

Trust Water Right Agreement (Estate of Harry Masterson)

This Trust Water Right Agreement (“Agreement”) is made and entered into as of the 20th day of June, 2012, by and between the Washington State Department of Ecology, State Trust Water Right Program (“Ecology”) and the Estate of Harry Masterson (“Masterson”).

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, Masterson is the owner of certain water rights on the Teanaway River as more particularly described and quantified in Exhibit A (the “Water”) and presently appurtenant to the land that is legally described in Exhibit B (the “Land”); and

Whereas, Masterson submitted a Trust Water Right Application to Ecology, WRTS File Nos. CS4-01467@11sb3a (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 to be used for any lawful purpose within the Yakima River basin in Kittitas County; 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”).

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;

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. **Purpose.** The purpose of this Agreement and the primary reason that Masterson is willing to place the Water into the Trust is to provide a senior water right as off-setting mitigation that will allow Masterson, or third parties acceptable to Masterson, to apply for and receive 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 Masterson’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. **Closing.** This Agreement shall be effective upon its mutual execution, and the Trust shall commence once the statutory warranty deed is executed, recorded, and delivered to Ecology. The term of this Agreement shall then be for so long as any portion of the Water remains in the Trust (the “Term”). Masterson’s executed statutory warranty deed shall be in a recordable form of the

Water to the Trust substantially in the form of Exhibit B attached hereto and incorporated herein (the "Deed").

3. Third Party Sales. The process for Masterson'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 Masterson 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 Masterson may elect, Masterson 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 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.

3.3 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 Masterson 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 .392

acre-feet (350 gallons per day on a 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.

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 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.

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 Yakima Pilot Water Bank 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 Masterson. If the form and substance of the draft ROE or water budget neutrality determination is acceptable to Masterson or the third party, Masterson 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 Masterson, or as otherwise set forth in the written escrow instructions or sale agreement between Masterson and the third party. Masterson and any third party having the right to do so under an agreement with Masterson, 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.

3.6 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 Masterson agree that investing in one or more upstream or headwaters riparian corridor projects would be desirable to address this nominal impact. Masterson 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.

3.7 Within 10 days of written request from Ecology to Masterson 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.

4. 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:

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 the Reports of Examination for Trust Water Right Application No. CS4-01467@11sb3a, 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 90.14.140(2)(h), at all times during the Term manage, maintain, preserve and protect for the benefit of Masterson 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;

4.3 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

4.4 Shall not assess or charge Masterson 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 Ecology's USBR contract for storage and exchange contract; and fees associated with assignment of Water in the Trust to offset impacts associated with the Groundwater Application or any New Application.

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 Masterson makes the following undertakings, representations and warranties to Ecology:

5.1.1 Kathleen Masterson is the personal representative of the Estate of Harry Masterson and fully able to enter into and perform all its obligations in this Agreement according to its terms.

5.1.2 Upon its full execution, this Agreement is binding upon Masterson in accordance with its terms.

5.1.3 Masterson 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 Masterson:

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; Default. Masterson 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 Masterson. 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:

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

6.1.1 Masterson shall identify all in-process designation agreements and inform Ecology of their status. Masterson 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.

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

6.1.3 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.

6.2 Pursue any other remedy now or hereafter available.

6.3 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 or the Groundwater Application.

7. Assignment. This Agreement may be assigned by Masterson 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.

8. Notices. Any notice or communication required by this Agreement between Masterson 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 Estate of Harry Masterson:

Estate of Harry Masterson
Attn. Kathleen Masterson
381 Masterson Road
Cle Elum, WA 98922

With copy to:
Washington Water Trust
Attn: Susan Adams
1530 Westlake Avenue N, Suite 400
Seattle, WA 98109

11. 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.

12. 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.

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

14. **Reciprocal Indemnification.** 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. **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: 
Mark Kemner, Section Manager
Water Resources Program, CRO

ESTATE OF HARRY MASTERSON

By: 
Kathleen Masterson, Personal Representative

EXHIBIT A
The Water

Note: Water right quantities reflect changes in purpose, and place of use in Ecology's Trust Water Report of Examination (ROE), file no. CS4-01467@11sb3a, dated and signed on March 28, 2012.

Court Claim No.: #01467

Source: Teanaway River

Purpose of Use: Instream flow for mitigation

Period of Use: Year-round

Instant. Quantity: 0.335 cfs May 1 – September 15; 0.045 cfs from September 16 – April 30

Annual Quantity: 49.035 acre-feet per year from May 1 - September 15; and 0.075 acre-feet per year from September 16 - April 30

Priority Date: June 30, 1883

Points of Diversion: A point 650 feet south and 1,140 feet west from the northeast quarter corner of Section 34, being within the NE ¼ NE ¼ of Section 34, T. 20 N., R. 16 E. W.M.

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

EXHIBIT B
The Land

Those portions of S ½ SW ¼, SW ¼ SE ¼ of Section 28, and N ½ NW ¼, N ½ NW ¼ NE ¼ of Section 33 lying southerly and westerly of Masterson Ditch and the portions of parcels numbered 293236, 093236, and 063236 in the N ½ SW ¼ of Section 28 lying south of the tree line, ALL being within T. 20 N., R. 16 E.W.M., Kittitas County, Washington; except those portions of the E ½ NW ¼ NW ¼ of Section 33, T. 20 N., R. 16 E.W.M. within Kittitas County Tax Parcel Number 625135 (Map Number 20-16-33020-0001).

| Map No. | Parcel No. | ¼ | ¼ | Section | Township | Range |
|------------------|------------|----|----|---------|----------|-------|
| 20-16-33010-0012 | 441336 | NW | NE | 33 | 20 N | 16 E |
| 20-16-33010-0011 | 431336 | NW | NE | 33 | 20 N | 16 E |
| 20-16-33020-0004 | 386036 | NW | NW | 33 | 20 N | 16 E |
| 20-16-33020-0005 | 396036 | NE | NW | 33 | 20 N | 16 E |
| 20-16-33020-0006 | 406036 | NE | SW | 33 | 20 N | 16 E |
| 20-16-28000-0028 | 253236 | SW | SE | 28 | 20 N | 16 E |
| 20-16-28000-0009 | 474636 | SW | SE | 28 | 20 N | 16 E |
| 20-16-28000-0030 | 013236 | SW | SE | 28 | 20 N | 16 E |
| 20-16-28000-0029 | 023236 | SW | SE | 28 | 20 N | 16 E |
| 20-16-28000-0027 | 223236 | SW | SW | 28 | 20 N | 16 E |
| 20-16-28000-0026 | 213236 | SW | SW | 28 | 20 N | 16 E |
| 20-16-28000-0025 | 203236 | SE | SW | 28 | 20 N | 16 E |
| 20-16-28000-0006 | 335035 | SE | SW | 28 | 20 N | 16 E |
| 20-16-28000-0021 | 293236 | NW | SW | 28 | 20 N | 16 E |
| 20-16-28000-0020 | 093236 | NW | SW | 28 | 20 N | 16 E |
| 20-16-28000-0017 | 063236 | NE | SW | 28 | 20 N | 16 E |

**EXHIBIT C
FORM OF DEED**

STATUTORY WARRANTY DEED

When Recorded Return to:

| | |
|---|--|
| (Space above this line for recorder's use only) | |
| DOCUMENT TITLE: | Statutory Warranty Deed |
| REFERENCE NUMBER(S) OF RELATED DOCUMENTS: | N/A |
| Additional reference numbers on page(s) <u>N/A</u> of document. | |
| GRANTOR: | Estate of Harry Masterson Kathleen Masterson, Personal Representative 381 Masterson Road Cle Elum, WA 98922 |
| GRANTEE: | State of Washington Department of Ecology |
| ABBREVIATED LEGAL DESCRIPTION: | Portions of Sec. 28 and Sec. 33, T. 20 N., R. 16 E.W.M. |
| Additional legal on Exhibit 1 of document. | |
| ASSESSOR'S TAX PARCEL NO(S). | _____ _____ _____ _____ |

STATUTORY WARRANTY DEED

Kathleen Masterson of 381 Masterson Road, Cle Elum, WA 98922, in her capacity as Personal Representative for the Estate of Harry Masterson ("GRANTOR"), for and in consideration of TEN AND NO/100 DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, conveys and warrants to Washington State Department of Ecology ("GRANTEE"), the water rights legally described on Exhibit 1 attached hereto, situate in the County of Kittitas, State of Washington (the "Property").

REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK. SIGNATURE PAGE FOLLOWS.

Dated: _____, 2012.

GRANTOR:

GRANTEE:

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

By _____

Its: _____

[Attach appropriate acknowledgements and exhibits]

EXHIBIT D

CONSUMPTIVE QUANTITIES

ASSOCIATED WITH Court Claim No. 01467 as stated as Mitigation purpose of use in Ecology Report of Examination No. CS4-01467@11sb3a

| Purpose | Unit | May | June | July | August | Sep 1-15 | Sept 16 - April 30 | Total |
|-------------------------|------|-------|-------|--------|--------|-------------|-----------------------|-------|
| Mitigation (average) | af | 0.002 | 6.812 | 13.152 | 9.732 | 7.061 | 0.015 | 36.77 |
| | cfs | 0.001 | 0.111 | 0.211 | 0.161 | 0.121 | 0.001 | - |