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FINAL REPORT

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

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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.

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 River 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.

III. ENHANCEMENT ACTIONS PROCESS

A. Identified Actions:

The Steering Committee identified six enhancement actions that may be implemented in Oregon and Washington. 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\(^1\) (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.

\(^1\) Based on comments, this action should not be limited to Oregon and rather more generally be "Water Right Transactions."
B. The Decision Process:

The process for analyzing each enhancement action is critical for making a decision and recommendation for protecting restored in-stream flows.

- The specified enhancement action must be defined.
- The existing authority to implement the action must be analyzed.
- Any legal impediments and legal gaps to full implementation and protection of the restored in-stream flows must be identified.  
- Alternatives to address impediments and gaps are identified. These alternatives can include changes in the policies by state agencies, changes in the law by the state legislature, voluntary actions, and other identified approaches.
- For each alternative, the pros and cons must be identified.
- 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.

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2 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.

3 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. A final draft was completed on December 10, 2015; a meeting with several members occurred February 24, 2016.
IV. ENHANCEMENT ACTIONS ANALYSIS

Enhancement Action 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 Defined:

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. Any loss of the water from leakage and evaporation that does not reach the Columbia River must be mitigated. For example, to 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.

B. Legal Authority:

i. Option 1: Exchange of Water Right

Oregon has specific statutory authority to authorize the exchange of water. Washington does not have a similar statute. 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. Again, the transportation losses through evaporation and leakage must be taken into account.

A project that establishes a new point of diversion downstream may also utilize the water right exchange laws, ORS 540.533(2). In a water right exchange, a person may use a combination of surface, storage, or groundwater rights. ORS 540.533(3). The irrigator continues to own the primary water right.

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.

ii. Option 2: Traditional Process to Store and Release

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.

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 watermasters’ 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. Legal Impediments/Gaps in the Law:

Restored flows from an exchange that involves an irrigator ceasing a diversion from the Walla Walla River in Oregon and exchanging it for a diversion from the Columbia River loses the protections under Oregon law.

In addition, in Oregon, a new Oregon water right to divert water from the Columbia River will not be authorized without full mitigation between April 15 and September 30 and, therefore, to be made whole additional water must be obtained in Washington to augment the Columbia flows at the new diversion for the transportation loss. 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.

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.

D. Alternatives Addressing Legal Impediments/Gaps:

i. Voluntary Action

Restored flows created through the water right exchange action could be protected by holders of junior diversionary water rights voluntarily agreeing not to divert when they would otherwise be regulated if there was no exchange project.
Pro/Con: A voluntary program with full participation by all junior diverters could be the most economically efficient means of protecting the restored flows. Information on the status of the flows would have to be provided to the water right holders; but, there would not be the cost and time necessary for governmental regulation.

However, a volunteer program is difficult to implement. There should be 100% participation by the junior water right holders for a volunteer program to be successful. Further, there must be protection for the junior water right holders from relinquishment if they do not divert when they legally could have. The confidence level of full participation is very low, and even with agreements not to divert, the risk is high that some will not comply. There is a better chance of a successful volunteer program if there is some incentive to voluntarily cease using water. In 2015, the drought in California resulted in an agreement of the senior water right holders to voluntarily reduce water use by 25%. In this case, many senior right holders would have likely been regulated anyway, and therefore there was was practical and strong political incentives to voluntarily not divert water. The Walla Walla Irrigation District in Oregon also agreed to voluntarily not divert, but it was under the threat of a federal lawsuit under the federal Endangered Species Act. These flows are not, however, protected downstream. Voluntary programs simply do not provide the necessary certainty of protecting restored flows from enhancement activities that would have usually been implemented at a high cost.

ii. Legislation

An option is to create a Washington trust water right in Oregon. However, 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.

Storage upstream on the Columbia River system should be considered to mitigate for the transportation losses. The recent laws allowing for the use of water from Lake Roosevelt is a good example of the opportunities for the use of storage in the Columbia River. However, the legislature did not allow the Roosevelt water to be

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4 In theory, only one junior water right holder could not divert when the flows at the diversion would allow, but this sets up the situation where there is no certainty as to which water right is now the restored flow—if any junior diverts the restored flows for the senior water rights agreement not to divert, the restored flow with the senior date is lost.

5 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
available for new irrigation water appropriations. One may argue that mitigating for transportation losses resulting from restored stream flows in the Walla Walla River is within the intent of the statute to provide water to increase stream flows. Otherwise, legislative amendments will be necessary. Any use of releases from upstream storage must be coordinated and approved by the Department of Ecology, likely through its Office of Columbia River, and possibly the Bureau of Reclamation.

Changes in the law should be considered in both Washington and Oregon that would clearly provide an opportunity for the creation of a trust water right based on an Oregon diversionary right.

Pro/Con: Legislation provides an opportunity to provide certainty and by specifying the authority to implement processes, such as the Washington Trust Water Rights Program, to protect in-stream flows. However, legislation is a slow moving process, and can have unexpected consequences. Any decision to authorize mitigation supplies from stored water in which the federal government has an interest will require coordination and possibly approval from the affected federal agency.

iii. Other

A memorandum of understanding between the States of Washington and Oregon may provide the best mechanism to memorialize how the protection of flows of the Oregon exchange water through the Walla Walla River. This can include how upstream storage in Washington can be available to address the transportation losses.

Pro/Con: A memorandum is generally an efficient means of implementing agreements with specificity and clarity, which is not always the case in legislative amendments. However, parties to a memorandum can only agree to what is already legal, and therefore, while the parties can agree to a process, they cannot agree to protections to restored flows that are not otherwise authorized in the law.

E. Recommended Alternative:

The recommended alternative to protect the restored flows under Enhancement Action No. 1 is to pursue legislation in both Oregon and Washington that will authorize if not clarify the law allowing an Oregon water right to be obtained for use in Washington, with protections through Oregon to the border, and under Washington law, allowing the same right to be placed in the Washington Trust Water Rights Program. In addition, Washington should pursue authorization to use Lake Roosevelt water to provide mitigation for downstream diversion of this right from the Columbia River.

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.
Enhancement Action 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 Defined:

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 and spring flows in the ground and withdraws that water in the irrigation season in lieu of surface water diversions.

B.  Existing Authority:

i.  Option 1 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.

ii. Option 2: Artificial Groundwater 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.

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.

C. Legal Impediments/Gaps in the Law:

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 690-077-0076⁶; 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

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⁶ The right may have to be certificated as opposed to just being a permit. Further research is required to answer this question.
an ASR project with a new appropriation from a stream to be injected in the aquifer for in-stream flow purposes, whereby the recovery of the water during low-flow periods would be discharged into the stream for in-stream flows.

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. 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.

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 recently issued, was appealed, and now has been finalized through a settlement. 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.

In regard to AR, 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. Oregon has stated that an option may be to file a secondary water right for in-stream flow enhancement and withdraw from the groundwater recharge project. Again, this requires more research and agreement by Oregon that it could be authorized. The water would have to be directly discharged into the Walla Walla River and measured. Oregon may require an NPDES permit for this discharge. 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.

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7 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.
D. Alternatives Addressing Legal Impediments/Gaps:

i. Voluntary Action

Similar to water right exchanges, restored flows can be protected by junior water right holder agreeing not to divert water when they would otherwise be regulated.

The pros and cons are the same as in Enhancement Action No. 1 above, alternative water supplies. There is a lack of certainty and confidence that there will be 100% participation by the juniors to protect the restored flows.

ii. Legislation

Legislation can 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. The legislation should focus on AR and shallow aquifer recharge because of the opportunities to avoid some of the water quality and testing requirements in ASR projects. If the restored water can be quantified, the restored flows need to be protected by statute.

Pro/Con: If all affected parties can agree on a proposal, legislation could provide a very efficient process and criteria for using ASR and AR for restoration of in-stream flows and protection of those flows. However, as stated above, legislation can be a lengthy and complex process that in the end may not provide the product that meets the intended goals. To the extent water quality requirements for ASR are an impediment, it will be difficult to change ground water quality standards.

E. Recommended Alternative:

The most efficient means of authorizing restored water through ASR and AR projects is to have a comprehensive legislative amendment to the laws that provides a streamlined process for protecting restored flows.
**Enhancement Action 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).

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).
C. **Legal Impediments/Gaps in the Law:**

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.

D. **Alternatives Addressing Legal Impediments/Gaps:**

i. **Voluntary Action**

As stated above, volunteer action can address the legal gap of protecting the restored flows. The pro is that it is efficient and comes with little cost to implement. However, the con is that it is difficult to monitor and enforce and to be effective all junior water right holders must participate.

ii. **Legislation**

Within each respective state, there are laws that will protect the conserved water in stream. However, to protect the water from Oregon into Washington, the law should be changed that would clearly provide an opportunity for the creation of a trust water right based on an Oregon diversionary right.

E. **Recommended Alternative:**

There is not a recommended alternative for restoring and protecting flows within each state. As discussed above, legislation should be pursued that will authorize or otherwise confirm the authority to protect the flows from Oregon into Washington. See recommended alternative for Enhancement Action No. 1.

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8 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).
**Enhancement Action 4. Oregon in-stream water rights--Water Right Transactions (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 forgo the use of the water (i.e. fallowing the land).

B. **Existing Authority:**

   i. Option 1: 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 secondary water right from a reservoir 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 Trust Water Rights Program.

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. Except for an in-stream flow water right established under ORS 537.346 or 537.348, Oregon gives precedence at times for multipurpose storage and municipal uses or a municipal applicant for hydroelectric project during OWRD’s review of the project. ORS 537.352. Further, during a declared severe and continuing drought, the Oregon Water Resources Commission precedence is given to human consumption and stock water uses. ORS 537.354; 536.700 to 536.780.

In Washington and Oregon, the in-stream flows established in rule are protected within the priority system, with the priority dates being the effective date of the minimum in-stream flow rule. Although contrary to the priority system, a permit that would, upon approval, have a senior priority date by virtue of the application date being prior to the in-stream flow rule, will still be conditioned with protection of the in-stream flow. RCW 90.03.247.

ii. Option 2: Changing Rights to 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.

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.

C. Legal Impediments/Gaps in the Law:

The in-stream water rights and minimum in-stream flows established as described above in Option 1 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. In addition, 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 by rule may be impaired by new uses if Ecology determines that there is a clear overriding consideration of the public interest (OCPI). RCW 90.54.012. However, OCPI can only be authorized for temporary withdrawals. Foster v. Dep't of Ecology, 184 Wn.2d 465; 362 P.3d 959 (2015).
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. However, most of the minimum flows in Oregon have been converted to in-stream water rights under ORS 537.346, and can thereafter not be amended as before.

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 creation of an in-stream flow by changing an existing diversionary right may be protected under 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.

D. Alternatives Addressing Legal Impediments/Gaps:

i. Voluntary Action

Within each state, volunteer action will not necessarily apply under the in-stream flow enhancement actions because the options would create in-stream flow rights through a legal mechanism that would protects the flows. Protected flows in Oregon that flow into Washington will not be legally protected, but volunteer action by juniors in Washington can protect those rights. However, as stated above, while this could be an efficient and low-cost means of protecting flows, it does not have any certainty and requires full participation, and therefore is not an effective solution.

ii. Legislation

Legislation may provide better certainty that in-stream flows established in rules will have greater permanency with a high standard to amend the flows. In addition, the exceptions to the established flows should be revisited, especially in Oregon.

Pro/Con: As stated above, legislation provides greater certainty and protection. However, it is difficult to obtain consensus on such legislation.

E. Recommended Alternative:

The only realistic alternative to protect flows under this enhancement action is through legislation as described above. Legislation is recommended to protect restored flows, resulting from changing a water right in Oregon to in-stream flow, into and through Washington. See recommendation in Enhancement Action No. 1.
Enhancement Action 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 (see Section V.C.).

B. Existing Authority:

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

i. Option 1: Agreements not to Divert/ Non Use Agreements

The Walla Walla Watershed Management Partnership Water Bank offers an opportunity 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 is most likely on a temporary basis, with the terms agreed upon by the water right holder and the Partnership. The banked water right on a temporary basis remains in the name of the water right holder. The water right may also be placed in the Washington State Trust Water Rights Program as a temporary trust.

ii. Option 2: 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

C. Legal Impediments/Gaps in the Law:

i. Option 1

The law does not protect these water rights downstream unless the rights are in the bank or the trust program, and 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 Partnership 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). Under the RCW 90.92, Ecology appears to be given independent authority to conduct an extent and validity analysis without a formal application process to change the water right under RCW 90.03.380. However, Ecology is not necessarily in agreement and will require the water right to apply to change the purpose of the water right to in-stream flows.

   ii. Option 2

The gaps in the law regarding the enforceability of protecting flows are also difficult to resolve because these agreements to use groundwater supplemental to a water right only bind the parties to the agreement, and they are voluntary.

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 under the Partnership in Washington cannot cause impairment to other water rights and therefore the surface flows will not be protected.

D. Alternatives Addressing Legal Impediments/Gaps-Pros/Cons:

   i. Option 1

   a. Voluntary Action

As stated above, the protection of these restored flows can occur if the junior water rights agreed to voluntarily not divert water. However, without some incentive, a volunteer program must require full participation, and without some incentive, can not be relied upon. Further, there must be protection for the junior water right holders from relinquishment if they do not divert when they legally could have. See pro and cons above in Enhancement Action No. 1.

   b. Legal

Legislation can assist in protecting the restored flows by streamlining the extent and validity of the beneficial use of the water right. For example, clarifying that water rights placed in the Walla Walla Bank can be confirmed independent of the formal change process under RCW 90.03.380. Thought should be given to allowing the persons authorized under the recently-created certified water right examiner program to conduct the analysis. There still must be a process to allow for appeals. As stated above, legislation provides the best certainty for protection of the restored flows and the existing water rights; yet, legislation can take a long
time and contentious. See pros and cons for legislation in Enhancement Action No.1.

ii. Option 2

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, there is the issue of enlargement of the water right. This is a gap in the protection law can be solved through changes to the statutes. However, addressing this gap will not provide an opportunity to the use of the groundwater from a different source that would otherwise impair any existing water rights in the groundwater source and the surface water hydrogeologically connected.

E. Recommended Alternative:

Legislation is again the recommended alternative to address the gaps in the law to protect restored flows. However, legislation cannot fix the legal impediment that these activities can not impair existing water rights. In Washington, legislation could confirm Ecology’s authority to determine the extent and validity of a water right in the Walla Walla Bank without having to process it through a formal change application process or transfer it to the Trust Water Rights Program. In Oregon, legislation could authorize a water right holder to agree to change to groundwater and not have enlarged the water right by applying to have the surface water right used for restored flows, which would still be subject to the no impairment analysis.
Enhancement Action 6:  Ground water return flows/retiming from targeted shallow aquifer recharge and floodplain habitat restoration.

A.  Action Description:

This enhancement action includes projects that develop flow patterns and enhance flows during critical times of the year. These projects may include diversion of high stream flows into recharge basins, development of riparian areas, and reestablishment of flood plains along streams. These function in a manner that delay the flow of water into the streams for the benefit of flows in otherwise critical flow periods. These would not be water right exchanges and would not rely on transfers of existing water rights. The primary question is whether these developed flows can be protected in-stream from diversion by water right holders. 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.

B.  Existing Authority:

This action is not per se authorized as an activity to enhance or restore flows. While there is authority to permit the riparian habitat improvements reestablishing flood plains, the authorization does not include the permitting of water use or changes to water rights.

C.  Legal Impediments/Gaps in the Law:

Other than ASR and SAR discussed above, there is no specific legal authority that protects enhanced flows during a period of the year that results from upstream riparian enhancement and flood plain projects.

D.  Alternatives Addressing Legal Impediments/Gaps-Pros/Cons:

i.  Voluntary Action

As stated above, volunteer action can address the legal gap of protecting the restored flows.

Pro/Con:  The pro is that it is efficient and comes with little cost to implement. However, the con is that it is difficult to monitor and enforce and to be effective all junior water right holders must participate.

ii.  Legislation

Legislation may be an alternative to create legal protection for these restored flows.
Pro/Con: Legislation can clearly define the projects and provide certainty for protection of the developed flows. The con is that the same issues may arise as in the implementation with SAR, including the complexity of determining the actual quantity, the location, and the timing of the developed water.

E. Recommended Alternative:

To pursue this action, a volunteer program may be more realistic, despite the shortcomings of relying on volunteers. To provide some level of certainty, a volunteer program can be developed that first establishes an acceptable model that can show with specificity the amount, location, and timing of the restored flows, and requesting the water right holders to execute an agreement not to divert.

V. A RECOMMENDED ENHANCEMENT ACTION AND ALTERNATIVE

A. General Discussion:

In both Washington and Oregon, there are legal impediments and gaps in the law for full protection of restored flows resulting from each of the six enhancement actions. There are also alternatives to address these legal gaps and protect flows within each state. In addition to the legal gaps, a few of the enhancement actions have other limitations, such as meeting water quality standards and resolving complex hydrogeological issues—mostly for the purpose of protecting other water rights.

Based on these limitations, the recommended approach for most efficiently providing restored flows is to have a valid diversionary water right and change it to in-stream flow. Enhancement Action Nos. 1 through 4 provide to some degree these opportunities. These enhancement actions provide the greatest certainty for protection of the restored flows and in turn the protection of other existing water rights. The technical challenges are not as complex as the other enhancement actions, and the alternatives to address legal impediments and gaps are more easily achievable.

Enhancement actions also provide the best opportunity to protect the restored flows across boundary from 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.

B. Implementing the Enhancement Actions:

i. 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.

ii. General Criteria

• The water right must be derived from an existing Oregon diversionary surface 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.

iii. 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.9

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,

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9 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.
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:

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.

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10 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.”

11 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.
iv. 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 interlocal agreements below.

v. 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 “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.

C. 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.