



Walla Walla Watershed Management Partnership

A Proposal for a Pilot Local Water Management Program in the Walla Walla Basin

Report to the Governor and the Washington
State Legislature



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Report to the Governor and the Washington State Legislature

*Submitted by
Washington State Department of Ecology
&
Walla Walla County
On behalf of Partners in the Walla Walla Basin*

Water Resources Program
Washington State Department of Ecology
Olympia, Washington 98504-7600

Table of Contents

	<u>Page</u>
List of Figures	ii
Purpose of this Report.....	iii
Abbreviations	iv
Executive Summary	1
Walla Walla Watershed Management Partnership	2
“Flow from Flexibility” Pilot Projects	2
Walla Walla Water Bank	2
Interstate Water Management Legal Options	3
Funding and Resource Requirements	3
Part I. A Proposal for Local and Flexible Water Management in the Walla Walla Basin ..4	
Introduction: A More Efficient Approach to Watershed Management	4
The Partnership: Local Management—State Oversight	10
Flow from Flexibility	15
Compliance and Dispute Resolution.....	21
Water Bank	23
Legislative Request.....	24
Funding and Resource Requirements	24
Part II: Assessment of Legal Issues and Options Related to Interstate	
Water Management	26
Interstate Water Issues: Existing and Emerging Legal Issues	26
Existing and Potential Legal Options and Approaches for Achieving Bi-State Flow	
Protection in the Walla Walla River	27
Appendices.....	33
Appendix A. Definitions.....	33
Appendix B. Proposed Water Management Plans.....	36
Appendix C. RCW References to Watershed Planning.....	39
Appendix D. Basin Accomplishments.....	45
Appendix E. Assessment of Legal Issues and Options Related to Interstate Water	
Management.....	47

List of Figures

	<u>Page</u>
Figure 1. Map of the Walla Walla Watershed, highlighting the Washington portion of the Basin covered by this proposal.	9
Figure 2. Partnership Structure	11

Purpose of this Report

In 2005, Ecology Director Jay Manning invited the Walla Walla Basin community to partner with the Department of Ecology to explore a new concept for managing water resources at the watershed level. In 2008, the State Legislature provided Ecology \$195,000 of the general fund--state appropriation for fiscal year 2009:

“...solely to support a collaborative process to design a proposed comprehensive water management structure for the Walla Walla River Basin. The proposed structure should address the allocation of functions, authorities, resource requirements, and issues associated with interstate watershed management of the basin.

Invited participants should include but not be limited to the Confederated Tribes of the Umatilla Indian reservation; appropriate state agencies; and Walla Walla basin interests such as municipalities, irrigation districts, conservation districts, fisheries, agriculture, economic development, and environmental representatives.

A report outlining the proposed governance and water management structure shall be submitted to the governor and the appropriate committees of the legislature by November 15, 2008.”

This report is in response to Ecology’s offer, the legislative requirement, as well as other basin needs (such as establishing a Walla Walla Water Bank). The Basin will request a legislative proposal to be more likely introduced in House Agriculture and Natural resources and Senate Water, Energy and Telecommunications.

For 2009-2011, the resources required to establish the Partnership and support its basic activities will be about \$450,000. Walla Walla County will be requesting funding from the 2009 watershed planning implementation funds. Further resources will be sought from other state and federal funding sources.

Ecology is in support of legislation authorizing the Walla Walla Water Management Partnership and a local Pilot Water Management Program, and providing funds for the partnership and its basic activities.

Abbreviations

cfs	Cubic feet per second
CIDMP	Comprehensive Irrigation District Management Plan
CTUIR	Confederated Tribes of the Umatilla Indian Reservation
ESA	Endangered Species Act
HCP	Habitat Conservation Plan
ITP	Incidental take permit
NMFS	National Marine Fisheries Service
QAPP	Quality Assurance Project Plan
Qi	Maximum Instantaneous Diversion Rate
RCW	Revised Code of Washington
RM	River mile
S.Ct	Supreme Court Reporter
TMDL	Total Maximum Daily Load
U.S.C.	United States Code
USFWS	United States Fish & Wildlife Service
USGS	United States Geological Survey
WAC	Washington Administrative Code
WMI	Water Management Initiative
WRIA	Water Resources Inventory Area

Executive Summary

The Walla Walla River Basin (Basin) poses unique water management challenges. It is an over-appropriated basin with very limited water resources and a critical need to improve flows for Endangered Species Act (ESA)-listed species. Other issues arise because water management must include coordination with Oregon water interests and governments.

In the face of these challenges, the Walla Walla community came together and showed their collective commitment to enhance flows for fish and provide improved water management practices for farms. Basin members have already started using numerous innovative methods to manage water sustainably. For example, irrigation districts in both Washington and Oregon have agreed to by-pass flows to support the recovery of ESA-listed fish species.

These efforts resulted in Washington Department of Ecology (Ecology) making an unprecedented offer. Ecology would support flexible, local management of water in the Basin, provided that:

- 1) Stream flows and water quality are enhanced and maintained to support fish.
- 2) Conflicts that might arise around flexible water use are handled within the Basin.

This report is in response to Ecology's offer, the Legislature's request for a comprehensive water management proposal, as well as other Basin needs. The report is divided into two parts.

Part 1 is a proposal for local and flexible water management program in the Walla Walla Basin. The proposal describes:

- **The Walla Walla Watershed Management Partnership:** a governance structure with clear authority and function. It addresses the requirements of the proviso in Sec. 302 (29) of the 2008 Supplemental budget passed by the Washington State Legislature.
- **“Flow from Flexibility” pilot projects:** projects consistent with Ecology's offer to support voluntary, cooperative approaches to augment stream flows.
- **Walla Walla Water Bank:** a tool for enhancing the Basin's ability to more efficiently and effectively manage water.

Part 2 is an assessment of legal issues and options related to interstate water management. The challenges include whether and how Washington State can legally protect water in streams for fish, from the point of origin to the mouth of the Walla Walla River.

All these elements of the report are discussed in more detail, below. Funding and resources requirements are also reviewed.

Walla Walla Watershed Management Partnership

The Walla Walla community proposes establishing a new Walla Walla Watershed Management Partnership. The Partnership will integrate local water and watershed management with state oversight, providing a primary governance structure for improved water management and ensuring that local and statewide interests are protected. The Partnership will feature three core groups:

- **The Walla Walla Partnership Board:** The Board, with nine members, will be the primary leadership, oversight and decision-making body for the Partnership.
- **Policy Advisory Group:** The Advisory Group will advise and assist the Partnership Board carry out its responsibilities.
- **Water Resources Panel:** The Panel will be composed of technical experts from a range of disciplines and perspectives to ensure that decisions are grounded in sound science and that knowledge is shared among people active in the Basin.

Ecology will have representatives on the Policy Advisory Group and Water Resources Panel. Ecology will provide shared oversight of water management activities and will approve water management plans jointly with the Partnership.

“Flow from Flexibility” Pilot Projects

Flow from flexibility projects are intended to encourage innovative water management so that flows are augmented to benefit fish while ensuring that groundwater is sustainably managed and other water right holders are not impacted. Using flexible water management a water user might change, for example, point of diversion, place of use, time of use, or source of water without applying to Ecology for the change. Irrigators, water managers and technical experts believe that by making thoughtful changes to water use practices, stream flows can be augmented while still providing sufficient water for projects’ participants.

Flow from flexibility projects would be voluntary and operate within the Partnership’s ten-year pilot period. An essential incentive for water right holders to participate in flow from flexibility is assurances that participation will not jeopardize their water right. Thus, this proposal seeks legislation authorizing flexible water management, modification of relinquishment provisions and changes to certain specific provisions of the water code for participating water users.

Walla Walla Water Bank

The Partnership will administer a local water bank that will accept water, hold it in stream for environmental benefit, and return it to the water right holder with its original priority dates and other conditions intact if and when the agreement ends. The bank would initially function as an accounting system for recording transactions involving water placed in stream for fish benefit.

However as resources become available, the role for the water bank will be expanded to maximize the full water market opportunities that may be available.

Interstate Water Management Legal Options

Legal issues surrounding the Walla Walla River Watershed go back over a century. They are described in detail in Part 2, along with an examination of a number of interstate water management options for protection of the river.

Washington and Oregon's respective shares of the interstate water may only be determined through three alternatives:

1. Equitable apportionment litigation before the U.S. Supreme Court.
2. Interstate compacts.
3. Congressional apportionment.

All three options would likely be very controversial, challenged for a number of reasons and very lengthy and costly.

Adjudication of tribal-reserved water rights for stream flows purposes appears, at first, to be one of the more viable options for protecting flows in the Walla Walla River. However, state-based water right holders are not likely to favor this option. In addition, the Confederated Tribes of the Umatilla Indian Reservation have expressed their desire to implement less disruptive options to protect stream flows for fish.

Purchase of junior and senior water rights, voluntary agreement to not divert, and Washington's trust water right program are very viable options to restore and protect stream flows. Each of these options depends on voluntary participation by water right holders.

Funding and Resource Requirements

For 2009-2011, the resources required to establish the Partnership and support its basic activities will be approximately \$450,000. This funding will be requested from the 2009 watershed planning implementation funds. Further resources will be required in 2009-2011 to support additional staff and capital expenditures to pilot flow from flexibility projects, develop water management plans, gain agreements not to divert, and administer the water bank. These additional resources will be sought from the watershed planning implementation funds (operation and capital) as well as other funding sources.

Secure funding in years 2011-2019 would be required for sustained progress toward the Partnership's goals, as well as to launch new activities to help the Basin adapt to altered water conditions due to climate change. Resource requirements for the continuation period will be developed as part of the Strategic Planning effort to be undertaken in 2009-2011.

Part I. A Proposal for Local and Flexible Water Management in the Walla Walla Basin

Introduction: A More Efficient Approach to Watershed Management

A new way of managing water is being proposed in the Walla Walla Basin. This approach is not based on regulatory control, but rather on cooperation, local responsibility, and inspiring people to go beyond what regulation can deliver. It refutes the either-or notion of fish versus farms. Instead, it supports the idea that water can be managed so that people, rivers, farms and fish can all continue to share this valuable resource long into the future.

In this document, the Walla Walla Basin community presents an innovative proposal for local water management. As directed by a proviso¹ in Sec. 302 (29) of the 2008 Supplemental budget passed by the Washington State Legislature, this report:

- Describes the proposed governance and water management structure for the Walla Walla Basin: the Walla Walla Partnership.
- Addresses the functions, authorities, and resource requirements (e.g. funding and staffing).
- Addresses issues associated with interstate watershed management of the Basin (in Part II).

In addition, this report describes an innovative voluntary approach to increasing flows for fish and providing flexibility for water users. Known as “*Flow from Flexibility*,” the Walla Walla Basin community and Ecology believe that this approach can augment flows well beyond what conventional water management options can deliver.

This report provides an overview of the principles and concepts of the proposal. Further details will be presented in proposed legislation related to establishing the Partnership, flow from flexibility projects, water bank, and other items presented in this report. Legislative action will be required to implement this proposal.

¹ Proviso Text: \$195,000 of the general fund--state appropriation for fiscal year 2009 is provided to Ecology solely to support a collaborative process to design a proposed comprehensive water management structure for the Walla Walla River Basin. The proposed structure should address the allocation of functions, authorities, resource requirements, and issues associated with interstate watershed management of the basin. Invited participants should include but not be limited to the Confederated Tribes of the Umatilla Indian reservation; appropriate state agencies; and Walla Walla Basin interests such as municipalities, irrigation districts, conservation districts, fisheries, agriculture, economic development, and environmental representatives. A report outlining the proposed governance and water management structure shall be submitted to the Governor and the appropriate committees of the Legislature by November 15, 2008.

Participants in development of the Walla Walla Watershed Management Partnership

City of College Place	Snake River Salmon Recovery Board
City of Milton-Freewater	Titus & Yellowhawk Creek Water Users
City of Walla Walla	Tri-State Steelheaders
Collaborative Leadership Institute	U.S. Army Corps of Engineers
Columbia Conservation District	Umatilla County
Columbia County	Walla Walla County
Confederated Tribes of the Umatilla Indian Reservation	Walla Walla Basin Watershed Council
Gardena Farms Irrigation District #13	Walla Walla Community College
Hudson Bay District Improvement Company	Walla Walla County Conservation District
Kooskooskie Commons	Walla Walla River Irrigation District
Little Walla Walla River Water Users	Walla Walla Watershed Alliance
Lower Walla Walla River Water Users	Washington State Attorney General
Many Waters Community Development	Washington State Department of Ecology
Oregon Department of Environmental Quality	Washington State Department of Fish and Wildlife
Oregon Department of Fish and Wildlife	Washington Water Trust
Oregon Water Resources Department	Water and Environmental Center
Port of Walla Walla	WRIA 32 Watershed Planning Unit

This proposal was collaboratively produced by the Walla Walla County Watershed Planning Unit, the Confederated Tribes of the Umatilla Indian Reservation, Ecology, and Washington Department of Fish and Wildlife. Also included were Walla Walla Basin stakeholders representing local governments in Walla Walla and Columbia counties, irrigation districts, municipal water purveyors, conservation districts, fisheries, agriculture, economic development, environmental, non-profit and community interest groups. (See text box above.)

Walla Walla Basin is Committed to Sustainable Water Management

The Walla Walla Watershed² is located in both Oregon and Washington, and much of the mainstem Walla Walla River's flows originate in Oregon. Surface water rights on the Washington side of the Basin are over-appropriated, and the Basin is deemed "fish critical," meaning there is a shortage of water for fish.³

For more than a hundred years prior to 2000, stretches of the mainstem Walla Walla River in Washington ran dry in summer months due to agricultural diversion. In pre-settlement time, the Basin supported significant runs of spring Chinook salmon, summer steelhead, bull trout and rainbow trout, most of which have become greatly diminished due to dams and low flows. In the late 1990s bull trout and summer steelhead were listed as threatened under the Endangered Species Act (ESA) and in 2000, irrigation districts were served notice of potential violations of the ESA.

² In this report, Walla Walla *Basin* refers to the Washington portion of the basin that drains to the Walla Walla River. This includes WRIA 32 exclusive of the Burbank area (which drains to the Snake and Columbia Rivers). Walla Walla *Watershed* refers to the entire bi-state drainage.

³ *Extinction Is Not an Option: Washington's Statewide Strategy to Recover Salmon*. Governor's Salmon Recovery Office. Olympia, WA, 1999.

In the face of these challenges, the Walla Walla Watershed community came together and committed itself to improving water management practices for the benefit of fish, farms and other water users. Walla Walla Watershed irrigators reached out to the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and pledged to “help bring back their fish.” The Tribal Board of Trustees responded in kind with a pledge to help “keep farmers farming.”

Since then, tribes, irrigators, municipalities, environmental and conservation organizations and others have worked together – and with Ecology – to increase flows for fish while maintaining a viable agricultural economy. The development of trust and cooperation between these entities has led to proactive initiatives, such as:

- Setting regulatory flows in the Washington portion of the mainstem Walla Walla River⁴ and limiting groundwater use through the Basin’s water management rule (WAC 173-532).
- Integrating salmon recovery implementation with watershed planning implementation.
- Seeking ways to significantly increase stream flows in the Basin through a Flow Enhancement Feasibility Study conducted jointly by the CTUIR and the U.S. Army Corps of Engineers.
- Seeking ways to achieve federal regulatory certainty for water users by developing a bi-state Habitat Conservation Plan.

The Basin has also accomplished numerous projects benefiting flow and fish, including:

- Irrigation efficiency projects
- Piping and lining of irrigation ditches
- Water acquisition
- Aquifer recharge
- Habitat improvements, fish screens
- Fish passage barrier removals.

In addition, Oregon and Washington irrigation districts agreed to bypass a substantial portion of their surface water right in a settlement agreement regarding the Endangered Species Act. As a result of these efforts, the Walla Walla River is flowing year-round throughout its entire length for the first time in more than one hundred years. These improvements created the conditions necessary for the CTUIR to reintroduce spring Chinook to the watershed. In 2004, a spring Chinook run returned to the Walla Walla River for the first time in 80 years.

While the salmon’s return is truly a remarkable achievement, the Basin community and Ecology recognize that more needs to be done. Flows are still not sufficient to adequately and dependably support fish survival.

⁴ The WRIA 32 Water Management Rule (WAC 173-532), amended in August 2007, establishes an instream flow water right for Management Point 5a located on the mainstem Walla Walla River at 250 cfs in December, January and February, 350 cfs in March and April, 250 cfs in May and establishes “closure” for June through November.

Because conventional approaches are unlikely to deliver sufficient flows to support recovery of ESA-listed fish species in the Basin, and because the community has consistently demonstrated its ability to work together and with Ecology, Ecology began working with the community to design a new way of solving the Basin's water challenges.

Key Elements of the Proposal

This proposal seeks to address three significant water challenges in the Walla Walla Basin:

- Coordinate and streamline efforts of numerous Basin entities to effectively and efficiently implement watershed improvements.
- Increase stream flows in an over-appropriated Basin with limited water resources.
- Identify pathways to resolve interstate water issues.

Although the Basin has accomplished many water improvements, a recent study⁵ indicated that the most pressing barrier to success was the large number of groups independently performing coordination, priority setting, and resource allocation roles in the Basin. The study noted that some of the leadership groups had been structured to support planning rather than implementation, and each had developed its own plan and goals. Now that the plans were complete, the study recommended establishing a shared governance mechanism to provide Basin-wide leadership, streamline coordination and decision-making, and focus on implementation.

To increase flows beyond current levels while maintaining a viable agricultural economy, the Basin community worked with Ecology to develop a voluntary approach to augmenting flows. This effort led Ecology to make an unprecedented offer to the Walla Walla Basin: Ecology would use the full extent of current agency flexibility and, if needed, seek additional authority to allow for the local management of water, provided that:

- Sufficient stream flows and water quality are maintained to support fish.
- Conflicts that might arise around the new flexibility in water use are handled within the Basin.

The Walla Walla Basin Water Management Initiative grew out of the collaboration between the Basin and Ecology and represents a multi-year process⁶ intended to provide local water users with flexibility in exercising their existing water rights in exchange for augmenting and protecting stream flows and water quality within the Basin. The Water Management Initiative included a locally governed water management system that would provide a degree of local

⁵ *Managing Many Waters: An Assessment of Capacities for Implementing Water and Fish Improvements in the Walla Walla Basin.* By Dan Siemann and Steve Martin. William D. Ruckelshaus Center. July 2007.

⁶ At least two legislative reports have described progress toward developing the Water Management Initiative: *2006 Report to the Legislature: Walla Walla Water Management Initiative.* Hedia Adelsman and Lynne Geller. Department of Ecology. Publication # 07-11-001. January 2007; and *Progress on Watershed Planning and Setting Instream Flows – 2007: Report to the Legislature.* Department of Ecology. Publication # 08-06-002. June 2008.

autonomy and responsibility for water management, giving those with the most at stake greater influence over their own destiny.

The Basin's efforts led to the 2008 legislative proviso requesting this report. The Walla Walla Basin community worked closely with Ecology and conducted a Basin-wide stakeholder process to design this proposal. This proposal for comprehensive water management addresses the requirements of the proviso, meets the conditions of Ecology's offer, and matches the spirit of the Water Management Initiative. Most importantly, it reflects the Walla Walla Basin community's passion for self-governance and confidence in their ability to deliver flows for fish through cooperative and voluntary approaches.

Walla Walla River Watershed Vision—the Land of Many Waters (working draft⁷)

The Walla Walla Watershed is a healthy river system capable of equitably sustaining its cultures and communities, including Tribal First Foods, agriculture, recreation, industry, and the amenities that enrich the lives of all residents. This vision requires a river system that is dynamic, with interacting ecological processes that maintain healthy stream and riparian habitats in which native species thrive. This vision involves and is fostered by community members who display a high regard of mutual respect, reflect both public and private interest, and willingly accept responsibility for their actions.

Geographic Extent of the Proposal

This proposal seeks authority to manage water in the portion of the Walla Walla Basin that drains to the Walla Walla River. This area comprises the Washington portion of the Walla Walla watershed, including the mainstem Walla Walla River and the Touchet River and their tributaries in Walla Walla and Columbia counties. This area involves Water Resources Inventory Area (WRIA) 32, exclusive of the Burbank area, which drains to the Snake and Columbia Rivers (see Figure 1).

While the focus of this proposal is on the Washington side of the watershed, achieving the goal of comprehensively managing water as an integrated system of groundwater and surface water throughout the entire watershed will require developing the ability to address water issues in the watershed's tributaries and on the Oregon side of the Basin in an equally collaborative manner. Thus, the Basin community views this proposal as detailing the initial phase of operations.

As the Partnership becomes established and experienced, it is expected to address a wide range of pressing water challenges, including issues such as protecting augmented bi-state flows and enhancing diminished flows in the Little Walla Walla River and Spring Branches of the mainstem Walla Walla River.

⁷ This draft vision is offered to the Partnership as a starting point to develop its own guiding vision. This draft drew substantially from the River Vision developed by the Confederated Tribes of the Umatilla Indian Reservation's Department of Natural Resources.

Walla Walla Basin

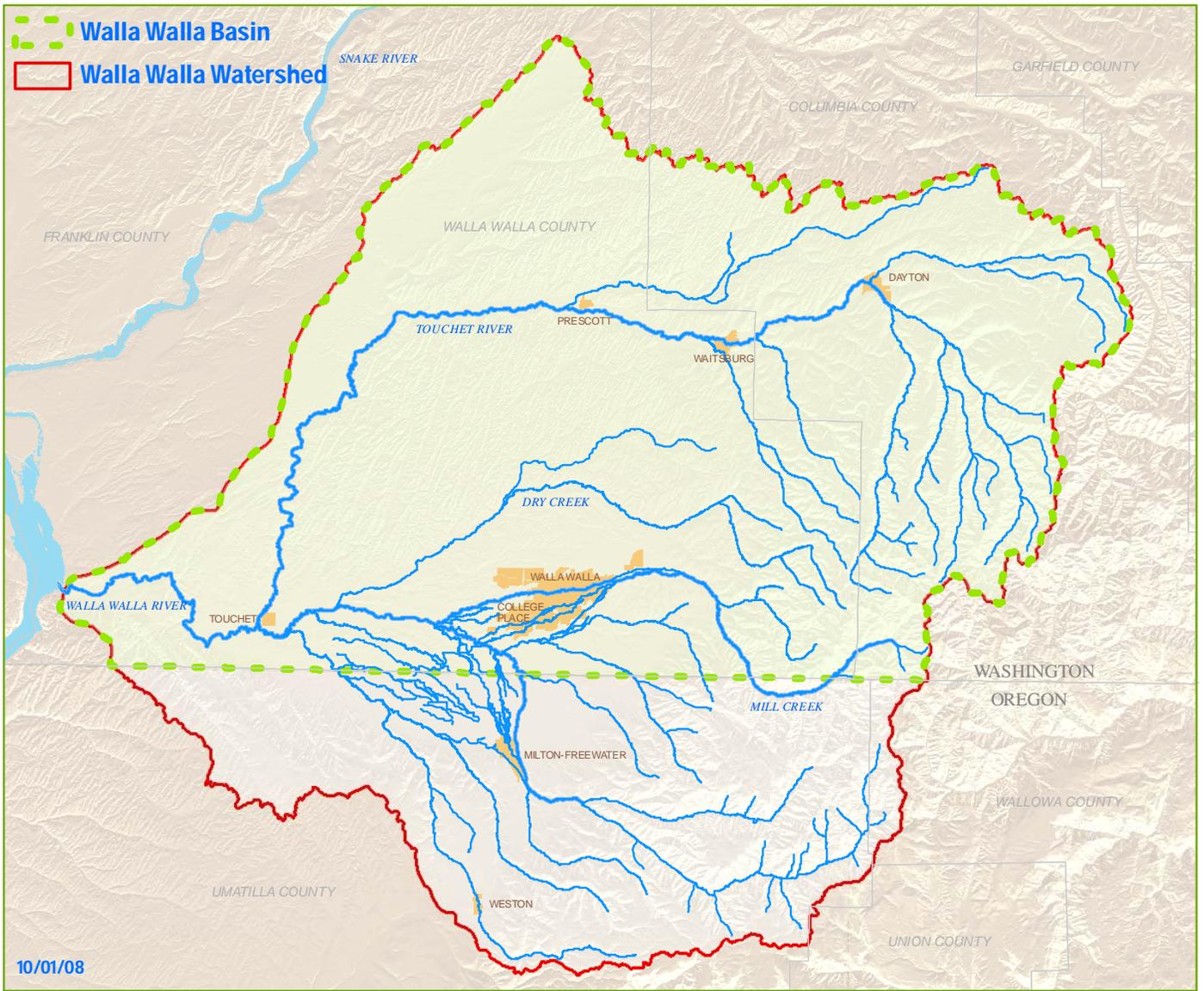


Figure 1. Map of the Walla Walla Watershed, highlighting the Washington portion of the Basin covered by this proposal.

The Partnership: Local Management—State Oversight

To lead the Basin’s efforts to more effectively manage water, the Walla Walla Basin community proposes establishment of the Walla Walla Watershed Management Partnership. The Partnership addresses the Basin’s need to elevate watershed management to a higher level, provide strategic coordination, a unified vision and a greater ability to focus on implementation for salmon recovery, water quality, groundwater management, and stream flow improvements. The Partnership will be the primary governance and water management structure to achieve comprehensive water management in the Basin. It will lead innovation and take advantage of new opportunities to improve flows for fish while providing greater flexibility for irrigators and other water users.

The Partnership will integrate local water management with state oversight, combining Basin-level decision-making with safeguards to ensure that flow goals are met and local and statewide interests are protected. To ensure that diverse perspectives are represented, the Partnership will integrate key government entities and watershed interests including Tribes, state agencies, municipalities, agriculture, environmental, economic development, and the community. While the Partnership will coordinate with other groups in the Basin, its intent is not to control or direct the operations of other organizations. The Partnership would be established as a public-private quasi-governmental entity.

The Partnership will seek to maximize the benefits of enhanced stream flows while maintaining a healthy local economy. The Partnership will focus on innovative, voluntary, and collaborative approaches to improve stream flows for fish and to increase flexibility and certainty for water users. As additional water is brought to the Basin from Oregon or via a proposed flow enhancement project,⁸ the Partnership will also position the Basin to effectively manage and protect augmented flows.

Structure

To provide leadership, public input, and technical expertise, the Partnership structure involves three core groups (see Figure 2):

- **Partnership Board** to oversee the entire effort and make final decisions.
- **Policy Advisory Group** to provide stakeholder input into decisions.
- **Water Resources Panel** to provide scientific and technical expertise.

The Partnership will be supported by a small professional staff to ensure efficient and effective operations of Partnership groups and actions.

⁸ The Confederated Tribes of the Umatilla Indian Reservation and the U.S. Army Corps of Engineers are developing a Flow Enhancement proposal to bring significant quantities of new water to the basin for fish and agriculture. The project is expected to be completed in approximately ten years.

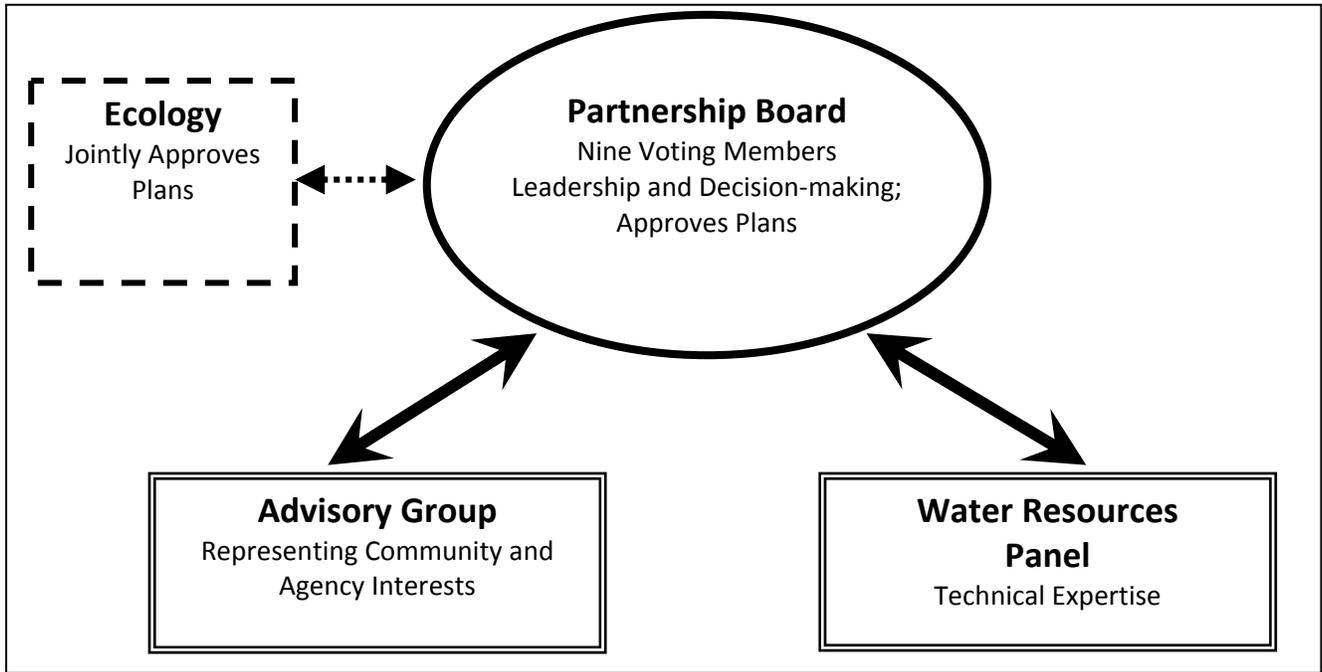


Figure 2. Partnership Structure

Partnership Board

The Walla Walla Partnership Board will be the primary leadership, oversight and decision-making body for the Partnership. The Partnership Board will be responsible for:

- Establishing vision, goals and priorities.
- Developing and sustaining a basin-wide strategic action agenda.
- Acquiring and allocating discretionary funds.
- Reviewing and approving water management plans.
- Determining compliance.
- Resolving disputes.
- Reporting results.

The Board will solicit the involvement of appropriate stakeholder groups as needed to develop and achieve its action agenda. The Partnership Board will also draft bylaws to define operations and address topics such as decision-making, ways to handle conflicts of interest, and other issues.

The Partnership Board will replace the existing WRIA 32 Initiating Governments and the Watershed Planning Unit originally formed in 2000 under the Watershed Planning Act (RCW 90.82). This will streamline and localize Basin watershed management by establishing a new primary leadership and governance entity for water management in the Basin.

The Partnership Board will be composed of nine (9) voting members selected to represent key entities or constituencies in the Basin.

- Five of these members will be chosen by the entities themselves, to represent the
 - Confederated Tribes of the Umatilla Reservation
 - Walla Walla County Board of Commissioners
 - Columbia County Board of Commissioners
 - City of Walla Walla (the largest city in WRIA 32)
 - Gardena Farms Irrigation District #13 (the largest water user in WRIA 32).
- A sixth member will be jointly selected by Walla Walla County Conservation District and Columbia Conservation District.
- The remaining three positions (water user, environmental interest, and citizen-at-large) will be jointly selected by the other six members.

Policy Advisory Group

The Partnership Board will form a Policy Advisory Group to help guide actions and ensure efficient and effective implementation of water related activities. The Policy Advisory Group will provide a valuable forum to ensure that all interests and individuals have a voice in decisions affecting the Basin and can monitor the performance of the Partnership. The Partnership Board will invite and appoint members of the Policy Advisory Group, which may include but not be limited to, representatives from municipalities, water users, fish managers, irrigation districts, environmental groups, agricultural and economic development interests, WRIA 32 Planning Unit members, and academic institutions, as well as representatives from Washington and Oregon state agencies and water interest.

The Partnership Board may form working groups or committees as appropriate to gain specialized insight, review or implementation. These smaller groups might help coordinate restoration projects, guide water quality improvement efforts, implement public awareness and outreach activities, or support resolution of bi-state water issues.⁹

Water Resources Panel

The Water Resources Panel will be composed of scientists and technical experts from a range of disciplines and perspectives to ensure that decisions and plans are grounded in sound science and that knowledge is shared within the Basin community. The Water Resources Panel will include a representative group of experts in water rights, surface/ground water monitoring and hydrological analysis, irrigation management and technology, fisheries, habitat management, economics and others. The panel may include representatives from state agencies, Confederated Tribes of the Umatilla Indian Reservation, local governments (counties, cities), the Walla Walla

⁹ For example, the current Planning Unit Water Quality Subcommittee, which serves as the Total Maximum Daily Load (TMDL) Advisory Committee for the development of TMDLs in the Walla Walla Basin, will continue with its current membership, but would report to the Partnership Board instead of the Planning Unit.

Water Conservancy Board, the Snake River Salmon Recovery Board, and private interests (water users, consultants, etc.).

The responsibilities of the Water Resources Panel will include:

- Providing technical information to water users interested in piloting the flow from flexibility concept.
- Reviewing technical elements of the water management plans developed for piloting flow from flexibility projects.
- Making recommendations to the Partnership and Ecology regarding the scientific and technical soundness of water management plans based on criteria developed by the Partnership and Ecology.
- Assessing monitoring data regarding Basin-level flows and fish trends to support evaluation of program effectiveness.

Key Functions and Responsibilities

The Partnership's key functions and responsibilities will include:

- **Continuing the functions of the Walla Walla Watershed Planning Unit:** Planning Unit functions and responsibilities will be assumed by the Partnership, including implementation of the watershed plan. It will oversee existing efforts such as:
 - Integrating watershed restoration and salmon recovery.
 - Soliciting, accepting, and disbursing funds for watershed management activities.
 - Representing WRIA 32 in the Columbia River Water Management Program and the Walla Walla Total Maximum Daily Load (TMDL) Planning Process.
 - Monitoring, evaluating and reporting on Watershed Plan implementation.
 - Implementing Watershed Plan projects such as shallow aquifer recharge.
 - Raising awareness and engaging the public.
 - Integrating science and technical knowledge into decision-making.
 - Monitoring, reporting, and ensuring accountability.(See Appendix C: References to Watershed Planning Units in the Revised Code of Washington.)
- **Administering new responsibilities and innovative activities:** The Partnership will lead development and implementation of innovative approaches to more effectively and comprehensively manage water. With this proposal, the Partnership seeks authority to:
 - *Implement flow from flexibility pilot projects to benefit stream flows.* This would involve modifying relinquishment and certain provisions of the Water Code for water users that commit to providing specified and approved stream flow augmentation and develop an approved water management plan or employ agreements not to divert.

- *Administer and manage a local water bank for stream flow enhancement and fish benefit.*
- *Adapt to changes in water availability.* The Partnership will cooperate with local and regional efforts to continue to respond to limited water resources and to trends that suggest that seasonal water availability in the Basin will be further reduced or altered due to climate change.¹⁰

The key tasks of the Partnership will include:

- Developing Basin-wide strategic action agenda and annual action plans to focus implementation efforts and ensure completion of priority projects consistent with the WRIA 32 Watershed Plan.
- Facilitating development and implementation of local water management plans and ensuring accountability by holding participants accountable for fulfilling commitments.
- Securing funding for activities to increase capacity.
- Leading Basin efforts to resolve bi-state water issues.
- Monitoring, tracking, and reporting progress to ensure effectiveness.
- Representing interests of the Basin.
- Coordinating and collaborating with key watershed entities, including Tribes, agriculture, counties and municipalities, environmental organizations, economic development and community interests.

Relationship to Ecology

Ecology will be a partner in water management with the Partnership and will be the primary agency overseeing and supporting its work. While this proposal represents increased Basin-level responsibility for water management, Ecology will play a crucial role in ensuring oversight and safeguarding the public interest. Ecology will have staff representatives on the Policy Advisory Group and the Water Resources Panel to ensure timely and effective communication. Ecology's role will include:

- **Joint review and approval of Water Management Plans:** Ecology and the Partnership Board will jointly review plans to ensure they are technically sound and support Basin goals. The Water Resources Panel will consult with Ecology to minimize the potential for involuntary impacts on other water right holders.
- **Flow and usage monitoring:** Participation in flow from flexibility projects will require installation and maintenance of source metering that Ecology and the Partnership will monitor. Ecology's flow gauges will also provide essential data to track progress in meeting flow goals.

¹⁰ These efforts might include cooperating with University of Washington's Climate Impacts Group and the United States Geological Survey (USGS), which are both working in the Walla Walla Basin to model the potential risks and impacts from climate change.

- **Reporting:** The Partnership will provide annual reports to Ecology on its progress, accomplishments, and challenges. Ecology will provide reports to the Legislature as required.
- **Enforcement:** Ecology’s Water Master will remain in the Basin and will support agreements between water users and the Partnership. The Water Master will also continue to monitor and enforce water usage for those not participating in flow from flexibility projects.
- **Termination:** If the goals and criteria of water management plans are not achieved in practice (e.g., if flows are not increased or other water right holders are involuntarily affected), then the Partnership and Ecology have the authority to jointly alter or suspend water management plans in order to fix the problems.

Ecology and the Partnership may develop agreements to define specific responsibilities and expectations related to the duties and functions of each entity. Both the Basin community and Ecology envision the Partnership evolving to take on more responsibility as confidence in the Partnership’s capacities and capabilities increases.

Flow from Flexibility

The Walla Walla community proposes to augment flows through an innovative, voluntary approach intended to simultaneously benefit water users and fish. Known as “Flow from Flexibility,” it is consistent with Ecology’s offer to provide the Basin water management flexibility, provided that flows are enhanced to support fish and disputes are handled within the Basin. The approach aims to give water users latitude to design and implement flow enhancement solutions that are more efficient and environmentally effective than the traditional system of external rules governing water management and stream flows. To remove barriers to participation, this approach also protects participating water right holders from relinquishment.

Flow from flexibility projects would be required to meet the following principles and criteria:

- Stream flows are improved measurably, especially at critical times.
- Groundwater use is managed sustainably.
- Other water right holders are not affected involuntarily.

The Partnership would have 10 years from its date of establishment to pilot the flow from flexibility approach and demonstrate effectiveness. If flow from flexibility projects prove successful, they could continue. If unsuccessful, water right holders would return to conditions prior to initiation of the pilot projects. For those not participating in flow from flexibility pilots, existing water law will continue to govern water management.

Flexible Water Practices

Studies and consultations with irrigators and municipal water users have identified the following water management changes that could simultaneously support water users' needs while augmenting stream flows to benefit fish:

- Change place of use
- Change time of use
- Change points of diversion
- Switch between points of diversion
- Storage (Shallow aquifer recharge; surface storage)
- Expand/spread place of use (without an increase in consumptive water use)
- Change sources (switch between surface & groundwater)
- Transfer/share water between users
- Change Maximum Instantaneous Diversion Rate (Q_i)

Using flexible water management, irrigators might draw from surface water during high flow periods and from groundwater during low flow periods or when fish need more water in stream. They might move their point of diversion downstream and pump water to increase flow in critical stretches. They might change to less water intensive crops and reduce consumption without fear of future relinquishment. And they might spread their water allotment over multiple land parcels to maximize productivity under reduced or annually changing water availability conditions.

Through agreements among users, water use could be optimized among sources and uses to enhance stream flow at critical times using techniques such as groundwater recharge, pulsing flows,¹¹ and water sharing.¹² While some of these practices are allowed under current law, existing regulatory procedures reduce many water right holders' willingness to seek approval to use them.

Key components of flow from flexibility projects are water management plans and mechanisms to keep augmented flows in stream. These are discussed below.

Water Management Plans

¹¹ *Pulsing flows* means that irrigators limit or stop pumping for a short period of time to create an increased pulse of stream flow that is designed to encourage fish migration.

¹² *Water sharing* means that water users coordinate by-passing water so that each farmer gets some water while instream flow levels are maintained.

To ensure that flexible water practices achieve demonstrable benefits for fish, water right holders will develop a local water management plan (with Partnership assistance, if desired) that will define the conditions under which flexible water management can be implemented.

The Partnership will focus on working with Water Management Units,¹³ comprised of irrigators, municipal water suppliers or others, to develop water management plans and implement flexible water practices that can deliver flows to address critical fish needs. By working with large groups of water users in a Water Management Unit, the Partnership can leverage its limited resources to maximize the benefits of flow from flexibility projects. Water management plans can also be developed with smaller groups of water users or individuals where augmented flows benefit fish.

Local water management plans will draw on information from the WRIA 32 Walla Walla Watershed Plan, with additional site-level information provided as needed to define conditions specific to the Water Management Unit. To ensure that water management plans are consistent with state-wide interests, Ecology and Washington Department of Fish and Wildlife staff (and others) will be involved at each stage of the water management planning process, including development and technical review. Ecology will review the plans for technical soundness and to ensure that other water users are not involuntarily impacted.

To participate in flow from flexibility projects, water right holders would be expected to meet the following criteria:

- Agree to allow a portion or all of an existing surface water right to remain in stream either long-term or during critical flow periods.
- For groups of water users, establish or have in place a water user organization such as an irrigation district or water district.
- Have existing operable water conveyance infrastructure in place and available for use (wells, conveyance systems, storage, etc.).
- Develop an approvable local water management plan.
- Commit to staying in the program (consistent with criteria to be established by the Partnership).

Elements of the Water Management Plan

Water management plans will be developed by water users. While water users may hire consultants and/or work with Partnership staff and others, water users are responsible for developing their water management plan. Information in the water management plans will include:

- Baseline water availability
- Critical flow issues for fish

¹³ *Water Management Units* are geographically distinct areas involving water users who draw from a common source such as a single point of diversion or a specific tributary.

- Flow augmentation goals and other improvements
- Flexible water management changes that are proposed
- Identification of other water users that may be affected
- Potential effects to water quality

The plans will also describe infrastructure changes, capital and operating costs, effectiveness monitoring, compliance and dispute resolution procedures (see Appendix B).

Technical Evaluation

Water management plans will be vetted carefully, based on hydrological and biological science and irrigation and agricultural knowledge. Each plan will be reviewed by technical experts on the Water Resources Panel and must be accepted and approved by the Partnership and Ecology.

Review of the plans will ensure that:

- Water has been used under the water right.
- The proposed water management changes will benefit stream flows for fish.
- Other water right holders are not involuntarily affected.
- Groundwater can be sustainably used.
- Total water use will not increase.

Keeping Augmented Flows In Stream

To keep contributed water in stream and enhance flows, the Partnership will use water management plans or agreements not to divert:

- **Water management plans:** Water users that develop flow from flexibility projects will have a water management plan that includes terms and conditions to ensure that water left in stream will remain in stream as long as the plan is operational.
- **Agreements not to divert:** The Partnership may enter into agreements not to divert with a water right holder who voluntarily commits him or herself not to divert a portion of their legally available water right and to instead leave that portion of water in stream for environmental benefit.
- **Junior water right holders downstream** from augmented flows will also be encouraged to enter into agreements with the Partnership to not divert available water, when necessary to ensure that water remains in stream. Junior water right holders will benefit from these agreements by receiving protection from relinquishment and other incentives as developed by the Partnership.

These mechanisms will be overseen and managed by the Partnership. Participants in flow from flexibility projects could also protect their water and gain additional benefits by placing it in the Washington State Trust Water Rights Program.

Development, Review and Approval of Water Management Plans

The water management planning process involves six steps to ensure effective development and credible review of the plans:

1. Water users contact Partnership to express interest in developing a water management plan.
2. Water users develop water management plan. Water users may hire consultants and/or work with Partnership staff and others. However, water users are responsible for developing their water management plan.
3. Partnership staff provides initial review of the water management plan for completeness and consistency with criteria and then submit the draft plan to the Water Resources Panel for technical review. This step will also involve public notice and the opportunity for public review of draft plans.
4. The Water Resources Panel will consult with Ecology regarding flow and the potential for involuntary impacts on other water right holders. The Water Resources Panel may request that water users alter the plan to improve consistency with goals and criteria. Following review and consultation with Ecology, the Water Resources Panel will make a recommendation to the Partnership Board regarding the plan's technical soundness, or advise on modifications for re-submittal.
5. The Partnership Board and Ecology will review and approve or deny water management plans.
6. Participating water users, the Partnership Board and Ecology will sign a binding agreement implementing the approved water management plan.

Once projects are operational, Partnership staff will work with water users to monitor and assess project outcomes and annually report results to Ecology.

While Ecology will play a more involved role initially, both the Walla Walla Basin community and Ecology envision the Partnership evolving to take on more responsibility as confidence in the Partnership's capacities and capabilities increases.

Incentives and Assurances for Participating Water Users

An essential incentive for water right holders to participate in flow from flexibility projects is assurances that participation will not jeopardize their water right and that the risks and benefits of infrastructure investments and other water management changes are explicitly stated. To provide certainty for water right holders that participation will be safe and rewarding and not lead to a loss of water rights or investment, water right holders have identified the following assurances to encourage participation in flow from flexibility projects:

- Suspend relinquishment clock for water right holders participating in good faith in flow from flexibility agreements.

- Ensure that flow from flexibility participants who comply with the provisions of their plan throughout the duration of their agreement have the opportunity to return to their prior status with pre-participation water rights intact or to have permanent changes made to their water rights based on the terms of their water management plan.
- Prevent Ecology or other state agencies from using information gained as part of the flow from flexibility agreement (e.g., agency participation on the Water Resources Panel), and not otherwise reasonably available, in a regulatory hearing or process against a good faith participant.¹⁴
- Encourage participation by facilitating regulatory assurances for participants who achieve appropriate levels of conservation.

In addition, the Partnership Board may develop monetary incentives (subject to available funding) to cover the costs of taking part in flow from flexibility projects or agreements not to divert.

Monitoring

To ensure that the Partnership's efforts are augmenting flows, benefiting fish and preparing for changing water and climate conditions, the Partnership will look to the Water Resources Panel to establish and manage a coordinated science, monitoring and evaluation program.

The monitoring program will include both Basin-scale and project-level performance monitoring. The Partnership and Ecology will build on the Basin's current Quality Assurance Project Plan¹⁵ to develop an agreement establishing responsibility and procedures for gathering, assessing and reporting monitoring data.

The Water Resources Panel will be the primary forum for integrating science, monitoring, and technical review of projects. The Water Resources Panel will lead Basin efforts to facilitate interdisciplinary study and make science and data available for both policy decisions and to provide access to the public and Basin stakeholders for reference and process transparency.

Basin-wide Monitoring

Development of both basin-level and water resource specific water budgets will aid setting goals for flow augmentation. A basin-level water budget is a model-derived representation of the significant Basin inflows and outflows and helps to quantify an area's water management needs such as crop water use, evaporation and surface and/or groundwater storage. Water budgets will help managers understand the Basin's hydrologic system and how hydrologic variation and

¹⁴ Information regarding water contributed by water users will be held by the Partnership and not be used by Ecology to determine the validity of water rights in future administrative or regulatory actions.

¹⁵ The QAPP outlines the current monitoring program study plans along with basic methods and procedures being followed by the Water Management Initiative monitoring program. It can be found at: <http://www.wallawallawatershed.org/wmi>

potential changes in water management will affect water supplies and stream flows throughout the Basin. A water budget will also help scientists prioritize water conservation projects and predict the likely impacts of potential management changes on habitat-critical flows.

Progress in achieving flow goals will be measured by a network of monitoring sites at strategic locations throughout the Basin. Currently, Ecology, United States Geological Survey (USGS) and others have networks of water monitoring sites to assess flow, temperature, groundwater levels and other water quality parameters. The Water Resources Panel will recommend to the Partnership and Ecology if additional monitoring stations are needed.

Project-level Performance Monitoring

Each water management plan will define baseline water usage and baseline flows and will include performance benchmarks and a program to monitor effectiveness. The amount of water contributed through a flow from flexibility project will be quantified, and this amount will become the minimum flow augmentation goal or performance standard.

Direct measurement of water use through flow meters will be a condition of participation in flow from flexibility projects. Flow meters will measure all withdrawals and diversions entering the project area. River gauges will also be established where appropriate to measure augmented stream flow. However, due to the complexity of surface and groundwater interactions and pooling with variable existing flows, river gauges are unable to definitively determine compliance with project goals. Thus, monitoring and compliance will be based primarily on flow meter data gathered at individual pilot projects.

Because each project is experimental, the Water Resources Panel will evaluate project monitoring data and determine if the water management changes or practices are achieving project goals. If they are not, the Partnership will work with water users to identify adaptive management steps to improve outcomes. In instances where a plan cannot meet its flow goals, the Partnership may recommend projects be reviewed for termination by the Partnership Board.

Compliance and Dispute Resolution

The Partnership will be responsible for ensuring compliance with water management plans, agreements not to divert, flow augmentation goals, and other aspects of flow from flexibility projects. For non-Partnership related water management activities, Ecology will continue to perform its current regulatory and enforcement role and the Ecology Water Master will continue to operate.

The Partnership will also be responsible for managing any disputes that arise related to flow from flexibility projects. A dispute resolution process will be developed and approved by the Partnership Board and will be a component of any water management plan and resulting agreements.

Because projects are voluntary and will receive careful technical review, disputes are expected to be rare. However, if they do occur, the Partnership will facilitate a dispute resolution process to ensure that problems are resolved fairly and effectively.

The dispute resolution process will be based on a multi-step approach that attempts to solve problems informally before engaging in increasingly formal successive steps. An example of a multi-step approach is:

1. Attempt to resolve the issue through informal discussions between affected parties.
2. Initiate a semi-formal process led by Partnership Executive Director.
3. Initiate a more formal process in which the decision authority is elevated to the Partnership Board.
4. If issues remain unresolved, voluntary agreements can be terminated and water management would revert to operating under conventional water law.

The actual steps might differ depending on the type of dispute and the type of parties involved. The specific steps will be developed by the Partnership with input from Ecology. However, the Partnership would have no involvement in disputes between non-participating water users that involve issues unrelated to activities of the Partnership. Ecology will continue to handle these types of disputes using existing procedures and authorities.

An additional area of possible dispute involves conflicts between the Partnership and Ecology. A memorandum of Agreement will be developed between the Partnership and Ecology to specify how such disputes will be resolved.

Examples of Flow from Flexibility Projects

A preliminary study¹⁶ provides examples of augmented flows that flexible water management projects could deliver. The study hypothesized that by working with groups of water users in Water Management Units, water use can be optimized for fish and farm benefit. A small number of priority Water Management Units have been identified that together could enroll approximately 80 percent of water rights in the Basin. Two high-value examples from the study illustrate the potential of flow from flexibility projects:

- **Irrigation District:** If an irrigation district switches to sources other than their current surface diversion (e.g., recharged gravel wells, lower river pump station, or basalt wells), potential flow improvement could be timed to provide 20-50 cubic feet per second (cfs) in the mainstem Walla Walla River to meet seasonal fish needs. If additional water were available to help complete the irrigation season earlier, flow improvements could exceed 90 cfs in December (and average more than 60 cfs during the first week of December) to improve stream conditions to support seasonal steelhead migration and other fish needs.

¹⁶ *Walla Walla Water Management Initiative: Pilot Development Project – Phase 2 Report*. Daniel S. Evans. Prepared for The Walla Walla Watershed Alliance. June 30, 2008.

- **Group of Irrigators:** If a group of irrigators on a tributary creek to the mainstem Walla Walla or Touchet River could switch from surface diversion to shallow and deep aquifer sources, they could augment surface flows in the creek and in the mainstem river by 4-5 cfs during critical seasonal periods for fish needs (subject to providing an approved mechanism/process for aquifer recharge).

Performance Evaluation

“Flow from flexibility” projects represent an experiment in local water management and voluntary approaches to augmenting flows for fish while continuing to provide sufficient water for current uses. To assess the efficacy of this approach, the Basin proposes that a thorough evaluation of the flow from flexibility concept and pilot activities be conducted at three-year intervals to ensure that the Partnership is performing as intended, that appropriate structures are in place, and that the Partnership’s work is resulting in measurable increases in flows and meaningful benefits for fish.

Ecology and the Partnership will jointly conduct the evaluations. Evaluation criteria will be developed by Ecology and the Partnership, with input from the Water Resources Panel and the Policy Advisory Group, to address the following questions:

- Were flow augmentation goals met at the project and Basin levels?
- Did ESA-listed species (summer steelhead, bull trout) and other species of concern (Chinook salmon, lamprey) benefit from flow from flexibility projects?
- Was groundwater sustainably managed?
- Were other water right holders involuntarily affected by flow from flexibility projects?
- Were conflicts successfully managed within the Basin?
- Were the Partnership’s goals achieved?

Towards the end of the ten-year pilot period a recommendation will be provided to the Legislature to continue, permanently adopt or terminate the Partnership and flow from flexibility pilots based on a detailed assessment of performance and effectiveness, in a manner to be defined by the enabling legislation.

Water Bank

To enhance the Basin’s ability to efficiently and effectively manage water, the Basin community proposes establishing a local Walla Walla Water Bank. A Basin-level water bank could:

- Help make water supplies available when and where needed.
- Improve stream flows and preserve instream values during fish critical periods.
- Facilitate fair and efficient reallocation of water from one beneficial use to another.

- Provide banked water supplies to offset impacts related to future development relying on permit-exempt ground water withdrawals.
- Facilitate water agreements that protect stream flows while retaining flexibility to manage the water users' water needs.

The local water bank would accept water through water management plans, agreements not to divert, voluntary contributions, and other mechanisms, and would hold it in stream for environmental benefit. Water in the bank would not be subject to relinquishment.

The Walla Walla Basin Water Bank would initially function as an accounting system for recording transactions involving water placed in stream for fish benefit. However, as resources become available the role of the water bank would expand to maximize the full water market opportunities that may be available.

Legislative Request

To implement this proposal, the following legislative actions will be necessary:

- Establish the Partnership as a Governmental Entity.
 - Partnership will assume authorities and roles of WRIA 32 Planning Unit and Initiating Governments for Watershed Planning.
- Enable flexible water management (under approved plans and agreements).
 - The Partnership will oversee flow from flexibility projects and jointly approve water management plans with Ecology.
- Water banking.
 - Partnership will administer and manage the local water bank.
 - Authorize the Partnership to acquire water rights.
- Modify relinquishment and certain provisions of the Water Code.
 - Assurances for water users.
 - Protect water users participating in good faith in flow from flexibility projects.
- Funding and resources for Partnership start-up.

Funding and Resource Requirements

To implement the activities and achieve the goals and priorities suggested in this proposal for 2009-2011, a draft two-year Partnership budget is under development with estimated costs for full implementation. Funding will be needed to establish and support the Partnership, implement pilot local water management plans and administer the water bank. In addition, funding will be

needed to continue to implement the watershed plan, sustain progress toward stream flow restoration, and monitor hydrologic and biologic conditions in the Basin.

Financial resources available from state, federal, and other funding sources will be sought to accelerate implementation of irrigation efficiencies, aquifer recharge, water quality improvements, and groundwater monitoring during 2009-2011. Grant funding could be used to leverage other project resources, including the Salmon Recovery Funding Board and Columbia River Water Management Program. The Partnership may also seek to gain capacity through financial and other resource partnerships on projects, and through volunteers which may be coordinated with volunteer networks from other organizations. As the Partnership begins to benefit the community, it will seek to leverage funding and in-kind services through local governments, Tribes, non-profit organizations and academic institutions. When possible, Basin partners will dedicate staff and program resources to assist the Partnership.

For 2009-2011, the resources required to establish the Partnership and support its basic activities will be approximately \$450,000. This funding will be requested from the 2009 watershed planning implementation funds.

In addition, resources in 2009-2011 will be required to support additional staff and capital expenditures to pilot the flow from flexibility projects, develop water management plans, gain agreements not to divert, and administer the water bank. These additional resources will be sought from the watershed planning implementation funds (operating and capital) as well as other funding sources.

Secure funding in years 2011-2019 would be required for sustained progress toward the Partnership's goals as well as to launch new activities to help the Basin adapt to altered water conditions due to climate change. Resource requirements for the continuation period will be developed as part of the Strategic Planning effort to be undertaken in 2009-2011.

To enhance financial viability, the Partnership may seek to establish a tax-exempt Foundation and fundraising committee to pursue grant opportunities and raise project funds. The Partnership may also explore the use of bonding capacity to secure funding. Based on the Walla Walla Watershed's achievements thus far, there exists a substantial level of local support for this effort and recognition that the Partnership has potential for providing greater public benefits in the future as a vehicle to promote locally-based watershed management.

Part II: Assessment of Legal Issues and Options Related to Interstate Water Management

The purpose of this section is to:

- Describe existing and emerging legal issues related to whether Washington State can protect water from point of origin in Oregon or Washington through the Walla Walla River to the confluence of the Columbia River at the McNary pool.
- Present various existing and potential legal options and approaches for achieving bi-state stream flow protection in the Walla Walla River. Each concept begins with a brief summary of the issue and the legal options, including Ecology's opinion as to whether the option(s) are viable.

For detailed discussion, see Appendix E.

Interstate Water Issues: Existing and Emerging Legal Issues

By-pass Flows

Oregon irrigation districts, through a settlement negotiated with the U.S. Fish and Wildlife Service, are by-passing flows in the Walla Walla River above the Washington state-line. Flows are also being by-passed in Washington under the settlement agreement. The issue is how to protect these by-passed flows through Washington State, from the state-line to the mouth of the Walla Walla River.

Water Pump Exchange

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and the U.S. Army Corps of Engineers are conducting a flow restoration feasibility study. One of the restoration measures is the construction and operation of a water pump exchange. Under this proposed measure, a new Washington Columbia River (McNary pool) water right would be granted to the CTUIR to deliver Columbia River water to Oregon irrigation districts. In exchange for receiving Columbia River water, the Oregon irrigation districts would voluntarily cease withdrawals of their Walla Walla River surface water rights in order for those water rights to be left in stream and allowed to flow through to the Washington side of the Walla Walla River.

The effect of such an arrangement would be that the portion of the Walla Walla River water that would remain in the river system through to the mouth of the Walla Walla, would also flow back into the Columbia River. The preliminary legal issues we see related to such a scenario are whether:

- The statutory four-part test is met for issuance of a new Washington water right from the Columbia River considering the “no negative impact on instream flow in the Columbia River in the months of July and August”, RCW 90.90.030.
- Such a water right would be subject to potentially frequent regulation by senior water rights.
- Ecology has authority to issue a Washington water right with a place of use (and possibly a point of withdrawal) in Oregon.

- An exchange agreement such as this would constitute an interstate compact that must be ratified by the United States Congress.

Storage in Oregon

A new Oregon water right will be needed to store water from the Walla Walla River; and new “secondary” rights will be needed to serve lands for irrigation in both Washington and Oregon with those existing flow rights from the Walla Walla River left in stream. Again, with storage in Oregon, the issue remains as to whether Washington State can protect the flows originating in Oregon through the Walla Walla River to the confluence with the Columbia River at the McNary pool.

Acquired Water Rights Transferred to the Washington Trust Water Rights Program

Washington has acquired water for streams through conservation, long term leases, and water purchases to improve stream flows in the Walla Walla River and its tributaries. The legal issue is how to protect these acquired water rights from their original points of diversion to the mouth of the Walla Walla River.

Little Walla Walla River & Spring Branches

Washington-side senior surface water right holders are experiencing water shortages due to several upstream changes (i.e., irrigation efficiencies, groundwater pumping, and the mainstem Walla Walla River flow improvements). The issue is whether there is currently a legal mechanism that would give Washington water right holders on the Little Walla Walla River system the authority to call for water from Oregon water rights holders.

Existing and Potential Legal Options and Approaches for Achieving Bi-State Flow Protection in the Walla Walla River

Note: Washington and Oregon’s respective shares of the interstate water may only be determined by equitable apportionment litigation before the U.S. Supreme Court (section A, below), interstate compacts (section B, below), or Congressional apportionment (section C, below).

A. State-Based Adjudications and the U.S. Supreme Court’s 1936 Decision in *Washington v. Oregon*

Summary

Both states independently held adjudications on the Walla Walla River in the early 1900’s in their respective state court. Washington then filed a bill of complaint in the 1930’s claiming that Oregon water users were impairing Washington users. In 1936, the U.S. Supreme Court dismissed Washington’s lawsuit concluding that Oregon diversions were not necessarily harming Washington water users. During the course of the lawsuit, the two states entered into a formal stipulation that some of the smaller interstate streams would be regulated by priority date, as if there were no state lines.

Legal options/opinions in brief

- Washington could file a petition in the U.S. Supreme Court to modify the 1936 decision. Washington would have to make a showing of substantial injury to be entitled to relief. This course of action is inadvisable.
- Washington could file another bill of complaint against Oregon and once again seek an adjudication of Walla Walla River water rights between the states. The Court would likely not accept or dismiss such a lawsuit, based on the precedent set by the 1936 decision. The state of Oregon would likely be the only defendant and state-adjudicated water right holders would be bound by the Court adjudication, and such water right holders would not be able to later assert greater rights in an equitable or legal proceeding. Further, this action would not necessarily be the best legal mechanism for clarifying tribal-reserved water rights. For all these reasons, the State does not intend to take this course of action.

B. Interstate Water Compact

Summary

The U.S. Supreme Court has often encouraged states to determine their shares of interstate waters by a compact rather than through litigation.

Legal option/opinion in brief

Negotiating a compact is a time-consuming and complicated process, and would likely be very controversial.

C. Congressional Apportionment

Summary

Congress can pass legislation determining Washington and Oregon's respective shares of interstate waters under the Commerce Clause of the U.S. Constitution.

Legal option/opinion in brief

This is rarely done. It is a very political process that could be challenged for a number of reasons.

D. Voluntary Agreement to Not Divert

Summary

Water right holders could enter into agreements to voluntarily stop diverting some or all of their water right so that water would stay in the river. Compensation of some type will most likely be needed, including protection from relinquishment if the agreement is temporary.

Legal option/opinion in brief

To encourage temporary agreements, Ecology will be requesting the Legislature to amend the relinquishment statute (RCW 90.14).

E. Trust Water Rights

Summary

Washington's Trust Water Program may be a useful tool for protecting flows in the Walla Walla River. It could be a way to protect by-passed Oregon water.

Legal option/opinion in brief

Even if the Washington Legislature were inclined to amend the Trust Water Code to allow for the protection of by-passed Oregon water, such legislation would likely be susceptible to a takings challenge under the Washington constitution by water right holders who have adjudicated water rights.¹⁷

F. Endangered Species Act (ESA) – Habitat Conservation Plans

Summary

Under the ESA, Habitat Conservation Plans developed and implemented in response to “incidental take” permits could result in more water left in the river.

Legal option/opinion in brief

It is difficult to rely solely on the ESA to secure additional water for the Walla Walla River. This is because such actions are dependent on a federal agency and occur under its auspices. Further, because the ESA is a federal law, Ecology lacks authority to enforce it.

G. Quantification of Tribal Reserved Water Rights

State Court Adjudication

Summary

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) believe that they have treaty-reserved water rights for fisheries purposes in the Walla Walla River Basin. A state adjudication to quantify their water rights would involve all the state-based water rights within the geographic framework of the adjudication.

Legal option/opinion in brief

Adjudication of tribal-reserved water rights for stream flow purposes appears, at first, to be one of the more viable options for providing additional stream flows in the Walla Walla River. These flows would be protected by virtue of having the most seniority of water rights along the river. *However*, this option will not likely be favored by state-based water right holders, whose rights

¹⁷ Washington's Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner.” Const., Article I, §16, The U.S. Constitution has a similar guarantee. U.S. Const., Amend. V.

could be determined junior to the CTUIR's. The CTUIR have expressed their desire to implement options that are less disruptive to existing state-based water right holders in order to protect by-pass flows and future additional flows originating from Oregon and Washington.

Federal Court Adjudication

Summary

The United States, as trustee to a tribe, can sue a state in federal court to adjudicate treaty-reserved water rights on behalf of that tribe.

Legal option/opinion in brief

Even if the United States brought suit against Oregon and/or Washington to adjudicate treaty-reserved water rights, state water right holders might still be required to be part of a federal court adjudication. Therefore, there is not necessarily an advantage to a federal court adjudication over a McCarran state adjudication.

Purchasing Junior Water Rights

Summary

The state could purchase a significant amount of junior water rights and retire them or put them in trust for stream flow purposes.

Legal option/opinion in brief

This is a viable option, but protection from relinquishment would be necessary.

Purchasing Senior Water Rights

Summary

Purchasing senior water rights and changing their purpose of use to stream flows would keep more water in the River.

Legal option/opinion in brief

This is a viable option, assuming that most senior rights could be purchased.

Purchasing Both Senior and Junior Water Rights

Summary

Purchasing both senior and junior water rights would leave more water in the River, although not necessarily any more than by purchasing senior water rights alone.

Legal option/opinion in brief

This is a viable option, but would require agency support and resources to regulate water users and take enforcement action when necessary.

Granting a Columbia River Water Right for Pump-Exchange

- *Can a water right be issued to the irrigation districts in light of the no negative impact on the Columbia River instream flows for the months of July and August, as required in RCW 90.90.030?*

Here the critical question will be whether it can be shown that Walla Walla water that is not withdrawn in exchange for the use of McNary pool water will be in fact be protected all the way to the Columbia to avoid any net impact.

- *Would the proposed diverted water from the McNary pool be subject to potentially frequent regulation by senior water rights?*

This potential new Columbia River water right would be junior to any other water rights previously issued on the Columbia. As a junior water right it might be subject to regulation. Treating this junior Columbia River water right as non-consumptive may be quite difficult due to natural losses and withdrawals by water right holders.

- *Does Ecology have authority to issue a Washington water right with a place of use (and possibly the point of withdrawal) in Oregon?*

Ecology can likely grant a Washington water right from the Columbia River with a place of use in Oregon, pursuant to the reciprocity clause provided in Ecology's statute at RCW 90.03.300.

Appendices

Appendix A. Definitions

Aquifer Recharge	A process of capturing surface water from runoff, precipitation, high flow events or other sources to replenish or improve storage of water in shallow or deep underground aquifers.
ASR – Aquifer Storage & Recovery	A process of injecting treated drinking quality water into a deep aquifer for storage and recovery at a later time.
Basin Vision	A desired set of future conditions within the Walla Walla Basin that reflect the environmental, economic and cultural interests and values of all Basin residents and stakeholders, including the Confederated Tribes of the Umatilla Indian Reservation.
Bi-State Issues	Issues pertaining to interstate water management, aquifer recharge and/or the protection of instream flows restored in Oregon after they cross the state boundary.
By-pass flows	Water left in the river that would otherwise have been diverted by irrigators, as established through settlements negotiated with the U.S. Fish & Wildlife Service.
Dispute	A disagreement between individual water right holders or water users regarding the exercise of legally held water rights or pertaining to the implementation of one or more provisions of a written agreement involving the management of water at the Basin level as part of the Water Management Initiative.
Dispute Resolution	A clearly defined process involving procedures and guidelines for resolving disputes, either by agreement, administrative determination or judicial decree regarding water rights and the management of water at the Basin level.
Environmental Enhancement Project (EEP)	A water storage project, above or below ground, that would provide net environmental benefits, with particular emphasis on enhancing salmonids production. Projects that enhance instream flows directly or indirectly qualify under the definition. Projects proposed as mitigation for new consumptive water rights do not qualify under this definition.

Flexibilities	Innovative practices involving water use by water right holders, some of which currently are not allowable under Washington water law.
Flow from Flexibility	The ability to obtain increased instream flows in exchange for water users having greater flexibility to use water in innovative ways to cooperatively manage water use at the Basin level.
Non-Impairment	To avoid causing detriment or injury to the use of a legally existing water right.
Outreach	Process of contacting and communicating with individuals and organizations to provide information and receive feedback.
Partnership	The <u>Walla Walla Watershed Management Partnership</u> , a shared governance mechanism developed for the purpose of administering, managing or coordinating activities associated with watershed management, the restoration of instream flows, water management agreements and water management practices within the Washington portion of the Walla Walla Basin, WRIA 32.
Performance Based	An approach that uses measurable goals in combination with monitoring and management evaluation as a means to achieve clearly defined outcomes.
Pilot Project	A geographical area within the Washington portion of the Walla Walla Basin with water right holders working voluntarily to demonstrate the effectiveness of cooperatively managing water within the Basin under the concept of “ <i>Flow from Flexibility.</i> ”
Pump Exchange	A proposed program intended to pump water from the Columbia River to a point in Oregon and Washington to replace the use of surface water for irrigation, thereby allowing surface water rights to remain in stream for fish.
Quasi-governmental Entity	A general term without specific legislative basis used to describe a type of quasi-governmental organization typically associated with a performing a special purpose within the context of a particular title or chapter of the RCW.
Shallow Aquifer Recharge (SAR)	Restoring and/or recharging water into shallow gravel aquifers.

Shared Governance	A concept that guided development of the Water Management Initiative and the Walla Walla Watershed Management Partnership in which responsibility and authority (governance) for water and watershed management are collaboratively shared among Ecology, Confederated Tribes of the Umatilla Indian Reservation, and Walla Walla Basin stakeholders.
Stakeholder	An individual, organization or entity with an interest in an issue or activity.
Trust Water Right	A “trust water right” results when a water right is transferred either temporarily or permanently into the Washington State Trust Water Right Program where it is not subject to relinquishment.
Walla Walla Basin	The Washington portion of the watershed that drains to the Walla Walla River. This includes WRIA 32 exclusive of the Burbank area (which drains to the Snake and Columbia Rivers).
Walla Walla Watershed	The entire geographic area in Oregon and Washington that drains to the Walla Walla River.
Water Bank	A program designed to improve stream flows by purchasing or securing water to mitigate for water resource impacts, future water supply needs or other beneficial uses.
Water Exchange	A proposed program that would support implementation of the Walla Walla Instream Flow Rule (WAC 173-532) by providing a mitigation process for permit-exempt wells.
Water Management Unit	A pilot project within the Washington portion of the Walla Walla Basin involving water right holders working within a written agreement to develop and implement a water management plan to cooperatively manage water at the Basin level to improve stream flows.
Water Transaction	A transfer, change, or other alteration of a part or all of a water right undertaken pursuant to authority delegated to the Walla Walla Watershed Management Partnership.
Water Transfer	A transfer, change, amendment, or other alteration of a part or all of a water right authorized under RCW 90.03.380 , 90.03.390 , or 90.44.100 .
WRIA 32	The Washington portion of the Walla Walla River Watershed within Walla Walla and Columbia counties defined as Water Resources Inventory Area 32.

Appendix B. Proposed Water Management Plans

This appendix provides additional preliminary details regarding:

- Development and review process for water management plans.
- Prospective goals and criteria for approval of water management plans.
- Prospective outline (content) of water management plans.

Development and Review Process for Water Management Plans

Plan Development

Initial flow from flexibility plans will be developed by Water Management Units or water users. While water users may hire consultants and/or work with Partnership staff and others, water users are responsible for developing their water management plan.

Review and Approval

Once a plan is developed, it is submitted to the Partnership. The Partnership is responsible for review and approval of the plans. The Water Resources Panel will review the water management plan for consistency with the goals and criteria of flow from flexibility projects (specific goals and criteria will be developed by the Partnership and approved by Ecology). The Water Resources Panel will issue a public notice of the proposed plan and provide opportunity for public comments. The Water Resources Panel must consult with Ecology regarding flow and the potential for involuntary impacts on other water right holders. Ecology and the Water Resources Panel may request that water users alter the plan to improve consistency with goals and criteria. Following review and consultation with Ecology, the Water Resources Panel will make a recommendation to the Partnership Board regarding the plan's technical soundness, or advise on modifications for re-submittal.

Annual Assessment and Reporting

Partnership staff will work with water users to monitor and assess project outcomes and annually report results to Ecology. If goals and criteria are not met in practice (e.g., if flows are not increased or other water right holders are involuntary affected), then the Partnership and Ecology, in cooperation with Flow for Flexibility participants, will jointly assess alternative actions to address deficiencies. The Partnership and Ecology have the authority to jointly suspend water management plans to meet the program/project goals and objects.

Prospective Goals and Criteria for Water Management Plans

Specific goals and criteria for assessing and approving water management plans will be established by the Walla Walla Watershed Management Partnership Board. As reflected in this proposal, goals and criteria might include:

- **Flows are improved.** Stream flow is augmented in places and at times that fish need it. Flow improvement would be commensurate with the degree of flexibilities sought and the potential risk of unintended consequences. Groundwater and surface water sources would be sustainably used.
- **Water rights are not involuntarily impacted.** Water right holders will not be involuntarily affected by flow from flexibility projects.
- **Total water use under the plan would be less than or equal to previous use.**

Prospective Outline of Components in Water Management Plans

The required contents of water management plans will be defined by the Walla Walla Watershed Management Partnership, with input from the Water Resources Panel and Ecology. Water Management Plans are likely to include the following information:

- Goal and Objective(s)
 - Purpose of project
 - Benefits and expected outcomes
- Area (geographic/stream)
- Participants (water users)
- Current Water Use
 - Crops
 - Irrigation (type/efficiency)
 - Water Usage (amount)
 - Conveyance system(s)
 - Storage measures (if any)
 - Water rights (aggregate)
 - Priority dates (senior/junior)
- Fish and key aquatic species and habitats
 - Species present in areas affected by plan
 - Life stages
- Flow Factors
 - Baseline
 - Flow goals
 - Critical issues (Quantity, timing, temp, water quality, TMDL, other)
- Hydrology

- Hydrological assessment (pilot area/relative to Basin)
- Recharge Plan
- Water Balance (baseline vs. flow goals)
- Proposed water management changes
 - Tools/techniques necessary to achieve goal/objectives (i.e. Flexibilities)
 - Infrastructure changes (system requirements; design considerations)
- Other water right holders potentially affected
- Performance Measures
 - Monitoring
 - Compliance
 - Reporting
 - GIS-mapping
- Water Management Process
 - User governance structure
 - Operational agreement
- Dispute Resolution
 - Process and agreements
- Costs
 - Capital costs
 - Operating/maintenance costs

Appendix C. RCW References to Watershed Planning

The following references to *watershed plans*, *watershed planning*, and *planning unit* identify existing authorities, functions and responsibilities currently managed by the WRIA 32 Watershed Planning Unit. As proposed in this report, these authorities, functions, and responsibilities would be shifted to the Walla Walla Watershed Management Partnership once it is formed and the Planning Unit is dissolved.

RCW 90.03.386

Coordination of approval procedures for compliance and consistency with approved water system plan.

(1) Within service areas established pursuant to chapter [43.20](#) or [70.116](#) RCW, the department of ecology and the department of health shall coordinate approval procedures to ensure compliance and consistency with the approved water system plan or small water system management program.

(2) The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter [43.20](#) RCW, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter [70.116](#) RCW, is that the place of use of a surface water right or ground water right used by the supplier includes any portion of the approved service area that was not previously within the place of use for the water right if the supplier is in compliance with the terms of the water system plan or small water system management program, including those regarding water conservation, and the alteration of the place of use is not inconsistent, regarding an area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter [36.70A](#) RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any **watershed plan** approved under chapter [90.82](#) RCW, or a comprehensive **watershed plan** adopted under RCW [90.54.040](#)(1) after September 9, 2003, if such a **watershed plan** has been approved for the area.

RCW 90.03.550

Municipal water supply purposes -- Beneficial uses.

Beneficial uses of water under a municipal water supply purposes water right may include water withdrawn or diverted under such a right and used for:

(1) Uses that benefit fish and wildlife, water quality, or other instream resources or related habitat values; or

(2) Uses that are needed to implement environmental obligations called for by a **watershed plan** approved under chapter [90.82](#) RCW, or a comprehensive **watershed plan** adopted under RCW [90.54.040](#)(1) after September 9, 2003, a federally approved habitat conservation plan prepared in response to the listing of a species as being endangered or threatened under the federal

endangered species act, 16 U.S.C. Sec. 1531 et seq., a hydropower license of the federal energy regulatory commission, or a comprehensive irrigation district management plan.

RCW 90.03.570

Change or transfer of an unperfected surface water right for municipal water supply purposes.

(1) An unperfected surface water right for municipal water supply purposes or a portion thereof held by a municipal water supplier may be changed or transferred in the same manner as provided by RCW [90.03.380](#) for any purpose if:

(a) The supplier is in compliance with the terms of an approved water system plan or small water system management program under chapter [43.20](#) or [70.116](#) RCW that applies to the supplier, including those regarding water conservation;

(b) Instream flows have been established by rule for the water resource inventory area, as established in chapter [173-500](#) WAC as it exists on September 9, 2003, that is the source of the water for the transfer or change;

(c) A **watershed plan** has been approved for the water resource inventory area referred to in (b) of this subsection under chapter [90.82](#) RCW and a detailed implementation plan has been completed that satisfies the requirements of RCW [90.82.043](#) or a **watershed plan** has been adopted after September 9, 2003, for that water resource inventory area under RCW [90.54.040](#)(1) and a detailed implementation plan has been completed that satisfies the requirements of RCW [90.82.043](#); and

(d) Stream flows that satisfy the instream flows referred to in (b) of this subsection are met or the milestones for satisfying those instream flows required under (c) of this subsection are being met.

RCW 77.55.221

Flood damage repair and reduction activities -- Five-year maintenance permit agreements.

The department shall, at the request of a county, develop five-year maintenance permit agreements, consistent with comprehensive flood control management plans adopted under the authority of RCW [86.12.200](#), or other **watershed plan** approved by a county legislative authority, to allow for work on public and private property for bank stabilization, bridge repair, removal of sandbars and debris, channel maintenance, and other flood damage repair and reduction activity under agreed-upon conditions and times without obtaining permits for specific projects.

RCW 79A.15.120

Riparian protection account--Use of funds. (Effective July 1, 2007.)

(10) In determining acquisition priorities with respect to the riparian protection account, the committee must consider, at a minimum, the following criteria:

(a) Whether the project continues the conservation reserve enhancement program. Applications that extend the duration of leases of riparian areas that are currently enrolled in the conservation reserve enhancement program shall be eligible. Such applications are eligible for a conservation lease extension of at least twenty-five years of duration;

(b) Whether the projects are identified or recommended in a **watershed planning** process under chapter 247, Laws of 1998, salmon recovery planning under chapter [77.85](#) RCW, or other local plans, such as habitat conservation plans, and these must be highly considered in the process;

RCW 79A.15.130

Farmlands preservation account--Use of funds. (Effective July 1, 2007.)

(9) In determining the acquisition priorities, the committee must consider, at a minimum, the following criteria:

(a) Community support for the project;

(b) A recommendation as part of a limiting factors or critical pathways analysis, a **watershed plan** or habitat conservation plan, or a coordinated region-wide prioritization effort;

RCW 90.42.040

Trust water rights program -- Water right certificate -- Notice of creation or modification.

(1) All trust water rights acquired by the state shall be placed in the state trust water rights program to be managed by the department. Trust water rights acquired by the state shall be held or authorized for use by the department for instream flows, irrigation, municipal, or other beneficial uses consistent with applicable regional plans for pilot planning areas, or to resolve critical water supply problems. To the extent practicable and subject to legislative appropriation, trust water rights acquired in an area with an approved **watershed plan** developed under chapter [90.82](#) RCW shall be consistent with that plan if the plan calls for such acquisition.

RCW 90.74.020

Mitigation plans.

(1) Project proponents may use a mitigation plan to propose compensatory mitigation within a watershed. A mitigation plan shall:

(a) Contain provisions that guarantee the long-term viability of the created, restored, enhanced, or preserved habitat, including assurances for protecting any essential biological functions and values defined in the mitigation plan;

(b) Contain provisions for long-term monitoring of any created, restored, or enhanced mitigation site; and

(c) Be consistent with the local comprehensive land use plan and any other applicable planning process in effect for the development area, such as an adopted subbasin or **watershed plan**.

RCW 90.03.060

Water masters -- Appointment, compensation.

(2) A water master may be appointed by the department for a watershed management area for which a plan adopted by a **planning unit** and by the counties with territory in the watershed management area under RCW [90.82.130](#) contains a requirement or request that a water master be appointed, subject to availability of state or non-state funding.

RCW 39.34.190

Watershed management plan projects -- Use of water-related revenues.

(3) The authority for expenditure of local government revenues provided by this section shall be applicable broadly to the implementation of watershed management plans addressing water supply, water transmission, water quality treatment or protection, or any other water-related purposes. Such plans include but are not limited to plans developed under the following authorities:

- (a) Watershed plans developed under chapter [90.82](#) RCW;

TMDL

RCW 43.21A.130

Studies -- Limitations.

(2)(a) Any studies conducted by the department to establish the total maximum daily load of a water body under chapter [90.48](#) RCW must involve meaningful participation and opportunities to comment by the local watershed planning group established in chapter [90.82](#) RCW, the local governments whose jurisdictions are within the affected watershed, and any affected or concerned citizen who notifies the department of his or her interest in participating. Technical or procedural disputes or disagreements that arise during the participation and comment process may be presented to the director for review. The director shall conduct a review of the disputed items and issue written findings and conclusions to all interested participants.

RCW 90.03.105

Petition by planning units for general adjudication.

The legislature finds that the lack of certainty regarding water rights within a water resource Basin may impede management and planning for water resources. The legislature further finds that planning units conducting water resource planning under chapter [90.82](#) RCW may find that the certainty provided by a general adjudication of water rights under this chapter is required for water planning or water management in a water resource inventory area or in a portion of the area. Therefore, such planning units may petition the department to conduct such a general adjudication and the department shall give high priority to such a request in initiating any such general adjudications under this chapter.

RCW 90.90.030

Voluntary regional agreements -- Scope and application -- Reports to legislature -- Definitions. (Expires June 30, 2012.)

(1) The department of 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.

(2) Such agreements shall ensure that:

(a) For water rights issued from the Columbia river mainstem, there is 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;

(b) For water rights issued from the lower Snake river mainstem, there is no negative impact on Snake river mainstem instream flows from April through August as a result of the new appropriations issued under the agreement; and

(c) Efforts are made to harmonize such agreements with watershed plans adopted under the authority of chapter [90.82](#) RCW that are applicable to the area covered by the agreement.

RCW 90.90.030

Voluntary regional agreements -- Scope and application -- Reports to legislature -- Definitions. (Expires June 30, 2012.)

(4) Before executing a voluntary agreement under this section, the department of ecology shall:

(a) Provide a sixty-day period for consultation with county legislative authorities and watershed planning groups with jurisdiction over the area where the water rights included in the agreement are located, the department of fish and wildlife, and affected tribal governments, and federal agencies. The department of fish and wildlife shall provide written comments within that time period. The consultation process for voluntary regional agreements developed under the provisions of this section is deemed adequate for the issuance of new water rights provided for in this section and satisfies all consultation requirements under state law related to the issuance of new water rights; and

RCW 90.90.040

Columbia river water supply inventory -- Long-term water supply and demand forecast.

(1) To support the development of new water supplies in the Columbia river and to protect instream flow, the department of ecology shall work with all interested parties, including interested county legislative authorities and **watershed planning** groups, adjacent to the Columbia river, and affected tribal governments, to develop a Columbia river water supply inventory and a long-term water supply and demand forecast.

RCW 90.90.050

Columbia river mainstem water resources information system.

(1) In order to better understand current water use and instream flows in the Columbia river mainstem, the department of ecology shall establish and maintain a Columbia river mainstem water resources information system that provides the information necessary for effective

mainstem water resource planning and management.

(2) To accomplish the objective in subsection (1) of this section, the department of ecology shall use information compiled by existing local **watershed planning** groups, federal agencies, the Bonneville power administration, irrigation districts, conservation districts in the Basin, and other available sources. The information shall include:

Appendix D. Basin Accomplishments

Since 2000, a wide range of local, tribal, governmental and private entities have contributed their efforts to improve water and fish outcomes in the Walla Walla Watershed. Two significant milestones have resulted from these efforts:

- **Salmon have returned:** Over 500 spring Chinook returned to the Basin from adult outplanting efforts by Confederated Tribes of the Umatilla Indian Reservation and Washington Department of Fish and Wildlife. This was the first restored fish run in 80 years.
- **Flow is improved:** More than 25 cfs is now consistently flowing in the mainstem Walla Walla River, where previously the river would go dry due to agricultural diversion. providing a minimum flow to allow salmon to survive.

Numerous activities and accomplishments contributed to these promising water and fish achievements. These accomplishments include:

- **Planning, assessment, and policy efforts.** At least 17 planning and assessment efforts have been undertaken in the Basin. Highlights include:
 - Basin-level water and fish plans: Walla Walla Watershed Plan (2005); Snake River Salmon Recovery Plan for Southeast Washington (2006); Walla Walla SubBasin Plan (2004); Bi-State Habitat Conservation Plan (in development); Watershed Detailed Implementation Plan (2006), integrating implementation of the salmon recovery and watershed plans.
 - Flow Enhancement Feasibility Study, underway by Confederated Tribes of the Umatilla Indian Reservation and U.S. Army Corps of Engineers.
 - Water Management and Instream Flow Rule (2007), which limits permit-exempt groundwater withdrawals and establishes an instream flow water right.
 - Four Comprehensive Irrigation District Management Plans (CIDMPs).
 - Development of the Walla Walla Watershed Management Partnership, flow from flexibility projects, and Water Management Initiative, currently underway.
- **On-the-ground projects.** Numerous on-the-ground projects have been completed or are on-going, including many irrigation efficiency projects, water conveyance piping projects, shallow aquifer recharge projects, aquifer storage and recovery wells, and removal of at least 10 fish passage barriers. Basin entities have also installed more than 350 water meters, 380 fish screens, 229 miles of riparian buffer, and 300 in-stream structures to improve fish habitat. In addition, three irrigation districts are by-passing about 30 percent of their legally divertible water to maintain stream flows in the Walla Walla River, and Confederated Tribes of the Umatilla Indian Reservation has established a fish acclimation facility that releases about 500,000 spring Chinook smolts into the Walla Walla River each year.
- **Science, monitoring and data collection.** A wide variety of technical studies have been completed or are on-going in the Basin related to stream flows, water quality, water storage, groundwater assessments, shallow aquifer recharge, and salmon and bull trout lifecycle needs. Monitoring and data collection activities include resident fish monitoring, anadromous

fish monitoring, natural fish production monitoring, bull trout monitoring, stream flow gauging, and seasonal stream temperature monitoring.

Since 2000, these activities have returned water and fish to the Walla Walla River, increased and improved aquatic habitat, and provided knowledge to help guide future work. They have reversed trends over the past century in water and fish conditions and they demonstrate the capacity of Basin entities to work together to achieve water and fish goals. These accomplishments were recognized nationally at the 2005 White House Conference on Cooperative Conservation.

The 2005 comprehensive Walla Walla Watershed Plan identified priority watershed enhancement projects. A full list of projects from Chapter 11, noting the project description and its status (complete, active, delayed, or pending) as of June, 2008 is available online at: <http://www.wallawallawatershed.org/library>.

Appendix E. Assessment of Legal Issues and Options Related to Interstate Water Management

State-Based Adjudications and the U.S. Supreme Court's 1936 Decision in *Washington v. Oregon*

Background

Both Washington and Oregon can adjudicate water rights within their respective states.¹⁸ Such adjudications are binding in regard to the source of water adjudicated and to those individual claimants within such water sources. Both the states of Washington and Oregon have held state adjudications of the water rights on the Walla Walla River. The Oregon portion of the Walla Walla River was adjudicated in 1912 and the Washington portion of the Walla Walla River was adjudicated in 1928. Neither of these states were parties to the other state's adjudication. Federal and Tribal reserved water rights were not adjudicated in either of these state proceedings.

In the 1930's, the State of Washington filed a bill of complaint with the United States Supreme Court against the State of Oregon.¹⁹ In this suit, Washington alleged that Oregon was wrongfully diverting the waters of the Walla Walla River and impairing Washington water right holders. Washington sought an adjudication to clarify the interests of the two states in the river and in tributary streams, and sought to restrain any use or diversion of the waters that were supposedly unlawful.

In 1936, the U.S. Supreme Court issued a decision²⁰ stating that because neither Oregon nor Washington was a party to the other state's adjudication, neither state was bound by the other's adjudication.²¹ The U.S. Supreme Court dismissed Washington's lawsuit because it found that Washington failed to prove its water right holders were seriously threatened by Oregon's allowance of withdrawals from the Walla Walla River. The Court decided that Oregon was taking its fair share of water from the river, and that the Washington water right holders were not necessarily harmed by Oregon's diversions.

¹⁸ Washington's Water Code provides for adjudications of water rights through a superior court adjudication process, *see* RCW 90.03.110-245. Oregon has a similar state-based adjudication process that is conducted before its district courts, *see* ORS Chapter 539.

¹⁹ This type of litigation is typically referred to as an "equitable apportionment" suit and is heard exclusively by the U.S. Supreme Court pursuant to the U.S. Supreme Court's authority to hear "all . . . controversies between two or more states." *See* U.S. Const., Article III, §2.

²⁰ *Washington v. Oregon*, 297 U.S. 517, 56 S.Ct. 540 (1936).

²¹ Washington did not challenge any of the priorities adjudged in the Oregon decree, and Oregon only challenged the priority date allotted to the Gardena Farms Irrigation District's water right in Washington's decree. Specifically, Washington asserted that Oregon diversions were not allowing the Gardena Farms Irrigation District to fully satisfy its 1892 priority 7,000 ac-ft/year water right (as adjudicated in Washington's 1928 decree). Oregon contested Gardena's 1892 priority date. The Court found that Gardena's water right was not put to beneficial use until 1904 or later. "Long before that time, beginning in 1880 or earlier and continuously thereafter, irrigators in Oregon had been appropriating to themselves the water of the river above the Red Bridge." *Washington v. Oregon*, 297 U.S. at 521-22.

During the case, the two states agreed that the water rights held in both states are governed by the doctrine of prior appropriation. The states entered into a formal stipulation that some of the smaller interstate streams, including Mud Creek and its tributaries, and Pine Creek and its tributaries, would be regulated by priority date cooperatively between the states “in the same manner as if the State line did not exist.”²² However, this stipulation does not extend to the regulation and treatment of water rights along the mainstem of the Walla Walla River, or any other interstate tributaries to the Walla Walla (i.e., the Little Walla Walla River and Spring Branches).²³

Neither the 1936 Court decision nor the stipulation make provision for Washington senior water right holders to call Oregon juniors other than those on the small interstate streams listed above (i.e., Washington seniors on the Little Walla Walla or the mainstem of the Walla Walla River have no provision for calling junior water right holders on the Oregon side of the Walla Walla River).

Since the 1936 U.S. Supreme Court decision, the Walla Walla watershed has changed significantly. This is due to many reasons, including but not limited to, conservation efforts in Oregon. These efforts have reduced return flows and seepage to the Walla Walla watershed, which significantly reduces water recharge to the interstate streams, resulting in lack of water on the Washington side of the Walla Walla River.

Conclusion

Option 1: Because of these changed circumstances, one option that Washington could pursue is filing a petition in the U.S. Supreme Court to “modify” the decree that the Court issued in the case. If Washington seeks a “reweighing of equities,” it must make a showing of substantial injury to be entitled to relief.²⁴ However, this course of action is inadvisable.²⁵

Option 2: Another option Washington could pursue, in light of the changed circumstances in the watershed, is to seek permission from the U.S. Supreme Court to file another bill of complaint against Oregon to once again seek apportionment of the Walla Walla River and its associated

²² *Stipulation before the Supreme Court of the United States*, Original No. 17, In Equity, signed October 21, 1933.

²³ The two states have continued to operate within the parameters of the 1933 stipulation by treating the water rights on the smaller interstate streams identified in that stipulation as if no state-line exists. As a practical matter, this means that if a senior water right holder on the Washington side of Pine Creek or Mud Creek is not fully satisfied, upon notice, the Oregon Water Master will regulate on the stream(s) to allow more water flow. Regulation may be enforcing against illegal diversions, or shutting-off juniors, and so on. On the other hand, Oregon water right holders that are senior to Washington water right holders are entitled to their full allotments without regard to junior Washington water right holders.

The two states appear to have relied on a Memorandum of Understanding regarding cooperative regulation of the water rights from smaller interstate streams described in the stipulation -- “Memorandum of Agreement between the Oregon Water Master and the Washington Water Master for Delivery of Water from Oregon to Washington in the Walla Walla Basin (1992).”

²⁴ *See Nebraska v. Wyoming*, 507 U.S. 584 (1993).

²⁵ *See Nebraska v. Wyoming*, 507 U.S. at 593 (“the interests of certainty and stability counsel strongly against reopening an apportionment of interstate water rights absent considerable justification”).

interstate streams. However, the Court could very well not accept or dismiss such a lawsuit, adhering to the previous 1936 decision as precedent.

If the Court exercises its jurisdiction to hear a new Washington complaint, the only defendant most likely needed in the lawsuit would be Oregon. This is because the current trend before the U.S. Supreme Court in equitable apportionment of waters is not to join persons or entities other than the states. The Court has previously ruled that water right holders in the litigating states are represented by their states (since a state represents its citizens) and, thus, these water right holders are bound by the decree of the U.S. Supreme Court even though they are not parties to the actual litigation.²⁶ Therefore, it appears that even though Washington and Oregon respectively conducted state-based adjudications on the Walla Walla River, these state-adjudicated water rights holders would be bound by the U.S. Supreme Court's apportionment and would not be able to later assert greater rights in either an equitable or legal proceeding.²⁷

Finally, it seems likely that the U.S. Supreme Court would allow the United States to intervene on behalf of a Tribe as trustee, or the Tribes could intervene²⁸ on their own behalf in an equitable apportionment case in order to have tribal reserved water rights adjudicated at the same time as the states' apportionment. It is likely that the U.S. Supreme Court could determine the tribal reserved rights as part of an interstate equitable apportionment case without the need for a separate federal district court case to determine the tribal rights (*see G* below), although there does not appear to be any court cases that deal with this nuance. The State does not intend to take this course of action.

Interstate Water Compact

Interstate compacts are another way to apportion water without resorting to litigation. As previously mentioned, both Washington and Oregon have conducted state-based adjudications of Walla Walla water rights. However, neither state is bound by the other state's adjudication.²⁹ Washington and Oregon's respective shares of the interstate water may only be determined by equitable apportionment litigation before the U.S. Supreme Court (*see A* above), interstate compacts (described here), or Congressional apportionment (*see C* below). The U.S. Supreme

²⁶ *See Wyoming v. Colorado*, 286 U.S. 494 at 508 (1932); compare *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (*per curiam*) (“[o]ur original jurisdiction should not be . . . expanded [by intervention of other parties] to the dimensions of an ordinary class action”).

²⁷ *Badgley v. City of New York*, 606 F.2d 358, 364-66 (2nd Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

²⁸ *See e.g., Arizona v. California*, 373 U.S. 546 (1963) and *Arizona v. California*, 460 U.S. 605, 614-15 (1983).

²⁹ *Id.* The U.S. Supreme Court in the *Hinderlider* decision provided that “[f]or whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.” *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938) (concerning the 1925 La Plata River Compact between Colorado and New Mexico and the effect of that compact on an upstream senior water right held in Colorado that was adjudicated in Colorado district court in 1898). *See also Washington v. Oregon*, 297 U.S. 517, 56 S.Ct. 540 (1936).

Court has often encouraged states to determine their shares of interstate waters by a compact rather than through litigation.³⁰

The United States Constitution provides that states entering into an agreement or compact with each other must have the consent of Congress.³¹ An interstate compact typically begins with congressional authorization (although this does not appear to be mandatory) for the states to negotiate a compact (this is because federal interests are typically involved in state agreements, e.g., federal/tribal reserved rights, navigation, hydropower, etc.).³² Each state then appoints commissioners to negotiate the compact. After negotiations are completed, the legislature and governor of each state must ratify the negotiations. The U.S. Congress then enacts legislation to ratify the interstate compact (and may have to reenact such legislation if the U.S. President vetoes).

A compact can also include establishment of regional administrative bodies (Commissions) to administer the compact and implement its terms. Congress often reserves the right to amend or repeal its consent to interstate water compacts, although such a right is not stated in the U.S. Constitution. Because Congressional consent to an interstate compact transforms the compact into federal law under the Compact Clause, the U.S. Supreme Court is the final arbiter of disputes that arise between states about the meaning and validity of an interstate compact.

Even though both Washington and Oregon have previously conducted state-based adjudications of Walla Walla River water, they could enter into an interstate compact dividing up their respective water rights.³³ The states could enter into compact negotiations between themselves alone, and would not necessarily need to include previously adjudicated water right holders from either state in such negotiations. Like a U.S. Supreme Court equitable apportionment case, dividing up waters between states through a compact binds the citizens of each state, even where the state(s) previously granted water rights prior to negotiation of the compact. Such compact could *potentially* provide that each state leave a certain quantity of water in the river for stream flows, even if it means that water right holders would need to cease diverting all or a portion of their previously state-based adjudicated water rights.

To date, Washington and Oregon have already engaged in equitable apportionment litigation, which resulted in the 1936 decision that applies to the Walla Walla River (*see A* above). In that case, the U.S. Supreme Court determined that Washington's lawsuit against Oregon did not warrant the Court's intervention in the specific allocation of waters between the two states, aside from the determination that Gardena Farms' priority date was approximately 1904 (versus 1892).

As far as an interstate compact is concerned, Oregon as the upstream state may have little interest in negotiating an interstate compact with Washington related to the Walla Walla River because:

³⁰ *Hinderlider*, 304 U.S. at 105.

³¹ U.S. Const., Article I, §10, cl. 3 (“no state shall, without the consent of Congress. . . enter into any agreement or compact with another state.”).

³² *See* Douglas L. Grant, *Waters and Water Rights*, §46.02 at 46-7 (2004 Replacement).

³³ *See e.g.*, *Hinderlider*, 304 U.S. 92 (1938).

- Oregon was successful in having Washington’s 1930s equitable apportionment case dismissed.
- Oregon already has a 1912 state-based adjudication allocating interstate waters for Oregon diverters.

However, Oregon may be motivated to negotiate a compact by the threat of litigation from Washington, if Washington

- Attempted to petition the U.S. Supreme Court to revise the previous decree entered in *Washington v. Oregon*.
- Initiated a new lawsuit seeking equitable apportionment of these interstate waters once again due to changed circumstances.

Even if Oregon is amenable to negotiating a compact with Washington, such a process is complicated and time-consuming. Often the compacting states each pass legislation approving the compact. Then consent of Congress must be obtained, and that typically takes 5 to 15 years. Congress can also disapprove the compact and/or take no action (which was the case when Congress refused its consent to the compact reached by California and Nevada—due in part to concerns with the effect of the compact on Tribal water claims). Finally, the U.S. President may veto the bill approving the compact.

Lastly, the possibility of Oregon and Washington negotiating a compact at this stage is further complicated in the Walla Walla Watershed because both states have already adjudicated the state-based claims related to the Walla Walla River. Entering into an interstate compact at this juncture that would in any way reduce the previously adjudicated state-based water rights in Oregon or Washington would most likely be very controversial.

Congressional Apportionment

Congress can pass legislation apportioning interstate waters under the Commerce Clause of the U.S. Constitution.³⁴ However, this is very rarely done. There appear to be only two instances of clearly established congressional water apportionment (Boulder Canyon Project and the Truckee-Carson-Pyramid Lake Water rights Settlement).³⁵ Congress may not be inclined to apportion water amongst states unless they both seek, or at minimum support, the action. Further, having Congress apportion interstate waters is a very political process that could be thwarted for any number of reasons, including Congress’s concern over the effect on federal water rights, such as tribal reserved water rights.

³⁴ See *Kaiser Aetna v. United States*, 444 U.S. 164, 173-74 (1979).

³⁵ Boulder Canyon Project Act, Pub. L. No. 642, 45 Stat. 1057 (1928); Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Title II), Pub. L. No. 101-618, 104 Stat. 3289 (1990).

Voluntary Agreement to Not Divert

This concept would require individual agreements between the water right holders and their respective states. Such agreements would essentially be contracts where water right holders would agree to stop diverting water, on a temporary or permanent basis, in order for the water to stay in the Walla Walla River. Presumably these water right holders would need to receive consideration for their agreement to cease water withdrawals, whether through protection from relinquishment (if the agreement is temporary), money payment, or some other benefit.

A permanent agreement could provide that the water right holder “voluntarily relinquish his/her water right.” Then that portion of water would remain in the system, if there is not a downstream diversion entitled to that water.

A temporary agreement could be for a set period of time (e.g., 10 years) if the water right holder was unwilling to voluntarily relinquish his/her water right. Under this scenario, if the water is not put into Ecology’s Trust Water Rights Program (*see E below*), protection from Washington’s relinquishment statute (RCW 90.14) will be needed to avoid relinquishment of the water right for non-use exceeding a five-year period. To encourage at least short-term agreements with water right holders who are not interested in placing their rights into trust, Ecology will be requesting the Legislature to amend the relinquishment statute to provide an exception from relinquishment for non-use of water that occurs as a result of such an agreement.

Trust Water Rights

Background

Washington’s Trust Water Program may achieve protection of stream flows in the Walla Walla River. The Washington Legislature established a Trust Water Rights Program in statute in the 1990s.³⁶ The Trust Water Rights Program provides a mechanism for reallocation of water, either through a direct change in the purpose of use of an existing water right or through the development and transfer of net water savings from water conservation and efficiency projects. Transfers to the Trust Water Rights Program may be either temporary or permanent. Water rights that are put into trust are not subject to relinquishment under Washington’s Water Code, RCW 90.14. Trust water rights are acquired by Ecology through donation, lease, or purchase. Specifically, the Trust Water Rights Program enables Ecology to accept water rights into trust for in stream purposes, thus protecting such trust rights from use by junior downstream diverters.

For example, protecting Gardena Farms by-pass flows: In the example of the Gardena Farms Irrigation District ceasing its withdrawal of Walla Walla River water in exchange for Columbia River water (the “pump-exchange” measure under the feasibility study), the issue arises as to how to protect the Gardena by-pass water on the Walla Walla River through to the confluence with the Columbia River.

³⁶ RCW 90.42.

Because the Gardena water right originates in Washington it would be eligible for the Trust Water Rights Program. If there are no water rights senior to Gardena's water right downstream of Gardena's point of withdrawal, the Trust Water Rights Program would keep that portion of water in the Walla Walla River, if adequate administrative safeguards were in place to prevent junior diverters from taking that water.

However, if there are existing water users senior to Gardena's water right downstream (there are a few seniors downstream), those seniors, if not fully satisfied, would be able to withdraw the amount of water necessary to satisfy their existing water right, including any portion of the Gardena water right in trust that reaches these senior diversion points along the river.

Conclusion

We analyzed the capability of Washington Trust Water Code to accept and protect in stream water rights along the Walla Walla River originating from Oregon. The Washington Trust Water Code only provides a mechanism to put Washington water rights into the trust program. Nothing in Washington's Trust Water Code or elsewhere in Washington law provides a mechanism for Washington to protect Oregon in stream water rights once those water rights pass into Washington State. Even if the Washington Legislature were inclined to amend the Trust Water Code to allow for the protection of by-passed Oregon water, such legislation would likely be susceptible to a challenge under the takings clause of the constitution by Washington water right holders who have adjudicated water rights.

Endangered Species Act (ESA)³⁷ – Habitat Conservation Plans

The ESA is enforced by federal agencies. At present, summer steelhead and bull trout in the Walla Walla River are listed as threatened species. A diversion that causes a "take" of an endangered or threatened species (such as an unscreened diversion structure that results in injury or death to endangered salmon fry) is prohibited by the ESA, and the diversion can be enforced against by the federal government. The federal government's enforcement of the ESA under this

³⁷ The Federal Endangered Species Act (ESA) was enacted in 1973. The policy of the ESA is to attempt to conserve and recover threatened and endangered species. The ESA is implemented by the U.S. Fish and Wildlife Service (USFWS) for most species and the National Marine Fisheries Service (NMFS) for marine species. Species may be listed by these agencies as endangered (any species that is in danger of extinction throughout all or a significant portion of its range) or threatened (any species that is likely to become an endangered species within the foreseeable future through all or a portion of its range). Under the ESA, there is a prohibition on a "take" of a listed species. The ESA provides that when a federal agency takes an action, the agency shall ensure that any such action is not "likely to jeopardize the continued existence of any endangered special or threatened species or result in the destruction of adverse modification of habitat of such species. . . ." 16 U.S.C. §1536(a)(2). The "Section 7 Consultation" process requires any federal agency taking an action to consult with either NMFS or USFWS to determine whether listed or candidate species may be present in the action area. If the consulting agency determines that species may be present in the action area, the action agency must produce a Biological Assessment with the NMFS or USFWS to identify any listed or candidate species likely to be affected by the action. If the Biological Assessment or informal discussion indicates that a listed or candidate species is likely to be adversely affected by the action, the consulting agency issues a Biological Opinion. The Biological Opinion states whether the proposed action will likely jeopardize the existence of listed or candidate species. If jeopardy is determined to be likely, the consulting agency must suggest "reasonable and prudent alternatives." 16 U.S.C. 1536(b)(3)(A). To apply for an incidental take permit, an application must develop a Habitat Conservation Plan (HCP).

circumstance “does not affect the [water right holders’] water rights but only the manner in which it exercises those [water] rights.”³⁸ Absent either a federal action trigger, or a diversion causing a “take” of listed species (where the federal government would *only* be able to affect the “manner” of the diversion), there appears to be no trigger for federal enforcement of the ESA that would actually require that additional stream flows remain in the Walla Walla River.³⁹

Consistent with the negotiated settlement between the three irrigation districts and the USFWS, the districts have applied for “incidental take” permits (ITP) from the USFWS and NMFS for their activities related to diversion of water from the Walla Walla River.⁴⁰ The Habitat Conservation Plan (HCP) for this ITP would apply along the Walla Walla River from Cemetery Bridge to Gardena Creek. This includes the water service areas of the three districts (including canal and other facility rights-of-way), the Walla Walla mainstem from the Little Walla Walla Diversion (Cemetery Bridge) to where Gardena’s return flows enter the river around RM 17.5, as well as the East and West Little Walla Walla Rivers and Pine Creek. In order to protect by-pass flows of the participating irrigation districts, and to decrease surface water diversions, the HCP will provide for water right transfers and changes, in stream leases, and trust water right agreements. All of these mechanisms would potentially increase stream flows in the Walla Walla River.

Conclusion

Short of the districts’ negotiated settlement agreement with USFWS regarding the districts’ individual water rights, and through the districts’ application for an ITP with an associated HCP proposal that is currently underway, it is difficult to rely solely on the ESA to enable additional water flows in the Walla Walla River. This is because the ESA trigger is based upon a federal agency authorizing, funding, or carrying out an activity that would likely jeopardize the continued existence of a listed species. Absent federal agency action of this nature, state-based water rights cannot be unilaterally regulated by NMFS or USFWS under the ESA. Further, Ecology lacks authority to enforce the ESA.

Quantification of Tribal Reserved Water Rights

³⁸ *U.S. v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 at 1134 (E.D. Cal. 1992).

³⁹ Many complicated issues arise under state law regarding water rights and their status as an interest in real property. In the context of state-based water rights, we have only seen the application of the ESA due to a federal action trigger where the water right holder needed a federal permit or authorization and a biological opinion included reasonable and prudent alternatives that related to the actual exercise of that state-based right.

⁴⁰ Under the ESA this ITP would cover the incidental take of bull trout and summer steelhead (belonging to the Middle Columbia River Distinct Population Segment). The ITP would supposedly cover various activities related to the diversion of surface water from the Walla Walla River and other actions by these districts in their proposed HCP for these districts. The HCP would establish acceptable levels of incidental take of steelhead and bull trout, which may occur as the unintended result of the districts’ covered activities. The HCP would also establish conservation measures to ensure that the districts’ covered activities will not appreciably reduce the likelihood of survival or recovery of the species in the wild. The conservation measures will minimize and mitigate the impacts to the covered species to the maximum extent practicable while providing for long-term management of various irrigation and related practices on non-federal lands.

State Court Adjudication

The U.S. Supreme Court held in *Winters v. United States*, 207 U.S. 564 (1908) that Indian reservations are entitled to water rights needed to fulfill the purposes of the reservation. These Indian water rights are typically referred to as “*Winters* rights.” When an Indian reservation is established with express or implied purposes for fishing, water is also reserved in quantities sufficient to sustain that purpose.⁴¹

Generally, Indian water rights for consumptive uses, such as irrigation, are reserved as of the date of creation of the reservation. Water right holders with priority dates earlier than the date of establishment of the Indian reservation would have priority over such Indian rights, but those with later dates would be junior to the tribal water right. Indian water rights for fishing, however, may have a priority date of “time immemorial,” with no possibility that any other right is earlier in priority.⁴²

The United States holds legal title to *Winters*’ water rights as trustee for the tribes. Therefore, the United States is an indispensable party to an adjudication of tribal water rights. Typically, the United States does not consent to be sued in state court. However, Congress enacted a unique federal statute in 1952 referred to as the “McCarran Amendment,” which allows the United States to be sued in state court.⁴³ Thus, if a state pursues an adjudication of treaty-reserved tribal water rights, the state can bring the United States into state court and commence an adjudication of those reserved water rights, along with all the state-based water rights within the geographic framework of the adjudication.

CTUIR unquantified treaty-reserved rights

The CTUIR believe that they have unquantified treaty-reserved water rights for fisheries purposes in the Walla Walla River Basin. If Oregon or Washington was inclined to quantify those water rights, it could commence an adjudication in state court against the United States (trustee of tribal reserved water rights) as allowed by the McCarran Amendment. A McCarran state adjudication would also involve adjudication of all the state-based rights in the Basin; the new adjudication would assess beneficial use, historical use, etc., for all the state water rights since the date of the early 1900s state adjudication decrees. A McCarran state adjudication must be all encompassing. If the objective is just to adjudicate the tribal rights, that form of adjudication may be able to take place in federal court (*see* discussion in G.2 below), however, in a declaratory judgment action related to groundwater that involved the Lummi Tribe in Washington State, the court determined that the state-based water right holders were necessary parties to the case.

Tribal water rights quantified for fishing purposes through a state court adjudication would be left in stream possibly through the entire Walla Walla River to the confluence with the Columbia River. This would depend on the court’s findings related to the usual and accustomed fishing

⁴¹ *United States v. Adair*, 723 F.2d 1394, 1408-11 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

⁴² *See United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

⁴³ 43 USC §666(a).

areas of the CTUIR and the stretch of river that would be entitled to the stream flow rights for the purposes of maintaining the viability of the tribal fishery. The CTUIRs' rights for in stream uses, to provide for fish and fish habitat protection, would likely be the most senior right on the River in both states. Therefore, the CTUIR would have the right to “call” the river to ensure that this water right is protected and remains in the stream.

Unquantified tribal-reserved water rights for fishing purposes of other regional tribes might exist within the Walla Walla Basin (e.g., the Nez Perce Tribe in Idaho). These could also be adjudicated to determine the extent of *all* tribal-reserved water rights in the Walla Walla River.

Conclusion

Adjudication of tribal-reserved water rights for stream flow purposes appears to be one of the more viable options for providing additional stream flows in the Walla Walla River. These flows would be protected by virtue of having the most seniority of any other water rights along the river. However, this option will not likely be favored by state-based water right holders in the Walla Walla Basin (in Washington or Oregon) who could potentially be determined subordinate to any senior treaty-reserved tribal water rights. In addition, the CTUIR have expressed their desire to implement options that are less disruptive to existing state-based water right holders in order to protect by-pass flows and future additional flows originating from Oregon and Washington.

Federal Court Adjudication

Federal courts have not given up their authority to adjudicate treaty-reserved tribal water rights.⁴⁴ Thus, a federal court would have jurisdiction to hear a case of the United States, as trustee to a tribe, suing a state such as Oregon or Washington to adjudicate treaty-reserved water rights on behalf of that tribe. However, federal courts maintaining such actions is not currently common, based on the long history of state court adjudications of tribal reserved water rights under the McCarran Amendment. Further, the U.S. Supreme Court has ruled that a federal court should abstain in favor of state litigation in this regard, even though the federal courts have concurrent jurisdiction to adjudicate tribal water rights.

Unlike a McCarran state adjudication, a federal case might not necessarily require adjudication of all of the state-based water rights. However, if the Lummi case (*see* G.1 above) is any indication, a federal court may be inclined to also adjudicate all affected state based water rights in such an adjudication. The Lummi case is an example of a declaratory judgment action (not an adjudication) brought by the U.S. against Washington State in federal court. The case required a division of groundwater for consumptive uses between the Tribe and the state (which may not be necessary if the CTUIR were only seeking a determination of their stream flow right associated with fishing rights—unless the court determines that adjudication of CTUIR’s stream flow right would directly affect state-based consumptive use rights). In the Lummi case, the state-based water right holders were determined to be necessary parties to the case, even though it was not an

⁴⁴ *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

adjudication of the individual state groundwater rights, but only a general division between the Lummi Tribe and state water right holders.

Finally, although the United States can initiate an adjudication of treaty-reserved water rights in federal court against a state, it does not appear that a state could initiate such a suit against the United States or a Tribe in federal court, which is presumably why the McCarran Amendment was enacted.

Purchasing Junior Water Rights

As resources allow, the state could purchase a significant amount of junior water rights held on the Walla Walla River in Washington and retire those water rights or place them in permanent trust for stream flow purposes. The amount of acquired water would then remain in the Walla Walla River, as long as those water rights were beneficially used (wet water) and located downstream of any active senior water right holders.

In order to prevent junior water right holders (that are unable to fully exercise their rights because of unavailability of water) from withdrawing water once it becomes available either through the by-pass requirement or additional flows from “big water project,” as resources allow, the state can purchase those rights through an agreement to not divert (*see* D above).

Purchasing Senior Water Rights

Purchasing senior water rights on the Washington side of the Walla Walla River and changing their purpose of use to stream flows would reduce the amount of water withdrawn from the Walla Walla River by the amount of those water rights. However, unless purchases extend to most senior water rights, any remaining senior water rights on the Walla Walla River would still be able to withdraw their water rights.

Purchasing Both Senior and Junior Water Rights

The purchasing of both senior and junior water rights would not necessarily result in any additional water remaining in the system than could be available simply by purchase of senior Washington water rights. This is because if a senior water right is changed to an in stream flow purpose of use, regardless of acquisition of other junior water rights holders, that water right would be able to be protected through the entire stretch of the Washington Walla Walla River.

Keep in mind, however, that any remaining water right holders that are more senior to the water rights acquired would still be able to divert their water right if that senior is upstream of the acquired water right or downstream by seeking curtailment of upstream juniors (i.e., “calling the river”). A water acquisition strategy of this nature will only succeed if there is agency support and adequate resources to regulate water users to the satisfaction of these trust in-stream flow

water rights under the priority system. This will require an active effort by a water master and the willingness to take enforcement action when necessary.

Granting a Columbia River Water Right for Pump-Exchange

- *Can a water right be issued to the irrigation districts in light of the no negative impacts on the Columbia River instream flows for the months of July and August, as required by RCW 90.90.030?*

In order for Ecology to grant a new water right from the Columbia River, regardless of whether the water right is to be used in Washington or Oregon, the statutory four-part test provided in Washington's Water Code must be met, *RCW 90.03.290; and RCW 90.44.060*. The statutory four-part test requires Ecology to determine that:

- (1) Water is available for appropriation
- (2) The water will be applied to a beneficial use
- (3) The proposed use will not impair existing rights
- (4) The proposed use will not be detrimental to the public interest.

In applying the four-part test, Ecology would presumably have to consider *RCW 90.90.030* to ensure there is no negative impact on Columbia River mainstem instream flows in the months of July and August as a result of the new appropriations. If, in fact, the by-pass of Oregon and Washington irrigation district water rights on the Walla Walla River is able to be protected through to the Columbia River, at least as far as the McNary pool, Ecology would be able to grant such a water right because the pump-exchange would eliminate any additional hit or impairment to the Columbia River system.

Here the critical question will be whether it can be shown that Walla Walla water that is not withdrawn in exchange for the use of McNary pool water will be in fact be protected all the way to the Columbia to avoid any net impact. That seems very unlikely considering the evaporative losses, seepage, and human diversions of that water that would predictably occur during the time the water flows from the original point of diversion to the McNary pool. Given those losses it seems that it will not be possible to achieve no net impact to the McNary pool without supplementing with some other source of water that could supply the McNary pool, such as Lake Roosevelt storage.

- *Would the proposed diverted water from the McNary pool be subject to potentially frequent regulation by senior water rights?*

This potential new Columbia River water right would be junior to any other water rights previously issued on the Columbia. As a junior water right it might be subject to regulation. For example, Ecology might need to regulate this junior right in a low flow situation. There may be some viable alternatives to regulating a junior Columbia River water right. As previously mentioned, one possibility would be to supplement the McNary pool with some other source of

water in order to prevent any reasonable likelihood of future regulation, such as Lake Roosevelt storage.

Another concept is that if the new water right were considered non-consumptive (e.g. if it is fully mitigated), the regulatory order against juniors may not apply to it, since such regulation would not improve circumstances in the McNary pool. However, treating this junior Columbia River water right as non-consumptive may be quite difficult due to the fact much of the mitigation water may be evaporated, seep underground, or some other water right holder may take it before it reaches McNary pool.

- *Does Ecology have authority to issue a Washington water right with a place of use (and possibly the point of withdrawal) in Oregon?*

Ecology can likely grant a Washington water right from the Columbia River with a place of use in Oregon, pursuant to the reciprocity clause provided in Ecology's statute at RCW 90.03.300. Oregon also appears to have a reciprocity statute at ORS 537-855 and 537-870. Moreover, even if Oregon did not provide reciprocity under this pump-exchange concept, Ecology would still likely be able to grant such a water right pursuant to the holding in *Sporhase v. Nebraska*, 102 S.Ct. 3456, 458 U.S. 941 (1982), as Washington's reciprocity statute may not be enforceable due to constitutional concerns.

In *Sporhase*, the United States Supreme Court held that the reciprocity requirement in Nebraska's statutory restriction on withdrawal of groundwater from any well within Nebraska intended for use in an adjoining state violated the commerce clause by imposing an impermissible burden on interstate commerce. The Court held that Nebraska's reciprocity provision, pursuant to which a permit would be granted only if the adjoining state in which water was to be used granted reciprocal rights to withdraw and transport groundwater from that state for use in Nebraska, operated as an explicit barrier to commerce between Nebraska and adjoining states.

Thus, even if Oregon did not provide reciprocity to Washington in regard to use of Oregon water in Washington, Washington would likely be in conflict with the interstate commerce clause by denying a water right even if it met all other aspects of the statutory four-part test of Washington's Water Code but was going to be used or withdrawn in Oregon.

As to whether Ecology could issue a water right with a point of diversion in Oregon under this pump-exchange concept, it is unlikely that would be possible (although it appears that Washington has granted such a right(s) in the past), since the waters diverted would technically be under the jurisdiction of the State of Oregon. Hence, the point of diversion would most likely have to be located in Washington in order for Ecology to have authority to issue the water right and regulate it as such. In that case, however, Oregon could issue the water right.