

Quinault Indian Nation

Please see attached letter from the Quinault Indian Nation regarding the NEB Guidance Document.



Quinault Indian Nation

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November 8, 2018

Rebecca Inman
Water Conservancy Board Coordinator
Water Resources Program
Department of Ecology
300 Desmond Dr SE
Lacey, WA 98503

Dear Ms. Inman,

We are submitting this letter on behalf of the Quinault Indian Nation (QIN or Quinault) from a technical perspective to provide comments on the draft document titled *Interim Guidance for Determining Net Ecological Benefit*.

The QIN is a signatory to the Treaty of Olympia (1856), by which it reserved, among other things, the right of “taking fish, at all usual and accustomed fishing grounds and stations” and the privilege of hunting and gathering, among other rights, in exchange for ceding lands it historically roamed freely. In a landmark court case known as the “Boldt decision,” a federal court confirmed the Quinault Nation’s Treaty fishing rights and established the plaintiff tribes, including the Quinault Nation, as co-managers of off-Reservation fisheries resources entitled to half of the harvestable number of fish returning to Washington waters. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) *aff’d* 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). Based on evidence provided, the court determined the usual and accustomed areas of the Quinault Nation include “the waters adjacent to their territory” and “Grays Harbor and those streams which empty into Grays Harbor.” *Id.* at 374-375. Accordingly, the QIN has Treaty-reserved rights and interests throughout the Chehalis Basin.

Treaty rights are not granted to tribes, but rather are “grants of rights from them—a reservation of those not granted.” *United States v. Winans*, 198 U.S. 371, 380-81 (1905). Treaties take precedence over conflicting state laws by reason of the Supremacy Clause of the U.S. Constitution, Art. VI, Sect. 2. Accordingly, treaties are the supreme law of the land. *Worcester v. Georgia*, 31 U.S. 515, 531 (1832). Moreover, the Ninth Circuit Court of Appeals has held that “The State of Washington is bound by the treaty. If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as

interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts.” *United States v. State of Washington*, 759 F.2d 1353, 1357 (9th Cir.1985) (en banc).

The State is obligated by the Treaties and recent federal court opinions to protect treaty resources and ensure agency actions do not harm them. The Centennial Accord further commits the Department of Ecology to maintain a government-to-government relationship that respects our values and culture, and protects Treaty rights and interests.

Additionally, the Public Trust Doctrine dictates protection of public resources including navigation, fish and wildlife and their habitat, recreation, and environmental uses. The Public Trust Doctrine has existed in Washington since statehood in 1889. In 1987, the Washington Supreme Court explicitly recognized that the Public Trust Doctrine applies to Washington’s navigable waters, and has so applied since statehood. *Caminiti v. Boyle*, 107 Wn.2d 662 (1987).

QIN believes this draft guidance document is a helpful start for watershed planners to submit projects that achieve NEB. However, it has yet to clarify how precisely Ecology plans to assess these projects. Ecology should clearly articulate the standards by which it will judge whether actions and/or projects meet the criteria for Net Ecological Benefits. We suggest that Ecology create a rubric or methodology to score various categories that it will use in determining whether NEB is achieved. This methodology should also be published to allow for a consistent and transparent assessment process that can be monitored, assessed and adjusted over time. Because of the unpredictability of the actual benefits in time and place from proposed projects in achieving actual NEB, coupled with the uncertainties we face regarding future climate change impacts, it is all the more important to develop a numeric standard.

For example, the guidance document states that priority projects include restoration for endangered, threatened, or native salmon species. It also states on page 6, that “These projects **should** support recovery of threatened and endangered salmonids and/or native species” [bold for emphasis]. However, there is no similar language for duration of expected benefits (i.e. that expected benefits **should** remain in perpetuity.) Quinault recommends that providing benefits to instream resources in perpetuity is a priority that be required for any project, and Ecology should include language to this effect. Ecology should keep in mind the impacts from ground water withdrawals are in perpetuity. In order to avoid impacting federally-protected Treaty rights, and to ensure the Public Trust Doctrine is met, any mitigation deemed to have a NEB must also be maintained in perpetuity.

Further, it is unclear from the guidance document whether the updated watershed plans must result in an overall benefit to instream resources. The guidance document includes potentially contradictory advice in that regard. The comment box on page 2 states “Net Ecological Benefit determination means anticipated benefits to instream resources from actions designed to restore streamflow will offset and exceed the projected impacts to instream resources from new water use.” However, reference elsewhere merely refer to “offsetting” impacts of consumptive domestic permit-exempt well use. We believe NEB unambiguously means there must be a net gain to instream flow resources, which should be clearly reflected in the guidance document.

A key element not discussed in this draft guidance document is how an accurate calculation of ecological impacts from exempt wells would be achieved. While Ecology does provide methods for estimating consumptive domestic permit-exempt use, these are simply modeled estimates that are not verified. In order to make an accurate calculation, it is imperative that withdrawals from exempt wells are monitored, regulated, and quantified. Similarly, there is no clarity on the accuracy of benefits calculations, which will also likely be based on modeling or qualitative assumptions. The direction in the guidance is for “meaningful” analysis. We recommend the guidance should require such analysis to be scientifically verifiable in order to meet the Treaty and Public Trust Doctrine requirements.

Also, not discussed in the draft guidance document is whether or how climate change is a factor that will affect determinations of NEB. Climate change will surely intensify our current water resource challenges and will increase uncertainty in the future of water supply in Washington. As the climate changes, we may experience a loss of natural water storage, and the timing and volume of stream flows will change due to reduced snowpack and earlier snowmelt, for example. In order to ensure mitigation projects are successfully completed, Ecology should assess whether projects adequately address anticipated impacts of climate change.

On May 2, 2018, QIN sent a comment letter to Ecology concerning QIN’s perspective on NEB following the April 16-17 NEB workshop hosted by Ecology. We invite you to revisit this letter as a reminder of our previous comments, as they are still relevant and may be applied to the current draft interim guidance document.

QIN acknowledges the short timeline that Ecology has to develop a definition and evaluation methodology for NEB, and we appreciate this opportunity to provide input before the guidance becomes final.

Sincerely,

A handwritten signature in black ink, appearing to be 'F. Sharp', written in a cursive style.

Fawn R. Sharp, President
Quinault Indian Nation

cc: Mary Verner, Water Resources Program Manager, Department of Ecology
Mike Gallagher, Water Resources Section Manager, SW Region Department of Ecology
Tom Laurie, Ecology Senior Advisor for Tribal & Environmental Affairs