



**TRUST WATER RIGHT AGREEMENT  
(George and Diane Burchak)**

THIS TRUST WATER RIGHT AGREEMENT ("Agreement") is made and entered into as of the 19 day of NOVEMBER, 2013, by and between the Washington State Department of Ecology, State Trust Water Right Program ("Ecology") and George and Diane Burchak ("Burchak").

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

*WHEREAS*, Burchak is the owner of a water right on Iron Mountain Creek / Tillman Creek as more particularly described and quantified in Exhibit A (the "Water"); and

*WHEREAS*, Burchak submitted a Water Right Change Application to the Kittitas County Water Conservancy Board, KITT-11-10 (the "Application"), to place a portion of the Water into the Trust for the purpose of enhancing in-stream flows and providing mitigation water to offset and allow for the permitting of new water rights to be used for any lawful purpose within the Yakima River basin in Kittitas County; and

*WHEREAS*, the Board initially approved the Application and issued a Report of Examination consistent therewith, which, turn, was modified and approved by Ecology under Order dated August 28, 2012 (CS4-05216sb5a); and

*WHEREAS*, Ecology's modified approval was the subject of appeals by a third-party to the Yakima County Superior Court and to the Pollution Control Hearings Board; and

*WHEREAS*, said appeals were settled by the parties thereto, the relevant terms and conditions of which being incorporated in Ecology's August 9, 2013, revised modified approval of the Application – CS4-05216sb5a(A) and CS4-05216sb5a(B) (the "Revised Approval"); and

*WHEREAS*, the Revised Approval incorporates the final and binding determination regarding the extent and validity of the Water, including the portion placed in Trust, as will be reflected in a trust water certificate to be issued by Ecology (the "Certificate"); and

*WHEREAS*, subject to the terms of this Agreement and the Revised Approval, Ecology is willing, able and authorized to hold the Water in the Trust as provided for herein;

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and undertakings as hereinafter set forth, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. **Purpose.** The purpose of this Agreement and the primary reason that Burchak is willing to place the Water into the Trust is to provide a senior water right as off-setting mitigation that will allow Burchak, or third parties acceptable to Burchak, to apply for and receive a water budget neutral determination for a new permit-exempt groundwater use or new ground water withdrawal or surface water diversionary permits within the Yakima River basin, particularly within Upper Kittitas County. These new water rights will be mitigated by way of a permanent designation of such portion of Burchak's beneficial interest in the Water in Trust as reasonably required to ensure no impairment to total water supply available in the Yakima River basin ("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 upon the close of an escrow established by the parties as hereinafter provided. The term of this Agreement shall then be for so long as any portion of the Water remains in the Trust (the "Term"). The escrow shall be opened with an escrow agent mutually agreeable to both parties the "Escrow Agent") upon the mutual execution of this Agreement and its deposit with the Escrow Agent.
  - 2.1 The escrow shall close within thirty (30) days of the occurrence of the last of the following events: (a) mutual execution of all agreements and documents contemplated by or collateral to this Agreement; (b) Burchak's deposit of an executed quitclaim deed subject to a condition subsequent in recordable form of the Water to the Trust substantially in the form of Exhibit B attached hereto and incorporated herein (the "Deed"); the giving of all requisite public notices for actions contemplated or referred to herein; the deposit of Ecology's letter accepting the Water into the Trust (the "Acceptance"); the deposit of the Certificate in form and content acceptable to Burchak; and the expiration of all notice, comment and appeal periods related to the full implementation of this Agreement and the Certificate. Burchak shall pay any of the escrow costs, and the parties shall execute appropriate escrow instructions to the Escrow Agent.
  
  - 2.2 Upon closing the Escrow Agent shall record the Deed with the Kittitas County Auditor and/or such other places as may be appropriate and shall deliver the Certificate to Burchak.
  
3. **Water Management and Monitoring Plan.** With respect to that portion of the Water that remains available for Burchak's out-of-stream uses under the Revised Approval:

- 3.1 Prior to sale of any portion of the trusted Water to third parties as provided herein, Burchak shall install and maintain an appropriate diversion structure and measuring device at their original point of diversion that complies with the *Acquavella* Court's Order Requiring Metering, Measuring, and Reporting, All Subbasins (1-3) In Benton, Kittitas, and Yakima Counties, dated September 15, 2005, and record and report flow measurement as required by the Court's Order, Chapter 90.03 RCW and Chapter 173-173 WAC the following January 31<sup>st</sup>. Such diversion structure(s) shall be screened in accordance with Department of Fish and Wildlife screening criteria (pursuant to RCW 77.57.010, RCW 77.57.070 and RCW 77.57.040).
  - 3.2 In the event of drought or during other low-flow events in Iron Mountain Creek, Burchak agrees to subordinate its out-of-stream irrigation use of water under the Revised Approval to the extent necessary to prevent any enlargement of the water right by use of the trusted Water for domestic purposes and to protect TWSA.
4. **Third Party Sales.** The process for Burchak's 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 Burchak 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 Burchak may elect (a "Third-Party Contract"). Burchak or such third party shall make application 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"). A New Application shall be filed with Ecology, except in those instances where a portion of the Water in Trust is proposed for protection of TWSA under a change application initiated at a water conservancy board, in which case the New Application *may*, at applicant's option, be made either to Ecology or to such conservancy board. In all cases, 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 The New Application will be processed 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.
  - 4.3 If necessary or appropriate, Ecology will complete a Water Transfer Working Group ("WTWG") project description and will present it to the

WTWG (proposals are available for review on the group's website). Ecology, in consultation with the U.S. Bureau of Reclamation, will determine if some or all of the Water that Burchak or the third party applicant designates would be assigned to the Reclamation-Ecology storage and delivery exchange contract (the "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 All domestic uses shall be metered to individual, third-party users. Such uses are, or will be made, subject to covenants, conditions and restrictions that impose water use restrictions for both inside and outside purposes that will be recorded against the project. Return flows will be 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.

4.4.3 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. Conditions relating to measuring and reporting water use and for reimbursement of any Ecology costs to administer the Exchange Contract will also be included in the permit.

4.5 If, following New Application review under Paragraph 4.4, Ecology is prepared to issue a report of examination for a New Application, it will publish a draft ROE on its Internet site. If Ecology is prepared to issue a determination of water budget neutrality, it shall so notify Burchak. If the form and substance of the draft ROE or water budget neutrality determination is acceptable to Burchak or the third party, Burchak or the third party applicant promptly shall cause an escrow to be opened for such transaction at the Escrow Agent, to include the fully executed Third-Party Contract and such other documents as may be necessary for closing.

- 4.6 Subject to a party's exercise of the New Application Withdrawal Option as defined below, escrow shall close within thirty (30) days of the occurrence of the last of the following events:
- 4.6.1 mutual execution of all agreements contemplated by or collateral to this Agreement;
  - 4.6.2 final approval from Kittitas County of any land use applications for development of the real property that is the intended place under the New Application, including exhaustion of all applicable appeal periods therefrom;
  - 4.6.3 the giving of all requisite public notices for actions contemplated by such transaction;
  - 4.6.4 deposit of the ROE or Water Budget Neutral Determination, each in form and content acceptable to Burchak and such third party, if any;
  - 4.6.5 the expiration of notice, comment and appeal periods related to the full implementation of this Agreement, the ROE and/or the new Water Budget Neutral Determination; and
  - 4.6.6 the deposit of all monies, documents and things relevant and necessary to conclude the transaction between Burchak and said third party.
- 4.7 All escrow costs shall be borne by Burchak, or as otherwise set forth in the written escrow instructions or Third-Party Contract. Burchak and any party having the right to do so under the Third-Party Contract, 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 (the "New Application Withdrawal Option").
- 4.8 In the event Closing occurs under Paragraph 4.6, Ecology shall immediately issue a final ROE identical in form to the previously issued draft version (or with modifications otherwise acceptable to Burchak and the third party applicant, if any). Thereupon and immediately following expiration of notice, comment and appeal periods therefrom, Ecology shall issue the mitigated permit. Upon issuance, the portion of the Water indicated on such mitigated permit shall be deemed irrevocably and perpetually committed to Trust.
- 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 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 Revised Approval, 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 Burchak 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 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 Burchak 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 the Exchange Contract; and fees associated with assignment of Water in the Trust to offset impacts associated with any New Application.

**6. Representations 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 Burchak makes the following undertakings, representations and warranties to Ecology:
  - 6.1.1 Burchak is authorized and fully able to enter into and perform all its obligations in this Agreement according to its terms.
  - 6.1.2 Upon its full execution, this Agreement is binding upon Burchak in accordance with its terms.
  - 6.1.3 Burchak 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 Burchak:

- 6.2.1 Ecology is a division 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.** Burchak 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 Burchak. 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 end the trust water right relationship in an orderly manner as follows:
  - 7.1.1 Burchak shall identify all in-process designation agreements and inform Ecology of their status. Burchak 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 Burchak or its designee the portion of the Water not yet irrevocably designated and assigned as mitigation for individual ground water and surface water permits.
  - 7.1.3 Each party shall be responsible for its own costs associated with terminating this Agreement and ending the trust water right relationship in an orderly manner.

- 7.2 Pursue any other remedy now or hereafter available under law.
- 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 any New Application.
8. **Assignment.** This Agreement may be assigned by Burchak 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 Burchak and Ecology shall be given to the addresses set forth below:

*To Ecology:*

Water Resources Section Manager  
Washington Department of Ecology  
Central Regional Office  
15 West Yakima Avenue, Suite 200  
Yakima, Washington 98902-3452

*To Burchak:*

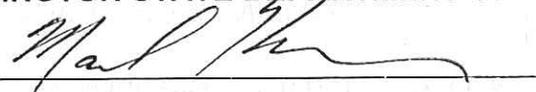
George and Diane Burchak  
1941 Mohar Road  
Cle Elum, WA 98922

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 7.1, 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. **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.

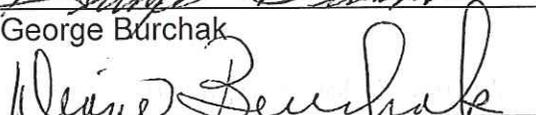
THIS TRUST WATER RIGHT AGREEMENT is executed as of the date first above written.

**WASHINGTON STATE DEPARTMENT OF ECOLOGY**

By: 

**BURCHAK**

By:   
George Burchak

By:   
Diane Burchak

**Exhibit "A"**  
**The Water**

As confirmed under the Revised Approval – CS4-05216sb5a(A) and CS4-05216sb5a(B)

Maximum cubic feet/second	Maximum acre-feet/year
<u>Right A:</u> 1.64 irrigation 0.02 domestic supply 0.01 stock water	<u>Right A:</u> 576 a-f/y for irrigation of 48 acres 2.0 a-f/y for domestic 2.0 a-f/y for stock water
<u>Right B:</u> 0.33 instream flow	<u>Right B:</u> 120 a-f/y instream flow

**Purpose of Use:**

Right A: Irrigation of 48 acres from April 1 through October 31; stock water and domestic supply year-round

Right B: 0.33 cfs, up to 120 a-f/y April 1 through October 31, for instream flows (99 a-f is nonconsumptive)

**Place of Use:**

Right A: W ½ SE ¼ and NE ¼ SE ¼ of Section 4, Township 19 N., Range 15 E.W.M., EXCPET the southernmost 350' of said W ½ SE ¼.

Right B: *Primary Reach:*

Within the ordinary high water mark of Iron Mountain and Tillman Creeks commencing at the Burchak diversion (which is located 325 feet north and 450 feet east of the center of Section 9, Township 19 N, Range 15 E.W.M.) and ending at the location where Westside Road crosses Tillman Creek in the NW ¼ SW ¼ of Section 4, Township 19 N, Range 15 E.W.M.

*Secondary Reach:*

Within the ordinary high water mark of Iron Mountain and Tillman Creeks commencing at the Burchak diversion (which is located 325 feet north and 450 feet east of the center of Section 9, Township 19 N, Range 15 E.W.M.) and ending at the confluence of the Yakima and Columbia Rivers.

**Exhibit "B"**  
**Form of Deed**

**After recording return to:**

Lawrence E. Martin, Esq. Halverson Northwest Law Group 405 E. Lincoln Yakima, WA 98902
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DOCUMENT TITLE: QUIT CLAIM DEED – WATER RIGHT

GRANTOR: GEORGE BURCHAK and DIANE BURCHAK, husband and wife

GRANTEE: WASHINGTON STATE DEPARTMENT OF ECOLOGY, STATE TRUST WATER RIGHTS PROGRAM

LEGAL DESCRIPTION: W ½ SE ¼ and NE ¼ SE ¼ of Section 4, Township 19 N., Range 15 E.W.M.

ASSESSOR MAP NOS.: 19-15-04040-0001; 19-15-04040-0010 and 19-15-04040-0012

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**QUIT CLAIM DEED – WATER RIGHT**

THE GRANTORS, GEORGE BURCHAK and DIANE BURCHAK, husband and wife, 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 Court Claim No. 05216 in *State of Washington v. Acquavella, et al.*, Yakima County Superior Court Cause No. 77-2-01484-5, described as follows:

0.33 cubic feet per second, 120 acre-feet per year (99 a-f/y being nonconsumptive), which, prior to final approval of Grantors' water right change application (KITT-11-10, CS4-05216sb5a(A) and CS4-05216sb5a(B), was appurtenant to real property situated in the County of Kittitas, State of Washington, and legally described above.



**Exhibit "C"**  
**Trust Water Consumptive Quantities**

Pursuant to CS4-05216sb5a  
And  
Confirmed under the Revised Approval – CS4-05216sb5a(A) and CS4-05216sb5a(B)

<b>Month</b>	<b>June</b>	<b>July</b>	<b>August</b>	<b>September</b>
A-F/month	3.86	7.54	5.57	4.03
CFS	0.06	0.12	0.09	0.07

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