PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

September 17, 2021

VIA ONLINE PUBLIC COMMENT FORM

Washington State Trust Water Rights Program
Attn: Mary Verner, Program Manager
300 Desmond Dr. Southeast
Lacy, WA 98503

RE: Comments Regarding Ecology's Policy and Interpretive Statement on the Administration of Statewide Trust Water Rights Program

The Port Gamble S'Klallam Tribe ("Tribe") provides the following comments on Ecology's Policy and Interpretive Statement on the Administration of Statewide Trust Water Rights Program ("TWRP", "Policy"). The Tribe is a federally recognized tribe with reserved aboriginal fishing rights under the 1855 Treaty of Point No Point. 12 Stat. 933; *United States v.* Washington, 459 F.Supp. 1020, 1039 (W.D. Wash. 1978). Dating to time immemorial, the Tribe and its members have held deep ancestral ties to their traditional use areas including both the Tribe's current reservation and its off-reservation usual and accustomed fishing and hunting grounds. Based on its members' unique historic relationship with and knowledge of these areas and their natural resources, the Tribe regularly participates in state administrative processes to ensure that tribal interests are accounted for and protected in state environmental decision making.

The Tribe appreciates Ecology's solicitation of public comments in its effort to improve the TWRP. As explained further below, however, the Tribe is concerned that the Policy permits Ecology to disregard tribes' federal reserved water rights, contrary to federal and state law, and considers "public interest" in a manner inconsistent with state law, among other serious concerns raised by the Policy. To avoid costly disputes over federal reserved water rights, adequately protect the public interest, and conserve limited water supply, the Tribe requests that Ecology modify the Policy consistent with the following comments.[1]

[1] The Application section of the Policy states: "Municipal water rights have unique attributes and allowances under the Municipal Water Law that are not addressed in this policy. Specific provisions that may apply to municipal water rights in regard to mitigation and water banking may be addressed in POL 2030, the Municipal Water Law Policy and Interpretive Statement." It is somewhat unclear whether Ecology intends the Policy to apply to any aspect of municipal water rights. The Policy itself does not address or reference municipal water rights at all. The Tribe understands the "Application" Section, quoted above, to mean that the Policy is not intended to apply to municipal water rights, or their attributes, such as exemption from relinquishment. Therefore, these comments do

A. The Policy Should Define Existing Rights to Include Tribes' Federal Reserved Water Right in Conformity With Federal and State Law.

Many actions under the TWRP require Ecology to determine whether the proposed action will cause injury or detriment to or will impair "existing rights" (collectively, "injury/impairment determination"), such as authorization of or a change to a trust water right. *See e.g.*, RCW 90.42.100(3)(a) (prohibition on using water banking to "cause detriment or injury to existing rights."); RCW 90.42.040(4) (trust water rights only authorized on a determination that "existing rights" will not be impaired); RCW 90.03.380 (a change to a water right is permitted if such change can be made without causing detriment or injury to a trust water right).

These protections for existing rights within the TWRP statute are an extension of long-standing protections for existing rights under Washington law, which were adopted even before the State's enactment of the Water Code in 1917.[2] When it adopted the system of prior appropriation as law, the legislature was careful to explicitly protect existing rights: "[n]othing contained in this chapter shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation, or otherwise."[3] Neither the federal courts nor the Washington state courts have held that "existing rights" do not include unadjudicated federal reserved water rights. Only two state courts have even addressed the phrase "existing rights," and neither precluded federal reserved water rights from its ambit or even addressed the question at all.[4]

Ecology addresses injury/impairment determinations under several Sections of the Policy, including Sections 4(2), 4(3), and 4(4).[5] Regarding its injury/impairment determination under

---

not address the intersection between TWRP and municipal water rights. If the Policy is intended to apply to municipal water rights in any way, Ecology should clarify to which aspects of municipal water rights they apply and permit the Tribe to supplement these comments.

[2] *Proctor v. Sim*, 134 Wash. 606, 615–16 (1925) (discussing the protection of "existing rights" of riparian owners under Washington law prior to and through the enactment of the 1917 Water Code).

[3] RCW 90.03.010.

[4] The Washington Supreme Court has considered the definition of "existing rights" in two cases, both concerning riparian rights. In *Botton v. State*, 69 Wash. 2d 751, 758 (Wash. 1966) the Court inquired, "What, then, are 'the existing rights' of the appellants as riparian owners which are to be considered as vested rights and may not be interfered with? Our answer is that it is the right to the beneficial use of such portions of the waters of the lake as are either directly or prospectively, within a reasonable time, proper and necessary for the irrigation of their lands and for the usual domestic purposes." *Id.* In *Proctor*, the Court defined an existing right as "the right to the beneficial use of such portions of the waters of the lake" which are within a reasonable time, as necessary for irrigation and domestic use. 134 Wash. at 615. These definitions of existing riparian rights would not apply to the separate category of federal reserved water rights exempt from state law. *See also State, Dep't of Ecology v. Acquavella*, 112 Wash. App. 729, 732 (Wash. Ct. App. 2002) (holding that the phrase, "subject to existing rights," refers to water rights acquired before 1917).

[5] Section 4(2) of the Policy states:

RCW 90.03.380 (as well as under RCW 90.03.290(3)), Ecology recently stated in an email to tribes that it will not consider tribes' unquantified federal reserved water rights because, according to its interpretation of *Rettkoski v. Department of Ecology*, "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, Ecology lacks authority to "consider the impairment claim because to do so, the agency would essentially have to validate, or adjudicate the claimed treaty reserved right" which it does not have authority to do. *See* Attachment 1, Email from Carrie Sessions (Aug. 1, 2021). Ecology has thus adopted a narrow interpretation of the phrase "existing rights" that creates a new requirement for federal reserved water rights to be adjudicated and quantified to be "existing", and one which rejects the inclusion of federal reserved rights under the category of water rights acquired "otherwise" under RCW 90.03.010. The Tribe is concerned that Ecology's position effects an end run around tribes' property rights that enables Ecology to knowingly approve trust water rights and related actions that injure/impair tribes' federally reserved water rights. While tribes' federal reserved water rights are not expressly excluded from injury/impairment determinations under the Policy, Ecology's email clarifies that they are impliedly excluded according to Ecology's unpublished policy.

The Policy's failure to require consideration of federal reserved water rights is erroneous for three reasons. First, tribal water rights are "existing water rights" by operation of settled federal law. Second, state courts, the PCHB, and state regulations all identify federal reserved rights as "existing rights". Third, Ecology is explicitly permitted under *Rettkowski* and progeny to issue a tentative determination of an unquantified water right. Federal reserved water rights are not an exception to this rule, and a tentative determination that considers federal reserved water rights does not amount to a de facto adjudication of tribal water rights. Fourth, while injury/impairment determinations should reduce legal uncertainties surrounding water use in a given waterbody and the likelihood of future litigation, the exact opposite is true when Ecology excludes federal reserved water rights from its analyses. By disregarding tribes' reserved water rights, Ecology will exacerbate already diminished water levels in Washington waterbodies and will deepen existing uncertainty and tension around water rights in Washington, increasing the likelihood that future disputes will arise.

1. Tribal Water Rights Are "Existing Water Rights" Under Federal Law.

> Evaluation of potential injury to existing rights will include, but is not limited to, an assessment of the extent and validity of the proposed mitigating right under RCW 90.03.380 and the water right's suitability to mitigate the proposed new or existing use(s).

Likewise, Section 4(3) of the states that "the purpose of a water banking agreement is to establish mutually-agreed upon terms and conditions that . . . protect against detriment or injury to existing water right holders." Similarly, Section 4(4) of the Policy states that "Ecology will ensure protection for existing rights" and explains that "[a]ny mitigated new water use must rely on a mitigating water right that has undergone a tentative determination of extent and validity under RCW 90.03.380, and has been authorized for instream flow and mitigation as purposes of use".

Tribal water rights are grounded in the federal reserved rights doctrine, now over a century old, which holds that the United States and Indian tribes have the power to reserve water from appropriation under state law.[6] In Washington, treaties, executive orders, and agreements confirm the United States' and tribes' intent to reserve water to fulfill the purpose of a reservation to support a permanent homeland for tribes,[7] which necessarily requires sufficient water resources, often for multiple purposes.[8] These federal reserved water rights carry a priority date of the date of the establishment of the reservation.[9] Federal reserved water rights may extend to both consumptive uses on the reservation,[10] as well as non-consumptive uses on and off the reservation to support their traditional hunting and fishing lifestyle. These latter non-consumptive rights have a priority date of time immemorial.[11] The quantity of water reserved is the "quantity of water sufficient to meet the purposes" for which the reservation was established.[12] Because federally reserved water rights terminate only by express abrogation by Congress, tribes' reserved rights cannot expire or be forfeited for non-use; thus, they are effective today. Federal reserved water rights are also superior to the rights of future appropriators.[13] In particular, water rights to maintain tribes' treaty right to hunt and fish entitles them "to prevent other appropriators from depleting the streams water below a protected level in any area where the non-consumptive right applies."[14]

While the exact quantity of some tribes' reserved water rights has not been adjudicated, the quantity is not dependent on or capped at a tribe's historic or current use and the amount of water reserved is intended to "satisfy the future as well as the present needs of the Indian reservations".[15] In some seminal cases, courts enforce water rights by enjoining water uses interfering with the right without quantifying the amount reserved.[16]

---

[6] *See Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Arizona v. California*, 373 U.S. 546, 601 (1963), *Winters v. United States*, 207 U.S. 564, 575-578 (1908).
[7] *See, e.g.*, *In re CSRBA*, 448 P.3d 322 (Idaho 2019); *In re Gen. Adjud. of All Rts. to Use Water in Gila River Sys. & Source*, 201 *Ariz.* 307, 315 (Ariz. 2001).
[8] *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (recognizing that water was reserved to the Tribes not only for the purpose of providing a land-based agrarian society, but also for the development and maintenance of replacement fishing grounds).
[9] *Cappaert*, 426 U.S. at 138.
[10] *E.g.*, *Winters*, 207 U.S. 564; *Arizona v. California*, 373 U.S. 546.
[11] *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (priority date of Klamath Tribes' aboriginal water right is time immemorial); *State, Dep't of Ecology v. Yakima Rsrv. Irr. Dist.*, 121 Wash. 2d 257, 264 (Wash. 1993) (priority date of Yakama Nation's reserved water rights for fish is time immemorial).
[12] *Cappaert*, 426 U.S. at 138.
[13] *Id.* at 139.
[14] *Adair*, 723 F.2d at 1411.
[15] *State of Ariz. v. State of Cal.*, 373 U.S. 546, 600 (1963), judgment entered sub nom. *State of Arizona v. State of California*, 376 U.S. 340 (1964), amended sub nom. *Arizona v. California*, 383 U.S. 268 (1966), and amended sub nom. *Arizona v. California*, 466 U.S. 144 (1984). *See also United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956) (finding that Indian water rights may "grow to keep pace with development" on the reservation).
[16] *See, e.g.*, *Cappaert*, 426 U.S. 128 (affirming decision enjoining diversions of water that would lower the groundwater level in in Devil's Hole below a level necessary to preserve fish to protect water right reserved by the

The Washington State Supreme Court has long affirmed these first principles of federal reserved water rights discussed above. In *State, Department of Ecology v. Yakima Reservation Irrigation District*, for example, the Court affirmed a water right for irrigation purposes and water rights necessary to fulfill treaty fishing rights, and held that these rights are "perpetual and is not limited by the beneficial use doctrine under state law."[17] In *In re Yakima River Drainage Basin*, the Washington State Supreme Court confirmed the Yakama Nation's reserved rights to "sufficient water to meet the present and future needs of its reservation," which include "agriculture based activities and fishing", as well as "a right that dates from time immemorial to adequate water to sustain fish and other aquatic life in Ahtanum Creek."[18]

In sum, contrary to Ecology's position, the legal "existence" of federal reserved water rights is well settled and is not dependent upon prior adjudication of the quantity of water reserved. Tribes' reserved rights are "existing rights" by operation of law and should not be artificially exempted from protection under the Policy.

2. Ecology's Position is Contrary to State Court and PCHB Decisions as Well as State Regulations Recognizing Federal Reserved Rights as "Existing Rights".

Courts of Appeals have recognized that federal reserved water rights are "existing rights." In *Vander Houwen v. State, Dep't of Ecology*, the court affirmed the Pollution Control Hearings Board's denial of two water rights applications in part because the proposed withdrawals would impair "existing rights" of the Yakama Indian Nation and the United States' and related efforts to improve the fishery.[19] Likewise, in *Kennewick Public Hospital District v. Pollution Control Hearings Board*, the Court of Appeals held that appellee tribes had standing because "Tribes have treaty rights to take fish from the Columbia . . . [and] [t]hese rights are within the protection of [WAC 173-531A-060]" which requires permit applications to be evaluated for "possible impacts on fish and existing water rights".[20] Courts in these cases did not require adjudication or quantification of water rights in the particular waterbody at issue.[21]

United States, but not quantifying the right); *Winters*, 207 U.S. 564 (enjoining diversions of water from the Milk River, but not quantifying the federal reserved water right of the resident Assiniboine or Gros Ventre Tribes); *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Dist's v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987) (holding that even where a tribe's water rights are unquantified, the Bureau of Indian Affairs has a duty to distribute project water fairly among other irrigators after the tribe's rights were protected).

[17] 121 Wash. 2d 257, 274, 301 (Wash. 1993) (en banc).

[18] 177 Wash. 2d 299, 309-11 (Wash. 2013), as corrected (May 22, 2013). The court further recognized that these rights are not subject to appropriation or disposal under state law. *Id.* at 313.

[19] 170 Wash. App. 1009, *8 (Wash. Ct. App. 2012).

[20] 126 Wash. App. 1030, *4 (Wash. Ct. App. 2005).

[21] Even existing state water rights under state law are not limited to fully adjudicated water rights. For instance, in *Neubert v. Yakima-Tieton Irr. Dist.*, the Washington Supreme Court characterized plaintiffs' rights as "existing water rights," but went on to determine the "extent" of those rights based on plaintiffs' beneficial use of the water. 117 Wash. 2d 232, 241 (Wash. 1991).

More recently, in *The Tulalip Tribes of Washington v. Washington State Department of Ecology and Snohomish River Regional Water Authority*, the PCHB considered Tulalip's challenge to Ecology's approval of a water right change application under RCW 90.03.380. The PCHB noted that Tulalip's water rights had not been formally quantified, and found that Ecology actively considered Tulalip's unquantified reserved rights in its evaluation whether the water right transfer would "impair existing water right holders" by attaching water quality conditions to the permit.[22] Thus, the unquantified status of Tulalip's water rights did not excuse Ecology from undertaking a determination of impairment/injury to federal reserved rights.[23] These cases demonstrate that Washington state courts regularly consider tribes' federal reserved rights as "existing rights" warranting protection under state law, even when they are unquantified.

Ecology's exclusion of federal reserved rights from the injury/impairment determination also runs contrary to the myriad regulations in the Washington Administrative Code ("WAC") that expressly include federal reserved rights within the definition of "existing rights". For example, the Water Management Program for the Dungeness Portion of the Elwha-Dungeness Resource [WRIA 18], the Entiat River Basin [WRIA 46], and the Instream Resources Protection Program-Wenatchee River Basin [WRIA 45] each state that: "'[e]xisting water right' includes "federal Indian and non-Indian reserved rights'". WAC 173-518-030, 173-546-030(9), 173-545-030(8). *See also* WAC 173-531A-030 (emphasis added) ("Nothing in the chapter shall be construed to lessen, enlarge, or modify existing rights acquired by appropriation *or by other means, including federal reserved rights*."); WAC 173-503-070, 173-501-070, 173-546-010, 173-549-060(1) (stating, nothing in the chapter "shall affect existing water rights, including . . . "federal Indian and non-Indian reserved rights."). These provisions illustrate that inclusion of federal reserved water rights with the definition of "existing rights" is common throughout the very regulations that govern Ecology's decisions across the state. Notably, none of the regulations qualify the phrase "existing rights" to require adjudicated or quantified rights.

In sum, Ecology's artificial quantification requirement is unsupported by the language of state regulation, statute, or case law. Ecology should bring the Policy into conformity with state law and regulations and explicitly define "existing rights" to include tribes' federal reserved water rights.

3. Ecology is Permitted to Consider Unadjudicated Water Rights in Its Tentative Determinations.

[22] 2002 WL 1650503 (PCHB No. 01-06, Apr. 17, 2002) at *8.
[23] *See also In the Matter of Johnny C. Pitts, v. State of Washington, Department of Ecology*, 1986 WL 26604 (PCHB No. 85-146, Apr. 21, 1986) at *4-5 (applying the federal reserved rights doctrine to irrigator's rights as a successor to an Indian allottee and holding that "[i]f there is here a right derived from federal law to divert river water through succession to the interest of the Indian allottee, we conclude that such right is an 'existing right' which must be recognized and respected").

Ecology rests its position on *Rettkowski*, however, that case does not support its position. *Rettkowski* actually supports the opposite rule. Under *Rettkowski*, Ecology is authorized to "tentatively determin[e] whether there are existing water rights with which the proposed use will conflict."[24] The Court clearly differentiated between tentative determinations which it determined Ecology has authority to issue, and final determinations of water rights, including a determination of priorities, which require a general adjudication that is beyond Ecology's power.[25] Over the nearly two decades since *Rettkowski* was decided, the Washington Supreme Court has repeatedly endorsed and extended Ecology's authority to issue tentative determinations, not just in the permitting context, but for water right changes under RCW 90.03.380 as well.

For example, in *Okanogan Wilderness League, Inc. v. Town of Twisp*, the Supreme Court considered whether the abandonment of a water right precluded a change to a water right from surface diversion to groundwater wells under RCW 90.03.380.[26] The Court held that under *Rettkowski* "*the Department has authority to tentatively determine whether there are existing rights* . . . but said in the event a conflict exists, the Department must deny the permit rather than determine who has the better claim."[27] The Court further held that quantification of a water right was necessary because if the right had been abandoned, "the issuance of a certificate of change in the amount of the old right, could cause detriment or injury to existing rights."[28] Notably, Ecology's quantification of the right did *not* convert the "tentative determination" into a "final determination of the validity of the water right."

Just two years later in *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, the Washington Supreme Court upheld the very same rule declared in *Town of Twisp*: "[Ecology] must tentatively determine the existence and extent of the beneficial use of a water right," where the "extent" of the right requires quantification of the right.[29] Subsequently, in *Public Utility District No. 1 of Pend Oreille County v. State*, the Court reaffirmed that: (1) Ecology has authority to tentatively quantify a water right, and (2) Ecology's "tentative determination as to whether a right has been abandoned or relinquished cannot be a final determination of the validity of the water right."[30] Most recently, in *Cornelius v. Washington Dep't of Ecology*, the Court noted the requirement that Ecology "tentatively quantify the right in order to determine whether the right qualifies for a change."[31]

[24] *Rettkowski v. Dep't of Ecology*, 122 Wash. 2d 219, 228 (Wash. 1993) (en banc).
[25] *Id.* at 227 n. 2. The Court ruled that Ecology's action went beyond a tentative determination because it had issued cease and desist orders.
[26] 133 Wash. 2d 769, 772 (Wash. 1997) (en banc).
[27] *Id.* at 778 (emphasis added).
[28] *Id.* at 779.
[29] 137 Wash. 2d 118, 127 (Wash. 1999) (en banc).
[30] 146 Wash. 2d 778, 794 (Wash. 2002) (en banc).
[31] 182 Wash. 2d 574, 630 n. 21 (Wash. 2015) (en banc).

In sum, long-standing precedent explicitly authorizes Ecology to (1) consider existing unquantified water rights under RCW 90.03.380, among other statutes, and (2) to consider federal reserved rights as part of a tentative determination for the purpose of making n injury/impairment determination. Ecology's position appears to ignore both of these key rules. It is very troubling that Ecology appears to be making an artificial and unlawful exception for federal reserved rights to the detriment of tribes' existing rights and the environment. In addition, under the case law discussed above, a tentative determination that considers a tribe's federal reserved water right would *not* be a final or binding adjudication of the tribe's right. Rather, Ecology's finding would acknowledge and provide administrative accommodation of the tribe's existing water right in the limited context of the specific trust water action under review by Ecology.

4. Ecology's Exclusion of Federal Reserved Water Rights Will Increase Uncertainty and Will Reduce Water Available for Tribes, Habitat, and Species.

For all of the reasons discussed above, the Tribe is very concerned that the Policy excludes tribes' federal reserved water rights from Ecology's impairment/injury determination. This unlawful exception to Washington's long-standing protection for existing rights has numerous practical implications for tribal and non-tribal water users alike.

First, by excluding tribal water rights from its impairment/injury analysis, Ecology is more likely to approve a trust water right for mitigation that injures or impairs federal reserved water rights. This is particularly likely where the mitigating water right was permitted without regard for federal reserved water rights in the first place. Second, water users relying on mitigated water will be surprised to have their trust water right and associated agreement terminated on account of impairment of a later-adjudicated federal reserved water right.[32] Such circumstances will only serve to intensify existing tension and disputes around water use in Washington, increasing the potential for protracted litigation. Third, transferring water rights, particularly out-of-basin transfers, without consideration for tribes' water rights, may leave a tribe with less water for its consumptive on-reservation uses or to support its non-consumptive, instream uses. However, the reduced availability of water will remain invisible as a legal matter because Ecology will not have documented potential impacts to existing tribal water rights. Fourth, the ecological health of habitat and species that depend on the water will bear the brunt of Ecology's incomplete impairment/injury determination.

The Tribe requests that Ecology rescind its current position and expressly define "existing rights" within the Policy to include tribes' federal reserved rights. This way, Ecology

[32] Section 4(4) of the Policy advises that "Per RCW 90.42.040(4)(b), if impairment becomes apparent during the time the trust water right is being exercised, Ecology will renegotiate, amend, or terminate a water banking agreement." However, Ecology's exclusion of federal reserved water rights from its injury/impairment analysis increases the risk that if impairment of these rights is later determined, the trust water right agreement will need to be renegotiated, amended, or terminated.

will acknowledge and accommodate tribes' reserved water rights in its impairment/injury determination consistent with federal and state law as it has in past cases. These amendments would be fully consistent with regulations that already define tribes' reserved water rights as "existing rights".[33] Ultimately, consistent, thorough consideration of tribes' reserved water rights across the state under TWRP will better protect the interests of Indian and non-Indian water users alike as well as the long-term ecological health of Washington waters.

B. Ecology's Definition of "Public Interest" is Over Broad and Unlawfully Conflates Public Interest With Beneficial Uses.

State law conditions the exercise of a trust water right on a determination by Ecology that "neither water rights existing at the time the trust water right is established, nor the public interest will be impaired."[34] Section 1 of the Policy defines "public interest" as, first, "[t]he consideration of impacts to the public at large that would result from the creation and operation of a water bank." Next, Ecology proposes that "public interest" considerations include "environmental impacts, with emphasis on the protection, restoration, and recovery of threatened and endangered species; environmental justice; implications for public health and safety; aesthetic, recreational, and economic effects; and impacts on publicly owned resources and facilities." The Policy then incorporates the "water resources fundamentals in RCW 90.54.020." Finally, the Policy "presumes" that the public interest is "reflected in watershed plans, ground water area management programs, related water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations." This definition of "public interest" is overly broad and contrary to state law for the following reasons.

The first problem with the Policy's definition of public interest is that it equates "public interest" with beneficial use. However, in *Swinomish Indian Tribal Community. v. Washington State Department of Ecology*, the Washington Supreme Court held that "public interest" is not equivalent to beneficial use. The Court explained that beneficial uses that are public benefits only in the sense that any useful end to which water is put benefits the public are not equivalent to the "public interest."[35] In so holding, the Court made clear that not all beneficial uses of water lie within the public interest. The Court further ruled that considerations of the "public interest" may not be used to reallocate water for future beneficial uses that impair instream flows.[36] Thus, adopting a definition of "public interest" that embraces all beneficial uses of water, or which permits Ecology to mitigate water uses to the detriment of instream flows runs contrary to state law. Likewise, in *Caminiti v. Boyle*, the Washington Supreme Court interpreted "public interest" to mean "protect[ing] against adverse effects to the public health, the land and its vegetation and

[33] *See* Part (A)(2) *supra* (listing regulations that define federal reserved water rights as "existing rights".).
[34] RCW 90.42.040.
[35] 178 Wash. 2d 571, 587 (Wash. 2013) (en banc).
[36] *Id.* at 598.

wildlife, and the waters of the state and their aquatic life."[37] Although this case was decided in the context of shoreline management, it would be imprudent for Ecology to ignore the Court's clear indication that "public interest" does not include all uses; rather, it prioritizes public health and the conservation of natural resources.

In light of *Swinomish Indian Tribal Community* and *Caminiti*, Ecology should omit or substantially modify its incorporation of the "water resources fundamentals" in RCW 90.54.020. The "water resource fundamentals" provides a list of beneficial water uses—yet again, under *Swinomish Indian Tribal Community* and *Caminiti*, beneficial uses are not equivalent to the public interest. In addition, the "water resource fundamentals" include uses such as hydroelectric power production, mining, and industrial uses. Of course, these water uses are dramatically different in their impact from the other uses in the Policy's proposed definition, such as the recovery of endangered species and recreation. Thus, Ecology's incorporation of the "water resource fundamentals" is contrary to state law and over broad in its inclusion of uses that are water intensive and that cause pollution.

The second problem with the Policy's definition of public interest is that it treats all listed water uses as equally within the public interest. Given extreme drought conditions and unmet and unenforced minimum flows in many basins across the state,[38] the definition of "public interest" should prioritize water uses that result in a net increase in water supply or which are water supply neutral. In particular, consumptive uses such as temporary or permanent mitigation of water use for new private development, for new water-intensive agriculture, and for water uses likely to diminish water quality should be given lower priority under the definition of public interest. A definition that places instream and consumptive water uses on equal footing ignores the reality of increasing severe water shortages across the state and misses an opportunity to meet or restore minimum flows.

The third problem with the Policy's definition of public interest is that it does not expressly account for the impacts of climate change, which bear heavily on water supply in Washington state.[39] To inform its public interest review, Ecology should request from trust water right or water banking applicants and consider all best available information regarding projected

[37] 107 Wash. 2d 662, 671 (Wash. 1987) (quoting *Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd.*, 92 Wash.2d 1, 4 (Wash. 1979)).
[38] For example, in Water Resource Inventory Area ("WRIA") 14 and 15, U.S. Geological Survey ("USGS") monthly stream flow data shows that Goldsborough Creek has failed to meet June minimum flows 2018-2020, 2013-2016, and 2005-2009; that is, minimum flows were not met 11 of the last 15 years. For August, Goldsborough Creek failed to meet minimum flows for *all* recorded years 2005-2020. For September, minimum flows were not met in Goldsborough Creek 2015-2020 and 2005-2009. Similarly, in WRIA 15, many streams are fully closed to further appropriation and many others are closed for the summer months.[38] Yet, increased demand on water resources continues in WRIAs 14 and 15.*See also* Saving Water in Washington, *available at* https://www.epa.gov/sites/default/files/2017-02/documents/ws-ourwater-washington-state-fact-sheet.pdf.
[39] *See, e.g., id.*; Water Supplies and Climate Change, *available at* https://ecology.wa.gov/Air-Climate/Climate-change/Climate-change-the-environment/Water-supply-impacts.

impacts of climate change on the waterbody or aquifer for which the trust water right action is proposed. With this information, Ecology may decide to condition the approval of a new mitigated water right on the reservation of a portion of the right for instream flows to compensate for water shortages from climate change, rather than approving the mitigated water right for the same amount previously used by the water right holder.

The fourth problem with the Policy's definition of public interest is that it presumes that certain local or regional planning documents, such as water supply plans, water conservation plans, Ecology administrative rules, and local land use plans and development regulations are in the public interest. While such presumption will likely expedite Ecology's processing of trust water rights, it may also lead to superficial examination of these documents, some of which may be outdated or insufficiently protective of the public interest. Moreover, the Policy does not specify how to rebut the presumption that these documents are in the public interest.

In conclusion, Ecology should revise its proposed definition of "public interest" to align with state case law, to account for the effects of climate change, and to actively protect instream flows and water quality.

C. Additional Comments on TWRP Policies

The Tribe offers comments on the following additional sections of the Policy.

In Section 1 of the Policy, Ecology proposes a single definition of "mitigating rights" that includes both rights for instream flows and for consumptive uses; however, these two types of mitigation are significantly different in their intent and effect on water supply. Therefore, Ecology should create two categories of "mitigating rights"—"instream mitigating rights" and "consumptive mitigating rights"—to ensure that the definition is sufficiently clear.

Section 1 of the Policy also proposes a definition of "temporary donation" that interprets the phrase to mean that water is donated "for a specified non-permanent period of time." This definition is over broad because it could include a donation for a period of time of 100 years or more, which is *de facto*, permanent. In addition, since trust water rights may be donated on a temporary, but recurring basis, Ecology should identify the total number of years after which a donation becomes "permanent." Such limitation is particularly crucial in circumstances in which mitigated out-of-stream uses rely on donated water to avoid a full tentative determination. Otherwise, Ecology could run afoul of the prohibition on the use of water banking to the detriment of existing water rights under RCW 90.42.100(3)(a).

In Section 4(1) of the Policy, Ecology proposes a minimum period of 30 days for publication of accepted water banking requests on its website. Ecology should post accepted water banking requests for a minimum of 90 days to maximize potential for informed public comment.

Section 4(9) of the Policy requires an existing water bank seeking to modify operations "substantially from their existing water banking agreement" to submit a new request form. While this is likely a useful requirement, the Policy does not define the term "substantial". Therefore, it is unclear which types of modifications will qualify as "substantial," and when Ecology will permit a water bank to forego the modification process because the modification is deemed insubstantial.

Regarding Section 5 of the Policy, under RCW 20.42.080, the quantity of a trust water right may not exceed the highest quantity of water put to beneficial use over the most recent five-year period. The quantity of water available for temporary mitigation is significant because if the amount of water made available for mitigation is higher than that actually used during the past five years, when the water right reverts to private ownership, Ecology will have expanded the water right unlawfully and will cause a net decrease in water supply. Therefore, Ecology's evaluation of the maximum amount of water used must be as rigorous as possible. In addition, Ecology should consider whether, in times of water shortage or drought, a mitigated water right should be approved for an amount less than the maximum used during the past five years to account for water shortages and climate change as well as water needed for habitat and species.

In addition, the Policy explains that Ecology may rely on an attestation from the water applicant, or alternatively, may conduct its own evaluation to quantify water use over the past five years. The Policy does not explain, however, how Ecology determines when it may rely on attestation and when it must conduct its own evaluation. In addition, the Policy does not list the requirements of an attestation or any criteria Ecology employs in its evaluation of past use. To ensure that Ecology's determination of past water use is consistently rigorous, Ecology should not rely on applicants' attestations. Furthermore, Ecology should disclose the standards and requirements it employs in its evaluation to avoid the unlawful expansion of water rights and to promote greater transparency and public trust in TWRP.

CONCLUSION

In conclusion, the Policy unlawfully prevents tribes' unquantified federal reserved water rights from being acknowledged or considered for injury/impairment as part of Ecology's tentative determinations, and the definition of "public interest" is contrary to state law and over broad, among other concerns. These issues should be fully corrected before Ecology recommends or adopts the Policy. The Tribe appreciates the opportunity to comment on the Policy and is available for any questions you may have. The Tribe will evaluate the need for consultation as this process unfolds.

Sincerely,

Paul McCollum
Director, Natural Resources Department
Port Gamble S'Klallam Tribe

cc: Steven Moe, Legal Counsel, Port Gamble S'Klallam Tribe
Claire Newman, Kanji & Katzen, P.L.L.C.
Jane Steadman, Kanji & Katzen, P.L.L.C.

ATTACHMENT 1

From:	Sessions, Carrie (ECY)
To:	"lkan@squaxin.us"; "m.ross@snoqualmietribe.us"; "lforsman@suquamish.nsn.us"; "chrismarks@ctuir.org"; "jamess@lummi-nsn.gov"; "merlej@lummi-nsn.gov"; "dsarff@skokomish.org"; Claire Newman; "jeffschuster@outlook.com"; Rasmussen, Lauren (non-ATG); "crossi@pnptc.org"; "bruce.wakefield@colvilletribes.com"; "charissa.eichman.ora@colvilletribes.com"; "aosullivan@suquamish.nsn.us"; "felecia.shue@puyalluptribe-nsn.gov"; Sullivan, Marie; "ted@tcklaw.com"; "jmarsh@cowlitz.org"; "danielle_squeochs@yakama.com"; "jjoseph@sauk-suiattle.com"; "stuart_crane@yakama.com"; "kmerrill@kalispeltribe.com"; "paribello@gmail.com"; "lukeesser@aol.com"; Lewis, Amber; "dpvyvyan@outlook.com"; "ann.harrie@snoqualmietribe.us"; "rogb@yakamafish-nsn.gov"; "smannakee@stillaguamish.com"; "romac@pgst.nsn.us"; "asavery@tulaliptribes-nsn.gov"; Jane Steadman; "garrett.rasmussen@quileutenation.org"; "jpavel@skokomish.org"; "haley.kennard@makah.com"; "jim_hedrick@comcast.net"; "atrainer@swinomish.nsn.us"; "frankl@lummi-nsn.gov"; "wasser.swinomish@gmail.com"; "mmartinez@nwifc.org"; "shona@yakamanation-olc.org"; "amelia.marchand@colvilletribes.com"; "kelsey.taylor@snoqualmietribe.us"; "jbrown@stillaguamish.com"; "smoe@pgst.nsn.us"; "cindy@snoqualmietribe.us"; "paulm@pgst.nsn.us"; "darylwilliams@tulaliptribes-nsn.gov"
Cc:	Brooks, Barbara (ECY); Verner, Mary (ECY); Wentzel, Noah (ECY); Christensen, Dave (ECY); North, Stephen (ATG)
Subject:	RE: Follow up on Water Transfers, Banking, and Investment
Date:	Thursday, July 29, 2021 3:37:46 PM

Dear tribal members,

I'm writing to follow up on our meeting last week on Water Right Transfers, Water Banking, and Private Investment in Public Water Resources. In response to a question on consideration of tribal water claims in impairment analyses, Ecology committed to sending legal citations for our position. Here is a synopsis of our position and legal rationale:

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.

Thank you again for your engagement on these issues.
Carrie Sessions

From: Sessions, Carrie (ECY)
Sent: Thursday, July 22, 2021 2:45 PM
To: lkan@squaxin.us; m.ross@snoqualmietribe.us; lforsman@suquamish.nsn.us; chrismarks@ctuir.org; jamess@lummi-nsn.gov; merlej@lummi-nsn.gov; dsarff@skokomish.org; cnewman@kanjikatzen.com; jeffschuster@outlook.com; Rasmussen, Lauren (non-ATG) <Lauren@Rasmussen-law.com>; crossi@pnptc.org; bruce.wakefield@colvilletribes.com; charissa.eichman.ora@colvilletribes.com; aosullivan@suquamish.nsn.us; felecia.shue@puyalluptribe-nsn.gov; Marie Sullivan <marie@mspublicaffairs.com>; ted@tcklaw.com; jmarsh@cowlitz.org; danielle_squeochs@yakama.com; jjoseph@sauk-suiattle.com; stuart_crane@yakama.com; kmerrill@kalispeltribe.com; paribello@gmail.com;

lukeesser@aol.com; Lewis, Amber <amber@lewisconsulting.us>; dpvyvyan@outlook.com; ann.harrie@snoqualmietribe.us; rogb@yakamafish-nsn.gov; smannakee@stillaguamish.com; romac@pgst.nsn.us; asavery@tulaliptribes-nsn.gov; jsteadman@kanjikatzen.com; garrett.rasmussen@quileutenation.org; jpavel@skokomish.org; haley.kennard@makah.com; jim_hedrick@comcast.net; atrainer@swinomish.nsn.us; frankl@lummi-nsn.gov; wasser.swinomish@gmail.com; mmartinez@nwifc.org; shona@yakamanation-olc.org; amelia.marchand@colvilletribes.com; kelsey.taylor@snoqualmietribe.us; jbrown@stillaguamish.com; smoe@pgst.nsn.us; cindy@snoqualmietribe.us; paulm@pgst.nsn.us; darylwilliams@tulaliptribes-nsn.gov
Cc: Barbara Brooks (ECY) (BABR461@ECY.WA.GOV) <BABR461@ECY.WA.GOV>; Mary Verner (ECY) (mave461@ECY.WA.GOV) <mave461@ECY.WA.GOV>; Wentzel, Noah (ECY) <Nwen461@ECY.WA.GOV>; Christensen, Dave (ECY) <davc461@ECY.WA.GOV>
Subject: Follow up on Water Transfers, Banking, and Investment

Good afternoon,

Thank you for joining us this morning for our discussion on Water Right Transfers, Water Banking, and Private Investment in Public Water Resources. I appreciated the fruitful discussion; I found it a helpful first step in dialogue about developing legislative recommendations on the issues. A few quick follow up items:

- Attached is a copy of the presentation and briefing paper for your reference.
- In response to a question from Larry Wasserman on consideration of tribal water claims in impairment analyses, Ecology committed to sending legal citations for our position. We will work on this with our attorneys and will email you this information when we have it available.

I would also like to reiterate our offer for continuing the conversation. Ecology will participate in Government-to-Government consultations with federally-recognized tribes as requested. In addition, we would value a less formal meeting with your tribe to dive deeper into the issues. Please reach out to me if you would like to schedule time to meet.

Lastly, a quick reminder on our next steps – After listening to tribal and stakeholder views on these issues over the next month, Ecology will draft a concept paper on issue definition, scope, and potential legislative recommendations. I will share the draft paper with all of you. We will then hold a public comment period and host 1:1 meetings to discuss feedback, after which Ecology will finalize what we present to the Legislature in November.

Thank you again for your engagement on these issues, and please reach out with any questions.

Best,
Carrie Sessions

Carrie Sessions
Policy and Legislative Analyst, Water Resources Program
WA State Department of Ecology

(360) 742-6582 (work cell)