



February 19, 2008

LeAnn Purtzer
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15 W. Yakima Ave, Suite 200
Yakima, WA 98902-3452

Via email: lesc461@ecy.wa.gov

Re: Comments on Proposed Voluntary Regional Agreement

Dear Ms. Purtzer,

Thank you for the opportunity to comment on the proposed Voluntary Regional Agreement (VRA) between the Columbia-Snake Rivers Irrigators Association (CSRIA) and the Washington State Department of Ecology (Ecology). We appreciate the tension between creating a durable contract and the need to solicit and heed public input on a decision with major implications for the Columbia and Snake rivers, which of course are public resources, the management of which is affected not only by state law, but by federal laws such as the Endangered Species Act and treaties with Columbia River tribes and Canada.

I. The Purpose and Need for a VRA

Some reasons for a VRA are stronger than others. Finding water to allow interruptible water right holders new water rights to irrigate in times of drought is an important purpose of the legislation under which the Columbia River Water Management Program operates, and it is a sound goal of a VRA. The proposed VRA contains important safeguards to ensure that issuing drought permits will not harm instream flows, including the requirement that participants “shall complete the initial BMP certification process and

recalibration of existing water rights before receiving a drought permit”¹; the requirement that “[m]itigation through water savings must be secured by Ecology either before or at the same time that water use under a drought permit occurs”; a metering/measurement requirement; and the requirement for SEPA review of an Implementation Plan for supplying the mitigation water associated with a permit.

In addition to these safeguards, it seems appropriate that drought permits, since they are new water rights (just less frequently used), should have the same fee associated with them as is associated with other water rights under a VRA (see below for a discussion of whether \$10 per acre-foot is an adequate fee).

While the goal of providing more certainty for interruptible water rights is established by RCW 90.90, we are concerned that the proposed VRA may result in the granting of new water rights for irrigating new acreage or to accommodate urban growth without an adequate basis for doing so. It is not clear that it is in the interest of eastern Washington agriculture, the environment, or the citizens of Washington to grant new water rights for the purpose of irrigating land not presently producing crops or for watering large lawns in a desert environment. As we noted in our comments on the Programmatic EIS in November 2006, “the legislation [RCW 90.90] indicates that new water supplies are for documented needs, and as Ecology has acknowledged, any new rights must be in the public interest. The simple existence of VRAs should not be considered sufficient to justify the expenditure of public funds.”

New water rights to irrigate land that is not currently being cultivated should not be issued unless there is a finding that it is in the public interest to do so. This essential piece of the four-part test for a new water right must be met independent of the existence of a VRA. Even a “pilot project” (let alone the three of them allowed under the VRA proposal) is inappropriate without first passing the public interest test. In addition, if the pilot projects do go forward under this VRA, their scope needs to be better defined. If the pilots rely on Columbia River account funding, they should be vetted by the Policy Advisory and the Technical Advisory Groups to the Columbia River Water Management Program. In that case, long-term instream/reach benefits would need to be clear in order to justify an expenditure from the fund.²

Given the structure of the proposed VRA, Phase 2 depends entirely on how the results of the pilot projects are interpreted. Before Phase 2 is initiated, there should be a

¹For any water right issued under a VRA, whether it’s a drought permit or a “new” water right – there should be regular check-ins to ensure that BMPs continue over time, as well as a mechanism for BMPs to be updated as technology improves – BMPs should not be defined as 2005 BMPs in perpetuity. In addition, the definitions and relationship of BMPs, saved water, and Ecology’s extent and validity / recalibration review require additional clarification. Under what circumstances does Ecology envision that an extent and validity review will result in trustable water? Sections D(3) and E(4) imply that “saved water” may come from Ecology’s recalibration. Should those provisions instead reference the “BMP certification process”? Indeed, the “saved water” definition includes a specific reference to the BMPs. In addition, does the phrase “reasonable beneficial use” in the definition of “saved water” relate to a general extent and validity review or is “reasonable beneficial use” intended only to address waste?

² Presumably, no water rights will be issued based on a pilot project.

public/agency comment period equal in all respects to that associated with the current VRA proposal. The public should not be required to simply rely on an agreement to proceed by the two primary VRA signatories when the consequences for moving ahead are substantial. Moreover, the pilot projects may highlight needed revisions to the governing VRA language.³

II. Price Per Acre-Foot

When the primary beneficiary of a public resource, like water, is a private party, that party should pay a reasonable price for use of the resource; a public cost-share is appropriate to the extent that there is a public benefit (e.g., improved stream flows in areas where they are needed for fish or other ecological benefits). The VRA should provide a clear, evidence-backed explanation of why \$10 per acre-foot is a fair contribution by water right applicants for Ecology's assistance in securing water to mitigate for new water rights, and if such an explanation cannot be provided the cost-share should be set higher. Given the costs of "new" water outlined in Ecology's 2007 water supply inventory, and even considering that the price of VRA water adjusts for inflation, it seems unlikely that \$10 per acre-foot makes up more than an de minimus share of that cost, and that share is likely to decrease in the future as water becomes even more scarce. Before settling on a particular price per acre-foot, we urge Ecology to conduct an independent appraisal of the value water acquired under a VRA.

III. Concerns About the Structure of the Contract

We have concerns about sections F and N of the VRA proposal, regarding modification of the agreement and severability of its provisions in the event that one or more provisions are invalidated in court.

With respect to section F on modification, any substantial modification should require an opportunity to comment by federal agencies, WDFW, local governments, tribes, and the public. Absent such an opportunity, the public review provisions of RCW 90.90.030(4) would lose much of their meaning.

Similarly, section N on "severability" allows the VRA to live on if any of its provisions are held invalid. As with section F, if the elimination of part of the VRA affects it in a meaningful way, there should be a comment opportunity consistent with the spirit of RCW 90.90.030(4).

Thank you for the opportunity to comment on the VRA proposal, and please contact us if you have any questions.

³ We would also emphasize that any new water rights contemplated by the VRA must have a secure, permanent source of water at the time the permitting occurs. Although the standard noted in Sec. E(17) is relevant – language in a permit should ensure that mitigation water is present before the water is actually diverted – more importantly, Ecology is responsible for determining with absolute certainty that the mitigation water is available before a permit is ever issued.

Sincerely,

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