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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

September 17, 2021

Dave Christensen
Water Resources Program
Washington State Department of Ecology
Via Online Portal

Dear Mr. Christensen:

The Swinomish Indian Tribal Community submits these comments on the Department of Ecology's Draft Policy and Interpretative Statement regarding Administration of the Statewide Trust Water Rights Program, Publication No. 21-11-017 (hereafter, Draft Policy). We attach the Tribe's November 10, 2020, comments to Ecology's Advisory Group on Water Trust, Banking and Transfers and request they also be considered as comments on the Draft Policy.

1. Please clarify the application of the Draft Policy. Does the Draft Policy apply to water rights held in the Trust Water Rights Program (TWRP) for purposes other than water banking? Does it apply to transfers of water rights to the TWRP other than donations?

2. The Draft Policy should state that dormant municipal water rights (*i.e.*, rights that have not been put to beneficial use for a period of five years or more) cannot be used for water banking or mitigation under the TWRP. Many (if not most) basins in the state are over-appropriated. Despite this fact, there continues to be substantial interest in establishing new out-of-stream rights allegedly offset by using dormant municipal water rights for water banking or "mitigation." Administratively approving the fiction that these new proposed uses will be offset by dormant municipal water rights (i.e., water that is currently instream) would exacerbate the problem to the detriment of existing water right holders, instream flow rights, and fish and in violation of Washington law. As a result, it is important that the Draft Policy squarely address this issue, notwithstanding what the Draft Policy describes as the "unique attributes and allowances" of municipal water rights. The use of dormant municipal water rights for water banking or mitigation under the TWRP should be prohibited for the following reasons:

First, the use of dormant municipal water rights for water banking or mitigation is inconsistent with the policies and purposes of the TWRP. In establishing the TWRP, the Legislature found that there is a shortage of water to meet *present* and future needs and that voluntary water transfers (among other mechanisms) could provide for *presently unmet needs* and assist in meeting future water needs. RCW 90.42.005(2)(a) & (b). The Legislature defined "[p]resently unmet needs or current needs" to include "the water required to *increase the*

frequency or occurrence of base or minimum flow levels in streams of the state, the water necessary to satisfy existing water rights, or the water necessary to provide full supplies to existing water systems with present unmet needs." RCW 90.42.005(2) (b) (emphasis added). It found that water banking, "as a function of the [TWRP] and as authorized by this chapter [Ch. 90.42 RCW]" could be an effective means to facilitate the voluntary transfer of water rights established through conservation, purchase, lease or donation, "to preserve water rights and provide water for *presently unmet and future needs* and to achieve a variety of water resource management objectives throughout the state, including drought response, *improving streamflows on a voluntary basis*, providing *water mitigation*, or reserving water supply for future uses." RCW 90.42.005(2)(d) (emphasis added).

The use of dormant municipal rights for water banking or mitigation will permit new out-of-stream uses without offsetting (or mitigating) such uses with an actual reduction in current water usage. This will *decrease* the frequency and occurrence of base or minimum flow levels in streams of the state and thus is directly contrary to the goals of the TWRP, which sought "to *increase* the frequency or occurrence of base or minimum flow levels in the streams of the state" and to "*improv[e]* streamflows on a voluntary basis." Moreover, the use of dormant municipal rights for water banking or mitigation will not provide "*water* mitigation" for new water uses; it will provide only *paper* mitigation. Because the use of dormant municipal rights for water banking or mitigation is directly contrary to the policies and purposes of the TWRP, the Draft Policy should prohibit such use.

Second, the use of dormant municipal water rights for water banking or mitigation is contrary to specific provisions of Washington law. For example, in basins in which tribes hold senior reserved water rights, the use of dormant municipal water rights for water banking or mitigation would adversely affect the tribes and impair their rights in violation of the Legislature's intent, as declared in RCW 90.42.010, "that persons holding rights to water … not be adversely affected in the implementation of the provisions of this chapter." In such basins, use of dormant municipal water rights for water banking or mitigation would also violate RCW 90.42.040(4)(a), which provides that "[e]xercise of a trust water right may be authorized only if the department first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired[,]" and RCW 90.42.100(3)(a), which provides that Ecology "shall not use water banking to … cause detriment or injury to existing rights."[1] Even in basins where tribes do not hold senior reserved water rights, the use of dormant municipal water rights for water banking or mitigation would impair the public interest in violation of RCW 90.42.040(4)(a) if there are unmet instream flow rights or a need to preserve or improve base flows. *See* RCW 90.54.020(3)(a).

[1] As discussed in our November 10, 2020, comments, although Ecology has stated many times that Washington treaty tribes have senior, but unquantified, water rights in basins that have not been adjudicated, these tribal water rights are rarely considered or protected. It is the Swinomish Tribe's view that these rights should be considered before trust water rights are established or water banks are developed and utilized. We attach our supplemental comments on a recent water right application, which discusses Ecology's legal obligation to consider these rights in the context of applications for new water rights at pages 25 – 34. For purposes of the TWRP, as stated in our November 10, 2020, comments, we believe that, in basins where tribes have senior reserved water rights, Ecology should obtain an agreement from the affected tribes before establishing trust water rights or developing water banks.

Third, while RCW 90.42.080 allows dormant municipal water rights to be donated to the TWRP for certain purposes, it does not allow dormant municipal water rights to be donated to the TWRP for *water banking or mitigation*. RCW 90.42.080(1)(b) provides that "the holder of a right to surface water or groundwater" may "donate all or a portion of the person's water right to the trust water system *to assist in providing instream flows or to preserve surface water or groundwater resources on a temporary or permanent basis* …" (emphasis added). RCW 90.42.080(4) provides that, "[e]xcept as provided in subsection[] … (11) … of this section, a water right donated under subsection (1)(b) of this section shall not exceed the extent to which the water right was exercised during the five years before the donation nor may the total of any portion of the water right remaining with the donor plus the donated portion of the water right exceed the extent to which the water right was exercised during the five years before the donation." RCW 90.42.080(11) provides in part that, for municipal water rights, which are exempt from relinquishment under RCW 90.14.140(2)(d), the amount of water eligible to be acquired under RCW 90.42.080(1)(b) "shall be based on historical beneficial use."

Under these provisions, dormant municipal water rights, measured by historical beneficial use, may be donated to the TWRP "to assist in providing instream flows or to preserve surface water or groundwater resources" under RCW 90.42.080(1)(b). However, the use of dormant municipal rights for *water banking* or *mitigation* will not assist in providing instream flows; it will, as explained above, *reduce* instream flows. Nor will the use of dormant municipal rights for water banking or mitigation "preserve surface water or groundwater resources"; it will, to the contrary, further *deplete* such resources. Thus, the special exception for the use of dormant municipal water rights to assist in providing instream flows or to preserve surface water or groundwater resources in RCW 90.42.080 provides no support for the use of such rights for water banking or mitigation.

For these reasons, the Draft Policy should expressly prohibit the use of dormant municipal water rights for water banking or mitigation under the TWRP.

3. The definition of "donation" in Section 1 of the Draft Policy should be revised to exclude dormant municipal water rights for the reasons discussed above. It should also be limited to donations "to assist in providing instream flows or to preserve surface water or groundwater resources" under RCW 90.42.080(1)(b), since those are the only donations that are treated uniquely under Ch. 90.42 RCW; conversely, the definition should expressly exclude donations for water banking or mitigation. Also, the definition of "donation" should make clear that the water right must be transferred to Ecology without expectation of any form of compensation from any person or entity. For example, the definition of "donation" should exclude the transfer of a water right from a water right holder who has entered into or intends to enter into an agreement with a third party for use of the water right (such as through a water bank) under which the water right holder will receive some form of compensation.

4. The definition of "permanent donation" in Section 1 of the Draft Policy should be revised by adding "in perpetuity" at the end.

5. The definition of "mitigation for out-of-stream uses" and "mitigating rights" in Section 1 of the Draft Policy should require that mitigation be based on non-use of a perfected, non-inchoate

water right from the same source as, and that has been put to beneficial use within the past five years in an equal or greater annual and instantaneous quantity than, the new use to be mitigated. These requirements should be applied to all references to mitigation in the Draft Policy

6. If the Draft Policy is applicable to transfers of water rights to the TWRP for purposes other than water banking, the definition of "public interest" in Section 1 should address those purposes as well. The last sentence in the definition of "public interest" should be changed so that it begins: "The public interest may be partially reflected in (but is not controlled by) watershed plans, …."

7. The introductory paragraph to Section 4 of the Draft Policy should note the following limitations on the use of the TWRP for water banking purposes:

> Under RCW 90.42.100, Ecology cannot use water banking: (1) to cause detriment or injury to existing rights; (2) to issue temporary water rights for new potable water uses requiring an adequate and reliable supply under RCW 19.27.097; (3) to administer federal project water rights; or (4) to allow carryover of stored water in the Yakima basin from one water year to another water year if it would if it would negatively impact the total water supply available.

The introductory paragraph to Section of the Draft Policy should also note that, under RCW 90.42.110, an application to transfer a water right to the TRWP for water banking purposes must be reviewed under RCW 90.03.380.

8. Section 4, Part 1 of the Draft Policy ("Requests to Establish or Modify a Water Bank") should require an entity seeking to use the TWRP for water banking purposes to state the annual and instantaneous quantities of the water right intended for mitigation that has been put to beneficial use in the past five years, the source of the right, and the place and manner of use of the right, and explain why the right is no longer needed for such use. The entity seeking to use the TWRP for water banking purposes should also be required to provide supporting documentation for all statements in the request to establish or modify a water bank, including statements regarding the water right intended for mitigation, the anticipated demand to be served by the water bank, and the anticipated public benefits.

9. Section 4, Part 2 of the Draft Policy ("Evaluation of a Water Banking Request") states that Ecology may prioritize water banking requests that align with program and agency goals and priorities and that this could include projects that solve critical water supply problems by providing water for uses or users that otherwise lack an available water supply. That example should be revised by adding, at the end, "without adversely affecting or causing detriment to instream flows, existing rights or the public interest." The Draft Policy should also provide that, in evaluating water banking requests, Ecology will disfavor requests that appear to be intended solely or principally to avoid relinquishment of the water right proposed for transfer to the TWRP, so as to avoid speculation in water rights. In the Draft Policy's statement regarding potential impairment of the public interest, the last sentence ("Therefore, Ecology will assess …") should be revised by adding, at the end, "taking into consideration the Washington Department of Fish and Wildlife's review and recommendations respecting impacts to fish and wildlife."

10. Section 4, Part 3 of the Draft Policy ("Agreements") should be revised to require that water banking agreements must include: the criteria to be used (and not merely the process) for allotting mitigation to new or existing uses; both annual and instantaneous quantitative and geographic limitations on the new uses that may be allotted for mitigation; and provisions for retaining a portion of a water right instream to provide an appropriate margin-of-error in any mitigation calculation.

11. Section 4, Part 4 of the Draft Policy ("Consideration of Impairment") should be revised to provide that a tentative determination of the extent and validity of a proposed mitigating water right under RCW 90.03.380 is required by RCW 90.42.110(2) at the time the right is transferred to the TWRP for water banking purposes regardless of whether the right has previously subjected to a tentative determination of its extent and validity under RCW 90.03.380. To be consistent with Ecology Policy 1200, ¶ 3(a)-(c), the Draft Policy should explain that, under RCW 90.03.380, Ecology must make a tentative determination of the extent to which the water right actually exists and is valid for change, including a determination whether the water right has been abandoned as a matter of common law, and may require information from the applicant beyond that required in the application if necessary to make these determinations. The Draft Policy should also delete footnote 4 because there is no exception in RCW 90.42.110(2) for municipal water rights.

Thank you for your consideration of the Tribe's comments.

Sincerely,

Amy Trainer
Environmental Policy Director

Enc.

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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

November 10, 2020

Ms. Mary Verner, Water Resources Program Manager
Department of Ecology
Via email and online portal: Mary.Verner@ecy.wa.gov

Re: Swinomish Indian Tribal Community Comments to Ecology's Advisory Group on Water Trust, Banking, and Transfers

Dear Ms. Verner,

The Swinomish Indian Tribal Community would like to provide the following comments to the Department of Ecology regarding Ecology's report on Water Trust, Banking, and Transfers. Tribal staff has been involved with the development of the State's legislation and policy regarding trust water rights since its inception in the mid 1990's. We are frustrated to see that these state actions that were developed to protect and restore instream flows as a result of the Chelan Water Agreement in 1994 have turned into something very different. The Trust Water Rights Program appears to have become a major tool to avoid relinquishment, which in many instances will have adverse consequences on the protection of adequate flows and restoration of diminished instream flows. We therefore have the following suggestions regarding the implementation of the trust water rights and banking programs through legislative or policy efforts.

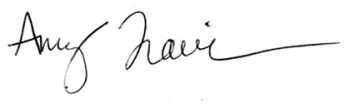
1. There may be many instances whereby the development of a water bank and trust water right can have beneficial impacts on instream flows, fish, and tribal treaty rights. This has been our experience regarding a number of efforts in the Skagit River Basin. However, despite the fact that Ecology has stated many times that Washington treaty tribes have senior, but unquantified, water rights in basins that have not been adjudicated, these tribal water rights are rarely considered or protected. It is the Swinomish Tribe's view that these rights should be considered before trust water rights are issued or water banks are developed and utilized. We believe the appropriate approach in basins where tribes have

Federally reserved water rights should be that Ecology must have agreement from the affected tribes prior to these tools being implemented.

2. It is the Tribe's view that when trust water rights are used to fund water banks to support additional out-of-stream development, those water rights must be "wet water"; that is water that is currently being utilized. This would preclude the use of inchoate water rights, or perfected water rights that have not been utilized for more than five years, regardless of whether such inchoate or perfected rights are deemed to be municipal rights under State law. Using "paper water rights" to mitigate additional out-of-stream appropriations will in most instances adversely impact instream flows, fish, and tribal treaty rights. The Department's apparent reluctance to pursue relinquishment or abandonment of unused paper water rights has added to the problem of uncertainty regarding available water supply in many basins, has contributed to reduced instream flows, and has thereby compounded the challenge of ensuring adequate instream flows for ESA-listed salmon upon which the treaty tribes' and State's fisheries depend. This problem will only worsen with the increasing impacts of climate change, and thus should be addressed. Therefore, it is our view that only water that is actively being utilized should be available for the Trust water rights program and water banking mitigation purposes.

Thank you for your consideration of our comments.

Sincerely,



Amy Trainer, Environmental Policy Director
Swinomish Indian Tribal Community

Cc: NWIFC

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August 13, 2021

Via Email

Ria Berns, Section Manager, Water Resources Program
Washington State Department of Ecology
Northwest Regional Office
15700 Dayton Ave. N.
Shoreline, WA 98113
RBER461@ecy.wa.gov

Re: Draft Report of Examination for Water Right Application G1-28878 (WR Doc ID 6801883)

Dear Ms. Berns:

The Swinomish Indian Tribal Community (Swinomish or Tribe) submits these supplemental comments on the Department of Ecology's Draft Report of Examination (Draft ROE) denying Water Right Application G1-28878 submitted by US Golden Eagle Farms LP (USGE). These comments supplement the comments we provided to you in our July 28, 2021, letter and accompanying memorandum and are based on documents produced by Ecology in response to the Tribe's public records request. We did not have an opportunity to review these documents before we submitted the Tribe's previous comments and are still in the process of reviewing the large volume of documents produced by Ecology. These supplemental comments are based on the documents we have reviewed to date.

As discussed in our July 28, 2021, letter, the Tribe supports Ecology's denial of USGE's application to appropriate water because the appropriation would be detrimental to the public interest. In addition, as also discussed in that letter, the Tribe believes that Ecology should deny USGE's application because water is not legally available for USGE's appropriation and because the appropriation would impair existing rights, including the Skagit instream flow right established in Ch. 173-503 WAC and the Tribe's senior reserved right. Moreover, as discussed in detail in the memorandum accompanying our July 28, 2021, letter, there are multiple, complex questions regarding the extent and validity of the water rights claimed by the Town of Darrington on which USGE relies for mitigation of its new appropriation.

The documents produced by Ecology reinforce the questions regarding the water rights claimed by the Town and raise additional issues. First, the documents provide further support for the Tribe's conclusion that the water rights claimed by the Town were not (and lawfully could not have been) used for commercial and industrial purposes and, therefore, it was improper to rely on commercial and industrial uses in estimating the peak historical use of those rights.

Second, the documents identify new issues regarding the attempt to use the Town's claimed groundwater rights to mitigate for the effects of USGE's proposed appropriation. Throughout its review of USGE's application, Ecology's mitigation analysis was premised on the use of surface water rights as mitigation. Ecology recognized that use of groundwater rights as mitigation was possible but would be more complex. However, when, at the last minute, Ecology, USGE and the Town switched from reliance on surface to groundwater rights for mitigation, there was no analysis of the more complex issues raised by the use of groundwater rights as mitigation. This failure was compounded by the Town's failure to specify an instantaneous quantity in the final version of its transfer application. The application seeks to transfer a portion of the Town's claimed groundwater rights under a 2007 Certificate of Change into the Trust Program. When Ecology informed the Town that the instantaneous quantity transferred into trust would have to come out of the 350 gpm changed in the 2007 Certificate, the Town simply deleted any reference to an instantaneous quantity from its application. The omission of an instantaneous quantity from the application is by itself sufficient grounds for its denial. Here, the omission of an instantaneous quantity, which could not in any event exceed 350 gpm, also precludes a determination that the water being transferred into trust can somehow mitigate for USGE's proposed appropriation of up to **600 gpm.**

Third, the new documents produced by Ecology reveal a disturbing pattern of Ecology working closely with USGE, the Town and their representatives to advance USGE and the Town's respective applications and protect their claimed rights (even when Ecology was aware of permitting errors with respect to those rights), a working relationship that may explain many of the failures of analysis identified in the Tribe's comments. These supplemental comments provide numerous examples of that disturbing pattern, such as Ecology's repeated (but ultimately unsuccessful) efforts to persuade the Washington Department of Fish and Wildlife (WDFW) not to recommend denial of USGE and the Town's applications because of the adverse impacts they would have on streamflows and fish, its repeated briefings for USGE and the Town of concerns raised by the Tribe, and its solicitation of assistance from USGE's attorney in responding to those concerns. This approach was contrary to Ecology's statutory duties to protect water resources, the State's obligation to protect the Tribe's treaty fishing rights and senior reserved water rights, and the State's government-to-government relationship with the Tribe.

This discussion also highlights several additional issues of concern. For example, an investigation into the Town's water rights confirmed that the Town has not perfected any of the

rights that Ecology authorized it to change to groundwater in 2003 and 2005 ROEs by putting the water to beneficial use. Because the Town failed to perfect those rights, as required by the Development Schedule in the 2003 ROE and RCW 90.03.330(4), they are not now available for transfer into the Trust Program notwithstanding the erroneous issuance of the 2004 and 2007 Certificates. Despite clear evidence that the Town had not perfected the changed rights, Ecology never addressed this issue.

The same investigation also revealed a substantial mathematical error in Ecology's estimate of peak historical use in the 2003 ROE, an error we documented in the memorandum accompanying our July 28, 2021, letter. Although Ecology became aware of that error in August 2020, it has taken no action to correct it and instead has attempted repeatedly to conceal it. As discussed below, Ecology should correct the error once and for all rather than continuing to attempt to hide and perpetuate it.

Another issue involves Ecology's failure identify a mitigation zone within the boundaries of the Darrington School District in which the effects of new permit-exempt wells would be mitigated by the claimed rights the Town seeks to transfer into trust. After Ecology sought a narrower mitigation zone than USGE's contractor proposed, it simply deleted any reference to the zone without explanation.

As a final matter, these comments address recent assertions by Ecology that it has no authority to consider tribal reserved water rights in making permitting decisions. As discussed below, we believe that Ecology's position is contrary to settled law.

In sum, while the Tribe strongly supports Ecology's draft decisions to deny USGE's application and the Town's request to transfer water rights into the Trust Program because they would be detrimental to the public interest, it believes there are multiple additional grounds on which those applications should and must be denied.

1. The Water Rights Claimed by The Town Were Not (And Lawfully Could Not Have Been) Used for Commercial and Industrial Purposes.

The Tribe's July 28, 2021, comments and accompanying memorandum raised multiple issues regarding the extent and validity of the Town of Darrington's water rights, which USGE proposes to use as mitigation for its new appropriation. One of those issues is that, in approving the Town's 2001 change application for S1-163865CL, the Town and Ecology relied on the historic use of water for commercial and industrial purposes (including for steam locomotives). However, the Town provided no evidence that either Darrington Water Works, the entity that filed

Claim No. 163865, or its predecessors in interest supplied water for commercial or industrial purposes during the period of peak historical use or that they were authorized to do so.[1]

The Town traced Darrington Water Works' claim to a reservoir allegedly constructed by S. R. Frost between 1910 and 1913 and the Washington Lumber & Spar Company, which filed an application for "fire protection and domestic supply" in 1919.[2] The Company's 1920 Proof of Appropriation stated that it had put water to use for "domestic" purposes, and it received Certificate No. 28 for "purposes of fire protection and domestic supplies" in 1921. Neither the application (as described by the Town) nor the Proof of Appropriation nor the Certificate, which Ecology concluded was "one and the same" as Claim No. 163865, refer to or authorize the use of water for commercial or industrial purposes.

Moreover, a 1952 contract between L. C. Freese, doing business as Darrington Water Works, and the Northern Pacific Railway Company, allowed the Northern Pacific to maintain a pipeline connecting its water tank in Darrington with a dam and reservoir owned and operated by Darrington Water Works. The contract specifically provided that the Northern Pacific would pay Darrington Water Works for maintaining the dam but that the Northern Pacific's right to water accumulated by the dam "is and shall be equal to the right of any and all users." The contract is further evidence that Darrington Water Works was not supplying water for industrial purposes during the period of peak historical use (which, in any event, would have been a violation of Certificate No. 28).

The documents produced by Ecology in response to the Tribe's public records request include Andy Dunn's notes of a May 16, 2002, meeting with Darrington officials at Ecology's

[1] Among the other issues the Tribe raised were: (1) the Town never acquired Claim No. 163865 from Darrington Water Works and, in its 2001 Water System Plan, recognized that it was still held by Darrington Water Works; (2) Claim No. 163865 was a claim for riparian rights which, under Washington law, are lost if not used for periods such as those involved here; and (3) the Town abandoned any rights under Claim No. 163865 when, in the 1970s and 1980s, it: (a) repeatedly sought new water rights, including surface rights from the same source identified in Claim No. 163865, without making any reference to or asserting any rights under the Claim and instead stating there were ***no*** existing rights serving the Town; and (b) expressly relinquished the surface water right, acquiesced in the cancellation of its reservoir permit application for the site, and physically removed the dam and destroyed the reservoir.

[2] In Mayor Dempsey's July 16, 2002, declaration (Att. A-1 to the Tribe's July 28, 2021, Memorandum regarding Darrington's water rights, at page 1 note 1), she cited a 1981 Environmental Checklist prepared by the Town and 1970 field notes prepared by Doug Clausing to support the claim that the reservoir was first constructed between 1910 and 1913. However, neither document identifies the source for that claim. Elizabeth Poehlman's history of the town, on which Mayor Dempsey relied elsewhere in her declaration, provides a later date for Frost's construction of the reservoir, one which aligns with the Washington Lumber & Spar Company's 1919 application. According to Poehlman: "In 1919 Stillman Frost began installing a water system, which, with considerable updating, still serves the town." E. Poehlman, Darrington: Mining Town/Timber Town at 96 (Darrington Historical Society, 2nd Ed. 2020). If the 1919 date is accurate, the system was developed after the adoption of Washington's Water Code in 1917 and was not properly the subject of a pre-1917 water claim. The Town's failure to disclose Poehlman's date was another material misrepresentation regarding its assertion of water rights under Claim No. 163865.

Northwest Regional Office (Att. A). According to Mr. Dunn's notes, Tom McDonald and Tim Flynn were also present. The first entry reads:

> 1910-1013 Reservoir built
> Use shared thereafter

That entry is consistent with the other evidence discussed above that neither Darrington Water Works nor its predecessors had sole use of the reservoir and that others, such as the Northern Pacific, had the right to use the reservoir and its water, a right that, as provided in the 1952 contract, was "equal to the right of any and all users." In contrast, we have seen no evidence that all water in the reservoir was claimed by Darrington Water Works or its predecessors or that, during the period of peak historical use claimed by the Town, they were supplying such water for commercial or industrial uses in violation of Certificate No. 28. Under these circumstances, it appears that the Town misrepresented the perfected quantity of water under Certificate No. 28 and Claim No. 163865 in support of its 2001 change application and the resulting certificates should be corrected accordingly.

2. Even if the Water Rights Darrington Seeks to Offer as Mitigation Were Valid, and Even if Non-Use of Water Rights that Have Not Been Used for Decades Could Be Used for Mitigation Without Detriment to the Public Interest, There Is No Basis for Concluding that They Will Provide Adequate Mitigation for USGE's New Appropriation.

Jill Van Hulle of Pacific Groundwater Group (PGG) prepared a draft letter dated September 6, 2018, transmitting USGE's draft application to appropriate additional water. Att. B. Her letter explained that, to mitigate impacts on the Skagit river, USGE entered into a contract with the Town of Darrington, "which holds valid municipal surface water rights in the form of Water Right Claim 163865, with associated right SWC 28." *Id*. at 2. Until mid-January 2021, Ecology's analysis of USGE's mitigation plan was premised on the use of these asserted surface water rights as the source of mitigation. However, on or around January 15, 2021, the source of mitigation was switched to groundwater rights under the 2007 Certificate of Change issued to the Town. *See* Att. C (email noting change in source of mitigation water). As noted above, the Tribe has raised multiple issues regarding the extent and validity of the 570 afy of groundwater rights that were purportedly changed in the 2007 Certificate (including, as discussed above, the perfected quantity of the rights recognized in the Certificate). However, we note here that, even assuming the validity of those rights, there are substantial, complex issues regarding the use of groundwater rights to mitigate USGE's new appropriations 40 miles downstream that have not been addressed by Ecology.

These issues were first noted by Ecology in its initial review of USGE's application. In a September 10, 2018, email, Ecology's Kellie Gillingham identified several "critical things that need to be discussed" regarding the application, including: (1) lack of USGE metering data to support its claims regarding the water duty it will need (Gillingham concluded that 60 afy of mitigation water might "be a good buffer for current acreage, but USGE will probably need an additional source of water if they want enough water to irrigate an additional 149 acres"); (2) concerns about the extent and validity of the mitigation water (including that the only authorized sources for the Town of Darrington were groundwater wells and that Certificate No. 28 may have been abandoned given that the diversion infrastructure appeared to have been abandoned and the 2002 water system plan didn't refer to surface water works). Att. D.[3] As to the latter issue, Gillingham noted that "[m]itigation from groundwater is more complex than surface water." *Id.* However, despite that observation, we found no evidence that Ecology conducted any analysis of those more complex issues after the source of mitigation water was switched from surface to groundwater.

Moreover, with the switch from surface to groundwater as the source of mitigation, Ecology took the position that both the instantaneous and annual quantities would need to come from the quantities changed to groundwater in the 2007 Certificate. *See* Att. E (Application to Enter a Water Right into the Trust Water Right Program with Ria Berns' edits; in Part 5.A on page 2, Ms. Berns commented: "This Qi should be debited from the 350 gpm approved through previous change authorizations"). However, it appears that the Town was reluctant to reduce the authorized instantaneous diversions (Qi) that it would retain under the 2007 Certificate by transferring a portion of them into the Trust Program. The issue was noted on January 20, 2021, when Ms. Berns forwarded revised versions of the Town's application, public notice and water banking agreement to Tom McDonald, with "[a]pologies for sending these around without much review time." Att. F. She noted that the revised versions "reflect the slight change in direction discussed with Dianne [Allen, the Town's clerk] last week. The only more substantive discussion is around the Qi." *Id.* The issue regarding the Qi was resolved by deleting any Qi from the Town's application to transfer water into the Trust Program: the final application, public notice (which was drafted by Ecology), and proposed water banking agreement make **no** reference to an instantaneous amount being transferred into the Trust Program and Ecology's June 14, 2021, ROE likewise makes no reference to the transfer of any instantaneous amount into the Trust Program. *See* Att. G, H, H-1 and I.

This was contrary to RCW 90.42.040(2), which requires a trust water certificate to indicate "the quantity of water transferred to trust." This includes both an instantaneous and an annual rate. *See Crown W. Realty, LLC v. Pollution Control Hr'gs Bd.*, 7 Wn. App. 2d 710, 734, 435 P.3d 288,

[3] Gillingham's concerns with the absence of metering data and USGE's use of more water than it was entitled to reflected multiple issues and concerns with USGE's operation. As even Ms. Van Hulle noted, "USGE's Cockreham project is fraught with 'issues' …." Att. D-1 (3-8-2019 Email).

302 (2019) (Washington "law limits each water right to an amount of use in gallons [per minute] and acre-feet per year"); *see also* RCW 90.03.383(3) (referring to "the instantaneous and annual withdrawal rates specified in the water right permit"). Section 2 of Ecology's Guidance for Processing and Managing Trust Water Rights (Guid-1220 Revised Feb. 2016) (available at GUID-1220 Guidance for Processing and Managing Trust Water Rights) states that where, as here, only a portion of a water right is being transferred to the Trust Program, the trust water agreement "should clearly reflect the *instantaneous and annual quantities* of each portion of the water right, including any limitations on use of either portion during period when use of both portions of the water right may conflict" (emphasis added). The purpose of this requirement is "[t]o ensure that the water right is not enlarged to the detriment or injury of other water rights competing for the same stream." *Id*. By not specifying an instantaneous quantity in its transfer application or water banking agreement, the Town purported to retain the entire 350 gpm in its 2007 Certificate of Change, allowing a further enlargement of a water right the validity of which is already subject to serious doubt.

Moreover, since the available instantaneous rate under the 2007 Certificate was limited to **350 gpm** (even assuming the validity of the Certificate), it is difficult to see how even transferring that entire quantity could mitigate for USGE's new appropriation of up to **600 gpm**. Here, however, it is not clear what (if any) portion of the 350 gpm is being transferred into the Trust Program. Thus, even if the water rights Darrington seeks to offer as mitigation were valid, and even if non-use of water rights that have not been used for decades could be used for mitigation without detriment to the public interest, there is no basis for concluding that they will provide adequate mitigation for USGE's new appropriation.

3. New Documents Produced by Ecology Reveal a Disturbing Pattern of Ecology Working Closely with USGE, the Town and Their Representatives to Advance USGE and the Town's Respective Applications and Protect Their Claimed Rights (Even When Ecology Was Aware of Permitting Errors with Respect to Those Rights) and Raise New Issues regarding the Extent and Validity of Darrington's Water Rights and Their Availability to Mitigate for USGE's New Appropriation.

From early in Ecology's consideration of USGE's application, Ecology officials worked closely with USGE, the Town of Darrington and their representatives to support and advance the application. The close working relationship may help explain many of the failures of analysis discussed in the Tribe's original and these supplemental comments.

Examples of Ecology's close working relationship with USGE, the Town and their representatives and of its support for their applications include the following. In a May 21, 2019, email, Ms. Berns stated that, unless Ecology's Buck Smith "see[s] major red flags, I am very comfortable moving forward on the CRA [Cost Reimbursement Agreement]" despite the multiple

complex issues identified by Ms. Gillingham. Att. J. On June 21, 2019, Mr. Smith wrote to Mr. McDonald (who was representing USGE), instructing him to use a form entitled Donation of a Water Right to the State Trust Water Rights Program as the vehicle to transfer a portion of the Town's water rights into the Trust Program and assuring him that:

> Assuming everything on the form is correct and the terms are reasonable, our response will be an "acceptance letter", not an "approval" letter. Our understanding is RH2 [specifically, Andrew Dunn, who previously worked for Ecology] will write the acceptance letter for our review and signature by Ria [Berns]. This will be part of the cost-reimbursement process.

Att. K. Smith also advised McDonald that either McDonald or Ecology should "reach out to the basin tribes early on to try to avoid any misunderstandings or disagreements about these projects." *Id*.[4]

On March 18, 2020, a Washington Department of Fish and Wildlife Habitat Biologist, Steve Boessow, informed Mr. Dunn that WDFW had "some serious concerns about moving forward with [USGE's] plan." Specifically, Mr. Boessow noted that "[t]here would be no water savings from trusting surface water claims for the [Town] of Darrington. That water isn't being used, so continuing to not use it will be no benefit to instream flows. Any groundwater pumping using Darrington water as mitigation would be an additional impact to instream flows, and to fish." Att. L. WDFW's concerns related both to the proposed use of the Town's long-unused water rights to mitigate for USGE's proposed appropriation and for new permit-exempt appropriations with the boundaries of the Darrington School District. As Mr. Boessow explained:

> Our Area Fish Biologist replied with this observation:
>
> "I saw a question raised as to fish use in these places. If I were to be asked independently of seeing these proposed actions to stick my finger on a map of where the "hot spots" were for coho and chum production in the Skagit basin, two of the three spots I would have my finger on would be these very two places.
>
> Steelhead use is very dispersed across the landscape, steelhead use tributaries throughout both locations. But the highest density spawning of steelhead by far in the whole basin occurs in the mainstem Sauk in the "Sauk Prairie" reach. Steelhead

[4] Mr. McDonald has never reached out to the Tribe regarding this project. Ecology also did not reach out to the Tribe regarding the project; it was not until the Tribe contacted Ecology in April 2020 that the Tribe and Ecology ever spoke about this project.

> use in the Lyman/Hamilton area would best be as average for the Skagit, which means "a lot more than most places"
>
> Chinook use is also quite high in the Sauk Prairie mainstem reach, and used to be very high in Dan's Creek when it had water... In the Lower Skagit, chinook use is relatively high in the Lyman/Hamilton reach."

Id. Mr. Boessow concluded by stating that he would start working on formal "response letters for your files soon." *Id.*

It appears that Mr. Dunn and Ecology's response to this communication was not to address WDFW's concerns on the merits but to launch a concerted effort to pressure WDFW to change its mind. Mr. Dunn promptly forwarded Mr. Boessow's email to Mr. Smith, John Rose and Ms. Berns at Ecology, noting that "[t]his is likely going to need some coordination between Ecology and WDFW." *Id*. Mr. Dunn then wrote to Mr. Boessow to provide "more background" on the Town's water right, asserting that, in 2003, Ecology determined that "peak historic use under the [Town's surface water] claim was estimated," that "the amount of water moved to the new well site was only a portion of the perfected historic use" and that "[t]he remaining 104 afy was left at the old surface water diversion site." Att. M. According to Mr. Dunn:

> It is the 104 afy that was determined to have been historically used, but that was not transferred that is the subject of the proposed temporary and permanent mitigation sources. … So, while you are correct that the surface water has not been used for many years by the Town, it was used historically, and given its municipal status, the Town has a right to it.

Id. Mr. Dunn made no mention of the error in the 2003 ROE, which had resulted in overstating the perfected historical use even according to the Town's own estimates, nor did he address WDFW's concern that not using water that (as Mr. Dunn put it) "has not been used for many years" provides no benefit to fish or instream flows. Thus, Mr. Boessow responded that, while he would defer to Ecology to sort out the municipal nature of the Town's claims, his comments were "specific to what's best for fish and the flows they need." *Id.* His role wasn't "to facilitate the legal aspects of projects and applications, but to offer comments on impacts to fish." *Id.* However, he agreed to talk with his supervisor before sending an official response. *Id.* Mr. Dunn offered to set up a conference call to discuss as Mr. Boessow "craft[ed his] official response." Mr. Dunn copied Ms. Berns and Mr. Rose on this response and forwarded it to Ms. Gillingham. *Id*.

On April 1, 2020, Mr. Dunn wrote to Mr. Boessow asking whether Mr. Boessow had talked with his "supervisor" regarding the use of the Town's water to mitigate USGE's new appropriation and new permit-exempt wells within the School District's boundaries. Att. N. Mr. Boessow again

informed Mr. Dunn that WDFW's view was "that the 570 afy claimed to have been used has already been transferred to municipal wells" and "that the claim does not add mitigation water that could be used as credit elsewhere, nor does it represent an improvement in current conditions." *Id.* Thus, "[g]iven that salmon and steelhead are present throughout the area, we will be recommending that this is not suitable mitigation." *Id.* He added that he was "filling in the blanks on the letter right now." *Id*. Mr. Dunn forwarded Mr. Boessow's response to Ms. Gillingham, Ms. Berns, Mr. Smith and Mr. Rose at Ecology.

Mr. Dunn then made another attempt to pressure Mr. Boessow to alter WDFW's opinion. He referred Mr. Boessow to his earlier email describing the past water right actions taken on the Town's water rights, "including a breakdown of the perfected municipal annual volume and instantaneous rate associated with this claim." Att. O. Mr. Dunn asserted that, "[a]s you can see there, more water was historically perfected than was transferred to the Town's wells." *Id.* Again, Mr. Dunn did not mention the error in the calculation of peak historical use in the 2003 ROE or the statements by Mr. McDonald and the Mayor that the Town was willing to forego the amount in excess of 570 afy to address errors in the calculation, nor did he address Mr. Boessow's concern that using long-unused water rights for so-called "mitigation" provided no benefit to instream flows or fish.

This time, Ms. Gillingham also weighed in. She wrote to Mr. Boessow providing links to the 2003 ROE and 2007 Certificate of Change, asserting that "both documents clearly state that only a portion of this water right (570 AFY) had a source change" and that, "[b]ased on the investigation at the time, there were an additional 104 AFY that had been historically perfect [*sic*], and remained unchanged. Now, [a] portion of this remaining part of the original water right is currently being proposed as mitigation." Att. P. Like Mr. Dunn, Ms. Gillingham did not mention the error in the calculation of the Town's peak historical use in the 2003 ROE or the statements by Mr. McDonald and the Mayor that the Town was willing to forego the amount in excess of 570 afy. Given that her email adds nothing of substance to the information Mr. Dunn had already provided to Mr. Boessow on multiple occasions, it appears that its intent was simply to put added pressure on WDFW to change its position.

On April 6, 2020, Mr. Boessow wrote to Mr. Dunn that, since finishing work on the Town's water banking proposal (*i.e.*, the proposal to use the Town's claimed but long-unused surface water rights to mitigate for new permit-exempt wells), he had started looking at the USGE application. Att. Q. He indicated he would have "the same opinion on the value of the Darrington surface water claim as [he had] already stated," but asked for clarification on how the "Gorge Dam mitigation water would apply to irrigation water rights." *Id.* According to Mr.

Boessow, "[e]verything [he had] read indicates that the [Gorge Dam] mitigation is for permit exempt wells." *Id.*[5]

Mr. Dunn responded on April 7, 2020. *Id.* His response confirms that Ecology was continuing to view the mitigation water for USGE as coming from surface water: "If the portion of the Town of Darrington claim can be used for mitigation, it starts in Brown/Toby Creek, which is tributary to the Sauk River.[6] Water placed in Trust would then flow down the Sauk and down the mainstem Skagit River and flow to the coast. For this reason, the mitigation water would only be applicable to the mainstem Skagit in the vicinity of Cockreham Island, and would not mitigate for any impacts to the tributaries in that area." *Id.* Mr. Dunn asserted that "[t]he applicability of mitigation (along the Skagit River mainstem only) is the same as with the Gorge Dam mitigation for permit-exempt wells but did not address the difference between dispersed permit-exempt wells with relatively low instantaneous withdrawal rates and more concentrated irrigation wells with much higher instantaneous withdrawal rates. *Id.*

Ecology's close working relationship with USGE, the Town and their representatives to secure approval of this project was evident in the aftermath of WDFW's recommendations against the proposed mitigation plans. On April 13, 2020, Mr. McDonald wrote to Mr. Smith that he (Mr. McDonald) had just received WDFW's letter, stated that "[i]n our opinion the water right remains valid and can be used for mitigation," and requested "a call when you have time." Att. S. Mr. Smith agreed to set up a call after Ecology spoke with WDFW and had an opportunity for internal discussions. *Id.* On April 24, 2020, Mr. McDonald wrote to Mr. Smith to confirm "a few of the points they had discussed." Att. T. Mr. McDonald stated that he "personally [had] a long history regarding the water right and the change application that was first filed in 2001" when he "assisted the Town in changing a portion of the water right to a well source," but, notably, did not mention the error in the 2003 ROE's calculation of the Town's peak historical use (even though it was Mr. McDonald who first provided the corrected estimate of 594 afy to Ecology, a figure later confirmed by the Town's mayor) and did not mention his own statement that the Town was willing to forego the amount in excess of 570 afy to account for errors in the calculation (a statement that was also corroborated by the mayor). *Id.* Mr. McDonald went on to argue that the Town intended to maintain the full use of the right, citing its 2001 Water System Plan and more recent actions but

[5] Ecology had established a small mitigation bank using 0.5 cfs of additional water Seattle City Light water spilled through Gorge Dam. However, Mr. Boessow was correct that this mitigation water is only available to offset the impacts of certain permit-exempt wells, not a large irrigation appropriation like the one proposed here.

[6] Certificate No. 28 identified the point of diversion as "Brown Creek, a tributary of Squire Creek." A map in Ecology's file for CS1-163865CL indicates that Brown and Toby Creeks were separate creeks and appears to indicate that there was a reservoir on Brown Creek discharging to Squire Creek and the North Fork Stillaguamish, *not* to the Sauk River. *See* Att. R. Even if the Certificate were otherwise valid (despite the numerous issues identified by the Tribe in its comments), a water right in the *Stillaguamish* basin can provide no mitigation for new appropriations in the *Sauk or Skagit* basins.

did not address evidence that the right was abandoned long before 2001. *Id.*[7] Ecology uncritically accepted these representations and incorporated them in its first draft ROE for USGE's application, which would have approved the application.

As communications with the three Skagit River tribes began, Ecology kept USGE, the Town and their representatives fully informed. On April 30, 2020, Ms. Berns wrote to Mr. McDonald that she had been contacted by Larry Wasserman on behalf of Swinomish and hoped to speak with him that day. Att. U. She promised to "pass along key points of the discussion once I have the opportunity to touch base with him." *Id.* The next day she wrote that she had spoken to Mr. Wasserman, who "expressed a number of concerns, which I wasn't able to fully allay." *Id.* She added that, in addition to Mr. Wasserman, Joel Massmann will also partake in a technical review on behalf of the Tribe." Mr. McDonald's response requested a call to "discuss status and the concerns raised by Larry." *Id.*

In May 2020 Ecology began its review of the draft ROE prepared by Mr. Dunn. *See* Att. V. Ecology's timeline provided that, after internal Ecology staff review, edits would be sent to RH2 (the contractor selected by USGE) for incorporation and then the draft would be sent "for review by USGE (likely Tom McDonald)." *Id.* Only after USGE returned the document to Ecology would it be shared with the tribes. *Id.*

As part of its internal review of the draft ROE, Ecology's John Rose was tasked with reviewing the Town of Darrington's water rights. *See* Att. W, X and Y (late July and early August, 2020, emails from Rose referring to his "project in regards to the US Golden Eagle/ Darrington proposed water right change"; stating that he is "[s]till researching the Town of Darrington's historical water use"; and is "[s]till working on Town of Darrington change application"); Att. Y-1 (July 31, 2020, email from Smith stating Rose "is currently researching the answers" to questions that arose regarding the draft documents); Att. Y-2 at pdf page 2 (Sept. 30, 2020, performance

[7] Mr. McDonald did not address many other issues regarding the Town's asserted historic rights that are discussed in the Tribe's comments, including the following: (1) Claim S1-163865 was a claim for riparian rights, which can be lost if not used, and large portions of the amount claimed by the Town had not been used for decades; (2) the Claim was associated with a reservoir, but the initial reservoir permit was cancelled in 1931 and neither Darrington Water Works nor the Town ever acquired a new reservoir permit, which was necessary to perfect a surface water appropriation from the reservoir site; (3) there is no evidence that either Darrington Water Works, who filed the claim, or its predecessors ever asserted water rights for industrial uses or conveyed water to industrial users, which was the basis for a significant portion of the Town's claimed perfected use; (4) there is no evidence that the Town of Darrington acquired the Claim S1-163865 from Darrington Water Works; (5) the Town asserted no rights under Claim No. S1-163865 in the 1970s and 1980s when it acquired new surface and groundwater rights, including surface rights to the reservoir associated with the Claim, and then relinquished that surface water right, acquiesced in the cancellation of the reservoir permit application, and physically removed the dam and allowed the reservoir to return to a natural condition, all of which demonstrated an intent to abandon any rights under the Claim; (6) Mr. McDonald and the Mayor's statements in 2002 that the Town was willing to forego any amount in excess of 570 afy to account for errors in the calculation of peak historical use; and (7) the error in calculating peak historical use in the 2003 ROE.

review noting that, for the Town of Darrington's proposed mitigation proposal, Mr. Rose conducted "a thorough review of the town's water right that is proposed for use as mitigation").

Among other things, Mr. Rose compiled data from Department of Health reports documenting that the Town's average water usage from 2011 through 2019 was 264 afy, with a high of 291 afy. *See* Att. Z. This usage was well within the Town's forecasted needs when it obtained 310 afy of new water rights in the 1980s and demonstrated that those rights alone were adequate to meet the Town's existing needs. Moreover, those data showed that the Town had not made beneficial use of *any* of the water rights for which Ecology approved change applications in 2003 and 2005. Ecology's issuance of a Superseding Certificate in 2004 and a Certificate of Change in 2007 for these rights without requiring beneficial use violated RCW 90.03.330(4) as well as the development schedule in the 2003 ROE, which was imposed under Ecology Policy 1200.

We have not located a typed summary of Mr. Rose's review of Darrington's water rights. However, Ecology has produced handwritten notes labelled "S1-163865 JMR notes." Att. AA. The various dates in those notes correspond with Rose's review of Darrington's water rights and appear to set forth Rose's findings. They are significant here in several respects. First, they document that, by August 2020, Ecology had discovered the error in the 2003 ROE's calculation of the Town's peak historical use. The notes include a detailed discussion of the mayor's original declaration dated July 16, 2002 (referred to as the "1st Affidavit of Perfected Use by Leila Dempsey"); Mr. McDonald's August 6, 2002, email, in which he reduced the estimate of peak historical use in the 1st Affidavit to 674 afy; Mr. McDonald's August 13, 2002, email, in which he further reduced the estimate to 594 afy; and the mayor's September 17, 2002, letter (referred to as her "Supplemental Declaration"), in which she confirmed the corrected estimate of 594 afy. According to Mr. Rose's notes, in stating that, after changing 570 afy to groundwater, there was "a 'remaining perfected annual quantity of 104 AFY not be[ing] changed,'" the 2003 ROE made a mathematical error:

> In the Recommendations section of the ROE Peggy [Williams, who signed the ROE] states that there is a "remaining perfected annual quantity of 104 AFY not be[ing] changed under this recommendation." **Therefore she is accepting the larger estimate of 674 AFY as per Tom McDonald's email, despite the [Supplemental] Declaration estimate & despite the fact that the sum of all the estimated maximum historical uses (Domestic, Commercial, Lumber & Trains) adds up to 594 AFY not 674 Afy. So Peggy never checked the math.**
>
> On 8/13/02 one week after receiving Tom McDonald's email stating that 674 AFY had been put to beneficial use historically by the Town, Peggy Williams, Buck Smith, and [Andy] Dunn received another email from Tom McDonald **in which he**

> **states that the 674 AFY was in error, that based on the reduce[d] estimate of water use by trains from 160,000 gpd to 50,000 gpd the correct total estimated historical use should be 594 AFY.**
>
> **I ran the numbers again to check the math:**
>
Domestic use -	260,000 gpd	=	291 AFY
Commercial use -	50,000 gpd	=	56 AFY
Industrial mills use -	170,000 gpd	=	190 Afy
Train use -	50,000 gpd	=	56 AFY
			593 AFY

> Given that there is some fractional amounts that I didn't account for **the correct number is 594 AFY**.

Id. at 4-5 (emphasis added) (capitalization normalized). According to Mr. Rose's notes, the 2007 Change Certificate "*perpetuates error*" by stating that 104 afy of perfected water remained at the old reservoir site. *Id*. at 6 (emphasis added). Mr. Rose's notes also discuss a June 2003 email from Ms. Williams to Mr. McDonald, which referred to "'a figure of about 674 [AFY] with Darrington stating they will forgo the 104 AFY to cover errors." *Id*. According to Mr. Rose, in this passage Ms. Williams was "*perpetuating a math error allready [sic] identified by Tom McDonald*." *Id*. (emphasis added).

In seeking to use the 104 afy as mitigation for USGE's new appropriation and the Town's proposed water bank, neither Mr. Smith, Mr. Dunn nor Mr. McDonald disclosed this error, even though Mr. McDonald himself provided the corrected estimate in 2003 and even though he sent it to Mr. Smith and Mr. Dunn at that time. Even more remarkable was what happened next. According to Mr. Rose's notes, he had a phone conversation with Ms. Berns on August 18, 2020. *Id*. at 7. The notes specifically mention the 104 afy issue and indicate Ms. Berns instructed him to ignore the significant error he had discovered: "**Leave the inchoate of 104 AFY Leave it be** …" *Id*. (emphasis added).

Instead, Mr. Rose's new task was to attempt to demonstrate that the historic use of the 60 afy intended to mitigate USGE's new appropriation was 100% consumptive. Either he or Ms. Berns asserted that "water that was used for trains [allegedly, 56 afy] is fully consumptive use." *Id*. Thus, the question for Mr. Rose was "can I find the 4 afy difference in lumber mills?" *Id*. His notes indicate that Ms. Berns instructed him to "make sure you describe it as fully consumptive." *Id*.

Ms. Berns confirmed her August 18, 2020, conversation with Mr. Rose in an August 18, 2020, email. Att. BB. She wrote that, based on their conversation, Mr. Rose would "surgically incorporate a couple of sentences into the draft ROE related to consumptive use of Darrington's

historical industrial use (trains). Assumption is that the train use was fully consumptive and it is this portion that is being transferred to USGE." *Id.* Mr. Rose responded that he would include language in the ROE and trust water acceptance letter "reflecting that the water being used for mitigation is coming from previously perfected and currently unused industrial water (train use)." *Id.*

Neither Ms. Berns nor Mr. Rose made any reference to the error relating to the 104 afy in these emails. Their apparent decision to perpetuate water rights known to be recognized in error and, instead, to proceed with steps aimed at approving an application for new appropriative rights based on that error, was a complete violation of Washington water law and a betrayal of Ecology's legal and moral responsibilities to the public and the Tribe.

Ms. Berns transmitted the draft ROE for USGE's application and draft acceptance letter for the Town's trust water donation to Swinomish on August 27, 2020. Att. CC. Both documents asserted that Ecology had tentatively determined in 2003 that 674 afy was the highest historical use of Claim No. 163865 and Certificate No. 28. Att. DD at 1; Att. EE at 18. Neither document disclosed the error discovered by Mr. Rose, which was long known to Mr. McDonald, Mr. Smith and Mr. Dunn and wan now known by Mr. Rose and Ms. Berns, and can reasonably be viewed as an effort to intentionally conceal the error.

In the meantime, Ecology was continuing to evaluate the Town's proposed water bank to mitigate for new permit-exempt wells within the boundaries of the Darrington School District. In a September 4, 2020, memorandum, Mr. Rose provided Ecology's comments on the methodology developed by PGG to delineate a mitigation zone. Att. FF. The memorandum raised the following concerns:

> [I]t appears that PGG's approach results in significantly smaller protection zones around identified tributaries than HDR's model, leading Ecology to question if this ensures adequate mitigation and meet [*sic*] the requirements of the Skagit Instream Resource Protection Program. WAC 173-503.
>
> If PGG believes their proposed approach does meet the goals mentioned in the Draft Technical Memorandum (for instance, the differences in streambed conductance between the model and PGG's approach, justify a narrower buffer zone) Ecology recommends providing addition[al] discussion to the memorandum to explain this.
> …
>
> On page 3, last paragraph of the memorandum, PGG refers to non-use of a portion of the Town's water right as streamflow augmentation. It is recommended that this proposal not be referred to as such. Rather, it should be stated that a portion of the

> Town's historically perfected, but no longer used, water right is being offered as mitigation for future permit-exempt uses within the Darrington School District boundary.

Id. at 1-2.

On September 9, 2020, Ms. Berns emailed Ecology's Dave Christensen and Mary Verner with background information in advance of a discussion regarding Darrington. Att. FF-1 (Sept. 9, 2020, Email). Ms. Berns did not disclose the 2003 permitting error discovered by Mr. Rose but instead asserted that the Town "has 674 acre-feet/year that has been proved up by Ecology through previous change decisions" in which Ecology "determined that this quantity represented a valid pre-surface code municipal water right." *Id*. She further stated the 570 afy of that total quantity had been changed from surface to groundwater but the remaining 104 afy was "identified as valid and in good standing and [had] not been changed." *Id*. Adopting Mr. McDonald's arguments on abandonment, she asserted that "[t]his quantity is still associated with the original pre-code surface water diversion, which is still operable (i.e., not abandoned) and has been recognized in two Ecology decisions (2001 and 2004) and identified in the Town's water system plan updates." *Id*. Ms. Berns did not address any of the evidence the Tribe has assembled regarding the abandonment of the right in the 1970s or 1980s—evidence that was available in Ecology's own files—or the other substantial issues regarding its extent and validity discussed in the Tribe's comments.

After describing the Town's current proposal, Ms. Berns identified two issues for discussion: (1) whether the process Ecology followed for mitigation of USGE's application, "i.e., mitigating a new water right with a temporary donation … is defensible given that the water right has been fully vetted"; and (2) "how comfortable we are related to the use of this historically perfected pre-code muni water as a mitigation source." *Id.* She made her own views crystal clear: "I will add that Ecology was very comfortable with this water previously, and was seeking to purchase these rights to establish its own mitigation programs. Also, changing course will lead to significant frustration and political pushback on a range of fronts." *Id*.

On September 17, 2020, Ms. Berns forwarded her September 9, 2020, email to Assistant Attorney General Steve North and to Mr. Christensen, Ms. Verner and Ecology's Trevor Hutton. *Id.* (Sept. 17, 2020, Email). She attached the draft USGE ROE and draft letter accepting the Town's trust donation but stated "<u>don't spend time reading these</u>" because the September 9 email "outlines the background more concisely re: our Darrington discussion, scheduled for today at 2 PM." *Id*. (emphasis in original). Ms. Berns' email identified two key questions: (1) whether temporary trust donations can be used to authorize temporary mitigated water rights; and (2) "[f]rom a Municipal Water Law perspective, is there vulnerability to this historically perfected quantity, noting that it *hasn't been used since the mid part of the last century?*" *Id*. (emphasis added).

As to the first question, Ms. Berns made clear her desire to avoid a review of the extent and validity of the Town's water rights under RCW 90.03.380 (which, as Ms. Berns must have known, would disclose the 2003 permitting error): "I recognize this [use of a temporary trust donation to authorize temporary mitigated water rights] is not the preference of the Program, but the question is around the legality of it. If not, are there *creative ways that we can park valid water without a RCW 90.03.380 change?*" *Id*. (emphasis added). As to the second question, Ms. Berns doubled down on Mr. McDonald's narrative regarding abandonment, with no reference to the many issues presented in Ecology's own files: "This is a true municipal entity, which has continued to be a municipal water purveyor for 100+ years, and they have continued to have their quantities recognized by Ecology in the form of change decisions and acknowledgment of their quantities in Water System Plans. There are not abandonment issues." *Id*.

Soon thereafter, consistent with Ecology's previous commitment to keep USGE and the Town informed as to the Tribe's comments, Ms. Berns emailed Mr. Tennant on September 28, 2020, that Ecology had received feedback from Swinomish and "plan[s] to loop back with you as well as the Town in the near term." Att. Y-1 (Sept. 28, 2020, email from Berns to Tennant). However:

> Before doing so, we are checking in with our attorney general's office on a few questions requiring additional legal clarity. It will it may [*sic*] be valuable to have Tom McDonald in on the discussion, if he's still on contract, given the complexities of Washington Water Law. I hope to reach out and schedule a meeting in the next 1 -2 weeks.

Id. Ms. Berns' suggestion that USGE bring Mr. McDonald into the discussions is another indication of Ecology's proactive efforts to support and move USGE's application forward. We are aware of no instance in which Ecology has ever advised Swinomish to involve legal counsel in any matter.

Mr. Tennant's email response indicates that, in addition to communicating by email, he and Ms. Berns had a phone call to discuss the situation. *Id*. (Sept. 30, 2020, email from Tennant to Berns). In his email, Mr. Tennant said that he had spoken with Mr. McDonald "and per your recommendation we would like to bring Tom into these discussions moving forward" and asked that Mr. McDonald and the Town be included in the meeting Ms. Berns was scheduling. *Id*. Ms. Berns' response provided the following summary of Swinomish's concerns:

> [T]he Tribe did not provide a letter. Rather, they verbally raised a number of pointed questions about the procedural vehicle we were pursuing in terms of using the temporary trust water statute and process to memorialize a new mitigated water

> right, even one that was term limited, as is proposed here. The other concern is whether this water is even a valid source of mitigation. Both of these comments/concerns were relayed in the form of a phone call to our Water Resources Program Manager, Mary Verner, and in follow-up discussions with me. Both concerns, as posed, require additional discussion with our attorneys before we connect with you and the Town on next steps. Once we have hear[d] back and discuss internally, we will work to schedule a call. I'm guessing it's probably 2 weeks out.

Id. (Sept. 30, 2020, email from Berns to Tennant). Ms. Berns then emailed Mr. Rose to tell him that "a number of new challenges have emerged with this project" and that she had spoken with Mr. Tennant and advised him to bring Mr. McDonald into a future discussion. *Id.* (Sept. 30, 2020, email from Berns to Rose). She asked Mr. Rose to "stop work on anything Darrington cost reimbursement related for the time being," including "the mitigation area delineation work." *Id*.

By October 27, 2020, Ecology was prepared to make a decision. In an email to Ms. Berns, Ms. Verner stated that she had "reviewed and considered all the info provided me, and [had] talked with both Steve [North] and Alan [Reichman], as well as with Tyson Oriero (both separately and in addition to Tyson joining the call with Larry)." Att. GG. She had "landed on a decision and [was] scheduled to touch base with Laura one last time tomorrow at 1:00 before letting you know which way I've decided to go with this." Att. GG. In response, Ms. Berns asked whether the decision was "specific to the MWL [municipal water law] questions? *Id.* Ms. Verner's response to this question was to suggest a call. *Id*.

We have not located any documents revealing the substance of Ms. Verner's planned decision. However, there is some evidence that it might have been adverse to USGE and the Town. In mid-November, Mr. McDonald wrote to Mr. Smith stating that "USGE would like to schedule a meeting that includes upper management including Mary Verner." Att. GG-1. After Ecology agreed to the meeting, Mr. McDonald indicated USGE was available on various dates in late November or early December. *Id*. In a December 11, 2020, email to Mr. North, Mr. McDonald wrote that he had spoken with Ms. Verner and requested that he be given an opportunity to speak with Mr. North "to discuss what [Mr. North] would see as the legal basis for the decision." Att. GG-2. Mr. McDonald indicated he had previously spoken to Mr. North and that there might "not be anymore than you have told me" but "[a]t least I may be able to share in more detail my analysis with you." *Id*. Mr. McDonald went on to summarize USGE's working relationship with Ecology, which had led it to believe that its application would be granted:

> I believe you have been told that USGE has been working on the permit application for many years, and I got involved when they decided to get mitigation. They have invested a lot based in large part on confirmation from Ecology that the Darrington

> right is good and even if the Tribe objects they see this as [a] legally supported mitigated water right. I know they cannot promise a final decision but this is a reversal and was a real jolt to them. So, knowing more about the possible decision to deny the application would be helpful.

Id. In his response, Mr. North assured Mr. McDonald that Ecology had not yet made a decision and that Ms. Verner "would prefer to pursue an alternative if one is reasonably available to your client." *Id*. (Dec. 13, 2020, Email from North to McDonald). Mr. North added that he was "pretty sure that that is where things stand right now with Ecology ledging to get back to you and your clients by COB tomorrow." *Id*.

A heavily redacted email indicates that Ecology met with Mr. McDonald on December 16, 2020, and developed a plan to move forward with USGE's application. Att. G-3 (Dec. 16, 2020, email from Christensen to Verner and North re: "we are meeting with Tom McDonald today at noon—need feedback on talking points"). A December 18, 2020, email from Mr. McDonald to Ecology's Jay Cook indicates that, to address the concerns about use of a temporary donation to the Trust Program to mitigate the impacts of USGE's new appropriation, Ecology has proposed that the Town permanently transfer water rights to the program. Att. HH. Mr. McDonald wrote that "until we get the Town of Darrington to agree to this new process for the permanent trust water right, we [presumably, USGE] should not commit." *Id.* Mr. McDonald was "optimistic, but if they will not agree, we lose the ability to use the water." *Id*. Mr. McDonald also noted a second issue, which involved the instantaneous quantity of the water right being transferred to the Trust Program to provide mitigation. According to Mr. McDonald, USGE was "using the full Qi authorized in [its existing] water rights," with the implication that it needed additional instantaneous withdrawal rights to support its planned expansion. *Id*.

In the midst of these developments, on December 9, 2020, Ms. Verner emailed Mr. Cook, Mr. Smith and other Ecology officials regarding a call with the Governor's Office. Att. II. The email acknowledges that the USGE/Darrington proposal would have actual impacts on streamflows at a time when it appears that Ecology was working closely with USGE to find a way to approve it. It reads as follows:

> Hi, all. I spoke with Jen Hennessey in the Governor's Office this morning to give her an overview of upcoming decisions regarding a new permit for US Golden Eagle and proposed mitigation using perfected water from the City of Darrington. Jen understands the dynamics of relationships with agriculture, municipal water utilities, and tribes (particularly the Swinomish Tribe). She asked us to provide her more specific information about the science of how water in the Skagit basin will actually be affected if we grant the permit to USGE and approve the city's proposal to use its rights in trust for mitigation.

> I shared that *there would be impact to streamflow as a result of the city's water right being put to use after over 30 years of sitting unused even though perfected.* I said I believed the streamflow impact would be measured at the Mt Vernon gauge, but I was not sure of the details of estimated cfs reduction. I also was unsure how USGE's associated groundwater withdrawals would be measured in the tributaries. Buck has shared this in the past but I did not have it handy when I was on the phone with Jen this morning.
>
> Without inundating her with volumes of technical reports, what can we provide to Jen for her consideration? Again, she is not looking for the legal analysis, but trying to better understand *what science tells us about the actual impact of the proposed projects on Skagit basin streamflow*.
>
> If we need a quick call instead of an exchange of emails, I'd be glad to hop on the phone for a brief discussion.

Id. (emphasis added).

By December 22, 2020, the application was clearly back on track. On that day Mr. Rose wrote to PGG that he had been given the go-ahead to resume work on the Darrington mitigation zone delineation. Att. JJ. On December 24, 2020, Mr. Rose wrote to PGG that the approach it suggested in a September 18, 2020, email was "most likely acceptable to all stakeholders given how contentious water is in this basin, and represents a good balance of environmental protection and future demand." Att. KK. That approach treated tributaries to the Sauk River similarly to non-modeled tributaries to the Skagit River and "expand[ed] the size of the tributary buffers." *Id.* (Sept. 18, 2020, email from Schwartzman to Rose). It assumed, among other things, that "[m]itigation zones occur in the alluvial valley bottom and do not extent to the surrounding foothills/uplands." *Id*.

However, in a January 4, 2021, email to Ecology's Kelsey Collins, Mr. Rose suggested expanding the mitigation zone to "include the entirety of the school district area":

> [W]hen we began discussions with PGG for delineation of the mitigation zone, the PGG stated that they were looking to us for guidance on what would be an acceptable zone. We discussed with them the approach we took with Main Stem Mitigation since that appeared to be a method that all the stakeholders found acceptable in the past. Now with a better understanding of what the stakeholders feel about the USGE/Darrington proposal, is it appropriate to suggest to Tom that they could include the entirety of the school district area as the mitigation zone

> instead of the more constrained zone that PGG has worked out? (as described in section 5.2.2 of the agreement). Or is it more appropriate to let them figure that out based on the wording of the agreement?

Att. LL. Mr. Rose did not explain Ecology's "better understanding of what the stakeholders feel about the USGE/Darrington proposal" or how that warranted omitting delineation of a mitigation zone that, as he put it in his December 24, 2020, email, "represents a good balance of environmental protection and future demand."

As it moved towards issuing decisions approving USGE's application and the transfer of the Town's water rights into the Trust Program, Ecology, USGE and the Town were continuing to rely on the Town's allegedly perfected 104 afy that remained at the old surface water site, despite the error discovered by Mr. Rose and communicated to Ms. Berns in August 2020. For example, although noting an outstanding question regarding the instantaneous quantity, a December 30, 2020, Tasks Table prepared by Ecology included a rough draft of the public notice of the Town's application to transfer water to the Trust Program, which states that the Town's application seeks "to transfer xx cfs, 104 ac-ft/yr from Claim No. S1-163865 to the Trust Water Rights Program." Att. MM.[8] And, on December 31, 2020, Mr. McDonald wrote that "I/USGE will analyze the consumptive quantity in the 104 afy." Att. NN. Ms. Berns alluded to the error in a January 4, 2021, email, which referred to an attached email (which Ecology has completely redacted) regarding "the original question that I posed to Steve in August re: past permitting mistakes." Att. OO. Despite this, an updated Tasks Table prepared on January 5, 2021, continued to indicate that the mitigation would come from the allegedly perfected 104 afy that had not been changed in 2003. Att. PP.[9]

However, a January 6, 2021, email from Mr. Rose to Ms. Berns indicates that Ecology had begun looking to an alternative to reliance on the alleged perfected 104 afy that was not changed in 2003. Att. QQ. The email indicates that Ecology was exploring whether there were perfected inchoate amounts associated with the groundwater rights the Town acquired in the 1980s. Mr. Rose concluded that those amounts had been perfected but were being utilized such that there wasn't "a whole lot of inchoate amounts of water associated with these rights." *Id.* He explained:

> Prior to early 1985 Darrington was relying solely on its reservoir for its water source, with a couple of wells for alternative or emergency supply (statement of

[8] As set forth in the Tasks Table, the draft notice also indicated that the transfer "proposes to mitigate for domestic permit exempt wells in the Darrington School District Boundary" as well as USGE's new appropriation. *Id*. There is no reference to the narrower mitigation zone developed by PGG.

[9] Like the previous Tasks Table, the draft public notice in the January 5 table provided that the transfer was proposed to mitigate impacts from permit exempt wells in the Darrington School District Boundary, with no reference to the mitigation zone developed by PGG. *Id*.

> town clerk cited in ROE of G1-24424C). These wells probably had GW claim G1-163866CL associated with them. In 1983 they applied for water right G1-24424C for a well to serve in that same capacity, with POA of 11/84. A few months later there was a major breach in the reservoir forcing the town to switch to wells. This resulted in the acquiring of water rights G1-24653 and G1-25114 in 1985 and 1987 respectfully (I don't see any mention of them relying on the GW claim, probably because it wasn't for sufficient quantities). The total Qa that can be withdrawn from these 3 GW rights is 304 afy. Ecology did not authorize the change from surface water to GW for the claim S1-163865CL until after 2000 and the final change of that water right claim to use all of their existing wells until 2007. So for a period of at least 16 years (1985-2001), Darrington had to be relying on its groundwater rights. I have examined the past 10 years of water consumption based on the DOH water efficiency reports, and the water use average is 271 afy, with one year being above 290 afy. Assuming this represents typical historical use (the town hasn't expanded significantly since then, not sure how much it might have contracted), then I would conclude that it is reasonable to assume the GW rights have been perfected and there isn't a whole lot of inchoate amounts of water associated with these rights. Which is probably why the town decided to go from SW to GW for the claim in the first place.

Id. This email again confirms that the Town had not made beneficial use of any of the rights Ecology authorized it to transfer from surface to groundwater rights in 2003 and 2005 but was utilizing groundwater rights obtained in the 1980s for its water supply. Although it had perfected the rights it acquired in the 1980s, there is no evidence that it perfected the rights authorized for change in 2003 and 2005, notwithstanding issuance of the 2004 Superseding Certificate or the 2007 Certificate of Change.

Further evidence that Ecology was looking for an alternative to the allegedly perfected 104 afy that was not changed in 2003 is found in a January 13, 2021, email from Mr. McDonald to Ms. Berns. *See* Att. RR. The email suggests that Ms. Berns may have informed Mr. McDonald of the error in the calculation of peak historic use in the 2003 ROE (which, of course, Mr. McDonald would have been well aware of). In his email, Mr. McDonald wrote that, "[f]or the call today, I want to let you know that I talked to the Mayor and Dianne [Allen, the Town's clerk] and briefed them on the background of the calculations of water use in the 2023 [*sic*] ROE. They have a copy." *Id*.

Two days later, on January 15, 2021, Ms. Berns wrote to Mr. Smith, Ms. Collins and Mr. Rose informing them that she had "a couple of good discussions with the Town" and that, in moving forward with the project, "[t]hey intend to put 100 AFY into trust and debit that quantity from the 570 AFY approved for change in the early 2000s." Att. SS. Thus, while Ms. Berns and

Mr. McDonald took pains not to confirm the error in the 2003 ROE in writing, all available evidence indicates that it led to the change from reliance on the allegedly perfected 104 afy that was unchanged in 2003 to reliance on a portion of the 570 afy that was changed.

As discussed in Part 2 above, this simply led to another problem, this time concerning the instantaneous rate of the water right being transferred to the Trust Program. On January 13, 2021, Ms. Berns had written to Mr. McDonald asking him where the 3.34 cfs figure in the draft public notice had come from. Att. TT. He initially responded that it "reflects the remaining instantaneous that was in the claim (converted from gpm) and not changed to the Town's ground water wells." *Id.* Ms. Berns forwarded his response to Mr. Rose and Mr. Smith and asked them to "take a look at this Qi to confirm it's even eligible for change." One day later, on January 14, 2021, Mr. McDonald provided a corrected response, noting that 3.34 cfs was equivalent to the 1,500 gpm in the original claim and that, because 350 gpm was transferred to the wells, that left 1,150 gpm or 2.56 cfs. Att. UU. He believed this was the correct amount for publication (even though much less would be used in the water bank for USGE and the exempt wells). *Id.* Ms. Berns responded that "2.56 cfs sounds like the right number," *id.*, but this was when Ecology was still relying on the allegedly perfected 104 afy that had not been changed in 2003. *See id*. (Jan. 14, 2021, email from Collins to Berns describing request "to transfer 2.56 cfs, 104 ac-ft/yr from Claim No. S1-163865CL").

As discussed in Part 2, once the decision was made to switch from reliance on the allegedly perfected 104 afy that was not changed in 2003 to a portion of the 570 afy that was changed, Ms. Berns took the position that the instantaneous rate would have to come out of the 350 gpm that was changed at that time. Apparently realizing that 350 gpm could not mitigate for USGE's new appropriations of up to 600 gpm, Ecology, USGE and the Town simply decided to omit *any* instantaneous rate from the Town's application to transfer water to the Trust Program. This episode is yet another illustration of Ecology's close working relationship with USGE, the Town and their representatives (especially Mr. McDonald) and its commitment to advancing USGE and the Town's applications despite the requirements of Washington water law and Ecology's policies.

On February 5, 2021, Ms. Berns forwarded final versions of the proposed water banking agreement and public notice to Mr. McDonald and Ms. Allen. Att. VV (Feb. 5, 2021, Email from Berns to McDonald and Allen).[10] In an earlier email, Ms. Berns had informed Mr. McDonald that the agreement contained "a placeholder … for Exhibit C: the Darrington Mitigation Area. We will

[10] Despite Ecology's knowledge of the error in the 2003 ROE, the proposed agreement continued to recite that Ecology had "found that 674 ac-ft/yr were perfected for municipal water supply purposes and authorized moving 570 ac-ft/yr to several of Darrington's wells resulting in issuance of Certificate of change No. S1-163865CL on February 2, 2007. The remaining 104 ac-ft/yr was not changed." Att. H-1 at 1 (¶ B). However, the proposed agreement purported to transfer 100 afy from Certificate of Change No. S1-163865CL to the Trust Program, not a portion of the 104 ac-ft/yr that was not changed. *Id*. (¶ D).

look to you and your clients about whether this gets included in the trust agreement." *Id*. (Jan. 27, 2021, Email from Berns to McDonald). It appears that, by February 5, 2021, Mr. McDonald and his clients had decided not to include it. In her email of that date, Ms. Berns wrote that she had revised the agreement "to reflect that we are not including an Exhibit C, which would define the mitigation zone within the School District Boundary." *Id*. As revised, the proposed agreement provided that the water transferred to the Trust Program could be used to mitigate "[d]omestic permit-exempt groundwater uses within the Darrington School District Boundary. This area may be refined into mitigation zones as the process for issuing Mitigation Assignments is developed." *Id*.; Att. H-1 at 2 (¶ 3.2.2).

We have not found any explanation for Ecology's determination that it was unnecessary to define a zone within the school district boundaries in which Darrington's water rights would provide actual mitigation. Those boundaries include lands on both sides of the Sauk River and tributaries in the vicinity. Non-use of Darrington's claimed water rights will not "mitigate" for the effects of new permit-exempt wells on those waters or fish populations that utilize them.

On March 4, 2021, Ms. Berns wrote to Mr. Smith and Mr. Rose that, with the Darrington public notice having been posted, "we're moving towards issuing the acceptance letter and the USGE mitigated ROE. Att. WW. She asked Mr. Smith to work with Ms. Collins to develop the trust water acceptance letter and Mr. Rose to "take the most recent draft of the USGE mitigated permit and make track change updates to reflect the different direction we've taken on this project (e.g., the water will be permanently donated through a trust water agreement, the mitigation is based on 60 AFY that will be cleaved off of Darrington's historically perfected muni water memorialized in certificate of change CS1-163865CL (570 AFY), rather than the 104 AFY that was previously discussed." *Id*.

Mr. Rose proposed the following edits (in blue) to address the new approach:

> In the CS1-163865CL report of examination for change (2003) and a subsequent report of examination for change issued on February 23, 2005 (file number CS1-163865CL@1), 570 ac-ft/yr was transferred by the Town of Darrington to be withdrawn from Town wells. The remaining 104 ac-ft/yr as perfected water under S1-163865CL was not transferred and remained within the original water right.
>
> Of the perfected 104 ac-ft/yr remaining under S1-163865CL, Darrington originally proposed to ~~place~~transfer 60 ac-ft/yr ~~is proposed to be placed~~ into the Trust Water Rights Program on a temporary basis as mitigation for G1-28878. However, after further examination of historic water use calculations[RJ(1], the town is now proposing that the 60 ac-ft/yr to be placed in the trust water right program come from the 570 ac-ft/yr that was ~~transferred~~relocated to the town wells and be transferred into permanent trust. While the Town of Darrington surface water right

> was perfected long ago, the Town retains a right to the perfected portion since water used for municipal water supply purposes is not subject to relinquishment (RCW 90.14.140) and the Town can choose to place it in the Trust Water Rights Program as mitigation if it so desires.

Att. XX at 19. Mr. Rose's comment in this passage reads as follows:

> Not sure we want to include this in the ROE. May raise doubts about historic water use. On the other hand, I feel it is appropriate here to mention a reason why Darrington changed its mind.

Id. Mr. Rose's edits and comment indicate that he understood the reason for the change in direction to which Ms. Berns referred was the error in the estimate of peak historic use in the 2003 ROE. However, it seems clear that neither he nor Ecology wanted to confirm the error in writing or call attention to it. Indeed, his draft retained the reference to the "remaining 104 ac-ft/yr as perfected water under S1-163865 [that] was not transferred and remained within the original water right" despite his knowledge of the error but in accordance with Ms. Berns' subsequent instruction to him to "leave it be."

In the final draft ROE, which denies USGE's application on public interest grounds, Ecology further obfuscated this issue, suggesting that the reason for the change in direction was WDFW's reference to Mr. McDonald's August 6, 2002, email in which he stated that the Town was willing to forego the difference between the then-asserted 674 afy perfected use and the 570 afy the Town was seeking to change. *See* Att. I at 14-15. Although that may have contributed to the decision, the documentary evidence discussed above indicates that the mistake in calculating peak historical use was the key factor. Notably, despite having discovered that error, neither the final draft ROE nor the final draft letter to the Town denying its application to transfer water into the Trust Program make any mention of it. To the contrary, Ecology's draft denial letter asserts that the decision "does not affect the extent or validity of Darrington's Certificate of Change no. S1-163865CL," which "remains valid and exempt from relinquishment because of its municipal status (RCW 90.14.140(2)(d))." Att. YY at 1-2.

These statements simply perpetuate a clear error in the 2003 ROE. Even if Ecology does not address the many other serious issues regarding the Town's water rights that the Tribe has identified, it should forthrightly acknowledge this error and correct it once and for all.

4. Ecology Has Express Statutory Authority to and *Must* Make Tentative Determinations of Existing Water Rights, including Federally Reserved Rights, to Determine Whether a Proposed Permit Would Impair Existing Rights.

As discussed in our July 28, 2021, letter and above, an additional ground for denial of USGE's application is that it would impair the Tribe's senior reserved water right. In a recent email and Pollution Control Hearings Board (PCHB) filing, Ecology has asserted that it has no

authority to consider unadjudicated federally reserved water rights in issuing permits for new appropriations of water under RCW 90.03.290. For the reasons discussed below, we believe that assertion is inconsistent with the plain language of the statute and its interpretation by the Washington Supreme Court and the PCHB.

a

In a July 29, 2021, email, Ecology's Carrie Sessions asserted that Ecology has no authority to consider unadjudicated federally reserved water rights when issuing permits for new appropriations of water under RCW 90.03.290(3) or when approving a change in an existing water right under RCW 90.03.380. Ecology has taken the same position in *Confederated Tribes and Bands of the Yakama Nation v. Department of Ecology and Sterling and Wilson Solar Solutions, Inc.*, PCHB No. 20-071 (*Solar Solutions*). In her email, Ms. Sessions explained Ecology's position as follows:

> RCW 90.03.290(3), which governs appropriation of new water rights, directs Ecology to make a finding that the application "will not impair existing rights". Similarly, RCW 90.03.380 establishes that a water right may be transferred to another entity "if such a change can be made without detriment or injury to existing rights." Both statues use the qualifier "existing" in the context of considering impairment. The Rettkowski Supreme Court decision makes clear that the agency cannot enforce priority of rights between unadjudicated claims and permitted junior water permits. To do so would constitute a de facto adjudication of the claim. Similarly, if an asserted tribal reserved right is to be considered in the context of an impairment claim, that would require the de facto adjudication of that claim. Therefore, the agency lacks the authority to consider the impairment claim because to do so, the agency would essentially have to validate, or adjudicate the claimed treaty reserved right.

Similarly, in *Solar Solutions* Ecology advanced the following argument:

> In Washington State, water rights can only be formally determined, i.e., adjudicated, by superior courts. *See* RCW 90.03.110-.245. Ecology cannot determine allegedly senior water rights among water users outside the context of statutory general adjudication. *Rettkowski v. Dep't of Ecology*, 122 Wn2d 219, 229, 858 P.2d 232 (1993) (reconsideration denied). Nor can the Pollution Control Hearing Board adjudicate priorities between water users. *Id*.

Solar Solutions, Ecology's Motion to Dismiss at 2 (July 26, 2021).

In its *Solar Solutions*' motion, Ecology acknowledged that, under RCW 43.21B.110(1)(d), the Board has jurisdiction to hear and decide appeals pertaining to "'the *issuance*, modification, or termination of any permit, certificate, or license by [Ecology.]'" *Id.* (emphasis added). However, it argued that the Board lacked jurisdiction to hear a challenge to Ecology's issuance of a permit based on Ecology's failure to consider the Yakama Nation's treaty reserved rights to streamflows necessary to support fish populations because, according to Ecology, the Yakama Nation's asserted right was "neither adjudicated nor quantified." *Id*. at 4. According to Ecology, "[i]n order to determine whether that right exists and should be protected would require its adjudication, which is plainly beyond the Board's jurisdiction." *Id*.

Ecology elaborated on its position as follows:

> The Board lacks jurisdiction over the Nation's claims the [temporary groundwater permit] G4-33257 will impair the Nation's treaty reserved rights to instream flows capable of sustaining fish in Pine and Wood Creeks. These rights are neither verified, nor adjudicated, thus precluding Ecology and the Board from considering their potential impairment since doing so would result in an ad hoc adjudication of these rights, something both entities lack the authority to do. For these reasons, the Board must dismiss issues two and five.
>
> Administrative agencies, like Ecology, and administrative tribunals, like the PCHB, have only those powers the Legislature has delegated to them. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (citing *Municipality of Metro. Seattle v. Public Empl. Relations Comm'n*, 118 Wn. 2d 621, 633, 826 P.2d 158 (1992)). The Legislature has not given Ecology the authority to determine water rights. *Rettkowski*, 122 Wn.2d at 229. Similarly, the Board cannot adjudicate competing priorities between water users. *Id. See* RCW 43.21B.110(2)(c) (PCHB does not have the authority to hear appeals of water rights determinations made under RCW 90.03.110). The statute creating the PCHB "specifically forbids" the Board from conducting hearings on "[p]roceedings by [Ecology] relating to general adjudications of water rights." *Id*. at 228-29 (alteration in original) (internal citation omitted). *See* RCW 43.21B.110(2)(c). The PCHB can only consider appeals alleging that decisions by Ecology impair *existing* water rights. RCW 43.21B.110(2)(c) (emphasis added). *See also Rettkowski*, 122 Wn.2d at 228-29.
>
> **Water rights become legally cognizable when they are adjudicated in superior court following the procedures set forth in RCW 90.03.** Only superior courts can conduct general adjudications to "determine the existence, amount, and priorities of the water rights." *Id*. at 234. Ecology plays an evidentiary role in general adjudications by conducting a preliminary hearing at which all parties can

> state their claims, examine the claims of other parties, and, as appropriate, question the validity of those competing claims. RCW 90.03.160--.200. Ecology then presents its findings to the superior court, which carries out a general adjudication that affords all interested parties the chance to be heard. *Rettkowski*, 122 Wn.2d at 229. In sum, Ecology cannot make a determination about the existence or priority of water rights outside of the context of a general adjudication and the Board cannot adjudicate competing claims to water. *Id*.; RCW 43.21.110(2)(c).
>
> Here, it is insufficient for purposes of the Board's jurisdiction to accept at face value any claim that the Nation might make in response to this motion that it possesses treaty reserved rights in Pine and Wood Creeks. The Nation must first (1) actually prove that it has treaty reserved rights in the subject creeks; and (2) also prove that the rights **have been adjudicated and thus capable of legal protection from claims of legal impairment by the subject permit**. Even if the Nation is able to prove it has treaty reserved rights in the subject creeks, the Board would still lack jurisdiction to consider their impairment of those rights absent their **legal adjudication** by an *appropriate* tribunal. The Board simply lacks jurisdiction to determine if the Nation's impairment claim is valid, because in order to validate that claim, the Board would essentially have to validate, or **adjudicate** the Nation's asserted treaty-reserved right.

Id. at 5-6 (italics in original; bold font added for emphasis).

b

Ecology's position as articulated in Ms. Sessions' email and Ecology's *Solar Solutions'* motion appears inconsistent with RCW 90.03.290(3), RCW 90.03.380, *Rettkowski* and more recent decisions of the Washington Supreme Court and a decision by the Pollution Hearings Control Board. In brief, Ecology's position fails to account for the distinction between Ecology's authority in the permitting context and its authority in the regulatory or adjudicative context. As *Rettkowski* recognized, in the *permitting* context Ecology has express statutory authority to and *must* make tentative determinations of existing water rights, whether adjudicated or not, to determine whether a proposed permit would impair existing rights. That tentative determination is not equivalent to an adjudication but is an essential element of the permitting process and the prior appropriation doctrine. Ecology's assertion that no unadjudicated rights can be considered in the permitting process would eliminate protection for existing rights in basins throughout the State in which water rights have not been adjudicated and would violate the plain language of the permitting statute and multiple decisions of the Washington Supreme Court.

In *Rettkowski v. Dep't. of Ecology*, 122 Wash.2d 219, 222 (1993), Ecology issued cease-and-desist orders to irrigators withdrawing groundwater pursuant to groundwater certificates issued by Ecology. The orders were based on Ecology's determination that the withdrawals conflicted with senior surface rights held by nearby ranchers. *See id.* at 223-24. "The [cease and desist] orders contained a lengthy 'findings of fact' section which included a unilateral determination by Ecology of the existence and validity of the water rights claims of the Ranchers, and a determination that they were senior in time to the Irrigators." *Id*.

The Supreme Court held that Ecology lacked authority to adjudicate the competing claims of the irrigators and ranchers and issue the cease-and-desist orders. *See id.* at 226-27. In so holding, the Court contrasted the absence of "any statute which specifically authorized the procedures [Ecology] followed in issuing these orders" with "the elaborate general adjudication process for determining water rights entrusted to the superior courts by RCW 90.03." *Id*. As the Court held, "[n]owhere in Ecology's enabling statues was it vested with similar authority to conduct general adjudications or even regulatory adjudications of water rights." *Id*. at 227.

In the absence of "explicit statutory authority to rely upon," Ecology asked the Court to "extend a number of previous cases to allow it the authority to make 'tentative determinations' of the priorities of existing water rights in order to regulate." *Id*. In response, the Court expressly *acknowledged* Ecology's authority to make such determinations in the permitting context but declined to extend that authority to the regulatory or adjudicative context.

The Court began by discussing Ecology's authority to make tentative determinations of water rights in the permitting context:

> [T]he concept of "tentative determinations" in the cases cited by Ecology was developed in a different context. Each of those cases dealt with the authority of Ecology (or its predecessor agency) to grant permits to appropriate water. The inquiry in that situation is relatively straightforward: is there water available to apportion, is the proposed use beneficial and not detrimental to the public interest, ***and is there any conflict with existing water rights*.** RCW 90.03.290. In the permitting situation, Ecology's determination is limited to tentatively determining ***whether there are existing water rights*** with which the proposed use will conflict. *Funk*[*v. Bartholet*, 157 Wash. 584, 594 (1930]; *Stempel*[*v. Dep't of Water Resources*, 82 Wash.2d 109, 115-16 (1973)]. Ecology investigates an application for a permit to tentatively determine ***the existence of water rights*** and the availability of water.

Id. at 227-28 (emphasis added; footnotes omitted).

The Court then contrasted Ecology's authority to "tentatively determine[e] whether there are existing water rights" in the permitting context, *id*., with the absence of authority to determine competing priorities after a permit has been issued:

> Once the permit has been granted, the situation is significantly different. Permit holders have a vested property interest in their water rights to the extent that the water is beneficially used. … Unlike the permitting process, in which Ecology only tentatively determines **the existence of claimed water rights**, a later decision that an existing permit conflicts with another claimed use and must be regulated necessarily involves a determination of the *priorities* of the conflicting uses. In order to properly prioritize competing claims, it is necessary to examine when the use was begun, whether the claim had been filed pursuant to the water rights registration act, RCW 90.14 and whether it had been lost or diminished over time. These determinations necessarily implicate important property rights. It is because of the complicated nature of such inquiries, and their far-reaching effect, that the Legislature has entrusted the superior courts with responsibility therefore. RCW 90.03.110.

Id. at 228 (italics in original; bold font added for emphasis).

This analysis does not support Ecology's argument that it has no authority to make tentative determinations of federally reserved water rights in the permitting process. To the contrary, the Court expressly held that Ecology has authority to tentatively determine the "whether there are existing water rights with which the proposed use will conflict," as expressly required by RCW 90.03.290. Its holding that Ecology cannot make such a determination in a separate regulatory or adjudicatory context is not to the contrary.

As stated in its *Solar Solutions'* motion, Ecology's argument rests on the theory that Ecology's authority to tentatively determine whether there are existing rights in the permitting context is limited to determining whether there are existing "adjudicated" rights and does not include the authority to determine whether there are existing "unadjudicated" rights. As Ecology put it, until they are "adjudicated," water rights are neither "legally cognizable" nor "capable of legal protection." *Solar Solutions*, Ecology Motion to Dismiss at 5-6. However, the *Rettkowski* Court drew no such distinction. To the contrary, in confirming Ecology's authority to tentatively determine "the existence of ***claimed*** water rights" in the permitting process, it made clear that it is not necessary that such rights previously have been adjudicated. Indeed, if Ecology lacked authority to tentatively determined the existence of unadjudicated water rights in the permitting process, the Court would have had no need to distinguish the permitting context from the regulatory and adjudicative context.

Moreover, for many basins in Washington, in which there has been no adjudication of water rights, Ecology's argument would effectively eliminate its authority to tentatively determine the existence of claimed rights in the permitting context because no "adjudicated" rights would exist. This is contrary to the plain language of the statute and is not a plausible reading of *Rettkowski*. *See Postema v. Pollution Control Hr'gs. Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000) (basic water law doctrine of prior appropriation as codified in RCW 90.03.290 requires that, before it issues a permit to appropriate water, Ecology must find, inter alia, that the "appropriation will not impair existing rights").

In sum, *Rettkowski* confirms that Ecology has authority to and must make tentative determinations of existing water rights in the permitting context, including rights that have not yet been adjudicated.

The Supreme Court has adhered to this approach.[11] For example, in *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash.2d 769, 788 (1997) (*OWL*), Ecology argued that before it could approve an application to change in point of diversion under RCW 90.03.380 it had to determine the existence and quantification of the right and whether the right had been extinguished or lost over the years. Citing *Rettkowski*, the Town of Twisp argued that Ecology had no authority to determine the validity of the underlying right. *Id.* In response, the Court again affirmed Ecology's authority to make tentative determinations of claimed existing rights in the permitting context:

> [*Rettkowski*] held that the [Ecology] has no authority to pass upon the validity of water rights and issue cease and desist orders to protect water right holders it has determined have priority. *The court acknowledged [Ecology] has authority to tentatively determine whether there are existing rights in order to determine whether to issue permits to appropriate water*, but said in the event a conflict exists, *[Ecology] must deny the permit rather than determine who has the better claim*.

Id. (emphasis added). This passage cannot be reconciled with Ecology's current position that, in the permitting context, only adjudicated rights can be given "legal cognizance" or are "capable of legal protection." There would be no need to "tentatively determine whether there are existing rights" if the only rights that could be considered are adjudicated rights since no "tentative determination" is necessary in the context of adjudicated rights. And there would be no need to "deny the permit rather than determine who has the better claim" if the only rights that could be

[11] *See also Hubbard v. Dep't of Ecology*, 86 Wn. App. 119, 936 P.2d 27 (1997) (citing *Rettkowski* for the proposition that, "[t]o determine whether a proposed use will impair existing rights, Ecology is authorized to tentatively determine the existence of senior water rights").

considered are adjudicated rights since it would be clear who had the better claims as a result of the adjudication.

The Court went on to note that the statute authorizing Ecology to approve a change in the point of diversion requires Ecology both to quantify the extent to which the right has been beneficially used and to determine whether the right has been abandoned so as to protect other existing rights: "If a right has not been beneficially used to its full extent, or if the right has been abandoned, then issuance of a certificate of change, in the amount of the original right, could cause detriment or injury to other rights." *Id.* at 779. It specifically held that *Rettkowski* was "not to the contrary" given the distinction between tentative determinations in the permitting context and final determinations in the adjudicatory context:

> It [*Rettkowski*] suggests by analogy that in order to decide whether to approve a change in point of diversion, [Ecology] must tentatively determine the existence and extent of beneficial use of the water right. *See Rettkowski I, 122 Wn.2d at 228.* ([Ecology] has authority *to tentatively determine the existence of water rights in order to decide whether to grant permits to appropriate water*). Also, if [Ecology] concludes that a water right has been abandoned or otherwise lost, then it should deny the change in diversion point. [Ecology]s] determination could not, however, be a final determination of the validity of the water right.

Id. (emphasis added). The Court's confirmation of Ecology's authority "to tentatively determine the existence of water rights in order to decide whether to grant permits to appropriate water" is flatly inconsistent with Ecology's argument that it has no authority to consider unadjudicated rights in deciding whether to grant a permit.

In *R.D. Merrill Co. v. Pollution Control Hearings Board*, 137 Wn.2d 118, 123 (1999), the Court "adhere[d] to [its] recent decision in [*OWL*] concerning beneficial use of water right before a change application may be approved under RCW 90.03.380." As the Court explained:

> [*OWL*] also resolves an additional claim made by plaintiff Burkhart that [Ecology] improperly conducted a de facto adjudication of the right to use waters of Early Winters Creek and the Methow River. In order to decide whether to approve a change under RCW 90.03.380, [Ecology] must tentatively determine the existence and extent of the beneficial use of a water right. [*OWL*], 133 Wn.2d at 770-780. Quantification of the right and whether the right has been relinquished or abandoned in whole or in part are matters [Ecology] must address in deciding whether to approve a transfer or change application.

Id. at 127.

The Court adhered to this precedent in *Public Utility District No. 1 v. Department of Ecology*, 146 Wn.2d 778 (2002), again noting the distinction between tentative determinations in the permitting context and final determinations in the adjudicative context. The Public Utility District argued that "neither Ecology nor the [PCHB] has authority to 'adjudicate' the District's water rights and determine they had been abandoned when deciding whether an application for change in point of diversion should be granted." *Id*. at 793. "[A]dher[ing] to precedent on this issue," *id*., the Court rejected this argument:

> It is true that neither Ecology nor the Board has the authority to adjudicate water rights. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993). However, this court has held that Ecology is required to tentatively determine the existence of a water right before it can approve a change in point of diversion of water under that right. [*OWL*], 133 Wn.2d at 778-79; *R.D. Merrill*, 137 Wn.2d at 127. … However, in light of the fact that Ecology does not have the right to finally adjudicate water rights, its tentative determination as to whether a right has been abandoned or relinquished cannot be a final determination of the validity of the water right. …

Id. at 794.

Ecology's argument that *Rettkowski* prevents it from considering unadjudicated rights in the permitting context is therefore misplaced. *Rettkowski* distinguished the permitting context from the regulatory or adjudicative context. In the permitting context, *Rettkowski* recognized the Ecology can and *must* make tentative determinations of existing rights to determine whether a proposed appropriation would impair such rights under RCW 90.03.290. The Court has adhered to that holding and the distinction between tentative determinations that are necessary in the permitting context and final determinations that can only be made in the adjudicatory context ever since. Ecology's failure to give effect to that distinction—and its failure even to mention it in Ms. Sessions' email and in its *Solar Solutions* motion—is contrary to settled law.

In its own motion for summary judgment in *Solar Solutions*, the Yakama Nation cites the PCHB's decision in *Yakama Indian Nation v. Ecology et al*., PCHB Nos. 83-157 *et seq*. (Oct. 9, 1998). In that case, Yakama moved to strike the following legal issue from the pre-hearing order: "Whether the proposed groundwater withdrawals will impair the Yakama Indian Nation's adjudicated treaty rights to instream flows as confirmed in Ecology v. Yakama Irrigation Dist., 121 Wn.2d 257 (1993)." *Id*.at 16-17. In the 1998 PCHB case, Yakama argued that "any Board action on this issue would be outside the statutory authority and jurisdiction of the Board, or Ecology" and asked that it be removed from consideration in the case. *Id*. at 17. Ecology opposed the motion, "arguing that the Board has jurisdiction to review Ecology's decision to authorize the

ground water rights in question, including the issue of whether senior water rights will be impaired." *Id*.

In support of its argument, Yakama argued that the wording of the issue in the pre-hearing order "would require the Board to adjudicate and quantify the Nation's treaty water right for fish." The Board stated that it had "never asserted jurisdiction over the issue of quantifying treaty rights nor has it purported to conduct adjudications." *Id*. (citing *Tulalip Tribes v. State of Washington*, PCHB No. 87-64 (May 25, 1998). However, the Board also stated that it "does have clear statutory jurisdiction to review water rights decisions made by Ecology" under RCW 43.21B.110. *Id*. Moreover:

> Examining impairment of senior water rights must be done under RCW 90.03.290, by Ecology, in the first instance, and by the Board on appeal. The Board can consider the state law issue of impairment without quantifying or adjudicating the amount of the Yakama Nation's treaty rights.

Id. Accordingly, the Board held that it had "jurisdiction to consider Ecology's decisions regarding impairment." *Id*. However, because Yakama asserted that it did not appeal based upon a cause of action of a violation of its Treaty water right for fish, i.e., because it "disavow[ed] any impairment argument in this case arising from its treaty rights for fish," the Board deleted the issues from the pre-hearing order. *Id*. at 17-18.

Although the issue framed in the pre-hearing order concerned "adjudicated treaty rights to instream flows," the PCHB's decision was not limited to adjudicated rights. Rather, it held that impairment of senior water rights—not just senior adjudicated rights—had to be addressed by Ecology under RCW 90.03.290. Indeed, in holding that the Board could consider the state-law impairment issue "without quantifying or adjudicating the amount of the Yakama Nation's treaty rights," it clearly implied that it could address the impairment issue even if the rights were unadjudicated. The Board's holding thus appears directly contrary to Ecology's current position that it cannot consider unadjudicated federal reserved rights in the permitting context.

As discussed in our July 28, 2021, letter, it is not necessary for Ecology to address the Tribe's reserved rights in this case if it adheres to its denial of USGE's application on public interest or other grounds. However, should Ecology change course on those issues, it would be necessary for it to make a tentative determination whether USGE's appropriation will impair the Tribe's senior reserved rights.

* * *

Thank you for your consideration of the Tribe's original and supplemental comments. As stated in the Tribe's original comments, the Tribe strongly supports Ecology's denial of USGE's application.

Sincerely,

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