



State of Washington  
 Department of Ecology  
 Office of Columbia River  
 Report of Examination for  
 Trust Water Change Application  
 CG4-01203C

File NR CG4-01203C  
 WR Doc ID 6007783

Changed Place of Use, Change Point of Withdrawal, and changed Purpose of Use

<b>PRIORITY DATE</b> 7/30/1971	<b>CHANGE AUTHORIZATION NUMBER</b> CG4-01203C	<b>TRUST TERM</b> Permanent
<b>WATER RIGHT OWNER</b> Kyle Mathison and Steven Shiflett 4597 Stemilt Hill Rd. Wenatchee, WA 98801-8933		

**Purpose, Rate, and Quantity**

The right has changed from irrigation to the purposes of instream flow and mitigation for out-of-stream uses. The right will convey by Quit Claim Deed to the State’s Trust Water Rights Program (Trust). The right has the maximum instantaneous flow rate and annual quantity values allocated in the following manner:

Period	Primary Reach		Secondary Reach	
	Flow (cfs)	Acre-feet	Flow (cfs)	Acre-feet
05/1 -10/15	N/A	N/A	1.5	283

The Primary Reach of an instream flow Trust Water Right is that portion of a water body that benefits from both the former consumptive use and former return flow waters of a water right. Downstream of the Primary Reach is found the Secondary Reach. The Secondary Reach benefits only from the former consumptive use as the return flow would have found its way back to the water body under the previously authorized use. Values given for the Secondary Reach would mitigate proposed out-of-stream uses located downstream along the Columbia River near Malaga, WA. Attributes of these proposed out-of-stream uses are captured in applications S4-29956 and S4-31083.

The quantity conveyed to Trust is further limited by monthly values given in Table 1 below:

**Table 1: Monthly Trust Water Quantities and Rates from WIG Data (pasture/turf at Nespelem Station)**

Monthly Trust Water Quantities and Rates							
	May	June	July	August	September	October	Total
<b>Qa (ac-ft)</b>	19.6	60.5	86.0	71.3	42.8	2.7	283.0
<b>Qi (cfs)</b>	0.3	1.0	1.4	1.2	0.7	0.0	N/A

**Trust Water Right Place of Use (See Attached Map)**

REACH	WATERBODY	TRIBUTARY TO	COUNTY	WATER RESOURCE INVENTORY AREA
Begin Secondary Reach	W.F. San Poil River	Columbia River	Okanogan	52 - Sanpoil
End Secondary Reach	Columbia River	Pacific Ocean	Chelan	40 – Alkali-Squilchuck

As discussed in the Investigator’s Report, a Primary Reach for this proposal is not warranted. The Secondary reach begins at a point located at N 48.57364, E -119.06771 (in NAD 83) and within the NE¼SE¼ of Section 33, T. 36N., R. 30E.W.M., and ends at a diversion point located within the SW¼SE¼ of Section 19, T. 22N., 21E.W.M.

**Proposed Works**

None. Water formerly withdrawn under G4-01203C remains in the aquifer and conveys to Trust.

**Provisions****General**

The water to convey to Trust under CG4-01203C is intended to mitigate new appropriations as captured within applications S4-29956 and S4-31083. If applications S4-29956 and S4-31083 are processed favorably and after any appeals favorably resolved:

- 1) All irrigation at the original Place of Use shall cease under G4-01203C.
- 2) Within 30 days of the last appeal period, the irrigation component of Surface Water Claim S4-069422Cl shall be voluntarily relinquished. Any authorizations that issue under applications S4-29956 and S4-31083 shall be provisioned such.
- 3) Within 30 days of the last appeal period, a Quit Claim Deed shall be filed with the Washington Department of Ecology conveying the authorized Trust water quantity and rate(s) under this Report of Examination to the Washington Department of Ecology.
- 4) Any authorizations that issue under applications S4-29956 and S4-31083 shall be provisioned such that they are subject to any cessation or modification resulting from a finding of impairment pursuant to RCW 90.42.040(4)(b).

If the four steps listed above are complied with, a Trust Water Certificate shall issue in the name of the Washington Department of Ecology for the amounts conveyed to Trust under this authorization.

**Real Estate Excise Tax**

This decision may indicate a Real Estate Excise Tax liability for the seller of water rights. The Department of Revenue has requested notification of potentially taxable water right related actions, and therefore will be given notice of this decision, including document copies. Please contact the state Department of Revenue to obtain specific requirements for your project. Phone: (360) 570-3265. The mailing address is: Department of Revenue, Real Estate Excise Tax, PO Box 47477, Olympia WA 98504-7477. Internet: <http://dor.wa.gov/> or E-mail: [REETSP@DOR.WA.GOV](mailto:REETSP@DOR.WA.GOV).

**Findings of Fact**

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. CG4-01203C, subject to existing rights and the provisions specified above.

**Your Right To Appeal**

You have a right to appeal this Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Order. 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 the following within 30 days of the date of receipt of the Order.

File your appeal and a copy of this Order 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 Order 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.

Street Addresses	Mailing Addresses
<p><b>Department of Ecology</b> Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503</p>	<p><b>Department of Ecology</b> Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608</p>
<p><b>Pollution Control Hearings Board</b> 1111 Israel RD SW, Ste. 301 Tumwater, WA 98501</p>	<p><b>Pollution Control Hearings Board</b> PO Box 40903 Olympia, WA 98504-0903</p>

Signed at Yakima, Washington, this \_\_\_\_\_ day of \_\_\_\_\_ 2015.

\_\_\_\_\_  
Mark C. Schuppe, Operations Manager

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://www1.leg.wa.gov/CodeReviser>.

INVESTIGATOR'S REPORT  
 Water Right Control Number CG4-01203C  
 Kyle D. Mathison, Applicant  
 Thomas Perkow, Department of Ecology

**BACKGROUND**

The general location of the site is near the confluence of Aeneas Creek and the West Fork of the Sanpoil River in Okanogan County. The intent is to cease irrigating all acres under this and the two other related water right documents (surface water certificate SWC 9231 and surface water claim S4-069422Cl (hereafter referred to as "the Claim")) and convey the formerly used water into the State's Trust Water Rights Program (Trust). Trust water would be used as mitigation for new out-of-stream uses in Chelan County as captured in new water right applications S4-29956 and S4-31083. The subject change application was submitted on October 30, 2013, by Kyle D. Mathison and assigned tracking number CG4-01203C. Two other related change applications were filed concurrently (CS4-SWC9231 and CS4-069422Cl), proposing similar changes.

**EXISTING Water Right Attributes**

<b>Water Right Owner:</b>	Kyle Mathison and Steven Shiflett
<b>Priority Date:</b>	7/30/1971
<b>Place of Use</b>	All those portions of Government Lots 1, 4, 5, 9, 10, 11, and 12 of Section 33 AND Government Lots 7 and 9 of Section 34, T. 36N., R. 30E.W.M. lying northerly and easterly of the highway.

<b>County</b>	<b>Waterbody</b>	<b>Tributary To</b>	<b>WRIA</b>
Okanogan	Groundwater		52-Sanpoil

<b>Purpose</b>	<b>Rate</b>	<b>Unit</b>	<b>Ac-ft/yr</b>	<b>Begin Season</b>	<b>End Season</b>
Irrigation of 150 acres	800	gpm	640	04/15	10/15

<b>Source Name</b>	<b>Parcel</b>	<b>Well Tag</b>	<b>Twp</b>	<b>Rng</b>	<b>Sec</b>	<b>QQ Q</b>	<b>Latitude</b>	<b>Longitude</b>
Well	3630330016		36N.	30E.W.M.	33	SW NE	48.5768	-119.0738

gpm = Gallons per Minute; Ac-ft/yr = Acre-feet per year; Sec. = Section; QQ Q = Quarter-quarter of a section; WRIA = Water Resource Inventory Area; E.W.M. = East of the Willamette Meridian; Datum in WGS84; Lat-Long coordinates estimated.

**REQUESTED Water Right Attributes**

<b>Name:</b>	The Washington Department of Ecology
<b>Date of Application:</b>	10/30/2013
<b>Place of Use:</b>	A Secondary Reach only as recommended at the end of this report.

County	Waterbody	Tributary To	WRIA
Okanogan	Aeneas Creek	Pacific Ocean	52-Sanpoil
Okanogan	West Fork Sanpoil River	Sanpoil River	52-Sanpoil
Okanogan	Sanpoil River	Columbia River	52-Sanpoil
Chelan	Columbia River	Pacific Ocean	40-Alkali-Squilchuck

Purposes	Rate	Unit	Acre-feet/yr	Begin Season	End Season
Instream Flow and Mitigation	800	gpm	640	04/15	10/15

## Legal Requirements for Requested Change

The following lists and describes requirements that must be met prior to authorizing the proposed change in place of use and in purpose of use.

### **Public Notice**

RCW 90.03.280 requires that notice of a water right application be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county or counties where the water is to be stored, diverted and used. Notice of this application was published in the 1) Douglas County Empire Press on March 13 and 20, 2014; 2) Omak-Okanogan County Chronicle on March 12 and 19, 2014; and 3) Wenatchee World on March 7 and 14, 2014.

### **Notice to the Washington Department of Fish and Wildlife**

Pursuant to RCWs 90.42.040(5)(b), 90.42.110(2), 90.03.280, and 77.57.020, Ecology must give notice to the Washington Department of Fish and Wildlife (WDFW) of applications to divert, withdraw or store water. On April 11, 2014, notice was mailed to WDFW in conjunction with the Trust Water notice discussed next. The project as a whole was described.

### **Creation of Trust Water Notice**

Pursuant to RCW 90.42.040(5)(b), "...the department shall send a notice containing pertinent information to all appropriate state agencies, potentially affected local governments and federally recognized tribal governments, and other interested parties." Such notice was sent on April 11, 2014, to a wide variety of agencies, tribes, and interested parties. A list of recipients can be obtained by request from Ecology's Office of Columbia River. Additionally, discussion on this project took place between Ecology representatives (including the author of this ROE) and the Water Rights Administrator for the Confederated Tribes of the Colville Reservation (the Tribe), Lois Trevino, and the Tribe's consultant, Fred Rajala, in August, September, and October of 2014.

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

A water right application is subject to a SEPA threshold determination (i.e. an evaluation whether there are likely to be significant adverse environmental impacts) if any one of the following conditions are met:

- (a) It is a surface water right application for more than one cubic foot per second, unless that project is for agricultural irrigation, in which case the threshold is increased to 50 cubic feet per second, so long as that irrigation project will not receive public subsidies;
- (b) It is a groundwater right application for more than 2,250 gpm;
- (c) It is an application that, in combination with other water right applications for the same project, collectively exceed the amounts above;

- (d) It is a part of a larger proposal that is subject to SEPA for other reasons (e.g. the need to obtain other permits that are not exempt from SEPA);
- (e) It is part of a series of exempt actions that, together, trigger the need to do a threshold determination, as defined under WAC 197-11-305.

Because this application does not meet any of these conditions, it is categorically exempt from SEPA and a threshold determination is not required.

### ***Water Resources Statutes and Case Law***

RCW 90.03.380(1) states that a water right that has been put to beneficial use may be changed. The point of diversion, place of use, and purpose of use may be changed if it would not result in harm or injury to other water rights.

Chapter 90.42 RCW authorizes Ecology to acquire water for Trust and to use this water for water banking purposes.

The Washington Supreme Court has held that Ecology, when processing an application for change to a water right, is required to make a tentative determination of the validity and extent of the claim or right. This is necessary to establish whether, and to what extent, the claim or right is eligible for change. *R.D. Merrill v. PCHB* and *Okanogan Wilderness League v. Town of Twisp*.

## **INVESTIGATION**

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### **History of Water Use and Tentative Determination of Validity and Extent**

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The subject right originally issued in June of 1977, with a priority of July 30, 1971, for the irrigation of 150 acres from a well located near Aeneas Creek. The original Report of Examination (ROE) for this right, written in 1975, mentions that a “supplemental” relationship exists between this and SWC 9231 (1958 priority). SWC 9231 authorizes the irrigation of 104 acres from a proximate diversion located on Aeneas Creek. The 1975 ROE for the subject right indicates that, of the 150 acres authorized, irrigation of lands already irrigated under SWC 9231 would be secondary while the remainder would be considered primary. Curiously, it does not mention the Claim, which was filed the year before in 1974. The place of use of G4-01203C overlaps with SWC 9231 and S4-069422C1 at the subject area proposed for change.

A review of documents (relevant permitting documents for SWC 9231 and G4-01203C, the Claim, surveyor’s notes from 1909 found on the Bureau of Land Management (BLM) website, and a 1910 map found on the BLM website) determined that irrigation likely did not occur here until much closer to 1958 than 1900. Firstly, the 1958 ROE for SWC 9231 indicates that only 35 acres were irrigated at that time and that no water had been previously appropriated here. Also, the Beginning of Construction form filed under SWC 9231 indicates that only 30% of the clearing work had been completed by March of 1960. The mathematically inclined reader will note that 30% of 104 acres is 31.2 acres – very close to 35 acres. Additional information given on the form states, “*Ice is over the creek and I have to wait for it to thaw and the water go down before I can continue work*”, indicates further that the project had not yet been fully completed at that time. Secondly, some uncertainty exists with the Claim as to whether the irrigation use (as opposed to the stock and domestic uses) dates back to 1900. Thirdly, the 1909 surveyor’s notes are unambiguous that the land surveyed, south and east of the subject property, was not under irrigation at that time, describing in some detail nearby areas as: “*Soil, rocky, first and second rates. Timber, pine, fir, and tamarack. Undergrowth, young growth of fir and tamarack, willow and*

*alder. Land mountainous or covered with dense undergrowth and exceptionally difficult to survey..."*\* The 1909 survey traversed to the south and then east of the subject area, along the Township boundary. A scanned 1910 map image is included on the BLM website that compiles data collected during the 1909 and other surveys.\*\* This map provides a high level of detail, labeling a small orchard, various barn locations, and even a local hen house. Tilled or irrigated fields appear to be denoted, yet the symbology used is undefined. Nothing on the 1910 map suggests that irrigation was taking place in the subject area.

Research efforts then swung towards aerial photo review. The USGS's "EarthExplorer", a map viewing program found on the USGS website, has a black and white photo covering the site dated October 1, 1953, available for inspection. Minimal evidence of development or irrigation was observed at the site from this photo. In contrast, two other black and white aerial photos on this website dated September 1, 1983, and September 5, 1991, clearly show irrigated fields within the site area. As such, it appears that water was not used in this area for irrigation until sometime after 1953.

\* [http://www.blm.gov/or/landrecords/survey/yNoteView1\\_2.php?R0160WA0138001390](http://www.blm.gov/or/landrecords/survey/yNoteView1_2.php?R0160WA0138001390)

\*\* [http://www.gloreCORDS.blm.gov/details/survey/default.aspx?dm\\_id=310365&sid=y4fgiyzr.1t1#surveyDetailsTabIndex=1](http://www.gloreCORDS.blm.gov/details/survey/default.aspx?dm_id=310365&sid=y4fgiyzr.1t1#surveyDetailsTabIndex=1)

This water use finding is injurious to the Claim in terms of the irrigation use component. After discussing this finding with the applicant's legal counsel (Mark Peterson and Marc Marquis), it was decided that the irrigation component of the Claim would be voluntarily relinquished and change application CS4-069422Cl voluntarily withdrawn if this change application, its companion application CS4-SWC9231, and new water right applications S4-29956 and S4-31083 are all favorably processed. Ecology's analysis of validity and extent of water rights continues below, now confined to the two State-issued Water Right Certificates.

Additional aerial photographs and satellite images were reviewed as part of Ecology's tentative determination of validity and extent of water rights here. This record extended from 1964 to 2013. It appears areas covered by wheel line irrigation were replaced by a center pivot in the early 2000s. Approximately 90 acres covered by the pivot and approximately 15 acres covered by a wheel line located NW of the pivot appeared to have been irrigated consistently through the years. However, the photographic and imagery records were not always consistent for the remaining portions of the farm, and a field visit was scheduled to examine these areas. The field visit took place on October 16, 2014. Participants were Mark Peterson (introduced earlier), Kenny Montanye (a current farm worker with historic knowledge of this site), Mark Schuppe (Operations Manager for the Office of Columbia River (OCR)), and the author of this report. Mr. Montanye first directed the tour of the property to two areas adjacent to Aeneas Creek where seasonal dams would be constructed to allow flood irrigation of some of the area south of the pivot. The dam sites were in poor condition and Mr. Montanye indicated that they had been heavily damaged during flooding events within the past couple of years and no flood irrigation had been applied since. Nevertheless, successful cultivation of a crop had occurred in this southern area in 2014. Inspection of this area, Mr. Montanye's explanation of how irrigation had occurred here in the past, and additional aerial photo review resulted in 20 acres estimated as likely being irrigated at least once every five years in this southern area. The tour then swung north, to a wheel line positioned NE of the pivot. Mr. Montanye indicated that in some years this wheel line would not be used at all, while in others the wheel line would be used sparingly. In the field, the wheel line did not appear to have been recently operated: the metal wheels were buried in several inches of soil and the wheel line was parked within tall, un-mown grasses. The marshy area to the north of this field was observed to be only slightly lower in elevation and it appeared that crops grown here would benefit

from some degree of sub-irrigation. These observations, coupled with re-inspection of aerial photo and satellite imagery, led the author and Mr. Schuppe to conclude that irrigation water had not been applied here at least once every five years. This resulted in an estimated 125 acres of irrigation consistently applied at this site and, ergo, available for transfer to Trust.

The original water duties allocated under G4-01203C and SWC 9231 were 53 inches/acre and 50.3 inches/acre, respectively. The tide of history has ebbed, and the reasoning for this high water duty here remains un-captured. However, there is recognition that (1) water use data were not as robust as today, (2) Ecology and Ecology's predecessor commonly affixed values near 48 inches during that period of time (a default value, say) without benefit of an explanatory narrative, and (3) the original values were based on a lower water delivery efficiency of 70% based on flood or rill irrigation. Of curious note is that the discussion on water duty in the original Report of Examination (ROE) for G4-01203C does not match the final acre-foot value assigned. The ROE discusses a 48.5 inches/acre water duty for this area which would have resulted in 606.3 ac-ft, and an explanation could not be found in the file for instead authorizing 663 ac-ft. This unexplained discrepancy is highly unusual. The author's personal opinion on this matter is that a ministerial or calculation error occurred where 606.3 was erroneously written as 663. In any case, the Proof of Appropriation for G4-01203C indicated that 160 acres are irrigated and, as the certificate issued for 640 ac-ft, it appears a 4 feet per acre water duty was settled upon.

Neither metering data nor power records were available to estimate water use. In the absence of such data, the U.S. Department of Agriculture's Washington Irrigation Guide (WIG) is commonly referred to. The type of water delivery system, in consultation with Ecology's guidance document GUID 1210 and site-specific conditions, then play into Ecology's water use estimate. For this analysis, 125 acres of an alfalfa/pasture grass mix will be considered. The WIG's Neselem station is proximate and thought to most closely mimic the microclimate at this site due to similarities in elevation, surrounding mountainous topography, and longitude. Here, alfalfa was found to require 26.96 inches of water while pasture/turf required 28.55 inches for an average of 27.78 inches. Under 125 acres irrigated, the amount of water used consumptively by the crops totals about 289 ac-ft. Evaporative loss while delivering water to the crop is accounted for below.

Impact sprinklers are used on the wheel line, while drop down sprinkler heads are used on the pivot, with a big gun installed at the end of the pivot. In conversations with the applicant's legal counsel and Mr. Montanye, and with field observations, it appears rigorous irrigation scheduling based on measured soil water conditions and weather data did not occur here. But neither did random or arbitrary watering. Generally, it appears that irrigation scheduling at this site occurred regularly, with attention to crop needs, and under an experienced eye, as time allowed. After consulting Ecology's guidance document GUID 1210, the historic irrigation practices on this farm point towards the pivot having an estimated 80% water delivery efficiency, the wheel line an estimated 75% efficiency, and the flood irrigation an estimated 50% efficiency. Applying the 80% application efficiency to the crop irrigation requirement yields a value of 2.89 feet, the 75% efficiency yields 3.09 feet, and the flood irrigation yields 4.63 feet. Over the 125 acres a water use estimate of 399 ac-ft results (90 acres served by center pivot, 15 acres served by wheel line, and 20 acres flooded).

For the consumptive use available for transfer to Trust, the irrigation requirement for the crops plus the amount lost to evaporation during application is considered. Ecology's GUID 1210 indicates that the amount lost to evaporation during application ranges from a low of 0 – 5% to a high of 15% depending on system type. GUID 1210 further indicates that the applicant's pivot would lose 15% to evaporation,

the wheel line 10%, and the flood irrigation 5%. As such, 337 ac-ft of consumptively used water would be available for transfer to Trust.

G4-01203C authorizes up to 800 gpm, and the applicant's counsel has indicated that a combined 800 gpm were historically used under the subject authorizations. Nelson Irrigation Corporation, in an online document titled, "Water Application Solutions for Center Pivots", estimates that the operation of a center pivot with end gun covering 90 acres would use approximately 700 gpm. Washington State University's "Irrigation in the Pacific Northwest" webpage contains a calculator to estimate system pumping requirements. Entering in data for this site, 606 gpm were calculated for the center pivot. It is likely that diversion from Aeneas Creek occurred simultaneously with the groundwater pumping that serves the center pivot (and wheel line), adding to the total instantaneous rate. Without benefit of actual measured flow, the combined 800 gpm value appears within reason and will remain undisturbed by Ecology's tentative determination of validity and extent at this site.

The two Certificates have an additive/non-additive relationship where G4-01203C is to be additive to any land not already under irrigation under SWC 9231, and non-additive to that land already irrigated under SWC 9231. Research, observations, and discussions with Mr. Montanye and the applicant's legal counsel indicate that, currently, approximately 105 acres are irrigated by groundwater and the remaining 20 acres by Aeneas Creek surface water. This practice appears to have been continuous along a timescale on the order of decades. As such and consistent with the additive/non-additive relationship as originally authorized, Ecology's tentative determination on validity and extent ascribes 20 acres to SWC 9231 as additive and ascribes the remaining 105 acres to G4-01203C as additive. In addition, G4-01203C has 20 acres of non-additive irrigation ascribed to it. The annual quantity and instantaneous rate are thus divided up proportionately, and Ecology's tentative determination of validity and extent is as follows: For SWC 9231, 54 ac-ft and 128 gpm (0.29cfs) for the irrigation of 20 acres are additive; for G4-01203C, 283 ac-ft and 672 gpm for the irrigation of 105 acres are additive and 54 ac-ft and 128 gpm for the irrigation of 20 acres are non-additive.

The majority of the lands covered by the three subject water right documents (SWC 9231, S4-069422Cl, and G4-01203C) lie within land allotted in 1880 to two enrolled members of the Confederated Tribes of the Colville Reservation. Patents for the allotments were issued by the United States of America in 1915: Chief Aeneas received a patent for his Allotment, Lot 10 of Section 33, T. 36N., R. 30E.W.M.; Julian Aeneas received a patent for his Allotment, Lot 9 of same Section 33. These two Lots were then conveyed in 1924 to a non-tribal member (named Clay Fruit) as fee simple patented lands. This is germane in determining whether or not a Federal reserved (Tribal) right exists here. Under a Ninth Circuit U.S. Court of Appeals case known as *Colville Confederated Tribes v. Boyd Walton, Jr.*, non-Indian successors to Indian allottees acquire a Federal reserved water right with a date of priority equal to the date the reservation was created for water already appropriated by the Indian allottee at the time of property transfer. Further, the non-Indian successor obtains a Tribal water right for any additional water appropriated with reasonable diligence after property transfer. These have been coined the term *Walton* rights. Here, allotted land transferred out of Indian ownership in 1924, and, as previously discussed, water likely was not used for irrigation until many years later, possibly not until 1958. As such, it appears a *Walton* right was not created here. Relinquishment of the irrigation portion of the Claim should absolve the subject area of Tribal water rights for irrigation. Should this change proposal be processed favorably, under today's water laws and concerns for aquatic life, the revival of irrigation here would very likely be possible only through successful water right transfer(s). These points were discussed with representatives of the Confederated Tribes of the Colville Reservation (the Water Rights Administrator and the Tribe's consultant) and the applicant's legal counsel.

## Proposed Use

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Under the proposal, the irrigation portion of the Claim would be voluntarily relinquished, and all irrigation under the two State-issued certificates (SWC 9231 and G4-01203C) would cease. The entire transferrable quantity would rely only on the two State-issued certificates. These would convey to Trust as instream flow and downstream mitigation for new out-of-stream uses. The Trust conveyance would involve the transfer of Deeds from the applicant to Ecology. The Place of Use (POU) of the Trust water would begin at the confluence of Aeneas Creek with the West Fork Sanpoil River as mapped on USGS maps (48.57364, -119.06771 in NAD 83) and extend downstream along the West Fork Sanpoil River, to the Sanpoil River, and then to its confluence with the Columbia River. From there, it would extend further downstream along the Columbia River to partially mitigate proposed new out-of-stream uses located near Malaga, WA, which are described more fully in new water right applications S4-29956 and S4-31083. Other rights proposed for change would similarly help mitigate these two new water right applications, but are not part of this report.

Trust water values obtained through Ecology's tentative determination of validity and extent would be further limited by month as given in the WIG for pasture/turf from the Nespelem station, and presented in the following Table:

<b>Monthly Trust Water Quantities and Rates</b>							
	<b>May</b>	<b>June</b>	<b>July</b>	<b>August</b>	<b>September</b>	<b>October</b>	<b>Total</b>
<b>WIG (inches)</b>	1.98	6.11	8.68	7.2	4.32	0.27	28.56
<b>% WIG</b>	6.9	21.4	30.4	25.2	15.1	0.9	100.0
<b>Qa (ac-ft)</b>	19.6	60.5	86.0	71.3	42.8	2.7	283.0
<b>Qi (cfs)</b>	0.3	1.0	1.4	1.2	0.7	0.04	N/A

## Other Landowners within the Place of Use

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The POU for G4-01203C covers many landowners besides the applicant. The signatures of these landowners were not included on the applications. To address this deficiency, a separate mailing by the applicant's legal counsel informed these landowners of the proposed change. These letters were sent Certified with both the law firm's and OCR's contact information given. While a few questions were fielded by the law firm, no responses were received by Ecology.

## Other Rights Appurtenant to the Place of Use

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No other irrigation rights or claims appear to share the same POU of any of the three subject documents.

## Hydrogeologic Evaluation

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A staff hydrogeologist licensed to practice in the State of Washington, Ron Dixon, examined relevant data and provided the following conclusions:

In this hydrological setting, stream depletion that results from pumping the wells likely occurs on Aeneas Creek and the West Fork Sanpoil River below or very near the area where return flows discharge back to the stream. As a result, a primary reach

determination is not warranted. Based on the topography of the valley floor and the spatial relationship of the irrigated field to Aeneas Creek and the West Fork Sanpoil River the start of the secondary reach is expected to be at or near the confluence of the two streams.

### Impairment Considerations

Relinquishment of the Claim's irrigation component and no longer irrigating under SWC 9231 and G4-01203C and conveying this water into Trust would reduce a commensurate amount of water being withdrawn by the well or diverted from Aeneas Creek. Water formerly withdrawn would remain un-intercepted in the aquifer and, consequently, discharge to both Aeneas Creek and the West Fork Sanpoil River. There appear to not be any other wells proximate to the applicant's wells. As such, no impairment is expected. However, should this expectation fail, Ecology is bound by RCW 90.42.040(4)(b), which states that "*If impairment becomes apparent during the time a trust water right is being exercised, the department shall cease or modify the use of the trust water right to eliminate the impairment.*" If approved, any authorization relying on this Trust water conveyance as mitigation would be provisioned to be subject to the cessation or modification.

### Public Interest Considerations

Under RCW 90.03.380, and upheld in *Public Utility District No. 1 of Pend Oreille County v. Ecology*, the public interest test does not apply to surface water right changes. Nevertheless, under RCW 90.44.100(2), changes to ground water rights are subject to the "...findings as prescribed in the case of an original application", and under RCW 90.42.040(4)(a), for authorizing the exercise of Trust water Ecology must first make the determination that the public interest would not be impaired. In terms of the public interest, the addition of instream flow to Aeneas Creek, the West Fork Sanpoil River, the Sanpoil River, and the Columbia River would likely benefit anadromous and resident fish, an interest of the public (Chapter 90.54 RCW). The intent of this Trust conveyance is to provide mitigation water for a separate irrigation project located south of Wenatchee, Washington. Any benefits to aquatic life would not extend beyond the diversion for this proposed irrigation project.

### Consideration of Protests and Comments

No protests were filed against this application. Concerns the Tribe has with this proposal were encapsulated in an email dated October 23, 2014, from the Tribe's consultant and are paraphrased below:

- A) From viewing Google Earth aerial photography, little if any irrigation water has been applied here since 1995.
- B) Older authorizations allocated water quantities well in excess of what today's irrigation systems would reasonably use.
- C) SWC 9231 is limited to the irrigation of 60 acres as that was the amount originally applied for and originally permitted.
- D) G4-01203C is non-additive to SWC 9231 to the extent SWC 9231 already irrigates land (up to perhaps 60 acres).
- E) A pump test on the well log indicates total drawdown after 4 hours at 800 gpm. What was the actual pumping rate?
- F) Multiple comments on the Claim relating to its validity and extent.

Ecology's responses to the Tribe's concerns follow below:

- A) Eleven aerial photos and twenty one satellite images over the span 1953 to 2013 were reviewed in great detail, two site visits made, the applicant's legal counsel interviewed, and a farm worker with a history of the site dating back to the 1960s (Kenny Montanye) was interviewed to determine that 125 acres have been consistently irrigated without a five-year span of non-use.
- B) Ecology's tentative determination of validity and extent significantly reduced the values originally applied for transfer to Trust based in part on more recent irrigation practices.
- C) Ecology's tentative determination on validity and extent ascribed less than 60 acres to SWC 9231.
- D) Ecology's tentative determination on validity and extent with regard to additive/non-additive quantities is consistent with the Tribe's comment.
- E) The combined instantaneous rate of diversion/withdrawal was estimated based on system parameters, third-party published documents, and professional judgment as flow measurements were not available.
- F) Any Report of Exam and/or Permit authorizing out-of-stream use(s) that would be mitigated by water formerly used at this site would require that the irrigation component of the Claim be voluntarily relinquished before the new out-of-stream use(s) begin(s). Relinquishment of the irrigation component of the Claim addresses the Tribe's concerns germane to the Claim.

In early May 2014, Ecology received a response from WDFW recommending denial of the two applications proposing out-of-stream uses (S4-29956 and S4-31083) as the water offered as mitigation did not equal the water requested for out-of-stream uses. A concern was raised, too, over the amount of the proposed mitigation water: WDFW questioned whether the full amount proposed has actually been applied to beneficial use and, thus, available for mitigation. WDFW indicated their willingness *"...to review some out-of-kind mitigation that would protect or enhance aquatic habitat."*

Ecology's tentative determination of validity and extent significantly reduced the amount of water available for transfer to Trust and, consequently, as mitigation for new, downstream uses. Any authorization that issued based on this water as mitigation would be limited to the amounts conveyed to Trust. Other proposed Trust conveyances, if approved, would add commensurate amounts, but are not subject to this report.

## **CONCLUSIONS**

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- The public notice complies with RCWs 90.42.040(5a), 90.42.110, and 90.03.280.
- Additional notice provided to other relevant agencies and entities complies with RCW 90.42.040(5b).
- The Washington Department of Fish and Wildlife received notice under RCWs 90.42.040(5)(b), 90.42.110(2), 90.03.280, and 77.57.020.
- Electronic notice to the Okanogan County Commissioners was provided pursuant to RCW 90.03.380(10)(a).
- A tentative determination on the validity and extent of the subject right was made (see Recommendations below).
- No impairment is expected.
- Detriment to the public interest is not expected.

## **RECOMMENDATIONS**

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Based on the above investigation and conclusions, I recommend that this request for a water right be approved in the amounts and within the limitations listed below and subject to the provisions listed in the above Report of Examination

### **Purpose of Use and Authorized Quantities**

The amount of water recommended is a maximum limit and the water user may only use that amount of water within the specified limit that is reasonable and beneficial:

#### **To Convey to Trust under CG4-01203C:**

672 gpm (1.5 cfs) (Limited further by monthly breakdown of quantities and rates as presented in Table 1 of the Report of Examination above.)

283 ac-ft per year

### ***For the purpose of instream flow as mitigation***

The Place of Use begins at the confluence of Aeneas Creek and the West Fork Sanpoil River and extends downstream along the West Fork Sanpoil River, to the Sanpoil River, and then to the Columbia River, and continues downstream along the Columbia River to the points of diversion given in applications S4-29956 and S4-31083 (located near Malaga, WA). Said confluence is located at 48.57364, -119.06771 in NAD 83.

Points of Diversion or Withdrawal are not applicable for this Trust water conveyance used as instream flow.

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*Thomas Perkow*

*Date*

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# CG4-01203C Place of Use

-  Secondary Reach
-  Cities
-  Rivers and Lakes

