

Trust Water Right Agreement

This Trust Water Right Agreement is made and entered into as of the ~~25~~ day of June 2015, by and between the Washington State Department of Ecology, Yakima River Basin Trust Water Rights Program ("Ecology") and Big Creek Water Right, LLC ("BCWR"), a Washington Limited Liability Company.

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

B. WHEREAS, BCWR is the owner of certain water rights in Big Creek, a tributary of the Yakima River as more particularly described and confirmed under Claim No. 00756 in the Conditional Final Order issued in Subbasin 2, dated February 13, 1997 in *Ecology v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5 ("*Acquavella*");

C. WHEREAS, the place of use and purpose of use for a portion of Court Claim No. 00756 was changed from irrigation to instream flow for mitigation under Change Application No. KITT-13-07 (CS4-00756sb2@3) ("Water Right"). The change was approved by the Kittitas County Water Conservancy Board and modified by Ecology in its certain letter dated July 2, 2014. The Water Right is described in Exhibit A.

D. WHEREAS, BCWR has requested to have Ecology hold the Water Right in Trust for instream flow and mitigation so that it can be used to offset or mitigate for future water uses.

E. WHEREAS, subject to the terms of this Agreement, Ecology confirms that it is willing, able, and authorized to hold the Water Right in Trust for the intended purposes 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, Ecology and BCWR hereby agree as follows:

1. **Purpose.** The purpose of this Agreement is to allow BCWR to provide senior water rights as off-setting mitigation for its own projects or for third parties seeking: 1) to mitigate existing groundwater withdrawals, 2) water budget neutral determinations, or 3) permits for new surface and groundwater uses. BCWR agrees to convey the Water Right to Ecology to be placed in Trust. By doing so, the Water Right may be made available as mitigation for uses designated by BCWR. These uses will be mitigated in whole or in part by way of a permanent assignment of a portion of the Water Right as is reasonably required to ensure no impairment to the total water supply available in the Yakima River basin ("TWSA") or other water rights.

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 quit claim deed shall be in a recordable form substantially in the form of Exhibit B attached hereto. The term of this Agreement shall then be for so long as any portion of the Water Right is available to be assigned to new and/or existing uses.

3 Allocations of Water to Third Parties and/or Water for use by TR

3.1 Allocations of Water to Third Parties. BCWR may propose or enter into a contract with a third party to provide a portion of the Water Right as mitigation on such terms consistent with this Agreement as BCWR may elect. BCWR or such third parties shall make application to Ecology for a water budget neutrality determination or a permit to appropriate surface or ground water by providing all regularly required supporting information and include documentation, as necessary to conform to WAC 173-539A-050 and designation, on a form prescribed by BCWR, of the specific quantity of the Water Right in Trust required to offset the consumptive uses described in the application or request for water budget neutral determination (hereinafter a "New Application"). As part of the New Application, Ecology will assign mitigation to offset the consumptive use associated with the uses described on the New Application.

3.3 Ecology will process the New Application in accordance with applicable law, utilizing such portion of the Water Right, as reasonably needed, together with any other proposed mitigation measures, shall reasonably offset the impacts of such new withdrawals.

3.4 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 Right that BCWR or the third party applicant designates would be assigned to the Reclamation-Ecology storage and delivery exchange contract.

3.5 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 a New Application shall also include the following considerations:

3.5.1 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 any 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 a portion of the Water Right and any other proposed mitigation measures, do not increase the consumptive use of water.

3.5.2 With regard to domestic uses, and so long as withdrawals are metered by 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 recorded 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, BCWR shall propose the gallons per day on a year round basis per equivalent residential unit ("ERU") that is acceptable to Ecology and the Washington State Department of Health.

3.6 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 to be consistent with the Water Right held by Ecology as mitigation. Conditions relating to measuring and reporting water use and reimbursement of any Ecology costs to administer the Reclamation-Ecology Exchange Contract will also be included in the permit. BCWR will ensure that any fees associated with storage under the exchange contract are paid to Ecology.

3.7 If all or a portion of the Water Right 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.

3.8 In the event Ecology prepares to issue an ROE for a New Application, it will publish the draft ROE on its internet site. If the form and substance is acceptable to BCWR and to the third party applicant, if any, BCWR shall cause an escrow to be opened for such transaction at the Escrow Agent upon the mutual execution and deposit of the fully executed agreement between BCWR and the third party applicant, if any, or the deposit of any other documents required for closing. The escrow shall close within thirty (30) days of the occurrence of the last of the following events:

- mutual execution of all agreements and documents contemplated by or collateral to this Agreement; BCWR's deposit of an executed document in a form acceptable to Ecology permanently allocating a portion of the then available and unallocated Water Right to the proposed purpose as set forth in the New Application;
- the giving of all requisite public notices for actions contemplated by such transaction;
- deposit of the ROE and the new water right permit, each in form and content acceptable to BCWR and such third party, if any;
- the expiration of all notice, comment and appeal periods related to the full implementation of this Agreement, the ROE, and the new water right permit;
- the deposit of all monies, documents and things relevant and necessary to conclude the transaction between BCWR and any third party.

3.9 All escrow costs shall be shared equally between BCWR and the third party. BCWR, and any third party having the right to do so under an agreement with BCWR, may, at any time prior to closing of escrow and without cause, withdraw the New Application or otherwise prevent any allocation of any portion of the Water Right to such transactions.

4. Management of Trust Water. Ecology shall hold and manage the Water Right pursuant to chapter 90.42 RCW and this Agreement as a part of the TWSA. Ecology:

4.1 Shall take no position and make no assertions that the quantities and beneficial use of the Water is other than as stated in Exhibit 1 and paragraph 3 above, and this representation shall also apply to any Water removed from the Trust;

4.2 Shall, in addition to the protections against relinquishment in RCW 90.03.380, 90.03.615 and 90.14.140, at all times during the Term manage, maintain, preserve and protect for the benefit of BCWR and its successors, designees and assigns all aspects and attributes of the Water Right including, but not limited to, the priority date, the total diversionary right, instantaneous quantity, and annual consumptive quantity from impairment, challenges, claims and relinquishment

4.3 Shall process all New Applications where portions of the Water Right are proposed to be assigned 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

4.4 Shall not assess or charge BCWR any costs or fees for maintaining the Water in the Trust; provided that Ecology may charge third parties its regular costs and fees for water right applications, transfers and investigations or costs attributable to assignment of a portion of the Water to Ecology's USBR contract for storage and exchange contract.

5. 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:

5.1 BCWR makes the following undertakings, representations and warranties to Ecology:

5.1.1 BCWR is a Washington limited liability company duly formed and authorized and fully able to enter into and perform all its obligations in this Agreement according to its terms.

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

5.1.3 Upon its full execution, this Agreement is binding upon BCWR in accordance with its terms.

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

5.2 Ecology makes the following undertakings, representations and warranties to TR:

5.2.1 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.

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

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

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

6. Termination and Default. BCWR shall have the right at any time to withdraw an Application, terminate this Agreement and remove from the Trust any portion of the Water that has not been permanently assigned as mitigation for other water uses as set forth in this Agreement. In the event BCWR terminates this Agreement, then Ecology shall, without delay, reconvey the unallocated portion of the Water Right back to BCWR using a quit claim deed. 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, if 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:

6.1 As the computation of damages may be difficult, continue this Agreement and bring an action to specifically perform this Agreement.

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

6.2.1 BCWR shall identify all in-process designation agreements and inform Ecology of their status. BCWR 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.

6.2.2 Ecology shall promptly convey to BCWR or its designee the portion of the trust water right not yet designated and assigned as mitigation for individual ground water and surface water permits. Ecology may use any unassigned portion of the Water Right set aside to address uncertainty associated with the then existing mitigated permits. and provide instream flow benefits. OK WITH BCWR

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

6.3 Pursue any other remedy now or hereafter available.

6.4 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.

6.5

7. This Agreement may be assigned by BCWR 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, assignees and other successors in interest.

8. Any notice or communication required by this Agreement between BCWR 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 BCWR:

Big Creek Water Right LLC
P.O. Box 808
Cle Elum, Washington 98922

9. BCWR, from time to time, may request by letter that Ecology add additional water rights, that BCWR owns or controls, to this Trust Agreement. Upon Ecology's agreement with said request, said water shall be added to this trust Agreement through an addendum.

10. 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 8.2, the party finding itself unable to enforce the provision may, at its sole discretion, declare this entire Agreement to be null and void.

11. If either party fails to exercise its rights under this Agreement, it will not be precluded from subsequent exercising 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 to this Agreement must be in writing and signed by an authorized representative of each of the parties.

13. 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. 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.

15. If either party hereto is required to retain an attorney to enforce any provision of this Agreement, whether or not a legal proceeding is commenced, the substantially prevailing party shall be entitled to reasonable attorneys' fees regardless of whether at trial, on appeal, in any bankruptcy proceeding, arbitration matter or without resort to suit.

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

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY:**

By: *Sage Park*
Print Name: Sage Park
Its: WR Section Manager

BIG CREEK WATER RIGHT, LLC:

[Signature]
By: _____
Print Name: PATRICK DENBERN
Its: manager

HH:Document1

EXHIBIT A

The Water Right

TYPE OF USE, PERIOD OF USE		MAXIMUM ACRE- FEET/ YEAR			MAXIMUM CUBIC FEET/ SECOND	
Instream flow for mitigation		Qa			Qi	
May 1 – September 1		60 (21.02 ac-ft/yr consumptive and 38.98 ac-ft/yr non-consumptive).			0.34	
March 1 to April 30		*			0.156	
May 1 to September 1		*			0.02	
September 2 to Nov. 15		*			0.156	
November 16 to Feb. 29		*			0.222	
		* Cumulative total for instream flow March 1 through February 29 is 0.9 ac-ft/yr.				
SOURCE				TRIBUTARY OF (IF SURFACE WATER)		
Big Creek				Yakima River		
¼	¼	SECTION	TOWNSHIP	RANGE	WRIA	COUNTY.
SW	SE	29	20 N.	14 E.W.M.	39	Kittitas
AT A POINT LOCATED: PARCEL NO. 1100 feet North and 750 feet East from the South quarter corner of Section 29, being within SW¼ SE¼ of Section 29, T. 20 N., R. 14 E.W.M.						
LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS TO BE USED AS APPROVED BY THE BOARD						
Primary Reach: The portion of Big Creek below the original point of diversion to the confluence with the Yakima River.						
Secondary Reach: Commencing at the confluence of Big Creek and the Yakima River, within the Yakima River downstream to the confluence with the Columbia River.						

EXHIBIT B

QUIT CLAIM DEED - WATER RIGHT

THE GRANTOR, Patrick Deneen, 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. 00756 in *State of Washington v. Acquavella, et al.*, Yakima County Superior Court Cause No. 77-2-01484-5, described as follows:

0.34 cubic feet per second, 21.02 acre-feet per year (consumptive use) instream flow water right per Change Authorization No. KITT-13-07, CS4-00756sb2@3 which was historically appurtenant to real property situated in the Easton Subbasin, County of Kittitas, State of Washington.

SUBJECT TO the terms and conditions of that certain Trust Water Right Agreement between Grantors and Grantee, attached hereto.

DATED THIS 25 day of June 2015.



BIG CREEK WATER RIGHT, LLC
Patrick Deneen

STATE OF WASHINGTON)
County of Kittitas) ss.
)

I certify that I know or have satisfactory evidence that PATRICK DENEEN who appears before me, and said individual acknowledged he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

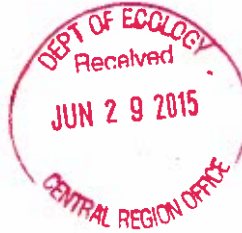
GIVEN under my hand and official seal this 25 day of June 2015.



Leroy A. Gaidos

Print Name: Leroy A. Gaidos
Notary Public in and for the State of
Washington
My commission expires: 9.29.15

Return to:
Big Creek Water Right, LLC
304 West First Street
Cle Elum, WA 98922



REVIEWED BY
KITTITAS COUNTY TREASURER
DEPUTY B. Blumensetter
DATE April 10 2015

04/10/2015 03:00:33 PM
\$73.00
Water Right AMERITITLE
Kittitas County Auditor

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QUIT CLAIM DEED - WATER RIGHT

AMT \$73⁵

THE GRANTOR, TEANAWAY RIDGE LLC, by it's manager, Patrick Deneen ("Grantor"), for valuable consideration, convey and quit claim to the BIG CREEK WATER RIGHT LLC ("Grantee") all of Grantor's right, title and interest in and to a *portion* of the water right under Court Claim No. 00756 in *State of Washington v. Acquavella, et al.*, Yakima County Superior Court Cause No. 77-2-01484-5, described as follows:

0.34 cubic feet per second, 21.02 acre-feet per year (consumptive use) instream flow water right per Change Authorization No. KITT-13-07, CS4-00756sb2@3 which was historically appurtenant to real property situated in the Easton Subbasin, County of Kittitas, State of Washington.

SUBJECT TO the terms and conditions of that certain Trust Water Right Agreement between Grantors and Grantee, attached hereto.

DATED THIS 8 day of April, 2015. EXCISE TAX PAID 3/31/15 AFF #2015-452



TEANAWAY RIDGE LLC, Manager
Patrick Deneen

COURTESY RECORDING ONLY...
NO LIABILITY FOR VALIDITY
AND / OR ACCURACY ASSUMED BY
AMERITITLE

STATE OF WASHINGTON)

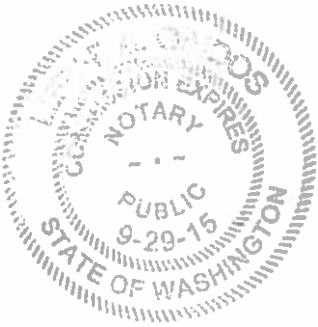
County of Kittitas)

) ss.

)

I certify that I know or have satisfactory evidence that PATRICK DENEEN, as Manager of Teanaway Ridge, LLC, who appears before me, and said individual acknowledged he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

GIVEN under my hand and official seal this 8th day of April, 2015.



Lerae A. Gaidos
Print Name: Lerae A. Gaidos
Notary Public in and for the State of Washington

My commission expires: 9/29/15

