



Water Resources Adjudication Assessment Legislative Report

Watersheds Proposed for Urgent Adjudication and Future Assessment

By

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For the

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Central	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
Eastern	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	4601 N Monroe Spokane, WA 99205	509-329-3400
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DEPARTMENT OF
ECOLOGY
State of Washington

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Executive Summary

In 2019, the Legislature directed the Department of Ecology “to assess and explore opportunities to resolve water rights uncertainties and disputes through adjudications in selected basins where tribal senior water rights, unquantified claims, and similar uncertainties about the seniority, quantity, and validity of water rights exist.”

At the Legislature’s direction, Ecology hired a Project Manager with expertise in water law, who began the assessment in October, 2019. Working with existing Ecology Water Resources Program staff, the Project Manager reviewed watersheds around the state to determine which areas would benefit most from a court adjudication process to resolve water right uncertainties and disputes. Through this assessment, we have identified two watersheds we recommend as urgent priority basins to begin this work.

Uncertainties about water rights can be found in most watersheds around the state because both water supply conditions and water law have evolved over the past century, and a core regulatory tool – court adjudication – has been underused. In some watersheds, uncertainties identified by the Legislature - tribal senior water rights, unquantified claims, and the seniority, quantity, and validity of water rights – have reached untenable levels of complexity. In these watersheds, basic water rights permitting and compliance activities have become extraordinarily challenging due to lack of clarity and certainty of water rights for both instream and out-of-stream uses.

These challenges are particularly pronounced in the Nooksack watershed. Despite good faith efforts over many years to achieve voluntary water management agreements in this watershed, disagreements about the legal right to use water have resulted in threats to local agricultural economies and counterproductive competition among different kinds of water uses. Solutions to competing demands for water – for fish, for farming, and for people - are stymied by the lack of a complete inventory and formal court determination of all the rights to use water under Washington’s laws.

In the Upper Columbia, the state’s largest reservoir (Lake Roosevelt) lies between two of our largest Indian Reservations (those of the Spokane and Colville Confederated Tribes). While there are far fewer state water users here than in other watersheds, there is profound uncertainty: the tribes, federal agencies, and the state all rely upon the same water without any consistent regulation or priority system. Ecology does not know whether tribes withdraw water on their land (or from Lake Roosevelt itself), and we regulate on-reservation permits only by invitation. Tribes presume they have Columbia River water to support their reservations, but have no legal documentation of its quantity or purpose to assist with their own planning and regulation. The U.S. Bureau of Reclamation holds early state water rights for waters distributed through the Columbia Basin Project, but it is potentially vulnerable to even older tribal claims. This poses profound uncertainty for holders of state-issued water rights and for the future of water use in this area.

The core principle of our water law is *prior appropriation*, where first in time is first in right. The first person to use the water has a senior claim over others who later claim water for their own

junior uses. Rights to use water are managed through Ecology's permitting system, which dates back to the first 1917 Water Code and acknowledges that water in use even before 1917 (pre-code) can be valid. Ecology's hydrogeologists determine whether water use in one place will impact existing use elsewhere. Our permit writers analyze historic use to determine whether new uses will increase impacts to senior water users. However, Ecology, on its own, cannot resolve competition among water users by directly applying prior appropriation. Court-approved reliable water rights inventories are necessary for this to be consistent and effective.

Where we lack a defined court-decreed inventory of legal water use, Ecology's enforcement and compliance work to protect senior rights is time-intensive. This process leads to scattered appeals and litigation of individual decisions. Parties engaged in managing water, and planning for future water uses, encounter a number of problems when the oldest water rights (pre-code claims) remain unexamined for validity.

Furthermore, federally-recognized Indian Tribes claim significant quantities of water, including water for reservation land and for fish habitat. Reservations may have their own water systems and irrigation uses that are unregulated by the state. If tribes claim that state users impair their legal water, Ecology cannot on its own determine how much water should be protected, and how much is available for other uses. Adjudication reconciles state and tribal water in a single process.

Adjudication has been the statutory tool for quantifying and prioritizing water right claims in Washington since implementation of the Water Code in 1917. Adjudication is the established process under existing law to prioritize water rights, set forth in RCW 90.03. It requires no statutory amendments or rulemaking to be effective. The law provides that Ecology identifies a water source (such as a watershed with a major river and its tributaries and groundwater). Then, Ecology files an action in court, and joins all pertinent water users into the court process before a local judge. Water users submit their claims, and Ecology gathers extensive information about water use. Ecology then makes recommendations to the court, and the court issues a final decree listing all rights in order of priority. Water users can negotiate settlement agreements and recommend them to the court for inclusion in the court's decree.

The decree is a final, comprehensive inventory of rights to use water in the adjudicated watershed. It is highly detailed and provides Ecology and stakeholders accurate information on the key components of each water right – priority date, authorized quantity, time and place of use, and purpose of use. With the certainty of an adjudication decree, a court-appointed water master can regulate use when water supply is inadequate for all users. Following an adjudication, water users have a true valuation of their water quantity that facilitates changes, transfers, and sales of water rights.

This report explains pressing challenges in water management, how adjudication can resolve many of those challenges, and why the adjudication assessment identified the Nooksack watershed, along with Lake Roosevelt and its middle tributaries, as the most urgent priorities for adjudication. It also includes a summary of costs, explains the cost-effectiveness of proceeding with two watersheds in the first biennium, and describes how this approach will rely upon current staff to keep the need for additional funding at a minimal level. This report also describes additional work recommended for prospective future adjudications in the

Spokane and Walla Walla river systems and recommends additional watersheds for further assessment.

Adjudication is a multi-biennium investment of time and resources. Ecology does not recommend it lightly. Where uncertainties have become untenable, an adjudication process ensures fairness and compliance with the law. Water management *without* adjudication has consumed decades of expense and effort without reaching full and fair conclusions. Investment at the beginning of the process ultimately can save water users and the state years of controversy, uncertainty, and costs.

Recommendation

After a statewide assessment, Ecology finds that it is in the public interest to commence immediate adjudication of two watersheds. Continued delay in adjudication will exacerbate existing water management challenges and render future adjudications, when they are eventually attempted, even more difficult than they are at present. Climate change models for both watersheds predict decreased streamflows, warmer water temperatures, less favorable runoff patterns and increased demand on water sources. This poses an urgent risk to aquatic species and water users alike. Further, in both watersheds, previous allocations of water supply have left tribal senior water rights unaddressed, resulting in serious risks to the state water rights system.

- **Nooksack Watershed (Water Resource Inventory Area [WRIA] 1)**

The Nooksack River system faces increasing pressure from consumptive water users and instream needs. These waters provide critical habitat for many species, including Chinook salmon that provide the exclusive diet for southern resident killer whales. Ecology faces significant difficulties regulating water use in the Nooksack watershed, where there is unresolved and widespread noncompliance with water law. Water users, including Tribes, all face uncertainty about their own legal rights and vulnerability to each other's potential claims.

WRIA 1 water users, tribes, and local governments have worked for over thirty years to address their water challenges. While parties agree about protecting fish habitat, they have not reached resolution about how to balance needs for fish with needs for farms and communities. Broad disputes remain about how much water should remain in streams and how the law should apply to water users.

Adjudication here has widespread support from fisheries, development and real estate, and environmental groups, but is opposed by agricultural interests, and some parties have taken a neutral position. The Lummi Nation and Nooksack Tribe have petitioned for adjudication, as the state court process provides the best and only means to reconcile tribal and state water rights in this area with the certainty of a court decree.

- **Lake Roosevelt and Middle Tributaries (WRIA 58)**

Ecology defines this area as Lake Roosevelt itself, along with the middle segment of tributaries defined as WRIA 58. WRIA 58 is a rural area with public forest lands and some small regulated uses in Stevens and Ferry counties. This area includes the state's largest reservoir, impounded behind the Grand Coulee Dam, and the largest Indian Reservation in Washington. The area is valuable habitat to steelhead, kokanee, and other fish and wildlife species, including anadromous salmon needed for Puget Sound whale recovery.

Both the Colville Confederated Tribes and the Spokane Tribe claim a historic right to these waters that are senior to other federal and state water rights, including the U.S. Bureau of Reclamation's water rights for Lake Roosevelt water. This poses a profound

uncertainty to the water of the Columbia Basin Project, which supplies water throughout Eastern Washington.

The State of Washington does not regulate either of the tribe's diversions from Lake Roosevelt itself. Adjudication is the only tool that can integrate tribal and state law on water rights. The Colville Confederated Tribes have petitioned for adjudication and the Spokane Tribe has indicated their support.

To support these recommendations, Ecology has submitted a funding request for the FY21-23 biennium. The amount of funding request is modest, in line with current budget constraints. Ecology will make efficient use of current staff to transition from the lengthy Yakima Basin *Acquavella* adjudication to new adjudication work with minimal additional funding. Ecology's request includes funding for legal support through the Attorney General's office and for support of local superior courts through the Administrative Office of the Courts. A budget summary is included in this report.

Adjudication Assessment Report

Why state waters need adjudication

Current management of Washington's water

Fresh water in Washington is a limited public resource.² While the Evergreen State is known for our ample rainfall and abundant agriculture, streamflows for fish are declining in many areas. Water users, who need a legal right to take water from streams and aquifers, often face uncertainty about their future.

Ecology manages water in rivers, lakes, and groundwater aquifers under the long-standing doctrine of *prior appropriation*: the first to legally use water has the highest priority right. An earlier water user (senior) has priority over later ones (junior). This is distinct from a riparian doctrine of water law, where landowners have a right to whatever water runs through or under their property.

Prior appropriation has been the law for surface water (rivers, lakes, and streams) since the Legislature adopted the first water code in 1917.³ Prior appropriation has been the law for groundwater since 1945. Under prior appropriation, whenever there is inadequate water for all users, junior users must curtail use that will impair a senior right. Once a water source is fully allocated, no new water users should be allowed.

The Legislature requires Ecology to manage water use through the permit system. Potential water users apply to Ecology for a permit, and Ecology must determine:

- Water is available,
- Water would be put to beneficial use,
- There would be no detriment to the public welfare, and
- The use would not impair senior water rights.

When Ecology approves a permit, it becomes a water right with a priority date as of the date of application. Any portion of a water right not used for five years is considered relinquished and returns to the state unless exemptions apply. After water is put to beneficial use it is considered “perfected,” and permit holders can ask Ecology to issue a certificate to verify the final quantity of water. Water right holders can apply to change the purpose or place of water use, and Ecology will evaluate those applications to determine how much water is still legal (and not relinquished) and whether other water rights would be impacted by the applicants’ proposed changes.

² “Water resources” used here describes the management of the quantity, purpose, place and priority of water use. This is distinct from the regulation of water *quality*, which is the assessment of pollutants in the water. Water quality does intersect with water resource management in the area of streamflow temperature. Lower flows often correspond with higher temperatures, and high temperatures are regulated under water quality standards.

³ In 1917, the water code preserved the right of uses existing at that time. RCW 90.03.010. Some of these uses still may be valid today, and are described as “pre-code claims.”

Certain groundwater uses are exempt from the permitting system, although subject to all other water regulation. Exemptions include residential domestic wells that use water within the withdrawal limits. Permit-exempt uses become water rights with priority of the date water is put to beneficial use.

Ecology also manages fresh water as an instream resource for fish habitat, recreation, and other ecosystem values. Ecology protects streamflows by establishing minimum flows and closures through the rulemaking process. An instream flow rule creates a water right for the stream with priority as of the date the rule takes effect. Instream flows cannot put water back in the stream, but protect existing flows from future appropriations, either from the connected surface water system or a connected aquifer. Where no additional water can be withdrawn without impairing streamflows and senior water rights, Ecology cannot allow further appropriations.

Most state residents and many businesses obtain water supply through group water purveyors. These purveyors may be cities, public utility districts, irrigation districts, or private systems. The water purveyors hold the legal water right and charge end users (their customers or beneficiaries) for the use. End users who pay a utility (or other purveyor) for water do not hold water rights. They would not be joined in an adjudication based on this use, but the purveyor would.

Challenges of Unadjudicated Water

The prior appropriation doctrine is straightforward, but water management is not. Ecology faces a number of challenges that make water regulation inconsistent, difficult, and costly:

- **Ecology cannot enforce all water rights by priority.** When a senior water right faces impairment by a junior user, the law is clear: the junior use should not impair the senior. But Ecology can apply this doctrine in very few contexts, such as new permit applications, conditional permits, changes and transfers, and instream flow regulation. Only a superior court can decide whether an existing permit conflicts with another claim use and must be regulated.⁴ Ecology cannot uniformly order water users to cease use based on their impairment of unadjudicated senior rights. If a long-time water user complains about their neighbor, Ecology can often do nothing but recommend the senior user file a lawsuit. The water code sets aside this process for adjudication, and it can only be done by the courts.
- **Permit-exempt wells.** Groundwater wells for providing water to stock and for small domestic and industrial uses are exempt from permitting. This does not mean such uses are exempt from water regulation entirely. Permit-exempt wells should not impair senior rights, and users need to stay within the legal maximum. These uses are relatively small but can add up over time, especially in areas with high water demand. Without

⁴ Pre-code claims are described below. The Washington State Supreme Court ruled on this very issue in *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993).

permits, Ecology does not have records of these uses. Notices of intent for well drilling have been required since 1987, but are not an exclusive or accurate count of permit-exempt uses. An adjudication would provide a simplified process for permit-exempt well users to confirm that they are not impairing senior water rights.

- **Pre-code claims.** Water use dating from before the 1917 water code was exempt from permitting, but some early uses remain. For many years these users were undocumented and nearly impossible to regulate. Some uses began originally under a riparian right that requires a specific legal process to be integrated into the priority system. The Legislature eventually required “pre-code” water users to submit claim forms to Ecology to register their pre-1917 water use. During the claims periods,⁵ thousands upon thousands of water users submitted claims. There is no process to review and compare these to actual water use; a vast number of these do not even appear to meet the minimum standards for claims (for instance, they do not list water in use prior to 1917). Still more may have been relinquished over the years or, even if currently used, may not accord with their original legal place or purpose. In the Yakima Basin, for example, most of the water rights eventually decreed emanated from pre-1917 claims and uses.
- **Tribal water rights.** In many watersheds, tribes have the earliest claim to water use. Federal law says that tribes hold water rights that are necessary for the purposes of their reservations, which could well include tribal claims to streamflows to support fish and wildlife. Unless adjudicated, this water has never been quantified and cannot be regulated. Ecology cannot require permits or enforce water use on tribal land. There is no way to be certain how much water tribes may claim. Tribal rights arise out of early treaties and executive orders, and will not simply disappear when they are ignored. This poses an inevitable risk to state water use. Lack of certainty under state law can also impede tribal communities in their own water regulation and planning. If Ecology does not initiate adjudications in state courts, quantification of tribal water rights may occur in federal court and potentially not as a part of an overall watershed analysis.
- **Enforcement and compliance.** Each Ecology regional office carries out enforcement and compliance of unlawful water use in local watersheds. This requires Ecology staff to make field visits, review water right documentation, and compare legal rights to water use. This is a time-intensive process that requires intensive staffing. Legal water use can be difficult to determine, and the abundance of permit-exempt uses and pre-code claims make enforcement nearly impossible in some watersheds. Ecology staff have to prioritize enforcement action where there are complaints about violations of instream flow rules or obvious misuse. Ecology does not have authority to determine priorities between unadjudicated senior and junior users, and therefore cannot fairly and consistently apply this process to all users of a water source.

⁵ The Legislature established a number of “open claims” periods between 1967 and 1999. See RCW 90.14.051-90.14.081.

- **Scattered appeals and litigation.** Enforcement orders, permits, and rules are all appealed through different channels of administrative and judicial review. This can lead to dozens of individual cases in a single watershed, each litigated on separate facts and law. This takes significant time and expense, and actions are not coordinated or consistent. Adjudication provides a single process where all factual and legal disputes on a water source are resolved together.
- **Without adjudication, water rights are only tentative.** Ecology regulates state waters by approving, certificating, changing and transferring water rights. Water users may invest substantial time and expense in this process. But all Ecology water rights come with a caveat: they are only tentative, and subject to prioritization and change in a superior court adjudication. This is because only the court has jurisdiction over the final determination of water rights. Adjudication is the only process to resolve this ultimate risk and provide legal certainty to water users.

The adjudication process

Adjudication is a key regulatory feature of the water code.⁶ Adjudication is the only process that provides a comprehensive inventory of all legal water uses, and allows for regulation in order of prior appropriation.

In adjudication, Ecology identifies a contested water source and joins all water users in a state court proceeding. The court “adjudicates” (judges) the history and legal status of each water right and issues a decree in order of prior appropriation. A court-appointed water master can then manage the rights so that, in times of scarcity, junior rights are curtailed before the senior ones.

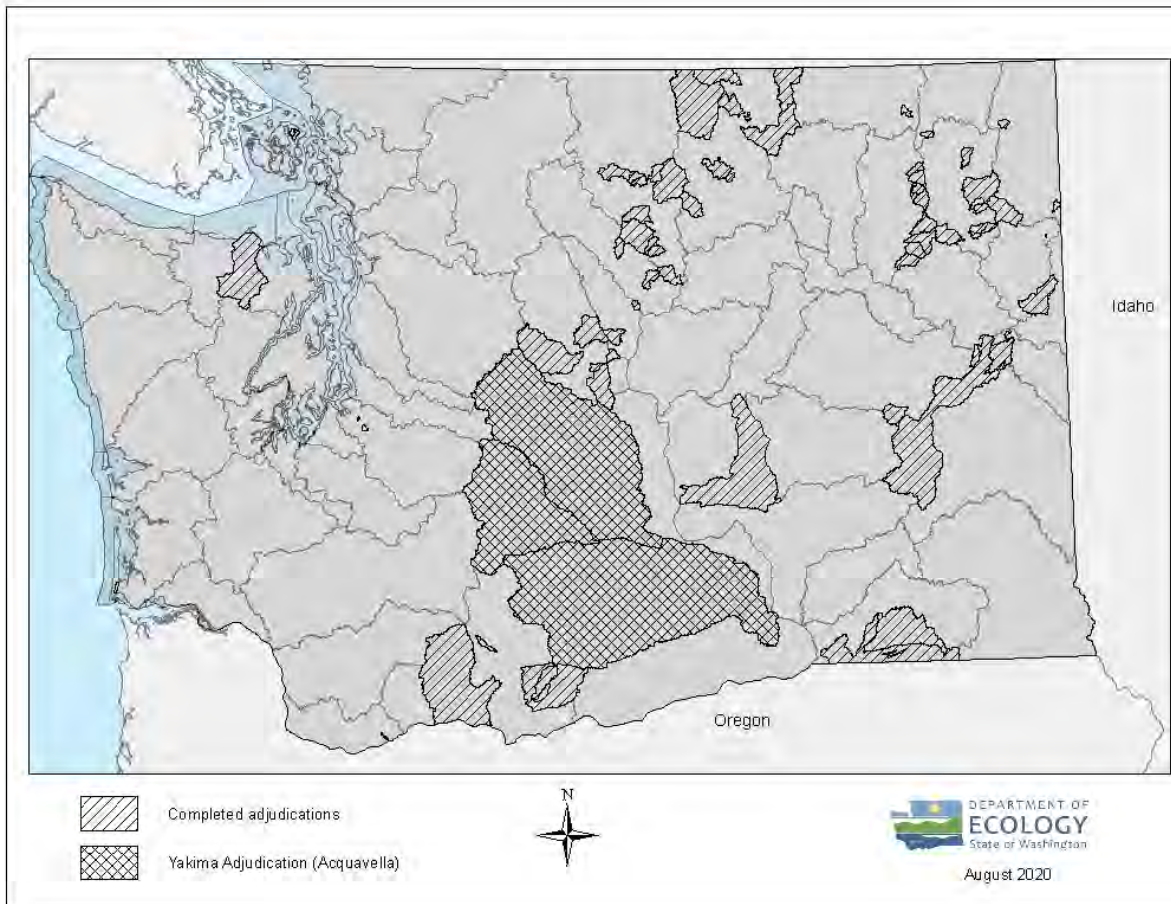
Adjudication is a powerful tool. Between the 1920s and 1970s, Ecology completed hundreds of small individual stream adjudications to resolve local water disputes (Figure 1). In these areas, Ecology is able to regulate users to protect senior water users. When Ecology begins a general stream adjudication – joining all parties to an entire water source – federal law provides that federal parties (including tribes, through their Department of Interior trustee) may be joined. This is a rare instance where the United States assents to state court proceedings (referred to as a waiver of sovereign immunity). Tribes (through the federal government) can also begin their own adjudication by suing the State of Washington in federal court.

Washington courts have completed one general stream adjudication: *Ecology v. Acquavella*, the general stream adjudication of the Yakima basin⁷. *Acquavella* addressed the water rights of the Yakama Nation, federal interests such as the Bureau of Reclamation, municipal suppliers, irrigation districts, and thousands of individual water users. *Acquavella* took over 40 years from filing to the entry of a final decree due to many years of dispute over jurisdiction, service, and appeals of these legal issues.

⁶ Adjudication is described in RCW 90.03.100-246 and RCW 90.03.620-645.

⁷ *Dep’t of Ecology v. Acquavella*, Yakima Superior Court No. 77-2-01484-5.

Figure 1 Completed water right adjudications in Washington state.



In 2009, the Legislature, anticipating future adjudications, amended the water code to address some of these disputes and streamline the adjudication process. Other disputes were resolved by appeals courts along the way; precedent should prevent the litigation of these same issues again. Though adjudication is inevitably a process that takes years, these improvements – along with modern evolution of electronic notice, filing, and document management – are expected to make future adjudications much more efficient.

Depending on the scope of an adjudication, staffing, and support, an approximate time frame for adjudication set out in RCW 90.03 will be:

- Year 1: Ecology delineates the water source (a system of surface water and any connected groundwater aquifers) and identifies water users through its own records and other public information.
- Year 2: Ecology prepares a Statement and Plan, along with a map of the area under investigation. The Attorney General's Office prepares a legal petition, which is filed in court with the Statement and Plan.

- Year 3: The court establishes deadlines for service and notice, and Ecology serves a summons to all water users. The court establishes deadlines and process for water users to respond to the summons. Water users may begin to file statements of claim.
- Years 4-6: The court at this time may divide the case into phases, subbasins, or other smaller processes. The court continues to set deadlines and resolve legal issues that arise. These decisions may be appealed by water users. Ecology staff reviews water rights and submits report(s) of findings to the court.
- Years 6-10: Ecology continues to provide reports of findings. Water users may object, offer evidence, or challenge the findings of other users' water rights. The court may issue conditional final orders as segments of the adjudication are completed. Parties may appeal those orders and additional legal issues may arise.
- Years 11-15: The court continues to review reports of findings and may issue conditional final orders. Legal issues may be appealed, resolved, or remanded to the court for further findings.
- Closing years: Legal issues are resolved. All conditional final orders are assembled into a final decree.

This complete pathway is depicted in Appendix D. Ecology's recommendation is to commence dual adjudications, maximizing the pre-adjudication and filing work of Years 1 and 2, so that multiple adjudications will then proceed in different regions according to the specific needs and timetables of those watersheds.

Adjudication is a long-term process. When considering these time frames, it is helpful to compare them to other efforts that also take many years. A single permit decision usually takes many months, and appeals can take between one and three years. Ecology invests significant time and effort providing technical assistance to help water users come into compliance, and litigation over enforcement actions is costly for both Ecology and the appellants. Watershed planning began in the 1990s and has yielded results, but plans have not resolved uncertainty of water rights. Adjudicated watersheds will eventually save money otherwise spent on permit investigations, enforcement and compliance work, and litigation over these and other Ecology water management actions.

Adjudication is a litigation process, but Ecology intends to provide a process where most users can submit their claims without attorneys. Permit-exempt users will be provided a simplified process. The water code encourages settlement prior to entry of a decree, and adjudication often motivates parties to settle as they draw near to a final determination of their rights. Federal support is often provided to tribes in this process, including settlement negotiations. An adjudication court will provide a framework for settlement with structure and deadlines that have been lacking from voluntary settlement discussions.

Ecology's 2020 adjudication assessment

Directive

As the *Acquavella* case came to a close, the Legislature directed Ecology to recommend whether and where the next adjudications should take place. This assessment and report is conducted under the Legislature's 2019 budget proviso which requires Ecology:

“[T]o assess and explore opportunities to resolve water rights uncertainties and disputes through adjudications in selected basins where tribal senior water rights, unquantified claims, and similar uncertainties about the seniority, quantity and validity of water rights exist.”⁸

Ecology's Water Resources Program conducted a competitive recruitment process and hired a full-time Adjudication Assessment Manager to conduct this assessment. Our new manager, a former Assistant Attorney General with significant water law experience, began work in October 2019 with a very short time to complete an extensive and complex assignment. An adjudication assessment must include interaction with the Administrative Office of the Courts to ensure consideration of the needs of the superior court that will undertake this sizable and lengthy project.

This report is provided to the Legislature as indicated in Ecology's 2019 Decision Package and budget request for this project.

Process

Ecology began this process with a general canvassing of regional water managers to ask two questions: 1. Where in your region are there pressing water challenges, uncertainties, or risks? 2. Could adjudication resolve these problems?

Through this process, the Water Resources Program refined the Legislature's general criteria for reviewing watersheds. It is not feasible to resolve all water issues statewide through legal processes such as an adjudication. Accordingly, the program sought to find the highest need for adjudication where some or all of the following were serious concerns:

- Ecology faces difficulty in regulating current water rights due to inadequate quantification, and an adjudication decree and concomitant schedule of rights will provide more consistent and uniform regulation.
- Water users are vulnerable to interruption, curtailment, or litigation by holders of unknown senior water rights.
- Past attempts to resolve issues through watershed planning, collaboration, and other efforts have been incomplete or unsuccessful.
- Improved regulation would protect streamflow.

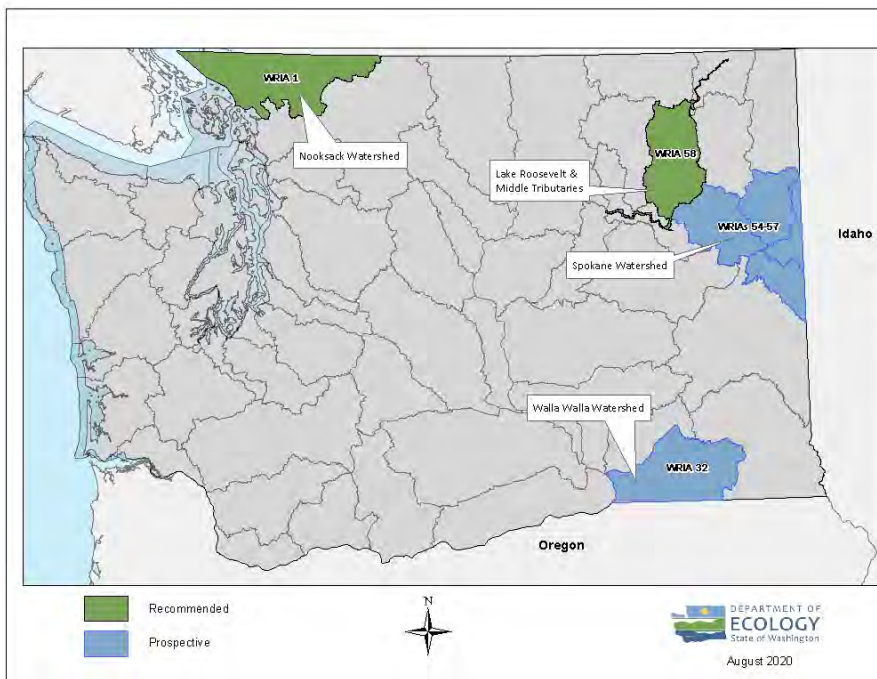
⁸ ESHB 1109, Section 302(6) (2019).

- Uncertainty or strain on water resources impairs the local economy, and clarity would serve to improve economic planning.
- The state, counties, and water right holders have significant exposure to potential legal risk due to uncertainty and unquantified claims.
- Water serves as critical aquatic habitat in urgent need of restoration or protection for the local ecosystem.
- Hydrology is accurate enough to delineate connected water sources.
- Tribal interest in taking part in an adjudication.

Ecology reviewed state watersheds, region by region, to determine where regional staff faced the most difficulties in managing water in line with the law. Adjudication staff reviewed historic court decrees, water rights records, and watershed planning reports to understand the history of permitting and planning in each area. Where problems were identified, staff met with stakeholders and local governments to assess interest, concerns, and challenges about adjudications.

Based on this and other related work, Ecology provides the following assessment. First, the most urgent watersheds, Nooksack and Lake Roosevelt and Middle Tributaries, are recommended for immediate adjudication. Second, the assessments of the Spokane and Walla Walla and other watersheds are described for prospective adjudication in the future (Figure 2). Last, a number of watersheds are described for potential future assessment (Figure 7).

Figure 2 Assessed Watersheds Recommended for immediate adjudication and prospective future adjudication.



Urgent watersheds recommended for immediate adjudication

Nooksack Watershed (WRIA 1)

Watershed

The Nooksack watershed is a diverse landscape of mountains, forests, farmland, and rivers, located primarily in Whatcom County in the northwest corner of Washington (Figure 3). The Nooksack River originates in the forested mountains of the northern Cascades, where snow melt feeds streams that are tributary to three forks (North, Middle, and South) that converge downstream to form the mainstem Nooksack River. The Nooksack mainstem continues through agricultural lowlands and enters Bellingham Bay between the Lummi Nation Reservation and the City of Bellingham.⁹ A number of groundwater aquifers support this system¹⁰.

The waters of the Nooksack River system face growing pressure from water users. The Nooksack watershed is critical habitat for threatened and endangered fisheries populations. Recent water disputes have involved rulemaking, unresolved tribal water rights, county growth management planning, and enforcement on non-permitted water use. Local collaborative management and settlement efforts, begun in the 1990s, have yet to fully resolve these conflicts. Climate change models predict that, in the coming decades, conditions for salmon will worsen while water demands will increase.

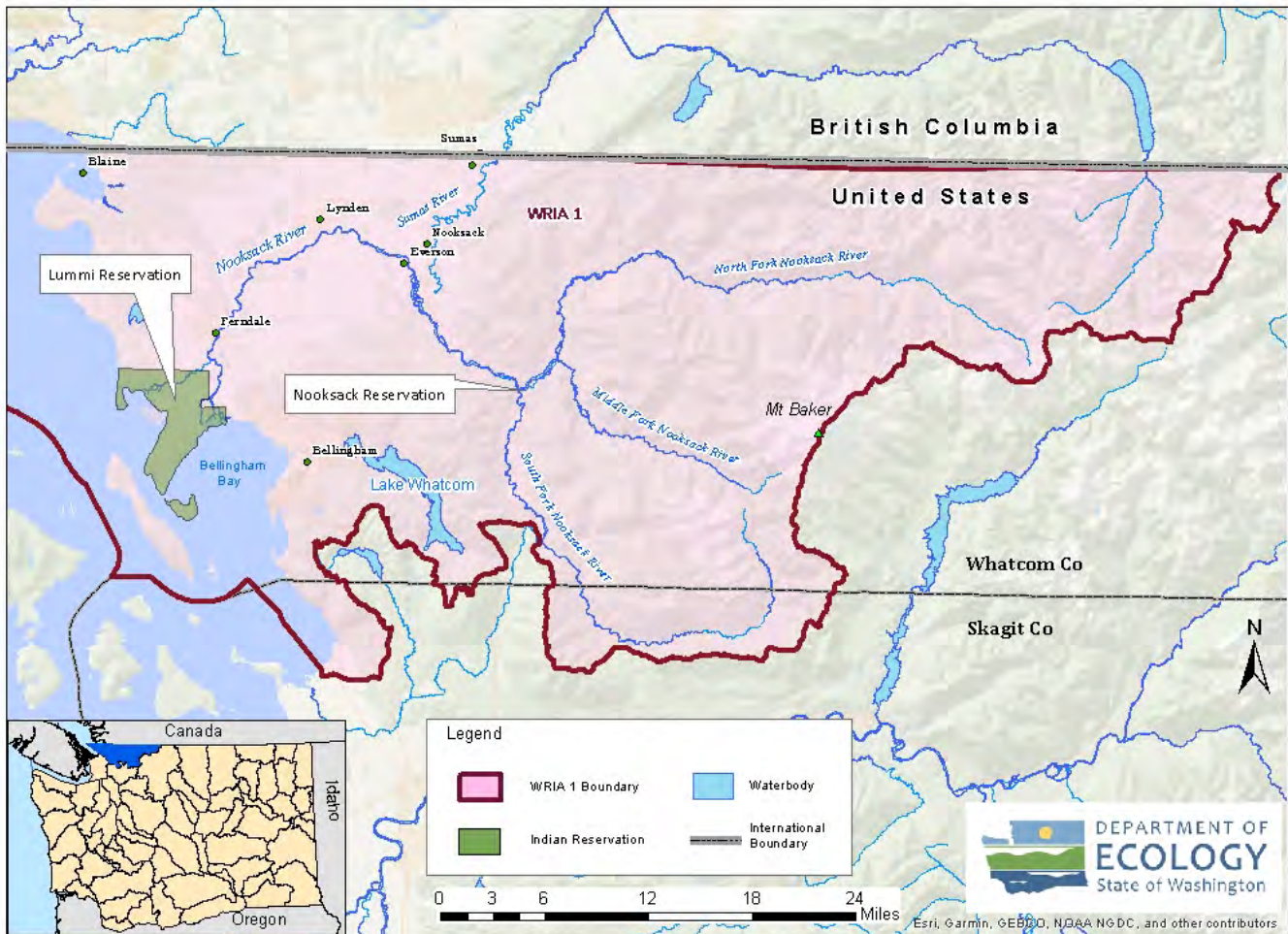
Collaborative groups of Nooksack-area interests, including local governments, Tribes, and agricultural interests, have met for many years to determine how best to restore salmon habitat while ensuring available water for use. Many of these interests – Tribes, fisheries, land development, a small municipal water district, environmental groups, along with the Department of Fish and Wildlife – support an immediate Ecology-led adjudication as a solution. Others, like the Whatcom Public Utility District, ask Ecology to continue to support collaborative efforts instead of initiating court proceedings at this time. Some, particularly within the agricultural community, oppose adjudication outright and argue for maintaining the status quo of their current water use. Since 2019, both the Lummi Nation and the Nooksack Tribe have petitioned Ecology to begin an adjudication, agreeing to the quantification of their federal treaty rights in local superior court. This presents an unprecedented opportunity to pursue state court adjudication without time-consuming litigation over jurisdiction.

⁹ Source for this section: 2010 State of the Watershed, WRIA 1.

<https://wria1project.whatcomcounty.org/resources/other-resources/2010-state-of-the-watershed-report>

¹⁰ Hydrological information in the Nooksack watershed is among the most up-to-date and comprehensive of any watershed in the state. See Ecology, 2013. *WRIA 1 Groundwater Data Assessment*. Publication No. 14-03-013.

Figure 3 Nooksack Watershed (WRIA 1) – Recommended for adjudication



Maps are for illustrative purposes only and do not represent a final determination of the proposed water source for adjudication. For any adjudication, Ecology is required to provide a map delineating the water source which will then be confirmed by the court.

Instream resources and habitat

Current Challenges

The Nooksack River system supports diverse wildlife, including providing migration spawning, incubation, rearing, and foraging habitats for all nine native Pacific Northwest salmonid species.¹¹ It is widely accepted among tribes, stakeholders, local, state, and national agencies and experts that land development and out-of-stream use of water in the Nooksack system have negatively impacted streamflow and water quality to the detriment of salmon populations. Historically, the Nooksack River had a broad delta that discharged water through distributary channels to both Lummi and Bellingham bays; the estuary environment supported

¹¹ Smith, Carol (2002); WRIA 1 Report (2010); Cramer (2019); EPA (2016); NMFS (2016); PSP Salmon Strategy (web page)

strong and diverse salmon runs. The Nooksack forks and tributaries provided valuable breeding ground for salmon returning from the ocean to spawn in mountain streams. The lowland mainstem, its tributaries, and the floodplain of the Nooksack also provided valuable salmon habitat.

Fish populations are declining, directly caused by habitat degradation. Diverting surface water for various uses – including domestic, commercial, municipal, industrial, and irrigation – has reduced the water available in streams, especially during spring to early fall. Groundwater aquifers are facing increasing pressure from well withdrawals which reduce water in connected streams and rivers. Low flows result in higher stream temperatures and lower dissolved oxygen, severely impacting the quality and quantity of fish habitat.¹² Insufficient streamflows impair migration, spawning, and rearing in several river basins affected by water withdrawals for municipal supplies and agriculture. This compounds the impacts to streams by other activities.¹³

Spring Chinook salmon, summer steelhead trout, and bull trout are listed as threatened under the Endangered Species Act. The Nooksack chinook populations are considered essential for recovery of the Puget Sound evolutionarily significant unit,¹⁴ and have been identified as one of the highest priority stocks of critical prey for endangered southern resident killer whales. Because Nooksack Chinook are one of the most important food sources for Puget Sound orcas,¹⁵ their habitat restoration is of the highest priority.¹⁶ Unfortunately, only 3 of 25 salmonid stocks identified in WRIA 1 by Washington State Salmonid Stock Inventories are currently considered healthy. The South Fork stock of Chinook, in particular, is on the brink of extinction. Habitat abundance and quality is directly impacted by the amount of streamflow.

In 1985, Ecology adopted chapter 173-501 WAC, the WRIA 1 instream flow rule. The rule closes certain surface waters, and connected groundwater, to new consumptive uses unless their impacts are mitigated under provisions of the law. A significant majority of the watershed is closed to further withdrawals/diversions in order to protect streamflow.

¹² Mantua, N. et al., 2010. Climate change impacts on streamflow extremes and summertime stream temperature and their possible consequences for freshwater salmon habitat in Washington State. (Change, 102(1(2), 187(223)).

¹³ Diking and draining; flood control; roads and armoring along the Nooksack mainstem; and the change of riparian land use. Converting forestland to agriculture and built environments has degraded habitat through the removal of natural shading, woody debris, filtering runoff, and other stream benefits.

¹⁴ An evolutionarily significant unit is a population of animals considered distinct for purposes of conservation. These populations may be defined as a “species under” the Endangered Species Act, 16 U.S.C. ch. 35 § 1531 et seq., even if they are not a “species” in the taxonomic sense.

¹⁵ NOAA Fisheries West Coast Region and Washington Department of Fish and Wildlife, 2018. Southern Resident Killer Whale Priority Chinook Stocks Report.

¹⁶ The July 2018 NOAA report includes a complete assessment of Puget Sound salmonid stocks, including the Nooksack populations.

Future Challenges

Growing evidence shows that climate change will only make the situation worse. Current models predict warmer and wetter winters, resulting in a decreased snowpack that melts sooner, moving peak streamflow earlier in the spring.¹⁷

Less snow means less water in streams over the summer. Warming air temperatures and declining snowpack may reduce river flows in summer, dry out small creeks, and lower water table levels in adjacent floodplains. Modelling shows likely stream temperature increases above critical thresholds in hundreds of miles of river. Climate change is projected to increase demand on water supplies, particularly during periods when streamflows are already low, further compounding pressure on already strained systems.¹⁸

Increased winter flows and lower summer flows are expected to negatively affect the species composition and structure of bordering riparian habitats. Earlier spring thaw increases runoff and flood risks, and may threaten survival rates for migrating adult salmon and smolt. Salmon and trout populations would be impacted by reductions in suitable spawning sites, egg survival, and rearing opportunities. Warm water damages Nooksack river salmon health, habitat, migration, and survival.

The University of Washington Climate Impact Group assessed the climate change vulnerability of riparian habitat in the Nooksack watershed and ranked it as “moderate to high” for its sensitivity to temperature and precipitation changes. Sensitive species include not only salmonids, but others such as bufflehead ducks, great blue heron, and broadleaf cattail that are especially vulnerable because they rely on small bodies of water that may dry out during summer months. Shifts in the seasonality and volume of streamflows will also influence local water table levels and soil moisture, further adversely impacting riparian vegetation and animals critical to a functioning ecosystem.¹⁹

A 2016 report of the U.S. Environmental Protection Agency identifies the need to “enforce water rights and incentivize water conservation in the lower South Fork valley to the extent possible (e.g., water banking)” to protect fish habitat in the face of climate change. The responsibility for water rights enforcement and water banking lies with the Department of Ecology.

¹⁷ Mauger, G.S., et al., 2015. State of Knowledge: Climate Change in Puget Sound. Report prepared for the Puget Sound Partnership and the National Oceanic and Atmospheric Administration. Available at <https://cig.uw.edu/publications/state-of-knowledge-climate-change-in-puget-sound/>

http://www.wbwc.org/images/Projects/Model/Reports/WWBIFES_ClimateChangeModeling_Report.pdf

¹⁸ Murphy, R. D. 2016. Modeling the Effects of Forecasted Climate Change and Glacier Recession on Late Summer Streamflow in the Upper Nooksack River Basin. Western Washington University.

¹⁹ *Climate Impacts Group, 2013. Washington State of Knowledge Report – Climate Change Impacts and Adaptation in Washington State: Technical Summaries for Decision Makers.* <https://cig.uw.edu/resources/special-reports/wa-sok/>

Out of stream use and water rights

The Nooksack system provides water for Whatcom County's many vibrant communities.

- **Municipal:** A number of major water systems draw surface water from the Nooksack River and Lake Whatcom: Whatcom County PUD #1, City of Bellingham, Lake Whatcom Water and Sewer District, the City of Lynden, and the cities of Everson and Nooksack. Most of the rest of the municipalities rely on groundwater as their source. In WRIA 1, there are about 200 large public water systems (Group A) and about 200 small public water systems (Group B). These systems serve about eighty percent of Whatcom county's residents and rely on water rights with priority dates generally between the 1940s and the 1960s.
- **Domestic:** Most of the remaining Whatcom county residents obtain their drinking water from private wells that are exempt from permitting as explained above. Disputes over water for future residential development led to *Whatcom County v. Hirst et al.*²⁰ and the subsequent streamflow restoration planning to offset these uses. New streamflow standards for future development are more flexible, but still require evaluation of available water rights, which will be easier with an adjudication. Adjudication is supported by land development interests because it would bring certainty to the real estate market.
- **Agriculture and Industry:** Whatcom County has many thousands of acres of irrigated agriculture, with a Whatcom County planning goal of 100,000 acres.²¹ Whatcom County is America's highest producer of red raspberries. Other berries, potatoes, corn, and dairy are also significant water users. Water use is necessary for crop irrigation and other agricultural water use such as stock watering, food processing, or dairy parlor wash down. Some industries are also large-scale users of both potable and non-potable water.

Agriculture in this area often relies on claims of early water use (prior to the 1917 surface water code) or older water certificates that have not been recently reviewed. Some agricultural land, originally used for dairy operations, converted to berry farms without a change or transfer of water rights. A report compiled for the Whatcom PUD compared mapped irrigated acres with water rights data and found some basins with hundreds or even thousands of acre-feet per year of water use in excess of authorized water rights.²² The Whatcom Agricultural Water Board asserts that of 40,000 irrigated acres in Whatcom County, an adjudication would impact at least fifty percent of

²⁰ In this case, the State Supreme Court case ruled that Whatcom County did not adequately review legal water availability in its Growth Management Planning process. *Whatcom County v. Hirst et al.*, 186 Wn.2d 648, 381 P.3d 1 (2016).

²¹ Whatcom County Council RES 2009-040. Also, see Whatcom County Agriculture Strategic Plan (Republished 07-27-2011).

²² See RH2 (2016). These watersheds include: Blaine, Dakota Creek, Semiahmoo, Padden Creek, Lummi Peninsula West, Sandy Point, Fishtrap Creek, Sumas City, Breckenridge Creek, Johnson Creek, and Saar Creek. <https://drive.google.com/file/d/1O51b3xQ5iJbPnJGGhEWvDes0XmRuIGII/view>

agricultural water use. This reflects extensive farming occurring throughout the watershed without a confirmed legal source of water. In an area of widespread noncompliance, there is little incentive for water users to have the legal status of their rights clarified or to comply with the law, and some agricultural interests oppose adjudication. On the other hand, farmers with legal water rights, having invested significant time and expense in purchasing and maintaining legal water uses, are not rewarded or motivated.

Beginning in 2006, Ecology undertook an extensive project to map all water rights (certificates, permits, changes, claims, and applications), using Geographic Information Systems (GIS), as a pre-adjudication effort. The agency completed this project and maintains up-to-date GIS mapping of all water rights in the watershed.

Ecology's records reflect approximately 5,400 holders of water rights in WRIA 1, including claims, permits, and certificates (Appendix A). Unless a particular water right has recently gone through a water right change or transfer process, it is not known whether the right is subject to relinquishment if water has been left unused for five years without a legal exception. Ecology does not have records of all permit-exempt well users. These users would be served in an adjudication by mailing all property owners outside the service area of a water purveyor.

Ecology faces profound difficulty in applying the existing law to current Nooksack water users. An extensive amount of agriculture in the area relies on non-permitted water use, with new irrigated farms developing every year. Enforcement and compliance is time-intensive work, and far in excess of what Ecology's regional compliance staff and water master can address. When Ecology does pursue formal enforcement, these actions go through the administrative appeal process and judicial review which require extensive staff and attorney time.

Current Watershed Planning Efforts

Local governments have collaborated on water management issues dating back several decades. The WRIA 1 Watershed Management Plan was adopted by the WRIA 1 Watershed Management Board, Watershed Planning Unit, and Whatcom County Council in 2005.²³ The plan states as its goals: water for use, fish restoration, and habitat improvement. For years, the Board and Planning Unit have met regularly, developed plans, acquired funding, and conducted research to attain a greater understanding of the watershed. However, this process has yet to resolve disputes of state or tribal water rights. Similarly, other attempts to advance negotiated settlement of water use and habitat restoration have not reached resolution. Based on this work, many participants in past negotiations (including tribes and Ecology) are uncertain how any resolution will be reached without the prospect of definitive resolution that adjudication provides.

²³ Membership information on the WRIA 1 Board and Planning Unit is available at <https://wria1project.whatcomcounty.org/about-us/wria-1-watershed-management-board/wmb-representation>
<https://wria1project.whatcomcounty.org/about-us/wria-1-planning-unit-caucuses-and-contacts>

All parties involved in the Board and Planning Unit agree that improved water management is necessary to resolve pressing needs of habitat, streamflow, and consumptive use. Whatcom County's Comprehensive Plan holds the goals to strive "to improve predictability to property owners" regarding legal water availability and encourage "a negotiated water rights quantification" with tribes and other water right holders.

Support for adjudication in the local community is widespread but not unanimous. In addition to the petitions of the Lummi Nation and Nooksack Tribe, Ecology received statements of support for adjudication from the WRIA 1 Planning Unit's Environmental Caucus, Land Development Caucus (including the Building Industry Association of Whatcom County and Whatcom County Association of REALTORS®), Fishers Caucus, as well as the Glacier Water District, RESources, a number of local individuals, and the Washington Department of Fish & Wildlife.²⁴ Opposition positions were received from the Whatcom Agricultural Water Board and other agricultural interests, the Private Well Owner's Caucus, and the City of Bellingham's Mayor. Statements of neutrality on adjudication, with strong support for collaborative solutions, were received from both the Whatcom County Executive and Whatcom Public Utilities District #1. Written position statements received are attached at Appendix B.

Tribes in the watershed

Both the Lummi Nation and Nooksack Tribe are signatories to the Treaty of Point Elliott and both of these federally-recognized tribes claim senior legal rights to Nooksack waters.²⁵ In addition to water reserved for purposes of their land reservations, WRIA 1 tribes claim a right to instream uses, including water for fish at their legally recognized "usual and accustomed" fishing grounds in the area of the Nooksack River, forks, and tributaries.

The people of the Lummi Nation traditionally fish in both salt and freshwater and harvest shellfish, and in their own words state that "[a]dequate instream flows are critical to the maintenance treaty fishery."²⁶ The Nooksack Tribe historically lived in the prairie uplands along the Nooksack River and fished in the Nooksack mainstem, forks, and tributaries. In the words of the Nooksack Tribe, "[t]he entire watershed is vitally important to the Nooksack way of life. The Nooksack people rely on the river not only for domestic use, but also for fishing, hunting and gathering and for almost all cultural activities."²⁷

The decline in fisheries has a serious impact on the health, culture, and well-being of tribal peoples. Many tribal communities still rely on salmon fishing and shellfish harvesting as a means of subsistence, income, and for ceremonial purposes. In the last 35 years, harvest levels have dropped significantly due to a decline in fish populations and shellfish bed closures due to water quantity and quality impairment.

²⁴ Washington Department of Fish & Wildlife indicates support for adjudication statewide, including in WRIA 1, though it does not endorse a prioritization of one over another.

²⁵ Lummi Indian Business Council, 2016. Lummi Nation Atlas: An overview of the history, natural and economic resources and government of the Lummi Nation.

²⁶ Lummi 2011 Request letter to Salazar (Appendix C).

²⁷ Nooksack Petition 2019 (Appendix C).

In 2001, after years of unsuccessful attempts to resolve non-Indian use of groundwater on Lummi Reservation land, the United States government on behalf of Lummi Nation, filed suit against the State of Washington in federal Court. This case was settled in 2007 between the State of Washington, Lummi Nation, the U.S. government and individual water users. Although the Lummi Nation claimed a senior right to the groundwater, the settlement agreement allowed water for existing and future development of non-tribal water use, subject to ongoing limits, metering, and monitoring.

Both Lummi Nation and Nooksack Tribe participated in negotiations for Nooksack watershed instream flows for a number of years. When negotiations were not successful, both the Nooksack Tribe and the Lummi Nation asked the U.S. Department of Justice to sue the State of Washington in federal court to quantify the tribes' water rights because the state had filed no adjudication and showed no intention of doing so. In 2015, the Lummi Nation initiated another round of settlement discussions aimed at resolving ongoing water management conflicts in the watershed; however, no resolution has been reached.

Both tribes have continued to participate in WRIA 1 Water Management Board work. Both tribes indicate that, while adjudication is necessary to verify their legal water rights, they are committed to working with the state and stakeholders collaboratively on broader water resources solutions within that context. The tribes ask for adjudication in order to keep all parties engaged in negotiation and to provide a binding legal mechanism for a final agreement.

The Nooksack Tribe petitioned in 2019 for a state adjudication in WRIA 1 (Appendix C); the Lummi Nation petitioned in January, 2020.²⁸ These petitions represent a significant shift in tribal willingness to participate in Ecology-led adjudication in state superior court.

A legal process to resolve treaty claims to water is important to tribes not only as a matter of sovereignty, but as a vital practical protection of fisheries, health, and community. Tribal populations are particularly vulnerable to impacts on the health of fisheries, because of its importance both as an economic driver and as subsistence and way of life for tribal communities. In 2016, Lummi Nation noted that, "(c)hanges away from the traditional diet have resulted in increased rates of diabetes, cancer, heart attacks, high blood pressure, and tooth decay."²⁹ Census data indicates a 21 percent unemployment rate in 2019 with 25 percent of the population with income below the poverty level.³⁰

Though both tribes have long shown a good-faith willingness to be cooperative in water management, their claims over Nooksack waters pose a serious legal and management risk to the state and all water users. This is a vast and inevitable challenge in state water management. Ecology ranks uncertainty about unadjudicated tribal water rights in the top tier of risks currently faced by the agency. The U.S. Environmental Protection Agency has identified

²⁸ Three other individual petitions have been received by Ecology: Tenmile Creek (1962), Nooksack River (1992), Lummi River (1992).

²⁹ Lummi Atlas (2016).

³⁰ The Lummi Nation Statistics Department estimated that 43.1 percent of Lummi families living on the Reservation during 2004 were living at or below 100 percent of the Federal Poverty Level. (Julius letter 2019).

“resolution of Tribal claims” as a high priority for protection of habitat.³¹ The Whatcom County Comprehensive Plan states that tribal water rights complicate water management (County Comprehensive Plan 10). A general stream adjudication would integrate and conform all tribal water rights into a complete inventory of rights that has long eluded water managers in the Nooksack basin.

Nooksack watershed summary

The Nooksack is subject to stark difficulty in the enforcement of extensive and ambiguous water rights. Improved regulation would enable protection of streamflows by clarifying legal stream protections and quantifying the legal quantity, place, and season of uses of valid water rights and vested claims. This information is not currently available. A generation of earnest and good-faith collaboration has not resolved water management in WRIA 1.

Adjudication would create the first definitive inventory of Nooksack water rights. This would, over the coming years, bring Nooksack water users into alignment with the law of prior appropriation. Adjudication would address the unknown, yet inevitable, challenges from tribes for recognition of their senior water rights. The State of Washington is positioned to provide a legal framework for a fair resolution of disparities among water users in line with the law.

There is widespread support for adjudication throughout the watershed; however it not unanimous. Organized irrigation interests, private well owners, and the Mayor of Bellingham have submitted statements indicating they do not support adjudication of the Nooksack watershed.

As in all areas, an adjudication will involve significant time and expense. Still, without an adjudication, water users and managers will continue to lack a complete inventory of the legal status of all water rights in the basin as determined through a fair process and a superior court decree. Ultimately, the adjudication will enable reliable water management and provide predictability and consistency that will serve the local economy. Court-affirmed water rights can be relied upon for water banking and markets in support of mitigation. The certainty of water rights will support governmental and private investments in water development projects. For these reasons, adjudication of the Nooksack is one of the highest priorities of Ecology’s Water Resources Program, and should be commenced as soon as possible.

Lake Roosevelt and Middle Tributaries (WRIA 58)

Watershed

Lake Roosevelt is the section of the Columbia River in northeastern Washington impounded by the Grand Coulee Dam. This assessment describes Lake Roosevelt along with the “Middle Roosevelt” drainage designated as WRIA 58, between Kettle Falls and the Spokane River at Fort Spokane. Fig. 5. The Upper Columbia River was historically a shallow, free-flowing river with numerous waterfalls and both ocean-going and resident fish. The land includes lowland sage

³¹ See 2016 EPA report.

steppe, pine savannahs, and alpine forest. In 1942, the construction of the Grand Coulee Dam created Lake Roosevelt as a reservoir. The Lake is 151 miles long and 82,300 acres in area. The dam and Lake caused relocation of villages and settlements, barred fish passage, and permanently changed the river ecosystem to a lake environment. The dam is the largest hydropower producer in the United States.

This is a rural, largely forested area with relatively little local demand for water in the tributaries. The primary water concern is Lake Roosevelt itself, which provides irrigation water throughout eastern Washington through the federal Columbia Basin Project. Columbia Basin Project irrigators do not hold individual water rights, but use water stored behind Grand Coulee Dam via contract with the U.S. Bureau of Reclamation and the Columbia Basin irrigation districts.

Colville Confederated Tribes claim water for their land reservation of over 470,000 acre-feet per year of Lake Roosevelt and WRIA 58 water with a priority date of 1872. They also claim aboriginal water rights for water for fish and wildlife with a priority of time immemorial. The Spokane Tribe also has a presumptive senior claim for Lake Roosevelt and Columbia River water.

The Colville Tribes' land reservation is over 2,100 square miles; the Spokane Reservation is over 240 square miles.³² Both the Colville and Spokane Tribes border Lake Roosevelt and share intertwined tributaries and aquifers with off-reservation land.

Even though the state issued water rights within reservation boundaries in the past, Ecology does not regulate or change these water rights without requesting case-by-case voluntary coordination with the tribe. This is the case even where the water use may draw from shared aquifers or impact off-reservation surface water. Conversely, without an adjudication, tribes have no legal process to verify the quantity and date of their water rights. The claims of the Colville and Spokane Tribes over the Columbia River pose one of the most profound uncertainties of water management in the state. Adjudication is the only tool to bring tribal water into alignment with state law.

Lake Roosevelt divides WRIA 58. The western half is within Ferry County. This is primarily the land of the Colville Reservation, including the small towns of Inchelium (population 409) and Twin Lakes (population 59). North of the reservation is the Colville National Forest, state Department of Natural Resources land, privately held forest land, and the state's Sherman Creek State Wildlife Recreation Area. The eastern half of WRIA 58 is within Stevens County and also includes the Colville National Forest, other wilderness and recreation areas, and some small farms. The Spokane Tribe's reservation is at the southeast end of Lake Roosevelt.

Precipitation is relatively low,³³ and only a fraction of snow and rain becomes groundwater available for well withdrawal. Most of the precipitation arrives during the winter months, when water demands are the lowest. In summer, the snowpack is gone, there is little rain, and

³² Neither of these totals include off-reservation Trust land.

³³ Middle Lake Roosevelt Watershed ranges from 10 inches per year near the mouth of the Spokane River to 30 inches in the higher elevations mountainous areas.

naturally low stream flows are dependent on groundwater inflow. This means that groundwater and surface water are least available when water demands are the highest. Groundwater access is limited by climate and geology and there is not widespread reliance on well systems.

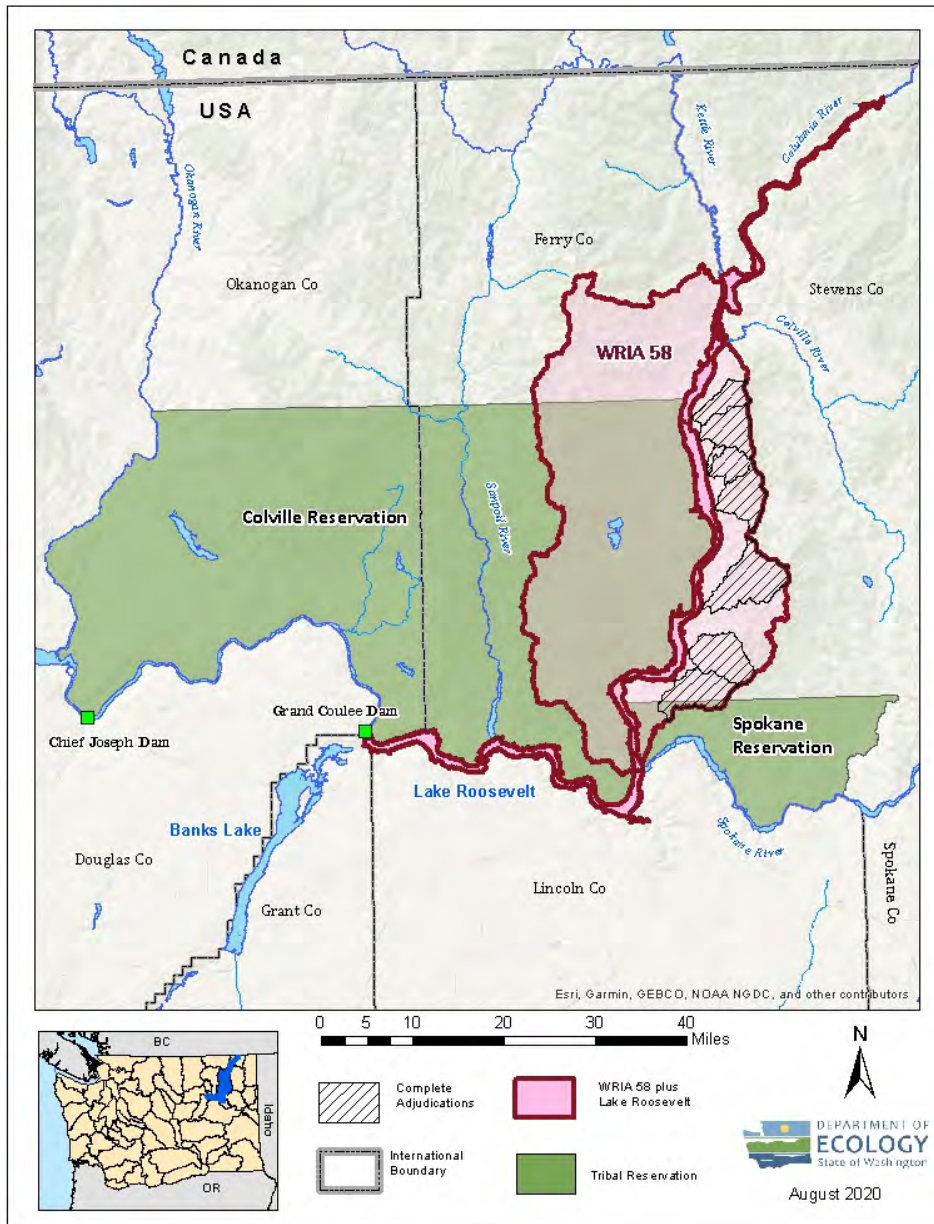
The water level in Lake Roosevelt is controlled by releases from the Grand Coulee Dam by the U.S. Bureau of Reclamation.³⁴ The reservoir is managed for power production, lake recreation flood control, releases of water for downstream flows, and irrigation water for the Columbia Basin Project. The Colville and Spokane Tribes and tribal members divert an unknown quantity of water from Lake Roosevelt for irrigation, water for wildlife habitat, and community use.

The operation of Lake Roosevelt is part of the Columbia River System Operations and their Environmental Impact Statement process, which reviews the operations, maintenance, and configuration of the dams and facilities throughout the Columbia River System under the National Environmental Policy Act.³⁵

³⁴ Lake Roosevelt Incremental Storage Release project regulates water levels. Lake levels can range from a high of 1290 feet elevation to a low of 1208 feet dependent on predicted snowmelt, power generation needs, fisheries and irrigation water releases, and at peak recreational periods. At full pool, the reservoir is 151 miles long, covers 82,300 acres, and stores approximately 9,562,000 acre-ft of water. When the reservoir was initially filled to full pool, over 70,000 acres of land was inundated.

³⁵ See Columbia River System Operations Environmental Impact Statement, July 2020.
<https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/14957>

Figure 4 Lake Roosevelt and Middle Tributaries – Recommended for adjudication.



Maps are for illustrative purposes only and do not represent a final determination of the proposed water source for adjudication. For any adjudication, Ecology is required to provide a map delineating the water source which will then be confirmed by the court.

Instream resources and habitat

Current Challenges

The Lake Roosevelt and WRIA 58 ecosystems, though irrevocably changed by dam construction, still support fish and wildlife and are also a cultural resource for tribes. When the dam was built, native fish species declined³⁶ because of lost reproductive opportunity and habitat degradation related to land-use practices and invasion of non-native plant species.³⁷ Changing reservoir levels cause fluctuations in fish populations. The current fish populations consist of both native fish and non-native fish introduced for recreation and tribal subsistence. Tribal hatcheries provide most fish to the region.³⁸ Water released downstream from Lake Roosevelt is vital to streamflow levels for fish habitat throughout the middle and lower Columbia River.

Area steelhead that return to the Upper Columbia are listed as threatened under the Endangered Species Act. Minimum reservoir elevation for Grand Coulee Dam is set in the fall to improve access to tributaries for spawning and to support zooplankton production, an important food source for resident kokanee (a species of non-anadromous sockeye salmon). The Lake Roosevelt drainage is also home to a diverse assemblage of large and small mammals and birds including gray wolf, grizzly bear, and listed species of bat, lynx, fisher, wolverine, shrew, birds, and amphibians.

Ecology has no instream flow rule for WRIA 58 tributaries. These tributaries are subject to individual permit restrictions established in conjunction with the Washington Department of Fish & Wildlife known as Surface Water Source Limitations (SWSLs), which limit uses of most water sources in the watershed. SWSL restrictions indicate that most water has been appropriated within tributaries to the mainstem of the Columbia River. In addition, portions of Ninemile Creek and the North Fork of Hall Creek are “closed” by SWSL, meaning new applications for water use will be denied based on Fish & Wildlife recommendation so the water body is effectively closed to new uses.

Future Challenges

Climate change models predict significant impacts in this area in the coming years. Reduced snowpack, loss of glaciers in the Canadian and northern U.S. Rockies headwaters of the watershed, warmer winters, more intense storm events, and hotter and drier summers will all impact Lake Roosevelt and the drainage. Increased lake level fluctuation will greatly impact habitat. Changing precipitation patterns and a fostered invasion by a host of non-native plant species may further alter lake ecosystems, and change upland vegetation communities. The National Park Service predicts a high potential of local extinction due to climate change for Lake

³⁶ Native westslope cutthroat trout, rainbow trout, bull trout, and mountain whitefish that were adapted to a free-flowing river environment faced an ecological disadvantage after the ecosystem changed with impoundment. Struggling fish populations combined with obstacles to fish passage resulted in declining native fish populations.

³⁷ E.g., agriculture, grazing, logging, and municipal development.

³⁸ Tribal fish hatcheries produces millions of salmon per year. Stocking lakes and streams throughout North Central Washington state.

Roosevelt's bird population and recommends improving habitat connectivity and reducing habitat disturbance.³⁹

Out of stream uses and water rights

In addition to the important fish and wildlife habitat described earlier, Lake Roosevelt and the WRIA 58 tributaries provide water for a variety of consumptive uses.

WRIA 58 tributaries

On the western half of WRIA 58, the state historically issued a small number of water rights on Colville Tribal land. Municipal use of tributary and aquifer water is limited to small local systems on the Colville Reservation at the towns of Inchelium and Twin Lakes within tribal jurisdiction. Ecology does not enter onto tribal land to monitor or enforce these water rights without coordinating with the Tribe. Tribal diversions from springs, creeks, or wells are not documented or regulated by Ecology.

North of the reservation boundaries, western WRIA 58 consists primarily of federal forest and other wildlife and recreation land. A small number of homes and farms have state water rights for agricultural and domestic use.

Eastern WRIA 58 is rural with no incorporated municipality. A small water district in the area of Hunters serves the local rural population. Nine stream drainages are regulated by an Ecology water master under adjudication decrees dating between 1924 and 1973. In general, most of the water on these adjudicated streams has been appropriated and new appropriations are not available from Ecology.⁴⁰ Little groundwater is available; there are a modest number of wells and certificated rights. A new general stream adjudication would not reopen the priority dates established by these decrees, but would integrate them into the overall priority system and update records to reflect the current legal status of previously adjudicated rights.

In south WRIA 58, the Spokane Tribe also has its own diversions and withdrawals on tribal land that are not regulated by Ecology.

Lake Roosevelt

The Columbia Basin Project permit system serves thousands of downstream irrigators who receive their water through contracts with the U.S. Bureau of Reclamation under federal water rights dated 1938. Though this permit system is administered by Ecology, these users are not

³⁹ <https://www.nps.gov/subjects/climatechange/upload/LARO-CFP-Action-Plan-508Compliant.pdf>

⁴⁰ Previous adjudications include Alder Creek (1924), Cheweka Creek (1924), Corus Creek (1926), Stranger Creek (1926), Quilisascut Creek (1929), Orapahan Creek (1931), Jennings Creek (1933), Harvey Creek (1972), Magee Creek (1973). A new general stream adjudication would not reopen the priority dates established by these decrees, but would integrate them into the overall priority system and update to reflect the current legal status of previously adjudicated rights.

holders of individual state water rights and do not require individual adjudication for quantity and priority.⁴¹

Ecology makes new water rights available for municipal, domestic, and industrial uses based on a program that releases water stored in Lake Roosevelt behind Grand Coulee Dam. New diversions from the river are available from the Canadian border south to Bonneville Dam, or from wells within a mile of either side of that stretch of the Columbia River, based on a contract between Ecology and U.S. Bureau of Reclamation.

Additionally, for all of Lake Roosevelt and WRIA 58, Ecology's records reflect approximately 843 holders of legal water rights, including pre-code claims, permits, and certificates. Unless these water rights have recently gone through a water right change or transfer process, it is not known whether they are subject to relinquishment for leaving water unused for five years without a legal exception. Similarly, it is not known how many of the pre-code claims are valid. Ecology does not have records of all permit-exempt well users. These users would be served in an adjudication by mailing all property owners outside the service area of a water purveyor. Full water right summaries are provided at Appendix A.

Current Lake Roosevelt and watershed management

In 2008, the Colville Tribes entered into an agreement with the three federal agencies responsible for operation and maintenance of the Federal Columbia River Power System: the Bonneville Power Administration; U.S. Army Corps of Engineers; and U.S. Bureau of Reclamation. This agreement is called the Columbia Basin Fish Accords. Through the Fish Accords, the Action Agencies provide long-term funding commitments to support implementation activities for the protection and recovery of salmon and steelhead listed under the Endangered Species Act. The Fish Accords recognize the Colville Tribes as a governmental partner in the protection and recovery of upper Columbia River Endangered Species Act listed salmon and steelhead.

In conducting this assessment, Ecology met with representatives of the Colville Confederated Tribe, Spokane Tribe, Stevens County, Washington Department of Fish & Wildlife, U.S. Bureau of Reclamation, U.S. Forest Service, the Bureau of Indian Affairs, and the Department of Justice.

Further outreach will be conducted to educate local water right holders before Ecology files the adjudication action in court.

Tribes in the watershed

Both the Spokane and the Colville Confederated Tribes claim senior legal rights to Upper Columbia waters, including Lake Roosevelt. The Colville Reservation was established by Executive Order in 1872, and the Spokane Reservation in 1881. Portions of both reservations lie

⁴¹ This is one of many issues legally resolved throughout *Acquavella*. Litigation of service of process in that matter lasted from 1981 to 1983. See RCW 90.03.120; *Dep't of Ecology v. Acquavella et al.*, 100 Wn.2d 651, 674 P.2d 160 (1983).

within the WRIA 58 drainage. Lake Roosevelt inundated areas of both land reservations after the construction of the Grand Coulee Dam.

Before the construction of the dams throughout the Columbia River system, tribal peoples relied on anadromous and resident fish as a keystone component of the native ecosystem and to provide cultural and subsistence fisheries. The vast impoundment behind Grand Coulee Dam is the cornerstone of a complex international Columbia River system that is operated predominantly for power production, navigation, and irrigation. The creation and operation of Lake Roosevelt caused drastic losses of fisheries and deep impacts on the tribes' cultures and traditions. Consistently since the construction of the Grand Coulee Dam in 1933, the Colville and Spokane Tribes have led regional efforts to restore viable fish passage throughout the managed river system. The legal assessment of tribal water rights in the Upper Columbia River, particularly Lake Roosevelt itself, has been a missing piece of this entire management system.

The land area of these reservations is very large (together they constitute nearly 3 percent of all land in the State of Washington). Water on Tribal lands is hydrologically connected to Lake Roosevelt and the waters of the State. Yet state and tribal water regulation is not integrated. Both tribes may manage water diversion and withdrawals within their own reservation boundaries. Ecology has in the past issued State water rights to users who choose to apply, but only enters reservation land to monitor or enforce water use when requested by the tribes. Tribes, similarly, are unable to address off-reservation water use, even when it is unlawful. Ecology enforces such use when it violates state law, but cannot stop state users from impairing tribal water rights. Tribal and Ecology staff regularly communicate and share information on water regulation, but are unable to comprehensively address these issues.

As with many tribal populations, the communities of the Colville and Spokane Reservations are disproportionately impacted by degraded ecological systems. The tribes are leaders in regional fishery and hatchery management, but still face significant health, cultural, and economic disparities. The tribes historically depended on fishing for food and income, a lifestyle that was permanently diminished by the damming of the river systems. For economic survival the tribes have relied on the timber industry, which is a declining and unstable source of revenue, and the mining industry, which left a legacy of contamination, health problems, and environmental damage. The Spokane tribal unemployment rate is 45.3 percent. The poverty rate is 37.6 percent.⁴² As with many tribal communities, environmental justice factors indicate disproportionate health impacts in almost every measure for the Colville and Spokane Tribes.

Federally reserved rights to water in WRIA 58 and Lake Roosevelt are not quantified at this time and thus the legal availability of water in these areas is undetermined. Federal courts have recognized the Spokane Tribe's right to water at the Eastern boundary of their reservation dating to the Executive Order.⁴³ To date, neither the Spokane nor the Colville Tribes' right to water in the Upper Columbia River have been quantified, prioritized, or recognized by a state or federal court.

⁴² Spokane Tribe of Indians, *477/TANF Annual Report for 2016*.

⁴³ The federal adjudication of Chamokane Creek is published at *U.S. v. Anderson*, 591 F. Supp. 1 (E. D. Wash. 1982)

The Colville Tribes petitioned in 2019 for a state adjudication. Ecology has consulted with the Spokane Tribe, which has indicated its support of adjudication to confirm senior Tribal rights and does not oppose state adjudication of Lake Roosevelt.

Lake Roosevelt and WRIA 58 Summary

Lake Roosevelt and the WRIA 58 drainage encompasses a rural area without a large population, and a small group (relative to other large watersheds) of individual users to join in an adjudication. However, due to the senior claims of the tribes to Columbia River Project water, this area is the most profoundly uncertain and vulnerable of any in the state. Adjudication will provide much needed certainty for both the Tribes and the State by integrating their water rights and management systems, which are currently independent of each other even where the water itself overlaps.

Adjudication of the Upper Columbia is one of the highest priorities of Ecology's Water Resources Program and supported by the Office of Columbia River, and should be commenced as soon as possible. Additional local outreach will be conducted prior to filing.

Watersheds for prospective future adjudication

Spokane River System (WRIAs 54-57)

Watershed

The Spokane River system flows from headwater tributaries to Lake Coeur d'Alene, across the Idaho border, through the largest urban area in Eastern Washington, to meet the Columbia River at the Spokane Indian Reservation. The river system is supported by the Spokane Valley Rathdrum Prairie Aquifer, which underlies both states. This system includes four distinct drainage basins that fall within the counties of Stevens, Pend Oreille, Spokane, and Lincoln:

- WRIA 54, Lower Spokane, forest and agriculture land with some small residential areas
- WRIA 55, Little Spokane, dispersed residential growth (fastest-growing in the area), small scale agricultural activities, and some forest
- WRIA 56, Hangman (Latah) Creek, agriculture and stock water with some residential
- WRIA 57, Middle Spokane, Spokane urban area and suburbs with surrounding agricultural areas

Each basin has a watershed plan (WRIA 55 and 57 are combined in a single plan). Spokane River system waters have recently faced protracted litigation over instream flow rules, permits, and senior water rights. Immediately to the east, Idaho is adjudicating the upstream section of the Spokane River drainage; Northern Idaho has one of the fastest-growing metro areas in the United States. The Spokane River system is also subject to the claims of the Spokane Tribe, which has an adjudicated right to instream flows in one tributary (Chamokane) to date. Other tribes may also claim rights to fisheries and streamflow in the area.

This is the largest area assessed in this report, consists of four water resources inventory areas and potentially including upwards of 40,000 water users. Adjudication would resolve extensive

unknown water rights and tribal claims to water, as well as strengthen Washington's position in negotiating cross-border waters with Idaho.

Figure 5 Spokane River System (WRIAs 54-57)



Maps are for illustrative purposes only and do not represent a final determination of the proposed water source for adjudication. For any adjudication, Ecology is required to provide a map delineating the water source which will then be confirmed by the court.

Instream resources and habitat

Current Challenges

All watersheds in this area are home to a number of fish species of concern that rely on healthy streamflows. Mountain whitefish are a target species in WRIA 54 and 55. Rainbow trout, including the redband trout population, are a target species throughout WRIsAs 54, 55, 56 and 57.⁴⁴ Decreases in streamflow have reduced spawning and rearing habitat. Watershed planning statewide emphasizes the need to protect fish habitat by improving streamflow, along with other habitat improvements such as riparian restoration and protecting watershed ecosystems.

Future Challenges

Climate change models predict a shift from snow to rain that will move peak flows to earlier in the season, reduce summer flows, and may result in warmer stream temperatures. This could decrease viable habitat for redband trout, which require cool water. Lower streamflows will increase predation of redband trout and increase competition from species such as smallmouth bass that thrive at higher temperatures. Earlier spring low-flows can also dewater the salmon's redds (egg-laying areas) during critical times, reducing viability of egg populations. At this time, Spokane River system temperatures are stabilized by cold water from the aquifer, which provides resiliency to the system. Current climate models project only small decrease in aquifer recharge over time as long as there is no significant change in water withdrawal from the aquifer.

The Spokane River system area has seen significant population growth in recent years. Ecology has issued water rights for a variety of consumptive uses of area surface and groundwater:

- **Municipal:** The City of Spokane provides water throughout the region, both directly within its service area and through interties by contract with outlying purveyors. The City of Spokane has a large right to inchoate (unperfected) water. Some West Plains-area purveyors, including Airway Heights in WRIA 54 and Cheney in WRIA 56, have had difficulty providing water to customers because of water quality and availability issues.
- **Domestic:** Residences outside of service areas largely rely on small systems and permit-exempt wells. Spokane County provides a water bank for new domestic uses in a portion of the Little Spokane watershed.
- **Agriculture and Industry:** Most agriculture in the region is "dry land" (non-irrigated) grain production. Other agriculture includes vegetable crops, fruit, cattle, dairy and nursery, generally in smaller farm operations.

⁴⁴ Other fish are bass and crappie, sturgeon, kokanee, brook trout. Chinook salmon have been re-introduced into the system; additional introduced species include walleye, bass, and brown trout.

Ecology's records for the Spokane River system reflect approximately 8,872 holders of water rights, including claims, permits, and certificates.⁴⁵ Thousands of these are pre-code claims that do not likely represent any valid water right. Unless these water rights have recently gone through a water right change or transfer process, it is not known whether they are subject to relinquishment for leaving water unused for five years without a legal exception. Ecology does not have records of all permit-exempt well users. These users would be served in an adjudication by mailing all property owners outside the service area of a water purveyor. See Appendix A for water right summaries.

Ecology has two instream flow rules applicable in the Spokane River System:

WRIA 55 (Little Spokane) Rule: The Little Spokane rule set instream flows in the upper and lower segments of the Little Spokane in 1976 and seasonally closed most tributaries and lakes in 2015.

WRIA 57 (Spokane River and Spokane Valley Rathdrum Prairie Aquifer): This rule set instream flows for the Spokane River and closed the Spokane Valley Rathdrum Prairie Aquifer. This rule is not enforced across state lines, and does not limit Idaho's ongoing permits for withdrawals within Idaho's jurisdiction.

Current Watershed Planning Efforts

All four basins of the Spokane River system have watershed plans:

WRIA 54 (Lower Spokane): The Lower Spokane Watershed plan, adopted in 2009, recommended a number of strategies to improve water quality and manage water resources. This plan emphasized water rights administration, efficient use, water storage to ensure water availability for future use, and protecting streamflows. The WRIA 54 Plan directly addressed uncertainties about water availability and lack of knowledge regarding actual water use. It recommended adjudication as "the only way to resolve the uncertainties" about water use which are "particularly acute because of declining river flows, increasing populations, climate change uncertainties, and the complexity of dealing with shared water resources across state boundaries."

WRIA 55/57 (Little Spokane and Middle Spokane): The WRIA 55/57 plan, adopted in 2006, emphasizes reduction in per capita consumption, limiting impacts of permit-exempt well withdrawals, and reducing summertime use. This plan mentions the uncertainty of potentially valid water rights represented by claims in the basin.

WRIA 56 (Hangman [Latah] Creek): This plan, adopted in 2005, is particularly concerned with groundwater demand that impacts the stream system, and the impact of permit-exempt wells on area streams. The plan indicates that groundwater rights are 80 percent of water use, but

⁴⁵ These include adjudicated certificates from the stream adjudications of Crystal Springs, Bigelow Gulch, and Deadman Creek.

that groundwater use exceeds aquifer recharge. A high priority called for in the plan is to carefully allocate future water rights for both instream and out-of-stream uses. It recommends initiating watershed-based negotiations to address cross-state line water availability.

Tribes in the watershed

The Spokane Tribe's interests are described in the section on Lake Roosevelt and Middle Tributaries (WRIA 58). The Spokane River system connects to the Columbia River at the Spokane Indian reservation. The Spokane people traditionally fished the Spokane River system in addition to the upper Columbia River now impounded as Lake Roosevelt. The waters of the Spokane River system, including Spokane Falls, have longstanding subsistence and cultural significance to the Spokane Tribe. In 1982, a federal water rights adjudication recognized the Spokane Tribe's reserved right to instream flows for Chamokane Creek, the site of the Spokane Tribal hatchery. The Spokane Tribe's claim to other water for reservation purposes, aboriginal cultural, or fishing, or otherwise have not been confirmed by a court.

In addition, the Coeur d'Alene Tribe, a federally-recognized Tribe in Idaho, has water rights interests within the Spokane River system that have not been addressed in a Washington state court. The Coeur d'Alene land reservation, established by executive order in 1873, includes Lake Coeur d'Alene at the Spokane River's headwaters.

The Kalispel Indian Community of the Kalispel Reservation hold a 1914 land reservation northward in WRIA 62 on the Pend Oreille River, which runs from Idaho north to Canada and is not directly connected to the Spokane River System. The Kalispel may also claim aboriginal fishing grounds on the Spokane River system.

Spokane River system Summary

The Spokane River system is a large area that includes four watersheds, over eight thousand water right holders, and upward of 24,000 rural landowners. This area is experiencing troublesome water rights uncertainty and challenges. Watershed planning has indicated the value of gaining certainty of water rights, especially in WRIA 54 (Lower Spokane). The most pressing issues are rapidly expanding development immediately upstream in Idaho; Idaho's ongoing adjudication on the upstream side of the state line; and potential claims of the Spokane Tribe, which is downstream of the entire river system.

Ecology considers the Spokane River system an area in need of adjudication as soon as resources are available. In 2011, Ecology compiled a substantial body of information in preparation for a potential adjudication at that time, but there was no funding to proceed. If possible within existing resources, Ecology will maintain those previously-compiled records to minimize the amount of additional information that would need to be gathered when attention can return to this watershed. Before recommending a court action be initiated, Ecology would need to conduct more outreach and assessment, including dialogue with other governmental agencies on both sides of the state line.

Walla Walla watershed (WRIA 32)

Watershed

The Walla Walla watershed (WRIA 32) is in Southeast Washington in Walla Walla and Columbia counties (Figure 6). The Walla Walla River and tributaries flow across the southern Oregon border into Washington in a heavily-appropriated ditch system. One of the main tributaries, Mill Creek, runs through the City of Walla Walla. From the North, the Walla Walla is fed by the Touchet drainage. The tributaries converge and flow to the Columbia River.

Water in this system has been heavily appropriated by agriculture since the territorial era. Seventy-five percent of the Washington-side Walla Walla basin is used for cropland. At certain times of year, the Walla Walla basin is over-allocated, resulting in stream dewatering unless water is bypassed by irrigation districts. Irrigators in both Washington and Oregon have been limited in their use of water based on terms of settlements under the Endangered Species Act.⁴⁶

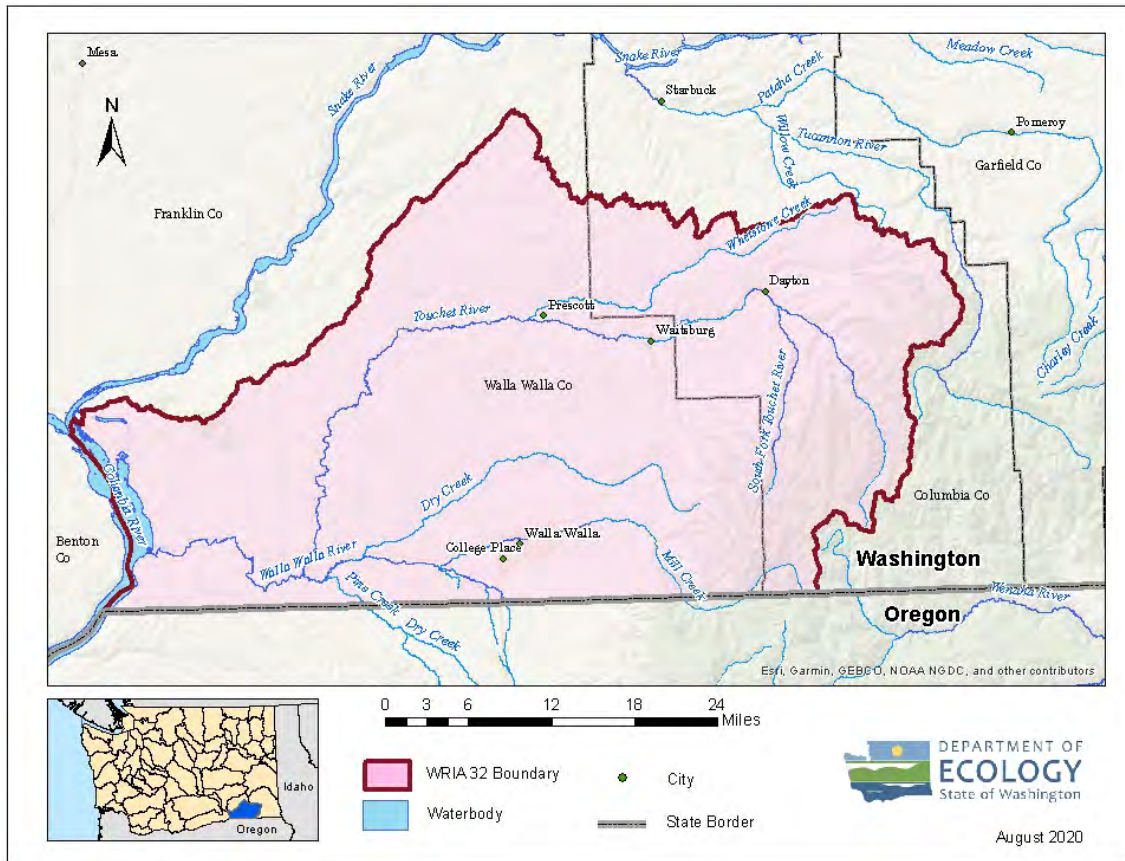
Because the Walla Walla watershed crosses the Washington-Oregon state border, managing for prior appropriation among users and streamflow presents serious challenges. A number of adjudications in both states set priorities of surface water users (groundwater is not subject to these decrees). In 1936, Washington sued Oregon for over-appropriation of water that prevented downstream flow to Washington users; the U.S. Supreme Court declined to order Oregon to release water to Washington. Ecology manages most Washington surface water use through water master regulation of court decrees prior to 1970. Current challenges involve dewatering of some reaches during summer months, the question of whether Oregon users prevent water from reaching Washington, and whether water passed into Washington for instream purposes is protected from consumptive use.

A variety of attempts have been made to resolve competing water demands in this area. In 2009, the Walla Walla Partnership was formed as a pilot project for a locally-structured water management system. Walla Walla water management will be addressed in a Legislative Report by Ecology's Water Resource program due this fall.⁴⁷ The area still lacks a comprehensive inventory and reconciliation of competing water rights and water supply shortages. At present, Washington also works with Oregon and the Umatilla Tribes on a collaborative and comprehensive approach to cross-boundary watershed issues until final resolution can be achieved through a comprehensive adjudication.

⁴⁶ <https://www.fws.gov/news/ShowNews.cfm?ID=2098160366>

⁴⁷ See 2SSB 5352 (2019).

Figure 6 Walla Walla Watershed (WRIA 32)



Maps are for illustrative purposes only and do not represent a final determination of the proposed water source for adjudication. For any adjudication, Ecology is required to provide a map delineating the water source which will then be confirmed by the court.

Instream resources and habitat

Current Challenges

The Walla Walla River historically supported significant runs of spring Chinook salmon, summer steelhead, bull trout, and rainbow trout. By the 1930s, stream dewatering and fish passage barriers led to the demise of the area salmon run. By the 1990s sections of the Walla Walla River and tributaries were running dry every summer. Bull trout and summer steelhead are now listed as threatened species under the Endangered Species Act. Individual irrigation districts in Washington and Oregon have invested in habitat restoration, conservation, and reduced use of surface water under state instream flow rules and agreements with U.S. Fish and Wildlife Service. Habitat has been improved due to recovery efforts of the past twenty years, and the Umatilla Tribes recently broke ground on a new hatchery. More habitat restoration is necessary, which will require improved management of water use.

Future Challenges

Climate change models predict that warmer winters and earlier snowmelts will result in greater reliance on groundwater and increased difficulties in meeting target Walla Walla River flows over summer months and into the fall.

Out of stream uses and water rights

Walla Walla water use predates statehood, and declining water availability was evident before the adoption of the state water codes. Courts in Washington and Oregon conducted stream adjudications of water rights between 1905 and 1929, generating separate decrees within their respective jurisdictions that did not account for cross-border impairment or integrate users into a single priority list. Washington began to issue surface water permits in 1917, added groundwater as of 1945, and conducted an additional small stream adjudication at Dry Creek in 1951. The last new water right was approved in 1992, and in 2007 the basin was formally closed to the issuance of new water rights. Current water use in Washington reflects the following:

- **Municipal:** The City of Walla Walla diverts water from Mill Creek, from a number of wells, and from a ditch diversion in Oregon that conveys water across the state border. Other municipal water systems include those serving College Place, Waitsburg, and Prescott.
- **Domestic:** Residences outside of service areas largely rely on small systems using wells, individual stream diversions, or permit-exempt wells.
- **Agriculture:** Farming is a significant economic driver of the area. In addition to dry-farmed wheat, crops include vegetables and vineyards. Irrigation rights are mostly held by irrigation districts that rely on surface water from regulated ditches.

Ecology's records reflect approximately 4,900 holders of recorded water rights, including claims, permits, and certificates.⁴⁸ Most of these are pre-code claims that do not likely represent any valid water right. Unless these water rights have recently gone through a water right change or transfer process, it is not known whether they are subject to relinquishment for leaving water unused for five years without a legal exception. Ecology does not have records of all permit-exempt well users. These users would be served in an adjudication by mailing all property owners outside the service area of a water purveyor. See Appendix A for water right summaries.

Current watershed management

Washington-side surface waters are regulated by Ecology's water master under adjudicated decrees. The instream flow rule of 1977, WAC 173-532, seasonally closes most streams and rivers, and limits future water withdrawals.

⁴⁸ See Appendix A for water right totals. Adjudicated certificates reflect previous stream adjudications of Stone Creek (1915), Doan Creek (1922), Upper Stone Creek (1923), Walla Walla (1927), Touchet (1929) and Dry Creek (1952).

In 2009, the Legislature authorized a pilot program for a local water management board, forming the Walla Walla Management Partnership to pursue the concept of “flow from flexibility.” This project continues subject to performance and financial audits to review its success.

The Partnership approves “local water plans” that provide flexibility to legal water right holders in exchange for enhancing flow conditions. Three local water plans have been partially implemented. The partnership also manages banked water, establishes voluntary critical low-flow plans, and enters into option contracts. This work has had modest success, and it is widely acknowledged that local flexibility has not resulted in sufficient restoration and enhancement of flows. Ecology has been directed to develop a thirty-year integrated strategic water plan, now known as the Walla Walla 2050 process. The strategic plan will incorporate new groundwater studies and extensive technical analyses of options to enhance flows.

The Confederated Tribes of the Umatilla Indian Reservation, Washington Department of Ecology, and Oregon Water Resource Department have regularly come together in an effort to address current and long term water resources in the Walla Walla basin. As part of its adjudication assessment, Ecology conferred with Oregon and the tribes about the prospect of an adjudication. There is not agreement about whether a state court adjudication in Washington is the best process for addressing streamflow needs and contested water rights at this time.

Tribes in the watershed

The Umatilla Reservation was established in 1855 for the Cayuse, Walla Walla, and Umatilla Tribes under the Treaty of Walla Walla, a Stevens Treaty that included the “exclusive right of taking fish” language that is common to Pacific Northwest treaties. The Umatilla Reservation is within Oregon, upstream on the Umatilla River. Tribal fishing is concentrated in the Umatilla River System, but tribes claim traditional fishing grounds throughout the Walla Walla system. The Umatilla Tribes historically relied upon fish as a “first food,” among the traditional foods that provide not only sustenance but cultural, economic, and sovereign benefit. Tribal restoration work has reintroduced spring Chinook into the Walla Walla system. Umatilla Tribes, at this time, have not made any request to the state of Washington for adjudication of Walla Walla waters.

Walla Walla summary

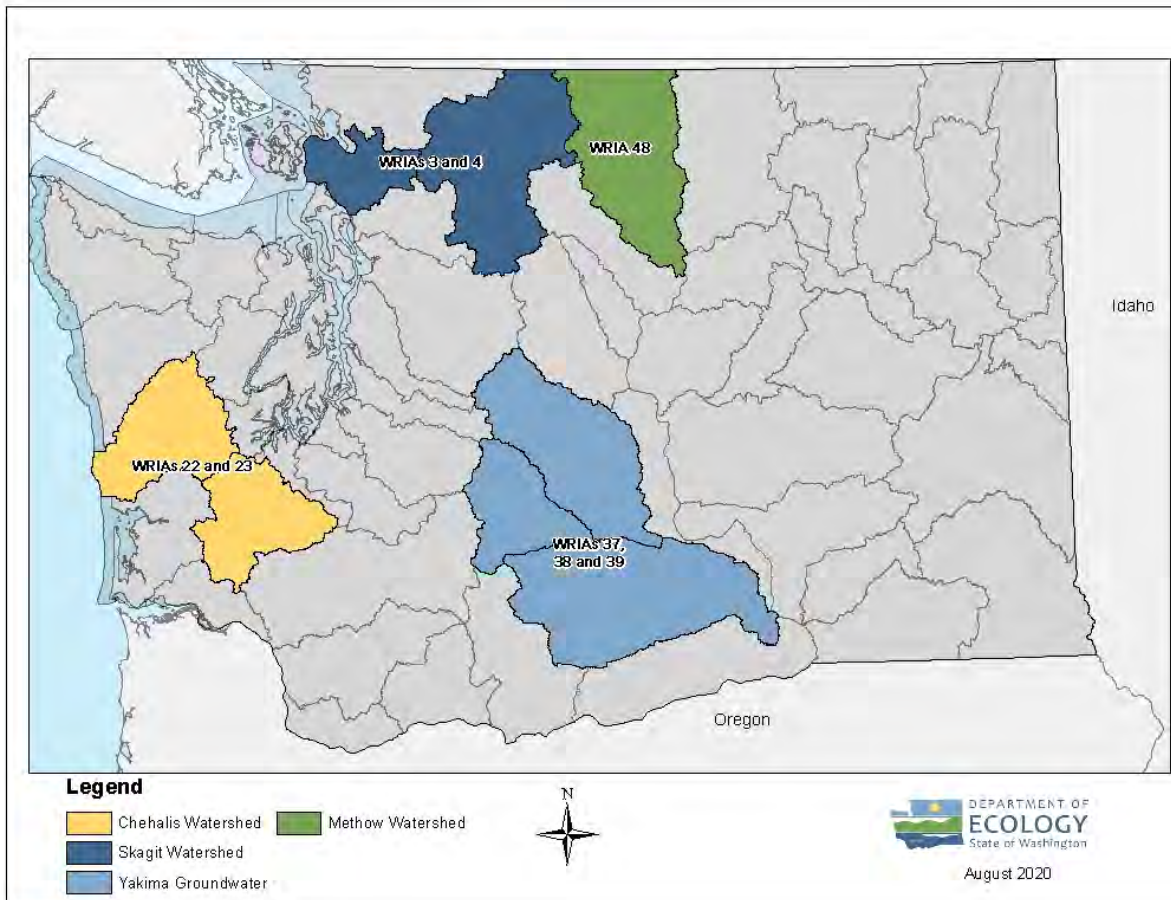
Adjudication of the Walla Walla watershed would provide a complete inventory of water rights, allowing integration of old adjudicated surface water rights with groundwater uses. This would provide more accurate and comprehensive water management in Washington, and would assist Ecology in understanding the use of water on the Washington side of the Walla Walla.

A Washington-side adjudication, however, would not directly address the use of water on the Oregon side of the basin. This raises complex legal questions of jurisdiction and venue. While there is a need to keep this basin under consideration due to problematic unresolved water rights conflicts, Ecology recommends further assessment, including collaborative work with tribes and the state of Oregon, before commencing an adjudication.

Watersheds for Future Assessment

In addition to the watersheds assessed in this report, Ecology has received inquiries about and interest in adjudication in other watersheds. Additional information and outreach is needed to determine whether adjudication would serve the public interest, resolve uncertainty, and benefit water management in these areas.

Figure 7 Watersheds for Future Assessment



Maps are for illustrative purposes only and do not represent a final determination of the proposed water source for adjudication. For any adjudication, Ecology is required to provide a map delineating the water source which will then be confirmed by the court.

- **Lower and Upper Skagit (WRIs 3 and 4)**

Ecology regulates streamflows and water use in the Skagit River system under chapter 173-503 WAC, promulgated in 2001. Water resource management is also guided, in part, by a 1996 Memorandum of Agreement (MOA) “Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes.” This MOA was signed by the two largest water purveyors in the watershed as well as county government, two state agencies, and the three basin treaty tribes. The Legislature has appropriated funds for Ecology to develop water solutions for permit-exempt domestic uses in the watershed.

Ecology recently developed new mitigation programs in the Big Lake area and along the mainstem Skagit River and continues to explore water solutions for small domestic users and agricultural water users. The Swinomish Tribe has submitted a written request for the Skagit River to be prioritized for future adjudication.

- **Upper Chehalis and Lower Chehalis (WRIAs 22 and 23)**

The Department of Ecology is responsible for regularly issuing water right curtailments on junior water rights in the Chehalis watersheds during low-flow seasons subject to WAC 173-522. Streamflow planning in this area is currently being conducted by the Chehalis Basin Partnership Planning Unit. Ecology's Office of Chehalis Basin administers funding related to flood damage reduction actions and habitat enhancements. The Quinault Indian Nation's reservation lands are located north of the Chehalis watershed, and its members have treaty fishing rights to Chehalis Basin waters. The Quinault Nation submitted a request to the Chehalis Basin Partnership in 2006 to submit a petition to Ecology for a state adjudication to protect tribal rights to water. The Quinault Nation and Confederated Tribes of the Chehalis Reservation participate in the current Chehalis Basin Partnership streamflow restoration planning effort, which is actively engaged in exploring options for flood control that will affect water and fish. More investigation is needed to determine whether adjudication is the best management tool to resolve water right uncertainty in the Chehalis watershed.

- **Methow (WRIA 48)**

Ecology regulates waters of the Methow River Basin under WAC 173-548. Many streams and lakes have been closed to new appropriations of surface water since 1976. New groundwater uses are not allowed if hydraulically connected to protected surface water. Okanogan County is responsible for making determinations of legal water availability for new building permits, although the last twenty years of judicial rulings have rendered some rule provisions problematic. A number of streams in this watershed have already been adjudicated. A petition from the Okanogan Wilderness League (OWL) in 2018 requested a general stream adjudication, and eight other petitions have requested stream adjudications within this system. Further investigation is needed to conclude whether adjudication would be in the public interest.

- **Yakima Basin Groundwater (WRIAs 37, 38, and 39)**

The *Acquavella* adjudication included all surface waters of the Yakima Basin, but not groundwater. As a result, groundwater rights are not regulated within the *Acquavella* management scheme. This has raised issues of fairness and consistency between groundwater and surface water uses. A new or expanded Yakima Basin adjudication could identify, prioritize, and quantify groundwater uses to integrate them with the priority of adjudicated surface water rights.

More assessment, including water rights review and hydrological evaluation, is needed to determine whether adjudication is in the public interest.

Cost Summary

Ecology has assessed costs of commencing the adjudications recommended in this report, and has submitted a decision package for inclusion in the Governor’s Budget in support of its funding request. First-biennium costs have been streamlined out of respect to current budget constraints. Ecology would conduct adjudication work primarily with existing staff within an agency budget that is reduced, as a whole, in line with current budget guidelines. A full timeline and estimate of costs is included in Ecology’s decision package of September, 2020. Department of Ecology 2021-23 Regular Budget Session, Policy Level DZ – Water Right Adjudications (Appendix E).

Ecology’s proposal for the first biennium will fund staff to complete the pre-adjudication and preparation work necessary to file petitions for adjudication in two state superior courts. This includes using current environmental specialist positions and adding manager and IT positions. It also includes legal support through the Attorney General’s Office and funds for the Administrative Office of the Courts for initial costs of assessing and preparing courts for adjudication filing. This funding will reassign water resources staff, currently finalizing work from the *Acquavella* adjudication, with minimal additional funding needed for data systems, legal support, and costs to the courts.

Requested Ecology Staffing

Job Class	Salary	FY 2022	FY 2023	FY 2024	FY 2025
WMS BAND 2	108,000	1.00	1.00	1.00	1.00
IT APP DEVELOPMENT	112,179	1.00	1.00	1.00	1.00
ENVIRONMENTAL SPECIALIST 3	61,219			1.50	2.00
TOTAL FTEs		2.3	2.3	4.0	4.0

Summary of Staffing Resources and Legal Support Funding Needed Each Biennium

2021-23 Biennium:

- FTE WMS Band 2 (ongoing)
- FTE IT Application Development Specialist (ongoing)
- AGO Support \$97,000
- AOC Support \$97,000

2023-25 Biennium:

- 1.5 FTE ES3 (ongoing)
- AGO Support \$200,000
- AOC Support \$200,000

As is mandated by RCW 90.03.110(2)(a), Ecology consulted with the Administrative Office of the Courts on the impact and needs of appropriate Superior Courts before filing adjudications. Ecology's conversations have been productive and the proposed costs in the accompanying decision package cover further assessment and commencement of filing. Whatcom County Superior Court and Spokane Superior Court would be the most practical places to conduct the two adjudications deemed urgent.

During the assessment phase funded in fiscal year 2021 (FY 21), Ecology has made significant progress toward pre-adjudication work. Continued funding will allow Ecology to continue and complete pre-adjudication work and initiate the court filings in FY 2022. This funding also will maintain Ecology's current capacity of three staff and legal advisors who have extensive experience in the *Acquavella* adjudication. Transitioning the small skilled team of existing staff to new adjudication work will avoid the costs of losing current skilled staff and institutional skill and knowledge.

Ecology recommends commencing adjudications in both the Nooksack and the Lake Roosevelt and Middle Tributaries watersheds. Concurrent adjudications will allow for work to continue apace on both cases. Like all major litigation, adjudications involve slower periods while the court and parties (including Ecology) are addressing procedural issues, await court or appellate rulings, and transition between issues. Nooksack activity will involve more upfront service of a large number of individual water users, while the relatively small number of users to be served in Lake Roosevelt/WRIA 58 will likely proceed later. Initiating two adjudications in tandem will be far more efficient than if adjudications were delayed or spread out over the coming years.

Due to the imminent legal and ecological risks of uncertain water rights, urgent water needs, impacts of climate change, critical habitat and development challenges, and rare opportunity to bring tribes voluntarily into state courts, this is a high-priority budget request for 2021.

Conclusion

Adjudication is a serious, even daunting, prospect. But it is no less serious or daunting than the continued conflict that unadjudicated water rights inevitably bring. Population increase and climate change only exacerbate these conflicts. Adjudication is the tool provided in state law to resolve lingering questions about priorities and quantities of lawful rights to use water.

Certainty around water rights provided through adjudications will remove doubt that hangs over irrigation and other uses, and will support reliable decision-making for local economies. Court decrees will resolve outstanding questions about water rights available to address fisheries and streamflows. Through adjudication, locally-developed collaborative solutions and negotiated settlements can be formalized into court decrees and made final rather than tentative.

Further, adjudication of a watershed provides real opportunity for long-term planning and strategic investments, as the Yakima basin has shown with development of the Integrated Plan

and its associated comprehensive water management solutions⁴⁹. Moreover, petitions recently submitted to Ecology by three federally recognized tribes provide the state with unprecedented opportunity to incorporate even the most senior Tribal water rights into these comprehensive adjudications.

In furtherance of its legislated directive and mission to work toward integrated water management throughout the state, Ecology respectfully submits this report describing our findings and recommendations.

⁴⁹ <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-supply-projects-EW/Yakima-River-Basin-projects/Yakima-integrated-plan>

Appendix A Water Right Summaries

Table A-1 Water right summary for assessed basins

	Spokane	Nooksack	Walla Walla	Lake Roosevelt and Middle Tributaries
Water Resource Inventory Area(s)	54-57	1	32	58 + Lake Roosevelt
Certificates (includes adjudicated certificates)	2,611	1,788	3,562	659
Adjudicated Certificates	147 ⁵⁰	0	1,507 ⁵¹	360 ⁵²
Permits	64	46	25	14
Applications	83	531	75	8
Claims ⁵³	9,600	4,768	3,299	742
Total Ecology Water Right Records	12,358	7,133	6,961	1,423
Total known persons claiming water rights ⁵⁴	8,872	5,436	4,902	843

⁵⁰ Adjudications of Crystal Springs (1931), Bigelow Gulch (1928), and Deadman Creek (1986).

⁵¹ Adjudications of Stone Creek (1915), Doan Creek (1922), Upper Stone Creek (1923), Walla Walla (1927), Touchet (1929) and Dry Creek (1952).

⁵² Adjudications of Alder Creek (1924), Cheweka Creek (1924), Corus Creek (1926), Stranger Creek (1926), Quilisascut Creek (1929), Orapahan Creek (1931), Jennings Creek (1933), Harvey Creek (1972), Magee Creek (1973).

⁵³ As explained in the Report, a vast number of claims were filed with Ecology during the open claims periods. Many of these do not in fact claim water in use prior to 1917. The number of claims on record is therefore far greater than actual parties of interest with valid claims to legal water.

⁵⁴ This reflects unique owners: the above total of water right records with duplicate owners removed.

Table A-2 The Water Code provides Ecology with three alternatives for identifying parties for adjudication: (1) identifying all real property owners outside a water service area (2) identifying the total known persons with water rights or (3) both those property owners and those persons with water rights. RCW 90.03.110(1(a)). These are the individuals named by Ecology and served with a summons in an adjudication lawsuit. RCW 90.03.120(2). Ecology would also identify and serve all federal and tribal parties potentially claiming water, provide notice by publication, and conduct community outreach.

	Spokane	Nooksack	Walla Walla	Lake Roosevelt and Middle Tributaries	Notice provision
Water Resource Inventory Area(s)	54-57	1	32	58 + Lake Roosevelt	
Rural landowners (owners of real property outside the service area of a municipal or other water right purveyor)	24,049	14,014	6,164	1,819	RCW 90.03.110 (a)(i)
Total known persons with recorded water rights	8,872	5,436	4,902	843	RCW 90.03.110 (a)(ii)
Total rural landowners AND persons with recorded water rights	32,921	19,450	11,066	2,662	RCW 90.03.110 (a)(iii)

Appendix B

Written Comments Received

MEMORANDUM

TO: Robin McPherson, Adjudications Assessment Manager, DOE
FROM: R. Perry Eskridge, WRIA 1 Land Use Caucus Chair *RPE*
DATE: September 28, 2020
RE: Adjudication of the Nooksack River Watershed – WRIA 1

This memorandum memorializes statements by the WRIA 1 Land Use Caucus during meetings of the WRIA 1 Planning Unit and conversations with Robin McPherson, Adjudications Assessment Manager for the Washington Department of Ecology concerning the possibility of adjudicating water rights in the Nooksack River watershed – WRIA 1 (“Watershed”). The Land Use Caucus supports adjudication of the Watershed for the reasons provided below.

It is no secret that Whatcom County has performed poorly planning and administering water availability within WRIA 1. The casual observer would be forgiven for believing that the only water issue within Whatcom County, given the amount of time and resources expended, would be water quality in Lake Whatcom. While local governments have had a singular view focused nearly entirely on that lake, other similarly important issues of water availability and management of water resources in the county have been left to languish. This is not to say that Whatcom County hasn’t created a myriad of executive-branch boards and committees to study the issues (*e.g.*, the Watershed Management Board, the Watershed Management Team, the Watershed Staff Team, The Joint Board, etc.) *See Attachment “A” for the “Clarified” Management Structure.* The result is watershed planning that seems to spend hundreds of millions of dollars but resolves no issues.

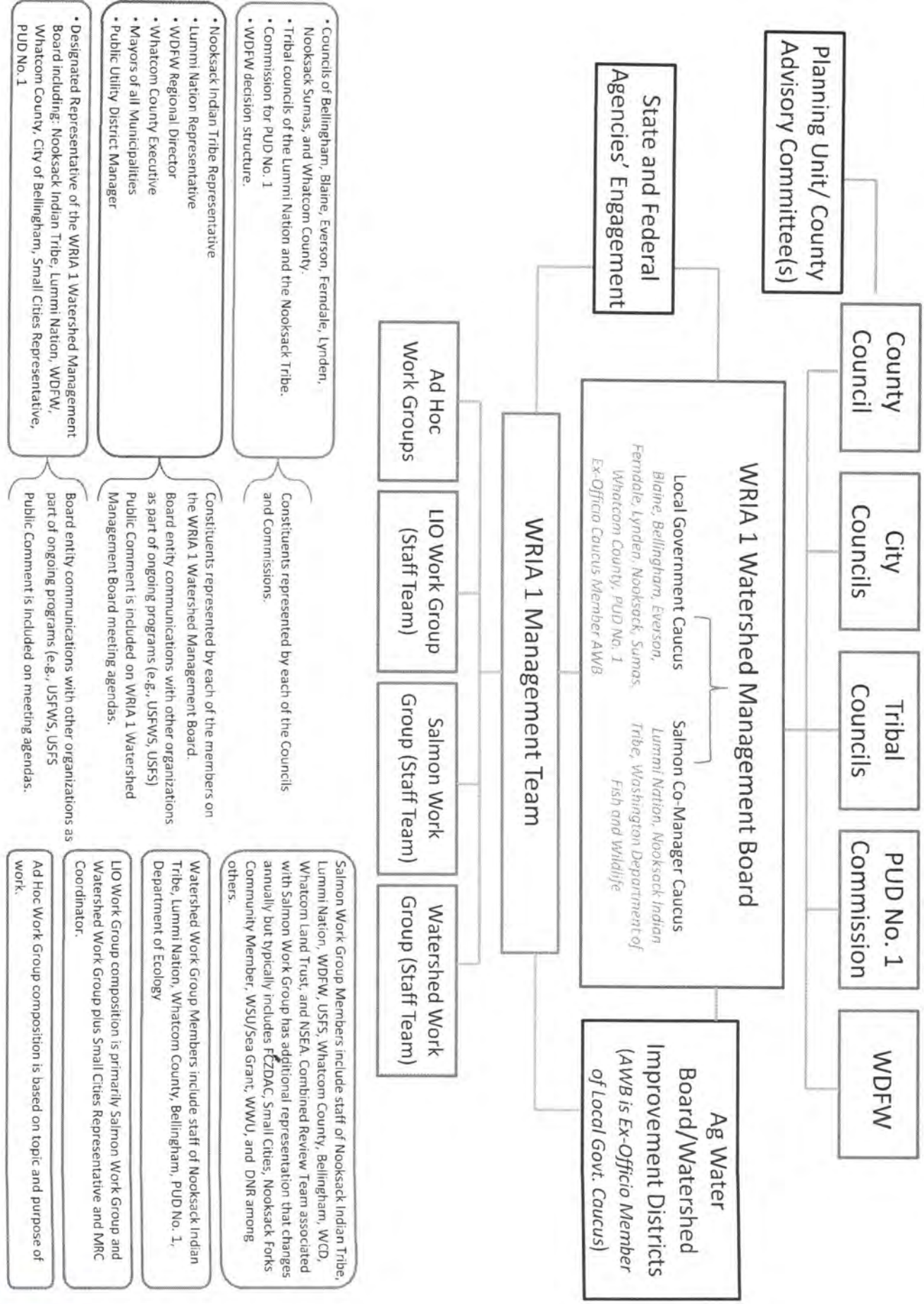
Reading the numerous comments submitted by members of the public, combined with nearly three years of public meetings following the Washington Supreme Court decision in *Hirst vs. Whatcom County*, it is clear that no party is too far from the same objective stated by the Land Use Caucus on multiple occasions: certainty with respect to water quantity and permission to use. The tribal interests wish to have certainty for water sustaining salmon populations while private well users want certainty that wells are available to support a rural lifestyle. Cities seek certainty for sustainable water quantities for ever-growing populations while agriculture seeks certainty for irrigating crops. After nearly three years’ work trying to develop an administrative rule that would form a solid foundation for moving watershed planning forward and failing at that effort, it now seems that the only path forward is watershed adjudication. That failure stemmed from the inability of the various parties to put aside suspicions ranging from treaty fish quantities, fears of rampant construction of private and exempt wells, and agricultural operations reliance on non-permitted water withdrawals to maintain the county’s agricultural economy. Indeed, the antithesis of certainty is suspicion.

The only process currently available to provide the certainty necessary ensuring Whatcom County citizens have access to sufficient quantities of water is adjudication. No other process will resolve the legal standing and claims of the numerous individuals claiming rights to withdraw water for a wide variety of purposes. Adjudication will also establish the priorities for those claims allowing those with more senior rights to rely on a sufficient supply of water. Using a judicial process to verify the various claims and prioritize the right to withdraw provides the sought after certainty that nearly every participant in this process proclaims is necessary. Moreover, the process will lend certainty with the determination of how much water remains available for appropriation, for what uses, and for what periods of time in the future.

Much has been said about wanting to engage in a “settlement” of water issues within the Watershed. Negotiation is preferred to litigation in all circumstances as the parties fashion a workable solution with

benefits to all involved. Indeed, the Land Use Caucus' response to claims that adjudication is undesirable has been to suggest that the interests representing various water users engage in a "negotiated rulemaking" process to establish a watershed-wide rule, complete with new in-stream flow requirement, to satisfy the needs of those interests and establish a process to manage water resources in the future. Such interest in a collaborative effort would have been preferable prior to the call for adjudication, but the specter of lengthy and expensive litigation might place parties on notice that a negotiated resolution is the preferred route. It should also be noted for completeness that settlement is possible following the evidentiary phase of adjudication, with or without a mediator, to resolve competing water claims within the Watershed. *See*, Rev. Code Wash. § 90.03.645 (2020).

The Land Use Caucus has been steadfastly committed to the statutory framework for watershed planning within the Watershed. The Caucus participated with the goal of developing a working process for determining water availability and planning for the foreseeable future in Whatcom County, however, those managing even the statutory process have permitted that process to deviate to a condition in which certainty of water usage and planning are nearly impossible. As stated by another Land Use Caucus representative, "Standing, fidelity to the law, due process and transparency are our concerns. And we think that adjudication is [now] the best way to address concerns going forward. Since without it, nobody really knows what right [that person] owns."



1 **WRIA 1 PLANNING UNIT CAUCUS INFORMATION**

2 **Purpose:** To inform existing and prospective caucus members, the PU, and the Lead Agency, of the current
3 status of the structure, function, goals and concerns of each PU caucus. It is presumed that existing and
4 prospective caucus members could rely on the information to determine if, and if so, to what extent, the
5 existing caucus leadership/representative(s) accurately represent their interests at the PU.

6 **Update Logistics**

7 **1. Date updated submitted: July 2, 2020**

8
9 **2. Does the information in this update reflect the 2019 Caucus status, structure, and operation? If not,
10 will there be an update in early 2020 to reflect current status, structure, and operation?**

11
12 **-There is no change to the Caucus status, structure, and operations.**

13 **Name of Caucus**

14 **Land Use Caucus**

15 **WRIA 1 Planning Unit Representative**

16 Name: R. Perry Eskridge

17 Email: perrye@wcar.net

18 **WRIA 1 Planning Unit First Alternate**

19 **Name:** David Onkels

20 **Email:** david@onkels.com

21 **WRIA 1 Planning Unit Second Alternate (if applicable)**

22 **Name:**

23 **Email:**

24 **Caucus Composition**

25 1. What groups are represented by this caucus? The caucus represents nearly every member of the real
26 estate, building, and land use professionals in Whatcom County. The primary organizations are the
27 Building Industry Association of Whatcom County and the Whatcom County Association of REALTORS®.

28 2. How does the caucus integrate new members? Because nearly every member of the caucus is
29 represented by the two primary organizations, new members are integrated when they join or
30 otherwise associate with those organizations

31 3. Does your caucus utilize a steering committee? If so, please indicate the current membership of the
32 committee. No.

- 33 4. Briefly identify the over-arching goals, issues and interests that have been identified by your caucus.
34 Our primary concern is the availability for water for continued development within the rural areas of
35 Whatcom County. Whatcom County has long had a rich agricultural tradition, a tradition that requires
36 households willing to continue that tradition and have access to domestic water to support the families
37 seeking to live a rural or agricultural lifestyle.
- 38 5. Please estimate the number of current members of your caucus. Please provide an estimate of the
39 number of active caucus members if it is different than the membership number. 1050

40

41 **Caucus Representative**

- 42 1. Have your representatives or alternates changed from those that are currently posted on the WRIA 1
43 Project website? (wria1project@whatcomcounty.org) If so, please indicate the new contact
44 information. No.
- 45
- 46 2. Please describe the means of communication between representatives and caucus constituency, and
47 the frequency of communication. The primary organizations maintain a robust communication
48 program with members. The REALTORS® have nearly 1,000 members and affiliated organizations alone
49 and the BIAWC has a comparable number.
- 50 3. Please describe the communication structure used to assure the representative is speaking on behalf of
51 the constituency. The primary organizations both have government affairs committees. Those
52 committees regularly convene with the representatives attending those meetings. Between the two
53 committees, the caucus representatives receive excellent direction for addressing issues.
- 54 4. How do you keep the constituency informed about Planning Unit meetings, discussions, and seek
55 advice and comments? See 2 and 3 above.
- 56 5. How regularly do you meet? Please indicate the total number of meetings of the caucus held last year.
57 If you have a steering committee, please also indicate the number of meetings held by that group last
58 year. The BIAWC Government affairs committee meets twice per month and the WCAR government
59 affairs committee meets once per month. E-mail communications are no less than twice per month.

60 **Committee, Work Group, and/or Team Participation**

- 61 1. What process is used to assure that individuals selected by the caucus to participate on committees
62 and work groups are representing the issues and interests of the caucus during these meetings? We
63 utilize the robust communication strategy outlined above to regularly communicate Planning Unit
64 developments to the memberships.
- 65 2. How do individuals participating on the committees and work groups report back to the caucus? Via
66 the e-mail communications and in-person government affairs committees.

67

McPherson, Robin (ECY)

From: Bob Carmichael <Bob@CarmichaelClark.com>
Sent: Tuesday, June 30, 2020 4:54 PM
To: McPherson, Robin (ECY)
Subject: FW: city of Bellingham adjudication letter and reminder June 24 board meeting

THIS EMAIL ORIGINATED FROM OUTSIDE THE WASHINGTON STATE EMAIL SYSTEM - Take caution not to open attachments or links unless you know the sender AND were expecting the attachment or the link

Robin,

Below is an email dated June 22nd to Becky Peterson of the Planning Unit from Commissioner Ellen Baker on behalf of Glacier Water District in support of adjudication of water rights in WRIA 1.

Bob

Robert A. Carmichael | Attorney
bob@CarmichaelClark.com



CARMICHAEL CLARK, P.S.
ATTORNEYS AT LAW

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Bellingham, WA 98225
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F. 360 647 1501
CarmichaelClark.com

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If you receive this communication in error, please call immediately 360-647-1500 and return this e-mail to Carmichael Clark, PS at the above e-mail address and delete from your files. Thank you.

From: Deborah Ellen Baker <Bakerwa1@outlook.com>
Sent: Monday, June 22, 2020 8:39 PM
To: Bob Carmichael <Bob@CarmichaelClark.com>
Subject: FW: city of Bellingham adjudication letter and reminder June 24 board meeting

Sent from [Mail](#) for Windows 10

From: [Deborah Ellen Baker](#)
Sent: Monday, June 22, 2020 8:24 PM
To: [glacierwater](#)
Subject: FW: city of Bellingham adjudication letter and reminder June 24 board meeting

Just "for the file" (watershed planning).

Sent from [Mail](#) for Windows 10

From: [Deborah Ellen Baker](#)

Sent: Monday, June 22, 2020 8:23 PM

To: [Becky Peterson](#)

Cc: [Dan Eisses](#); [Richard Banel](#)

Subject: FW: city of Bellingham adjudication letter and reminder June 24 board meeting

Importance: High

Hi Becky,

Kathy Sabel let me know that you're putting something together about Planning Unit caucus position statements about adjudication (something to that effect).

Through COVID, the WWDC (Whatcom Water Districts Caucus) hasn't met, but I've repeatedly stated – for the record, at Planning Unit meetings – that Glacier Water District has discussed the matter and the commissioners unanimously support adjudication.

If there's still time to include that fact in whatever section would address districts' input, it would be 100% accurate to include this statement:

“The commissioners of Glacier Water District support adjudication of water rights in WRIA 1.”

Best to you,

Ellen Baker, Commissioner

Glacier Water District

Sent from [Mail](#) for Windows 10



Re: Fishers In favor of Adjudication in the Nooksack River Basin

The Fishers Caucus is a member of the *WRIA 1* Watershed Management Planning Unit. Certain members of this Caucus are involved in the commercial fishing industry in Whatcom County. Others are in local environmental groups, are fisheries biologists, natural resource managers, or interested citizens.

In-stream water quality and water quantity are two key factors determining whether the streams in *WRIA 1* will provide the essential habitat for salmon throughout the freshwater part of their life cycle. The Nooksack River Watershed and the salmon have experienced long standing water quality and quantity issues. Summer flows in the Nooksack River and in its tributaries, known historically as important in salmon production, are in many cases over-allocated either for surface water removal or by the effect of ground water removal on stream flow.

Salmon populations throughout Puget Sound, including within *WRIA 1* and Marine Area 7-B, have been in deep decline for many decades. A consequence is the difficulty in the management of salmon harvest when populations are depressed.

Adjudication could bring interested parties and water users together to finally determine those who legally have water rights and to what degree. The desirable outcome of adjudication is the establishment of rules and regulations that will provide the broadest beneficial ecological services within *WRIA 1* including those supplied by healthy salmon populations whose numbers are heavily affected by low stream flows during critical months.

For the objective of having sustainable salmon populations, a key component of a healthy ecosystem's goods and services, the Planning Unit's Fishers Caucus recommends Washington's Department of Ecology to establish adjudication in *WRIA 1* to bring all parties together to produce a negotiated settlement. Additionally, the Fishers Caucus, by consensus, supports the petition of the Lummi Nation and the Nooksack Indian Tribe for adjudication.

Shannon Moore, Fishers Caucus Representative: *WRIA 1* Planning Unit



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

Robin McPherson
Adjudications Assessment Manager
Washington Department of Ecology
Robin.mcpherson@ecy.wa.gov

via Email only

July 31, 2020

Dear Ms. McPherson:

CELP strongly urges Ecology to select the Nooksack River basin (WRIA 1) as the next Washington basin to be adjudicated. The Nooksack is an important river system that supports native runs of wild chum, chinook, coho, and pink salmon, as well as other salmonids including bull trout and steelhead. The Tribes with reserved fishing rights in WRIA 1 (the Lummi Nation and Nooksack Indian Tribe) have requested action by the Federal Government to judicially determine their reserved water rights, including water for instream flows to protect their rights to fish and in turn the habitat on which those rights depend. *See* Letter from Nooksack Tribal Council Chairman Robert Kelly to Interior Secretary Ken Salazar, dated March 11, 2011; Letter from Lummi Indian Business Council Chairman Clifford Cultee to Interior Secretary Ken Salazar, dated June 6, 2011 (“Lummi Nation Letter”).

The Nooksack’s runs of Chinook, Steelhead, and Bull Trout are ESA-listed as threatened. 79 Fed. Reg. 20802; 64 Fed. Reg. 58910. These salmon stocks are increasingly imperiled by low stream flows and increased water temperature. Water temperatures frequently exceed safe levels for salmon, particularly in the South Fork of the Nooksack as well as tributaries to all three forks. *See* Carol J. Smith, *Salmon and Steelhead Habitat Limiting Factors in WRIA 1, the Nooksack Basin*, Washington State Conservation Commission (2002) at 171-3. “Inadequate” streamflows have been identified as a pervasive problem throughout WRIA 1. *Id.* at 173.

All forks of the Nooksack, as well as the mainstem downstream of their confluence, are designated as critical habitat for Puget Sound Chinook and for Puget Sound Steelhead. 50 CFR 226.212. Critical habitat designation includes:

[T]he stream channels within the designated stream reaches, and includes a lateral extent as defined by the ordinary high-water line (33 CFR 319.11). In areas where ordinary high-water line has not been defined, the lateral extent will be defined by the bankfull elevation. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain and is reached at a discharge which generally has a recurrence interval of 1 to 2 years on the annual flood series.

In other words, critical habitat includes the entire stream channel up to and including the channel occupied at high/flood stages, not merely whatever stream channel is occupied at a low flow level

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resulting from diversions of water. The critical habitat designation includes identification of primary constituent elements (PCE):

c) *Primary constituent elements.* Within [the critical habitat] areas, the primary constituent elements essential for the conservation of these [Distinct Population Segments]s are those sites and habitat components that support one or more life stages, including:

(1) Freshwater spawning sites with water quantity and quality conditions and substrate supporting spawning, incubation and larval development;

(2) Freshwater rearing sites with:

(i) Water quantity and floodplain connectivity to form and maintain physical habitat conditions and support juvenile growth and mobility;

(ii) Water quality and forage supporting juvenile development; and

(iii) Natural cover such as shade, submerged and overhanging large wood, log jams and beaver dams, aquatic vegetation, large rocks and boulders, side channels, and undercut banks.

(3) Freshwater migration corridors free of obstruction and excessive predation with water quantity and quality conditions and natural cover such as submerged and overhanging large wood, aquatic vegetation, large rocks and boulders, side channels, and undercut banks supporting juvenile and adult mobility and survival;

50 C.F.R. 226.212

Adequate streamflows are a key part of these PCE, and are already under tremendous pressure due to over-appropriation. The instream flow was set by Ecology in 1985, and is likely inadequate for fish habitat.¹ WAC 173-501. But even this minimal flow is frequently not met, particularly in the critical late-summer period. Any further reduction in flows would be harmful to critical habitat and to the listed salmonid populations, and is impermissible. And streamflows cannot be protected without gaining control of diversions, most importantly preventing further diversions that would adversely affect habitat.

Adjudication is a prerequisite to gaining control of diversions from the Nooksack. In addition to flow reduction by permitted diversions of water, the Nooksack appears to suffer more from unpermitted and illegal diversions than other rivers in the state. Numerous surface diversions from the River that appeared not to be associated with valid water rights have been brought to Ecology's attention in the past. *See, e.g.*, letter from Merle Jefferson, Lummi Nation Natural Resources Department, to Ecology Director Maia Bellon, dated July 14, 2015.

While the exact fraction of water use that is unpermitted is unknown, statements by the Whatcom Ag Water Board are telling. In a position paper circulated in opposition to adjudication, this organization argues that:

¹ A 2013 study looked at the amount of habitat available for various salmonid life stages as a function of flow rate. Bandaragoda, C. and Joanne Greenberg (2013), *Data Integration of WRIA 1 Hydraulic, Fish Habitat, and Hydrology Models*. Nooksack Indian Tribe, Whatcom County, WA; WRIA 1 Joint Board. As one example, that study found that fish habitat in the South Fork Nooksack was optimized at flows between 500-1400 cfs, with lowest optimal flows in August, September and October of 530, 731, and 1000 cfs, respectively. These numbers are much higher than the 1985 minimum instream flows adopted by Ecology for those months of between 300 (August) – 650 (Oct. 31). WAC 173-501-030(2).

A water rights adjudication would ultimately result in a significant loss of irrigated agriculture, and other types of water rights would also be eliminated or reduced. Whatcom County has approximately 40,000 acres of irrigated agriculture, thousands of acres and likely at least 50% of agricultural water use would be negatively impacted by an adjudication.

Position Paper on Water Right Adjudication in the Nooksack Basin, Whatcom Ag Water Board (2020).

Because holders of legitimate water rights would generally not be adversely affected by adjudication, this is tantamount to an admission that a great fraction of water use in the Nooksack, perhaps up to 50%, is unpermitted and therefore illegal. This is a damning indictment of the current situation, and reinforces the need to determine whose water use is lawful and whose is not. The solution to illegal water use is not to pretend it is not occurring (and therefore allow streamflows to be illegally depleted) but to identify and stop unpermitted uses. And an adjudication is a crucial first step to accomplishing that goal.

Illegal water use not only harms the river, but it works an injustice on junior water right holders when illegal users effectively jump to the head of the line. Water users whose rights are junior to the instream flow are subject to regulation when that flow is not met. To the extent that illegal users deplete flows in the river, they make meeting the instream flow less likely and make curtailment of lawful junior users more frequent. Adjudication of the Nooksack basin would protect water users who have followed the law and applied for water rights under the Water Code. A court's determination of extent and priority would provide much greater certainty for legitimate water users and help to avoid inevitable conflicts as flows become even lower.

Adjudication, by providing certainty about the quantity and priority of water rights, will simplify management of the river. It has been very difficult to come to an agreement about how the Nooksack should be managed; the most recent example of this is failure of the WRIA 1 Planning Unit to reach agreement on how to provide water to compensate for new permit-exempt domestic uses. Uncertainty about water rights, and rampant illegal diversions, contribute to this difficulty. Unauthorized water use cannot be reliably quantified. Without accurate knowledge of how much water is actually being used, Ecology cannot make reliable determinations of whether and where water might be available for new users.

Adjudication of the basin would also provide important incentives for wise water management. One tool that has been effective in putting limited water supplies to their best use is water banking. Lack of certainty about the precise contours of water rights in WRIA 1 may be a factor discouraging participation in water banking. Holders of water rights may be reluctant to subject their rights to the scrutiny that accompanies making water rights available as part of a water bank. And water users who are allowed to continue illegal use have little incentive to purchase or lease water through a bank. By providing certainty about the extent and validity of water rights, adjudication could encourage water banking.

Adjudication would also provide a formal acknowledgement that there are limits to water availability, which would incentivize efficiency in water use. Wider adoption of water conservation techniques would allow some of the water now used by lawful right holders to be "spread" to provide water for would-be users who lack legal rights.

Climate change will exacerbate conflicts by reducing future summer flows. Under the 8.5 RCP climate scenario (a relatively high-emissions forecast that appears, sadly, to be all too likely) summer flows in the North, Middle and South Forks of the Nooksack have been predicted to be reduced by 77%, 65%, and 76%, respectively, by 2075. *2016 State of Our Watersheds: A report by the Treaty Tribes in Western Washington*, Northwest Indian Fisheries Commission (2016) at 146. Even smaller reductions in summer streamflows would mean that instream flows are met less often, prompting curtailment of junior water rights and increasing conflicts between users. Unauthorized, out-of-priority diversions will make resolving such conflicts even more difficult. Here, too, the key to addressing this issue is to determine which withdrawals are legitimate and to identify their priorities with respect to other water rights in the basin.

In summary, streamflow adjudications are critical to ensuring robust and equitable management of Washington's water supply. For the reasons stated above, CELP believes that adjudication of the Nooksack basin is especially important and should be given the highest priority. Please don't hesitate to contact CELP if you would like any further information.

Sincerely

A handwritten signature in black ink that reads "Trish Rolfe". The signature is written in a cursive, flowing style.

Trish Rolfe
Executive Director

To: Robin McPherson
Adjudications Assessment Manager
Department of Ecology Water Resources Program
Washington State Department of Ecology
P.O. BOX 47600
Transmitted Via Email to: rmcp461@ecy.wa.gov

July 7, 2020

RE: Ecology Review of General Stream Adjudication

Dear Ms. McPherson:

Thank you for taking the time to consider our comment on the Department of Ecology's (Ecology) statewide review of potential watersheds to conduct a general stream adjudication. We are submitting this comment in support of a general stream adjudication for the Nooksack Watershed Resource Inventory Area 1 (WRIA 1).

RE Sources is a non-profit organization located in northwest Washington and founded in 1982. We work to protect the health of northwest Washington's people and ecosystems through the application of science, education, advocacy, and action. Our priority programs include Protecting the Salish Sea, Freshwater Restoration, Climate Action, and Fighting Pollution—all critical issues affecting our region. Our North Sound Baykeeper is also a member of the Waterkeeper Alliance, with over 300 organizations in 34 countries around the world that promote fishable, swimmable, drinkable water. RE Sources has thousands of supporters in Whatcom, Skagit, and San Juan counties, and we submit these comments on their behalf.

RE Sources has been involved with the Environmental Caucus in various capacities from member to Representative since the inception of the WRIA 1 Planning Unit following the passage of the Watershed Planning Act (Chapter 90.82 RCW). Our staff currently serve as Environmental Caucus Representative and have done so consecutively since 2014. Through our involvement we have seen the cooperative nature of the Planning Unit stakeholders and Initiating Governments to create a Watershed Management Plan (WMP) in 2005. We had high hopes that implementation of the 2005 WMP would result in improved health of the watershed, including streamflows. Unfortunately, many projects in the WMP were not fully implemented, and there's been little to no observable improvements on streamflows and watershed health.

For the last few years, the Planning Unit and Watershed Management Board have been mired in process without being able to produce an agreed-upon vision for the watershed with substantive plans to implement including a plan to address the Streamflow

Restoration Act. Given this continuing inability to comprehensively address local problems (as opposed to the current project-by-project piecemeal approach), we see no alternative to basin-wide adjudication. The Whatcom County Executive wrote:

“Various water interests in Whatcom County have been engaged in water planning activities for over 20 years to resolve long-standing water management issues including participation in the watershed planning process under RCW 90.82. While a lot of good work has been accomplished during this time, there is a lot more to do to resolve these issues, including implementing the Watershed Management Plan approved by County Council in 2005. There have been several efforts by various stakeholders to engage in settlement discussions, yet, significant agreements on water management issues have not come to fruition.”¹

We agree with the County Executive and hope the pressure, brought on by adjudication yields substantial, long-lasting solutions to our collective water-supply problems.

Adjudication is a complicated and extensive legal process; however, we see no other way that will compel key governments and parties, namely Lummi Nation, Nooksack Indian Tribe, farmers, Whatcom County Public Utility District and other public and domestic water providers, and Department of Ecology, to the table. As Ecology notes, “Adjudications can encourage settlement and partnerships because all water users are joined together in a uniform process.”² To be clear, we hope that adjudication incentivizes a negotiated settlement to produce outcomes in a shorter time span that are agreeable to all or the majority of parties.

The end result of adjudication or settlement will provide certainty regarding water rights, including quantification and protection of Lummi Nation and Nooksack Indian Tribe’s treaty protected water rights. RE Sources believes this is critical in order to move forward on many watershed solutions such as water banks and natural resource marketplace concepts that often require confirmed water rights. The Nooksack watershed has sufficient water to meet the needs of people, farms, and fish; however, the supply and streamflow issues are seasonal and there are solutions available to address those issues if all parties are able to come together.

Time is limited given the impacts of climate change and population growth. We hope all parties in WRIA 1 with water rights at stake can come together to achieve water supply and streamflow agreements that benefit agriculture, municipal and domestic uses, and fish and wildlife.

Sincerely,

¹ S. Sidhu, Whatcom County Executive, “Memo to Members of Ag Water Board,” April 29, 2020.

² Ecology, *Focus on: Future Adjudications*, Pub. 19-11-092, Nov. 2019.

Shannon Wright
Executive Director

CC:

Laura Watson, Department of Ecology Director
Mary Verner, Department of Ecology Water Resources Program Manager
Lummi Nation Chairman's Office
Lummi Nation Natural Resources
Nooksack Indian Tribe Chairman's Office
Nooksack Indian Tribe Natural Resources
Whatcom County Executive
Whatcom County Council
Bellingham Mayor
Bellingham City Council

STATEMENT IN FAVOR OF ADJUDICATION IN THE NOOKSACK RIVER BASIN

Environmental Caucus of the WRIA 1 Planning Unit

May 26, 2020

The Environmental Caucus is a member of the Water Resource Inventory Area No. 1 (WRIA 1) Watershed Management Project Planning Unit. We envision a future Whatcom County where our community is unified in restoring and protecting a resilient ecosystem as our highest priority. Members of the Environmental Caucus include nonprofit organizations, community groups, and individual citizens in Whatcom County.

We support an adjudication of all water rights within the Nooksack River Basin. We also support the Lummi Nation and Nooksack Indian Tribe in the protection and quantification of their treaty protected water rights.

The Nooksack River watershed and the salmon, wildlife and communities that rely upon it face long-standing water-resource issues – primarily too little water in the river and streams during the summer months. These problems have been recognized for at least two decades. Several local entities, both government and nongovernment, developed plans and conducted projects during this time. Nevertheless, the problems are not moving toward resolution. Indeed, primarily because of climate change, these problems are getting worse and will almost surely continue to worsen during the rest of this century.

Our many years observing and participating in local water-supply processes suggest that adjudication is now the only viable path to increasing flows in the three forks, tributaries, and mainstem Nooksack River. Adjudication is complicated, expensive, and takes years to reach resolution. But we see no other way to encourage, motivate, or compel the key parties (Lummi Nation, Nooksack Indian Tribe, farmers, and Department of Ecology) to the negotiating table. As Ecology notes, “Adjudications can encourage settlement and partnerships because all water users are joined together in a uniform process.”¹ Also, the end result of adjudication is certainty on who has water rights. To be clear, we hope that the potential of adjudication preempts completion of and obviates the need for that process by producing a negotiated settlement.

One approach that might work better than either the current process-dominated one or adjudication would require Ecology to vigorously bring the parties together to develop regionwide solutions. A deadline from Ecology to begin enforcing state water law combined with financial support would motivate the participants to negotiate in earnest. Ecology, along

¹ Ecology, *Focus on: Future Adjudications*, Pub. 19-11-092, Nov. 2019.

with the farmers, tribes, and other local interests, could then make a strong case to the state legislature to allow implementation of locally developed solutions. Alas, Ecology shows no sign of such leadership.

Karlee Deatherage
Environmental Caucus Representative to the
WRIA 1 Planning Unit



City of Bellingham

May 15, 2020

Robin McPherson
Adjudications Assessment Manager
Department of Ecology Water Resources Program
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. McPherson:

Thank you for taking the time to meet with my staff regarding a potential adjudication of the Nooksack basin. We understand that several basins are being considered for the next adjudication and that you will be making a recommendation to Ecology this month and then to the legislature in September about which basin you (and Ecology) believe is most suited to an adjudication process at this time.

As you know from speaking with my staff, specifically Renee LaCroix and Amy Kraham, the City does not believe the adjudication process is the best vehicle for solving WRIA 1 regional water issues. From our early 2000s negotiations with the Lummi Nation, Nooksack Tribe, Ecology, the federal government and others to the present day, we continue to feel that a locally led solution is best. The communities of Whatcom County are committed to a sustainable future.

To that end, the City of Bellingham supports senior tribal water rights for instream flows and other tribal treaty rights, as well as out of stream uses, such as water for irrigation for responsible and sustainable agriculture. The City further supports responsible development through adherence to the GMA, which protects our local food sources. As you may be aware, the City participated in the Three Forks negotiations with the Lummi Nation, the Nooksack Tribe, Ecology, and to a limited extent, the Department of the Interior from 2005 through 2010 when the Lummi Nation withdrew from the process largely due to its position that the federal government needed to be involved in the settlement process or in the quantification of tribal treaty water rights. At the time, Ecology was unable to create a scenario in which such a federal presence would not be required to come to a settlement. A draft settlement agreement was produced that, if executed and entered by the court, would have solved most of the issues we face today and likely obviated the need for a basin-wide adjudication. The City believes that the framework of that process and draft agreement could be used to reinstate settlement discussions. The City also believes that Ecology should adequately fund local water supply planning efforts already in process which will facilitate resolution of many issues. Last week the

WRIA 1 Management Team unanimously agreed to invest \$100,000 of NEP funds (administered through Puget Sound Recovery Programs) in Drainage Basin Management Planning (Strategy 4 of the WRIA 1 Watershed Management Board 2018- 2023 Work Plan).

As you are aware, adjudications take multiple decades. I understand that Ecology feels that lessons have been learned from the Yakima Basin process and that the time and expense would be more limited in the next adjudication, but the City believes that the process would take at least ten years and probably twenty or more, incurring extraordinary expense during a pandemic which has severely impacted City and state resources, and engendering extreme animosity amongst the parties. There are numerous legal issues that may need to be litigated prior to the actual work of the adjudication beginning, the interplay of municipal water rights, recent case law, and adjudication procedure being only one such issue.

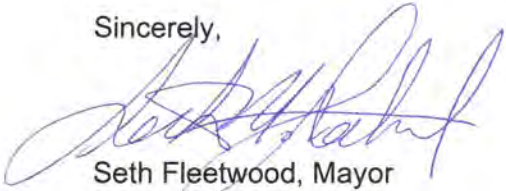
In addition to believing that there is a much more efficient and effective path forward, the City does not believe that the Nooksack Basin is ripe for adjudication. You may recall the conversation you had with my staff in which you discussed the lack of technical information regarding high flows in the river. You let staff know that Ecology was under the impression that all the major parties agreed on instream flow. However, that is not the case. The streamflow study conducted by Utah State University was never completed, and the modeled flows were not validated by observed data the City collected for an Endangered Species Act Section 10 Habitat Conservation Plan on the Middle Fork of the Nooksack River. The City did not join the Lummi Nation and Nooksack Tribe's request for federal adjudication several years ago partially due to the City's dispute with the USU model and lack of validation. The discrepancy between the USU modeled conclusions and site-specific data illuminates the wide gap between the technical understanding and agreement of the water rights holders in the Nooksack and illustrates the fact that WRIA 1 is not ripe for adjudication. The science is not there yet, and it will take time and a significant financial commitment to get to that point. The City believes that Ecology's budget would be better spent supporting development of a Regional Water Supply Plan and Drainage Based Management approach as outlined in Strategies 3 and 4 of the WRIA 1 Watershed Management Board 2018-2023 Work Plan instead of initiating acrimonious litigation.

As stated above, the City understands that the Lummi Nation and the Nooksack Tribe have important and sovereign interests in settling their water rights and ensuring enough water is left instream for fish and habitat. The City also understands that strong local agriculture is critical to feed our community and wants to find solutions to the lack of water legally available to farmers in the Nooksack watershed. And we know that the other water purveyors, like the P.U.D. need certainty and we agree with both of those groups that an adjudication is not the path best suited for the solution. We also understand that an adjudication only includes parties with legal water right, while a negotiated settlement could include the valuable interests and perspective of many others in the basin.

The City of Bellingham has a large perfected water right in the Nooksack River. We are prepared to help solve regional problems within a negotiated settlement structure, which could include applications for changes to the City's Nooksack water rights certificate, which could include moving water downstream and into trust. We will assign staff to help negotiate and implement solutions, including working toward securing funding to complete the USU work. We

will need Ecology's help to do this, both financially, and in the processes necessary to ensure the outcome desired by all, including forbearing initiating a claim for adjudication.

Sincerely,

A handwritten signature in blue ink, appearing to read "Seth Fleetwood". The signature is fluid and cursive, with a large initial "S" and "F".

Seth Fleetwood, Mayor
City of Bellingham

cc: Laura Watson

Whatcom Ag Water Board Position Paper on Water Right Adjudication in the Nooksack Basin

The Whatcom Ag Water Board (AWB) is a coalition of the six Watershed Improvement Districts (WIDs) established in Whatcom County. Farmers created the WIDs to enable agriculture to address a variety of issues facing our community: drainage, water quality, habitat restoration, and water resources. Over the past few years, the Department of Ecology (“Ecology”) has expressed interest in initiating a new water rights adjudication somewhere in Washington State, as the adjudication in Yakima is completed. Ecology received funding from the Legislature to review where a water rights adjudication could be conducted, and the Nooksack Basin is one of the potential locations. Over the past few months, we have carefully reviewed the question of whether Ecology should initiate a water rights adjudication in the Nooksack Basin.

Our conclusion is that a water rights adjudication in the Nooksack Basin would be harmful, and potentially disastrous, to agriculture and our entire Whatcom County community.

We have reached this decision after considerable review. Our review has involved a significant amount of research into the adjudication process, its time and cost, potential impacts on irrigated agriculture and other water right holders, and the existence of other mechanisms to address water resource issues in Whatcom County. The AWB appreciates the candor and professionalism of Ecology’s staff to explain the agency’s review process, educate us on how an adjudication would be conducted, and discuss potential outcomes. We have also talked with all other major non-tribal water resource stakeholders to answer a fundamental question: **Will a water rights adjudication in the Nooksack Basin serve the interests of agricultural families and communities in Whatcom County? The answer is clearly no. A water rights adjudication would ultimately result in a significant loss of irrigated agriculture, and other types of water rights would also be eliminated or reduced.** Whatcom County has approximately 40,000 acres of irrigated agriculture, thousands of acres and likely at least 50% of agricultural water use would be negatively impacted by an adjudication.

Our opposition to a water rights adjudication is also based on our conclusion that processes other than water rights litigation would result in greater environmental benefits for the Nooksack Basin. The agricultural community respects and understands the significant legal status of tribal reserved water rights – but water supply is neither the sole nor primary cause of decreased fish populations. Expensive and prolonged water rights litigation will be divisive, rather than uniting stakeholders in efforts to address a wide range of issues to improve fish populations and the environment of Whatcom County: habitat restoration, water quality, instream flows, protection of agricultural and natural resource lands, and improved water resource infrastructure.

Further, the circumstances of an adjudication would likely result in pro-active salmon recovery efforts ending, or being indefinitely suspended. Over the past few years, the AWB, WIDs, and individual farmers have engaged in a number of proactive efforts to address both instream and out-of-stream water resource issues in Whatcom County, as well as related habitat and water quality issues. We fully recognize the importance of addressing the needs of all water resource interests, and a number of efforts are underway to do so. These efforts include:

- Implementing instream flow projects through SB 6091, Surface to Ground conversions and stream augmentation
- Ecology's amendment of the Nooksack Instream Flow Rule Chapter 173-501 WAC and the AWB's Foster Pilot Project for tributary flow enhancement
- Drainage-Based Management (DBM) planning process
- Habitat enhancement projects by individual farmers and our WIDs
- Water quality protection programs leading to improved conditions in shellfish beds

There is more proactive water resource and related habitat restoration work underway in the Nooksack Basin than in perhaps any other basin in Western Washington, and a water rights adjudication lawsuit would jeopardize these proactive efforts. Farmers do not want our citizens, businesses, and local governments to spend our community's limited time and money litigating against each other in court. Instead, we are committed to continuing the processes underway, improving them, and establishing negotiated agreements and funding that advances all our interests. We are implementing a number of ideas to improve water resource management in Whatcom County, and we welcome new ideas from other interests. But adjudications result in harsh and inflexible outcomes – and the loss of water rights. We believe the state should invest in multiple benefit solutions instead.

We are distributing this position paper, Ecology's focus sheet on water right adjudications, and our attachment addressing questions about the adjudication process for the entire Whatcom County community to review. We welcome further questions and discussion on this critical issue. Ultimately, we request your support of our position and ask that you join us in opposing a water rights adjudication in the Nooksack Basin.



BACKGROUND INFORMATION ON WATER RIGHTS ADJUDICATIONS

At the Ag Water Board's February 12, 2020 meeting with the Department of Ecology, we discussed a variety of issues regarding the agency's review and report on potential water right adjudication locations, and implications for irrigation and other water rights. Farmers raised a number of questions at that meeting, and additional questions have been raised by farmers and community members in recent weeks. This question and answer document, prepared by AWB Attorney Bill Clarke, addresses those questions.

Question 1: Why is Ecology conducting this review of potential locations for a water rights adjudication?

A: Ecology sought funding from the Legislature in 2019 to review locations around the state for a future adjudication. The 2019 Operating Budget provided Ecology with funding "to assess and explore opportunities to resolve water rights uncertainties and disputes through adjudications in selected basins where tribal senior water rights, unquantified claims, and similar uncertainties about the seniority, quantity, and validity of water rights exist." 2019 ESHB 1109 Sec. 302(6). Over the past few years, Ecology has expressed interest in initiating new adjudications, as the *Acquavella* adjudication in the Yakima Basin nears completion.

Question 2: Will Ecology recommend to the Legislature where a water rights adjudication should occur?

A: Ecology's review will conclude with a report to the Legislature by September 1, 2020, analyzing water resource issues in a number of basins, and describing those conditions. The report will likely detail whether those conditions would support or hinder an adjudication, the existence of other alternatives to an adjudication, the extent of local support, and other factors. More information is in the attached Ecology Focus Sheet.

Question 3: Does Ecology need authorization from the State Legislature to initiate an adjudication?

A: There is no statute requiring legislative approval prior to Ecology filing an adjudication. RCW 90.03.110(2)(b) requires that prior to filing an adjudication, Ecology must "[r]eport to the appropriate committees of the legislature on the estimated budget needs for the court and the department to conduct the adjudication." The law also requires Ecology to consult with the court system regarding the adequacy of funding. While the extent of legislative

support for an adjudication will be a factor in whether and where Ecology files an adjudication, the Legislature's main role is to provide funding (or not), as Ecology and Office of the Attorney General have underlying authority to decide whether to file a lawsuit or not.

Question 4: Who conducts the water right adjudication?

A: The water right adjudication is conducted by the Superior Court in the basin where the water rights exist. For example, the Yakima County Superior Court conducted the *Acquavella* adjudication, and had a specific judge assigned to preside over the adjudication process.

Question 5: Are all types of water rights included in a water rights adjudication?

A: The Yakima adjudication and many other older adjudications only addressed surface water rights. There has not been an adjudication initiated since Ecology changed its position on groundwater/surface water interactions, or since Ecology started imposing limits on exempt wells by rulemaking. It is likely that a future water rights adjudication would include both surface and groundwater rights, including exempt groundwater uses. Permits, certificates, and claims would be included for all purposes of use.

Question 6: Does state law govern how a Superior Court conducts an adjudication?

A: Yes, RCW 90.03.110-.245 governs water right adjudications. These statutes are provided at the end of this memo. In addition, as a civil court case, the Superior Court Civil Rules, and on appeal, the Rules of Appellate Procedure govern the adjudication. The adjudication statutes also allow the Pre-Trial Orders developed in the Yakima Adjudication to be used in other county water right adjudications, as determined by the Superior Court.

Question 7: Who provides legal representation for water right holders involved in the adjudication?

A: Holders of water right permits, certificates, claims, or exempt uses would be responsible for hiring legal counsel to represent them in this court case. Water rights of a similar type or location may be joined together in sub-proceedings, and water right holders may be able to obtain joint representation. Just as in other types of litigation, the Superior Court has the discretion to organize how the adjudication process would be conducted to increase efficiency and minimize the cost and burdens on the parties.

The State is represented by the Ecology Division of the Office of the Attorney General, and federal interests are represented by the U.S. Department of Justice and individual attorneys for tribal governments or other federal parties. The State is the Plaintiff in the lawsuit, and all state water right holders, the federal government, and tribes are Defendants in a water rights adjudication.

Question 8: What are the initial steps in an adjudication?

A: Ecology, as Plaintiff in the lawsuit, would file a Summons and Complaint in Superior Court. Ecology would then serve the Summons and Complaint on the known Defendants, which would be the known water right holders of record. Because of the inaccuracy of water right records, Ecology would also publish the Summons in a local newspaper, directing holders of water rights to file a Notice of Appearance in the Superior Court action. The adjudication statute also provides for the filing of an “adjudication claim,” which is a document that provides details from the water right holder as to his or her claimed water right.

Question 9: How does an adjudication relate to an adopted Ecology minimum instream flow level?

A: There has never been a water rights adjudication in a basin with an Ecology-adopted instream flow rule. Under RCW 90.03.345, a minimum flow adopted by rule is an appropriation of water, with a priority date as of the effective date of the rule. In the Nooksack Basin and many other basins with rules adopted in the 1970s and 80s, the instream flow rule adopted by Ecology was adopted as a surface water rule – meaning junior groundwater rights and exempt uses would not be impacted by the instream flow rule. However, Ecology has since changed its interpretation of its own rules and prevailed in the *Postema* Supreme Court decision. This decision affirmed permit denials by Ecology based on connectivity between groundwater and surface waters closed by Ecology rule. So, it is likely that after a water right adjudication, Ecology would curtail or regulate both surface and groundwater rights and exempt uses that are junior to (a priority date later in time) than the Ecology instream flow level.

Question 10: Could a water right adjudication result in curtailment or limitations on domestic wells or water rights for domestic human consumption?

A: If the prior appropriation were strictly applied by Ecology after an adjudication, then domestic wells could be subject to curtailment. This is because many of Ecology’s adopted instream flow levels will not be met at some point during the year, and so junior water rights subject to interruption include junior exempt uses like single domestic wells. Practically speaking, it is unlikely that Ecology would, in fact, order curtailment of indoor domestic uses to occur because of the obvious negative impacts to human health, the economy, and other factors. It is possible that Ecology would enforce an adjudication decree to limit outdoor domestic uses, limit indoor uses to a certain level, limit junior municipal or domestic water rights, or require mitigation for out-of-priority domestic uses to avoid curtailment.

Question 11: If Ecology Curtailed All Water Rights Junior to its 1985 Instream Flow, Would Ecology's Instream Flow Level Be Met?

A: No, in years with low snowpack and/or less rainfall in the spring or summer, actual flow levels are much less than Ecology's adopted flow level. In these types of low flow years, Ecology's flow level would still not be met even if junior, and most senior water rights were eliminated.

Question 12: If water rights are relinquished as a result of a water rights adjudication, will those quantities of water be available to others as new water rights?

A: No. While the original purpose of water rights forfeiture laws was to ensure that water was allocated to water users that would put water to beneficial use, that is no longer the case. In recent decades, water rights relinquishment does not create new water supplies that can be reallocated to water right permit applicants. This is because of Ecology's position that many basins are over-appropriated, or because of Ecology instream flow rules that have closed basins to issuance of new water rights. Relinquishment of water rights through an adjudication would benefit instream flows and/or senior water rights.

Question 13: Could an adjudication impact water rights that have previously been reviewed by Ecology through a water right change or transfer?

A: Yes. When a water right is changed or transferred, it is subject to a "tentative determination of validity and extent" by Ecology. This review by Ecology evaluates whether the applicant has a valid water right, and what quantity is valid based on the history of beneficial use. This Ecology review is only a "tentative" administrative review, as under the water code, only a Superior Court in a water right adjudication can issue a final determination as to the validity and extent of a water right. So, it is possible that based on different evidence or law applied by the adjudication court, that the Court's determination of a water right could differ from Ecology's earlier administrative review. In addition, during the period of time since an Ecology change or transfer decision, the beneficial use of water could have changed. Thus, the valid quantity at the time of adjudication could be less than the quantity previously approved for change or transfer by Ecology because of reduced beneficial use since the Ecology decision.

Question 14: Who in Whatcom County or the Nooksack Basin has expressed interest in or support for a water rights adjudication in the Nooksack Basin?

A: To our knowledge, only the Lummi Nation and Nooksack Tribe have requested a water rights adjudication. Part of Ecology's process of reviewing water right adjudication locations will include outreach to water resource interests to evaluate the existence of local support for an adjudication in different parts of the state.

Question 15: Can federal and tribal water rights be included in a water rights adjudication?

A: Yes. The adjudication of federal water rights is one of the few subject matters where state courts have jurisdiction over federal parties. This is because of the McCarran Amendment, which is a provision in federal law creating a waiver of federal sovereign immunity to enable federal rights to be adjudicated in state court. Federal water rights are most commonly established through federally-reserved water rights. Federal courts have ruled that when the federal government establishes a federal reservation of land, there is an implication that such reservation of land includes a reservation of water rights as necessary to accomplish the purpose of the federal reservation. This is the case for a variety of federal reservations of land – military bases, national parks, wilderness areas, or Indian reservations.

As to Indian reservations, courts have recognized federally-reserved water rights in two parts. The first part is the reserved water right for on-reservation uses. The extent of this water right turns on the language of the treaty creating the reservation. For example, if the purpose and language of the treaty evidences an intent to develop on-reservation irrigation, then the on-reservation water right would include a quantity of water for irrigation use. The on-reservation part of the water right has a priority date as of the date of the Indian treaty. The Lummi Nation and Nooksack Tribe are parties to the Treaty of Point Elliott, signed in 1855, which would be the priority date for on-reservation water rights.

The second part of reserved rights that tribes would assert is for off-reservation implied instream flow water rights. This type of water right is far less certain as to its existence, quantification, and location, and a full review of this issue is beyond the scope of this memo. The extent of this type of water right, for which tribe, at what level, at what location, at what time, etc. - would depend on a multitude of factors. This type of water right could have a priority date of “time immemorial” – because the usage predates the creation of the reservation by treaty.

Question 16: Is there a difference between the state instream flow level adopted by Ecology rule, and a tribal off-reservation implied instream flow?

A: It is unknown how the flow level in an Ecology instream flow rule compares to an adjudication-court established tribal implied instream flow water right. In some basins, the Ecology instream flow level comports with Ecology’s original interpretation of the state water code, that instream flows were a “minimum” flow level. Other, more recent Ecology instream flow levels (generally, those adopted after 2000) included a much higher flow level, not a hydrologic minimum, but at a higher flow level to benefit fish species throughout a variety of life stages. There has never been a water rights adjudication in Washington State involving both a treaty-based reserved instream flow water right and a state instream flow adopted by rule.

Question 17: Does having water rights adjudication filed by Ecology prevent a water rights negotiation or settlement process?

A: A water rights adjudication is a civil case, and so like other lawsuits could involve a settlement discussion. However, as a multi-party lawsuit with potentially thousands of defendants, the process of such a settlement effort would first involve considerable negotiation and likely briefing to the adjudication court as to how such a settlement discussion would be structured.

Question 18: Would a water rights adjudication in the Nooksack Basin take into consideration prior Ecology positions and representations as to agricultural water rights?

A: Ecology's regulation of water rights in the Nooksack Basin includes a number of unique circumstances that do not exist in other parts of the State. One of these is the so-called "Husseman Promise," referring to a former Ecology employee who worked with a number of agricultural water users to have groundwater permit applications filed in the 1980s and 1990s. Ecology represented that such applications on file would protect existing groundwater uses until they could be approved by Ecology.

However, even though Ecology's Nooksack Basin rule was originally adopted as a surface water rule (under which the pending groundwater applications could still be approved), Ecology later changed its interpretation of its own rules, so that groundwater applications cannot be approved. These types of equitable arguments could be raised in an adjudication, though it is unclear how a Superior Court would address these types of issues in the midst of an adjudication.

Question 19: Would a water right adjudication prevent other existing water resource management efforts from proceeding forward?

A: Strictly speaking, there is no legal prohibition to continuing forward with efforts such as the WRIA #1 Regional Water Supply Plan and Drainage Based Management processes while a water rights adjudication is underway. However, an adjudication would create significant practical, financial, and political barriers to continuing these efforts. If an adjudication were initiated, individual farmers and other water right holders should prioritize devoting time and financial resources to the litigation. Further, if an adjudication is filed in a basin, it would be a signal from Ecology that the agency views existing basin efforts and processes as insufficient to address water resource issues. Without support from Ecology, it is hard to envision those processes continuing.

Focus on: Future Adjudications



More information

Visit our [Adjudications page](https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Adjudications):
ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Adjudications

Contact information

Robin McPherson
Adjudication Assessment Manager
360-407-7244
robin.mcpherson@ecy.wa.gov

ADA accommodations

To request ADA accommodation including materials in a format for the visually impaired, call Ecology at 360-407-6872 or visit <https://ecology.wa.gov/accessibility>. People with impaired hearing may call Washington Relay Service at 711. People with speech disability may call TTY at 877-833-6341.

Adjudications Protect Water and Water Users

Adjudications are lawsuits that verify all water rights on a water source, including Tribal water rights and stream flows. All water users receive notice and have a chance to prove their right in court. The court rules on each water right's quantity and history, and ranks rights on a "first in time, first in right" schedule. In times of water scarcity, a water master manages the rights so that newer ("junior") rights are curtailed before the older ("senior") rights. This is the most fair and complete method of managing a source of water.

Following *Ecology v. Acquavella*, the adjudication recently completed in the Yakima Basin, the Legislature has asked Ecology to recommend whether and where the next adjudications should take place.

Where Will Adjudications Help the Most?

Adjudication are big undertakings, and the State needs to prioritize where they will make the most difference. Ecology is identifying basins where adjudication is the right tool to protect water and water users. In some watersheds, the history of water rights is unclear, making regulation difficult. Ecology cannot enforce one water user's claim against another – water users must sue each other to stop impairment by junior users. Water users face uncertainty from year to year because they are vulnerable to interruption. An adjudication brings certainty and protection to all water rights, including stream flows.

How Adjudications Begin

Ecology prepares for an adjudication by defining a water source and identifying all uses of that source, including streamflow. Water users, claimants, and the public all receive notice of the adjudication. Then Ecology files a lawsuit in state superior court naming all users and claimants as defendants. Ecology assists water users by providing available state documentation of their water rights. Water users may also present evidence of their historic water use. Any legal questions on the legal status of a water right are addressed by the court.

Tribal and Federal Reserved Water Rights

Federal law allows Ecology to join Tribes and the Federal Government in state court for general water adjudications.

Tribes may prove a number of claims to a water source including water for instream flow, agriculture, or other purposes. The court determines the quantity and priority date of Tribal rights along with all others. Depending on the history of the water right, the priority date might be “time immemorial,” the date of a federal land reservation, or the date water was acquired by the Tribe.

Before bringing any lawsuit against a Tribe, Ecology will comply with the Attorney General’s Tribal Consent and Consultation Policy.

Adjudicating Groundwater

A water source often includes both surface and ground waters that are connected. All water users, as well as stream flows, are entitled to the security and protection of an adjudication.

In a new adjudication, Ecology will describe the water source for the court, including maps and hydrology to show whether groundwater wells impact rivers and streams.

If they are connected to the water source, groundwater claimants may prove their history and legality of use, and the court will enter them on the final decree with a priority date.

Adjudications Get Results

An adjudication verifies valid water rights based on their past use and any legal exemptions. This keeps water uses fair and legal.

A final adjudication decree has the force of law. Verified rights receive adjudicated certificates stating their priority date, quantity, and use. Unlike state-issued permits and certificates, these are not “tentative” decisions. The adjudication is the final word on a water user’s relative priority. This includes many very old claims to water that the State cannot otherwise regulate.

Adjudications can take a number of years, depending on how many water users are involved. The adjudication of the Yakima River system in *Acquavella* included 33 subbasins and took over 40 years. Future adjudications will be more efficient due to changes in the law and advances in technology.

Collaboration and Settlement

The law encourages Ecology to settle water rights disputes. This includes adjudications. Adjudications can encourage settlement and partnership because all water users are joined together in a uniform process. Any final settlement in an adjudication is presented to the court for approval of the agreed water right quantities. This provides transparency and due process throughout the watershed.

Ecology’s Next Steps

Ecology is looking statewide to assess watersheds that might benefit from adjudication. We are considering basins with senior Tribal water rights, streamflow needs, and challenges caused by water user uncertainty and conflict.

Ecology will incorporate its assessment and recommendations into an in-depth report to the Legislature. The report will describe the challenges and benefits of adjudicating certain watersheds.

Before filing an adjudication, Ecology must consult with the courts and legislature about budget and resources. Ecology is consulting with the courts in preparation for its Adjudication Assessment Legislative Report, required by September 1, 2020.

provided solely for the department of ecology to assess the need, costs, and barriers to initiating the adjudication process in selected watersheds to reduce and resolve uncertainty about water rights. The department shall evaluate multiple watersheds to identify stakeholder and local government interest and concerns about the process, and to determine the cost of conducting an adjudication in each watershed identified in the evaluation. The department shall submit an evaluation report and recommendations to the governor and appropriate legislative committees by September 1, 2020.

Adjudications Assessment 2020

Robin McPherson

March 27, 2020

What is an Adjudication?

- Superior Court prioritizes rights from oldest to newest
- A single process for all facts, history, and law of water use
- Final Court Decree lists priority, quantity, and purpose of all valid water rights

How do Adjudications Work?

1. Ecology defines a water source and identifies users
2. Superior Court sets deadlines and process
3. All water users respond with a claim and supporting evidence
4. Ecology provides a Report of Findings applying existing state law (municipal exemptions, pumps & pipes, etc.)
5. Water users may object to Ecology or each other
6. Court rules on rights and issues a schedule. Partially-perfected rights might have special certificates or be “split” into perfected/inchoate portions

Form – Statement of Claim



ADJUDICATION STATEMENT OF CLAIM

1. Name of Claimant (Last, First MI) _____		2. Phone Number (day) _____ Phone Number (evening) _____						
3. Street Address: _____		4. Email Address: _____						
5. Mailing Address (if different from above) _____								
6. Name, Address, and Phone number of Legal Owner of Property if different from claimant _____								
7. Driving directions to property on which water is claimed _____								
8. Legal Doctrine of the right or use on which claim is based (appropriation, riparian) _____								
9. Permit, certificate or claim number (attach copy) _____								
10. Documentation of Claimed Right (if any)								
WATER RIGHT OR CLAIM NUMBER		RECORDED NAME(S)						
IS THE DOCUMENTATION RECORDED IN YOUR NAME? <input type="checkbox"/> YES <input type="checkbox"/> NO								
IF NO, PROVIDE NAME AS SHOWN ON DOCUMENTATION:								
IS THIS CLAIM ASSERTING A RIGHT UNDER THE EXEMPTION FROM PERMIT PROVIDED WITHIN 90.44.050 RCW? <input type="checkbox"/> YES <input type="checkbox"/> NO								
IF SO, IS A WATER WELL REPORT AVAILABLE FOR THE SOURCE WELL? <input type="checkbox"/> YES <input type="checkbox"/> NO								
11. Name of the water source (stream name, "a groundwater well", etc.) _____								
12. Date of initiation of the water use project <i>(This is from 90.03.140(3))</i> _____		13. Date the water was put to first use (commencement of use) by the original appropriator _____						
14. Does the claimed right use a diversion or withdrawal of water from the water source? _____								
15. Legal description of the location of the point of diversion								
SOURCE	NO.	¼	¼	SEC.	TWP.	RGE.	PARCEL #	WELL TAG #
DO YOU OWN THE CLAIMED POINT(S) OF DIVERSION/WITHDRAWAL? <input type="checkbox"/> YES <input type="checkbox"/> NO								
IF NO, PROVIDE OWNER(S) NAME:								
16. Asserted date of priority of claimed right _____				17. Date of the completion of diversion works _____				

18. Description of diversion or withdrawal and conveyance works _____							
19. The dimensions and capacity of all existing dams, ditches, pipelines, storage tanks or reservoirs _____							
20. Amount of land under irrigation (current and historical maximum and year of maximum) _____							
21. PURPOSES OF USE AND MAXIMUM WATER QUANTITIES CLAIMED FOR THOSE USES							
PURPOSE OF USE	GPM or CFS	ACRE-FT/YR	PERIOD OF USE				
22. Amount of land under irrigation (if applicable) _____							
23. Current and Historical maximum quantity of water used for irrigation _____							
24. Year of Maximum use _____	25. Number of residences and population served _____	26. Type and numbers of stock watered _____					
27. Legal description of the land where the water is used, including parcel numbers							
LEGAL DESCRIPTION OF LANDS WHERE CLAIMED WATER RIGHT IS USED:							
¼	¼	SEC.	TWP.	RGE.	COUNTY	PARCEL #	# OF ACRES
DO YOU OWN ALL THE LANDS IN THE CLAIMED PLACE OF USE? <input type="checkbox"/> YES <input type="checkbox"/> NO – IF NO, PROVIDE OWNER(S) NAME:							
28.							
<input type="checkbox"/> Water still in use							
<input type="checkbox"/> Water is no longer in use and claimant does not intend to use water in the future							
29. I hereby declare under oath that all statements made herein are true to the best of my knowledge.							
_____ Signature of Claimant							

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KITTITAS

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE WATERS OF COOKE CREEK AND ITS TRIBUTARIES IN KITTITAS COUNTY, WASHINGTON, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 117 OF THE SESSION LAWS OF 1917 OF THE STATE OF WASHINGTON.

No. 6222

D E C R E E

Court rules on rights and issues a schedule

DATE OF SETTLEMENT	DATE OF INITIATION OF WATER RIGHTS	NUMBER OF ACRES	AMOUNT OF WATER Cubic Feet Per Second	MINERS' INCHES 4-inch Pressure	DESCRIPTION OF LAND IN WHICH TRACT IS LOCATED
					Sec. Twp. N. R. E.W.M.

Rufus Cook, Executor of the	April 1870	156.0			
Cecil Johnson	June 1870	115.0			
M. D. Cook	1871	85.0			
William V. Bott	1871	12.0			

DATE OF SETTLEMENT	DATE OF INITIATION OF WATER RIGHTS	NUMBER OF ACRES	AMOUNT OF WATER Cubic Feet Per Second	MINERS' INCHES 4-inch Pressure	DESCRIPTION OF LAND IN WHICH TRACT IS LOCATED
					Sec. Twp. N. R. E.W.M.
CLASS 14.					
Milwaukee Land Company					
1889	1893	90.0	1.80	90.0	SE $\frac{1}{4}$ 2 - 17 - 19
CLASS 15.					
Sherman Smith					
1892	1896	160.0	3.20	160.0	SW $\frac{1}{4}$ 36 - 17 - 19
CLASS 16.					
R. I. Scammon					
1886	1905	70.0	1.40	70.0	SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ Lots 1 & 2, 1 - 17 - 19
CLASS 17.					
R. I. Scammon					
1915	1915	200.0	4.00	200.0	E $\frac{1}{2}$ 36 - 18 - 19
John Edwards					
1915	1915	160.0	3.20	160.0	NW $\frac{1}{4}$ 36 - 18 - 19
CLASS 18.					
Henry Kleinberg					
1917	1917	320.0	6.40	320.0	35 - 18 - 19

Adjudication Assessment 2020

- Report to the appropriate committees of the legislature on the estimated budget needs for the court and the department to conduct the adjudication. *RCW 90.03.110(2)(b)*
- Need, costs and barriers
- Reduce and resolve uncertainty about water rights
- Evaluate multiple watersheds
- Local interests and concerns

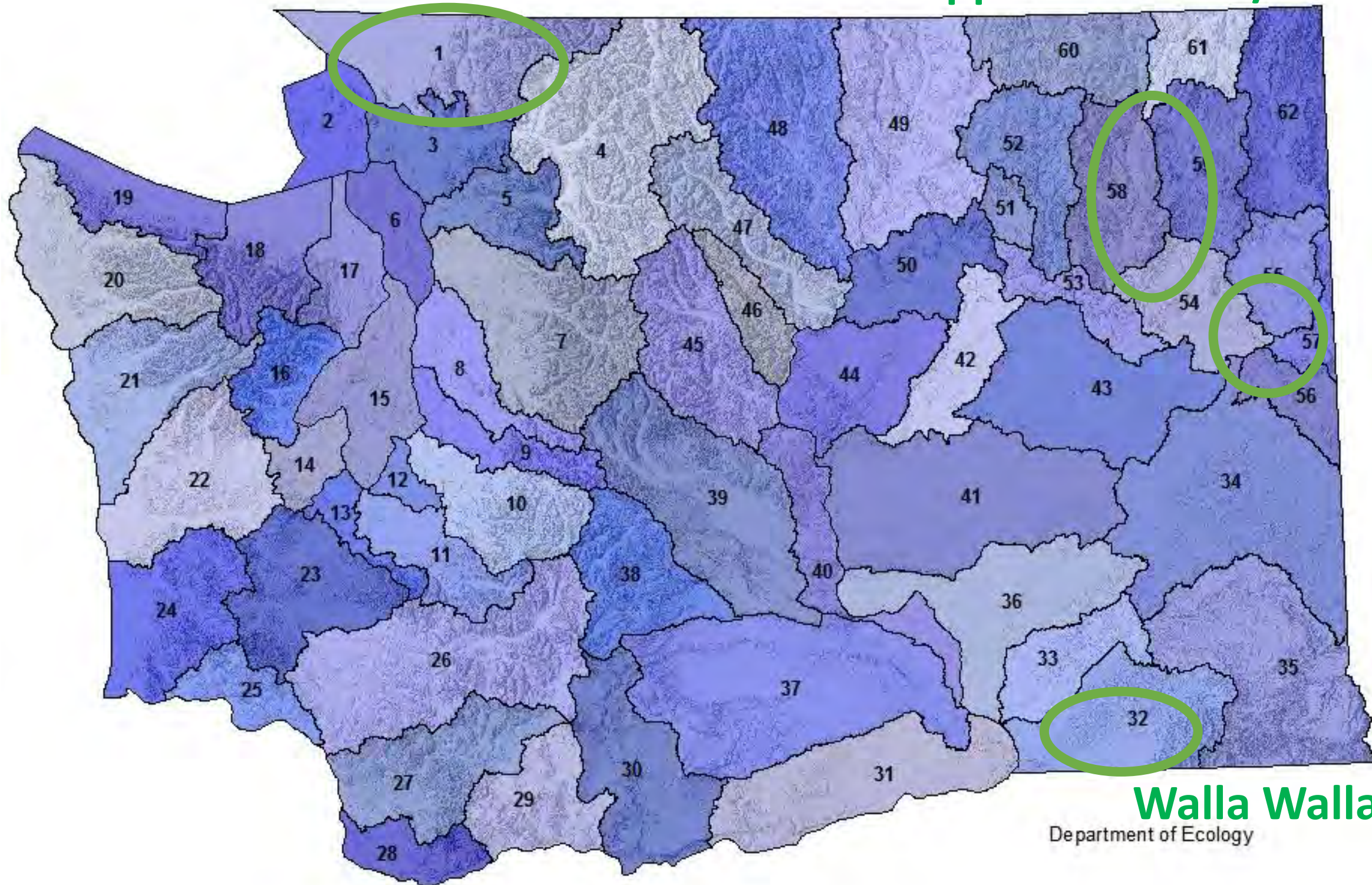
Watershed Evaluations

- How thorough and fair are current regulations?
- How certain are paper rights?
- How complete is the hydrology?
- How effective is stream protection?
- What other solutions have been attempted?
- How vulnerable to future risk?
- What would it cost and how long would it take?

Watersheds Evaluated

Nooksack

Upper Columbia/ Lake Roosevelt



Spokane

Walla Walla

Department of Ecology



Robin McPherson

360-407-7244

Robin.McPherson@ecy.wa.gov

Adjudications Assessment 2020



PO Box 424 | Everson, WA | 98247 | 360-303-9123

Washington State Department of Ecology
Director Laura Watson
Via email: laura.watson@ecy.wa.gov

August 10, 2020

Dear Director Watson:

Farmers and community leaders are very disappointed to hear through Robin McPherson that the state is likely to move forward with adjudication in the Nooksack basin. Though the actual action may be delayed until 2023, we are concerned that with this plan Ecology may include a budget request for this in the upcoming session.

We want you to know that farmers and the community vigorously oppose this potential decision and will do all that we can to dissuade Governor Inslee from allowing this to move forward. If needed, we will engage the community to appeal to the Governor and legislators to reject a budget request.

The proposed adjudication is said to be about helping restore salmon. However, it is clear to us that a likely outcome will be the permanent loss of farms in one of the last remaining viable farming areas in Puget Sound. Whatcom and Skagit Counties, positioned between expanding urban areas to the north and south, cannot remain strongholds of family farming without a reliable supply of water. Farmers believe adjudication will end water access for a significant number and make it far less reliable for most farmers. The investment needed to maintain the family farm and pass it on to the next generation will be undermined by this uncertainty.

It is not difficult for the public to understand the nexus between fish and farms. As our attached white paper makes clear, it is urban development that presents the greatest threat to fish. Farms support habitat and fish recovery efforts and offer a bulwark against harmful urban expansion. In Whatcom County farmers have supported many pro-active measures to enhance habitat and support fish recovery and are fully committed to do more unless stopped by state action.

Right now processes are underway with all concerned stakeholders that offer the promise of a cooperative, collaborative resolution to water resource issues. We have appealed to the Lummi Nation to allow those to go forward rather than turn this issue over to lawyers and the courts. Whatcom family farmers and the Lummi Nation demonstrated how a collaborative process was preferable to lawyers and division in the 2017 Portage Bay Partnership. This effort contributed to the reopening of the shellfish beds less than two years later and laid the groundwork for positive, constructive solutions to issues such as water use.

We appeal to you to allow these negotiations to continue. The request for funding alone will likely put an end to the ongoing efforts involving all concerned groups. This is why stakeholder groups and local governments in Whatcom County are strongly opposed to adjudication. The state has seen how enforceable agreements between the Muckleshoot Indian Tribe and the cities of Seattle and Tacoma can resolve water resource issues. The community has seen the benefits of a tribe/farmer partnership. What is the value of putting an end to these efforts in exchange for a process that will force everyone into their corners, divert much needed money and time now aimed at fish recovery, and likely contribute to dissension and discord in the community?

The only explanation we have heard for why Ecology is considering this decision is that it offers "certainty." The certainty that the state seeks is available through much better means, and the certainty that the court would likely provide would almost certainly result in the loss of one of the last viable farming areas in the region. We doubt that certainty in the loss of our farms is what you seek.

Save Family Farming is a state-wide farm advocacy group with affiliate organizations in Whatcom Family Farmers, Skagit Family Farmers and Eastern Washington Family Farmers. Farmers across the state are being informed of this potential action by the state and share in the concern of farmers in Whatcom County. Our organization works to unify farmers and farm supporters across the state and speak out clearly to the public about actions, such as this, that are seen to harm family farmers.

As it is our intention to reach out to Governor Inslee very soon on this issue, and encourage others in the community to also reach out to him, we would welcome your earliest response to this request or a further discussion about this by phone or video meeting.

Sincerely,

Save Family Farming

A handwritten signature in black ink, appearing to read "Larry Stap", written in a cursive style.

Larry Stap
President, Save Family Farming



Gerald Baron
Executive Director, Save Family Farming



Rich Appel
President, Whatcom Family Farmers



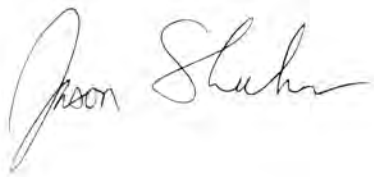
Fred Likkel
Executive Director, Whatcom Family Farmers



Jason VanderKooy
President, Skagit Family Farmers



Austin Allred
Co-President, Eastern Washington Family Farmers

A handwritten signature in black ink that reads "Jason Sheehan". The signature is written in a cursive style with a large initial 'J'.

Jason Sheehan
Co-President, Eastern Washington Family Farmers

Department of Ecology

MAY 29 2020

Water Resources Program

Scanned
TF.

PUBLIC UTILITY DISTRICT No. 1 of Whatcom County

P.O. Box 2308 • 1705 Trigg Road
Ferndale, WA 98248
P: (360) 384-4288 F: (360) 384-4849
email: info@pudwhatcom.org
www.pudwhatcom.org

May 20, 2020

Ms. Laura Watson
Director
Department of Ecology
PO Box 47600
Olympia, WA
98504-7600

Ms. Mary Verner
Manager
Water Resources Program
Department of Ecology
PO Box 47600
Olympia, WA
98504-7600

**RE: PUD Comments on Ecology Review of Requests for General Stream Adjudication
in WRIA-1**

Honorable Director Watson and Ms. Verner:

PUD No. 1 of Whatcom County (PUD) has a long and committed history in supporting and promoting regional water resource solutions in the Nooksack Basin. As Ecology has a deadline this September to bring a recommendation to the State Legislature, and potentially a proposal for funding of an adjudication in a basin in the State, the PUD offers here its viewpoint on what Ecology's recommendation to the legislature should be..

In reviewing the request for adjudication filed by the Lummi Nation and the Nooksack Indian Tribe, the PUD notes that the expressed goals are to "move forward together in the shared management of our water resources"¹, and to "allow rational planning and development"².

The PUD strongly and unequivocally supports these goals, as evidenced by its actions of the past years. The PUD looks forward to engagement directly with the Lummi Nation and the Nooksack Indian Tribe and others to pursue these goals and welcomes committed leadership from the Department of Ecology in the pursuit of these goals with meaningful and measurable implementation actions.

A primary goal of the PUD has been and continues to be the improvement of flow in the Nooksack Basin and tributaries for additional habitat benefit, as well as finding solutions that meet the needs of salmonids, the Lummi Nation, the Nooksack Indian Tribe and local residents, and businesses. The PUD has expressed a willingness to commit more water from the PUD's mainstem source to improve the flow in the stream to meet fish habitat needs, as evidenced in its advocacy for and willingness to lead the California Creek Streamflow Restoration project.

¹ Lummi Nation January 29, 2020 Letter to Ecology Director Watson.

² Nooksack Indian Tribe May 3, 2019 Letter to Ecology Director Bellon.

PUBLIC UTILITY DISTRICT No. 1 of Whatcom County

Another example is the Coldstream Dairy Project, in which the PUD was asked by the Department of Ecology to lead. This Project, utilizing a cutting-edge filtration system, will transform cow manure from a 2,500 dairy cow operation into clean water to be held by the PUD as "new" water.

The PUD is in a position to facilitate water supply solutions throughout the Nooksack Basin. Any such process, however, will require a committed Ecology financial and expertise investment into a defined process with definitive actions with administrative and legal creativity applied towards mutual goals. The PUD believes that such a process will have a higher likelihood of achieving an outcome aligned with the aforementioned goals, rather than a positional, litigious adjudication process that is resource and time consuming. As we have expressed to Ecology staff in the past, this process needs Ecology's administrative, policy and legal creativity and financial commitment. This region needs Ecology to join the PUD, the Tribes, and other stakeholders in leading pathways to solutions.

The PUD believes that a firm commitment from Ecology to a definitive negotiated process is more likely to result in a meaningful, timely and implementable regional solution. Ecology's recent presentations indicate that it sees a Nooksack adjudication as taking 10-20 years to complete, which is difficult to reconcile with recent experiences, such as the Yakima Basin adjudication that was limited to surface water, while the requested adjudication in the Nooksack Basin includes surface water and groundwater and more than one tribal claim.

The PUD has the history and proven commitment to working on solutions to regional water resource issues with the diverse jurisdictions in Whatcom County. The PUD has proven that it is prepared to do the work that needs to be done to facilitate, find and implement regional water resource solutions.

Recently, the PUD completed a Drought Contingency Plan funded by the U.S. Bureau of Reclamation Drought Response Program and the PUD. This planning process was supported by Birch Bay Water and Sewer District, the City of Bellingham, the City of Lynden, the Lummi Nation, the Nooksack Indian Tribe, Washington State University Center for Sustaining Agriculture and Natural Resources, the Whatcom County Executive Office, and the local Ag Water Board. This Whatcom County Drought Contingency Plan was prepared to assist local agencies responsible for planning for, and responding to, drought conditions in the County and for coordinating such activities with the State of Washington.

The PUD is presently administering the development of a WRIA 1 Regional Water Supply Plan ("Water Supply Plan"), on behalf of the WRIA Watershed Management Board³. This plan can and should be a first step in a negotiated, non-adjudicative process. The Water Supply Plan development is mostly funded by a grant from the Puget Sound Partnership. The work being undertaken now is phase I of two phases to complete the plan. The second phase of this is scheduled for completion in 2022.

The PUD recommends that Ecology request funding from the legislature for a new and specific process for addressing water supply, water allocation and water quality in the Nooksack Basin and its tributaries.

³ The WRIA 1 Watershed Management Board consists of PUD, the Lummi Nation, the Nooksack Indian Tribe, the City of Bellingham, and Whatcom County.

PUBLIC UTILITY DISTRICT No. 1 *of Whatcom County*

We recommend that Ecology fund work to evaluate and recommend science-based solutions to the following matters:

- i. Instream Flow Requirements, including instream flow and water quality improvement projects that benefit salmonid populations and habitat.
- ii. Water Quality Requirements.
- iii. Habitat Restoration and Protection Requirements.
- iv. Water Supply Requirements, including evaluating water supply storage opportunities designed to benefit salmonids, local residents, and the Lummi Nation and the Nooksack Indian Tribe, and supplanting and replacing illegal, non-potable ground and surface water uses with PUD and/or other entities surface water supply.
- v. Accountability.
- vi. Necessary policy, regulatory and statutory limitations and solutions, including revisions and/or amendments to the Water Code and/or Ecology policy.

The PUD is prepared to meet directly with the Lummi Nation, the Nooksack Indian Tribe, as well as other entities represented in the WRIA 1 Watershed Management Board, to further define the scope of the study and the process to solutions immediately. The PUD would be willing to administer and facilitate such work.

We note that communities and tribes in Washington State have achieved agreements in recent years through the execution of agreements that did not require extensive adjudication litigation. One prime example is in the Skagit Basin 1996 Memorandum of Agreement. The PUD would, therefore, encourage all parties interested in the resolution of the Nooksack River Basin issues to examine the range of potential and successful negotiation models that currently exists.

The process itself, the development of a potential settlement, and implementation of a settlement, will require significant financial resource commitment from the State of Washington. It is worth restating that it is the view of the PUD that a committed Ecology financial and expertise investment with flexibility and creativity will have a higher likelihood of achieving the desired outcome. Such solutions may also require legislative action. Leadership by Ecology in obtaining such legislative action combined with the required resources and expertise cited above, and working with tribal, federal and state elected leadership will be necessary. The PUD is committed to support Ecology in such an endeavor.

If Ecology and the Governor would seek a settlement solution in lieu of adjudication, the State must commit to a leading role in all phases and advocate strongly in all forums. The PUD believes that if this process is to be successful, the adjudication recommendation must be deferred. An adjudication process by its very nature may create barriers for many parties, including the PUD, from moving forward with regional solutions and the goals that the PUD has been committed to pursuing as outlined above.

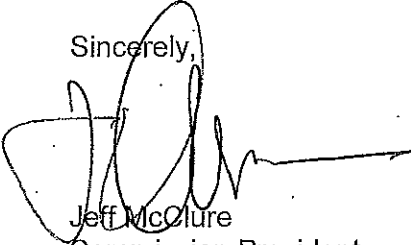
I am available to meet with you, as well as others, to discuss and refine this proposal. I can meet with you in Olympia, or over electronic means to maintain social distancing requirements. It is important for the Governor, the State Legislature and Ecology to actively support and participate in these alternative approaches rather than defer this process to the court system.

PUBLIC UTILITY DISTRICT No. 1 *of Whatcom County*

In the meantime, the PUD will continue to work on regional water resource solutions with the Lummi Nation, the Nooksack Indian Tribe, the Department of Ecology, and participating stakeholders in the basin.

The PUD has always greatly valued its relationship with the Lummi Nation and the Nooksack Indian Tribe and will continue to do so going forward, regardless of any future pathway or process that addresses water resources in the Nooksack Basin. To that end, as District Commission President, I will be reaching out directly to the leaders at the Lummi Nation and the Nooksack Indian Tribe, as well as the City of Bellingham to foster discussions.

Sincerely,



Jeff McClure
Commission President

Cc:

Chairman Solomon, Lummi Nation
Chairman Cline, Sr., Nooksack Indian Tribe
Mayor Fleetwood, City of Bellingham
Executive Sidhu, Whatcom County
Mr. Henry Bierlink, Ag Water Board
PUD No. 1 of Whatcom County Commissioners
Mr. Stephan Jilk, General Manager, PUD No. 1 of Whatcom County
Robin McPherson, Adjudication Assessment Manager, Department of Ecology



April 29, 2020

MEMO TO: Members of Ag Water Board
FROM: Satpal Singh Sidhu, County Executive
SUBJECT: Possible Water Adjudication Process

I have received the position letter from the Ag Water Board (AWB) a few weeks ago about the possible Water Adjudication process in Nooksack Basin (WRIA 1). Though we are largely dealing with our response to the COVID 19 crisis right now, I have had a chance to review the position letter. I have also been made aware that Washington Department of Ecology is likely to decide soon on a potential region to initiate an adjudication of water rights. One of the basins that is being considered is the Nooksack River Basin (WRIA 1). Both local tribes, Lummi Nation and Nooksack, have stated their support for an adjudication and have submitted letters requesting Ecology to initiate one.

Various water interests in Whatcom County have been engaged in water planning activities for over 20 years to resolve long-standing water management issues including participation in the watershed planning process under RCW 90.82. While a lot of good work has been accomplished during this time, there is a lot more to do to resolve these issues, including implementing the Watershed Management Plan approved by County Council in 2005.

There have been several efforts by various stakeholders to engage in settlement discussions, yet, significant agreements on water management issues have not come to fruition. According to Ecology, an adjudication process would provide an opportunity for a negotiated settlement between the affected parties. Your letter states that the Ag Water Board is opposed to an 'adjudication' process and is interested in re-starting the water settlement talks from basic principles created in 2015 by the Lummi Nation with input from the Nooksack Tribe, and other major water right holders (e.g. PUD and City of Bellingham).

I am keen to see resolution of water management, water use, water quality and water security issues in Whatcom County. This is especially important so that our citizens can be provided with economic and environmental security for future generations. The resolution of water issues was a cornerstone of my campaign for the executive's office in 2019. As soon as I took office in January, facilitating water settlement discussion has been one of my top priorities, prior to potential adjudication proceedings by DOE. Understand I am not taking a position either in favor or against initiation of an adjudication in the Nooksack Basin.

I support the parties coming together and engaging in meaningful negotiations, whether it is a prelude to an adjudication or a separate process. I am willing to support this effort through provision of staff who can play a neutral role in facilitating settlement discussions. Whatcom County is in a unique position to play this role in that it represents all people in the county and

Page two
Ag Water Board, April 29, 2020

recognizes the range of needs and perspectives of its residents and has a vested interest in the resolution of these issues. Furthermore, Whatcom County is not a water purveyor or a significant water right holder; therefore, it does not have a direct stake in the negotiations, eliminating any conflicts of interest that might be present with other parties.

I believe time is of the essence in getting these discussions going. Conflicts over water are already causing problems for many constituents and these problems will only get worse with a growing population and as the effects of climate change continue to develop. I urge all water user interests to begin discussions as soon as possible to showcase to WA DOE the seriousness of parties to seek a mutually agreed local solution.

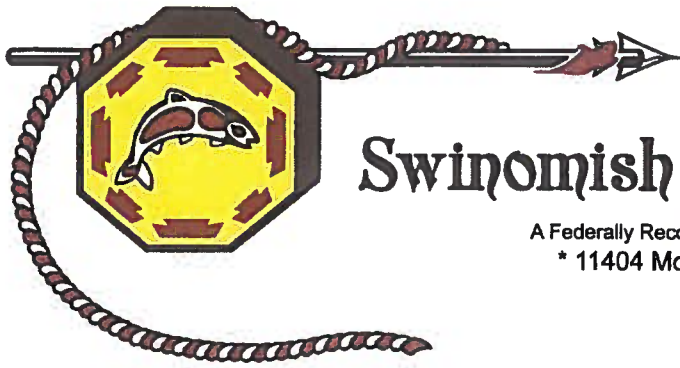
Sincerely,



Satpal Singh Sidhu
County Executive

Appendix C

Tribal Petitions and Correspondence



Main Office: 360.466.3163
Facsimile: 360.466.5309

Swinomish Indian Tribal Community

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

July 28, 2020

Director Laura Watson
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503
Via email: laura.watson@ecy.wa.gov

Dear Director Watson:

Thank you for speaking with us last month to discuss the Department's evaluation of adjudication alternatives throughout Washington State. As you know, salmon have been at the heart of the Swinomish Tribal Community's economy and way of life since time immemorial. One of the Tribe's overarching missions is to protect and restore salmon for current and future generations. To do that, we have to preserve the water and habitat that salmon need to survive. For more than 25 years, Swinomish has tried to work collaboratively with the Washington Department of Ecology and others to ensure that no further harm will come to our salmon resources as a result of additional out of stream appropriations or other ongoing adverse habitat modifications.

In 1996, Swinomish and seven other governmental entities entered into a landmark Memorandum of Agreement (MOA) that was intended to ensure both that sufficient water remained instream for fish and that sufficient water was available to meet out-of-stream demand. Unfortunately, those promises have not been met. While many of our MOA partners and others in the Skagit community have worked with us to achieve these goals, there are others (both within and beyond the Skagit watershed) who disregard Washington's first-in-time, first-in-right principle and the Tribe's senior water rights.

As you consider where to commence new adjudications, we certainly hope that you will consider the Skagit River watershed. In addition to the Tribe's valid but as yet unquantified Federally reserved water rights, there are junior municipal and agricultural rights in the basin whose status is uncertain. The moratorium on new water rights in the basin for nearly a decade has led to significant conflict. Addressing these issues now will not only avoid confrontations in the future but also will help to preserve what Ecology and the Washington Department of Fish and Wildlife have identified as the most important salmon producing watershed in Puget Sound. To stop, or at least slow, the precipitous declines in the Southern Resident Killer Whale population and salmon populations, we must address water supply and habitat issues in the Skagit in a timely manner.

Thank you for your consideration,

Chairman Steve Edwards
Swinomish Indian Tribal Community



**Confederated Tribes
of the Colville Reservation**

21 Colville Street
PO Box 150, Nespelem, WA. 99155
(888) 881-7684 (509) 634-2200 Fax: (509)634-4116
www.colvilletribes.com

August 30, 2019

Director Maia Bellon
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Petition of Confederated Tribes of the Colville Reservation for Determination and Adjudication of Water Rights and for Initiation of General Stream Adjudication of Tribal Water Rights

Dear Director Bellon:

By this letter, the Confederated Tribes of the Colville Reservation (“Tribes” or “Colville Tribes”) requests that the Washington Department of Ecology (“Department”) commence a general stream adjudication including but not limited to the Columbia River System, the Okanogan River System, all tributaries and boundary waters, and all groundwater within those systems and others as they affect the Colville Indian Reservation. WASH. REV. CODE §§ 90.03.110 to -.245. The Petition of the Confederated Tribes of the Colville Reservation To Commence a General Adjudication of the Tribes’ Water Rights Including All Surface and Groundwater Rights (“Petition”) setting forth the Tribes’ claims is attached to this letter. As set forth in the Petition, the Tribes’ claims are well-developed and ready for adjudication, and are summarized as follows:

- The Tribes claims water necessary to satisfy its rights, protected under federal law, to the Columbia River and its tributaries upstream, downstream and within the Colville Indian Reservation, including but not limited to the Columbia River, the Okanogan River and its tributaries, all streams within the Timentwa-Omak Lake Basin, Omak Creek and tributaries, Nespelem River and tributaries, Sanpoil River and tributaries, all streams with the Upper Inchelium Basin, all streams within the Lower Inchelium Basin, all streams within the Buffalo-McGinnis Basin, and No Name Creek and tributaries.
- The Tribes claims all groundwater contributing to the above-named streams and any additional water sources that border, traverse, and/or underlying the Colville Indian Reservation.
- The Tribes claims water to serve off-Reservation lands held in trust for the Tribes and/or Indian allottees, including water necessary to support the Tribes’ reserved rights in the North Half, and the Icicle Fishery.
- The Tribes claims water rights to satisfy its permanent homeland needs within the Colville Indian Reservation, and on trust lands located outside of the Reservation,

reserved under federal law and with a priority date of July 2, 1872. The Tribes' federal reserved rights include water for: irrigation; domestic, commercial, municipal and industrial ("DCMI") uses; livestock watering; mining; timber harvest; cultural water uses; and wildland firefighting.

- The Tribes claims water rights to serve its uninterrupted aboriginal rights, which include but are not limited to hunting, fishing, trapping, gathering and cultural activities, all of which have a priority of time immemorial.
- The Tribes claims water rights for the protection of instream flows necessary for fisheries on, adjacent to, and off of the Colville Indian Reservation.
- The Tribes seeks an injunction to enjoin all users of the waters of the Columbia River, its tributaries flowing adjacent to and through the Reservation, and contributing groundwater from interfering with the Tribes' rights protected under federal law, and also to close the Columbia River Basin to further appropriations in order to preserve the water resources from over-appropriation to the detriment of the Tribes.

Each of these claims is described in detail in the attached Petition.

The Tribes understands that a general stream adjudication of these rights is an immense undertaking, given the amount of water and number of claimants that will be involved. Accordingly, the Tribes proposes that the Department conduct the general stream adjudication in a manner similar to the procedural posture established in the *Aquavella* litigation. See *Final Decree, Washington Dep't of Ecology v. Aquavella*, No. 77-2-01484-5 (Yakima Cty. Super. Ct. May 9, 2019). In that litigation, the Department addressed water rights claims to the Yakima River system, adjudicating four separate pathways within that system, subsections within each of the pathways, and concluding with a final unifying decree at the end of the series of adjudications. The *Aquavella* procedure made the adjudication of a large number of water rights manageable.

The Tribes believes that the adjudication of its rights should be similarly phased, and proposes that the adjudication proceed according to Water Resource Inventory Areas ("WRIAs"), commencing with WRIA 58 and considering of all water sources within that WRIA including the Columbia River, all tributaries, and all groundwater. It is the Tribes' view that commencing with the Columbia River at the northeast corner of the Colville Indian Reservation is logical because the Columbia River forms the eastern and southern boundaries of the Reservation. In addition, commencing the adjudication on the mainstem of the Columbia River will lead to joinder of the majority of water rights claimants, sufficient for McCarran Amendment jurisdiction to require the United States' joinder. 42 U.S.C. § 666(a). Thereafter, the adjudication should proceed in a systematic fashion to follow the Columbia River through WRIAs 53, 52, 51 and 50. The Tribes' rights within No Name Creek WRIA, already adjudicated in the *Walton* litigation, should be confirmed in the proposed adjudication. See *Confederated Tribes of the Colville Reservation v.*

Walton, 752 F.2d 397 (9th Cir. 1985). Interim decrees for each of the WRIAs would be entered as a conditional partial decree. Upon entry of interim decrees for each of the WRIAs listed above, adjudication of claimed rights to the Okanogan River and WRIA 49 would be next, followed by all other Reservation boundary waters, and all off-Reservation water rights claims. Final conclusion of the general stream adjudication requested in the Tribes' Petition would be by a final, unifying decree such as was entered in the *Acquavella* litigation.

The Tribes' Petition is well-developed and ready for consideration by the Department and the Washington courts. The Tribes respectfully requests that the Department commence a general stream adjudication of the portion of the Columbia River System covered by the WRIAs described in this letter (58, 53, 52, 51, 50 and 49), in accordance with the claims set forth in the Tribes' Petition. Although large in scope and complexity, adjudication of the Tribes' claims will bring certainty to a system that continues to be subject to the cloud of the Tribes' senior, unadjudicated rights. Unlike water rights determined under state law, the Tribes' water rights to serve its permanent homeland and to protect its uninterrupted aboriginal water uses cannot be lost by mere passage of time or failure to put the water rights to beneficial use, and until quantified and determined, the Tribes' claims will continue to cause state-issued permits to be uncertain at best. Adjudication of the Tribes' claims as set forth in the Petition will also address the growing problem of over-appropriation of the waters by halting the continued issuance of permits to use such waters.

The Tribes' permanent homeland and aboriginal water right needs are paramount and require the Department's careful consideration at this time. The Tribes looks forward to working closely with the Department and its staff to identify next steps in order to proceed, including setting up a meeting or call in early September to discuss the Tribes' request as set forth in this letter and in the Petition.

Sincerely,



Chairman Rodney Cawston
Colville Business Council

**PETITION TO
WASHINGTON DEPARTMENT OF ECOLOGY**

BY

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

**TO COMMENCE A GENERAL ADJUDICATION OF THE WATER RIGHTS OF THE
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION INCLUDING ALL
SURFACE AND GROUNDWATER RIGHTS**

I. INTRODUCTION

The Confederated Tribes of the Colville Reservation (“Tribes”) files the instant petition requesting the Washington Department of Ecology (“Ecology”) to initiate a stream adjudication to resolve the Tribes’ rights under federal law to the waters of the Columbia River and its tributaries flowing through or adjacent to the Colville Indian Reservation (“Reservation”), to the waters of the Okanogan River and its tributaries flowing through or adjacent to the Reservation, to all groundwater underlying the Reservation, to all groundwater and surface waters within the Reservation that are not tributaries to the Columbia or Okanogan Rivers, to all groundwater and surface water appurtenant to allotments, wherever located, of members of the Tribes, to all groundwater and surface water necessary to support the Tribes’ off-reservation hunting, fishing, trapping, gathering and cultural use rights, to groundwater contributing to the flows of the Columbia River and tributaries, and to groundwater contributing to the flows of the Okanogan River and tributaries. The Columbia River is an interstate and international stream originating in Canada, flowing through Washington, and ending at its confluence with the Pacific Ocean forming the boundary between Washington and Oregon. The Okanogan River is an international stream originating in Canada and flowing into the Columbia River. The Columbia and Okanogan Rivers together form three of the four boundaries of the Reservation.

The necessary parties to any adjudication of these water rights are the Tribes, the United States of America, the State of Washington, and water users and claimants located in the State of Washington who appropriate mainly junior, state-created water rights, relative to the Tribes. This includes, but is not limited to, the waters upstream, downstream, and within the Reservation, including the Columbia River and its tributaries, the Okanogan River and its tributaries, all streams within the Timentwa-Omak Lake Basin, Omak Creek and tributaries, Nespelem River and tributaries, Sanpoil River and tributaries, all streams within the Upper Inchelium Basin, all streams within the Lower Inchelium Basin, all streams within the Buffalo-McGinnis Basin, and No Name Creek and its tributaries, all located in the State of Washington, all groundwater underlying the Reservation, and all groundwater contributing to the above-named streams and any additional water sources that border, traverse, or underlie the Colville Reservation, all groundwater and surface water necessary to support the Tribes' off-reservation hunting, fishing, trapping, gathering, and cultural use rights, and other off-reservation lands held in trust for the Tribes and/or Indian allottees in the State of Washington.

This petition seeks an adjudication of the Tribes' water rights reserved under federal law to serve the Reservation's permanent homeland purposes, *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), and the preservation of the Tribes' access to fishing grounds, *id.*, for which the United States set aside the Reservation, to the waters of the Columbia River and its tributaries bordering upon, traversing, and/or underlying the Reservation, to the waters of the Okanogan River and its tributaries bordering upon, traversing, and/or underlying the Reservation, all other interior and boundary waters of the Colville Reservation, and all other waters listed above and described herein. The Tribes claims federal reserved rights with a priority date of July 2, 1872, to waters in amounts sufficient to provide for the present and future

needs of the Tribes and its members. In addition, based upon the Tribes' uninterrupted aboriginal uses of the waters listed above and described herein, the Tribes claims water rights to serve those aboriginal uses with a priority date of time immemorial, which uses include, but are not limited to, irrigation, hunting, fishing, trapping, gathering, and cultural activities both on and off the Reservation, as well as protection of instream flows for fisheries on, adjacent to, and off of the Reservation. The Tribes' claims include water rights that were expressly reserved in the portion of the Reservation ceded by the Tribes, known as the North Half, under the Agreement of May 9, 1891, as well as those rights affirmed by the United States Court of Appeals for the Ninth Circuit to the Icicle Fishery located outside the boundaries of the Colville Reservation. By this petition, the Tribes seeks to enjoin all users of the waters of the Columbia River, the Okanogan River, their tributaries flowing through and adjacent to the Reservation, and all contributing groundwater from interfering with the rights of the Tribes to the waters of the Columbia River, the Okanogan River, their tributaries flowing through and adjacent to the Reservation, all contributing groundwater, and to the groundwater underlying the Reservation. *See Cappaert v. United States*, 426 U.S. 128, 142-43 (1976) (reserved rights doctrine protects federal reserved rights both from injurious surface and groundwater diversions). Finally, by this petition, the Tribes seeks a determination by Ecology to close the Columbia River Basin, Okanogan River Basin and all other river basins subject to the Tribes' claims in this Petition to further appropriations so as to preserve the water resources therein from over-appropriation to the detriment of the Tribes and all junior appropriators.

Under Washington law, the commencement of an adjudication to determine the water rights claimed by the Tribes is necessarily a general stream adjudication in which the water rights of all users of the waters are determined. Such an adjudication will serve the public

interest by removing any uncertainties that result from the Tribes' outstanding claims to significant amounts of senior water rights. *See* WASH. REV. CODE § 90.03.110(1).

II. NECESSARY PARTIES

1. The Tribes is a federally recognized Indian tribe organized pursuant to its constitution approved in February of 1938. *See* 79 Fed. Reg. 4,748, 4,749 (2014) (list of federally recognized Indian tribes). The Tribes' constitution established the Colville Business Council, the fourteen member body that governs the Tribes today. CONSTITUTION OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, art. II, §§ 1, 2.

2. The United States of America has a fiduciary responsibility to the Tribes to protect tribal trust resources, including the Tribes' water rights, and to act in the Tribes' best interests in carrying out its statutory and other obligations, and is, therefore, a necessary party to any stream adjudication involving the Tribes' water rights claims. Ecology, an agency of the State of Washington, and the Washington courts may join the United States in proceedings to determine the Tribes' water rights under the McCarran Amendment, 43 U.S.C. § 666(a), because the United States is the legal owner of the lands encompassed by the external boundaries of the Reservation and is, therefore, a necessary party to this petition as such legal owner and in its capacity as trustee for the Tribes in the assertion of water rights to serve the Tribes' permanent homeland.

3. The State of Washington was admitted to the Union on November 11, 1889, following its ratification of the Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676. The State of Washington is a necessary party to any adjudication of the Tribes' rights because the Tribes, Reservation, and the waters claimed by the Tribes in this petition are all located within the State.

4. Ecology is the agency authorized to initiate a general stream adjudication upon petition by individuals and entities claiming the right to any waters within the State of Washington. WASH. REV. CODE § 90.03.110. Ecology is, therefore, a necessary party to these proceedings.

5. Other necessary parties include all water users on the Columbia River and its tributaries flowing through the Reservation, the Okanogan River and its tributaries flowing through the Reservation, all streams within the Timentwa-Omak Lake Basin, Omak Creek and tributaries, Nespelem River and tributaries, Sanpoil River and tributaries, all streams within the Upper Inchelium Basin, all streams within the Lower Inchelium Basin, all streams within the Buffalo-McGinnis Basin, No Name Creek and tributaries, and any additional water sources that border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees in the State of Washington, all located in the State of Washington, because the determination of the water rights claimed by the Tribes in this petition necessarily requires the determination of the *inter sese* water rights of all other users of said waters.

6. This petition is properly filed with Ecology because the Reservation is located within the State of Washington and the water rights that the Tribes claims herein to serve such Reservation are located in and will be used in Washington. *See id.*

III. FACTUAL AND LEGAL BACKGROUND

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

7. The Tribes has lived in the region within and surrounding the present-day Reservation since time immemorial. *Findings of Fact* ¶ 5, *Confederated Tribes of Colville Reservation v. United States*, 4 Indian Cl. Comm'n 151, 153 (1956); *Opinion of the Commission, Confederated Tribes of Colville Reservation v. United States*, 4 Indian Cl. Comm'n 187, 189 (1956).

8. The Reservation was established by President Ulysses S. Grant under the Executive Order of July 2, 1872. As originally established, the Reservation encompassed three million acres, bounded on the south and east by the Columbia River, on the west by the Okanogan River, and on the north by the Canadian border.

9. By agreement dated May 9, 1891, the Tribes ceded 1.5 million acres of the original Reservation to the United States in exchange for the promise by the United States that the remaining lands would be protected for the Tribes as its permanent homeland. Following the 1891 agreement, the northern half of the reservation was restored to the public domain by the Act of July 1, 1892, ch. 140, 27 Stat. 62, and opened to entry and settlement by proclamation of the President dated April 10, 1900, 31 Stat. 1963. The Tribes expressly reserved the right to hunt and fish on the ceded lands, now known as the North Half, which unequivocally remain in force and effect. *Antoine v. Washington*, 420 U.S. 194, 205-07 (1975).

10. The Reservation initially included the following bands of Indians: Methow, Okanogan, Sanpoil, Nespelem, Lakes, Colville, Calispel, Spokane, and Coeur d'Alene Tribes. The Calispel, Spokane, and Coeur d'Alene Tribes later moved off of the Reservation. Thereafter, under the Agreement of July 7, 1883, which Congress ratified by the Act of July 4, 1884, ch. 180, 23 Stat. 76, 79-80, the Moses Band of Columbia, Wenatchi, Chelan, and Entiat Tribes agreed to relocate onto the Reservation with "equal rights alike with all other Indians now

on the Colville Reservation.” *Findings of Fact on Compromise Settlement* ¶ 5, *Confederated Tribes of Colville Reservation v. United States*, 18 Indian Cl. Comm’n 531, 533 (1967).

Subsequently in 1886, the Palus Tribe and Chief Joseph’s Band of Nez Perce were also relocated onto the Reservation, again with the same rights and protections as all other Indians located on the Reservation. *Opinion of the Commission, Confederated Tribes of Colville Reservation ex rel. Joseph Band of Nez Perce Tribe v. United States*, 25 Indian Cl. Comm’n 99, 100-02 (1971); see *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1104 n.1 (Fed. Cir. 1992).

11. The twelve tribes comprising the Tribes became organized as the Confederated Tribes of the Colville Reservation pursuant to its constitution that it approved in February of 1938. *Findings of Fact* ¶ 7, *Confederated Tribes of Colville Reservation v. United States*, 4 Indian Cl. Comm’n at 155. The twelve tribes are: Colville, Entiat, Lakes, Methow, Moses Band of Columbia, Nespalem, Okanogan, Palus, Sanpoil, Wenatchi, Chief Joseph’s Band of Nez Perce, and Chelan.

12. As stated in Paragraph 9, the Act of July 1, 1892, ch. 140, 27 Stat. 62, opened the North Half of the Reservation set aside by the Executive Order of July 2, 1872 to non-Indian settlement, and describes the present-day Reservation as follows:

Beginning at a point on the eastern boundary line of the Colville Indian Reservation where the township line between townships thirty-four and thirty-five north, of range thirty-seven east, of the Willamette meridian, if extended west, would intersect the same, said point being in the middle of the channel of the Columbia River, and running thence west parallel with the forty-ninth parallel of latitude to the western boundary line of the said Colville Indian Reservation in the Okanogan River, thence north following the said western boundary line to the said forty-ninth parallel of latitude, thence east along the said forty-ninth parallel of latitude to the north-east corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being

a portion of the Colville Indian Reservation created by executive order dated July second, eighteen hundred and seventy-two.

27 Stat. at 62-63.

1. Aboriginal Water Uses.

13. The Indian Claims Commission, in proceedings beginning in 1958 and continuing through 1978, considered the aboriginal land, water, and other resources used by the individual tribes comprising the Tribes on the lands used by them aboriginally since time immemorial. The individual tribes making up the Tribes depended upon fishing as their primary source of food: “The summer was devoted to fishing and the Indians spent this season at the great salmon fishing grounds along the rivers.” *Findings of Fact* ¶ 11, 4 Indian Cl. Comm’n at 158. For this reason, the individual tribes comprising the Tribes lived next to rivers aboriginally prior to the arrival of non-Indians. *Id.* ¶¶ 13-19, 4 Indian Cl. Comm’n at 159-65; accord *Findings of Fact* ¶ 3, *Confederated Tribes of Colville Reservation v. United States*, 43 Indian Cl. Comm’n 553, 555 (1978) (“The earliest known culture of these Salish was characterized by a dependence on fish. This was reported by the earliest explorers in the region. The source of fish was the waters on or adjacent to their aboriginal homelands which the Salish had fished from time immemorial.”).

14. In addition to fishing, the Tribes’ constituent tribes engaged in hunting and gathering during other seasons of the year. *Findings of Fact* ¶ 11, 4 Indian Cl. Comm’n at 158 (“In the spring the Indians were occupied in root digging which was the task of women and small game hunting was undertaken by the men. . . . In the fall the Indians would move on to fall fishing grounds and some into the mountains to gather fall roots or to hunt.”). The Tribes has also continued to use water for various other cultural practices since time immemorial.

15. The Tribes is entitled to water rights sufficient to enable it to continue the constituent tribes’ aboriginal practices: “preservation of the tribe’s access to fishing grounds was

one purpose for the creation of the Colville Reservation.” *Walton*, 647 F.2d at 48. As with other Indian reservations in Washington, “the Government and the Tribe[s] intended to reserve a quantity of the water flowing through [and adjacent to] the reservation not only for the purpose of supporting [tribal] agriculture, but also for the purpose of maintaining the Tribe[s]’ executive order] right to hunt and fish on reservation lands.” *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1984).

16. The following findings by the Indian Claims Commission and the early reports of the Commissioner of Indian Affairs support the Tribes’ right to water for its uninterrupted hunting, fishing, trapping and gathering activities and other cultural practices, all with a priority of time immemorial:

a. Sanpoil and Nespelem.

The Indian Claims Commission determined that the Sanpoil and Nespelem Tribes, who the Commission treated together as a unit, had aboriginal or Indian title to the area described as follows:

In northeastern Washington, about 85 miles south of the Canadian boundary, the Columbia river abruptly changes its course from south to westward. This has come to be known as the Big Bend of the Columbia, and the adjacent territory to the south of the river is called locally the Big Bend country. This general area, together with that included within the bend, was originally occupied by the Sanpoil. The confluence of the Sanpoil and the Columbia rivers marked the center of population but the geographical center was somewhat north of this point, near Lake Annum (Buffalo Lake). The southern boundary of the area was approximately a straight line running east and west at about 47° 40’ latitude. The eastern boundary intersected this line about 15 miles west of the town of Davenport. From that point it continued in a northeasterly direction to the bend of the river, or just west of the village called Peach. The boundary line then followed the river northward to Hunters, where it veered westward and connected with the Kettle river range of mountains; this range formed the remaining portion of the eastern territorial limit. A line drawn directly eastward from Republic to the Kettle river mountains would represent the northern boundary with fair accuracy. On the west the boundary line proceeded from Republic to Kartaro, then southward across the river toward Coulee City.

All villages were located along the Columbia river; therefore the boundary points on the river were much more clearly defined than in other parts of the territory. The former were determined by the actual extent of the villages, the latter merely by the greatest extent of territory covered during hunting and root gathering expeditions. The area thus recognized as belonging to the Sanpoil comprised about 1600 square miles. Approximately 85 miles of the course of the Columbia were included and both sides of the river were occupied except for the short distance between Miles and Hunters.

Findings of Fact ¶ 15, 4 Indian Cl. Comm'n at 162; *accord id.* ¶ 17, 4 Indian Cl. Comm'n at 163 (Sanpoil and Nespelem “exclusively used and occupied the area of land described” above).

The Sanpoil and Nespelem Tribes historically subsisted on fishing, hunting, trapping, and the gathering of plants. *Id.* ¶¶ 12-14, 4 Indian Cl. Comm'n at 158-61. In his annual report for 1867, George A. Paige reported that the Sanpoil and Nespelem Tribes also “cultivate a few patches of ground, here and there, along the banks of the [Columbia] river, amounting to about 100 acres—300 bushels of wheat, 50 of oats, 75 of potatoes, eight tons of hay.” *Report on Indian Affairs by the Acting Commissioner for the Year 1867* at 57 (1868) (“1867 Report”). Similarly, in his annual report dated September 1, 1871, William P. Winans stated that the Sanpoil and Nespelem Tribes had a “few small inclosures [sic], in which they plant corn and potatoes,” and were also “rich in horses and cattle.” *Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1871* at 293 (1872) (“1871 Report”); see *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1870* at 25 (1870) (“1870 Report”) (reporting that the Sanpoils and Nespelems have a “few farms” and that they grazed 1,189 horses and 187 head of cattle on their lands).

b. Colville.

The Indian Claims Commission determined that the Colville Tribe had aboriginal or Indian title to the area “generally located on both sides of the Columbia River from just above Kettle Falls on the north to near Hunters, Washington, on the south with the northeastern boundary line of the Sanpoil . . . being the western boundary line of the Colville.” *Findings of Fact* ¶ 23, 4 Indian Cl. Comm’n at 167-68.

The Colvilles primarily subsisted on fishing and plant gathering prior to the establishment of the Reservation. *See* 1867 Report at 55. In his July 1865 report, however, Paige stated that the Colvilles also “cultivate small fields of grain and vegetables. After putting in their spring crops they usually repair to the cammas grounds, . . . where they are engaged until the middle of June collecting cammas and bitter root for food.” *Report of the Commissioner of Indian Affairs for the Year 1865* at 98 (1865). Two years later, in 1867, Paige reported that the Colvilles own “small farms and fields along the Columbia and in Colville valley, which they cultivate with some success,” and that “[t]he number of acres cultivated by them during the year is 300.” 1867 Report at 55. In 1868, T.J. McKenney, the Superintendent of Indian Affairs, reported that the Colvilles “occupy large tracts of excellent land, which they themselves have brought under cultivation, and by the growth of grain and grass, and the pasturage of large herds of cattle and horses, do a profitable farming business.” *Annual Report of the Commissioner of Indian Affairs, for the Year 1868* at 97 (1868). In 1870, Samuel Ross reported that the Colvilles “have 31 farms, with 1,621 acres under fence, and 751 under cultivation; they have sown this year 414 bushels wheat, 311 bushels oats, 203 bushels potatoes, 15 bushels peas, 22 bushels corn, and 69 pounds garden seeds.” 1870 Report at 24. Finally, in 1871, the year before the Reservation was established, Winans reported that the Colvilles “have thirty-five farms; they raise wheat, oats, corn, potatoes, peas, tomatoes, and garden vegetables. About one-half of their subsistence is

derived from this source; some of the farmers are industrious and raise as good crops as their white neighbors.” 1871 Report at 293; *see id.* at 620 (table indicating that Indians in the Fort Colville District cultivated 1,063 acres in 1871); *Findings of Fact* ¶ 20, 4 Indian Cl. Comm’n at 166.

c. Lakes.

The Indian Claims Commission determined that the Lakes had aboriginal or Indian title to the area “east of Kettle River from Kettle Falls north along the Columbia River to the international boundary.” *Id.* ¶ 24, 4 Indian Cl. Comm’n at 169; *accord id.* ¶ 26, 4 Indian Cl. Comm’n at 171 (“the Lake Tribe has by substantial evidence established Indian title to” this area).

In 1871, Winans reported that the Lakes Tribe had begun farming that same year and that they “subsist almost entirely from hunting and trapping; they catch the finest furs, and more of them than any other tribe in this district, which they sell to the traders, and purchase food and clothing.” 1871 Report at 294.

d. Okanogan.

The Okanogan inhabited “the whole of the Banks of the Okanogan River from the Columbia river to the Great Ok Lake, and thence to Thompsons River, a distance computed to be about 400 miles.” *Id.* ¶ 27, 4 Indian Cl. Comm’n at 172. Their “principal occupation is catching and curing salmon.” *Id.* The Commission determined “that the Okanogan Indians exclusively used and occupied the area as delineated for the Southern Okanogan on petitioners’ Exhibit 532.” *Id.* ¶ 37, 4 Indian Cl. Comm’n at 180.

The Okanogan Tribe historically subsisted on hunting, fishing, trapping, and plant gathering. *Id.* ¶ 35, 4 Indian Cl. Comm’n at 178. In 1871, Winans reported that the Okanogans

“depend mostly on fish, roots, and berries for subsistence,” but that they also maintained “four farms, on which they raise wheat, corn, and potatoes.” 1871 Report at 293; *see* 1870 Report at 26 (reporting that the Okanogans “subsist mostly on roots, berries, and fish in summer, and bear, deer, and beaver in the winter”).

e. Methow.

The Indian Claims Commission determined that the Methow Tribe

exclusively used and occupied only that part of the Methow River watershed as delineated on petitioners’ Exhibit 532, from the mouth of said river to the town of Twisp. It is considered that for the purpose of defining the northern boundary of this tract an east-west line extending between the east and west boundary lines through the town of Twisp, shown on petitioners’ Exhibit 532, will, for the purposes of this finding, fairly show the area occupied aboriginally and to July 2, 1872, by the Methow Tribe.

Id. ¶ 40, 4 Indian Cl. Comm’n at 185.

In 1871, Winans reported that most of the Methows “cultivate small patches of potatoes and corn; about one-third of their subsistence is derived from this source; the remainder from hunting, fishing and root-digging.” 1871 Report at 293.

f. Moses Band of Columbia.

The Indian Claims Commission found that the Columbia Tribe aboriginally occupied the following territory:

Beginning on the Columbia River at Rock Island, Washington, thence northerly along the divide which separates the waters of the Columbia River on the west from the waters of Beaver Creek on the east to the head of Beaver Creek, thence northeasterly to Waterville, Washington, thence easterly to the Coulee City, Washington, thence southerly to Othello, Washington, thence westerly along the line of 46° 50’ north latitude to its intersection with Crab Creek, thence westerly along Crab Creek to the Columbia River, thence northerly along the Columbia River to a point east of the eastern extremity of the ridge of Ryegrass Mountain, thence west to said extremity, thence westerly along said ridge to the westerly extremity thereof, thence westerly along the ridge which separates the waters of Middle Canyon and Ryegrass Coulee to the highest point between the source of the waters of Middle Canyon Creek and the source of the waters of Ryegrass

Coulee, thence northerly along the divide which separates the waters of the Yakima River on the west from the Columbia River on the east to Whiskey Dick Mountain and continuing northerly to Colockum Pass, thence northeasterly along the ridge separating the waters of Stemilt Creek and Colockum Creek to the point of beginning.

Additional Findings of Fact ¶ 50(d), *Yakima Tribe v. United States*, 12 Indian Cl. Commission 301, 356-57 (1963).

As described by the Indian Claims Commission, most Columbia Indians subsisted on “roots, berries, deer and antelope and other small game found over the plateau region. The Columbia Indians had many horses in aboriginal times and used them in traveling over their territory.” *Id.* ¶ 48(b), 12 Indian Cl. Comm’n at 337.

g. Chelan.

The Indian Claims Commission found that twenty village locations listed for the Chelan Tribe were located along the northern Columbia River. *Id.* ¶ 48(a), 12 Indian Cl. Comm’n at 335. Specifically, the Chelan Tribe was located “along the Columbia River from about 10 miles below the mouth of the Methow to a few miles above Entiat and around Lake Chelan.” *Id.* ¶ 43, 12 Indian Cl. Comm’n at 325. The Commission further defined the Chelan Tribe’s aboriginal territory as follows:

Beginning at a point where the main Sawtooth Ridge abuts and adjoins the Cascade Mountains, said Ridge being the divide between the waters of the Methow River on the north and the Stehekin River and Lake Chelan on the south, thence southeasterly along said Sawtooth Ridge to the Columbia River, thence southerly along the Columbia River to its intersection with a line running along the main ridge of the Chelan Mountains, which ridge separates the waters of Lake Chelan and the Entiat River, thence northwesterly along the main divide of the Chelan Mountains to its junction with the main divide of the Cascade Mountains, thence northerly and easterly to the point of beginning.

Id. ¶ 50(a), 12 Indian Cl. Comm’n at 355-56.

As determined by the Indian Claims Commission, the Chelan, Entiat, and Wenatchi Tribes spent most of the spring and summer at various fishing stations, but “[o]ther seasons were devoted to gathering roots and berries and hunting for game.” *Id.* ¶ 48(a), 12 Indian Cl. Comm’n at 336.

h. Entiat.

With regard to the Entiat Tribe, “[t]here were four village sites listed by Dr. Ray for the Entiat Tribe. Three were located on the Columbia River and one a short distance up the Entiat River.” *Id.* ¶ 49(a), 12 Indian Cl. Comm’n at 335. The Commission specifically found the Entiat aboriginal territory to be as follows:

Beginning at the point where the main ridge of the Chelan Mountains abuts and adjoins the main ridge of the Entiat Mountains, thence southeasterly along the main ridge of the Chelan Mountains, which ridge separates the waters of Lake Chelan and the Entiat River to the Columbia River, thence southerly along the Columbia River to its intersection with a line running along the main ridge of the Entiat Mountains, which ridge separates the waters of the Entiat River and the Wenatchee River, thence northwesterly along the main ridge of the Entiat Mountains to the point of beginning.

Id. ¶ 50(b), 12 Indian Cl. Comm’n at 356.

As stated above, the Entiat, Chelan, and Wenatchi Tribes dedicated most of the spring and summer to fishing, but “[o]ther seasons were devoted to gathering roots and berries and hunting for game.” *Id.* ¶ 48(a), 12 Indian Cl. Comm’n at 336.

i. Wenatchi.

“The Wenatchee [*sic*] area included fifteen village sites on Dr. Ray’s map. Seven of the sites were located along both banks of the Columbia River with the remainder located along the Wenatchee River and its tributaries.” *Id.* ¶ 49(a), 12 Indian Cl. Comm’n at 335. Specifically, the Commission found the Wenatchi aboriginal territory to be as follows:

Beginning at the point where the main range of the Chelan Mountains abut and adjoin the main range of the Cascade Mountains, thence easterly along the ridge of said Chelan Mountains to the point of junction with the main ridge of the Entiat Mountains, thence southeasterly along said ridge of the Entiat Mountains to the Columbia River, thence southerly along the Columbia River to its intersection with a line running along the divide which separates the waters of Stemilt Creek from the waters of Colockum Creek and thence southwesterly along said divide to the main ridge of the Wenatchee Mountains, thence northwesterly along said ridge to the junction with the main ridge of the Cascade Mountains, thence northerly along the main Cascade ridge to the point of beginning.

Id. ¶ 50(c), 12 Indian Cl. Comm’n at 356.

As stated above, the Wenatchi, Chelan, and Entiat Tribes engaged in fishing during most of the spring and summer, but “[o]ther seasons were devoted to gathering roots and berries and hunting for game.” *Id.* ¶ 48(a), 12 Indian Cl. Comm’n at 336.

j. Palus.

The Indian Claims Commission found the Palus aboriginal territory to be as follows:

Beginning at the westernmost point of Kahlotus Lake, thence northerly to the divide separating the waters of Rattlesnake Canyon and Sand Hills Coulee, thence northeasterly along said divide to the source of the southernmost branch or the waters of Rattlesnake Canyon, thence northeasterly to the mouth of Rock Creek, thence northeasterly to Lancaster, Washington, thence easterly to Steptoe, Washington, thence southerly to Wawawai, Washington, thence westerly along the Snake River to a point opposite Devils Canyon, thence northwesterly along said canyon to the place of beginning.

Id. ¶ 50(k), 12 Indian Cl. Comm’n at 360.

The Palus Tribe historically engaged in “gathering roots, berries, and in hunting for subsistence. The Palus territory provided game, both large and small, throughout the entire area. Salmon fishing was one of the important sources of subsistence for the Palus.” *Id.* ¶ 48(i), 12 Indian Cl. Comm’n at 345.

k. Chief Joseph Band of Nez Perce.

Around 1886, the federal government moved the Chief Joseph Band of Nez Perce to the Colville Reservation. *Findings of Fact on Compromise Settlement* ¶ 5, 18 Indian Cl. Comm'n at 533. As a member of the Tribes, the Chief Joseph Band has equal rights and protections alike with all other Indians now on the Reservation.

The Indian Claims Commission determined that the Chief Joseph Band of Nez Perce historically “were a hunting, herding and gathering people.” *Findings of Fact* ¶ 3, *Confederated Tribes of Colville Reservation ex rel. Joseph Band of Nez Perce Tribe v. United States*, 25 Indian Cl. Comm'n 128, 129 (1971).

17. It is settled that the Tribes has aboriginal rights requiring water for their support:

[T]he Commission concludes that claimants possessed special fishing rights to take fish in the rivers running through or adjacent to their aboriginal lands, and that once they were confined to the Colville reservation such rights continued uninterrupted and unimpaired.

The Commission further concludes that the establishment of the 1872 reservation in the context of the circumstances outlined in the foregoing findings carried with it, in addition to any aboriginal aspect of fishing, the establishment of special rights to take fish in the waters on or adjacent to the reservation.

Finding of Facts ¶ 32, 43 Indian Cl. Comm'n at 578. Courts have confirmed the Tribes' rights to water to support its irrigation, hunting, fishing, trapping, gathering, cultural and other aboriginal practices, which the Tribes has exercised and continues to exercise since time immemorial. *Walton*, 647 F.2d at 47; *Antoine*, 420 U.S. at 205-07.

2. Reservation Water Uses.

18. The Tribes is entitled to water sufficient to make the Reservation a livable homeland for its present and future generations. *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (when the United States sets aside an Indian reservation, it impliedly reserves sufficient

water to fulfill the purposes of the reservation with a reservation date priority). “[T]he United States . . . reserve[d] the water rights for the Indians effective as of the time the Indian Reservations were created.” *Arizona v. California*, 373 U.S. 546, 600 (1963). The reserved water rights must be of a quantity sufficient “to irrigate all practicably irrigable acreage on the reservation[,]” *id.*, as well as serve “the purposes of the reservation.” *Walton*, 647 F.2d at 46. It is well-established “that when the Colville reservation was created, sufficient appurtenant water was reserved to permit irrigation of all practicably irrigable acreage on the reservation,” and to preserve the Tribes’ access to, development and maintenance of fishing grounds. *Id.* at 48 (“We agree with the district court that preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation. Under the circumstances, we find an implied reservation of water from No Name Creek for the development and maintenance of replacement fishing grounds.”).

19. Despite the fact that the Tribes has occupied the area now encompassed by the Reservation and the larger surrounding area since time immemorial, and despite the fact that the United States established the Reservation as the Tribe’s permanent homeland in 1872, the Tribes’ water rights to serve the permanent homeland purpose of the Reservation have never been adjudicated. Nor have the Tribes’ aboriginal water rights been quantified or determined.

3. Reservation Water Sources.

20. The Columbia River is an international stream commencing in Canada and ending at its terminus with the Pacific Ocean in Oregon. The Reservation lies entirely within the Columbia River Basin, which includes all of the streams and their tributaries bordering, traversing, and underlying the Reservation. The Columbia River forms first the eastern and then the southern boundary of the Reservation. The eastern and southern boundaries of the

Reservation extend to the center of the original Columbia River channel. With respect to the Colville Reservation, the Columbia River spans Ecology's Water Resource Inventory Areas ("WRIA") 49, 50, 51, 52, 53, and 58. Under the Tribes' designated Water Management Areas ("WMAs") within the Colville Reservation Boundary, the Columbia River is encompassed by WMA 01: Columbia River. The Tribes' claims in this petition include all tributaries to the Columbia River, which border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees in the State of Washington.

21. The Okanogan River is a tributary of the Columbia River, commencing in Canada, entering the United States in north central Washington, and ending where it joins the Columbia River northeast of Brewster, Washington, between the Wells Dam downstream and the Chief Joseph Dam upstream. The Okanogan River forms the western boundary of the Reservation, and the Reservation boundary extends to the west bank of the Okanogan River. The Okanogan River watershed forms Ecology's WRIA 49 and the Tribes' WMA 02: Okanogan River. The Tribes' claims in this petition include all streams within the Okanogan River Basin, which border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees in the State of Washington.

22. The Nespelem River and Little Nespelem River are tributaries of the Columbia River. They are entirely located in Okanogan County, Washington, and the Reservation. The Nespelem River drainage system originates in eastern Okanogan County and flows south. It passes by the town of Nespelem, Washington, the headquarters of the Reservation; the Little Nespelem River takes a parallel path to the east and drains into the Nespelem River below the town of Nespelem. Below Nespelem, the Nespelem River turns west and empties into the Columbia River several miles below Grand Coulee Dam and thirty-seven (37) miles above Chief

Joseph Dam. The Nespelem River comprises Ecology's WRIA 51 and the Tribes' WMA 05: Nespelem Drainage; it lies entirely within the Reservation. The Tribes' claims in this petition include all streams within the Nespelem River Basin.

23. The Sanpoil River is a tributary to the Columbia River that originates near the city of Republic, Washington, in the Okanogan Highland, east of the Okanogan River. It flows south through the Colville National Forest, Okanogan National Forest, and the Reservation. The Sanpoil River enters Lake Roosevelt, the impounded Columbia River, above Grand Coulee Dam. The West Fork Sanpoil River originates in the Okanogan National Forest to the west of Republic, Washington and drains to the Sanpoil River a few miles south of the northern boundary of the Reservation and is considered part of the Sanpoil River Basin. The Grand Coulee Dam impounds the last few miles of the Sanpoil River as well. The Sanpoil River comprises Ecology's WRIA 52 and the Tribes' WMA 06, San Poil Drainage. The Tribes' claims in this petition include all streams within the Sanpoil River Basin, which border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees in the State of Washington.

24. Timentwa-Omak Lake Basin is comprised of numerous small lakes and ponds and the much larger Omak Lake. It is a closed basin lying entirely within the exterior boundaries of the Reservation from which surface water does not flow out. The Timentwa-Omak Lake Basin is within Ecology's WRIA 49 and the Tribes' WMA 03: Timentwa-Omak Lake Basin. The Tribes' claims in this petition include all streams within the Timentwa-Omake Lake Basin.

25. Omak Creek is a stream entirely contained within the Reservation and ending at Omak, Washington where it enters the Okanogan River. Omak Creek is within Ecology's WRIA 49 and the Tribes' WMA 04: Omak Creek (Titled Omak Creek). WMA 04 also encompasses

the portion of the Tunk Creek basin that is located within the Reservation boundaries. Tunk Creek is also a tributary to the Okanogan River. The Tribes' claims in this petition include all streams within the Omak Creek Basin and the Tunk Creek basin, which also lie within the Reservation.

26. The Upper Inchelium drainage encompasses two (2) major stream systems within the Reservation boundary, Hall Creek and Stranger Creek. The Hall Creek stream system begins north of the Reservation and empties into the Columbia River. The Stranger Creek Stream System originates within the Reservation and empties into the Columbia River just south of the Hall Creek outlet. The Upper Inchelium drainage is within Ecology's WRIA 58 and the Tribes' WMA 07: Upper Inchelium. The Tribes' claims in this petition include all streams within the Upper Inchelium Basin, which border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees in the State of Washington.

27. The Lower Inchelium drainage encompasses three (3) major stream systems lying entirely within the exterior boundaries of the Reservation, Nine Mile Creek, Nez Perce Creek, and Wilmont Creek. The Lower Inchelium drainage is within Ecology's WRIA 58 and the Tribes' WMA 08: Lower Inchelium. The Tribes' claims in this petition include all streams within the Lower Inchelium Basin.

28. The Buffalo-McGinnis WMA is comprised of a closed basin lying entirely within the exterior boundaries of the Reservation from which surface water does not flow. The Buffalo-McGinnis Lakes Basin is within Ecology's WRIA 50 and the Tribes' WMA 09: Buffalo-McGinnis. The Tribes' claims in this petition include all streams within the Buffalo-McGinnis Lakes Basin.

29. No Name Creek WMA is comprised of an aquifer and a spring-fed stream lying entirely within the exterior boundaries of the Reservation and drains to WMA 03: Timentwa-Omak Lake Basin. It is included as a separate unit from the Timentwa-Omak Lake Basin WMA because it was subject to a federal court decree. *See Colville Confederated Tribes v. Walton*, 752 F.2d 397, 405 (9th Cir. 1985). No Name Creek Basin is within Ecology's WRIA 49 and the Tribes' WMA 10: No Name Creek. The Tribes' claims in this petition include all streams within the No Name Creek Basin.

30. Groundwater underlies the Reservation and the allotments held in trust for the benefit of the Tribes' members located outside the Reservation. The Tribes claims the right to use such groundwater to satisfy its permanent homeland needs identified herein. Specifically, the Tribes' relies on groundwater for agricultural, domestic, commercial, municipal, and industrial uses, but the Tribes' groundwater claims are not limited to these uses. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270-71 (9th Cir. 2017).

4. Lands Entitled to Water Rights.

31. The lands on which the Tribes is entitled to use the water rights claimed in this petition include all lands within Reservation boundaries, as established by the Executive Order of 1872.

32. The lands on which the Tribes is entitled to use the water rights claimed in this petition include all trust allotments within Reservation boundaries, and all trust allotments outside of Reservation boundaries which the United States holds in trust for the benefit of members of the Tribes.

33. The lands on which the Tribes is entitled to use the water rights claimed in this petition also include all lands adjacent to and outside of Reservation boundaries on which Tribes have reserved rights, known as the North Half. *See Antoine*, 420 U.S. at 205-07.

34. The lands on which the Tribes is entitled to use the water rights claimed in this petition also include the lands encompassed by the Wenatchapam Fishery to which the Wenatchi Tribe has established reserved rights. *United States v. Confederated Tribes of Colville Reservation*, 606 F.3d 698, 715 (9th Cir. 2010).

IV. CLAIMS

ABORIGINAL WATER RIGHTS

35. The Plaintiffs herein incorporate the allegations and claims set forth in Paragraphs 1-34 hereof.

36. The Tribes is entitled to aboriginal water rights based upon its aboriginal use and occupancy of the lands now encompassed by the Reservation as established by the Executive Order of 1872, within the North Half, at the Icicle Fishery, on trust lands located outside of the 1872 Reservation, and other aboriginal areas where the Tribes' continual use, from time immemorial to the present, of the waters located within, adjacent to, and off of the Reservation. *Adair*, 723 F.2d at 1410 ("the Government and the Tribe intended to reserve a quantity of the water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands."); *accord Walton*, 647 F.2d at 48. The Tribes' aboriginal water rights include water to support irrigation, hunting, fishing, trapping, gathering, cultural and other aboriginal activities which the Tribes has practiced since time immemorial.

37. The Tribes is entitled to water rights consistent with and to protect its reserved hunting, fishing, trapping, gathering and cultural use rights on lands located both within and outside of the present-day Reservation, which rights the Tribes has exercised since time immemorial. *Antoine*, 420 U.S. at 196 n.4, 205-06; *United States v. Confederated Tribes of Colville Reservation*, 606 F.3d at 715. The Tribes' water rights to serve and protect its reserved hunting, fishing, trapping, gathering and cultural activities are entitled to a time immemorial priority.

38. The Tribes is entitled to water rights, protected under federal law, sufficient to protect and provide for instream flows for fish habitat and fisheries in order to protect the Tribes' reserved, aboriginal rights to continue to harvest fish as it has done since time immemorial. Attachment A hereto identifies the instream flow requirements for fish habitat and fisheries. The Tribes' water rights to serve and protect its rights to preserve fish habitat and fisheries are entitled to a time immemorial priority.

39. The Tribes is entitled to water rights, protected under federal law, sufficient to support traditional economic activity associated with aboriginal fishing in the streams and rivers identified herein. *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979); *Walton*, 647 F.2d at 48.

40. The Tribes has acquired real property, described in Attachment B hereto, for the benefit of anadromous fish habitat. The Tribes is entitled to water rights to serve the real property described in Attachment B for instream flows and for the benefit of fish habitat and fisheries. Such water rights are entitled to a time immemorial priority.

41. The Tribes' aboriginal water rights include water to support cultural water uses on the Reservation consistent with the Tribes' traditional cultural practices since time immemorial.

FEDERAL RESERVED WATER RIGHTS

42. The Plaintiffs herein incorporate the allegations and claims set forth in Paragraphs 1-41 hereof.

43. The Tribes is entitled to water rights, reserved under federal law, to serve the permanent homeland purposes of the Reservation and the purpose of preserving the Tribes' fishing rights.

44. The Tribes' federal reserved water rights for the purpose of a homeland include water in sufficient quantity to serve irrigation, livestock, fish hatcheries, domestic, commercial, municipal, and industrial ("DCMI"), timber harvesting, mining and cultural needs on the Colville Reservation now and in the future, in a total amount not less than 993,479.07 acre-feet per year ("afy"), and specifically defined as follows:

- a. Irrigation: 946,722.40 afy to irrigate 236,681 acres on the Reservation.

The Tribes' federal reserved water rights include water to support irrigation on the Colville Reservation consistent with the Reservation's purpose as the Tribes' permanent homeland. The irrigable acres within the Reservation are divided by elevation into three categories: up to 500 feet pumping lift above the mean elevation of the Columbia and Okanogan Rivers; between 500 feet pumping lift and 1,500 feet pumping lift; and Timentwa Flats, all of which land is above 1,500 feet pumping lift.

1. Columbia River.

- A. 500 feet pumping lift: 245,156.00 afy to irrigate 61,289 acres.

- B. 1,500 feet pumping lift: 177,668.00 afy to irrigate 43,417 acres.
 - C. Timentwa Flats: 13,084.00 afy to irrigate 3,271 acres.
2. Okanogan River.
- A. 500 feet pumping lift: 34,336.00 afy to irrigate 8,584 acres.
 - B. 1,500 feet pumping lift: 28,652.00 afy to irrigate 7,163 acres.
 - C. Timentwa Flats: 0.
3. Nespelem River Drainage.
- A. 500 feet pumping lift: 2,800.00 afy to irrigate 700 acres.
 - B. 1,500 feet pumping lift: 84,648.00 afy to irrigate 21,162 acres.
 - C. Timentwa Flats: 0.
4. Sanpoil River Drainage.
- A. 500 feet pumping lift: 27,704.00 afy to irrigate 6,926 acres.
 - B. 1,500 feet pumping lift: 31,888.00 afy to irrigate 7,972 acres.
 - C. Timentwa Flats: 0.
5. Timentwa-Omak Lake Basin.
- A. 500 feet pumping lift: 18,748.00 afy to irrigate 4,687 acres.
 - B. 1,500 feet pumping lift: 29,320.00 afy to irrigate 7,330 acres.
 - C. Timentwa Flats: 60,520.00 afy to irrigate 15,130 acres.

6. Omak Creek.
 - A. 500 feet pumping lift: 772.00 afy to irrigate 193 acres.
 - B. 1,500 feet pumping lift: 20,436.00 afy to irrigate 5,109 acres.
 - C. Timentwa Flats: 0.
7. Upper Inchelium Basin.
 - A. 500 feet pumping lift: 1,400.00 afy to irrigate 350 acres.
 - B. 1,500 feet pumping lift: 91,632.00 afy to irrigate 22,908 acres.
 - C. Timentwa Flats: 0.
8. Lower Inchelium Basin.
 - A. 500 feet pumping lift: 400.00 afy to irrigate 100 acres.
 - B. 1,500 feet pumping lift: 74,712.00 afy to irrigate 18,678 acres.
 - C. Timentwa Flats: 0.
9. Buffalo-McGinnis Basin.
 - A. 500 feet msl elevation: 480.00 afy to irrigate 120 acres.
 - B. 1,500 feet msl elevation: 1,092.00 afy to irrigate 273 acres.
 - C. Timentwa Flats: 0.
10. No Name Creek Basin.
 - A. Total arable acreage at all elevations: 794.40 afy to irrigate 199 acres per decree in *Walton*, 752 F.2d at 405.

b. DCMI: 33,227.091 afy to serve a projected future population of 21,459.

The Tribes' federal reserved water rights include water to support DCMI needs on the Colville Reservation consistent with the Reservation's purpose as the Tribes' permanent homeland. The Tribes' DCMI claims include water for tribal fish hatcheries, among other uses.

1. Columbia River: 19,860.40 afy.
2. Okanogan River: 11,089.34 afy.
3. Nespelem River Drainage: 1,057.50 afy.
4. Sanpoil River Drainage: 366.46 afy.
5. Timentwa-Omak Lake Basin: 107.06 afy.
6. Omak Creek: 307.52 afy.
7. Upper Inchelium Basin: 360.66 afy.
8. Lower Inchelium Basin: 55.64 afy.
9. Buffalo-McGinnis Basin: 22.51 afy.
10. No Name Creek Basin: 0 afy.

c. Livestock: 219.158 afy. The Tribes' federal reserved water rights include

water to support livestock watering on the Reservation consistent with the Reservation's purpose as the Tribes' permanent homeland.

1. Columbia River: 31.03 afy.
2. Okanogan River: 7.78 afy.
3. Nespelem River Drainage: 34.26 afy.
4. Sanpoil River Drainage: 28.91 afy.
5. Timentwa-Omak Lake Basin: 22.15 afy.
6. Omak Creek: 17.95 afy.

7. Upper Inchelium Basin: 1.50 afy.
8. Lower Inchelium Basin: 17.02 afy.
9. Buffalo-McGinnis Basin: 2.80 afy.
10. No Name Creek Basin: 0 afy.

d. Mining: 12,895.17 afy. The Tribes' federal reserved water rights include water for mining as a form of economic development on the Reservation consistent with the Reservation's purpose as the Tribes' permanent homeland.

1. Columbia River: 12,895.17 afy for mining activities on 11,025 acres.

e. Timber harvest: 149 afy. The Tribes' federal reserved water rights include water to support timber harvest as a form of economic development on the Reservation consistent with the Reservation's purpose as the Tribes' permanent homeland.

f. Wildland Firefighting: 15 afy. The Tribes' federal reserved water rights include water to support wildland firefighting on the Reservation consistent with the Reservation's purpose as the Tribes' permanent homeland. In emergency situations this amount may increase as needed.

45. The Tribes' federal reserved water rights include water in sufficient quantity to serve the purposes set forth in Paragraph 42 hereof from groundwater contributing to the flows of the streams listed in Paragraphs 20-29 hereof.

46. The Tribes' federal reserved water rights have a priority date of July 2, 1872, the date of the Executive Order establishing the Reservation.

GROUNDWATER

47. The Plaintiffs herein incorporate the allegations and claims set forth in Paragraphs 1-46 hereof.

48. The Tribes is entitled to all of the groundwater underlying the lands encompassed by the Reservation and any waters that border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees in the State of Washington.

49. The Tribes' federal reserved rights to the groundwater underlying the lands encompassed by the Reservation have a priority date of July 2, 1872, the date of the Executive Order establishing the Reservation. The Tribes' aboriginal rights to use groundwater underlying the lands encompassed by the Reservation and to serve reserved rights outside of the Reservation have a priority date of time immemorial.

50. The water uses set forth in Paragraphs 36 through 39 and 42 hereof include groundwater as a source to serve such uses. *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1270-71. The Tribes claims the right to use sufficient quantities of groundwater, with surface water, to satisfy its aboriginal and permanent homeland needs identified herein.

51. The Tribes' claims the right to use groundwater discharge to springs for all purposes. The Tribes' claims the right to utilizes all flows of springs within the Reservation and to the extent necessary to support the Tribes' reserved rights in the North Half.

V. CONCLUSION

52. Upon the filing of this petition, and in accordance with the allegations and claims set forth herein, the Tribes requests Ecology to:

A. Conduct an investigation pursuant to WASH. REV. CODE § 90.03.110(1) to determine that a general stream adjudication involving the Tribes' outstanding water right claims will provide certainty to all water users and will thereby serve the public interest.

B. Consult with the Washington courts and legislature pursuant to WASH. REV. CODE § 90.03.110(2) regarding available judicial resources and budgetary needs.

C. Prepare a statement of facts, together with a plan or map of the area subject to adjudication, for filing with the Superior Court for Okanogan County, Washington pursuant to WASH. REV. CODE § 90.03.110(1), in order to determine the Tribes' aboriginal and federal reserved water rights, described above, as well as the rights of all other claimants described in this petition.

D. Determine that the Tribes is entitled to water rights, reserved under federal law, from the flows of the Columbia River and its tributaries within the Reservation, the Okanogan River and tributaries, all streams within the Timentwa-Omak Lake Basin, Omak Creek and tributaries, Nespelem River and tributaries, Sanpoil River and tributaries, all streams within the Upper Inchelium Basin, all streams within the Lower Inchelium Basin, all streams within the Buffalo-McGinnis Basin, and No Name Creek and tributaries, in an amount not less than 993,479.08 afy, and with a priority date of July 2, 1872.

E. Determine that, based on the Tribes' aboriginal uses of water within the area now encompassed by the Reservation, and in addition to the federal reserved water rights described in Paragraph 42, *supra*, the Tribes' is also entitled to aboriginal water rights to the Columbia River and its tributaries within the Colville Reservation, the Okanogan River and tributaries, all streams within the Timentwa-Omak Lake Basin, Omak Creek and tributaries, Nespelem River and tributaries, Sanpoil River and tributaries, all streams within the Upper

Inchelium Basin, all streams within the Lower Inchelium Basin, all streams within the Buffalo-McGinnis Basin, and No Name Creek and tributaries, with a priority date of time immemorial.

F. Determine that the Tribes is entitled to instream flows in sufficient quantity to protect its cultural uses, including for hunting, fishing, trapping, gathering, and other aquatic resources upon which the Tribes depends and to which the Tribes has aboriginal rights with a priority of time immemorial. Such instream flow rights exist both within Reservation boundaries, adjacent to Reservation boundaries, and outside of Reservation boundaries. *See Attachment A; see also RCW 90.54.*

G. Determine that the Tribes is entitled to all of the groundwater underlying the Reservation, with a priority date of July 2, 1872.

H. Enjoin all users of the waters of the Columbia River and its tributaries within the Reservation, the Okanogan River and tributaries, all streams within the Timentwa-Omak Lake Basin, Omak Creek and tributaries, Nespelem River and tributaries, Sanpoil River and tributaries, all streams within the Upper Inchelium Basin, all streams within the Lower Inchelium Basin, all streams within the Buffalo-McGinnis Basin, No Name Creek and tributaries, contributing groundwater, and any additional water sources that border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees, preventing them from interfering with the Tribes' federal reserved and aboriginal rights of said streams, their tributaries, and contributing groundwater.

I. Enjoin all groundwater users in the Columbia River Basin and its tributaries within the Reservation, the Okanogan River Basin, the Timentwa-Omak Lake Basin, the Omak Creek Basin, the Nespelem River Basin, Sanpoil River Basin, the Upper Inchelium Basin, the Lower Inchelium Basin, the Buffalo-McGinnis Basin, No Name Creek Basin, and any

additional water sources the border, traverse, or underlie the Colville Reservation and other off-reservation lands held in trust for the Tribes and/or allottees, to prevent them from using groundwater in a manner that interferes with the Tribes' right to use all groundwater underlying the Reservation.

J. Determine to close the Columbia River Basin to further appropriations so as to preserve the water resources within the Columbia River Basin from over-appropriation to the detriment of the Tribes and all junior appropriators.



LUMMI INDIAN BUSINESS COUNCIL

2665 KWINA ROAD BELLINGHAM, WASHINGTON 98226 (360) 312-2000

June 22, 2020

Satpal Sidhu, County Executive
Whatcom County
311 Grand Avenue, Suite No. 108
Bellingham, WA 98225

Seth Fleetwood, Mayor
City of Bellingham
210 Lottie Street
Bellingham, WA 98225

Jeff McClure, Commission President
PUD No. 1 of Whatcom County
1705 Trigg Road
Ferndale, WA 98248

Ag Water Board
204 Hawley Street
Lynden, WA 98264

Subject: Position Statements on the Potential Nooksack Basin Adjudication

Dear County Executive Sidhu, Mayor Fleetwood, Commission President McClure, and Ag Water Board,

We have received your letters regarding the potential upcoming general stream adjudication of the Nooksack basin. To begin, thank you. We appreciate your willingness to put forward your concerns about how an adjudication may impact you and your constituents. Clearly, you have presented your opinions as to whether you feel an adjudication is the proper mechanism to resolve the long-standing water rights conflicts in the Nooksack basin. We hear you, we recognize your concerns, and we understand that the prospect of an adjudication brings a level of fear and uncertainty to everyone involved, including ourselves. We understand that an adjudication will take substantial time and resources to complete, and, at times, may become contentious—though it is our desire that an adjudication be friendly. But, in the end, we firmly believe that an adjudication is essential to finding an enduring solution to protect valuable water resources.

Water in the Nooksack basin is a limited resource and will only become more so with the increasing demands of a growing human population and the current and anticipated future impacts of climate change. Now, more than ever, it is imperative that we settle our disputes and protect what remains.

With limited exceptions, we have been unsuccessful in resolving most of the larger water rights conflicts in the Nooksack Basin. An adjudication provides us with an opportunity to permanently resolve these issues by following a transparent, prescribed process where all water claims are given due consideration under the law. We see great benefit in an adjudication because it brings people to the table and keeps them there until resolution is found. In the end, all water users with legitimate claims will come out of the process knowing the priority date and quantity of their water rights. In conjunction with the adjudication, we can work together to find the real and enduring solutions that everyone wants and needs that address

more than just water rights. Meaning, with an adjudication, we will finally have the certainty that is required to enable effective and adaptive planning for our collective futures.

We invite you to discuss how we can make this process work for all of us. Please reach out to LIBC Water Resources Manager Kara Kuhlman (karak@lummi-nsn.gov, 360-312-2128) to schedule a meeting.

Sincerely,



Lawrence Solomon, Chairman
Lummi Indian Business Council

cc: Merle Jefferson, Lummi Natural Resources Department Executive Director
Ross Cline, Sr., Nooksack Indian Tribe Chairman
Laura Watson, Ecology Director
Mary Verner, Ecology Water Resources Program Manager
Robin McPherson, Ecology Adjudications Assessment Manager



LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD · BELLINGHAM, WASHINGTON 98226 · (360)384-1489

DEPARTMENT _____ DIRECT NO. _____

June 6, 2011

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

The Honorable Larry Echo Hawk
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Litigation Request to Protect Lummi Nation Treaty Fishing and Water Rights

Dear Secretary Salazar and Assistant Secretary Echo Hawk:

The Lummi Nation requests that the United States commence litigation against the State of Washington for the purpose of obtaining a declaratory judgment that quantifies the Lummi Nation's treaty reserved water rights in the Nooksack River basin and on the Lummi Reservation, and enjoins the issuance of, or reliance upon, state water permits that would impair these rights. The State's administration of water rights has abrogated tribal treaty rights and threatens to extirpate the fishery resources upon which the Nation relies.

The Lummi Nation is a federally-recognized Indian Tribe and a party to the 1855 Treaty of Point Elliott, 12 Stat. 927, II Kapp. 669. *United States v. Washington*, 384 F. Supp. 312, 360-363, aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), aff'd in substantial part, 443 U.S. 658 (1979). The Nation's reservation is located in northwestern Washington State, at the mouth of the Nooksack River where it flows into Bellingham Bay.

The Lummi people have fished in the Nooksack River and the waters of northern Puget Sound since time immemorial. Article V of the Treaty of Point Elliott provides that the "right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory." The Lummi Nation has adjudicated treaty rights to fish in the marine areas of Puget Sound from the Canadian Border "south to the present environs of Seattle" and in the river systems, "**especially the Nooksack**, emptying into the bays from Boundary Bay south to Fidalgo Bay." 384 F. Supp at 360 (emphasis added). As the court ruled in 1974, "fishing is vitally important to the people of the tribe, both for subsistence and a livelihood," 384 F.Supp. at 362, and that statement remains true today.

The Lummi Nation retains a federal Indian reserved water right to instream flows sufficient to support their treaty fishing rights. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *United States v. Winans*, 198 U.S. 371 (1905). Lummi also retains a federal reserved water right for consumptive uses necessary to fulfill other

purposes of its reservation. *Winters v. United States*, 207 U.S. 564 (1908). A portion of that right was adjudicated in *United States and Lummi Nation v. State of Washington Department of Ecology*, C01-0047Z (W.D. Wash.), but that litigation covered only one water source and only a portion of the Lummi Reservation.

At this time, state-permitted water diversions have reduced flows in the Nooksack River and threaten the fish species that make up the Nation's treaty fishery. In addition, state sanctioned water withdrawals within the Lummi Reservation threaten the Nation's reserved water rights on the Reservation. Federal legal action is necessary in order to protect and preserve the Nation's water rights and its treaty fishery.

I. The Lummi Nation Has Federal Reserved Water Rights For Instream Flows Necessary To Support Its Treaty Fishery.

The Lummi Nation has treaty-based rights. A treaty between the United States and an Indian tribe is not a grant of rights to the Indians but, rather, a grant from them. *United States v. Winans*, 198 U.S. 371, 381 (1905). The Lummi Nation has possessed certain rights, such as rights to fish and hunt, from time immemorial. *State v. Buchanan*, 978 P.2d 1070, 1078 (Wash. 1999). Rights not expressly ceded in a treaty, as well as those expressly reserved, remain with the tribe. *Id.*

The Treaty of Point Elliott reserves to the Lummi Nation the right of taking fish at usual and accustomed grounds and stations. Article V, 12 Stat. 927, II Kapp. 669. In the Treaty, the Nation reserved the right to fish in the Nooksack River, its tributaries, and at other locations in Puget Sound.

In accordance with the Treaty of Point Elliott and the "reservation of rights" doctrine, the Lummi Nation retains a federal reserved water right to support its treaty hunting, fishing, and gathering rights. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

The Nation's water right includes the right to sufficient instream flow to support the tribal treaty fishery. *Id.*; *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984). As stated by the Ninth Circuit in *Joint Board of Control*, "[t]o the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them." *Joint Board of Control*, 832 F.2d at 1131.

The Nation's water right includes "the right to prevent other appropriators from depleting the streams water below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411; *Joint Board of Control*, 832 F.2d at 1131-32; *see also Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985).

The priority date for water for the reserved fishing right is time immemorial, not the date of the Treaty. *Joint Board of Control*, 832 F.2d at 1131 (holding that “the priority date of time immemorial obviously predates all competing rights asserted by . . . the irrigators in this case.”) The Treaty did not create the fishing right; rather, it recognized and preserved an existing right. *Winans*, 198 U.S. at 381; *Adair*, 723 F.2d at 1414; *Buchanan*, 978 P.2d at 1078. As stated by the Ninth Circuit Court of Appeals in *Adair*:

[W]ithin the 1864 Treaty is a recognition of the Tribe’s aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.

Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. [Internal citations omitted]

Adair, 723 F.2d at 1414.

Because the priority date for the Nation’s fishing water rights is time immemorial, that right takes precedence over all competing and later non-Indian uses. *Joint Board of Control*, 832 F.2d at 1131. Even if the priority date were the 1855 Treaty date, that priority date would still have clear seniority over all competing non-Indian uses in the Nooksack River basin. The Nation’s senior right is entitled to the full measure of its right before other junior holders can claim any water.

In *Joint Board of Control v. United States*, the Ninth Circuit Court of Appeals specifically rejected the argument that the Tribe was not entitled to the full quantity of its fishing water right:

At oral argument, the Joint Board contended that the law would not permit the tribal fisheries to be protected in full if the result was to deprive a much larger number of farmers of the water needed for irrigation. This contention ignores one of the fundamental principles of the appropriative system of water rights. [Internal citations omitted]. ‘Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users.’ [Internal citations omitted] To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can ‘prevent other appropriators from depleting the streams waters below a protected level.’

Joint Board of Control, 832 F.2d at 1132.

Great effort has gone into establishing and protecting tribal treaty rights to fisheries. See *United States v. Washington*, 384 F. Supp. 312, *aff’d* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Puget Sound Gillnetters Ass’n v. United States District Court*, 573 F.2d 1117 (9th Cir. 1978), *aff’d*, *Washington v. Washington Commercial Passenger Fishing Vessel*

Assoc., 443 U.S. 658 (1979). Without sufficient water, that effort, and the resulting decisions affirming the tribal treaty right to fish would be effectively nullified.

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is held by all federal agencies. *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). The trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. See *Mitchell v. United States*, 463 U.S. 206, 224-226 (1982) (discussing, in general, United States responsibility as trustee to tribal resources); *Joint Board of Control*, 832 F.2d at 1132 (discussing United States duty, as trustee, to protect tribal water rights necessary for treaty fishing). Federal legal action brought the United States, as trustee for the Lummi Nation and its trust resources is necessary at this time in order to ensure protection and preservation of the Nation's treaty rights.

II. The Lummi Nation Has Federal Reserved Water Rights In An Amount Necessary to Fulfill the "Homeland" Purposes of its Reservation, Including, But Not Limited To, Instream Flows for Treaty Fisheries.

In addition to the "non-consumptive" reserved water rights necessary to support the treaty fishery, the Nation also has an additional quantity of "consumptive" reserved water rights necessary to fulfill the tribal "homeland" purposes of its reservation. *Winters v. United States*, 207 U.S. 564 (1908) (holding that, in setting aside land for the Fort Belknap Indian Reservation, Congress impliedly reserved water to effectuate the purpose of the reservation); see also *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (holding that when the United States withdraws land from the public domain and reserves it for a federal purpose, it implicitly reserves water to the extent needed to accomplish the purpose of the reservation). In sum, the *Winters* doctrine provides that when the United States reserves land for a purpose requiring water, it impliedly reserves sufficient water, then unappropriated, to fulfill the purposes for which the land is reserved. The priority date of the *Winters* right is the date that Congress or the Executive acted to reserve the lands.

"The underlying purpose of all Indian reservations is the establishment of a permanent home for Indian people." Cohen's Handbook of Federal Indian Law, 2005 ed., Section 19.03[5][c], citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *Winters v. United States*, 143 F.3d 740, 742 (9th Cir. 1906); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 74 (Ariz. 2001). The reserved lands on the Lummi Reservation, including trust allotments, carry with them sufficient water to sustain domestic uses, food production, municipal and economic development activities of the Nation. *Id.*

Preservation of the Nation's treaty fishery is also part of the "homeland" purpose of the Reservation. *Adair*, 723 F.2d at 1409-1410 (noting that "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle"); *Walton*, 647 F.2d at 47-48 (finding that providing a "homeland

for the Indians” as well as “preservation of the Tribe’s access to fishing grounds” were dual purposes behind establishment of the Colville Reservation). Here, the Lummi Nation has reserved rights to water in amounts necessary to provide a permanent “homeland,” including instream flows in sufficient quantities to maintain and preserve its treaty fishery.

The Lummi Reservation was created by the Treaty of Point Elliott in 1855, and its boundaries were later formalized by Executive Order in 1873. See *United States v. Milner*, 583 F.3d 1174, 1183-1186 (9th Cir. 2009). The Reservation consists of approximately 12,500 acres of uplands and 7000 acres of tidelands.

III. Federal Legal Action Is Necessary to Protect and Preserve Nooksack Water Rights and the Nooksack Treaty Fishery.

The Nooksack River originates in the Cascade Mountains east of the Lummi Reservation. It is comprised of three “forks” (the North, South, and Middle) which conjoin near Deming. Historically, the Nooksack River produced multiple runs of salmon annually, including both spring and fall Chinook (King), Coho (Silver), Chum (Dog), and, in odd numbered years, Pink (Humpback) salmon. In addition to salmon, Steelhead trout, Dolly Varden, char, and sea-run cutthroat trout spawn in the river and migrate to marine waters. All of these species are anadromous fish, i.e., fish which are hatched and spend a portion of their lives in fresh water but then migrate to the sea to mature, returning to their fresh water natal streams to spawn. Since time immemorial, the Lummi Nation and its members have harvested these species for commercial, subsistence, and ceremonial purposes. The Tribe’s treaty right guarantees the right of taking these fish.

Adequate instream flows are critical to the maintenance of the treaty fishery. As part of the treaty fishing rights litigation, the United States, State of Washington, and treaty tribes identified five necessary elements of anadromous fish habitat: (1) access to and from the sea; (2) an adequate supply of good-quality water; (3) a sufficient amount of suitable gravel for spawning and egg incubation; (4) an ample food supply; and (5) sufficient shelter. See *United States Fish and Wildlife Service, et al., Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington* (1973). Each of these elements requires adequate instream flows.

The National Marine Fisheries Service has emphasized the following basic requirements for salmon habitat: “Juvenile salmon may remain in fresh water streams over a year. They must find adequate food, shelter, and water quality conditions to survive and avoid predators. They must be able to migrate upstream and downstream within their stream and into the estuary to find these conditions and to escape high water or unfavorable stream conditions.” *Proposed Recommendations for Amendment 14 to the Pacific Coast Salmon Plan for Essential Fish Habitat*, National Marine Fisheries Service, March 26, 1988 Draft, p. 137. Sufficient instream flows are necessary to maintain suitable habitat.

All life stages (eggs, larvae/alevins, juvenile and adult) of Chinook, Coho, Pink, Chum, Sockeye salmon, and Steelhead trout are found within the Three Forks of the Nooksack River. All life stages of these species require sufficient instream flows to support their habitat requirements. Migrating adult Chinook salmon require adequate flows as they travel the River to their spawning grounds. Low stream flows result in barriers that impede migration. Prior to and during spawning, adult Chinook salmon require deep pools with an abundance of large logs or other hiding structures in close proximity to spawning areas. Incubating eggs and alevins (the life stage between hatching and juvenile fish stage) require a continual supply of water through the redd (salmon spawning nest) to protect them from high temperatures, provide oxygen, and process waste. Emerging Chinook fry and juveniles require shallow stream margins and pools for rearing and benefit from logs and other cover to avoid predation and to find food.

State permitted water diversions have significantly depleted flows in the Nooksack River and directly threaten the treaty fishery. Simply put, fish need water. Low flows resulting from diversions result in reduced wetted habitat, increased temperatures, and impaired channel configuration. As flows go down, productive, protective side channels may become shallow, isolated ponds where fish are trapped. As stream temperatures rise, oxygen content is reduced and potential for disease increases. Low flows and reduced habitat area also result in reduced food supply. Competition for food increases as the same number of fish is concentrated into a smaller area. Finally, dewatering of streams can leave salmon eggs dry, exposed, and lifeless.

Due in part to increased diversions of water for development and other uses, the Puget Sound Chinook salmon and the Puget Sound steelhead are currently listed under the Endangered Species Act. The Biological Opinion prepared by the National Marine Fisheries Service on September 22, 2008 regarding Implementation of the National Flood Insurance Program in the State of Washington (the "FEMA Floodplain BiOp") identifies blockages by dams, water diversions, and shifts/changes in flow regimes as a cause in the decline of the Puget Sound Chinook salmon. FEMA Floodplain BiOp, p. 27. Similarly, habitat loss (which results from loss of stream flow) is cited as the "principal factor for decline of [Puget Sound] steelhead." *Id.* p. 30. *See also* p. 42 (noting that "salmon declines are particularly prevalent in Washington . . . due to greater human impacts on freshwater and estuarine habitats"). The FEMA Floodplain BiOp identifies the need for critical habitat consisting of spawning, rearing, and migration areas with adequate water quantity and quality. *Id.* at p. 45.

The FEMA Floodplain BiOp discussed anthropogenic impacts to the Nooksack River specifically, noting that "habitat degradation from human actions is considered the leading cause for the decline of North and South Fork [Nooksack] Chinook salmon." *Id.* at p. 64. Increased water temperatures in the South Fork were cited as a major cause of concern. *Id.* at p. 64-65. The South Fork Chinook salmon population was designated as a "high risk" population due, in part, to the "low productivity of the freshwater habitat." *Id.* at p. 112. This low productivity is due in part to extensive channel modification and diversions.

Substantial work has already been performed by stakeholders to determine the instream flows necessary to maintain the treaty fishery. More than \$1 million was invested in a public process to analyze needed water flows in the Nooksack tributaries. Several reports and recommendations resulted from a 1999 workshop which developed the methodology to quantify the relationship between instream flow and fish habitat quantity and quality for various fish species and life stages throughout Water Resource Inventory Area 1. The first item listed in the link below is an overview of how the work was conducted.

<http://wria1project.whatcomcounty.org/Resource-Library/Studies-And-Reports/Habitat-and-Instream-Flow/71.aspx>

As a result of this process, the existing analysis performed by Utah State University (USU) provides the best available science on the level of flows required for maintenance of the treaty fishery and its habitat. The USU flows significantly exceed the minimum instream flows that have been required under Washington law in the Nooksack River and its tributaries since 1985. See Washington Admin. Code 173-501. The state regulation establishing minimum flows fails to achieve its flow objectives because of non enforcement of permitting requirements or because of claims to hold diversion rights that predate 1985.

In summary, all life stages of salmon and Steelhead found in the Three Forks of the Nooksack River are negatively affected by state-permitted diversions that have reduced stream flows. The diversions are impairing maintenance of the tribal fishery. The diversions are junior in priority to the time immemorial water rights of the Tribe. Although negotiations regarding water rights and instream flows have been ongoing between the Lummi Nation, the Nooksack Tribe, the State of Washington, and other stakeholders since 2005, no resolution has been reached. Federal legal action brought by the United States on behalf of the Tribe is necessary to protect the trust resources of the Tribe and to preserve the treaty right of taking fish. If the treaty right to take fish is to be respected and to achieve the intentions of the parties, declaratory and injunctive relief must be obtained against the State and its water users.

No state adjudication of water rights in the Nooksack basin has ever been completed and no such adjudication is currently being proposed. The Nation's reserved rights can and should be determined without the necessity of determining the status or validity of any state-based water rights in the basin. Therefore, the scope of litigation necessary to confirm and defend the Nation's water rights will be much narrower than would be required if a state general adjudication were undertaken.

If you have any questions, comments or request additional information, please contact Merle Jefferson, the Director of the Lummi Natural Resources Department. He can be reached at 360-384-2225 and merlej@lummi-nsn.gov. In addition to serving as the director of the natural resources department, Merle is a member of the Lummi Indian Business Council. If you have any technical questions please contact Jeremy Freimund, the Water Resources Manager for the Lummi Natural Resources Department. He can be reached at 360-384-2212 and jeremyf@lummi-nsn.gov.

The continued efforts to protect the tribal treaty rights and the water necessary to support the treaty rights are a priority for the Lummi Nation. It is my sincere hope that the United States will now be in a position to take a meaningful role in this process. Enclosed with this letter is a resolution from the Lummi Indian Business Council that supports this litigation request to your department.

Sincerely,



Clifford Cultee, Chairman
Lummi Indian Business Council

Enclosure



LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD • BELLINGHAM, WASHINGTON 98226 • (360) 384-1489

RESOLUTION # 2011-078

TITLE: Approval of Litigation Request to the U.S. Department of the Interior for the Lummi Nation Water Rights from the Nooksack River

WHEREAS, the Lummi Indian Business Council is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-laws of the Lummi Tribe of the Lummi Reservation, Washington; and

WHEREAS, the Lummi Indian Business Council has the inherent duty and responsibility to protect the Treaty rights of the Lummi Nation and its members; and

WHEREAS, the Lummi Indian Business Council has established the Lummi Nation's Treaty reserved water rights as one of its most important priorities for affirmative protection and advocacy; and

WHEREAS, the Treaty of Point Elliot and subsequent case law established the Lummi Nation's Treaty reserved rights to water of sufficient quantity to support a permanent, economically viable homeland for the Lummi People; and

WHEREAS, the Lummi people have fished in the Nooksack River and the waters of northern Puget Sound since time immemorial. Article V of the Treaty of Point Elliott provides that the "right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory," and

WHEREAS, the Lummi Nation retained a federal Indian reserved water to instream flows sufficient to support a sustainable, harvestable surplus of fish to exercise their treaty fishing rights when the reservation to take fish was made in the Treaty of Point Elliott; and

WHEREAS, at this time, state-permitted water diversions in the Nooksack River Basin threaten the fish species that make up the Nation's treaty fishery and the water resources needed to ensure a permanent, economically viable homeland for the Lummi People; and

WHEREAS, at this time, the amount of water necessary to support the Lummi Indian Reservation as a permanent and economically viable homeland has not been established; and

WHEREAS, the United States has a trust responsibility to protect tribal trust resources and therefore the United States is required to protect tribal fishing and water rights; and

WHEREAS, federal legal action brought by the United States, as trustee for the Lummi Nation and its trust resources is necessary at this time in order to ensure protections and preservation of the Nation's treaty rights, on and off the Lummi Indian Reservation; and

NOW THEREFORE BE IT RESOLVED, the Lummi Nation requests that the United States commence litigation against the State of Washington for the purpose of obtaining a declaratory judgment that quantifies the Lummi Nation's treaty reserved water rights in the Nooksack River Basin and on the Lummi Indian Reservation, and enjoins the issuance of, or reliance upon state water permits that would impair these rights; and

BE IT FINALLY RESOLVED, that the Chairman (or Vice Chairman in his absence) is hereby authorized and directed to execute this resolution and any documents connected therewith, and the Secretary (or the Recording Secretary in his absence) is authorized and directed to execute the following certification.

LUMMI NATION



Clifford Cultee, Chairman
Lummi Indian Business Council

CERTIFICATION

As Secretary of the Lummi Indian Business Council, I hereby certify that the above Resolution #2011-078 was adopted at a Regular Meeting of the Council held on the 17th day of May, 2011, at which time a quorum of 7 was present by a vote of 6 for, 0 against, and 0 abstention(s).



James Wilson, Secretary
Lummi Indian Business Council





January 29, 2020

Laura Watson, Director
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Subject: Lummi Nation Petition for General Stream Adjudication in WRIA-1

Dear Ms. Watson:

The Lummi Nation requests that the Washington State Department of Ecology commence a general stream adjudication for surface waters and related groundwaters in Water Resources Inventory Area 1 (WRIA-1), which includes the Nooksack River basin, pursuant to RCW 90.03.110. WRIA-1 is within the traditional territories of the Lummi Nation.

The Lummi Nation is a federally-recognized Indian Tribe and a party to the 1855 Treaty of Point Elliott. The Lummi Indian Reservation is located at the mouth of the Nooksack River where it flows into Bellingham Bay. The Lummi have fished from the Frasier River to the environs of Seattle, especially the Nooksack River, since time immemorial and the Lummi Nation has adjudicated treaty rights to continuing fishing the Nation's usual and accustomed grounds and stations. The Lummi Nation retains a federal Indian reserved water right to instream flows in the Nooksack basin and adjacent coastal watersheds sufficient to support these treaty fishing rights. The Lummi Nation also retains a federal reserved water right for consumptive uses necessary to fulfill other purposes of its reservation.

State-permitted water diversions have reduced flows in the Nooksack River and threaten the fish species that make up the Lummi Nation's treaty fishery. State sanctioned water withdrawals within the Reservation threaten the Lummi Nation's reserved water rights on the Reservation. A general stream adjudication of surface waters and related groundwaters in WRIA-1 appears to be the most appropriate action to resolve the ongoing water rights conflicts throughout the basin and provide all water users with the certainty and finality that is needed to move forward together in the shared management of our water resources.

If you have any questions, comments, or requests, please contact Merle Jefferson, the Executive Director of the Lummi Natural Resources Department. He can be reached at 360-312-2328 (office), 360-410-1706 (cell), or merlej@lummi-nsn.gov.

Sincerely,

Lawrence Solomon, Chairman
Lummi Indian Business Council

cc: Duane Mecham, DOI Solicitor's Office/Lummi Nation Federal Negotiation Team Chair
WRIA-1 Watershed Management Board



January 29, 2020

Laura Watson, Director
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

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Sincerely,

Lawrence Solomon, Chairman
Lummi Indian Business Council

cc: Duane Mecham, DOI Solicitor's Office/Lummi Nation Federal Negotiation Team Chair
WRIA-1 Watershed Management Board



Nooksack Indian Tribe

May 3, 2019

Hon. Maia D. Bellon, Director
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

DEPARTMENT OF ECOLOGY
OFFICE OF DIRECTOR

MAY 09 2019

Re: Petition for General Water Rights Adjudication for WRIA-1 Pursuant to RCW 90.03.110

Dear Director Bellon:

On behalf of the Nooksack Indian Tribe and pursuant to RCW 90.03.110, I am hereby petitioning the Washington Department of Ecology to institute a general water rights adjudication for surface waters and related groundwaters of Water Resource Inventory Area – 1 (WRIA-1), the Nooksack River Basin.

As you know, the Nooksack River and all its tributaries, together with adjacent marine waters, constitutes the Nooksack Indian Tribe's usual and accustomed fishing grounds and stations. As such, the entire watershed is vitally important to the Nooksack way of life. The Nooksack people rely on the River not only for domestic use, but also for fishing, hunting and gathering and for almost all cultural activities. As the Washington legislature has found, a determination of water users' rights will provide the necessary certainty to allow rational planning and development, even more critical in these times of increasing pressure on water resources.

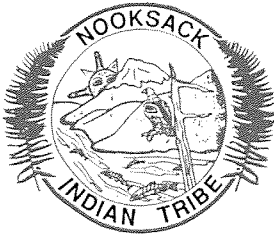
We therefore petition the Department to commence a water rights adjudication for surface and groundwaters of WRIA-1 as soon as possible. By a copy of this letter, I am notifying other governmental units in WRIA-1 of this petition. Please feel free to contact me if you have any questions about the Nooksack Indian Tribe's petition.

Sincerely,

A handwritten signature in dark ink that reads "Ross Cline Sr." in a cursive, slightly slanted script.

Ross Cline Sr., Chairman
Nooksack Tribal Council

cc: Hon. Jeremiah Julius, Chairman, Lummi Indian Business Council
Hon. Jack Louws, Whatcom County Executive
Hon. Kelli Linville, Mayor, City of Bellingham
Hon. Jeffrey L. McClure, Whatcom PUD #1 President



NOOKSACK INDIAN TRIBE

5016 Deming Road • P.O. Box 157 • Deming, WA 98244
Administration: (360) 592-5176 • Fax: (360) 592-2125

March 11, 2011

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

The Honorable Larry Echo Hawk
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Litigation Request to Protect Nooksack Indian Tribe Treaty Fishing and Water Rights

Dear Secretary Salazar and Assistant Secretary Echo Hawk:

The Nooksack Indian Tribe requests that the United States commence litigation against the State of Washington for the purpose of obtaining a declaratory judgment that quantifies the Nooksack Tribe's treaty reserved water rights and enjoins the issuance of, or reliance upon, state water permits that would impair these rights. The State's administration of water rights has abrogated tribal treaty rights and threatens to extirpate the fishery resources upon which the Tribe relies.

The Nooksack Indian Tribe is a federally-recognized Indian Tribe and a party to the 1855 Treaty of Point Elliott, 12 Stat. 927, II Kapp. 669. *United States v. Washington*, 459 F. Supp. 1020, 1041 (W.D. Wash. 1978); *State v. Buchanan*, 978 P.2d 1070, 1076 (Wash. 1999). The Tribe's reservation is located in northwestern Washington State, approximately 17 miles east of the town of Bellingham, Washington. The Tribe's reservation land base is located along and adjacent to the Nooksack River, which ultimately flows into northern Puget Sound.

The Nooksack people have fished in the Nooksack River and the waters of northern Puget Sound since time immemorial. Article V of the Treaty of Point Elliott provides that the "right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory." The Nooksack Indian Tribe has adjudicated treaty rights to fish in the Nooksack River and the marine areas of northern Puget Sound.

The Nooksack Indian Tribe retains a federal Indian reserved water right to instream flows sufficient to support their treaty fishing rights. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *United States v. Winans*, 198 U.S. 371 (1905). The Tribe also retains a federal reserved water right for consumptive uses necessary to fulfill other purposes of their reservation. *Winters v. United States*, 207 U.S. 564 (1908).

At this time, state-permitted water diversions have reduced flows in the Nooksack River and threaten the fish species that make up the Tribe's treaty fishery. Federal legal action is necessary in order to protect and preserve the Tribe's water rights and its treaty fishery.

I. The Nooksack Indian Tribe Has Federal Reserved Water Rights For Instream Flows Necessary To Support Its Treaty Fishery.

The Nooksack Indian Tribe has treaty-based rights. A treaty between the United States and an Indian tribe is not a grant of rights to the Indians but, rather, a grant from them. *United States v. Winans*, 198 U.S. 371, 381 (1905). The Nooksack Tribe has possessed certain rights, such as rights to fish and hunt, from time immemorial. *State v. Buchanan*, 978 P.2d 1070, 1078 (Wash. 1999). Rights not expressly ceded in a treaty, as well as those expressly reserved, remain with the Tribe. *Id.*

The Treaty of Point Elliott reserves to the Nooksack Indian Tribe the right of taking fish at usual and accustomed grounds and stations. Article V, 12 Stat. 927, II Kapp. 669. In the Treaty, the Tribe reserved the right to fish in the Nooksack River, its tributaries, and at other locations in Puget Sound. The right of hunting and gathering on open and unclaimed lands is also reserved. *Id.*

In accordance with the Treaty of Point Elliott and the "reservation of rights" doctrine, the Nooksack Tribe retains a federal reserved water right to support their treaty hunting, fishing, and gathering rights. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

The Tribe's water right includes the right to sufficient instream flow to support the tribal treaty fishery. *Id.*; *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984). As stated by the Ninth Circuit in *Joint Board of Control*, "[t]o the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them." *Joint Board of Control*, 832 F.2d at 1131.

The Tribe's water right includes "the right to prevent other appropriators from depleting the streams water below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411; *Joint Board of Control*, 832 F.2d at 1131-32; *see also Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir. 1985), *cert denied*, 474 U.S. 1032 (1985).

The priority date for water for the reserved fishing right is time immemorial, not the date of the Treaty. *Joint Board of Control*, 832 F.2d at 1131 (holding that "the priority date of time immemorial obviously predates all competing rights asserted by . . . the irrigators in this case.") The Treaty did not create the fishing right; rather, it recognized and preserved an existing right. *Winans*, 198 U.S. at 381; *Adair*, 723 F.2d at 1414; *Buchanan*, 978 P.2d at 1078. As stated by the Ninth Circuit Court of Appeals in *Adair*:

[W]ithin the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.

Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. [Internal citations omitted]

Adair, 723 F.2d at 1414.

Because the priority date for the Tribe's fishing water rights is time immemorial, that right takes precedence over all competing and later non-Indian uses. *Joint Board of Control*, 832 F.2d at 1131. Even if the priority date were the 1855 Treaty date, that priority date would still have clear seniority over all competing non-Indian uses. The Tribe's senior right is entitled to the full measure of its right before other junior holders can claim any water.

In *Joint Board of Control v. United States*, the Ninth Circuit Court of Appeals specifically rejected the argument that the Tribe was not entitled to the full quantity of its fishing water right:

At oral argument, the Joint Board contended that the law would not permit the tribal fisheries to be protected in full if the result was to deprive a much larger number of farmers of the water needed for irrigation. This contention ignores one of the fundamental principles of the appropriative system of water rights. [Internal citations omitted]. 'Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users.' [Internal citations omitted] To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can 'prevent other appropriators from depleting the streams waters below a protected level.'

Joint Board of Control, 832 F.2d at 1132.

Great effort has gone into establishing and protecting tribal treaty rights to fisheries. See *United States v. Washington*, 384 F. Supp. 312, *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Puget Sound Gillnetters Ass'n v. United States District Court*, 573 F.2d 1117 (9th Cir. 1978), *aff'd*, *Washington v. Washington Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979). Without sufficient water, that effort, and the resulting decisions affirming the tribal treaty right to fish would be effectively nullified.

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is held by all federal agencies. *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). The trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. See *Mitchell v. United States*, 463 U.S. 206, 224-226 (1982) (discussing, in general, United States responsibility as trustee to tribal resources); *Joint Board of Control*, 832 F.2d at 1132 (discussing

United States duty, as trustee, to protect tribal water rights necessary for treaty fishing). Federal legal action brought the United States, as trustee for the Nooksack Tribe and its trust resources is necessary at this time in order to ensure protection and preservation of the Tribe's treaty rights.

II. The Nooksack Indian Tribe Has Federal Reserved Water Rights In An Amount Necessary to Fulfill the “Homeland” Purposes of its Reservation, Including, But Not Limited To, Instream Flows for Treaty Fisheries.

In addition to the “non-consumptive” reserved water rights necessary to support the treaty fishery, the Tribe also has an additional quantity of “consumptive” reserved water rights necessary to fulfill the tribal “homeland” purposes of its reservation. *Winters v. United States*, 207 U.S. 564 (1908) (holding that, in setting aside land for the Fort Belknap Indian Reservation, Congress impliedly reserved water to effectuate the purpose of the reservation); *see also Cappaert v. United States*, 426 U.S. 128, 138 (1976) (holding that when the United States withdraws land from the public domain and reserves it for a federal purpose, it implicitly reserves water to the extent needed to accomplish the purpose of the reservation). In sum, the *Winters* doctrine provides that when the United States reserves land for a purpose requiring water, it impliedly reserves sufficient water, then unappropriated, to fulfill the purposes for which the land is reserved. The priority date of the *Winters* right is the date that Congress or the Executive acted to reserve the lands.

“The underlying purpose of all Indian reservations is the establishment of a permanent home for Indian people.” Cohen’s Handbook of Federal Indian Law, 2005 ed., Section 19.03[5][c], *citing Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *Winters v. United States*, 143 F.3d 740, 742 (9th Cir. 1906); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 74 (Ariz. 2001). The reserved trust lands on the Nooksack Reservation, including trust allotments, carry with them sufficient water to sustain domestic uses, food production, and economic development activities of the Tribe. *Id.*

Preservation of the Tribe’s treaty fishery is also part of the “homeland” purpose of the Reservation. *Adair*, 723 F.2d at 1409-1410 (noting that “one of the ‘very purposes’ of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle”); *Walton*, 647 F.2d at 47-48 (finding that providing a “homeland for the Indians” as well as “preservation of the Tribe’s access to fishing grounds” were dual purposes behind establishment of the Colville Reservation). Here, the Nooksack Tribe has reserved rights to water in amounts necessary to provide a permanent “homeland,” including instream flows in sufficient quantities to maintain and preserve its treaty fishery.

Many of the tribal trust lands within the Nooksack Reservation were originally tribal trust allotments. In *United States v. Powers*, 305 U.S. 527 (1939), the Supreme Court held that allotments of tribal lands also hold reserved water rights. Indian homesteads reserved under the authority of the Indian Homestead Act of 1884 are on equal footing with allotments reserved under the General Allotment Act of 1887 and also hold reserved water rights. *United States v. Jackson*, 280 U.S. 183 (1930); *In re Yakima River Drainage Basin (Acquavella)*, Yakima County, Wash., Sup. Ct. Case No. 77-2-0148-5 (Memorandum Opinion re Off-Reservation Indian Land, November 12, 1992 and Order re Off-Reservation Indian Land, December 10,

1992) (holding that Indian homesteads retain reserved water rights). *See also* Cohen, at Section 19.03[8][a], n. 208; Richard B. Collins, *Indian Allotment Water Rights*, 20 Land & Water L. Rev. 421, 437 (1985) (both stating that allotments from the public domain or by purchase should be accorded reserved water rights subject to the same rules as tribal reserved rights). Thus, tribal allotments carry reserved water rights whether formed pursuant to the General Allotment Act or the Indian Homestead Act, and tribal reacquisition of such allotments vests the tribe with the water rights originally reserved. *Walton*, 647 F.2d at 49-51 (holding transfer of allotment conveys full quantity of water available to allottee with associated priority date).

III. Federal Legal Action Is Necessary to Protect and Preserve Nooksack Water Rights and the Nooksack Treaty Fishery.

The Nooksack River originates in the Cascade Mountains east of the Nooksack Reservation. It is comprised of three “forks” (the North, South, and Middle) which conjoin near the Tribe’s reservation. Historically, the Nooksack River produced multiple runs of salmon annually, including both spring and fall Chinook (King), Coho (Silver), Chum (Dog), and, in odd numbered years, Pink (Humpback) salmon. In addition to salmon, Steelhead trout, Dolly Varden, char, and sea-run cutthroat trout spawn in the river and migrate to marine waters. All of these species are anadromous fish, i.e., fish which are hatched and spend a portion of their lives in fresh water but then migrate to the sea to mature, returning to their fresh water natal streams to spawn. Since time immemorial, the Nooksack Tribe and its members have harvested these species for commercial, subsistence, and ceremonial purposes. The Tribe’s treaty right guarantees the right of taking these fish.

Adequate instream flows are critical to the maintenance of the treaty fishery. As part of the treaty fishing rights litigation, the United States, State of Washington, and treaty tribes identified five necessary elements of anadromous fish habitat: (1) access to and from the sea; (2) an adequate supply of good-quality water; (3) a sufficient amount of suitable gravel for spawning and egg incubation; (4) an ample food supply; and (5) sufficient shelter. *See* United States Fish and Wildlife Service, et al., *Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington* (1973). Each of these elements requires adequate instream flows.

The National Marine Fisheries Service has emphasized the following basic requirements for salmon habitat: “Juvenile salmon may remain in fresh water streams over a year. They must find adequate food, shelter, and water quality conditions to survive and avoid predators. They must be able to migrate upstream and downstream within their stream and into the estuary to find these conditions and to escape high water or unfavorable stream conditions.” *Proposed Recommendations for Amendment 14 to the Pacific Coast Salmon Plan for Essential Fish Habitat*, National Marine Fisheries Service, March 26, 1988 Draft, p. 137. Sufficient instream flows are necessary to maintain suitable habitat.

All life stages (eggs, larvae/alevins, juvenile and adult) of Chinook, Coho, Pink, Chum, Sockeye salmon, and Steelhead trout are found within the Three Forks of the Nooksack River. All life stages of these species require sufficient instream flows to support their habitat

requirements. Migrating adult Chinook salmon require adequate flows as they travel the River to their spawning grounds. Low stream flows result in barriers that impede migration. Prior to and during spawning, adult Chinook salmon require deep pools with an abundance of large logs or other hiding structures in close proximity to spawning areas. Incubating eggs and alevins (the life stage between hatching and juvenile fish stage) require a continual supply of water through the redd (salmon spawning nest) to protect them from high temperatures, provide oxygen, and process waste. Emerging Chinook fry and juveniles require shallow stream margins and pools for rearing and benefit from logs and other cover to avoid predation and to find food.

State permitted water diversions have significantly depleted flows in the Nooksack River and directly threaten the treaty fishery. Simply put, fish need water. Low flows resulting from diversions result in reduced wetted habitat, increased temperatures, and impaired channel configuration. As flows go down, productive, protective side channels may become shallow, isolated ponds where fish are trapped. As stream temperatures rise, oxygen content is reduced and potential for disease increases. Low flows and reduced habitat area also result in reduced food supply. Competition for food increases as the same number of fish is concentrated into a smaller area. Finally, dewatering of streams can leave salmon eggs dry, exposed, and lifeless.

Due in part to increased diversions of water for development and other uses, the Puget Sound Chinook salmon and the Puget Sound steelhead are currently listed under the Endangered Species Act. The Biological Opinion prepared by the National Marine Fisheries Service on September 22, 2008 regarding Implementation of the National Flood Insurance Program in the State of Washington (the “FEMA Floodplain BiOp”) identifies blockages by dams, water diversions, and shifts/changes in flow regimes as a cause in the decline of the Puget Sound Chinook salmon. FEMA Floodplain BiOp, p. 27. Similarly, habitat loss (which results from loss of stream flow) is cited as the “principal factor for decline of [Puget Sound] steelhead.” *Id.* p. 30. *See also* p. 42 (noting that “salmon declines are particularly prevalent in Washington . . . due to greater human impacts on freshwater and estuarine habitats”). The FEMA Floodplain BiOp identifies the need for critical habitat consisting of spawning, rearing, and migration areas with adequate water quantity and quality. *Id.* at p. 45.

The FEMA Floodplain BiOp discussed anthropogenic impacts to the Nooksack River specifically, noting that “habitat degradation from human actions is considered the leading cause for the decline of North and South Fork [Nooksack] Chinook salmon.” *Id.* at p. 64. Increased water temperatures in the South Fork were cited as a major cause of concern. *Id.* at p. 64-65. The South Fork Chinook salmon population was designated as a “high risk” population due, in part, to the “low productivity of the freshwater habitat.” *Id.* at p. 112. This low productivity is due in part to extensive channel modification and diversions.

Substantial work has already been performed by stakeholders to determine the instream flows necessary to maintain the treaty fishery. More than \$1 million was invested in a public process to analyze needed water flows in the Nooksack tributaries. Several reports and recommendations resulted from a 1999 workshop which developed the methodology to quantify the relationship between instream flow and fish habitat quantity and quality for various fish species and life

stages throughout Water Resource Inventory Area 1. The first item listed in the link below is an overview of how the work was conducted.

<http://wrialproject.whatcomcounty.org/Resource-Library/Studies-And-Reports/Habitat-and-Instream-Flow/71.aspx>

As a result of this process, the existing analysis performed by Utah State University (USU) provides the best available science on the level of flows required for maintenance of the treaty fishery and its habitat. The USU flows significantly exceed the minimum instream flows that have been required under Washington law in the Nooksack River and its tributaries since 1985. See Washington Admin. Code 173-501. The state regulation establishing minimum flows fails to achieve its flow objectives because of non enforcement of permitting requirements or because of claims to hold diversion rights that predate 1985.

In summary, all life stages of salmon and Steelhead found in the Three Forks of the Nooksack River are negatively affected by state-permitted diversions that have reduced stream flows. The diversions are impairing maintenance of the tribal fishery. The diversions are junior in priority to the time immemorial water rights of the Tribe. Although negotiations regarding water rights and instream flows have been ongoing between the Nooksack Tribe, the State of Washington, and other stakeholders since 2005, no resolution has been reached. Federal legal action brought by the United States on behalf of the Tribe is necessary to protect the trust resources of the Tribe and to preserve the treaty right of taking fish. If the treaty right to take fish is to be respected and to achieve the intentions of the parties, declaratory and injunctive relief must be obtained against the State and its water users.

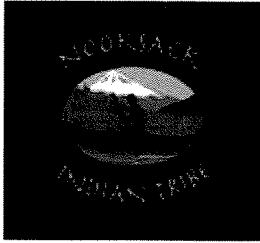
Very truly yours,

Nooksack Tribal Council



Robert Kelly, Chairman

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NOOKSACK TRIBAL COUNCIL

PO Box 157
Deming, WA 98244

RESOLUTION #11- 21

March 11 , 2011

TITLE: Litigation Request Re-water Flows in Nooksack River Tributaries

WHEREAS, the Nooksack Tribal Council is the governing body of the Nooksack Tribe of Indians, a recognized tribe, under the Treaty of 1855, in accordance with its Constitution and By-Laws approved by the Deputy Assistant Secretary of Indian Affairs on September 23, 1973, and in accordance with Indian Reorganization Act of June 18, 1934; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of the Nooksack Indian Tribe; and

WHEREAS, The Nooksack Tribe is a signatory to the Treaty of Point Elliott, 12 Stat. 927, which reserved the Tribe's right of taking fish at all usual and accustomed grounds and stations; and,

WHEREAS, Excessive fresh water withdrawals and other actions have so greatly reduced habitat in the Nooksack River system that key species, including spring and summer Chinook salmon, are listed as threatened under the Endangered Species Act and spring Chinook salmon are nearly extirpated; and,

WHEREAS, Over \$1 million in technical work by Dr. Thomas Hardy and others at Utah State University have quantified instream flows required for protection of fish in the Nooksack River system; and,

WHEREAS, The Tribe has joined with the Lummi Nation, the Washington State Department of Ecology, the City of Bellingham, and others over the past seven years in an intensive effort to negotiate reduction of excessive water diversion and other habitat improvements; and,

WHEREAS, The State of Washington in 1985 adopted instream flow requirements for the Nooksack River system, WAC Chapter 173-501, but the rule is inadequate, both because the flows are inadequate at times to protect fish propagation, migration and survival, and also because the State fails to enforce the rule against known violators.

WHEREAS, Negotiations have been unsuccessful.

Resolution #11- 21

Page 1 of 2

Phone: 360 592-5164  Fax: 360 592-4505

WHEREAS, NOW THEREFORE BE RESOLVED, by the Nooksack Indian Tribal Council that the Nooksack Tribe petitions the United States as trustee for the tribal water and fishing rights to bring suit against the State of Washington, the City of Bellingham and water users within the Nooksack River Basin and to quantify the Treaty-reserved instream flow rights of the Tribe and further to quantify the water rights reserved by the United States for appropriation and use on Nooksack tribal trust land within the Basin.

AND BE IT FURTHER RESOLVED: that the Nooksack Indian Tribal Council authorizes and directs the Chairman to submit a formal request for such litigation

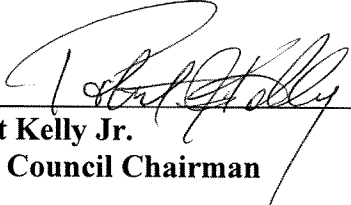
BE IT FURTHER RESOLVED THAT the Chairman (or Vice-Chairman in his absence) is hereby authorized and directed to execute this resolution and any documents connected here within, and the Secretary is authorized and directed to execute the following certification.

CERTIFICATION

I hereby certify that the above resolution was duly enacted by the Nooksack Tribal Council by a vote/telephone vote of the members held on March 11, 2011 on the Nooksack Indian Reservation, at which time a quorum was polled. The resolution was approved by a vote of:

6 FOR, 0 AGAINST, and 0 ABSTENTIONS.

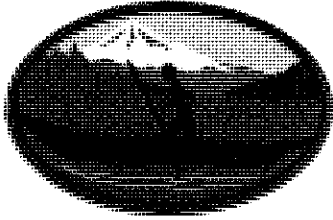
ATTEST:



Robert Kelly Jr.
Tribal Council Chairman



Rudy St. Germain
Tribal Council Secretary



Nooksack Indian Tribe

June 2, 2020

Robin McPherson
Adjudications Assessment Manager
Department of Ecology Water Resources Program
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Department of Ecology

JUN 08 2020

Water Resources Program

Re: Potential Adjudication of the Nooksack Basin

Dear Ms. McPherson:

The City of Bellingham's May 15, 2020, letter to you gives a misleading and rosy discussion of the settlement process. As you may recall, the last draft settlement agreement dealt only with the Middle Fork, not the other stems, and the parties never reached discussion of the mainstem. As difficulties arose in the discussions the parties progressively narrowed the geographic scope of an agreement. However, even that was not enough to resolve the matter, and negotiations ceased by mutual consent.

In addition, contrary to the City's contention, the instream flow technical work, led by Thomas Hardy of Utah State University, was finished at the time of the discussions. The City never held otherwise before its May 15, 2020 letter to you. The work showed the percentage of weighted usable area available throughout the basin at various flows. The parties did not dispute the calculations, but they could not agree upon the appropriate percentage. However, the City is correct in saying that the parties could not create a path to settlement that did not include the federal government. Ecology was right about the importance of the federal trustee as a party, but the federal administration was unwilling to act then, and still is, so far as we can tell. Both ours and the Lummi Nation's request for federal intervention has remained unanswered for years.

The Whatcom Ag Water Board Position Paper memo asserts that they "talked with all other major non-tribal water resource stakeholders" and concluded, in effect, that as much as 50% of agricultural usage is illegal. They say "A water rights adjudication would ultimately result in a significant loss of irrigated agriculture, and other types of water rights would also be eliminated or reduced. ... [L]ikely at least 50% of agricultural water use would be negatively impacted by an adjudication." It is difficult to imagine a better reason to commence an adjudication than the present condition in which knowledgeable water stakeholders admit to significant *illegal* impairment of senior water rights.

Further, the Ag Water Board incorrectly asserts that domestic wells would be put in jeopardy by an adjudication. ESSB 6091 provides that wells constructed in a *Hirst*-affected basin before the effective date of the act (January 19, 2018) would serve as proof of an adequate water supply for a building permit. Development proposals relying on wells constructed in these basins in compliance with RCW 18.104 before the effective date of the act are not subject to the new fees and restrictions. This is true regardless of whether the well was put to beneficial use prior to January 19, 2018. Pursuant to a section added in RCW 19.27.097(5), permit-exempt withdrawals established before the effective date of the legislation are deemed to be evidence of adequate water supply so long as they were constructed in accordance with laws establishing well construction standards. As a result, legitimate domestic use would not be threatened.

We would be happy to discuss these matters with you in greater detail. Thank you for considering the urgent need for an adjudication in the Nooksack River basin.

Sincerely,

A handwritten signature in cursive script that reads "Ross Cline Sr".

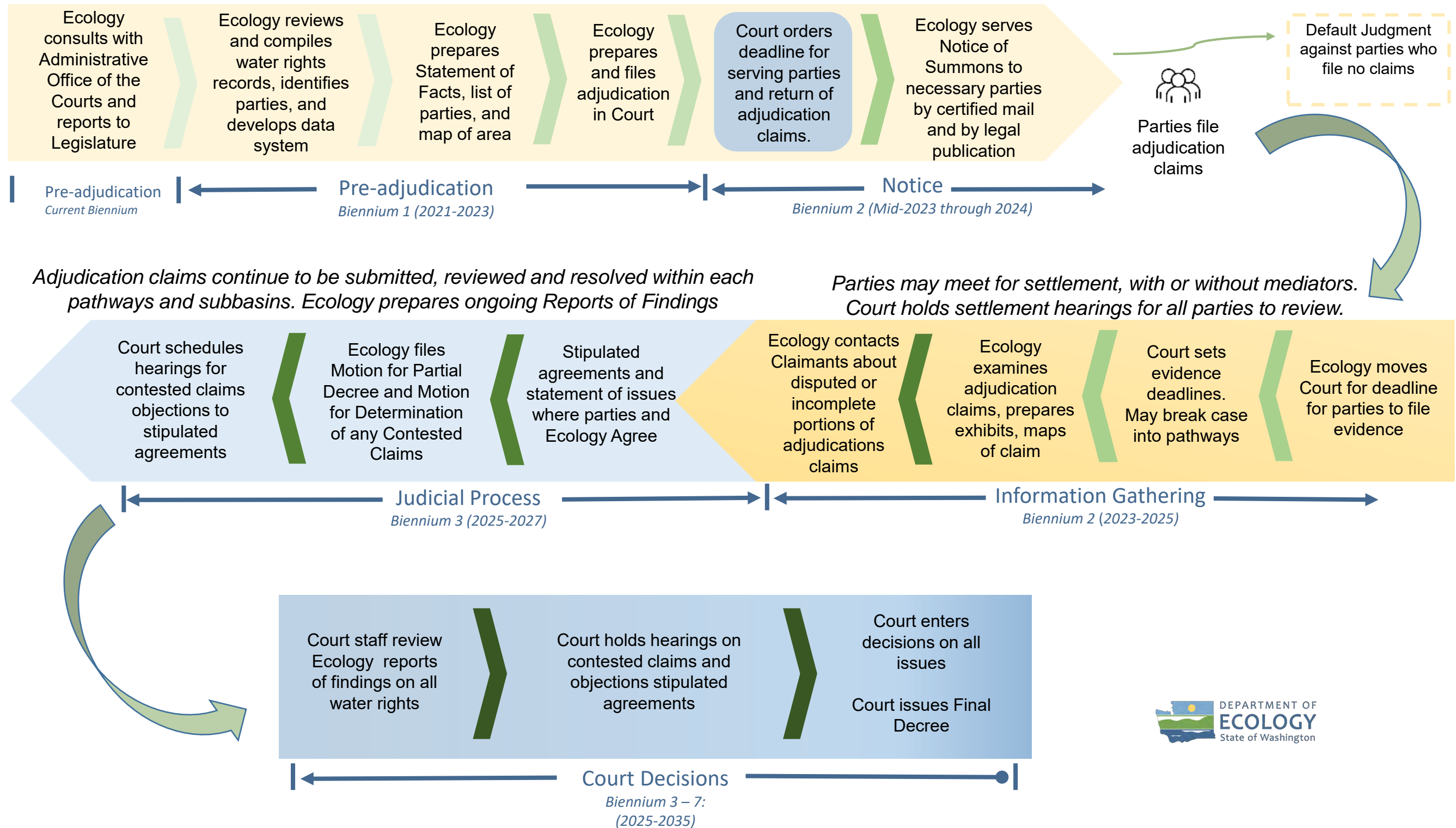
Ross Cline, Sr.
Chairman, Nooksack Tribal Council

cc: Hon. Lawrence Solomon, Chair, Lummi Indian Business Council
Hon. Seth Fleetwood, Mayor, City of Bellingham

Appendix D

Water Right Adjudication Pathway

Water Right Adjudication Pathway



Pathway summarizes legal process described in RCW 90.03.100-246 and RCW 90.03.620-645. All dates are estimates. Actual timeframe depends on number of claims, settlements, appeals, and sufficiency of court and agency staffing.

Appendix E
Ecology Budget Submittal: Water Right Adjudications



Agency Recommendation Summary

The Department of Ecology is proposing an adjudication of water rights in the Nooksack (Water Resource Inventory Area 1) and Lake Roosevelt and Middle Tributaries (Water Resource Inventory Area 58) watersheds. A general adjudication of surface and groundwater rights will determine who has a legal right to use water and the volume of each right. Water is critical for both fish and wildlife and economies in these basins, but uncertainties about tribal senior water rights, unquantified claims, and the validity of water uses pose ongoing impediments to effective water management to support the state’s environment and economy. Adjudication of these basins will provide urgently-needed resolution of water rights disputes. (General Fund-State)

Fiscal Summary

Fiscal Summary <i>Dollars in Thousands</i>	Fiscal Years		Biennial	Fiscal Years		Biennial
	2022	2023	2021-23	2024	2025	2023-25
Staffing						
FTEs	2.3	2.3	2.3	4.0	4.0	4.0
Operating Expenditures						
Fund 001 - 1	\$463	\$537	\$1,000	\$779	\$779	\$1,558
Total Expenditures	\$463	\$537	\$1,000	\$779	\$779	\$1,558

Decision Package Description

Context

While water uncertainty is a challenge statewide, some watersheds face particularly significant uncertainty about the legal validity of water rights. “Uncertainty” here means that Ecology cannot definitively determine how much water is legally available for use; who is entitled to its use; whether the rights, certificates, and claims are valid; or the legal priority of water rights during water shortages. Lack of clarity about who has the legal right to use water creates obstacles to current and future water management in the face of increasing competition for in- and out-of-stream needs.

A water right adjudication applies the current law of “prior appropriation” to existing water rights by reviewing historic use and documentation. It is a comprehensive and meticulous process where Ecology joins all water users in the basin in a superior court process. Users then submit their water right to be evaluated by the court and listed on an inventory according to priority date and quantity. For more detailed information about the adjudication process, please refer to Ecology’s legislative report and publication “Process for Conducting a Water Rights Adjudication” at <https://fortress.wa.gov/ecy/publications/documents/1011013.pdf>.

To date, only one general stream adjudication joining tribal and federal parties has occurred in Washington state courts, and it was specific to only surface water (did not address groundwater withdrawals). Specifically, Ecology has concluded the superior court phase of adjudication of surface water rights in the Yakima Basin in *Dep’t of Ecology v. Acquavella et al.*, Superior Court for Yakima County, No. 77-2-01484-5. This work involved identifying surface water rights; determining whether water rights remained valid; identifying seniority of each water right; and resolving many conflicts between and among those rights. This adjudication started in 1978 and a final superior court decree was entered in 2019. This final adjudication provided certainty among surface water users, the Yakama Nation, and the U.S. Bureau of Reclamation.

The time required for adjudications will vary depending upon the number of water withdrawals and funding provided for the review and process.

Tribal claims to water are unresolved throughout the state, except for those of the Yakama Nation in the Yakima Basin. Historically, many small stream adjudications were completed in local areas, but these did not resolve senior claims of tribes or federal parties. We expect future adjudications to be significantly more efficient due to legal clarifications from judicial decisions in *Acquavella* and other water right litigation, amendments to the adjudication statute, and innovations in technology.

This request does not require statutory amendment. The current statutory framework clearly prioritizes rights between competing water needs (“prior appropriation”). But the law is not self-executing and Ecology cannot fully manage water without using the tool of adjudication, which requires a superior court process and funding to inventory all water rights.

Note: More detailed and complete information related to this Decision Package is in Ecology’s related Legislative Report, which will be available by October 2020.

Current Condition – Problem Statement

At the Legislature’s direction in 2019, Ecology conducted a statewide overview of the need for water rights adjudications, then assessed in detail four watersheds with substantial uncertainty about legal water use. Two of these watersheds reviewed face profound and time-sensitive needs for improved water regulation. This budget request is for resources to initiate the process for adjudications in the Nooksack (Water Resource Inventory Area (WRIA) 1) and Lake Roosevelt and Middle Tributaries (Lake Roosevelt and WRIA 58) watersheds to address:

- Profound, inevitable risk of state water management to senior water claims of tribes and absence of integration between state and tribal water management on- and off-reservation.
- Chronic local water disputes due to the unresolved legal status of tribal rights, streamflow rules, and state water rights (irrigation, municipal, domestic, and industrial).
- Restricted ability for Ecology to fairly and comprehensively protect legal water use, enforce against unlawful water use, and ensure protection of streamflow.
- Challenges to local growth management and other planning that relies on clarity of legal water availability.
- Cost-intensive and unpredictable results when changing and transferring water rights. This inhibits establishment of water mitigation banks, which are critical tools to protect streamflow while allowing out-of-stream uses.
- Ongoing investment of time and expense over many years in local efforts that, to date, have not yielded complete or satisfactory water management solutions, despite widespread good-faith efforts and resources.
- Increasing uncertainty and risk of water disputes with neighboring states, sovereign tribes, and federal parties.
- Disproportionate impact to the natural resources (including critical habitat for listed salmon), subsistence, and economies of tribal Communities where historic inequity has compromised the health and safety of Native people for generations.
- Lost opportunities for multilateral negotiation of water resource solutions that will be protected by court decrees through an open and established court adjudication process.
- Disincentives to water conservation. Without fully quantified water rights, many water users will be concerned that conservation of water will result in loss of the right. In certain instances, non-use of water for more than five years can result in loss of that right.

Unique Opportunity to Proceed Efficiently

In 2019 and 2020, a unique opportunity arose when three federally-recognized tribal governments petitioned Ecology under state law to use the state's court process for water right adjudication. Historically, tribes have resisted state jurisdiction over treaty and reservation water, which has led to many years of litigation over jurisdiction and venue by tribal and federal parties when states pursue adjudication. The three petitions recently received – from the Lummi Nation, Nooksack Tribe, and Confederated Tribes of the Colville Indian Reservation – demonstrate that these tribes assent to the determination of their priority and quantity of water rights by the state of Washington.

The tribes' willingness to enter state courts to resolve water rights presents an unprecedented opportunity to make immediate progress to address the fundamental legal underpinnings of water management, and provide more certainty to all water users. With the willing participation of tribal governments, Ecology can make strides for the environment, the economy, and justice that will result from a court's determination of the legal status of water rights.

To bring tribal and federal parties into state court, however, the state must adjudicate all pertinent water users in a comprehensive general stream adjudication. Adjudication will apply the law fairly and consistently to all claimants of a water source, including individual, municipal, tribal, federal, and instream flow water rights.

Proposed Solution

Adjudications of water rights in these two watersheds will commence a long-term, but necessary process. This work will result in court decrees that will resolve conflicts and claims for water rights among all parties. Ecology will have an accurate inventory of water rights for new permit decision, water right changes, and enforcement. Water users whose water rights are now only tentative will have more certain and permanent water rights established in the adjudication.

Certainty of water rights will allow for secure, long-range planning of water use and protection. Adjudicated rights can be accurately valued in efficient water markets, and security of legal status can underpin investments in water-related infrastructure and water conservation.

This request will enable Ecology to complete pre-adjudication work and initiate adjudications in these two critical and time-sensitive watersheds. Costs are based on preparation and filing of the initiating petitions in superior courts to adjudicate the Nooksack (WRIA 1) and Lake Roosevelt and Middle Tributaries (WRIA 58) watersheds. Ecology anticipates we will facilitate collaboration and negotiation of water disputes throughout the court process, similar to the way it has happened in other adjudications in Washington and other states.

Four Ecology staff are currently working on adjudication related activities during the 2019-21 Biennium:

- One WMS Band 2 FTE is compiling the legislatively directed report to frame the path to new adjudications. This project FTE was funded in the 2019-21 Operating Budget on a one-time basis.
- Three FTEs continue to finalize paperwork, issue superseding water right certificates, file documents with courts, and local governments etc., to bring the *Acquavella* adjudication matter to a close. This work is expected to continue through the 2021-23 Biennium. These three staff also have provided analysis and information for the project manager's compilation of recommendations for the next two adjudications. Once these three existing staff finish work the Yakima Basin matter, they will transition and begin work to initiate and administer the two new adjudications proposed in this request.

The transition to new adjudications will:

- Use the skills and expertise of three current adjudication staff (one Environmental Specialist 4 (ES4) and two ES3 positions).
- Make the one WMS Band 2 Manager an ongoing position to lead and manage the new adjudications.
- Add IT staff and legal support in preparing for new adjudications.

The FTEs that will transition to the new adjudication work are part of Activity A003 – Implementing Integrated Solutions to Protect Instream Resources.

Purchase Description

This request will support additional staff (above the three ongoing FTEs mentioned above) needed to complete the pre-adjudication and preparation work necessary to file petition(s) for adjudication in state superior court. This includes the manager, analyst, and information technology (IT) positions described below. It also includes legal support through the Office of the Attorney General (AGO) and provides funding for the Administrative Office of the Courts (AOC) for costs associated with the adjudication filing.

Benefits of continuing from assessment into pre-adjudication work

Additional funding in the 2021-23 Biennium will allow Ecology to build on and continue the work that is currently underway to prepare for future adjudications. During the assessment phase that was funded in the 2019-21 Biennium, Ecology has made significant progress toward the pre-adjudication work that will be required next. Funding this request will allow Ecology to complete the pre-adjudication work and initiate court filings in Fiscal Year 2023.

This request will also build on Ecology's current capacity of three staff and legal advisors who have extensive experience with the Yakima adjudication. Transitioning current staff to new adjudication work during the 2021-23 Biennium will avoid the costs of losing institutional knowledge. Likewise, initiating two adjudications in tandem will allow for simultaneous work on two projects, which will be far more efficient than if adjudications were delayed or spread out over the coming years. Staff working on the Yakima adjudication have helped support the adjudication assessment process during the 2019-21 Biennium, and will transition to pre-adjudication work for new adjudications beginning in the 2021-23 Biennium.

As described above, currently there are important factors favorable to adjudicating in these two basins. With the willing participation of tribal governments, Ecology can make strides for the environment, the economy, and justice that will result from a court's determination of the legal status of water rights. A gap now in Ecology's adjudication work could jeopardize this unique opportunity.

While uncertainty exists based upon many factors, Ecology anticipates these two adjudications could last up to twenty years. Future funding will be requested each biennium to ensure that all state and local needs are identified and supported, including costs for Ecology, the AGO, AOC, and local governments. Depending on the ongoing needs of each case, Ecology will coordinate requests of additional legal representation and judicial staff to ensure adequate staffing and efficient progress.

Impact on population served:

Adjudication will directly impact water users in the adjudicated watersheds, particularly water rights holders and tribal populations. There are approximately 5,400 recorded water users in the Nooksack Basin, and approximately 843 within Lake Roosevelt and the Middle tributaries (WRIA 58). An additional estimated 15,000 rural landowners may have water rights based on their use of permit-exempt wells. Permit exempt users would be joined in the adjudication through a simplified process that would confirm their legal quantity and ensure they are not impairing senior rights. (Adjudication proceedings do not include water users who obtain water from a municipal purveyor or by contract with an irrigation district.)

An adjudication will give water users a formal determination of their rights to use water, with associated values, affirmed by a court and embodied in the court's decrees. Aligning water uses with legal rights to use water, through a superior court adjudication process, reduces uncertainty about legal availability of water for economic development. Clear legal protection of water rights through a court decree facilitates well-founded permitting and enforcement, benefiting streamflow and ecosystems and protecting endangered species.

While adjudication entails substantial time and expense, it ultimately resolves and reduces local and legislative conflict over water resources.

Alternatives Explored:

Adjudication is a fundamental water management tool provided for in the state law. Ecology is also authorized to adopt streamflow protection rules, approve or deny water right permit applications, and advise counties on legal water availability. Without adjudication, however, existing legal mechanisms are insufficient to fairly and completely regulate water use.

Processes that are less formal than court adjudications were considered. In fact, in these two watersheds, Ecology and many other parties have invested substantial time and resources in alternative water management solutions for decades. These alternative solutions have not yet resolved local disputes about water rights, despite many years of good-faith effort.

Ecology explored a request that would involve a larger team and more expansive efforts toward adjudication in the four watersheds that were evaluated in detail for the assessment phase conducted during the 2019-21 Biennium. In considering current budget constraints, Ecology selected only the two most urgent watersheds for this budget request.

Consequences of Not Funding This Request:

If this request is not funded, state and local government ability to successfully manage water needs in these watersheds would continue to be limited by a lack of water right certainty. Considerable state, local, and tribal investments in watershed planning, water supply development, prior litigation, and other flow improvement efforts would continue with limited effectiveness. Current challenges would only get worse with time, and when adjudication is eventually attempted, it would be even more expensive and time-consuming than if started now.

The impacts of water use uncertainty are exacerbated by climate change. Failure to prepare and file adjudications in these areas, or any delay, threatens irrevocable change to stream habitat, threatened species of salmon, and the communities’ ecosystems that depend on them.

Particularly in these identified watersheds, Washington and water users would remain vulnerable to claims by tribal and federal governments in the event tribes brought legal actions against Washington State for impairing tribal water rights.

Assumptions and Calculations

Expansion, Reduction, Elimination or Alteration of a current program or service:

This request would expand Activity A003 – Implementing Integrated Solutions to Protect Instream Resources by providing funding for additional staff and legal resources to initiate work on two new adjudications in the Nooksack (WRIA 1) and Lake Roosevelt and Middle Tributaries (WRIA 58) watersheds. Work on adjudications is only a portion of Activity A003. There are currently four FTEs (one project; three permanent) working on adjudication work. Below is a summary of the 2017-19 and 2019-21 base funding and FTEs for this activity. Administrative Overhead related to this activity is also in the agency’s Administration Activity A002, but not included in the totals below.

A003 – Implementing Integrated Solutions to Protect Instream Resources		
	2017-19*	2019-21
FTEs Total	30.3	47.5
001-1 General Fund State	\$9,539,965	\$17,302,000
001-2 General Fund Federal	\$197,635	\$198,000
001-7 General Fund Private/Local	\$134,750	\$135,000
02P-1 Flood Control Assistance	\$1,819,591	\$1,508,000
22K-6 Watershed Restoration Enhancement	\$0	\$623,000
489-1 Pension Funding Stabilization Account	\$446,847	\$354,000
Other Dedicated Accounts	\$133,583	\$415,000
TOTAL	\$12,272,371	\$20,535,000

*2017-19 amounts combine Activities A001 and A003. Activity A001 – Clarify Water Rights was discontinued in 2019-21 and combined with Activity A003.

Detailed Assumptions and Calculations:

Assumptions:

1. All funding would be from General Fund-State.
2. Staff requested as part of this Decision Package will perform pre-adjudication work during the 2021-23 Biennium in preparation for filing adjudication in superior court at end of Fiscal Year 2023 or beginning of Fiscal Year 2024.
3. Ecology’s three existing permanent FTEs, currently working on closing the Yakima adjudication, will transition to supporting the new adjudications during the 2021-23 Biennium. The FTE resources requested in this Decision Package are in addition to Ecology’s current base of three FTEs.
4. Beginning in Fiscal Year 2024, staff (both base and requested in this Decision Package) will review water right claims and coordinate with local courts to issue summons and service to relevant parties in the first new adjudication filed in the Nooksack Basin. During Fiscal Year 2024, preliminary steps will be taken to prepare for adjudication in the Lake Roosevelt Middle Tributaries Basin.
5. Beginning in Fiscal Year 2025, staff will review water right claims and coordinate with local courts to issue summons and service to relevant parties in the second new adjudication in the Lake Roosevelt Middle Tributaries Basin. Work will continue in the Nooksack Basin.
6. Funding for AGO and AOC legal support will be passed through to these partner agencies via inter-agency agreements (IAAs).
7. Ecology anticipates each adjudication will take a minimum of five biennia to complete once filed in Superior Court.

Beginning July 1, 2021, Ecology will require salary, benefits, and associated staff costs for 1.0 FTE WMS Band 2 and 1.0 FTE IT Application Development Specialist to perform pre-adjudication work to prepare for filing in superior court. Funding is also required for increased legal support through the Office of the Attorney General (AGO), and for the Administrative Office of the Courts (AOC) to conduct an assessment
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and determine initial costs of preparing for adjudication filing. These FTEs and base legal costs are ongoing and/or increase gradually in future biennia.

Beginning July 1, 2023, Ecology will require salary, benefits, and associated staff costs for 1.5 FTE ES3 to conduct reviews of all water right claims relevant to the basis being adjudicated. These new FTEs will assist with preparing and issuing summons and service requirements to notify relevant entities that they are party to the adjudication. In addition to the increase in staffing needed, Ecology anticipates that costs related to both AGO and AOC assistance will increase as court related work and support for the local court, county clerk, and court reporting workload increases as proceedings commence. These FTEs and legal costs will be ongoing and/or increase in future biennia.

Beginning July 1, 2025, Ecology will require salary, benefits, and associated staff costs for an additional 0.5 FTE ES3 to conduct reviews of all water right claims relevant to the basis being adjudicated. This position will also assist with the preparing and issuing summons and service requirements to notify relevant entities that they are party to the adjudication. In addition to the staffing needed, Ecology anticipates that costs related to both AGO and AOC assistance will continue to increase as court related work and support for the local court, county clerk, and court reporting workload continues to increase. These FTEs and legal costs will be ongoing and/or increase in future biennia.

Ecology has coordinated with the AGO and AOC regarding this budget request. Ecology will need AGO support in the form of legal advice, preparation, and filing of adjudication petitions. For AOC, funding is needed to assess and support an increase in staffing for local superior court clerks and ultimately, for increased judicial staff when necessary to address the extraordinary costs of high-volume litigation.

Summary of Staffing Resources and Legal Support Funding Needed Each Biennium:

2021-23 Biennium:

- 1.0 FTE WMS Band 2 (ongoing)
- 1.0 FTE IT Application Development Specialist (ongoing)
- AGO Support - \$97,000
- AOC Support - \$97,000

2023-25 Biennium:

- 1.5 FTE ES3 (ongoing)
- AGO Support - \$200,000
- AOC Support - \$200,000

2025-27 Biennium:

- 0.5 FTE ES3 (ongoing)
- AGO Support - \$500,000
- AOC Support - \$300,000

Workforce Assumptions:

Expenditures by Object		FY 2022	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
A	Salaries and Wages	220,179	220,179	312,008	312,008	342,617	342,617
B	Employee Benefits	80,586	80,586	114,195	114,195	125,398	125,398
E	Goods and Services	71,448	145,448	220,034	220,034	422,896	422,896
G	Travel	5,574	5,574	9,755	9,755	11,148	11,148
J	Capital Outlays	3,274	3,274	5,730	5,730	6,548	6,548
T	Intra-Agency Reimbursements	82,410	82,410	116,780	116,780	128,236	128,236
Total Objects		463,471	537,471	778,502	778,502	1,036,843	1,036,843

Staffing

Job Class	Salary	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
WMS BAND 2	108,000	1.00	1.00	1.00	1.00	1.00	1.00
IT APP DEVELOPMENT-SENIOR/SPECIALIST	112,179	1.00	1.00	1.00	1.00	1.00	1.00
ENVIRONMENTAL SPECIALIST 3	61,219			1.50	1.50	2.00	2.00
FISCAL ANALYST 2		0.20	0.20	0.35	0.35	0.40	0.40
IT APP DEVELOPMENT-JOURNEY		0.10	0.10	0.18	0.18	0.20	0.20
Total FTEs		2.3	2.3	4.0	4.0	4.6	4.6

Explanation of costs by object:

Salary estimates are current biennium actual rates at Step L.

Benefits are the agency average of 36.6% of salaries.

Goods and Services are the agency average of \$5,724 per direct program FTE. Also included are AGO and AOC IAA costs of \$194,000 in 2021-23, \$400,000 in 2023-25, and \$800,000 in 2025-27.

Travel is the agency average of \$2,787 per direct program FTE.

Equipment is the agency average of \$1,637 per direct program FTE.

Agency Administrative Overhead is calculated at the federally approved agency indirect rate of 27.4% of direct program salaries and benefits, and is shown as object T. Agency Administrative Overhead FTEs are included at 0.15 FTE per direct program FTE, and are identified as Fiscal Analyst 2 and IT App Development-Journey.

How is your proposal impacting equity in the state?

Insufficient water management disproportionately affects tribal communities and tribal members in the two identified watershed areas – Nooksack (WRIA 1) and Lake Roosevelt and Middle Tributaries (WRIA 58). The waters subject to these petitions are a central focus to the culture, identity, and well-being of these tribes. Securing adequate water is essential for a range of needs among these economically vulnerable populations. These tribes have steadfastly pursued protection and restoration of salmon populations and other species and habitats without having adequate tribal participation in water management decisions that affect these environmental and cultural imperatives.

Ecology does not have legal authority to recognize or protect tribal water rights without an adjudication. Adjudication is the only complete process that will comprehensively address longstanding inequities around water for:

- The Lummi Nation and Nooksack Tribe by resolving their claims to water for their reservations and any water for treaty rights fisheries and shellfish.
- The Colville Confederated Tribes by resolving their claim to water for their reservation, including water from the Columbia River, which forms the reservation boundary. This includes water for fisheries, domestic, municipal, agricultural, and other uses as claimed by the Colville Tribes.
- The Spokane Tribe by resolving its claim to water in Lake Roosevelt (this does not include the entire Spokane land reservation at this time).

Strategic and Performance Outcomes

Strategic Framework:

This request is essential to implementing Ecology’s strategic plan because it supports the goals to:

- Protect and manage our state’s waters.
- Reduce and prepare for climate impacts.
- Support and engage our communities, customers, and employees.

Both watersheds that need adjudication are:

- Essential habitats for endangered salmon, including the orca food chain in the Nooksack watershed, and other listed species.
- Experiencing detrimental impacts from climate change on the ecosystem and reliability of water supplies.
- Profoundly vulnerable to tribal claims of senior water rights and lacking coherent water management between states and tribes.
- Critical to supporting the cultures, health and subsistence of tribal populations that experience disproportionate impacts to environmental degradation

This request provides essential support to the Governor’s Results Washington Goal 3, Sustainable Energy and a Clean Environment by helping to meet economic and community needs for reliable water supplies, while protecting and enhancing river flows for fish.

Performance Outcomes:

The outcome of this request will be the preparation and filing of adjudication[s] in the identified watershed(s).

Other Collateral Connections

State Workforce Impacts:

N/A

Intergovernmental:

Ecology has conducted significant intergovernmental outreach in its adjudication assessment process to date (see details in Legislative Report when available). In its adjudication assessment, Ecology has met with all area tribes, the Department of Justice, the Bureau of Indian Affairs, and other federal parties. Regarding a potential Nooksack adjudication, Ecology has met with local governments (Whatcom County, the Cities of Bellingham and Lynden, water districts and the Public Utility District), the local watershed planning unit and management board, and local interest groups including those representing agriculture, development, and environmental protection. Ecology has received widespread support from tribes, environmental groups, fisheries interests, and real estate and development interests.

Ecology has continuously engaged agricultural interests, who oppose adjudication, including in-person meetings and site tours earlier in the year and agriculture representatives' ongoing communication with Ecology's Director and program manager. With regard to the Upper Columbia and Lake Roosevelt, Ecology has met with all affected tribes, the Department of Justice, the Bureau of Indian Affairs, and the Bureau of Reclamation. Ecology has additionally met with Stevens County and has conducted internal coordination with Ecology's Office of Columbia River. Ecology has not received any formal opposition.

Ecology will continue to engage with tribes to identify issues, concerns, and opportunities for addressing tribal senior water rights. Ecology will perform outreach to local governments to assist them in educating their citizens. Ecology will continue to work with the AOC and relevant county clerks to ensure adequate support of impacts of adjudication to local government. Ecology will continue to work with federal agencies and other state agencies prior to joining them in an adjudication proceeding.

State Facilities Impacts:

N/A

Changes from Current Law:

N/A

Puget Sound Recovery:

N/A

Legal or Administrative Mandates:

N/A

Stakeholder Response:

There is a mix of opposition and support for adjudication, consistent with current disputes over water rights. Individual stakeholder comments and positions received are detailed in Ecology's Legislative Report due September 2020.

Those with strong and senior claims are more inclined to support adjudication than those with junior and less certain claims. The cost of adjudication is a deterrent, but the certainty that is provided once an adjudication is complete encourages local economic development and environmental protection.

Reference Documents

[Water Right Adjudications IT Addendum.docx](#)

IT Addendum

Does this Decision Package include funding for any IT-related costs, including hardware, software, (including cloud-based services), contracts or IT staff?

Yes

Objects of Expenditure

Objects of Expenditure <i>Dollars in Thousands</i>	Fiscal Years		Biennial	Fiscal Years		Biennial
	2022	2023	2021-23	2024	2025	2023-25
Obj. A	\$220	\$220	\$440	\$312	\$312	\$624
Obj. B	\$81	\$81	\$162	\$114	\$114	\$228
Obj. E	\$71	\$145	\$216	\$220	\$220	\$440
Obj. G	\$6	\$6	\$12	\$10	\$10	\$20
Obj. J	\$3	\$3	\$6	\$6	\$6	\$12
Obj. T	\$82	\$82	\$164	\$117	\$117	\$234

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