SQUAXIN ISLAND TRIBE

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September 18, 2021

Mary Verner, Program Manager
Water Resources Program
Washington Department of Ecology
300 Desmond Drive SE
Lacey, Washington 98503

Re: Squaxin Island Tribe's comments on Ecology's draft Policy and Interpretive Statement Re: Administration of the Statewide Trust Water Rights Program

Dear Mary:

The Squaxin Island Tribe submits these comments on the above policy. The Tribe's overriding goal, which hopefully Ecology shares, is a trust water rights program that ensures the restoration and long-term protection of instream flows for fish.

General concerns

Squaxin is generally concerned that transferring a water right into Ecology's trust water rights program does not guarantee permanent streamflow restoration, particularly for those creeks with unmet instream flows. Long-term restoration and protection aligns with the Tribe's senior instream flow rights. Some of our concerns, listed below, may be based on an incorrect understanding of Ecology's trust program, and we greatly welcome further education on this topic:

1. That Ecology declines to exercise or accept into trust a donated water instream flow right based on a faulty determination that there will be impairment either to water rights existing at the time the trust water right is established or to the public interest. Along those lines, we are concerned that Ecology will decline to accept a donated right into the program or, if it does, to ensure that the trust rights go into effect if (a) a municipal water right holder claims impairment with inchoate water rights (that they may or may not be entitled to) and Ecology and/or the PCHB agrees, or (b) a junior user claims impairment and Ecology and/or the PCHB agrees. We also welcome education as to what Ecology's "exercise" of a donated trust water right means, and the degree to which Ecology will exercise discretion not to exercise the right when instream flows are unmet.

2. That Ecology conducts a flawed "public interest" analysis, based on definition in its draft policy that, among other things, (a) includes ensuring a consumptive water supply for development and (b) emphasizes restoring only ESA-listed species. Numerous runs (e.g., chum, coho) runs are impaired due to low flows, and are critical to the Tribe's Treaty fisheries – but they are not ESA-listed.

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3. That the donation could somehow be used as mitigation for new consumptive uses.

4. A lack of clarity as to the donated water right's priority date, in light of RCW 90.42.040(3) ("A trust water right retains the same priority date as the water right from which it originated, but as between the two rights, the trust right shall be deemed to be inferior in priority unless otherwise specified by an agreement between the state and the party holding the original right.").

5. That a water bank could be established that somehow undermines the effect of the trust donation.

6. A lack of faith that Ecology would enforce the terms of a trust donation for instream flows, given its poor track record of enforcing instream flows throughout South Puget Sound (here, having a designated water master would greatly help).

7. That the Washington Legislature changes Washington Water law in ways that would undermine trust donations (e.g., the "Hirst fix").

8. The policy should define existing rights to include tribes' federal reserved rights, in conformity with federal and state law. Squaxin generally concurs with the analysis in Port Gamble S'Klallam Tribe's comments (Sept. 17, 2021).

The Tribe has numerous additional questions and concerns about the trust program. We look forward to additional discussions with Ecology.

Specific comments on the draft policy

RCW 90.42.040(4)(a) provides, "Exercise of a trust water right may be authorized only if [Ecology] first determines that neither water rights existing at the time the trust water right is established, nor the public interest will be impaired." RCW 90.42.040(4)(b) provides that "If impairment becomes apparent during the time a trust water right is being exercised, [Ecology] shall cease or modify the use of the trust water right to eliminate the impairment."

P. 2: The draft policy defines "public interest" as follows:

> Public interest – The consideration of impacts to the public at large that would result from the creation and operation of a water bank. As applicable, considerations should 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. General guidelines for consideration of the public interests are set forth in the water resources fundamentals in RCW 90.54.020. The public interest can also be presumed to be 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" improperly "presume[s] that the public interest is reflected in, among other things, "watershed plans", "related water supply plans", and "local land use plans and development regulations." For reasons described below, the definition is overbroad and affords Ecology excessive discretion to do harm to instream flows in its efforts to accommodate water supplies, development and consumptive uses. As Ecology is aware, the goals of the listed documents are often to accommodate growth and increased water consumption, often at the expense of instream flows and fish. And, these documents often fail to ensure mitigation of such impacts on instream flows. This includes watershed plans created under RCW Ch. 90.94 that are intended to offset new growth.

Squaxin is concerned that Ecology will rely on this overly expansive definition to conclude that exercising a donated trust water right will impair the public interest because that will constrain growth, development and water consumption. *See also* Pt. Gamble S'Klallam Tribe's comments.

Any "public interest" definition must expressly acknowledge that: (1) new water supply for residential development is often a private and not a public use and thus not in the public interest; (2) when ensuring a public water supply is actually in the public interest, that cannot be accomplished at the expense of instream flows, particularly when they are enforceable water rights; (3) the water consumptive aspects of local land use plans and development regulations can reflect the public interest only if these documents also comply with state law provisions (e.g., GMA, 1971 Water Resources Act) that protect and restore instream flows (conversely, Ecology cannot presume the public interest from noncompliant local plans and development regulations); (4) the "public interest" must expressly include restoring instream flows during periods that they are unmet; and (5) while watershed plans approved under RCW Ch. 90.82 may be presumed to be in the public interest, other watershed plans –e.g., those resulting from the RCW Ch. 90.94 process – may not be in the public interest. See, e.g., Swinomish Indian Tribal Community v. State, 178 Wn.2d 571, 587 (2013); RCW 90.22.010; RCW 90.54.020(3)(a). As to (5), while the RCW Ch. 90.94 plans are supposed to offset water consumption, in many cases they do not and fail to comply with state law that mandates protection and restoration of instream flows.

Finally, the "public interest" definition should not place an "emphasis" on protection, restoration, and recovery of ESA-listed species. Many species, and specifically fisheries that are not ESA-listed but are being harmed by unmet instream flows, must be equally considered.

3. P. 5-6. In numerous places, Ecology cites to the anti-impairment provision, RCW 90.42.040(4)(a), without mentioning its "public interest" requirement. Instead, Ecology only mentions impairment of existing rights.

4. P. 6. The draft policy states that if a water right holder who wants to change the purpose of use to instream flow and mitigation lacks a signed water banking agreement with Ecology, then Ecology will issue a provisional approval. If an agreement is not executed within six months of the change report of examination, then Ecology will cancel the change and the water right will revert to the original purpose of use. Ecology states in n. 7 that it may elect to extend the provisional approval for additional time "if warranted." Here, Ecology should develop criteria to avoid speculation. The phrase "if warranted" affords Ecology excessive discretion. Also, is the water right holder allowed to start the new consumptive use during this period?

Thank you for your consideration.
/s/Andy Whitener

Andy Whitener, Director
Squaxin Island Natural Resources Department