



THE TULALIP TRIBES

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The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliott

August 31, 2009

Honorable Phil Rockefeller
Honorable Bruce Chandler
Co-Chairs, Stock Water Working Group

RE: Invitation to Participate in the Stock Water Work Group.

Dear Senator Rockefeller & Representative Chandler;

The Tulalip Tribes were invited by the Department of Ecology to participate in the Stock Water Working Group as established last legislative session by ESHB 1244. We appreciate the invitation to participate but must decline. We will, however, observe the proceedings.

The Tulalip Tribes is a federally recognized Indian tribe whose rights are secured by the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927). The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty. These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish-Snoqualmie-Skykomish river basin and certain marine waters of the Puget Sound through which fish propagated in such basins pass. *U.S. v. Washington*, 450 F.Supp 1020, 1058 (W.D. Wash. 1978); *U.S. v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *Aff'd*, 841 F.2d 317 (9th Cir. 1988). The right to take fish includes the right to habitat protection including a reserved water right of appropriate quality and quantity to support continuation and enhancement of fish runs. The Tulalip Tribes reside on the Tulalip Indian Reservation established pursuant to the Treaty of Point Elliott and by The Executive Order of December 23, 1873. Water rights sufficient to meet the purposes of the Tulalip Reservation are reserved by The Executive Order of 1873. Washington State achieved statehood on November 11, 1889 making Tulalip federally reserved and treaty water rights senior to any state water rights.

Instream flows were established in ten control points in the Snohomish River watershed, and numerous tributaries were closed to further appropriation after the Washington State Department of Ecology adopted the Snohomish River Basin Instream Resources Protection Program in 1979. WAC 173-507. In 1995 Ecology processed and denied most pending water rights applications in the Snohomish River basin relying on Snohomish watershed instream flow gages which indicated that stream flows did not meet flows set by the Ecology rule. The Agency determined in most instances that regulatory flows were not met over 100 days a year. Since 1995, Ecology has approved few new water rights in the Snohomish watershed because there has been no improvement in flows to warrant granting new withdrawals. In fact, quite the opposite

is evident. At the same time, exempt wells authorized under RCW 90.44.050 continue to proliferate in this basin at an alarming rate.

Although the State of Washington cannot regulate tribal water rights reserved by federal law or Treaty, they do have an obligation to manage water resources in a manner which does not impair these prior rights. The exempt well provision of the Water Code makes it impossible for the Department of Ecology to meet its duty to manage water rights and prevent impairment of senior water rights.

While Tulalip would prefer that the State address the exempt well provision as a whole, the Stock Water Work Group is charged with a distinct task. Tulalip does not agree with the strained interpretation rendered by the Attorney General in its AGO 2005 No. 17. We wish to see a workable solution for livestock uses that does not expand water usage to the detriment of tribal water rights. Tulalip enjoys a good working relationship with dairy farmers in the Snohomish watershed and is aware of their water needs. At the same time, the Tulalip fishing industry is severely curtailed due to declining salmon returns. Habitat loss, instream flows being one component, is directly implicated in the decline of the fishing industry.

Any recommendations from the Stock Water Work Group will need to insure protection of the Tribes' senior water rights. The Tulalip Tribes reserves the right to use any and all means available to protect their federally and treaty reserved water rights. Receipt by the Tulalip Tribes of materials developed by the Work Group, and/or attendance by Tulalip representatives in the proceedings of the Work Group may not be taken by members of the group as acquiescence in or agreement with any recommendations made to the Legislature as required by ESHB 1244.

Sincerely,

THE TULALIP TRIBES OF WASHINGTON



Melvin Sheldon, Chairman
Board of Directors

cc: Governor Christine Gregoire
Jay Manning, Director of Ecology
Dan Newhouse, Director of Agriculture
Representative John McCoy
Representative Judy Warnick
Senator Bob Morton
Senator Brian Hatfield
Members, Stock Water Work Group
Tulalip Board of Directors