

Trust Water Right Agreement

This Trust Water Right Agreement is made and entered into as of the 7th day of February, 2012, by and between the Washington State Department of Ecology, State Trust Water Right Program ("Ecology") and Land Lloyd Development Company, Inc. (Lloyd).

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, Lloyd is the owner of certain water rights within the Yakima River basin as more particularly described and quantified in Exhibit A (the "Water") and presently appurtenant to the land legally described in Exhibit B (the "Land"), each such exhibit being attached hereto and incorporated herein; and

Whereas, Lloyd submitted a Trust Water Right Application to Ecology, WRTS File No. CS4-00714sb2 (the "Application"), to place 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, specifically Applications G4-35432, and G4-35529, and for potential new water uses requiring Determinations of Water Budget Neutrality (WBN determinations) in accordance with WAC 173-539A-050; and

Whereas, Ecology has accepted the Application, has completed its examination of the extent and validity of the Water and is prepared to issue its Trust Water Right Report of Examination concerning the extent and validity of the Water (the "ROE") and its trust water certificate (the "Certificate"). Exhibit D documents that determination, including quantification of the consumptive quantity associated with the right; and

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

Now, therefore, in consideration of the forgoing, 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. The purpose of this Agreement and the primary reason Lloyd is willing to place the Water into the Trust is to provide a senior water right as off-setting mitigation that will allow issuance of WBN determinations and Mitigated Groundwater Permits G4-35432 and G4-35529 to Lloyd within the Yakima River basin, particularly within Kittitas County. These new water uses will be mitigated by way of a permanent designation of such portion of Lloyd's beneficial interest in the Water in Trust as reasonably required to ensure no impairment to TWSA or other water rights; provided that any portion of such mitigation may also be provided by other means.

2. This Agreement shall be effective upon its mutual execution, and Lloyd's deposit of an executed quit claim deed in recordable form of the Water to the Trust substantially in the form of Exhibit C 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 ROE and the Certificate, each in form and content acceptable to Lloyd; and the expiration of all notice, comment and appeal periods related to the full implementation of this Agreement, the ROE, and the Certificate.

3. Once this agreement is executed, Ecology will investigate the New Application (Applications for Water Right G4-35432 and G4-35529) and prepare a Report of Examination recommending issuance or denial of a permit based on applicable policy, rules, and law. Pursuant to WAC 173-539A-060, Ecology shall process its decision in a timely manner as provided under RCW 90.03.260-.340 and Chapter 90.44 RCW utilizing such portion of the Water in Trust as reasonably needed under the quantity allocation set out in Exhibit D which, together with any other proposed mitigation measures, shall reasonably offset the impacts of such new withdrawal.

3.1. 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 Lloyd designates would be assigned to the Reclamation-Ecology storage and delivery exchange contract.

3.2. 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 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, 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 a year round basis) per equivalent residential unit ("ERU").

3.3. Ecology's permit 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. Lloyd 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.

5. 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 Exhibits A and D and paragraph 3 above, 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 90.38.000, at all times during the Term manage, maintain, preserve and protect for the benefit of Lloyd 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 process all New Applications and Requests for Determination of Water Budget Neutrality where portions 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 Lloyd any costs or fees for maintaining the Water in the Trust; provided that Ecology may charge 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.

6. 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 Lloyd makes the following undertakings, representations and warranties to Ecology:

6.1.1 Lloyd is a Washington corporation duly formed and authorized and fully able to enter into and perform all its obligations in this Agreement according to its terms.

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

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

6.1.4 Lloyd 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 Lloyd:

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

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

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

7.2.2 Ecology shall promptly convey to Lloyd 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 and determinations. If any reserve has been set aside to address uncertainty (see paragraph 3.6) associated with the then-existing mitigated permits, Ecology will retain such reserve until it is either assigned to individual permits or Ecology determines some or all of the reserve is unnecessary. Any reserve not needed shall be promptly conveyed by Ecology to Lloyd.

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

7.3 Pursue any other remedy now or hereafter available.

7.4 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.

8. This Agreement may be assigned by Lloyd 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. Any notice or communication required by this Agreement between Lloyd 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 Lloyd

Land Lloyd Development Company
Att. Bob Couper
PO Box 3889
Federal Way, WA 98063

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 9.2, 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 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 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.

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

WASHINGTON DEPARTMENT OF ECOLOGY

By: 
Mark Kemner, Section Manager
Water Resources Program/CRO
Date: 3/27/12

LAND LLOYD DEVELOPMENT INC

By: 
Robert Couper
Officer
Date: 2-7-12

EXHIBIT A

1 CLAIMANT NAME: Carl B. Benson, et al. COURT CLAIM NO. 00714
2 Source: Fowler Creek
3 Use: Irrigation of 10 acres
4 Period of Use: April 15 to September 30
5 Quantity: 0.20 cubic foot per second (plus 1.3 cubic feet per second
6 for conveyance), 30 acre-feet per year for irrigation
7 Priority Date: October 9, 1893
8 Point of Diversion: 375 feet south and 1400 feet east from the northwest
9 corner of Section 2, being within Government Lot 4,
10 Section 2, T. 19 N., R. 14 E.W.M.
11 Place of Use: The north 400 feet of Government Lots 2 and 3 Section 2,
12 T. 19 N., R. 14 E.W.M.; EXCEPT the west 700 feet of
13 Government Lot 3.

12 CLAIMANT NAME: Charles K. Parsons COURT CLAIM NO. 01465
13 Source: Little Creek
14 Use: Irrigation of 7 acres and stock water.
15 Period of Use: April 15 to September 30
16 Quantity: 0.17 cubic foot per second, 33.6 acre-feet per year for
17 irrigation; 0.01 cubic foot per second, 1 acre-foot per
18 year for stock water
19 Priority Date: June 30, 1895
20 Point of Diversion: 1100 feet south and 900 feet west from the east quarter
21 corner of Section 28, being within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 28,
22 T. 20 N., R. 14 E.W.M.
23 Place of Use: The east 425 feet of that part of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 28,
24 T. 20 N., R. 14 E.W.M. lying southerly of the Nelson
25 Siding Road.
26

27 REPORT OF REFEREE
28 Re: Subbasin No. 2
29

1 Registration Act, RCW 90.14. Failure to file a claim forfeits any right that may
2 have existed, RCW 90.14.071.

3 Therefore, based on the above, the Referee must recommend that rights not be
4 confirmed under Court Claim No. 6044 to Dona L. Bogan and James H. Dobbs.

5
6 COURT CLAIM NO. 00714 --- Carl B. Benson, et al.
7 & Lorraine E. Benson
8 Newton W. Galley
& Kathryn B. Galley

9 COURT CLAIM NO. 00888 --- Estate of Michael Burchak
10 & Marie Burchak
Dennis Burchak
& Diana Burchak

11 The Department of Ecology took exception to the legal descriptions used for
12 the rights that the Referee recommended be confirmed under Court Claim No. 00888
13 and 00714. Ecology found that the two legal descriptions overlapped and described
14 a portion of the same property. Upon review of the exhibits it was determined that
15 rather than use the legal description in the investigation report for Court Claim
16 No. 00888, the correct legal description for the Burchak property was contained in
17 Exhibit DE-155 submitted at the original evidentiary hearing. The Referee will
18 amend the place of use description for the right recommended under Court Claim No.
19 00888 to the following: The west 700 feet of Government Lot 3 and all of the east
20 356.16 feet lying south of the north 417.42 feet in Government Lot 4, all in
21 Section 2, T. 19 N., R. 14 E.W.M..

22 Dennis Burchak also filed an exception to the instantaneous quantity for the
23 right that the Referee recommended for confirmation. Mr. Burchak appeared and
24 testified at the supplemental hearing. The original recommendation by the Referee
25 was that a right be confirmed for the diversion from Fowler Creek of 0.21 cubic
26

27 SUPPLEMENTAL
28 REPORT OF REFEREE
Re: Subbasin No. 2

Referee's Office
15 W. Yakima Ave Ste. 200
Yakima, WA 98902-3401

EXHIBIT B

Court Claim No. 00714 Place of Use:

The west 700 feet of Government Lot 3 and all of the east 356.16 feet lying south of the north 417.42 feet in Government Lot 4, all in Section 2, T. 19 N., R. 14 E.W.M.

When recorded return to:

COPY

Robert Couper
Land Lloyd Development Company
PO Box 3889
Federal Way, WA 98063

WATER RIGHT CONVEYANCE

LAND LLOYD DEVELOPMENT (Grantor), for no consideration, hereby conveys and quit claims to the STATE OF WASHINGTON (Grantee), a water right for 30 acre-feet per year (afy) and 0.2 cfs (with 1.3 cfs for conveyance) under Court Claim No. 00714 within Subbasin No. 2 in the Yakima River Basin Water Rights Adjudication, *State of Washington v. James J. Acquavella, et al.*, (Yakima Superior Court Cause No 77-2-01484-5), annually. The Water Right was confirmed by the Court in the Conditional Final Order for Subbasin No. 2 entered February 13, 1997 (the "Water Right").

The Water Right was formerly appurtenant to the real property legally described as:

A 10-acre portion of the South Half of the Northwest Quarter the southeast quarter of the northeast quarter, and Lots on (1), two (2) and (3); All in Section two (2), Township 19 North, R. 14 E.W.M, except the west 700 feet of Lot 3.

Situate in the County of Kittitas, State of Washington.

With the enactment of a Trust Water Right Agreement the Water Right is severed from the above-described property, and is appurtenant to the Yakima River, to be used for the purpose of instream flow and water banking mitigation purposes.

Grantor conveys and quitclaims the Water Right to the State of Washington in perpetuity to be administered and managed by the Department of Ecology as a trust water right under the Trust Water Program established in chapter 90.38 RCW.

DATED this ____ day of _____, 2012.

GRANTOR:

Robert Couper, Land Lloyd Development
Company

STATE OF WASHINGTON)
) ss
COUNTY OF _____)

I certify that I know or have satisfactory evidence that **Robert Couper** is the person who appeared before me and said person acknowledged that he signed this instrument and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

Notary Public in and for the State of Washington
Residing at _____
My appointment expires: _____

EXHIBIT D

Tentative Quantification of the Consumptive Use of Court Claim No. 00714:

	June	July	August	Sept.	Total
Avg. Qi (cfs)	0.052	0.098	0.073	0.054	--
Qa (ac-ft/yr)	3.10	6.04	4.45	3.22	16.8