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DEPARTMENT OF ECOLOGY
State of Washington

# State of Washington
# REPORT OF EXAMINATION
# FOR WATER RIGHT APPLICATION

S4-35378
WR Doc ID: 4689605

**PRIORITY DATE**
June 25, 2010

**WATER RIGHT NUMBER**
S4-35378

**MAILING ADDRESS**
James A. Mallon & Judith A. Mallon
2020 223rd Pl. N.E.
Sammamish, Washington 98074

**SITE ADDRESS (IF DIFFERENT)**
161 Kachess Lane
Easton, Washington 98925

## Quantity Authorized for Withdrawal or Diversion

| DIVERSION RATE | UNITS | ANNUAL QUANTITY (AC-FT/YR) |
|---|---|---|
| 0.02 | CFS | 0.20 |

## Purpose

| PURPOSE | DIVERSION RATE ADDITIVE | DIVERSION RATE NON-ADDITIVE | UNITS | ANNUAL QUANTITY (AC-FT/YR) ADDITIVE | ANNUAL QUANTITY (AC-FT/YR) NON-ADDITIVE | PERIOD OF USE (mm/dd) |
|---|---|---|---|---|---|---|
| Single Domestic (Indoor Use) | 0.02 | | CFS | 0.20 | | Continuous |

**REMARKS:** Consumptive use is limited to 0.06 ac-ft/yr, which is mitigated by a portion of Certificate of Trust Water No. S4-01746CTCLsb10(b).

## Source Location

| COUNTY | WATERBODY | TRIBUTARY TO | WATER RESOURCE INVENTORY AREA |
|---|---|---|---|
| Kittitas | Unnamed Spring | Kachess Lake | 39-Kittitas |

| SOURCE FACILITY/DEVICE | PARCEL | TWN | RNG | SEC | QQ Q | LATITUDE | LONGITUDE |
|---|---|---|---|---|---|---|---|
| Point of Diversion | 056835 | 21N | 13E | 21 | NWNE | 47°18'14.46"N | -121°12'58.91"W Datum: WGS84 |

## Place of Use (See Map: Attachment 1)

**PARCEL**
018936

**LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE**
Lot 97, Lake Kachess Summer Home Sites, in the County of Kittitas, State of Washington, as per plat thereof recorded in Book 4 of Plats, pages 23 and 24, records of said County.

## Proposed Works

Water is diverted from a small improved spring, conveyed a short distance via 2-inch diameter PVC pipe to a 300 gallon storage tank, and then delivered to the cabin by a 1-inch diameter PVC service line under gravity flow. Water which is not consumptively used is discharged to an individual on-site septic system.

The point of diversion is shared by three cabins located on Parcel Nos. 946835 (Jerald Williams), 018936 (James and Judith Mallon), and 272236 (Steve Defoe).

## Development Schedule

| BEGIN PROJECT | COMPLETE PROJECT | PUT WATER TO FULL USE |
|---|---|---|
| Complete | Complete | May 30, 2017 |

## Measurement of Water Use

| | |
|---|---|
| How often must water use be measured? | Monthly |
| How often must water use data be reported to Ecology? | Annually (Jan 31) |
| What volume should be reported? | Total Annual Volume |
| What rate should be reported? | Annual Peak Rate of Withdrawal (cfs) |

## Provisions

**General**

You will record with the Kittitas County Auditor a property covenant as required under WAC 173-539A-050 that restricts or prohibits trees or shrubs over a septic drain field on Parcel No. 018936.

You will record with the Kittitas County Auditor an appropriate conveyance instrument under which the applicant obtains an interest in Trust Water Certificate No. S4-01746CTCLsb10(B) to offset consumptive use as described in this report.

**Mitigation**

Water use under this authorization is contingent upon the conveyance of an equal (0.06 acre-feet per year) or greater amount of consumptive use from a suitable instream flow right (Certificate of Trust Water Right No. S4-01746CTCLsb10(b)) to the Washington State Trust Water Right Program (TWRP).

During periods of water shortages, valid priority calls against the source Trust Water Certificate No. S4-01746CTCLsb10(b), based on local limitations in water availability, may result in temporary curtailment of the use of water under the permit until the priority call for water ends.

**Measurements, Monitoring, Metering and Reporting**

An approved measuring device shall be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use", WAC 173-173, which describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition the Department of Ecology for modifications to some of the requirements.

Recorded water use data shall be submitted via the Internet. To set up an Internet reporting account, contact the Central Regional Office. If you do not have Internet access, you can still submit hard copies by contacting the Central Regional Office for forms to submit your water use data.

**Easement and Right-of-Way**

The water source and/or water transmission facilities are not wholly located upon land owned by the applicant. Issuance of a water right authorization by this department does not convey a right of access to, or other right to use, land which the applicant does not legally possess. Obtaining such a right is a private matter between applicant and owner of that land.

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**Water Use Efficiency**

Use of water under this authorization shall be contingent upon the water right holder's maintenance of efficient water delivery systems and use of up-to-date water conservation practices consistent with established regulation requirements.

**Proof of Appropriation**

The water right holder shall file the notice of Proof of Appropriation of water (under which the certificate of water right is issued) when the permanent distribution system has been constructed and the quantity of water required by the project has been put to full beneficial use. The certificate will reflect the extent of the project perfected within the limitations of the permit. Elements of a proof inspection may include, as appropriate, the source(s), system instantaneous capacity, beneficial use(s), annual quantity, place of use, and satisfaction of provisions.

**Certification**

A permit will issue to appropriate surface water based on the quantities described on Page 1 of this report following the appeal period for this decision, and will remain in permit status through the pendency of the Yakima County Superior Court Adjudication Proceedings *State of Washington v. Acquavella*. A final certificate will issue only after the Court's Final Decree is entered and all matters (i.e. appeals) in the Adjudication Proceedings are settled.

**Schedule and Inspections**

Department of Ecology personnel, upon presentation of proper credentials, shall have access at reasonable times, to the project location, and to inspect at reasonable times, records of water use, wells, diversions, measuring devices and associated distribution systems for compliance with water law.

**Findings of Facts**

Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that water is available from the source in question; that there will be no impairment of existing rights; that the purpose(s) of use are beneficial; and that there will be no detriment to the public interest.

Therefore, I ORDER approval of Application No. S4-35378, subject to existing rights and the provisions specified above.

## YOUR RIGHT TO APPEAL

You have a right to appeal this Decision to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Decision. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do all of the following within 30 days of the date of receipt of this Decision:

- File your appeal and a copy of this Decision with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Decision on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

**ADDRESS AND LOCATION INFORMATION**

| Street Addresses | Mailing Addresses |
|---|---|
| **Department of Ecology**<br>Attn: Appeals Processing Desk<br>300 Desmond Drive SE<br>Lacey WA 98503<br><br>**Pollution Control Hearings Board**<br>1111 Israel Road SW, Suite 301<br>Tumwater WA 98501 | **Department of Ecology**<br>Attn: Appeals Processing Desk<br>PO Box 47608<br>Olympia WA 98504-7608<br><br>**Pollution Control Hearings Board**<br>PO Box 40903<br>Olympia WA 98504-0903 |

*For additional information visit the Environmental Hearings Office Website: http://www.eho.wa.gov*
*To find laws and agency rules visit the Washington State Legislature Website: http://www.leg.wa.gov/CodeReviser*

Signed at Yakima, Washington, this 6 day of MARCH 2013.

Mark Kemner, Section Manger
Water Resources Program/CRO
Department of Ecology

## INVESTIGATOR'S REPORT

### BACKGROUND

#### Project Description

On June 25, 2010, James A. Mallon & Judith A. Mallon filed Application No. S4-35378 with the Washington State Department of Ecology (Ecology) requesting an appropriation of public surface water. The applicant proposes to divert an instantaneous rate (Qi) of 0.02 cubic feet per second (cfs) and a cumulative annual diversion volume (Qa) of 0.20 acre-feet per year (ac-ft/yr). The purpose of use is for single domestic (indoor only) supply year round, as needed.

The subject application is one of 19 applications submitted by members of the East Kachess Homeowners Association, part of a larger project in which Ecology is assisting with water banking opportunities for cabin owners in the Yakima Basin. The applicant intends to mitigate for consumptive use of this proposed use through purchase of mitigation credits from the Williams Family Trust Water Bank (Certificate of Trust Water Right No. S4-01746CTCLsb10(b)), subject to an agreement between The Williams Family Trust Water and Ecology, signed on December 8, 2011. The application would therefore be water budget neutral with respect to Total Water Supply Available (TWSA). Out-of-season and/or carry over impacts to instream flows would be managed with use of Water Storage and Exchange Contract No. 09XX101700 between Ecology and the United States Bureau of Reclamation.

**Table.** Summary of Application No. S4-35378

| *Attributes* | *Proposed* |
|---|---|
| Applicant | James A. Mallon & Judith A. Mallon |
| Application Received | June 25, 2010 |
| Instantaneous Quantity | 0.02 cubic feet per second |
| Source | Unnamed Spring |
| Point of Diversion | NW¼, NE¼, Section 21, T. 21 N., R. 13 E.W.M. |
| Purpose of Use | Single Domestic (indoor only) |
| Period of Use | Year round |
| Place of Use | Kittitas Parcel No. 018936 |

**Legal Requirements for Application Processing**

The following requirements must be met prior to processing a water right application:

- **Public Notice**

  Notice of the proposed appropriation was published in The Daily Record of Ellensburg, Washington, on December 12 and 19, 2011. The public notice described both the transfer to trust, Application No. CS4-01746CTCLsb10 and the 19 applications on Kachess Lake proposing to use the trust right for mitigation. One protest was received during the 30-day comment period and is addressed in the Consideration of Protests and Comments section below.

- **State Environmental Policy Act (SEPA)**

  The subject application is categorically exempt under SEPA (WAC 197-11-305 and WAC 197-11-800(4)) because the instantaneous quantity is less than the 1.0 cfs threshold.

- **Water Resources Statutes and Case Law**

  RCW 90.42.100(1) states that Ecology is authorized to use the Trust Water Rights Program (TWRP) in the Yakima River basin for water banking purposes. RCW 90.42.100(2)(a) states that water banking may be used to mitigate for any beneficial use under chapter 90.03, 90.44 or 90.54 RCW, consistent with any terms and conditions established by the transferor, except that return flows from water rights authorized in whole or in part for any purpose shall remain available as part of the Yakima basin's total water supply available and to satisfy existing rights for other downstream uses and users. RCW 90.42.100(2)(b) states that water banking may be used to document water right transfers to and from the Trust Water Rights Program.

- **Expedited Processing**

  This application qualifies for expedited processing under WAC 173-152-050(2)(d) which would result in providing for public water supplies. Based on the provisions of RCW 43.21A.690 and RCW 90.03.265, this application has been processed by Aspect Consulting, LLC (Aspect Consulting) under Ecology Cost-Reimbursement Assignment No. ASP011 (Master Contract No. C1000185).

**INVESTIGATION**

In consideration of this application, Aspect Consulting reviewed available documents pertaining to the historic use of water, site conditions, and the potential effect on existing water rights. This included information submitted by the applicant and pertinent Ecology records including adjudication and water rights records and water resource policy and guidance documents.

A site visit was completed on July 22, 2011. Tyson Carlson of Aspect Consulting visited with each available cabin owner to inspect the point of diversion(s), place of use, and answer questions regarding estimates of total or consumptive use.

This project was presented at the Water Transfer Working Group (WTWG) on August 30, 2010. This group represents private, federal, state and tribal groups interested in water right changes in the Yakima Basin. There were no objections to the cabins on Kachess Lake receiving surface water permits mitigated by a senior water right from Schnebly Creek, as long as the consumptive use quantity needed for mitigation is assigned to Water Storage and Exchange Contract No. 09XX101700 between Ecology and the USBR.

In addition, Ecology has sought consultation with Reclamation who controls all remaining unappropriated waters of the Yakima River – including all tributaries and groundwater in continuity. Reclamation subsequently granted a release of water for the subject application via email received on May 4, 2012.

**Site Description**

The proposed point of diversion is located on the 56-acre tract of land located on the east side of Forest Service Road 4818, in the northwest quarter of the northeast quarter of Section 21, T. 21 N., R. 13 E. W. M., in the Kittitas Water Resource Inventory Area (WRIA 39). The tract of land is jointly owned by members of the Lake Kachess Cabin Owners Association, intended to be preserved in its natural state to protect the numerous diffuse hill-side springs that have supported the vacation cabin community for nearly 50 years.

The point of diversion is a small improved spring in which water is conveyed a short distance via 2-inch diameter PVC pipe to a 300 gallon storage tank located at the spring site, and then delivered to the place of use by a 1-inch diameter PVC service line under gravity flow. Water which is not consumptively used is discharged to an individual on-site septic system.

The point of diversion is shared by three cabins located on Parcel Nos. 946835 (Jerald Williams), 018936 (James and Judith Mallon), and 272236 (Steve Defoe). In addition to the historic surface water source, the Williams cabin is supported by a shared groundwater well for emergency backup purposes. The well (No. BAP031) was drilled on November 8, 2008, prior to the withdrawal of all unappropriated groundwater in upper Kittitas County under WAC 173-539A, and therefore qualifies for the domestic groundwater permit exemption under RCW 90.44.050. The well is shared with neighboring Parcel No. 018936 (James and Judith Mallon).

**Domestic Water Use**

Senate Bill 6861 directed Ecology to facilitate the purchase of senior mitigation credits to offset the consumptive use of out-of-priority or unpermitted water use. In response, Ecology (2006) completed a survey to identify the number of water users that rely on surface water, how they use water (in-house and/or outside irrigation), and how much water they use. Ecology received 285 completed surveys from water users with and without water rights. Ecology estimated the group's annual water use by multiplying the gallon per day identified on the survey by the number of days the cabin was occupied. In cases where a water duty was not provided, Ecology used criteria developed for mitigation during the 2005 drought and/or procedures outlined in the Washington State Department of Health (2009) Water System Design Manual.

A full time single residence with no irrigation is required to demonstrate a maximum daily demand of 350 gallons per day (gpd) to qualify as an adequate water supply, per Chapter 246-291 WAC. By definition, the maximum daily demand is at least 2 times greater than the average daily demand in Eastern Washington for indoor use (DOH 2009, pg 226). Therefore, the average daily demand is equal to 175 gpd, or a cumulative annual diversion volume (Qa) of 0.20 ac-ft/yr. Per WAC 173-529A-050(3), consumptive use is defined as 30 percent of Qa, equaling 0.06 ac-ft/yr. Based on this rationale, estimated total and consumptive use quantities by month are summarized in Table 2. Because most cabins are rustic and use very little water, and few are occupied year-round, the numbers are considered to be a liberal estimate of actual use.

**Table 2** – Schedule of Estimated Total and Consumptive Use.

| | Jan | Feb | Mar | April | May | June | July | Aug | Sept | Oct | Nov | Dec | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Total Use (acre-feet)** | 0.017 | 0.015 | 0.017 | 0.016 | 0.017 | 0.016 | 0.017 | 0.017 | 0.016 | 0.017 | 0.016 | 0.017 | **0.20** |
| **Consumptive Use (acre-feet)** | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | 0.005 | **0.06** |

**Four Statutory Tests**

This Report of Examination (ROE) evaluates the application based on the information presented above and in referenced documents. To approve the application, Ecology must issue written findings of fact and determine that each of the following four requirements of RCW 90.03.290 has been satisfied:

1. The proposed appropriation is a beneficial use;
2. Water is available for appropriation;
3. The proposed appropriation would not impair existing water rights; and
4. The proposed appropriation would not be detrimental to the public welfare.

**Beneficial Use**

In accordance with RCW 90.54.020(1), the proposed appropriation for single domestic indoor use is a beneficial use of water. As detailed on the Application for Permit, the point of diversion is supported by the necessary infrastructure to deliver the full appropriation of water to the cabin.

**Availability**

The small spring has supported three connections for up to 50 years. The water source is one of numerous springs emanating from the steep hillside on the 56-acre tract of land preserved for the protection of the cabin community's water supply.

The appropriation proposed under the subject application will be water budget neutral by dedicating 0.06 ac-ft/yr of consumptive use available from the Williams Family Trust Water Bank. Month-by-month mitigation is offered to account for the project's indoor only use during the irrigation season (April 1 – October 15). Out-of- season (October 16 – March 31) use and/or potential carry over impacts to instream flows will be mitigated through the USBR-Ecology Water Storage and Exchange Contract.

**Potential for Impairment**

RCW 90.03.290 and RCW 90.44.060 require a determination that a new appropriation will not impair existing rights. There are no water right certificates, permits, or claims between the proposed point of diversion and Kachess Lake. Furthermore, Kachess Lake is a proportional massive water body which will not be affected by the proposed appropriation.

Kachess Lake is a migratory barrier to anadromous salmonids (Kachess Dam has no fish passage facilities), and the numerous diffuse springs do not converge in a single tributary large enough to provide habitat for anadromous salmonids or resident fish species (Reclamation 2005). In addition, Washington Department of Fish and Wildlife (WDFW) fish distribution data indicate no occurrence of Bull Trout or other Endangered Species Act (ESA)-listed fish.

Therefore, no impairment to existing rights or to local habitat will occur. Assignment of 0.06 acre-feet is appropriate, given that the flow reduction resulting from this permitted use is below the consultation threshold in paragraph 18(b) of the USBR-Ecology contract.

**Public Welfare**

The proposed appropriation will provide authorization for domestic supply to the rural cabin community, and is not detrimental to the public interest as provisioned.

**Consideration of Protests and Comments**

On January 10, 2012 a letter of protest was received on behalf of the Ellensburg Water Company, Cascade Irrigation District, and West Side Irrigating Company ("Irrigation Water Providers). The letter cites that the Irrigation Water Providers have authorized points of diversion on the mainstem Yakima River between the downriver source of mitigation (Trust Water Certificate No. S4-01746CTCLsb10(b)) and the proposed upriver mitigated users (on Kachess Lake), and that the trust right does not contribute to instream flows along this reach.

The Irrigation Water Providers assert that Yakima River flows at their points of diversion "will be negatively impacted – unless or until the USBR can provide operational guarantees that any such mainstem Yakima River deficit will be eliminated by means of additional (upstream) reservoir spills." Therefore, Ecology will assign a portion of the consumptive use (from September 1-March 31) to the USBR-Ecology Water Storage and Exchange Contract No. 09XX101700 to mitigate for out-of-season and any potential carry over impacts to instream flows.

The protest letter also questions the reliability of the trust water right in late season and that permitting new uses based on using this right as mitigation may enlarge the original claim (No. 01746). However, Mr. Williams has been able to fully irrigate his acreage with the claim during the late season. In addition, Ecology does not have any records of curtailment of this right on Schnebly Creek. Therefore, the reliability of this water right is sufficient for the proposed purpose of use (mitigation) and any new mitigated permits will be provisioned accordingly.

**CITATIONS**

Ecology 2006. 2006 Report to the Legislature, Potential Water Solution for Domestic Surface Water Users, Yakima Basin Camps & Cabin Owners. Publication No. 06-11-044. December 2006.

Health 2009. Water System Design Manual. DOH 331-123 (REV. 12/09). December 2009.

Reclamation, 2005. Phase I Assessment Report, Storage Dam Fish Passage Study, Yakima Project, Washington. Revised April 2005

WDFW. SalmonScape. http://wdfw.wa.gov/mapping/salmonscape/index.html.

## CONCLUSIONS

The conclusions based on the above investigation are as follow:

1. The proposed appropriation for single domestic use (indoor only) is a beneficial use of water;
2. The quantity of water requested is made available by purchase of mitigation credits;
3. The proposed appropriation will not impair senior water rights or local habitat; and
4. The proposed appropriation will not be detrimental to the public interest.

## RECOMMENDATION

Based on the information presented above, the author recommends that a permit be authorized to appropriate surface water in the amounts described, limited, and provisioned on page 1 through 3 of this report.

**Purpose of Use and Authorized Quantities**

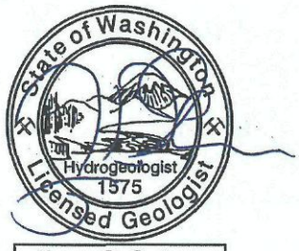
0.02 cfs, 0.20 ac-ft/yr for continuous single domestic use.

**Point of Diversion**

NW¼, NE¼, Section 21, T. 21 N., R. 13 E.W.M.

**Place of Use**

Lot 97, Lake Kachess Summer Home Sites, in the County of Kittitas, State of Washington, as per plat thereof recorded in Book 4 of Plats, pages 23 and 24, records of said County.




Report by: _____

Tyson D. Carlson, LHG, Aspect Consulting, LLC — Date

Reviewed by: Kelsey S. Collins 3/6/13

Kelsey S. Collins, Water Resources Program — Date

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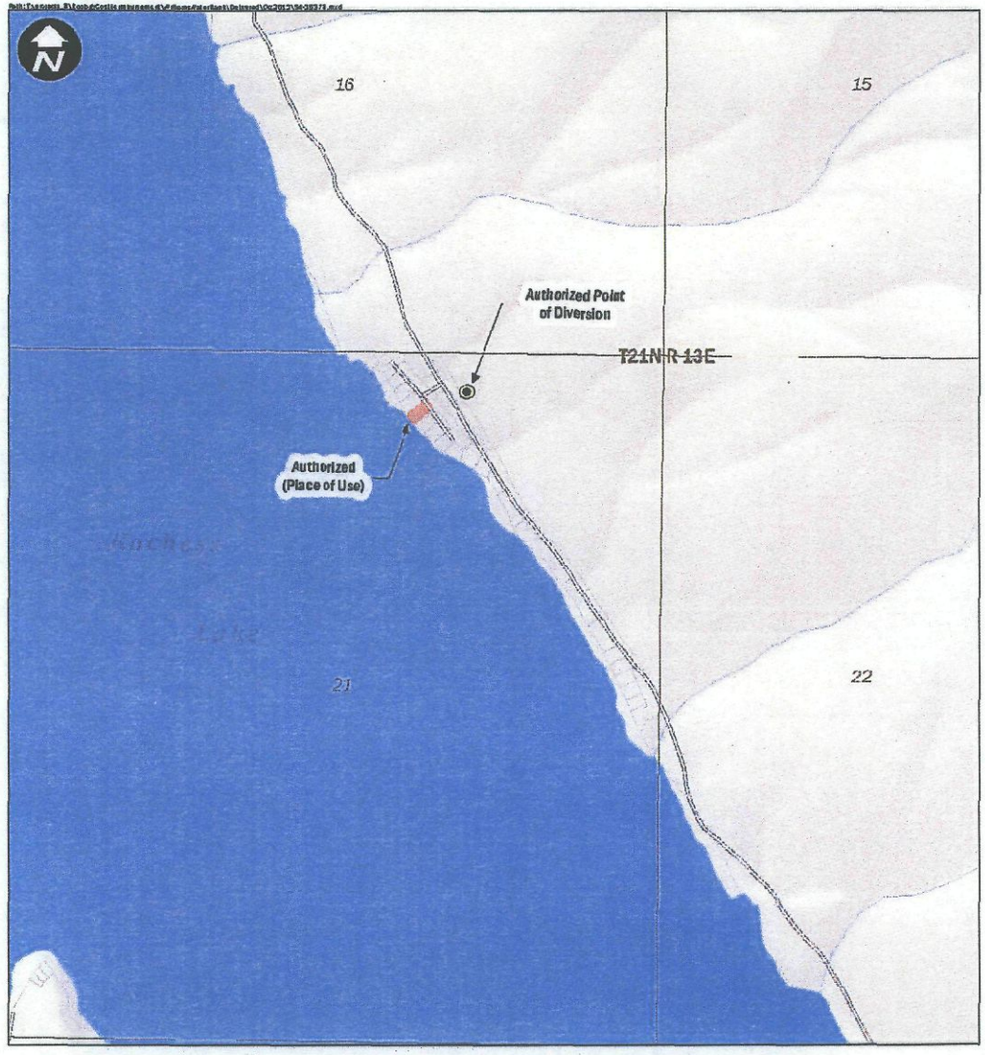
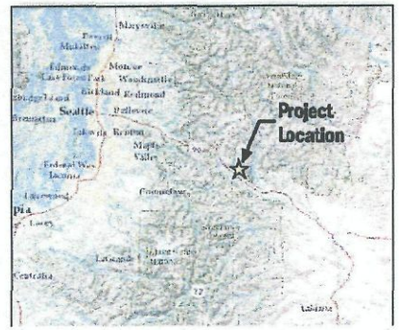
Attachment 1




**Comments:** *Place of use and point of diversion are defined on the cover sheet under the heading "LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS TO BE USED."*

**LEGEND**

*Place of Use:*

Place of Use

Authorized Point of Diversion

Local Road

Tax Parcel

Township/Range

Sections

0 1,000 2,000

Feet

**No. S4-35378**

James A. & Judith A. Mallon

T21N/R13E - Section 21

Kittitas County, Washington

| Aspect CONSULTING | November, 2012 | | ATTACHMENT NO. |
|---|---|---|---|
| | 090180 | TDC/ EAH | 1 |

REPORT OF EXAMINATION