

# **A Voluntary Regional Agreement**

**Between**

**The Columbia-Snake River Irrigators Association (CSRIA)**

**And**

**The Washington State Department of Ecology (Ecology)**

## ***A. Preamble***

CSRIA members specified in Appendix A and the Department of Ecology are entering into a Voluntary Regional Agreement (VRA), as authorized under RCW 90.90.030. This statute provides that Ecology may enter into voluntary regional agreements for the purpose of providing new water for out-of-stream use, streamlining the application process, and protecting instream flow.

This VRA is intended to result in the issuance of drought permits to existing interruptible water right holders and new permanent water rights on the Columbia River and Lower Snake River. New water rights shall only be issued by Ecology if the standards in RCW 90.03.290 are met. This VRA also provides that new water uses resulting from the issuance of permits under this agreement shall not reduce or negatively impact streamflows in the Columbia or Snake Rivers during the critical periods established by the legislature.

To meet this standard of protection, Ecology and CSRIA will pursue water conservation, acquisition, storage and other appropriate actions that will provide new water in a quantity sufficient to fully offset any and all new water uses during summer months (see RCW 90.90.030(2)). CSRIA members who participate in this VRA will provide Ecology with an annual mitigation payment. Additionally, CSRIA members who participate in this VRA will submit their water rights for recalibration, to reflect beneficial use consistent with best management practices. Any water saved during the recalibration that can be enrolled in the State's trust water program will be permanently assigned to Ecology. Consistent with state law, Ecology will use water acquired through recalibration, and acquired through other conservation and storage actions funded by the Columbia River Program, to mitigate for new water right applications in the order they were/are received<sup>1</sup> (WAC 173-152-030).

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<sup>1</sup> Ecology has a backlog of several hundred existing applications for new water rights. See Columbia River Programmatic EIS for a discussion on processing of water rights in the Program.

### *Establishment of Pilot Projects and Implementation*

This VRA will be implemented in two phases. Phase 1 will involve full implementation of the VRA, except Section E. Under Phase 1, the feasibility of Section E will be investigated by conducting three pilot water conservation projects to be mutually agreed upon by Ecology and CSRIA. The pilot projects are intended to demonstrate the potential for the types of conservation projects proposed by CSRIA to fulfill the provisions of Section E of the VRA. Phase 1 will terminate no later than December 31, 2010 (unless extended by mutual written agreement). Findings and conclusions regarding Phase 1 will be documented in Ecology's 2009 Columbia River Basin Water Management Program Legislative Report.

Phase 2 would consist of continued implementation of the Phase 1 portions of this VRA as well as full implementation of Section E. Phase 2 will be entered into by written agreement of Ecology and CSRIA only if the parties agree to the following:

- 1) The types of conservation projects identified by CSRIA appear to be capable of providing water in sufficient quantities to support issuance of the new water rights envisioned in Section E of this VRA; and
- 2) An adequate foundation has been established in Phase 1 that will support a long-term working relationship between Ecology and CSRIA.

### **B. Parties**

This VRA is entered into by the State of Washington, acting through the Department of Ecology, an agency of Washington State government in Olympia, Washington, and designated members of CSRIA, defined in this document as CSRIA VRA Participants (see Appendix A), and the CSRIA organization.

### **C. Definitions**

1. "Best Management Practices (BMP's)." BMP's mean conservation and efficiency measures that must be implemented by "CSRIA VRA Participants" under this VRA (see Appendix B, CSRIA Irrigation BMPs, June 2005 edition). The intent of best management practices is to ensure the highest and most economical, beneficial use of water and the elimination of project return flows. Every 5 years from the date of this agreement, Ecology and CSRIA shall meet to discuss whether this agreement should be modified to reflect updated BMPs.
2. "Columbia River Mainstem." Columbia River Mainstem means all water in the Columbia River within the ordinary high water mark of the main channel of the Columbia River between the border of the United States and Canada and the

Bonneville dam, and all ground water within one mile of the high water mark (RCW 90.90.030(12)(a)).

3. "Columbia River Mitigation Standard." Columbia River Mitigation Standards means water rights issued from the Columbia River mainstem, where there will be no negative impact on Columbia River mainstem instream flows in the months of July and August as a result of the new appropriations issued under the agreement (RCW 90.90.030(2)(a)).
4. "CSRIA VRA Participant." CSRIA VRA Participant means a CSRIA member who meets the following conditions:
  - a. The participant is a CSRIA member as of the required enrollment deadline; AND
  - b. The participant is identified in Appendix A as having agreed to have an application for a drought permit or new water right processed under this VRA in lieu of the consultation process provided in WAC 173-563-020(4); AND
  - c. The participant has an "interruptible water right" on the "Columbia River Mainstem" or the "Lower Snake River Mainstem" and an application for a drought permit associated with that "interruptible water right" is on file with Ecology as of the required enrollment deadline<sup>2</sup>; OR
  - d. The participant has a water right application on the "Columbia River Mainstem" or the "Lower Snake River Mainstem" on file with Ecology when Phase 2 is initiated as specified in Section E.1.
5. "Drought." Drought means that the March 1 forecast of April-September runoff at The Dalles is 60 MAF or less (see WAC 173-563-056(c)) and the Governor has declared a drought under WAC 173-166.
6. "Drought Permit." Drought Permit means a standby/reserve permit authorizing the use of Columbia River Mainstem or Lower Snake River Mainstem water in a drought year in the same quantities and manner as authorized by an Interruptible Water Right in a non-drought year, subject to available Mitigation Water.
7. "Interruptible Water Right." An Interruptible Water Right means an existing certificate or permit that is subject to the 1980 Columbia River instream flow rule (WAC 173-563).
8. "Lower Snake River Mainstem." Lower Snake River Mainstem means all water in the lower Snake River within the ordinary high water mark of the main channel of the lower Snake River from the head of Ice Harbor pool to the confluence of

the Snake and Columbia Rivers, and all ground water within one mile of the high water mark (RCW 90.90.030(12)(b)).

9. "Mitigation Payment." Mitigation Payment means an annual payment by a CSRIA VRA Participant to Ecology for mitigation water funded in advance for permits issued under this VRA.
10. "Mitigation Water." Mitigation Water means water managed in Ecology's trust water program or otherwise developed through Ecology's efforts to find, fund and secure water rights through acquisitions, surface and aquifer storage projects, pumps and pipes infrastructure and other conservation projects.
11. "Recalibration." Recalibration means Ecology's tentative determination of the extent and validity of a water right certificate, permit or claim consistent with state law, including applicable regulations, and with appropriate Ecology and Benton & Franklin Water Conservancy Board's guidance. The process of developing a tentative determination shall include consultation with CSRIA. As a condition of this VRA, an existing water right must be recalibrated if a CSRIA VRA participant applies for a new water right or a drought permit, and if the water right is:
  - a. The interruptible right associated with the drought permit; OR
  - b. A water right owned by the participant that shares a point of diversion or withdrawal with the proposed new water right, interruptible water right or drought permit; OR
  - c. A water right that shares a place of use with the proposed new water right, interruptible water right or drought permit; OR
  - d. A water right that is specifically conditioned with a diversion or beneficial use limitation as a water right in a., b. or c. (e.g. Diversions under Water Right A and B shall not exceed 1 cfs).

The provisions of b., c., and d., above, shall not apply to water rights that are under separate ownership from the CSRIA VRA Participant for whom recalibration is being conducted.

12. "Saved Water." Saved Water means the difference between the tentative determination of the water right and the quantity of water required for beneficial use based on best management practices following recalibration of a water right. The process of developing a tentative determination and determining the saved water quantity shall include consultation with CSRIA.
13. "Snake River Mitigation Standard." Snake River Mitigation Standard means water rights issued from the Lower Snake River Mainstem, where there will be

there is no negative impact on Lower Snake River Mainstem instream flows from April through August as a result of the new appropriations issued under the agreement (RCW 90.90.030(2)(b)).

14. "Trust Water Program." Trust Water Program means Ecology's statutory authority under RCW 90.42 and RCW 90.38 to manage waters of the State for instream and other uses.
15. "VRA Implementation Plan." The VRA Implementation Plan means a plan that describes the location and quantities of (where and in what quantities) Mitigation Water is available in Ecology's Trust Water Program (or in storage managed by Ecology) and which applicants will receive it. Updates to the VRA Implementation Plan will be completed iteratively as the program expands.

#### ***D. Terms and Conditions For Drought Permits***

The parties agree to the following mutual obligations:

1. CSRIA VRA Participants will be allowed to file applications for drought permit in two enrollment periods. Enrollment period 1 will conclude on July 1, 2008. Enrollment period 1 applicants will be identified in the VRA at time of signing. Enrollment period 2 will conclude on December 31, 2008. Consistent with provisions of Section F, the parties agree to modify the VRA subsequent to the conclusion of enrollment period 2 solely for the purpose of identifying the additional applicants. The parties agree that such modification will not represent a substantive modification to the VRA.
2. CSRIA VRA Participants shall maintain compliance with BMPs (see Appendix B CSRIA Irrigation BMPs, June 2005 edition.). CSRIA VRA Participants shall submit to on-site BMP certification inspections conducted by Ecology's staff or contractors (e.g. conservation districts). Such inspections shall be coordinated with CSRIA.
3. CSRIA VRA Participants applying for drought permits shall submit their existing water rights for recalibration by Ecology. The process of developing a tentative determination shall include consultation with CSRIA. Any "saved water" shall be permanently transferred to Ecology. Where possible, Ecology will manage "saved water" in its Trust Water Program, in part to mitigate for the impacts of out-of-stream uses for the next pending water right applicant, and in part to meet the instream flow objectives in RCW 90.90.005(2). If said waters do not meet the criteria for protection under the trust water program, then they shall be voluntarily relinquished (perfected water) or otherwise forfeited (inchoate water) by the CSRIA VRA Participant to the State. Ecology will provide standardized forms

for trust water conveyances, voluntary relinquishment or inchoate water forfeiture.

4. CSRIA VRA Participants shall complete the initial BMP certification process and recalibration of existing water rights before receiving a drought permit from Ecology.
5. In establishing demand reduction conditions for drought permits issued under this agreement, consideration will be given to the difference between the amount of water permitted under the original interruptible water right or permit and the quantity of water required for beneficial use based on implemented best management practices. Such conditions will be determined on a permit-by-permit basis. Drought preparedness planning currently conducted by Ecology is relies largely on assumptions based on 2001 drought conditions; however, it is recognized that under more severe drought conditions, more extensive demand reduction measures may be necessary.
6. RCW 90.90.020(3)(c) directs Ecology to develop “a new uninterruptible supply of water for the holders of interruptible water rights on the Columbia River mainstem that are subject to instream flows or other mitigation conditions to protect stream flows.” Ecology will make a good faith effort to provide the mitigation water necessary to ensure that drought permits will meet the Columbia River and Snake River Mitigation Standards under RCW 90.90.030(2); Ecology will consult with CSRIA in the process of identifying measures to prevent drought curtailment in advance, and to avoid curtailment during a drought condition. For example, these measures could include voluntary sales of water by CSRIA members.
7. Mitigation through water savings must be secured by Ecology either before or at the same time that water use under a drought permit occurs.
8. When mitigation water is secured, Ecology will prepare a VRA Implementation Plan describing the sources and quantities of mitigation water. Ecology will conduct a SEPA review of the Implementation Plan before permits are issued.
9. Ecology commits to issue drought permits effective during the periods in which Interruptible Water Rights would be curtailed.
10. Ecology will process applications for drought permits under this VRA as follows:
  - a. In advance of a declared drought if the applications can be priority processed under WAC 173-152 (Hillis Rule) or cost-reimbursement; OR,
  - b. In a drought year, subject to a declaration by the Governor.

11. In the event that sufficient mitigation water for a given drought year is unavailable, then mitigation water shall be assigned to CSRIA VRA participants who are in compliance with this VRA in the drought year in a manner consistent with the Ecology's environmental review for the mitigation water. Ecology will consult with CSRIA in the process of identifying measures to prevent curtailment in advance, and to avoid curtailment during a drought condition.
12. CSRIA will actively support all tangible and pragmatic water supply options identified and pursued by Ecology to provide mitigation water for drought permits.
13. CSRIA and CSRIA VRA Participants agree that all water use authorized in Ecology-issued permits pursuant to this VRA must meet the Columbia River and Snake River Mitigation Standards under RCW 90.90.030(2) and the criteria of applicable water law, including but not limited to RCW 90.03.290.

### ***E. Terms and Conditions Regarding New Water Rights***

The parties agree to the following mutual obligations:

1. Within 60 days following mutual written agreement by both parties that Phase 2 will be initiated, CSRIA VRA participants will file applications for new permits with Ecology. However, such agreement shall not be made prior to the legislative approval for the Mitigation Payment in Section E.2. in compliance with I-960. If both parties agree to initiate Phase 2, both Ecology and CSRIA will jointly seek legislative approval for the Mitigation Payment.
2. CSRIA VRA Participants agree to pay a mitigation payment for mitigation water funded and acquired by Ecology in advance of issuance of new permits. The first payment will be calculated based on \$10 per acre foot of water, times the full quantity of the issued permit, times the first 3 years of authorized use of water. The first payment shall be made to Ecology within 30 days of the date the permit is issued.. Starting in Year 4 and thereafter, annual payments will be based on \$10 per acre foot of water times the actual measured use of water (or the full permitted quantity in the event of measurement failure) from the previous year. Payment in Year 4 and thereafter are due by January 31<sup>st</sup>. Should Ecology incur charges or fees associated with securing service contracts from the Bureau of Reclamation, the parties agree to negotiate pass-through costs, if any.
3. CSRIA VRA Participants shall maintain compliance with BMPs (see Appendix B CSRIA Irrigation BMPs, June 2005 edition.). CSRIA VRA Participants shall submit to on-site BMP certification inspections conducted by Ecology staff or contractors (e.g. conservation districts). Such inspections shall be coordinated with CSRIA.

4. CSRIA VRA Participants applying for new permits shall submit their existing water rights for recalibration by Ecology. The process of developing a tentative determination shall include consultation with CSRIA. Where possible, Ecology will manage “saved water” in its Trust Water Program, in part to mitigate for the impacts of out-of-stream uses for the next pending water right applicant, and in part meet the instream flow objectives in RCW 90.90.005(2). If said waters do not meet the criteria for protection under the trust water program, then they shall be voluntarily relinquished (perfected water) or otherwise forfeited (inchoate water) by the CSRIA VRA Participant to the State. Ecology will provide standardized forms for trust water conveyances, voluntary relinquishment or inchoate water forfeiture.
5. CSRIA VRA Participants shall complete the initial BMP certification process and recalibration of existing water rights before receiving a new water right permit from Ecology.
6. CSRIA and CSRIA VRA Participants agree that all water use under permits issued pursuant to this VRA must meet the Columbia River and Snake River Mitigation Standards under RCW 90.90.030(2) and the criteria of applicable water law, including but not limited to RCW 90.03.290 and I-960.
7. CSRIA will work with Ecology to identify the most cost-effective and feasible projects that can be funded to provide mitigation water for new water rights.
8. CSRIA will support Ecology efforts to find, fund and acquire mitigation water, utilizing funds from the Columbia River Basin Water Supply Development Account and/or Mitigation Payments paid by CSRIA members to Ecology.
9. CSRIA VRA Participants shall install and maintain water measuring capability or devices (in compliance with permit conditions) on each diversion for each water right (drought permit, new water right and recalibrated water right) authorized under this VRA consistent with WAC 173-173.
10. CSRIA VRA Participants shall provide the information necessary for Ecology to investigate the proposed new water right permit, drought permit, and associated water rights to be recalibrated. This information shall be shared with CSRIA by Ecology once it has been received from the VRA Participant. Documentation will include but is not limited to:
  - a. Historic water use information;
  - b. Water right ownership interest(s);
  - c. Proposed water use information;
  - d. Compliance with BMPs.

11. For CSRIA VRA Participants that are municipal or quasi-municipal entities (special service districts), the following additional terms apply for new water rights and those pending development:
  - a. Municipal, utility, or special service district water efficiency standards consistent with applicable CSRIA BMPs may be considered as one option for best management practices, but shall in no case be less stringent than required by the State Department of Health
  - b. Nothing in this Agreement shall supersede the terms of the Settlement Agreement in *Center for Environmental Law and Policy v. Department of Ecology*, and the subsequent water right permit issued by Ecology subsequent to that agreement, Surface Water Permit No. S4-30976P.
12. Ecology will identify the most cost effective and feasible projects that can be funded to provide mitigation water for new water rights.
13. Ecology will enter into agreements with water right holders to fund mitigation water projects utilizing funds provided by the State and/or CSRIA VRA Participants.
14. Ecology will deposit Mitigation Payments received from CSRIA VRA Participants into the Columbia River Basin Water Supply Development Account.
15. Mitigation Payments made by CSRIA VRA Participants will be adjusted annually for inflation by Ecology. Ecology will use the Implicit Price Deflator (IPD) for Personal Consumption as provided by OFM to adjust payments. An alternate IPD may be used provided both parties agree.
16. Ecology will make a good faith effort to provide the mitigation water necessary to ensure new permits meet the Columbia River and Snake River Mitigation Standards under RCW 90.90.030(2).
17. Mitigation through water savings must be secured by Ecology either before or at the same time that water use under a new permit occurs.
18. When mitigation water is secured, Ecology will prepare a VRA Implementation Plan describing the sources and quantities of mitigation water. Ecology will conduct a SEPA review of the Implementation Plan before new permits are issued.
19. All new water rights issued under this agreement shall meet the Columbia River and Snake River Mitigation Requirements, the requirements of I-960 and applicable water law, including but not limited to RCW 90.03.290.

20. Ecology will develop and implement a billing and notification system to track compliance with Mitigation Payments collected under this agreement, saved water developed through mitigation water projects and CSRIA VRA Participants benefiting from saved water. Ecology will include this information in applicable legislative reports.
21. Ecology will process applications for new water rights in as timely a manner as possible, in accordance with applicable law and the funding and staff provided by the Legislature.
22. In order to enable priority processing of water right applications, CSRIA VRA Participants may propose priority processing under the “Hillis Rule” (WAC 173-152) if applicable.

#### ***F. Modifications and Amendments***

This agreement may be modified or amended in writing by mutual agreement of the parties. Modifications and amendments shall be signed by managing, authorized agents of the parties and binding on the parties, their representatives and assignees. If Ecology deems a proposed modification or amendment is substantive, it will consult with CSRIA on the scope of the proposed amendment. Following consultation, Ecology will provide public notice as specified in RCW 90.90.030(4) if Ecology determines the amendment is substantive.

#### ***G. Assignment***

If a CSRIA VRA Participant or their heirs, successors or assigns receives a new water right permit or a drought permit, then participation under this agreement can be assigned if the following conditions are met:

1. Ecology receives signed notification by the CSRIA VRA Participant waiving equity interest in all or a portion of the affected water right; and,
2. Ecology receives signed notification by the assignee of consent to abide by the terms and conditions of this VRA and the affected water right; and,
3. The assignee owns property appurtenant to the affected water right.

Assignments shall be made on a form provided by Ecology. Any assignment beyond the scope of the terms of this VRA constitutes a new VRA. This VRA and each of its terms, provisions, conditions and covenants shall be binding upon the parties and their respective heirs, successors and assigns.

## ***H. Compliance***

If a CSRIA VRA Participant receives a drought permit or a new water right under this VRA, then active compliance with the terms and conditions of this VRA is required in order to divert water under their water right(s). These conditions will be included in the permits themselves and are binding even if the VRA itself is terminated. These conditions include, but are not limited to the following:

1. BMP's must be maintained and certified.
2. Measurement devices and/or capability shall be installed and maintained consistent with WAC 173-173. Measurement data shall be submitted in a timely manner. If measurement data is either not submitted or is unusable, then the mitigation payment for that year shall be based on the full permitted quantity.
3. Mitigation Payments and fees must be paid by January 31<sup>st</sup> of each year starting in Year 4. If payment is not received by January 31<sup>st</sup>, then Ecology shall notify the water right holder that pumping shall not be authorized under the permitted water right(s) until payment in full is provided to Ecology. If payment is provided after January 31<sup>st</sup>, then a late payment fee of 2 percent per month (or portion thereof) is required.

In the event of noncompliance, Ecology will provide technical assistance and enforcement according to RCW 90.03.605 in order to facilitate compliance.

## ***I. Termination for Convenience***

Any party may terminate this Agreement upon prior written notice of at least 30 calendar days to the other party. If this Agreement is terminated for convenience, the parties shall be liable only for performance rendered or costs incurred in accordance with law and the terms of this VRA prior to the effective date of termination. Any valid permits and/or water right decisions issued pursuant to this VRA before Termination for Convenience shall remain in effect so long as the permit conditions are met.

## ***J. Termination for Cause***

If, for any cause, any party does not fulfill in a timely and proper manner its obligations under this Agreement, or if any party violates any of the terms and conditions of this Agreement, the aggrieved party shall give the other party written notice of at least 30 calendar days of such failure or violation and of the aggrieved party's intention to terminate this Agreement. The responsible party will have the opportunity to correct the violation or failure within 30 calendar days. If the failure or violation is not corrected, this Agreement may be terminated immediately by written notice by the aggrieved party to the affected party. If this Agreement is terminated for cause, the parties shall be liable only for performance rendered or costs incurred in accordance with law and the terms of

this VRA prior to the effective date of termination. Any valid permit and/or water right decisions issued pursuant to this VRA before Termination for Cause shall remain in effect so long as the permit conditions are met.

### ***K. Disputes***

In the event that a dispute arises that relates to any way to this VRA, the parties shall first attempt to resolve the dispute on an informal basis. If informal negotiations do not resolve the dispute, the parties may agree to jointly select a mediator to help resolve the dispute. Mediation is not required. If a party chooses not to mediate the dispute, any party may proceed to terminate the VRA, in accordance with the termination provisions.

Ecology permit decisions and orders are appealable to the Pollution Control Hearings Board. Further action may only occur after the exhaustion of administrative remedies, as an “other agency action” under the Administrative Procedure Act, RCW 34.05.570 (4).

### ***L. Governance***

This agreement is entered into pursuant to and under the authority granted by the laws of the state of Washington and any applicable federal laws. The provisions of this agreement shall be construed to conform to those laws.

In the event of an inconsistency in the terms of this Agreement, or between its terms and any applicable statute or rule, the inconsistency shall be resolved by giving precedence in the following order:

- a. applicable state and federal statutes and rules; and
- b. any other provisions of the agreement, including materials incorporated by reference.

### ***M. Waiver***

A failure by either party to exercise its rights under this agreement shall not preclude that party from subsequent exercise of such rights and shall not constitute a waiver of any other rights under this Agreement unless stated to be such in a writing signed by an authorized representative of the party and attached to the original Agreement.

### ***N. Severability***

If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, if such remainder conforms to the requirements of applicable law and the fundamental purpose of this agreement, and to this end the provisions of this Agreement are declared to be severable.

If a provision of the VRA is held invalid and Ecology deems that a modification is necessary and substantive, it will consult with CSRIA and provide public notice as specified in RCW 90.90.030(4).

***O. All Writings Contained Herein***

This Agreement contains all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the parties hereto.

***P. Term of Agreement***

The term of this Agreement shall be based on successful implementation of the Phase 1 pilot projects. The start date of Phase 1 shall be the date of this agreement. The termination date of Phase 1 shall be December 21, 2010. Phase 1 may be extended until June 20, 2012 based on mutual written consent of both parties. Phase 2 shall commence at the conclusion of Phase 1 and occur by mutual written agreement of both parties. Phase 2 shall end on June 30, 2012, unless extended through mutual written agreement the parties.

*This Voluntary Regional Agreement is Executed By:*

*Representing the Washington State Dept. of Ecology:*

*Representing the Columbia-Snake River Irrigators Association VRA Participants in Appendix A:*

*Jay Manning, Director*

*Don Odegard, President, CSRIA*

*Date*

*Date*

*Darryll Olsen, Ph.D., CSRIA Board Rep.*

*Date*



## **Appendix B: CSRIA Best Management Practices**