

Amended and Restated Trust Water Right Agreement

This Trust Water Right Agreement is made and entered into as of the 19th day of May, 2016, by and between the Washington State Department of Ecology, Yakima River Basin Trust Water Rights Program (“Ecology”) and Aqua Mitigation LLC, a Washington limited liability company (“Aqua”).

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

B. WHEREAS, Aqua was the owner of certain water rights in Manastash Creek, a tributary of the Yakima River as more particularly described and confirmed under Claim Nos. 01968 and 01553 in the Conditional Final Order issued in Subbasin 11, dated June 14, 2001 in *Ecology v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5 (“*Acquavella*”), as divided pursuant to that certain Order to Divide Water Right and Join Parties entered on October 14, 2010;

C. WHEREAS, the place of use and purpose of use of the water rights were changed from irrigation to instream flow in Change Application Nos. KITT-10-11 (CS4-01553sb11a) and KITT-10-12 (CS4-01968sb11a) approved by the Kittitas County Water Conservancy Board and approved by Ecology in its certain letter modifying the transfers dated April 8, 2011 and May 17, 2011 (the “Modification Letters”); and

D. WHEREAS, the water rights designated as Trust Water Right A in both of the Modification Letters have been sold to Ecology to be used in perpetuity for instream flow purposes; and

E. WHEREAS, the water rights identified as Trust Water Right B in both of the Modification Letters (the “Mitigation Water Rights”) have an authorized purpose use for mitigation of future residential use; and

F. WHEREAS, Aqua and Ecology placed the Mitigation Water Rights in trust upon the recording of the deeds recorded at Kittitas County Auditor’s File Nos. 201108300035 and 201108300036 and entered into this Trust Water Rights Agreement to establish the terms and conditions under which said Mitigation Water Rights may be used for mitigation purposes; and

G. WHEREAS, Aqua submitted Trust Water Right Applications to Ecology, WRTS File Nos. CS4-01553sb11a (KITT-10-11) and CS4-01968sb11a (KITT-10-12) (the “Applications”), to place the Water into the Trust for the purpose of enhancing in-stream flows, providing mitigation water to offset and allow for the permitting of new water rights to be used for any lawful purpose, and providing mitigation water to mitigate for current water uses within the Yakima River basin; and

H. WHEREAS, Ecology has accepted the Applications, has completed its examination of the extent and validity of the Water based on Kittitas County Water Conservancy Board Report of Examination, modified and confirmed by Ecology’s Modification Letters and issued its Trust Water Right Report of Examination concerning the extent and validity of the Water (the “ROE”) and its trust water certificate (the “Certificate”), which documents that determination, including quantification of the consumptive quantity associated with the right; and

I. WHEREAS, subject to the terms of this Agreement and the Applications, Ecology confirms that it is willing, able and authorized to hold the Water in the Trust and does accept the Water in trust for the intended purposes as provided for herein; and

J. WHEREAS, subject to the terms and conditions of this Agreement, on March 25, 2013, Ecology and Aqua entered into the First Amendment to Trust Water Right Agreement, which amended Paragraph 3 of the Trust Water Right Agreement dated August 9, 2011; and

K. WHEREAS, on May 29, 2014, Aqua assigned, subject to the Trust Water Rights Agreement, to Kittitas County all of its beneficial interest in the Trust Water Right identified herein on Exhibit A-1, said irrevocable Partial Assignment of the Beneficial Interest in a Trust Water Right was recorded under Kittitas County Auditor's File No. 201405300018; and

L. WHEREAS, on January 8, 2015, Aqua assigned a portion of its beneficial interest in this Trust Water Right to Kittitas County, a political subdivision of the State of Washington ("Kittitas County"), and in said assignment, Aqua retained 0.815 consumptive acre-feet and irrevocably assigned 67.203 consumptive acre-feet per year to Kittitas County and Ecology consented to said assignment. Said irrevocable Partial Assignment of the Beneficial Interest in a Trust Water Right was recorded under Kittitas County Auditor's File No. 201501080021; and

M. WHEREAS, Ecology and Aqua now desire to amend and restate the Trust Water Right Agreement so that this Trust Water Right Agreement applies only to the 0.815 consumptive acre-feet retained by Aqua as described on Exhibit A attached hereto and incorporated herein by reference; and

N. WHEREAS, Ecology and Aqua now desire to have the portion of Aqua's beneficial interest in the 67.203 consumptive acre-feet per year of this Trust Water Right that was assigned to Kittitas County be separated from this Trust Water Right Agreement and subject to a separate Trust Water Right Agreement between Ecology and Kittitas County, which shall be entered into by those parties concurrent with this Agreement.

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 Aqua hereby agree as follows:

1. The purpose of this Agreement and the primary reason Aqua is willing to place the Water into the Trust is to provide senior water rights as off-setting mitigation that will allow Aqua or third parties to apply for and receive new ground water withdrawal or surface water diversionary permits within the Yakima River basin. An additional purpose of this agreement is to place water into Trust to provide a senior water right as offsetting mitigation that will allow Aqua or a third party to apply for and receive mitigation for existing groundwater withdrawals or surface water diversion permits. These water rights will be mitigated by way of a permanent designation of such portion of Aqua's beneficial interest in the Water in Trust as reasonably required to ensure no impairment to the total water supply available in the Yakima River ("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 the Trust Water Rights shall continue as restated herein. The term of this Agreement shall then be for so long as any portion of the Water remains in the Trust (the "Term").

3. The process for Aqua'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:

3.1 Aqua 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 Aqua may elect. Aqua 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.

3.2 Ecology will process the New Application in accordance with applicable law, utilizing such portion of the Water in Trust as reasonably needed for the uses proposed in the New Application, together with any other proposed mitigation measures, shall reasonably offset the impacts of such new withdrawal.

3.3 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 Aqua or the third party applicant designates would be assigned to the Reclamation-Ecology storage and delivery exchange contract.

3.4 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:

3.4.1 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 may be, 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.

3.4.2 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 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 250 gallons per day on a year round basis per equivalent residential unit ("ERU"), or such lesser quantity of water as may be established after consultation with the applicant, Aqua, the Washington State Department of Ecology and Washington State Department of Health for serving a residential dwelling.

3.4.3 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 Trust Water Rights Program 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.

3.4.4 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 Trust Water Rights Program as mitigation.

3.4.5 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.

3.5 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 Aqua. If the form and substance of the draft ROE or water budget neutrality determination is acceptable to Aqua or the third party, Aqua or the third party applicant promptly shall cause an escrow to be opened for such transaction at the Escrow Agent. All escrow costs shall be borne by Aqua, or as otherwise set forth in the written escrow instructions or sale agreement between Aqua and the third party. Aqua and any third party having the right to do so under an agreement with Aqua, 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. Aqua 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 allocated as mitigation of other water uses as set forth in this Agreement.

5. Aqua may open an escrow for any transaction between Aqua and a third party designated in the new application upon the mutual execution and deposit of a fully executed agreement between Aqua and the third party applicant, if any. The escrow may 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; Aqua's deposit of an executed document in a form acceptable to Ecology permanently allocating a portion of the then available and unallocated Water in the Trust 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 Aqua 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; and the deposit of all monies, documents and things relevant and necessary to conclude the transaction between Aqua and any third party. All escrow costs shall be shared equally between Aqua and the third party. Aqua, and any third party having the right to do so under an agreement with Aqua, 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 to such transaction.

6. During the Term, Ecology shall hold and manage the Water in trust pursuant to chapter 90.38 RCW and this Agreement as a part of the TWSA. Ecology:

6.1 Shall take no position and make no assertions that the quantities and beneficial use of the Water is other than as stated herein, and this representation shall also apply to any Water removed from the Trust;

6.2 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 Aqua and its successors, designees and assigns all aspects and attributes of the Water as quantified in Exhibits A-1 and A-2, including, but not limited to, the priority date, the total diversionary right, instantaneous quantity, and annual consumptive quantity from impairment, challenges, claims and relinquishment;

6.3 Shall process all New Applications 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

6.4 Shall not assess or charge Aqua 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.

7. 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:

7.1 Aqua makes the following undertakings, representations and warranties to Ecology:

7.1.1 Aqua 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.

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

7.1.3 Upon its full execution, this Agreement is binding upon Aqua in accordance with its terms.

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

7.2 Ecology makes the following undertakings, representations and warranties to Aqua:

7.2.1 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.

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

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

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

8. 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:

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

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

8.2.1 Aqua shall identify all in-process designation agreements and inform Ecology of their status. Aqua 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.

8.2.2 Ecology shall promptly convey to Aqua 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. If any reserve has been set aside to address uncertainty 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 Aqua.

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

8.3 Pursue any other remedy now or hereafter available.

8.4 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.

9. This Agreement may be assigned by Aqua 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.

10. Any notice or communication required by this Agreement between Aqua 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 Aqua:
Aqua Mitigation LLC
1880 Quail Run Lane
Ellensburg, Washington 98926

11. 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.

12. 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.

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

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

15. 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.

16. 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:**

AQUA MITIGATION LLC:

By: Trevor Hutton
Print Name: Trevor Hutton
Its: Water Resources Section Mgr

By: Mitch Williams
Print Name: MITCH WILLIAMS
Its: MANAGER / MEMBER

**Exhibit A
(Trust Water Right B)**

Name: Aqua Mitigation LLC, a Washington limited liability company

Source: Manastash Creek

Use: Trust Water Rights Program

Period of Use: April 1 through October 31 for irrigation

Priority Date: June 30, 1874

Quantity: .234 cfs from April 1 through June 30; .118 cfs from July 1 through October 31;
0.815 acre-feet/year of consumptive use for mitigation of future domestic use

Point of Diversion: Not applicable because the water will be placed in trust

Place of Use: The primary reach is described as follows: within the ordinary high-water mark of Manastash Creek commencing at the Jensen and Keach Ditch Diversion, which is located 550 south and 650 feet east from the N¹/₄ corner of Section 14 within the NW¹/₄NE¹/₄ of Section 14, T. 17 N, R. 17 E.W.M. and ending at the confluence of Manastash Creek and Yakima River; and

The secondary reach is described as follows: commencing at the confluence of the Manastash Creek and Yakima River and terminating at the confluence of the Columbia River and Yakima River