

January 6, 2020

Mark Rigos
Acting City Administrator
City of North Bend
920 SE Cedar Falls Way
PO Box 896
North Bend, WA 98045



Ted Stonebridge
General Manager
Sallal Water Association
44021 SE Tanner Road, Suite E
PO Box 378
North Bend, WA 98045

Re: Friends of Snoqualmie Valley Trail and River

Dear Mr. Rigos and Mr. Stonebridge:

The Friends of Snoqualmie Valley Trail and River (Friends) has hired Cascadia Law Group to assist and represent it in its effort to ensure that there is a legal and properly coordinated water supply for the current growth and water demand of the City of North Bend (City) and the Sallal Water Association (Sallal).

Friends is a non-profit with members residing in or near the City and Sallal. The members actively use the Snoqualmie River for fishing, boating, swimming, picnicking, hiking, dog training, and the simple enjoyment of being near a living and vibrant river.

The mission of Friends is to preserve and protect the quantity and quality of the water that flows in the Snoqualmie River and the surrounding natural resources. As stated in the North Bend Comprehensive Plan, "The contamination or reduction of these resources where people reside and work, damages the very reasons that people choose to live here." Friends has organized itself around this goal.

In support of its mission, Friends has asked me to inquire into the intertie agreement that the City and Sallal are negotiating. The draft agreement, dated 11/14/2019, commits Sallal to provide water under Sallal's Water Right Permit No. G1-24671 (Sallal Water Right) to the City for mitigation of the City's Water Right Permit No. G1-26617, otherwise known as the Centennial Well Permit. The water would be delivered through the proposed Boxley Intertie. The draft agreement also commits the City to provide water to Sallal through a proposed Centennial Intertie. As I understand the agreement, the water delivered by the City to Sallal will be for future growth in Sallal's retail service area that is within the City's UGA.

Friends has serious concerns that the agreement risks the future water supply for Sallal members, and it will use Sallal water to mitigate for growth in the City to the detriment of the Snoqualmie River and the Friend's members' use and enjoyment of the River. The Centennial Well Permit and the proposed intertie agreement creates unprecedented complexity regarding water supply for both the City and Sallal. Friends is concerned that this complexity would invite water management failures.

First, Friends is concerned that the Sallal water right does not authorize the use of water for mitigation. The Sallal Water Right authorizes the use of water for municipal purposes within the area served by Sallal. Municipal purposes is specifically defined in RCW 90.03.015 and does not include mitigation or instream resources. I recognize that the City's Permit No. G1-26617 appears to authorize the Sallal wells as a source of mitigation. However, Ecology's issuance of this Permit does not and cannot by reference amend the Sallal Water Right.

While not stated in either the Permit or the Report of Examination for the City's Permit, the law does provide that a municipal use can be used for uses that benefit fish and wildlife or other instream resources. RCW 90.03.550. This definition does not in my opinion authorize an otherwise inchoate portion of a municipal water right to mitigate for impacts on a river by a totally different municipal water provider. In this case, the use of water from Sallal will not benefit the instream resources, but rather it will be a direct benefit to the City. It is no different than developing an intertie to move water directly into the City's municipal system for sale to the City's customers, outside of Sallal's authorized place of use. Other than the discussion in the Report of Examination, if you have any legal analysis that RCW 90.03.550 does allow Sallal to use its water right to mitigate for another municipal water right, I ask that you provide it to me. Otherwise, an application to change the water right should be filed with the Department of Ecology.

Further, if the Boxley Intertie is meant to improve the reliability of the two water systems, as it appears to be under the draft agreement, the intertie statute would apply, RCW 90.03.383. Again, under this statute, an application must be filed with the Department of Ecology to change the place of use of the water right under RCW 90.03.380 and 90.44.100. Also, interties are not to be allowed to include the development of new sources of supply to meet future demand. RCW 90.03.383(2)(a).

Second, the Friends know that based on review of Sallal's current water demand, Sallal's Water Right does not authorize a sufficient supply of water to meet the present and future projected demands of Sallal and also provide the mitigation water. The draft agreement provides that Sallal will commit up to 35% of its water right as mitigation for the withdrawal of water from the Centennial Well. This is equivalent to 244 acre-feet per year (afy) of the 696 afy authorized in the Sallal Water Right. The remaining 452 afy is not adequate for Sallal's current demand. Based on the records we have reviewed, Sallal's actual water demand has exceeded 452 afy every year

since 2007, except in 2011 when 439 afy was consumed. It is noteworthy that in year 2007, when the Centennial Well Permit was issued, the Sallal demand was 551 afy, leaving a shortage of 99 afy to fully mitigate.

By contracting to provide water outside its retail service area, the agreement has the potential to place at risk the Sallal Water Right and jeopardize Sallal's ability to provide a safe and reliable supply of water to serve its member-owners. I recognize that the Centennial Intertie is to provide water to serve customers within Sallal's retail service area and the City's UGA, and that the authorized place of use of the Centennial Well Permit includes the UGA. However, the agreement does not guarantee the delivery of water through the Centennial Intertie. If the City is unable to provide the water even for short periods of time after Sallal has become reliant on that water for its members, it would appear that Sallal would have to have an alternate supply to meet its responsibility to serve these members within its retail service area. Again, this places into question Sallal committing any surplus water for mitigation to the City.

Finally, Sallal's Water Right is junior to the instream flow rule, Ch. 173-507 WAC. This regulation provides that any further consumptive appropriation would harmfully impact instream values. While Ecology has apparently "grandfathered" the right to be regulated as senior to the instream flow, it is certainly troubling, if not unlawful, to now allow the right to be used for a purpose neither contemplated nor intended when the water right was issued that will have an additional impact on the Snoqualmie River during periods of low flow.

Any change to the use of the Sallal Water Right should not have any greater impact on the Snoqualmie River. As stated above, the City cannot rely on the Centennial Well Permit to authorize the Boxley Intertie. Before the Boxley Intertie is operational, it should in my opinion be reviewed by Ecology as a change of the place of use and purpose of use to the Sallal Water Right. Ecology must consider whether the use of this water to mitigate for impacts to the Snoqualmie River from the withdrawal of water from the Centennial Well will have greater impacts to the Snoqualmie River.

In considering this new use for the Sallal Water Right, Ecology should consider that by law, the Sallal Water Right is junior to instream flows regardless of the fact that the Right does not specify that it is subject to the instream flows, and at this time Ecology does not regulate the Sallal Water Right for instream flows. See RCW 90.03.345, 247, 90.54.020. This review is supported in the Supreme Court decisions of *Hirst*¹, *Foster*², *Swinomish*³, and *Postema*⁴. These cases emphasize that state and local

¹ *Whatcom County v. Hirst, Futurewise, Western Washington Growth Management Hearings Board*, 186 Wn.2d 648, 381 P.3d 1 (2016).

² *Foster v. Dep't of Ecology*, 184 Wn.2d 465; 362 P.3d 959 (2015).

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

⁴ *Postema v. PCHB*, 142 Wn.2d 68 (2000).

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actions under the water code and the Growth Management Acts must protect instream resources from impacts by groundwater withdrawals junior to the instream flows, and that Ecology's policies and rules cannot conflict with statutory requirements to protect these resources. Therefore, even if one accepts that Ecology has regulatory discretion not to regulate the Sallal Water Right for the benefit of the senior instream flow, it should not be extending that protection and allowing a portion of the Sallal Water Right to impact instream flows for the benefit of another junior municipal water use. The groundwater withdrawn from Sallal Wells 1 and 2 is water that would otherwise flow to and support the base flows in the Snoqualmie River above the location of the Centennial Well, and therefore is not appropriate for mitigation.

On behalf of the Friends, I respectfully request that you provide me with the status of the negotiations, and any information you may have that addresses the concerns discussed above with the use of the Sallal Water Right for mitigation. Friends is committed to insure the Sallal Water Right is protected for its members and customers and is not used in a manner that will allow for further impairment to the instream values of the Snoqualmie River.

Sincerely,



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TM:en

cc: Jean Buckner, EdD, Friends of The Snoqualmie Valley Trail and River
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