Walla Walla Water 2050 Plan Legislative Report

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By

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For the

Water Resources Program

Washington State Department of Ecology

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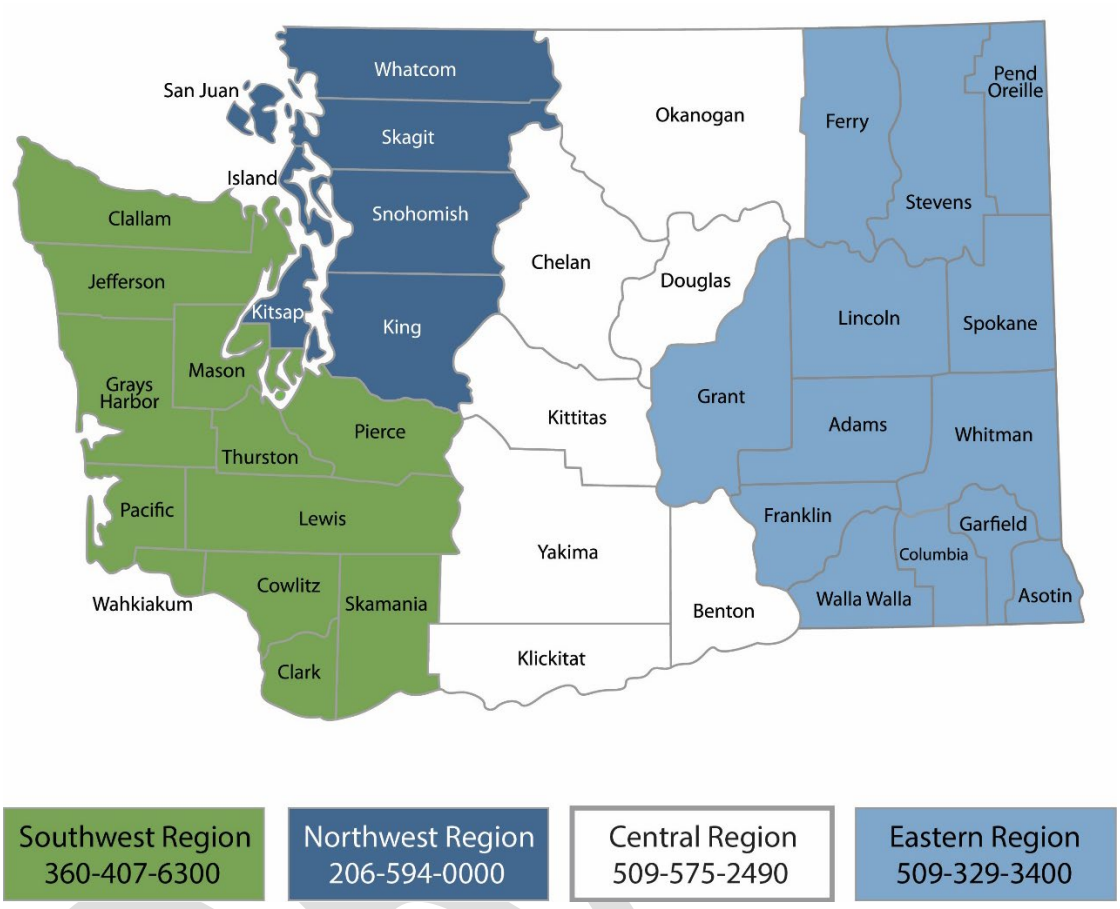
Map of Counties Served



Region	Counties served	Mailing Address	Phone
Southwest	Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Mason, Lewis, Pacific, Pierce, Skamania, Thurston, Wahkiakum	PO Box 47775 Olympia, WA 98504	360-407-6300
Northwest	Island, King, Kitsap, San Juan, Skagit, Snohomish, Whatcom	PO Box 330316 Shoreline, WA 98133	206-594-0000
Central	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
Eastern	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	4601 N Monroe Spokane, WA 99205	509-329-3400
Headquarters	Across Washington	PO Box 46700 Olympia, WA 98504	360-407-6000

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Legislative Report

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DEPARTMENT OF
ECOLOGY
State of Washington

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Walla Walla Water 2050 Plan Legislative Report

Introduction/Background

The Walla Walla River basin occupies about 1,750 square miles in northeastern Oregon and southeastern Washington. The Walla Walla River starts in foothills of Oregon's Blue Mountains flowing north to the Oregon-Washington border and then west to the Columbia River.

Prior to Euroamerican settlement, the Walla Walla basin supported vibrant populations of salmon, steelhead, and other anadromous and resident fishes. These species were a cornerstone of tribal culture, subsistence, and commerce for the Umatilla, Cayuse, and Walla Walla Tribes, as well as many others indigenous groups along the Columbia River.

As agricultural development increased in the mid-1800s, farmers increasingly cultivated land and diverted water from the Walla Walla River for irrigation. Ultimately, the degradation of the Walla Walla River contributed to the extirpation of salmon from the basin in the early 1900's.

By the 1990s, continuing declines in populations of summer steelhead and bull trout prompted listings under the Endangered Species Act (ESA) and created additional legal obligations for basin irrigators to restore depleted summer stream flows. In 2000, these listings compelled two irrigation districts in Oregon and one in Washington to enter into a settlement agreement with the US Fish & Wildlife Service to avoid the "take" of listed species.

Under the settlement agreement, the irrigation districts bypassed water to maintain minimum instream flows in the Walla Walla River throughout the summer. However, there was no legal mechanism to protect the bypassed water from being legally diverted in Washington. Thus, the flows left instream from Oregon irrigators benefited the upper basin to Oregon but did not translate to benefits in the lower river basin in Washington.

The Department of Ecology (Ecology) adopted a formal closure to the issuance of new water rights in the Walla Walla Basin in 2007. The Washington Legislature then adopted chapter 90.92 RCW in 2009, which authorized a pilot management structure for ten years. The law created a local water management board, formally known as the Walla Walla Watershed Management Partnership (Partnership), to use unique tools to provide water management flexibility.

In 2019, when it was clear that stream flow improvements had not manifested, the Legislature passed Second Substitute Senate Bill 5352 (2SSB 5352). In the law, the Legislature extended the Partnership authority two years, and directed the Partnership and Ecology to develop a thirty-year integrated strategic plan for water resource management in the Walla Walla Basin.

After completion of the Walla Walla Water 2050 Plan, the Legislature passed Second Substitute House Bill 1322 (2SHB 1322) in 2023. This bill, among other things, provided authorities necessary for the successful implementation of the Walla Walla Water 2050 Plan. The bill also

directed Ecology to submit a report to the relevant committees of the legislature by June 30, 2025, with a recommendation for the bistate legal regulatory framework necessary for equitable allocation and management of developed water[2] resources from water supply projects envisioned in the Walla Walla Water 2050 plan.[3]

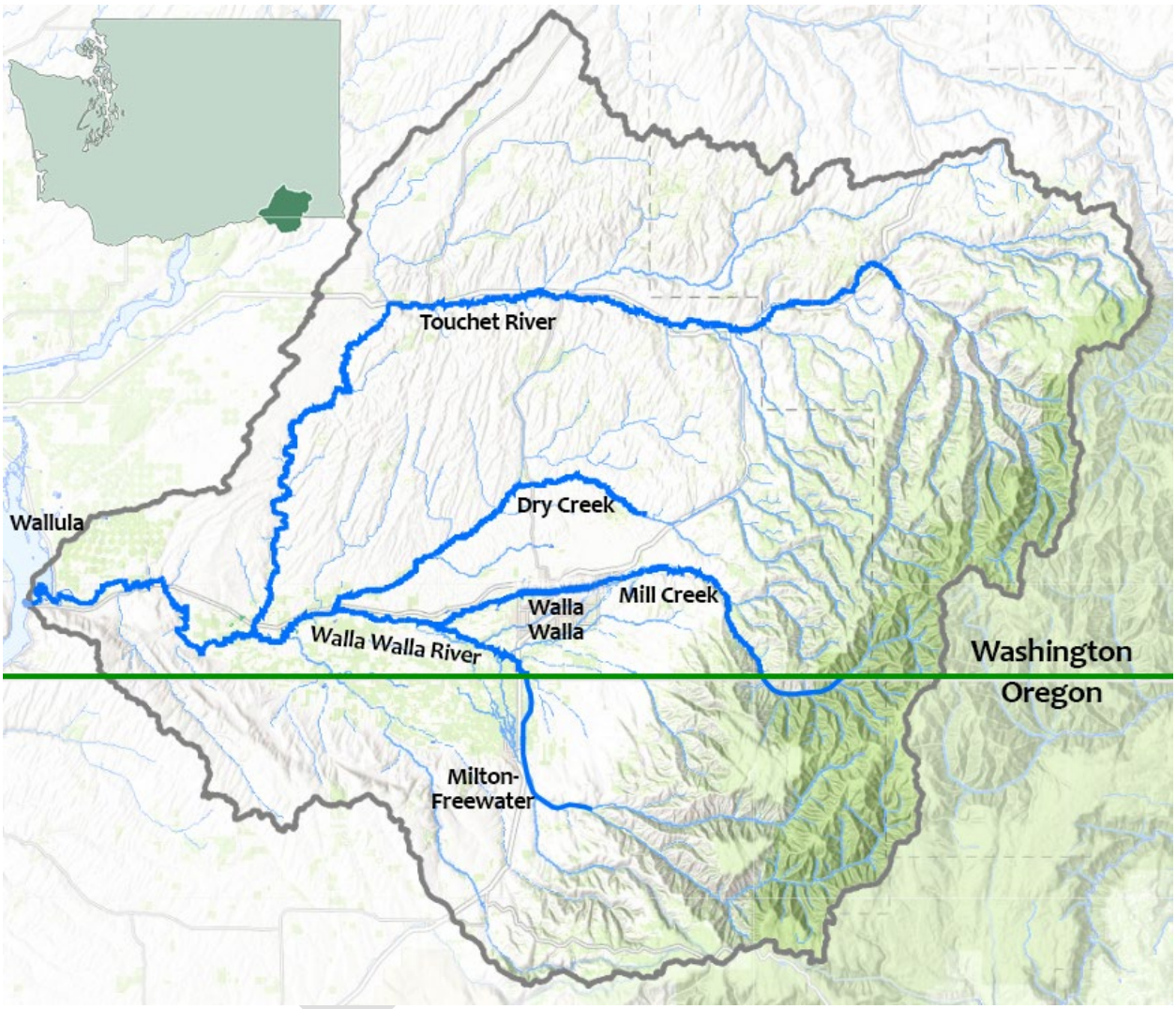

Figure 1: Map of the Walla Walla River watershed. [Placeholder to be updated in final draft]

In 2024, the Oregon Legislature passed Senate Bill 1567, a companion bill to Washington's 2SHB 1322. This bill contains similar requirements and authorizations, including the same provision requiring the Oregon Water Resources Department (OWRD) to submit a report to the relevant committees of the Oregon Legislature with recommendations for a bistate legal regulatory framework.

[2] "Any increase in the quantity of water supply due to a project being implemented under the Walla Walla Water 2050 plan that is completed after July 23, 2023." (RCW 90.90.120(3))
[3] RCW 90.90.120(6)

Process for developing this report

Ecology developed this report in collaboration with OWRD and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) to meet the legislative directives outlined in 2SHB 1322. A core writing group met monthly to review drafts and provide updates to the coordinating committee. The core writing group then met with the Walla Walla Basin Advisory Committee (BAC), a group comprised of representatives from local governments, agriculture interest groups, and environmental groups, on a quarterly basis to receive input and to provide progress updates. This report represents the collective agreement from the three sovereign governments overseeing water resource management in the Walla Walla Basin, with input from local stakeholders reflecting community goals.

Need for coordinated management of the Walla Walla River

Walla Walla Water 2050 Strategic Plan

The Walla Walla Water 2050 Strategic Plan (WW 2050 Plan) is a comprehensive 30-year guide to regional water resource decisions. The WW 2050 Plan was created to, "identify and prioritize key strategies to balance and harmonize the basin's threatened ecosystem health with the continued growth and prosperity of its human inhabitants." Ecology completed the WW 2050 Plan in 2021 in collaboration with the State of Oregon, CTUIR, and local stakeholders collectively participating as the BAC.

The WW 2050 Plan consists of five major focus areas.

1) Improve the quality of both the water and the floodplains that support critical species and their habitats.
2) Attain in-stream, out-of-stream, and groundwater flows to support regional growth in agriculture, urban life, and industry, while restoring stable water levels for critical species.
3) Achieve a thriving watershed through restorative land use practices. These include effective floodplain and stormwater quality management for establishing long-lasting climate resilience in the basin.
4) Sustain and improve the economy and the quality of life in the Walla Walla Valley by supporting clean and reliable water supply, community health, and opportunities for outdoor recreation and tourism in the region.
5) Support advancements in monitoring and metering to establish better water resource and adaptive management.

The WW 2050 Plan also recommends the development of a new governance structure for the cooperative management of the basin. A collaborative effort among Washington, Oregon, and the CTUIR, this new governance structure will work to implement the goals outlined in the WW 2050 Plan.

Potential Projects

Projects have been proposed that could increase water supply in the Walla Walla River during low flow periods, primarily summer and fall. Some examples include:

- Projects that reduce surface water diversions from the Walla Walla River and tributaries during critical flow periods by modifying how diversions or withdrawals occur.
- Increase storage of water either above or below ground to "re-time" higher winter flows for release during low flow periods.
- Enact water conservation measures, including in residential, commercial, and agricultural settings, to reduce impacts to the Walla Walla River and tributaries.
- Improve floodplain function resulting in increased alluvial water storage from high winter flows that improve summer flow conditions.

The projects and actions identified in the WW 2050 Plan may be implemented in either state, and coordinating the management of the developed water between Oregon and Washington is essential for successful implementation of the plan. Coordination will require additional monitoring and communication about active regulation of existing water users. Without effective coordination, developed water supplies may not benefit the intended target for projects and actions. Effective coordination requires a formalization of management strategies and expectations. Options for formalizing the agreements between Oregon and Washington are detailed in the next section.

Developed water

RCW 90.90.120(3) defines developed water as, "any increase in the quantity of water supply due to a project being implemented under the Walla Walla Water 2050 plan that is completed after July 23, 2023." Potential projects that create an increase in water supply during one part of the year, such as a project that improves low flow conditions, must include specific, quantifiable impacts in order for the developed water to be effectively managed.

Some projects, such as managed aquifer recharge or floodplain restoration, may increase water supply during low flow conditions, but those impacts may not be effectively quantified. In these cases, the benefits achieved through the project implementation cannot be specifically managed through the regulatory framework that exists in Washington and Oregon. However, these projects may still be beneficial for the overall intent and goals of the WW 2050 Plan, providing more general improvement to water availability in the basin.

Evaluation of options for coordinated management

The following represents the potential approaches to establish the bistate legal regulatory framework necessary for equitable allocation and management of developed water resources from the build out of water supply projects envisioned in the WW 2050 Plan.

Management framework	Description
Memorandum of agreement/memorandum of understanding	Development of a formal agreement to memorialize shared goals and purpose and to document responsibilities for each state.
Bi-state legislation	Mutual passage of identical or coordinated legislation by both the Oregon and Washington legislatures to define individual states' roles and responsibilities in statute.
Federal interstate compact	Ratification of a formal interstate compact agreement by the legislatures of Oregon and Washington legislatures *and* U.S. Congress.
Non-federal interstate compact	Ratification of a formal interstate compact agreement by the legislatures of both Oregon and Washington.

Memorandum of Agreement/Memorandum of Understanding

The simplest collective management approach between Washington and Oregon would be the development of a Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU). While often used interchangeably, MOAs and MOUs serve different functions: MOAs are generally used to formally document the conditions of an agreement that may be preliminary to a contract, whereas MOUs are typically a non-binding statement of intent. Both types of documents may be binding or non-binding, depending on the content of the document. However, as an agreement between states, jurisdiction for any dispute would fall to the U.S. Supreme Court, which may limit the enforceability of the document.

In the context of management in the Walla Walla basin, use of an MOU would imply that the parties do not intend to form a legally enforceable contract, which could be useful if the parties eventually choose to enter a compact with one another. As conditions and water availability change in the basin, an MOU would additionally allow greater flexibility as Washington and Oregon respond to these circumstances. However, this would not provide any legal enforceability, leaving the agreement vulnerable to change under evolving political circumstances.

An MOA would imply further agreement between parties compared to an MOU. An MOA could be structured as a contract, similarly to what exists currently between Washington and Oregon with joint transportation agreements. However, without a formal compact, it may prove difficult for one state to sue another state for breach of contract should disagreements or

conflicts arise in the future. Matters of this nature would be referred to the Supreme Court, but the Court may decline to exercise jurisdiction to interpret and enforce provisions of an MOA.

Pros	Cons
• Agreement is useful as an initial strategy if parties eventually intend to enter into a compact. • Flexible nature of the agreement enables adaptation to future changes of conditions in the watershed.	• Agreement is voluntary due to lack of legal enforceability. • Supreme Court is under no obligation to exercise jurisdiction if one party chooses to sue the other.

Unified/Mirrored Bi-State Legislation

Washington and Oregon could manage the Walla Walla basin jointly by adopting identical (or nearly identical) legislation that provides a mechanism for bi-state cooperative water management. This approach would need to recognize differences in existing authorities for water management in each state but would not rely on federal approval.

Examples of this approach being used in other states include NRS 532.172, a law in Nevada that allows for the state to enter into agreements with other states on matters involving shared groundwater basins. Per NRS 532.172, "Agreements concerning cooperative management of groundwater basins shared between states. The State Engineer, after a public hearing on the issue and with the approval of the Director of the State Department of Conservation and Natural Resources, for and on behalf of the State of Nevada, is authorized to enter into agreements with neighboring states or their political subdivisions concerning cooperative management of groundwater basins shared between the states." While the law was approved in 1991, it has never been used as the basis for regulation.

Legislation of this nature shares many similarities with non-federally approved interstate compacts; therefore, it shares similar gaps in legal enforceability through federal courts if interstate conflict would arise.

Pros	Cons
• Legislation enshrines the management structure in statute rather than a voluntary agreement between states.	• It may be challenging to pass identical or nearly identical legislation in both states. • If interstate conflict were to occur, one or both states could repeal or

• Legislation provides management authority without the need for congressional action.	modify their laws without consent of the other state.

Interstate Compact

Historically, interstate disputes involving water allocation have been settled by means of congressionally ratified interstate compacts, which function as both statute and contractual agreement. The legal authority for a state to enter a compact is derived from the Article 1 of the Compact Clause. As an agreement between two states that is recognized by the federal government, compacts remain a highly desirable solution for resolving issues of interstate water allocation. Agreements made under the Compact Clause maintain both significant state and federal regulatory power: states arrange and agree to the terms of the compact and assign an administrative body or interstate agency to enforce its terms, while congressional ratification of the compact codifies the agreement as federal law, making the agreement enforceable in federal court.

However, congressional ratification may take years or even decades to achieve, dramatically delaying implementation of the agreement. As a result, this legal mechanism would be the least expedient to implement. In order to achieve WW 2050 Plan goals more quickly, Washington and Oregon could enact the provisions of the compact into both Washington and Oregon law and begin implementation using individual state authorities while awaiting federal ratification.

Pros	Cons
• An interstate compact establishes a permanent and enforceable legal relationship between the states for managing the watershed. • Federal ratification authorizes the broadest suite of management strategies and tools.	• The process to develop a compact between states generally takes years or decades. • Congressional ratification may take years or decades to achieve.

Interstate Compact without Federal Approval

Although most interstate compacts require congressional ratification, the Supreme Court of the United States argues that congressional ratification is only required if the compact risks undermining the power of the federal government. If the agreement between the states *does not* undermine the power of the federal government, then there is no need for involvement from the federal government. This argument was first made in the 1893 Supreme Court decision of *Virginia v. Tennessee*, and later upheld in the decision of *U.S. Steel Corp. v.*

Multistate Tax Commission (1978). In instances where congressional consent is not needed, state courts will interpret the compact using prior rulings on contracts and statutes.

A compact that does not receive congressional ratification accelerates implementation of the agreement; however, the lack of federal enforceability leaves it up to the states themselves to be guarantors of its implementation. Implementation would rely on each state's ability and success in developing legal enforcement mechanisms. In essence, this approach would provide the same likelihood for long term success as bi-state legislation, discussed above.

Pros	Cons
• Establishes a legal relationship between the states. • Creates uniform and formal guidelines, procedures, and practices. • Does not require the states to wait for Congressional approval before implementation.	• The process to develop a compact between states generally takes years or decades. • This is a new and untested approach to enacting an interstate compact for water apportionment compact. • Without federal approval, the scope of management strategies and tools that the states can unilaterally approve is limited to those that can be authorized through state legislation.

Recommendations

Based on our analysis and feedback from our partners in the Walla Walla watershed, Ecology believes that current statutory authority is sufficient to proceed with implementation of new water supply projects in the basin. Therefore, additional statutory authority or federal approval is not needed at this time to implement developed water projects in the near and medium term.

Instead, Ecology and its partners OWRD and CTUIR intend to develop a memorandum of agreement to memorialize the roles, responsibilities, and shared goals of the member parties for managing developed water. Our analysis indicates that this agreement, coupled with recent legislation in both Washington and Oregon, will be sufficient to manage developed water projects in the near and medium term.

Over the long term, Ecology and its partners may identify new and unforeseen water management challenges from specific developed water projects. Importantly, as more funding is committed to larger-scale projects, the reliance on voluntary agreements may not provide the long-term assurances needed.

Additional interstate management authority may also be needed to achieve Walla Walla 2050 Plan goals outside of the scope of water supply projects developed under RCW 90.90.120. Examples of this include transboundary groundwater management and use of the state trust water rights program. Therefore, Washington should take an adaptive approach to developing an interstate agreement such that current work on an MOA supports the development of mutual legislation or a compact (federal or non-federal) should the need arise over the lifespan of the WW 2050 Plan.

To support this goal, we recommend that the Legislature revisit the issue again and require an updated report on implementation of the WW 2050 Plan by Ecology in ten years. This timeline will allow for Ecology and its partners to implement the first series of developed water project and gather critical feedback on future priorities under the WW 2050 Plan to determine if additional authority is needed.

Appendix A. Text of WA 2SHB 1322

SECOND SUBSTITUTE HOUSE BILL 1322
Passed Legislature - 2023 Regular Session
State of Washington 68th Legislature 2023 Regular Session
By House Capital Budget (originally sponsored by Representatives Rude, Chapman, Klicker, Lekanoff, and Reeves; by request of Department of Ecology)

AN ACT Relating to the Walla Walla water 2050 plan; amending RCW 90.90.020; and adding a new section to chapter 90.90 RCW.

Sec. 1. RCW 90.90.020 and 2011 c 83 s 4 are each amended to read as follows:

(1)(a) Water supplies secured through the development of new storage facilities made possible with funding from the Columbia river basin water supply development account, the Columbia river basin taxable bond water supply development account, and the Columbia river basin water supply revenue recovery account shall be allocated as follows:

(i) Two-thirds of active storage shall be available for appropriation for out-of-stream uses; and

(ii) One-third of active storage shall be available to augment instream flows and shall be managed by the department of ecology. The timing of releases of this water shall be determined by the department of ecology, in cooperation with the department of fish and wildlife and fisheries comanagers, to maximize benefits to salmon and steelhead populations.

(b) Water available for appropriation under (a)(i) of this subsection but not yet appropriated shall be temporarily available to augment instream flows to the extent that it does not impair existing water rights.

(2) Water developed under the provisions of this section to offset out-of-stream uses and for instream flows is deemed adequate mitigation for the issuance of new water rights provided for in subsection (1)(a) of this section and satisfies all consultation requirements under state law related to the issuance of new water rights.

(3) The department of ecology shall focus its efforts to develop water supplies for the Columbia river basin on the following needs:

(a) Alternatives to groundwater for agricultural users in the Odessa subarea aquifer;

(b) Sources of water supply for pending water right applications;

(c) A new uninterruptible supply of water for the holders of interruptible water rights on the Columbia river mainstem that are subject to instream flows or other mitigation conditions to protect streamflows; and

(d) New municipal, domestic, industrial, and irrigation water needs within the Columbia river basin.

(4) The one-third/two-thirds allocation of water resources between instream and out-of-stream uses established in this section does not apply to ((~~applications~~)):

(a) Applications for changes or transfers of existing water rights in the Columbia river basin; or

(b) Applications for water rights in the Walla Walla river basin implementing the Walla Walla water 2050 plan adopted June 30, 2021.

NEW SECTION. Sec. 2. A new section is added to chapter 90.90 RCW to read as follows:

(1) The Walla Walla water 2050 plan must be used as an integrated water resource strategy, through a coordinated effort between the states of Washington and Oregon, affected federally recognized tribes, affected federal, state, and local agencies, and agricultural, environmental, business, and other community stakeholders.

(2) In developing water supply solutions in the Walla Walla river basin, the department of ecology should employ an integrated water resource management strategy that will provide concurrent water supply benefits to both instream and out-of-stream uses and address a variety of water resource and ecosystem challenges affecting fish passage, habitat functions, and agricultural, municipal, industrial, and domestic water supply, consistent with the Walla Walla water 2050 plan.

(3) The department of ecology shall consider any increase in the quantity of water supply due to a project being implemented under the Walla Walla water 2050 plan that is completed after the effective date of this section to be water supply developed under this section.

(4) In implementing subsection (2) of this section, the department of ecology will be advised by the Walla Walla basin advisory committee, including representatives from a broad range of interests, including agricultural, environmental, and other stakeholders, and tribal, local, state, and federal governments.

(5) In consultation with affected federally recognized tribes, the department of ecology shall evaluate the development of a bistate legal regulatory framework for allocation of developed water resources, in collaboration with the state of Oregon.

(6) The department of ecology shall submit a report to the relevant committees of the legislature by June 30, 2025, with a recommendation for the bistate legal regulatory framework necessary for equitable allocation and management of developed water resources from the build out of water supply projects envisioned in the Walla Walla water 2050 plan.

(7) Subject to the availability of amounts appropriated for this specific purpose, the department of ecology is authorized to fund the development, construction, and implementation of projects to implement the Walla Walla water 2050 plan that may be located outside of the state, provided that the projects benefit instream and out-of-stream water demands in the state.

(8) Water supplies developed under this section must be apportioned between the states consistent with any written agreements entered into with the state of Oregon and the confederated tribes of the Umatilla Indian reservation related to the management of water in the Walla Walla river basin.

(9) The department of ecology has the authority to designate water supplies developed under this section for instream flow purposes and placed into the trust water rights program authorized under chapter 90.42 RCW. Water supplies developed under this section that are designated for instream flow purposes are unavailable to satisfy existing water rights, including water rights with superior priority, and are exempt from provisions under RCW 90.42.070.

(10) Water supplies developed under this section must be managed consistent with the intent of the specific project being implemented.

(11) It is the intent of the legislature for the state to share in the cost to implement the Walla Walla water 2050 plan authorized under this section, subject to the availability of amounts appropriated for this specific purpose, with at least one-half of the total costs to finance the implementation of the Walla Walla water 2050 plan funded through federal, private, and other nonstate sources, including private funding sources from entities that benefit from projects. This section applies to the total costs of the Walla Walla water 2050 plan and not to individual projects within the plan and includes funding for projects that have been completed prior to the effective date of this section.

(12) Nothing in this section prevents the department of ecology from regulating water users consistent with existing adjudications to ensure that water use by holders of adjudicated

surface water right certificates are not impaired by use under junior groundwater right certificates, claims, and permits.

Appendix B. Text of OR SB 1567

Senate Bill 1567
Sponsored by Senators HANSELL, MANNING JR, Representatives LEVY B, HELM, SMITH G; Senators FINDLEY, PATTERSON, WAGNER, Representatives ANDERSEN, CONRAD, GAMBA, HARTMAN, HOLVEY, MCINTIRE, NERON, OWENS, WRIGHT

AN ACT Relating to the Walla Walla River Basin.

Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) Consistent with all other Oregon laws, the Water Resources Department shall collaborate with the Confederated Tribes of the Umatilla Indian Reservation and the State of Washington to implement and guide cooperative, bistate water management in the Walla Walla River Basin pursuant to the Walla Walla Water 2050 Strategic Plan, under advice from a Walla Walla River Basin advisory committee consisting of representatives from a broad range of interests, including agricultural, environmental and other stakeholders and federal, tribal, state and local governments.

(2) It is the intent of the Legislative Assembly that:

(a) The State of Oregon shall share in the cost of implementing the Walla Walla Wate 2050 Strategic Plan, subject to the availability of moneys appropriated for this purpose; and

(b) At least one-half of the total costs of implementing the Walla Walla Water 2050 Strategic Plan will be funded through federal, private and other nonstate sources, including funding from private entities that benefit from projects under the Walla Walla Water 2050 Strategic Plan.

(3) The department shall implement the Walla Walla Water 2050 Strategic Plan as an integrated water resources approach that invites coordination among the State of Oregon and the State of Washington, affected federally recognized Indian tribes, agencies and community stakeholders, including stakeholders concerned with agriculture, the environment and business.

(4) In developing water supply solutions in the Walla Walla River Basin, the department shall use an integrated water resources management approach, consistent with the policy described in ORS 536.220 and other Oregon laws, that provides concurrent water supply benefits to in-stream, out-of-stream and ground water uses and addresses a variety of water resource and ecosystem challenges affecting fish passage, habitat functions and agricultural,

municipal, industrial and domestic water supply, consistent with the Walla Walla Water 2050 Strategic Plan.

(5) In consultation with affected federally recognized Indian tribes, and in cooperation with the State of Washington, the department shall assess the development of a legal and regulatory framework, coordinated between the State of Oregon and the State of Washington, for the allocation, distribution and management of developed water resources. Enrolled Senate Bill 1567 (SB 1567-INTRO) Page 1

(6) In undertaking programs or using moneys appropriated by the Legislative Assembly, agencies, as defined in ORS 183.310, may, consistent with all other Oregon laws concerning the programs or use of the moneys, fund the study, design, engineering and construction of projects implementing the Walla Walla Water 2050 Strategic Plan that are located wholly or partially in the State of Washington if the projects:

(a) Benefit in-stream, out-of-stream or ground water demands in this state; and

(b) Are consistent with the objectives of the Walla Walla Water 2050 Strategic Plan.

SECTION 2. (1) On or before June 30, 2026, the Water Resources Department shall submit a report, in the manner prescribed in ORS 192.245, to a committee or interim committee of the Legislative Assembly related to water that contains recommendations for a legal and regulatory framework to promote equitable allocation, distribution and management of developed water resources and water supplies resulting from projects undertaken under the Walla Walla Water 2050 Strategic Plan.

(2) In coordination with the Confederated Tribes of the Umatilla Indian Reservation and the State of Washington, the department shall report to the Walla Walla River Basin advisory committee described in section 1 (1) of this 2024 Act on the development of a legal and regulatory framework described in subsection (1) of this section:

(a) Three times in 2025; and

(b) Three times in 2026 before the date specified in subsection (1) of this section.