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Washington State Department of Ecology
Northwest Regional Office
3190 160th Ave SE
Bellevue, WA 98008-5452

ATTN:

Re: Tulalip Tribes Comments on Policy Statement for the Trust Water Rights Program

Submitted via email to the online comment submission portal

To Whom It May Concern::

This letter is submitted on behalf of the Tulalip Tribes.

The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927). These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish-Snoqualmie-Skykomish river basins and certain marine waters of the Puget Sound through which fish propagated in such basins pass. *U.S. v. Washington*, 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); *U.S. v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *Aff'd*, 841 F.2d 317 (9th Cir. 1988). The Tulalip Tribes are co-managers of fisheries and fish habitat with the federal government and Washington State. Water of appropriate quality and quantity to support habitat for continuation and enhancement of fish runs is essential to the Tribes' treaty fishing rights.

Proper and transparent administration of Washington's Trust Water Right program is essential to ensure the public's faith in this program. The Tulalip Tribes applaud Ecology's recognition of this fact and hope that this policy will bring the state closer to making certain that trust water is not a source of speculation, hoarding, or taking advantage of the system in order for water right holders to negatively impact instream flows and senior water rights.

Section 1: Definitions

The term "Mitigation for Out of Stream Uses" states that these are measures used to "eliminate impairment and/or harm to the public interest." The goal for mitigation should

indeed be the elimination of impairment and harm to the public interest. Mitigation, at the very least, must make the senior water right holder or the instream flow “whole” and cannot be allowed to merely “offset” or create a balancing test as to when mitigation is acceptable. With this in mind, the Tulalip Tribes recommends that the term “Mitigating rights” be changed to read “Water rights held in the TWRP that are used to augment instream flows for the purpose of [eliminating] impacts...”

This change would make the definitions internally consistent and is what is required for determining whether the mitigation is proper.

Section 4: Water Banking

Subsection 3: Agreements

Ecology notes that due to administrative and financial constraints it is necessary to delineate roles for the operation of the water bank, shared between the proponent and Ecology, which include but are not limited to creating a process by which the water bank will allot mitigation from its reserves. The Tulalips urge Ecology to not delegate or forego its authority to ensure that the use of mitigation water from water banks will not harm existing rights or instream flows. The allocation of mitigation water to create new out of stream uses must be carefully monitored to ensure the public’s interest is protected along with senior water right users. While the draft policy provides examples of ways to protect against harm to the public interest and existing water rights, it should always be Ecology’s responsibility to ensure these are protected.

Subsection 4: Consideration of Impairment

The Tulalips support Ecology’s policy that all mitigated new water use can only rely the existence of a mitigating water right that has undergone a tentative determination. Additionally, Ecology is correct that new permanent mitigated water use must be reliant on a permanently transferred trust water right.

However, footnote 5 is very concerning. A long-term lease is not permanent and the term “long-term” is not defined. The use of a “long-term” trust water right for a permanent new water use will create a time in the future when the public interest and/or existing rights will be harmed when the lease ends. The use of long-term leases should not go to new permanent water uses as it will create speculation and cause harm in the future.

Subsection 5: Consideration of the Public Interest and Public Welfare

The diagram detailing the points at which Ecology will consider public interest and public welfare in the trust water right program is concise and helpful.

Is it assumed that Ecology will be making these determinations at each stage of the process? Namely, will a public interest/welfare analysis be conducted for each of these stages in the creation of a water bank?

Subsection 6: Water Right Changes to Create Mitigating Rights

Ecology's use of "provisional approval" to allow for an entity without a signed water banking agreement must have a limit on the number of extensions Ecology will approve and should not be extended further than 12 months.

Subsection 7: Water Conservancy Boards

Ecology's oversight and final determination of Water Conservancy Board determinations is appropriate and necessary to ensure the conditions of this proposed policy are met. Ecology must overlay the Board's decision with the conditions of this policy, especially the determinations regarding harm to the public interest and public welfare. As stated above, Ecology should not allow a provisional approval to extend beyond 12 months.

Subsection 8: Donations

The five-year look back provision in this section is too limited and in some cases may result in the acceptance of water that has been relinquished. Ecology must ask for a hierarchy of data that it will use to determine the amount of water available for donation. Up to date metering records should be required if they are available. The temporary nature of these donations and Ecology's acceptance of them, may lead to water right certificates becoming "rehydrated" via the trust water bank process which then protects this previously relinquished water from further scrutiny in the future.

The Tulalip Tribes do not want the temporary donation program to become a water right certificate "laundering" program that will validate previously invalid certificates or portions of a certificated water right.

Thank you for your consideration of the Tulalip Tribes' comments.

Sincerely,



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