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Draft Instream Flow Action Plan, draft Version 6c.

Executive Summary

The purpose of this Instream Flow Selection and Adoption Action Plan (ISF Action Plan) is to take actions that result in recommendations for instream flows that support other processes where such flows are established. These actions will include:

- On a drainage scale:
 - providing pertinent information to affected parties and providing opportunities for them to ask questions, identify their needs, and discuss management options for water resource management; and
 - facilitating negotiations to recommend (to both participants of the WRIA 1 Watershed Management Project [WRIA 1 Project] and other processes) a range of flows (including regulatory flows) that support ecological functions of WRIA 1 stream systems.
- On a regional scale, provide recommended flows to:
 - the water quantity, water quality, and fish habitat elements of the WRIA 1 Project;
 - the Federal/Tribal/State claim settlement process (to be accepted or rejected and, if rejected, to return to this process); and
 - the State regulatory process including rule making by Ecology on flow setting.

The ultimate goal is to have water of sufficient quantity and quality to meet the needs of current and future human generations, including the restoration of salmon, steelhead, and trout populations to healthy and harvestable levels and the improvement of habitats on which we collectively rely (SOW March 2000).

The heart of this ISF Action Plan is the drainage scale effort to inform and involve affected parties. This education and involvement effort is followed by a local negotiation process intended to provide instream flow recommendations to the WRIA 1 Project participants and other processes. This effort will be led by the Intergovernmental Instream Flow Working Group. The goal is to negotiate and recommend the range of flows needed to support the ecological functions and the out of stream needs of the various drainages that comprise WRIA 1. The local tribal governments, Lummi Nation and Nooksack Indian Tribe, and Washington State have indicated their interest and willingness to participate in this negotiation process, have agreed to support this effort, and are willing to accept or reject the recommended flows in a Federal/Tribal/State settlement process (pending confirmation from tribal and state policy makers). The Intergovernmental Instream Flow Working Group is working to get agreement from the federal government that it will support this effort and that it too is willing to accept or reject the flow recommendations in a Federal/Tribal/State settlement process.

Tribal water claims have a significant impact on local water management. If a senior federal or tribal water right is left unresolved or is not quantified, the result is uncertainty about the future availability of water for every other water use in WRIA 1. Therefore, it is very important that the WRIA 1 process leads to a resolution of these questions. In order to provide the needed certainty this ISF Action Plan supports a process that resolves tribal water claims. The local tribes, Lummi

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47 Nation and Nooksack Indian Tribe, have various claims with the Federal government including
48 claims for water rights. The Federal government has a defined process for settling tribal claims.
49 The ISF Action Plan is intended to support the local portion of this settlement process by providing
50 flow recommendations that will be accepted or rejected by the Federal/Tribal/State settlement
51 process and, if rejected, returned to the local process for further work.
52

53 Because the current instream flows set by Ecology's existing rule in 1986 are expected to require
54 modification, this ISF Action Plan will provide a recommended management strategy including
55 regulatory flows for a new Ecology rule making to set prospective flows for the purpose of
56 processing pending applications for new water rights.
57

58 A level of clarity and certainty regarding existing water rights and claims is needed in order to
59 achieve the goals of the WRIA 1 Project to fairly and effectively manage the WRIA 1 water
60 resources. The required level of clarity and certainty regarding who has what water rights does not
61 currently exist in WRIA 1. Existing state statutes, as interpreted by case law, make adjudication in
62 state Superior Court the only process currently available to determine the extent and validity of
63 water rights and claims. However, state Superior Court may not be the most appropriate or efficient
64 venue to achieve a negotiated settlement of federal, tribal, and state water rights and claims.
65 Consequently, since it is anticipated that adjudication may eventually be required to achieve the
66 required level of clarity and certainty regarding water rights, a task envisioned by this ISF Action
67 Plan is that as part of the initial education effort, the Intergovernmental Instream Flow Working
68 Group will garner support for state and federal legislation to reform the adjudication process or
69 provide an alternative process that is more user friendly and effective. The state Attorney General's
70 office is currently working on a reform recommendation. Whatever the outcome of the reform
71 effort, the timing and handling of the needed local adjudication will be worked out in the drainage
72 scale negotiations as part of the initial outreach and information sharing effort. A further effort
73 envisioned by this ISF Action Plan, that may require legislative change, is to create a way for
74 currently unpermitted water users to participate in a meaningful way in the goals of this Action Plan
75 and ultimate adjudication. Under the current law unpermitted water users do not have standing in an
76 adjudication.
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78 It is understood that this ISF Action Plan is part of the WRIA 1 Project and is intended to integrate
79 with the other components of the WRIA 1 Project (i.e., water quality, water quantity, instream flow,
80 and fish habitat). To that end, flow recommendations, flow management strategies, technical work,
81 and the adoption process for flow recommendations will support the other components of the WRIA
82 1 Project and, upon conclusion of this ISF Action Plan, they will be incorporated into the WRIA 1
83 Project management process.
84

85 Approvals of the work products of this ISF Action Plan start at the drainage level and continue with
86 the Joint Board and Planning Unit. Ultimately, the approval process is expected to include federal,
87 tribal, and state legislative actions and/or court decrees in order to make the results of the process
88 binding on all water users and provide the needed certainty which will serve as the foundation for
89 future water resource management decisions in WRIA 1.
90

91 A substantial commitment of time and money and the political will to carry it through to a viable
92 conclusion is required to achieve the desired results of this ISF Action Plan.

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94 This proposed ISF Action Plan is undergoing policy and legal review by the Joint Board, State, and
95 Small City representatives. This proposed Action Plan is being distributed for comments and
96 further definition of the roles and responsibilities of the Project participants.

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98 The following document provides more details and context for this proposed ISF Action Plan.

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101 **I. Introduction**

102
103 In response to Chapter 90.82 RCW, the Water Resources Inventory Area No. 1 (WRIA 1)
104 Watershed Management Project was initiated in 1998 by the City of Bellingham, Whatcom County,
105 PUD No. 1 of Whatcom County, the Lummi Nation, and the Nooksack Indian Tribe. Substantial
106 steps have been taken to engage the general population in the watershed planning and
107 implementation project. The active participants in the Project are: a Planning Unit, comprised of 18
108 water interests and governmental caucuses; an inter-governmental Staff Team; six technical teams;
109 and a Joint Board. More descriptive information about the WRIA 1 Watershed Management
110 Project can be found at the Project’s website (<http://www.wria1project.wsu.edu>).

111
112 The overall goal of the WRIA 1 Watershed Management Project is to have water of sufficient
113 quantity and quality to meet the needs of current and future human generations, including the
114 restoration of salmon, steelhead, and trout populations to healthy and harvestable levels and the
115 improvement of habitats on which we collectively rely (March 2000 SOW). Water quantity, water
116 quality, instream flows, fish habitat and the interrelationship of these elements are being addressed
117 as part of the project. This ISF Action Plan is focused on the instream flow element of the WRIA 1
118 Project – specifically, the Action Plan will be used to select, achieve, adopt, and recommend
119 instream flow levels throughout WRIA 1 for enforcement through other processes. This Action
120 Plan builds on the technical work being conducted as part of the WRIA 1 Project and a May 2002
121 symposium on potential methods to recommend and adopt instream flows.

122
123 The parties recognize that final agreement is more likely if the parties can freely discuss alternatives
124 and hypotheticals without prejudice to positions they may take in legal proceedings. Therefore, no
125 discussion, proposal, plan, agreement, (other than a formally adopted plan or agreement) offer of
126 compromise, proposed agreement, concession, statement, material, or documents whether oral,
127 written, or in electronic or other format (herein the “protected material”), made or prepared by the
128 parties or their authorized agents in furtherance of the planning process envisioned by this
129 agreement shall be offered into evidence against the party providing the “protected material” in any
130 legal or administrative proceeding. Protected material originating from the Lummi Nation shall not
131 be offered into evidence in any legal or administrative proceeding, regardless of whether the Lummi
132 Nation is a party to that proceeding. Reports and data from the original studies conducted by or on
133 behalf of the Planning Unit are public information.

134
135 In Washington statutes RCW 90.22.020 and RCW 90.54.020(3)(a), the term “instream flow” is
136 defined as the minimum amount of water flowing through a natural stream course that will, with
137 reasonable confidence, protect and preserve instream resources at healthy and sustaining levels.
138 Statutorily protected instream resources include fish (in all life stages), wildlife, aesthetics,

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139 recreation, water quality, navigation, and other environmental values. Environmental values may
140 include recruitment of fresh water to the estuaries, riparian vegetation, floodplain wetlands, and
141 maintenance of channel geomorphology. It is noted that hydropower and waste assimilation are not
142 listed as an instream resource in either Chapters 90.22 or 90.54 RCW of state law. Federal Clean
143 Water Act (CWA)(40 CFR 131.10) prohibits the state from adopting "waste assimilation" as a
144 designated use. State law also requires that the instream flows provide adequate waters for non-
145 feedlot related riparian stockwatering that does not result in extraordinary waste of water (RCW
146 90.22.040). Water requirements sufficient to maintain all of these instream values at an acceptable
147 level are the "instream flow requirements." (RCW 90.22, 90.54.020(3)(a), USFWS 1993).

148
149 The current instream flow requirements for WRIA 1 are specified in Chapter 173.501 WAC. In
150 establishing instream flow rules, the Washington State Department of Ecology (Ecology) is required
151 by RCW 90.03.247 to consult with the Washington State Department of Agriculture and Office of
152 Community Development, as well as Federally recognized Indian Tribes and Nations. The WRIA 1
153 rule established in 1986 can be found online at www.ecy.wa.gov/lawsrules/ecywac.html#wr.

154
155 An intergovernmental working group was tasked with developing a draft action plan that
156 recommends an approach for selecting, achieving, adopting and enforcing instream flow levels
157 throughout WRIA 1. This draft Action Plan is being submitted to the Planning Unit, Staff Team,
158 technical teams, and Joint Board for review, comment, completion, and ultimate approval and
159 implementation. The current draft of the ISF Action Plan will be used as a guideline to implement
160 Instream Flow Pilot Negotiations within WRIA 1. The information learned in the Pilot Negotiation
161 process will be used to modify the ISF Action Plan over time. As will become apparent, due to the
162 interrelationship of water quantity, water quality, instream flow, and fish habitat, implementation of
163 this Action Plan is dependent on the technical studies underway in all of the WRIA 1 Project
164 elements.

165
166 The working group that prepared this draft Action Plan were: Clare Fogelsong (City of
167 Bellingham), Bruce Roll and John Thompson (Whatcom County), Tom Anderson and Rebecca
168 Schlotterback (PUD No.1), Leroy Deardorff and Jeremy Freimund (Lummi Nation), Bob Kelly and
169 Llyn Doremus (Nooksack Indian Tribe), Tom Laurie and Jim Bucknell (Ecology), and Bill Verwolf
170 (Small Cities). The working group meetings were facilitated and summarized by Mary Dumas and
171 Rob Kelly (Resolution Services).

172
173 Including this introduction, this Action Plan is comprised of eight sections and two appendices. The
174 Action Plan sections are:

- 175
- 176 ➤ Section I introduction
 - 177 ➤ Section II lists the criteria used to evaluate the potential success of various approaches to
178 selecting and adopting instream flow levels.
 - 179 ➤ Section III presents an overview of the recommended process and participants.
 - 180 ➤ Section IV presents the Recommended Instream Flow *Selection* Action Plan
 - 181 ➤ Section V presents the Recommended Instream Flow *Achievement* Action Plan
 - 182 ➤ Section VI presents the Recommended Instream Flow *Adoption* Action Plan.
 - 183 ➤ Section VII presents the Recommended Instream Flow *Enforcement* Action Plan
 - 184 ➤ Section VIII presents the Instream Flow *Implementation and Funding* Action Plan

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The two appendices to this Action Plan are:

- Appendix I - Definition of Terms
- Appendix II - Federal Reserved Water Rights- The Negotiated Settlement Option (IIFWG, Nov 5, 2003)

A list of definitions used in the development of this Instream Flow Action Plan has been included in Appendix I to function as a reference in reviewing this document. It also reflects a common understanding among the authors of the terms used. Various terms describing stream flow are used throughout this Plan. The distinctions and relationships between these stream flow terms are described below. The full definitions of italicized terms are in Appendix I.

Ecological flow regimes for each stream will be developed using best available science. Ecological flow regimes are made up of five functional flow components: valley maintenance, riparian maintenance, channel maintenance, fisheries baseflow, and water quality maintenance flow. The ecological flow regime is the technical product of the work currently being conducted by Utah State University (USU) and the WRIA 1 technical teams.

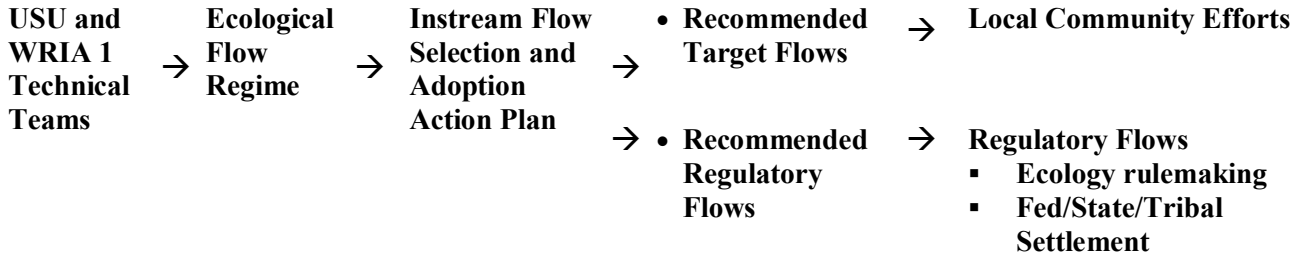
Target flows are achievable and include consideration of instream and out of stream needs. Target flows will be developed locally by the Intergovernmental Instream Flow Working Group (IIFWG –see section “Participant Description and Summary of Roles”) for *each* of the ecological flow components. Target flows will be the recommended goals that will come out of local negotiations and are the flows the community agrees to try to achieve. It is noted that the target flow may or may not be the same as the recommended regulatory flow regime.

Regulatory flows will be developed locally by the Intergovernmental Instream Flow Working Group (IIFWG –see section “Participant Description and Summary of Roles”) for *each* of the ecological flow components. WRIA 1 approved regulatory flows based on an agreed-to management strategy will be the recommended regulatory flow regime. The recommended regulatory flows will be submitted to: (a) Ecology for the use in the state rulemaking process to revise the current *state regulatory instream flows* for WRIA 1 Chapter 173-501WAC, and (b) the Federal/Tribal/State settlement process and may be used by a judge and/or legislative body for consideration and adoption through a consent decree and/or Federal and State legislation. The result of these two adoption processes will establish the final regulatory flows.

State and/or Federal regulatory instream flows may be different than locally recommended flows if the WRIA 1 Planning Unit and/or the Joint Board fail to reach agreement on recommended flows and do not pass on a recommendation to Ecology and the Federal/Tribal/State settlement process. Ecology or the settlement process may then undertake rule making or court or legislative action to change existing state regulatory flows. Figure 1 provides a summary of the overall selection and adoption process and how each of these flow terms are used.

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230 Figure 1.
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234 **II. Criteria for Success**

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236 The working group concluded that to be successful, the action plan for *selecting* the flows to
237 recommend and adopt must meet agreed upon criteria. The working group agreed that the approach
238 to selecting target instream flows to recommend must:

- 239
- 240 ▪ Conform to the Federal and State guidelines, statutory requirements, and other legal
- 241 requirements for instream flows (as described in the Introduction)
- 242 ▪ Be compatible with the goals of the WRIA 1 Project and achieve the goals of the ISF Action
- 243 Plan
- 244 ▪ Be an approach that all parties are willing to accept
- 245 ▪ Be based on the best available science and a credible, scientific analysis of WRIA 1
- 246 instream and out-of-stream water users’ proportionate impacts on flows, water quality, and
- 247 salmonid life cycle and habitat use at a specific river or tributary reach
- 248 ▪ Include target flows that are sufficient to achieve specific healthy and sustainable fish
- 249 populations at all life stages and meet Endangered Species Act (ESA) obligations, but also
- 250 reflect the limitations posed by seasonal/annual variability in hydrologic and climate
- 251 conditions. That is, target flows provide conditions conducive to viability of specific fish
- 252 species and life stages in a variety of hydrologic conditions (e.g., the inter-annual variation
- 253 in water availability resulting from annual variations in precipitation)
- 254 ▪ Meet all water needs to the greatest degree possible, including reconciling the effects of
- 255 meeting instream fish flow targets with legal, existing, and projected out-of stream uses and
- 256 needs.
- 257 ▪ Allow for maintaining a viable economy in WRIA 1 to the maximum extent practicable
- 258 ▪ Recommend target flows that are physically and financially achievable to the maximum
- 259 extent practicable consistent within legal requirements.

260
261 Similarly, the working group concluded that to be successful, the action plan for *adopting* instream
262 flows must meet the following criteria:

- 263
- 264 ▪ Provide reasonable certainty for both instream and out of stream users that water will be
- 265 there for future operations and other related factors. (This will require keeping adequate
- 266 records of use and maintaining water right records in a manner to facilitate enforcement of
- 267 water law. The use of adjudication for existing water rights will be applied as negotiated.).

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- 268 ▪ Defines a clear process of what is going to happen and who is involved.
- 269 ▪ Contributes to salmon recovery and also meets the requirements of the Endangered Species
- 270 Act (ESA).
- 271 ▪ Meets any applicable requirements of the Federal Clean Water Act (CWA).
- 272 ▪ Includes consideration of competing uses. (Note: By definition, recommended target flows
- 273 include consideration of out of stream uses.)
- 274 ▪ Be acceptable to all parties.
- 275 ▪ Have adaptability and flexibility to account for issues beyond local control such as climate,
- 276 new information/ideas, changed factual circumstances, and important legal developments.
- 277 ▪ Recognize existing statutory and legal obligations (e.g., public health and safety and treaties
- 278 between the United States and Indian Tribes).
- 279

280 The working group acknowledges that providing for finality and certainty may limit the extent that

281 adaptive management can be incorporated as an approach for achieving adequate flows for all uses.

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III. Process Overview and Participants

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286 The overall process involves four sub processes (instream flow selection, achievement, adoption,

287 and recommendation to other processes that achieve enforcement) that are sequenced, but also

288 overlapping in time, as summarized in Figure 2. Two processes that occur outside the WRIA 1

289 Watershed Management Project, 1) the Federal/Tribal/State settlement process, and 2) rule making

290 by Ecology, are included in this ISF Action Plan for completeness and clarity.

291

292 To better define and test this ISF Action Plan, the Plan will be implemented in phases. The first

293 phase will be pilot project implementation of this Plan, which will start during 2004. This ISF

294 Action Plan may be revised in the future based on the results of these negotiations and any proposed

295 changes will be brought to the Joint Board and Planning Unit for approval.

296

297 The working group agrees that all affected parties need to be given ample opportunity to express

298 their views and must have opportunities to be represented in the processes to select, achieve, adopt,

299 and recommend instream flows. Further they must understand how flows will be enforced. To

300 accomplish this overall goal, the “concentric circle” approach described by Michael Mirande and

301 included in the *Instream Flow Selection Methodology Symposium Proceedings* (WRIA 1, May

302 2002) will be applied – particularly to the *selection* of target and regulatory flows for

303 recommendation. The “concentric circle” approach is designed to give everyone that needs to be

304 involved an opportunity to participate, as depicted in Figure 3. This decision making approach

305 works with each interested and affected party in succession. Discussions may repeat or iterate back

306 through the succession as changes are made or new information is obtained. There will be

307 significant effort put into information sharing and involvement of affected parties. For example, the

308 Intergovernmental Instream Flow Working Group (IIFWG defined below) will develop a set of

309 initial ecological flows for a particular drainage or logical aggregation of drainages. Then the

310 IIFWG will organize a series of workshops with the affected parties in each drainage or logical

311 aggregation of drainages to discuss flow recommendations. The participating affected parties and

312 the IIFWG will work together to determine the ability of each drainage or aggregation to meet the

313 flows, identify problems and solutions, and to determine an appropriate management strategy.

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Figure 2. The general sequencing/overlapping of the four subprocesses

<i>Selection</i>	<i>Achievement</i>	<i>Adoption</i>	<i>Enforcement</i>
<i>Steps Inside the WRIA Project 2514 Process and Implementation</i>			
<i>Decide where to start and how big an area. Decide whether to support request for Federal involvement at beginning of process or delay involvement. Decide timing of adjudication request and stay.</i>			
<i>Initial target flows developed</i>	<i>Initial target flow discussions and contracts with affected parties by drainage</i>		<i>Water user education</i>
<i>Initial target flows converted to target flows through interaction with affected parties</i>			<i>Water user education</i>
<i>Target flows recommended to PU for approval</i>	<i>Flow achievement discussions with affected parties</i>	<i>PU considers and conducts public workshop on recommended target flows Need to check RCW 90.82 to make sure the PU has authority to conduct hearings. It may be the lead entity?</i>	<i>Water user education</i>
	<i>Target flow contracts negotiated and signed</i>		<i>Water user education</i>
	<i>Develop management strategies</i>	<i>WRIA 1 Watershed Management Plan v2 includes flows recommended for Ecology rule making and Federal settlement process</i>	<i>Begin compliance and enforcement on users without valid state water rights target flow contracts</i>
<i>Steps Outside the WRIA Project 2514 Process and Implementation</i>			
<i>Request Federal Involvement. Initiate formal negotiations between State, Federal and Tribal governments</i>	<i>Contracts, consensual agreements leading to formal settlement agreement</i>	<i>Ecology rule making to adopt recommended instream flows with priority date that affect new users. Continue a negotiated settlement option with Lummi Nation and Nooksack Tribe to end with a consent decree.</i>	<i>Proceed with adjudication.</i>

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Figure 3. Step 2 Initial Flow Selection Representation & Step 3 Seek Agreement on Flow Recommendations Diagram

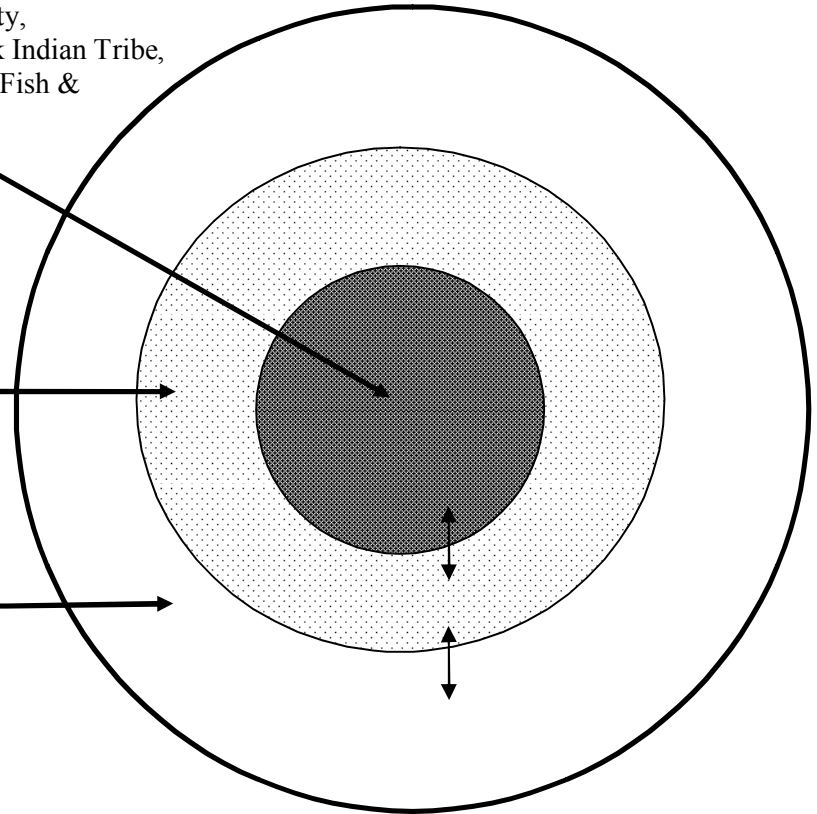
Intergovernmental Working Group

(City of Bellingham, Whatcom County, PUD No.1, Lummi Nation, Nooksack Indian Tribe, Ecology, Washington Department of Fish & Wildlife, NOAA , USFS, and EPA)

Planning Unit

(Governmental and water interest caucus representatives)

WRIA-wide Affected Parties



During Joint Board and Planning Unit meetings, these efforts will be reviewed. Any changes proposed by the Joint Board and Planning Unit will be taken back for discussion with the affected parties in the drainages.

When all of the drainages have recommended target and regulatory flow regimes, those recommendations will be evaluated by the IIFWG for any conflicts and inconsistencies and a set of WRIA-wide recommended target and regulatory flows will be presented to the Joint Board and Planning Unit. The Joint Board, IIFWG, and the Planning Unit will conduct a public workshop. Then the Joint Board and Planning Unit will make decisions on approving the WRIA-wide target and regulatory flows and, based on a management strategy, recommend target and regulatory flows to the Federal/Tribal/State settlement process and to Ecology for state regulatory instream flow rule making. Formal adoption of flows will occur through the Joint Board and Planning Unit, State rulemaking, negotiated settlement, Federal and/or State legislation, and a federal court consent decree, or a combination of the above.

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Participant Descriptions and Summary of Roles

362 Joint Board. The Joint Board is comprised of the administrative decision makers of the
363
364 WRIA 1 “Initiating Governments”. The Initiating Governments are the Lummi Nation,
365 the Nooksack Indian Tribe, Whatcom County, City of Bellingham, and the Whatcom
366 County Public Utility District No.1.
367

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369 Intergovernmental Instream Flow Working Group (IIFWG) – The IIFWG is a subset of
370 the WRIA 1 Watershed Management Project participants. Members are: City of
371 Bellingham, Whatcom County, PUD No. 1 of Whatcom County, the Lummi Nation,
372 Nooksack Indian Tribe, a representative for the Small Cities Caucus, and the Department
373 of Ecology. The Washington Department of Fish and Wildlife, NOAA Fisheries, U.S.
374 Fish and Wildlife Service, U.S. Forest Service, and the Environmental Protection
375 Agency will also be asked to review the flow recommendations and will be asked to
376 participate in the IIFWG. The IIFWG will propose WRIA 1-wide instream flow goals
377 (to be approved by the Joint Board and Planning Unit), develop initial flow
378 recommendations, recommend flows to the Joint Board and Planning Unit for approval,
379 and participate in the Federal/Tribal/State settlement process. Ecology also conducts
380 formal state regulatory instream flow rule making.
381

382 Planning Unit - The WRIA 1 Planning Unit as currently constituted will continue as
383 described in the Implementation Plan. Planning Unit members will approve WRIA-wide
384 instream flow goals, can participate in drainage level workshops on recommended flows
385 where their constituents have interests, will review and approve flows recommended by
386 IIFWG, and approve WRIA 1 Watershed Management Plans which include
387 implementation and management option strategies.
388

389 Affected Parties - In each drainage, affected parties are the property owners, water right
390 document holders (certificate, permit, application, claim), and the Planning Unit
391 Caucuses. Affected parties are encouraged to participate in the preparation of the flow
392 recommendations and identification of strategies for achievement. They can also
393 participate in information sharing workshops on, this Plan, water laws, and management
394 options and participate in Ecology’s formal state regulatory flow rule making process,
395 adjudicatory court action, and/or legislation.
396

397 Federal Negotiating Team – A Federal Negotiating Team is required for the
398 Federal/Tribal/ State settlement process. The Intergovernmental Working Group, the
399 Joint Board, and the Planning Unit will consider supporting expanding the geographic
400 scope of the existing Federal Negotiating Team assigned to the Lummi Reservation
401 water rights negotiations. The Department of Interior will be requested to add
402 representatives from the U.S. Fish and Wildlife Services, NOAA Fisheries, the
403 Environmental Protection Agency, and the U.S. Forest Service to the existing Team that
404 has representatives from the Bureau of Indian Affairs, the Bureau of Reclamation, and
405 the Solicitor’s Office. There is more information in Appendix II.
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407 Other Participants – In establishing instream flow rules, Ecology is required by RCW
 408 90.03.247 to consult with the Washington State Department of Agriculture and Office of
 409 Community Development. In addition, because of the interrelationship of watersheds
 410 and the overlap of usual and accustomed fishing areas, Ecology will consult with all
 411 affected Indian tribes whose usual and accustomed grounds and stations include WRIA
 412 1. Parties that are not otherwise legally bound to the process would also participate.
 413
 414

IV. Recommended Instream Flow Selection Action Plan

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 417 The proposed approach to identifying the instream flow requirements (as defined in Appendix I)
 418 begins with an effort to inform and involve affected parties while seeking agreement between the
 419 Intergovernmental Instream Flow Working Group (IIFWG) members on initial flow
 420 recommendations. The rationale for using the IIFWG to make the initial recommendations for
 421 target flows is the following:

- 422 ▪ To reduce expenses and effort, a collaborative approach will be used to reach agreement.
 423 For practical reasons, cost and efficiency, the number of members of this group are limited.
- 424 ▪ Representative governments have the ability to direct technical and legal resources to ensure
 425 that recommended flows meet the criteria described previously.
- 426 ▪ Agreement among the IIFWG members is critical as they are all in a position to veto an
 427 outcome they cannot accept.

428
 429 The following four-step approach to selecting instream flows is proposed: 1) foundation
 430 development, 2) initial flow recommendation development, 3) seek acceptance of affected parties,
 431 4) recommend flows to the Joint Board and Planning Unit that at least include target and regulatory
 432 flows. Pursuant to the selection criteria, there must be possible physical and financial means for
 433 achieving the recommended target flows. Possible strategies will be explored to ensure
 434 achievement is possible but final approaches used to achieve flows may be left up to the
 435 implementing entities.
 436

437 **Step 1 Foundation Development:** The IIFWG will recommend to the Joint Board and Planning
 438 Unit for approval where geographically to start and how big of drainage units (one drainage or
 439 several aggregated drainages) to include in this ISF Action Plan process. This process will
 440 ultimately be completed throughout WRIA 1. Multiple teams may be established to work in
 441 different areas of WRIA 1 depending on available funding.
 442

443 The IIFWG will propose WRIA-wide instream flow goals (to be approved by the Joint board and
 444 Planning Unit). Then the IIFWG will compile technical information for the first drainage unit and
 445 conduct workshops for affected parties in the drainage unit to ensure that all of the affected parties
 446 within the drainage unit are identified and informed about the issues listed below. It is anticipated
 447 that this will involve the following affected parties:

- 448 ▪ Water right document holders (certificate, permit, application, claim)
- 449 ▪ Water users
- 450 ▪ Property owners
- 451 ▪ Planning Unit Caucuses

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453 This foundation development step will require a significant public involvement and information
454 exchange effort on the following topics:

- 455 ▪ WRIA-wide instream flow goals and overview of flow selection, achievement, adoption,
456 and enforcement process
- 457 ▪ Ecological flow regime
- 458 ▪ Other instream uses
- 459 ▪ Current and future out-of-stream uses
- 460 ▪ Hydrologic impacts of drainage activities
- 461 ▪ Water quality
- 462 ▪ Hydraulic continuity
- 463 ▪ Groundwater availability
- 464 ○ ASR potential
- 465 ▪ Surface water storage potential
- 466 ▪ Wetlands restoration, protection, and mitigation banking
- 467 ▪ Concept of initial target flows and target flows
- 468 ▪ Concept of flow contracts
- 469 ▪ Endangered Species Act
- 470 ▪ Clean Water Act
- 471 ▪ Potential processes to resolve extent of existing rights and claims, including adjudication
- 472 ▪ Federal involvement, settlement agreements, and consent decrees
- 473 ▪ Tribal claims
- 474 ▪ Enforcement options
- 475 ▪ Conservation
- 476 ▪ Reclamation and Reuse
- 477 ▪ Washington State Water Law

478
479 This effort is focused on ensuring that the information needed to make knowledge-based decisions
480 is available to all parties for consideration in the flow selection process. The information from the
481 technical analysis will provide the foundation for discussions at the drainage level. It is expected to
482 include modeled hydrographs for the drainage unit under historical, current, and future use patterns
483 for wet, average, and dry circumstances; estimated current and future out of stream needs; current
484 water claims, applications, permits and certificates; the range of ecological flows desired and a
485 description of the WRIA-wide instream flow situation.

486
487 As the discussion in the drainage unit expands it will include current and future out of stream water
488 needs. This gets tied to a discussion of existing rights and claims. A level of clarity and certainty
489 regarding existing water rights and claims is needed. The required level of clarity and certainty
490 regarding who has what water rights does not currently exist in many drainage units. Existing state
491 statutes, as interpreted by case law, make adjudication in state Superior Court the only process
492 currently available to determine the extent and validity of water rights and claims. The existing
493 adjudication process allows for a range of geographic scales, from multiple WRIsAs to a drainage
494 level. However, the use of state Superior Court and the existing adjudication process may not be
495 the most appropriate or efficient venue to achieve a negotiated settlement of existing state water
496 rights and claims. It is anticipated that either local or basin wide adjudication will eventually be
497 required to achieve the required level of clarity and certainty regarding existing water rights and
498 claims. The IIFWG will develop recommendations for policy makers regarding state and federal

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499 legislation to reform the adjudication process or provide an alternative process that is more user
500 friendly and effective. The state Attorney General's office has developed reform recommendations;
501 new legislation may be introduced in 2004. What ever the outcome of the reform effort the timing
502 and handling of the needed local adjudication will be worked out in the drainage scale negotiations.
503

504 Federal reserved water claims including Tribal water claims have a significant impact on local
505 water management. If a senior federal or tribal water right is left unresolved, or is not quantified,
506 the result is uncertainty about the future availability of water for every other water use. Therefore,
507 it is very important that the WRIA 1 process leads to a resolution of these questions. The local
508 tribes in Whatcom County have stated a desire to quantify their claims. The local tribes have
509 various claims with the Federal government including claims for water rights. The Federal
510 government has a defined process for settling tribal claims. The local tribes preferred method is a
511 Federal/Tribal/State settlement process as outlined in Appendix II. The local tribes and the State
512 have agreed that within a Federal/Tribal/State settlement process they would accept or reject the
513 flow recommendation from this process and if they are rejected refer them back to this process for
514 further work (pending policy and legal review). The ISF Action Plan is intended to support the local
515 portion of this settlement process by providing flow recommendations. The IIFWG will, as part of
516 the discussions in the drainage unit, hold discussions about the pros and cons of a
517 Federal/Tribal/State settlement process. The IIFWG will solicit public input to determine the level
518 of support for recommending this approach and recommendations will be forwarded to the Joint
519 Board and Planning Unit for action.
520

521 A further effort envisioned by this ISF Action Plan, that may require legislative change, is to create
522 a way for immediate improvements to flows and habitat to occur and for currently unpermitted
523 water users to participate in a meaningful way in the goals of this Action Plan and ultimate
524 regulatory processes. This is discussed in more detail in Section V.
525

526 **Step 2 Initial Flow Recommendation Development:** The IIFWG will develop the initial flow
527 recommendations for the drainage unit. This development step is to identify flow levels that state,
528 federal, tribal, and local government representatives will accept. Physically and financially
529 practicable strategies to achieve flows will be identified. This is to ensure that the recommended
530 flows are achievable within the context of the selection criteria identified previously. Several
531 approaches may be used by the IIFWG to arrive at the recommended flows, and the recommended
532 flows will be evaluated in terms of the criteria described previously. The initial flow
533 recommendation development will generally proceed as follows:
534

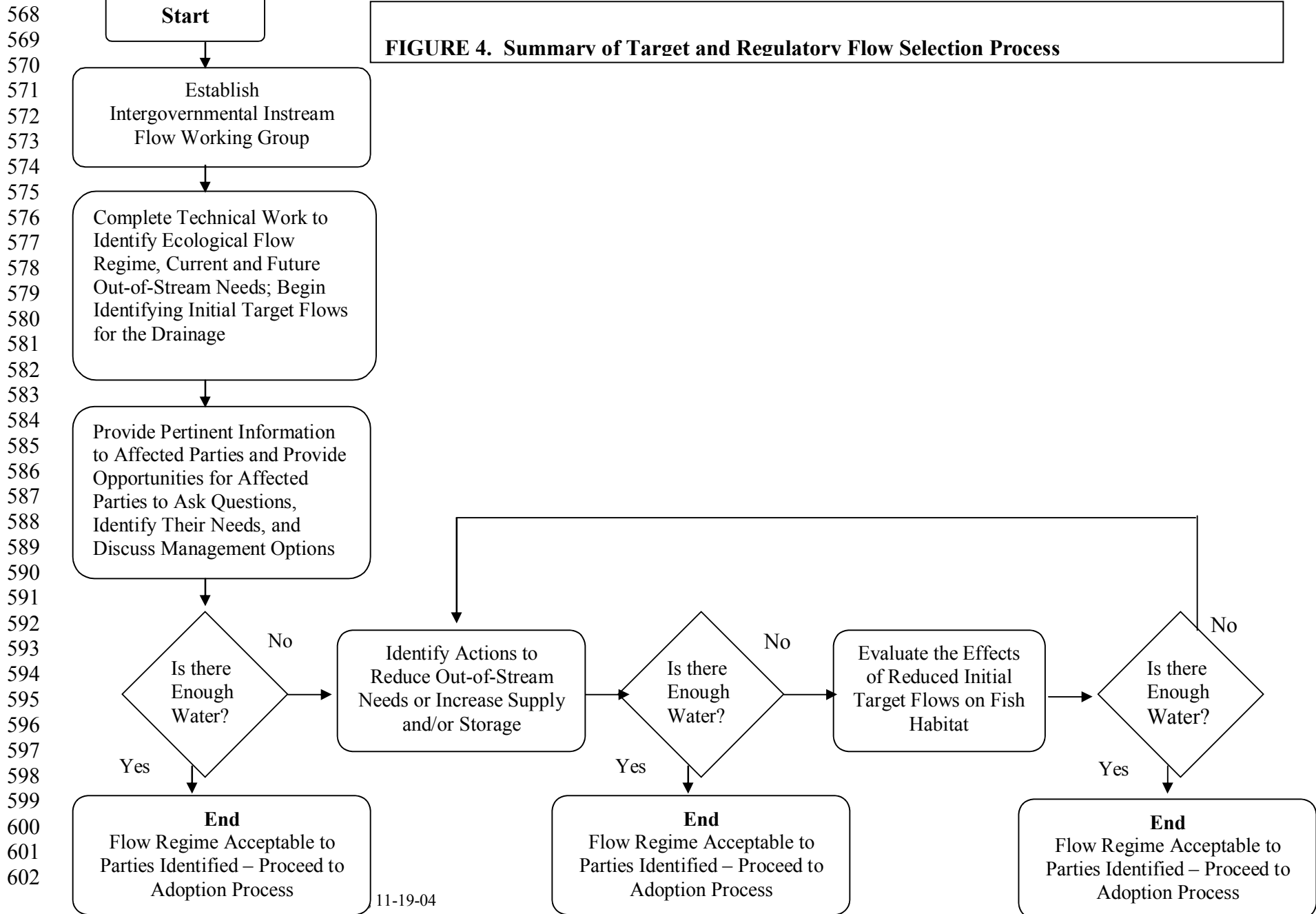
535 A. Utah State University's technical studies will be used to identify the instream flow requirements
536 of an ecological flow regime for the drainage unit. The Utah State University's modeling effort
537 will provide hydrographs for historic, current, and future scenarios under wet, average, and dry
538 conditions. Those studies will also define a quantitative relationship between instream flow and
539 fish habitat quantity and quality for the drainage unit.
540

541 B. An estimate of current and future uses in the drainage unit will be prepared along with an
542 analysis of existing water right claims, permits, certificates, and applications. This will include
543 uses of water from wells exempt from permitting under RCW 90.44.050.
544

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- 545 C. The surface water model predictions of a historic conditions instream flow hydrograph for each
546 drainage unit will be developed for wet, average, and dry years to evaluate water availability
547 during each of these weather conditions. An analysis will be conducted to compare this
548 “natural” water availability to the estimated current and future needs as well as the existing
549 claims permits and certificates. This analysis will determine the magnitude, duration, timing,
550 and frequency of events where water is available for instream and out-of-stream uses. This
551 analysis may include evaluating sequential wet and/or dry years. Also modeling of historic
552 flows will provide information on human impact to flows. Land use changes by humans can
553 have significant effects on the timing and size of flow events. Understanding how changes have
554 affected flows and habitat availability will provide direction on how to achieve desired
555 outcomes.
556
- 557 D. The results of the WRIA 1 ground water quantity modeling effort will be used to assist in the
558 assessment of the impact of ground water use upon stream flow and habitat, and has the
559 potential to be used to evaluate augmentation of streamflow and habitat, and evaluate other
560 ground to surface water and habitat options that might be useful in development of instream
561 flow recommendations.
562
- 563 E. When the IIFWG reaches consensus on proposed flows and practicable management strategies,
564 then initial flows for recommendation have been identified for a drainage unit and the process
565 can move to step 3.
566
- 567 The IIFWG will use the process summarized in Figure 4 in both Step 2 and Step 3.

FIGURE 4. Summary of Target and Regulatory Flow Selection Process



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603 **Step 3. Seek Agreement on Flow Recommendations:** Once the IIFWG has agreed to an initial
604 flow recommendation, it will present its initial flow recommendation, selection methodology, and
605 justification to the affected parties for feedback and discussion at a workshop in the drainage.
606 These flow recommendations will include information on the full range of ecological flows and will
607 specifically include target flows, regulatory flows to be set by Ecology, and regulatory fish flows
608 for the Federal/Tribal/State settlement process. For drainage units where the analysis indicate there
609 is not sufficient water to meet instream and out-of-stream needs, the IIFWG and the participating
610 affected parties will first analyze the economic and other impacts of decreased water supply for out
611 of stream uses and then look for alternatives to increase supply such as conservation, water
612 reclamation and reuse, surface or ground water storage, and importation of water. The cost impacts
613 of these alternatives will be analyzed. If this analysis determines that both out-of-stream and
614 instream uses can be met in a manner consistent with the selection criteria identified above, the flow
615 regime is ready for adoption. If not, the effects of lower than recommended instream flows on fish
616 habitat quantity and quality will be analyzed and the potential alternatives for enhancing instream
617 flow or habitat will be identified including storage and ground water augmentation. The economics
618 of all options will be evaluated and will include the consideration of environmental factors. This
619 process, which will be iterated until acceptable flows and possible strategies are identified, is
620 summarized in Figure 4.

621
622 In some drainage units the required level of clarity and certainty regarding who has what water
623 rights does not currently exist. This makes the task of balancing available water with uses and
624 rights impossible. Existing state statutes, as interpreted by case law, make adjudication in state
625 Superior Court the only process currently available to determine the extent and validity of water
626 rights and claims. As part of the process of iterating the instream and out of stream needs the
627 IIFWG and the participating affected parties will analyze the available methods (including
628 adjudication both local and basin wide) for determining the size and extent of existing rights and
629 claims and will agree on what process will be applied to the drainage unit in question.

630
631 Further as part of the iteration process the IIFWG and the participating affected parties will discuss
632 management strategies for all aspects of water management including flow achievement,
633 compliance with environmental laws, flow contracts, and the long term enforcement options. The
634 IIFWG and participating affected parties will prepare a recommendation on management strategies
635 to be forwarded to the Joint Board and Planning Unit to be incorporated into the WRIA 1
636 implementation process.

637
638 Once agreement is reached, the next step is for the recommended flows for the drainage unit to be
639 forwarded to the Joint Board and Planning Unit for approval. It is anticipated that in some cases the
640 process for reaching agreement with the Joint Board and/or Planning Unit will include iterations on
641 the flow recommendations with the IIFWG and participating affected parties.

642
643 **Step 4. Recommend Flows:** Due to the interrelationships and cumulative nature of stream flow
644 within a system of drainages, initial flow recommendations will first be developed for each
645 drainage. After that the flows for each drainage within a system will be identified and integrated,
646 then the combined flow recommendations for the system will be recommended to the Joint Board
647 and Planning Unit. After all WRIA 1 flow recommendations have been developed and approved by
648 the Joint Board and Planning Unit, the IIFWG will review the compiled set of flows WRIA-wide

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649 for any inconsistencies and contradictions. The IIFWG will then present a final complete set of flow
650 recommendations to the Joint Board and Planning Unit for approval. A public hearing will be held
651 on the recommended full set of flows. Then the Joint Board and Planning Unit will consider the
652 comments from the public hearing and make a decision on the recommended flows. This set of
653 approved flow recommendations will then be incorporated into the next version of the WRIA 1
654 Watershed Management Plan. If the agreed to management strategy requires Ecology to change
655 current regulatory flows, the Planning Unit will provide direction to Ecology to proceed with
656 rulemaking.

657
658 These instream flow recommendations would also be forwarded to the Federal/Tribal/State
659 settlement negotiations for acceptance or rejection. If the flow recommendations are rejected, the
660 process would iterate until acceptable flow recommendations are achieved or an impasse is declared
661 in which case the process could default to an adjudicative court process.

662
663 If the IIFWG, Joint Board, and Planning Unit cannot agree on the recommended flows, two
664 scenarios are possible:

- 665 ▪ Evaluate the possibility of reaching agreement and if agreement looks likely, go back to
666 discussion and make changes to flows or out of stream demands until agreement is reached.
- 667
668 ▪ Notify Ecology that agreement on recommended flows cannot be reached. Ecology could
669 then go to rule making on its own. Alternatively, if an adjudication has been started the
670 adjudicating court could be notified that an agreement could not be reached and that a
671 judicial determination is requested.

672
673 If the Joint Board and Planning Unit decision is to request no change to current state regulatory
674 flows in Chapter 173-501 WAC, then the instream flow recommendation process under Watershed
675 Planning would end. The existing adopted flows would then be used in other WRIA 1 Project work
676 as needed.

677
678 Potentially affected parties who chose to not participate in the initial flow review process will have
679 an opportunity to participate in the formal Ecology rule making, adjudication court case when
680 started, and flow adoption stage that follows. It is anticipated that in some cases private parties or
681 some water resource interest groups may not be able to accept a given flow recommendation. It
682 should be noted that these flow recommendations will be subject to further public and judicial
683 review in the adoption process.

684 685 686 **V. Recommended Instream Flow *Achievement* Action Plan**

687
688 Because a regulatory flow adoption process may require agreements that take significant time due
689 to associated legal processes, it is recommended that flow achievement strategies be developed and
690 implemented early on that are not dependent on the regulatory flow adoption process. One possible
691 approach that has been proposed is the concept of consensual agreements that result in habitat
692 improvement in the short term and participation of unpermitted water users in the negotiation
693 process. These consensual agreements, which may include other provisions, are being referred to as
694 flow contracts.

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695
 696 Affected parties in the drainage will also have the opportunity to discuss additional strategies for
 697 achieving target flows in their drainage. The WRIA 1 implementation process will provide
 698 assistance as needed or if there are no willing implementers the WRIA 1 Management group (as
 699 defined in the Implementation Strategy) will take on the task.
 700

701 In addition, the flow achievement process will evaluate strategies such as:

- 702 ▪ Monitoring the percentage of available habitat supported by the recommended target flows
- 703 ▪ Dedicating a use maximum and reserving the rest for fish in certain reaches (upside down
- 704 water rights)
- 705 ▪ Trading habitat and wetland enhancements for out-of-stream uses
- 706 ▪ Stream augmentation by ground water or seasonal surface water storage
- 707 ▪ Changing surface water withdrawals to ground water sources
- 708 ▪ Drainage modifications
- 709 ▪ Irrigation scheduling, especially of direct surface water withdrawals
- 710 ▪ Conservation and reuse
- 711 ▪ Land use and zoning changes
- 712 ▪ Other management options such as interbasin transfers and water marketing

713
 714

715 **VI. Recommended Instream Flow *Adoption Plan***

716

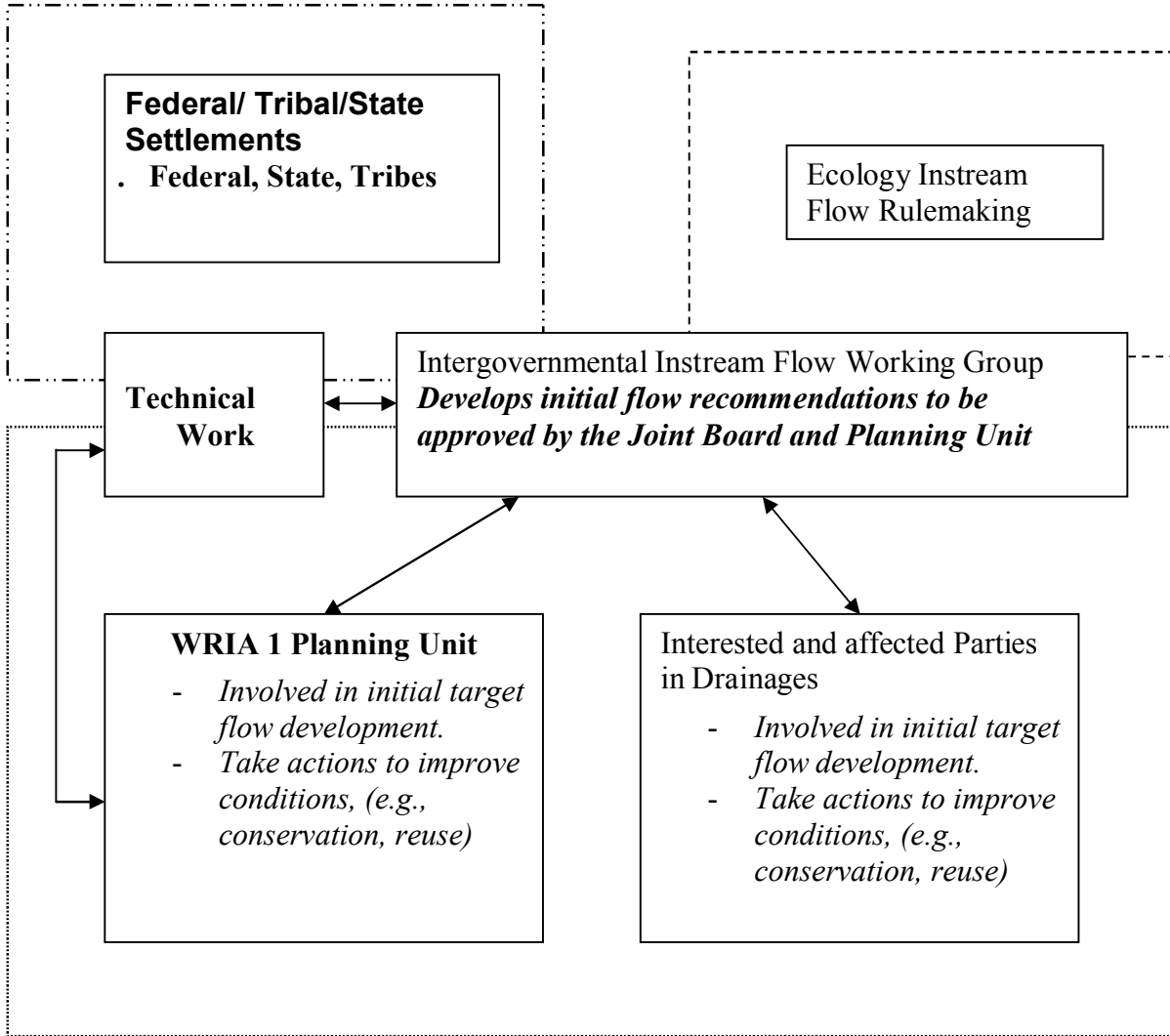
717 Following recommendation on the drainage unit level and integration of flows for all drainages in
 718 the stream systems, the Joint Board and Planning Unit will approve the flow recommendations. To
 719 the extent necessary the boards, commissions and councils of the local governments will have an
 720 opportunity to approve flows that affect their jurisdiction. As part of the WRIA 1 Plan approval the
 721 lead agency will hold public hearings prior to adoption by the County Council of the recommended
 722 flows.
 723

724 Following the above adoption the regulatory instream flow adoption process will utilizes the flows
 725 recommended by the IIFWG and approved by the Joint Board and Planning Unit. The locally
 726 approved regulatory portion of the flows is the basis for two formal adoption processes which *take*
 727 *place outside the WRIA 1 Project*. The two adoption processes are state rulemaking conducted by
 728 Ecology and a Federal/Tribal/State settlement process as requested by the Tribes and State (pending
 729 policy review) to resolve water and other claims with the Federal government. Parties involved in
 730 the Federal/Tribal/State settlement process will be asked to agree to take the locally approved flows
 731 into the process for acceptance or rejection. If the Federal/Tribal/State settlement process rejects
 732 the flows, the flows would iterate back to the IIFWG and the local process for review and approval.
 733 If the local process were to declare an impasse the decision would default to the Federal/Tribal/State
 734 settlement process. Ecology’s rulemaking is a defined process with public input and review and if
 735 Ecology receives additional information during these hearings that lead to changes to the
 736 recommended flows, the IIFWG will be asked to review any proposed changes to the recommended
 737 flows.
 738

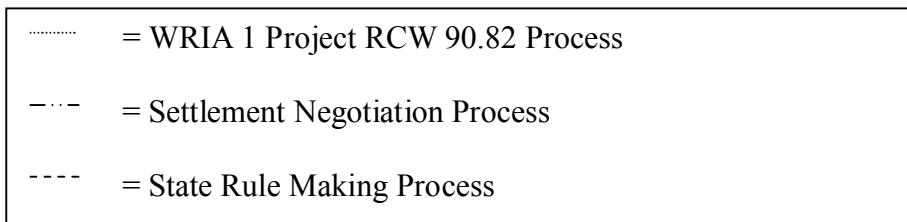
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739 The chart below illustrates the participants in the adoption processes. The chart also shows how the
740 rulemaking process occurs and the Federal/Tribal/State settlement process occurs “outside” the
741 WRIA 1 Project, but with overlap occurring in the form of the IIFWG.
742

743 **ISF Action Plan Adoption Process Flow Chart**



744
745
746



747
748
749

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750 **Federal/Tribal/State settlement process**

751
752 Outside the WRIA 1 Project, a negotiated Federal/Tribal/State settlement is reached through the
753 multiple step negotiated process described in the document *Federal Reserved Water Rights-The*
754 *Negotiated Settlement Option* (IIFWG, November 5, 2003) found in Appendix II. The steps in the
755 negotiated settlement flow chart are: 1) preparation, decide who participates; 2) reach local
756 agreement (this process' step 2 includes flow selection, Joint Board and Planning Unit flow
757 approval, and rule making); 3) final authorization by state and local parties; 4) federal review and
758 approval; 5) tribal referendum; 6) federal approval; 7) funding the settlement 8) implementation of
759 settlement including consent decree. (The negotiated settlement is filed as a legal action requesting
760 a consent decree in federal court.)
761

762 If successful the negotiated settlement option will resolve tribal claims and may bring federal
763 money to the WRIA, and could result in senior tribal rights to instream flows for fish and water
764 consistent with the 1855 Treaty of Point Elliot. It is also possible that federal and state legislation
765 may be needed to execute the terms of a settlement agreement and this legislative action may affect
766 the timing of any judicial action.
767

768 **State Rule Making**

769 After local agreements are reached on flows, state rule making may also be required to modify the
770 current Chapter 173-501 WAC on flows and to trigger implementation actions by State agencies.
771 State rule making provides for representation, public education and involvement, and public
772 hearings and will be an opportunity for anyone who chose not to participate earlier to be heard.
773 However, state rule making alone will not resolve tribal claims and will not result in certainty or
774 finality. (See definition of priority date in Definition of Terms, Appendix I.)
775

776 Under RCW 90.82.040, if there is no Planning Unit agreement on approval of flow
777 recommendations within four years of when funds were first received, Ecology *may* initiate rule
778 making and has two years to set flows. Section 080 of Chapter 90.82 RCW describes the rule
779 making process after the Planning Unit makes recommendations on flows. When Ecology proposes
780 an instream flow rule negotiated by a Planning Unit, it is obligated to follow the State
781 Administrative Procedure Act (APA)(Chapter 34.05 RCW). If the planning effort was sufficiently
782 broad and thorough, it most likely will be complete, consistent with legal requirements, and have
783 captured or considered most all of the views in the flow deliberations. However, if during the APA
784 review process, concerns are identified that the State concludes may require a substantive change to
785 the flow recommendation, the State will refer the flow recommendations/proposed rule back to the
786 instream flow selection group for further consideration. The State reserves its statutory authority to
787 proceed with rulemaking if, in its judgment, an amended flow recommendation acceptable to the
788 State is not timely developed.
789
790
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795

DRAFT SUBJECT TO LEGAL REVIEW**VII. Recommended Instream Flow Enforcement Plan**

796
797
798 Compliance and enforcement issues will be identified, discussed, and recommended in the drainage
799 unit level discussions. At some point in this process the IIFWG will recommend to the Joint Board
800 and Planning Unit modifications to the Plans compliance and enforcement sections for
801 implementation by the WRIA 1 Project. It is currently recommended that the plan for compliance
802 with instream flows contain the four elements outlined in the WRIA Wide Compliance Program and
803 be consistent throughout the WRIA:

- 804 • Education
- 805 • Technical Assistance
- 806 • Formal Enforcement
- 807 • Compliance Monitoring

808
809 Therefore, enforcement will begin as an information sharing effort during workshops with affected
810 parties in the drainages. Technical assistance will include discussion with affected parties of
811 options such as flow contracts, submitting water right change applications to resolve some
812 compliance problems if possible, and other compliance strategies. After target flows are approved
813 by the Joint Board and Planning Unit and water users have evaluated the flow contract option,
814 enforcement against unpermitted water users without flow contracts should begin. The local
815 negotiation process will define how enforcement will be conducted and identify the appropriate
816 authorities for implementation. At some point in the process formal adjudication of existing claims,
817 permits and certificates will be required to determine their official extent. This step will also create
818 a legal forum to determine the extent of their rights for holders of claims, permits or certificates
819 who have chosen not to participate in the instream flow negotiation process.

820

821

VIII. Recommended Instream Flow Implementation and Funding Plan

822
823
824 This Action Plan is intended to be an integral part of the WRIA 1 Project. A number of the
825 outcomes from this Action Plan will feed into other WRIA 1 programs. The flow recommendations
826 clearly will be used in a number of areas. It is also the intent of this Action Plan that the need for
827 compliance and enforcement be taken up as part of the ongoing WRIA 1 Project with input from
828 this Action Plan.

829

830 The reverse is also true in that for this Action Plan to achieve the goals set forth, WRIA 1 work on
831 ground water will be required. The interaction of ground and surface water and the way in which
832 ground water supports instream flows is critical to managing instream flows especially during low
833 flow periods. Also understanding the storage potential and release timing issues of the ground
834 water aquifers is important when considering how to store more water for both instream and out of
835 stream uses. The ground water work will move forward in concert with this ISF Action Plan.

836

837 The interrelatedness of water quantity, water quality, instream flow and fish habitat makes the
838 funding support for the entire WRIA 1 Project an important single package. The costs should be
839 looked at in aggregate and adjusted as a collective to facilitate being able to move forward in a
840 cooperative collective fashion.

841

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842 The value of the WRIA 1 Project is its cooperative nature and being able to maintain that aspect is
843 important since it will enable the WRIA 1 Project participants to attract significant Federal and
844 State grant funding. An important aspect of bringing in a Federal team to engage in the proposed
845 Federal/Tribal/State settlement process is that it is the only way that finality and certainty goals can
846 be achieved and the solution to tribal claims under these settlement processes usually involves
847 Federal funding of large projects to resolve the claims. Everyone benefits and the funding is
848 potentially greater if there is a cooperative local negotiation aspect to support the settlement
849 process. The alternative to the current cooperative process is significantly more adversarial. The
850 history of disputes in the western U.S. over water is one of significant litigation and costly court
851 battles. The current WRIA 1 Project is on a path to substantially avoid costly litigation and court
852 battles.

853
854 However, political will is required to financially support the process and maintain a long-term
855 vision for a cooperative future. Staff will be presenting a funding package for the WRIA 1 Project
856 including this Action Plan in the near future along with the first draft of the WRIA 1 Plan.
857

858 In the meantime it is the hope of staff that everyone can focus on the details of this Action Plan and
859 understand and appreciate the linkages with other aspects of watershed management under the
860 WRIA 1 Project.

861
862

DRAFT SUBJECT TO LEGAL REVIEW863 **APPENDIX I– Definition of Terms**

864

865 **Achieving Flow Settings** - The process of ensuring that there is sufficient water in streams to
866 satisfy the instream flow requirements adopted by rule-making and/or other processes.

867 **Adaptive management** - A process whereby management decisions can be changed or adjusted
868 based on additional biological, physical, or socioeconomic information. In the context of instream
869 flow, adaptive management can result in higher or lower instream flow requirements.

870 **Adjudicated certificate** - A document issued pursuant to RCW 90.03.240 to evidence a water right
871 adjudicated under the terms of an adjudication through a Superior Court.

872 **Adjudication** - A general adjudication of water rights determines the validity and extent of existing
873 water rights in a specific geographic area. An adjudication is a legal process, generally conducted
874 through the superior court in the county in which the water is located. An adjudication does not
875 create new rights, it only confirms existing rights.

876 **Adopting Flow Settings** - The process of finalizing instream flow requirements by establishing
877 instream flows as water rights with a specific priority date.

878 **Affected Parties**- The property owners, water right document holders (certificate, permit,
879 application, claim), the PU Caucuses, the Nooksack Indian Tribe, and the Lummi Nation.

880 **Appropriation of water** - The process of legally acquiring the right to specific amounts of public
881 water through application of the water to beneficial use.

882 **Aquifer** - A geologic formation that contains water.

883 **Availability - Water** that is not only physically available, but which has not been previously
884 appropriated by another person or which is not required to satisfy instream flows (see physical water
885 availability).

886 **Base Flow** - Streamflow originating entirely from ground water discharging to the stream. Also
887 used to refer to a level of streamflow established in accordance with provisions of Chapter 90.54
888 RCW required in perennial streams to preserve wildlife, fish, scenic, aesthetic, and other
889 environmental and navigational values. WAC 173-500-050 (3)

890 **Basin** - A region in which rainfall or snowmelt water will flow toward a single point. Thus, it is
891 any hollow or trough in the earth's crust, whether filled by water or not. A basin is the total area
892 drained by a river and its tributaries. Used interchangeably with watershed.

893 **Beneficial use** - (1) the use of water for domestic, stock watering, industrial, commercial,
894 agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and
895 enhancement, shell fish and other aquatic life, navigation, recreation, thermal power production,
896 preservation of environmental and aesthetic values, and all other uses compatible with the
897 enjoyment of the public waters of the state, or (2) the measure of a water right based on the amount
898 of water applied in a reasonable manner without waste.

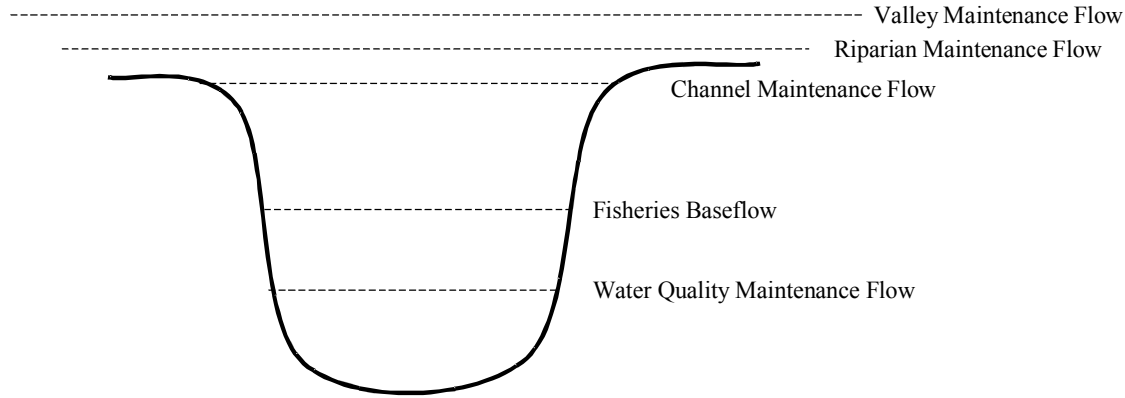
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- 899 **Certificate** - A document issued pursuant to Chapters 90.03 or 90.44 RCW to evidence a water
900 right perfected under the terms of the water right permit.
- 901 **Change Application** - The standard form, which when completed and filed with Ecology, is the
902 first step toward changing a water right.
- 903 **Channel-maintenance flow** - (1) The minimum streamflow to sustain biota; (2) range of flows
904 within a stream from normal to peak runoff and may include, but is not limited to, flushing flows or
905 flows required to maintain the existing natural stream channel and adjacent riparian vegetation.
- 906 **Clean Water Act** - Growing public awareness and concern for controlling water pollution led to
907 enactment of the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977,
908 this law became commonly known as the Clean Water Act. The Act established the basic structure
909 for regulating discharges of pollutants into the waters of the United States. It gave EPA the
910 authority to implement pollution control programs such as setting wastewater standards for industry.
911 The Clean Water Act also contained requirements to set water quality standards for all contaminants
912 in surface waters. The Act made it unlawful for any person to discharge most pollutants from a
913 point source into navigable waters, unless a permit was obtained under its provisions and
914 recognized the need for planning to address the critical problems posed by non-point source
915 pollution.
- 916 **Consent Decree** - A contract of the parties entered upon the record with the approval and sanction
917 of a court of competent jurisdiction, which cannot be nullified or set aside without the consent of
918 the parties thereto, except for fraud or mistake. Has the same force and effect as any other
919 judgment. Because the agreement of the parties waives exception to irregularities in the
920 proceedings occurring prior to the time of agreement, appeal from a consent decree/consent
921 judgment is limited to attack for mistake, fraud, or lack of jurisdiction.
- 922 **Diversion** - (1) a physical structure constructed to take surface water from its natural course into a
923 canal, pipe or other conduit by means of gravity flow or by pumping, or (2) the action of taking
924 water from a stream or other body of water.
- 925 **Ecological Flow Regime** - instream flow levels needed to preserve, protect, and restore the
926 physical, biological, and chemical aspects of a stream. As shown in Figure 5, can be divided into
927 five functional categories: 1) water quality maintenance, 2) fisheries baseflow, 3) channel
928 maintenance, 4) riparian maintenance, and 5) valley maintenance. Each of these flows components
929 were identified by the September 1999 conference (Hardy 2000) participants as essential for
930 maintaining the ecological health of the stream system. Please note this is a diagrammatic
931 representation and does not represent an absolute relationship between the flows identified (i.e.,
932 water quality maintenance flow may or may not be less than the fisheries baseflow).
- 933 Briefly, the water quality maintenance flow is the quantity of water needed to assimilate wastewater
934 and still achieve compliance with applicable water quality standards. The fish habitat maintenance
935 flow is the minimum instream flow needed to support fish populations during different life stages.
936 The channel maintenance flow is the minimum amount of water needed to perform processes such
937 as sediment transport. The channel maintenance flows impact the long-term characteristics of
938 aquatic habitat such as the distribution, quantity, and quality of pools and riffles. Riparian
939 maintenance flows are the flows needed to maintain a productive plant and animal community

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940 along the stream corridor. Valley maintenance flows are catastrophic flood events and are generally
941 not quantified.

Figure 5. Hypothetical illustration of the flow components essential for maintaining the ecological health of the stream system



942 Request to change the term “Fisheries Baseflow” in Figure 5 above changed to “Fish Habitat
943 Maintenance Flow”.

944 **Ecology** - The department of ecology.

945 **Endangered Species Act** - The 1993 Endangered Species Act requires that all Federal agencies
946 undertake programs for the conservation of endangered and threatened species, and are prohibited
947 from authorizing, funding, or carrying out any action that would jeopardize a listed species or
948 destroy or modify its "critical habitat" [section 7].

949 – **Flow, Optimum** - That instantaneous discharge which provides the best set of hydraulic
950 conditions for a selected life history stage, species, or fishery. (Bahya 1979)

951 **General adjudication of water rights** - A Washington State Superior Court legal proceeding
952 initiated by the department of ecology as plaintiff to determine the validity, priority and extent of
953 existing water rights in a given geographic area or watershed. An adjudication is a form of a quiet
954 title action.

955 **Ground water** - All waters that exists beneath the land surface or beneath the bed of any stream,
956 lake, or reservoir, or other body of surface water within the boundaries of Washington State,
957 whatever may be the geological formation or structure in which such water stands or flows,
958 percolates or otherwise moves.

959 **Hydraulic continuity** – The natural interconnection of ground water and surface water bodies. An
960 aquifer is in hydraulic continuity with wetlands, lakes, streams, rivers or other surface water bodies
961 if it discharges, recharges, or otherwise affects the surface water bodies.

962 **Instream** - Within the natural stream channel.

963 **Instream flow** - The level of flow determined by the department to be necessary to protect instream
964 resources. RCW 90.03.345 states that “the establishment of . . . minimum flows or levels under

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965 RCW 90.22.010 or 90.54.040 shall constitute appropriations with in the meaning of this chapter
966 with priority dates as of the effectives dates of their establishment.” (i.e. they are water rights)
967 [parenthetical material added]

968 **Instream Flow Requirement** - Instream flow is the amount of water flowing through a natural
969 stream course that is needed to sustain the instream values at an acceptable level. Instream values
970 and uses include protection of fish and wildlife habitat, migration, and propagation; outdoor
971 recreation activities; navigation; hydropower generation; waste assimilation (water quality); and
972 ecosystem maintenance which includes recruitment of fresh water to the estuaries, riparian
973 vegetation, floodplain wetlands, and maintenance of channel geomorphology. Water requirements
974 sufficient to maintain all of these uses at an acceptable level are the "instream flow requirements."
975 (USFWS 1993)

976 **Instream Values** - defined by law (RCW 90.54.020(3)(a)) as fish, wildlife, recreation, aesthetics,
977 navigation, water quality, and other environmental values subject to protection through
978 establishment of minimum instream flows.

979 **Instream Resources** - Resources, values, or activities, such as fish, other organisms, navigation,
980 recreation, hydropower, and water quality, which require water in the stream channel.

981 **Low flow** - Flow level limitations appearing as provisions on permits and certificates issued by the
982 department or its predecessors.

983 **Minimum Instream Flow** - streamflows established by administrative rule or other means for the
984 purpose of protecting and preserving instream values. Flows adopted by rule are considered a water
985 right with a priority date as of the date of their adoption. Also called "instream flows" and "base
986 flows" in Washington statutes, and generally referred to as "instream flows".

987 **Mitigation** - A wide variety of measures (such as siting, facility design, operation, and retrofit)
988 which the department determines are defensible, technically feasible, and environmentally sound
989 that are taken to diminish the impact of an action. It may include, but is not limited to not
990 implementing the decision, taking affirmative steps to avoid the impact, rectifying through
991 restoration or compensating by replacing or providing substitute resources; changes in siting,
992 facility design or operation; retrofitting; transfer or protection of equivalent resources.

993 **Permit** - A document issued by the department pursuant to Chapter 90.03 or 90.44 RCW in
994 response to a report of examination that conveys authority to appropriate water and construct
995 physical works associated with the appropriation. To the extent water is not put to use, a permit is
996 an inchoate water right.

997 **Prior Appropriation Doctrine** - the system for allocating water to private individuals and public
998 institutions used in most Western states, *including Washington*. The prior appropriation doctrine is
999 based on the concept of "First in Time, First in Right." The first person to take a quantity of water
1000 and put it to "Beneficial Use" has a higher priority of right than a subsequent user. Under drought
1001 conditions, higher priority users are satisfied before junior users receive water. Appropriative rights
1002 awarded under state water law can be lost through nonuse (i.e., "use it or lose it") in a formal
1003 process known as relinquishment; they can also be sold or transferred apart from the land. In
1004 contrast, federal reserved water rights and tribal reserved water rights are not subject to
1005 relinquishment due to nonuse (Winans citation).

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1006 **Priority** - Priority determines the order of rank of the rights to use water in a system. Under the
1007 Prior Appropriation Doctrine, priority is the concept that the person first using water for a beneficial
1008 purpose has a right superior to those commencing their use later. The priority date of a Federal
1009 reserved water right is the date the land is withdrawn from the public domain. Priority is important
1010 when the quantity of available water is insufficient to meet the needs of all those having rights to
1011 use water from a common source. Under the prior appropriation system, shortages are not shared.
1012 Some Western State statutes contain priority or preference categories of water use, under which
1013 higher priority uses (such as domestic) have first right to water in times of shortage, regardless of
1014 priority date. There may also be constraints against changes or transfers involving these priority
1015 uses. (USFWS 1993)

1016 **Recharge of ground water** - The processes by which surface water percolates below the rooting
1017 zone of soil and reaches the saturated zone in an aquifer.

1018 **Regulatory Flow** -

1019 **Reserved Water Rights** - This class of water rights is a judicial creation derived from *Winters v.*
1020 *United States* (207 U.S. 564, 1907) and a subsequent federal case law, which collectively hold that
1021 when the federal government withdraws land from general use and reserves it for a specific
1022 purpose, the federal government by implication reserves the minimum amount of water
1023 unappropriated at the time the land was withdrawn or reserved to accomplish the primary purposes
1024 of the reservation. Federal reserved water rights may be claimed when Congress has by statute
1025 withdrawn lands from the public domain for a particular federal purpose or where the President has
1026 withdrawn lands from the public domain for a particular federal purpose pursuant to congressional
1027 authorization. (National Research Council 1992)

1028 **Rulemaking** - The process, articulated by the Administrative Procedures Act (see Chapter 34.05
1029 RCW), whereby Washington State government agencies adopt regulations as part of the
1030 Washington Administrative Code (WAC) in order to implement the statutes embodied in the
1031 Revised Code of Washington (RCW).

1032 **Senior water right** - Any water right with a priority date earlier than the water right under
1033 consideration.

1034 **Surface water** - (1) a body of water such as a stream, a lake, or spring at or on the land surface, or
1035 (2) water flowing in or overland to a stream or present in a lake, pond, or wetland.

1036 **Target Flow** - Federal agencies use the term target flow in referring to an amount of water in a
1037 stream to meet fish needs. Under the Endangered Species Act (ESA), the National Marine Fisheries
1038 Service and the US Fish and Wildlife Service use target flows as their goal to provide adequate
1039 flows for ESA-listed fish. A target flow is to be biologically-based, achievable, and would provide
1040 sufficient water for properly functioning habitat.

1041 **Time Immemorial** - A priority date under the Appropriation Doctrine of time 0000, essentially
1042 making such water rights the most senior right possible.

1043 **Treaty Reserved Right/Treaty Rights** - Rights of Indian Tribes that were confirmed in the
1044 Stevens Treaties. These rights have also been affirmed by judicial decisions. These rights include
1045 the right of Tribal members to harvest fish resources throughout their usual and accustomed fishing

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1046 areas. Several U.S. Supreme Court Decisions have also recognized that any rights not specifically
1047 given up in the treaties are rights retained by the Tribes.

1048 **Vested water right** -A right to use surface water established prior to the effective date of chapter
1049 90.03 RCW or to use ground water prior to the effective date of the 1945 ground water code
1050 (chapter 90.44 RCW).

1051 **Water Resource Inventory Area or (WRIA)** - One of 62 geographic areas of the state based
1052 generally on drainage patterns and demarcated on the map in WAC 173-500-990.

1053 **Water right** - A legal right to make beneficial use of public waters of the State of Washington.

1054 **Water Right Application** - The standard form which is filed with Ecology to request that a permit
1055 be issued for the use of water, and is the first step toward establishing a water right.

1056 **Water right claim** - A claim to a vested right to withdraw or divert and make beneficial use of
1057 public surface or ground waters of the state, filed on a form provided by the department and
1058 registered in accordance with Chapter 90.14 RCW.

1059 **Well** - Any excavation that is drilled, cored, bored, washed, driven, dug, jetted, or otherwise
1060 constructed when the intended use of the excavation is for the location, diversion, artificial
1061 recharge, or withdrawal of ground water. Well includes water-supply well and resource protection
1062 well. Well does not mean excavations excluded in Chapter 173-160-WAC.

1063 **Withdrawal** - (1) the physical structures constructed to take ground water from an aquifer into a
1064 pipe or other conduit by means of gravity flow or by pumping, or (2) the action of removing ground
1065 water from an aquifer.

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1067 **Appendix II**

1068

1069 **Federal Reserved Water Rights- The Negotiated Settlement Option (IIFWG, 2003)**

1070