

**MEMORANDUM OF UNDERSTANDING BETWEEN THE
U.S. DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION AND
THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY FOR WATER
EXCHANGE IN THE YAKIMA BASIN**

PARTIES

This Memorandum of Understanding (MOU) is entered into between the State of Washington (State), acting through the Department of Ecology (Ecology) and the U.S. Department of the Interior Bureau of Reclamation (Reclamation).

INTRODUCTION AND HISTORY

In 1945 the Federal District Court for the Eastern District of Washington approved a consent Judgment providing for Reclamation to facilitate diversion of water from the Mainstem Yakima and Naches Rivers to enumerated parties from storage, return flows, natural flows and other sources, denominated as the Total Water Supply Available (TWSA) , according to parties' status as pro-ratable or non-proratable. All parties to the Consent Decree have water rights of May 10, 1905 or earlier priority.

In 1989, anticipating passage of federal legislation pertaining to water conservation in the Yakima basin, the Washington Legislature enacted Chapter 90.38 RCW, authorizing the Yakima Basin Trust Water Rights Program. The legislature recognized that the interests of the state would be served by developing programs, in cooperation with the United States and the various water users in the basin, that increase the overall ability to manage basin waters in order to better satisfy both present and future water needs.

In 1994, Congress authorized Phase II of Title XII , Yakima River Basin Water Enhancement Project of 1994, P.L. 103-434, (YRBWEP). Ecology and Reclamation have worked together for more than a decade to jointly identify and fund various conservation projects and water right acquisitions that advance the goals and objectives of Title XII. Water right acquisitions in several upper Yakima Valley tributaries have significantly improved stream flows for the benefit of anadromous fisheries. Conservation projects funded by Reclamation and Ecology through YRBWEP benefit target flows in the lower Yakima River by adding two-thirds of the conserved amount of water to flows.

In 1999, Reclamation and Ecology, together with the Yakama Nation, agreed to participate in an extensive study of Yakima basin ground water resources and develop a model to better describe how surface water and ground water within the Yakima basin affect one another. The USGS is expected in release the study and model in 2007. Until the study is complete, an August 1999 MOU between the YN, USBR, and Ecology ensures that Ecology's water permitting actions are performed within a conservative framework that protects existing federal and state-based water rights.

The adjudication of Yakima basin water rights initiated in 1977 is progressing towards conclusion. The Court has adjudicated thousands of claims to surface water rights in the Yakima basin and conditionally determined the extent and validity of those rights. Further, the relative priority of surface water rights have also been conditionally determined.

In 2001, the Roza Irrigation District (Roza) first sought curtailment of junior users to protect “proratable” water users, like Roza, who rely on May 10, 1905 rights that are based on Reclamation’s initiation of the Yakima Irrigation Project. The court entered an order and the use of water by water right holders with a priority date later than May 10, 1905 (“junior” rights) was immediately curtailed, excepting only in-house domestic water use.

In 2004, a year of mild shortage, a call for curtailment of post May 10, 1905 rights was renewed with the court. An order curtailing junior rights was entered on June 10, 2004. This order did not provide an exception for in-house domestic water use. On March 11, 2005, the adjudication court issued a slightly amended order that remains in effect. The March 11, 2005 Order Limiting Post-1905 Diversions provides that when Reclamation imposes prorationing among May 10, 1905 rights, all post-May 10, 1905 water users are immediately curtailed. The curtailment of junior rights remains in effect until prorationing among May 10, 1905 rights ends.

Prorationing has occurred in the Yakima Basin during three irrigation seasons since 2000. Consequently, above the Chandler power return in the lower basin, “junior” water rights are not reliable. Junior users, if they wish to continue their use after prorationing is announced, must either acquire senior water rights or demonstrate that their use does not conflict with TWSA-based proratable water rights. Similarly, any future new agriculture or other new uses would need to acquire senior rights if they want reliable access to water.

The senior water right acquisitions and proposed transfers generally lead to changes in point of diversion, place of use, or season of use. Changes in point of diversion and purpose or season of use can impact project operations by changing the location where a call for water occurs along the Yakima River or its tributaries, where return flows find their way back to the natural river course, and in the case of domestic or municipal supplies, when the call for water may occur. In a severe case, the transfers could cause impairment to pro-ratable users by reducing the TWSA. If water is to be transferred downstream a significant distance, the transfer can favorably affect project operations for instream flow improvements. Water transferred upstream for use depletes the river reach between the two points of diversion and can reduce operational flexibility by leaving a gap in flows which can, if necessary, be mitigated through drafts of storage water.

Certain existing users, especially in the upper basin, find their water rights to be inadequate. Others seek water rights, through transfer, for new uses. In both cases, these

users may be at continued risk of curtailment of their junior or transferred senior water rights, without the use of Reclamation storage facilities.

Reclamation and Ecology desire to implement a water exchange program to provide a potential solution for the water needs without impacting the TWSA-based rights.

PURPOSE, OBJECTIVE AND SCOPE

Ecology and Reclamation intend to use their best efforts to work collaboratively and in good faith to pursue and implement a program for water banking and exchange and the delivery of water under subsequent mitigated permits between Ecology and identified third-party water users.¹ This MOU outlines the relationship between Reclamation and Ecology for the water exchange process. This voluntary intergovernmental MOU is not a contract.

This MOU applies to the Yakima River and its tributaries upstream from Wanawish Dam.

PROCESS

1. Ecology identifies the type and location of participants (water users) and quantifies their water demand;
2. If the senior right is acquired from an individual or entity, Ecology negotiates the conditions of the trust water right prior to placement of the water right into the Trust Water Program (TWP);
3. Ecology acquires senior water rights;
4. Ecology issues appropriate instruments associated with the trust water right.

Ecology and Reclamation may then execute a contract to implement the following general procedures:

5. Ecology conveys the trust water right to the United States as part of a bargained-for exchange for the use of storage. Ecology certifies all changes to the water rights as permanent.
6. Reclamation will provide a water service/water delivery contract to Ecology for quantities of stored water commensurate with the value of trust water rights to the United States.
7. Concurrently, Ecology issues a permit to the designated water user as a state action.
8. Reclamation makes water available pursuant to the water service/water supply permit. (See below.)

¹ Section 1203(i)(2) of Title XII (YRBWEP), states: “The Secretary shall, to the maximum extent possible under applicable Federal, State, and tribal law, cooperate with the State of Washington to facilitate water and water right transfers, water banking, dry year options, the sale and leasing of water, and other innovative allocation tools used to maximize the utility of existing Yakima River basin water supplies.”

In addition to many sections of RCW 90.38 and 90.42. RCW 90.42.100 states: “(1)The Department is hereby authorized to use the trust water rights program in the Yakima river basin for water banking purposes.

PRIORITIES

In general, the purpose of this water exchange program is to provide a means to resolve some Yakima Project operational issues that result from the need for water for existing or new uses. This program may assist junior domestic and municipal users who require full-year use of safe and reliable water without reducing Reclamation's ability to manage and deliver project water. Because of the relatively small amounts of water required, and pending *Acquevella* special considerations, the initial efforts of this program will focus first on these junior domestic and municipal users.

WATER EXCHANGE MANAGEMENT

1. Ownership: Pursuant to the intended contract, the water right will be vested in the United States on behalf of the Washington State Department of Ecology.

2. Delivery: The trust water conveyed to Reclamation will maintain its elements, including priority date. Reclamation will provide a water service/water delivery contract to Ecology to make water available to identified exchange program water users while ensuring flexibility, discretion, and protection of all river operations and non-program water users.

The maximum amount of water to be delivered will be limited to the consumptive amount of water associated with the trust water right exchanged for a contract, less any amount required by condition VI.3 to demonstrate substantial environmental benefit/fisheries benefit.

Further, that amount will be limited to:

- The amount of water available at the original point of diversion of the trust water right exchanged for a contract;

and,

- The amount of otherwise unused storage capacity in project reservoirs that is available to store water under the trust water right exchanged for a contract. The amount would be calculated on a month-to-month basis during the irrigation season and would identify a volume of stored water at the end of the irrigation season available for use until the beginning of the subsequent irrigation season;

3. Substantial Environmental Benefit/ Fisheries benefit: Ecology will ensure an instream benefit to the Yakima River basin consistent with the YRBWEP goals and objectives. This objective applies to all water rights placed into the trust water program for the purpose described in this MOU.

The instream benefits may be demonstrated in one of two ways:

- a. Ecology acquires the water right(s) from a priority tributary stream identified by the State's water acquisition program or YRBWEP; or,

b. Ecology reserves from the conveyance to the United States a one-third share of that acquired water, to be delivered instream to benefit the Yakima River below Parker.

4. Costs: Reclamation will require Ecology to advance funds for its proportionate share of project O & M costs annually. Ecology may allocate proportionate shares of project costs in the price of program water to be charged to the users.

5. Non-Impairment:

a. Ecology will include in each mitigated permit a provision where the user agrees that valid priority calls against source trust water based on local limitations in availability may result in temporary curtailment of the use of water under the contract until the priority call for water ends.

b. Ecology and Reclamation agree that implementation of this MOU or execution of any subsequent mitigated permits pursuant to this MOU shall not cause detriment or injury to the rights of existing water users.

6. Non-use and Reallocation: Where the water user does not beneficially use the water identified and deliverable under this program for its permitted use, Ecology may reallocate that water to another user.

7. Source availability matching:

a. Ecology will maintain an inventory and account of exchange program water rights and their associated permits. Reclamation and Ecology will jointly monitor the performance of this program.

b. Ecology will use generally accepted techniques for calculating the consumptive use and normal return flow characteristics associated with each acquired trust water right. Depending on the circumstances, the consumptive use amount can be a single value expressed as acre-feet per year, or could vary seasonally and be expressed in acre-feet per month, or for short duration could be a single year or single month values based on climate for that period.

8. NEPA/SEPA Compliance: Reclamation and Ecology agree that contracts entered into pursuant to this MOU will be both Federal and State actions. Further, Reclamation and Ecology agree that mitigated permits between Ecology and water users will be State actions. Each agency will be responsible for their respective environmental compliance requirements.

GENERAL PROVISIONS

1. Nothing in this agreement expands, alters or limits the property or other rights, authority, responsibilities, sovereignty, or jurisdiction of any party. Nothing herein shall act to waive, abrogate, or diminish the Treaty rights of the Yakima Nation nor the sovereign rights of the State of Washington or the United States.

2. Notwithstanding any other provision of this MOU, the parties acknowledge that Reclamation's actions are subject to federal reclamation law, as amended and supplemented, and the policies, rules and regulations promulgated by the Secretary of the Interior under federal reclamation law; and applicable federal law, including but not limited to, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). NEPA compliance activities may include public scoping meetings and hearings, Fish and Wildlife Coordination Act consultations, and cultural resource consultations with Tribes on Indian Trust Assets. ESA activities may include consultation with NOAA Fisheries and the USFWS.

3. Notwithstanding any other provision of this MOU, the parties acknowledge that any contract executed under this MOU where Project benefits are afforded shall be subject to federal reclamation law, policies, and rules and regulations governing recovery of Project costs. The parties further acknowledge that the costs of development, review and approval of proposed actions, including but not limited to, environmental compliance activities preparation, negotiation and execution of contracts, and any other costs of mitigation determined to be required, shall be incurred by the benefiting contractor. Costs to the benefiting contractor may be mitigated by other enhancement or contributions that benefit the parties to this MOU, at the discretion of Reclamation. Any contract executed under this MOU that implements a joint federal and state program, as authorized and directed by federal law and funded through federal appropriations, shall be subject to federal cost sharing laws, policies and practices.

4. Nothing in this MOU is intended to create any right in any entity not a party to this MOU nor shall any entity be considered a third party beneficiary to this MOU.

5. This MOU constitutes the entire MOU between and among the parties with respect to the subject matter of this MOU. Any modification of this MOU must be made in writing and agreed to by all the parties.

6. All actions called for by this MOU are subject to and contingent upon the availability and allocation of future federal and state appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals as needed. The parties recognize that if any necessary authority and/or funding is not forthcoming, the schedules identified in this MOU will be reviewed and adjusted as necessary, by mutual consent.

INDEFINITE TERM

Ecology and Reclamation enter into and continue this MOU voluntarily and in good faith. This MOU shall be effective upon the signatures of the officials listed below. This agreement may be amended or supplemented at any time by mutual consent of the parties. This MOU is severable from any contracts that are entered into pursuant to this MOU.

TERMINATION OF MEMORANDUM

This MOU may terminate upon the following conditions or events:

- a. Where this agreement creates a financial detriment to the United States.
- b. Upon written notice by either Reclamation or Ecology.

SIGNATURES

J. William McDonald, Regional Director
Pacific Northwest Region, Bureau of Reclamation

DATE

Jay Manning, Director,
State of Washington Department of Ecology

DATE