DEPARTMENT OF ECOLOGY
State of Washington

State of Washington
Report of Examination for Water Right Change
Add Point of Diversion, Change Place of Use
WRTS File # CS4-CV1P243(B)

WR File No. CS4-CV1P243(B)
WR Doc ID: 4684564

Change Place of Use Add or Change Point of Diversion/Withdrawal

PRIORITY DATE

Approximately 1915*

* This estimated priority date is based on the adjudication. This is the Class 3 right, which must be younger than the Class 2 right (priority date of March 1912) and older than the passage of the surface water code (June 1917).

WATER RIGHT NUMBER CS4-CV1P243(B)

Adjudication Certificate Volume 1 Page 1-a
(WRTS File No. S4-*01001BDJWRIS)

MAILING ADDRESS

Public Utility District No. 1 of
Okanogan County
P.O. Box 912
Okanogan, WA 98840

SITE ADDRESS (IF DIFFERENT)

Enloe Dam
Similkameen River

Total Quantity Authorized for Withdrawal or Diversion

WITHDRAWAL OR DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)
750	CFS	NA

Purpose

	DIVERSION RATE			ANNUAL QUANTITY (AF/YR)		
PURPOSE	ADDITIVE	NON-ADDITIVE	UNITS	ADDITIVE	NON-ADDITIVE	PERIOD OF USE (mm/dd)
Hydropower	750	0	CFS	NA	NA	01/01 – 12/31

REMARKS

This water right was originally issued with no annual quantity limit. No annual quantity limit was imposed when the right was adjudicated or when it was changed in 1948. Similarly, no annual limit will be specified through this change decision.

Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Okanogan	Similkameen River	Okanogan River	49 - Okanogan

SOURCE FACILITY/DEVICE	PARCEL	WELL TAG	TWN	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
East Bank	4026131003	NA	40N	26E	13	Govt Lot 5 and 6	48.966067	-119.501628
West Bank	4026130002	NA	40N	26E	13	Govt Lot 7	48.965459	-119.502475

Datum: NAD83/WGS84

FILE COPY

Place of Use (See Attached Map)

PARCELS (NOT LISTED FOR SERVICE AREAS)

4026131003 and 4026130002

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE

Government Lot 6 and 7, Section 13, T. 40 N.,R. 26 E.W.M.

Proposed Works

A trapezoidal intake canal will be excavated into the bedrock and will convey water out of the river channel on the east bank. A penstock intake will be located at the end of the intake canal. There will be two 8.5 foot (ft) diameter steel penstocks leading from the penstock intake to the powerhouse. The penstocks will provide water to two vertical-axis Kaplan turbine/generator units capable of producing a total of 9 megawatts (MW). The tailrace will be a trapezoidal canal excavated into bedrock that allows the water to return to the river.

Development Schedule

BEGIN PROJECT	COMPLETE PROJECT	PUT WATER TO FULL USE
August 31, 2014	December 31, 2018	December 31, 2026

For this water right, putting water to full use means perfecting the instantaneous rate.

Measurement of Water Use

Hydropower

How often must water use be measured?	Daily
How often must water use data be reported to Ecology?	Annually
What volume should be reported?	NA
What rate should be reported?	Daily Rate of Diversion (cfs)

Bypass Flows

How often must water use be measured?	Daily
How often must water use data be reported to Ecology?	Annually
What volume should be reported?	NA
What rate should be reported?	Daily Bypass Flow Rate (cfs)

Provisions

Measurements, Monitoring, Metering and Reporting

An approved measuring device must be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use", WAC 173-173, which describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition the Department of Ecology for modifications to some of the requirements. Water use data shall be recorded daily and maintained by the property owner. The daily rate of diversion shall be submitted to the Department of Ecology by January 31st of each calendar year.

Recorded water use data shall be submitted via the Internet. To set up an Internet reporting account, contact the Central Regional Office. If you do not have Internet access, you can still submit hard copies by contacting the Central Regional Office for forms on which to submit your water use data. http://www.ecy.wa.gov/programs/wr/measuring/measuringhome.html

Department of Fish and Wildlife Requirement(s)

A Hydraulic Project Approval (HPA) permit will be required for construction related to the proposed project.

Bypass Flow

The water right holder must comply with Ecology's 401 Water Quality Certification, Ecology Order No. 9007, related to licensing of the Enloe Hydroelectric Project (FERC No. 12569) on the Similkameen River, Okanogan County, Washington issued on July 13, 2012, and any subsequent updates. The following minimum flows must be maintained in the bypass reach. They are a requirement of the 401 Water Quality Certification as well as this authorization.

Time Period	Bypass Flows (cfs)
January 1 – July 15	10
July 16 – September 15	30
September 16 – December 31	10

Power Generation Fees

This use authorization is subject to the fees in Revised Code of Washington (RCW) 90.16.050 and 90.16.090. Theoretical horsepower for this water right is calculated below:

$$\text{Theoretical Horsepower} = \frac{81 \text{ feet} * 750 \text{ cfs}}{8.8} = 6{,}903$$

Schedule and Inspections

Department of Ecology personnel, upon presentation of proper credentials, will have access at reasonable times, to the project location, and to inspect at reasonable times, records of water use, wells, diversions, measuring devices and associated distribution systems for compliance with water law.

Proof of Appropriation

The water right holder must file the notice of Proof of Appropriation of water (under which the certificate of water right is issued) when the permanent distribution system has been constructed and the quantity of water required by the project has been put to full beneficial use. The superseding certificate will reflect the extent of the project perfected within the limitations of the change authorization. Elements of a proof inspection may include, as appropriate, the source(s), system instantaneous capacity, beneficial use(s), annual quantity, place of use, and satisfaction of provisions.

Easement and Right-of-Way

The water source and/or water transmission facilities are not wholly located upon land owned by the applicant. Issuance of a water right change authorization by this department does not convey a right of

access to, or other right to use, land which the applicant does not legally possess. Obtaining such a right is a private matter between the applicant and the owner of that land.

Findings of Facts

Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that there will be no impairment of existing rights.

Therefore, I ORDER approval of Application No. CS4-CV1P243(B) subject to existing rights and the provisions specified above.

Your Right To Appeal

You have a right to appeal this Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of the Order.

- File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means *actual receipt by the PCHB during regular business hours.*
- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Address and Location Information

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 111 Israel RD SW STE 301 Tumwater, WA 98501	**Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

Signed at Yakima, Washington, this 6 day of August 2013.

Mark Kemner, LHG, Section Manager
Water Resources Program/CRO

If you need this document in an alternate format, please call the Water Resources Program at 509-575-2490. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.

INVESTIGATOR'S REPORT

BACKGROUND

Project Description

Public Utility District No. 1 of Okanogan County (PUD) is undertaking a project to restart hydropower production at the Enloe Dam site on the Similkameen River. Enloe Dam is a 54-ft high, 315-ft long concrete gravity arch structure with a broad central overflow spillway that is 276-ft long (OKPUD, 2008). This project is Federal Energy Regulatory Commission (FERC) project number 12569. This water right change application was filed to allow the PUD to divert water and put it to beneficial use creating hydropower from either side of the river above Enloe Dam. The proposed hydropower facility will be the third facility constructed to take advantage of the hydraulic potential of Enloe Dam. The first facility (since removed) was positioned on the left (east) bank of the river downstream from the dam and was in operation from 1906 to approximately 1920. The second facility (existing but in disrepair) was positioned on the right (west) bank of the river downstream from the dam and was in operation from approximately 1920 to 1958. The proposed facility will be positioned on the left (east) bank of the river downstream from the dam. For the remainder of this ROE we will refer to either the west or east bank of the river, as opposed to using river right and river left, respectively.

OKPUD has filed change applications for two existing water rights to add the east bank of the river as a new point of diversion and new place of use (application numbers CS4-CV1P243(A) and CS4-CV1P243(B)) as well as an application for an additional hydropower water right at Enloe Dam (application No. S4-35342) and a groundwater application designed to provide environmental mitigation at the side channel enhancement area for any instream impacts that result from the project (application No. G4-35343). These other applications are addressed in separate ROEs.

History of the Water Right Document

On February 10, 1918, the State of Washington filed documents with Okanogan County Superior Court to begin an adjudication of the Similkameen River water rights. Defendants in the case were the West Okanogan Valley Irrigation District and the Okanogan Valley Power Company.

On November 26, 1918, Okanogan County Superior Court judge C.H. Neal issued a decree, "In the Matter of the Determination of the Relative Rights to the Use of the Waters of the Similkameen River and its Tributaries". This decree recognized the report of the State Hydraulic Engineer as Referee as filed. The report recommended three classes of water rights.

Class 1 – Okanogan Valley Power Company – 250 cfs (subject of change application No. CS4-CV1P243(A)

Class 2 – West Okanogan Valley Irrigation District – variable rates through the irrigation season

Class 3 – Okanogan Valley Power Company – 750 cfs (subject of this change application)

At that time the right was described as follows:

> *The Okanogan Valley Power Company, in addition to the claims mentioned in Paragraph 4, claim the right to divert seven hundred fifty second-feet by an enlargement of their present plant, maps and plans of which have been submitted to this Department and transmission lines are now being constructed and the installation of additional units will be undertaken when the war needs of the electrical manufacturing plant will permit of this work.*

On June 29, 1925, the Supervisor of Hydraulics of the State of Washington (R. K. Tiffany) issued Certificate Record No. 1 Page No. 1-a to the Okanogan Valley Power Company. This adjudicated certificate confirmed a right to 750 cfs for a point of diversion and power plant located in Lot 6, Section 13, T. 40 N., R. 26 E.W.M.

In December 1947, the Division of Hydraulics received an application from Public Utility District No. 1 of Okanogan County that requested to change the point of diversion and place of use for both of their Similkameen River hydropower rights from Lot 6 (east bank) to Lot 7 (west bank), Section 13, T. 40 N., R. 26 E.W.M.

On February 4, 1948, Certificate of Change (Volume 1, Page 243) was issued to the Public Utility District No. 1 of Okanogan County changing the point of diversion and place of use for both of their Similkameen River hydropower rights from Lot 6 to Lot 7, Section 13, T. 40 N., R. 26 E.W.M.

On June 8, 2010, Public Utility District No. 1 of Okanogan County filed a change application that is the subject of this report of examination.

In Ecology's water right database, it appears to indicate the priority date of the 750 cfs water right is 1901. However, the adjudication documents obtained as part of this investigation suggest that the priority date should be junior to that of the West Okanogan Valley Irrigation District, since their right was identified as Class 2 and the 750 cfs right was Class 3. The historic records identified did not list a priority date for this water right. In order to qualify as a pre-code water right and maintain the priority order determined by the adjudication, the priority date for this right must fall between March 1912 and June 1917.

Table 1: Attributes of the Existing Water Right and Proposed Change

Attributes	Existing	Proposed
Name	Public Utility District No. 1 of Okanogan County	Same
Priority Date	Approximately 1915 [1]	Same
Change App. Date	NA	June 8, 2010
Instantaneous Quantity	750 cfs	Same
Annual Quantity	None Indicated	Same
Purpose of Use	Power	Same
Period of Use	Continuously	Same
Place of Use	Government Lot 7, Section 13, T. 40 N., R. 26 E.W.M.	Government Lots 5, 6, and 7, Section 13, T. 40 N., R. 26 E.W.M. [2]
Point of Diversion	Government Lot 7, Section 13, T. 40 N., R. 26 E.W.M.	2 Points of Diversion: (1) Government Lots 5 and 6, Section 13, T. 40 N., R. 26 E.W.M. (2) Government Lot 7, Section 13, T. 40 N., R. 26 E.W.M. [3]

[1] This estimated priority date is based on the adjudication. This is the Class 3 right, which must be junior to the Class 2 right, which has a priority date of March 1912 and senior to the passage of the surface water code, which occurred in 1917.

[2] The applicant requested that the proposed place of use include Government Lot 5, 6, and 7. Upon review, it is clear that Government Lot 5 is located upstream and at a higher elevation than the intended location of the proposed powerhouse. The powerhouse will be located on Government Lots 6 and 7.

[3] The point of diversion on the east bank is very close to the line between Government Lots 5 and 6 and so both lots have been identified, even though there will only be on diversion point on the east bank.

Legal Requirements for Proposed Change

RCW 90.03.380(1) states that a water right that has been put to beneficial use may be changed. The point of diversion and place of use may be changed if it would not result in harm or injury to other water rights.

The following requirements must be met prior to processing a water right application:

- **Public Notice**
  Public notice of the application was published in the *Okanogan Valley Gazette-Tribune* and *Quad City Herald* on February 10 and February 17, 2011. One written protest letter was received by Ecology on March 18, 2011, during the 30-day protest period. The protest was from the Center for Environmental Law and Policy (CELP) on behalf of CELP, the Sierra Club Washington State Chapter, Spokane Falls Trout Unlimited, Citizens for a Sustainable Okanogan, and the Columbia River Bioregional Education Project. The protest letter is discussed in the *Consideration of Protests and Comments* section below.

- **State Environmental Policy Act (SEPA)**
  On April 4, 2012, OKPUD submitted a SEPA Determination of Nonsignificance (DNS) and Environmental Checklist, with supporting documents, for the four water right applications

associated with the Enloe Dam Hydroelectric Project on the Similkameen River. These applications are in support of the PUD's Federal Energy Regulatory Commission (FERC) proposed license for the Enloe Dam Project, FERC No. 12569. Based on these documents, the PUD has determined that issuance of the requested water rights will not have a probable significant environmental impact and, therefore, they have prepared a DNS. The DNS was published on April 4 and 5 in the Omak-Okanogan Chronicle and the Gazette Tribune, respectively. This publication completes the environmental review associated with the four water right applications. Interested parties had until April 18 to submit written comments or permitting requirements.

A comment letter was received from the Washington Department of Fish and Wildlife, dated April 17, 2012, which expressed concerns about the protection of flows in the bypass reach. OKPUD has replied to the WDFW and explained that the ROEs will be conditioned on OKPUD meeting the requirements of the State 401 water quality certification which, in turn, will be a condition of the FERC license. Both the FERC license and the 401 water quality certification will specify the flow requirements for the bypass reach and the methods of providing those flows. Indeed, the water right ROEs for each of the OKPUD applications include a provision that the water cannot be used for hydropower unless the requirements of the 401 water quality certification are met, which include the bypass flows and temperature criteria among other things.

The Department of Ecology's environmental review staff commented in a letter dated April 16, 2012, that the details of the project relating to water rights will be addressed as part of the water right permitting process.

- **Water Resources Statutes and Case Law**
  This change application is subject to RCW 90.03.380. Ecology must issue written findings of fact and determine that:

  The proposed change would not impair existing water rights

  The Washington State Supreme Court held that Ecology must make a tentative determination of the extent and validity of the right to be changed (R.D. Merrill v. PCHB and Okanogan Wilderness League v. Town of Twisp). See Extent and Validity section of this report, below.

  401 Water Quality Certification Bypass Flows
  Ecology's Water Resources and Water Quality Programs worked collaboratively to determine the flows that will be required throughout the year in the bypass reach in order to operate the hydropower facility. This report of examination includes a provision that these flows must be met in order to utilize the water right.

  Table 2 contains the flows from Ecology Order No. 9007, 401 Water Quality Certification, related to licensing of the Enloe Hydroelectric Project (FERC No. 12569) on the Similkameen River, Okanogan County, Washington Issued on July 13, 2012. The applicant is advised that, should the Water Quality Certification be modified in the future, this water right will be subject to the terms and conditions of the revised Water Quality Certification.

Table 2. 401 Water Quality Certification Required Bypass Flows	
Time Period	**Bypass Flows (cfs)**
January 1 – July 15	10
July 16 – September 15	30
September 16 – December 31	10

OKPUD will need to meet the bypass flows under the 401 Water Quality Certification, which are currently identified in Table 2, or as the bypass flow requirement in the 401 Water Quality Certification may be amended in the future.

- **Expedited Processing**
  This investigation was performed by RH2 Engineering, Inc. on behalf of the Department of Ecology under cost reimbursement contract number C1000190; Work Assignment No. RH2002. The hydropower facility will have no net consumptive use, outside of the bypass reach, and the subject application will not diminish the water available to earlier pending applicants for changes or transfers from the same source of supply. Therefore, this change application meets the criterion for expedited review under RCW 90.03.265(1)(c).

INVESTIGATION

History of Water Use Under Water Rights Held by OKPUD for the Enloe Project

From the Referee's report dated September 25, 1918:

The Similkameen Power Company, a corporation duly organized and existing under and by virtue of the laws of the State, initiated its rights to the waters of the Similkameen River in the fall of 1905, had constructed a hydroelectric plant situated on Lot 6, Section 13, T. 40 N., R. 26 E.W.M., in Okanogan County, Washington, together with intake, headrace, and tunnel for the diversion of the waters of the Similkameen River in connection with its power development and from about the end of the year 1905 it began operating the plant and so continued until June 1916 when it disposed of its interests to W. C. Sivyer and Eugene Enloe, who in turn continued the operation until the present successors, the Okanogan Valley Power Company, purchased all their right, title, and interest in the plant and water rights and continued to operate the same until the present time.

During these years they claim to have diverted and used about two hundred fifty second-feet of water. This claim is substantiated by measurements taken by the writer in November 1912 and by an engineer of this Department in August of the present year.

The following history of hydropower production near Similkameen Falls and Enloe Dam comes from Exhibit C of the Final License Application of the Enloe Hydroelectric Project, FERC Project No. 12569.

HISTORY OF PROJECT DEVELOPMENT AND OWNERSHIP

A detailed description of the hydroelectric development at the Enloe Hydroelectric Project site and of the ownership of facilities prior to the District is provided in the Historical American Engineering Record (HAER); Appendix E.4.1, (available upon request).

EARLY PROJECTS

The Enloe Hydroelectric Project is located on the Similkameen River about 3.5 miles northwest of the City of Oroville, in north-central Washington State, near the Canadian border. The history of hydropower development at this site, just upstream of Similkameen Falls on the lower Similkameen River, spans the past century.

According to the HAER (Appendix E.4.1), the earliest known power production on the Similkameen River occurred when an elderly German settler named Kruger placed a small waterwheel on a shaft and lowered it into the Similkameen River (Vissia 1974). The exact location of the waterwheel and powerhouse has been lost to time. This first powerhouse with its small generator furnished electricity for the mining town of Golden, located 6 miles to the south.

The first hydroelectric powerplant, a run-of-river project, was built at Similkameen Falls by the Similkameen Power Company, organized by J.M. Hagerty in 1902. Hagerty secured land and water rights at the site and spent the next three years developing the project until his death in 1905. Hagerty started construction on a wooden crib dam above the Similkameen Falls to divert water to the powerhouse below the falls. The wooden dam and powerhouse were completed in 1906, about a year after his death.

The plant supplied power and light to the towns of Oroville and Nighthawk, as well as local irrigation. The dam had contracts with the Owasco and Ivanhoe mines, where electric power was to be used in driving a 4,000-ft tunnel (Hallauer 1979). The Ruby and Caaba mine was also supplied with power, as was the Wannacut Lake mining camp of Golden.

The plant was leased to J.L. Harper and his associates, of Republic, Washington, in June, 1910. Operating under the name of North Washington Power Company, the consortium signed a ten-year lease obligating the Company to install a power line from Oroville to service Republic mines and mills. In October of the same year the Company announced plans to add 950hp to the Hagerty powerhouse (Oroville Weekly Gazette 2 September 1910:1). It appears that the North Washington Power Company failed to accomplish either of its envisioned plans as in 1913 executors of the Hagerty estate moved to cancel the lease for failure to perform and listed the property for sale (Oroville Weekly Gazette 14 March 1913:1).

In 1915, the Okanogan Water Company, a subsidiary of the Washington Water Power Company of Spokane, contested the water rights of the Similkameen Power Company. The West Okanogan Valley Irrigation District opposed the claims of both power companies, seeking the opportunity to develop power in connection with its irrigation system (Oroville Weekly Gazette 29 October 1915:1). Bo Sweeney, Assistant Secretary of the Department of the Interior, awarded the title of rightful claimant to the water power in the Similkameen River to the Similkameen Power Company.

ENLOE ERA

Eugene Enloe incorporated the Okanogan Valley Power Company (OVPC) under the laws of the State of Washington in 1913. In 1916, the OVPC bought the complete holdings of the Similkameen Power Company, including the powerhouse and all related machinery, and the power lines and substations that serviced the mines. Construction of the arch-gravity dam appears to have begun in 1919 and was completed in the summer of 1920, as evidenced by the inscription stamped on the west abutment of the dam. The Project itself, however, was not completed for three more years, in 1923 (FPC Order Issuing License Project No. 2062, June 26, 1956). The Project served the mining community of Nighthawk upstream, and the crossroads town of Oroville downstream.

In July of 1922 Enloe Dam drew the attention of large power companies. Washington Water Power (WWP) had already extended a power line into Grant County early in 1922 (Oroville Weekly Gazette 21 July 1922:1). That year WWP approached Eugene Enloe, expressing interest in acquiring the facility. On January 1, 1923, Enloe sold the property to Washington Water Power. WWP then installed a second penstock from the dam and a second generating unit in the powerhouse (Oroville Weekly Gazette 11 May 1923:1). The Company also constructed cottages (since removed) near the east abutment of the dam to house operators of the facility.

WWP continued to operate Enloe Hydroelectric Project until 1945, when Public Utility District No. 1 of Okanogan County acquired the property. The District acquired the hydropower project on May 11, 1945 (FPC Order Issuing License Project No. 2062, June 26, 1956), and has owned it since. The District ceased operation of the power generators on July 29, 1958, when the extension of Bonneville Power Administration's high-voltage transmission line into the Okanogan Valley provided a less expensive source of power. Operation of Enloe Dam became unprofitable, and the facilities were abandoned. Operation was discontinued because the generating equipment had become obsolete and repair or modernization of the power facilities was not economically feasible. One of the penstocks, which had largely collapsed, was sold for salvage.

Site Visit

On November 22, 2010, Steve Nelson of RH2 met with Nick Christoph of OKPUD to inspect the Enloe Dam site and the side channel enhancement area on the Similkameen River. The west bank of the Similkameen River at the dam is occupied by the west abutment of the dam, and historic diversion, penstock and powerhouse structures, which were intact but in a state of disrepair. According to Mr. Christoph, the OKPUD intends to see if it can find a group that would want to take ownership of the existing structures in order to preserve them from a historical perspective. If the structures are preserved, they would not be used to produce power. If no qualified organization agrees to take over ownership, then OKPUD intends to remove the structures. The preservation or removal of the historic structures will not affect the surface water flow or the stream channel. The east bank of the Similkameen River at the dam is occupied by the east abutment of the dam, and the foundation of the original powerhouse is visible downstream of the dam. The new access road and the new powerhouse on the east bank will not affect stream flow or significantly alter stream channel geometry. The new diversion structure will occupy the east bank above the east abutment of the dam. The new dam control structure on top of the dam will result in an approximately 5-ft rise above current pool elevation, which will match the pool height during historical operation of the dam. The resulting increase in pool height will inundate areas of the pool that were flooded during historical operation.

Extent and Validity

Chapter 90.14 RCW addresses the relinquishment of water rights for non-use unless there is "sufficient cause" for the non-use of water and, in RCW 90.14.140, "sufficient cause" for nonuse is defined. RCW 90.14.140(2) states: Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right:

(a) If such right is claimed for power development purposes under chapter 90.16 RCW and annual license fees are paid in accordance with chapter 90.16 RCW;

Annual license fees are paid to what is now the Washington State Department of Ecology. RH2 contacted Mr. Chris Maynard at Ecology and inquired about the status of the power license fees

associated with the water rights for this project. Mr. Maynard responded that the PUD has paid their power license fees from 1929 to the present and he is in possession of the records documenting these payments.

Therefore, while the water authorized for use at Enloe Dam has not been diverted for several years, there has been no relinquishment of those rights because the fees have been paid in accordance with Chapter 90.16 RCW.

Water Rights Appurtenant to the Proposed Place of Use

Table 3 lists all of the water rights that were identified as being appurtenant to Government Lots 5, 6, and 7, Section 13, T. 40 N., R. 22 E.W.M. using Ecology's Water Resources Explorer on March 11, 2011 (https://fortress.wa.gov/ecy/waterresources/map/WaterResourcesExplorer.aspx).

Table 3. Water Right Documents Associated With the Proposed Place of Use

Water Right Number	Priority Date	Qi	Qa (ac-ft/yr)	Owner	Purpose of Use
Adjudicated Certificate 1	Fall 1905	250 cfs	None Listed[1]	OKPUD	Hydropower
Adjudicated Certificate 1a	Approximately 1915 [2]	750 cfs	None Listed[1]	OKPUD	Hydropower
Application No. S4-35342	June 8, 2010	600 cfs		OKPUD	Hydropower
Long Form Claim No. S4-074639CL	August 1957	1.5 gpm	2.4	Bureau of Land Management	Livestock and Wildlife

[1] No annual volume was listed on the adjudicated water right certificates.

[2] This estimated priority date is based on the adjudication. This is the Class 3 right, which must be younger than the Class 2 right (priority date of March 1912) and older than the passage of the surface water code (June 1917).

The first three water right documents in Table 3 are owned by Public Utility District No. 1 of Okanogan County and are associated with historic and proposed hydropower production at Enloe Dam.

The water right claim was filed by the Bureau of Land Management for livestock and wildlife use from springs within Government Lot 5. Since the identified date of first use listed on the water right claim is after the enactment of the surface water code, it likely does not represent a vested right. However, the final determination of the validity and extent associated with a claim ultimately lies with the Superior Court through the general adjudication process provided for by RCW 90.03.110 through RCW 90.03.240.

Discussion of Proposed Changes

OKPUD has requested to retain the existing point of diversion in Government Lot 7 (west bank) in addition to adding a point of diversion in Government Lot 5 and 6 (east bank). The east bank point of diversion includes two Government Lots because the dividing line runs very close to where the water will be diverted from the existing river channel. Leaving the point of diversion on the east bank as two Government Lots will ensure that the intent of this application is fulfilled.

OKPUD has requested to make the place of use include Government Lots 5, 6, and 7. For purposes of this report of examination the place of use is considered to be the powerhouse. Upon review of area topography, it was determined that Government Lot 5 lies primarily adjacent to and upstream of Enloe Dam. Therefore, the beneficial use of water for hydropower production could not occur in this area due to the lack of suitable hydraulic head. For this reason, Government Lot 5 will be excluded from the place of use.

The Bureau of Land Management Claim identified in Table 3 is attached to Government Lot 5. With the determination that Government Lot 5 is not appropriate to include as part of the place of use, any issues surrounding this claim are moot.

Impairment Considerations

Water in the Similkameen River could historically pass the Enloe Dam site by either spilling over the top of the dam, or by flowing through the penstocks and being utilized for creation of hydroelectric energy before returning to the river. Enloe Dam was designed to accommodate the spilling of water when flows exceeded the capacity of the hydroelectric facilities. However, OKPUD intends to provide a means of releasing water at the base of the dam to satisfy required flows in the bypass reach as specified by the 401 Water Quality Certification, Order No. 9007 related to licensing of the Enloe Hydroelectric Project (FERC No. 12569) on the Similkameen River, Okanogan County, Washington Issued on July 13, 2012 (see Table 2).

Instream flows are water rights that are measured at designated control points on the river, typically at a river gaging site. For this reach of the Similkameen River the control point identified in WAC 173-549-020 is USGS gage 12442500 Similkameen River at Nighthawk, which is located upstream of Enloe Dam. This water right is senior to the instream flow rule. Because the water under this water right will continue to be diverted and returned to the river a short distance downstream, the only affected stream reach is the bypass reach. Flows above the dam and below the tailrace will be unchanged. This, combined with the minimum instream flows required by the 401 Water Quality Certification to protect the bypass reach results in no impairment of minimum instream flows.

The use of water under this water right is nonconsumptive, except to the bypass reach leading from the point of diversion upstream of the dam to the tailrace of the hydropower facility below the dam. The bypass reach for the prior hydropower facility was a distance of approximately 900-ft measured downstream of the dam. The bypass reach for the proposed hydropower facility will be a distance of approximately 370-ft measured downstream of the dam. No surface water diversions are located within either bypass reach.

The 401 Water Quality Certification has established minimum instream flows for the bypass reach, which must be satisfied in order for the project to operate.

Consideration of Protests and Comments (for CS4-CV1P243(B))

Comments were solicited from the Colville Confederated Tribes, Yakama Nation, and Washington State Department of Fish and Wildlife (WDFW) through email requests on March 11, 2011 and April 7, 2011. No response was received from either the Colville Confederated Tribes or the Yakama Nation.

WDFW worked with Ecology's Water Quality Program to ensure that the bypass flow requirements of the 401 Water Quality Certification are protective of fish and wildlife. This project is not authorized to be operated unless the bypass requirements of the Water Quality Certification are satisfied.

In addition, in an e-mail dated November 7, 2011, Patrick Verhey, the WDFW lead on Enloe Dam, stated:

> *We do not have concerns in regards to the water right applications and indeed support the side-channel project as part of the mitigation to address impacts of Project operations.*
>
> *My understanding from WDFW discussions with Okanogan PUD and Ecology is that we are not requiring an intake screen be placed at the entrance to the Enloe Dam penstock. A one inch spaced trash rack is being required by the FERC license along with monitoring and evaluation components to in part address impacts to fish. Also, impacts to resident fish entraining or mortality due to turbine strikes are being addressed by mitigation negotiated during the development of the FERC license. We continue to develop measure (sic) to monitor and evaluate these mitigations through the 401 water quality certification process. I do not support requiring a fish screen at the entrance to the penstocks.*
>
> *Tailrace exclusion screening for turbine start up and shut down are already an element of the FERC license application. Once the turbines are on line a velocity barrier will exist that will prevent fish from entering the tailrace and gaining access to the turbines. I don't see a need to duplicate requiring a tailrace net barrier as a WDFW provision.*

One written protest letter was received on March 18, 2011, from the Center for Environmental Law and Policy (CELP). The protest was from the Center for Environmental Law and Policy (CELP) on behalf of CELP, the Sierra Club Washington State Chapter, Spokane Falls Trout Unlimited, Citizens for a Sustainable Okanogan, and the Columbia River Bioregional Education Project. The protest relates to the following new and amended water rights:

- CS4-CV1P243(A)
- CS4-CV1P243(B)
- S4-35342
- G4-35343

Because the protest letter applied to each of the four water right applications and because the applications are a mix of change applications and new surface and ground water applications, not every comment applies to every application. The following discussion includes the comments and Ecology's response to those comments as they relate to this water right application.

These points are also addressed in each of the other pending water right applications (CS4-CV1P243(A), S4-35342, and G4-35343) as they relate to those applications.

(1) Impoundment/diversion of water for the Enloe Dam is not non-consumptive and will have negative impacts on de-watered reaches of the Okanogan River.

Ecology's Water Resources Policy POL-1020 defines consumptive and nonconsumptive use. It states that "Water used consumptively diminishes the source and is not available for other uses; whereas nonconsumptive water use does not diminish the source or impair future water use." This policy also

defines the "By-pass reach" as follows: "A water use may be consumptive to a specific reach of a stream when water is diverted, used, and returned to the same source at a point downstream not in close proximity to the point of diversion. The stream reaches between the point of withdrawal and the point of discharge is the by-pass reach."

In this project, the by-pass reach extends from the proposed point of diversion immediately upstream of the existing Enloe Dam downstream to the proposed location of the hydropower tailrace, a distance of approximately 370 horizontal feet. The bypass reach for the old powerhouse on the west bank of the Similkameen River was approximately 900-ft in length.

WAC 173-549-010(5) states that:

> (5) *Projects that would reduce the flow in a portion of a stream's length* (e.g. hydroelectric projects that bypass a portion of a stream) will be considered consumptive only with respect to the affected portion of the stream. Such projects will be subject to instream flows as specified by the department. These flows may be those established in WAC 173–549–020 or, when appropriate, may be flows specifically tailored to that particular project and stream reach. When studies are required to determine such reach– and project–specific flow requirements, the department may require the project proponent to conduct such studies

Ecology worked with the WDFW to establish project specific minimum instream flows for the bypass reach which are a condition of the operation of this project, through the 401 Water Quality Certification, such that the project will be required to maintain specified flows in the bypass reach throughout the year.

The existing water rights for OKPUD's project at Enloe Dam are consumptive with respect to the by-pass reach associated with that project and this right, if amended and if accompanied by the new water right, if approved, would both be consumptive with respect to the by-pass reach described above. The question then becomes "What are the impacts of this diversion of water on that by-pass reach."

There are no existing surface water diversion points in the bypass reach. Therefore, it is clear that this water right change will not impair any existing water rights.

The question then becomes whether the change in the point of diversion for this water right will impair instream values in the by-pass reach. In the case of the proposed new powerhouse, the length of the by-pass reach is being reduced by approximately 530-ft or nearly 60 percent. Without quantifying the instream resource values that are located on-site, it is clear that any impacts on instream values that occur in this reach under the terms of the proposed changes to this water right will occur in significantly less area than occur under the terms of the current water right. Therefore, if there are impacts to instream resource values in this stream reach, they can be assumed to be positive with respect to the current water right conditions.

Notwithstanding the reduction in the length of the bypass reach, the 401 Water Quality Certification will establish minimum instream flows for the bypass reach with which the project must comply in order to operate.

(2) Proposed mitigation for the water rights is inadequate.

This proposed water right change, if approved, will reduce the length of the by-pass reach that exists under the existing water right. Therefore, since any adverse impacts on instream values will be reduced, mitigation is not required. The need for mitigation of any impacts associated with the requested new water right is addressed in that Report of Examination (S4-35342).

(3) Impoundment/diversion of water will cause adverse water quality impacts in the Similkameen River.

Water is already impounded by the existing Enloe Dam and has been for many years. The bypass flows under the 401 Water Quality Certification are designed to ensure compliance with the State water quality standards including flow, temperature, and dissolved oxygen in the bypass reach.

(4) Impoundment/diversion of water will cause adverse impacts on habitat and native aquatic species in the Similkameen River.

The bypass flows under the 401 Water Quality Certification were developed to prevent impacts to habitat and native aquatic species in the Similkameen River. In addition, this change, if approved, will reduce the length of the currently approved bypass reach by approximately 530-ft so it would seem likely that any impacts on habitat and native aquatic species would be positive, not negative with respect to the current project configuration.

(5) Impoundment/diversion of water will cause adverse impacts on aesthetic values, including at the Similkameen Falls.

The bypass flows under the 401 Water Quality Certification are designed to protect the aesthetic values of water flowing over the falls. If this change is approved and the diversion of water at Enloe Dam is resumed under the terms of this water right, less water will be spilled over the face of Enloe Dam than has occurred since the power house on the west bank was taken out of service, but flow over the dam will be unchanged from that allowed by this water right. In addition, flows below the by-pass reach will be unchanged and, as stated above, the length of the by-pass reach will be shortened by about 60 percent.

(6) The Enloe Dam project is not economically feasible and the proposed water rights are therefore not a beneficial use of water resources of the state.

This comment was forwarded to Nick Christoph at OKPUD by email on April 1, 2011, for their consideration. Their response received via email on April 11, 2011, is as follows:

> The Okanogan Public Utility District (District) is proceeding to license and permit the Enloe Hydroelectric Project because it considers it to be economically feasible. The District has filed a License Application for the Project with the Federal Energy Regulatory Commission (FERC), documenting the Project's construction and annual operating costs, the costs of proposed protection, mitigation and enhancement measures, and the value of project power as compared to the off-peak and on-peak cost of bulk power at the Mid-Columbia hub. The FERC has accepted these analyses and data without further request for additional information to document the economic feasibility of the Project. In the judgment of the District,

the projected economic and social benefits for the Project would be greater than the cost of the Project.

Based on this response, there appears to be no reason to suspect that this project is not economically feasible.

With respect to the claim that this project does not constitute a beneficial use of water, it should be noted that RCW 90.54.020 states that:

> "Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, **hydroelectric power production**, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, **are declared to be beneficial**." (emphasis added).

(7) The Enloe Dam project is connected to the proposed Shankers Bend project, directly upstream, but the two projects have been improperly segmented and the impacts are not being studied together.

On September 26, 2011, the OKPUD submitted a letter petitioning the FERC for the voluntary surrender of its preliminary permit for the Shanker's Bend Hydroelectric Project, stating that "due to a variety of District concerns that became evident in the District's studies of the potential Project and also experience gained in the course of the ongoing licensing proceeding for the Enloe Hydroelectric Project, FERC Project No. 12569, the District concludes that it would not be prudent to pursue the licensing of the Project at this time."

As a result of this action by the OKPUD, the comment expressing concern that the two projects are being addressed separately is no longer applicable.

(8) Water is not available for the proposed water rights.

This will be evaluated as part of the water right analysis for the application for new water rights (S4-35342 and G4-35343) but does not apply to this change application where the water has already been found to be available, and confirmed in an adjudication, at this location for this purpose.

(9) The proposed water rights will be detrimental to the public interest.

RCW 90.03.380 states that a change to a surface water right for both point of diversion and place of use may be approved if the change can be made without detriment or injury to existing rights. This means that the requested change can be approved if it passes the impairment test. The Washington State Supreme Court in Public Util. Dist. No. 1 of Pend Oreille County v. Ecology, 146 Wn.2d 778, 51 P.3d 744 (2002) has confirmed that the public interest test is not applied when processing surface water change applications. The public interest test will be examined when processing the new water right applications (S4-35342 and G4-35343).

(10) SEPA review is inadequate.

At the time the protest was received (March 18, 2011), this was a true statement given the fact that the SEPA review had not yet been conducted for the project. However, on April 4, 2012, OKPUD issued a SEPA checklist and Determination of Nonsignificance (DNS) for the water right related portion of this project. In addition, OKPUD has adopted FERC's Environmental Assessment documents to satisfy the full project SEPA review. Issuance of that threshold determination and adoption of the federal documents concluded the SEPA process. Consistent with Water Resources Program Procedure PRO-1000, this draft report of examination was not finalized until SEPA was satisfied See the discussion in the section of this ROE entitled State Environmental Policy Act (SEPA), above.

(11) Water right decisions must be linked with 401 Certification decisions.

Like the SEPA review, the 401 Water Quality Certification process was not complete at the time of protest. Minimum bypass flow conditions from the 401 Water Quality Certification are included by reference in the provision section of this report of examination as well as the corresponding sections of the reports of examination for the other pending water right applications for this project. All hydropower permits or certificates issued for this project will be conditioned on the provision of the minimum bypass flows required in the 401 Water Quality Certification Ecology Order No. 9007, issued on July 13, 2012, and any subsequent updates or revisions.

(12) The existing water rights for the project have been lost for non-use.

This argument is addressed in the discussion of Extent and Validity. State law protects hydropower water rights from relinquishment due to non-use when the water right holder has paid the power license fees (RCW 90.14.140(2)(a)). Ecology records indicate that OKPUD (and its predecessors) has paid the power license fees for their existing water rights from the period of 1929 through 2012. Therefore, contrary to the allegation made here, these rights have not been relinquished because of non-use. In addition, any claim of abandonment of these rights is easily refuted by the deliberate payment of the power license fees by the water right holder for more than 80 years.

References

Public Utility District No. 1 of Okanogan County, July 2005, Initial Consultation Document, Enloe Hydroelectric Project, FERC Project No. 12569.

Public Utility District No. 1 of Okanogan County, August 2008, Final License Application of the Enloe Hydroelectric Project, FERC Project No. 12569.

http://www.okanoganpud.org/shankers/Shankers%20Bend%20Voluntary%20Surrender%20Letter%209-26-11.pdf

State Hydraulic Engineer – Marvin Chase, September 25, 1918, Report of the State Hydraulic Engineer as Referee, In the Matter of the Determination of the Relative Rights to the use of the Waters of the Similkameen River and its Tributaries. Okanogan County Superior Court.

Chapter 90.03 RCW, Water Code

Chapter 90.14 RCW, Water Rights – Registration – Waiver and Relinquishment, Etc.

Chapter 90.54 RCW, Water Resources Act of 1971

Chapter 173-549 WAC, Water Resources Program in the Okanogan River Basin, WRIA 49

CONCLUSIONS

Diversion of water from either the east or west bank of the Similkameen River upstream of Enloe Dam for nonconsumptive hydropower use as proposed will not impair existing rights.

RECOMMENDATIONS

Based on the information presented above, the author recommends that change application No. CS4-CV1P243(B) be approved, subject to the provisions described in the Order for Report of Examination, pages 1-5.

Purpose of Use and Authorized Quantities

The amount of water authorized is a maximum limit and the water user may only use that amount of water within the specified limit that is reasonable and beneficial.

- 750 cfs
- Nonconsumptive hydropower use

Points of Diversion

Government Lot 5, 6, and 7, Section 13, T. 40 N., R. 26 E.W.M.

Place of Use

Government Lot 6 and 7, Section 13, T. 40 N., R. 26 E.W.M.

Report by: Jim Bucknell
Jim Bucknell, RH2 Engineering, Inc. Date

Report by:
Steve Nelson, RH2 Engineering, Inc. Date

Report by:
Andrew B. Dunn, RH2 Engineering, Inc. Date

State of Washington Hydrogeologist 822 Licensed Geologist
ANDREW B. DUNN

Reviewed by: 8/6/13
Kelsey S. Collins, Water Resources Program Date

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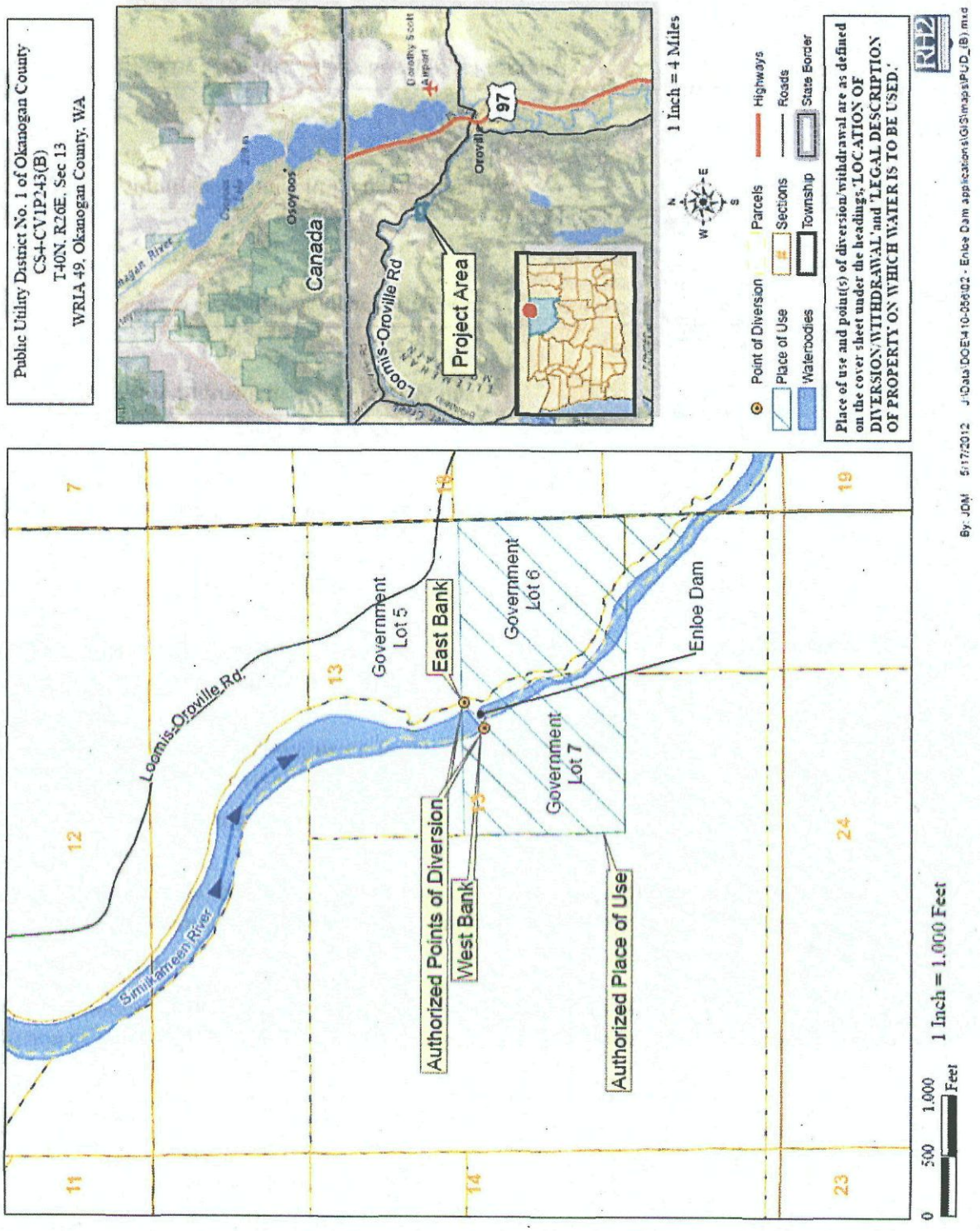
ATTACHMENT 1. Authorized Points of Diversion and Place of Use