

Trust Water Right Agreement
Final Draft 08-06-2014

This Trust Water Right Agreement (the “Agreement”) is made and effective as of the ____ day of _____, 2014, by and between the Washington State Department of Ecology, State Trust Water Right Program (“Ecology”) and the Methow Valley Irrigation District, a quasi municipal Corporation, (“MVID”).

Whereas, Ecology is the trustee of the State Trust Water Rights Program as authorized under Chapter 90.42 RCW (the “Trust Water Rights Program”); and

Whereas, MVID is the owner of certain water rights in the Methow River Basin as more particularly described and quantified in Exhibit A (the “Water”) and presently appurtenant to the land legally described in Exhibit B (the “Land”), each such exhibit being attached hereto and incorporated herein; and

Whereas, MVID submitted three Water Right Change Applications to Ecology, WRTS File Numbers CS4-MVID@155 (Certificate SWC 945), CS4-118277CL (Claim 118277), and CS4-MVID@156 (Claim 003935) (collectively, the “Change Applications”) in Exhibit A, to place these Water Rights (the “Water”) into the Trust Water Rights Program for the purpose of enhancing in-stream flow and providing mitigation water to offset the permitting of new water rights to be used by MVID members for irrigation within the MVID boundaries and municipal water supply within the Town of Twisp water system service area as part of the MVID Instream Flow Improvement Project; and

Whereas, Ecology has accepted the Change Applications and is investigating the extent and validity of the Water in preparation to issue its Water Right Reports of Examination concerning the extent and validity of the Water (the “ROE’s”) and its trust water certificates (the “Certificates”). Following issuance of the ROE’s, the Certificates will be incorporated into this Agreement and appended in Exhibit C to document Ecology’s determination, including quantification of the consumptive use associated with the MVID’s water rights; and

Whereas, subject to the terms of this Agreement and the Change Applications, Ecology confirms that it is willing, able and authorized to hold and manage the Water in the Trust Water Rights Program as provided for herein;

Whereas, subject to the terms of this agreement, MVID confirms it is willing, able, and authorized to convey the Water to the Trust Water Rights Program as provided for herein; and

Whereas, MVID has submitted new “master” groundwater and surface water applications (“New Applications”) to Ecology, WRTS File No’s S4-33097 and G4-33098 in Exhibit D, to permit new MVID authorizations mitigated by the Water to be held in the Trust Water Rights Program. Following approval and issuance by Ecology of “New ROE’s” and “New Permits” or “Other New Permits” in response to these New Applications, they

will be incorporated into this Agreement and appended in Exhibit D to document the new MVID diversionary authorization.

Whereas, Ecology and MVID intend through this agreement to establish the MVID Water Bank; and,

Whereas, the New Permits or other New Permits will be mitigated through permanent designation of such portions of MVID's beneficial interest in the Water as is reasonably required to offset the consumptive use associated with the use authorized by the New Permits and any Other New Permits to ensure there will be no impairment to the instream flows adopted in WAC 173-548, or to other senior water rights.

Whereas, MVID may assign portions of the New Permits to its members to implement the MVID Instream Flow Improvement Project, and may also file "Other New Applications" during or following construction if unallocated water remains in the Trust Water Rights Program

Definitions:

"The Water" means the three water rights associated with Water Right Claim 003935, Water Right Claim 118277, and Surface Water Certificate 945.

"The Water Right Change Applications" means applications CS4-MVID@156 (Claim 003935), CS4-MVID@155 (Certificate SWC 945), and CS4-118277CL (Claim 118277).

"The Reports of Examination" means Ecology's Investigator's Reports and Findings of Fact and Order in response to the Water Right Change Applications.

"MVID Instream Flow Improvement Project" means Alternative 5 described in the Methow Valley Irrigation District Alternatives Report prepared by Anchor QEA as modified during design (see Attachment 1).

"The New Applications" or "New Applications" means Water Right Applications S4-33097 and G4-33098.

"The New Permits" or "New Permits" means Ecology's permit(s) issued in response to a New Application or New Applications.

"Other New Applications" means an application for a new water right filed by MVID on behalf of one or more MVID members, not including S4-33097 and G4-33098.

"Other New Permits" means Ecology's permit(s) issues in response to an "Other New Application."

“Assignment” means the process pursuant to RCW 90.03.310 for Ecology to acknowledge the change ownership from MVID to a MVID member of a portion or all of an unperfected New Permit or Other New Permit.

“Designation” means an allocation of any portion of The Water to offset the consumptive use of a new appropriation of public water requested in a New Application or Other New Application.

“Permanent Allocation to Instream Flow” means any portion of The Water committed to:

- a) mitigate the consumptive impact associated with a New Permit or Other New Permit in good standing or has been superseded by a Certificate of Water Right; or,
- b) be held by Ecology in the Trust Water Rights Program exclusively for instream flow improvement.

“MVID member” means the owner of land within the MVID boundaries and service area.

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 agree as follows:

1. The purpose of this Agreement and the primary reason MVID is willing to place the Water into the Trust Water Rights Program is in exchange for a fully funded and constructed “Instream Flow Improvement Project,” the funding for which has been contracted between MVID and Trout Unlimited – Washington Water Project (“TU-WWP”) pursuant to the contract dated _____, 2014 and to provide a senior water right as off-setting mitigation (“MVID Water Bank”) that will allow MVID members to apply for and receive new ground water withdrawal or surface water diversionary permits within the Methow River basin.

The primary purpose for Ecology to accept the Water into the Trust Water Rights Program is to provide instream flow benefit on the Twisp and Methow Rivers in exchange for grant funding of upgrades to MVID’s irrigation system. Ecology’s partner in implementing this project is Trout Unlimited (TU), which has negotiated an “*Agreement between Methow Valley Irrigation District and Trout Unlimited-Washington Water Project*” to facilitate implementation of the MVID Instream Flow Improvement Project.

1.1 Final quantities conveyed to the Trust Water Rights Program will be documented in the ROE’s in Appendix C, and in the Deeds conveyed in Section 2.2. However, the general intent of this agreement is to provide the following quantities under this agreement, subject to final statutory decision-making by Ecology:

1.1.1 MVID's interest in Twisp River Water Right Claim 003935 from approximately RM 4 to the confluence of the Twisp and Methow Rivers for instream flow purpose, less that portion impacted by groundwater wells under the MVID Instream Flow Improvement Project.

1.1.2 MVID's interest in any non-consumptive water right quantity on the Methow River from MVID water rights Claim 003935, Certificate SWC 945, and Claim 118277 for instream flow purpose, except that quantity required to support reasonable return flow quantities associated with long-term lost and unaccounted for water associated with the redesigned conveyance system, reasonable return flow associated with a maximum of 4 acre-foot/acre on-farm water duty, and reasonable return flow associated with quantities conveyed/assigned to the Town of Twisp.

1.1.3 MVID's interest on Alder Creek from MVID water right Claim 118277 for instream flow purpose.

1.1.4 MVID's interest in any consumptive water right and reasonable non-consumptive right reserved under Section 1.1.2 from MVID water rights Claim 003935 and Certificate SWC 945 for irrigation, municipal, and water banking purposes.

2. This Agreement shall be effective upon its mutual execution. The term of this Agreement shall then be for so long as any portion of the Water remains in the Trust Water Rights Program (the "Term") unless terminated sooner as provided in this Agreement.

2.1 Prior to issuance of the New Permits by Ecology, MVID shall convey three (3) original signed Deeds to Ecology for the Water and record the Deeds with the Okanogan County Auditor. The Water shall permanently remain with Ecology's Trust Water Rights Program for management under this agreement unless the "Deed Reversion" provision in Paragraph 11.2.2 is triggered. One Deed shall be recorded for each of MVID's three water rights attached in Exhibit A.

2.2 Until the MVID Instream Flow Improvement Project for the upper west side system, is fully constructed, MVID retains the right to divert water from the Twisp River to meet MVID Member needs under a partially constructed system under the development schedule as set forth in Trust Water ROE CS4-MVID@156.

2.3 Ecology shall issue the New Permits under Applications S4-33097 and G4-33098 within 30 days of receipt and acceptance of the Deeds.

3. Once this agreement is executed and New Permits are issued in response to Applications S4-33097 and G4-33098, MVID may assign all or a portion of The Permits to the individual members it will serve as follows:

3.1. If MVID elects to assign MVID Members a portion of water under the “New Permits” or “Other New Permits” held by MVID:

3.1.1 MVID will adopt a framework that will govern assignment of portions of the New Permits or Other New Applications.

3.1.2 The Individual MVID Member assignments or Other New Applications will include the following information:

3.1.2.1 The peak instantaneous withdrawal rate and annual quantity of the Permit to be assigned, expressed as gallons per minute and ac-ft/yr, respectively.

3.1.2.2 The “firm” and “contingent” portion or portions of the Designated amount of Water (See 8.2)

3.1.2.3 Assignment shall be in a form consistent with the requirements of RCW 90.03.310, include responses to 3.1.1.1- 3.1.1.4, and shall be filed and co-signed by MVID and the assignee.

3.1.3 Ecology agrees to timely process Permit assignments under this Agreement.

3.1.4 MVID Members assigned a portion of the New Permits would not need to file an application and receive a permit of their own for the use and amounts of water authorized by their assigned portion of the New Permit.

3.1.5. Upon satisfaction of the permit requirements consistent with RCW 90.03.330, Ecology shall issue a new certificate for each MVID Member (or MVID for the portion retained by the district).

3.2 For New Individuals or Entities Designated by MVID (“Other New Applications”): “Other New Applications” may also be filed at MVID’s discretion if contingent or unallocated water remains in the Water Bank that is not already committed to other parties through the assignment process described in Section 3.1 (e.g. MVID members, instream flows). The process for MVID to file such applications is:

3.2.1 MVID or such third party member of MVID may make application to Ecology to appropriate surface or ground water at the desired location and for the intended use and quantities, together with all regularly required supporting information. As part of the Other New Application, MVID will designate the specific quantity of the Water in Trust Water Rights Program as required to offset the consumptive loss associated with the uses described on the application. In the case of a third-party applicant, MVID will also co-sign the Other New Application.

3.2.2 Upon receipt of a complete Other New Application, Ecology, pursuant to WAC 173-152-050(2)(g), shall accept and timely process it under RCW 90.03.260-.340 and Chapter 90.44 RCW utilizing such portion of the MVID Water Bank as reasonably needed under the quantity allocation set out in Exhibit C which, together with any other proposed mitigation measures, shall reasonably offset the impacts of such new withdrawal. Ecology agrees that expedited processing for water budget neutral projects such as the MVID Water Bank is appropriate under WAC 173-152-050(2)(g).

3.2.3. Ecology will prepare a public notice and send it to the applicant for publication in a newspaper with general circulation in the area as required by RCW 90.03.

3.2.4. The applicant must publish the notice and ensure that the newspaper transmits an affidavit of publication to Ecology. In the event Ecology prepares to issue an ROE for a New Application, it will publish the draft ROE on its internet site for a 30 day review period.

3.2.5. Ecology will investigate the Other New Application and prepare an ROE recommending issuance or denial of a permit based on applicable policy, rules, and law and the terms provided herein. Ecology's review of Other New Applications shall also include the following considerations:

3.2.5.1 In order to develop and confirm appropriate permit standards, MVID and/or such third party shall provide information to reasonably show or estimate, as the case may be, that the consumptive uses of the proposed project, when offset by the mitigation water allocated from the Trust Water Rights Program and any other proposed mitigation measures, do not increase the consumptive use of water. If the Trust Water Rights Program water ROE conditions a portion of the consumptive use eligible for mitigation upon certain performance (e.g. consumptive use assumptions born out via monitoring), then that conditioned portion of the mitigation shall not be allocated or assigned until such performance is met.

3.2.6. Following issuance of New Permits based on the Other New Applications in Appendix D that may subsequently be filed and approved, MVID may assign portions of a Permit to new individuals or entities, provided such individual or entity may exercise that portion of the Permit consistent with the Permitted provisions, or such provisions are permissible for change under RCW 90.03.380 and RCW 90.44.100. In this event, an assignment form consistent with the requirements of RCW 90.03.310 and as provided in Exhibit E shall be filed and co-signed by MVID and the assignee. Ecology agrees to timely process permit assignments under this Agreement.

4. The New Permits relative to the New Applications and Other New Applications will specify the conditions and limitations on the use of water in a manner consistent with the Water held in the MVID Water Bank as mitigation. Conditions relating to measuring and reporting water use will also be included in the permit(s). Permits issued based on New Applications and Other New Applications will have a priority date based on the date filed (pursuant to RCW 90.03.340), provided however, that they will be provisioned to clarify that their priority date for purposes of regulation, adjudication, or any other challenge is equal to the water rights held in Trust Water Rights Program in the MVID Water Bank as set forth in Exhibit A.

5. Both the New Applications and Other New Applications, and their respective Permits once issued, shall be conditioned such that:

5.1 The forfeiture of a Permit or Certificate, or a subsequently issued certificate or portion thereof, does not disturb or prevent the assigned or associated portion of the Trust Water Right from further designation or use under this agreement.

5.2 In the event of forfeiture of a Permit or Certificate described above, Ecology shall notify MVID for the purposes of determining appropriate future designation or uses of the water right.

6. Upon development and beneficial use of water in accordance with Permits issued to MVID or an MVID-designated and assigned third party, the permit holder shall be issued a Certificate of Water Right consistent with the terms set forth herein. Certificates issued will have a priority date based on the date filed (pursuant to RCW 90.03.340), provided however, that they will be provisioned to clarify that their priority date for purposes of regulation, adjudication, or any other challenge is equal to the water rights held in Trust Water Rights Program in the MVID Water Bank as set forth in Exhibit A

7. This agreement, including consideration of removal from the Water Bank of any Water that has not been and cannot be permanently assigned or designated due to circumstances beyond MVID's control, may be modified to incorporate changed circumstances or, alternatively, the agreement may be terminated as provided in paragraph 8. Those changed circumstances are as follows:

7.1 A lack of funding to fully implement the MVID Instream Flow Improvement Project. This provision shall have no effect once all, non-individual well construction contracts are signed and provided construction expenses do not exceed the construction budget determined to be adequate and available at the time construction contracts are signed.

7.2 An inability to obtain all necessary approvals from the various agencies with regulatory authority over the actions described herein.

7.3 An inability to implement any portion of the MVID Instream Flow Improvement Project or this Agreement because of any Court action, order, or

other litigation. A Court action, order, or decision reducing MVID's authorized diversions below those contained in the ROEs is not a changed condition.

7.4 In the instances described in 7.1, 7.2 or 7.3 come to pass, and if MVID agrees, Ecology will convey from the water bank that portion of the water that cannot serve the purposes of this agreement back to MVID.

8. This agreement may be terminated due to any unforeseen circumstances only by mutual agreement of the parties.

8.1 As used in this paragraph, the term "unforeseen circumstances" means those circumstances not specifically described in paragraph 7

8.2 Termination of this agreement due to unforeseen circumstances must be in writing and executed by all parties to this agreement.

8.2 In the event that the parties mutually agree to terminate this agreement due to unforeseen circumstances and do in fact terminate this agreement due to unforeseen circumstances, Ecology will convey from the water bank that portion of the water not already allocated under the terms of this agreement back to MVID.

9. During the Term and in its capacity as a fiduciary, Ecology shall hold and manage the Water in the Trust Water Rights Program pursuant to chapter 90.42 RCW. Ecology:

9.1 Shall support its extent and validity determination and the findings in the ROE that the quantities and beneficial use of the Water is as stated in Exhibits C and paragraph 3 above, and this representation shall also apply to any Water removed from the MVID Water Bank;

9.2 Ecology will conservatively manage the portion of the Water represented by the estimated consumptive use reduction due to piping the east and west canals and replacing portions of the canals with wells ("contingent" water). An Adaptive Management Protocol (Protocol) for verifying the consumptive use estimates contained in the 2013 TU Vegetation Survey and 2013 Anchor QEA Evapotranspiration Report will be performed by MVID. This Protocol includes the following elements patterned after the 2013 analyses:

- Assessment of the condition of east side and west side water delivery infrastructure.
- Aerial photo review.
- Field verification and GPS recording of affected vegetation, wetlands, and ponds.
- Characterization of vegetation type.
- Evapotranspiration estimates.

This analysis is anticipated to be completed in 2019, but may be completed earlier, or incrementally, at MVID's discretion. Following completion of the Protocol, Ecology will timely review it, determine the verified consumptive use quantity, and subsequently exercise the trust water rights in accordance with the verified consumptive use quantity. Ecology would then timely respond to assignments or Other New Applications, as provided in 8.4, for MVID members assigned "contingent" water.

Ecology:

9.3 Shall, in addition to the protections against relinquishment in RCW 90.14.140(2)(h), manage, maintain, preserve and protect for the benefit of MVID and its successors, designees and assigns all aspects and attributes of the Water;

9.4 Shall process all New Applications and Other New Applications where portions of the Water is proposed as mitigation in accordance with the terms of this Agreement; and

9.5 Shall not assess or charge MVID any costs or fees for maintaining the Water in the Trust Water Rights Program; provided that Ecology may charge member third parties its regular costs and fees for water right applications, assignments, transfers and investigations.

9.6 Shall use best efforts to seek and obtain funding sufficient for any costs planning, design, permitting, and construction consistent with the MVID Instream Flow Improvement Project Alternative 5.

9.7 Shall provide technical assistance, where and when appropriate, to MVID to help identify and procure any necessary water right authority to implement the MVID Instream Flow Improvement Project.

9.8 Shall assist MVID in coordinating, permitting, and seeking funding for improvements to the East Canal System if Barkley Irrigation Company improves its system in a manner that reduces flow into the MVID East Canal.

10. 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:

10.1 MVID makes the following undertakings, representations and warranties to Ecology:

10.1.1 MVID is a quasi-municipal corporation duly formed and authorized and fully able to enter into and perform all its obligations in this Agreement according to its terms.

10.1.2 Each individual executing this Agreement on behalf of MVID is duly authorized to execute and deliver this Agreement.

10.1.3 Upon its full execution, this Agreement is binding upon MVID in accordance with its terms.

10.1.4 MVID shall use its best efforts to fully and timely perform its obligations and actions contemplated by this Agreement.

10.2 Ecology makes the following undertakings, representations and warranties to MVID:

10.2.1 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.

10.2.2 Each individual executing this Agreement on behalf of Ecology is duly authorized to execute and deliver this Agreement.

10.2.3 Upon its full execution, this Agreement is binding upon Ecology in accordance with its terms.

10.2.4 Ecology shall use its best efforts to fully and timely perform its obligations and actions contemplated by this Agreement.

11. Upon alleged breach of this Agreement by any party, or other disputes arising hereunder, representatives of MVID and the Department of Ecology shall meet and confer in good faith to resolve their differences. In the event no resolution is reached, MVID may request a meeting with the Director of Ecology to occur within 30 days of the request in order to resolve those differences. In the event of any such alleged breach, or any other dispute, or if any term of this Agreement is found or believed by any party to be void and unenforceable, the parties will meet and seek to reach a mutually agreeable modification. The parties may employ a mutually agreed upon mediator or other suitable facilitator if they believe this may help resolve their dispute. If, after a reasonable period of time, the parties are unable to resolve a dispute by the process outlined above, any party may seek appropriate relief.

12. 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 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:

12.1 As the computation of damages may be difficult, continue this Agreement and bring an action to specifically perform this Agreement.

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

MVID retaining the right to its original authorized points of diversion if the Agreement is terminated prior to start of construction:

12.2.1 MVID shall identify all in-process assignment agreements and inform Ecology of their status. MVID shall not make representations regarding in-process designations, and shall work with Ecology to determine whether an assignment should be completed in each instance. If Ecology agrees, the permit process will be completed promptly in accordance with applicable policies, rules, and law.

12.2.2 Ecology shall promptly convey to MVID or its designee the portion of the Trust Water Rights in the MVID Water Bank (i) not yet assigned as mitigation for individual ground water and surface water permits or associated with MVID's groundwater or surface water delivery systems or (ii) not permanently allocated to instream flow. If any reserve has been set aside to address uncertainty ("Contingent" water subject to the adaptive management plan) associated with the then-existing mitigated permits, Ecology will retain such reserve until it is either assigned to individual permits or Ecology determines some or all of the reserve is unnecessary. Any reserve not needed shall be promptly conveyed by Ecology to MVID.

12.2.3 Each party shall be responsible for their own costs associated with ending the trust water right relationship in an orderly manner.

12.3 Pursue any other remedy now or hereafter available.

13. This Agreement may be assigned by MVID 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. In the unlikely event of a dissolution of MVID, all interests in the water and rights herein, shall remain in good standing and be held by the then current members and water users of MVID.

14. Any notice or communication required by this Agreement between MVID and Ecology shall be given to the addresses set forth below:

To Ecology:
Office of Columbia River Manager
Washington Department of Ecology
Central Regional Office
15 West Yakima Avenue, Suite 200
Yakima, Washington 98902-3452

To MVID:
Attn: Bunny Morgan
PO Box 860

Twisp, WA 98856

14. This Agreement is contingent upon:

14.1 The contemporaneous approval and execution of a separate Agreement between MVID and TU-WWP.

15. 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, the party finding itself unable to enforce the provision may, at its sole discretion, declare this entire Agreement to be null and void.

16. 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.

17. Amendments to this Agreement must be in writing and signed by an authorized representative of each of the parties.

18. Each party shall protect, defend, indemnify, and hold the other harmless from and against their respective acts and omissions and for all third party claims arising out of or related to this Agreement.

19. This Agreement will be governed and enforced under the laws of the State of Washington.

20. Each party agrees to defend the validity of this Agreement. In the event any part of this agreement or the process described in this Agreement is challenged by way of administrative or judicial processes, Ecology agrees to assume the lead in defense thereof.

This Agreement is effective as of the date first above written.

Methow Valley Irrigation District

Name Date

Title

Washington State Department of Ecology

Name Date

Title