**PRESENTATIONS TO ESSB 6091 COMMITTEES RE TRIBAL WATER RIGHTS**

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# Two topics:

1. Tribe’s federal reserved rights to instream flows that are senior to and supersede state and private rights.
2. Reasons for Tribe participating in state process.

# Whose water is it?

State rights; federal reserved rights.

# What are federal reserved rights?

Longstanding judicially recognized doctrine: when the U.S. creates a reservation of land, it impliedly reserves rights to sufficient water to fulfill the purposes of that reservation.

# Where do the Squaxin Island Tribe’s reserved rights come from?

1854 Treaty of Medicine Creek.

Squaxin U&A - fresh and salt waters south and west from the Tacoma Narrows.

# How do these rights operate?

Outside of state law; can’t be diminished by state law; predate rights created by state law. Property rights held in trust by the United States for the benefit of Indian tribes; trust property. Currently unadjudicated.

# What is an adjudication?

Court process: Tribe’s federal reserved water rights and all other water rights in a basin are recognized by a court and quantities determined.

# How is the Tribe’s reserved right relevant to the Committee’s efforts on watershed plans?

Reserved rights to instream flows in sufficient amounts to support healthy salmon populations.

Essential to fulfilling the Reservation’s purpose to serve as a permanent, self-sustaining homeland for Squaxin members; to fulfilling the purpose of the Treaty fishing right.

The Tribe specifically negotiated rights in return for giving up rights to vast acreage and to settle on a small island reservation.

Without sufficient fresh water in streams for salmon, the Tribe’s fishing rights are valueless. Without habitat for spawning and rearing in these freshwaters, fish cannot survive.

Federally reserved instream flow right is likely to reserve more water than the state instream flows.

# If the Tribe’s rights operate outside of the state system, why is the Tribe participating in this state watershed planning process?

ESSB 6091 has drawbacks but also presents extremely important possibilities. Incentivizes parties with varying interests to come together and devise solutions.

See Dickison/Haensly 2017 Water Report article: discussed need for state, local and tribal governments and others to creatively collaborate on a watershed-by-watershed basis. See also Supreme Court Judge Madsen’s concurring opinion in Hirst.

ESSB 6091 forces creative collaboration; requires more than offsetting new domestic permit- exempt wells – e.g., existing permit-exempt wells, inchoate municipal water rights.

Climate change compounds problems.

Properly devised plans - help avoid kicking the can down the road, bring longer term certainty, avoid need to adjudicate federal reserved water rights.