

MEMORANDUM OF UNDERSTANDING
No. 1425-08MU1U7121
BETWEEN
THE UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
AND THE
STATE OF WASHINGTON DEPARTMENT OF ECOLOGY
FOR WATER MARKETING AND FOR MANAGEMENT OF TRUST WATER RIGHTS
IN THE YAKIMA RIVER BASIN

PARTIES

This Memorandum of Understanding (MOU) is entered into between the State of Washington (State), by and through the Department of Ecology (Ecology), and the United States of America (United States), by and through the Department of the Interior, Bureau of Reclamation (Reclamation).

INTRODUCTION AND HISTORY

In 1945, the Federal District Court for the Eastern District of Washington approved a consent Judgment providing for Reclamation to facilitate diversion of water from the mainstem Yakima and Naches Rivers to enumerated parties from storage, return flows, natural flows and other sources, denominated as the Total Water Supply Available (TWSA), according to parties' status as pro-ratable or non-proratable. All parties to the Consent Decree have water rights of May 10, 1905, or earlier priority. Ecology was not a party to the Consent Decree.

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

In 1994, the United States Congress authorized Phase II of Title XII, Yakima River Basin Water Enhancement Project of 1994, P.L. 103-434 (YRBWEP). Section 1203(i)(2) of YRBWEP reads as follows:

“The Secretary shall, to the maximum extent possible under applicable Federal, State, and tribal law, cooperate with the State of Washington to facilitate water and water right transfers, water banking, dry year options, the sale and leasing of water, and other innovative allocation tools used to maximize the utility of existing Yakima River basin water supplies.”

Similarly, RCW 90.42.100 authorizes Ecology to use the Trust Water Rights Program in the Yakima River Basin for water banking purposes.

Ecology and Reclamation have worked together for more than a decade to jointly identify and fund various water conservation projects and water right acquisitions that advance the goals and objectives of YRBWEP.

The Yakima Basin surface water adjudication, Washington Department of Ecology v. Acquavella, initiated in 1977, is nearing conclusion. The Superior Court has adjudicated thousands of claims to surface water rights in the Yakima Basin and conditionally determined the extent and validity of those rights. Further, the relative priority of surface water rights has also been conditionally determined.

PURPOSE, OBJECTIVE, AND SCOPE

Ecology and Reclamation intend to use their best efforts to work collaboratively and in good faith, to the maximum extent possible under applicable Federal and State law, to meet the clear intent of the U.S. Congress and the Washington State Legislature to facilitate water transfers, water banking, and water marketing in the Yakima River Basin. Ecology and Reclamation will work cooperatively to ensure that such water transfers, water banking, and water marketing activities do not impair or injure any existing water rights or reduce Reclamation's ability to manage, deliver, and protect project water.

This MOU outlines the mutual understanding between Reclamation and Ecology relating to management of Yakima River Basin water rights acquired by Reclamation and/or Ecology under YRBWEP through the State's Trust Water Rights Program (TWP). This voluntary intergovernmental MOU is not a contract. Reclamation's and Ecology's participation in the TWP to facilitate the purposes of YRBWEP is voluntary.

This MOU applies to the Yakima River and its tributaries from Wanawish Dam upstream and outside of the Yakama Reservation, and also applies to these trust water rights in the Columbia River, downstream from the confluence of the Yakima River. Reclamation and Ecology also agree to explore future opportunities to facilitate water transfers, water banking, water marketing, and other water management activities.

WATER RIGHTS ACQUIRED UNDER YRBWEP

Yakima Basin water rights acquired for the United States by Reclamation to facilitate the purposes of YRBWEP will remain in the United States' ownership, and will be placed into the TWP to be managed for the purpose of instream flow enhancement, or for other purposes of use if consistent with the intent of, and the authority granted under, YRBWEP and the TWP. Reclamation will place these Reclamation-acquired water rights into the TWP on a long-term renewable basis, each term being for a period of ten (10) years, with automatic renewals, unless terminated pursuant to the "**Termination**" section of this MOU below.

Yakima Basin water rights acquired by Ecology to facilitate the purposes of YRBWEP will remain in Ecology's ownership, and will be placed into the TWP to be managed for the purpose of instream flow enhancement, or for other purposes of use if consistent with the intent of YRBWEP and the TWP. If Ecology's water is acquired by way of lease, Ecology's leased water right will be placed into the TWP for a period equal to the duration of the lease agreement. If Ecology's water is acquired through a purchase, the term of the trust water right would be perpetual.

JOINT ACQUISITION OF WATER RIGHTS UNDER YRBWEP

Reclamation and Ecology are jointly funding water conservation projects under the YRBWEP Yakima River Basin Water Conservation Program that will generate water savings that will be used for instream flow enhancement purposes and to improve the reliability of water supply for irrigation.

Since 2000, Reclamation and Ecology have already partnered on the joint acquisition of three water rights, each providing a cost-share towards the purchase of the water rights associated with: 1) the former Rocky Mountain Elk Foundation "Heart K Ranch" property in the Taneum Creek Subbasin; 2) the former Schultz and Johnson Buchanan Ranch at the confluence of Wenas Creek with the Yakima River; and 3) the Wapatox Power Plant water right on the lower Naches River formerly held by PacifiCorp. Reclamation and Ecology may partner in the future on additional water right acquisitions, reflecting their cooperative partnership in implementation of YRBWEP.

For each of these jointly-acquired water rights, and future jointly-acquired water rights, Reclamation shall retain full ownership title to each of the water rights, unless Ecology's ownership portion of the right is clearly defined in the cost-share agreement with Reclamation. In that case, Ecology and Reclamation will each retain full ownership title to their respective ownership portion of the acquired water right for placement into the TWP as described above in the sections that address water rights owned entirely by Reclamation or owned entirely by Ecology. Reclamation agrees to place each of these jointly-acquired water rights into the TWP on a term basis, with each term being for a period of ten (10) years, with automatic renewals, unless terminated pursuant to the "**Termination**" section of this MOU below, and as described below in the section entitled **Term**, to facilitate the purposes of YRBWEP and to be managed for the purpose of instream flow enhancement, or for other purposes of use if consistent with the intent of YRBWEP and the TWP. In consideration of Ecology's substantial cost-share towards the purchase of these jointly-acquired water rights, Reclamation will automatically renew the term of placement of these jointly-acquired water rights into the TWP, so long as the trust water rights continue to satisfy the goals and objectives of YRBWEP and are consistent with applicable Federal laws and regulations and Reclamation land management plans and Project needs.

PERIODIC REVIEW OF YRBWEP RIGHTS IN THE TWP

The TWP will be reviewed by the parties periodically to determine if the YRBWEP goals are being achieved. If the goals of YRBWEP are being met, then the Reclamation-owned trust water rights would remain in the TWP until the next periodic review.

TERM

The term of this MOU will be ten (10) years from the date of final signature by the parties hereto, with automatic renewals, unless terminated sooner as provided herein.

Reclamation recognizes the desirability of retaining the Reclamation-acquired and jointly-acquired water rights in the TWP for the long-term. However, should Reclamation determine that the YRBWEP goals are not being met, Reclamation may request termination of the placement in the TWP for all, or a specific number, of the Reclamation-acquired trust water rights, and of the Reclamation ownership interest in jointly-acquired trust water rights, as provided below in the section entitled **Termination**. In that event, all aspects of the trust water rights owned by Reclamation, including the Reclamation ownership interest in jointly-acquired trust water rights, would revert to the original terms and conditions associated with the rights immediately prior to their placement into the TWP.

PROCEDURES TO PLACE THE YRBWEP RIGHTS INTO THE TWP

- Submit Trust Water Right Application to Ecology to change the purpose of use;
- Submit evidence of ownership of the water right (Quit Claim or Deed) to Ecology;
- Reclamation authorizes placement of water right into TWP by lease, license, or other appropriate means determined by Reclamation and Ecology (terms consistent with this general agreement);
- File Motion to Substitute Parties to Yakima County Superior Court (if acquired right is subject to Yakima River Adjudication);
- Ecology will process the lease, license, or other appropriate authorization facilitating placement of a Reclamation-owned or a jointly-acquired YRBWEP water right into the TWP according to the procedures outlined in Chapter 90.38 RCW, and under Chapter 90.42 RCW if required, subject to the terms of this general agreement and any other specific conditions determined by Reclamation for each specific future trust water right.

TRUST WATER RIGHTS MANAGEMENT – GENERAL

Ecology agrees to provide Reclamation a list of all of the instream flow trust water rights that exist in the Yakima Basin that must be protected as target flow increases in the lower Yakima River, by March 1st of each year. Reclamation will add that quantity of added instream flow trust water rights to the designated YRBWEP target flows for the Yakima River below the Sunnyside Diversion Dam and below the Prosser Diversion Dam, as established by the 1994 YRBWEP Act and as managed by Reclamation. Reclamation will manage the Yakima River each year to maintain these total additive instream target flows at these locations. Or alternatively, Reclamation and Ecology may agree to utilize storage space in the Yakima Project federal reservoirs, when space is available, to store certain portions of these trust water rights to allow Reclamation and Ecology to shape the release of the stored water to provide pulse flows, incubation flows, or other flow releases that maximize the benefit to public fish and wildlife resources in the Yakima Basin.

SUBSTANTIAL ENVIRONMENTAL BENEFIT/FISHERIES BENEFIT

Ecology will ensure that trust water right applications will be prioritized in accordance with the Hillis Rule (WAC 173-152). This objective applies to all water rights placed into the TWP for the purposes described in this MOU.

GENERAL PROVISIONS

1. Nothing in this agreement expands, alters or limits the property or other rights, authority, responsibilities, sovereignty, or jurisdiction of any party. Nothing herein shall act to waive, abrogate, define or diminish the Treaty rights of the Yakama Nation or the United States.
2. Notwithstanding any other provision of this MOU, the parties acknowledge that Reclamation's actions are subject to federal reclamation law, as amended and supplemented, and the policies, rules and regulations promulgated by the Secretary of the Interior under federal reclamation law; and applicable federal law, including but not limited to, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).
3. Any agreement executed under this MOU that implements a joint federal and state program, as authorized and directed by federal law and funded through federal appropriations, shall be subject to federal cost sharing laws, policies and practices.
4. Nothing in this MOU is intended to create any right in any entity not a party to this MOU nor shall any entity be considered a third party beneficiary to this MOU. This MOU is not intended to bind or affect any non-signatory party, and the failure of any non-signatory party to object to any provision of this MOU cannot be viewed as waiving, affecting, or prejudicing any non-signatory party's rights, factual arguments, legal arguments or legal positions.
5. This MOU and any written attachments or amendments thereto constitute the entire MOU expression between and among the parties with respect to the subject matter of this MOU, and any oral representations or understandings not incorporated herein are excluded. Any modification of this MOU must be made in writing and agreed to by the parties.
6. All actions called for by this MOU are subject to and contingent upon the availability and allocation of future federal and state appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals, as needed.
7. Nothing herein shall, or shall be construed to, obligate the Bureau of Reclamation to expend or involve the United States of America in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and administratively allocated for the purposes and projects contemplated hereunder.
8. This MOU outlines the relationship between Reclamation and Ecology relating to management of Yakima River Basin water rights acquired by Reclamation and/or Ecology under YRBWEP through the State's Trust Water Rights Program (TWP). This voluntary intergovernmental MOU is not a contract.

9. No member of or delegate to Congress, or resident Commissioner, shall be admitted to any share or part of this Agreement or to any benefit that may arise out of it.

10. The United States and Ecology will each be responsible and liable only for the negligent acts or omissions of their respective employees or assigns to the extent provided by law. However, nothing in this MOU will be construed to be an admission of fault or liability, and nothing will limit the defenses and immunities legally available to each party against each other.

AMENDMENT AND SEVERABILITY

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

DESIGNATED REPRESENTATIVE AND NOTICES

Reclamation and Ecology designate the following as representatives for administrative purposes and desire that all written communications be sent to these addresses.

Reclamation: Area Manager
Attn: Gerald Kelso
Upper Columbia Area Office
Bureau of Reclamation
1917 Marsh Road
Yakima WA 98901-2058

Ecology: Water Resources Section Manager
Attn: G. Thomas Tebb
Central Regional Office
Washington State Department of Ecology
15 W Yakima Av, Suite 200
Yakima WA 98902-3452

All parties are responsible for notifying all affected parties of any change in address, organizational changes, responsibility adjustments, and other related changes, as they take place.

TERMINATION

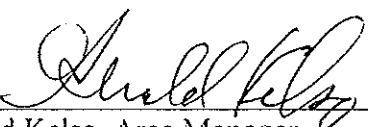
Either party may terminate this MOU by providing 60 days written notice to the other party. Further, should Reclamation determine that the YRBWEP goals are not being met; Reclamation may terminate the placement in the TWP for all, or a specific number, of the Reclamation-owned trust water rights, or the Reclamation ownership interest in jointly-acquired trust water rights, by providing Ecology 60 days written notice.

SIGNATURES

UNITED STATES OF AMERICA

IN WITNESS WHEREOF, the United States of America has executed this document this 9th day of July, 2008

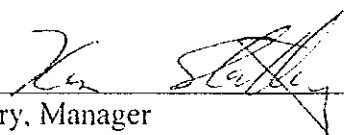
UNITED STATES OF AMERICA
Department of the Interior

BY: 
Gerald Kelso, Area Manager
Upper Columbia Area Office
Bureau of Reclamation
1917 Marsh Road
Yakima, WA 98901-2058

WASHINGTON STATE DEPARTMENT OF ECOLOGY

IN WITNESS WHEREOF, the Washington State Department of Ecology has executed this document this 3^d day of July, 2008

WASHINGTON STATE
Department of Ecology

BY: 
Ken Slattery, Manager
Water Resources Program
State of Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600