File NR CS4-02255(A)CTCL@2
WR DOC ID 4645314

State of Washington
REPORT OF EXAMINATION
FOR TRUST WATER RIGHT

Add or Change Purpose of Use ☒ **Change Place of Use** ☒ **Add or Change Point of Diversion/Withdrawal** ☐
Change Season of Use ☐ **Add Irrigation Acres** ☐ **Well Consolidation** ☐

PRIORITY DATE	WATER RIGHT NUMBER	BEGIN TRUST TERM	END TRUST TERM
June 30, 1890	CS4-YRB03CC2255(A)	June 1, 2011	Permanent

WATER RIGHT OWNER

SwiftWater Ranch LLC
Attn David Gleason
6152 NE 3rd Court
Renton WA 98059

Trust Water Right Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Kittitas	Teanaway River	Yakima River	39-Upper Yakima
Kittitas, Yakima, Benton	Yakima River	Columbia River	39-Upper Yakima; 37-Lower Yakima

REACH*	WATERBODY	RIVER MI	TWN	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
Begin Secondary Reach	Teanaway River	2.00	20N	16E	34	NE NE		
End Secondary Reach	Yakima River	0.00	09N	29E	19	NE		

*There is no primary reach associated with the subject water right. The secondary reach begins at approximately 650 feet south and 1200 feet west of the northeast corner of Section 34, T. 20 N., R. 16 E.W.M.

When any portion of this trust water is available and not being used for water banking or other authorized purposes, those quantities will be added to the instream target flows managed by the U.S. Bureau of Reclamation at Parker and Prosser and continue downstream to the Yakima River's confluence with the Columbia River. If the water is used to offset consumptive use under WAC 173-539A, then the trust water right will NOT be added to the instream target flows at Parker and Prosser.

Purpose and Quantity

Trust water right for the purpose of instream flow that may be used for water banking, with quantities allocated to the secondary reach in the following manner.

	Secondary Reach	
Period	**Flow (cfs)**	**Acre-feet**
06/01 to 06/30	0.075	4.47
07/01 to 07/31	0.141	8.69
08/01 to 08/31	0.104	6.40
09/01 to 09/15	0.156	4.64
ANNUAL TOTAL		**24.20**

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"Primary reach" means that portion of a water body that benefits from both the former consumptive use and former return flow waters of a water right. There is no primary reach associated with the subject water right. "Secondary reach" means that portion of a water body that benefits only from the former consumptive portion of a water right.

Provisions

1. This permanent instream flow trust water right is the result of fallowing the entire 14.32 acre place of use for Change Authorization No. CS4-YRB03CC2255(A). The real property to which the water rights are appurtenant shall remain fallow unless and until another valid water right is transferred to or a new valid water right is established on the historic place of use.
2. The Department of Ecology must manage this trust water right to effectively mitigate for impacts to total water supply available and flow reductions that adversely affect fish. Any portion of this trust water right that is assigned to the 2009 Exchange Contract No. 09XX101700 between the Department of Ecology and the U.S. Bureau of Reclamation will be managed in accordance with the contract and its associated review procedures.
3. 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/
   E-mail: REETSP@DOR.WA.GOV
4. Prior to issuing a Trust Water Right Certificate for the subject right, the applicant will submit a Voluntary Relinquishment form for the 52.51 acre-feet portion of the subject right that has since relinquished as a result of the change in irrigation method to a pressurized sprinkler system.

Findings of Facts and Decisions

Upon reviewing the investigator's report, I find all facts relevant and material to the subject application have been thoroughly investigated. Furthermore, I find the change of water right as recommended will not be detrimental to existing rights or detrimental to the public interest.

Therefore, I ORDER the requested change of place and purpose of use under Trust Water Right Application No.CS4-02255(A)CTCL@2, be approved subject to existing rights and the provisions specified above.

This Decision may be appealed pursuant to RCW 34.05.514(3), RCW 90.03.210(2), and Pretrial Order No. 12 entered in *State of Washington, Department of Ecology v. James Acquavella, et al.*, Yakima County Superior Court No. 77-2-01484-5 (the general adjudication of surface water rights in the Yakima River Basin). The person to whom this Decision is issued, if he or she wishes to file an appeal, must file the notice of appeal with the Yakima County Superior Court **within thirty (30) days of receipt of this Decision**. Appeals must be filed with the Superior Court Clerk's Office, Yakima County Superior Court, 128 North 2nd Street, Yakima WA 98901, RE: Yakima River Adjudication. Appeals must be served in accordance with Pretrial Order No. 12, Section III ("Appeals Procedures"). The content of the notice of appeal must conform to RCW 34.05.546. Specifically, the notice of appeal must include:

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The name and mailing address of the appellant;
Name and address of the appellant's attorney, if any;
The name and address of the Department of Ecology;
The specific application number of the decision being appealed;
A copy of the decision;
A brief explanation of Ecology's decision;
Identification of persons who were parties in any adjudicative proceedings that led to Ecology's decision;
Facts that demonstrate the appellant is entitled to obtain judicial review;
The appellant's reasons for believing that relief should be granted; and
A request for relief, specifying the type and extent of relief requested.

The "parties of record" who must be served with copies of the notice of appeal under RCW 34.05.542(3) are limited to the applicant of the decision subject to appeal, Ecology and the Office of the Attorney General.

All others receiving notice of this Decision, who wish to file an appeal, must file the appeal with the Yakima County Superior Court within **thirty (30) days of the date the Order was mailed.** The appeal must be filed in the same manner as described above.

Signed at Yakima, Washington, this _____ day of _____ 2011.

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Mark C. Schuppe, Section Manager
Water Resources Program
Central Region Office

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BACKGROUND

Description and Purpose of Proposed Change

SwiftWater Ranch, LLC, submitted three applications to the Department of Ecology (Ecology) to enter three water rights into the Trust Water Right Program on July 30, 2009. The applications were accepted and assigned numbers CS4-02255(A)CTCL@2, CS4-02255(B)CTCL@2, and CS4-02255(C)CTCL@2. This Report of Examination (ROE) addresses Application No. CS4-02255(A)CTCL@2, in which SwiftWater Ranch LLC requested to transfer 78.29 acre-feet per year (ac-ft/yr) and 0.286 cubic feet per second (cfs) to the Trust Water Right Program for instream flow use and for water banking purposes to mitigate for proposed new uses. The ROE also addresses the attributes and the portions of the investigation that are common to all three applications.

The three applications qualify for expedited processing under WAC 173-539A-060, whereby they may be processed prior to applications submitted at an earlier date when an application for a new water right is eligible for expedited processing under WAC 173-539A-060(2). These Trust Water Right Applications were submitted as proposed mitigation for new uses of ground water under WAC 173-539A-060(2). More specifically, SwiftWater Ranch LLC submitted Water Right Application No. G4-35208 on August 15, 2008, proposing to serve a 56-lot residential development that would be located approximately 1 mile upstream from the subject rights and northerly and westerly of the Teanaway River.

Table 1
Attributes of the Existing Water Right and Proposed Change

Attributes	Existing	Proposed
Name	Lyons (Trustee for Renee Lynn Peare Irrevocable Trust)	SwiftWater Ranch LLC
Priority Date	June 30, 1890	Same
Change Application Date		07/30/2009
Instantaneous Quantity	0.286 cubic feet per second	0.286 cubic feet per second
Annual Quantity	77.3 ac-ft/yr for the irrigation of 14.32 acres 0.99 ac-ft/yr for stock water	78.29 ac-ft/yr
Purpose of Use	Irrigation and stock water	Instream Flow
Period of Use	May 1 to September 15	May 1 to September 15
Place of Use	That portion of the SW¼SW¼ of Section 26, T. 20 N., R. 16 E.W.M., lying south of State Route 970 coincident with Parcel 5 as described and/or delineated on that certain Survey as recorded October 16, 2001 in Book 26 of Surveys, pages 206 and 207, under Auditor's File No. 200110160025, records of Kittitas County, State of Washington; being a portion of the southwest quarter of Section 26 and a portion of the northwest quarter of Section 35, all in T. 20 N., R. 16 E.W.M., in the County of Kittitas, State of Washington.	Instream, beginning at approximately 650 feet south and 1200 feet west of the northeast corner of Section 34, T. 20 N., R. 16 E.W.M.

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Existing Source of Diversion

Source Name	Parcel	WellTag	Twn	Rng	Sec	Q/Q	Latitude	Longitude
Teanaway River	465235		20N	16E	34	NE NE		

Legal Requirements for Proposed Change

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

Public Notice

Notice was published on September 18 and 25, 2009 in the Ellensburg Daily Record, a general circulation newspaper in Kittitas County. The 30-day protest period ended on October 25, 2009. No protests or comments were received.

In addition, notice of application to change the subject water rights was included in the February 2010 Monthly Notice, in compliance with the requirements of Pre-trial Order No. 12 for the *Acquavella* Adjudication.

State Environmental Policy Act (SEPA)

This application is categorically exempt from the provisions of SEPA, due to the fact that the water quantities proposed for change are for less than 1.0 cfs. While the project relying on this trust Water Right Application is not exempt from SEPA, Ecology may proceed with exempt aspects of the proposal so long as the requirements of WAC 197-11-070 are met. Those requirements being: the agency actions will not have an adverse environmental impact; or, such action would not limit the choice for reasonable alternatives. Issuing this trust water right will not result in an adverse environmental impact and will not limit the choice for reasonable alternatives.

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.

RCW 90.03.380(5)(b) states that applications relating to existing surface or ground water rights may be processed and decisions on them rendered independently of processing and rendering decisions on pending applications for new water rights within the same source of supply without regard to the date of filing of the pending applications for new water rights.

RCW 90.38.040(1) states that all trust water rights acquired by the Department of Ecology (Ecology) shall be placed in the Yakima River Basin Trust Water Right Program to be managed by Ecology. Ecology shall issue a Certificate of Water Right in the name of the state of Washington for each trust water right it acquires.

RCW 90.42.100(1) states that Ecology is authorized to use the Trust Water Right Program 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

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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 transfer water rights to and from the Trust Water Right Program.

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 extent and validity of the claim or right. This is necessary to establish whether the claim or right is eligible for change. *R.D. Merrill v. PCHB* and *Okanogan Wilderness League v. Town of Twisp.*

INVESTIGATION

In considering this application, the investigation included, but was not limited to, research and/or review of:

- The State Water Code, administrative rules, and policies.
- Other recorded water rights and Court Claims in the vicinity including information from related change application files including CS4-YRB03CC2255(A), CS4-YRB03CC2255(B), and CS4-YRB03CC2255(C), CS4-02255(A)CTCL@1, CS4-02255(B)CTCL@1, and CS4-02255(C)CTCL@1.
- Yakima County Superior Court Conditional Final Order, dated February 8, 2001, and Reports of Referee of the Yakima River Basin Water Rights Adjudication for Subbasin No. 3 (Teanaway River).
- A site visit conducted on September 2, 2010, by Ecology staff, Ingrid Ekstrom and Kurt Walker.
- Correspondence and conversation with the applicant (SwiftWater Ranch LLC), its representatives, property owners, and Kittitas County PUD #1 staff.
- Conversations with Ecology staff.
- Field notes, conversations, and email correspondence from Stan Isley, Court Appointed Teanaway River Stream Patrolman.
- Topographic and local area maps.
- Aerial photographs of the site from 1998, 2003, 2005, 2006, and 2009 and Landsat Imagery.
- Washington Irrigation Guide (WIG), Cle Elum climatic station.
- US Department of Agriculture, Natural Resources Conservation Service Web Soil Survey for Kittitas County area
- Documents and information submitted by the applicant or its representatives including, power records, Affidavit of Renee Peare, Aspect Consulting Memorandum Re: Beneficial Use and Consumptive Use Estimates for Court Claim No. 2255 (May 21, 2008), and Water Right Statutory Warranty Deed (as to Water Right) dated June 3, 2008.
- Draft Trust Water Right Agreement.
- Ecology records.

History of Water Use

The shared point of diversion and places of use for Change Authorization Nos. CS4-YRB03CC2255(A), CS4-YRB03CC2255(B), and CS4-YRB03CC2255(C) are located in Kittitas County in Water Resource Inventory Area (WRIA) 39, approximately 5 miles east of Cle Elum, WA. More specifically, the point of diversion is located on the Teanaway River approximately two miles upstream of its confluence with the Yakima River.

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George L. Blackburn and Penny L. Blackburn were confirmed two rights with a priority date of June 30, 1890 under Court Claim No. 02255 in the Conditional Final Order (CFO) for Subbasin No. 3 (Teanaway River) signed February 8, 2001 in *State of Washington Department of Ecology vs. James J. Acquavella (Acquavella)*. The CFO confirmed the two rights as follows:

- 0.32 cubic feet per second (cfs) and 86.4 acre-feet per year (ac-ft/yr) for irrigation of 16 acres and 1 ac-ft/yr for stock watering between May 1 and September 15 with a place of use within that portion of the SW¼SW¼ of Section 26, T. 20 N., R. 16 E.W.M. lying south of State Route 970.
- 0.04 cfs and 10.8 ac-ft/yr for irrigation of 2 acres between May 1 and September 15 with a place of use within that portion of the N½NE¼NE¼ of Section 34, T. 20 N., R. 16 E.W.M., lying northerly of the Teanaway River and northerly of a pond located on the property.

On February 10, 1999, Penny Blackburn applied to change the point of diversion for both water rights under Change Application Nos. CS4-YRB03CC2255 and CS4-YRB03CC2255@1. Following the sale of the property within the place of use to the Renee Lynn Peare and Kerri Farnum Irrevocable Trusts, the first of the two change applications was administratively split into an A and C portion, CS4-YRB03CC2255(A) and CS4-YRB03CC2255(C). The second change application was assigned over to the new property owner, the Kerri Farnum Irrevocable Trust, and given a new Change Application No. CS4 YRB03CC2255(B). In July 2004, Ecology authorized the permanent change in shared point of diversion for each of the three resulting applications (A, B, and C) to its present location within the NE¼NE¼ of Section 34, T. 20 N., R. 16 E.W.M. The change authorizations are summarized in Table 2 below:

Table 2
Summary of 2004 Change Authorizations

Change Authorization File Number	Maximum cfs	Maximum ac-ft/yr	Purpose of use	Season of Use
CS4-YRB03CC2255(A)	0.286	78.29	77.3 ac-ft/yr for irrigation of 14.32 acres and 0.99 ac-ft/yr for stock water	May 1 - Sept 15
CS4-YRB03CC2255(B)	0.04	10.8	Irrigation of 2 acres	May 1 - Sept 15
CS4-YRB03CC2255(C)	0.034	9.11	9.1 ac-ft/yr for irrigation of 1.68 acres and 0.01 ac-ft/yr for stock water	May 1 - Sept 15
Total	0.36	98.2	97.2 ac-ft/yr for irrigation of 18 acres and 1 ac-ft/yr for stock water	May 1 - Sept 15

The places of use for the three change authorizations are adjacent to one another and were used to irrigate a single field between State Route 970 and the Teanaway River within Sections 26 and 34, T. 20 N., R. 16 E.W.M. Additionally, the three rights used a shared pump, mainline, and irrigation system. As a result, the investigations into the extent and validity and the trust water calculations for each of the three rights are considered together and are repeated in each of the three ROEs. Quantities and details specific to each right will also be presented in the respective ROEs.

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Yakima County Superior Court in the Reports of Referee of the Yakima River Basin Water Rights Adjudication for Subbasin No. 3, describes a varied history of the location of the points of diversion (PODs) historically used and authorized in previous decrees for the subject rights. By the mid-1990s, the Report of Referee indicates that the northeast portion of the subject field (located in Section 26, and the place of use for portions A and C) was served by a POD for Seaton Ditch in the NE¼SE¼ of Section 26, T. 20 N., R. 16 E.W.M. The 2 acres within the southwestern portion of the field (located in Section 34, and the place of use for portion B) were also served by Seaton Ditch. In 1996, the Seaton Ditch diversion was washed out in a flood, and the court authorized a temporary change in POD to the Masterson Ditch diversion in Section 25. Shortly afterwards, in 1997, the court approved temporary use of the current POD within NE¼NE¼ of Section 34, and, as discussed above, Ecology approved the permanent changes in July 2004. The diversion in Section 34 is shared by several rights confirmed in the *Acquavella* Adjudication and each right holder operates his/her own pump. The shared station is located approximately 1,000 feet downstream of the southernmost end of the field served by the subject rights. As recently as 2008, an operational pump at the diversion was used for irrigation of the subject property and stock watering under Change Authorization Nos. CS4-YRB03CC2255(A), CS4-YRB03CC2255(B), and CS4-YRB03CC2255(C). In January 2009, a Teanaway River flood destroyed this pump station and the pump for the subject property was not replaced.

Conversations with the applicant and property owners, information provided in Aspect consulting report, field notes and communications with the Teanaway River Stream patrolman - Stan Isley, and power records, indicate water use within the place of use occurred during the following irrigation seasons following the issuance of the 2001 CFO: 2003, 2004, and 2008. The Yakima County Superior Court's findings are used for water use prior to 2001. Ecology's ROEs for the 2004 Change Authorizations and communications with Stan Isley (2010) were heavily relied upon for determining water use between 2001 and 2004. Through the 1999 irrigation season, the owners irrigated the place of use using gravity flow flood irrigation from a ditch system. Following the 1999 irrigation season there is no record of water use until 2003, when a pressurized system was installed consisting of a centrifugal pump serving a wheel line. The higher water quantities confirmed in the CFO and authorized in the 2004 ROEs (see Table 2 above) reflect the older gravity flow ditch system and not the pump and wheel line system used in 2003, 2004, and 2008. The following analysis focuses on water use under the subject rights during the years following the 2004 change authorizations of which there is evidence for one year of use in 2008.

The 2008 irrigation season represents the year of highest water use within the past 5 years and will be relied on for the tentative determination of the extent and validity of the subject rights. Additionally, given that the same irrigation system was used during the 2003 and 2004 seasons and lacking flow meter data for those years, it is assumed that total water used during 2004 was similar to that in 2008. Field notes suggest less water use in 2003 and indicate that a new pump was installed early during the 2003 irrigation season and water was likely used for only a portion of 2003 (email communication with Stan Isley, 2010).

In 2008, water was diverted from the Teanaway River using a 10 horsepower Baldor centrifugal pump feeding a 5-inch main line. The main line was connected to a wheel line with 11 to 12 impact sprinklers equipped with 5/32-inch nozzles (the same irrigation system that was used during the 2003-2004 irrigation seasons). Conversations with Bill Peare, father of the property owner responsible for irrigation and stock watering, indicate that the field was irrigated on a schedule of approximately two sets per day, and there was approximately one cutting of hay in addition to use of the field as pasture for horses. The stock water portions of the rights were used for drinking water for 4 horses kept on site typically

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within a small fenced-off area on the property (Bill Peare, phone conversation, 2010). Aerial photos for the available years of 2003, 2006, and 2009 indicate the extent of the field to be approximately 18 acres within sections 26 and 34

Total water use on the property during the 2008 irrigation season was based on flow meter readings for June through September. A McCrometer flow meter was in place during the 2008 irrigation season for the pump serving the 18 acre field. An affidavit submitted by Renee Peare, the property owner in 2008, states that the flow meter was installed in approximately June 2008. Stream patrolman, Stan Isley, visited the pump station on 8/27/2008 and 9/29/2008, and the flow meter for the 10HP pump read 24.315 acre-feet (af) and 32.402 af, respectively. The season of use awarded by the Superior Court for the Blackburn rights under Court Claim No. 2255 is May 1 through September 15 for both irrigation and stock watering. The affidavit submitted by Renee Peare states that irrigation commenced on or about May 1, 2008. However, conversations with Kittitas County PUD #1 indicate that the power meter for the 10HP pump was de-activated in 2006 and was not reactivated again until June of 2008 at which time the PUD recorded the same reading as that from the end of 2006 indicating no water use from the 10HP pump prior to June 2008. As a result, total water use for the 2008 season is considered to be reflected in the 9/29/2008 flow meter reading (32.402 af) and occurred between June and September 15. Information from the Washington Irrigation Guide supports this season of use, recording the crop irrigation requirement for pasture/turf at the Cle Elum climatic station beginning June 3 and ending October 7 with no irrigation water requirement for May.

The quantity of water used in 2008 for stock water under the subject rights was based on a typical per horse requirement of 12 gallons per day (Table 5-2: Guide for Average Daily Nonresidential Water Demand in Washington State Department of Health Water System Design Manual, 2009). For the 107 day season (June 1 – September 15), four horses would require 5,136 gallons, or 0.016 af of water. Subtracting the stock water use from the total metered quantity, yields the water used for irrigation in 2008 to be 32.39 af (32.402 af – 0.016 af = 32.386 af).

The applicant also provided electrical power consumption data recorded by the Kittitas PUD #1 for 2008 from a meter dedicated to the 10HP centrifugal pump. Electrical power consumption data can be used to calculate total volume of water pumped by using the following equation presented in WAC 173-173-160(2):

$$V = \frac{318{,}600(kWh)(Peff)(Meff)}{TDH}$$

Where, V = volume of water pumped in gallons,
kWh = number of kilowatt-hours for 2008,
Peff = pump efficiency,
Meff = motor efficiency, and
TDH = total dynamic head of the system in feet.

Records from the Kittitas PUD #1 indicate 11,064 kWh of power was used in 2008 between June and the end of the irrigation season. A typical range of efficiencies for centrifugal pumps of 55% to 65% and a typical motor efficiency of 88.5% were used. The operating pressures at the pump and at the sprinkler nozzles were unavailable because the irrigation system was no longer in place at the time of the 2010 site visit. As a result, a reasonable range of TDH for the system is assumed to be between 124 ft and 181 ft based on friction losses in piping (approximately 10 ft), elevation head (10 to 20 ft), and a reasonable range of discharge pressures at the nozzles (45 to 65 psi). Applying the formula to the range of parameters listed above results in an estimated range in total water use of 29.2 af to 50 af for 2008.

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Selecting reasonable values within the above ranges of Peff=65%, Meff=88.5%, and TDH = 175.6 ft yields a best estimate of 35.4 af based on power records.

Finally, water use was estimated based on sprinklers with 5/32-inch nozzles emitting 5 to 6 gallons per minute (gpm) per nozzle at an assumed nozzle discharge pressure ranging from 45 to 65 psi each for the 11 to 12 sprinkler heads. Assuming 100 days of irrigation out of the 107 day actual season of irrigation in 2008 (June through September 15), an estimated total volume of irrigation water use was estimated to be between 24 to 32 af.

Total water use as recorded on the McCrometer flow meter corresponds with estimates of volume pumped based on the power consumption data as well as water use estimated from sprinkler emissions and irrigation practices. As a result, the extent of the three water rights combined is tentatively determined to be 32.40 ac-ft/yr; and the extent of Change Authorization No. CS4-YRB03CC2255(A) alone is tentatively determined to be 25.78 ac-ft/yr.

The difference between the annual quantities confirmed by the Yakima Superior Court for the subject rights under the 2001 CFO (totaling 98.2 ac-ft/yr) and those tentatively determined for the subject Trust Water Right Applications is 65.80 ac-ft/yr [98.2 ac-ft/yr - 32.40 ac-ft/yr = 65.80 ac-ft/yr]. The difference for CS4-YRB03CC2255(A) alone is 52.51 ac-ft/yr [78.29 ac-ft/yr - 25.78 ac-ft/yr = 52.51 ac-ft/yr]. This difference in water use reflects the change in irrigation method from flood irrigation served by a ditch through 1999 to a pressurized sprinkler system served by a pump directly from the river beginning in 2003. The difference in water use is attributable to a change in application method (flood to sprinkler), and therefore the 52.51 ac-ft/yr is largely non-consumptive. Eleven years have elapsed since the flood irrigation and ditch system was used to provide water to the place of use under the three rights and ten years have passed since the CFO issued. Additionally, no exception from relinquishment has been demonstrated to apply to the reduced use. As a result, the 65.80 ac-ft/yr of the 98.2 ac-ft/yr confirmed by the Superior Court in 2001 for the three rights combined, including the 52.51 ac-ft/yr of the 78.29 ac-ft/yr under Change Authorization No. CS4-YRB03CC2255(A), is considered to be relinquished. Prior to transferring the subject right to the Trust Water Right Program a Voluntary Relinquishment form is required from the applicant as described in the Provisions on page 2 above.

Proposed Use

The applicant proposes to change the rights confirmed for Penny Blackburn under Court Claim No. 2255 as modified under Change Authorization Nos. CS4-YRB03CC2255(A), CS4-YRB03CC2255(B), and CS4-YRB03CC2255(C) to the State Trust Water Rights Program for the purpose of instream flow use and for water banking in order to offset the consumptive use associated with new groundwater uses.

Other Rights Appurtenant to the Place of Use

A review of Ecology's records and database did not reveal any other rights or claims which are appurtenant to the places of use for Change Authorization Nos. CS4-YRB03CC2255(A), CS4-YRB03CC2255(B), and CS4-YRB03CC2255(C).

Trust Water Right Place of Use

As described in Ecology Guidance 1220, the place of use of a trust water right for instream flows is defined within a primary reach and a secondary reach, as applicable. The primary reach is the portion of a water body that benefits from both the former consumptive use and return flow waters of a trust

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water right. It is the reach between the original diversion point and the point where the last return flows re-enter the stream or river. The secondary reach is the portion of a water body that received return flow waters while the water right was exercised for its original out-of-stream purpose. The secondary reach, therefore, only benefits from (i.e., is augmented only by) the former consumptive portion of the trust water right. The secondary reach is located downstream from the point where return flows from the historic use under the water right re-entered the stream or river. The reader is also referred to RCW 90.42.020(2) and RCW 90.38.010(2).

Guidance 1210 defines return flow as, "the sum of deep percolation and runoff that returns to waters of the State or would return to waters of the State but is intercepted by a water user." The existing place of use for the subject rights is located upstream of the existing POD on the north bank and on a bend in the Teanaway River. The Natural Resources Conservation (NRCS) Web Soil Survey for Kittitas County maps Patnish-Mippon-Myzel complex soils and Xerofluvents in the vicinity of the place of use and along the river bank, respectively. These soils are generally composed of a loamy soil near ground surface overlying coarser and more permeable sands, gravels and cobbles in the lower portions of the soil profile. During a typical irrigation season, the irrigation water applied to the subject field that was not consumed by the crop or other evaporative losses would have subsequently percolated below the root zone and moved through the more permeable sands and gravels of the lower soil profile before returning to the Teanaway River upstream of the current POD. This is the deep percolation component of the return flow. Based on local topography, any surface runoff component would also have returned to the River upstream of the POD.

As a result, in years that the rights were used for irrigation, such as in 2008, the reach of the Teanaway River directly upstream of the current POD received return flows from irrigation on the applicant's field causing a net increase in water to the Teanaway River upstream of the POD during and immediately following the irrigation season. The reach downstream of the POD was depleted by the volume of water consumptively used under the rights. As a result of transferring the water rights to trust, the reach upstream of the POD will no longer receive the benefit of irrigation return flows. Instead, the water that was historically diverted will remain instream at the POD and the former consumptive portion will benefit the Teanaway River downstream of the authorized POD.

Based on the above analysis and the definitions for primary and secondary reaches from Guidance 1220, there is no primary reach as the return flows entered the Teanaway River upstream of the POD. The secondary reach begins at the POD in the NE¼NE¼ of Section 34 T. 20 N., R. 16 E.W.M. When this secondary reach water is available and not being used for water banking or other authorized purposes, quantities will be added to instream target flows at Parker and Prosser and continue downstream to the Yakima River's confluence with the Columbia River. If the water is used to offset consumptive use by new groundwater uses, the water right will be considered instream only to immediately above the Sunnyside Diversion Dam in order to offset impacts to Total Water Supply Available (TWSA), and will not be added to the instream target flows at Parker and Prosser.

Trust Water Right Calculations

In order to determine the month by month quantity of instream flows to be assigned to the secondary reach for the proposed trust water rights, the monthly consumptive use under the subject rights is calculated. Ecology's Guidance Document GUID 1210, *Determining Irrigation Efficiency and Consumptive Use*, the Washington Irrigation Guide, and the tentative determination of the extent and

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validity of the subject water rights as described above were used to determine irrigation application efficiency (Ea) and consumptive use (CU) under the three change authorizations. The Ea is calculated using the equation, Ea = CIR ÷ Total Water Use, where CIR is the crop irrigation requirement and Total Water Use is the total water use for irrigation. The crop irrigation requirement (CIR) for pasture/turf at the Cle Elum station is 18.11 inches for the period June through September. For 18 acres of pasture, the CIR is 27.17 ac-ft/yr. The total irrigation water use for the same period (June – September) is 32.39 ac-ft/yr, or the total volume recorded on the flow meter for June through September less the water consumed by the horses for the same time period (32.402 ac-ft/yr – 0.016 ac-ft/yr = 32.39 ac-ft/yr). Applying the formula for Ea,

Ea = CIR ÷ Total Water Use = (27.17 ac-ft/yr) ÷ (32.39 ac-ft/yr) = 83.9%

The range of application efficiencies typical for a wheel line irrigation system as presented in Table 1 of Ecology GUID 1210 is 65% to 85%. The calculated Ea of 83.9% falls within this range.

Based on Guidance 1210, the equation for consumptive use for irrigation can be expressed as CU = [(TIR x %Evap) + CIR]. Where, TIR is the total irrigation requirement, and the %Evap term represents the consumptive components of irrigation efficiency (spray evaporative loss, etc.). The TIR is 32.386 ac-ft/yr for the three subject rights combined and Table 1 of Ecology Guidance 1210 presents 10% as a typical value for %Evap for wheel line systems. Applying the formula for consumptive use to the irrigation use yields:

CU = [(TIR x %Evap) + CIR] = [(32.386 ac-ft/yr x 0.10) + 27.165af] = 30.404 ac-ft/yr

The remaining 1.98 ac-ft/yr of the 32.386 ac-ft/yr required for irrigation is return flow. The entire extent of the water rights required for stock watering, 0.016 ac-ft/yr, is considered to be consumptively used by the horses. As a result, the total combined consumptive use under the three subject rights is 30.42 ac-ft/yr, or (30.404 ac-ft/yr + 0.016 ac-ft/yr = 30.42 ac-ft/yr). The total stock water use is considered to have been used under Change Authorization No. CS4-YRB03CC2255(A), and the total consumptive use under this Authorization is 24.20 ac-ft/yr.

The total non-consumptive water use under Change Authorization No. CS4-YRB03CC2255(A) is 1.58 ac-ft/yr. The non-consumptive water will not be transferred to the Trust Water Right program and will not be protected by Ecology because there is no primary reach for the subject rights as discussed above and, as a result, the Teanaway River would not benefit from the non-consumptive portion of the right.

Monthly instream flows in the secondary reach need to be determined on a month to month basis in terms of average cfs and total acre-feet of consumptive use. Monthly consumptive use acre-feet for irrigation were determined by distributing the 30.40 ac-ft/yr of total consumptive use proportionally throughout the irrigation season based on the monthly crop requirements presented in the WIG. That is, 18% in June, 36% in July, 26% in August, and 19% in September. The stock water quantity was evenly distributed among the months within the season of use. The monthly stock water quantities were added to the monthly irrigation consumptive use yielding total monthly instream flow in acre-feet. The total volume of consumptive use each month was converted to cfs for an average monthly instantaneous quantity used for instream flow augmentation along the secondary reach. The resulting average and total monthly consumptive use quantities for irrigation plus stock water are presented in Table 3 below. The consumptive use quantities specific to CS4-02255(A)CTCL@2 are presented in Table

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4 and include consumptive use for irrigation of 14.32 acres of the 18 acre field as well as the stock water use.

Table 3. Summary of Instream Flow in the secondary reach for three rights combined.

	June	July	August	September	Total
Average Qi (cfs)	0.094	0.178	0.131	0.196	---
Qa (af)	5.62	10.92	8.05	5.83	30.42

Table 4. Instream Flow in the secondary reach for CS4-02255(A)CTCL@2.

	June	July	August	September	Total
Average Qi (cfs)	0.075	0.141	0.104	0.156	---
Qa (af)	4.47	8.69	6.40	4.64	24.20

Trust Water Right Management

The consumptive use portions of Change Authorization Nos. CS4-YRB03CC2255(A), CS4-YRB03CC2255(B), and CS4-YRB03CC2255(C) are being changed to instream flow for water banking purposes. As a condition of placing these water rights into the Trust Water Right Program, the water placed into trust may be available as mitigation to address the issue of, and prevent, third-party water right impairment with respect to new out-of-priority water rights consistent with WAC 173-539A. The details can be viewed in the Trust Water Right Agreement between Swiftwater Ranch LLC and the Washington State Department of Ecology in Appendix 2.

The subject water rights have a priority date of June 30, 1890, and are considered Class 9 within Subbasin No. 3 (Teanaway River). Given the priority date, the quantity of water confirmed by the Court to rights senior to the subject rights in Subbasin No. 3, and historic flows on the Teanaway River, it is possible that the subject water rights could be curtailed in the future. Proposals to use these rights as mitigation for new uses should consider the possibility of regulation and curtailment to satisfy senior Teanaway River Subbasin water rights.

Impairment Considerations

Under RCW 90.38.040(5)(a), a trust water right may be exercised only if Ecology first determines that the authorization will not impair or injure any other water right. An attempt was made to identify any third parties who may be potentially affected by an approval of this application. Ecology sent a notice on November 30, 2009, containing pertinent information to appropriate state agencies, potentially affected local governments and federally recognized tribal governments, and other interested parties. Ecology did not receive any comments regarding the issue of impairment from any third party.

As discussed in the Trust Water Right Place of Use section above, as a result of the proposed change the reach of the Teanaway River directly upstream of the POD and adjacent to the historic place of use will no longer receive the benefit of irrigation return flows. This is not considered as having the potential to impair any uses within this reach because a water user can not be required to continue using the water for the sole benefit of other parties. The Pollution Control Hearings Board in an Order Granting Motion for Summary Judgment in *Dr. and Mrs. Bernard Thurlow vs. State of Washington Department of Ecology*

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and Washington Water Trust, found that Ecology lacks the authority to require an applicant to use its water right to irrigate its lands. Changes in timing and location of return flows by leaving the water instream as a trust water right, rather than diverting it for irrigation and stock water, is not considered to cause impairment to nearby reaches on the Teanaway River. In addition there are no points of diversion that will be affected within the reach directly upstream of the subject POD that would have historically benefited from return flows from the subject rights.

Exercising the water right under Change Authorization No. CS4-YRB03CC2255(A) for instream flow purposes would increase river flows from the historic point of diversion downstream at least to the Sunnyside Diversion Dam near Parker. At that point, it would be added to the instream target flow at Parker, but only during times when there is a surplus to that amount of water required to offset consumptive use: 1) by new water users purchasing mitigation credits from the applicant, 2) new water uses associated with the applicant's proposed development under Water Right Application No. G4-35208, or 3) any other new use to be mitigated by the subject right.

Public Interest Considerations

Pursuant to RCW 90.42.040(4)(a) exercise of a trust water right may be authorized only if the department first determines that the public interest will not be impaired. Ecology must consider how the change in purpose and acceptance into the Trust Water Right Program will affect an array of factors such as wildlife habitat, recreation, water quality, and human health. The environmental amenities and values associated with the area were taken into account during the consideration of this change application. Consideration of these factors allows the author to reach the conclusion in the Conclusions section below that this transfer will not impair the public interest.

Consideration of Protests and Comments

No protests were filed against this application.

Conclusions

In conclusion, the author makes a tentative determination in accordance with RCW 90.03.380 that Change Authorization No. CS4-YRB03CC2255(A) represents a valid right to divert up to 25.78 ac-ft/yr (24.20 ac-ft/yr consumptive and 1.58 ac-ft/yr non-consumptive) of water from the Teanaway River. The 1.58 ac-ft/yr of non-consumptive water will not be protected in the Trust Water Right Program because there is no primary reach.

Approval of this trust Water Right Application as provisioned above will not enlarge the water right or impair existing rights.

Permanently transferring water rights to the Trust Water Right Program for instream flow and water banking use in the Yakima Basin will not impair the public interest.

RECOMMENDATIONS

Based on the above investigation and conclusions, I recommend that the request for transfer of Change Authorization No. CS4-YRB03CC2255(A) to the State Trust Water Rights Program be approved in the amounts and within the limitations listed below and subject to the provisions beginning on Page 2 of this Report of Examination.

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Trust Water Right Attributes

Primary Reach:
None

Secondary Reach*:
24.20 ac-ft/yr from June 1 through September 15 for instream flow and water banking purposes distributed monthly as follows:

	June	July	August	September	Total
Average Qi (cfs)	0.075	0.141	0.104	0.156	---
Qa (af)	4.47	8.69	6.40	4.64	24.20

*Only the portion of the right which is not being used as mitigation will be eligible for protection.

The secondary reach begins approximately at River Mile 2 on the Teanaway River at a point located approximately 650 feet south and 1200 feet west of the northeast corner of Section 34, T. 20 N., R. 16 E.W.M.

When any portion of this trust water is available and not being used for water banking or other authorized purposes, those quantities will be added to the instream target flows managed by the U.S. Bureau of Reclamation at Parker and Prosser and continue downstream to the Yakima River's confluence with the Columbia River. If the water is used to offset consumptive use by new water users purchasing mitigation credits from the applicant, by new water uses associated with the applicant's proposed development under Water Right Application No. G4-35208, or any other new use to be mitigated by the subject right, then the trust water right will NOT be added to the instream target flows at Parker and Prosser..
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Report Writer *Date*

If you need this publication in an alternate format, please call Water Resources Program at (360) 407-6600. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.

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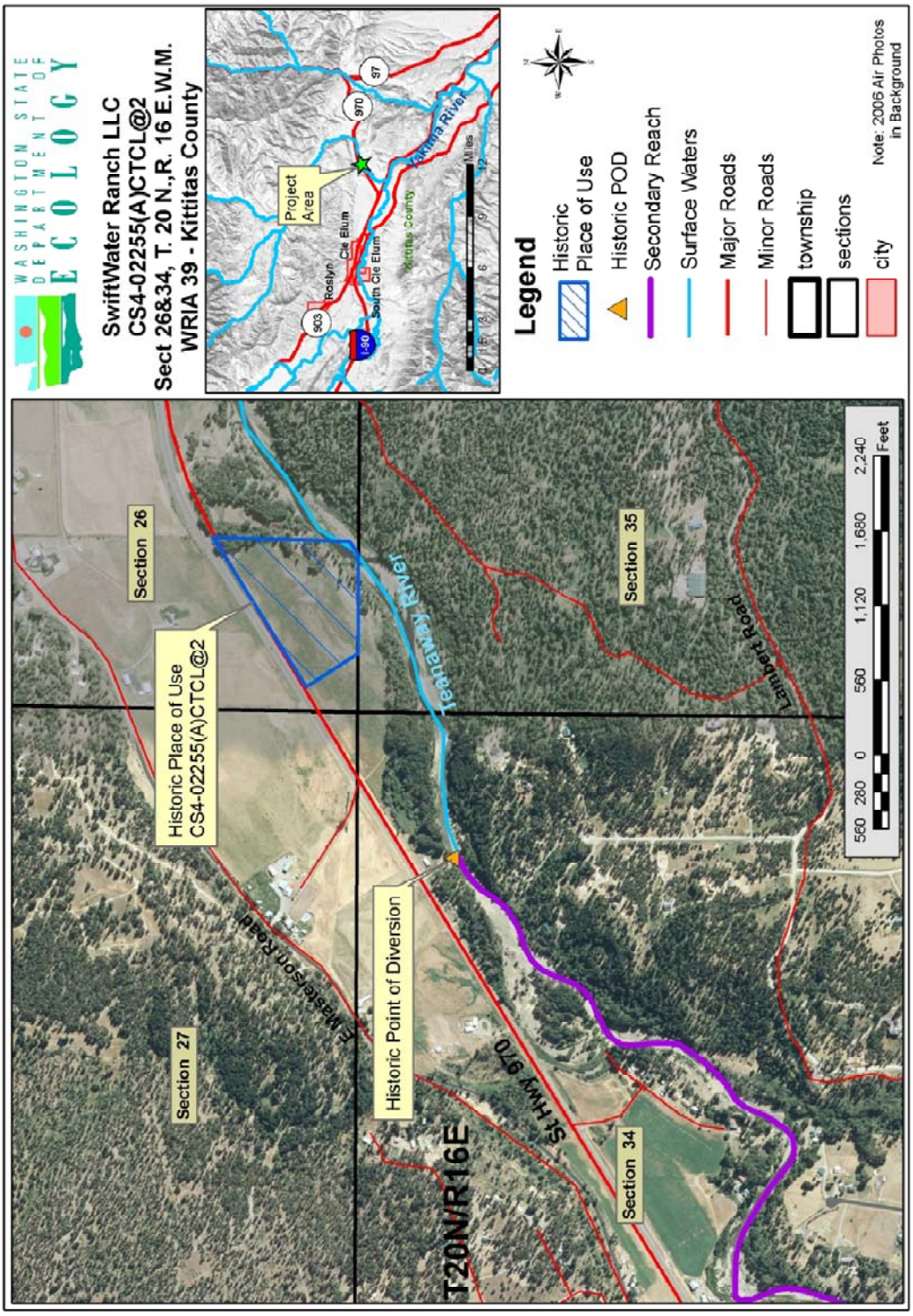
Attachment 1



Trust Water Right Agreement
(SwiftWater Ranch)
(Revised January 31, 2011)

This Trust Water Right Agreement ("Agreement") is made and entered into as of the ____ day of _____, 2010, by and between the Washington State Department of Ecology, State Trust Water Right Program ("Ecology") and SwiftWater Ranch ("SwiftWater").

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, SwiftWater 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 A (the "Land"); and

Whereas, SwiftWater submitted Trust Water Right Applications to Ecology, WRTS File Nos. CS4-02255(A)CTCL@2, CS4-02255(B)CTCL@2, and CS4-02255(C)CTCL@2 (collectively, the "Applications"), 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 Applications, 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 SwiftWater is willing to place the Water into the Trust is to provide a senior water right as off-setting mitigation that will allow SwiftWater, or third parties acceptable to SwiftWater, 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 SwiftWater'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.

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2. **Closing.** This Agreement shall be effective upon its mutual execution, and the Trust shall commence upon the close of an escrow established by the parties as hereinafter provided. The term of this Agreement shall then be for so long as any portion of the Water remains in the Trust (the "Term"). The escrow shall be opened with an escrow agent mutually agreeable to both parties (the "Escrow Agent") upon the mutual execution of this Agreement and its deposit with the Escrow Agent.

2.1. The escrow shall close within thirty (30) days of the occurrence of the last of the following events: (a) mutual execution of all agreements and documents contemplated by or collateral to this Agreement; (b) SwiftWater's deposit of an executed quitclaim deed subject to a condition subsequent in recordable form of the Water to the Trust substantially in the form of Exhibit B attached hereto and incorporated herein (the "Deed"); the giving of all requisite public notices for actions contemplated or referred to herein; the deposit of Ecology's letter accepting the Water into the Trust (the "Acceptance"); the deposit of the ROE and the Certificate, each in form and content acceptable to SwiftWater; and the expiration of all notice, comment and appeal periods related to the full implementation of this Agreement, the ROE, and the Certificate. SwiftWater shall pay any of the escrow costs, and the parties shall execute appropriate escrow instructions to the Escrow Agent.

2.2. Upon closing the Escrow Agent shall record the Deed with the Kittitas County Auditor and/or such other places as may be appropriate and shall deliver the ROE and Certificate to SwiftWater.

3. **Groundwater Application.** Once this Agreement is executed, Ecology will promptly evaluate the extent to which the Water held in the Yakima Pilot Water Bank will be suitable to mitigate the domestic uses proposed by SwiftWater under Application No. G4-35208 ("Groundwater Application").

3.1 Ecology, pursuant to WAC 173-539A-080, shall timely process the Groundwater Application under RCW 90.03.260-.340 and Chapter 90.44 RCW utilizing such portion of the Water in Trust as reasonably needed under the quantity allocation set out in Exhibit C which, together with any other proposed mitigation measures, shall offset the impacts of the new withdrawal proposed under the Groundwater Application.

3.2 Ecology shall complete a Water Transfer Working Group ("WTWG") project description and will present it to the WTWG for the Groundwater Application. Ecology may assign some or all of the Water to the Reclamation-Ecology storage and delivery exchange contract in order to provide appropriate mitigation for the Groundwater Application.

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3.3 Ecology shall investigate the Groundwater Application and prepare a Report of Examination recommending issuance or denial of a permit based on applicable policy, rules, and law. Ecology's review of the Groundwater Application shall also include the following considerations:

3.3.1 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.

3.3.2 If issued, Ecology's permit relative to the Groundwater 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.

3.3.3 If the Water is deemed adequate to fully mitigate the Groundwater Application, then, 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 Groundwater Application, and exhaustion of all applicable appeal periods thereof, SwiftWater shall execute such documentation as necessary to irrevocably and perpetually commit the Water to Trust for purposes of offsetting the Groundwater Application.

3.4 If Ecology intends to issue an ROE for the Groundwater Application, it will publish the draft ROE on its internet site. If the form and substance is acceptable to SwiftWater, SwiftWater shall cause an escrow to be opened for such transaction at the Escrow Agent. The escrow shall 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; the giving of all requisite public notices for actions contemplated by such transaction; Ecology's deposit of the ROE and the new water right permits associated with the Groundwater Application, each in form and content acceptable to SwiftWater; the expiration of all notice, comment and appeal periods related to the full implementation of this Agreement, the ROE, and the new water right permits; and the deposit of all monies, documents and things relevant and necessary to conclude the transaction between SwiftWater and Ecology. SwiftWater may, at any time prior to closing of escrow and without cause or penalty, withdraw the Groundwater

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Application, limit or withhold any allocation of any portion of the Water to such transaction, or terminate this Agreement, all as further described below.

4. **Uncommitted Trust Water Rights.** With respect to any Water that has not been irrevocably committed to the Trust as mitigation water to offset and allow for the permitting of new water rights, SwiftWater may, at any time and its sole discretion:

4.1 Withdraw from the Trust all of the Water concurrent with cancellation of the Groundwater ApplicationGroundwater Application and any permits issued thereunder, and utilize, transfer, sell, or otherwise appropriate the Water consistent with applicable law.

4.2 Withdraw from the Trust that portion of the Water that is not required for mitigation of the Groundwater Application.

4.3 Enter into third party agreements for Water in the Trust that is in excess of that required as mitigation for the Groundwater Application, all as consistent with the process set forth in Section 5, below.

4.4 Cancel or modify the Groundwater Application and enter into third party agreements for all Water in the Trust, consistent with the process set forth in Section 5, below.

5. **Third Party Sales.** The process for SwiftWater'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:

5.1 SwiftWater 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 SwiftWater may elect, SwiftWater 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.

5.2 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.

5.3 If necessary or appropriate, Ecology will complete a Water Transfer Working Group ("WTWG") project description and will present it to the

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WTWG. Ecology, in consultation with the U.S. Bureau of Reclamation, will determine if some or all of the Water that SwiftWater or the third party applicant designates would be assigned to the Reclamation-Ecology storage and delivery exchange contract.

5.4 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:

5.4.1 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 maybe, 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.

5.4.2 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.

5.4.3 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.

5.4.4 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.

5.4.5 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

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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.

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

6. **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:

6.1 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 Nos. CS4-02255(A)CTCL@2, CS4-02255(B)CTCL@2, and CS4-02255(C)CTCL@2, 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 90.14.140(2)(h), at all times during the Term manage, maintain, preserve and protect for the benefit of SwiftWater 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;

6.3 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

6.4 Shall not assess or charge SwiftWater 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

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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.

7. **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:

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

7.1.1 SwiftWater is a Washington limited liability company authorized and fully able to enter into and perform all its obligations in this Agreement according to its terms.

7.1.2 Upon its full execution, this Agreement is binding upon SwiftWater in accordance with its terms.

7.1.3 SwiftWater 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 SwiftWater:

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. **Termination; Default.** SwiftWater shall have the right at any time to withdraw the Applications, 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 SwiftWater. 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

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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:

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

8.1.1 SwiftWater shall identify all in-process designation agreements and inform Ecology of their status. SwiftWater 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.

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

8.1.3 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.

8.2 Pursue any other remedy now or hereafter available.

8.3 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.

9. **Assignment.** This Agreement may be assigned by SwiftWater 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. **Notices.** Any notice or communication required by this Agreement between SwiftWater 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 SwiftWater Ranch:
Attn. David Gleason
6152 NE 3rd Court
Renton, Washington 98059

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With copy to:
Shallbetter Law
3201 Airport Road
Cle Elum, WA 98922
(509) 674-3836

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 Schuppe, Section Manager
Water Resources Program, CRO

SWIFTWATER RANCH, LLC
A Washington limited liability company

By_____
David Gleason, Its Managing Member

DRAFT

EXHIBIT A
Water Rights 02255(A), 02255(B), and 02255(C)
and Land to Which Water Rights are Appurtenant

2255 (A) "Renee Lynn Peare Irrevocable Trust": 0.286 cfs, 25.77 AFY for irrigation of 14.32 acres and 0.016 AFY for stock water between May 1 and September 15 in that portion of the SW¼SW¼ of Section 26, T. 20 N., R. 16 E.W.M., lying south of State Route 970 coincident with parcel 5 as described and/or delineated on that certain survey as recorded October 16, 2001 in Book 26 of Surveys, pages 206 and 207, under Auditor's File No. 200110160025, records of Kittitas County, Sate of WA, being a portion of the SW¼ of Section 26 and a portion of the NW¼ of Section 35, all in T. 20 N., R. 16 E.W.M., in Kittitas County.

2255 (B) "Kerri Farnum Irrevocable Trust": 0.04 cfs, 3.60 AFY for the irrigation of 2 acres from May 1 to September 15 in that portion of the N½NE¼NE¼ of Section 34, T. 20 N., R. 16 E.W.M., lying northeasterly of the Teanaway River and northerly of a pond located on the property coincident with Parcels 3 and 4 as described and/or delineated on that certain Survey as recorded October 16, 2001, in Book 26 of Surveys, pages 206 and 207, under Auditor's File No. 200110160025, records of Kittitas County, State of WA, being a portion of the SW¼ SW¼ of Section 26, SE¼SE¼ of Section 27, the NE¼NE¼ of Section 34, and the NW¼NW¼ of Section 35, all in T. 20 N., R. 16 E.W.M., in Kittitas County.

2255 (C) "Renee Lynn Peare Irrevocable Trust": 0.034 cfs, 3.02 AFY for irrigation of 1.68 acres from May 1 to September 15 in that portion of the SW¼SW¼ of Section 26, T. 20 N., R. 16 E.W.M lying south of State Route 970 coincident with parcels 3 and 4 as described and/or delineated on that certain survey as recorded October 16, 2001 in Book 26 of Surveys, pages 206 and 207, under Auditor's File No. 200110160025, records of Kittitas County, Sate of WA, being that portion of the SW¼ SW¼ of Section 26, SE¼SE¼ of Section 27, the NE¼NE¼ of Section 34, and the NW¼NW¼ of Section 35, all in T. 20 N., R. 16 E.W.M., in Kittitas County.

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EXHIBIT B
FORM OF DEED

Upon Recording Return to:
Traci Shallbetter
SHALLBETTER LAW
3201 Airport Road
Cle Elum, WA 98922

DOCUMENT TITLE: WATER RIGHT QUITCLAIM DEED

GRANTOR: SWIFTWATER RANCH, LLC, a Washington limited liability company

GRANTEE: Washington State Department of Ecology, State Trust Water Right Program

LEGAL DESCRIPTION OF PROPERTY ASSOCIATED WITH WATER RIGHTS:

Claim No. 2255(A): Portion of the SW ¼ SW ¼ of Sec. 26, T20N, R16E., W.M. lying south of SR970, coincident with Parcel 5, as delineated on the Survey recorded in Book 26 of Surveys, pages 206-207, Auditor's File No. 200110160025, records of Kittitas County, Washington, being a portion of the SW ¼ of Section 26 and the NW ¼ of Section 35, all in T20N, R 16E., W.M., Kittitas County, Washington

Claim No. 2255(B): Portion of the N ½ NE ¼ NE ¼ of Section 34, T20N, R16E, W.M., lying northeasterly of the Teanaway River and northerly of a pond located on the property, coincident with Parcels 3 and 4 as described on that certain Survey recorded in Book 26 of Surveys, pages 206 and 207, under Auditor's File No. 200110160025, records of Kittitas County, State of Washington, being a portion of the SW ¼ SW ¼ of Section 26, SE ¼ SE ¼ of Section 27, the NE ¼ NE ¼ of Section 34, and the NW ¼ NW ¼ of Section 35, all in T20N, R16E., W.M. in the County of Kittitas, State of Washington.

Claim No. 2255(C): Portion of the SW ¼ SW ¼ of Section 26, T20N, R16E, W.M., lying south of SR 970, coincident with Parcels 3 and 4 as described on that Survey recorded in Book 26 of Surveys, pages 206 and 207, under Auditor's File No. 200110160025, records of Kittitas County, State of Washington, being a portion of the SW ¼ SW ¼ of Section 26, the SE ¼ SE ¼ of Section 27, the NE ¼ NE ¼ of Section 34, and the NW ¼ NW ¼ of Section 35, all in T20N, R16E., W.M., in the County of Kittitas, Washington.

ASSESSOR'S TAX PARCEL NOS.:

20-16-26060-0001 20-16-26060-0002
20-16-26060-0003 20-16-26060-0004

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20-16-26060-0005	20-16-26060-0006
20-16-26060-0007	20-16-26060-0008
20-16-35050-0008	20-16-35050-0007
20-16-35050-0005	20-16-35050-0003
20-16-35050-0004	20-16-35050-0001

WATER RIGHT
QUIT CLAIM DEED

THE GRANTOR, SWIFTWATER RANCH, LLC, a Washington limited liability company, for valuable consideration in, conveys and quit claims to the Washington State Department of Ecology, State Trust Water Right Program, ("Grantee") all of Grantor's right, title, interest and beneficial use of, in and to the water rights arising under or related to Claim No. 2255(A) and Claim No. 2255(B) and Claim No. 2255(C) as confirmed in Conditional Final Order re Subbasin No. 3 (Teanaway) in *State of Washington v. Acquavella, et al*, Yakima County Superior Court Cause No. 77-2-01484-5, on February 8, 2001, which water rights are appurtenant to the real property situated in the County of Kittitas, State of Washington, legally described on the cover sheet and incorporated herein by reference;

SUBJECT TO the terms and conditions of that Trust Water Right Agreement attached hereto as Exhibit A.

Dated this ____ day of _____, 2011

SWIFTWATER RANCH, LLC

_____

By: David Gleason, Managing Member

DRAFT

STATE OF WASHINGTON)
) ss.
COUNTY OF)

I certify that I know or have satisfactory evidence that DAVID GLEASON is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledge it as the Managing Member of SWIFTWATER RANCH, LLC, to be the free and voluntary act of such limited liability company for the uses and purposes mentioned in this instrument.

Dated this _____ day of _____, 2010.

_____

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

DRAFT

EXHIBIT C
CONSUMPTIVE QUANTITIES
ASSOCIATED WITH Water Rights 02255(A), 02255(B), and 02255(C)

02255(A):	24.20 AFY
02255(B):	3.38 AFY
02255(C):	2.84 AFY

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EXHIBIT D
QUANTITY ALLOCATIONS FOR MITIGATION WATER

Consumptive Water Use Calculator

Percentage of Water Consumed by Rule

Water Use	% Consumed
In-house Use with a On-site Septic System	30%
n-house Use Hooked up to a Sanitary Septic System	20%
Outdoor Use (Irrigation)	90%

How Much Water Do I need?

In-House Use	Number of Connections	Amount of water per Connection (gallons per day) *
In-house Use with a On-site Septic System	1	350
In-house Use Hooked up to a Sanitary Septic Syste	0	350

* This value is a default value based on Dept of Health minimum service

Outdoor Use	Number of Square Feet	Number of Acres	Amount of water per acre (ac-ft)**
Irrigation	21,780	0.500	1.89

** This value is based on an irrigation requirement for pasture/turf in the Cle Elum area and an irrigation efficiency of 80% consistent with WAC 173-539A.

TOTAL CONSUMED	TOTAL USE
Consumptive Water Use (ac-ft)	Water Use (ac-ft)
0.118	0.392
0.000	0.000
Consumptive Water Use (ac-ft)	Water Use (ac-ft)
0.849	0.943
Total Consumptive Water Use (ac-ft)	Total Water Use (ac-ft)
0.967	1.335

The total consumptive water use is based on the assumptions in WAC 173-539A

Total water use is the quantity of water required for the project.