

Trust Water Right Agreement (Jason and Danica Bourne)

This Trust Water Right Agreement ("Agreement") is made and entered into as of the 23rd day of July, 2015, by and between the Washington State Department of Ecology, State Trust Water Right Program ("Ecology") and the Jason and Danica Bourne (the "Bournes").

Whereas, Ecology is the trustee of the Yakima River Basin Trust Water Rights Program ("Trust") as authorized under Chapter 90.38 RCW; and

Whereas, the Bournes are the sole owner of certain water rights on the North Fork Teanaway River more particularly described in Exhibit A (the "Water") and presently appurtenant to the land that is legally described in Exhibit B (the "Land"); and

Whereas, the Bournes have filed an *Application for Change/Transfer of Water Right* with the Kittitas County Water Conservancy Board (the "Board"), Conservancy Control No. KITT-14-05, WRTS File No. CS4-01863sb3@27 (the "Application"), to change the purpose of use to instream flow and mitigation to offset and allow for the permitting of new water rights to be used for any lawful purpose within the Yakima River basin; and

Whereas, the Board has accepted the Application, has completed its examination of the extent and validity of the Water and has issued a Record of Decision approving the Report of Examination (the "ROE"); and

Whereas, Ecology has reviewed the Board's ROE and accepted the Board's findings as to the extent and validity of the Water and is prepared to issue its trust water certificate (the "Certificate"). Exhibit C describes the Water based on Ecology's approval, including quantification of the consumptive quantity associated with the right; and

Whereas, subject to the terms of this Agreement and the Application, Ecology is willing, able and authorized to hold the Water in the Trust as provided for herein; and

Now, therefore, in consideration of the forgoing, the mutual covenants and undertakings set forth herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

1. Purpose. The purpose of this Agreement and the primary reason the Bournes are willing to place the Water into Trust is to provide a senior water right as off-setting mitigation that will allow the Bournes, or third parties acceptable to the Bournes, to apply for and receive new groundwater withdrawal or surface water diversionary permits within the Yakima River basin, particularly the upper Teanaway River basin. These new water rights will be mitigated by way of a permanent designation of such portion of the Bournes beneficial interest in the Water Right in Trust as reasonably required to ensure

no impairment to Total Water Supply Available ("TWSA") or other water rights; provided that any portion of such mitigation may also be provided by other means.

2. Closing. This Agreement shall be effective upon its mutual execution, and the Trust shall commence once the quit claim deed is executed, recorded, and delivered to Ecology. The term of this Agreement shall then be for so long as any portion of the Trust Water Right remains in Trust (the "Term"). The Bourne's executed quit claim deed shall be in a recordable form of the Water Right to the Trust substantially in the form of Exhibit D attached hereto and incorporated herein (the "Deed").

3. Management of Retained Water. When the Teanaway River below Forks (USGS 12480000) is below 11 cfs, the Bournes agree the remaining portion (11.48 consumptive acre-feet) will not be diverted. In exchange, Ecology agrees to allow all assigned third party mitigation between Red Bridge Road and the authorized point of diversion on the North Fork Teanaway River to continue out-of-priority use (i.e., at a time when the Water could be "called" by senior water right, including those held by Ecology) in accordance with their permit or determination of water budget neutrality by offsetting the total combined consumptive use with an equivalent quantity of Ecology's portion of Court Claim No. 01467 (No. CS4-01467@11sb3a(A)) acquired by purchase. The total consumptive use of all mitigated permits or water budget neutrality determinations above Red Bridge Road may not exceed five (5) consumptive acre-feet.

4. Third Party Sales. The process for the Bournes' sale of any uncommitted Water in Trust to third parties, and the corresponding issuance of mitigated permits or water budget neutrality determinations by Ecology, shall be as follows:

4.1 The Bournes will propose or enter into a contract with a third party to provide a portion of the Water in Trust as mitigation on such terms consistent with this Agreement as the Bourne's may elect, the Bournes or such third party shall make applications to Ecology (or, if appropriate, to a water conservancy board) for a water budget neutrality determination or to appropriate surface or ground water at the desired location and for the intended use and quantities, together with all regularly required supporting information (each, hereinafter a "New Application"). As part of the New Application, Ecology will assist in designating the specific quantity of the Water in Trust as required to offset the consumptive loss associated with the uses described on the New Application.

4.2 Ecology will process the New Application in accordance with applicable law, utilizing such portion of the Water in Trust as reasonably needed under the quantity allocation set out in Exhibit C which, together with any other proposed mitigation measures, shall reasonably offset the impacts of such new withdrawal. As detailed in Exhibit C, up to five (5) consumptive acre-feet may be made available for mitigation of new water rights above Ecology's newly established gage at Red Bridge Road. Any amount held in Trust not used for mitigation above the Red Bridge Road gage may be made available for mitigation below Red Bridge Road.

4.3 If necessary or appropriate, Ecology will complete a Water Transfer Working Group ("WTWG") project description and will present it to the WTWG. Ecology, in consultation with the U.S. Bureau of Reclamation, will determine if some or all of the Water that the Bournes or the third party applicant designates would be assigned to the Reclamation-Ecology storage and delivery exchange contract.

4.4 Ecology will investigate the New Application and recommend issuance or denial of a permit or a determination of water budget neutrality based on applicable policy, rules, and law. Ecology's review of New Application shall also include the following considerations:

4.4.1 In order to develop and confirm performance standards as set forth in any respective report of examination or determination of water budget neutrality, Ecology and such third party shall provide information to reasonably show or estimate, as the case maybe, that the consumptive uses of the proposed project, when offset by the mitigation water allocated from the Trust and any other proposed mitigation measures, do not increase the consumptive use of water.

4.4.2 With regard to domestic uses and so long as withdrawals are metered to users; and the subject project is, or will be made, subject to covenants, conditions and restrictions which impose water use restrictions for both inside and outside purposes which will be recoded against the project; and reasonable water use enforcement provisions are provided; and return flows are provided for through an approved septic or other waste treatment facility reasonably designed to infiltrate treated water in the general area from which it is being withdrawn, the allocation of Trust water for mitigation shall be at a rate of not more than 0.392 acre-feet (350 gallons per day on an average year round basis) per equivalent residential unit ("ERU"), or such greater amount as required by the Kittitas County Department of Health for serving a residential dwelling.

4.4.3 Ecology's permit or determination of water budget neutrality relative to a New Application will specify the conditions and limitations on the use of water in a manner consistent with the Water held in the Yakima Pilot Water Bank as mitigation. Conditions relating to measuring and reporting water use and for reimbursement of any Ecology costs to administer the Reclamation-Ecology Exchange Contract will also be included in the permit.

4.4.4 If issued, Ecology's permit or determination of water budget neutrality relative to a New Application will specify the conditions and limitations on the use of water in a manner consistent with the Water held in the Yakima Pilot Water Bank as mitigation.

4.4.5 If all or a portion of the Water is deemed adequate to fully mitigate a New Application, then the third party, upon receipt of final approval from Kittitas County of its land use applications for development of the real property that is the intended place and purpose of use of the New Application, and

exhaustion of all applicable appeal periods thereof, the third party applicant (beneficiary of the Water) shall execute such documentation as necessary to irrevocably and perpetually commit the Water to Trust for purposes of offsetting the New Application.

4.5 If Ecology intends to issue an ROE for a New Application, it will publish the draft ROE on its internet site. If Ecology intends to issue a determination of water budget neutrality, it shall notify the Bournes. If the form and substance of the draft ROE or water budget neutrality determination is acceptable to the Bournes or the third party, the Bournes or the third party applicant promptly shall cause an escrow to be opened for such transaction with an escrow agent mutually agreeable to both parties (the "Escrow Agent"). All escrow costs shall be borne by the Bournes, or as otherwise set forth in the written escrow instructions or sale agreement between the Bournes and the third party. The Bournes and any third party having the right to do so under an agreement with the Bournes, may, at any time prior to closing of escrow and without cause or penalty, withdraw the New Application or otherwise prevent any allocation of any portion of the Water to such transaction.

4.6 Ecology has determined that a proposed sale or transfer to third parties of a portion of the Water in Trust as mitigation for a water budget neutrality determination authorizing year-around residential groundwater use will likely result in a nominal reduction in flow after the end of the irrigation season. This reduction in flow is often concurrent with the lowest natural base flows of the year. Consequently, these nominal flow reductions may negatively affect Teanaway River aquatic resources, including fish production. Ecology and the Bournes agree that investing in one or more upstream or headwaters riparian corridor projects would be desirable to address this nominal impact. The Bournes shall deposit Five Hundred Dollars (\$500.00) per residential connection to an escrow or other account managed by a third party ("Reserve Fund") for each transaction where Ecology determines that mitigation water withdrawals would have a nominal negative impact.

4.7 Within 10 days of written request from Ecology to the Bournes or the agent managing the Reserve Fund, all amounts in the Reserve Fund shall be disbursed to the Kittitas Conservation Trust, or other such recipient as Ecology designates in writing, for the exclusive purpose of funding flood plain function and riparian condition improvements in the Teanaway River Basin.

5. Management of Trust Water. During the Term and in its capacity as a fiduciary, Ecology shall hold and manage the Water in trust pursuant to chapter 90.38 RCW and this Agreement as a part of the Total Water Supply Available (TWSA) in the Yakima River. Ecology:

5.1 Shall take no position and make no assertions that the quantities and beneficial use of the Water is other than as stated in the Reports of Examination KITT-14-05 (No. CS4-01863sb3@27) and designated in Exhibit C and this representation shall also apply to any Water removed from the Trust;

5.2 Shall, in addition to the protections against relinquishment in RCW 90.14.140(2)(h), at all times during the Term manage, maintain, preserve and protect for the benefit of the Bournes and its successors, designees and assigns all aspects and attributes of the Water, including, but not limited to, the priority date, the total diversionary right, instantaneous quantity, and annual consumptive quantity from impairment, challenges, claims and relinquishment;

5.3 Shall, as expeditiously as reasonable, process the Groundwater Application and any New Application where all or a portion of the Water is proposed as mitigation and shall take all steps necessary to comply with any restrictions imposed by other agreements to which Ecology may be subject, including, but not limited to memorandums of agreement and groundwater moratoriums or subsequently enacted water right processing rules; and

5.4 Shall not assess or charge the Bournes any costs or fees for maintaining the Water in the Trust. The foregoing shall not be construed to prohibit Ecology from charging: its regular, published costs and fees for water right applications, transfers and investigations; costs attributable to assignment of a portion of the water to storage and exchange contract between Ecology and United States Bureau of Reclamation; and fees associated with assignment of Water in the Trust to offset impacts associated with the Groundwater Application or any New Application.

6. Representation and Warranties. In keeping with the purpose of this Agreement and as a material part of the consideration for this Agreement upon which its execution is dependent:

6.1 The Bournes make the following undertakings, representations and warranties to Ecology:

6.1.1 Jason and Danica Bourne are fully able to enter into and perform all its obligations in this Agreement according to its terms.

6.1.2 Jason or Danica Bourne are duly authorized to execute and deliver this Agreement.

6.1.3 Upon its full execution, this Agreement is binding upon the Bournes in accordance with its terms.

6.1.4 The Bournes shall use its best efforts to fully and timely perform its obligations and actions contemplated by this Agreement.

6.2 Ecology makes the following undertakings, representations and warranties to the Bournes:

6.2.1 Ecology is an agency of the State of Washington duly formed and authorized and fully able to enter into and perform all its obligations in this Agreement according to its terms.

6.2.2 Each individual executing this Agreement on behalf of Ecology is duly authorized to execute and deliver this Agreement.

6.2.3 Upon its full execution, this Agreement is binding upon Ecology in accordance with its terms.

6.2.4 Ecology shall use its best efforts to fully and timely perform its obligations and actions contemplated by this Agreement.

7. Termination; Default. The Bournes shall have the right at any time to withdraw the Application, terminate this Agreement and remove from the Trust any portion of the Water that has not been permanently allocated as mitigation of other water uses as set forth in this Agreement. In such event, Ecology shall promptly execute a Statutory Warranty Deed transferring the Water from the Trust to the Bournes. If either party defaults in its obligations under this Agreement; or if this Agreement, or a material portion thereof, be declared illegal or unenforceable; or, either party, through no fault or action by such party, should be incapable or prevented from performing any material obligations or actions, the non-defaulting party in the event of a default or either party in any other event shall have the right to the following:

7.1 Declare the Agreement null and void, whereupon the parties shall cooperate to alter or end the trust water right relationship in an orderly manner as follows:

7.1.1 The Bournes shall identify all in-process designation agreements and inform Ecology of their status. The Bournes shall not make representations regarding in-process designations and shall in each instance work with Ecology to determine whether an assignment should be completed. If Ecology agrees, the permit process will be completed promptly in accordance with applicable policies, rules, and law.

7.1.2 Ecology shall promptly convey to the Bournes or its designee the portion of the Water not yet designated and assigned as mitigation for individual ground water and surface water permits.

7.2 Each party shall be responsible for their own costs associated with ending the trust water right relationship in an orderly manner.

7.3 In no event shall the termination of this Agreement alter or affect any Water previously allocated for mitigation or permits granted relative to New Applications or the Groundwater Application.

8. Assignment. This Agreement may be assigned by the Bournes upon the giving of written notice to Ecology. This Agreement is binding upon and inures to the benefit of the parties to the Agreement as well as upon and to the benefit of their respective heirs, personal representatives, assigns and other successors in interest.

9. Notices. Any notice or communication required by this Agreement between the Bournes and Ecology shall be given to the addresses set forth below:

To Ecology:
Water Resources Section Manager
Washington Department of Ecology
Central Regional Office
1250 West Alder Street
Union Gap, Washington 98903-0009

To the Bournes:
Jason and Danica Bourne
3715 Shore Ave.
Everett, Washington 98203

10. Severability. No provision of this Agreement is severable from any and all other provisions of this Agreement. Should any provision of this Agreement be unenforceable for any reason outside the control of the parties and subject to the provisions of Paragraph 8.1, the party finding itself unable to enforce the provision may, at its sole discretion, declare this entire Agreement to be null and void.

11. Waiver. If either party fails to exercise its rights under this Agreement, it will not be precluded from subsequent exercise of its rights under this Agreement. A failure to exercise rights will not constitute a waiver of any other rights under this Agreement, unless stated in a letter signed by an authorized representative of the party and attached to the original Agreement.

12. Amendments. Amendments to this Agreement must be in writing and signed by an authorized representative of each of the parties.

13. Reciprocal Indemnification. Each party shall protect, defend, indemnify, and hold the other harmless from and against their respective acts and omissions and for all third party claims arising out of or related to this Agreement.

14. Applicable Law. This Agreement will be governed and enforced under the laws of the State of Washington. Venue for any action arising under or related to this Agreement shall be in Kittitas County, Washington.

This Agreement is executed as of the date first above written.

WASHINGTON STATE DEPARTMENT OF ECOLOGY

By: Sage Park 7/30/15
Sage Park, Section Manager
Water Resources Program, CRO

JASON AND DANICA BOURNE

By: [Signature]
Jason Bourne

By: [Signature]
Danica Bourne

EXHIBITS

- Exhibit A: The Water**
- Exhibit B: The Land**
- Exhibit C: Consumptive Quantities**
- Exhibit D: Form of Deed**

Exhibit A: The Water

Note: Water right quantities reflect changes in purpose, and place of use in Kittitas County Water Conservancy Board's Record of Decision, Conservancy Control No. KIIT-14-05, WRTS File No. CS4-01863sb3@27, dated and signed on January 20, 2015, and the Amended Modification by Ecology, dated and signed on June 12, 2015.

Court Claim No.: 01863

Source: North Fork Teanaway River

Purpose of Use: Instream Flow and Mitigation

Period of Use: May 1 through September 15

Quantity: 0.1960 cubic foot per second; 39.20 acre-feet per year

Priority Date: June 30, 1886

Point of Diversion: 525 feet north and 250 feet west from the east quarter corner of Section 6, being within SE¼NE¼ Section 6, T. 20 N., R. 16 E.W.M.

Place of Use: Instream flow in the Teanaway, Yakima, and Columbia Rivers.

Exhibit B: The Land

That portion of Parcel 3 of that certain Survey as recorded May 31, 1991, in Book 17 of Surveys, pages 190 and 191, under Auditor's File No. 539752, records of Kittitas County, Washington; being a portion of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 5, Township 20 North, Range 16 East, W.M., in the County of Kittitas, State of Washington. Kittitas County Tax Parcel Number 512936.

Exhibit C: Consumptive Quantities

Associated with Court Claim No. 01863 as stated as Mitigation purpose of use in Kittitas County Water Conservancy Board's Report of Examination, Conservancy Control No. KITT-14-05, and Ecology's Amended Modification Order No. CS4-01863sb3@27.

Purpose	Unit	May	Jun	Jul	Aug	Sep	Oct	Total
Mitigation above Red Bridge Road (average)	acre-ft.	0.66	1.09	1.42	1.09	0.61	0.13	5.0
	cfs	0.011	0.018	0.023	0.018	0.01	0.002	-
Mitigation below Red Bridge Road (average)	acre-ft.	0.66	1.09	1.42	1.09	0.61	0.13	5.0
	cfs	0.011	0.018	0.023	0.018	0.01	0.002	-
Total	acre-ft.	1.32	2.18	2.84	2.18	1.22	0.26	10.0
	cfs	0.022	0.036	0.046	0.036	0.02	0.004	-

Quit Claim Deed

After recording return to:

Trust Water Coordinator Dept. of Ecology, Water Resources 15 W. Yakima Ave, Suite 200 Yakima, WA 98902

DOCUMENT TITLE: Quit Claim Deed – Water Right

GRANTOR: Jason and Danica Bourne

GRANTEE: Washington State Department of Ecology, State Trust
Water Rights Program

LEGAL DESCRIPTION: Instream Flow in the Teanaway, Yakima, and Columbia
Rivers

QUIT CLAIM DEED – WATER RIGHT

THE GRANTORS, Jason and Danica Bourne for valuable consideration, convey and quit claim to the WASHINGTON STATE DEPARTMENT OF ECOLOGY, STATE TRUST WATER RIGHTS PROGRAM. ("Grantee") all of Grantor's right, title and interest in and to a *portion* of the water right under *Acquavella* Adjudication Court Claim No. 01863, described as follows:

0.046 cubic feet per second, 18.20 acre-feet per year (10.00 acre-feet per year consumptive), instream in a reach beginning at a point 525 feet north and 250 feet west from the east quarter corner of Section 6, being within SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 6, T. 20 N., R. 16 E.W.M., continuing downstream in the Teanaway River to the confluence with the Yakima River, downstream to the confluence of the Columbia River, and downstream to the Pacific Ocean. This instream flow right was established in Change Application No. CS4-01863sb3@27 and was historically appurtenant to real property situated in the County of Kittitas, State of Washington.