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

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VIA ONLINE PUBLIC COMMENT FORM

Ria Berns
Section Manager, Water Resources Program
Northwest Regional Office
15700 Dayton Ave. N.
Shoreline WA 98133
RBER461@ecy.wa.gov

RE: Comments Regarding Ecology's Draft Revisions to the Municipal Water Resources Policy 2030

Dear Ms. Berns:

These comments on the Department of Ecology's ("Ecology") Draft Revisions to the Municipal Water Resources Policy 2030 ("Policy") are submitted on behalf of the Port Gamble S'Klallam Tribe ("Tribe"). The Tribe strongly opposes those provisions of the Policy that allow municipal water rights to circumvent bedrock protections for existing water rights, including tribes' reserved water rights and minimum instream flows, and those provisions that increase uncertainty around and the likelihood of speculation in the market for municipal water rights.

The Tribe's objections to the Policy arise from both legal and water resource management concerns. These comments first place the Policy in context: (1) instream flows set by rule under Washington law are currently unmet, unenforced, and on many streams, have never been set at all, (2) Ecology granted and continues to administer municipal water rights without regard for tribes' reserved water rights which, as Ecology often notes, are senior to many other state water rights, including municipal water rights, and (3) municipal water rights are an exception to foundational rules requiring relinquishment of water not put to beneficial use under prior appropriation law. Under Ecology's interpretation of municipal water law, this exception to relinquishment will become the rule.

The comments next walk through several Section-specific issues. As a general matter, Ecology's effort to improve its prior municipal water law policy is undermined by internal inconsistency within the Policy and the issuance of new policies with no support in statute or

caselaw. On the merits of the Policy, Ecology's authorization for water right holders to conform, use, and consolidate water for municipal water supply purposes, including inchoate water, without basic safeguards, such as tentative determinations of extent and validity and impairment analyses, portend long-lasting adverse impacts to senior reserved water rights, including instream flows. The absence of these basic safeguards will encourage speculation in the market for inchoate water and will deepen uncertainty around municipal water rights. Finally, throughout the comments, the Tribe proposes ways to strengthen protections for existing water rights and to more responsibly manage inchoate water through the Policy.

A. Background

The Tribe is a federally recognized Indian Tribe headquartered in Kingston, Washington. Since time immemorial, the Tribe and its ancestors have lived, worked, and fished in and around Puget Sound and in and around Washington rivers and streams. Salmon and other fish in the Sound, and in those rivers and streams, have been and are central to the Tribe's subsistence, culture, and economy. The Tribe has a federal treaty right to take fish at their usual and accustomed fishing places.[1] Unfortunately, salmon, and the rivers and streams on which they rely, are significantly depleted with Puget Sound Chinook so scarce they have been listed as threatened under the Endangered Species Act.[2] The Tribe is directly harmed as a result.

1. Instream Flows Are Unmet and Unenforced or Have Never Been Set at All

The Puget Sound Salmon Recovery Plan[3] identifies flow as a critical component of salmon recovery and further identifies Ecology's development of instream flow rules as an important step.[4] Yet the minimum flows identified in Ecology's rules are consistently unmet and unenforced. For example, in Water Resource Inventory Area ("WRIA") 14 and 15, U.S. Geological Survey ("USGS") monthly stream flow data[5] shows that Goldsborough Creek[6] 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

[1] *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975); *U.S. v. Washington*, 626 F.Supp. 1405, 1442 (W.D. Wash. 1985).
[2] As updated, 79 Fed. Reg. 20802 (Apr. 14, 2014).
[3] *Available at* https://repository.library.noaa.gov/view/noaa/16005.
[4] Ecology's instream flow rules have been adopted specifically to benefit and protect fisheries habitat. *See, e.g.,* WAC 173-500-020(4), 173-514-020, 173-527-010.
[5] It must be noted that there is in fact very little stream flow data readily available for Washington streams. USGS has discontinued some monitoring due to lack of funding over the years and Ecology's monitoring system is very limited.
[6] WAC 173-514-030, minimum instream flows for WRIA 14.

in Goldsborough Creek 2015-2020 and 2005-2009. Most of the creeks in WRIA 14 are closed to additional appropriation May through October; Kennedy Creek is closed May through November.[7] Similarly, in WRIA 15, many streams are fully closed to further appropriation and many others are closed for the summer months.[8] Yet, increased demand on water resources continues in WRIAs 14 and 15. Ecology has not set protected instream flows for WRIA 16 which includes such important rivers as the Skokomish, Duckabush, and Dosewallips Rivers.

The situation is similarly dire in WRIAs 17 and 18. In WRIA 17, monthly monitoring demonstrates that the Big Quilcene River has fallen below minimum protective flows[9] in June for all years since 2013, as well as 2004-2006. In August and October, flows have been below the minimum for every year since 1997. Almost all rivers and streams within WRIA 17 are closed year-round.[10] In WRIA 18, USGS data shows that the Dungeness River is far below minimum instream flow requirements[11] every year since 2015 as well as in 2009 and in 2000. In WRIA 18, every stream is closed to new appropriation year-round except the mainstem Dungeness which is closed July through November.[12]

On the other side of Puget Sound, WRIA 5 suffers from the same problems. According to USGS monthly data, the North Fork Stillaguamish failed to meet minimum protective flows[13] in July all years from 2013-2020, 2009-2010, and all years 2000-2007. For August, the North Fork Stillaguamish failed to meet minimum flows all years from 2005-2020 and 1998-2003; that is, the river failed to meet the protective minimum flows 23 of the last 24 years. For September, the North Fork Stillaguamish failed to meet minimum instream flow requirements in 2014-2020, and 1998-2012, again, 23 of the last 24 years. In WRIA 5, all tributary streams are closed to new appropriation and there is overall closure in the larger basins with some limited appropriation allowed in winter months.[14]

[7] WAC 173-514-040.
[8] WAC 173-515-030.
[9] WAC 173-517-090.
[10] WAC 173-517-100. The Big Quilcene and Chimacum Creek are closed to new appropriation most, but not all, of the year.
[11] WAC 173-518-040.
[12] WAC 173-518-050.
[13] WAC 173-505-050.
[14] WAC 173-505-070.

Plainly, the problems in these Basins (and basins throughout Washington) are getting *worse* despite the intended "protections" of instream flow rules.[15] Although instream flows are co-equal to appropriative water rights and have priority over later-acquired appropriative rights,[16] with all WRIAs, the mere existence of the instream flow rules is not preventing water shortages or protecting the salmon and people that depend on them. The failure to protect streams and the decline in salmon stemming from that failure harms tribes, injuring their subsistence, culture, and economies and undermining their treaty rights to take fish. As Ecology is aware, even a "small loss" to fisheries over a period of years will not support a decision to override existing instream flow rules.[17]

In light of the ongoing failure to protect flows in Puget Sound rivers and streams, especially in the face of climate change, Ecology must minimize any future reductions to instream flows from its administration of municipal water rights. Ecology cannot allow municipalities to unilaterally and unlawfully mischaracterize old unused, abandoned, and/or relinquished water rights, particularly rights for uses other than domestic supply, as municipal rights in order to resurrect them for profit. Allowing municipalities to do so, and then sell unused rights to the highest bidder as in this case, would set dangerous and harmful precedent that thwarts instream flow laws, circumvents the public interest, is a detriment to salmon and tribes, will exacerbate already dire circumstances in Washington rivers and streams, and will contribute to water speculation, contrary to the spirit, purpose, principles, and intent underlying Washington water law. The Tribe strongly urges Ecology to enhance protections for instream flows throughout the Policy.

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[15] *See Cornelius v. Washington Dep't of Ecology*, 182 Wash. 2d 574, 610, 344 P.3d 199, 216 n.1 (2015) (Madsen, J. dissenting) (describing a 50% loss of glacial volume in the last century and a decline in snowpack at 73% of mountain sites studied since 1983 in the North Cascades).

[16] RCW 90.03.345 ("[M]inimum flows … under RCW 90.22.010 or 90.54.040 shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment over later acquired appropriative rights"); *Swinomish Indian Tribal Cmty. v. Washington State Dep't of Ecology*, 178 Wash.2d 571, 595, 311 P.3d 6, 18 (2013) (reiterating that "minimum flows set by rule continue to be important existing rights" and holding generally that Ecology may not "relegate minimum flow water rights to a lesser class of water right than others").

[17] *Swinomish Indian Tribal Cmty.*, 178 Wash.2d at 584 (declining to adopt Ecology's finding that a "small loss" to tribal fisheries over 20 years was a sufficient basis for permitting new withdrawals from the Skagit River where minimum instream flows had been set).

2. Municipal Water Rights Were Granted and Are Currently Administered Without Regard for Tribes' Senior Reserved Water Rights and Impacts to Those Rights

In establishing Policy governing the administration of municipal water rights, Ecology must consider tribes' senior reserved water rights. Courts have long recognized that tribes reserved water rights for themselves, like fishing rights, through treaties, orders, or agreements, and accordingly, they have protected and enforced these rights against state appropriative water rights.[18] Under the reserved rights doctrine, courts have held that these federal reserved water rights are "paramount to water rights later perfected under state law."[19] Federal reserved water rights may serve several purposes, including, for example, domestic and agricultural purposes on the reservation, among others, and, as most relevant here, water necessary to sustain tribal fisheries subject to a tribe's treaty fishing rights.[20] The quantity of water reserved is the amount of water necessary to fulfill the purpose of the reservation, regardless of how the reservation was established.[21] While the specific amount of water remains unquantified for many tribes, courts have nonetheless protected and enforced unquantified federal reserved water rights against junior water users.[22] Federal reserved water rights are often senior in priority to water rights appropriated under state law, some as old as "time immemorial."[23] Because they exist by operation of law, as opposed to withdrawal for beneficial use, federal reserved water rights cannot be relinquished or abandoned for non-use.[24] For all of these reasons, tribes' federal

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[18] *United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States,* 207 U.S. 564, 576–77 (1908); *Cappaert v. United States*, 426 U.S. 128, 143 (1976).

[19] Newton, Nell Jessup et al., Cohen's Handbook of Federal Indian Law § 19.03[1] (2012 ed.) (citing *Winters*, 207 U.S. at 576–577).

[20] *See, e.g.*, *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47–49 (9th Cir. 1981); *Baley v. United States*, 942 F.3d 1312, 1335 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 133 (2020); *In re CSRBA*, 448 P.3d 332, 355 (Idaho 2019); *In re Yakima River Drainage Basin*, 296 P.3d 835, 840 (2013); *Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 764–66 (Mont. 1985).

[21] *Arizona v. California*, 373 U.S. 546, 598 (1963).

[22] *See generally*, *Winters*, 207 U.S. 564; *Adair*, 723 F.2d 1394; *Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1132 (9th Cir. 1987).

[23] *See, e.g.*, *Arizona*, 373 U.S. 546 at 600 (priority date is the date of the creation of the reservation); *Adair*, 723 F.2d at 1414 (priority date of "time immemorial").

[24] *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, 1248 (D. Nev. 2004), aff'd sub nom. *United States v. Truckee-Carson Irrigation Dist.*, 429 F.3d 902 (9th Cir. 2005) ("As beneficial use is not the basis, measure, or limit of a federal reserved water right, these doctrines [of forfeiture, abandonment, and failure to perfect] are inapplicable to federal reserved rights.")

reserved water rights are "existing rights" under state law and must be considered as part of any tentative determination or impairment analysis.[25] The protection of tribes' senior reserved water rights is even more urgent during times of shortage, which are common in the era of climate change.

Ecology must also consider tribes' interest in instream flows for the purpose of protecting salmon. Instream flows in Washington are treated as water rights with a priority date from the date of Ecology's rulemaking.[26] As noted above, instream flows are already not met across the state to the detriment of salmon and tribes.[27]

3. Municipal Water Rights Are—and Should Remain—a Limited Exception to Prior Appropriation Law

Concerns presented by the Policy are best understood by placing municipal water rights in the context of Washington's "prior appropriation" regime.[28] The protection of water rights that were "first in time",[29] avoiding waste, and the relinquishment of water rights if an appropriator fails to put water to beneficial use for the statutory time period are hallmarks of the prior appropriation system.[30] Municipal water rights are an exception to relinquishment because they permit municipal water suppliers to hold inchoate water with less risk of relinquishment.[31]

The problems presented by inchoate water are intensified by (1) the fact that Ecology does not know how much water is legally available because water rights have never been adjudicated in the majority of watersheds in Washington state, (2) Ecology does not know how much water is physically available because it does not collect sufficient instream flow data, and (3) to the Tribe's knowledge, the total amount of inchoate water has never been inventoried

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[25] *See State, Dep't of Ecology v. Yakima Rsrv. Irr. Dist.*, 121 Wash. 2d 257, 287, 850 P.2d 1306, 1323 (1993) (Yakama Nation reserved water rights to fulfill the purposes of the reservation including for fishing, irrigation, and other purposes).
[26] *Swinomish Indian Tribal Cmty.*, 178 Wash.2d at 593 (2013).
[27] For additional discussion of why Ecology is required to consider tribes' unadjudicated senior reserved water rights when it conducts tentative determinations and impairment analyses, please see Port Gamble S'Klallam Tribe's Comments Regarding Ecology's Policy and Interpretive Statement on the Administration of Statewide Trust Water Rights Program dated September 17, 2021.
[28] RCW § 90.03.010 ("as between appropriations, the first in time shall be the first in right").
[29] *Id.*; *Foster v. Washington State Dep't of Ecology*, 362 P.3d 959, 963 (2015) ("Our cases have consistently recognized that the prior appropriation doctrine does not permit even de minimis impairments of senior water rights.").
[30] RCW § 90.14.180; *see* RCW § 90.14.140(2)(d).
[31] RCW § 90.14.140(2)(d).

statewide.[32] In the absence of data on the legal and physical availability of water, Ecology cannot accurately track water use, inchoate water, and conservation. This haphazard approach to water resource management falls far short of Ecology's obligation to protect senior water rights, to retain base flows of rivers and streams, and to protect the high quality of waters in the state.[33]

Failing to account for the total amount of legally and physically available water, including inchoate water, presents numerous risks. First and foremost, as a legal matter, it allows municipal water rights, which the legislature intended to be an exception, to swallow the rule requiring the protection of senior water rights under prior appropriation. Second, it increases uncertainty around the extent and validity of municipal water rights. Third, given competing water demands and dwindling water resources, municipal water rights have become an important tool for entities seeking to profit from speculation in the market for inchoate water, which is discouraged under Washington law.[34] Fourth, it increases the risk that when inchoate water is put to use in the future, instream flows will fall further below regulatory minimums and/or that municipal water supplies may be interrupted to meet the demand of senior water right holders.[35] The Policy invites these risks by liberally permitting the conformance of non-municipal water to municipal water supply purposes and permitting consolidation of water rights in the absence of tentative determinations or impairment analyses. Each time that Ecology allows municipal water suppliers to circumvent protections for existing rights, it deviates from the prior appropriation system that it is entrusted to uphold.[36]

B. Section-Specific Comments: The Municipal Water Law Policy 2030 Departs from Fundamental Protections of Existing Water Rights

1. Section 2: Municipal Water Suppliers and Municipal Water Supply Purposes

Section 2 addresses how Ecology interprets the statutes governing municipal water suppliers and the purposes for which they may put municipal water rights to use. Proper interpretation of these statutes is critical because it determines which entities and which purposes of use may avail themselves of valuable inchoate water and exemption from relinquishment.

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[32] Rachael Paschal Osborn, *From Loon Lake to Chuckanut Creek: The Rise and Fall of Environmental Values in Washington's Water Resources Act*, 11 WASH. J. ENVTL. L. & POL'Y 115, 172 (2021).
[33] RCW §§ 90.54.020(3)(a), (b); 90.03.010.
[34] *R.D. Merrill Co. v. State, Pollution Control Hearings Bd.*, 137 Wash. 2d 118, 131, 969 P.2d 458, 465 (1999).
[35] The interruption of municipal water supply is particularly concerning given the pace of population growth in Washington state. *See Cornelius*, 182 Wash. 2d at 610 n.1 (2015) (Madsen, J. dissenting) (describing projected population growth in Washington state).
[36] RCW § 90.03.010.

When considering "other municipal beneficial uses associated with a water right for municipal water supply," Ecology states that "other purposes of use generally associated with a municipality . . . are also considered to be for municipal water supply purposes . . . include, but are not limited to, residential, governmental or governmental proprietary, commercial, industrial, irrigation of parks and open spaces, institutional, landscaping, fire flow, water system maintenance and repair, and the uses described in RCW 90.03.550."[37] Given that municipal water suppliers often use water for these consumptive purposes during the warmest months of the year at the same time that instream flows often go unmet and unenforced, the Tribe urges that municipal water suppliers are not at liberty to satisfy their entire consumptive demand if doing so impairs senior water rights, including instream flows. Ecology must balance these "other purposes of use" against the protection and enhancement the quality of the natural environment and reduce junior municipal water use when minimum instream flows are not met.[38] Ecology can assist municipal water suppliers to assess their water for these "other purposes of use" and identify those uses which may be deferred, which may benefit from water conservation, and which must be entirely retired to ensure that minimum instream flows are met.

Section 2 further states that "[w]hen considering whether a water right qualifies for a governmental purpose, Ecology considers how the water right has historically been used."[39] However, the Policy does not clearly identify which water uses or entities would not be deemed for "governmental purposes." For example, the Policy states that if a municipal water right was originally issued to a "non-governmental entity (e.g., a private developer) and later acquired by a governmental entity then the right *may* not qualify as being for municipal water supply purposes."[40] This portion of Section 2 is inconsistent with Section 3 which states in relevant part:

> If a right for a governmental purpose (e.g., irrigation of parks) was issued to a nongovernmental entity (e.g., a private developer) and later acquired by a governmental entity then the right *does not* qualify as being for municipal water supply purposes. In this situation, its purpose of use can be changed to municipal water supply purposes through the change application process under RCW 90.03.380, which includes a tentative determination of extent and validity of the water right.[41]

Thus, the Policy does not clearly answer the question whether Ecology will deem a water permit, certificate, or right originally granted to a private developer and subsequently transferred to a

[37] Policy at 4.
[38] RCW § 90.54.020(3)(a),(b).
[39] Policy at 4.
[40] *Id.* (emphasis added).
[41] *Id.* at 6 (emphasis added).

governmental entity a water right for municipal water supply purposes. Since not all water rights are exempt from relinquishment, clarity around which *uses* and which *entities* qualify for municipal water rights is essential to ensure fidelity to RCW § 90.03.015 and transparency in the administration of municipal water rights. Municipal water suppliers holding water rights originally granted to private developers must not be permitted to benefit from the exception to relinquishment, otherwise that exception will quickly swallow the rule.

2. Section 3: Issuing, Conforming, and Population/Connection Limits of Municipal Water Rights

The Tribe's concerns with the policies set forth in Section 3 center on the provisions that permit splitting municipal water rights and conforming permit exempt wells to municipal water supply purposes. Regarding splitting municipal water rights, Section 3 permits Ecology to "consider a permit holder's request to split a partially developed permit by issuing a certificate for the portion of water put to beneficial use and issuing a superseding permit for the remaining portion of inchoate water with the development schedule."[42] This portion of Section 3 is unclear for two reasons. First, the Policy does not indicate whether for the portion of the permit that remains undeveloped, permit holders must obtain a development extension under RCW §§ 90.03.320 or 90.44.060 and POL-1050. If they must obtain an extension, the Policy should state that requirement explicitly; if not, Ecology should explain why not. Second, without further clarification, it appears that Ecology may presume that the undeveloped portion of the water right is in good standing, valid, and not canceled as required by RCW § 90.03.320 (requiring cancellation of a permit if a permit holder does not show cause why the permit should not be canceled) and POL-1050(6). Ecology should not allow permit holders to "split" water permits to circumvent development schedules and cancellation.

Regarding the conformance of permit exempt wells, Section 3 allows Ecology to conform permit exempt wells not originally identified as being for municipal water purposes to, after-the-fact, indicate that they may be used for municipal water purposes, including permit exempt wells.[43] Conforming permit exempt wells for municipal water supply purposes is problematic for numerous reasons. First and tellingly, RCW § 90.44.105, the permit exempt well consolidation statute, never references the consolidation of permit exempt wells for the purpose of creating new municipal water rights. Second, and to reiterate, it is unclear whether the consolidation and

[42] Policy at 5.
[43] *Id*.

amendment of permit exempt wells, including permits originally granted to private developers, will be approved for municipal water purposes under the Policy.[44]

Third, RCW § 90.03.560 prohibits Ecology from "authoriz[ing] any other water right or portion of a right held or acquired by a municipal water supplier to be so identified without the approval of a change or transfer of the right or portion of the right for such purpose."[45] Thus, any conformance of permit exempt wells for municipal water purposes would require Ecology to approve a change or transfer of the right before it can be used for municipal water supply purposes. The approval of a change of use or transfer is further supported by Section 4 of the Policy, which states in relevant part:

> A water right issued and beneficially used for the purpose of serving fewer residential connections or non-residential services than is described in RCW 90.03.015(4)(a) may not be conformed as a municipal water right. The population or number of connections specified on the application or any subsequent water rights document is limiting. To become water rights for municipal water supply purposes these water rights require a purpose of use change under RCW 90.03.380.[46]

This provision of Section 4 requires a change of purpose for water rights serving fewer residential connections and does not permit them to be automatically conformed to municipal water rights. If a water right serving fewer residential connections cannot be automatically conformed to a municipal water right, it is unclear why permit exempt wells, many of which serve few residential connections, may be conformed for municipal water supply purposes without a purpose of use change under RCW 90.03.380. This inconsistency between Section 3 and Section 4 further confuses Ecology's conformance policy for permit exempt wells.

Fourth, Ecology's new conformance Policy for permit exempt wells is problematic because it fundamentally misinterprets *Cornelius v. Washington Dep't of Ecology*. In that case, the Washington Supreme Court permitted Ecology to amend water rights held by Washington State University ("WSU") for municipal water supply purposes. In that case, the quantity of water held by WSU was 971 million gallons of water per year for the purpose of supplying water to 15,000 students.[47] Water rights intended to serve 15,000 students are a far cry from individual

[44] *See* Part (B)(1), *supra* (discussing inconsistency between Section 3 and Section 4 regarding the treatment of water rights originally granted to private developers and subsequently acquired by municipal water suppliers).
[45] *Id.*
[46] Policy at 7.
[47] *Id.* at 593.

or even a group of permit exempt wells, which were never intended to become municipal water rights. Conforming permit exempt wells for municipal water supply purposes blurs the longstanding distinction between domestic water rights and municipal water rights.[48]

Fifth, conforming permit exempt wells to become municipal water rights will deepen uncertainty around municipal water rights. As Justice Madsen pointed out in *Cornelius*, "great uncertainty would be introduced into certificated water rights if they can be disregarded in favor of after-the-fact, case-by-case inquiries into the purpose of use that the applicant attempted to obtain."[49] Ecology must minimize, not promote, such uncertainty.

In sum, the legal basis for allowing conformance of permit exempt wells for municipal water purposes is at best confusing and is at worst lacking all together. Without a legislative enactment or directive from the Supreme Court supporting Ecology's conformance policy for permit exempt wells, this portion of Section 3 exceeds Ecology's authority to interpret and implement laws through policy statements.[50]

3. Section 7: Consolidation of Connected Municipal Water Suppliers

Section 7 sets forth an administrative procedure it calls "consolidation".[51] The Policy defines consolidation as "two municipal water suppliers merge to become one entity and combine their management, planning, finances, and operations into one consolidated entity."[52] This consolidation policy makes not reference to any provision of the water code. This omission is problematic because as an interpretive and policy statement, the Policy must either interpret "the meaning of a statute or other provision of law, of a court decision, or of an agency order"[53] or provide a "written description of the current approach . . . to implementation of a statute or other provision of law or of a court decision or of an agency order".[54] The consolidation policy does neither.

Section 7 also fails to address if and how Ecology plans to account legally and practically for the inchoate portions of water rights held by the two municipal water suppliers, the respective priority dates of the water rights, and any applicable permit extensions related to inchoate water. Without accurately and transparently tracking and accounting the quantity of inchoate water

[48] *See Cornelius*, 182 Wash. 2d at 628 (Madsen, J. dissenting) (discussing the "longstanding" distinction between water for municipal and domestic purposes under Washington water law).
[49] *Cornelius*, 182 Wash. 2d at 623.
[50] RCW §§ 4.05.010(8); § 4.05.010(15).
[51] Policy at 10-11.
[52] *Id.* at 10.
[53] RCW § 4.05.010(8).
[54] RCW § 4.05.010(15).

resulting from a consolidation, the public has no way of knowing whether Ecology is managing these valuable rights consistent with the law.

Wholly apart from problems with transparency in Ecology's administration of inchoate water, on the merits, the consolidation policy under Section 7 is untethered from laws requiring the protection of existing water rights. The dangers of the consolidation policy come into focus when it is juxtaposed with RCW § 90.03.383, the statute governing interties. Interties are "interconnections between public water systems permitting exchange or delivery of water between those systems".[55] The intertie statute includes several key safeguards, including (1) public notice,[56] (2) a limit on the quantity of water subject to the intertie—"the instantaneous and annual withdrawal rates specified in the water right permit", (3) a requirement that "no outstanding complaints of impairment to existing water rights have been filed with the department of ecology", and (4) a requirement that interties "shall not adversely affect existing water rights".[57] These sensible requirements help ensure that as municipal water systems expand they do not impair existing water rights, including instream flows.[58] However, Ecology has determined that RCW § 90.03.383 does not apply to consolidations.[59]

Even if the intertie statute does not apply to consolidations, the Policy offers no legal justification for dispensing with its basic safeguards, such as (1) public notice of consolidations, (2) a limit on water use to the instantaneous and annual withdrawal rates of the consolidating entities, (3) a requirement that there be no outstanding complaints of impairment against either entity, and (4) a prohibition against adverse effects on existing water rights. By exempting consolidations from these sensible requirements, Ecology has created a new mechanism for entities seeking to avail themselves of the exception to relinquishment to freely circumvent impairment analyses that are fundamental to Ecology's obligation to protect existing water rights.[60] The lack of any public notice requirement leaves federally recognized tribes and other senior water right holders without any opportunity to protest the validity of inchoate water that may impact their water rights. Furthermore, given the high value of inchoate water, there is a

[55] RCW § 90.03.383(2)(a).
[56] RCW § 90.03.383(3), (7).
[57] RCW § 90.03.383(4).
[58] *See e.g.*, RCW §§ 90.03.010, 90.54.020.
[59] *Id.* at 11 ("RCW 90.03.383, the statutory provision related to interties, is not applicable when water suppliers interconnect and consolidate into one entity).
[60] *See* RCW § 90.03.010.

substantial risk that the consolidation policy under Section 7 will encourage speculation in the market for inchoate water.[61]

Once again, the Policy imbues the use of inchoate water with great uncertainty, kicking the accounting of these rights down the road and increasing the likelihood that municipal water rights will be interrupted in the future.

4. Section 9: Using Municipal Water Rights for Mitigation

Section 9 of the Policy offers different ways that municipal water rights can be used for mitigation. Parts of this Section are internally inconsistent. For example, Section 9 correctly states that under RCW 90.03.550 beneficial uses of water under a municipal supply purposes water right may be used "to benefit fish and wildlife, water quality and other instream resources or related habitat values."[62] While that statute requires water to be physically withdrawn or diverted before it may be used for these instream purposes, the Policy nonetheless states that "*[i]t may be possible* to use perfected or inchoate portions of municipal water rights for mitigation under RCW 90.03.550."[63] Because inchoate water is not "physically withdrawn or diverted, permitting the use of inchoate water for mitigation is plainly inconsistent with RCW § 90.03.550. Moreover, issuing a highly consequential policy with such uncertain terms (i.e., "it may be possible") does not offer the clarity or transparency necessary to responsibly manage a finite and diminishing resource like water.

Most importantly, it is neither logical nor responsible water resource management to use inchoate water for mitigation. Because inchoate water is not physical, wet water, crediting it for mitigation provides no physical benefit to instream resources such as water quality or habitat. Mitigation is ineffective if it merely maintains the status quo and offers no net benefit to instream resources. Fish need water. Paper water has no legal or practical effect because it will not increase flows and does nothing for listed chinook or any other aquatic organisms.

Section 9's discussion of using municipal water for mitigation under the Trust Water Rights Program ("TWRP") hints at this very issue:

> Using the TWRP to transfer water right certificates for municipal water supply purposes for instream flows for mitigation of new out-of-stream uses also requires consideration of the public interest. Municipal water rights are one type of water

[61] *See also*, Sharon Haensly and Jeff Dickison, *Public Water System Consolidations, A Good Idea? Or a Strategy for Unmitigated Instream Flow Impacts and Exceeding Water Rights?*, The Water Report (Jan. 15, 2023).
[62] Policy at 13.
[63] *Id.* (emphasis added).

> right that may be protected from relinquishment even after an extended period of nonuse where environmental, social, economic, and other conditions may have changed. Therefore, there may be municipal water rights with quantities that are valid for change that might not meet this public interest standard due to the factors considered as part of the public interest evaluation in POL-1010.[64]

Whether municipal suppliers seek to use municipal water rights for mitigation purposes under the TWRP, or one of the other pathways described in Section 9 of the Policy, mitigation should only be permitted if wet, perfected, choate water is used to realize a corresponding benefit to the stream and fish habitat. Ecology must require mitigation to be in time, in kind, and in place. *Foster,* 362 P.3d at 963; Joint Legislative Task Force On Water Resource Mitigation Report (Nov. 14, 2022, Comments from Task Force Members and Tribes at 40 (Tulalip Tribes, objecting to out-of-kind mitigation), 101-112 (Sierra Club, objecting to out-of-kind mitigation, 115 (Stillaguamish Tribe of Indians, objecting out-of-kind mitigation).

C. Conclusion

In conclusion, the Policy will have far reaching effects on water supply, not only on the ability of municipalities to meet the demand of an ever-increasing population in Washington state, but also on the availability of water to fulfill the reserved rights of tribes that relied on Washington's formerly abundant waters long before municipal water rights existed and to meet the needs of fish for minimum instream flows. By omitting key safeguards for the protection of these existing rights from the Policy, Ecology fails in its duty to uphold the basic tenets of prior appropriation and responsibly manage the water resources with which it is entrusted. 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,

Roma Call
Director, Natural Resources Department

[64] *Id.* at 13-14.

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.