



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

August 9, 2021

Washington State Department of Ecology
Northwest Regional Office
Water Resources Program
15700 Dayton Ave. N.
Shoreline, WA 98133

ATTN: Ria Berns, Section Manager, Water Resources Program

Re: Draft Report of Examination for Water Right Application G1-28878 – WR Doc ID
6801883

Dear Ms. Berns:

The Center for Environmental Law and Policy (CELP) submits these comments on the Department of Ecology's Draft Report of Examination (Draft ROE) denying Water Right Application G1-28878 as submitted by US Golden Eagle (USGE). CELP submits these comments on behalf of the Western Environmental Law Center (WELC). CELP and WELC strongly support for Ecology's denial of the application. These comments contain more information regarding our interest in the application, why we concur with the denial of the application based on the detriment to the public interest, and to identify additional grounds on which the application should be denied.

I. CELP and WELC both have interest in the protection of the Skagit River as it flows currently and in the impact of the details listed in USGE's application

a. CELP and WELC are interested in the outcome of USGE's application as both organizations are involved with protecting the public interest in rivers in Washington.

CELP is a non-profit organization with members throughout the both the Upper and Lower Skagit River Watershed and Washington State. Our mission is to protect and restore freshwater resources, including rivers and aquifers, in order to promote public values. CELP's vision for the future is that Washington State will have adequate and sustainable water supplies to support healthy ecosystems, thriving fish and wildlife, and robust communities. We have a longstanding interest in the Skagit River and its tributaries.

The Western Environmental Law Center works to safeguard the public lands, water wildlife, and communities of the American West, including throughout Washington State.

b. The Skagit River system is currently home to vital populations of salmonoids at risk due to development and reduced instream flows.

The Skagit is the largest river system in the Puget Sound area, encapsulating more than 3,000

ivers and streams and delivering one-quarter of the fresh water flowing into the Puget Sound.¹ It is the only river system in the lower 48 states that is home to all five species of Pacific salmon and Steelhead trout.² Due to development in the Skagit basin salmon runs have been declining in recent decades.³ This decline is in part due to reduced instream flows for salmon spawning and migration.⁴ In 2005 and 2007 three fish species present in the Skagit Basin were listed as threatened under the Endangered Species Act.⁵ Additionally it is widely acknowledged that Chinook salmon are closely linked to the continuation of the Southern Resident Killer Whales (SRKW), a population that is also listed under the Endangered Species Act.⁶ The State of Washington has identified the Skagit River and Samish River watershed as the most significant Puget Sound watershed for salmon recovery.⁷ Further, the Washington Department of Fish and Wildlife (WDFW) has acknowledged that water withdrawals are one of a number of factors inhibiting Chinook salmon populations.⁸ An instream flow was set under Ch 173-503 WAC and it was determined that 200 cubic feet per second (cfs) were available for consumptive appropriation in WIRA 3 and 4.⁹

It is our belief that promoting the health of this river system and the continuation of the fish species that rely on it is imperative moving forward.

c. USGE's application details the amount of additional water they want to pull from the Skagit river as well as the planned uses.

USGE is a multinational corporation based in Canada. It currently has a water right for consumptive use on the Skagit River system in order to irrigate 630 acres of blueberries.¹⁰ The current right allows for a withdraw of 194 acre-feet per year (afy) at an instantaneous rate ranging from 150 to 650 gallons per minute (gpm) in Sections 15, 16, 21, and 22 in Township 35 North Range 6 East.¹¹ USGE's current application is for a new permit to withdraw an additional 600 gpm and 60 afy from seven wells (six existing and one proposed)¹² The new permit would allow for the irrigation of an additional 140 acres of blueberries, increase the amount of water used on the current 630 acres of blueberries, and increase the pumping rate so that more wells could be used at once which would in turn allow for more irrigation zones to be irrigated at once.¹³ It would also allow for pumping and

¹ *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 577, 311 P.3d 6 (2013)

² *Id.*

³ *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138 Wn. App. 771, 773 (158 P.3d 1179 (2007))

⁴ *Id.*

⁵ Endangered Species Act, 16 U.S.C. §§ 1531 – 1544 (ESA). See 50 C.F.R. § 17.11 & 223.102 (Coastal-Puget Sound Bull Trout, Puget Sound Steelhead and Puget Sound Chinook)

⁶ Executive Order 18-02 Southern Resident Killer Whale Recover and Task Force (Mar. 14, 2018) [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.governor.wa.gov%2Fsites%2Fdefault%2Ffiles%2Fexe_order%2Feo_18-02_1.pdf&cflen=76567&chunk=true](https://www.governor.wa.gov/sites/default/files/Executive_Order_18-02_1.pdf)

⁷ *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Bd.*, 161 Wn.2d 415, 425, 166 P.3d 1198 (2007). The Lower Skagit and Samish Rivers are in the same Watershed Resource Inventory Area (WIRA) for state management purposes. The Lower Skagit is WIRA 3 while the Upper Skagit is WIRA 4.

⁸ Skagit River System Cooperative and Washington Department of Fish and Wildlife. 2005. Skagit Chinook Recovery Plan. <https://www.skagitwatershed.org/wp-content/uploads/SkagitChinookRecoveryPlan13.pdf>

⁹ WAC 173-503-050

¹⁰ See Draft ROE at 1, 7

¹¹ *Id.* at 7

¹² *Id.* at 4

¹³ *Id.* at 6, 8

irrigating earlier in the season than the current water right.¹⁴

When Ecology and WDFW reviewed the application, they found that both the current and proposed wells would withdraw water from aquifers that are hydrologically connected to the Skagit River and its tributaries.¹⁵ Therefore, USGE's proposed water right would impair the minimum streamflows set by Ch. 173-503 WAC.¹⁶ The application proposed to mitigate its impairment of the instream flow right with 60 afy of water from the Trust Water Rights Program.¹⁷ To insure that there was water in the Trust Water Rights Program for the proposed mitigation USGE entered into a water supply agreement with the Town of Darrington.¹⁸ The agreement states that USGE will pay Darrington to transferred a portion of the town's perfect water rights into the Trust Water Rights Program which USGE will then be able to use to mitigate the proposed impairment of the instream flow.¹⁹

II. Ecology correctly denied USGE's application based on detriment to the public interest.

Ecology is required to examine every new application for a new appropriation of water. There are four criteria that Ecology must consider during that examination.²⁰ The appropriation must (1) be for beneficial use of (2) legally and physically available water (3) without impairing existing water rights and (4) without detriment to the public welfare or public interest.²¹ An application must pass all four criteria before Ecology can approve the application.²² Further, Ecology is not permitted to exercise a trust water right if such an exercise will impair either (1) water rights existing at the time the trust water right is established or (2) the public interest.²³ The USGE application relies on both the approval of the application and the exercise of a proposed trust water right.²⁴ Therefore, Ecology is doubly required to address whether the application impairs the public interest. In the Draft ROE, Ecology finds that the application will cause detriment to the public interest.²⁵ It focuses on the impacts of USGE's application on salmonoids, the SRKW population, and on the instream flows of the Skagit River.

The Draft ROE acknowledges that the Skagit River is home to all five Pacific salmon species, Steelhead Trout, Coastal Cutthroat, and Bull Trout.²⁶ It also notes that Chinook Salmon, Steelhead, and Bull Trout are all listed under the ESA.²⁷ The Draft ROE cites the Skagit Chinook Recovery Plan and highlights that water withdrawals are detrimental to all of the species listed above because of increased water temperatures and decreased habitat.²⁸ Ecology concluded that the water supply in the tributaries

¹⁴ *Id.* 8

¹⁵ *Id.* at 8

¹⁶ *Id.* at 12-13

¹⁷ *Id.* at 14

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ RCW 90.03.290(3). RCW 90.03.290 is the surface water cod but it is applied to appropriations for groundwater through RCW 90.44.050 and RCW 90.44.060.

²¹ *Id.*

²² *Id.*

²³ RCW 90.42.040(4)(a)

²⁴ Draft ROE at 14

²⁵ *Id.* at 19

²⁶ *Id.* at 17

²⁷ *Id.*

²⁸ *Id.* citing Skagit River System Cooperative and Washington Department of Fish and Wildlife, Skagit Chinook Recovery Plan at 44-45 (2005) (available at skagitcoop.org/wp-content/uploads/Skagit-Chinook-Plan-13.pdf).

effected by USGE's application would be negatively impacted if the wells drew more than 25% of the proposed water from the tributary supplies as opposed to the mainstem of the Skagit.²⁹ Additionally, WDFW recommended denial of the application.³⁰ WDFW found that the application was "a new impact to the water needs of fish without a new benefit to fish from the proposed mitigation."³¹ WDFW pointed out that many species use the side channels and tributaries that would be effected by USGE's water withdrawal.³² Since fish use the tributaries in question and it is likely that both the tributaries and mainstem water supplies would be impacted by the proposed withdrawal, the Draft ROE correctly concluded it was likely that USGE's application would negatively impact fish.

As pointed out above, it is widely acknowledged that Chinook salmon are closely linked to the continuation of the SRKW population.³³ Consistent with this widespread scientific knowledge, the Draft ROE points out Chinook salmon are the primary food source for the SRKW population.³⁴ It recognizes that increasing the abundance of Chinook salmon through habitat protection and restoration is one of three identified actions essential for promoting the health of both Chinook and SRKW populations.³⁵ Since USGE's application will negatively impact the Chinook salmon it will also negatively impact the SRKW.

The final public interest concern that the Draft ROE examined in-depth was the impacts to streamflows. By withdrawing water from resources that are hydrologically connect the Skagit River and its tributaries the proposed withdrawal will reduced streamflows in mainstem of the Skagit as well as its tributaries. The streamflow of the Skagit River and its tributaries is already below the minimum instream flow levels established in WAC 173-503 for ninety-seven days of the year.³⁶ USGE proposed to mitigate the negative effects of its new water withdrawal with 60 afy of water from water that the Town of Darrington would transfer into the Trust Water Rights Program.³⁷ However, the Draft ROE notes that the water rights Darrington is proposing to put into trust have not been used for decades.³⁸ Since those rights have not been used recently they are already in the streamflow. Thus, transferring those rights to the Trust Water Rights Program would not result in any additional streamflow to offset USGE's new withdrawal. Ultimately the proposed appropriation "will reduce actual flows in the Skagit River Basin,"³⁹ because the proposed mitigation is misleading. The non-use of Darrington's water rights will not add water to the river because they have long been unused thus the Draft ROE correctly finds that the application would be detrimental to streamflows in the Skagit River and tributaries and thus would be detrimental to the public interest.⁴⁰ Since the application would be detrimental to the public interest, Ecology correctly denied the application in the Draft ROE.

²⁹ *Id.* at 8-9.

³⁰ See *Id.* at 7

³¹ 5/13/2021 WDFW Letter to Ecology at 1.

³² *Id.* at 2

³³ See above at page 2

³⁴ Draft ROE at 17 citing the Southern Resident Orca Task Force: Report and Recommendations at 19 (Nov. 2019) (available at [OrcaTaskForce_FinalReportandRecommendations_11.07.19.pdf \(wa.gov\)](https://www.wa.gov/OrcaTaskForce/FinalReportandRecommendations_11.07.19.pdf))

³⁵ *Id.*

³⁶ Draft ROE at 18 (*see also Id.* at 12-13 (depicting probability of minimum instream flow not being met during the irrigation season and listing number of days each irrigation season—ranging from 37 to 146—that the minimum instream flows have not been met over the past six years).

³⁷ *Id.* at 9,14

³⁸ *Id.* at 19

³⁹ *Id.* at 18

⁴⁰ *Id.* at 19.

We concur with the Draft ROE that USGE's application is detrimental to the public interest. The proposed mitigation is misleading as it does not actually mitigate the withdrawal and instead will reduce streamflows which will cause harm to fish species and the SRKW population.

III. Additional Grounds for Denial

Although Ecology correctly denied USGE's application based on the impairment of the public interest there are several additional grounds on which this application should have been denied.

a. USGE's application does not meet two other criteria under 90.03.290.

In addition to failing the public interest criteria laid out under 90.02.290, USGE's application also fails the criteria that water must be legally and physically available, and the criteria that the proposed withdrawal will not impair existing rights. As pointed out above, the proposed mitigation of USGE's application does not actually mitigate the proposed withdrawal. Therefore, as Ecology examined the criteria laid out in RCW 90.03.290(3) it should not have considered the "mitigation."

Without the proposed "mitigation" there is not legally or physically available water at this point in the Skagit River. Under WAC 173-050(2) any water rights that propose to use the water available when the rule was adopted (200 cubic feet per second from the mainstem) will be interruptible rights.⁴¹ Therefore USGE's there is not legally available water for uninterruptible rights.⁴² Further, the water that USGE is proposing to withdrawal from the Skagit is not physically available during the time of year that USGE is hoping to irrigate. USGE plans on irrigating from April 1 to September 15, a time frame of 168 days.⁴³ Streamflow in the Skagit River and tributaries are below the instream flow levels established in WAC 173-503 an average of ninety-seven days per year generally during the warm summer months.⁴⁴ Since USGE's proposed withdrawal would be junior to the instream flow it would be curtailed on average 97/168 days, more than 50% of the time ever year. Additionally, the Draft ROE points out that climate change will likely lower summer flows in the Skagit River even further⁴⁵ making it more likely that USGE's proposed withdrawal would face curtailment for most of its active period. Since the right would spend more time curtailed than not it is clear that there isn't water physically available, and Ecology should have denied USGE's application on the availability criteria.

USGE's application also should have been denied based on the impairment an existing right as the proposed "mitigation" would not actually mitigate the withdrawal. The Draft ROE states that there would be no impairment with an approved mitigation plan.⁴⁶ However, the instream flow set by WAC 173-503 would be impaired if USGE's application were approved and they pumped the full amount allotted. WDFW recognized that the proposed mitigation would not offset the impairment⁴⁷ and Ecology states that using "Darrington's long-unused water right [for mitigation], will reduce actual flows in the Skagit River Basin."⁴⁸ It is clear then that the instream flow will be impaired and thus

⁴¹ WAC 173-050(2)

⁴² See *Fox v. Skagit Cty.*, 193 Wn. App. 254, 259, 372 P.3d 784, 787 (2016). The court found that since a water right was going to be interruptible under WAC 173-503 it was not legally sufficient to secure a building permit.

⁴³ Draft ROE at 3

⁴⁴ *Id.* at 18

⁴⁵ *Id.*

⁴⁶ *Id.* at 19

⁴⁷ *Id.* at 15

⁴⁸ *Id.* at 18

Ecology should have denied USGE's application on the impairment criteria as well.

Therefore, Ecology should have found that three of the four criteria laid out under RCE 90.03.290(3) were not met by USGE's application.

b. USGE's application proposes an improper use of trust Water Rights

Ecology should have also denied the application because exercising the proposed trust water rights would impair an existing right, the instream flow as established by WAC 173-503. Not only is the proposed mitigation misleading and its impact detrimental to the Skagit River, but it is also an improper use of the Trust Water Rights Program. Ecology cannot exercise a trust water right under the Trust Water Right Program if such an exercise will impair either (1) water rights existing at the time the trust water right is established or (2) the public interest.⁴⁹ A trust water right is exercised as long as it is in the trust water rights program.⁵⁰ Therefore as soon as the water right from Darrington is put into the program it is considered exercised. The Draft ROE recognizes that the exercise of that right will diminish stream flows and thus will impair the instream flow.⁵¹

The exercise of the proposed trust right will impair a currently existing right, so Ecology cannot approve Darrington's proposal to transfer the applicable water right into the trust water rights program for the purpose of banking and mitigating USGE's new withdrawal because it would impair water rights in existence.⁵²

c. USGE's application proposes an improper use of Darrington's municipal water rights

The water that Darrington is attempting to put into trust are municipal water rights. Even though the water right has not been used in decades⁵³ municipal water rights are protected from relinquishment.⁵⁴ However, there are concerns about allowing municipalities to resurrect long dormant municipal water rights and then sell those rights outside the municipal service area to the highest bidder.

⁴⁹ RCW 90.42.040(4)(a). Note that RCW 90.42.040(8) exempts trust water rights donated for instream flows as defined in RCW 90.42.080(1)(b). Darrington's transfer of water into trust rights does not meet the criteria laid out in RCW 90.42.080(1)(b) because the purpose of the transfer was listed as water banking. Additionally, the agreement between Darrington and USGE in which USGE is paying Darrington to put water into the Trust Water Rights Program in order to mitigate USGE's application confirm that Darrington's transfer is not "to assist in providing instream flows." Therefore RCW 90.42.040(4)(a) is controlling.

⁵⁰ RCW 90.42.040(4)(c)

⁵¹ Draft ROE at 19.

⁵² Even if the trust could be created there are issues with the amount of water that Ecology could exercise. Under RCW 90.42.040(4)(d) the consumptive quantity of a trust water right ... is equal to the consumptive quantity of the right prior to the transfer into the trust water rights program." Darrington's application to transfer 100afy of its water rights into the Trust Water Rights Program acknowledges that these water rights have not been used in the last five years and does not contain any information on when they were last put to beneficial use. Ecology has determined that these rights are perfected as municipal water rights but there is no clear determination about how much of its water right Darrington has been using and therefore no clear determination about how much water is eligible for the Trust Water Rights Program.

⁵³ Draft ROE at 19.

⁵⁴ RCW 90.14.140(2)(d) – Darrington's municipal water rights are not protected from abandonment by RCW 90.14.420(2)(d). There is a strong argument that the right that Darrington is trying to use in this case has been presumptively abandoned as the industries it was once used for are no longer operating in Darrington and Darrington has no long-term plans for use of the water within its municipal service area. See Draft ROE at 15.

There is strong public policy against water right speculation in Washington.⁵⁵ In this application, USGE and Darrington have attempted to take municipal water rights, which are specifically protected for future use by the municipality and transfer them downstream out of the municipal service area to the detriment of the instream flows and other aspects of the public interest. It should be Ecology's policy to deter this kind of misuse of municipal water rights and deny that such a transfer and use of municipal water is possible.

Even if Ecology is unwilling to challenge this obvious attempt to allow speculation, municipal water supply purposes are defined by RCW 90.03.015. Agricultural irrigation is not generally an accepted use of municipal water.⁵⁶ In order to use municipal water rights for agricultural irrigation the municipality in question must have statutory authority to provide agricultural irrigation and those rights must have been used, at least in part, for agricultural irrigation since the time the right was issued.⁵⁷ The right that Darrington is attempting to use for agricultural irrigation was originally used for industrial uses for lumber mills and steam locomotives, but it has long been dormant and not being used for any beneficial purpose.⁵⁸ This right has not been used for agricultural irrigation and thus as municipal supply cannot be used for agricultural irrigation.

Ecology should have denied this application because it opens the door for speculation in Washington and barring that argument, the municipal water rights may not be used for agricultural irrigation.

IV. Conclusion

It is clear from the Draft ROE that the proposed mitigation in USGE's application is not adequate to protect the public interest in the Skagit Basin. This inadequate "mitigation" would result in impairment of the instream flow, as well as detriment to both fish and the SRKW populations. Ecology correctly denied this application based on the public interest. However, Ecology should have also recognized that this application would open the door to speculation of unused municipal water rights and shut that door firmly. Ecology should have determined that this was an improper use of the Trust Water Rights Program and a misuse of municipal water rights. Ecology should challenge this scheme that would impair the instream flow by specifically denying the application based on more than just the detriment to the public interest.

Thank you for your consideration of these comments. To reiterate, we strongly support the denial of USGE's application.

Sincerely,

⁵⁵ See *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 595, 957 P.2d 1241 (1998) (rejecting interpretation of the water codes that "would allow speculation in water rights and lead to uncertainty in management."); see also *R.D. Merrill Co. v. Pollution Control Hr'gs Bd.*, 137 Wn2d 118, 131, 969 P.2d 458, 465 (1999) (interpreting RCW 90.44.100 to prevent water right speculation"); *City of West Richland v. Ecology*, 124 Wn. App. 683, 693, 103 P.3d 818, 822 (2004) (rejecting an application to change the purpose of use where the only new benefit for the applicant is a speculative financial benefit)

⁵⁶ See RCW 90.03.015 and ECY Policy 2030

⁵⁷ ECY Policy 2030

⁵⁸ Draft ROE at 9.

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