



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

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via Email only

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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

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