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Washington State Department of Ecology
Water Resources Program
Northwest Regional Office
3190 160th Avenue SE
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June 4 , 2009

Dear Mr. Dunn,

It appears to be a commonly held belief that water is being used in the Skagit and Samish River watersheds for purposes of irrigation without the requisite water rights and in violation of State law. In fact, the Department of Ecology acknowledged this with respect to the Skagit River watershed at least as early as its April 17, 2006 review of the Draft Skagit Basin Comprehensive Irrigation District Management Plan (CIDMP) developed by the Washington Agricultural Association. Ecology's review states:

“During the development of the [CIDMP] much discussion has circled around regarding the desire of the agricultural community to get all of the areas currently being irrigated, plus any future irrigation demand, to be covered by water rights. *Even now, the sum of all permits, certificates, and claims [in the CIDMP Planning Area] do not add up to the estimated water use....* Knowing that there is water use within the Planning Area, absent a water right, there is no way that the Water Resources Program can make a blanket statement that all irrigators are in compliance with the water code.”

The Department of Ecology reached a similar conclusion with respect to the Samish River basin during the 2514 watershed management process that attempted unsuccessfully to develop a management strategy to protect instream resources and meet out of stream needs.

The Department of Ecology also knows and has repeatedly documented that Skagit River instream flows are frequently well below the minimum instream flow levels determined by Ecology to be necessary to protect fisheries resources and other instream values and established by administrative rule in 2001. For example, Department of Ecology calculations indicate that on average Skagit River minimum instream flows were not met 32% of the time between 2001 and 2005 and that in Skagit River minimum instream flows were not met a single day in October of 2002, September of 2003, and August of 2005.

The Swinomish Tribe is very concerned that illegal use of water for irrigation purposes in the Skagit and Samish River watersheds will continue to harm fisheries resources and impair senior water rights, including senior instream flow rights. This concern is both substantiated and reinforced by the acknowledgements of the Department of Ecology described above. Moreover, the Tribe's concern will only grow in light of increased water demand for out-of-stream purposes in the Skagit and Samish River watersheds and a predicted higher frequency and duration of drought conditions associated with global climate change.

To begin addressing this concern, the Swinomish Tribe conducted a review of the use of water for irrigation purposes in the Lower Skagit, Samish and Padilla Bay watersheds during the summer of 2008. The Tribe conducted irrigation surveys during 8 days in July and August by looking for irrigation use that could easily be observed from within public rights of way. When we observed irrigation, we photographed points of diversion or withdrawal, irrigation works, and/or place of use and established GPS coordinates for the same to the best of our ability from within public rights of way. In some instances, we were unable to determine definitively the precise location of points of diversion or withdrawal or place of use because our respect for private property rights precluded our unauthorized access to private land for closer inspection. In these instances, we approximated the point of diversion or withdrawal or place of use to the best of our ability. When we were reasonably certain that we had correctly identified the location of the point of diversion or withdrawal and place of use, keeping in mind the limitations upon our ability to verify as discussed above, we used the WRATS database and associated files to try to determine whether there were claims, certificates or permits associated with the observed use of water. We did not make any determination as to the validity of any of the claims, certificates, or permits we reviewed, but assumed *for purposes of this exercise only* that claims, certificates, and permits listed in WRATS represent valid State authorization (or will result in future valid State authorization) to make beneficial use of water. In some instances, we were able to locate a claim, certificate, or permit that, if valid as assumed, appeared to authorize the observed use. In other instances, we were unable to locate any claim, certificate, or permit that, if valid, may authorize the observed use. The attached map shows sections where we observed irrigation use but were unable to locate any claim, certificate, or permit that, if valid, may authorize the observed use. The attached table provides a list of the sections where this use was observed, and the number of observations within that section.

We by no means claim that our methods resulted in a complete or precisely accurate picture of illegal irrigation in the Lower Skagit, Samish, and Padilla Bay watersheds. As noted above, our investigation was limited to irrigation activities that we could easily observe from public rights of way and in some instances we could not conclusively identify the exact location of the point of diversion or withdrawal and the place of use. In other instances, we could not be sure that points of diversion or withdrawal were not located in areas geographically distant to the observed place of use. Additionally, our investigation was conducted over a limited number of days, and during only a single irrigation season. As the Department is aware, cropping patterns in the area are such that the crops grown on a particular parcel may change from year to year such that areas of applied irrigation change annually as well. Finally, as noted above, our investigation was limited to documentation available to us in the WRATS database and we did not consider whether such documentation is complete or accurately reflects valid water rights or State authorization to make beneficial use of water. While some of these possible limitations may result in overestimation of the area or number of instances where it appears that water was used for irrigation purposes without the requisite water rights and in violation of State law, others of these possible limitations may result in underestimation of the area or number of instances where it appears that water was used for irrigation purposes without the requisite water rights and in violation of State law.

Regardless, our review and analysis led us to the conclusion that no authorization exists in the records available to us for a significant amount of the irrigation we observed. Based upon the procedure and analysis described above, it appears that the sites identified on the attached map and table represent areas where there has been unauthorized use of water for irrigation purposes. Of course, we are aware that our analysis is subject to the limitations described above and that it is Ecology that has regulatory and investigatory authority and responsibility in connection with off-Reservation water use. We therefore request that the Department of Ecology exercise its authority, fulfill its responsibility, and promptly undertake an independent investigation of the uses of water for irrigation purposes in the geographic areas referenced above and take all appropriate and necessary enforcement actions to stop any use of water for irrigation purposes that Ecology determines to be unauthorized. We hope you find the enclosed information that we have developed to be of assistance in this regard.

Given that the Department of Ecology has known since at least April 2006 that illegal water use for irrigation purposes exists in the Skagit and Samish River watersheds and that yet another irrigation season with the potential to further harm fisheries resources and impair senior water rights, including senior instream flow rights, looms upon the horizon, we must stress the urgency of this situation and the importance of the Department of Ecology acting expeditiously to investigate the extent of illegal use of water for irrigation purposes within the Skagit, Samish, and Padilla Bay watersheds and to take appropriate and effective enforcement action to stop such use.

Finally, the Tribe also requests that you advise me directly of Ecology's intended course of action in response to these concerns and requests. The Tribe looks forward to your answer.

Sincerely,

A handwritten signature in blue ink, appearing to read "Larry Wasserman".

Larry Wasserman
Environmental Policy Manager