FINAL REPORT

Legal Analysis – Part 1
Walla Walla Basin Integrated Flow Enhancement Study

Chris Hyland, Executive Director
Walla Walla Watershed Management Partnership

Brian Wolcott, Executive Director
Walla Walla Basin Watershed Council

by

Tom McDonald
Cascadia Law Group PLLC

DECEMBER 10, 2015
# TABLE OF CONTENTS

I. BACKGROUND........................................................................................................... 1
II. SCOPE OF WORK......................................................................................................... 1
III. ENHANCEMENT ACTIONS ....................................................................................... 2

1. Alternative surface water supply and water right exchange (Columbia River/above-ground storage supply in exchange for Oregon and Washington surface water rights left in-stream) ........................................ 2
   A. Action Description .................................................................................................. 2
   B. Existing Authority .................................................................................................. 3
      i. Alternative: Exchange of Water ................................................................. 3
         a. Description ................................................................................................. 3
         b. Protection .................................................................................................... 4
         c. Gap ............................................................................................................. 4
      ii. Alternative: Traditional Process to Store and Release ....................... 5
         a. Description ................................................................................................. 5
         b. Protection .................................................................................................... 6
         c. Gap ............................................................................................................. 6

2. Alternative ground water supply and water right exchange (shallow/deep aquifer recharge and recovery supply in exchange for Oregon and Washington surface water rights left in-stream) ........................................ 6
   A. Action Description .................................................................................................. 6
   B. Existing Authority .................................................................................................. 6
      i. Alternative: Aquifer Recharge and Storage ............................................. 6
         a. Protection .................................................................................................... 7
         b. Gaps ............................................................................................................. 8
      ii. Alternative: Aquifer Recharge ................................................................. 8
         a. Protection .................................................................................................... 9
         b. Gaps ............................................................................................................. 9

3. Irrigation efficiency conserved water ........................................................................ 9
   A. Action Description .................................................................................................. 9
   B. Existing Authority .................................................................................................. 9
      a. Protection ....................................................................................................... 10
      b. Gaps ............................................................................................................... 10

4. Oregon in-stream water rights (leases, time-limited transfers, permanent in-stream and allocation of conserved water) ........................................................................... 10
   A. Action Description .................................................................................................. 10
   B. Existing Authority .................................................................................................. 11
      i. Alternative: Traditional In-stream Flows ................................................. 11
         a. Minimum Flows ....................................................................................... 11
         b. In-stream Flow Water Rights ............................................................... 11
         c. Protection .................................................................................................... 11
         d. Gaps ............................................................................................................. 12
      ii. Alternative: Establishment of In-stream Flow Water Rights ............. 12
         a. Protections ................................................................................................. 13
         b. Gaps ............................................................................................................. 13

5. Water management agreements (e.g. downstream point-of-diversion transfers, temporary surface to ground water supply transfer) .......................................... 14
   A. Action Description .................................................................................................. 14
   B. Existing Authority .................................................................................................. 14
      i. Alternative: Agreements not to Divert/ Non Use Agreements .......... 14
6. Ground water return flows/retiming from targeted shallow aquifer recharge and floodplain habitat restoration ........................................ 15
   A. Action Description .................................................................. 15
      i. Gaps ............................................................................. 15
   B. Local Agreements and Contracts: ......................................... 20

IV. TRANSBOUNDARY PROTECTION OF ENHANCED FLOWS .............. 16
1. General Discussion................................................................. 16
2. Implementing the Alternatives ............................................... 17
   A. Washington Trust Water Rights Program: ............................ 17
      i. General Criteria ........................................................... 17
      ii. Analysis ..................................................................... 17
      iii. Process .................................................................... 19
      iv. Filling the Gaps with State Legislation ......................... 19
   B. Local Agreements and Contracts: ........................................ 20
I. BACKGROUND

The Walla Walla Watershed Management Partnership (Partnership) and the Walla Walla Basin Watershed Council (Council) are conducting the Walla Walla Basin Integrated Flow Enhancement Study (Flow Study). A Steering Committee has been convened to help guide the development and implementation of the Flow Study. The Steering Committee will be considering and selecting a flow restoration and protection plan for implementation.

Cascadia Law Group (CLG) has been retained to conduct the initial phase of a legal analysis of issues regarding the implementation of the Flow Study and specifically the issue of protecting in-stream flows from impairment when those flows are established in Oregon and will need protection as they cross into Washington and through the Walla Walla Basin.

II. SCOPE OF WORK

The Partnership and the Council developed with the Steering Committee a scope of work that is intended to guide the analysis and development of alternatives that provide the ability to protect restored in-stream flows throughout the Walla Walla Basin. CLG is tasked to consider the following three protection categories to augment existing protection mechanisms or implementation of new stand-alone protection alternatives:

1. Amendments/modifications to existing state laws;
2. Use of other bodies of water law (e.g. contract law); and
3. Use of local authorities/voluntary incentive based systems.

The steering committee identified six enhancement actions that may be implemented in Oregon and Washington and are to be considered in the scope of work. These actions are:

1. Alternative surface water supply and water right exchange (Columbia River/above-ground storage supply in exchange for Oregon and Washington surface water rights left in-stream);
2. Alternative ground water supply and water right exchange (shallow/deep aquifer recharge and recovery supply in exchange for Oregon and Washington surface water rights left in-stream);
3. Irrigation efficiency conserved water;
4. Oregon in-stream water rights (leases, time-limited transfers, permanent in-stream and allocation of conserved water);
5. Water management agreements (e.g. downstream point-of-diversion transfers, temporary surface to ground water supply transfer); and
6. Ground water return flows/retiming from targeted shallow aquifer recharge and floodplain habitat restoration.
The scope of work provides for five (5) tasks. Under Tasks 1 and 2, each of the enhancement actions is analyzed by (1) considering gaps in existing law that inhibit full protection by restored flows; and (2) developing and assessing alternatives under the three protective categories that would provide in-stream flow protection for existing and new flows developed by the enhancement project. Under Task 3, the alternatives are narrowed and a final strategy is recommended in Section IV below. Additional and more in-depth analysis will be part of a new scope of work that will provide greater detail on final options and future planning and criteria for implementation.

Task 4 required draft reports and presentations to the Steering Committee. A first draft report was completed on February 10, 2015, and presented to the Steering Committee on February 12, 2015. After receiving comments, both in writing and in additional conference calls, a second draft was completed on May 19, 2015, and presented to the Steering Committee on May 20, 2015.

Task 5 requires this final report. This report was completed after receiving additional comments on the second draft.

III. ENHANCEMENT ACTIONS

1. Alternative surface water supply and water right exchange (Columbia River/above-ground storage supply in exchange for Oregon and Washington surface water rights left in-stream).

   A. Action Description:

   This enhancement action involves the development of projects that would retain stream flows in critical low flow periods by changing the timing of diversions from surface waters. Out-of-stream uses will be supplied through alternative water supplies. For example, winter flows can be diverted from a stream and stored to be available for out-of-stream uses in lieu of or in exchange for the current summer diversions. The loss of water from leakage and evaporation will require storage of more water than is otherwise diverted in the summer and likely authorized under a water right.

   This enhancement action could also be a project that establishes a new point of diversion downstream, thereby enhancing the stream flows between the diversions. However, 100% of the quantity of water that could have been diverted upstream is not likely to be available at the new point of diversion because of natural loss of water in the system. Augmented supplies will be necessary to mitigate for any loss of the water from leakage and evaporation. For example, to

---

1 When considering gaps in the law, the scope of work required the review of existing reports and analyses regarding the in-stream flow issues and potential solutions in the Walla Walla Basin. Many reports and memoranda were reviewed and analyzed. Attachment A lists the reports and memoranda reviewed and analyzed.
mitigate for these losses when a diversion from the Walla Walla River in Oregon is exchanged for a diversion from the Columbia River, stored water in Washington may provide mitigation water. Currently, there may be available storage water in Lake Roosevelt.

B. Existing Authority:

i. Alternative: Exchange of Water

a. Description:

Oregon has specific statutory authority to authorize the exchange of water. Washington does not have a similar statute, but for all practical purposes similar actions are authorized through its water banking and trust water right provisions. The Oregon Water Resources Department (OWRD) may authorize the use of stored, surface, or groundwater from another source in exchange for supplying replacement water in an equal amount to satisfy prior appropriation from the other source. ORS 540.533-543; OAR 690-380-2260. An exchange under this law is allowed if: (1) the exchange would not adversely affect other appropriators and the public interest; (2) there is a sufficient quantity of water available to replace the water to be used under the exchange, which should include consideration of consumptive use and transmission losses; and (3) the exchange would not be too difficult to administer.

The exchange may be implemented through storage of water in a reservoir and a secondary authorization for in-stream flow purposes. Based on the protocol developed for an authorized exchange, releases from the reservoir would occur when flows are dropping to the minimum target levels. In exchange for the use of these releases, the irrigator would allow the irrigation water right to remain in the stream, which would be protected through the stream based on the water right’s priority date.

A project that establishes a new point of diversion downstream may also utilize the water right exchange laws, ORS 540.533(2). In the example given above, an irrigator in Oregon would stop diverting from the Walla Walla River. The irrigator would replace that water by obtaining a right to divert water from the Columbia River. The irrigator would replace the water in the Columbia River by ceasing the diversion on the Walla Walla River and protecting it through the Walla Walla and into the Columbia River at its new point of diversion. In a water right exchange, a person may use a combination of surface, storage, or groundwater rights. ORS 540.533(3). In this exchange, the irrigator continues to own the primary water right.

Additional water must be obtained to augment the Columbia flows at the new diversion to mitigate for the transportation loss of a portion of the water from seepage and evaporation. In Oregon, a new water right to divert water from the Columbia River will not be authorized without full mitigation between April 15 and
September 30. Opportunities for the mitigation of transportation losses may therefore be limited to storage in Washington or obtaining senior water rights in Washington above the new diversion point. The diversion for the mitigation water could be a new water right that would have to be in compliance with Washington’s reciprocity statute, RCW 90.03.300, and the Oregon laws, which do not specifically prohibit a Washington water right for use in Oregon.

Storage from Lake Roosevelt should be considered. In 2006, the Washington legislature authorized the Columbia River Basin Development Account, that may be used to assess, plan, and develop new storage, improve or alter operations of existing storage facilities, implement conservation projects, develop pump exchanges, or any other actions designed to provide access to new water supplies within the Columbia River Basin for both in-stream and out-of-stream uses. RCW 90.90.010. The intent of the law is to develop water supplies for in-stream as well as out-of-stream uses. RCW 90.90.020(1)(a)(ii). To develop new water supplies, the legislature amended the law in 2008 to authorize new releases from Lake Roosevelt “to replace the use of diminishing groundwater in the Odessa aquifer; new water supplies for municipalities with pending water right applications; enhanced certainty for agricultural water users with water rights that are interruptible during times of drought; and water to increase flows in the river when salmon need it most.” RCW 90.90.060. Any use of releases from Lake Roosevelt must be coordinated and approved by the Department of Ecology, through its Office of Columbia River, and the Bureau of Reclamation.

b. Protection:

If water for an in-stream use is provided by an exchange, the priority date of the flows left in the stream is the priority date of the irrigation water right. The water master must regulate the diversions as necessary to assure that the exchange water is not diverted from the channel of the most downstream point of use specified in the water right for an in-stream flow purpose. ORS 540.543.

c. Gap:

The previous reports document the legal barriers for protecting Oregon water rights at the Washington border, even if those rights are Oregon in-stream flow rights or if they are part of an exchange for a new diversion on the Columbia River. See Attachment A and Attachment B. An option is to create a Washington trust water right in Oregon. See Section IV, Recommendation: Transboundary Protection of Enhanced Flows, page 16. In the analysis in Attachment B, the author opines that the Washington Trust Water Rights Program is only available for Washington water rights. This is a very narrow interpretation of the trust law, ch. 90.42 RCW. See Section IV herein. The author also dismisses the ability to divert water from the Columbia River to irrigate the land in Oregon that ceased diverting from the Walla Walla River to enhance the flows in the Walla Walla River. The author opines that Oregon must also have a reciprocity statute, and even with a reciprocity statute, the diversion under a Washington water right may not be constitutional. See
Sporhase v. Nebraska, 458 U.S. 941 (1982). The analysis should be different if it is an Oregon water right from the Columbia River. Further, I dispute the applicability of Sporhase. Part 2 of the legal analysis will address this issue more fully.

A memorandum of understanding between the States of Washington and Oregon may provide the best mechanism to memorialize the protection of flows of the Oregon exchange water through the Walla Walla River, and the use of Lake Roosevelt releases for mitigation of in-stream flow impacts from transportation losses.

ii. Alternative: Traditional Process to Store and Release

a. Description:

It is not clear if the law allowing the Oregon water right exchange provides the authority for all potential projects under this enhancement action, without reliance on the traditional laws to obtain alternative supplies. Under the laws in both Oregon and Washington, a person may obtain a new water right for storage, and a secondary right to use the storage for beneficial use in the irrigation season. The use of the storage will replace diversions under the existing water right. The existing water right would be placed into the in-stream flow programs in the respective states.

In both states, a person may apply for a water right reservoir permit. ORS 537.130, 537.140(d), and 537.400. RCW 90.03.370. The person must also file an application for a permit, known as a secondary permit, to divert the water from storage and use it for beneficial uses. These applications will be reviewed by OWRD under the criteria set forth in ORS 537.130, 537.140, and 537.145-240, and by Ecology under RCW 90.03.250-320. The criteria under both Oregon and Washington laws will only allow a diversion for storage if water is available for diversion without impairing other water rights including in-stream flows, and it is in the public interest.

In Oregon, if the water exchange under ORS 540.533 is not utilized, a secondary permit from a reservoir is issued for supplemental irrigation to an existing water right that is appurtenant to the land. A supplemental right cannot be exercised for irrigation when the primary right is available even if the primary right is intended to be transferred to in-stream flows. In Oregon, the secondary permit can however be leased for in-stream flow purposes. OAR 690-077-0076 to 0077. If the water right appurtenant to the land is transferred to in-stream flow, OAR 690-077-070; ch. 90.42 RCW, prior to obtaining the reservoir and secondary permits, the secondary permit would be considered primary and could be applied to the land.
b. **Protection:**

In Oregon, the lease of a secondary water right from storage for in-stream flow will be protected as a senior water right because it would be considered developed water for that period of time, and is outside of the priority system. Otherwise, under ORS 537-348, a water right transferred to an in-stream flow water right would be protected with a priority date as of the date of the water right. The application will be reviewed as a change of a water right under OAR 540.505 to 540.580. The standard impairment requirements are applied. Also see water masters’ general authority. ORS 540.045.

In Washington, if the irrigation can reliably use the stored water, the primary water right can be transferred, either temporarily or permanently, into the Washington Trust Water Rights Program. Ch. 90.42 RCW. The right will be protected in-stream from impairment by junior water right holders. RCW 90.42.040.

c. **Gap:**

As explained before, there is a gap in the laws covering any protected flows in Oregon as a protected flow in Washington with the same priority date. It is also questionable whether this alternative is practical or helpful in Oregon to enhance in-stream flows.

2. **Alternative ground water supply and water right exchange**

   *(shallow/deep aquifer recharge and recovery supply in exchange for Oregon and Washington surface water rights left in-stream).*

   A. **Action Description:**

   This action involves the use of groundwater in lieu of surface water diversions to retain stream flows during critical low flow periods. This can be a simple change of source of supply from the stream to groundwater based on the understanding that the groundwater withdrawal will have a delayed and more muted impact on the stream flow at a less critical time. This action can also be the development of groundwater storage by an aquifer recharge project, which stores the higher winter flows in the ground and withdraws that water in the irrigation season in lieu of surface water diversions.

   B. **Existing Authority:**

   i. **Alternative: Aquifer Recharge and Storage**

   The use of groundwater in lieu of surface water may provide for additional surface water flows during critical low flow periods. A primary tool is the aquifer storage and recovery (ASR). As with the surface water exchanges, ASR allows the storage of flows during high flows and withdrawal of that water in the irrigation season in lieu of surface water diversions. Artificial recharge has been studied and
implemented locally since 1950. See Artificial Recharge in Oregon and Washington 1962, USGS Paper 1594-CORS.

In Oregon, ASR is authorized and regulated under ORS 537.531-534; OAR 690-350-0010 to 0030. ASR is a beneficial use inherent in all water rights, permits and certificates, for other beneficial uses. Therefore, ASR is not a separate appropriation but allows ASR to occur with a water right. OAR 690-350-0010(4). The priority date of the water right will not change when used for an ASR project. OAR 690-350-0010(3). The water injected into the aquifer must meet drinking water standards or the Environmental Quality Standards whichever is more stringent. OAR 690-350-0010(6). To obtain a permanent ASR permit, a testing program under a limited license must be completed. OAR 690-350-0030. If a new water right is needed as part of the ASR project, the new water right application is subject to the same standards as any new water right application.

The use of recovered water under an ASR permit must be the same as the use described by the water right permit or certificate for injection source water; however, the holder of a permit for ASR may apply for a transfer, if the use of recovered ASR water is different from that which is allowed in the water right permit or certificate for the injection source water. The ASR permit may be revoked if the use interferes with other water rights, including in-stream flows, and aquifer water quality. Up to 100% can be recovered, based on a demonstration of what water can be recovered. OAR 690-350-0010(8).

In Washington, the ASR program is governed by RCW 90.44.460; 90.03.370; Ch.173-157 WAC. Washington has many of the same requirements as Oregon, but they are not as explicitly stated in statute and rules. Washington authorizes the injection and storage of water in the aquifer under the authority of a reservoir permit. RCW 90.44.460; 90.03.370. As with any surface water storage, Washington requires a secondary permit for the withdrawal and beneficial use of the stored water. The water injected into the aquifer must meet the state water quality standards for groundwater. Any discharges to the surface water must meet the surface water quality standards.

a. Protection:

Unlike the opportunity for surface water, in Oregon the water right exchange under ORS 540.543 is not available for ASR projects. The option to lease the recovery water from an ASR project water for in-stream flows may be available under OAR 690-077-0076; however, there is no known precedent in Oregon. Otherwise, it is doubtful that the enhanced flows resulting from the ASR permit during low-flow periods can be protected, whether one seeks to protect the water from the ASR permit/secondary permit, or it is water identified as the original water right. Additional consideration should, however, be given to independently applying for an ASR project with a new appropriation from a stream to be injected in the aquifer for in-stream flows purposes, whereby the recovery of the water during low-flow periods would be discharged into the stream for in-stream flows.
b. **Gaps:**

The discussion above under Protection describes some of the legal gaps. There are issues regarding the legal authority to use ASR as alternative water supplies and protect enhanced flows in the summer low-flow period resulting from ASR projects\(^2\). The enhanced flows will result if a water right holder utilizes storage water in lieu of the direct diversion under the water right in the low-flow period. However, except for the water right exchange authority and the authority to lease water for in-stream flows in Oregon, there is not a clear legal means of protecting these enhanced flows. Both Oregon and Washington struggle with legal limitations because under the scenarios that include an exchange with an existing water right, these storage rights are considered supplemental to existing water rights, or are simply a change in the season for the point of diversion. In either case, there is not a legally recognized enhanced in-stream flow that can be protected. An option to solve this issue is to authorize in statute the ability to clearly recognize that the rights from storage projects are not limited as supplemental rights simply because the water will be used on land that has an existing water right, and that the enhanced flows can be protected in-stream flows under existing law.

There are also practical issues with ASR that make it not as desirable of an enhancement option. ASR has not been used to a great extent because of the legal standards and physical limitations. The process is expensive, requires extensive water quality analysis and possible treatment before the water can be injected. The City of Walla Walla filed an ASR application in December 2006, which followed a feasibility study started in 1999. The final decision was just issued and is now on appeal. Only after extensive studies was Ecology able to determine an annual leakage rate of 10%, and withdrawal of the stored water will be at 60% annual recovery quantity and carryover percentage. The source of water is the Oregon water rights held by the City.

ii. **Alternative: Aquifer Recharge**

ASR is not to be confused with artificial groundwater recharge (AR), which is authorized under ORS 537.135; OAR 690-350-0110 to 690-350-130. The appropriation of water for the purpose of recharging basins is declared to be a beneficial purpose. Storage may be by well injection or infiltration. A new permit is required for artificial recharge, and a secondary permit is required to use stored water. The recoverable water may be up to 85%. Unlike an ASR project, the AR and secondary permit holders need not be the same entity.

Washington also recognizes shallow aquifer recharge (SAR), which provides for water to be used to recharge shallow groundwater systems, but it is not intended for storage and subsequent recovery. There is not an explicit statutory authorization other than the authority for a reservoir permit.

\(^2\) An ASR project may be applied for in-stream flow purpose, and as such may be protected, but this would not be available necessarily as an alternative water supply.
a. **Protection:**

In Oregon, if the AR is completed as part of water right exchange, the water right is protected in-stream under ORS 540.543. See discussion above in Enhancement Action No. 1. However, this authority is limited to Umatilla Basin, which may or may not include the Walla Walla Basin. OWRD is researching this question.

b. **Gaps:**

There is a question of the legal authority to recognize and protect the enhanced flows that are the result of the shallow aquifer recharge. In Oregon, the water right exchange may not apply and further research is being done. The option to lease a secondary use of the recharge water for in-stream flows may be available under OAR 690-077-0076, but there is no known precedent in Oregon. The water would have to be directly discharged into the Walla Walla River and measured. In Washington, there is no authority to even allow the SAR water to be used for secondary purposes such as in-stream flow. Much of the same discussion for ASR projects is pertinent to AR/SAR projects.

3. **Irrigation efficiency conserved water.**

   A. **Action Description:**

This action requires an analysis of the classic savings of water through efficiencies in the diversion and application of water, resulting in conserving a quantity of water that is retained in the stream. The methods of conserving water may include more efficient irrigation systems, lining/piping ditches, and changing crops and cropping patterns. The issues that arise involve not only costs, but also the potential loss of water rights from nonuse, and the loss of return flows that would otherwise have had positive delayed impacts on stream flows and fish habitat.

   B. **Existing Authority:**

Water conserved through conservation and efficiency efforts can be protected for in-stream flow purposes with the priority date of the water right. In Oregon, any person holding a water right certificate may submit a conservation proposal to OWRD. ORS 537.455 to 537.500; ch. 690-018, 077 OAR. The conserved water is first allocated to mitigate the effects, if any, of the conservation project on other water rights, and the remaining allocated between the state and the water right holder in percentages representing the amount of any federal and state funding, but in no event will either the state or the water right holder be allocated less than 25% of the remaining conserved water. ORS 537.470. The state’s portion of the conserved water right is converted to an in-stream flow water right. The conservation proposal can specify that the water holder’s portion of the conserved water right also be transferred to an in-stream flow water right. The in-stream flow water right has the same priority date as the original conserved water right and is protected with that date or one minute after the priority date. ORS 537.485.
Washington law also provides for the protection of water resulting from conservation activities. RCW 90.42.030 to 050. Like Oregon, a portion of the net water savings from conservation that had public funding would be placed into the state’s trust program. The trust water right acquired by the state through the funding of conservation projects will be quantified based on a determination of the net water savings resulting from the conservation, and is not subject to the transfer statute, RCW 09.03.380. A water right holder can also place any additional conserved water into the trust program permanently or temporarily, and have that right protected and available for other uses, and may have to be transferred under the transfer statute, RCW 90.03.380. RCW 90.42.080(5).

a. Protection:

The in-stream flow right resulting from conservation is legally protected with essentially the same priority date as the original water right or one minute after that date. ORS 537.485, 537-500; RCW 90.42.040(3).

b. Gaps:

The administration of conserved water can be difficult and time consuming, and sometimes not accurately calculated when first done, which creates the risk that either an in-stream water right overstates the water saved, limiting the water right holder’s future use to a quantity necessary for the continued beneficial use of water, or underestimates the quantity saved that may create the risk of relinquishment of the unused quantity. The legal gap is with protecting saved water in Oregon across the border into Washington and downstream.

4. Oregon in-stream water rights (leases, time-limited transfers, permanent in-stream and allocation of conserved water).

A. Action Description:

This action requires an analysis of Oregon laws regarding the establishment of in-stream flows as protected water rights based on existing water right holders donating, leasing, and selling their diversionary water rights for in-stream flow purposes. Under the terms of the agreements, the in-stream water rights may be temporary or permanent. In addition, the water transferred/changed to in-stream flows may be from conserved water or as a result of the water right holder simply agreeing to either temporarily or permanently forego the use of the water (i.e. fallowing the land).

3 To insure accurate calculations of conserved water, a person can complete a test of the project before the conserved quantity is finalized. OAR 690-018-0062(2). Also, if water is not used for beneficial use, the right may not be relinquished if the user is otherwise ready, willing, and able to make full use of the right. ORS 540.610(3)(a)(b)
B. Existing Authority:

i. Alternative: Traditional In-stream Flows

a. Minimum Flows:

Both Oregon and Washington authorize the establishment of in-stream flows. ORS 537.322 to 537.360; RCW 90.54.020; 90.122.010. In Oregon, OWRD may, upon application by the Oregon Department of Fish and Wildlife and the Department of Environmental Quality, establish minimum in-stream flows by administrative rule. Ch. 690-076 OAR. In Washington, the in-stream flows are established by rule under the administrative procedures act. RCW 90.22.010, 90.54.020. In both states, the minimum in-stream flows have a priority date as of the effective date of the rule. OAR 690-076-0015(2); RCW 90.03.345.

b. In-stream Flow Water Rights:

Under the Oregon statutes, specific state agencies may request an in-stream flow water right, and OWRD will process the request in accordance with the provisions for obtaining a permit to appropriate water. ORS 537.336; OAR 690-077-000 to 690-077-0053. A water right certificate is issued with the priority date as of the date of the water right application and is held in the name of OWRD with the same legal status as any other certificated water right. Washington does not issue certificates for new water rights for in-stream flow purposes, although it may have that authority under its general permitting authority. This has been debated for years. Ecology has the sole authority to establish minimum in-stream flows by rule. RCW 90.03.247. Only through the trust water rights program, Ch. 90.42 RCW, does Ecology issue water rights certificated for in-stream flow purposes through a process of transferring an existing water right into the trust.

While there is very little precedent for privately owned in-stream water rights, the law does allow for such an interpretation. For example, it is worth exploring the opportunity to apply to appropriate water into a reservoir for in-stream flow purposes, and through a secondary permit withdraw that water in a different, low-flow season, at which time the in-stream flow right can be protected as a senior right using developed water. This is not contrary to the water right lease for in-stream flows in Oregon, and in fact Oregon has authorized a reservoir water right for in-stream flow purposes (Certificate #76086 - McKay Reservoir). This is also an option with a person’s ownership of temporary in-stream flow water rights in the Washington state trust program.

c. Protection:

The in-stream flow certificated water rights are protected with priority dates as described above. ORS 537.349, 350; chapters 690-076 and 690-077 OAR. However, the protection of these water rights is limited, with precedence given at times for multipurpose storage and municipal uses or a municipal applicant for
The in-stream water rights and minimum in-stream flows established as described above are very junior and not necessarily a practical approach to protecting the in-stream resources. Further, in Oregon during times of a declaration of a severe and continuing drought, human consumption and stock water may be given precedence over the in-stream flow water rights that are established by purchase, lease, and donation. ORS 537.354. Further, the right to use water for multipurpose storage or municipal uses, including municipal applicants for hydroelectric projects, has precedence over these flows when OWRD reviews the project. See ORS 537.170. ORS 537.352. In Washington, the in-stream flows established in rule are not vested water rights but rather Ecology, in its discretion, can amend the rules and revise if not eliminate the in-stream flows. There is uncertainty regarding the effect on water rights that were issued subject to these flows. This same amendment process can occur in Oregon.

ii. Alternative: Establishment of In-stream Flow Water Rights

In-stream flow water rights may also be issued based on transferring existing water rights to in-stream flow water purposes. In Oregon, a water right can be converted to an in-stream flow water right. ORS 537-348. The application will be reviewed as a change of a water right under OAR 540.505 to 540.580. The standard impairment requirements are applied. Changes within irrigation districts have special considerations. OWRD issues a water right certificate showing the original priority date. A water right can be transferred to an in-stream flow water right with a priority date as of the date of the water right. The water right can be transferred permanently or be time limited. OAR 690-0770065 60 690-077-0075. The transferred water right will be in the name of OWRD. A water right may also be leased for a specified period of time not to exceed five (5) years. OAR 690-077-0076. The process for leasing a water right for in-stream flow purposes is provided in detail in the rules. OAR 690-077-0076 to 690-077-079. A lease that is limited by season of use or duty of water for a season shall only allow the use of the original water right or the in-stream flow but not both during any one season unless the source is from stored water.
In Washington, the water right can be transferred into the Washington Trust Water Rights Program. Ch. 90.42 RCW. The law provides for a water right holder to donate and lease the water right to the trust program solely for the purpose of protecting the water right from relinquishment. A person may also transfer the water right to the trust to be available for other beneficial uses including in-stream flows. If it is transferred to the trust for the purpose of being protected as in-stream flow right, an application will be processed under the criteria of any other water right change, RCW 90.03.380, which requires an analysis of the extent and validity of the water right, and whether the change is in the public interest and will not impair other rights. The water right that is transferred permanently to the trust program is issued a certificate and held in the name of the State of Washington. The trust water right has the priority date of the original water right; however, if only a portion of a water right is transferred to the trust, the trust right is considered inferior in times of regulation as between the original water right and the trust water right.

a. Protections:

The in-stream flow would be protected from impairment by junior water rights. ORS 537.350. See watermasters’ general authority. ORS 540.045. In Washington, the in-stream flow is protected like any other water right from impairment by junior water right holders. RCW 90.42.040.

The change of a water right to in-stream flows cannot impair other existing water rights and, therefore, the protected quantity of water in the in-stream water right is going to be the quantity of water that was consumptively used by the original water right. There is a primary reach of a stream that the quantity diverted from was fully consumed, and a secondary reach of the stream that accounts for any return flow back into the stream.

b. Gaps:

In Oregon, during times of a declaration of a severe and continuing drought, human consumption and stock water may be given precedence over the in-stream flow water rights that are established by purchase, lease, and donation. ORS 537.354.

The same trust program can be used to protect in-stream flows when a water right holder desires to change the right to a downstream location that has not yet been determined and it is not known when the new diversion will occur.
5. **Water management agreements (e.g. downstream point-of-diversion transfers, temporary surface to ground water supply transfer).**

A. **Action Description:**

This action requires an analysis of the types of agreements that are available and would legally bind parties to manage water through changes to the water rights, such as changing points of diversion to benefit specific stretches of a stream, and changing from surface water to ground water for the benefit of in-stream flows. This action will overlap with other enhancement actions such as Enhancement Action No. 4, the transfer of water rights to in-stream flow water rights. The action will involve review of the authority of governmental and quasi-public entities to enter into agreements for the management of water.

B. **Existing Authority:**

Local agreements and contracts are an alternative to accomplish many of the enhancement actions.

i. **Alternative: Agreements not to Divert/ Non Use Agreements**

The Walla Walla Watershed Management Partnership Water Bank offers a toll to enter into a voluntary agreement with a water right holder to not divert water and place the water right into the water bank to avoid any relinquishment. RCW 90.92.070. The banked water right on a temporary basis remains in the name of the water right holder.

a. **Protection:**

Generally, under these agreements, the water that remains in the stream is not protected downstream.

b. **Gaps:**

The law does not protect these water rights downstream unless Ecology conducts an extent and validity analysis of the water right. For a temporary transfer to the bank, Ecology may do an analysis of the validity of the water right without requiring that it go through the Trust Water Rights Program. If it is vetted through this process, the bank can manage the right in the bank as mitigation for impairment to in-stream flows and other existing water rights. RCW 90.92.070(2).

ii. **Alternative: Agreement to Use Groundwater Supplemental Water Right**

In Oregon, a water right holder may agree to utilize a supplemental groundwater right for a surface water diversion. ORS 540.524 allows for a water right holder to substitute the groundwater use for the surface water use. In Washington, the Local Water Plans may provide for such an exchange. RCW 90.92.080.
a. **Protection:**

There is little if any protection for the surface water downstream. In Oregon, the surface water use will likely not be available for an in-stream flow water right because this could be determined to be enlargement of the water right.

The Local Water Plans in Washington cannot cause impairment to other water rights and therefore the surface flows will not be protected.

b. **Gaps:**

It will be difficult to resolve the lack of protection of the surface water flows from a change to the use of groundwater if the issue is impairment to other water rights. The other water rights cannot be subject to both the impacts from the groundwater use and also regulated for the protection of the enhanced surface water flow. If, however, the ground water source is from a different source than the surface water, i.e. there is no hydrologic connection, the issue is enlargement of the water right. This may be a gap in the law that can be solved through changes to the statutes.

The gaps in the law regarding the enforceability of protecting flows are also difficult to resolve because these agreements can only bind the parties to the agreement, and they are voluntary.

6. **Ground water return flows/retiming from targeted shallow aquifer recharge and floodplain habitat restoration.**

   A. **Action Description:**

   This action requires an analysis of the authority to manage a water system that would result in a change to the timing of stream flows through the system. The actions that would develop this flow pattern could include diversion of high stream flows into recharge basins, developing riparian areas, and reestablishing flood plains along streams. These would function in a manner that delay the flow of water into the streams for the benefit of the flows in otherwise low-flow periods. These would not be water right exchanges and would not rely on transfers of existing water rights. Rather, these are development of flows in a time when they would not have otherwise been in a stream, and the primary question is whether they can be protected in-stream from diversion by water right holders.

   i. **Gaps:**

   Other than ASR and SAR discussed above, there is no specific legal authority regarding the protection of enhanced flows during a period of the year that results from upstream riparian enhancement and flood plain projects.
To pursue this action, it is recommended that legislation be developed that would protect enhanced flows, which will require quantification.

IV. TRANSBOUNDARY PROTECTION OF ENHANCED FLOWS

1. General Discussion.

Based on the analysis of the enhancement actions, successful implementation of each of the identified alternatives requires resolving the gap in the law to protect the enhanced stream flows that are derived from projects in Oregon through the Walla Walla River in Washington. The flows are to be derived from current water rights, whether they are from conserved, exchanged water, or from existing Oregon trust water rights. Logically, there is not a realistic option to obtain a new water right with a junior priority date.

The several reports and papers on this subject list several potential legal processes to accomplish the ultimate goal of protecting a senior water right from Oregon and in-stream through the Walla Walla River in Washington. See Attachment A. Many of these reports are very comprehensive and well researched. As stated above, this current scope of work is not intended to duplicate these efforts.

For a variety of reasons the processes identified in the reports were determined not to be realistic, helpful, or legal. See Attachment B (Appendix E to A Proposal for a Pilot Local Water Management Program in the Walla Walla Basin. Report to the Governor and the Washington State Legislature. Walla Walla Watershed Management Partnership (December 2008). Equitable apportionment, interstate compacts, congressional allocation, and adjudications may be helpful in understanding the rights to the use of the water between the states, but these processes do not necessarily resolve the ultimate issue of how to take a right created in Oregon, change it to in-stream flow purposes and protect those flows as they cross into and flow through Washington. Federal actions such as enforcement of the Endangered Species Act and adjudication of tribal time immemorial rights are not realistic at this time and they do not necessarily guarantee the flows will be maintained across the Oregon/Washington border without continuous enforcement against existing water rights in both states.

Although the previous reports discount the ability to use many legal processes to protect the in-stream flows across state boundaries, the research and analysis in these reports still provide a very good base for developing limited options for protecting the flows derived from the specified flow enhancement alternatives.
2. **Implementing the Alternatives.**

   A. **Washington Trust Water Rights Program:**

Several of the alternatives under the enhancement actions can be implemented under existing laws in Oregon and Washington. The best alternatives are those that will allow for enhanced flows from actions in Oregon to be protected without additional legislation. To then protect that water in Washington requires applying existing Washington laws to obtain a legal interest in the Oregon water right that is used to enhance flows. The tool to obtain this interest will be utilizing the Washington Trust Water Rights Program to transfer the Oregon enhanced flow right to also a Washington trust water right.

   i. **General Criteria**

   - The water right must be derived from an existing Oregon water right.
   - Oregon Law must recognize the right to use the water right in Washington, and Washington must recognize the water right as a protectable Washington water right.
   - The water right must have seniority, such that it can be protected as an in-stream flow in Oregon, and when it enters Washington, it may be protected as it flows in the Walla Walla River.
   - In protecting the flows in Washington, existing water right holders must continue to have the ability to exercise their rights in the same manner as if the water right was consumptively used in Oregon. In other words, the flows are enhanced over the flow levels that would otherwise have flowed in the Walla Walla River into Washington.

Using these criteria, the current laws in Oregon and Washington may authorize this option with minimal legislative changes. The concept is to transfer a senior Oregon water right to the Washington trust program.

   ii. **Analysis**

Currently, Oregon allows water to be appropriated, stored, or diverted for use outside the "basin of origin" if it complies with specific statutory criteria and standards. ORS 537.801 et seq. If the right is for 50 cfs or more, it requires legislative approval. ORS 537.810. This condition does not appear to limit an entity from Washington obtaining an Oregon water right for use in Washington. In fact, pursuant to this law, the Oregon legislature authorized the City of Walla Walla to apply for the right to divert and store water from Mill Creek in Oregon for the use of water in the City of Walla Walla. ORS 537.835. Under ORS 537.810, Oregon analyzes several factors including future needs of water in the basin, impairment to other water rights, and the public uses.
Oregon law also provides that any municipal corporation of a state adjoining Oregon may acquire title to a water right within Oregon, “which lies within any watershed from which the municipal corporation obtains or desires to obtain its water supply.” ORS 537.870. This law appears to also support the Oregon water right authorized for the City of Walla Walla.

Under the Washington Trust Water Rights Program, existing senior water rights may be transferred to the state and protected as in-stream flows with the senior priority date of the initial water right. Ch. 90.42 RCW. This law provides the mechanism for any person to essentially control an in-stream flow water right, and have it transferred to the state to be protected as an in-stream flow right with a senior priority date.  

There may be gaps in the law to allow full implementation of this option. First, previous reports provide the opinion that only Washington water rights may be conveyed to the Washington Trust Water Rights Program. While the trust water right laws clearly provide that Washington water law governs a trust water right, and the trust water right is issued in the name of the state of Washington, I do not believe that the law necessarily forecloses the opportunity to convey a senior Oregon water right to the Washington trust program. However, because the issue has been raised, the ability under the Washington trust laws to convey an Oregon water right into the Washington trust program should still be recognized as a possible gap in the law.

The more general question is whether a Washington water right may be held from a water source located in an adjoining state and used in Washington. An issue is raised because Washington owns and manages all water when it crosses the state boundary into Washington, which means there is no longer any legal claim to the water by the adjoining state. All water is declared to be waters of the state of Washington and allocated only as provided Ch. 90.03 RCW. There is no authority to protect a water right not otherwise recognized under Washington law. Washington law does not however prohibit a person from obtaining a water right from a source outside the state for use in Washington. The law allows recognition of such a water right under RCW 90.03.300:

4 Washington law generally protects in-stream flows through the establishment of minimum flows under RCW 90.54.020 and RCW 90.22.010. The Walla Walla River has established minimum in-stream flows, but the problem is that they have a junior priority date. Ch. 173-532 WAC. These flows are subject to the first-in-time, first-in-right prior appropriation law, and therefore the flows are not protected from impact when the senior water rights divert the water. RCW 90.03.345. The in-stream flow was established in September 2007, and therefore has a very junior priority date.

5 RCW 90.42.040(2) states: “The department shall issue a water right certificate in the name of the state of Washington for each permanent trust water right conveyed to the state indicating the quantity of water transferred to trust, the reach or reaches of the stream or the body of public groundwater that constitutes the place of use of the trust water right, and the use or uses to which it may be applied.”
No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or because the place of intended use or the lands to be irrigated by means of such water, or any part thereof, may be situated in some other state or nation, but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands, to be irrigated by means of such water, are situated within the state of Washington, the permit shall issue as in other cases.

There is precedence for Washington to adjudicate a Washington water right outside of its boundaries. The state authorized a Washington water right from a source in Oregon, and also authorized an irrigator in Canada from a river that flowed from Washington into Canada and eventually the water flowed back across into Washington.

iii. Process

The process of obtaining a Washington trust water right in Oregon must insure the protection of existing water rights and the sovereignty and constitutional powers of the respective states. In this regard, the current Oregon laws regulating and defining the criteria to change a right must be followed, including those criteria for in-stream flows. ORS 537.332 et seq. In addition, the current Washington laws for changing a water right to the Trust Water Rights Program must be followed. RCW 90.42. By utilizing both states’ laws, findings are made by both states as to the extent and validity of the right including confirming the priority date, and the protection of existing senior rights in both states. The timing of the decisions must be determined, and if necessary the process for appeals legislatively revised. These details and defining the cooperation between the state agencies may be set forth in an intergovernmental agreement. See discussion on inter-local agreements below.

iv. Filling the Gaps with State Legislation

Oregon: OWRD needs to consider whether the use of the water constitutes a use “out of basin” and the need to comply with “out of basin diversions”. As explained above, the current statutes appear to allow a person to obtain a water right of less than 50 cfs and transfer it for use outside the basin without legislative approval. OWRD will also have to consider whether the transfer complies with the rules on

---

6 The Myers Creek adjudication occurred in 1932 in the Superior Court for Okanogan County. This right is listed in the Adjudication decree as owned by a Mrs. Jacques. It was adjudicated as a class 2 water right for .617 cfs for the irrigation of 46.3 acres on Lot No. 470, Osoyoos, Similkameen Division of Yale District British Columbia. The junior irrigators in Washington are subject to regulation to protect the water right in Canada.
“out of basin diversions”. OAR 690-12. Because the Legislature passed an act authorizing the City of Walla Walla water, it is advisable to discuss with OWRD whether to seek similar legislation or other action to authorize the state of Washington to obtain an Oregon water right for the purposes of changing it to a Washington trust water right for in-stream flow purposes pursuant to ORS 537.810. Ecology has also indicated that Oregon will have to pass a reciprocity law to allow for a Washington trust water right to be obtained in Oregon. I do not agree that this should be necessary.

Washington: Because the issue has been raised that the Washington Trust Water Rights Program cannot obtain a trust water right from an Oregon right, it is advisable to obtain legislation in Washington to authorize the state to obtain existing water rights in an adjoining state for the purpose of placing those water rights into the state trust. The legislation can specify that the change of the Oregon water right to the trust for in-stream flow purposes must be processed through the standards and criteria in RCW 90.42.

B. Local Agreements and Contracts:

Local agreements and contracts are an alternative to accomplish many of the enhancement actions. However, the gaps in the law regarding the enforceability of protecting flows are difficult to resolve, primarily because these agreements can only bind the parties to the agreement. Washington law allows for interlocal agreements under the Interlocal Cooperation Act of 1967. Ch. 39.34 RCW. This Act is discussed in the options listed in Attachment B.

The Interlocal Cooperation Act was amended in 2003 to specifically recognize the watershed management plans. The statute notes the following statement of legislative intent:

The legislature finds that throughout Washington state there are many active efforts to protect, manage, and restore watersheds. The state’s river systems provide a variety of benefits for society's many needs, so efforts to protect these watersheds should reflect the diversity of social, environmental, and economic factors that make the state unique.

Yet, there is a conflict between the natural flow of river systems and the way watersheds are governed. From a hydrological standpoint, a watershed is a single, integrated system. But these systems usually flow through a number of cities, counties, and other municipalities as they move from their source to the sea. As a result, many are subject to the full range of management interests, including multiple government entities with jurisdiction over water. In many cases, the political boundaries of government do not align with the hydrological boundaries of watersheds and may actually hinder the implementation of coordinated, cooperative plans. Cooperative
watershed management actions by local governments, special districts, and utilities can help maintain healthy watershed function and support the beneficial use of water by these entities and protect the quality of the resource that they use or affect. By participating in cooperative watershed management actions, local governments, special districts, and utilities are acting in the public interest and in a manner that is intended to sustain maximum beneficial use and high quality of water over time and to maintain the services that these entities provide.

Therefore, it is the intent of this act to remove statutory barriers that may prevent local governments from working together in the creation and implementation of cooperative, coordinated watershed plans. In addition, it is the further intent of this act to provide additional authorities to assist in such implementation.

Note after RCW 39.34.190.

This Act is therefore intended to allow public entities such as the Washington Department of Ecology and the Oregon Department of Water Resources to execute an agreement regarding water management in the Walla Walla basin. The gaps in the law to use such an agreement include: (1) an agreement will not bind individuals; (2) an agreement does not change the jurisdictional authority of the states to independently permit and regulate the waters in their respective states; and (3) Oregon’s authority to enter into such an agreement appears limited and would likely depend on the specific factual background of the agreement.

While a local agreement may not alone be able to protect flows from an enhancement action, such an agreement may be the implementing document for proceeding to protect flows under the state regulatory laws described above. Washington and Oregon are also developing a Memorandum of Understanding that is intended to address cooperation between the states regarding water, and in part, transboundary deliveries. It will be important to coordinate at some level with this process.
ATTACHMENT A
INDEX OF MATERIAL REVIEWED
STREAM FLOW PROTECTION SCOPE OF WORK

WALLA WALLA WATERSHED MANAGEMENT PARTNERSHIP


Memo to Walla Walla Watershed Management Partnership from Tom McDonald, Cascadia Law Group re Bi-State Water Issues (Dec. 22, 2009) ........ 2

REPORTS AND OTHER MATERIAL

Memorandum of Understanding among bi-state parties (effective date January 1, 2001).................................................................. 3


Washington v. Oregon, 297 U.S. 517 (1936)......................................................... 12
ATTACHMENT B
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. 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 of 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. 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 decision 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. 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.


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." 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).

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 "rewieving of equities," it must make a showing of substantial injury to be entitled to relief. However, this course of action is inadvisable.

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)."


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 intervene\(^ {28}\) 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 C 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”).


\(^{29}\) 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.

---


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. 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.” 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.

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. 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**

---


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.\textsuperscript{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

\textsuperscript{44} Colourado 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.