

Department of Ecology

Date July 6, 2020

Re: Comments on proposed June 22, 2020 Advisory Committee's findings and recommendations.

Dear: Ms. Verner, Ms. Sessions and Mr. Christensen;

This provides preliminary recommendations and comments from the Yakama Nation staff who are monitoring Ecology's Interim sessions on the workings of the trust program and water banking. We understand this is a work in progress and these comments are on this Draft dated above. However, since draft bills or rules have not been provided by the Department of Ecology the Nation reserves the right to comment further when draft bills or rules are provided.

- **Topic 1: Out of Basin transfers.**

**The Department of Ecology is proposing changes to state law concerning transfers of water rights when the point of diversion is changed between WRIAs or water basins. The Nation is not in favor of changes in state law on this matter. Ecology's proposed findings in summary says they need flexibility. We agree that each Basin is unique and oppose changes in law here. County commissioners in Eastern Washington already get notice of certain proposed transfers under RCW 90.03.380(10).**

**1.1 Ecology proposes that State and local Governments get right of first refusal. The Nation opposes this option. This creates a hierarchy of uses for state-based water under State jurisdiction. Giving local governments this preference may adversely affect protection for fish, wildlife and other natural resources.**

- **Topic 2: Transparency in water right sales.**

Ecology's proposed finding in its summary says public notice to the general public improves market transparency. The Nation has no comment on this proposal at this time but reserves the right to comment further if legislation is proposed.

- **Topic 3: Private investment & marketing of water rights – Use of the Trust Program.**

Currently there is a lack of consistent definitions in statute for terms such as “temporary donation” and “transfer into trust”. It is not clear under this proposal what Ecology's role is or would be in managing the water right. Flexibility of the program is an asset. A state-based water right used for mitigation should first undergo a tentative determination of extent and validity. The Nation agrees that amendments to the current statutes may assist in providing clarity here but the Nation reserves further comments until it sees a draft bill.

All water rights used for both temporary and permanent mitigation need to go through an annual consumptive quantity test and extent and validity test. If the water right is to be placed in the State Trust water program and for mitigation, the annual consumptive quantity test should occur (even if the parties are not seeking a change in purpose of use).

The statute and water right users would benefit from a clear definition of the authorized uses for a donated Trust Water Right, a water right that has been transferred to instream flow, or a water right transferred to instream flow with mitigation. The definitions are frequently misunderstood have been applied inconsistently by Ecology in the past.

- **Topic 4: Private investment & Marketing of water rights – Water banking.**

The Nation opposes the proposal prioritization of water banks.

This appears to be another effort to reduce protection of fish, wildlife and other natural resources under State law. It is inappropriate to create

**a model for a “duty to serve” for water banking. In the discussions held in meeting 5, the utilities expressed this “duty to serve” may be an element for public utilities in their service to customers. Ecology should not take on this mission as a duty to assure citizens that water is available for service. As in most basins, water is simply not available and creating a “duty to serve” is not achievable.**

The Yakama Nation reserves the right to make all arguments and to pursue all remedies available to it concerning this matter. Nothing herein is intended to waive, limit, define or diminish the Treaty rights of the Yakama Nation.