

## WATER LEASE AGREEMENT

THIS WATER LEASE AGREEMENT ("Lease") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2013 ("Effective Date") between the Basalt Water Conservancy District ("BWCD," "District," or "Lessor"), a Colorado Water Conservancy District organized pursuant to C.R.S. § 37-45-101 et seq., whose address is c/o Balcomb & Green, P.C., P.O. Drawer 790, Glenwood Springs, CO 81601, the Town of Basalt, Colorado, a Colorado municipal corporation, whose address is 101 Midland Avenue, Basalt, CO 81621, and the Board of County Commissioners of the County of Pitkin, Colorado, a Colorado municipal corporation, whose address is \_\_\_\_\_ (Town of Basalt and Pitkin County together the "Lessees" or individually as "Basalt" and "Pitkin County", respectively). Lessor and Lessees are sometimes referred to individually herein as a "Party" or collectively as the "Parties."

### WITNESSETH:

WHEREAS, the District is the owner of 1.02 cubic feet per second ("c.f.s."), absolute, of the Grace and Shehi Ditch ("Grace and Shehi Water"), which consists of 0.42 c.f.s. in Priority Number 142, adjudicated on May 11, 1889 in Case Number CA0132 for irrigation purposes; and 0.60 c.f.s. in Priority Number 302, adjudicated on August 25, 1936 in Case Number CA3082 for irrigation purposes; and

WHEREAS, the Grace and Shehi Water was used to historically irrigate the acreage depicted on Figure 1 within 'Parcel 2' as described at Exhibit A attached hereto and incorporated herein; and

WHEREAS, the District filed Case No. 10CW47, District Court for Colorado Water Division No. 5, to change the Grace and Shehi Water from direct use for irrigation to include use for augmentation including by exchange; and

WHEREAS, Basalt and Pitkin County filed Statements of Opposition to Case Number 10CW47; and

WHEREAS, Basalt agreed to withdraw its Statement of Opposition to Case Number 10CW47 in exchange for an agreement to lease the Grace and Shehi Water for irrigation when not in use by the District; and

WHEREAS, the Water Court entered a final Decree granting the District's Application in Case No. 10CW47 on December 3, 2012 and previously had approved the Stipulations between the District and Basalt and the District and Pitkin County; and

WHEREAS, Basalt and Pitkin County are the co-owners of the land historically irrigated by the Grace and Shehi water depicted on Figure 1 and described at Exhibit A; and

WHEREAS, Basalt and Pitkin County desire to lease the Grace and Shehi Water from the District when it is not in use by the District for operation of the plan for augmentation, including operation by exchange, as decreed in Case Nos. 02CW77 and 10CW47, District Court for Colorado Water Division No. 4.

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, it is agreed between the Parties as follows:

**1. Grant of Lease.**

- a. Subject to legal and physical availability and other terms and conditions of the Lease and the Decree entered in Case No. 10CW47, Lessor hereby leases to Lessees the Grace and Shehi Water for irrigation of the land depicted on Exhibit A.
- b. The Grace and Shehi Water may be diverted only during the historical irrigation season, which is no earlier than May 1 and no later than October 31 each year, and only when the Grace and Shehi Ditch is operational.
- c. The Grace and Shehi Water may: (i) only be used on the land depicted on Exhibit A and not on any other location; (ii) only be used for customary agricultural uses; and (iii) not be used for any commercial or industrial operations or purposes.

**2. Subordination.**

- a. **Subordination to District's Needs.** Lessees' right to divert and use the Grace and Shehi Water shall at all times be subordinate to Lessor's needs. At such times when the District determines, in its reasonable discretion, that the Grace and Shehi Water is needed for augmentation as set forth in the decree in Case No. 10CW47, then the District's needs shall take precedence over Lessees' rights under this Lease and the amount of the Grace and Shehi Water Lessees are entitled to divert hereunder shall be reduced by the amount required to satisfy the District's needs.
- b. **Procedure for District's Use of Grace and Shehi Water.** At any time during this Lease, the District may utilize the Grace and Shehi Water for the purposes authorized by the final decree in Case No. 10CW47. Due to the unpredictable and sudden nature of an administrative water rights call, the District is entitled to utilize any portion of the Grace and Shehi Water immediately upon issuance of notice to Lessees by telephone, email, or written notice to Lessees ("Notice"). Immediately upon receipt of Notice, the Lessees shall immediately cease diversions at the headgate for any irrigation of the area depicted on Figure 1 and described at Exhibit A. Lessees shall not reinstate diversion and use of the Grace and Shehi Water until written permission to do so is received by Lessees from the District. Such written permission may be in the form of electronic mail.

3. **Term.** This Lease shall expire on January 1, 2063, provided, however, either Party may terminate this Lease on or before January 1<sup>st</sup> of any year for any reason by providing written notice to the other Party prior to December 15<sup>th</sup> of the previous year. However, Lessees' rights of termination are severable such that either Pitkin County or Basalt may terminate this Lease, while the non-terminating Lessee may continue its rights and obligation hereunder this Lease.
4. **Rental Amount.** Lessees shall pay to Lessor One-Dollar (\$1.00) together annually due on

January 1<sup>st</sup> of each year.

5. **Covenants of Lessees.** In consideration of the lease of the Grace and Shehi Water, the Lessees hereby covenants and agrees as follows:

- a. Lessees shall not directly or indirectly challenge or threaten Lessor’s title to or right to use the Grace and Shehi Water, including by filing a statement of opposition in any case in which the Grace and Shehi Water is at issue unless this Lease has been terminated by the Party filing any such statement of opposition.
- b. Lessees shall keep detailed records and evidence of their use of the Grace and Shehi Water, including monthly diversion records. Lessees shall provide Lessor copies of all records on an annual basis or at any time upon request.
- c. To implement Lessor’s compliance with the decree in Case No. 10CW047, Lessees shall limit its use of the Grace and Shehi Water to no greater than the following volumetric limits in any year:

May	June	July	August	September	October
27.87 AF	52.10 AF	57.25 AF	53.84 AF	51.10 AF	31.97 AF

Average diversion rates in any month may not exceed the following:

May	June	July	August	September	October
0.453 cfs	0.876 cfs	0.931 cfs	0.876 cfs	0.831 cfs	0.520 cfs

These limits are reduced from the 10-year average stated in the final decree of Case No. 10CW47 to ensure that the Lessor can utilize the maximum diversion for its purposes any one given year out of ten. These limits will be further reduced by the Lessor’s pro rata share of the Ditch if the full decreed amount of the water rights from which the Grace and Shehi Water is derived Ditch cannot be diverted.

- d. Lessees’ use of the Grace and Shehi Water shall comply with the final decree in Case No. 10CW47 and this Lease Agreement.
- e. Lessees shall install, operate, maintain, and repair all ditches and structures required for it to use the Grace and Shehi Water in good and safe condition at its own cost and expense. The District may inspect all structures on the Lessees’ Property to verify the condition of the ditch upon 24 hours notice to Lessees by telephone or voicemail, unless emergency situation dictates immediate inspection. Lessees shall be responsible for all expenses relating to the Lessees’ use of the Grace and Shehi Water, including any expense related to the operation and maintenance of the Grace and Shehi Ditch, except that the District shall pay for the cost of the diversion and measurement devices and operations needed during times when it either bypasses or diverts and returns the Grace and Shehi Water for operation of its augmentation plan decreed in Case No. 10CW047.

6. **Raw Water.** The water to which Lessees are entitled shall be raw, untreated water. The Grace

and Shehi Water shall be available to Lessees at the headgate of the Grace and Shehi Ditch. Lessees undertake the obligation to physically deliver the Grace and Shehi Water to the property depicted on Figure 1 and described at Exhibit A, including the pro rata obligations for any necessary repairs of the ditch or headgate, based upon the diversion rate of the subject leased Grace and Shehi Water to the total cumulative diversion rate of all water rights decreed for diversion in the Grace and Shehi Ditch.

7. **Disclaimer of Warranties.** Lessor makes no representations and warranties concerning the legal or physical availability of the Grace and Shehi Water and is under no duty or obligation to undertake any actions to otherwise perfect, deliver, or provide the Grace and Shehi Water to Lessees. Lessor expressly disclaims all representations and warranties to Lessees concerning the availability or quality of the water under this Lease Agreement, express or implied, including the usefulness or fitness for a particular purpose. Lessees acknowledge that water availability and quality may be determined by many factors beyond Lessor's control, including but not limited to drought or Lessor's use of the water for augmentation, especially during dry years.
8. **No Conveyance or Assignment.** Lessees agrees not to sell, lease, give, sublease, assign, or otherwise provide any portion of the Grace and Shehi Water to any other person or entity without the express written consent of Lessor. Lessees shall not encumber or pledge the Grace and Shehi Water for any purpose.
9. **Indemnification.** To the extent permitted by law, Lessees hereby indemnify and hold Lessor harmless from and against any and all demands, claims, actions, arbitrations, and lawsuits or other circumstances arising out of or connected in any way to exercise of the Grace and Shehi Water by Lessees, including its employees, contractors, agents, members, managers, directors, shareholders or related parties of interest. This indemnification includes, but is not limited to, any and all judgments, fines, liability, settlements, loss, damage, payments, injury, costs and expenses, of any nature whatsoever, including attorneys' fees, thereby incurred by Lessor arising out of or connected in any way to exercise of the Grace and Shehi Water by Lessees pursuant to this Lease.
10. **Insurance.** During the term of this Lease, Lessees shall obtain and maintain comprehensive general liability insurance at its cost covering its uses and activities occurring pursuant to this Lease, in a commercially reasonable amount mutually acceptable to the parties. The policy shall name the Lessor as an additional insured. Lessees shall provide a copy of "Certificate of Insurance" to the District upon request.
11. **Miscellaneous:**
  - a. **Heirs, Successors and Assigns.** The reservations, covenants and restrictions and the rights, duties and obligations stated and declared herein shall be binding upon and shall inure to the benefit of and shall be a burden upon the successors and assigns of the Parties and shall be enforced by each Party against any of the other Parties.
  - b. **Recordation.** This Lease is intended to be recorded in the Official Records of Pitkin County, Colorado.

- c. **Amendment.** Any or all provisions hereof may be amended only upon written approval of the Lessor and Lessees.
- d. **No Implied Waivers.** Failure to enforce any restriction or other provision of this document shall not operate as a waiver of that restriction or provision or of any other restriction or provision contained in this document.
- e. **Governing Law, Remedies, Costs and Expenses.** This Lease shall be construed under and governed by the laws of Colorado, with jurisdiction and venue restricted to a court of competent jurisdiction in Pitkin County, Colorado. If Lessees fail to satisfy or promptly perform any covenant, condition, obligation or agreement that they are obligated to satisfy or perform under this Lease, and such failure shall continue for a period of thirty days after notice is provided to Lessees in writing specifying the nature of such failure, this Lease shall, at the option of Lessor and a non-defaulting Lessee, wholly cease and terminate or Lessor and a non-defaulting Lessee may elect to continue this Lease in full force and effect and Lessor shall have the right to injunctive relief, specific performance or damages, or both, and utilize all available legal remedies to obtain the same. All of the rights and remedies of Party under this Lease shall be cumulative. In any action to enforce or construe the terms of this Lease, the substantially prevailing party shall recover all legal and related court costs, including all reasonable attorneys' fees and expert witness fees, costs and expenses. Should Lessor incur expenses and/or costs in enforcing any covenant of this Lease, Lessees shall pay Lessor's expenses and costs, including reasonable attorney fees.
- f. **Severability.** Wherever possible, each provision of this Lease shall be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Lease shall be found invalid or unenforceable, this shall not affect the validity of the remaining provisions of this Lease, and the remaining provisions shall remain in full force and effect.
- g. **Integration.** This Lease and any documents required or permitted to be executed consistent with this Lease contains the entire agreement and understanding of the Parties with respect to the subject matter hereof, and no other representations, promises, agreements or understandings regarding the subject matter hereof shall be of any force or effect unless in writing, executed by all Parties hereto and dated after the date hereof.
- h. **Liberal Interpretation.** The provisions of this Lease shall be liberally construed as a whole to effectuate the purpose of this Lease.
- i. **No Further Rights; No Third Party Rights.** This Lease is intended to affect, benefit or burden only the Parties to this Lease and no rights or obligations are created for any third parties by this Lease.
- j. **Counterparts.** This Lease may be executed in multiple counterparts or by legible facsimile copy, each of which shall constitute an original, but all of which, taken together, shall constitute one and the same instrument. The facsimile transmission of a

signed copy of this Lease shall be considered valid and constitute a signed original. Copies of this Lease may also be delivered among the parties by facsimile transmission or other electronic means, such as by means of internet utilizing PDF format, and such transmitted copies displaying facsimile duplications of the signature of a party shall have the same force and effect as an original, originally signed in ink by the party, which has been personally delivered to the recipient.

- k. **No Construction Against Drafter**. This Lease was drafted by both Parties with review and comment from each Party’s attorney. Accordingly, the Parties agree the legal doctrine of construction against the drafters will not be applied should any dispute arise concerning this Agreement.
  
- l. **Notices**. All notices, demands or writings in this Lease provided to be given or made or sent that may be given or made or sent by either party hereto to the other, shall be deemed to have been fully given or made or sent when made in writing and delivered either by Fax, Email or United States Mail (certified, return receipt requests and postage pre-paid), and addressed to the party, at the below stated mailing address, email address or fax number. The mailing address, email address or fax number to which any notice, demand or writing may be changed by sending written notice to each party notifying the party of the change.

<b><u>Lessees:</u></b>	<b><u>Lessor:</u></b>
<b><u>With a Copy to:</u></b> Bentley Henderson, Town of Basalt Public Works Director and Tom Kinney, Town water attorney	<b><u>With copy to:</u></b>

IN WITNESS WHEREOF, the Parties have each executed this Lease as of the Effective Date.

**LESSOR:**

**Basalt Water Conservancy District,  
a Colorado Water Conservancy District**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Donald Boyer, President

STATE OF COLORADO )  
 ) ss.  
COUNTY OF GARFIELD )

Acknowledged, subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2013, by  
Donald Boyer, as President of the Basalt Water Conservancy District.

Witness my hand and official seal.

\_\_\_\_\_ My commission expires: \_\_\_\_\_  
Notary Public

**LESSEES:**

PITKIN COUNTY BOARD OF COUNTY COMMISSIONERS

By: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF COLORADO )  
 ) ss.  
COUNTY OF PITKIN )

Acknowledged, subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2013, by \_\_\_\_\_, the \_\_\_\_\_ of the \_\_\_\_\_.

Witness my hand and official seal.

\_\_\_\_\_ My commission expires: \_\_\_\_\_  
Notary Public

**LESSEES:**

THE TOWN OF BASALT, COLORADO

By: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: Mike Scanlon

Title: Town Manager

STATE OF COLORADO )  
 ) ss.  
COUNTY OF PITKIN )

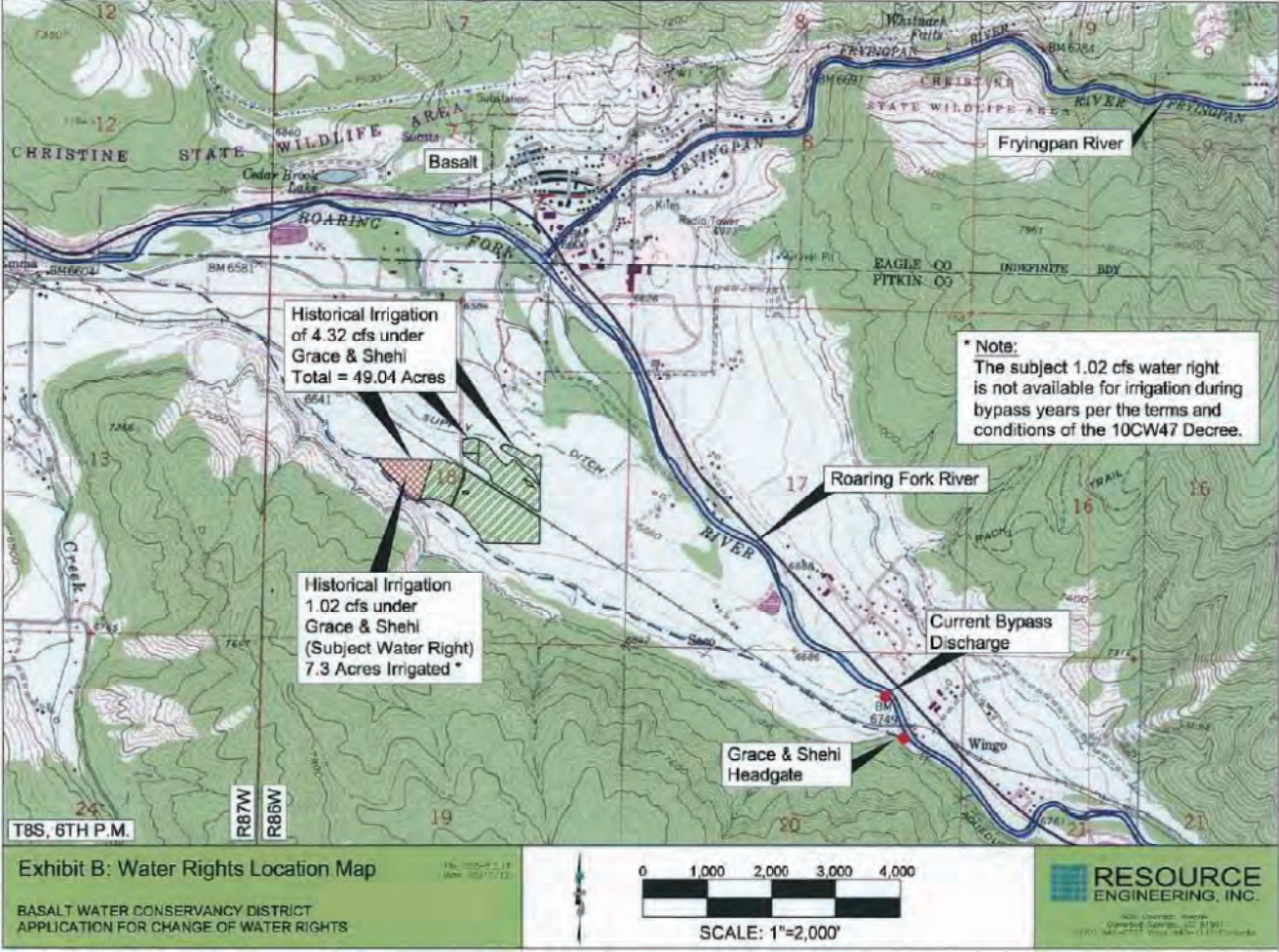
Acknowledged, subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 2013, by \_\_\_\_\_, the \_\_\_\_\_ of the \_\_\_\_\_.

Witness my hand and official seal.

\_\_\_\_\_ My commission expires: \_\_\_\_\_  
Notary Public



**Figure 1.** Map of historically irrigated 7.3 acres using District’s 1.02 cfs, absolute, Grace & Shehi Ditch, Priority Nos. 142 and 302 water rights (Exhibit B to Water Court decree in Case No. 10CW47)



**EXHIBIT A**

(Description of 'Parcel 2' historically irrigated with 1.02 cfs, absolute,  
Grace & Shehi Ditch Priority Nos. 142 and 302 water rights)

A parcel of land situated in Tract 59 of Section 18, Township 8 South, Range 86 West of the 6th P.M. being more fully described as follows:

Beginning at Angle Point No. 7 of said Tract 59 thence S 89°33'30" W 1382.71 feet;  
thence N 89°09'58" W 240.00 feet to the True Point of Beginning;  
thence N 89°09'58" W 1012.49 feet to Angle Point No. 5 of said Tract No. 59;  
thence N 00°05'51" W 1239.38 feet to Angle Point No. 4 of said Tract No. 59;  
thence N 89°46'49" E 973.45 feet;  
thence S 17°46'15" W 624.30 feet;  
thence S 19°14'44" E 702.61 feet to the True Point of Beginning.

**EXCEPTING THEREFROM:**

A parcel of land situated in tract No. 59 of Section 18, Township 8 South, Range 86 West of the 6th P.M., lying Easterly of the Westerly line of said Tract 59 and Southwesterly of the center line of a ditch as constructed and in place, said parcel of land is described as follows:

Beginning at an iron post with a brass cap, found in place, and properly marked for Angle Point No. 4 of said Tract No. 59;  
thence N 89°46'50" E 75.00 feet along the Northerly line of said Tract No. 59 to a point in the said ditch;  
thence S 44°08'21" E 96.56 feet along the center of said ditch;  
thence S 28°20'00" E 50.34 feet along the center of said ditch;  
thence S 35°12'38" E 69.70 feet along the center of said ditch;  
thence S 39°39'15" E 43.28 feet along the center of said ditch;  
thence S 40°22'00" E 40.91 feet along the center of said ditch;  
thence S 49°07'06" E 59.51 feet along the center of said ditch;  
thence S 53°31'56" E 84.01 feet along the center of said ditch;  
thence South 227.17 feet;  
thence West 372.07 feet to a point on the Westerly line of said Tract No. 59;  
thence N 00°05'40" W 550.79 feet along the Westerly line of said tract No. 59 to Angle Point No. 4 of said Tract No. 59, the Point of Beginning.