

Agreement between Methow Valley Irrigation District and Trout Unlimited-Washington Water Project

DRAFT 08/08/14

This Agreement is entered into between METHOW VALLEY IRRIGATION DISTRICT a quasi-municipal corporation (“MVID”), an irrigation district formed pursuant to RCW 87.03, and TROUT UNLIMITED’S WASHINGTON WATER PROJECT OF TROUT UNLIMITED, a 501(c)(3) nonprofit corporation (“TU-WWP”), as of, _____ 2014 (“Effective Date”).

Recitals

- A. MVID is an irrigation district currently operating an irrigation water delivery system including delivery through an open ditch “West Canal” with a diversion from the Twisp River at river mile 3.5 and delivery through an open ditch “East Canal” with a diversion from the Methow River approximately 4 miles from its confluence with the Twisp River.
- B. TU-WWP is a nonprofit corporation that has been determined by the IRS to qualify as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code. TU-WWP is engaged in water policy advocacy, water right acquisitions, and river and stream restoration projects through partnerships with local landowners and grassroots organizations.
- C. The Twisp and Methow rivers are located in the Methow Basin and support populations of steelhead, bull trout and spring Chinook salmon, all of which are listed as endangered or threatened under the Endangered Species Act. There is often insufficient stream flow in the lower Twisp River, during the late summer months, to meet the in-stream flow rule (Chapter 173-548 Washington Administrative Code). The low summer flows, and attendant rise in water temperature, result in loss of habitat access.
- D. MVID and TU-WWP recognize that improvements to MVID’s existing irrigation diversions and delivery systems will provide benefits to ESA-listed fish species through increased in-stream flows in the Twisp and Methow rivers. MVID and TU-WWP are committed to working together under the terms of this Agreement to implement a project to meet their mutual shared goals.
- E. MVID and TU-WWP recognize the need to assure MVID members that project improvements will not adversely impact delivery of irrigation water to members.
- F. MVID holds Surface Water Right Claim No. 003935, filed with the Washington Department of Ecology (“Ecology”) on April 1, 1971. This claim has a priority date preceding the enactment of the surface water code in 1917. The claim is for the right to divert 120 cubic feet per second (cfs) from the Twisp River, for the irrigation of 705 acres of land within the MVID, lying west of the Methow River. Water from this

diversion flows into the West Canal. A copy of WRC No. 003935 is attached as Exhibit A to this Agreement.

- G. MVID also holds Surface Water Certificate No. 945, with a priority date of 1936. Certificate 945 authorizes the diversion of 150 cfs from the Methow River for the irrigation of up to 1,366.66 acres of land lying east of the Methow River. Water from this diversion flows into the East Canal. A copy of SWC No. 945 is attached as Exhibit B to this Agreement.
- H. MVID holds Water Right Claim No. 123748, which authorizes the diversion of 2 cfs from Alder Creek, a tributary to the Methow River. A copy of WRC No. 123748 is attached as Exhibit C to this Agreement.
- I. Under the terms of the March 2011 Methow Valley Irrigation District Water Right Settlement Agreement between MVID and Ecology (“Settlement Agreement”), MVID agreed to reduce, by the beginning of the 2016 irrigation season, its instantaneous diversion from the Twisp River into the West Canal to 11 cfs over the course of the entire irrigation season. MVID further agreed to limit its diversions from the Methow River into the East Canal to 20 cfs, less inflow from the Barkley Canal. A copy of the Settlement Agreement is attached as Exhibit D to this Agreement.
- J. MVID and TU-WWP are committed to working cooperatively to ensure timely implementation of improvements, more particularly identified as the “MVID Instream Flow Improvement Project” which consists of Alternative 5 as described in the Methow Valley Irrigation District Alternatives Evaluation Report prepared by Anchor QEA as modified during design, a copy of which is attached as Exhibit E to this Agreement.
- K. MVID and TU-WWP are working collaboratively with Ecology, which has contracted separately with the U.S. Bureau of Reclamation (“BOR”) for the design of the Instream Flow Improvement Project, to develop the appropriate mechanism to achieve their mutual shared goals and are evaluating the potential to achieve these goals through the state Trust Water Rights Program.
- L. MVID submitted permanent trust water rights applications for each of its water rights described in Recitals F, G, and H above. The purpose of MVID’s applications to place the water rights into the state Trust Water Rights Program is to (1) enhance in-stream flow and (2) provide mitigation water as an offset for the allowance and authorization of water withdrawn from Trust, evidenced by replacement permits and certificates issued by Ecology to supply MVID members with irrigation water for lands within the boundaries of the District and for the Town of Twisp water system service area (“MVID Water Bank”), as contemplated with and in accordance with the Instream Flow Improvement Project.
- M. TU-WWP wishes to acquire for placement in the state Trust Water Rights Program,

and MVID wishes to transfer, approximately 11 cfs as measured at MVID's current point of diversion or headgate, under Water Right Claim No. 003935 from the Twisp River to the state Trust Water Rights Program for in-stream flow in the Twisp River; and up to 0.5 cfs for the MVID Water Bank and for mitigation of MVID's member irrigation needs, which will be established through the Trust Water Right Agreement between MVID and Ecology.

- N. TU-WWP wishes to acquire for placement in the state Trust Water Rights Program, and MVID wishes to transfer, upon completion of the Instream Flow Improvement Project, 2 cfs under Water Right Claim No. 123748 from Alder Creek to the state Trust Water Rights Program for in-stream flow in Alder Creek and the Methow River.
- O. TU-WWP also wishes to have the option to acquire for placement in the state Trust Water Rights Program any additional water associated with the water rights mentioned in Recitals F, G, and H above, which is conserved by this Project and not needed for irrigation use by MVID, as solely determined by MVID, for the benefit of in-stream flows in the Twisp and Methow rivers. MVID is willing to consider that option in the future as MVID experiences the operation and maintenance economies, if any, of the improvements derived from this project and the water needs of MVID.
- P. MVID has committed to work with TU-WWP to sell, bargain and/or convey the water rights mentioned in Recitals F, G, and H above to the state Trust Water Rights Program for the benefit of in-stream flows in the Twisp and Methow rivers in exchange for funding and implementation of the Instream Flow Improvement Project, to achieve improvements and to ensure delivery of irrigation water to meet MVID member needs.

Agreement

For good, valuable and sufficient consideration, acknowledged by the parties, TU-WWP and MVID agree as follows:

- 1. **Role of MVID.** MVID agrees to enter into a Trust Water Right Agreement with Ecology (which among other provisions will provide for the ultimate transfer of MVID's water rights, referenced in F, G, and H of the recitals, to the state Trust Water Rights Program) in exchange for funding sufficient for the MVID Instream Flow Improvement Project.
- 2. **Obligations of MVID.** MVID, as part of MVID's commitment and consideration for this Agreement, agrees to the following actions:
 - a. Enter into a Trust Water Right Agreement with the Ecology to provide for water transfers into the state Trust Water Rights Program to, among other things, eliminate MVID's water diversion from the Twisp River, benefit in-stream flows, and provide MVID members with protected water rights and water delivery service through alternative water delivery methods.

- b. Actively participate in meetings with TU-WWP, BOR, Ecology, and other federal, state, and local agencies and entities as needed to fully design and implement this project.
 - c. Serve as the Project Co-proponent for the purposes of State Environmental Policy Act compliance.
 - d. Work cooperatively with TU-WWP to keep MVID members informed of project progress.
 - e. Assume full ownership and responsibility for the maintenance and operation of the improvements funded by this project upon completion and successful demonstration of project sufficiency.
3. **Role of TU-WWP.** TU-WWP agrees to spearhead and assume the primary responsibility for finding funding sources, soliciting the necessary funding sources and obtaining commitment of funding sufficient to enable the Parties to implement the Instream Flow Improvement Project in a manner that will allow MVID to achieve water delivery efficiency improvements and ensure irrigation water delivery to meet MVID member needs and to provide water for instream flow.
4. **Obligations of TU-WWP.** TU-WWP, as part of TU-WWP's commitment and consideration for this Agreement, agrees to the following:
- a. Seek and obtain funding sufficient for planning, permitting, and construction consistent with the Instream Flow Improvement Project Alternative 5, or a mutually agreed upon modification. In the event that funding cannot be secured within agreed upon project timeframes, TU-WWP will attempt to secure extensions to existing funding and implementation agreements;
 - b. Act as Project Manager for the purposes of TU-WWP's obligations under this Agreement, including but not limited to: (1) obtaining all state and local permits and permissions to construct the project; (2) completing all state and local environmental compliance documentation and consultation activities necessary to implement the project; (3) securing all easements and/or rights-of-way necessary for project staging, construction, and long-term maintenance; and (4) reviewing all project technical specifications and contract documents for completeness and accuracy;
 - c. Assist Ecology and Okanogan County, the SEPA Co-lead Agencies for this effort, with SEPA compliance and serve as MVID's authorized agent for all project permit applications;
 - d. Solicit, advertise for, secure and supervise contractors necessary for the planning, construction, and completion of the project, including but not limited to test drilling, land survey, archaeological survey and investigation, and construction contractors;
 - e. Assure that all project contracts are adequately bonded and warranted for the project construction period and for two years following construction;
 - f. Secure project materials and/or equipment necessary for timely project

- construction;
- g. Provide MVID periodic reports on project progress at least once per calendar quarter;
- h. Manage project close-out, including obtaining and transmitting project as-built drawings to MVID upon project completion; and
- i. Manage grants and grant reporting.

5. Contingencies.

a. This Agreement is contingent upon TU-WWP obtaining funding as set forth above. In the event that TU-WWP is unable to obtain the funding required for implementation within the agreed time period in Paragraph 6 below, TU-WWP agrees to negotiate in good faith with funding and regulatory agencies to secure additional time as may be needed to complete the project.

b. This Agreement is contingent upon the contemporaneous approval and execution of a separate Trust Water Right Agreement between MVID and Ecology, and the execution and performance of the Trust Water Right Agreement.-

6. Satisfaction of Contingencies. All contingencies in Paragraph 5 shall be satisfied or waived on or before December 31st 2014, or upon the satisfactory disposition of all appeals of MVID's water rights transfers, whichever occurs later. This date may be extended only by written agreement of the parties. If the contingencies have not been satisfied or waived by such date and the date has not been extended, this Agreement shall be terminated and the commitments of the parties hereunder shall be null and void. TU-WWP and MVID agree that if the contingencies are not satisfied the State of Washington and Ecology shall to reconvey the waters and water rights in the state Trust Water Rights Program back to MVID as contemplated in the Trust Water Rights Agreement between MVID and Ecology.

7. Additional Warranties and Covenants

a. TU-WWP. In addition to the representations contained elsewhere in this Agreement, TU-WWP makes the following warranties and representations, each of which is material and being relied upon by MVID:

a.i. Power and Authority. TU-WWP has all necessary power and authority to enter into this Agreement and to consummate the transaction herein contemplated; provided however, that nothing herein shall be construed to obligate TU-WWP to expend money in excess of available funding from BPA, the Department of Ecology or other sources of funding for this project.

b. MVID. In addition to the warranties and representations contained elsewhere in this Agreement, MVID makes the following warranties and representations, each of which is material and being relied upon by TU-WWP:

i. Power and Authority. That MVID has all necessary power and authority to enter into this Agreement and that MVID directors have passed a resolution authorizing its President or other officer to execute this Agreement on behalf of MVID and fully bind MVID thereby.

ii. Disclosure of Information. That MVID's representations and commitments to TU-WWP, as set forth in this Agreement, are based upon information known or reasonably available to MVID's officers, agents, and employees as of the Effective Date of this Agreement.

iii. No Adverse Interests, Proceedings, or Claims. To the best of MVID's knowledge, including that of MVID's officers, agents, and employees as of the Effective Date of this Agreement, there is no (a) existing, proposed or contemplated condemnation or eminent domain proceedings which would affect the water right claims in any way, (b) litigation, suit, arbitration, claim or proceeding, at law or equity, judicial, municipal or administrative, pending, or threatened, which does or could materially affect the ownership, use or possession of the water right claim, (c) agreement, contract or liens that would affect the performance of MVID hereunder or the use or possession of the water right claim, (d) disputes, claims or actions involving the ownership of the water right claim. Provided, however, MVID and TU-WWP anticipate potential challenges to the program contemplated in this agreement, which are hereby exempted from this provision.

8. Construction Access / Easement. MVID hereby grants and conveys to TU-WWP, and to its employees, agents, and successors, at all times reasonable access to MVID's irrigation system for the purposes set forth in this Agreement. MVID agrees to work with TU-WWP and its contractors to obtain any and all easements necessary for construction of the Project.

9. Indemnification. MVID will indemnify, protect, defend and hold TU-WWP harmless from and against any and all claims, liabilities, losses, damages, costs and expenses, of any nature whatsoever, including, without limitation, attorneys' fees, arising from or related to any breach of MVID's warranties contained in this Agreement or damage or liability on account of personal injury or death, property damage, economic loss of any kind or nature, caused by MVID, MVID members, or any person, firm or corporation acting on MVID's behalf related to or arising out of this Agreement. MVID shall be responsible for, and shall indemnify and hold TU-WWP harmless from all assessments, costs, or other charges relating to the use and exercise of its water right claims.

TU-WWP will indemnify, protect, defend and hold MVID harmless from and against any and all claims, liabilities, losses, damages, costs and expenses, of any nature whatsoever, including, without limitation, attorneys' fees, arising from or related to any breach of TU-WWP's warranties contained in this Agreement or damage or liability on account of personal injury or death, property damage, economic loss of any kind or nature, caused by TU-WWP, TU-WWP employees, or any person, firm or corporation acting on TU-WWP's behalf related to or arising out of this Agreement.

10. Insurance. TU-WWP shall require its construction and other service contractor(s) to secure and maintain in full force and effect during the performance of all work on the Project a policy of comprehensive general liability insurance providing coverage in the amount equal to the value of the construction contract or at least \$1,000,000 per occurrence and \$2,000,000 aggregate for personal injury, whichever is greater. Additionally, TU-WWP shall require its construction contracts to secure and maintain insurance of at least \$1,000,000 per occurrence and \$2,000,000 aggregate for property damage and automobile insurance providing coverage of at least \$1,000,000 for bodily injury and property damage combined single limit. MVID shall be named as an additional insured in each policy and TU-WWP or its contractor(s) shall furnish MVID certificates showing the type, amount, class of operations, effective dates and dates of expiration of policies prior to commencement of any work. MVID shall be entitled to written notification at least thirty (30) days prior to the expiration or material change in coverage of such policies. Failure of TU-WWP contractors to maintain insurance coverage as agreed shall be a material breach of this Agreement and may result in termination for cause of the Agreement.

11. Assignment. This Agreement is transferable. However, TU-WWP may only assign its rights and obligations under this Agreement to an organization that is a qualified organization authorized as a “nonprofit nature conservancy organization” under RCW 64.04.130 and 84.34.250, or a public entity authorized to acquire water for in-stream flow. TU-WWP shall notify MVID in writing 90 days in advance of such assignment to request MVID consent and approval for such assignment. The failure of TU-WWP to give such notice and seek approval from MVID may affect the validity of such assignment and the responsibilities assigned under this Agreement.

12. Succession. If at any time it becomes impossible for TU-WWP to ensure compliance with the terms and conditions contained in this Agreement, or TU-WWP ceases to exist or to be authorized as a “nonprofit nature conservancy organization” under RCW 64.04.130 and 84.34.250, then TU-WWP’s rights and obligations under this Agreement will become vested and fall upon another entity with purposes similar to TU-WWP’s, constituting a “nonprofit nature conservancy organization” under RCW 64.04.130 and 84.34.250 (or any successor provision(s) then applicable). TU-WWP will notify MVID of the entity proposed to succeed TU-WWP. If MVID objects to the proposed successor, TU-WWP agrees to meet with MVID to discuss the objections and evaluate other qualified entities.

13. Incorporation of Prior Agreements. This Agreement contains the entire agreement and understanding of TU-WWP and MVID with respect to the subject matter hereof, and no prior written or oral agreement, understanding, or communication pertaining to any such matter shall be effective for any purposes. This Agreement supersedes the Memorandum of Agreement between TU-WWP and MVID dated December 18, 2012. No provision of this Agreement may be changed except by written agreement signed by all the parties hereto.

14. Notices. Any notice, demand, or request authorized or required by this Agreement shall be deemed to have been given, on behalf of MVID when mailed, postage prepaid or delivered to Lisa Pelly, Director, Washington Water Project of Trout Unlimited, 103

Palouse Street, Suite 14, Wenatchee, Washington 98801, and on behalf of TU-WWP when mailed, postage prepaid or delivered to MVID, c/o Bunny Morgan, Secretary, P.O. Box 860, Twisp, WA 98856.

15. Counterparts Execution. This Agreement may be executed in any number of counterparts, each of which will be an original, but all of which will constitute one contract, binding on TU-WWP and MVID even though the signatures of all parties may not appear on any one counterpart.

16. Advice of Counsel. The parties acknowledge they have had the opportunity to consult with their own legal counsel regarding this Agreement.

17. Construction. This Agreement will be governed by and construed under the laws of the State of Washington. The captions and paragraph titles used in this Agreement are for reference only and will not be used in the interpretation of this Agreement or any related document. If any provision of this Agreement is determined to be invalid, illegal, void or unenforceable, such determination will not affect any other provision of this Agreement and all such other provisions will remain in full force and effect.

18. Dispute Resolution. TU-WWP and MVID shall make good faith efforts to quickly and collaboratively resolve any dispute arising under or in connection with this Agreement. The parties shall use their best efforts to resolve disputes promptly and at the lowest organizational level. In the event that the parties are unable to resolve the dispute, the parties shall submit the matter to non-binding mediation facilitated by a mutually agreed upon mediator. The parties shall share equally in the cost of the mediator. Each party agrees to cooperate to the fullest extent possible in resolving the dispute. The parties agree that they shall have no right to seek relief in a court of law until and unless the Dispute Resolution process has been exhausted.

19. Governing Law; Venue. This Agreement shall be governed and enforced under the laws of the State of Washington. Venue for any civil action shall be Okanogan County, Washington.

20. Amendment. This Agreement may not be modified or amended except by written agreement of the parties.

This Agreement has been signed by MVID and TU-WWP as of the Effective Date.

MVID:

METHOW VALLEY IRRIGATION
DISTRICT,

By: _____

TU-WWP:

WASHINGTON WATER PROJECT OF
TROUT UNLIMITED,
a Michigan nonprofit corporation

By: _____

Greg Nordang, Board President
Address:
P.O. Box 860
Twisp, WA 98856

Lisa Pelly, State Director
Address:
103 Palouse Ave., Suite 14
Wenatchee, WA 98801

ACKNOWLEDGEMENTS

State of Washington
County of _____

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he signed this instrument and acknowledged it as President of the Board of METHOW VALLEY IRRIGATION DISTRICT to be the free and voluntary act of such entity, for the uses and purposes mentioned in the instrument.

Dated: _____ Name: _____

NOTARY PUBLIC for the State of _____,
residing at _____

My appointment expires: _____

State of Washington
County of _____

I certify that I know or have satisfactory evidence that LISA PELLY is the person who appeared before me, and said person acknowledged that she signed this instrument and acknowledged it as the Director of WASHINGTON WATER PROJECT OF TROUT UNLIMITED, a Michigan nonprofit corporation, to be the free and voluntary act of such entity for the uses and purposes mentioned in the instrument.

Dated: _____ Name: _____

NOTARY PUBLIC for the State of Washington,
residing at _____

My appointment expires: _____

Exhibit A

Water Right Claim No. 003935 (Methow River)

Exhibit B

Surface Water Certificate No. 945 (Twisp River)

Exhibit C

Water Right Claim No. 123748 (Alder Creek)

Exhibit D

2011 Settlement Agreement between MVID and Ecology

Exhibit E

MVID Instream Flow Improvement Project