Walla Walla Water 2050 Plan Legislative Report

Implementing RCW 90.90.120

By

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For the

Water Resources Program

Washington State Department of Ecology

Olympia, Washington

July 2025, Publication 25-11-001

DEPARTMENT OF ECOLOGY
State of Washington

Publication Information

This document is available on the Department of Ecology's website at:
https://apps.ecology.wa.gov/publications/summarypages/2511001.html

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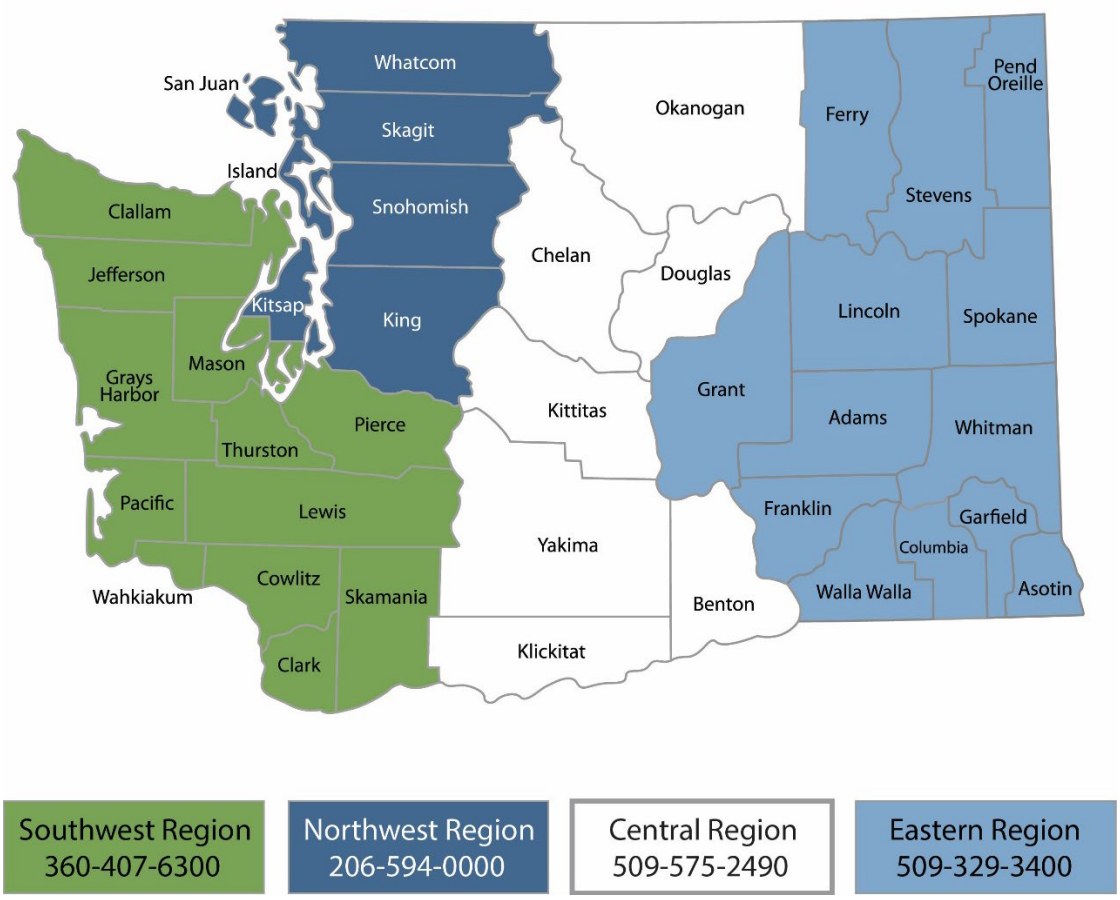

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Central	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
Eastern	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	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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Executive Summary

The Walla Walla River basin experiences water supply shortages due to historical over-appropriation of water resources in the region. Water supply has been insufficient to meet instream and out-of-stream needs, impacting native salmonid populations and out-of-stream uses.

The watershed straddles the border between Washington and Oregon overlaying two different state water rights management regimes. This structure makes it difficult to manage water supplies for both instream and out-of-stream use.

To address these issues, the Washington Legislature enacted RCW 90.90.120 in 2023. This legislation authorized Ecology to develop new water supply projects throughout the watershed and to manage project water supplies consistent with project purposes. The legislation also directed Ecology to study potential bistate management strategies for developed water projects and to recommend the best strategy for use in the Walla Walla River basin.

Ecology has identified four potential strategies for interstate water resource management:

- **Memorandum of Agreement:** Development of a formal agreement to memorialize shared goals and purpose and to document responsibilities for each state.
- **Mutual Legislation:** Mutual passage of identical or coordinated legislation by both the Oregon and Washington legislatures to define individual state roles and responsibilities in statute.
- **Interstate compact:** Ratification of a formal interstate compact agreement by both Oregon and Washington legislatures *and* U.S. Congress.
- **Interstate compact without federal ratification:** Ratification of a formal interstate compact agreement by the legislatures of both Oregon and Washington.

Based on our analysis, there is no indication that Washington needs additional state or federal authority through legislation or compacting to implement developed water projects in the basin. As a result, our recommendation is that developed water projects be implemented under a memorandum of agreement between Washington and Oregon. We also recommend that the Legislature direct Ecology to revisit and report on management needs in ten years to determine if emergent water resource issues in the basin warrant developing additional strategies.

Ecology has developed this report in partnership with Oregon Department of Water Resources and the Confederated Tribes of the Umatilla Indian Reservation. It reflects the consensus recommendations of these three governmental entities with input from the Walla Walla Basin Advisory Committee.

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 the foothills of Oregon's Blue Mountains, flowing north to the Oregon-Washington border and then west to the Columbia River (Figure 1).

The Walla Walla basin once supported robust 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, and other Tribes along the Columbia River.

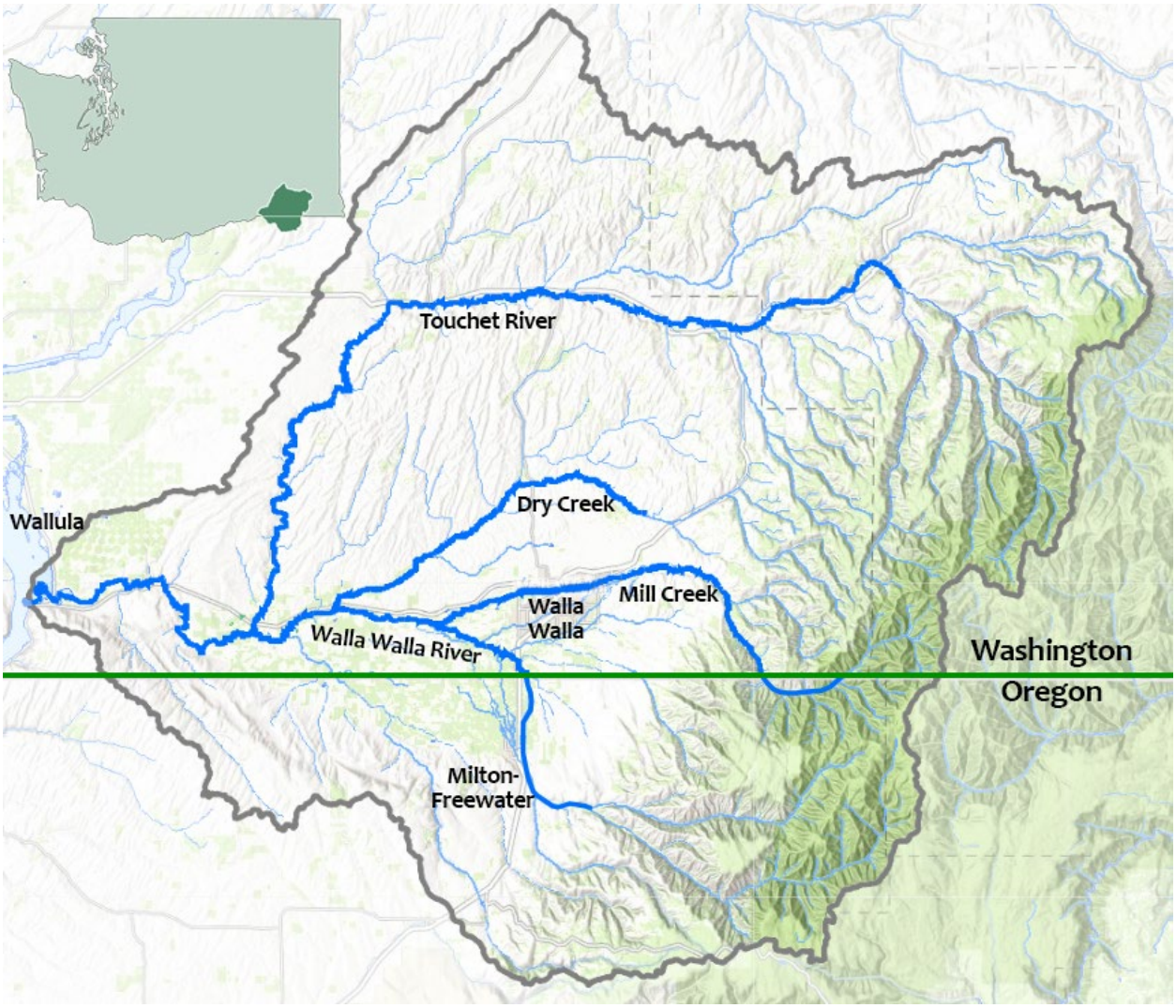

Figure 1: Map of the Walla Walla River watershed

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

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 penalties for ESA violations.

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 in Oregon but did not translate to benefits in the lower river basin in Washington.

Ecology adopted a formal closure to issuing 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 flows had not improved, the Legislature amended chapter 90.92 RCW to extend Partnership authority for two years.[2] During this period, the legislation directed the Partnership and Ecology to develop a thirty-year integrated strategic plan for managing water resources in the Walla Walla Basin.

After completion of the Walla Walla Water 2050 Plan, the Legislature enacted RCW 90.90.120 in 2023. The new law, 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. The report must include a recommendation for the bistate legal regulatory framework needed for equitable allocation and management of developed water resources from water supply projects in the Walla Walla Water 2050 plan [3].

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] Chapter 78, laws of 2019.
[3] "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))

Process for developing this report

Ecology developed this report in collaboration with OWRD and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) as directed in RCW 90.90.120. 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 OWRD, CTUIR, and local stakeholders collectively participating as the BAC.

The WW 2050 Plan consists of five major focus areas.

- Improve the quality of both the water and the floodplains that support critical species and their habitats.
- Improve instream, out-of-stream, and groundwater flows to support regional growth in agriculture, urban life, and industry, while restoring stable water levels for critical species.
- 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.
- 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.
- 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 cooperatively managing water resources in 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

Proposed projects 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. Management of developed water between Oregon and Washington is essential for successfully implementing the plan. Effective integrated water resource management across the entire basin will require additional monitoring and communication about active regulation of existing water users. Developed water supplies may not benefit the intended target for projects and actions without effective coordination, which requires a formalization of planned actions, 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 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 table below represents the potential approaches to establish the bistate 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.

Table 1. Coordinated Management Options

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.

Ecology evaluated each option under the explicit lens of what is needed to manage developed water projects, as directed under RCW 90.90.120. Additional interstate management authority may also be needed to achieve WW 2050 Plan goals outside of the scope of water supply projects. Examples of this include transboundary groundwater management and use of the state trust water rights program. Those specific needs are not addressed in our analysis.

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. Disputes could be referred to the U.S. Supreme Court, but the Court is unlikely to exercise jurisdiction to interpret and enforce provisions of an MOA.

Table 2. Pros and Cons of Memorandum of Agreement/Understanding

Pros	Cons
• An agreement is useful as an initial strategy if parties intend to later enter into a compact. • Flexible nature of the agreement enables adaptation to future changes of conditions in the watershed.	• An agreement is voluntary due to lack of legal enforceability. • The U.S. 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 jointly manage the Walla Walla basin by adopting identical (or nearly identical) legislation that provides a mechanism for bi-state cooperative water management. This approach would build on the existing authorities adopted in RCW 90.90.120. Any bi-state legislation 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.

No current water management issues require additional statutory authority since the adoption of RCW 90.90.120. Even if new issues arise that highlight insufficient clarity or authority, federal courts are unlikely to intervene to enforce each state's laws. Both Washington and Oregon would need to independently seek legal redress for disputes. Thus, the lack of federal enforceability on mirrored bi-state legislation is a potential limit to success leaving issues in a potential "legal limbo."

Table 3. Pros and Cons of Mutual Legislation

Pros	Cons
• Legislation adopts the management structure in statute rather than a voluntary agreement between states. • Legislation provides management authority without the need for congressional action.	• 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 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 US Constitution, formally known as 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 management framework would be the least expedient to implement. Washington and Oregon are currently implementing elements of the Walla Walla 2050 Plan, so delaying plan implementation in anticipation of a federally-ratified compact substantially delay any progress toward achieving plan goals. State agency resources would be required to develop, negotiate, and enact an interstate compact, which would divert resources away from implementation of developed water projects.

If barriers to successful implementation of the WW 2050 Plan arise, Washington and Oregon could enact the provisions of the compact into both Washington and Oregon law. The states could then implement the specific provisions using individual state authorities as an interim approach while awaiting federal ratification.

Table 4. Pros and Cons of Federally-Ratified Interstate Compact

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 US Supreme Court has determined 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.

Proceeding with an interstate compact without congressional ratification will accelerate the implementation of the agreement. However, the absence of federal enforceability afforded by congressional ratification means that successful implementation will rely on cooperative state action. In essence, this approach proceeds from the same state-level authority as bi-state legislation, discussed above.

As with an MOA or MOU, contractual disputes between states fall under the jurisdiction of the U.S. Supreme Court. However, the Court is not likely to intervene to resolve a dispute between Washington and Oregon over provisions of a compact that has not been previously ratified by Congress. This could result in ongoing water management challenges or disputes remaining unsettled without a clear pathway for resolution.

A possible approach exists to create an oversight commission to anticipate and resolve conflicts over an interstate compact without federal approval. Washington and Oregon could establish an independent body to review disputes and make rulings on water management decisions. However, the authority of an oversight commission would still rely on each state to independently carry out rulings under its own authority.

Although avoiding congressional ratification would accelerate implementation of the Walla Walla 2050 Plan, significant time and resources would still be required to develop an interstate compact under this option. State agency resources would be required to develop, negotiate,

and enact an interstate compact, which would divert resources away from implementation of developed water projects.

Table 5. Pros and Cons of Non-Federal Interstate Compact

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 allocation 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 and Conclusion

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 implementing 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 formalize 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 WW 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 projects and gather critical feedback on future priorities under the WW 2050 Plan to determine if additional authority is needed.