of all such approvals and permits.
- (c) [Organization], as well as its subcontractors and other licensees who will enter the Property for purposes of installing, or otherwise working on the Water Supply System shall, during the duration of this Agreement, carry workman’s compensation insurance for all employees, comprehensive general liability insurance, and automobile policies covering vehicles and equipment.
- (d) Upon completion of construction and written acknowledgement of the Start Date by Landowner, the Water Supply System shall by operation of this Agreement become the property of Landowner. Landowner shall maintain, repair, and operate the Water Supply System as provided herein, and shall be responsible for any and all maintenance and repair expenses. Landowner is responsible for all costs and liabilities of any kind related to the ownership, operation, upkeep, taxes and maintenance of the Property.

6. Landowner’s Forbearance. Landowner shall forbear and refrain from all diversion of surface water and groundwater, as described in this Section (“Forbearance”):

- (a) Each year between the dates of [month] and [month], inclusive (the “Restricted Period”), Landowner shall cease all diversion, pumping or other withdrawals of water from _____ Creek and its tributaries (including but not limited to surface streams, subterranean streams, springs and other sources of flow contribution to _____ Creek) on or to the Property. During the Restricted Period Landowner will cease diversions under any and all bases of water right, and for any and all purposes including, without limitation, domestic and agricultural use.
- (b) Notwithstanding the requirements of subsection 4(a) above, Landowner may, following notice to, and consent from, [Organization] as provided below, declare Emergency Conditions during the Restricted Period. Emergency Conditions include significant loss of or inability to use stored water from the Water Supply System due to mechanical failure, vandalism, need to withdraw water for firefighting purposes, or any other unforeseen event that threatens human health or safety.
- (c) Prior to declaring Emergency Conditions, Landowner shall notify [Organization] by phone and electronic mail to obtain its consent, which shall not be unreasonably withheld. In the event Landowner is unable to contact [Organization] within 36 hours of first attempting to do so, after making all reasonable efforts to do so Landowner may unilaterally declare Emergency Conditions.
- (d) Landowner’s diversions during Emergency Conditions shall be for the minimum time and amount necessary to meet Landowner’s requirements on the Property. Landowner

Appendix A - Forbearance Agreement Examples

shall quickly remedy any situation causing an Emergency Condition under his or her control.

7. **Reporting.** Landowner shall comply with all requirements of the State Water Resources Control Board (“SWRCB”) regarding the measuring and reporting of water diverted and used via the Water Supply System, and shall copy [Organization] on all Statements of Water Diversion and Use sent to SWRCB. [Organization] staff will, upon request, assist the landowner with completing any mandatory or voluntary filings with SWRCB.
8. **Access to Property.** Landowner shall provide [Organization] and its agents and designees, reasonable access to the Water Supply System and to the diversion points on or to the Property, at reasonable intervals, for the purpose of ensuring compliance with and effectiveness of this Agreement. [Organization] shall provide Landowner reasonable notice of not less than 48 hours prior entering onto the Property, and Landowner shall have the opportunity to participate in any inspection. Notice of access may be given by mail, in person, or by telephone. In any emergency, or if [Organization] is unable to contact Landowner after reasonable effort, they may access the Property for the limited purpose of ensuring protection and safety of person, property or biological resources.
9. **No Waiver of Water Rights.** This Agreement shall not be interpreted to and does not waive, relinquish, modify, abandon, forfeit, sever or change any riparian or other water rights now held by or that may in the future be acquired by Landowner.
10. **Amendment.** No amendment or modification to this Agreement shall be effective unless in writing and signed by all parties. All amendments shall be recorded as provided in Paragraph 3.

11. Termination.

- (a) Any party may terminate this Agreement at any time upon the occurrence of one or more of the following conditions:
 - i. [Organization] is unable to complete construction of the Water Supply System due to lack of sufficient funds or any other reason.
 - ii. Landowner is unable, despite making all reasonable efforts and full good-faith cooperation with [Organization], to obtain permit conditions and other approvals allowing operations consistent with the Project Purpose. The right to terminate the Agreement under this paragraph (ii) shall expire upon the Start Date.
 - iii. Another party is in material breach or default of this Agreement and fails to cure the breach or default, as provided in Paragraph 12, below.

12. Legal Remedies.

- a. If any party defaults in the performance of any of the terms and conditions of this Agreement, or materially breaches any of its provisions or warranties, and fails to

Appendix A - Forbearance Agreement Examples

cure the default or breach within 21 business days after being served with written notice of such default or breach, any party may bring an action at law or in equity.

- b. In addition to the right to terminate this Agreement in the event of default or breach, the parties shall have any other rights available in law or equity to remedy or recover for any injury or damages it suffers as a result of such breach or default, including specific performance or other injunctive relief.
- c. Notwithstanding its rights pursuant to Section 11, it is the intention of the parties to strive to amicably resolve any dispute that might arise concerning this Agreement. The parties agree that prior to taking any other action they will communicate any concerns relating to the performance of this Agreement to the other parties, and shall provide a reasonable opportunity, including through mediation, for the parties to fully present and address their views and concerns with regard to the dispute.

12. Entire Agreement. This document and any exhibits attached constitute the entire agreement of the parties, and any and all prior agreements, understandings, and representations are hereby canceled in their entirety and are of no further force and effect.

13. Authority to Enter Agreement. Landowner and [Organization] represent and warrant that each has the legal authority to enter into this Agreement.

14. Notifications. Except as provided in Paragraph 6, all notification under this Agreement shall be made in writing and mailed by first class mail, return receipt requested, to the addresses shown below. In addition to this requirement, the parties are encouraged to send additional informal notice via email or telephone.

[Organization]
[Name]
[Street]
[City, State, Zip Code]
[Phone]
[Email]

[Landowner]

[Street]
[City, State, Zip Code]
[Phone]
[e-mail]

IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

[Organization]:

By: _____

[Name, Title]

Landowner:

By: _____

Appendix A - Forbearance Agreement Examples

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature (Seal)