DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement

Chapter 173-539A WAC:

Upper Kittitas Groundwater Rule

Summary of rule making and response to comments

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Concise Explanatory Statement

Chapter 173-539A WAC,
Upper Kittitas Groundwater Rule

Water Resources Program
Washington State Department of Ecology
Olympia, Washington 98504-7600

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Introduction

The purpose of a Concise Explanatory Statement is to:

- Meet the Administrative Procedure Act (APA) requirements for agencies to prepare a Concise Explanatory Statement (RCW 34.05.325).
- Provide reasons for adopting the rule.
- Describe any differences between the proposed rule and the adopted rule.
- Provide Ecology's response to public comments.

This Concise Explanatory Statement provides information on The Washington State Department of Ecology's (Ecology) rule adoption for:

Title:	Upper Kittitas Groundwater Rule
WAC Chapter(s):	173-539A
Adopted date:	December 22, 2010
Effective date:	January 22, 2011

To see more information related to this rule making or other Ecology rule makings please visit our web site: www.ecy.wa.gov/lawsandrules

Reasons for Adopting the Rule

This rule establishes a partial withdrawal of groundwater within a portion of WRIA 39 in Kittitas County, WA. The partial withdrawal and restrictions are designed to prevent new uses of water that negatively affect flows in the Yakima River and its tributaries while a groundwater study is performed. The withdrawal allows for continued development using the groundwater exemption or new permits when the new consumptive use is mitigated by one or more pre-1905 water rights held by Ecology in the trust water right program of equal or greater consumptive quantity. Withdrawals of groundwater for structures for which building permit applications were vested prior to July 16, 2009 are allowed but are subject to curtailment.

Differences Between the Proposed Rule and Adopted Rule

RCW 34.05.325(6)(b)(ii) requires Ecology to describe the differences between the text of the proposed rule as published in the *Washington State Register* and the text of the rule as adopted, other than editing changes, stating the reasons for the differences.

- Ecology reduced the reporting requirement for water measurement data from five times per year, within 30 days following each of five reporting periods, to one time per year by January 31.

There are some differences between the proposed rule filed on June 22, 2010, and the adopted rule filed on December 22, 2010. Ecology made these changes for all or some of the following reasons:

- To reduce the administrative burden on water users required to report their water use data and on Ecology to manage the reports.

Response to Comments

Summary Response

A large portion of the comments received on the proposed rule related to several core issues. We felt we could better communicate our responses by providing a summary response that addressed these issues up front. You will find many of the responses to the following questions will reference this summary response.

Authority and purpose for the proposed Upper Kittitas ground water withdrawal rule

Ecology withdrew groundwater from new appropriation unless the consumptive impacts of the new use was offset or mitigated. The decision to withdraw ground water from appropriation was based on the following interconnected factors:

- New developments and water systems were being permitted and constructed based on developers' plans to supply water to new houses without obtaining water right permits required by law. Many of these developing lands were former railroad and forest land that historically did not carry water rights.

- The Upper Kittitas area is underlain by glacial, fluvial and bedrock aquifer systems that are hydraulically connected to the Yakima River and its tributaries. Wells penetrating bedrock aquifers often have poor yields and impacts to nearby surface waters are difficult to predict due to the nature of the bedrock. Wells penetrating the glacial or

alluvial aquifers typically have a more immediate impact on surface waters and generally produce water in higher amounts, but there are many areas even along the Yakima River where wells have poor yields.

- Aquifers that support high yield wells will tend to result in larger impacts to surrounding surface water. Aquifers that support wells with poor yields will be prone to well interference problems.

- The groundwater and streams in this area make up the headwaters of the Yakima River system and are sensitive areas that serve as critical habitat for resident and anadromous fish.

- This area is part of a larger three-county wide water basin (surface and groundwater) system. Downstream senior water right holders depend on water in the surface and groundwater system. In dry years, the total water supply of the entire basin is inadequate to supply even all of the rights with priority dates of May 10, 1905 and earlier.

Ecology has different authorities it may use to halt new appropriations in a particular basin. With authority is used depends in large part on how much information is available to make water allocation decisions that are necessary to manage the ground water and surface water resources. When Ecology concludes that a basin cannot support any new appropriations, Ecology may "close" a basin. If Ecology lacks sufficient information to support a permanent closure of a basin, but determines that current information suggests limitations on the availability of water, Ecology may use its authority to "withdraw" from new appropriations until information and data supporting a different decision becomes available.

Here, Ecology has proposed to withdraw from new appropriation all new unmitigated groundwater uses in Upper Kittitas County based on available information (summarized in the bullets above). Although the ongoing USGS Yakima study confirms that groundwater and surface water are interconnected in the Yakima River basin, a more detailed hydrogeologic framework is needed. A study will begin soon to analyze the hydrogeology of the upper county areas. The objectives of this study are to: (1) define the hydrogeology of the study area, (2) provide information regarding groundwater occurrence and availability, (3) describe the potential extent of groundwater and surface water continuity in the study area, and (4) determine the extent of potential impairment resulting from well use.

Until Ecology obtains results from these additional studies, Ecology has determined that the appropriate course of action is to stop any new unmitigated withdrawals under the authority of RCW 90.54.050(2) in order to prevent the current situation described in the bulleted information above from getting worse.

Impacts of the emergency rules on the building and land development industry in Kittitas County

The emergency rules that first withdrew groundwater in July 2009 have affected Kittitas County's ability to issue building permits. Many comments described the real estate market and implied or

stated it was the result of the emergency rules. Since the proposed rule is identical to the emergency rule now in place, Ecology evaluated this comment.

Ecology collected data from the US Dept. of Commerce[1] for the years 2005-2009 and compared Kittitas County building permit data to Yakima County, Washington, and US building permit data. These data are summarized in the following table:

	Kittitas County		Yakima County		Washington		U.S.
	Units	Value[3]	Units	Value[3]	Units	Value[3]	Permits[4]
2005	559	98,832,047	780	139,130,548	52,988	8,741,714,000	139.7-211.9
2006	588	101,451,258	692	126,449,789	50,033	8,539,795,000	111.4-194.2
2007	549	107,985,408	1,224	222,510,639	47,397	8,129,631,000	77.8-146.0
2008	282	72,534,141	760	127,795,482	28,919	5,063,320,000	41.2-110.6
2009	177	35,883,934	508	83,203,910	17,011	3,185,821,000	37.6-61.3
Decline[2]	**70%**	**67%**	**58%**	**63%**	**68%**	**64%**	**73-71%**

1 http://www.economicindicators.gov/

2 Calculated using the lowest number of units or total value for the 2008-9 period, compared to the highest number of units or total value for the 2005-2007 period.

3 Total value of the units permitted.

4 The range shown is based on the month with lowest and highest annualized rate for the year.

The declines in building permits and new home construction in Kittitas County coincide with what has become popularly known as the Great Recession. The financial crisis began in 2007 and continues to the present. It resulted in the collapse of large financial institutions who were major lenders to the real estate industry around the world. It also triggered bailout of banks by national governments and declining world stock markets. Although comments offered at the hearing and in writing ascribe the cause for Kittitas County's decline in building permits and new home construction to Ecology's emergency rules, it is apparent from the data in the table that the decline in Kittitas and Yakima County building permits began by 2008. The depth of the decline is also comparable to that in Yakima County, the State of Washington, and nationally. In conclusion, Kittitas County's residential construction industry experienced an overall decline from 2007 through 2009 comparable to other areas of the state and nation.

Cost Benefit and Least Burdensome Alternative Analyses

Cost Benefit Analysis (CBA) - RCW 34.05.328

Before adopting a rule an agency is required to determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented. A cost benefit analysis is used to document the determination and how it was made.

Scope of the Upper Kittitas cost benefit analysis and identification of who is affected by the proposed rule

Without the rule, landowners could be expected to continue to develop groundwater supplies under the legal authority of the exemption from permitting found in RCW 90.44.050 and without any mitigation. At some point in the near future, Ecology would expect litigation in one of two forms. Either the pending Yakima Basin Surface water adjudication could be expanded to cover groundwater or individual water right holders whose rights are impaired by new groundwater uses might bring legal actions against the groundwater users to restrict their use of groundwater. Under either scenario, without the rule, groundwater rights established in recent years and in the near future (the most junior rights in the system) would likely be restricted in water short years.

In contrast, with the new rule, new users of groundwater have the upfront expense of obtaining mitigation, but because their water rights will be backed by mitigation, they will not be subject to the risk of future interruption.

The Cost Benefit Analysis compares the qualitative and quantitative costs and benefits associated with the rule. It concludes that the probable benefits of the proposed rule are greater than the probable costs.

Entities Ecology included in the CBA baseline for the Kittitas analysis include:

- Groundwater users that would seek a water right permit or who would rely on the groundwater permit exemption after the effective date (July 2009) of the first emergency rule that withdrew Upper Kittitas groundwater from new appropriations.

Entities required to comply with the rule are:

- Prospective groundwater users who do not currently have a water right.

Least Burdensome Alternative Analysis (LBA)

Before adopting a rule an agency shall determine, after considering alternative versions of the rule and the analysis required, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated.

Ecology considered and proposed to adopt a rule in 2009 that would have been a more moderate way to address the problems of unmitigated ground water withdrawals in the upper Kittitas area. However, a 2009 Attorney General's Opinion concluded that Ecology lacked the legal authority to limit new groundwater uses as they would have been limited by the January 2009 proposed rule, making that option unavailable to the agency.

Ecology considered enacting a rule that would have withdrawn groundwater from new appropriations without any mitigation exception. Under such a rule, a prospective groundwater use could be authorized only if an existing water right was privately acquired and the purpose and place of use of the water right (a transfer) was changed to the new purpose and place of use. The rule as enacted withdraws the groundwater in the basin from new appropriations, but allows new water uses to be authorized by permit and under the ground water permit exemption if the new uses are mitigated to protect existing out-of-stream rights, stock water and wildlife riparian rights, and federal instream fisheries rights. As between these two alternatives (withdrawal without

mitigation and withdrawal with mitigation), Ecology selected the least burdensome alternative for those required to comply with the rule.

Ecology's current version of the rule appears to be the least burdensome alternative when considering the costs to all parties involved. The no action alternative may have a lower ***initial*** cost or burden, which would be preferred by land developers. However, the costs and other burdens to reconcile the need for a reliable domestic water supply with the long-term the risk of curtailment of domestic water supply would ultimately have to be borne by the home purchasers. It defers the burden and would instead place that burden upon parties with less capacity to address it. The burden would not be reduced.

Small Business Economic Impact Statement

The Regulatory Fairness Act (RFA), RCW 19.85, requires that proposed administrative rules be evaluated to determine whether they will impose more than minor costs on businesses. If so, the agency is required to evaluate whether a proposed rule would have a disproportionate impact on small businesses subject to the rule. The legislature enacted the Regulatory Fairness Act so that impacts to small businesses would be clear and so that agencies, as part of the rulemaking process, would take steps to reduce any disproportionate impacts to small businesses where legal and feasible. A small business economic impact statement must include a brief description of the reporting, record keeping, and other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements. It analyzes the costs of compliance for businesses required to comply with the proposed rule.

The SBEIS is an analysis designed to consider equity among businesses. The analysis:

- Lists the industries affected (by four-digit SIC codes and or NAICS coding).
- Identifies Small Businesses defined as 50 or fewer employees required to comply with the rule.
- Evaluates disproportionate impacts on small businesses compared to largest business
- Lists cost reducing features of the rule.
- Describes how the agency involved small business in rule development.

Ecology identified the baseline and the businesses to be included in the Kittitas analysis. These are the businesses that, if they require a new groundwater appropriation, would be required to comply with the rule:

- Those businesses that do not currently have an established water right and are seeking a water right permit or would rely on a new use of the ground water permit exemption.

Ecology concluded that the costs of compliance to small businesses are more than minor and that the costs of compliance for the smallest businesses required to comply are disproportionate

compared to the costs of compliance for the largest businesses required to comply. Ecology further concluded that the effects on revenue and jobs would be small.

In light of the projected impact to small businesses, Ecology's analysis identifies actions taken to reduce the impact of the rule on small businesses, including: (1) selecting the least burdensome version of the rule that would meet the statutory goals and objectives; (2) facilitating the establishment of the Kittitas Water Exchange; and (3) investing administrative resources to expeditiously processing water budget neutral determinations.

Ecology also notes the benefit received by those who comply with the rule compared to those that established new groundwater rights without mitigation prior to the effective date of the rule. Those who comply with the rule and establish a new groundwater right backed by mitigation will hold a groundwater right that is not likely to be the subject of litigation and curtailment in water short years.

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The table below lists the names of organizations or individuals who submitted a comment on the rule proposal and the page where you can find Ecology's response to the comment(s).

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Comments on Sections of the Proposed Rule

Description of comments: The following comments have been summarized and edited for clarity. You can see the original content of the comments we received in Appendix A (written comments) and Appendix B (oral testimony from the public hearing) of this document.

010 Purpose

Comment # 1

I feel the true purpose of the rule is to ban further development.

Commenter(s)

Hurwitz, Dave

Response

The purpose of the rule is not to ban development. The proposed rule allows new development that avoids injury to existing rights and resources. It would preclude development only in areas where effective mitigation cannot be provided to offset the impacts to existing rights or public resources. Please also see the summary response on page 3.

Comment # 2

WAC 173-539A-010 Purpose. The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County pending completion of a ground water study.

The actual intent of all this hocus-pocus is to remove many property owners from Kittitas County. Are there some Ecology employees -- and/or their families and/or friends -- that have plans for properties currently owned by others? One must suspect that that is so.

Commenter(s)

Smithson, Julie Kay

Response

Ecology is not aware of any employees involved with the rule with the motives you suggest. If an Ecology employee, family member, friend, or the Governor wished to build in the area affected by the rule, the constraints of the rule would apply to their project equally as to any other citizen.

Comment # 3

The purpose section should explicitly note that it applies to permit-exempt wells, and that the geographic scope covers the entirety of Kittitas County.

Commenter(s)

Aqua Permanente and CELP

Response

The withdrawal of unappropriated water applies to all proposed new withdrawals of ground water, not simply new permit-exempt withdrawals. The withdrawal applies to the area delineated in WAC 173-539A-990. It is the *portion* of Kittitas County referred to as Upper Kittitas County.

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020 Authority

Comment # 4

I believe this moratorium is enforcing **regulations of questionable legality**. Where are the elected public servants who to protect individual citizens over the narrow interest of an overreaching state agency.

Commenter(s)

Windh, Carole

Response

Ecology's authority to withdraw public water from further appropriation is RCW 90.54.050. The Attorney General reviewed the emergency ground water withdrawal rule in mid-2009 and, in Attorney General Opinion (AGO) 2009 No.6, concluded as follows:

"We also conclude, in response to your third question, that the authority of the Department of Ecology to withdraw water from new appropriation applies to both permitted and permit-exempt uses. This means that the withdrawal of water from further appropriation has the effect of precluding new exempt withdrawals, except that new appropriations that are mitigated for any consumptive use in equal or greater amount by existing trust water rights may be authorized."

Comment # 5

The rule takes a huge bite here administratively, far more than other agencies have done administratively, without really substantiating an enabling statute. The statutes quoted are not being executed, or not being carried out consistently statewide.

It is risky to do things administratively that should be reserved to the Legislature. The people have said the Legislature should fix this thing. We did try to fix it. We ran legislation this year. We had a hearing but we couldn't even get a vote.

We really set ourselves up for this conflict when we decided the state owns all ground water. We have allowed 65 years of rural development based on the exemption. Now we are saying that we are going to do away with that in one county, or at least part of the county. We can't do that. That has to be a deliberate action of the Legislature.

Commenter(s)

Hinkle, Representative Bill

Response

The issue the rule addresses is not a statewide issue. The Legislature elected to fund a ground water study to address the uncertainty associated with further allocation of ground water in the Upper Kittitas area and Ecology is pursuing that study with the USGS.

Ecology is responsible for administering the water codes enacted by the Legislature. Washington declared in 1917 that all waters of the state were owned by the state for the benefit of its citizens. The ground water permit exemption is not being eliminated within the Upper Kittitas area. Unappropriated water is being withdrawn while the study is performed and until sufficient information is available to determine whether, and how, new appropriations can be made.

Please also see the response to Comment #4.

Comment # 6

Your authority of RCW 90.54.050, it provides that when lacking enough information. You gain authority when you lack information.

I question the constitutionality of your interpretation. Because the United States Constitution and the Washington State Constitution trumps you.

We are a supreme law of the land. Just because you ruffle some paperwork doesn't mean that it's legal by constitutional law. I'll ask you very simply, has the law ever been repealed by our supreme courts?

If you are against immigration or for immigration in Arizona, that law is being debated right now. It doesn't matter if you are for or against it. It might be found unconstitutional. That means those legislators made the wrong decision. And that was legislators voted in.

You are a bureau, this is made up of a governor utilizing authority power. I don't remember what your quote was, one gentleman about only jackasses or something -- no, dictators. Look up the definition of a dictator. Dictators make proclamations; dictators make moratoriums. A rule of law without a legislative branch with no oversight based with lacking information.

There's a chance you might be so right. We might be thanking these people. So let's leave that door open. We might be thanking these people down the road for preserving our water. I say thank you and may owe you an apology. I reserve the right to that. I'm not deciding whether I'm for it or against it.

If you are going to take all this authority based on lacking information, that seems ludicrous. That's like a parent making a decision with his child, sure you can go over there. Don't you want to know the information? Or saying no, you can't, when everything is fine: Because I said so, because I said so. This is what you are doing: Because I said do.

Commenter(s)

Voice of Independence

Response

RCW 90.54, enacted by the Legislature in 1971, has not been repealed by the Legislature or found by the courts to be unconstitutional. Ecology has, as an executive branch agency, the responsibility to carry out the statutes the Legislature enacts. Ecology is authorized to promulgate rules, such as this, to carry out those responsibilities. . Please also see the summary response on page 3 and the response to Comment #4.

Comment # 7

The good and honest people of Kittitas County have been coerced, threatened, stymied, stressed, and lied to enough for several lifetimes, and for what? So Ecology can waltz in and tap-dance on their heads? I think not. Where you have no rights, you do not belong. It's clear that you've come to Kittitas County with a Trojan horse, its belly filled with ominous portent, its entire purpose to deceive, take the rights of others, trample the economic health of this entire county, and then prance about at will -- as though you can.

My first reaction is, "How dare you?"

You, however, will likely snicker at this, because you expect astonishment and dismay from the property owners of Kittitas County. You expect property owners to lie down and let your steamroller make them part of the pavement. This is the technique employed by bullies. It is no wonder that state -- and federal – agencies have lost the respect of citizens. Treat people as though they have no rights and you will get two reactions: people will either forget their rights, and you will "win" by default, or people will learn their rights and how to protect those rights, and they will read your collective pedigrees. Your steamroller has keys in the ignition, but don't expect those keys to remain. Your perceived authority has far overstepped the bounds given it when the Washington State Department of Ecology was created.

Commenter(s)

Smithson, Julie Kay

Response

Ecology does not agree with your characterization of its intentions, or of the purpose and authority for the proposed rule. The comments do not seem to recognize or value the water rights of existing Yakima basin water users. Those are the rights of the existing pro-ratable and junior surface water users who are negatively affected in low water years like 2001, 2004, and 2005 by ground water pumping. Also, affected is the Yakama Nation, who holds an unquantified, time immemorial right to enough water to support fish in their usual and accustomed areas. Please also see the summary response on page 3 and the response to Comment #4.

Comment # 8

Ecology has only limited authority to impose a permanent moratorium on permit-exempt groundwater uses. The rule provides for a permanent moratorium on new water uses in Upper Kittitas County, which modifies Ecology's statutory authority for a temporary moratorium on groundwater appropriations.

Ecology only has a limited or conditional authority to issue a moratorium on groundwater appropriations. It is only when "sufficient information and data are lacking" that the Legislature has given Ecology the ability to issue a moratorium. From a plain reading of the statute, when there is sufficient information and data, Ecology no longer has the authority to issue the moratorium.

The proposed rule does not account for this conditional authority. It is a permanent rule and prevents all new uses of water regardless of whether there is sufficient information. In other words, the Legislature allows Ecology to issue a moratorium only when Ecology needs more information to make sound management decisions. However, the proposed rule improperly extends Ecology's authority to withdraw groundwater to all situations.

Commenter(s)

Kittitas County Attorney

Response

The proposed rule provides for a withdrawal of unappropriated water, not a moratorium. In addition, the withdrawal is subject to the exception for those uses determined by Ecology to be water budget neutral.

The main point of this comment appears based on objection to a rule that is labeled "permanent" when Ecology has stated publicly that it intends to revisit the rule after it obtains the results of a ground water study in the Upper Kittitas County area (described in section -990 of the proposed rule). The Legislature provided $700,000 to fund the Upper Kittitas ground water study, and Ecology has contracted with USGS to perform the study.

Section -010 of the proposed rule states:

> "The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County pending completion of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule."

Under the Administrative Procedures Act (APA), RCW 34.05, there are basically two types of rules, emergency rules and permanent rules. When Ecology refers to the current rule as a "permanent" rule, it uses the term "permanent" in the context of the APA, not in the context of signaling that it intends to leave this rule in place for decades or longer.

As noted above and as consistently stated to the public, Ecology's rule is based on the information it has available to it now. Once the groundwater study is complete (results expected in about three years), Ecology will revisit this rule and determine what changes are needed, such as: converting the withdrawal to a closure; repealing all or part of the rule; or changing conditions in the rule.

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025 Applicability (and vesting)

Comment # 9

If limitations on the use of permit-exempt wells are to continue, Ecology should make the provisions of the proposed rule effective from the date of enactment and not retroactively to July 16, 2009, when the first emergency rule was issued, or any other prior date. Other time lines set in the proposed rule for determining "existing" and "new" uses appear to be wholly arbitrary and offer no benefits toward protecting the water resource.

Any existing well should be considered an existing use exempt from the proposed rule's restrictions. Any existing Group B water system approved by the County or the Washington State Department of Health should be allowed full use of that approved system up to 5,000 gallons per day without mitigation and without any time limits for activating approved connections to the system's capacity.

Lot owners in Kittitas County are confused as to when they have a vested right to use water from an existing or new well or Group B water system lawfully created at the time. Ecology should appreciate the inequities and liability created when a lot owner has lawfully invested in an individual well or purchased a lot in a development with an existing, approved Group B water system, only to be told that they now have no legal right to use that water without adequate mitigation because of an arbitrary five-year time limit. In many cases, private investments and contractual commitments have been made to secure water service to lot owners on a Group B water system, and the proposed rule exposes developers to liabilities for breach of contract.

More specifically, the proposed rule's definition of an "Existing use of the ground water exemption" for a group use includes use of such water that was beneficially used prior to July 16, 2009; and, "The water right is perfected within the five years following the first regular beneficial use for that purpose. Water to serve a parcel that is part of a group use begun within five years of the date water was first regularly and beneficially used on one or more parcels in the group is an existing use if the group use remains within the limit of the permit exemption." WAC I73-539A-030.

WAC I73-539A-040 "Withdrawal of unappropriated water in upper Kittitas County," also sets a vesting date and makes exception to the proposed rule for those with a building permit issued prior July 16,2009, but the well/water system must be operable within three years; if not, then one must buy mitigation water.

These five-year and three-year timeframes appear to be wholly arbitrary and unrealistic for most construction build-out periods and general real estate market conditions.

If Ecology continues to pursue the proposed rule, the definition of "existing use of the ground water exemption" should be amended to include any existing permit-exempt well as of the date the proposed rule is enacted. This would significantly reduce developer and seller contract liabilities for water service and reduce public hardship. If Ecology does not amend this definition, we believe there should be some "safe harbor" provision in the proposed rule that retroactively protects entities from legal action by third parties as a result of the proposed rule's restrictions.

Commenter(s)

R&R Heights Land Company

Response

The proposed rule includes provisions to provide clarity on several concepts in Washington water law applicable to all water rights and to those rights specifically implicated by this rule. Under Washington water law, once a water right holder begins a project requiring water, he or she must use reasonable diligence (also referred to as due diligence) to put water to beneficial use. In the context of permitted rights, a schedule for development is included in the permit. This schedule specifies the timeframe within which the water must be put to beneficial use. Although permit-exempt rights do not receive a schedule for development, such rights are nonetheless subject to the requirement that the water be put to beneficial use using reasonable diligence. Both permitted and permit-exempt water rights are said to "vest" or become "perfected," after the water intended to be used for the project has been put to beneficial use using reasonable diligence.

All water rights are subject to the requirement that the water be put to beneficial use using reasonable diligence. The approach in the rule that expects permit-exempt domestic and group domestic water rights to be completed within 5 years of their commencement is consistent with this principle. Concluding to the contrary is not supported by principles of Washington water law.

In the context of this rule, if a water right holder began use of water before July 16, 2009 and exercised reasonable diligence to put his or her water to beneficial use, then the right would be recognized as having been in existence before July 16, 2009, and therefore would not be subject to the requirements of the rule. However, if a water right holder began the use of water before July 16, 2009 but did not exercise reasonable diligence to put his or her water to beneficial use, then the planned or intended water use would not be recognized as having been in existence before July 16, 2009. After the period of time within which reasonable diligence has no longer been exercised, the planned or intended water use would be viewed as a new use, subject to the requirements of the rule. To provide clarity to water right holders (so they know whether their right is subject to the rule), Ecology specified 5 years as the "perfection period," or the period for putting small water rights to beneficial use based on an assumption of reasonable diligence.

The rule does not prevent new uses of water that are not completed within 5 years. The rule simply identifies that such uses cannot be considered "existing" for the purpose of the rule's requirements.

The comment also asks about the 3 year period referenced in proposed WAC section 173-539A-040. That section does not relate to perfection or "vesting" of a water right. Instead, that section specifies that water uses associated with projects for which building permits had vested (under land use principles) before July 16, 2009, even if the associated water use did not begin until after July 16, 2009, would not be subject to the rule's new requirements, so long as the holder of the building permit completes the project within 3 years of the building permit vesting. The rationale for using a three year period is that it is the maximum period the holder of a building permit has to construct a residence under county limitations.

The comment references "private investments and contractual commitments [that] have been made to secure water service to lot owners on a Group B water system," and suggests that "the proposed rule exposes developers to liabilities for breach of contract." The comment appears to assume that private contacts might serve as a basis for establishing a water right. Under Washington Water Law water rights are established when water is put to beneficial use. Water rights cannot be created by private contract. To the extent parties entered a contract presuming they could develop a new water supply in the future without any limitations, they were basing their assumption on an incorrect understanding of Washington Water law.

Finally, the comment suggests that the state provide some sort of "safe harbor" against third party right holders who may assert their priority of right against new users. This sounds like a request for the state to provide legal indemnification. We are not in agreement with the premise that the rule interferes with reasonable contractual expectations. In any case, Ecology lacks specific statutory authority to provide legal indemnification.

Comment # 10

The proposed rule improperly restricts perfection of a water right to five years of the first beneficial use. Once an exempt well is put to beneficial use, Ecology does not have the authority to limit that use to less than the statutory amount per RCW 90.44.050. Ecology even acknowledges this in an internal email: "We have proposed a five year "perfection" period based on due diligence?). I don't see where we have in law the authority to do this."

The effect of imposing this five year period is that a group B water system that was designed and installed prior to the emergency rule would be artificially capped at less than the 5,000 gpd amount allowed by RCW 90.44.050 and less than the full capacity that the group B system was designed for. The County believes that the five-year limit should be removed from the proposed rule.

Commenter(s)

Kittitas County Attorney

Response

The rule does not cap permit exempt uses to an amount less than 5,000 gallons per day. As explained in response to R&R Heights Land Company 8, the rule identifies the time period for perfection/reasonable diligence in order for a domestic use to be considered existing, for purposes of application of the rule.

Comment # 11

The City doesn't understand why the definitions of "new use," "group use," and "existing use" all allow an expansion of the "pre- July 16, 2009" withdrawals to additional property for a period of 5 years. Vesting in property development is only for what was applied for and allowed at the time of the land use application and approval. Allowing additional expansions to existing applications or approvals will only encourage developers to seek amendments and expansions of existing projects (with the impact of an additional increase in consumptive use of ground water) and provides a vesting that goes beyond that recognized in real property or

water law. It simply isn't necessary or prudent. Most of these concerns can be addressed by tightening up the definitions.

Commenter(s)

City of Roslyn

Response

The rule defines the terms "existing use," "new use," and "group use" and includes a 5 year "reasonable diligence" and "perfection period" in order to provide clarity about which uses are subject to the rule's requirements and which are not. 5 years is a reasonable time frame within which a small ground water use that began before July 16, 2009 should be able to complete development. If the rule did not define "existing use," "new use," or "group use" and if the rule did not include a provision identifying a specific time period for perfection, the law would still contemplate that all water rights be put to beneficial use (perfected) with the use of reasonable diligence. However, water right holders would have no clarity regarding what constituted reasonable diligence and whether their use of water was subject to the rule's requirements. The inclusion of these definitions and of a timeframe for "perfection" and "reasonable diligence" does not allow the expansion of any water rights. Please also see the response to Comment #9.

Comment # 12

Only after we bought the property and installed a road, power, and water did the rules get changed in mid project. What happened to being grandfathered in under the rules and laws that governed when we spent the dollars on the improvements leading to eventually building on this property? If we were not going to be able to utilize our well without buying water rights, why didn't it state the conditions of use on the permit? For example, "before you can use this well, that Ecology is giving you a permit for, you had better obtain a water right before you invest $24,000 into a hole in the ground."

Commenter(s)

Brannian, Beth

Response

Section 040-1(a) of the proposed rule is an exemption for those parties who had vested building permit applications and may have been caught mid-development by the change in rules on July 16, 2009. If you had a vested building permit application, your related use of ground water is exempt from the proposed rule.

A notice of intent to construct a water well (filed by the licensed well driller) and the water well report also submitted by the licensed driller is not a permit to appropriate ground water. They are a notice and a report by the driller to Ecology. The water must be put to beneficial use to establish a water right.

Comment # 13

I'm opposed to the new policy effecting older exempt wells that were in service prior to the ban. In effect, I guess I'm asking for two levels of exempt wells:

- Those that are older and placed into service within the spirit of the law, as written in the 1940s.
- A second class for the newer ones put into service after the developers and county ran rampant with new subdivisions.

Commenter(s)

Rooney, Tracy

Response

Thank you for your comment. The rule does apply differently to wells put to use before the emergency moratorium than to later developed wells. What Ecology cannot do is change how the prior appropriation doctrine applies to junior uses (those created later than others) when there isn't adequate water available to fully serve senior water uses.

Comment # 14

I agree that a property owner (current owners - not future owners and not land developers) should be allowed to build. Something needs to be done to accommodate those folks.

Commenter(s)

Hoban, Mike

Response

Thank you for your comment. Ecology is working on legal alternatives, including the existing mitigation bank using the Trust Water Right Program, allowing landowners to build homes on their lots.

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027 Advisory

Comment # 15

If property owners use "unmitigated" water (exempt wells), as most do in the upper county and across the state as a whole, and they do not have senior water rights that date prior to May 10, 1905, they are subject to having their water use curtailed.

Why is this "advisory" even in this proposed rule that only applies to upper Kittitas County? How would this action be any different for any junior water right holders anywhere in the entire state? If there is no difference for junior water right holders anywhere in the state, then this inflammatory section of the proposed rule should be removed, as its sole purpose seems to be to frighten property owners, and more importantly scare potential lenders away from financing all real estate in the upper county if the property does not have a senior water right to go along with the exempt well that serves the residence. This would create an even more negative valuation of properties in the upper county than that which will already occur from the rest of this proposed rule if it is enacted.

Commenter(s)

Hurwitz, Dave
Velie, Linda

Response

The purpose of the advisory is to explain the potential for future regulation based on its current knowledge. Ecology does not agree with your characterization of its intentions. Ecology is working with a broad group of water users to identify potential water supply projects and actions that would meet the needs of existing and prospective water users. Ecology hopes this effort would prevent the need, and expense to all parties, for senior and/or proratable surface water users making a "call" against junior ground water users.

Comment # 16

The rule is proposed to only apply to new uses of ground water initiated after July 16, 2009, as stated in Section 025 - Applicability. The City remains concerned that the exemption of the pre-July 16, 2009 group of ground water users ignores the real and present risk that all or many of such users are having on senior users like the City of Roslyn. The City's concern, however, is tempered by the language in the "advisory" section that puts all users of groundwater on notice that they should obtain mitigation to avoid curtailment. Accordingly, if a senior water right holder believes that it is being impaired by a pre-July 16, 2009 ground water user it can seek mitigation. The City fully supports this provision as it is consistent with what is required of all surface water users.

Commenter(s)

City of Roslyn

Response

Thank you for your comment.

Comment # 17

In addition to being indispensible in the permitting of water rights in the basin, the City requests that this advisory provision be publicized prominently and in fact should be identified as a next step for regulatory action.

Commenter(s)

City of Roslyn

Response

Ecology has already begun working with Yakima, Benton, and Kittitas county commissions to address the need for contacting affected users should senior or proratable surface water users make a "call" against some or all junior ground water users in the Yakima basin.

Comment # 18

The proposed rule states that anyone with an exempt well could be cut off from water usage. This is something that really scares me. Lenders will not lend on properties and people will have the value of their properties decreased drastically.

Commenter(s)

Vincent, Betty

Response

The rule provides an informational cautionary statement regarding a pre-existing condition. The rule does not alter the risk of a call being made on junior water users (to curtail their use) by other water users when there is insufficient water to meet the full measure of their senior water rights. Please also note that the rule applies equally to both permit-exempt and permitted ground water withdrawals.

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030 Definitions

Comment # 19

Words and phrases floated throughout the nine-page "proposed rule" read like what they are, just so much language deception. Ecology expects property owners to believe that things like "water budget neutral," "may be subject to," "mitigated," "unmitigated," "advised to obtain," "curtailment," "permit exempt use," "property covenant," "consumptive use," "mitigation," "appropriate," "...To the extent that Ecology determines that the mitigation offered would not reliably mitigate to be water budget neutral ... " -- your use of words and phrases that are either indefinable or deliberately vague and subject to the interpretation of ... guess who? You! This speaks volumes for your utter disdain of the property owners of Kittitas County and Washington State, excepting, I'm sure, yourselves.

The definitions section of the proposed rule supposedly defines the important terms used. They fail miserably. I have spent over a decade assembling a glossary that currently stands at 3,333 pages. Its definitions originate with various state and federal agencies and the definitions are hyperlinked to the documents from which they were gleaned. Many times these definitions are like those the Washington State Department of Ecology uses: chockfull of language deception and completely ambiguous.

For your edification, I've included a smattering of definitions for words/phrases you've used, just to help you –as though you needed help ... -- understand how obnoxious your definitions and verbiage are to property owners and cognizant citizens. [See comments #s below.]

Commenter(s)

Smithson, Julie Kay

Response

Definitions often vary in detail and application based on the intended use of the term. It is common to find multiple meanings to a single word in any dictionary. This is a function of language and usage, and is not a characteristic only of governmental rules.

Please also see the response to Comment #21.

Comment # 20

The definition for 'Common Ownership' significantly impedes a normal business relationship with customers by bringing into question if the use of the same business by two disparate parties, constitutes some joint relationship. Specifically, this is created by the language "A joint development arrangement may be evidenced by, but is not limited to agreements for....shared use of services. . ." When previously proposed, this had an immediate impact on some of our members as customers chose to avoid any possible 'common ownership' inference by using an out of county business, even at higher costs, rather than risk any exposure.

Further, there is at least some possible unintended consequences by discouraging any broader scale planning between the County and disparate parties because such interactions may be construed to be joint planning, the language addressing "joint activity or cooperation that is customary or required by land use. . . ," notwithstanding. We believe this whole definition should be reexamined and rewritten to achieve the apparent objective, which we assume to be to address the Campbell & Gwinn Supreme Court decision of 2002.

Commenter(s)

Central WA Home Builders

Response

We have carefully drafted the definition to address the level of interest or joint activity in a project to determine whether it is part of a project both described in AGO 1997 No. 6 and Campbell & Gwinn Supreme Court decision. Ecology understands that developers may favor using out-of-county service providers based on the definition in the proposed rule; however, the use of common services is but one element of several that would be used to determine whether the project is commonly owned. Nevertheless, if risk reduction is the principal concern, a developer proposing development that combined needs more than 5000 gpd may apply for a ground water permit and receive expedited processing. The rule is neutral with regard to permitted and permit-exempt appropriations.

Comment # 21

Proposed WAC 173-539A-030 defines the term "common ownership" in an attempt to clarify the meaning of the State Supreme Court's decision in Campbell & Gwinn, in which the Court held that RCW 90.44.050 allows for one 5,000 gallon per day exempt "per project." The proposed definition goes far beyond the "per project" concept in Campbell & Gwinn and should be narrow and clarified. Specifically, the proposed definition would find "common ownership" when adjacent parcel owners, who have no familial or business relationship, merely cooperate in joint development arrangements. Given that the proposed rule applies to rural parts of Kittitas County, with large lot land use patterns, parcel owners often cooperate to both save costs, improve project design and layout, and to minimize environmental impacts from development.

For example, if adjacent property owners work together to hire a single engineering firm to design roads and utilities, and then with a contractor to coordinate road and utility construction, the result will be cost savings to the project and improved design, as roads are compatible and can be planned to improve safety. In addition, construction can occur at a single time, rather than in multiple stages as would be the case in uncoordinated development by adjacent landowners. The proposed "common ownership" definition discourages landowners from

hiring the best qualified engineering and construction firms who are capable of creating development plans for multiple landowners. Instead, to avoid Ecology's "common ownership" definition, landowners will be encouraged to pursue uncoordinated and piecemeal planning and development that will negatively impact project design, safety, cost, and environmental impact.

Nor should "common ownership" be inferred simply because there is any type or degree of legal or equitable property interest held by an applicant in any proximate parcel.

Finally, Ecology's proposed definition simply lacks logic. In no sense of the word "ownership" would it be thought that adjacent landowners with no family or business connection, and who could independently develop land if they so chose, would be consider common owners. Where there is no actual, legal ownership between adjacent lot owners, Ecology must follow the 5,000 gallon per day principle from Campbell & Gwinn.

Commenter(s)

Central WA Home Builders
Realtors and Home Builders Associations
R&R Heights Land Company

Response

The definitions of "group use" and "common ownership" are included in the rule in order to provide clarity to new water users on whether they are subject to the requirements of the rule. In general, the rule limits new uses of ground water (defined as those that begin after July 16, 2009) to those that Ecology determines to be "water budget neutral." The water budget neutral provision does not apply to uses that began before July 16, 2009.

Given that the water code recognizes that certain single parcel domestic uses of ground water can be considered part of a larger "group use," it is important for the rule to include criteria for recognizing when the use of groundwater on an individual parcel is part of a larger "group use." The concept of "group use" has its origin in RCW 90.44.050 (where the Legislature exempted from permitting withdrawals of groundwater for group domestic uses not exceeding 5,000 gallons per day). Ecology based the definitions in the rule of "group use" and "common ownership" on discussion of these concepts in the Supreme Court's *Campbell & Gwinn* decision and in AGO 1997 No. 6. Both the court decision and the Attorney General Opinion offer guidance regarding how to determine when multiple parcels are all part of one "group use."

"Common ownership" is an important factor indicating that multiple parcels make up one "group use." The purpose of including "group use" and "common ownership" definitions is to provide clarity to individual parcel owners whose individual water use begins after July 16, 2009 regarding whether they are subject to the requirements of the rule. If an individual parcel is part of a "group use" that began using water before July 16, 2009 and the parcel meets other requirements of the rule, the new home built on the parcel is considered an "existing use" and is not subject to the rule's water budget neutral provision.

Ecology believes the "group use" or "common ownership" definitions are consistent with the scope of RCW 90.44.050, as well as the court decision and AGO interpreting the statute. The

use of common services is but one factor of several identified in the definition. One factor of several factors identified in the definition does not constitute the entire definition.

However, even if a developer or group of individuals meeting more than one of the "common ownership" factors and the resulting combined project would use greater than 5000 gpd for a group domestic use, the developer or individuals within the group could apply for a ground water permit and receive expedited processing. The rule is neutral with regard to permitted and permit-exempt appropriations. Water budget neutrality is required in either case.

Comment # 22

Other government definitions related to "consumptive use:"

- Consumptive use - Recreation activities, which consume natural resources. Hunting and fishing are regarded as consumptive recreation because wildlife [is] consumed. Rockhounding is consumptive because nonrenewable resources are removed.
- The quantity of water absorbed by the crop and transpired or used directly in the building of plant tissue together with that evaporated from the cropped area. The quantity of water transpired and evaporated from a cropped area or the normal loss of water from the soil by evaporation and plant transpiration. The quantity of water discharged to the atmosphere or incorporated in the products of the process in connection with vegetative growth, food processing, or an industrial process
- That part of withdrawn water that is evaporated, transpired, incorporated into products or crops, consumed by humans or livestock, or otherwise removed from the immediate water environment.
- Water whose state, chemical, or biological characteristics are altered sufficiently to render it useless to further beneficial uses. Also referred to as water consumption or water consumed.
- Consumptive use means that portion of water withdrawn or withheld from the basin that is lost or otherwise not returned to the basin due to evaporation, incorporation into products, or other processes.
- Water removed from available supplies without direct return to a water resource system for uses such as manufacturing, agriculture, and food preparation.
- Use of resources that reduces the supply, such as logging and mining.
- The use of water by plants, animals, and/or humans. This includes evapotranspiration but does not include water that returns to the surface or groundwater system. With reference to Colorado River entitlements, it means diversion from the river less return flows to the river.
- Consumptive use [irrigation] - The total amount of water taken up by vegetation for transpiration or building of plant tissue, plus the unavoidable evaporation of soil moisture, snow, and intercepted precipitation associated with vegetal growth.
- Consumptive use, net - The consumptive use decreased by the estimated contribution by rainfall toward the production of irrigated crops. Net consumptive use is sometimes called crop irrigation requirement.

- Consumptive uses - uses of a resource that reduce the supply. Examples include irrigation, domestic and industrial water use, grazing, and timber harvest.
- Consumptive waste - The water that returns to the atmosphere without benefiting man.

Commenter(s)

Smithson, Julie Kay

Response

Definitions often vary in detail and application based on the intended use of the term. It is common to find multiple meanings to a single word in any dictionary. This is a function of language and usage, and is not a characteristic only of governmental rules.

Comment # 23

The "consumptive use" definition is too limited. Impacts on water quality, and the location and timing of return flow are factors that should be referenced and implemented.

Commenter(s)

Aqua Permanente and CELP

Response

In the context of the proposed rule, the definition of consumptive use is adequate. Location and timing of return flow, for example, are considered in determining whether a project is water budget neutral. As an example, please see the Suncadia Lamb and Anderson mitigation suitability maps posted on Ecology's website.

Comment # 24

Contrary to popular opinion, I think it's noble of you to provide a 5-year window for us to get our things built, but that isn't enough for many. The reality is that we can't always meet that deadline. We buy our property, drill wells, build roads, and build our homes—we do things as we have money.

Commenter(s)

Hinkle, Representative Bill

Response

RCW 90.44.050 does not identify or establish a timeframe for reasonable diligence; only that the right equivalent to one that could have been obtained by applying for a permit. Ecology's opinion is that all parts of the water code except the requirement for a permit apply to permit-exempt users. Ecology believes the 5-year period allowed in the rule is reasonable for a water user relying on the ground permit exemption to construct and complete his or her project.

Comment # 25

The "existing use of the ground water exemption" definition should not provide for or allow grandfathering. See comment on section 040 Withdrawal of unappropriated ground water, below.

Commenter(s)

Aqua Permanente and CELP

Response

Thank you for your comment. Ecology disagrees primarily on the basis that the water code generally incorporates the concept of reasonable or due diligence. Defining group uses under the ground water permit exemption without incorporating a reasonable diligence period would not apply basic water code principles that Ecology believes apply to permit exempt uses.

Comment # 26

The inclusion of 'Administrative or exempt segregation' as one of the land-use applications for the purposes of the rule is unnecessary. Under the Kittitas County Code 16.08.015 such segregations are limited to less than 10 lots each, at least20 acres in size, with the parent lot not having been segregated in the previous five years. They do not fall within the county subdivision process unless they are subsequently reduced below 20 acres in size or further proposed for subdivision. The administrative segregation action in itself is not an assertion of an appropriation or withdrawal of water re: WAC 173-539A-040.

Commenter(s)

Central WA Home Builders

Response

Under the rule, administrative segregation is one factor, but not necessarily a deciding factor, in determining whether a parcel is part of a group use. Although the administrative segregation *may not* infer a new appropriation or withdrawal, it is an expression of how parcels relate to one another and where and when common ownership existed.

Comment # 27

The City is concerned with the limited scope of the definition of "land use application." Instead, the Department's definition of "land use application" needs to be more broad and encompassing or the same or similar to the definition set out in RCW 36.70C.02, namely:

"(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses; (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter."

Commenter(s)

City of Roslyn

Response

The rule governs water uses, not land segregations. To the extent required by GMA, the county must conduct its land segregation and building permit programs recognizing actual water availability. Ecology thinks the definition of "land use application" is sufficiently generic to include land use approval actions by the county that are likely to relate to new water uses.

Comment # 28

"Land use application" definition invites Kittitas County to create a new term for land division that could then be interpreted to fall outside the rule. We encourage you to add a generic definition that includes all land use decisions.

Commenter(s)

Aqua Permanente and CELP

Response

To the extent required by GMA, the county must conduct its land segregation and building permit programs with recognition of the actual water availability. Ecology thinks the definition is sufficiently generic so that it does not give rise to the concern identified by the comment, because it does not connect its definitions to the county's definitions; it simply describes land use approval actions we know the county has authority to make. Please also see our response to Comment #27.

Comment # 29

Other government definitions related to mitigation:

- To lessen the severity.
- To lessen the impacts of, alleviate, or avoid to the extent reasonably feasible.
- Mitigating measures - Modifications of actions that (1) avoid impacts by not taking a certain action or parts of an action; (2) minimize impacts by limiting the degree or magnitude of the action and its implementation; (3) rectify impacts by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate impacts over time by preservation and maintenance operations during the life of the action; or (5) compensate for impacts by replacing or providing substitute resources or environments.
- Mitigation - Activities that will avoid, reduce the severity of, or eliminate an adverse environmental impact.
- Mitigation, in an environmental context, refers a sequence of considerations designed to help manage environmental impacts, which includes (in order of preference) avoid, minimize, rectify, reduce and offset. The concept originated from a Memorandum of Agreement between the U.S. EPA derived from a Department of the Army – Environmental Protection Agency 1990 on Mitigation. "Environmental offsets aim to

ensure that significant and unavoidable adverse environmental impacts are counterbalanced by a positive environmental gain, with a goal of achieving a 'net environmental benefit'. In light of the State's recent alignment with the sustainability philosophy, it has potential to be a useful management tool – enabling development to occur, but not at the total expense of the environment. It is important to recognize that environmental offsets represent a 'last line of defense' for the environment, only being used when all other options to avoid and mitigate environmental impacts have been exhausted.

- Mitigation includes: (a) Avoiding an impact altogether by not taking a certain action or parts of an action; (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; (e) compensating for the impact by replacing or providing substitute resources or environments.

- Avoiding the impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree of magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and/or compensating for the impact by replacing or providing substitute resources or environments.

- Actions taken to avoid, reduce, or compensate for the effects of environmental damage. Among the broad spectrum of possible actions are those that restore, enhance, create, or replace damaged ecosystems.

- Measures designed to counteract environmental impacts or to make impacts less severe.

- "Mitigation" includes: (a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing or providing substitute resources or environments. As used in cultural resource compliance procedures: Any treatment of historic or prehistoric property that will offset adverse effects that may result from an agency's action. Municipal and industrial (M&I) water: Water delivered to industries and cities for uses, including human consumption, livestock and wildlife, recreation, and tourism development. - U.S. Bureau of Reclamation Glossary

- To moderate or compensate for an impact or effect.

- Includes avoiding an impact by not taking certain actions, minimizing impacts by limiting the degree or magnitude of the action and its implementation, rectifying the impact by repairing, rehabilitating, or restoring the affected environment, reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, and compensating for the impact by replacing or providing substitute resources or environments.

- The abatement or reduction of an impact on the environment by (1) avoiding a certain action or parts of an action, (2) employing certain construction measures to limit the degree of impact, (3) restoring an area to preconstruction conditions, (4) preserving or maintaining an area throughout the life of a project, (5) replacing or providing substitute resources to the environment or (6) gathering archaeological and paleontological data before disturbance.

- Measures taken to reduce adverse impacts on the environment. Steps taken to avoid or minimize negative environmental impacts. Mitigation can include: avoiding the impact by not taking a certain action; minimizing impacts by limiting the degree or magnitude of the action; rectifying the impact by repairing or restoring the affected environment; reducing the impact by protective steps required with the action; and compensating for the impact by replacing or providing substitute resources.

- Methods used to alleviate or lessen the impact of something.

- Avoiding or minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact by preservation and maintenance operations during the life of the action.

- Actions to avoid, minimize, reduce, eliminate, replace, or rectify the impact of a management practice.

- One or all of the following: (1) Avoiding an impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of an action and its implementation; (3) rectifying an impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action; and (5) compensating for an impact by replacing or providing substitute resources or environments.

- Actions taken to avoid, reduce, or compensate for the effects of environmental damage, including activities that restore, enhance, create, or replace damaged ecosystems.

- Restoring, replacing, or creating ecological habitats (usually wetlands) in one area to compensate for loss of natural habitats in another area due to development. Synonym: compensatory restoration 2.) Avoiding, minimizing, or reducing ecosystem losses.

- The compensation for functions and values that are lost on a converted wetland through restoration, enhancement, or creation.

- Includes the following: (l) Avoiding an impact altogether by not taking a certain action or parts of an action. (2) Minimizing impacts by limiting the degree of magnitude of the action and its implementation. (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (5) Compensating for the impact by replacing or providing substitute resources or environments.

- An activity designed to avoid, minimize, rectify, eliminate, or compensate for impacts of a proposed project. A mitigation measure should be a solution to an identified environmental problem.

- Mitigation (Heritage Resources) - Actions taken to reduce or eliminate adverse effects caused to heritage resources. Avoidance is not considered a mitigation measure.

- Mitigation Banking - Creates "mitigation credits" that can be purchased by developers in lieu of compensatory restoration.

- Mitigation Banks - 1.) Sites selected for habitat restoration or creation 2.) Market-based banks that exchange "mitigation credits" on the developing site for wetland restoration/creation requirements on another site.

- Mitigation Measure - A measure applied to a project that would avoid, reduce, or repair a program impact.

- Mitigation measures - Modifications of actions that (1) avoid impacts by not taking certain actions or parts of an action; (2) minimize impacts by limiting the degree or magnitude of the action and its implementation; (3) rectify impacts by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate impacts over time by preservation and maintenance operations during the life of the action; or (5) compensate for impacts by replacing or providing substitute resource or environments.

- Mitigation Monitoring and Reporting Program - Included as part of the Final Program EIR (Environmental Impact Report), the mitigation monitoring plan will list all required mitigation measures and will specify when the measure needs to be applied (e.g., before, during or after construction), and the agency or district department responsible for verifying compliance.

Commenter(s)

Smithson, Julie Kay

Response

Definitions often vary in detail and application based on the intended use of the term. It is common to find multiple meanings to a single word in any dictionary. This is a function of language and usage, and is not a characteristic only of governmental rules.

Comment # 30

The definition of "New use of the ground water exemption" is objectionable. Throughout the past year with the passage of related and substantively similar emergency rules imposing the current moratorium in Upper Kittitas County, Ecology informed us of varying definitions of the terms "new use."

While a five-year window has been fairly consistent for group uses, only recently has it been communicated it was Ecology's intent to retroactively apply that five-year time period to the date of first beneficial use of an approved group use. Previous interpretations have considered the date of the first emergency rule, July 16, 2009, to be the start date of the five-year window.

As any group uses which were approved prior to July 16, 2009 were done so under different circumstances and void of any five-year perfection requirement, we believe they should be exempt from such a regulation.

At minimum, the five-year requirement should not be imposed retroactively, but begin on the date of the first rule - July 16, 2009.

Commenter(s)

Kittitas County

Response

The 5-year "perfection period" is based on what Ecology believes is a reasonable time to complete development for a small ground water use which is exempt from permitting under RCW 90.44.050. It is independent of whether conditions changed on July 16, 2009.

Comment # 31

It's not "your way or the highway," Washington State Department of Ecology, though that is what you've apparently come to believe. The magic date of July 16, 2009, was likely also chosen capriciously. Is there no end to the control freak mentality that seems to have swept over the Washington State Department of Ecology like a tsunami, leaving little but flotsam and jetsam in its wake?

Commenter(s)

Smithson, Julie Kay

Response

July 16, 2009 is the day the emergency rule withdrawing unappropriated water was signed by the Director of Ecology and filed with the Code Reviser.

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040 Withdrawal of unappropriated water in upper Kittitas County

Comment # 32

Section -040: Subsections (l)(a) and (3) effective authorization of water for grandfathered parcels is not supported in the law, which establishes that permit-exempt (as well as permitted) groundwater uses are subject to the "first in time" priority rule and cannot trump senior water rights. In the Kittitas Valley, interruptible surface water rights are affected by junior groundwater rights. Regardless of the rule disclaimer in subsection (2), it is inappropriate and legally improper for Ecology to adopt a rule that encourages such use through grandfathering. We urge you to reconsider this approach.

Commenter(s)

Aqua Permanente and CELP

Response

The comment objects to the provision in the rule that exempts projects for which building permits had vested (under land use principles) before July 16, 2009, even if the associated water use did not begin until after July 16, 2009. The rule allows such uses to continue without being subject to the rule, so long as the holder of the building permit completes the project within three years of the building permit vesting. The rationale for using a 3-year period is that it is the maximum period the holder of a building permit has to construct a residence under county limitations.

Ecology included this provision to address concerns about fairness for those projects that were significantly underway when the first emergency rule was enacted in July 2009. Ecology does not view this provision as encouraging more expansive use of "grandfathering" because it captures only those projects that were already underway before enactment of the July 2009 rule.

Comment # 33

The moratorium is premature.

Commenter(s)

Mirly, Ken

Response

Ecology does not agree. Please see the summary response on page 3.

Comment # 34

The moratorium is the failure of politics. The moratorium is the failure of reason. The moratorium is a failure of common sense. The moratorium is crazy. Boneheads use a moratorium to rule.

Commenter(s)

Coe, Bruce

Response

Thank you for your comment. The proposed rule provides for a withdrawal of unappropriated water, not a moratorium. In addition, the withdrawal is subject to the exception for those uses determined by Ecology to be water budget neutral.

Ecology attempted a less restrictive approach before imposing the withdrawal of unappropriated water. When Ecology proposed a rule based on the MOA negotiated with Kittitas County, the County Prosecutor objected that it exceeded Ecology's authority. On July 9, 2009, Ecology adopted an emergency rule that was expressly within its authority and the proposed final rule relies on the same authority as the emergency rule.

Comment # 35

I oppose the moratorium and the permanent curtailment of new exempt wells.

As a landowner in the Upper Kittitas County, I am opposed to a further well moratorium for the Upper County.

Please remove the moratorium and reject the proposed rule.

The current temporary moratorium must end immediately. The new proposed "rule" must be immediately sent straight to the nearest shredder -- do not pass go or collect two hundred dollars!

Commenter(s)

Barschaw, Valeria
Ferrell, Susan
Kenny, Lorna
Kittitas County
Lewis, Gary
Rattray, Jane and Mark
Smithson, Julie Kay

Response

Ecology does not agree that ignoring the consequences of new ground water development in the Upper Kittitas area is a prudent water resources management decision. Please also see the summary response on page 3.

Comment # 36

The City supports the withdraw from appropriation of all unappropriated ground water within the upper Kittitas County pending the completion of a ground water study. We interpret this to mean exempt and non-exempt ground water.

Commenter(s)

City of Roslyn

Response

Ecology agrees that the withdrawal of unappropriated ground water includes both permit-exempt and non-exempt uses.

Comment # 37

My wife and I are retired and live on a fixed income. We invested in land eight years ago to supplement and prolong our retirement income. We own four 3-acre parcels on which we had wells drilled as a requirement to sell the properties. We, like many others, went through the permit process, paying the fees and getting the certifications needed to use the wells. That right has been taken away by the moratorium.

Commenter(s)

Childs, Roger and Karen

Response

Thank you for your comment. Drilling a well does not create a right to the use of water. Although a permit-exempt ground water use does not require applying for and receiving a water right permit, all other requirements of the water code apply.

The rule contains a provision that allows you to proceed if you had a vested building permit application or if you demonstrate that your project is water budget neutral.

The withdrawal of unappropriated water does not take away a right that you as the landowner had. It does affect how you can accomplish what you wish to do and what the costs will be. Please also see the summary response on page 3.

Comment # 38

Stopping drilling of new wells stops all development in the county during a recession. This inflicts the most pain to the community and sets the upper county back ten years.

Commenter(s)

Sanders, Jim

Response

Thank you for your comment. The withdrawal of unappropriated water does not stop all development:

- Any water use under the ground water permit exemption begun before July 16, 2009 may continue to develop for up to five years after the first use of water began.
- Persons with vested building permit applications as of July 16, 2009 are exempted from the rule.
- Persons or entities that have an existing water right that has an inchoate portion (Roslyn, Suncadia, etc) may continue to develop.
- Water budget neutral projects may also proceed.

Comment # 39

The moratorium has an impact on everyone in this room, whether you are for the moratorium or against it.

Commenter(s)

Sanders, Jim

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 40

Water is the lifeblood of the community. This moratorium is bleeding this community. This is our life. This is everything to us. This is not just a home; it’s not a vacation home. This is everything to us. We are trying to survive here.

Commenter(s)

Wise, Susie

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 41

Will you please help me understand the proposed water moratorium rule as it applies to me?

In 2005, I developed two contiguous 40-acre parcels in upper Kittitas County into two plats. One parcel (#20-17-32000-0006) was divided into seven lots and is called Hidden Valley Vistas. The second parcel (#20-17-32000-007) was divided into five lots and is called Hidden Valley Meadows.

During the platting process, a Class B well was approved to serve the 12 lots in Vistas and Meadows. Water lines and meters were installed to service each lot, and each lot owner is subject to a Water Users Agreement which was recorded on July 21, 2005. A copy of the approval of the Class B well is included in the attached pdf file. Also included is a letter from the Department of Health documenting the well's identification number (#AB 115K) and the recorded Water Users Agreement, which limits each lot owner's daily usage to 415 gallons (so that the usage of the well does not exceed 5,000 gallons per day).

I have sold 10 of the 12 lots. I still own 1 lot in Vistas (Parcel #20-17-32057-0004, property tax account #21017) and one lot in Meadows (Parcel #20-17-32058-0005, property tax account #21014). I do not intend to build on or sell my remaining two lots for another 10 years.

One lot on Vistas has a home on it that was constructed in 2008. Two lots on Meadows have homes on them that were constructed in 2008 and 2009. Water from my well is currently being used and metered on all three homes.

Will you please help me understand how the proposed water moratorium applies to my situation? I am afraid of losing my water rights for the well I constructed and paid for. I am not a "developer." The 2005 platting process to divide the land I owned was a one-time project intended to fund my future retirement.

Is there a possibility that my two 40-acre parcels have senior water rights attached to them? Can you tell me if they do, or how I might research this myself? If those underlying parcels have senior water rights, would those rights carry over to the lots in the Vistas and Meadows plats?

Commenter(s)

Scott, Donna

Response

You can obtain answers to your questions about existing water rights on your parcels and applicability of the proposed rule by contacting the Help Desk at Ecology's Central Regional Office.

050 Water budget neutral projects

Comment # 42

We agree with the concept and requirement of water budget neutrality in all future water allocations and further that Ecology make such determinations for all proposals, whether permitted or permit-exempt.

Commenter(s)

Aqua Permanente and CELP
City of Roslyn

Response

Thank you for your comment.

Comment # 43

The proposed rule appears to rely exclusively on "water budget neutral determination" process as the only mechanism to avoid the impact of the moratorium. While the water budget neutral process has developed as a necessity to avoid the impacts of Ecology's groundwater moratorium, this concept should not be viewed as the sole mitigation strategy in Upper Kittitas County.

The rule needs to include some additional flexibility to allow for mitigation strategies such as off-site and on-site storage, water transfers, deep well withdrawal, and other types of mitigation strategies that could be developed in future years. The current water exchange process provides one type of mitigation that will provide relief for some landowners, but Ecology's rule should acknowledge that other types of mitigation may be developed in the future.

Commenter(s)

Realtors and Home Builders Associations

Response

Thank you for your comment. Mitigation banking is one way to facilitate water budget neutral determinations. Ecology looks forward to working with the Kittitas County Realtors and Home Builders to develop effective programs to better serve the Upper Kittitas area.

Comment # 44

The County recognizes Ecology has a role in the protection of senior water rights, but this role is limited by the Legislature. Water budget neutrality is consistent with RCW 90.54.050(2) when used to preserve the status quo during temporary moratoriums. The use of water budget neutrality when paired with a permanent moratorium looks very much like permitting, which is prohibited by RCW 90.44.050.

Commenter(s)

Kittitas County Attorney

Response

The comment suggests that the components of the rule make it look like a system that requires permits for permit-exempt ground-water uses. Ecology is relying on the authority in RCW 90.54.050(2) to enact the rule. AGO 2009 No. 6 confirmed Ecology's authority to withdraw groundwater from new appropriations and to include an exception for new mitigated uses. The rule applies to any new appropriations of groundwater, including both permitted and permit-exempt appropriations. As such, Ecology does not believe the rule exceeds statutory authority or equates to requiring permits for permit-exempt uses.

Comment # 45

Other government definitions of "water budget:"

- Water budget - A summation of Juts, outputs, and net changes to a particular water resource system over a fixed period. (Also, water balance model).

- An accounting for the amount of water entering (irrigation and precipitation) and the amount of water leaving (evaporation, CU, deep percolation) a given plot of land to determine efficiency and estimate deep percolation.

- An irrigation tool that keeps track on a daily basis of the amount of plant available water in the soil over a 12-month period. It sums soil water depletion by evapotranspiration using one of the climatonomic estimators and deducts water inputs from precipitation or irrigation. This yields the amount of irrigation water needed to be applied to bring the soil back to field capacity within the root zone of the crop being irrigated. Water applications in excess of field capacity are assumed lost to percolation or runoff.

Commenter(s)

Smithson, Julie Kay

Response

Please see the response to Comment #19.

Comment # 46

The term "water budget neutral" is perplexing to me and seems to be a disingenuous statement. For this statement to be truthful, wouldn't this actually mean that if let's say "family A" wanted to sell their current property and house in the upper county that is on an exempt well without senior water rights to "family B", and "family A" was a two person family and "family B" was made up of three or more individuals. Would they not be allowed to do so by Ecology because there is no way this exchange could be considered "water budget neutral"?

Commenter(s)

Hurwitz, Dave

Response

The term water budget neutral is carefully defined as a trust water right of at least an equal amount as the consumptive impact of a new ground water use. Washington's court have determined a permit-exempt ground water use is not a transferrable water right and therefore cannot be placed in the trust water right program and changed to an instream flow purpose. If instead, family "A" had obtained a water right permit and put the water to use, the water right could *potentially* be changed to serve both families "A" and "B".

Comment # 47

I see no language in this rule that would change anything in regards to existing buildings. What about if "family A" just wanted to stay in their current house, but they had two babies that were born during the current or proposed ban. Would they have to move out of their house in the upper county because their family with their two additions would not be considered "water budget neutral?" If they could stay, would they be allowed a building permit to enlarge their small home to make room for their growing kids? What about seasonal families becoming permanent families?

Where does "water budget neutral" not apply, and if it does not apply to all non-neutral water budget neutral uses, why is Ecology trying to apply this new rule to basically only new building permits? Would this rule even have a chance of holding up in court in its current "selective" application to certain property owners, but is not applied fairly to all?

Commenter(s)

Hurwitz, Dave
Velie, Linda

Response

Your question about whether the rule applies to your examples (two new babies, and growing kids in an existing home) depends on whether they would constitute a new appropriation. There is no specific case law or statute that has drawn a bright line. Generally, if the activity would create a substantial increase in the water use from the historic use under the original water right, whether based on a permit or the permit exemption, that increase in use it would be a new appropriation and would be subject to the rule.

Ecology believes that the rule is legal in its current form. Ecology's authority to withdraw public water from further appropriation is RCW 90.54.050. The Attorney General reviewed the emergency ground water withdrawal rule in mid-2009 and, in Attorney General Opinion (AGO) 2009 No.6, concluded as follows:

"We also conclude, in response to your third question, that the authority of the Department of Ecology to withdraw water from new appropriation applies to both permitted and permit-exempt uses. This means that the withdrawal of water from further appropriation has the effect of precluding new exempt withdrawals, except that new appropriations that are mitigated for any consumptive use in equal or greater amount by existing trust water rights may be authorized."

Enacting a rule that withdraws a water basin from new appropriations (a tool available in state law) necessarily requires that the rule draw a line between existing and new. The rule draws

that line based on both practical and legal factors. Implementing the rule, of course, will also involve application of practical and legal factors as well as agency discretion. In the situation you ask about, Ecology does not view the changes in use related to single family usage like addition of children to a family that you mention as of the magnitude to necessitate agency review or agency exercise of discretion. Thus, to the extent a family resides in a house that relies on a permit-exempt groundwater right that predates July 16, 2009, and the family subsequently grows thereby using additional water (but still for domestic use and still under the permit exempt amount of 5,000 gallons per day), Ecology does not anticipate designating such changed use of water as a new use.

Comment # 48

How will we be able to gain Water Budget Neutrality? How much will this cost?

Commenter(s)

Rattray, Jane and Mark

Response

Section -050 addresses how water budget neutrality can be obtained. You have the option to place a water right of equivalent consumptive use into the Trust Water Right Program, or you can obtain mitigation credit from the holder of a suitable water right. The cost of acquiring suitable water rights will vary. Suncadia's selling price for mitigation credits is roughly $6,000 per residence, plus additional fees to offset costs for escrow agents, contracts, and recording.

Comment # 49

How willing is the Department of Ecology to assist the people of "Unsuitable" zones to become Water Budget Neutral?

Commenter(s)

Rattray, Jane and Mark

Response

The most effective way Ecology can assist people looking for mitigation is to cultivate sellers who hold senior right in the areas where Suncadia's Lamb and Anderson right will not provide adequate mitigation. Ecology has been meeting with home builders and realtors to identify opportunities to work together to establish mitigation banks in areas like Swauk Creek, the Teanaway River and Big Creek. Finally, Ecology is working directly with some senior water right holders to establish mitigation banks.

Comment # 50

The assumption that the return water percentage via traditional drain fields is 70% is absurd. Since around 2002, the County has required infiltrator style drain fields that are likely to return a much higher percentage of water and I doubt that includes factoring in the imported liquids in the form of bottled, canned, cartooned, and jugged beverages that are also invariably associated with the folks using the wells. So that number is suspect at best and more likely pure baloney.

Commenter(s)

Griswold, Steve

Response

The default return percentages in the proposed rule are believed by Ecology to be relatively conservative when applied to an entire class of water users. A review of literature shows that return flow to ground water aquifer systems can range from 0 percent to nearly 100 percent. The rule allows Ecology to consider actual performance data when reviewing a request for a water budget neutral determination. The defaults in the rule are intended to be protective of the total water supply available (TWSA) and avoid the need for a requester to spend significant amounts of money to establish a system's actual performance.

Comment # 51

With respect to Subsection (3) we object to a determination regarding offsets for consumptive use due to "return flow" concepts. On-site septic systems are not necessarily permanent structures. Return flow from septic systems can be compromised in quality, or the system can fail to function properly if not maintained. Ultimately, wastewater should not be legally considered a substitute for freshwater unless treated to the highest level (i.e. a level at which such water could be consumed like freshwater, including as drinking water supply). Outside watering should be debited at 100% unless an individual properly can demonstrate return flow. Wastewater effluent can return to the river at locations far from the original withdrawal. Rule-based assumptions crediting return flow to consumptive use should not be adopted.

Commenter(s)

Aqua Permanente and CELP

Response

Ecology does not agree with your position regarding what constitutes adequate mitigation. Ecology is using what it believes to be reasonable default for return flows that will avoid impairment to existing water rights. The default values will not be conservative in every case; however, when used for a class of hundreds or thousands of water users we believe they are sufficiently conservative. Septic tank effluent or treated wastewater from a Publicly Owned Treatment Plant is unsuitable for drinking, but it meets the state's requirements set by the Board of Health and by Ecology's NPDES and State Waste Discharge permits. The fact that septic tank effluent and wastewater are not suitable for direct reuse for drinking does not negate their contribution to the Yakima Basin water budget and to protection of TWSA.

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060 Expedited processing of trust water applications, and new water right applications or requests for a determination of water budget neutrality associated with trust water rights

Comment # 52

Objections to the water bank.

Commenter(s)

Mirly, Ken

Response

Thank you for your comment.

Comment # 53

Developers currently have the option of using the existing transfer process to acquire and transfer water rights to meet proposed needs. Developers should not expect their projects will be supplied water at the expense of senior water rights holders.

Commenter(s)

City of Roslyn

Response

Ecology agrees.

Comment # 54

Where there is a water bank, people can put it to good use where really needed. If there is impairment, no one can argue that.

Commenter(s)

Hinkle, Representative Bill

Response

Thank you for your comment.

Comment # 55

I am in support of the proposal to mitigate water for new building in the Upper County.

Commenter(s)

Moon, Keith

Response

Thank you for your comment.

Comment # 56

Despite our concerns about a moratorium, we do support the requirement that new users mitigate for their impacts. We'll continue our best efforts to help implement the mitigation program in a straightforward, cost effective, and especially timely manner.

Commenter(s)

Suncadia

Response

Thank you for your comment.

Comment # 57

I do applaud the water trust program. I see it as a good temporary measure to solve the problem.

Commenter(s)

Association of Realtors

Response

Thank you for your comment.

Comment # 58

The water transfer program allows us one real positive thing that we can do, that we could never do before. As strapped as the municipalities are, we now have the possibility to take water from the surface to the ground in areas outside of the UGA where the municipalities could never afford to get the infrastructure. This creates economic development and creates jobs.

Commenter(s)

Association of Realtors

Response

Thank you for your comment.

Comment # 59

Trendwest Resorts, which was Suncadia's predecessor, bought the land that Suncadia Resort is on now. It was timberland and had no water associated with it.

Starting in 1996, Suncadia and its predecessors began to acquire water for the resort project. We bought several different water rights in various places in Kittitas County. Most of the supply has an 1884 priority date. These are existing surface water rights that were transferred to use on the resort property.

In about 2000, Kittitas County commissioners required Suncadia to provide a water supply in addition to the resort requirement for induced offsite development. As modified by the Department of Ecology, this requirement imposed on Suncadia an obligation to purchase 471 acre feet of consumptively used water. In 2002, the Washington Legislature authorized Suncadia to use that water in the trust water program for water banking purposes.

Since that time, we have been working to establish the upper Kittitas County water bank. Three times during that period, in 2001, 2003 and 2005 I believe, we made transfers to the trust program to mitigate for the drought-related impacts of the city of Roslyn and the Kittitas Reclamation District.

It took us about seven years, but starting in 2009 in October, we reached agreement on a trust water right program with Ecology. Since that time, we have had requests for about 870 residential units, we have signed letters of intent to provide mitigation for 383. We have signed contracts for 138 connections for which escrow accounts were open. Sixty-three of those have been sent to the Department of Ecology and 57 have been approved. We have closed on the transfer of mitigation certificates for 49 units and our focus has been to provide water for those who are trying to build or sell property during the 2010 construction season. With all that effort, we've only committed 12 acre-feet of water and we have enough left for over 2,000 homes.

Now, this is a program that I believe is working.

Commenter(s)

Suncadia

Response

Thank you for your comment.

Comment # 60

I'm okay with a policy that prohibits "new" wells without offsetting water if the Upper County ground water study indicates that this is the proper course of action and that the state partners with the county to fund and implement a marketplace that serves all of the county and not just specific areas.

Commenter(s)

Rooney, Tracy

Response

Ecology is working with senior water right holders in areas like the Teanaway River and Swauk Creek to broaden the effectiveness of the Upper Kittitas mitigation bank. Also, Ecology is evaluating mitigation for junior residential and domestic ground water use through the water demand infrastructure planning as part of the Yakima River Basin Water Enhancement Project.

Comment # 61

The market is the state water bank system developed by the governor and Ecology. The demand is the water moratorium imposed on the upper county and the new requirement to purchase mitigation water from the market.

Commenter(s)

Sanders, Jim

Response

The comment does not correctly state the relationship between the market and the bank. The rule provides the context and motivation for buyers and sellers to work out market exchanges that do not harm third parties who also rely on surface water and ground water in the Upper

Kittitas area. The sellers are those with pre-1905 water rights who are willing to sell some of their rights so that new water users, the buyers, may gain a reliable water supply otherwise not available. The water bank is simply an intuitional framework to hold and manage water rights so that sellers can market them to potential buyers.

Comment # 62

There are several mechanisms available through which the local land-use authority can deal with the asserted impacts that would result from their decisions. They can modify their decision-making process in a manner so that the asserted impacts do not occur. They can mitigate the asserted impact through the acquisition of water rights to replace the water that is claimed to be taken from a stream, etc. They can require mitigation by individual recipients of building permits as a condition for attaining such permits. Additionally, the local land-use authority could build its own storage or engage in a regional Aquifer Storage and Recovery (ASR) program to make water available when necessary. Who pays for the mitigation and how it is accomplished remains completely within the purview of the local government.

Local government's responsibility is to assess the cost/benefit project aspects within the context of their local community. Moreover, they can determine what mitigation methods would serve as an appropriate response for their specific situation. Water rights are always available to local governments whether they decide to obtain them by condemnation or other purchase agreements.

It is not necessary for Ecology to set itself up as the sole source of mitigation through a water banking system - such as has recently occurred with the "Suncadia" water arrangement. The valid promise of mitigation by the affected local land-use authority should end Ecology's role in land-use planning with the proviso that Ecology could choose to verify that the mitigation provided properly addresses the impact concerns previously raised by Ecology. It is, of course, also within the purview of local government to challenge Ecology's assertion of impact and since Ecology is intruding upon local government authority, it is logical that the burden of proof would lie with the agency or source that is asserting such impact.

It has long been our position that the issues raised in defense of the Upper Kittitas County moratorium and in defense of Ecology's existing rule, can each be addressed without state government taking over the land-use authority that is already vested in local government. It has been expressed, emphatically, by a direct vote of the people of this state that they desire land-use planning to be accomplished at the local governing level. Any attempt by Ecology to usurp that authority will be in direct contradiction to the expressed desire of the citizens residing in Washington State.

Commenter(s)

WA Ground Water Association

Response

Thank you for your comment. Ecology agrees that the Trust Water Right Program and mitigation banking are not the only ways to address the current water management issues. However, just because other ways may be available does not mean people are willing to develop and use them. Ecology's approach does not preclude other options. Kittitas County

citizens may ultimately persuade their county government to adopt a different approach to their involvement in water resource management.

The comment that a "valid promise by the local land use authority" should end Ecology's jurisdiction cannot be equated to actual mitigation. The governance construct advanced within the comment is inconsistent with Kittitas County's claim that it lacks jurisdiction or authority. Once the Supreme Court rules next year on the RIDGE case, it is possible there will be more clarity about potential shared governance water management solutions supportable by both Ecology and Kittitas County.

Comment # 63

Although the groundwater moratorium is now over a year old, Ecology is still working out various processing and review issues associated with water budget neutral determinations needed for subdivision and building permit applications. While the proposed rule includes language that such applications can be expedited (see proposed WAC 173-539A-060), development projects require more certainty as to when Ecology will issue specific decisions. By enacting the moratorium, Ecology is placing itself in the midst of real estate transactions and the land development permitting process, and should provide applicants with specific timelines for action.

RCW 90.80.80(4) requires Ecology to review county water conservancy board decisions within 60 days. We think this is an appropriate model for Ecology to follow in the water budget neutral process as well. By having a specific timeline in rule, parties to real estate transactions and in development projects will have greater certainty in structuring agreements.

Commenter(s)

Realtors and Home Builders Associations

Response

The comment is accurate that the program is still evolving. Most of the procedural evolution is associated with the suitability of Suncadia's Lamb and Anderson water rights in the so-called "Yellow" areas on the mitigation suitability map. These are the areas where impacts of new development on fish are a concern to Dept. of Fish and Wildlife and the Yakama Nation. New development proposals that would impact streams in those areas may not be approvable by Ecology without on-site or in-basin mitigation to supplement or replace Suncadia's mitigation credit.

Forcing a decision in a set period would ensure that a decision is made, but that decision may be to deny the water budget neutral determination. One alternative is to integrate the mitigation requirements with the development approval, not the building permit approval. Another would be to complete aquatic resource assessments of all of the streams in the "yellow" areas of Suncadia mitigation suitability map. The assessment would support earlier resolution of the project-specific mitigation requirements. A third approach would be to foster development of an ecosystem services market in the Upper Kittitas that could supplement Suncadia's and other sellers' consumptive use mitigation. These three possibilities are not mutually exclusive, but all require some level of financial and institutional support to fully develop.

Comment # 64

It is improper for Ecology to adopt a permanent groundwater rule that continues the groundwater moratorium without first putting in place a functional mitigation system that addresses the severe economic consequences of moratorium on Kittitas County's citizens, landowners, and businesses.

Ecology is not doing what is necessary to mitigate groundwater withdrawals to accommodate future land endeavors.

Commenter(s)

Realtors and Home Builders Associations
Kenny, Lorna

Response

Ecology has chosen, within its ability and authority, to support mitigation banking as a means of reducing the financial impacts to property owners while the ground water study will be performed. We do not think the withdrawal is improper; however, we have no intention to cause negative impacts to the economy if they can be avoided by an affirmative program that meets the water management needs. Please also see our response to Comment #8.

Comment # 65

As any new program, the water bank could always be improved. We will work with the Department of Ecology and affected parties, including the Yakama Indian Nation, water right holders, homebuilders, realtors, well drillers and others to suggest improvements for the program.

The rule requires a person to sign a covenant to protect an onsite septic system from planting trees and shrubs. I don't think that's necessary. It adds a great deal of cost to the transfers of water for mitigation.

Commenter(s)

Suncadia

Response

Thank you for your comment. That cost is, however, is balanced by the benefits that come with a lower default assumption for the consumptive impact of the on-site septic system and therefore a lower cost for the water required to offset consumptive use.

Comment # 66

We have consistently supported the development of a workable mitigation program. We believe that considerable work remains to be done with respect to the water trust program in areas such as the fallowing requirements for lands from which water rights are dedicated to a water bank, the negative incentive created by the 'use it or lose it' policy which discourages efficient use and conservation of water, and opportunities for not-in-kind mitigation efforts.

Commenter(s)

Central WA Home Builders

Response

Thank you for your comment. Please see the response to Comment #63.

Comment # 67

Begin exploring sensible, feasible water mitigation avenues that can be effectively implemented and managed by local Kittitas County government along with the complementary direction of the Washington State Department of Ecology.

After nearly three years of often contentious debate, questionable decision making and legal determinations, the recent upper Kittitas County process for moving forward has been the acceptance of the fact that mitigation is, indeed, the avenue through which water can be utilized in areas of the upper county without causing a violation of water rights as interpreted by Ecology.

Commenter(s)

Washington State Ground Water Association

Response

Thank you for your comment. Please see the responses to comments #62 and #63.

Comment # 68

I need predictability and stability in a trust process. I need to know our legislators in particular will honor the conditions of a trust agreement, which I have with the state if I choose to put water in a trust. I need to know that there's not going to be any extractions or punishments if I take water in and out of the trust. I need to know especially that our governor will honor my trust agreement with an agency if I do that.

Commenter(s)

Coe, Bruce
Voice of Independence

Response

Thank you for your comment. Trust is important. The person placing a water right in trust needs to be confident that the right will be managed, and the person buying a mitigation credit needs to know that the trust water right that they have purchased is well managed. Trust water right agreements are intended to address those needs, and they provide for the event that either party to the agreement fails to live up to their responsibilities.

Ultimately, it is the Legislature that determines to fund Ecology to provide long-term continuity of the program. Please also see the response to Comment #115.

Comment # 69

The water bank has to work. It needs to be sustainable.

Commenter(s)

Hinkle, Representative Bill

Response

Ecology agrees. Ecology's June 2009 Yakima River Basin Integrated Water Resource Management Alternative Final Environmental Impact Statement (Final EIS) describes the role of market-based reallocation as a strategy for meeting both interim and long-term water supply needs in the Yakima basin. Please also see the response to Comment #68.

Comment # 70

WAC 173-539A-060 indicates that RCW 90.42.100 authorizes Ecology to use the trust water right program for water banking purposes within the Yakima River Basin and that Ecology may expedite review of such applications as part of implementing the proposed rule.

The water bank program has independent validity regardless of the proposed rule because certain projects are too large to be served by the quantities allowed under a permit-exempt well (5,000 gpd), and must instead be served by secured water rights.

The water bank program can be a viable program, but Ecology should be held accountable to the public for administration of the trust program and the water bank.

Commenter(s)

R&R Heights Land Company

Response

Thank you for your comment. Please see the response to Comment #68.

Comment # 71

Suncadia spent a great deal to buy water rights for the resort and some in reserve. The state then said they may be unable to use those rights, and then later that they could be used for mitigation. This creates a history of creating a huge cost to just one private company, let alone what the rule has cost each citizen. How can the citizens trust that the situation will work well?

Commenter(s)

Hinkle, Representative Bill

Response

Please see the response to comments #68 and #69.

Comment # 72

You are asking for a lot of trust that Ecology can process permits and applications, but what if you lose funding? What if budgets are cut? This is the worst budget year and the next we may

lose another 5 billion dollars. How can we rely on Ecology to process these permits and applications.

Commenter(s)

Hinkle, Representative Bill

Response

Please see the response to Comment #68.

Comment # 73

The capital budget is losing funds to the operating budget. I worked to save the $700,000 budget for Kittitas County, originally for the ground water study. When the study wasn't happening and the funds were at risk of being lost, I looked for other tools to use that money for. Part of that was the water transfer for the domestic water reserve program.

We don't have to put it all in the study or all into the water bank. We worked hard to create these tools and options.

Commenter(s)

Warnick, Representative Judy

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 74

The Yakama Nation supported the use of the $700,000 to just move ahead with mitigation rather than just spend the money on the study.

Commenter(s)

Yakama Nation

Response

Thank you for your comment. Please see the response to Comment #73.

Comment # 75

I encourage the Department of Ecology not to support any plan that does not provide realistic options for all private property owners in the region.

Commenter(s)

Stougard, Jerry

Response

Thank you for your comment. Ecology is striving to find mitigation options for property owners throughout the area affected by the rule.

Comment # 76

I don't know of any water rights for sale in the Teanaway.

Commenter(s)

Geiger, Jesse

Response

Thank you for your comment. Please see the responses to comments #60 and #77.

Comment # 77

The senior water rights -- pre-dating May 10, 1905, which are, as you well know, unavailable to the entire region affected by this proposed rule -- are a moot point.

Commenter(s)

Smithson, Julie Kay

Response

Senior rights are not unavailable. The market in water rights is not well developed. Nevertheless, purchases and sales have occurred periodically and there are pending sales in both the Teanaway River and Swauk Creek basins.

Comment # 78

The colored "zones" ostensibly give Ecology the ability to tell the citizens and property owners of Kittitas County who may purchase water from the Suncadia Water Bank. The Swauk and Teanaway drainage property owners are now told they must purchase water from senior water rights holders in only those drainages, of which none are for sale.

Does Ecology intend to use this "rule" as a leverage tool to force all property owners in the upper county to buy from the Suncadia Water Bank if this rule is put into place? As you well know, this option will soon be depleted. What then?

Commenter(s)

Smithson, Julie Kay

Response

The zones on the map are intended to convey the general effectiveness of any particular water right to serve as mitigation in different areas. Ecology's intention is to prepare a map for each right that would be placed in the TWRP for mitigation purposes. A water right from the Teanaway River, for example, would bring with it a "green zone" that differs from what Suncadia's Lamb and Anderson rights can effectively offer.

The Lamb and Anderson rights total several hundred acre-feet of water – enough to satisfy the domestic water needs of more than 1000 homes. At current development rates for the area, the Lamb and Anderson rights will not be soon depleted.

Comment # 79

The proposed rule is in actuality an anti-growth anti-people building ban that permanently bans buildings, without first obtaining senior water rights pre-dating May 10, 1905, which are not available to the entire region affected by this proposed rule.

Currently there is a "red zone", "yellow zone" and "green zone," and only those in the "green zone" are allowed to buy water from the Suncadia Water Bank according to information I have been provided. I have been told that the Swauk drainage properties must buy water from senior water rights holders only located in that drainage, of which none are for sale today. The same scenario as in the Swauk drainage applies for the Teanaway drainage.

I see no reference to drainages or zones in this permanent rule. Will all property owners in the upper county be allowed to buy from the Suncadia Water Bank if this rule is put into place? If so, this senior water rights option will soon be depleted. What will happen after this occurs?

Commenter(s)

Hurwitz, Dave
Velie, Linda

Response

Suncadia's water rights are the only ones currently placed by a seller into the Trust Water Right Program to be marketed for mitigation. Other sellers are welcome to negotiate similar arrangements with Ecology. Please also see the responses to comments #62, #63, and #80.

Comment # 80

"Paper" Water Mitigation from Suncadia needs to be readily made available in the "yellow" and "red" zones. Ecology needs to make general/conservative assumptions so not to complicate the process that Suncadia is trying to follow. If not, this process will fail and any confidence in Ecology's ability to find a solution will diminish.

Commenter(s)

Kirkpatrick, Marc

Response

Conservative assumptions would preclude the use of Suncadia's Lamb and Anderson rights in the yellow and red areas. In the yellow areas, it is possible that local mitigation or a better understanding of the impact of new uses on fisheries would enable the Lamb and Anderson rights to be accepted as full mitigation. This is why they are annotated with "more information needed." In the red areas, Ecology expects that *other* water rights acquired within the Teanaway River, Swauk Creek , Big Creek, and Little Creek basins would be effective mitigation, and not that the Lamb and Anderson rights would be used.

Comment # 81

It is unfortunate that the only source of water comes from Suncadia with a relatively high price tag of $10,000. We live in a county with a staggering amount of water that is used for the two least productive uses—growing hay and stock watering. Agriculture uses over 400,000 acre-feet of water. Maybe the State or the County should be looking at an affordable source of mitigated water.

Commenter(s)

Moon, Keith

Response

The fact that there is a large economic difference in the benefits of water makes it likely that willing sellers will step forward to take part in mitigation banking as it would be in their financial interest to do so.

Comment # 82

Some people are happy to spend another $10,000 to build a house where they drilled a well years ago.

Commenter(s)

Sanders, Jim

Response

Thank you for your comment.

Comment # 83

The water bank has created an inflated market for the sale of senior irrigation water rights to mitigate for third party domestic use. It may be that Suncadia's set value of nearly $50,000 per acre-foot is enough incentive for others to sell, leaving a significant amount of farm acreage fallow, with primarily irrigation districts left to supply water to support an agricultural-based economy. However, even the customer base and water needs of irrigation districts (senior and junior) have seemingly changed over the decades with subdivision of "irrigable acreage" and conversion out of crop production.

Commenter(s)

R&R Heights Land Company

Response

Thank you for your comment. Ecology is aware that this is occurring in many parts of the state, including those without a water bank.

Comment # 84

Transferring money from our joint checking account to Suncadia's checking account does not create more usable water.

Commenter(s)

Lussier, Dave

Response

The comment is incorrect. The water right Suncadia placed into the Trust Water Right Program is used to benefit Yakima River instream flows until is it assigned through a water budget neutral determination to a specific buyer of mitigation credit. Once assigned, it would no longer be part of flow over Parker dam to the lower Yakima River.

Comment # 85

Water banks have always been baffling to me since this popped up. Water rights as far as I've always been explained by many of the farmers that we talk and communicate with, is they always have a "use it or lose it" policy. They nag you to no end, they monitor your wells, and you are only allowed to irrigate between the months of May and September. But suddenly Suncadia can take a water right, and irrigate the water right, meter it out to different people in the county, and year-round. Never could figure that one out.

Commenter(s)

Conner, Kelli

Response

Suncadia has used its water rights since they acquired them. They generally have been used at the resort, changed to instream flow purposes, or periodically transferred to other water users including the City of Roslyn and the Kittitas Reclamation District during declared droughts.

Comment # 86

I appreciate the efforts of Suncadia and some others to put together a working water bank. Suncadia had to spend maybe three million dollars to buy water rights for a resort and some in reserve. The state then said they weren't sure they could use them. Then we figured out that yes, we can use these water rights to mitigate, but there was no plan when the permit was done.

Commenter(s)

Hinkle, Representative Bill

Response

Comment noted. Ecology is unclear what Representative Hinkle means by the comment about what Ecology wasn't sure of. Ecology has a written agreement with Suncadia regarding management of the rights it placed into the Trust Water Right Program for mitigation. The purpose of the off-site induced development mitigation Ecology required nearly 10 years ago is described in the Cle Elum Supplement to the County's FEIS for Trendwest's Mountain Star Master Planned Resort and the water right change files.

Comment # 87

How does buying Suncadia's "paper" water improve the basin's "wet" water?

Commenter(s)

Kirkpatrick, Marc

Response

The "paper" is evidence of the water right. The water rights Suncadia changed to instream flow purposes is the mitigation for impacts, not the paper. They are "wet" water and the water has been in the Yakima River since Suncadia acquired the Lamb and Anderson rights and retired the irrigation use on those properties.

Comment # 88

Suncadia Resort has clearly become an important partner for Ecology 's ability to implement this portion of the Proposed Rule. Suncadia has senior water rights that serve as the initial deposit into Ecology's water bank program. This is clearly a benefit and some people are financially able to take advantage of the opportunity. However, many believe that Suncadia is being unjustly enriched through this process, namely by "double-dipping" on their historic mitigation requirements imposed on Suncadia in 2003 by Ecology for water use associated with the Master Planned Resort (MPR) and projected offsite induced housing development. Such mitigation requirements were established in water rights transfer documents approved by Ecology and in the County's Environmental Impact Statement for the resort.

Since the water bank market was not a viable option for Suncadia in 2003, presumably Ecology's intent was to allocate, at no cost to the public, so much water for instream flows to mitigate for off-site induced housing development on an "umbrella" basis rather than on a "parcel-by-parcel" basis as is now being done with Suncadia's water as part of implementing the Proposed Rule. It may be that Suncadia has exceeded its historical mitigation requirements (486 acre-feet per year) and Suncadia water being sold now is wholly independent from that obligation, but Ecology should have an accounting of Suncadia's compliance history readily available. It would not be in the public's interest for the public to pay for a private developer's (Suncadia) historical mitigation requirements simply because a market exists. In this case, Suncadia's water sales to the public could total $20 million or more.

This perception exists and we ask, within the formal response to these comments, an up to date accounting of how Suncadia's water rights (the "Lamb-Anderson" water rights) now being sold through the water bank to mitigate for off-site induced housing development in Upper Kittitas County, are allocated toward Suncadia's historical mitigation requirements that Ecology imposed on Suncadia in 2003 for the MPR and projected off-site induced housing development. This documentation is also consistent with Ecology's reporting requirements under the February 11, 2010 Trust Water Rights Agreement with Suncadia.

Commenter(s)

R&R Heights Land Company

Response

All water budget neutral determinations are posted on Ecology's website. A link to the current and archived determinations appears on the Upper Kittitas Water Exchange page.

Comment # 89

I assume that the Suncadia water bank gets its water from upstream water and that the water is not purchased downstream and shipped upstream, even although the rights were purchased from senior downstream holders. Why then the funny little map that limits the purchase of this water right to a narrow area essentially running down either side of the Yakima River. I assume that what we are talking about is the ability to dig a well and use the water if the property is located in certain areas and the owner has the wherewithal to pay the purchase price. You keep on calling this mitigation – it is not mitigation. There is no creation of more water. The amount of water is exactly the same. The only thing I can see is that it takes money out of someone's pocket and puts it in somebody's else.

Commenter(s)

Ceraold, Frances

Response

The commenter's assumption or presumption is incorrect. In every case, the Lamb and Anderson mitigation is located downstream from impacts within the Upper Kittitas area. Please see the response to #87.

Comment # 90

Suncadia's "green zone" covers less than 10% of the moratorium area and is located directly adjacent to the Yakima River. This will encourage development of homes and water withdrawal where we all can agree has the best continuity—and biggest impact—to the "Wet" water of the Yakima River Basin. Is this in the best interest of the downstream senior water right holders?

Commenter(s)

Kirkpatrick, Marc

Response

The "green zone" on the mitigation suitability map is the area where the mitigation is most suited to offset the impacts to *all water rights*, not only the downstream water right holders. It fairly protects the downstream senior water right holders too.

Comment # 91

For nearly three years, there have been countless hours of effort by many to reach an acceptable resolution to this issue. During this process, some progress has been made, such as a conceptual domestic water reserve program that would include the lease or purchase of senior water rights for mitigation for water-short years. And more recently the creation of a water bank in which water rights may be acquired.

While the water bank has provided relief for some, the area in which it can be applied is limited and still doesn't provide opportunity for others in areas categorized as in the red zone.

Commenter(s)

Kittitas County

Response

That's correct. Please refer to the answer to Kirkpatrick, Marc 4.

Comment # 92

What happens when Suncadia's water rights in the water bank are fully utilized? Can senior water right holder other than Suncadia sell or lease portions of their water to mitigate water use by exempt wells?

Commenter(s)

Mirly, Ken

Response

Once Suncadia's Lamb and Anderson rights are fully assigned through purchase of mitigation credits, other rights will need to be made available to meet any further demand for mitigation. Yes, other senior water right holders may elect to negotiate an agreement with Ecology and place their water right, or a portion of the water right, into the Trust Water Right Program and market mitigation credits.

Comment # 93

The rule and the documents surrounding it imply that there are ways to get water rights, to get mitigation of water withdrawals. That is perhaps the case in some areas. As the map shows, there's a few areas in the upper county that that's true, if you have the money to pay for it. But in most of the areas, there isn't even any ability to find a water right to use to offset for that. There's a11 big red blotch over most of it.

There doesn't seem to be any real likelihood that there will be water available in the Teanaway basin, but there might be for the Swauk, but that isn't known for sure.

Without any way to mitigate these supposed effects of ground water withdrawals and the inability to get permission to withdraw water, it has rendered property pretty much useless. It's worth less than a tenth than it was before when it was just bare forest land. It can't be used for whatever it was intended to be used for.

Commenter(s)

Grinnell, Roy

Response

Thank you for your comment. Please see the response to Comment #49.

Comment # 94

I would like to explain the situation as this directly effects me and my family. I was born in Ellensburg and raised in Kittitas County. Although I moved away for my career with the Bellingham Fire Department I have always called this region home.

In the fall of 2004 I found this property on Teanaway Terrace I purchased it on January 3 of 2005 with the plan to make it my retirement home. Part of the appeal was that it was a well established area with a mix of permanent and vacation homes on large properties of 10 acres and greater. The property I purchased was surveyed and short platted in September of 1992 (tax parcel number 20-16-26000-0014).

In 2006, I built my road and began camping at the site. In 2007, I had underground power installed to the property. In May of 2008, I applied for and received a permit from Ecology to install my domestic exempt well. The well was completed on June 3, 2008 and Ecology received my well log on June 13, 2008 (unique Ecology well tag BAF-987). I installed a pump and have been using the water in my camp trailer since that time. I was preparing to move forward with plans for a small two-bedroom home for the two of us when the moratorium hit in July of 2009.

Since that time, I have explored several options with the Kittitas County and the State's water bank. I am in the Teanaway so I have been told I can't use the Suncadia water from the water bank. No water bank water exists for my area. My property is in the red zone.

It seems very unfair to have such a devastating impact on a person that thought he was in compliance with all rules and permits as I went along in the process. I have nearly $200,000 tied up in the dream and it is rapidly being destroyed and turned into a nightmare as others continue to build in nearby areas yet I seem to have no recourse.

Commenter(s)

Stougard, Jerry

Response

Please see the response to Comment #49.

Comment # 95

In support of the ground water ruling, Governor Gregoire mentions two innovative solutions which contribute to water budget neutrality I) Suncadia's water bank and 2) the Domestic Water Reserves Program.

As you are aware, the Teanaway River area is located in the "Unsuitable" area of Upper Kittitas County. This means we will not benefit from Suncadia's water bank. With regards to the second option, the Domestic Water Reserves Program, it is my understanding that this refers to irrigation water; which is supported by the Kittitas Reclamation District (KRD).

A letter, dated April 6, 2010 to Tom Tebb, KRD made several points, two are as follows. 1) "KRD water cannot be used as mitigation water, nor can it be used as potable water." 2) KRD "receives water from natural resources that come from creeks running through the borders... by and large these water rights are not available to participate in the sale or lease as described in the Domestic Water Reserves Program."

Commenter(s)

Rattray, Jane and Mark

Response

Thank you for your comment.

Comment # 96

How will we get household water and a building permit for our planned retirement home? How much will this cost?

Commenter(s)

Rattray, Jane and Mark

Response

Please see the response to comments #48 and #49.

Comment # 97

Some people are happy to spend another $10,000 to build a house where they drilled a well years ago.

Commenter(s)

Sanders, Jim

Response

Thank you for your comment.

Comment # 98

We have also investigated the availability of water from Suncadia. If we were to go this route, our cost would be approximately $24,000 to get Ground Water Mitigation Certificates for our properties. Three of our properties appear to be in the yellow zone and one in the red zone. We understand this may even be a concern to buy water for our properties.

Commenter(s)

Childs, Roger and Karen 3

Response

Thank you for your comment. The yellow zone on the Lamb and Anderson mitigation suitability map means that Ecology must complete an assessment of the impacts to fish and any other water right in the area before it could assign a portion of the Lamb and Anderson right to the USBR-Ecology contract. The Suncadia mitigation requires that Ecology use the USBR contract to resolve potential impairment concerns expressed by the Cascade irrigation District, Westside Irrigation District, and the Ellensburg Water Company. The property in the red zone is not eligible to purchase mitigation credits from Suncadia, but may be able to buy mitigation credits in the future from another senior water right holder.

Comment # 99

I think the Constitution and some of the stuff that everyone is arguing over related to water rights goes way back to the rules -- the details of when it's applied and when you get the water rights and all that stuff.

It's more like the water business. When I saw a lot of the rich people start scrambling for water rights so they could do their developments, the businessmen, and so they could do their resorts and stuff. It seems the state is stepping into the same business. You know, everyone is in a hard time right now.

Commenter(s)

Merbs, Jerad

Response

Thank you for your comment, but the state does not profit from the mitigation bank. Fees charged by the state cover only a portion of the state's costs to complete the transaction.

Comment # 100

I have an exempt well, 5,000 gallons a day that I am allowed to use. I have at least 45 hundred gallons a day that I don't use. Can I sell those?

Commenter(s)

Wise, Susie

Response

No. First, a water right based on the ground water exemption cannot be transferred. Second, beneficial use is the measure of a water right and no right exists to water that has not first been beneficially used.

Comment # 101

Maybe I have an angle that I can benefit from this rule. Maybe I come out on top. It sounds like if you have senior water rights, you are sitting in a really good position. So if I have senior water rights, does that mean I'm like the big boys, I don't have to do all this stuff right here? Because it seems like you are only going after the little guy and then the little well. The big boys that have all the water, maybe I'm not against it.

Commenter(s)

Voice of Independence

Response

If you have a pre-May 10, 1905 water right, you have a right that may be marketable to those seeking mitigation credit. The process you could use is the same as that used by Suncadia to offer its water right for mitigation.

Comment # 102

The senior water rights Ecology has proposed for mitigation precede the construction of the Upper County reservoirs. Those senior water right holders downstream of the reservoirs allow the impoundment of the water by junior right holders because the junior folks can impound the water and deliver it to the senior folks when they really need it. So any junior holder should be able to provide their share of impoundable water as mitigation as it is more valuable to the senior folks and definitely more valuable than un-impounded senior water rights.

Commenter(s)

Griswold, Steve

Response

The Yakima Adjudication court adopted the 1945 Consent Decree and its Total Water Supply Available (TWSA) calculation as the basis for allocating water among senior and proratable (May 10, 19905 priority date) water rights. TWSA relies on actual and forecast stream flow and climate, plus storage volumes in the project reservoirs. The premise or conclusion that stored project water is more valuable than pre-1905 rights is not apparent from the TWSA calculation. Project water is ultimately proratable. Senior rights are subject to availability of the source stream. Stored water will only be equal in value to a pre-1905 mainstem right when water in the Yakima system is sufficiently abundant to avoid prorationing. It will never be of greater value.

Comment # 103

The following is based on what I understand are the assumptions used to justify the mitigation measures in the rules. The water use of a single-family dwelling is 350 gallons per day and that 70% of that is returned to the ground. If so, the net use is 105 gallons per day or 38,325 gallons per year. If it's assumed each well is associated with a dwelling, what impact does the dwelling have on the annual run off?

Let's assume 3,600 square feet of each exempt well dwelling is covered by the roofs of homes, outbuildings and driveways. That 3,600 square feet multiplied by the annual rainfall (in feet) over the dwelling gives the number of cubic feet of water of water that the dwelling increases the runoff to the surrounding area. (1 cubic foot = 7.48 gallons.)

Each dwelling would contribute extra runoff to the surrounding area, proportionally to the amount of rainfall at that location:

- If a dwelling in lower county has an annual rainfall of 1.2 feet then the annual extra runoff would be 32,314 gallons or 6,000 gallons less the assumed consumption.
- If we go to Cle Elum and use 1.5' of annual rainfall the extra runoff = 40,392 gallons or 2,000 gallons more than consumption.
- In Easton, at 2.8 feet, the extra runoff is almost double the consumption and near Snoqualmie Pass, with 6.7 feet, the extra runoff is over 4.5 times the consumption.

So if the dwellings associated with the exempt wells are increasing runoff more than the consumption, why is mitigation required?

Although I disagree with the assumption that exempt wells diminish down stream flows, the reasoning above strongly suggest that Ecology has improperly included the Upper County exempt wells as the issue, when (if there really was an issue with wells and water availability) the impact of lower county wells are much more likely to be the problem

If un-impounded senior water rights are acceptable for well mitigation then the increased run off created by the development associated with wells should also be accepted as mitigation.

Commenter(s)

Griswold, Steve

Response

Measures to increase runoff (thereby decreasing ground water recharge) are not viable options to mitigate for water use. The Pollution Control Hearing Board has previously rejected an applicant's contention that land clearing was a viable basis for offsetting the consumptive impacts to streams. See Manke v. Ecology, PCHB, 1996.

Comment # 104

Will we be allowed to collect rain water or snow melt and use it, or do we need to purchase this right, and by whom?

Commenter(s)

Rattray, Jane and Mark

Response

Yes, the use of roof top runoff (rain or snowmelt) is addressed by Ecology policy POL-1017. However, the use would be a new appropriation and mitigation to offset the consumptive impact of the use would be required by the proposed rule. POL-1017 provides:

> **The on-site storage and/or beneficial use of rooftop or guzzler collected rainwater is not subject to the permit process of RCW 90.03.** If and when the department determines that rooftop or guzzler rainwater harvesting systems are likely to negatively affect instream values or existing water rights, local restrictions may be set in place to govern subsequent new systems. To qualify as rooftop collected rainwater, the roof collecting the rainwater must be part of a fixed structure above the ground with a primary purpose other than the collection of rainwater for beneficial use. A guzzler is a device used to catch and store rainwater to provide drinking water for wildlife, livestock or birds.

Comment # 105

The selling and transfer of water rights may make sense on paper, but not on the ground. Our County was subjected with unnecessary flood damage during the 2009 January flood. An improper decommissioning or abandonment of the Masterson Ditch along Redbridge Road caused the County and many of the residents, cattle, and land to receive serious damages and costing them and taxpayers thousands of dollars. After the water rights were purchased from Masterson Ditch, who became responsible for the ditch maintenance?

Commenter(s)

Kirkpatrick, Marc

Response

Property owners are generally responsible for their property, including any appurtenant structures or works. If an improperly operated or decommissioned structure harmed a neighboring property or property owner, the property owner that was harmed may have recourse in the court system to seek a remedy for the harm caused by the other property owner. Ecology does not play a role in these kinds of issues. A water right is required to divert and beneficially use water. A water right does not authorize construction of physical works. Similarly, the transfer of a water right to another party does not authorize or require decommissioning of works - the works simply cannot be used to divert and beneficially use water to the extent that the water right no longer authorizes such use as a result of a water right change.

Comment # 106

With respect to subsection 060 (2)(b), we appreciate the inclusion of a requirement that proposed new uses must be consistent with agreements governing the trust water right. Because there are numerous trust water transactions occurring in the Yakima Basin, and because many of these rights contain conditions and limitations designed to protect senior rights, instream flows, and the public interest, it is essential that Ecology recognize and limit use of such rights as required in associated agreements in order to assure reliable, permanent mitigation.

Commenter(s)

Aqua Permanente and CELP

Response

Thank you for your comment.

Comment # 107

Mitigation is a critical concept in Ecology's ability to process water rights in the Yakima Basin. It is essential that water resources mitigation be real in every way, in terms of validity of mitigation rights, and location, quantity, quality, and timing, for proposed new uses. We appreciate Ecology's efforts to achieve a balance between development pressures and the absolute necessity of protecting senior water rights and environmental flows. The number and quantity of water budget neutrality and mitigation requests that are now "stacking up" in your offices is impressive and may not be suitable for processing.

Commenter(s)

Aqua Permanente and CELP

Response

Thank you for your comment. Ecology is concerned by the number of requests; however, we anticipate that the number of requests will drop off as developers address the need to provide mitigation for their projects. Currently, we are processing many requests from individuals on

public water systems who are required to obtain mitigation for a building permit. If this need had been met by the developer, the same effort could have been expended to process the mitigation needs for the entire water system as needed to process an individual request.

Comment # 108

The City supports the regulation and implementation of mitigation for ground water withdrawals and believes it is necessary in order for Ecology to properly process water rights in the Yakima Basin. The mitigation, however, cannot just be on paper and must be real and must include metering. A review of the number of requests, as well as the quantity of some of the requests for water budget neutrality and mitigation, underscores the need to have each permit reviewed carefully, just as our mitigation rights have been, as well as subsequent metering and monitoring in order to ensure that real mitigation occurs.

Commenter(s)

City of Roslyn

Response

Thank you for your comment.

Comment # 109

We respectfully question the wisdom of establishing a process for expediting applications while the agency is experiencing suffered substantial budget and personnel cuts that prevent it from accomplishing basic duties. This section will establish expectations by applicants that it seems quite possible cannot be met. In the (worse) alternative, it would require Ecology to elevate the processing of Upper Kittitas County water rights above other regional and statewide activities that may be of greater import.

Commenter(s)

Aqua Permanente and CELP

Response

Ecology has made the decision to place a high priority on processing water budget neutral requests in Upper Kittitas County. However, Ecology would not supplant a higher priority activity or project within the Central Regional Office, or within another regional office. Any activity or project eligible for priority processing must compete with other activities and projects that are eligible under WAC 173-152 for priority processing.

Comment # 110

The City is concerned that the proposed rule provides for expedited consideration of water budget neutrality determinations for new exempt wells. Why is this an urgent priority, particularly in this economy? How is this to occur? As a result of the economic downturn, Ecology is in the process of reducing its staff even further to implement across the board budget reductions. In most regions of the state, Ecology does not have any staff processing water right permit applications, some of which have been waiting for years.

Ecology effectively has little to no staff capability for compliance and enforcement presently and yet determinations for new exempt wells are to be expedited? While the City, better than anyone, understands that the process of acquiring mitigation water for even existing development can be lengthy, we fail to see why new development applications should be expedited. Additionally, the expedited process furthers our concerns regarding enforcement.

Commenter(s)

City of Roslyn

Response

Economic development is an important part of the upper Kittitas County and state economy. Ecology's intent with the proposed rule (and the preceding emergency rules) isn't to stop development in the unincorporated upper county area. The fundamental purpose of the proposed rule is to ensure that new development in the upper county area doesn't result in impacts to existing rights that are not and cannot be mitigated. We share your concern about the impact on our own capacity; however, this rule is an effort to avoid an even larger enforcement problem in the future.

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070 Measuring and reporting water use

Comment # 111

With respect to subsections (1) and (2) we suggest that there may not be any real need for or value to collecting data for very low flow wells that cannot possibly produce at some minimum per day allocation such as·a flow rate of less than one gallon per minute. In those cases, a qualified professional could attest to the actual flow rate, and the minimum daily use could then be assumed for data purposes.

Commenter(s)

Central WA Home Builders

Response

Thank you for your comment. RCW 90.03.360 and WAC 173-173 already state the measuring requirement for all surface and ground water users of <u>any</u> volume that affect surface water that contains depressed or critical fish stocks. The final rule reduces metering reports from five times per year (30 days after each period) to once per year, on January 31. Please also see the response to Comment #112.

Comment # 112

If metering is a solution, then pass a law to do so. Allow 500 gallons a day for each residential parcel and more for commercial land based on type of business so that the small businesses can survive.

Commenter(s)

Hamberlin, Del and Dianna

Response

The Legislature amended the water code, RCW 90.03, in 1993 to require water users to measure their water use. Ecology adopted a rule, WAC 173-173, in 2002 to clarify application of the 1993 amendment:

WAC 173-173-040

The requirements of this chapter apply to the owner or owners of any source water diversion or source withdrawal and to the department.

(1) Any owner or owners of any surface water diversion are required by state law (RCW 90.03.360) to measure and regulate their water use.

(2) The department must enforce the requirement to measure water use for the following types of water use:

(a) All new surface water permits;

(b) New and existing surface water rights where the diversion of any volume of water is from waters containing depressed or critical salmonid stock;

(c) New and existing groundwater rights where the department concludes that the withdrawal of any volume of water may affect surface waters containing depressed or critical salmonid stock;

(d) Existing surface water rights where the diversion volume exceeds one cubic foot per second.

Comment # 113

If you want to meter wells to restrict usage, we agree.

Commenter(s)

Childs, Roger and Karen

Response

Thank you for your comment. Ecology's reason for requiring metering is not to restrict usage; it is to ensure that water users and Ecology have a factual basis to better manage the water resource.

Comment # 114

We spend so much time and resources debating the legal issues, we never get around to directing any real effort to the question of water supply, more specifically to monitoring water supply.

We need to get on task and keep focused on the issue of water supply. We put our attention and effort on everything but a focus in comprehensive planning of water supply management.

Commenter(s)

Okanogan County

Response

Thank you for your comment.

Comment # 115

If I place my water rights in trust so that I can build a house, you guys are going to have control of whatever, that water reservoir, however you are going to do it. But this other guy here said that there's a couple reservoirs built, and that must be private or public, I'm not sure, but this guy over here said that right in the paper there wasn't going to be one built for 20 years.

So it's exactly what it looks like, exactly what it looks like. They want to take your rights away and then not do anything they promised to do. Just like the federal government has done to us for years and years and years.

Commenter(s)

Merbs, Jerad

Response

An agreement between Ecology and the person placing the water right into trust governs each water right in the Trust Water Program. Ecology has a model agreement posted on its website for anyone interested to review. That model agreement includes specific remedies if Ecology does not do what it agreed to do. In any event, the trust water right agreement provides both Ecology and the party conveying the water right to the Trust Water Right Program the legal assurances to an intentional or unintentional governmental taking of the water right.

Comment # 116

We have to remember these are people we are affecting. The enabling statue for fish and wildlife, I wish also had a statute so that nothing in this chapter will prevent the free use of individual private property. We want to protect senior water rights, that's a property right too. But we also want to supply water for exempt wells, which are the foundation of what we have done in this state.

Commenter(s)

Hinkle, Representative Bill

Response

Thank you for your comment. The statute requiring Ecology to protect base or minimum flows to preserve fish and wildlife, and to protect the quality of water in Washington's streams and rivers is RCW 90.54.020.

Comment # 117

You should allow all property in the Upper County water without having to spend time and money to purchase water rights. Note: several large developers in the county have already purchased water rights and will not share. This rule will not affect them. It just affects individuals such as my husband and me.

Commenter(s)

Hamberlin, Del and Dianna

Response

Ecology disagrees. The rule affects all new uses of ground water in the Upper Kittitas area—both permitted and permit-exempt—and does not favor large development over individual property owners. Please see the summary response on page 3.

Comment # 118

During the ongoing moratorium, Ecology has relied heavily on RCW 90.54.050 for the proposition that when it is lacking necessary information, it may withdraw waters of the state, including exempt groundwater, from appropriation. We believe that Ecology is obligated to give equal authority to another provision of the Water Resources Act, RCW 90.54.020(5), which states that "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs."

Commenter(s)

Realtors and Home Builders Associations

Response

Ecology believes that the rule is consistent with the Legislature's direction to preserve and protect adequate and safe water in potable condition. Please also see the summary response on page 3.

Comment # 119

Our water rights must be preserved as much as larger companies' mineral rights are preserved.

Commenter(s)

Adams, Floyd

Response

Thank you for your comment. The purpose of the rule is to manage ground water conservatively to protect existing water rights and clarifying a pathway for new uses to occur while the ground water study is performed.

Comment # 120

The whole premise of the exempt water withdrawals is that the ability to have water, get water on your property and use it is a part of the land. It's not separable from the land. It should be an inalienable part of owning the land.

It's the premise behind this 1945 law, it's the premise behind western water law forever is that you could get water on your land if you had it—unless you were sold it. But I never sold my water rights and I don't think anyone on my land did before me.

Commenter(s)

Grinnell, Roy

Response

Ecology disagrees. The general premise of the 1945 law is that any new appropriation would have to first obtain a permit before using ground water. The exemption from the permit requirement was to ease the burden for certain small uses of ground water by avoiding the permitting process. It is not an exemption from the state's water law.

Comment # 121

I don't think anyone should be deprived of the rights that come with their land. Those are property rights. That's what makes the fabric of our country important is that those things were founded and written down on a piece of paper a long time ago. And we are losing that so much.

I hear a lot of republicans bitching about the fact that socialism and all that, taking our rights away and they are. It doesn't matter which side you are on. They are constantly taking our rights away, every day. And this is the same thing.

They are constantly coming up with a different thing. It's just the way it's going to be. And I really think -- I think it's a failure. I think they are going to get their way. I think they will get their way. And what they want, they want to gain control like the lady sitting here early on in the night, can we buy into it? The guy said yeah, that's a great idea. We like that one. Of course they do.

Commenter(s)

Merbs, Jerad

Response

Water rights based only on the ownership of land absent beneficial use, were at one time a part of the legal framework in Washington, but only for lands riparian to a stream. The right to use water is an appurtenance to the land. If a water right exists, it is conveyed with the land when sold.

Since 1932, new uses could not be based only on ownership of riparian lands. The Washington Supreme Court ruled (*Dept of Ecology v. Abbott, 1985*) that riparian owners had until 1932 to begin beneficially using water in order to maintain a water right based on the riparian doctrine. The court held that, following adequate notice and the passage of a reasonable period for claiming such rights, unused riparian rights reverted to the State. Further, the court held it is a valid exercise of police power and is not an unconstitutional taking without compensation.

Comment # 122

From a Washington State Ground Water Association legislative handout:

> "Washington's current water law does not provide enough consideration toward ensuring that its citizens have access to water to meeting their most basic domestic needs."

What we have here is a state that's increased in population in 70 years. It's grown from 1.7 million to nearly 7 million. So we have a situation here. The game plan is changing, it is

changing every single day. Our state is growing. But the water issue we are talking about, it's hard to believe that it's occurring right here in the Evergreen state.

Current Washington water law provides and protects water needed for fish, wildlife and farm stock. Conversely, water for people is allocated and managed under the prior appropriation principle and is therefore subject to the denial and cease and desist order usages.

A recent Seattle Times article, "Resources Take the Lead at Western Governors Meeting." Bottom line, a few comments were made here in this article about water.

> "The fight over natural resources is taking center stage in a meeting of governors from the west, led off by straight talk about the water that has been the source of bitter battles predating many of the states themselves. A growing population combined with long unsettled arguments over water rights will only create more problems. And the sooner those problems are dealt with, the better the governors were told."

Commenter(s)

Washington State Ground Water Association

Response

There is an inherent conflict between continued growth in population and water use and the protection of existing water rights. Water law, based on the prior appropriation doctrine, is the system in place to resolve that inherent conflict. Economists and property right advocates favor market-based reallocation systems to resolve such conflicts. The Yakima basin has been moving in precisely that direction for the past decade.

Comment # 123

Under our state's water law, the first in time is the first in right. All water rights, including those for small domestic users, are subject to the prior appropriation plan. Water rights are property rights and to allow for some to use water without water rights and not others violates the property rights of those who have surface water rights.

Commenter(s)

Suncadia

Response

Thank you for your comment. Ecology agrees.

Comment # 124

About 75 percent of the region's water goes towards agriculture. There's spillage that occurs, waste. We have a water law now that if you don't use that water, it's subject to being taken away over time. So let's use as much as we possibly can, even if it means waste. So the motivation needs to change as our state continues to grow.

Commenter(s)

WA Ground Water Association

Response

Far more than 75 percent of the Yakima basin's water supply goes to serve agricultural needs. Reasonable operational spill associated with open canals is not a waste of water. Waste is prohibited under RCW 90.03.005, and is not a means to legally establish or maintain a water right.

Comment # 125

As an attorney who's participated in the Acquavella adjudication for a number of years, I know this basin is officially over-appropriated. The Bureau of Reclamation withdrew all previously unappropriated water from further appropriation on May 10, 1905, and there has been no new water available since then.

Commenter(s)

Suncadia

Response

Thank you for your comment. The original May 10, 1905 withdrawal by USBR under RCW 90.40 did end before 1960. However, a more recent USBR withdrawal has been in place since the early 1990s to support planning and implementation of the ongoing Yakima River Basin Water Enhancement Project. Water right permits for new reservoirs and diversion works, such as the proposed Wymer Project now under consideration, would rely on the more recent USBR withdrawal as the basis for a 1990s priority date.

Comment # 126

Money is sitting there waiting to be appropriated. If we don't get this study now, turn on C-SPAN and figure out that an appropriation is the most powerful thing. In government, the more that you appropriate, the bigger the committee you are in charge of, the more that money is going be spent.

This is the biggest water basin in North America. Wouldn't that be something you want in your study, if this is the largest water basin in North America? Do you realize that Grand Coulee Dam is the largest generation of power in North America? Canada, America, Mexico, nothing makes more power. Isn't that amazing? Yet we are having a water shortage here.

It reminds me of the term WMD's, weapons of mass destruction, imminent threat. Remember that term, "imminent threat?" Do your research, read the Constitution. You'll understand why he used the term "imminent threat." It was the only loophole. So right now they are using the emergency act on water that isn't -- there is no shortage.

Where is this over-appropriation? Where is an example? So is there a well that went dry somewhere? Is there a golf course that didn't get water? I mean what happened to make you say that we were over-appropriated. You might be right.

I can't find a single case of water being over-appropriated. Can anybody here tell me where there's one case where somebody turned on their faucet where there wasn't water

appropriated? Maybe there isn't an over-appropriation and maybe there is. So do your study before you take dictatorial powers and effect these good people's lives.

Commenter(s)

Voice of Independence

Response

The Yakima basin is not the largest basin in North America; the Mississippi and Missouri river basin is the largest.

Yakima County Superior Court's Order Limiting Post-1905 Diversions 77-2-01484-5 requires all post-May 10, 1905 water rights to curtail their diversions when USBR imposes prorationing. In 2001, 2004, and 2005, hundreds of existing water right holders were partially or completely curtailed. USBR's contract holders were limited to 40 percent of their contract entitlements in 2001 and 2005. Please also see the response to Comment #125.

Comment # 127

Thank you for doing your job well. That water is ours in the Yakima valley. Your actions have been right on. Your latest proposal is great. Kittitas has been stealing our water for years.

Great job guys. The water has been promised to us in the Yakima valley.

Commenter(s)

McLean, Jim

Response

Thank you for your comment.

Comment # 128

I have a registered well in upper Kittitas County that has been pumping water since August 2006. I am seeking a building permit for a residence because I have been using a trailer and will be retiring in two years. According to Kittitas County water availability form for a building permit, I have an exempt well because it has been in use before July 2009. The form states that I am required to put a meter system in before a building permit will be granted along with a bacteria test.

Will the state or county read the meter and charge me for water use periodically?

Commenter(s)

Frank, Tom

Response

Given the facts you have offered, it appears that you have an existing appropriation as defined in the proposed rule and if you fully develop that use by August 2011, you will not be required to mitigate for the consumptive impact of your use. If you wait until 2012, the portion of your use for your new home (assuming it is larger than the use you began in 2006) would be a new

appropriation and both mitigation and metering would be required. You should contact Kittitas County for an explanation of their requirements.

Neither the state, nor Kittitas County currently charges permit-exempt well users a periodic fee for their metered water use.

Comment # 129

The City fully supports this rule and the use of uniform quality meters and the measuring and reporting of water use as an essential part of allowing ground water withdrawals. It is absolutely essential for having accurate information about water usage and for any enforcement or mitigation program. Without metering, the entire premise of the concept of water neutrality would not work and the City would not be able to support new withdrawals of groundwater. Additionally, in order for the requirement for reporting to be meaningful, the City requests that it must be followed up with prompt aggressive enforcement for failing to report.

Commenter(s)

City of Roslyn

Response

Thank you for your comment.

Comment # 130

If water is indeed scarce, then it needs to be measured and its use metered. This should apply to all users regardless of how senior their water right is. Again, if a thing is scarce it needs to be measured and its use metered.

Commenter(s)

Lussier, Dave

Response

Thank you for your comment.

Comment # 131

Metering and reporting is essential. We ask that you require consistent and reliable metering equipment and that the requirement be extended to all exempt wells using water for outdoor uses (because that use has been deemed “unlimited”).

Commenter(s)

Aqua Permanente and CELP

Response

Thank you for your comment.

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080 Educational information, technical assistance and enforcement

Comment # 132

The Department of Ecology states they will educate the people. Will this education be directed at the consequences of not complying with Water Neutrality and the sanctions, or will your education have real substantive value in how to achieve water neutrality?

Commenter(s)

Rattray, Jane and Mark

Response

Ecology's education effort is primarily directed at how people can comply with the current emergency rule and proposed final rule.

Comment # 133

The City supports the concept and requirement of "water budget neutrality" but has some concerns regarding how such requirements will be monitored or enforced. For example, the standard letter requires the property owner to record a covenant against trees/shrubs over a septic system and to record an instrument confirming acquisition of the proposed trust water quantity. Who is going to confirm that these recordings occur and that their content is correct? The rule is silent. In addition, the standard letter states, "any valid priority calls against trust water right No XYZ, based on local limitations of water availability, will result in temporary curtailment of the use of water until the priority call for water ends." How will this be enforced?

If a house is built and occupied, how does Ecology propose to curtail water usage? When will use be allowed to resume? Upon mitigation? The City is concerned that the Department is already underfunded and understaffed to follow through with enforcement. Additionally, the general enforcement powers and procedures seem inadequate for this type of noncompliance.

Commenter(s)

City of Roslyn

Response

The primary monitoring of the water budget neutral determination recipients will be through the water metering and reporting process, which is described in the rule. The covenant requirement for on-site septic system is either addressed through the escrow process (in the case of Suncadia's program) or is a requirement placed upon the permit holder for those water users who are required to have a water right permit.

Calls for water (regulation) on a stream (or regulation of an aquifer) are made by water users who are not receiving their entitlement. For surface water users, until the adjudication is complete, a petition would be filed to Yakima County Superior Court in the same manner that Roza Irrigation District did in 2001 and 2004. The Court currently has jurisdiction over Yakima Basin water rights enforcement. For groundwater users, water users would notify Ecology. Ecology would respond as resources allow and would follow the process in WAC 173-150 - Protection of withdrawal facilities associated with groundwater rights.

Comment # 134

We have a water moratorium in Kittitas County, yet I see contractors removing surface water for dust control every day.

Commenter(s)

Marion, Fred

Response

Thank you for your comment. Contractors are required to have a water right to divert water for such uses. The Yakima Adjudication Court under its pretrial Orders No. 6 and No. 12 has jurisdiction for the temporary changes of use to surface water rights that would allow for temporary uses such as dust abatement. The Adjudication Court also has jurisdiction to enforce its Conditional Final Orders. If you have a question about whether the surface water diversion is authorized, you may contact Ecology's Central Regional Office.

General Comments

Description of comments: The following comments have been summarized and edited for clarity. You can see the original content of the comments we received in Appendices A and B of this document.

Comment # 135

If we want to talk about budgets and tax and money being thrown around, this project for the state taxpayer has been unbelievably horrible from a financial standpoint. It's been a Pyrrhic victory at best for Ecology. I don't think they would even claim that.

Commenter(s)

WA Ground Water Association

Response

Thank you for your comment.

Comment # 136

Continue efforts in progress to resolve ambiguities and inconsistencies regarding implementation of the Campbell-Gwinn decision.

The 2002 Campbell-Gwinn decision was a case that originated in the Yakima County. The attorney general was Christine Gregoire, who also authored the attorney general's opinion that laid the foundation for the 5 to 4 Supreme Court decision. Representing the appellant was the just then assistant attorney general Brian Faller. The counsel representing the Environmental Law and Washington Environmental Council who filed a brief was Jay Manning.

When this controversy reared up some four or five years ago, the head of the Department of Ecology was Jay Manning. The assistant attorney general working with the Department of Ecology was Brian Faller. The governor was and is, of course, Christine Gregoire. A lot of ownership in what is arguably a predetermined outcome.

Commenter(s)

Okanogan County

Response

Please see the response to Comment #195.

Comment # 137

As a resident of the state of Washington, I am asking for the facts and consideration of the families of Kittitas County to direct you in a positive decision for our future. We are hard working families that saved and sacrificed to have homes in this beautiful area. We are and will continue to be a vital part of the fabric of this community whether you take our water or not. We will not be driven from our homes by threats and misuse of power by a select few. Yes, we are here to stay, but an election has been known to change the direction of a nation. You are here to serve the many not just the few with obvious agendas.

Commenter(s)

Windh, Carole

Response

Thank you for your comment. The rule will not force people from their homes, as it does not apply to legal water uses established prior to the adoption of the first emergency rule in July of 2009.

Comment # 138

I cannot believe that Ecology intends to do harm to folks like me who are just trying to "get by."

Commenter(s)

Scott, Donna

Response

Please see the summary response on page 3.

Comment # 139

I have seen what the emergency exempt well closure has created through unintended consequences. There have been families forced to leave our area with upset children. I believe in regulating our resources but I believe an emergency closure has created hysteria. I am seeing large agricultural landowners creating large clusters development designs to get it through before the water is "taken away" from them. I feel that they would have waited had this

moratorium had gradually been put into place as in the Walla Walla area where there were no emergency closures.

Commenter(s)
Griswold, Trish

Response
Water users, Walla Walla County, Ecology, federal agencies, and the Confederated Tribes and Bands of the Umatilla Indian Reservation were and are all working to achieve a common set of goals in the Walla Walla River basin. That degree of cooperation and interdependence has not been achieved within the Upper Kittitas area in the past decade.

Comment # 140
The wholesale seizure of people's property rights by preventing them from developing and using their property the way they wish is insane—no matter whether it makes sense to Ecology or the fish in the stream.

Commenter(s)
Coe, Bruce

Response
Please see the summary response on page 3.

Comment # 141
I have never been one to be afraid of my government but sadly am heading in that direction. My husband and I have lived here for 30 years. We have slowly acquired four 5-acre parcels to make open space which we use for hay and livestock. We felt that the higher price for the 5-acre parcels would assure other rights as our children collect the means to build on our land. It seems that our dreams may be taken away by our own government. . . a sad day.

Commenter(s)
Griswold, Trish

Response
Thank you for your comment. The proposed rule does not preclude new uses of ground water.

Comment # 142
I see this permanent ban on exempt wells and building as a punishment for being conservative. We left our 40 acres in its natural state for 26 years.

Commenter(s)
Rattray, Jane and Mark

Response

Thank you for your comment. The proposed rule is not a ban on ground water use and does not preclude new ground water uses if the consumptive impact is mitigated.

Comment # 143

I am a homeowner, taxpayer, voter residing with my wife and children in a single-family residence in Roslyn, WA. - We moved to Washington from Colorado 5 years ago. Three years ago we purchased a 3-acre parcel in the area of Kittitas County known as upper Peoh Point. Before closing on the 3-acre parcel, we were assured by county officials that the land is zoned for residential use. The land has a preexisting exempt well being used by the parcel next door.

Our goal was to build our home, finish raising our children, and retire on this new parcel. The county will no longer approve a building permit on this land. My family currently uses an average of 241 gallons per day. This is calculated from five years of water bills from the Town of Roslyn. This is not the "consumptive use," but the gross amount into my home as measured by the water meter. Most reasonable people would categorize this as a tiny amount of water.

I would start up my plans for building this new home as soon as Ecology announced they will not extend the temporary rule and will not put in place a permanent rule.

Commenter(s)

Lussier, Dave

Response

Thank you for your comment. The rule does not preclude new uses that are mitigated. Although we acknowledge this adds expense and complexity to your plans, it will also prevent curtailment of your new water use during low-water periods.

Comment # 144

In September 2009, we signed a purchase agreement to sell one of our 3-acre parcels. In May 2010, the buyer backed out of the agreement because of the water issue! Our loss, as well as the county's!

Commenter(s)

Childs, Roger and Karen

Response

Thank you for your comment. An emergency rule was in place well before the signing of the purchase agreement.

Comment # 145

I moved here in 1966 and I have not complained about other people moving here. Now it seems that the ones that have been here for a short while want to stop any else from moving here.

Commenter(s)

Geiger, Jesse

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 146

My husband and I own 40 undeveloped acres in Teanaway Terrace. Twenty-six years ago we bought our first 10 acres and shortly thereafter added two adjacent parcels. We are now faced with the inability to place a planned retirement home on one of the parcels and potentially sell our long-held other parcels in 10 to 20 years to support our retirement.

Commenter(s)

Rattray, Jane and Mark

Response

Thank you for your comment. The proposed rule does not preclude development of the property.

Comment # 147

The addition of more developments with chip sealed and blacktop roads will cause more pollutants to drain into Fowler Creek, which is our irrigation water.

Commenter(s)

Adams, Floyd

Response

Thank you for your comment. Storm water runoff is a consequence of increased hardened surfaces that provide access to homes. It is just one example of the environmental impacts that come from land development for residential use.

Comment # 148

Look at the situation of the lower Yakima Valley with nitrates entering a large percentage of the wells.

Commenter(s)

Adams, Floyd

Response

Thank you for your comment. Ecology has looked at the lower valley nitrate problem and will be working on it for decades to come.

Comment # 149

The proposed rule appears to be fair to those wishing to build a home while doing much to protect and insure the water supply of the existing upper county purveyors and residents. Water District #2 fully supports your efforts to implement the rule and go forward with the ground water study.

Commenter(s)

Kittitas County Water District #2

Response

Thank you for your comment.

Comment # 150

I support the Growth Management Act and what it's trying to do. I do not support how Kittitas County's Commissioners decided to interpret the GMA and their continued approvals of new subdivisions that rely on exempt wells.

Commenter(s)

Rooney, Tracy

Response

Thank you for your comment.

Comment # 151

The years of playing a very carefully calculated game of cat-and-mouse by successive trios of Kittitas County commissioners, who have chosen to ignore the law and who have acted solely to benefit but a few to the detriment of many, are very near to their end: I support the permanent rule as it has been thus far drafted.

Commenter(s)

Clerf, Catherine

Response

Thank you for your comment.

Comment # 152

We generally support adoption of the draft permanent rule for Kittitas County and thank the Department of Ecology for taking an approach that is consistent with our September 2007 petition seeking basin closure until sufficient information is known to ensure protection of senior water rights and instream flows.

Commenter(s)

Aqua Permanente and CELP

Response

Thank you for your comment.

Comment # 153

The City of Roslyn has spent much time and expense, in fact over 9 years and over $600,000, to acquire and transfer senior water rights to be used by Roslyn as mitigation water in order to avoid being curtailed when there is a call on the river in the Yakima basin. Accordingly, the City is well aware of the issues surrounding water use and shortages of water in the upper Kittitas County Basin.

The City has worked diligently with Ecology and other senior water users to reach an agreement on the use of water rights to be used as mitigation in times of water shortages so that the City is not required to shut water off to its citizens when an order of curtailment is entered. In fact, the City is currently in the final stages of implementing these agreements and is required to continue to monitor its uses and provide data to Ecology on a yearly basis in order to be able to utilize its mitigation water. Nevertheless, while the City was incurring this commitment of time and resources, development has continued outside of the City and throughout the County that has completely ignored the realities of water shortages and the related curtailment orders. Not only fairness, but also common sense, dictates that all water users in Kittitas County should be subject to mitigation and monitoring.

Commenter(s)

City of Roslyn

Response

Thank you for your comment.

Comment # 154

The City generally supports Ecology's draft permanent Upper Kittitas Ground Water Rule. We would like to thank Ecology for its efforts to address the previous concerns expressed by the City in this current version of the rule.

Commenter(s)

City of Roslyn

Response

Thank you for your comment.

Comment # 155

I find it ironic that Jay Manning, the one originally from the Department of Ecology that was so Gung ho on the moratorium is now the Queen Gregoire's jester. She's the one requesting that you draft a proposal making this permanent.

I wondered if the county commissioners that signed on to that management agreement originally are going to get a sweet position too, you know, that would at least explain why they signed the death certificate for all their constituents.

Perhaps I will say in closing, if you insist on imposing your socialist ideals on the upper county, maybe you should pass Vaseline out to all the residents so that when we're bent over, it's not so painful.

Commenter(s)

Okanogan County

Response

Please see the summary response on page 3.

Comment # 156

I absolutely am opposed to the proposed WAC 173-539A - Upper Kittitas Ground Water Rule.

Commenter(s)

Hurwitz, Marisa
Kittitas County
R&R Heights Land Company

Response

Thank you for your comment.

Comment # 157

I am truly astonished that you people are so uncaring about the effect on people's lives this rule will have. I am also very saddened that our Governor did not side with the people on this issue when it came before her. Believe me, I will be telling everyone I know to never vote for any Democrat again! Apparently, you folks in the Dept of Ecology are nothing but environmental Nazis.

Commenter(s)

Hurwitz, Marisa

Response

Thank you for your comment. Ecology is not uncaring and is very cognizant of what the rule requires and its impacts. However, our concerns extend beyond those who wish to develop land, market it, and build houses. Many other people depend on the streams and rivers in the Upper Kittitas and Yakima basin generally for their livelihoods. Aquatic ecosystems support fish and wildlife and support recreation uses by many Washington citizens wherever they live. It is not a partisan political issue.

Comment # 158

Governor Gregoire is appearing similar to Marie Antoinette, known for the quote, "Let them eat cake" in reference to the people who were starving in her kingdom. Similarly, the people in Upper Kittitas County with exempt wells on the Teanaway River should go live in Suncadia or within their water rights. This appears to be Governor Gregoire's plan for growth and development in Upper Kittitas County.

Commenter(s)

Rattray, Jane and Mark

Response

Thank you for your comment. Please see the summary response on page 3 and the response to Comment #157.

Comment # 159

The fact that those employed by the Washington State Department of Ecology are not the only ones with dreams, goals, plans, etc., must have been lost on you, but there are many wonderful people in Kittitas County and Washington State that have come to loathe your actions, and overwhelmingly, rightfully so.

To coin a new word, the ludicrosity of it all would be funny, if it weren't so draconian. Back off, "Ecology," and reconsider your approach to the property owners of Kittitas County. A sincere apology should be immediately forthcoming, after you shred both the temporary and "proposed rule" bans.

You are a mere state agency. You have no individual rights.

Commenter(s)

Smithson, Julie Kay

Response

Thank you for your comment. Please also see the summary response on page 3 and the response to Comment #157.

Comment # 160

I hope Ecology officials are happy with their decision in regards to this rule and that you will all sleep well at night in your dream homes, many of which more than likely use exempt water wells, who will not be affected by your proposed upper Kittitas County building ban.

Commenter(s)

Hurwitz, Dave

Response

Thank you for your comment.

Comment # 161

What will the State of Washington will do with the land in Upper Kittitas County without water? Dam it all for more water storage? Turn it into a State Park?

Commenter(s)

Hamberlin, Del and Dianna

Response

Thank you for your comment. The rule does not preclude development and is an interim measure until the ground water study is completed.

Comment # 162

What does common sense tell you, that somebody that lived here, a city like Roslyn -- and I'm not against Suncadia. Some days I feel guilty, but you think it's funny they brought a whole bunch of $100 bills and bought up water on a proclamation from 1904?

Has anybody read that? Has anybody in this room read that proclamation from 1904? Have you? Has anybody? Why do you laugh? We need to read these documents. Maybe that document is not even constitutional because the Washington State Constitution trumps the department of proclamation, a federal bureau. When was our Washington State Constitution written? How shortly after was this federal mandate put on the citizens of Washington State?

Read into this. Look at what's going on with our water. Not just right now with this, but follow it backwards and you can see that there's only one thing we can do, it's in our Constitution, it's nullification. We nullify it and do what Gandhi did, peacefully, peacefully, not comply.

What's the independence, democratic, republican, all you, you let this happen. Independence is where it is at. You need to be my congressman, you need to be my congresswoman because I trust you. I don't know you, but I would trust you with my water because you are good people like me. Maybe we don't agree on the war, maybe we don't agree on immigration, but we agree on this. I'd vote for you.

Somebody stand up and run because that's how we are going to change this. I wanted Bill Hinkle to be here. He knew it. I wanted to ask him: Are you going to draft legislation? Let's see the legislation, draft it, Mr. Hinkle, put it up for vote, force the vote. Let's stand in front of their house with protest signs with our legislation demanding that it be allowed on the floor, demanding that it be voted on. Do you understand how politics works, with these committees and subcommittees and appropriations?

Commenter(s)

Voice of Independence

Response

Thank you for your comments.

Comment # 163

It doesn't matter if you are democratic or republican, they are just up there doing what they want to do. Everyone is like vote them out. I don't know how you vote for anything. Once they are voted in, they are in. That's it. Hopefully you made the right choice. But 90 percent of the time, as soon as the palms start getting greased, you know, it sounds like a conspiracy theory, your typical thing.

Commenter(s)

Merbs, Jerad

Response

Thank you for your comment.

Comment # 164

Taking rights away and turning our country upside down more and more. It's our own government, it's our own elected officials that keep on doing this stuff crooked and not holding up to what they say they are for.

There's always some kind of money involved. It's sick. I'm disgusted that people are asking for your forgiveness. Here you are, you are just taking this. I don't know, I hope I'm wrong about the look in your eye. You are up there smirking and you got this little smile with everyone that's been talking in here.

So, you know, I just think we are screwed pretty much. That's my statement. It's not official. All of us can talk and complain and everything.

Commenter(s)

Merbs, Jerad

Response

Thank you for your comment.

Comment # 165

It's our right to go use our property to its best and full use. And when we bought our property in this county, no one bought any property with the idea that they are going to take away, our right to use water, or even drill for it.

Commenter(s)

Merbs, Chad

Response

The commenter has the right to fully use his property. However, that right does not include the right to the use of water outside what is allowed by the water codes. Please see the response to Comment #386.

Comment # 166

That's what it is, you are clamping down on control so when it comes time to use it, they are on top, they are making money, everyone is divvied out. I think that's not freedom, it's definitely not freedom.

Commenter(s)

Merbs, Jerad

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 167

If you want this land to remain forest and not a homesite, why don't you buy it from us? Then you can do whatever you want or don't want with it.

Commenter(s)

Brannian, Beth

Response

In a prior appropriation system, it is the first user who has the senior right, not the person who now hopes to begin using water. The rule does not preclude development, but defines the conditions for new uses to gain a reliable water supply without impacting senior water rights.

Comment # 168

How would you feel if you got a speeding ticket and were never told how fast you were going above the speed limit? In an area where no speed limit existed? How would like it if you were told your only two choices were: #1 Expend years to take it to Court (during which time your license is suspended); or #2 pay a substantial fine and it won't show up on your record and you get to drive in that unmarked zone? Would you feel outraged if this happened to your son or daughter? Would you feel the same way if this happened to your next-door neighbor too? Well hang on - because there is no air bag to deploy and help you in this mess.

This scenario is precisely what is happening to the people of Upper Kittitas County over the use of underground water. This citation (via a moratorium/rule) has been issued by the Department of Ecology and they have decreed that without ANY evidence to support their position that the "selected" people of Upper Kittitas cannot have an exempt well - unless they are willing to pay an extra fee first. In other words, if you are rich - you can afford to buy all the wells you want. But if you are feeling the pain and agony of this recession, you are destined to die of thirst.

Sadly, the Department of Ecology has admitted it is not here to help preserve or conserve water. They are only going to see that it is sold to the rich at the expense of the poor people of Upper Kittitas County. Ecology should be stopped.

Commenter(s)

Ducati, Rhoda

Response

The analogy to a speed ticket is not accurate. A speed limit is not the same thing as the maximum capacity of a highway. A correct analogy would be that new cars are at the on ramp to I-90, but traffic on I-90 is congested and new people cannot get onto it. The people on the on ramp can wait for WSDOT to build another lane or they could purchase an empty seat in a car already on I-90. However, someone must pay for the capacity – either taxpayers or water users. There is no penalty involved – at least until cars on the on ramp push their way onto I-90. If a new car pushes a car that is already on I-90 off the road, then there might be a fine or a lawsuit. It depends on the nature of the incident and who got pushed off the road.

Alternative Solutions

Comment # 169

The moratorium is not the answer.

From July 16, 2009, to today, my position remains that a moratorium is not the answer. The impact to our citizens, businesses, and communities cannot be considered as an acceptable level of collateral damage in an effort to achieve an agency goal.

I respectfully ask you to give full attention to and carefully weigh the testimony from those whose lives have been directly impacted by this action as you consider adoption of this permanent rule.

I know there is a better answer than a total ban and so do you.

Commenter(s)

Geiger, Jesse
Kittitas County
Merbs, Chad
Mirly, Ken

Response

The rule is not a moratorium of new development. New development may occur if water rights are transferred or mitigation credits are purchased to provide the needed water supply. Please also see the summary response on page 3.

Comment # 170

Stop re-inventing the wheel. Nationwide there are similar situations that have been dealt with. If there is an assumption to be made, make it towards using one of the many tools we already have as a nation. Placing a moratorium on the citizens of Upper Kittitas County tells the public you have given up and are out of ideas.

See what other States have done, such as Arizona, Nevada and California. They all have less water available then Eastern Washington and a lot more population. Learn from others!

Commenter(s)

Kirkpatrick, Marc
Hamberlin, Del and Dianna

Response

Thank you for your comment.

Comment # 171

Work harder to find another solution.

Find another more equitable means to control development in the area. We all want to do what is right to create a long-term water management program for our area and the greater Yakima Basin area. I ask you please go back to the drawing board - meet with the Kittitas County Commissioners - try again - get creative - find solutions - let the new water study prove or disprove the need for a ground water rule such as you are proposing.

We are certainly supportive of a groundwater management strategy that is based upon the best available science and takes into consideration a balanced approach that is considerate of all stakeholders. We believe this proposed rule falls well short of such an approach.

You have spent years dealing with water rights as we have also. You have knowledge and you have creativity. Please supply all of that to the situation and help us come up with a creative solution, not a desperate solution, but a solution that will make us all better.

Let’s get to work on the real solutions and frankly the adoption of this rule is not one of those solutions.

Let’s come back and focus our energies on things that will solve the problem long term.

I hope that you and others at Ecology can find away to turn this ship in the right direction. Please do what you think is right and don’t just follow orders from a misinformed few.

Propose a plan or steps towards an overall solution that gives everyone hope and the ability to support Ecology in their ongoing effort to manage the water’s of the state.

We urge Ecology to work with all parties to obtain credible science, and to develop mitigation strategies that assist all property owners in obtaining water supply without impacting senior water rights holders.

Commenter(s)

Coe, Kim
Hinkle, Representative Bill
Kirkpatrick, Marc
Kittitas County
Okanogan County
Realtors and Home Builders Associations
Schoon, Karla

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 172

Kittitas County is committed to working with Ecology to find a legal solution to groundwater management.

We request Ecology renew efforts to work with Kittitas County to develop alternative groundwater management strategies for Upper Kittitas County that are consistent with state law, respectful of agency authorities, and are based on the best available science.

We encourage the County, Ecology and other water resource manager to continue a dialogue and explore coordinated short and long-term water management solutions through such efforts as the Yakima River Basin Water Enhancement Project. Rather than spend millions of dollars for a rule that only applies to a small amount of water by domestic users in half of Kittitas County, Ecology should instead concentrate our limited public resources on a strategy, such as storage, that will have broader, sustainable long-term benefits for users and the protection of water resources.

Commenter(s)

Kittitas County
Kittitas County Attorney
R&R Heights Land Company

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 173

It is appropriate that surface water holders as well as those wanting to withdraw water from the aquifer solve this problem together.

Commenter(s)

Mirly, Ken

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 174

Work with the farmers and the Indians for better water management.

Commenter(s)

Hamberlin, Del and Dianna

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 175

Central Washington Home Builders Association and Washington Association of Realtors have really been whacked by this whole situation in the upper county. As a result, they are pouring a lot of time and effort and energy and resources into trying to come up with feasible answers and conclusions. Washington State Ground Water Association certainly embraces that process and has been a part of those meetings. We thank the two associations for that. We are going to encourage that some very important bridge building occur.

It's been a Pyrrhic victory at best for Ecology. I don't think they would even claim that. So we are going to encourage that Ecology and Kittitas County Commissioners get together and start really hammering this out. But bring the aid of some strong associations who have very real stakes in this whole process. And that is, of course, your local realtors and your homebuilders.

These people can help. They have great ideas. Get them to the table, get these stakeholders to the table. We'd like to be a part of that too.

Commenter(s)

WA Ground Water Association

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 176

The real answer is to keep things as they are, where ground water is ground water and surface water is surface water.

Commenter(s)

Griswold, Steve

Response

Ecology disagrees. It would be both shortsighted and ultimately more expensive to ignore the interaction of surface water and ground water.

Comment # 177

Fix the proximity problems in the exempt well rules and move on.

Commenter(s)

Griswold, Steve

Response

Thank you for your comment. Changes to the ground water permit exemption would require legislative action.

Comment # 178

Unlike other Ecology water resource rules in which rule adopted occurs after completion of technical review, the Upper Kittitas rule is proceeding in advance of technical review. There is considerable work to be done both in terms of technical review, and in making the existing rule structure function as well as possible for the time being. For example, Ecology must continue to refine and improve the water exchange process, and additional mitigation options could become available before the technical groundwater work is complete. For this reason, the rule must include a process or language through which the rule can be modified over time. There are examples of this in other Ecology water resource rules, such as the Skagit Instream Flow Rule, which includes provisions regarding periodic review of the rule and modifications to the rule based on hydrologic investigation. See WAC 173-503-140; 116.

Commenter(s)

Realtors and Home Builders Associations

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 179

Begin exploring sensible, feasible water mitigation avenues that can be effectively implemented and managed by (local) Kittitas County government along with the complementary direction of Ecology.

Commenter(s)

WA Ground Water Association

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 180

I would like to know why I guess you are all committed on mitigation water banks, but you close your eyes to every other idea that doesn’t cost that much to the consumer.

Commenter(s)

Bach Well Drilling

Response

Please see the summary response on page 3 and the response to Comment #63.

Comment # 181

Another option to alleviate the hardships of the rule would be to allow exempt wells for single users to be put in. Ecology documents say the average single user is 350 gallons a day, not 5,000 gallons a day.

Commenter(s)

Grinnell, Roy

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 182

There was discussion at some point during all these emergency rules and temporary moratoriums we have had that there would be some kind of window opened, but it somehow depended on agreement with the county that they would or wouldn't do something. That kind of window should be part of this rule if there is going to be a permanent rule.

There should be a window that allows people to do things they were planning to do and have a timeframe for planning. That window should be for a whole construction season, but it should be for a period of time that's sometime far enough out where people can plan and arrange to do something. It shouldn't be something that opens today without any notice and closes five months from now. It should be for five months in a period in the future, where it's actually usable where people can do something with it. It's unreasonable not to provide that kind of window.

Commenter(s)

Grinnell, Roy

Response

Ecology does not think there is a credible basis to allow a 5-month Upper Kittitas "land rush." It is inconsistent with the purpose for which this rule and the series of emergency rules were adopted.

Comment # 183

To require owners to comply with the Water Neutrality requirement without the infrastructure in place is the equivalent to a building ban on the Teanaway River, and the sacrifice of our dreams of the past 26 years. There should have been a grandfather clause giving longstanding landowner/citizens the opportunity to fulfill their retirement dreams and the need for a supply of household water without losing invested dollars in this hard economic time.

Commenter(s)

Rattray, Jane and Mark

Response

Please see the summary response on page 3.

Comment # 184

We feel we should not have to buy mitigation rights but that all wells drilled before the moratorium should be grandfathered for usage. If you are to change the rules, it should be for new well permits and allow the grandfathered existing wells to be used as planned.

Commenter(s)

Childs, Roger and Karen

Response

Ecology disagrees. Please see the summary response on page 3.

Comment # 185

If someone wants to buy property now to develop it, let him or her find water. But people who have owned property for years should be able to drill wells.

Commenter(s)

Geiger, Jesse

Response

Ecology disagrees. Please see the summary response on page 3.

Comment # 186

Why can't people who are not farmers have one well, for one dwelling on 10 to 17 acres of land solely for household use?

Commenter(s)

Rattray, Jane and Mark

Response

Please see the summary response on page 3.

Comment # 187

A better solution would have been to increase the number of acres per well, restrict the number of homes to a particular number of acres, and/or decrease the number of gallons of water per day per household. Some of these measures you are accomplishing.

Commenter(s)

Rattray, Jane and Mark

Response

AGO 2009 No.6 states that Ecology does not have the authority to reduce the amounts of water provided by the Legislature's ground water permit exemption.

Comment # 188

Instead of the unattainable water budget neutral plan a better plan using conservation, up to date appliances, modern building codes, a properly designed septic system and natural landscaping could be water budget minimal.

Commenter(s)

Stougard, Jerry

Response

Water budget neutrality is attainable. Ecology has already approved water budget neutral determination requests for 1,280 residential connections. Please see the summary response on page 3.

Comment # 189

It is clear that conservation and better education could help reduce the water currently being used in this region. As I drive around the area I see open ditch irrigation, sprinkling of yards and gardens in the heat of the day, fountains and water feature landscaping, the planting of non native plants that require much more water. I would also like to see a greater effort of public education about conservation in the home from efficient washers and toilets to low flow shower heads. All new construction would be compliant by current code.

The 5000 gallon per day exempt well figure often used by anti growth groups is very unrealistic in today's world. A modern efficient home with a septic tank built today would draw less than 300 gallons per day. Seventy percent or greater would be returned to ground water in a properly designed septic system.

You could cut down the exempt well allotment and let us conserve water because that also would be the most measurable form of a system and a device that we could put in effect immediately.

Commenter(s)

Stougard, Jerry
Association of Realtors

Response

Please see the responses to comments #187 and #188.

Comment # 190

Conservation is the best thing I have heard. That's just about the simplest, most logical thing I've heard.

Let's get the municipalities involved, let's work with conservation while the ground water study is being done. I think most people can get along with what's called an ERU, an equivalent residential unit, equivalent usage of 250 gallons per day. You need to drop -- instead of having an exempt well drawing 5,000 gallons a day, which very few people use, let's drop it down to 250. Let's be generous at 400 gallons a day, a mere one million gallons a year per exempt well should be enough to satisfy anybody's use for a single family residence.

Conservation is immediate, conservation makes sense to people, conservation requires metering on some level so that you know that people are conserving, getting municipalities

wound up in the solution instead of letting them use however much water they want to, getting institutions like Central Washington University involved in conservation measures.

Commenter(s)

Brannian, Beth
Coe, Bruce
Merbs, Jerad

Response

Conservation does not offset impacts, it only reduces them. Please also see the responses to comments #187 and #188.

Comment # 191

It bugs me to see municipalities get off Scott free when people that live in rural Kittitas County have to foot the bill for our water deals. Why are we not encouraging the municipalities to stand at the same standards of conservation? Most of the population, therefore, most of the water usage happens in the municipalities.

Municipalities tend to say: We have the water. We have the water rights. We have the distribution. We have the billing network. Those water bills make a lot of money for the municipalities.

We can ask people to put 1.4 per gallon per flush meters in their toilets and 1.5 gallon per minute restrictors on their showerheads.

If we are going to do this, let's share the burden. Let's get our municipalities on board. Conservation is the tool here. You should enact conservation measures instead of a moratorium.

Commenter(s)

Coe, Bruce

Response

Roslyn had its total use curtailed by Court order in 2005 and all but its indoor use was curtailed in 2001. It is the second largest municipality in the Upper Kittitas area. Additionally, irrigation uses far more water in the basin than all the municipalities combined. Yakima basin's reservoirs, like Cle Elum reservoir, were built to meet irrigation needs not municipal or rural residential needs.

Comment # 192

Conservation, that's a really important issue. I live at Lake Cle Elum. I watched that lake. And it always fascinates me when we have a drought year and they don't·shut that lake down. They let that water go. So it always amazes me.

If you know you are going to have a drought, close those lakes off so that the reservoirs will fill up. All that water is going down the river and it's being wasted. To me that's just poor management.

The other thing is you will see this down in the lower valley is the ditches that aren't lined. I mean there's other issues that are effecting us, not the wells. It's just bad management from all around. Those issues need to be looked at as well.

Commenter(s)

Wise, Susie

Response

Please see the summary response on page 3. USBR reservoir operations are designed to supply water for the Yakima Irrigation Project and for environmental flows set by the U.S. District Court and Congress.

Comment # 193

Let's talk about lining ditches. We did a project -- Exit 106 is going to become a regional retail center. I represented the land property at the time who also was some of the water you are getting to use now because that came out of the Ellensburg. We drilled 22 dry wells there to prove that 33 acres was not wetlands. We were able to prove that, then we were able to sell that water, get it up here.

But guess what? That little brushy spot by the interstate I about spoke before, we are irrigating the ground to make it a wetland. I guess this is not an uncommon practice.

Commenter(s)

Association of Realtors

Response

Thank you for your comment.

Comment # 194

For years, the Department of Ecology has forced us to do the wrong thing to do the right thing. The perfect example of this is the whole relinquishment idea. There is not a realtor, an Attorney, or anyone in town that doesn't advise their client with senior water rights to pour it to the coals whether you are using it or not.

I have been one of those 40 percent water people several times in the junior district. I remember the pain of that. I also remember the anger of coming down off my hill and watching the senior water rights people running it down the highway.

Conservation has to be an issue. Let's put in integrity in the process. Are we really after land use or are we after preserving the resource? Conservation has to be a part of that. In two fell swoops, if you were to eliminate relinquishment, cut the 5,000 gallons to 1,000, and start

giving people incentive to conserve, we'll get a bunch of that over-appropriated water in this basin back for you. Those are measurable things.

We allow the bureau to be only 50 percent effective—and that's the Bureau of Reclamation. But it's a two-edged sword. You have got to have the slop to get the push to get it everywhere else, and then get it back to the river. It becomes a factor of a pretty specific argument when it comes to water and to distribution.

We have got to get integrity back in the process and conservation has to be a part of it. The senior water rights people are taking a little bit different attitude too. There's a lot of technology out there that's available for water management, but again, they have to have the incentive.

Commenter(s)

Association of Realtors

Response

Please see the response to Comment #437.

Comment # 195

It is time to put politics and speculative impacts aside and create a useful approach to resolving this issue. Efforts are underway to resolve the confusion driven by the implementation of the Campbell-Gwinn decision. The fruits of that effort should have general application and will certainly have application here. Let's put our effort into accomplishing a firmer legal approach to the use of exempt wells before we dot the landscape with individual area-specific rules.

Commenter(s)

Okanogan County

Response

Thank you for your comment. The Attorney General has published three opinions in addition to the Supreme Court Campbell & Gwinn decision interpreting the application of the permit exemption. Ecology has also worked for years to obtain more clarity around this issue.

Comment # 196

This issue should be addressed by the Legislature.

Overall, there are still more questions than answers. You have also heard concerns from numerous other counties in how this issue may ultimately affect them. Their letters have been directly sent to Ecology and I request that they become a part of the official record. As they have indicated, and I also believe, this issue should be addressed by the Legislature.

We need to work on legislative fixes. We have to look legislatively at trying to get away from the posting of a decision and actually say let's look at how water is really used and make sure we protect somebody's ability to withdraw their water, not govern on this one molecule connection.

Commenter(s)

Hinkle, Representative Bill
Kittitas County

Response

All letters Ecology received are included in the rule record. Ecology does not disagree that there are issues the Legislature should address.

Comment # 197

The County wishes to see the proposed rule withdrawn, and the current emergency rule expire, with Ecology working towards a permanent legislative solution. The County believes that additional legislation to resolve the apparent conflict between RCW 90.54.050 and 90.44.050, and the limitations of current administrative authority for Ecology to manage permit-exempt wells in light of senior water rights would be the most appropriate approach.

In the alternative, the County requests that Ecology adopt the addition of a sunset clause, remove the five-year limitation on existing use, conduct a proper Cost Benefit and Least Burdensome Analysis and Small Business Economic Impact Analysis, and provide a complete implementation plan that does not require the County to exceed its authority.

Commenter(s)

Kittitas County Attorney

Response

Thank you for your comment. Ecology reviewed and modified the draft Cost Benefit Analysis and Least Burdensome Analysis in response to the many comments we received. The implementation plan for this rule does not require Kittitas County to implement the rule.

Comment # 198

Rely on existing laws regarding impairment to resolve proven impairment complaints.

Commenter(s)

Okanogan County

Response

Thank you for your comment. Existing laws could be applied by surface water users to require all groundwater uses to be included in the current adjudication of surface water rights in the Yakima River system. This rule provides a simpler and less expensive option for the state and new Upper Kittitas ground water users.

Comment # 199

WSDOT construction along 1-90/Snoqualmie Pass has an impact on the “wet” water storage in Lake Keechelus. WSDOT was able to mitigate by purchasing “paper” water rights and dredging the lake. This is a great example of finding a logical solution. Now we need to do the

same for the public that does not just put the burden on the single landowner. Create/maintain storage in our existing reservoirs is a long-term solution that can be done immediately.

Commenter(s)

Kirkpatrick, Marc

Response

WSDOT purchased a senior water right to serve as mitigation for their consumptive use of water during the construction of the additional lanes on I-90. (Dredging the lake it was an unconnected action.) They have an agreement with USBR that allows them to pump an equal amount of water to the right they acquired and placed into Ecology's Trust Water Right Program. This is the same model used for Suncadia's mitigation program and the lower Kittitas Valley mitigation water bank.

Comment # 200

Increased storage would solve the problem.

One day we will have supply issues that will be resolved only by new and better storage capacity and water management. We all support storage as a long-term answer to water supply.

Increased water storage could eliminate the need for litigation. The Cost Benefit Analysis implies there will be no water storage projects completed in the next 20 years in the Yakima River basin. Is that really the position of our governor and the Department of Ecology is that there will be absolutely no water storage started in the next 20 years?

The Columbia River initiative achieved little results in terms of storage, but I am still hopeful. There are still plans lying around from modification of the gates of Lake Cle Elum, other relatively inexpensive projects that increase storage.

The greater storage capacity opportunities from a responsive management practices are created, let's work on that. It's my belief that in the end, what truly suffers from a lack of focus on the real issues is the resource itself.

Commenter(s)

Hinkle, Representative Bill
Okanogan County
Holmquist, Senator Janea

Response

Storage alone will not fully address the problems in the Yakima basin, nor will it address water supply issues on the many smaller streams within the Upper Kittitas area. The current planning and evaluation process for Yakima basin water supply options, documented in Ecology's 2009 Supplemental SEIS for the Yakima Basin Integrated Water Management Program, demonstrates this. Additionally, Keechelus, Kachess, and Cle Elum reservoirs currently provide more than 750,000 acre-feet of storage capacity.

Comment # 201

As I have pointed out in years of testimony at Kittitas County public hearings, rural residential development is not sustainable in the Yakima River Basin until public policies embrace increased permanent water storage capabilities and/or water creation with water distribution by cost-effective means.

Commenter(s)

Clerf, Catherine

Response

Thank you for your comment. Please see the response to Comment #200.

Comment # 202

This county should probably have to sponsor and build their own new water reservoir - and/or watershed for future growth and needs.

Commenter(s)

Hoban, Mike

Response

Thank you for your comment.

Comment # 203

A look at the dams (water storage) that have enabled the farmers and Indians water availability and control of water they would not have without said dams.

Commenter(s)

Hamberlin, Del and Dianna

Response

Thank you for your comment.

Comment # 204

I'd like to know why you haven't opened your toolbox on programs like drilling deep mitigation wells, allowing people to still drill while stealing off any surface water. You guys have totally taken a blind eye to that. It's been brought up a lot, and it would work in the entire upper county, not the green zone, red zone, wherever. You guys allow these same type of constructions and ideas to be done in the lower valley in Yakima during times of emergency drought. Those wells use thousands of gallons a day. Here you are talking about ones that are a couple gallons a minute.

Commenter(s)

Bach Well Drilling

Response

Please see the response to Comment #437.

Comment # 205

We need to provide water now and in the future. It is important to deal with the prorated issue completely.

Commenter(s)

Hinkle, Representative Bill

Response

Thank you for your comment. Ecology agrees.

Comment # 206

If Ecology feels they need more funds before beginning the study, then why doesn't Ecology just charge a "reasonable" fee of possibly $200 for all property owners in the entire county with unappropriated existing exempt wells, and for those property owners with unappropriated exempt wells who would like to be able to use their wells for a new residence, and possibly property owners that would like to drill a new well on their property could be charged a similar fee, say $300. That would bring in quite a bit of extra revenue for Ecology to perform this study, and in the meantime people could move on with their lives and not be sitting on nearly worthless property if they are located in the red or yellow zone where they can't buy into the Suncadia Water Bank.

Commenter(s)

Hurwitz, Dave
Velie, Linda

Response

Ecology can only charge fees that the Legislature authorizes us to collect.

Comment # 207

Study and compare population, and availability and use of water, by agriculture, residential and commercial in the entire state.

Commenter(s)

Hamberlin, Del and Dianna

Response

Thank you for your comment. A comprehensive water study for the state would have value but would be a huge undertaking and has not been funded by the Legislature. This rule applies only to the upper Kittitas County.

Comment # 208

This proposed rule, though a permanent rule, should be viewed an interim measure until better science and mitigation can be developed for Upper Kittitas County.

Commenter(s)

Association of Realtors
Realtors and Home Builders Associations

Response

This is an interim rule that will be in effect until the study produces information that would allow us to terminate the interim rule or replace it with one that describes appropriate water management for ground water in the upper basin.

Comment # 209

The Cost Benefit and Least Burdensome Analysis, states that "once the Upper Kittitas Groundwater Study is complete, a new rule would be proposed and adopted to replace this rule." The appropriate approach would be to include a sunset clause that details when the proposed rule is no longer effective.

Commenter(s)

Kittitas County Attorney

Response

The proposed rule includes a description in the purpose statement, WAC 173-539A-010, that the rule will remain in effect while the study is performed. Please also see the response to Comment #208.

Comment # 210

"Domestic in-house use" is apparently an issue of concern for the Washington State Department of Ecology. I have the perfect solution: each of you remove your homes' plumbing and install outhouses! Buy washtubs for bathing!

Commenter(s)

Smithson, Julie Kay

Response

The rule uses the term "domestic in-house use" to define the default values for the consumed fraction of water withdrawn from a well for that purpose. Ecology can use the default to meet the water budget neutral calculation requirement in WAC 173-539A-050 when actual data is unavailable.

Comment # 211

Could deep wells be the answer or part of the answer? Is there value in regulated shallow wells but not deep wells as opposed to a moratorium?

Commenter(s)

Mirly, Ken

Response

The withdrawal rule is not a moratorium. The proposed rule requires mitigation for the consumptive impact of water use. In the context of a conjunctive ground water and surface water management program, the distance a well is located from a stream and depth of the well are important considerations. During the 2001 and 2005 emergency well pumping programs, Ecology allowed temporary use of wells to alleviate short-term economic impacts from the drought. However, it was still necessary to mitigate for the impacts in subsequent years from those single-year pumping authorizations.

Comment # 212

Is there value in regulating how well water is used as opposed to simply prohibiting the drilling of new wells?

Commenter(s)

Mirly, Ken

Response

Ecology's rule does not preclude drilling wells. It requires that new uses of ground water must be mitigated to be water budget neutral, therefore the rule is regulating water use.

Comment # 213

Is there value in investigating and perhaps tightening up the regulations on how surface water is used?

Commenter(s)

Mirly, Ken

Response

Possibly, although better management of surface water supplies does not necessarily mean that the supply of water for ground water users would be markedly improved. The Yakima Basin has a unique surface water management system. (See response to Comment #437.)

Improving management of surface water in the Kittitas Valley holds great promise for restoring tributary streams that have been seasonally cut off from the Yakima River. On the other hand, it may mean ground water levels would decline in some areas. It also would not necessarily improve TWSA.

CR-102/Filing packet

Comment # 214

The CR-102 that was filed with a summary of the proposed rule is also deficient. It fails to mention the metering requirement in the rules. I consider metering a significant requirement that should have been, at the very least, mentioned in the summary.

Commenter(s)

Holmquist, Senator Janea

Response

Thank you for your comment. The primary purpose of the rule is to withdraw ground water from appropriation, and provide two exceptions: One for those new uses determined to be water budget neutral, and a second those for persons with vested building permit applications. Ecology's decision when summarizing the rule elements in the 2-page rule proposal notice was to focus on the fundamental purpose of the rule and the two exceptions.

Comment # 215

There is a legal concern with an unresponsive implementation plan on how Ecology intends to implement and enforce the rule.

RCW 34.05.328(3)(a) requires the agency to place in the rule making file an implementation plan that details how the agency intends to: (a) Implement and enforce the rule, including a description of the resources the agency intends to use; (b) Inform and educate affected persons about the rule; (c) Promote and assist voluntary compliance; and (d) Evaluate whether the rule achieves the purpose for which it was adopted, including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcomes.

Publication No 09-11-020 contains Ecology's response to this question. There is no description of how Ecology intends to implement and enforce the rule, no description of what Ecology expects of Kittitas County under this rule, nor are there any milestones for Ecology to assess the progress of the rule. The milestones are particularly important for a rule that has conditional authority; without milestones, there is no way for Ecology to determine when there is "sufficient data."

Additionally, as described above, the County does not have the authority to implement the proposed rule as Ecology has communicated it should be implemented. The lack of an implementation plan both obscures what Ecology expects Kittitas County's role in implementation will be, and obscures the fact that Kittitas County does not have the authority to perform as Ecology seems to expect. The County believes that a true implementation plan should be developed that addresses all of these issues.

Commenter(s)

Kittitas County Attorney

Response

Please see the responses to comment #214 and ##357. The rule does not require Kittitas County to implement it. The county's authority was a central issue in negotiations over various draft Memoranda of Agreement between Ecology and Kittitas County, however, negotiations failed to achieve a signed MOA that could have enabled a somewhat different rule. Ecology and the county have argued their respective positions to the Washington Supreme Court in the RIDGE case and await a decision.

Economic Impacts and Economic Analyses

Comment # 216

Tax relief is not the answer. It is the loss in value that is hurting people who wanted property for retirement. The impact on our economy has been huge but no one cares.

Commenter(s)

Geiger, Jesse

Response

The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The decline in real estate prices is well documented to be a consequence of the national and world wide financial crisis. In 2006, the national median home price hit a record high of $245,000. By 2009, the median home price had declined to $195,000. Please also see the summary response on page 3.

Comment # 217

Roslyn -- I don't have the right numbers here I know, but Roslyn appealed their assessment, 165 million or so, give or take 10 or 20 million. They claimed it's only worth 66 or 67 million. The state came back last week and said no, it's only worth 45 million.

The tax rate in this county, the money that's taken for schools and police and fire, is going to be reduced this year. The county is going to have to deal with that this year. But next year, no problem. They will -- they won't reassess the properties in Roslyn, in the cities.

My property will be reassessed by then. I've given up hope that this county is going to come back. So all of us that have been affected by this moratorium that have land that we cannot sell or build are going to get reassessed, our property values are going to go down. Yours won't in Cle Elum and Roslyn and other places with public water available.

The tax, the amount of taxes needed to support this county won't change. Everybody's tax is going up except mine; mine will go down. Until they do reassessments on the rest of the county. We all know that even the houses in Cle Elum and Roslyn have lost an enormous amount of value in the last year and a half.

Commenter(s)

Sanders, Jim

Response

It is true that if your property is reassessed at a lower rate you will likely pay less taxes. Please also see the summary response on page 3 and the response to Comment #216.

Comment # 218

Property tax base change alone in Suncadia is equivalent to one teacher salary?

Commenter(s)

Griswold, Trish

Response

Thank you for your comment. Please also see the summary response on page 3 and the response to Comment #216.

Comment # 219

As was shown at the July 28 hearing, the proposed rule will impose a significant economic hardship on the upper county, an area that today is severely impacted by the national recession and the Ecology moratorium. This, at a time, when substantive efforts are being made nationally and by the State of Washington to stimulate economic growth. Ecology's rule is very counter- productive in that sense.

Commenter(s)

Mundy, Bill

Response

Ecology agrees the rule results in some economic hardships. The Cost Benefit Analysis recognizes these costs. There are also significant benefits from keeping landowners and the community in general out of protracted lawsuits and or adjudications. Additional benefits include protecting existing rights and investments in habitat restoration.

Comment # 220

I think we all agree that the rules will present a burden to those in the construction industry and to future homeowners who will bear the increased costs of mitigation. This, in turn, impacts their disposable income over the life of their mortgage. Even a small business owner in the area that uses city water (that we'll assume is operating on a senior water right) will still be affected. As a result of a more expensive house and a reduced disposable income, constituents have less money to spend at this small business. Consequently, this proposed rule would cause businesses to lose sales and revenue over time.

Commenter(s)

Holmquist, Senator Janea

Response

This rule acknowledges that new users must acquire a water right. If new users obtain access to an existing water right (i.e., a municipal permit or certificate or group domestic permit water), then the proposed rule does not affect them. The potential costs of litigation, or a reduced or curtailed water supply avoided by enacting the rule far exceed the costs to the general community economy from the required mitigation. Even if the new water user were not the one impacted by the reduced total water supply, another community member would be.

Comment # 221

The year-long moratorium has grossly impacted the Upper County through job loss, home loss, business loss, reduced property values (resulting in lost revenue that pay for county services, roads, education, etc.), not to mention the destroyed dreams of retirement and plans for homes that may never be realized. Vacant lands are no longer looked at as investment opportunities but are now described as "camping lots." Two huge segments of the economy, real estate and construction, have been nearly wiped out.

Many of our workers have lost their lively hoods here altogether; they have been forced to move out of the area to· find work, or travel long distances to seek work in other counties to support their families. The engineering company Encompass, owned by Marc Kirkpatrick, has had to open an office in Issaquah to generate income to keep its doors open here. It was once a thriving business in Cle Elum with many employees.

All of this loss has had a huge trickledown effect on the local economy overall because people who are no longer working cannot afford to purchase goods, go to restaurants, theatres, or buy clothing, gas, groceries, etc. I would imagine the real losses are in the hundreds of thousands of dollars - maybe more.

Commenter(s)

Schoon, Karla

Response

This rule acknowledges that new users must acquire a water right, but the rule does not prevent new development. The impacts to property values and the building industry are not isolated to the area affected by the rule. See responses to comments #216 and #220, and the summary response on page 3.

Comment # 222

The damage to this community is real, not assumed, and more damage lingers in our future if this water moratorium stands and becomes a permanent rule while we wait for the completion of a water study.

The yearlong moratorium has already had a far-reaching and disproportionate impact on small business. It has crippled the local economy and actually reduced property values. I can't even imagine the effects of a permanent ruling that would last for three more years while a water study is conducted.

Commenter(s)

Schoon, Karla

Response

This rule acknowledges that new users must acquire a water right. The Cost Benefit Analysis recognizes the costs and the SBEIS recognizes disproportionate impacts to the smallest business compared to the largest businesses affected by the rule. It also recognizes there are significant benefits from keeping landowners and the community in general out of protracted lawsuits and or adjudications. Additional benefits include protecting existing rights and investments in habitat restoration. Please also see the summary response on page 3.

Comment # 223

It is very unfortunate that you took the route you took and so many residents in the upper county had to be hurt.

Commenter(s)

Ferrell, Susan

Response

Thank you for your comment. Ecology agrees that a more moderate option would have been preferable. Ecology worked with Kittitas County for three years striving for an alternate solution to the escalating problem. Once we reached an agreement, the county questioned the authority for implementing the agreement. Ultimately, Ecology acted using the authority the Legislature provided for circumstances where insufficient information is available to make sound water resource management decisions.

Comment # 224

Water is necessary to support the community's economy.

We can't govern by legal theory when it comes to people's livelihood. Water is the lifeblood of a community. We are cutting it off, in the worst economy of the world. This is like cutting your arm off in King County and expecting the medics to show up, the best medic system in the world. And guess what? No one shows up. There is no one there to fix this thing. We have shut down the medic units. We are shutting down the economy.

Since the moratorium was announced, I can say for sure that the area's economy has suffered. People have lost their jobs, families have lost their homes, and businesses have closed their doors as a direct result of the moratorium, a direct result of the state's actions.

Under this proposed permanent rule, the area's economy will continue to stagnate and my citizens will continue to suffer.

Commenter(s)

Hinkle, Representative Bill
Holmquist, Senator Janea

Response

The Cost Benefit Analysis recognizes the costs resulting from the rule. It also recognizes there are significant benefits from keeping landowners and the community in general out of protracted lawsuits or an adjudication. Additional benefits include protecting existing rights and investments in habitat restoration. The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The decline in real estate beginning in the fall of 2007 is well documented to be a consequence of the national and worldwide financial crisis. Please also see the summary response on page 3.

Comment # 225

The impact to our citizens, businesses, and communities cannot be considered as an acceptable level of collateral damage in an effort to achieve an agency goal.

Commenter(s)

Kittitas County

Response

Ecology agrees that the rule results in some hardships. The Cost Benefit Analysis recognizes the costs. It also recognizes there are significant benefits from keeping landowners and the community in general out of protracted lawsuits and or adjudications. Additional benefits include protecting existing rights and investments in habitat restoration.

Comment # 226

We have a lower county newspaper that proclaims the moratorium has impacted the upper county, but probably no more than ten percent.

Commenter(s)

Sanders, Jim

Response

Thank you for your comment.

Comment # 227

Some senior water right holders regret the economic impact on others from the moratorium.

Senior water right holders stand to make a little money on this deal. For me to be enriched at the pain of my fellow citizens disturbs me greatly.

Suncadia has been and continues to be deeply concerned about the economic impacts that a moratorium would have on the upper county.

I stand to gain from this rule. All of you stand to gain. If we end up with senior water rights, we gain.

But is that fair to the next guy, is that fair to our kids, to our kids' kids that want to live the American dream? Isn't that socialism, isn't that fascism? Is this democracy? Is this what America was founded upon? We are quoting the Constitution.

Commenter(s)

Coe, Bruce
Suncadia
Voice of Independence

Response

Thank you for your comments. Fairness is difficult to judge, as it varies by a person's biases and values. Ecology is bound instead to work within the parameters of the law. The prior appropriation doctrine, which is comprised of common law and statutes that govern water resources allocation. The prior appropriation system allocates rights to the use of water. Within it, senior rights are superior to junior rights when the available supply is not sufficient to satisfy both. Washington's constitution provides protections for the rights of its citizens. This rule does not set the price of mitigation for new uses. If senior water right holders feel that they are unfairly profiting, they are able to offer their senior water rights at a lower price. Please also see the summary response on page 3.

Comment # 228

These are hard times. Ecology and Kittitas County are making it even more of a hardship to be a landowner in the Upper County.

Commenter(s)

Kenny, Lorna

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 229

If the study shows the groundwater use does not impair the senior water rights, how will the State of Washington compensate the citizens and property owners for all the loss they have sustained economically? How will the State replace lost values to our real estate, lost income to families due to loss of jobs, and the lost capital due to small businesses going under?

What recourse will property owners have if the Upper Kittitas County Groundwater Study is inconclusive or does not provide the evidence of impairment to support the restrictions imposed under the proposed rule?

Commenter(s)

R&R Heights Land Company
Schoon, Karla

Response

The study results will be publicly available and could potentially be used by anyone to support a claim against the state or other water users. The types of losses described above would most likely have to be recovered through some type of tort claim if a viable case exists.

Comment # 230

Will the state compensate us for the loss of our investments, the loss of jobs, the loss to small businesses in the Upper County, and the loss to Kittitas County and the State of Washington regarding taxes and revenues?

Commenter(s)

Hamberlin, Del and Dianna

Response

The state does not normally compensate individuals for the loss of investments. However, programs such as unemployment benefits, disaster relief, or economic incentives do exist to reduce or offset some types of financial loss.

Comment # 231

The moratorium will have a significant negative impact on real estate values. Even though Ecology has attempted to minimize the adverse impact by encouraging the establishment of water banks, this, only has had a minimal effect and there are areas where no water banks have or will be established. For those properties, there is a significant economic impact due to the lowering of real estate values. I can say this with some authority, as I am a Washington State Licensed Real Estate Appraiser with the MAI designation. For developable homesites in the range of 6 to 15 acres, values are approximately $12,500/acre. When a site is not developable (for example - it has no water source), values are equivalent to agricultural (with a surface water right) or forestry where values are approximately $3,500/acre. This is a $9000 diminution or 75% loss of value.

Commenter(s)

Mundy, Bill

Response

Thank you for your comment. Ecology recognizes that the value of undeveloped or underdeveloped properties is sensitive to the development potential. If the development potential is lessened, or the cost to achieve the potential is increased, the value of that land to a developer would be similarly lessened.

Comment # 232

Our land values have been permanently damaged due to the arbitrary actions of unelected officials. Our local economy has been devastated. Ecology actions over the last two years have severely harmed my family's dreams, goals, and finances. The arbitrary rules regarding new water uses from exempt wells should not be made permanent.

Commenter(s)

Lussier, Dave:

Response

See response to Comment ##222.

Comment # 233

Many at the hearings spoke on the economic impact of the closure. I know there will be an impact due to the need to purchase a water right and meter. What no one will ever know is the true impact of the current emergency closure because, concurrent with the closure there was a total collapse of the housing and banking industries.

I do know lower Kittitas County and surrounding counties that do not have a closure to new permit exempt wells are not experiencing any building booms; draw your own conclusions.

I do believe there were some individuals in the upper county that suffered from the closure but by and large it is the special interests that are opposed to any mitigation or metering. In the long term, it is protection of the quantity and quality of water in the Yakima Basin that demands mitigation and metering.

Commenter(s)

Link, Deidre

Response

Thank you for your comments. The national and worldwide banking crisis and the resulting lack of credit available to allow new construction was the primary cause of the reduction in new home construction. This is apparent when comparing Yakima County building permit data for 2008, 2009, and 2010 to home building declines in Washington and the United States.

We agree that those individuals who had the funds or credit available to construct new homes would be the ones who would be directly affected. By the end of 2010, about 90 homeowners had purchased mitigation certificates based on Suncadia's Anderson and Lamb water rights. At least some of the purchasers had funds available to begin construction of a home.

Comment # 234

Some might want to do a little subdivision just for the retirement. They don't have a state retirement. They don't have a corporate retirement. They are invested in property. That's all they've got. Basically this rule does away with that in many respects.

Commenter(s)

Hinkle, Representative Bill

Response

Thank you for your comment. The proposed rule does not preclude such new, small subdivisions. It provides an exception for those proposals that offset their consumptive impacts

through a pre-1905 water right held in the Trust Water Right Program, or by obtaining a pre-1905 water right. Finally, property values have declined as a result of national and international economic conditions that have made credit less available. Nationally, the median price of an existing home declined 20% between 2006 and 2009. If mitigation costs are solely placed upon the investor (assuming it could not be passed on to the home purchaser), that cost is significantly less than the decline in value due to national economic conditions.

Comment # 235

Farmers don't have hefty retirement packages like you people do. Some of them counted on selling a chunk of their land for when they want to retire and slow down. Some would like their children or their grandchildren to build a little parcel next to them and live close by for when they grow older. You've killed these dreams.

Commenter(s)

Conner, Kelli

Response

Thank you for your comment. Please see the response to Comment #234.

Comment # 236

Property values of undeveloped lots where neither city water nor mitigation water from Suncadia is available are particularly hard hit.

I have land out by the lake there, and now it's useless as long as this is going on. So my investment may, I don't know, it might equal a tenth of what I'm spending.

Without any way to mitigate these supposed effects of ground water withdrawals and the inability to get permission to withdraw water, it has rendered property pretty much useless. It's worth less than a tenth than it was before when it was just bare forest land. It can't be used for whatever it was intended to be used for.

Home site to campsite, there's a huge price difference on a per-acre basis.

I have a client who has acreage in the Teanaway. He was asking $165k for 6+ acres and now that land is nothing more than a nice camping spot, worth not even half of what it was.

The rule would reduce the property we purchased after a lifetime of work to no value.

Commenter(s)

Association of Realtors
Grinnell, Roy
Merbs, Chad
Velie, Linda
Vincent, Betty

Response

Thank you for your comment. Values for undeveloped or underdeveloped properties are sensitive to their development potential. Ecology agrees that if the development potential is lessened, or the cost to achieve the potential is increased, the value of that land to a developer would be lessened. Please also see the response to Comment #234.

Comment # 237

We've seen the conversion of home sites go to campsites. I said to some of our senior water rights people, what happens if you don't have any alternative use for your Timothy ground or for your irrigated ground, if you can't convert your marginal ground to a home site, and you can't then put the circle on the ground where you really want to put it or change the method of irrigation?

Land values are going to get their attention and have the same kind of impact everywhere as we have seen up here. That's been a very measurable, very definitive thing. Home site to campsite, there's a huge difference on a per-acre basis.

Commenter(s)

Association of Realtors

Response

Values for undeveloped or underdeveloped properties are sensitive to their development potential. Ecology agrees that if the development potential is lessened, or the cost to achieve the potential is increased, the value of that land to a developer would be lessened.

Comment # 238

I am aware of numerous individuals who own just one small parcel in the upper county, who have bought their property over the last 5 to 10 years, with plans to retire there when they are financially able to do so. Many of these average folks live and work on the west side of the Cascade Mountains in the Puget Sound area during the weekdays as there are more jobs there. They then travel to the upper county nearly every weekend to spend relaxing "stress relieving" time on their dream property with family and sometimes with friends.

Some of these individuals camp out, some have trailers, and some have outbuildings such as garages, barns, and pole buildings (some even with small living quarters). Many of these property owners have already drilled theirs wells and are using water every weekend. Others have waited to drill their wells and build their dream homes due to cost or other more pressing financial issues such as sending their children to college or possibly dealing with health issues as they age and prepare for retirement. Most have spent a good portion if not all of their retirement funds for their upper county properties.

Also keep in mind the lower income property owners that have not been able to afford home ownership on the west side of the mountains where they work and rent their living quarters, but they have been able to scrape by, save a little here and there, and just barely afford to buy less expensive property in the upper county to be able to build their dream home someday. This

might only be a 1000 square foot, 2-bedroom house. That might not seem like much to many, but to them it would be their castle.

Why does Ecology plan to tell all of these people through this permanent rule that Ecology just doesn't care, and those that could afford to build by July 16, 2009 won the lotto, and the rest of you property owners must let your dreams die so just get over it?

How sad for so many innocent property owners that had no involvement in the Ecology vs. the Kittitas County Commissioners authority battle. They will pay for it with their current livelihood or their future retirement. In this sad event, they will still be considered the luckier ones. The less lucky will pay for the Ecology decision with their lives due to stress leading to heart attacks, or outright suicide over losing their financial stability and their dreams.

Commenter(s)

Hurwitz, Dave
Velie, Linda

Response

The rule requires that new users must acquire a pre-1905 water that offsets the consumptive impact of the proposed new use. This prevents impairment to senior rights. If new users access a water right established prior to July 16, 2009, the proposed rule does not affect them. Please also see the response to Comment #227.

Comment # 239

I do not understand how you could give my partner, Jerry Stougard, a permit to drill an exempt well and then not allow us to build a home and utilize our property. Could you please explain to me what we are to do? More than $200,000 has been invested in this properly, 1630 Teanaway Terrace, where we planned to build our retirement home.

We have worked for years on this property, limbing trees and eliminating ground fuel (fire prevention). We have spent thousands of dollars on rock to improve the driveway and parking area, creating a campsite where we park our travel trailer from Spring to Fall. We've brought in power and installed 600 feet of underground wiring in preparation for the house we were going to build when we retire in a few years. In May of 2008, we had our well drilled, installed a pump, dug water lines, and installed hydrants that would service the house, barn, and shop that we had planned to build there in the future.

We could start over somewhere else, but now this property is not even salable for what we have invested in it. Why would someone buy a property that they cannot build on? If we knew when we bought this property that we would only be allowed to "camp" on it, we would have bought a membership to "Thousand Trails" instead.

We cannot afford to start over. We cannot recover financially from this situation. I know others have written letters with more facts, figures, and detailed information about laws and why this whole situation is unjust.

Commenter(s)

Brannian, Beth

Response

Thank you for your comment. Ecology has not issued an unmitigated ground water permit within the Yakima River basin since 1994. Ecology does not issue permits for permit-exempt uses unless a prospective water user files an application for a permit. The commenter is most likely referencing the well driller's Notice of Intent, which is not a permit and does not constitute a decision by Ecology that water from the well could be lawfully used.

Comment # 240

The moratorium is not responsible for the loss of real estate values in the area. The losses in value began before the moratorium and are due to other causes. Even properties with water rights available have lost value.

The real estate problems and the collapse of the housing market started long before the moratorium went into effect. The timber industry collapse along with high gas prices had already led to an exodus from the upper county. From 2006-2010 our school enrollment declined 10%. Real estate was being speculated on at unsustainable levels. It's absurd to think that the moratorium has anything to do with the collapse in real estate prices.

Sapphire Skies the biggest developer had already drilled dozens of wells and has had property for sale for several years with few buyers and even fewer homes being built. To my knowledge Sapphire Skies has never commented on the moratorium and they are the biggest real estate speculator in the Upper County with 10,000 acres. Has the moratorium really hurt their sales?

Suncadia recently had some of their properties revalued from 100 million dollars to 42 million dollars. That had nothing to do with the moratorium. Suncadia has plenty of water yet their business also fell off a cliff with the rest of the national economy.

The moratorium is simply a convenient scapegoat for many over the collapse in real estate and the ensuing loss of jobs in the Upper County. If anything, property owners should support mitigation and the end of wild speculation in the Upper County. That will stabilize prices over the long run.

Commenter(s)

Moon, Keith

Response

Thank you for your comments. Property valuation statewide has been impacted by the housing crisis. What we see in the upper Kittitas County is consistent with property values in the rest of the county, surrounding counties, and statewide. Please also see the summary response on page 3.

Comment # 241

I personally know of several couples, including my husband and I, that have invested hundreds of thousands of dollars getting their dream property ready to build for retirement, which

includes drilling a well, putting in a septic system, and bringing in utilities (i.e. power and phone), and now they can't get a building permit!?!?!

Commenter(s)

Hurwitz, Marisa

Response

Thank you for your comment. The proposed rule requires that new users must acquire a pre-1905 water right that offsets the consumptive impact of the proposed new use. This prevents impairment to senior rights but does not preclude development

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Comment # 242

Succinctly, present and past Kittitas County commissioners have been approving rural residential development under the banner of and in the disguise of "economic development", development that has always unsustainable, development that blatantly disregards the rights of existing water rights holders, and development that in foresight and hindsight was doomed to implode the micro-economy of Kittitas County, including its small towns, as part and parcel of and participation in a national and global real estate bubble bursting leading to the inevitable financial collapses nationally and globally that have been playing out since 2007.

Further compounding the travesty of years of exceedingly poor decisions by current and past county commissioners is the fraudulent claim that the Upper County moratorium imposed by the Department of Ecology is responsible for the economic downturn as regards any and all Upper County rural land development. In fact, Kittitas County commissioners are simply witnessing the results of what they have wrought with the complete participation of the real estate community, the development community, the financial community, the title insurance community, the appraisal community, and the building trades community.

In short, homes became a commodity and the commodity crashed. These same communities refuse to accept their responsibility in having willingly participated and refuse to accept their responsibility in accepting the negative financial outcomes of commodities trading, which is, in actuality, what these communities have been engaging in, commodities trading.

Commenter(s)

Clerf, Catherine

Response

Thank you for your comments.

Comment # 243

Will financial compensation be available such as in grants awarded to private forest owners who create habitats for endangered species?

Commenter(s)

Rattray, Jane and Mark

Response

Such a market could be developed, but at this time there is no formal ecosystem services market within the upper Yakima basin. In such a market, parties proposing impacts could elect to purchase mitigation credits from sellers who have projects or activities that generate certified credits that can be sold within the market rules.

Comment # 244

The moratorium will result in a loss of farmland.

Increasing the demand of senior water rights and decreasing overall land values, can and will cause many prime farmlands with senior water rights to turn them fallow. During difficult farm years, the only thing valuable for farmers to supplement with will be their water rights. See Ellensburg's old golf course along 1-90 for example.

Commenter(s)

Kirkpatrick, Marc

Response

Thank you for your comment. Mitigation for residential development will most likely reduce the amount of land irrigated for agricultural purposes. Based on the experience of the Trendwest/Suncadia and Reecer Creek Golf Course water right acquisitions, the least productive and profitable lands are most likely to be the source of water to offset the consumptive impact of new residential development.

Comment # 245

The agricultural sector is a large component of the economy of the State of Washington, as well as being responsible for our state being one of the top exporter states in the nation. Hence, I believe that public policies at the county and state levels need to be enhanced and strengthened to ensure that expansion of our state's agricultural sector, an economic substrate which is wholly sustainable and which provides a broad and expandable revenue base, affecting and reaching into nearly every county in the state, is a priority and not an afterthought.

Commenter(s)

Clerf, Catherine

Response

Thank you for your comment.

Comment # 246

Aside from landowners themselves whose properties are impacted by Ecology's ongoing groundwater moratorium in Upper Kittitas County, no one has been affected by the moratorium more than the members of the Kittitas County Association of Realtors and the Central Washington Homebuilders Association.

Commenter(s)

Realtors and Home Builders Associations

Response

Ecology agrees that both home construction and sales have declined greatly since 2007. Please also see the summary response on page 3.

Comment # 247

As far as economic impact, I can give you a specific. There are now 65 less realtors in our county.

Commenter(s)

Association of Realtors

Response

Thank you for your comment. Please see the response to Comment #246.

Comment # 248

The current moratorium and this proposed rule has eliminated 80% of the number one industry in our region of Kittitas County. Those developers, if they are still in business, are now 20% of what they were three years ago. The impact goes well beyond that, consultants, surveyors, equipment rental, hardware stores, lumber, banking, grocery stores, restaurants, gas stations, hotels ... the list is endless ... are all grossly impacted by these rules.

Commenter(s)

Cle Elum Roslyn Chamber of Commerce

Response

Please see the summary response on page 3.

Comment # 249

The SBEIS and PCBLBA both use the wrong baseline. In fact, the PCBLA uses a different baseline: July 16, 2009 versus the proposed rules. While Director Manning announced the moratorium on the morning of July 16, 2009, the harsh negative economic fallout in Upper Kittitas County began the moment that announcement was made. Consequently, the best date upon which to rest the baseline of both reports is the day before the moratorium's public announcement, July 15, 2009.

Commenter(s)

Holmquist, Senator Janea

Response

The baseline is the current legal framework governing the administration and management of water resources in the basin. Baseline conditions include current water management practices in the basin, and other applicable water resource laws and court cases.

In response to comments we received on the Cost Benefit Analysis, the Least Burdensome Analysis, and the Small Business Economic Impact Analysis, and in order to consider additional information obtained by Ecology as it has implemented a nearly identical Emergency Rule between July 2009 and the present, Ecology reviewed the reports it prepared in June 2010, updated them, and has decided to republish each report. Please see the summary response on page 3 for more information on the requirements of the Administrative Procedure Act and the Regulatory Fairness Act, where we explain better the scope, purpose, baseline, and conclusion of each analysis.

Comment # 250

At the very minimum, Ecology should use the same base line in its documentation and make a good faith effort in compiling information for the Small Business Economic Impact Statement and the Preliminary Cost Benefit, as well as the Least Burdensome Analysis.

As Ecology has not done its due diligence in considering the impact to small businesses, the citizens and the landowners impacted, I think that you lack a firm basis necessary to decide what is the most prudent course of action.

Commenter(s)

Holmquist, Senator Janea

Response

Please see the response to Comment #249.

Comment # 251

The ability to develop land is handled very differently in the SBEIS vs. the CBLBA. In the CBLBA, the base assumption is that the proposed rule will allow for the continued development of land, and counts this as the major benefit under the CBLBA. Per the CBLBA, "allowing this opportunity to develop could allow 3000 new lots at $83,780 in increased land value. . . Ecology believes this development is 80 percent more likely to occur under the rule than without the proposed rule. However, the SBEIS states that the land development will not happen.

To count the development of the land as a major benefit of the proposed rule in the Cost Benefit Analysis, but then to turn around and state that land development will not happen for the SBEIS is baffling. Again, the County believes that if there is procedural compliance with rule-making procedures, then the SBEIS and CBLBA should rely on the same basic assumptions about the impacts of the rule.

Commenter(s)

Kittitas County Attorney

Response

The CBLBA and SBEIS use the same assumptions. The CBA focuses on the costs and benefits to all that are required to comply with the rule, while the SBEIS focuses on the costs to

businesses and if there are disproportionate impacts to small businesses versus large businesses, as described in RCW 19.85.

Comment # 252

The SBEIS ignores the conclusions of the Cost Benefit and Least Burdensome Analyses (CBLBA). The CBLBA estimates that 3000 new residences will be seeking water through permit-exempt withdrawals in the next 20 years. A small business would presumably develop and construct each of these residences. The CBLBA estimate is that the cost per residence of obtaining a water right is $5700, with an additional $800 to $1300 for "expected taxes and fees" for a total of $6500 to $7000 per residence.

However, the SBEIS then draws a different conclusion: that the value of the water right will equal the cost. If the value is $5700, but the cost is $6500 to $7000, then the value of the right does not equal the cost. Any construction company or developer who is building these residences will have to pay an additional $800 to $1300 in taxes and fees over and above the value of the water right.

Commenter(s)

Kittitas County Attorney

Response

Please see the responses to comments #249 and #251. Only businesses seeking a new groundwater appropriation are required to comply with the proposed rule.

Comment # 253

I can't even tell you how angry I am when I heard Senator Janea Holmquist say that the economic analyses say that there's no economic impact. You can tell my friend and her children who are losing their home because they lost their job because of this moratorium, you tell them that, that there's no economic impact. And that's all over this town. That's all over the upper county. It's even starting to effect the lower county. There's a residual. It's not just builders, not just real estate agents, it's everybody.

Commenter(s)

Wise, Susie

Response

Please summary response on page 3 and the response to Comment #246.

Comment # 254

We understand that the SBEIS and CBA are clearly not intended to analyze actual economic impacts of the rule, but rather, to construct an administrative framework to assist Ecology in defending the rule if it is appealed. The documents are grossly inaccurate and fail to meet the rulemaking requirements in RCW Chapters 19.85 and 34.05.

Commenter(s)

Realtors and Home Builders Associations

Response

The analyses are designed to address the economic impacts of rulemaking in accordance with the Administrative Procedures Act and the Regulatory Fairness Act. Please also see the summary response on page 3.

Comment # 255

The Preliminary Cost Benefit and Least Burdensome Analysis and the Small Business Economic Impact Statement are clearly flawed and inaccurate documents. Prior to the adoption of any rule, these documents must reflect an honest economic analysis of the proposed rule. In their current form, they must be dismissed as nothing more than political propaganda written to support Ecology's position.

We request the analysis be conducted properly and presented by a qualified, independent, and mutually agreeable third-party expert.

Commenter(s)

Kittitas County
Kittitas County Attorney

Response

The analyses are designed to address the economic impacts of rulemaking in accordance with the Administrative Procedures Act and the Regulatory Fairness Act, and are peer reviewed by other economists. Please also see the summary response on page 3.

Comment # 256

Ecology's Small Business Economic Impact Statement (SBEIS) and Cost Benefit Analysis (CBA) fail to meet statutory requirements and are grossly inaccurate. RCW Chapter 19.85 requires Ecology to analyze the impacts of the rule on small business, including an analysis of cost impacts and jobs that may be gained or lost. Instead of actually analyzing how the rule will impact the real estate development and construction industry in Kittitas County, Ecology's SBEIS and Cost Benefit Analysis are premised on an artificial narrow scope that avoids any meaningful analysis. The SBEIS states that "the proposed rule does not directly affect current or future businesses that have or use established water rights." SBEIS, at 2. This narrow scope is different from how Ecology has analyzed job and economic impacts in other recent water resource rulemaking processes.

Commenter(s)

Realtors and Home Builders Associations

Response

Realtors are not required to comply with the rule unless their specific business is seeking a new water right. Only new ground water appropriations without an established right are required to comply with the proposed rule. These are the businesses within the scope of the analysis for the

SBEIS. The summary response on page 3 provides further information on requirements of the Administrative Procedures Act and Regulatory Fairness Act.

Comment # 257

The economic studies do not reflect the true economic impacts to Kittitas County. The January 7, 2009 Cost Benefit Analysis estimated the benefits at $18.6 million; and in June 2010, this estimate went up to $153.69 million. In 2009, the costs were estimated at 3.2 million and in 2010, this estimate jumped to $16.2 million. The 2010 cost estimate, while higher and based on more current data, still does not fully reflect the economic impacts to the county as a result of the proposed rule. The scope of Ecology's cost-benefit analysis and small business economic impact statement is narrow, resulting in an underestimate of true economic impacts to the county and should be reevaluated.

Commenter(s)

R&R Heights Land Company

Response

The CBA from January was for a different rule. The current proposed rule completely addresses the legal risk to new users. The first proposed rule did not. Further information on what was required under the Administrative Procedures Act and Regulatory Fairness Act is described in the summary response on page 3, which also describes scoping of the analyses.

Comment # 258

Data is available on the impacts of the moratorium. By reviewing sector-specific job loss data from the area, one can gain a glimpse of the negative economic impact of the July 16, 2009 moratorium. For example, in regards to the construction industry in Kittitas County, the Employment Security Department reported, "On the average, mostly construction jobs in the county dropped from 1,080 in 2008 to 730 in 2009, a 32.4% decline" (as cited in Daily Record, July 29, 2010, p. A3).

Additionally, I contacted DSHS to determine the percentage increase in Temporary Assistance for Needy Families (TANF) recipients. For the cities of Cle Elum, Easton, Ronald, Roslyn, and South Cle Elum, there has been an increase of 28.8% in TANF recipients from June 2009, the month before the moratorium, to June 2010. This data only includes TANF recipients within the moratorium's boundaries in Upper Kittitas County. This data sheds light on the degree to which my constituents have been negatively impacted.

From the data provided to me by DSHS, I also discovered that between June 2009 and June 2010 there has been a 33% increase in the number of people who received food stamps in Cle Elum, Easton, Ronald, Roslyn, and South Cle Elum. This helps substantiate the other data and is yet another indicator of the extent of the negative impacts of the moratorium.

Commenter(s)

Holmquist, Senator Janea

Response

The rule does not restrict ongoing use of water under existing water rights. Therefore, the rule has a greater impact on people wishing to construct new homes outside a public water service area than those already residing here. The area affected by the rule is suffering from the economic downturn, similar to other areas of the county, the state, and the nation. The housing market and construction industry have been particularly impacted. Please see the summary response on page 3.

RCW 19.85.040 states "To determine whether the proposed rule will have a disproportionate cost impact on small businesses, the impact statement must compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rules using one or more of the following as a basis for comparing costs."

Only new water withdrawals without an established right are required to comply with the rule. These are the businesses within the scope of the analysis for the SBEIS. The summary response on page 3 provides further information on what was required under the Administrative Procedures Act and Regulatory Fairness Act.

Comment # 259

There is a legal concern with a flawed Cost Benefit and Least Burdensome Analyses (CBLBA) that conflicts with the lack of SBEIS. The "rule making file" is insufficient to persuade a reasonable person that:
(l) The probable benefits of adopting the rule outweigh the probable costs, and
(2) That the proposed rule is the least burdensome to those it places a burden upon to achieve the goals.

A reasonable person would not be so persuaded because:
(1) The only quantified benefit listed in the Cost Benefit Analysis is not a benefit from the baseline. This rule will result in less development and so the effect it will have on developmental rights from the baseline is a cost. Additionally, many of the costs are understated in the analysis.
(2) It is not difficult to find a less burdensome alternative; one example would be to ask the Legislature for additional authority to evenly regulate permit-exempt groundwater. This approach is being taken by the Stock Water Working Group, and there is no reason that Ecology should not at least consider it as an alternative for upper Kittitas County.

Commenter(s)

Kittitas County Attorney

Response

Thank you for your comment. In response to comments we received on the Cost Benefit Analysis, the Least Burdensome Analysis, and the Small Business Economic Impact Analysis, and in order to consider additional information obtained by Ecology as it has implemented a nearly identical Emergency Rule between July 2009 and the present, Ecology reviewed the reports it prepared in June 2010, updated them, and has decided to republish each report. Please see the summary response on page 3 for more information on the requirements of the

Administrative Procedure Act and the Regulatory Fairness Act, where we explain better the scope, purpose, baseline, and conclusion of each analysis.

Comment # 260

Where is the financial report that truthfully measures the dramatic impact this moratorium has brought to bear on an already fragile community?

Does anyone remember the sign in Seattle that read "Will the Last Person Leaving, Please Turn Out the Lights?" The financial impact of that time is much like what has happened in "Upper Kittitas County." Ecology has chosen to turn a blind eye to the detrimental impact of the well moratorium in Kittitas County. Their economic impact statement was written only to be self-serving and not to measure the facts.

Commenter(s)

Barschaw, Valeria

Response

Please see the summary response on page 3 describing the impact of the most recent recession on the local, state, and national housing construction industries. The Cost Benefit Analysis is designed to measure the direct impacts to those that are required to comply with the rule. Secondary or other affects would be very subjective and the results could be dramatically skewed from inaccurate assumptions. Only new water users without an established right are required to comply with the proposed rule. The direct affect on these users is measured. Further information on what was required under the Administrative Procedures Act and Regulatory Fairness Act is described in the Kittitas Analyses summary response on page 3, which also describes scoping of the analyses.

Comment # 261

I'm concerned about the impact on real estate lending and its many related consequences in the county that the new regulation could have on properties using older exempt wells and feel that the state should do a thorough analysis on this point.

Commenter(s)

Rooney, Tracy

Response

The summary response on page 3 provides further information on what was required under the Administrative Procedures Act and Regulatory Fairness Act and on the scoping of the analyses. Property valuation statewide has been impacted by the housing crisis. What we see in upper Kittitas County is consistent with the surrounding counties and statewide property valuation.

Comment # 262

The impact statement (2010) states that, "We have assessed the impacts of the proposed rule by analyzing and comparing water right management under the proposed rule, in contrast to

current practices" (p. 1). This statement mistakenly compares the proposed rule to the emergency rule that we are under now. It should compare the proposed rule in contrast to the day before the moratorium was first announced. Such an analysis would reveal a significant negative economic impact on small businesses.

Commenter(s)

Holmquist, Senator Janea

Response

Please see response to Comment #258.

Comment # 263

This rule making is legally deficient through the failure to produce a Small Business Economic Impact Statement.

A Small Business Economic Impact Statement (SBEIS) is required "if the proposed rule will impose more than minor costs on businesses in an industry ..." When a SBEIS is required, the analysis "must compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rules." No SBEIS analysis was performed, as there is a conclusion that no small businesses are required to comply with the proposed rule. This argument is contradicted by Ecology's own SBEIS, CBLBA, CR-l02 Proposed Rulemaking Notice, common sense, and extensive evidence to the contrary.

The County believes that by admitting small businesses will incur costs to obtain water budget neutrality and metering, a SBEIS must be performed.

The County feels that the rule-making procedure was not followed as a SBEIS analysis was not performed as required by statute for the following reasons: 1) there was no true analysis of what costs small land development and construction business would incur under the proposed rule, 2) costs such as obtaining water rights and metering were ignored by the SBEIS, and 3) the SBEIS ignored substantial evidence regarding the true impacts to business. The County requests that an accurate SBEIS be performed per the statutory requirements.

We strongly disagree with the conclusions contained in Publication No. 10-11-016 and believe a Small Business Economic Impact Analysis is required of Ecology for an action such as the temporary or the proposed permanent rule.

Commenter(s)

Cle Elum Roslyn Chamber of Commerce
Conner, Kelli
Kittitas County Attorney

Response

Ecology completed a small business economic impact statement for the proposed rule, which has been modified before final rule adoption. RCW 19.85.040 states "To determine whether the proposed rule will have a disproportionate cost impact on small businesses, the impact statement must compare the cost of compliance for small business with the cost of compliance

for the ten percent of businesses that are the largest businesses required to comply with the proposed rules using one or more of the following as a basis for comparing costs."

Only new water withdrawers without an established right are required to comply with the proposed rule. These are the businesses within the scope of the analysis for the SBEIS. Further information on what was required under the Administrative Procedures Act and Regulatory Fairness Act is described in the summary response on page 3.

Comment # 264

The SBEIS contains several contradictory conclusions. First, it determines that no small businesses are required to comply with the proposed rule. However, later the SBEIS lists multiple small businesses that may be impacted by the proposed rule, including Land Subdivision and Development (Code 2331), Residential Building Construction (Code 2361), Nonresidential Building Construction (Code 2362), and Land Subdivision (Code 2372). That Ecology can create such a list in one section of the SBEIS, and then discount all such impacts in another begs logic.

Commenter(s)

Kittitas County Attorney

Response

Please see response to Comment #258.

Comment # 265

The Small Business Economic Impact says, "Ecology expects little or no job impacts to come from this proposed rule." This is in stark contrast with the reality of upper Kittitas County's economy. Ecology should not be able to proceed in the adoption process of this ground water rule since the SBEIS is inaccurate and untrue. Ecology should not be able to use this information to ensure that the proposed rule is consistent with legislative policy.

We have construction companies who are small businesses. Under these proposed rules, their ability to construct new homes will be significantly restricted, thus undermining their revenue. If the construction company cannot find water or afford the water, then that business could potentially close their doors or layoff employees.

It needs to address the negative economic impacts that have been felt throughout the value chain within the area; for example, from manufacturer to supplier, to builder and ultimately to the consumer. Building material suppliers are also small businesses.

There is data available on the impacts of the moratorium that we should be using and looking, reviewing unemployment rates, vacancy rates of businesses, reductions in collections of sales taxes from the area. Then we could gain a real true sense of the true potential real negative economic impact.

The Small Business Economic Impact Statement needs to be completely redone to capture a report on these obvious sources of economic loss to small businesses and to the citizens in the

area since the moratorium began. This impact must be measured quantitatively (meaning real numbers that reflect actual records of business loss or gain and numbers from job loss or gain as documented by the Washington State unemployment records and small business tax returns) for the period of time that has occurred as of the date the initial moratorium was put in place to present.

Commenter(s)

Grinnell, Roy
Holmquist, Senator Janea
Kittitas County
Merbs, Chad
Schoon, Karla

Response

Please see response to Comment #258.

Comment # 266

On page 2 of the SBEIS, it states, "Small businesses are not required to comply with the proposed rule." This is a ridiculous statement as many small businesses exist in Upper Kittitas County (or at least did exist before the imposition of the current moratorium) which service the land development industry. Any business which includes rural land development is expected to comply with this rule both in the platting and building stages of the process. The report goes on to justify the previous conclusion by stating:

> "Businesses that locate in areas with established water rights are not required to comply with the rule ... Businesses that choose to locate a new operation outside a water service area may be affected ... "

This statement draws two clearly erroneous conclusions in attempting to justify the previously stated position. First, the physical location of a business may have nothing to do with its requirement to comply with the rule. This is obviously true in the case of a local builder who may be constructing speculative homes. Second, the statements again assume a business may only be affected by their location and takes into account no consideration of the additional impacts which may occur to businesses as a result of this rule whether or not they must directly comply with it. For instance, lenders who provide loans for properties that may or may not be able to comply with this regulation are certainly affected. Land use planning organizations which assist in the planning of developments are absolutely affected as costs for their clients increase or investments are lost due to the unavailability of water in many areas making land undevelopable.

Finally, layoffs resulting from lost revenue directly attributable to the current moratorium and this proposed rule affect many service and retail businesses from restaurants and coffee shops to gas stations and grocery stores. Stating that "small businesses are not required to comply with the proposed rule" is clearly false and a blatant misrepresentation of the facts.

Commenter(s)

Kittitas County

Response

Please see the response to Comment #249.

Comment # 267

Basically, the Small Business Economic Impact Statement states small businesses are not required to comply with the proposed rule if they are located in an established water right area. That's all they have to say.

It is appalling to me that this study would stand as a valid impact statement regarding the true impact that this moratorium and permanent rule will and has had on small businesses in upper Kittitas County.

As just one small business employer in the upper county, prior to the moratorium, my small construction firm had between 3 and 4 million dollars of new construction projects on my desk ready to start. This dollar volume of work would have been a good year for my business in any economy but all of those projects but one were cancelled as a direct result of the water moratorium.

This caused my small firm to layoff eight full time employees, not to mention the scores of subcontractors that would have been employed, and all the materials that would have been purchased as well as new owners utilizing their homes, partaking of our local upper county services and stores, etc. Not all of these employees have found gainful employment even to this day and are no longer purchasing lattes, gas, food, clothes, restaurant visits, visiting any of our local small businesses.

This example is but one small business and is an incredibly small percentage of the impact on small businesses that this issue has and will continue to cause. How can a small business impact statement not take facts like these into consideration?

Traditionally the upper Kittitas area has been somewhat insulated from the national economic swings as it derives much of its business from vacation and tourism, business primarily from the west side of the mountains.

In the 11 years I have been building homes in the upper county, I have only built one home for a client who lives here in the county. All of my clients have been from the Seattle metropolitan area or other states, building here to vacation or to retire. Most of these projects are self-funded and do not require bank financing, making many of these people somewhat less impacted by the poor economy and causing them to see this is a time that everything is on sale.

Commenter(s)

Senger, Steve

Response

The rule requires new users to mitigate their consumptive use so as not to impair senior water rights. It does not preclude development. Although purchasing a water right or mitigation credits may add to the initial costs to construct a home, it does assure a reliable water supply without risk of curtailment during low water periods.

The decline in home construction is not isolated to the area affected by the rule, so is not wholly a result of the rule. The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The decline in home construction and real estate prices is well documented to be a consequence of the national and world wide financial crisis. Please also see the summary response on page 3.

Comment # 268

The next argument for avoiding a SBEIS analysis is that only small businesses which are seeking a new water appropriation would be impacted by the proposed rule. This is followed by attempts to avoid SBEIS analysis in two ways: 1) by arguing that businesses can avoid costs by locating in an area where there is an existing water service, and 2) by arguing that any cost the business might incur by obtaining a senior water right is balanced by an equal gain in value from the water right.

These arguments must fail. First, many of the small businesses listed by the SBEIS include land development. These businesses cannot just relocate in an area where there is an existing water service. Land development is (by definition) located in areas where there is not existing services - that is why it is land development, not simply construction services.

Second, the SBEIS ignores the definition of "minor cost." RCW 19.85.020(2) defines ''minor cost" as "a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll." The definition is not a cost that is balanced by a possible gained value - it is simply any outright cost over a certain amount to a small business.

Commenter(s)

Kittitas County Attorney

Response

See response to Comment #259.

Comment # 269

By constraining the scope of the SBEIS only to what Ecology considers a "direct" effect, the SBEIS analyzes only the impact to small business that would build a new facility in Upper Kittitas County in an area not served by public water. It is deeply troubling to the Associations that Ecology would adopt a permanent groundwater moratorium for which only limited mitigation is available, and in so doing refuse to actually analyze the impacts of this rule on the development community.

We can assure you that the "direct effect" between Ecology's groundwater moratorium and negative economic consequences to the real estate development community is much more evident than is Ecology's theory of "direct effect" between groundwater and surface water that underpins its moratorium.

Commenter(s)

Realtors and Home Builders Associations

Response

The rule is not a moratorium and does not preclude development, even outside public water service areas. Although mitigation credits are not yet available in all areas affected by the rule, Ecology is working to also find senior water rights for those areas that can be used to mitigate new uses.

See also the response to Comment #259.

Comment # 270

On Page 3 under Impacts to Businesses in the Kittitas Groundwater Area, it states "Most businesses **are not directly** affected by the proposed rule for the Kittitas Groundwater Area." This is totally false and misleading. Public testimony was given on July 28th, 2010 at the public hearing for this rule that directly refutes these findings. I would refer you to direct testimony given by Steve Senger of Senger Construction - how his business has lost most of its work and has had to lay off eight full time employees. He is only one of numerous small business owners who have suffered excessively as a result of Ecology's current actions. Many other business owners provided the same type of testimony about the negative impacts of the current water moratorium. These testimonies were substantiated by the comments of our elected lawmakers; State Sen. Janea Holmquist and Rep. Bill Hinkle.

Commenter(s)

Schoon, Karla

Response

See the response to Comment #259.

Comment # 271

If a person walks down Main Street and speaks to the shop owners, they will find that those that are still in business are and have been hanging on by a thread trying to keep their doors open. This is a direct impact of the moratorium and therefore the proposed permanent rule.

Commenter(s)

Senger, Steve

Response

The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The housing dilemma is well documented to be a consequence of the national and world wide financial crisis. See also the responses to comments #259 and #269.

Comment # 272

I can tell you as a person on the ground level of the construction industry that since the moratorium, business in the upper county is now nonexistent. All of our business is either from a dribble from Ellensburg, quite a bit from Grant County, and a bit from Wenatchee and from the other side of the pass, not from our locals. They can't build anything.

Commenter(s)

Conner, Kelli

Response

The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. See also the response summary on page 3.

Comment # 273

The Small Business Economic Impact Statement is revolting. A proper analysis needs to be completed by the State's Chamber of Commerce and Kittitas County's Economic Development Group.

Commenter(s)

Kirkpatrick, Marc

Response

Please see response to Comment #259.

Comment # 274

The Cle Elum Roslyn Chamber of Commerce representing small business in Kittitas County takes exception to the conclusion that the proposed rule **only affects businesses that are seeking** new appropriations of groundwater and the determination that this is a **minor cost** therefore exempting Ecology from needing to prepare a Small Business Economic Impact Analysis.

Commenter(s)

Cle Elum Roslyn Chamber of Commerce

Response

Please see response to Comment #259 and the response summary on page 3, which provides further information on what was required under the Administrative Procedures Act and Regulatory Fairness Act.

Comment # 275

Under the heading "Cost to Firms and Required Professional Services" on page 3, the report states that required **services** (i.e. engineering, hydrogeologists, legal) for transferring a water right to use as mitigation are included at a fixed mitigation cost within the Upper-Kittitas Water Exchange. This is accurate, but the current availability within the Upper-Kittitas Water

Exchange is proving severely geographically limiting. At present, no other water is available to serve the majority of the areas in Upper Kittitas County affected by the rule. If an individual business owner must locate appropriate mitigation outside of the Upper-Kittitas Water Exchange, the costs are likely to be significantly greater.

Commenter(s)

Kittitas County

Response

The commenter is correct that Suncadia's Lamb and Anderson water rights are limited in their geographic scope. In fact, every other existing water right that predates May 10, 1905 is a candidate for use as a mitigation water right. The difficulty is that a willing buyer must find a willing seller for a transaction to be negotiated. Sellers will emerge as willing buyers announce themselves and offer prices that reflect the sellers perceived valuation of their water rights. Professional services required to do it include engineering, hydrogeology, and law, as well as marketing and brokerage services. Costs associated for these services would also need to be incorporated into the price of the water, and would increase the price as the commenter notes.

Comment # 276

The analysis also implies that purchasing water rights is an easy economical option for people, which it is not. A water bank is in place that covers a small area within the boundary of the rule but outside of this program, finding someone willing to sell a senior water right is not an easy task.

Commenter(s)

Cle Elum Roslyn Chamber of Commerce

Response

See response to Comment #275.

Comment # 277

The section of the SBEIS titled "Quantification of Costs and Ratios" states its purpose is to "evaluate whether... the proposed rules could cause businesses to lose sales or revenue." Yet, no analysis or discussion is included regarding lost builder sales due to the inability to comply with the rule in the majority of the affected area. Nothing was included about lost sales of flooring, lumber, tools, furniture, or appliances resulting from this rule.

Additionally, no consideration is given to lost real estate sales by local real estate firms or lost revenue from loans for banks and other lenders, and lost revenue from real estate purchase transactions from title companies. No discussion was included regarding construction subcontracts lost, or architectural services that won't be required.

Finally, nothing is presented illustrating the potential layoffs that may occur as a direct result of the affect on businesses that serve the land development industry and the cost of those layoffs in lost revenue to other service and retail business. Clearly, all of the aforementioned have the potential to be affected by this rule but none were presented or discussed.

Commenter(s)

Kittitas County

Response

See response to Comment #259.

Comment # 278

Most construction companies are small businesses. Under the proposed rules, their ability to construct new homes will be significantly restricted, thus undermining their revenues. If the construction company cannot find or afford water, the business would have to close its doors and layoff its employees.

Commenter(s)

Holmquist, Senator Janea

Response

Please see the response to Comment #259 and the summary response on page 3.

Comment # 279

The SBEIS ignores the metering requirement of the proposed rule. This places a universal requirement on all users of groundwater to install meters. Ecology estimates these costs from $300 to $750 for installation of each small to medium water system. On top of these installation costs will be the ongoing metering costs of maintenance and reporting which the SBEIS does not account for. Small businesses that use groundwater, or install residential wells as a part of their business (land development and construction) will be required to install meters. However, there is no analysis of the impact to small business because of this additional cost.

Commenter(s)

Kittitas County Attorney

Response

All water users in the Yakima River basin are already required to measure their water use under WAC 173-173, adopted in 2002. This is the baseline.

> "WAC 173-173-040(2) The department must enforce the requirement to measure water use for the following types of water use:
>
> (a) All new surface water permits;
>
> (b) New and existing surface water rights where the diversion of any volume of water is from waters containing depressed or critical salmonid stock;
>
> ***(c) New and existing ground water rights where the department concludes that the withdrawal of any volume of water may affect surface waters containing depressed or critical salmonid stock;***
>
> (d) Existing surface water rights where the diversion volume exceeds one cubic foot per second."

Comment # 280

The SBEIS ignores many other costs associated with the proposed rule, including the decrease in land value, and the ripple effect that the rule has on the entire Upper Kittitas County economy. Kittitas County is currently bracing for land owners affected by the rule to petition the county to request a reduction in the assessed value of affected property. The County has posted links to the petition on the Kittitas Groundwater Moratorium website. The effects of the proposed rule will likely impact property values in Upper Kittitas County, most significantly in the areas where water is currently not available from the Suncadia water bank:. Any decrease to value of land purchased for construction and development in Upper Kittitas County should be counted as a cost to small business in the SBEIS.

Commenter(s)

Kittitas County Attorney

Response

Please see response to Comment #259 and the response summary on page 3.

Comment # 281

The SBEIS avoids extensive evidence that small business is heavily impacted by the rule. As a result of the emergency rule, small land development and construction has ground to a halt in upper Kittitas County.

There has been extensive feedback on the proposed rule's effect on business. Ms. Tokarsyck, the Executive Director of the Cle Elum Chamber of Commerce, estimates that 80% of land development is now out of business, and that other business in the area is directly impacted from this decline. Mr. Clarke, representing the Central Washington Home Builders Association, reports "devastating impacts on the development community, landowners, and economy in Kittitas County."

Additionally, many people spoke at the public hearing on July 28th regarding the groundwater moratorium's economic impact on the region. Included was Mr. Senger, of Senger Construction, who followed up his comments at the public hearing with a letter where he reports that the groundwater moratorium canceled all but one of his construction contracts, and forced the firing of eight full time employees. Not one person at the public hearing stated that business was not impacted as a result of the rule.

Commenter(s)

Kittitas County Attorney

Response

The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The decline in real estate prices is well documented to be a consequence of the national and world wide financial crisis. Please also see the response to Comment #259 and the response summary on page 3.

Comment # 282

Ecology is required to consider the economic impact to the area. The Cost Benefit Analysis needs to adequately consider the cost on individual landowners and the economic losses of the community.

Commenter(s)

Sanders, Jim
Grinnell, Roy

Response

Ecology has modified the Cost Benefit Analysis in response to comments. The response summary provides further information on the requirements of the Administrative Procedures Act and Regulatory Fairness Act and describes the scoping of the analyses.

Comment # 283

The Kittitas County Board of Commissioners strongly objects to the fundamental conclusion set forth in the Preliminary Cost Benefit and Least Burdensome Analysis (PCBLBA) that the "benefits of the rule are greater than the costs." On its face, this is a ridiculous statement and the PCBLBA clearly does not support such a conclusion other than through flawed analysis, clear omissions, and misrepresentation.

Commenter(s)

Kittitas County

Response

Please see the response to Comment #259 and the response summary on page 3, which provides further information on the Administrative Procedures Act and the Regulatory Fairness Act requirements.

Comment # 284

The PCBLBA is fatally flawed and insufficient as it does not take into consideration any of the following:

- Losses in property value as a result of this rule.
- Ongoing cost of metering including maintenance and reporting.
- Cost of inflation over the 20-year horizon.
- The fact that water is not available in most areas of Upper Kittitas County even with the creation of the Upper-Kittitas Water Exchange.
- Development costs associated with creating the development benefits outlined in the analysis are not considered as offsets.
-

Commenter(s)

Kittitas County

Response

Please see the response to Comment #259 and the response summary on page 3, which provides further information on the Administrative Procedures Act and the Regulatory Fairness Act requirements.

Comment # 285

The Preliminary Cost Benefit and Least Burdensome Analyses has some problems:

- Uses the wrong baseline.
- Alleged benefits of adopting the rules are non-substantive and unrealistic. Salmon restoration projects are benefits of grant funding, not the proposed rules, and the proposed rules will not reduce the risk of litigation.
- Ignores pre-existing protections of instream flows.
- The actual benefit of the proposed rules is near zero; and, therefore, the net costs of the proposed rules exceed the net benefits.
- This report implies no water storage projects will be completed within the next 20 years. Water storage's positive impact is not mentioned.

Commenter(s)

Holmquist, Senator Janea

Response

Please see the response to Comment #259 and the response summary on page 3, which provides further information on the Administrative Procedures Act and the Regulatory Fairness Act requirements.

Comment # 286

On the cost side of the equation, there is a failure to account for many costs associated with the proposed rule. These costs include the decrease in the value of property in Upper Kittitas County, the ongoing costs of metering, and the impact that the rule has on the economic health of Upper Kittitas County.

Commenter(s)

Kittitas County Attorney

Response

Please see the response to Comment #259 and the response summary on page 3.

Comment # 287

The moratorium has had a huge economic impact. Not just on our private folks here in Kittitas County. It's had a huge impact on the county itself and the state.

We are not realizing the sales tax revenue that we could have with the construction that could have been developed here. So it's affecting all of us. How they are saying that there is no impact or very little impact, I question that as well.

Commenter(s)

Warnick, Representative Judy

Response

The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The housing and economic crisis is well documented to be a consequence of the national and world wide financial crisis. Please see the summary response on page 3.

Comment # 288

As an innocent property owner caught in the middle, I can't begin to tell you about the stress this has put on me and my family. I didn't enter into this as a speculative venture for the future. This property was my retirement dream and my retirement savings. At our age, we don't have the time or ability to financially recover from the negative impact of this decision.

Commenter(s)

Stougard, Jerry

Response

Thank you for your comment. Ecology regrets that a more moderate solution was outside our authority. Litigation against junior ground water users by senior water users was a real risk as ongoing development increased impairment of their water rights. How much greater would have been the financial impact to you and your family once your dream home was complete if a court order required you to curtail your water use whenever water supplies were inadequate to meet the needs of these senior water users? The rule protects senior water users from further impairment and provides a method for acquiring a reliable water supply for new development.

Comment # 289

My husband Del, age 70 and myself, age 67 are only two people of many people in Upper Kittitas County that are directly affected by the Washington State Department of Ecology, Ted Sturdevant, and Gov. Gregoire's decision to cut off our water source(s) to land we own. We personally own 16 acres of land in Upper Kittitas County.

In the past 40 years, we purchased said property, saved our money, built a home, subdivided into 3-acre parcels, developed a road, and added a well to each parcel as we could afford. We were advised to drill the wells in order to increase the marketability of each parcel and assure a potential buyer the water was available. Each well had the original water well report filed with the Department of Ecology as they were drilled. At no time were we notified that our efforts and monies spent were in peril of being wasted or lost.

Our property has gone from investment and our retirement to worth no value at all. We cannot sell it, build on it, or use it for any purpose without water.

A year ago, we sold one 3-acre parcel on contract. Said payments, plus some of our savings are used to supplement our 92 year old mother's care in an assisted home. On July 12 we received a letter from the buyers attorney stating that because of the "moratorium on new exempt wells"

the buyers have decided to allow the property to be foreclosed. Not only can we not sell our remaining lots, we are getting this one back.

Commenter(s)

Hamberlin, Del and Dianna

Response

Thank you for your comments. See the response to Comment #189. Ecology acknowledges that this rule requires new users to mitigate for their consumptive use so as to not impair senior rights. If new users access a water right established prior to July 16, 2009, the rule does not affect them.

Comment # 290

The CBLBA does not address the fact that the proposed rule is most likely to hinder land development, not help it. The emergency rules have effectively stopped land development in Kittitas County. Market value assessments are likely lower than prior to the proposed rule. Yet no reason is given why the proposed rule will act in a different way. Instead, there are unfounded assumptions that "this development is 80 percent more likely to occur under the rule than without the proposed rule" without giving any rational basis for this assumption. The CBLBA ignores reports that land development has halted by 80% since the groundwater moratorium.

Commenter(s)

Kittitas County Attorney

Response

Thank you for your comment. Ecology disagrees that land development has effectively been stopped by the emergency rules. By December 2010, Ecology made water budget neutral determinations for permitted and permit-exempt uses that allow a total of 1260 homes. Please also see the response to Comment #293.

Comment # 291

In order to perform a cost benefit analysis, there must be an estimate of future costs. This means that there must be: 1) an estimate of what those costs are in present cost dollars, and 2) those present costs must be adjusted for inflation.

When adjusting present costs for inflation, costs typically rise over time - if a bottle of water costs $1 today, then one year from now it will cost more because of inflation. Economists typically use a simple equation to calculate how to adjust present costs for inflation. It is:

$$\text{Future Costs} = \text{Present Costs} \times (\text{Inflation Rate})^{\text{time period}}$$

This equation takes into account the fact that a cost 20 years from now will be inflated much more than a cost a year from now because it is a longer time period in the future. Ecology's cost analysis fails to follow this simple formula and treats any future cost equally, regardless of whether it is one year or twenty years from now. For an economic analysis to assume that

interest rates will remain static over 20 years is flawed and violates co=on sense. See the table below for an example of Ecology's present costs adjusted for inflation vs. costs adjusted for inflation that take into account how far in the future the costs are incurred.

Year	Present Value	Ecology's Adjusted Cost	Correct Adjusted Costs
1	1	1.02	1.02
2	1	1.02	1.05
3	1	1.02	1.08
4	1	1.02	1.10
5	1	1.02	1.13
6	1	1.02	1.16
7	1	1.02	1.19
8	1	1.02	1.21
9	1	1.02	1.24
10	1	1.02	1.28
11	1	1.02	1.31
12	1	1.02	1.34
13	1	1.02	1.37
14	1	1.02	1.41
15	1	1.02	1.44
16	1	1.02	1.48
17	1	1.02	1.52
18	1	1.02	1.55
19	1	1.02	1.59
20	1	1.02	1.63
Total:		20.49	26.07

Commenter(s)

Kittitas County Attorney

Response

The discount rate chosen by Ecology uses a "real" rate that factors in inflation. Regardless of discount rate you choose, it does not have the ability to change the outcome that the benefits outweigh the costs. If the benefits exceed the costs today, they also exceed the costs in 20 years.

Comment # 292

In the "Benefits Summary," Ecology asserted that $4,032,953 in benefits from salmon restoration projects would be enjoyed because of the proposed rule. I disagree. These benefits exist because the State has already invested in them. This figure should be discounted because this is not a benefit of the proposed rules, rather of grant funding.

Instream flows for salmon and other fish are already protected. If instream flows fall too low, then junior water right holders' water allotments will be prorated, ensuring proper flow, and thus preserving the benefits of the salmon restoration projects. Therefore, neither the State's investment in the restoration projects, nor protecting instream flows are direct benefits of the existing and proposed rules.

Commenter(s)

Holmquist, Senator Janea

Response

To continue to deplete streamflows would mean those investment dollars would go unrealized. Stopping added withdrawals to the streams from the proposed rule means those investments can be realized. This is a benefit of the rule.

Comment # 293

The Cost Benefit Analysis creates a false baseline based on Ecology's presumption of future litigation relating to groundwater. While we agree that risk of litigation over exempt groundwater withdrawals exists under the pre-moratorium status quo, such litigation is in fact hypothetical. The correct baseline is not the emergency rule, or the hypothetical litigation baseline, but the pre-moratorium situation regarding groundwater use.

Commenter(s)

Realtors and Home Builders Associations

Response

Thank you for your comment. The risk of litigation is not merely a hypothetical risk. Court actions to cease water use by post-1905 water users have been made by Roza Irrigation District, and appeals of Ecology's ground water permit decisions by the Yakama Nation and USBR are not hypothetical. Absent state action to manage continuing ground water use, and improve water supply for the proratable users, Ecology's assessment is that litigation to bring ground water users into the surface water adjudication is high once the nearly-finished USGS ground water study is released. The preview presentation of the study results presented in Yakima and Ellensburg during October 2010 indicate that ground water pumping is depleting approximately 200 cfs basin-wide and approximately 140 cfs at the Parker gaging station.

Comment # 294

Ecology also claims almost $150 million in litigation risk reduction. This is entirely speculative. Even with the proposed rules, the State and water users are still exposed to the same litigation risk.

The alleged benefits of adopting these rules I found to be very non-substantive and somewhat unrealistic. For example, the salmon restoration projects are benefits of grant funding, they are not benefits of these proposed rules. And the proposed rules will not eliminate the risk of litigation.

I think the actual benefit of the proposed rules is closer to zero, and therefore the net costs exceed the net benefits.

Commenter(s)

Holmquist, Senator Janea

Response

The proposed rule does not eliminate the risk of litigation or lawsuits. The proposed rule greatly reduces the risk of litigation to a very large group of ground water users, not just the new water users. Please also see the responses to Comment #293, and to Comment #292 regarding salmon restoration. Consequently, the benefits are calculated to be substantially greater than the costs.

Comment # 295

The entire report ignores the fact that Ecology, the Governor, and the Legislature are working to realize water storage solutions meant to relieve pressure on Upper County and other Yakima River Basin water users. Water storage's impact should have at least been mentioned in this report.

Commenter(s)

Holmquist, Senator Janea

Response

Thank you for your comments. Whether a water storage project occurs at some future date is beyond the scope of this rule and would be speculative. It would therefore have been inappropriate to include in the economic analyses for this rule.

Comment # 296

The calculation of the benefits of the proposed rule is based upon a flawed assumption. The CBLBA states that the overwhelming benefit of the proposed rule is based upon an estimate of development right values (DRV) for the purposes of Transfer of Development Rights (TDR) program. The CBLBA assumes that without the proposed rule, all new residential land use development will be subject to litigation and that therefore the entire development right value (DRV) is the benefit of the proposed rule. There are several flaws in this analysis.

A DRV is defined as "a landowner's property right to use and subdivide a lot to the extent allowed by zoning regulations." The equation for calculating the development right value is:

[Market-value Assessment] - [Current-use Assessment] = [Development Value]

A DRV is transferred between two sites: a sending site that sells the DRV, and a receiving site which purchases the DRV. The receiving site will purchase DRVs in order to develop the receiving site property further than the receiving site zoning will allow. The values for the market value assessment and the current use assessment are from January 2008 data from the Kittitas County Assessor's Office. The ability to install an exempt well with or without the risk of litigation over water rights is very different from a DRV.

First, the transfer of development right value estimate is something entirely different from the value of a water right or water budget neutrality. The DRV is based on a number of factors - only one of which is the utilities available to a property. The DRV are based on these factors: 1) The characteristics of the property (access, available utilities and infrastructure, views, etc.), 2) the property's physical location, and 3) the availability of development rights for purchase.

For Ecology to use the entire development right value when only a small portion might be impacted by the proposed rule is inherently flawed. Additionally, the cost estimates developed to allow for the sale of development rights is different from ability to install an exempt well. To use one for the other is to compare the cost of apples and oranges.

Second, the CBLBA ignores the fact that the DRYs are from January 2008, almost one and a half years before the proposed rule. Therefore, the 2008 development right values are those that include the risk of adjudication litigation. Put another way, the 2008 development right values are for land with permit-exempt wells without any purchase of senior water rights, i.e. land that has the risk of water right litigation. Therefore, the 2008 development right values reflect that litigation risk.

For Ecology to assess the presumed benefit of the proposed rule, the analysis would have to be performed for the current market value and current use assessments (2010 values) in order to compare to the higher litigation risk 2008 development values. The assumption that the development right value falls to zero without the proposed rule is illogical. The TDR Report was able to calculate a 2008 development right value without the proposed rule.

Commenter(s)

Kittitas County Attorney

Response

The Cost Benefit Analysis recognizes the costs resulting from the rule. It also recognizes there are significant benefits from keeping landowners and the community in general out of protracted lawsuits or an adjudication. Additional benefits include protecting existing rights and investments in habitat restoration. The impacts to the economy from the decline in the real estate industry are not limited to Upper Kittitas County, Kittitas County, the Yakima basin, or even the State of Washington. The decline in real estate beginning in the fall of 2007 is well documented to be a consequence of the national and world wide financial crisis. Please also see the summary response on page 3.

Values for undeveloped or underdeveloped properties are sensitive to their development potential. If the development potential is lessened, or the cost to achieve the potential is increased, the value of that land to a developer would be lessened. The value of the property in question, *absent speculation of the potential for a water right*, is the value of the land. Once a water right is established or obtained by purchase, that property *may have* more value but it depends on the both the purpose of use and the priority date of the water right. The DRV is used to estimate the potential that would be realized if water rights are acquired legal ability to develop is not in question.

Comment # 297

The Cost Benefit and Least Burdensome Analysis (CBLBA) is not a true economic analysis, misinterprets and misuses development right values, and is directly at odds with Ecology's assumptions in other parts of the rule-making file. The County feels that the CBLBA fails to meet procedural rule-making requirements as it grossly misuses and misstates the rule's benefits, and fails to account for many of the rule's costs. The County asks that it be redone to

produce an honest Cost Benefit and Least Burdensome Analysis that addresses the true benefits and costs of the rule.

Commenter(s)

Kittitas County Attorney

Response

Thank you for your comments. Ecology has completed a cost benefit analysis for the proposed rule in accordance with the Administrative Procedures Act. Please see the response to Comment #259.

Comment # 298

The statement under the heading "Reason for taking action" on page 2 of the PCBLBA is a complete misrepresentation and omits pertinent facts. While it is well known that a petition was submitted to Ecology by a group of citizens known as Aqua Permanente, the parties (Kittitas County and Ecology) did not agree to terminate the MOA signed in April 2008 (misstated as November, 2007 in the PCBLBA). In fact, it was Ecology who withdrew from the MOA, not Kittitas County.

Ecology's withdrawal was indeed a response to our questioning of Ecology's authority to impose many of the aspects they included in the proposed rule of January 2009. However, it did not occur as quickly or as simply as presented in the PCBLBA. As a result of the County's questions, further negotiation between the parties took place at Ecology's request. Reaching what we believed was an impasse on a few key points, Kittitas County requested an Official Opinion from the Washington State Attorney General's Office. Specifically, we were concerned as to whether or not Ecology had the authority to curtail the exemptions clearly outlined by the Legislature in RCW 90.44.050, as the proposed rule was attempting to limit exempt wells from 5,000 gallons per day to significantly less.

When notified of our intent to provide questions to the State Attorney General, Ecology threatened to impose a moratorium in Upper Kittitas County if we did not agree to rescind our request. As stated publicly, they were concerned with how the opinion may affect agreements they currently had in place in other counties. The County refused to rescind our opinion request and Ecology followed through on their threat to impose the moratorium currently in place today.

As an aside, the Attorney General published his response to our request in AGO 2009-6 which upheld the County's position regarding Ecology's authority to curtail the exemption. This is a true and accurate representation of the "Reasons for taking action."

In the PCBLBA, under the heading "Coordination between Ecology and Kittitas County", subheading "Baseline", Ecology makes the statement that "until July 16, 2009, the County issued building permits and land division approvals without requiring mitigation." This is a true and accurate statement, but not unique to Kittitas County. It further states, "Ecology believes that continuation of this baseline would result in litigation between surface water users and ground water users within the 20-year horizon for this cost benefit analysis." Whether this concern for potential litigation is accurate, is again not unique to Kittitas County.

Commenter(s)

Kittitas County

Response

Ecology and the County obviously have different opinions as to the reasons and actions that led us to this point. Ecology has documented its understanding of them in the description of the reasons for taking action. Please see the summary response on page 3.

Comment # 299

The Least Burdensome Analysis ignores an obvious option. It concludes that it has only three options: 1) complete closure of groundwater extractions, 2) no new rule, or 3) the proposed rule. There is another alternative. RCW 90.54.040(3) directs Ecology to recommend statutory changes to the Legislature whenever statutes related to water resources appear to be ambiguous, unclear, unworkable, unnecessary, or otherwise deficient. When the only alternatives proposed by the LBA are extremes, either shutting down all groundwater extractions or doing nothing, it is a flawed analysis.

Commenter(s)

Kittitas County Attorney

Response

Thank you for your comments. Ecology has consulted with the Legislature on statute changes related to water rights and water right management and will continue to recommend improvements to the water code in the future.

Hydrology and the Upper Kittitas Ground Water Study

Comment # 300

In all other areas of the state's purview, the Ecology requires measures to mitigate the increased run off caused by development, but in Upper Kittitas County, exempt wells = water consumptive development that decreases runoff or surface water?

Commenter(s)

Griswold, Steve

Response

Development, depending on its intensity, may increase or decrease the volume of run-off, and just as importantly, re-times the run-off. The use of permit-exempt wells associated with development does not increase the volume of run-off; the consumptive portion of the ground water use reduces the water supply.

Comment # 301

There's not enough information actually demonstrating the linkage between the use of water under the ground water exemption, and if those withdrawals affect stream flows.

Commenter(s)

Grinnell, Roy

Response

We agree there is a lack of hydrogeologic information in Upper Kittitas County. Ecology executed a joint funding agreement with the USGS on November 29, 2010 to conduct the Upper Kittitas Groundwater Study (also known as the Western Kittitas Groundwater Study). Kittitas County, Ecology, and other parties worked together to define the objectives for the ground water study. These objectives are to: (1) define the hydrogeology of the study area, (2) provide information regarding groundwater occurrence and availability, (3) describe the potential extent of groundwater and surface water continuity in the study area, and (4) determine the extent of potential impairment resulting from well use.

Comment # 302

If we've lost that important distinction between surface and ground water, then the question is, "Do exempt wells diminish water rights?" If wells diminish surface water, why does the city of Tacoma have well fields (multiple wells) above the Howard Hansen Dam, (a city water reservoir)? Same question for the Roza irrigation wells? The argument that wells diminish surface water doesn't hold water when objective reasoning is applied.

Commenter(s)

Griswold, Steve

Response

See response to Comment #301. Kittitas County, Ecology, and other parties worked together to define the objectives for the ground water study.

Comment # 303

Have you or Tom Ring or any else been down there [underground] to see where the water comes from and where it goes? Tom Ring stated everywhere there is·ground water, there is a connection to surface water. Well, thank God that some of that water goes into the ground. If it did not, what would Tom Ring do with it all.

Commenter(s)

Geiger, Jesse

Response

Groundwater studies are performed by examining the aquifer characteristics, mapping the aquifer's water levels, and calculating the recharge to the aquifer. One does not need to literally see into the aquifer to know the flow amounts and directions. These are among the things the USGS Yakima Basin groundwater study has examined and what the new Upper Kittitas ground water study will look at in more detail.

Comment # 304

The reality is that sure, it's probably there's a lot of water connected, but does it matter? We are assuming impairment because it is connected. What we need to understand is not if there a connection, but what is the hydrogeology? How is this impacted? What is the recharge? We haven't really looked at the recharge. We need a real look at the science.

Commenter(s)

Hinkle, Representative Bill

Response

Ecology is not assuming impairment only because of the connection to the Yakima River. It is because ground water is connected to the Yakima River which is also over-appropriated in dry years and to several tributary streams that are over-appropriated most years. Impairment of the water rights that rely on those sources for their supply is the basis for Ecology's concern.

An Upper Kittitas County ground water study is necessary (see response to Comment #301) because the current United States Geological Survey (USGS) ground water study of the Yakima River Basin does not study or report on the Upper Kittitas County hydrogeology in sufficient detail to be useful in water use planning efforts and decisions. The results from BOTH of the studies will have a major bearing on how water is managed in the entirety of Kittitas County in the future. The rule is an interim rule until completion of the Upper County groundwater study, at which time the rule will be reviewed and maybe revised, as part of a long-term management program, WAC 173-539A-010.

Comment # 305

You need to show proof that all this ground water is being recharged from the rivers and lakes and that there is a connection to the loss of so much irrigation water.

Commenter(s)

Geiger, Jesse

Response

There is no technical merit to the general premise that pumping ground water will not affect surface water in the Yakima basin. We agree there is a lack of hydrogeologic information in Upper Kittitas County. Ecology executed a joint funding agreement with the USGS on November 19, 2010 to conduct the Upper Kittitas Groundwater Study (also known as the Western Kittitas Groundwater Study).

In addition, the Yakima River Basin USGS groundwater study and computer model was commissioned by Ecology, the Yakama Nation, and the Bureau of Reclamation in a 1999 Memorandum of Agreement (MOA) related to groundwater management in the Yakima Basin. The preliminary results of this comprehensive groundwater study presented by the USGS on Sept. 21, 2010, provide a clearer picture of the significant interaction between surface water and groundwater in the Yakima River Basin.

Comment # 306

From studies in other areas, it has been concluded that ground water is ground water and is not coming back up to the surface unless it is pulled back up by a pump. This means that the downstream surface water users are not being impacted by our using ground water.

Commenter(s)

Vincent, Betty

Response

The preliminary results of the Yakima River Basin groundwater study and computer model presented by the USGS on Sept. 21, 2010, provide a clearer picture of the significant interaction between surface water and groundwater in the Yakima River Basin.

Comment # 307

In my opinion there is just as much, if not more evidence which supports more well drilling into ground water supplies for home use where the majority of that water will return to surface water systems and improve stream flow, surface water supplies, and wild life habitat.

Commenter(s)

Lewis, Gary

Response

In general, groundwater aquifers feed the Yakima River and its tributaries year round. Groundwater withdrawals remove water from an aquifer that would otherwise naturally discharge to stream flows relied upon by senior surface water right users and instream flows for fish. While Ecology recognizes some return flow for domestic and irrigation use within the rule, there is a consumptive component to each. This consumptive use depletes an already over-committed water supply. Shifting water from groundwater to surface water within the hydrologic cycle and retiming discharge does not produce net gains on the overall water budget.

Comment # 308

Now, consider the possible results of a water study that does not support the claim that exempt wells are negatively impacting senior water rights holders and instream flows, etc. in the Upper Kittitas County area. It's possible since we have the highest recharge rates in the Yakima Basin area and most water pumped out of exempt wells is returned to the ground through septic systems and outside watering.

Commenter(s)

Schoon, Karla

Response

See response to Comment #307.

Comment # 309

What's the relative annualized average volumes of water under review, surface water flow, aquifer size, well extractions?

On the back of an envelope, if we take the thousands of wells that have been drilled at 5,000 gallons per day or whatever the allocation is versus the amount of acre-feet of water that's flowing down the Yakima River and its tributaries every day. What percent do the wells extract? I suspect from preliminary conversations with some scientific people, it's a relatively small percentage.

Commenter(s)

Mirly, Ken

Response

The Yakima River Basin consists of eight major rivers and numerous smaller tributaries covering about 62,000 square miles. The drainages combined produce a mean annual unregulated streamflow of approximately 4,055,000 acre-feet (4.1 million acre-feet). The mean annual precipitation over the entire basin is approximately 8.7 million acre-feet. In the context of the entire Yakima basin water management scheme, the upper Kittitas issue is a fairly small one when measured by volume, around 1000 acre-feet of consumptive use under a pre-1905 water right would offset the impact of many years of further residential development.

The upper Kittitas area contains a complex assortment of glacial and alluvial sediments and bedrock units. Several objectives of the Upper Kittitas Groundwater study are 1) to provide information regarding groundwater availability and 2) to define the hydrogeology of the study area (this would include delineating aquifer size).

Comment # 310

As Tom Ring from the Yakama Nation pointed out, ground water and surface water are for the most part connected. As he pointed out to me many years ago, ground water usually comes from some place and it goes somewhere else.

Commenter(s)

Suncadia

Response

Ecology agrees. Results from the on-going USGS study also indicate that groundwater and surface water in the Yakima Basin are connected.

Comment # 311

Pumping water from wells and consumptively using that water, as a matter of basic hydrogeologic principles, reduces surface water supplies. Mass is conserved. Producing aquifers don't actually produce water, they simply convey it from recharge area to discharge area. That applies whether we are talking about gravel, bedrock, shallow wells, deep wells.

You don't need to do a study to determine that basic fact. A study will allow you to determine how long it takes for those effects to be felt and where they are felt, which stream a well will affect.

Commenter(s)

Yakama Nation

Response

Ecology agrees that mass is conserved. See response to Comment #307. Several objectives of the Upper Kittitas Groundwater study are to 1) describe the potential extent of groundwater and surface water continuity and 2) determine the extent of the potential impairment (whether it be neighboring wells or stream flows) resulting from well use.

Comment # 312

The governor's concept of ground water and surface water does not apply to control low river systems. Water reservoirs provide for the strong flows in summer, I think May and September somebody said, that irrigation is done, they are needed for basin farmers. Without them, the current level of allocation would be impossible.

Senior water rights prior to 1917 would have been based on natural river flow because there were no reservoirs. The reservoirs provided additional water during the growing season. So thank God for the federal funding that we all paid for.

The reservoirs and the strong river flows provide inflow into ground water that would otherwise be outflow during low flow periods of a natural flowing river. Natural resources management and the environmental department states during high flow periods, ground water recharge tends to occur through the riverbed, whereas ground water often contributes to low flow recharge. In other words, the fall, the river's down, it might start drawing ground water.

They also state a possible advantage of reducing the water table prior to the rainy season is that it may increase the potential for ground water recharge. Again, I hate to get into the science, but that's probably something we will find out with a real study.

These reservoirs serve all Washingtonians from the source to the Columbia River. Without them, lower ground water tables would mean deeper and fewer wells from the summit to the Columbia River. Lower river flows in summer would make irrigation impossible except for the most senior water rights holders, as you said.

Cities on the Yakima River, such as Roslyn, could not be sustained. The conclusion I draw from that is that there's a positive impact of ground water on river flow, but it's only during low water conditions.

Since the reservoirs ensure a high flow during the irrigation period, there is no negative ground water impact on the Columbia River and other controlled-flow river systems in Washington.

I believe that the successes that you stated, that you've done already in Washington, were on uncontrolled rivers. This means there is equitable sharing of the federally-funded reservoir water as there should be. We all paid for it.

Commenter(s)

Sanders, Jim

Response

See response to Comment #437.

Comment # 313

I have a small farm on Upper Peoh Point Road on which we grow hay using junior water rights from the KRD canal. It also has an old farmhouse with a domestic well dating back many years. I am very confused regarding this moratorium even though I have followed the history and reasoning documented in both the Tribune and Daily record. Perhaps you could answer my questions, give me clarification, consider my reasoning, and make this thing comprehensive in the big picture. This is what I understand – please correct me if I am wrong.

There is a fear held by senior water rights holders that a proliferation of exempt wells in the Upper County would adversely affect the withdrawal of their water supply. This fear is only generated by exempt wells in Upper County only, and that the other basins that contribute to the Lower Yakima Basin do not have the effect of causing fear of loss.

I was taught in school that water is never really lost, that it just moves in a cycle. For instance: the water that is used for my hay field is recharging the ground supply, running off as surface water that eventually goes into the Yakima River as does the recharged ground water as it reaches its holding capacity. Some of this irrigation water is retained by the crop and is exported out of the County as the moisture content of the hay is around 10% of the weight. So it is a very tiny portion of the water that is put on the fields that ends up going out of the county.

The same applies to any other livestock or plant material. It is simply recycled through the material and again ends up in the Yakima River with again a very small proportion retained as a sort of reservoir.

This is true for all domestic use of water too. It is simply recycled and ends up in the Yakima whether it is used for gardening, washing, toilets, etc. If you were to make a claim that there was a fear of pollution of the Yakima it would make more sense than claimed that the water was being “consumed”

This portion of water that is exported from the Upper County in the form of hay exports etc. is undoubtedly balanced out with the imports of liquid foodstuffs for human consumption that again would end up in the Yakima River.

Since there has never been a study done on an aquifer in Upper County, we can at least put our imaginations to work. Imagine an underground lake, with its deepest point being along the Yakima and Cle Elum Rivers, that it gradually thins out and laps up against the ridges on either side and is replenished on the west side by Snoqualmie.

Now imagine what would happen in a decade long drought. It is no longer being recharged at full rate by Snoqualmie; the exempt wells along the edges of the aquifer are the first to fail as

the water table shrinks. The last wells to fail would be the ones at the deepest portion of the aquifer and the down river wells. So why is there a fear that Upper County wells would adversely affect Lower County wells when in effect the Upper County wells are acting only as a temporary holding tank for the flow into the Yakima River?

Using imagination again I try to put myself in the other person's shoes. Imagine that there were 100 new exempt wells put in use in the hills above my farm. I would indeed have the fear that I could run out of water but could take solace in the fact that the new wells would run out before mine.

Imagine also that I am a senior water rights holder in the Lower Valley and have for many decades relied on the waters of the Yakima to irrigate my fields and orchards. I too might feel threatened but perhaps more from irate citizens of the Upper County who perceive the rights of the senior holders to deny and withhold any chance of economic growth in the Upper County. Such imbalances and misuse lead to consequences that are indeed hard to imagine.

Commenter(s)

Ceraold, Frances

Response

The comment incorrectly assumes the *only* water consumed growing a hay crop is that water in the hay shipped out of the basin. The comment correct states water in the hay when it is shipped out of the basin is consumptive with respect to the Yakima River water supply. However, the largest consumptive use associated with a hay crop in the Upper Kittitas area is evapotranspiration – water losses to the atmosphere as a consequence of plant growth and evaporation of applied water off the soil and other watered surfaces.

Atmospheric water may then form clouds and possibly rain to the east in the Blue Mountains or Rocky mountains. A well irrigated hay crop in the Upper Kittitas, consumes approximately 1.5 acre-feet of water per acre irrigated, no matter whether it's viewed from the perspective of a senior user or a junior user. That water is lost to the Yakima basin as surely as the water in the hay plant trucked to Seattle to be shipped to Japan.

Comment # 314

The waters in question in the area that my husband and I own are dammed. Without these dams, if a drought was to prevail, during times of growth (July thru Sept) or when the fish are spawning the farmers and the fish would be in great peril. These "storage tanks", paid for by us taxpayers, have allowed storage of water and controllable water in times of need for said growing periods and spawning. Without these dams the water would be not be available, having already passed them by and ended in the ocean.

Commenter(s)

Hamberlin, Del and Dianna

Response

The United States Bureau of Reclamation (USBR) manages the Yakima River under a formula governed by a 1945 federal consent decree. The Total Water Supply Available (TWSA), the governing calculation of water available in the basin, can be likened to a bucket that contains

stored water, which can be filled by return flows, snowmelt, runoff from rain, or even water conservation.

The USBR accounts for water by adding 1) natural flow 2)releases from the 5 storage reservoirs and 3) return flows from irrigation to meet diversion needs above the Parker Gage (just downstream of the Sunnyside Diversion dam) and meet target flows over Parker Dam. This water supply supports the $1.5 billion agricultural industry encompassing Kittitas, Yakima and Benton counties. The economic benefits of these farms are threatened when water supplies run short. The comment is generally correct by recognizing that if the 1.05 million acre-feet of storage capacity in the five major reservoirs wasn't available to use each July, August, and September, there would be far less irrigated land than is now in agricultural production in the Yakima Valley.

Comment # 315

If the water study had been done, we would likely find that there's 120 percent recharge of the ground water in the upper county. It's kind of preposterous for most of us who have been around wells and constructing things to think that there's not a lot of water here. There's a lot of water.

Your own hydrogeologist mentioned three times to Jay Manning before this was instituted, "Please don't do this because there's not the scientific substantiation to do it."

Commenter(s)

Hinkle, Representative Bill

Response

We agree there is a lack of hydrogeologic information in Upper Kittitas County. Still, there is no question that irrigators and the City of Roslyn with 100-plus year old water rights have had their water use prorated or curtailed during drought years. See the response to comments #301 and #307.

Comment # 316

I remember when they use to dam the Teanaway River off completely for irrigation the river was dry past Red Bridge Road and I don't know of anyone who had their well dry up. You could stop every well in the upper county from pumping water and you would not see one drop of water difference in the rivers.

Commenter(s)

Geiger, Jesse

Response

See response to Comment #307.

Comment # 317

The "ground water equals surface water" analogy some folks use to make their argument is the concept of a fish bowl full of marbles and water with in it. The marbles represent the ground water layer and the straw represents the well. When water is sucked out through the straw, the water in the bowl lowers. Anybody can picture it so it's a great sound bite that can be repeated often and emphatically. What they fail to add is that the well water is placed back in the bowl via the drain fields that are invariably associated with exempt wells. Once this is pointed out then the claim becomes that only a fraction of the water is returned to the ground to become, at some point in time, surface water.

In reality, the aquifers in any glaciated mountainous valley that has been formed like the east slope of the Cascades is nothing like a fish bowl full of marbles. We have lava flows on top of sedimentary folds, with faults complicated by andosite dikes, pyroclastic deposits and any number of highly variable ash deposits...and that's just the geologic plate tectonics issues. Add to that the climatic influence of massive ice age glaciers and floods the like we never seen in our lifetimes as the glaciers retreated and you can imagine how complex things are down below us. There aren't many neatly laid out horizontal layers of uniformly graded till that act like marbles in fish bowl. Instead picture a valley that has been bulldozed by a glaciers, flooded then inundated with landslides of epic portions on top of the pot hole style lakes left by the glaciers retreat. Our aquifers are more like underground reservoirs that may or may not have outlets that may find the way to the valley bottom. Pumping water out of them via wells is more likely to add to the water available to the Yakima River than it is likely to diminish it. Marbles in a fish bowl . . . seriously?

The assumption that all of the aquifers act like the marbles in the fish bowl and are directly connected Yakima River (which for the sake of the analogy would be a spigot in the side of the fish bowl) has problems. If that were true, all of the wells that are drawing water from an elevation above the spigot (Yakima River) would go dry in drought years.

The reason this doesn't happen and why we don't see water pouring out of the bottom of the aquifers along the banks of the river is that most of the aquifers are more like underground reservoirs that can be pumped all year long bringing what was locked up ground water to the surface and actually giving that water a shot at getting to the river. So in drought years, the senior water right holders are more likely to benefit from exempt wells being pumped to full capacity to add water to the surface than they are to prevent them.

Commenter(s)

Griswold, Steve

Response

See responses to comments #301 and #307. The comment misstates ecology's understanding of how aquifers in the Yakima Valley relate to surface water. Surface water and ground water are interconnected and that has management implications. The purpose of the USGS Yakima groundwater study and the new Upper Kittitas ground Water study is to better describe the aquifer systems their interaction with the rivers and streams. The rule will be in effect until the study is completed and then it will be revised as needed to reflect the study conclusions.

Comment # 318

In terms of obtaining more information about groundwater and groundwater use in Upper Kittitas County to better determine if such use is creating a water shortage for senior water right holders downstream, it seems there is a lot of information readily available from state and federal studies for Ecology and other water managers to base decisions on. How does Ecology reconcile information from other groundwater experts, such as the Washington State Ground Water Association, that have information contrary to Ecology's "lack of information" about groundwater use and the degree of impacts to surface water?

We believe taxpayer resources should only be spent on the Upper Kittitas County Groundwater Study if Ecology can document and reference other studies reviewed and why that existing scientific information is deemed unreliable or lacking in scope to the degree that water management decisions and scientific assumptions cannot be made without the full scope of the Upper Kittitas County Groundwater Study.

Commenter(s)

R&R Heights Land Company

Response

Kittitas County, Ecology, and other parties worked together to define the objectives for a further ground water study. (See response to comment #301.) As with any scientific study, there is an information-gathering phase, which includes compiling and documenting available data and collecting new data. Phases 1, 2 and 3 of the groundwater study includes tasks specific to data compilation (i.e., well drilling data, published literature) and collecting additional new data. All available information and data will be analyzed in developing a conceptual model of groundwater flow in Upper Kittitas County and estimating hydraulic characteristics of hydrogeologic units.

Comment # 319

This would have been a perfect year to do a study, 2010, with the water availability the way it was. It would have been a perfect year to study the recharge.

Commenter(s)

Warnick, Representative Judy

Response

You are correct. The year 2010 was not a water year in the Yakima Basin where USBR imposed pro-rationing. However regardless of water year conditions, there is still peak demand in late summer and fall on many of the tributary streams when supply in these tributaries decreases to the point that existing rights are not satisfied. The water year status (drought vs. not) does not control whether data will be useful in analyzing ground water and surface water continuity and potential impairment.

Comment # 320

A study, why even have a study? Are you going to stop people from drinking water, using water?

Commenter(s)

Merbs, Jerad

Response

The permit-exempt groundwater withdrawals in question are junior in priority to senior ground water and surface water rights and will be vulnerable to calls for water if impacts are demonstrated. This translates to future homeowners having to curtail their domestic water use. The City of Roslyn, many cabins and several church camps, all which hold junior surface water rights for domestic, community domestic, or municipal purposes were issued curtailment orders by the Yakima County Superior Court in 2001 and 2005.

The best insurance policy for junior water users is to obtain coverage under a senior water right (that pre-dates May 10, 1905). This will provide them assurance that their new groundwater use will not be curtailed during low water years. So yes, an Upper Kittitas groundwater study is necessary, and will provide information that is lacking about the groundwater resources in the bedrock areas of Upper Kittitas County.

Comment # 321

We need a true, accurate study done in Upper County of our surface and ground waters; volumes, recharge rates, impact from snow levels, rains, etc - not just "talk." Detailed studies and data would benefit everyone now and in the future.

Commenter(s)

Hoban, Mike

Response

See response to Comment #301.

Comment # 322

Who is going to conduct the study? Are those scientists, the people who do the study, are they biased? You know, here is BP buying all the scientists. There's always some big crooked scheme behind water or oil or some kind of basic need or staple that we have to survive.

Commenter(s)

Merbs, Jerad

Response

See response to Comment #301.

Comment # 323

Just considering the Yakima River Basin alone, significant evidence exists to suggest the greatest risk for exempt-well use to impact stream flows is not in Upper Kittitas County. The USGS examined 2001 ground water pumping in the Yakima River Basin and determined that:

> "Most of the pumpage in 2001 was in the lower part of the basin, especially in Yakima County, which is also the location of most of the groundwater rights, groundwater claims, and population. The least pumpage occurred in Kittitas County, the least populous county in the study area and the county with the smallest number of groundwater rights."

The study further concluded that all of Kittitas County was a minor user of groundwater in the Yakima River Basin, with only 3% of all groundwater pumpage. As the significant majority of the county's population currently resides in Lower Kittitas County, Upper Kittitas County, where this rule is proposed and a current moratorium exists, represents less than half of that same 3%.

If Ecology were truly concerned with potential litigation between surface water users and groundwater users it would seem to make more sense to address the issue where more significant use is occurring. Clearly, if Ecology's reasoning as stated is true, then the entire Yakima River Basin should be included in the proposed rule, not the area with the least amount of groundwater pumpage. In this instance, Ecology is blatantly ignoring clear scientific data.

Commenter(s)

Kittitas County
Kittitas County Attorney

Response

Ecology's rule seeks to address a specific and immediate situation where intense land use development is occurring near the headwaters of many tributaries of the Yakima River.

From 2003-2007, Kittitas County created thousands of lots in subdivisions on former railroad and forest land that had no prior water rights. Developing these subdivisions impacts the headwaters of the Yakima River, sensitive areas with critical habitat for resident and anadromous fish.

When considering land-use applications, the county is required to perform environmental review under the State Environmental Policy Act (SEPA) and to make sure water is available for the development under the state's land use subdivision law (Chapter 58.17 RCW) and the Growth Management Act. As part of SEPA review, Ecology submitted comments to the county on hundreds of land-use decisions, raising concerns about the potential environmental impacts to the watershed from new unmitigated water uses.

Consistently over the years, Ecology advised the county that large developments were not eligible to rely on the authority of the permit exemption to establish new ground water uses. In particular, Ecology pointed to the State's Ground Water Code (RCW 90.44.050) and a 2002 State Supreme Court decision (Campbell & Gwinn) that interpreted the permit-exemption for group domestic uses. Despite these large developments' intent to use water without the legal authority to do so, Kittitas County nonetheless granted land use approval to these developments.

Unlike many developing areas within the Yakima basin, the subdivisions approved in the Upper Kittitas are often situated far upstream of historically irrigated lands and their associated diversion, storage, and conveyance works. Opportunities to acquire and retire a water right are generally located some distance downstream. The result is an unmitigated stream flow

reduction between the location of the new subdivision and the location of the acquired water right that would serve as mitigation for the consumptive impact of the subdivision. These unmitigated flow reductions can harm fish and fish habitat. In basins like Big Creek, the Teanaway River, and Swauk Creek, it would also mean impairing senior rights during the latter parts of the irrigation season.

Comment # 324

If you want to investigate water problems, why don't you go to the west side where you have three million people sucking up water?

Look at the huge amount of water that goes to the Seattle side of the mountains from the Chester Morris water shed. We are getting the water from the other side of those same mountains and not anywhere close to a fraction of the number of users.

Commenter(s)

Merbs, Chad
Vincent, Betty

Response

Although Western Washington has a larger population, it also has more precipitation and does not share aquifers with Eastern Washington. Although Western Washington is not without water supply issues, which are the concerns of other rule-making efforts, those concerns must be dealt with separately from this rule.

The proposed rule addresses how pumping from aquifers diminishes stream flows relied upon by senior surface water right users and fish in the Yakima River basin and the information needed to make effective water resources allocation decisions.

Comment # 325

There is money appropriated to do a study when you won't even do the study. So I ask you, is there a chance that you might be wrong about the well use impacting the senior rights and stream flows?

Commenter(s)

Voice of Independence

Response

Ecology executed a joint funding agreement with the USGS on November 29, 2010 to conduct the Upper Kittitas Groundwater Study (also known as the Western Kittitas Groundwater Study). An Upper Kittitas County ground water study is necessary because the current United States Geological Survey (USGS) ground water study of the Yakima River Basin does not study or report on the Upper Kittitas County hydrogeology in sufficient detail to be useful in water use planning efforts and decisions. The results from BOTH of the studies will have a major bearing on how water is managed in the entirety of Kittitas County in the future. The rule is an interim rule until completion of the Upper County groundwater study, at which time

the rule will be reviewed and may be revised, as part of a long-term management program, WAC 173-539A-010.

Comment # 326

It's ridiculous to think that 30 or 40 thousand people in the upper county are sucking the aquifers dry.

Commenter(s)

Merbs, Chad

Response

Groundwater withdrawals remove water from an aquifer that would otherwise naturally discharge to stream flows relied upon by senior surface water right users and instream flows for fish. Groundwater withdrawals from wells in Upper Kittitas County intercept these surface water supplies where they begin at the headwaters of the Yakima River. New withdrawals of groundwater that would have otherwise naturally discharged at some point in time to the Yakima River system deplete an already over-committed surface water supply.

Comment # 327

Pumping water from wells and consumptively using that water, as a matter of basic hydrogeologic principles, reduces surface water supplies. Mass is conserved.

Commenter(s)

Yakama Nation

Response

Ecology agrees. Thank you for your comment.

Comment # 328

As Senior Water Right holders on Fowler Creek, we would like to voice our concern regarding the influx of the projected large developments in the Granite Creek area and numerous wells that have been drilled in this drainage area.

The five wells on Section 3 are pumping water to the Granite Creek development. (See the Well Log for their specific locations.) It would appear to us that the underground source of these waters are one and the same as those supplying Fowler and Peterson Creeks with their stream flows.

Further, there are two Class A wells that are located in the old Granite Creek creek bed. (This channel changed course in the 1980's due to extreme run-off and resultant downed timber.) This underground water source is also most likely a source of the Fowler Creek drainage area.

The well, located upon our property, was producing one gallon per minute when it was originally drilled. It appears to be more than coincidental that the output of this well has decreased as more and more wells have been drilled in our area.

We have been metering our irrigation water use since advised to do so by the Department of Ecology. As we and our adjacent property owner are the final senior water rights holders on Fowler Creek, it is most obvious to us that by the end of the irrigation season there is no excess of water flowing in the creek. For this reason, we firmly believe that any transfer of water rights out of the Fowler Creek drainage area would negatively affect the stream flow, our senior water rights, and negate water budget neutrality. It is our hope that, as part of your groundwater study in our Upper County, you will include the Fowler Creek drainage area.

Commenter(s)

Burchak, Dennis and Diana

Response

You have shared a personal story as to why a study is needed in Upper Kittitas County. Ecology agrees that a study is needed and has a joint funding agreement with USBR to execute this study. (See responses to comments #301 and #304.) The study will include estimating hydraulic characteristics for hydrogeologic units. These units may not be specific to a subbasin like Fowler Creek, meaning a bedrock unit may encompass a larger area than just Fowler Creek, or Fowler Creek may include several bedrock units. One of the objectives of the Upper Kittitas study is to determine the extent of potential impairment resulting from well use, as you spoke of in your comment.

Comment # 329

Population is another issue Ecology has not considered. Kittitas County has a very small population. There are two cities in Upper County, Roslyn and Cle Elum, both of which have a population of about 3000. These two cities are downstream from the sources of water in question. From the dams to the top of Snoqualmie Pass, the majority of the land is Alpine Wilderness, Forest Service Land or owned by the railroad. The balance, a very small portion is in private ownership and most of those lands are in areas that development is very restricted because of hilly terrain.

Upper Kittitas County's' use of the waters in question now and in the future is a drop in a bucket.

Commenter(s)

Hamberlin, Del and Dianna

Response

Ecology's rule seeks to address a specific and immediate situation where intense land use development is occurring in and/or near the headwaters of many tributaries of the Yakima River. (See response to Comment #298.)

Comment # 330

Granite Creek is a small basin that helps feed Fowler Creek and Peterson Creek. A large percentage of the water flowing in the basin is shallow, 5 to 50 feet deep. The best producing

wells are shallow. There is a well on the old bed of Granite Creek. If Granite Creek changes course again the water will run right through the well.

Commenter(s)
Adams, Floyd

Response
Thank you for your comment.

Comment # 331
It's funny when: we flood up here and the ground can't hold any more water all of a sudden nobody owns that water! It must be different water.

Commenter(s)
Geiger, Jesse

Response
Flooding is an unfortunate natural disaster and a normal part of a climatic cycle. Flood events contribute to immediate surface water supply and potentially to groundwater recharge. Responsibility for the costs of flood-related damage is not related to the ownership of the water.

All state waters are owned in common by the citizens of Washington, unless reserved by the United States. Water right holders do not own the water either – they own a right to the use of the water.

Comment # 332
I have concerns about septic tanks that can run down into our water systems of Fowler Creek and Peterson Creek.

Commenter(s)
Adams, Floyd

Response
Potential contamination of a water supply due to a septic tank is not addressed by this rule. Please contact Kittitas County Health Department for specific septic tank regulations. Subsection -050 (2)(d &e) and -050(3) of the rule only address soil conditions, vegetation, and consumptive use associated with septic tanks.

Comment # 333
Is test drilling being done to see how much water is flowing? Will it affect the water of our water rights?

Commenter(s)
Adams, Floyd

Response

See response to Comment #301. The budget for the ground water study is not sufficient for drilling new wells. Most of the aquifer information will be gather using drillers' reports for existing well, water levels, and other geologic reference information.

Comment # 334

The ground water study should include the financial impact to county, small cities, individual property owners like myself, as well as developers and speculators.

Commenter(s)

Stougard, Jerry

Response

Ecology executed a joint funding agreement with the USGS on November 29, 2010 to conduct the Upper Kittitas Groundwater Study (also known as the Western Kittitas Groundwater Study). (See response to Comment #301.) Ecology chose to contract with the USGS because they provide unbiased, scientific information and studies about groundwater resources in the United States and they already have some familiarity of the study area due to the current USGS ground water study of the greater Yakima River Basin.

Ecology analyzed financial and economic impacts of the proposed rule as part of the rule adoption process. This information is provided in two documents, the Small Business Economic Impact Statement (SBEIS) and Preliminary Cost Benefit and Least Burdensome Analyses. The second document has now been finalized. Ecology determined that the benefits of the proposed rule are greater than the costs, that the proposed rule is consistent with legislative policy, and that we are proposing the least burdensome alternative of the rule.

Comment # 335

Yes, we have drought years, but we also have flood years (it's a normal 7-year cycle). It all balances out.

Commenter(s)

Vincent, Betty

Response

Droughts and floods are a normal part of a climatic cycle. Looking at a long-term climatic cycle is not always appropriate. A water budget may very well be neutral over time, however this does not negate the impacts that post-1905 water users (including exempt uses) have on stream flows in a water short year in the Yakima Basin. Stream flows, even during drought, must be maintained at a level to support fish as ordered by state and federal courts and as mandated by Congressional act. Those water rights dating after 1905 (including exempt uses) are junior in the Yakima Basin and may be limited or curtailed in a water short year or during drought.

The best insurance policy is for a junior water user to obtain mitigation coverage under a senior water right. This will provide the assurance their water supply will remain intact during water rationing or curtailment, hence adding immeasurable value to their property.

Comment # 336

We are pleased to see that the groundwater study for Upper Kittitas County funded by the State Legislature will proceed forward, in hopes that it will create better understanding of technical groundwater issues, more precise regulation of actual impacts, and meaningful mitigation where necessary to avoid impacts to senior water rights.

Commenter(s)

Realtors and Home Builders Associations

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the Upper Kittitas ground water study.

Comment # 337

The study is absolutely necessary. I was told early on that the USGS study would be available by now. May not have the information that we need, but it would be available. It still hasn't come forward.

Commenter(s)

Warnick, Representative Judy

Response

Thank you for your comment. During the week of September 20, 2010, USGS presented their preliminary findings of the Yakima basin ground water study at public meetings in Yakima and Ellensburg.

Comment # 338

Let's focus on that study. Let's do a good job, a thorough job, of making sure we analyze this so we have real information.

Move forward with the study. We think Ecology's rule making process would be more informed, more effective and less suspect than it is right now on the basis of lack of information.

Commenter(s)

Hinkle, Representative Bill
Central WA Home Builders

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the Upper Kittitas ground water study.

Comment # 339

We haven't reliably established that the water extracted by exempt wells now and in the foreseeable future is a significant percentage of all available water. The data isn't there because we haven't done the study.

Commenter(s)

Mirly, Ken

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the Upper Kittitas ground water study. Also, there is no "significant percentage" of impact that applies to this situation. If there isn't enough water to satisfy senior rights, then the prior appropriation system of calling for water begins with curtailing use under the most junior rights. The process of curtailing the most junior right continues to the next most junior user until the senior right has sufficient water.

Comment # 340

What is the scientific or geological connection between ground water and surface water in Kittitas County? Obviously there's some connection but what exactly is it?

Exactly how and to what extent would a prohibition on ground water extraction improve or maintain surface water flow? Is the ground so porous that a reduction in underground aquifer water volume would significantly reduce surface stream flows?

Is the subterranean water contained in one big, contiguous enclosure or is ground water found in various quantities, separated by dry layers of non-porous rock?

If ground water extraction does affect surface water flow, is this interaction independent of well depth?

Commenter(s)

Mirly, Ken

Response

Ground water withdrawals in the Yakima basin negatively affect streams flows. In September, the USGS previewed the results of its 10-year basin-wide ground water study and model. Current ground water withdrawals reduce Yakima River flow at Parker by approximately 140 cfs and the mouth of the river near West Richland by 200 cfs. Curtailing all ground water pumping would, over a period of several decades, eliminate most of this negative impact on Yakima River flows.

Please also see the response to Comment #326.

Comment # 341

I think that the answer lies with a comprehensive ground water study that looks at the impact of all facets of this issue. This would include mapping aquifers, measuring well depths, well log histories, and monitoring static level changes at different times of year. A study would also incorporate seasonal data from snowpack and rainfall stream flows and seasonal changes in surface water.

Commenter(s)

Stougard, Jerry

Response

Thank you for your comment. The nearly completed USGS study for the Yakima River basin provides what you describe. Please also see the response to Comment #340.

Comment # 342

Let's direct all of the effort being expended in this multi-rural writing effort to gathering and developing the information needed to make informed decisions of this magnitude. Develop new monitoring programs for ground water, measure those against surface flow, precipitation levels, measure that data against the amount of new ground water withdrawals. If any of that has been done to any measurable degree, county officials don't seem to know about that.

Commenter(s)

Okanogan County

Response

Thank you for your comment. Ecology provided grant support for Kittitas County's monitoring program in 2008 and 2009; however, the program was terminated by the county earlier this year.

Comment # 343

There is still too little known about the interconnection of different water aquifers, rivers and basins. There is also a consensus that we can't manage what we can't measure and what we don't understand. We ask for the timely conducting of the water study by an experienced, respected, and unbiased scientific source.

Commenter(s)

WA Ground Water Association

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 344

We need to identify the fish critical basins and start collecting stream data now in those areas. We can't continue to talk about what to do in those areas and then find ourselves without the data in order to make decisions.

My great fear is that by November or December, we'll realize we don't have the information we need and don't have the study that we need, and we don't have the stream data to develop that study, and we'll have to wait another year in order to be able to provide water for people in those places.

Commenter(s)

Suncadia

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 345

You are making these decisions right here, without information. So let's do a hypothetical. What happens with this study? If I had senior water rights, I'm not going to want the study either because the study might find there's enough water. If there's not enough information, could you be wrong in your evaluation?

Commenter(s)

Voice of Independence

Response

Thank you for your comment. Please see the response to Comment #340.

Comment # 346

Since September 2007, Washington State Ground Water Association has endorsed and encouraged the timely conducting of a water study by an experienced, respected, and unbiased scientific source - which still is not underway.

Commenter(s)

WA Ground Water Association

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 347

We are very concerned that the ground water study will remain 'pending' until some indefinite future unless it begins prior to this September. Our Association believes that the study should

have proceeded without regard to any of the proposed agreements by both parties to a Memorandum of Agreement, or the groundwater moratorium, or the establishment of this rule.

We have expressed from the beginning of this process, in 2008, that we believed that information about the hydrogeology of the upper County should be a fundamental element for decisions about management of the water resources. We actively supported the elected representatives for Kittitas County when they went to the Legislature to obtain the funding to initiate the study. It is with considerable regret and some anger that we now contemplate loss of those funds because nothing has been done with respect to actually moving forward with the study over the last several years.

Commenter(s)

Central WA Home Builders

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 348

Why wasn't the study started three years ago? Why are you still waiting?

I am also very frustrated as a legislator that that money has been there and we haven't yet even started that study."

You are hoping that the county will spend the money on a water bank reserve plan and you won't have to do the study.

In 1997, there was a court order that Ecology start processing water rights. By 1999, we had an agreement with the Bureau of Reclamation and the Tribes that we wouldn't issue any permits until we did a ground water study. How long ago now was that?

I don't want to be harmed because you guys haven't done your job by doing the study that the money has already been set aside for.

I was appalled to find out that Ecology has had money for scientific testing but has failed to begin its work yet our community has had to suffer.

Allow the water study to be executed and completed.

The repeated testimony and outcries pointing to an absence of scientific proof should have been provided that evidence, shouldn't they? Even though Representative Warnick testified that funds were available for scientific research, for years, did it get done?

Why don't you do your study, and use common sense?

Commenter(s)

Barschaw, Valeria
Grinnell, Roy

Griswold, Trish
Hinkle, Representative Bill
Holmquist, Senator Janea
Lussier, Dave
Merbs, Chad
Merbs, Jerad
Sanders, Jim
Voice of Independence
Wise, Susie

Response

The study was not initiated two years ago primarily because negotiations between Ecology and Kittitas County did not produce a common agreement. Later, the Legislature provided that Kittitas County could instead use the funding for a mitigation program but they were unable to get the support of Yakima basin water users. Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 349

I support the start of a groundwater study for the upper basin of the Yakima River in Kittitas County. As far as I know the funding to start the study is still there. I would implore that this become a priority for both the board of commissioners and Ecology to make this happen in a timely fashion so the funds are not redirected to the general fund to cover budget shortfalls.

Commenter(s)

Link, Deidre
Senger, Steve
Vincent, Betty

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 350

Why is Ecology currently sitting on $700,000 appropriated for the groundwater study, yet nothing is happening? My guess is because the study will most likely prove that the aquifer in the upper county is doing just fine and not affecting surface water that provides downstream river flows to senior water right holders, and that would (or should I say “should”) end the current and proposed Ecology building ban.

Commenter(s)

Hurwitz, Dave
Velie, Linda
Smithson, Julie Kay

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study. The premise that pumping ground water would not affect surface water in the Yakima basin is inconsistent with the conceptual flow model and water budget developed by the USGS for the Yakima River basin-wide ground water study. Please see the response to Comment #340.

Comment # 351

It has been approximately a year since the funding was made available but no study has yet been started. We hope that adopting this rule will expedite the beginning of the study that is needed to determine the amount of water available for future growth in the upper county.

Commenter(s)

Kittitas County Water District #2

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 352

If we do not spend the money on water for the domestic water reserve program/water bank, we still have that money to spend on the study. We don't have to spend it all on the study or all into the bank. We have options.

Commenter(s)

Warnick, Representative Judy

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 353

It is incumbent upon the Department of Ecology to perform the upper county groundwater study as funded in the initial amount of $700,000 as agreed upon by Kittitas County commissioners and the Department of Ecology. That is the explicit premise in which the state Legislature approved the initial $700,000 funding. If a change in how this money should be spent, then the change needs to be re-debated in the state legislature in the next 2011 session.

Commenter(s)

Knudson, Desmond
Clerf, Catherine

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 354

When the Kittitas County Board of Commissioners revealed they were entertaining the idea of a so called "drought response fund" or "domestic water reserve program" using money allocated for the water resource study in the upper county for funding, it troubled us. To transfer the money from this much needed study to a program that would use it to purchase water rights to sell to developers is unacceptable. We strongly object to this tentative plan and hope that the Ecology will do all in its power to prevent its implementation.

Water District #2 serves a small population with a total of only 114 residential and commercial hookups. We purchase our water through an intertie from the City of Roslyn so anything that affects Roslyn also affects us. In the past, we have had our water supply curtailed by water rights senior to those held by Roslyn. It is important to us, as it should be to all small public water districts in the upper county, that the water study fund be used for the purpose it was intended.

Commenter(s)

Kittitas County Water District #2

Response

Thank you for your comment. Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 355

It is disingenuous for the current county commissioners (Crankovich, Jewell, and McClain), to now declare to prefer that this initial $700,000 funding, and any future funding, for an upper county ground water study should be used instead to purchase water rights in behalf of future rural residential exempt well users.

Commenter(s)

Knudson, Desmond
Clerf, Catherine

Response

Thank you for your comment.

Comment # 356

We believe Ecology's rule making process is less informed, less effective, and more suspect when it is made on the basis of a 'lack of information.'

Commenter(s)

Central WA Home Builders

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 357

Please do not adopt this rule until studies are made based on current up to date geological findings. As we understand, money is available but no contract has been signed for these studies and that the money may be taken by the State for other uses.

Commenter(s)

Hamberlin, Del and Dianna

Response

The proposed interim rule will cover the time the study is being performed by the USGS. Once the study is complete, Ecology will review the rule and vacate or modify the interim rule and propose a permanent rule based on the results of the study.

Comment # 358

Rescind all versions of the Upper Kittitas County rule and continue the work to finish the hydrogeologic study and to set in place an ongoing monitoring program for both ground and surface water supplies in Kittitas County.

Commenter(s)

Okanogan County

Response

Please see the response to Comment #357.

Comment # 359

I question whether Ecology can even do its job and facilitate a water study, since it has not been able to do so in the several years since Aqua Permanente put forth the initial petition request in 2007.

Commenter(s)

Schoon, Karla

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Comment # 360

If the study will not be done, the proposed permanent rule should be withdrawn as it is contingent on the study.

Commenter(s)

Schoon, Karla
Hinkle, Representative Bill

Response

Ecology signed an agreement with USGS on November 29, 2010 to perform the ground water study.

Justification / Legal Issues / Politics

Comment # 361

I think we just need common sense when we look at these problems and not have a general rule that applies when it shouldn't.

Commenter(s)

Conner, John

Response

Thank you for your comment.

Comment # 362

Nothing of a substantive nature has been demonstrated that anyone's water right(s) have been adversely affected.

Commenter(s)

Mundy, Bill

Response

Please see the summary response on page 3 for the authority and purpose of the proposed rule.

Comment # 363

People are kind of wondering why -- no one can really pinpoint why the emergency, what's the emergency. I think it's just to have an excuse, maybe, just a theory.

I don't think there's an emergency. I definitely don't think there's a water shortage in upper Kittitas County.

I was born in Alaska but I grew up in southern California. If you want to see a drought go down there. Those are real droughts. And even during the drought, the faucets never stopped running. We couldn't water lawns or wash our cars and stuff like that. You get fined for doing stuff like that.

I mean, you guys are water specialists, the Department of Ecology. Like he said, it's the biggest water basin in North America. It's like you are dreaming up a job. I don't really see how there could be a water shortage.

Commenter(s)

Merbs, Jerad

Response

Ecology has previously adopted a series of emergency rules to respond to an emergency. This rule will be in effect for the interim period while a ground water study of the bedrock aquifers within the upper county area is performed. This rule was not proposed as an emergency response. Please also see the response to Comment #336.

Comment # 364

The rule should not be adopted until scientific evidence is available to justify the moratorium.

I don't think you have enough information or any real indication of pending disaster to justify this effort.

All this has been done with no evidence whatsoever that there was ever a problem with exempt wells. Public input from long-time well-drillers in our area confirmed there has not been a well gone dry after another one was put in.

I am still mystified that we are even moving forward and looking at a proposed permanent rule without scientific justification.

I don't think we have a problem that can't wait until the study is done.

Over the last two years, I've been hearing from the citizens that elect me that they really feel that the state is moving in the wrong direction by adopting emergency temporary rules and now looking at a proposed permanent rule without the scientific justification.

I very, very much support not doing the permanent rule at this point, but part of the $700,000 that we still have our fingers on for a study and part for a water banking or water reserve program, we can do it all.

What's the rush to adopt a permanent rule? We have one opportunity to get this right, so let's make sure we do the due diligence required to make this a viable system that will allow property owners to enjoy their property and regain the value it once had.

When I see people's lives impacted as negatively as they have been for a moratorium that has no basis to it, that just infuriates me because you need to do your job.

How can a logical decision on a resource like the water moratorium be made without a study being done? As a lifelong resident and seven generations that have lived in this county, I find it difficult to have an agency like Ecology tell our communities this is the way it will be, without justification and a study to prove this.

I think the rule should be forestalled until the information is better understood.

We need a lot more information before we make such a rule cutting off exempt water wells.

We need the studies done to show the causative relationships, and then address the issues at that time.

The Groundwater Study needs to occur prior to any rule making so that we can get it right the first time. We and the Dept. of Ecology do not have the right to make assumptions that ultimately affect the livelihoods of citizens working hard to stay alive in this already challenging economy.

Please lift the moratorium while the study takes place. When we get the information we can make reasonable decisions pertaining to shared resources.

The emergency rules have cut off water to Upper Kittitas County and has turned this area into a rotting, unproductive graveyard. This decision was made without merit. This decision was made on very old geological data and to date there are no current up to date geological tests or studies to confirm your decision. No proof was been available to us that shows that the ground waters we draw off or would draw off affect the downstream flows.

It's hard and it hurts to believe that the State of Washington government and/or its entities can render this situation without studies, solutions or compensations. It's not the American way.

Where are the scientific facts to back a permanent ban on new wells in Upper Kittitas County? Ecology and the governor are taking this too far without having any due cause. The governor and Ecology are enabling Cle Elum to slowly die. Don't put the cart before the horse.

I believe Ecology is like a battle ship that has reached full speed ahead on the senior water rights mitigation agenda, and will adopt the proposed rule in spite of any common sense or objectively based analysis that is contrary to those rules and regardless of the consequences of what I feel is an unjust solution to a non-problem.

I really do not believe there is a shortage of water, but there sure seems to be a shortage on people trying to get along. Come up with solid proof there is a problem and then, if so, find a solution ... instead of crying "wolf."

I feel that there needs to be objective scientific information used to determine whether there is a real affect on the water in the basin from the domestic wells being drilled. I hope in the future you take the time to really research alleged 'problems' before you would ever do this again.

You have absolutely no proof whatsoever that there is a problem and here in this proposed rule you are taking extreme measures!

Ecology has not provided any credible evidence that Upper County exempt have impacted water availability. They have emphatically declared it is so, but since those that say so are closely aligned with the mitigation agenda and Yakima River Adjudication process that their declarations should be viewed with the same skepticism that the Bush administration's emphatic declarations of WMDs in Iraq. And here the same tactics are being used, say it often and emphatically and ignore or squelched contrary testimony. And once again, unintended consequences and collateral damage are forsaken in stubborn pursuit of a biased goal.

Ecology should not adopt a permanent groundwater rule before undertaking the necessary studies to better understand the complex technical issues associated with groundwater in Upper Kittitas County.

I implore you to withdraw this proposed permanent groundwater rule because it is based on speculation and inaccurate information. It is quite possible that the impact of exempt wells on senior water rights may be grossly overestimated. There needs to be a clear foundation of facts that are not debatable before a permanent water rule of this nature is put in place.

Commenter(s)

Brannian, Beth
Childs, Roger and Karen
Conner, Kelli
Ferrell, Susan
Fitters Furniture, Inc
Grinnell, Roy
Griswold, Steve
Griswold, Trish
Hamberlin, Del and Dianna
Hinkle, Representative Bill
Holmquist, Senator Janea
Horish, Paul and Linda
Hurwitz, Dave
Hurwitz, Marisa
Kenny, Lorna
Kirkpatrick, Marc
Mirly, Ken
Okanogan County
R&R Heights Land Company
Realtors and Home Builders Associations
Schoon, Karla
Senger, Steve
Stougard, Jerry
Velie, Linda
Vincent, Betty
Warnick, Representative Judy
Wise, Susie

Response

Please see the summary response on page 3.

Comment # 365

So far all I hear is opinions very few hard facts. Well I have an opinion, which is just as valid as everyone else's opinion. What you are doing is wrong and you know it.

Commenter(s)

Geiger, Jesse

Response

Thank you for your comment. Ecology respectfully disagrees.

Comment # 366

From what I see, Ecology could care less to have proof that new wells are making this huge difference in the amount of water available.

Commenter(s)

Geiger, Jesse

Response

Ecology's several emergency rules and the proposed action are not an attempt to make a large difference in water availability in the basin. The proposed rule responds to actions by the county, developers, and ultimately the purchasers of property sold by those developers that have systematically operated to avoid permit requirements and negatively impact water resources and water rights in the basin.

The water resource is acutely short almost every year in some tributary areas (Big Creek, Swauk Creek, and the Teanaway River, for example). In other areas, such as along the main stem of the Yakima River, new uses have an extraordinarily small percent impact on the total water supply and only negatively impact water rights when USBR prorates water. However, the fact remains that twice in the past decade, water users in the Yakima basin have been severely curtailed and ground water use does affect the flow of the Yakima River. Ground water pumping can also reduce flow in many tributary streams in the upper basin that have not been fully exploited by irrigation use and provide habitat for fish.

Comment # 367

Someone who does not want the upper county to develop is saying that the few wells being drilled are using up all the irrigation water. So you want to make this rule permanent without any study, conservation, more storage or banning wells state wide.

Commenter(s)

Geiger, Jesse

Response

Ecology is not adopting this rule because a few wells are using up all the irrigation water. Please see the response to Comment #366.

Comment # 368

I am the owner of Encompass Engineering & Surveying and have felt firsthand what damaging affect this temporary rule has had on our business, families, friends, and clients. Trying to find the logic in this ruling only makes things even more frustrating for the people living within it.

Commenter(s)

Kirkpatrick, Marc

Response

Thank you for your comment. Please see the response to Comment #366 and the summary response on page 3.

Comment # 369

It appears that all this fuss and fighting resulting in the current and proposed new ban is all because Ecology wants to teach the Kittitas County Commissioners (KCC) a lesson that Ecology is the "big daddy" in town, and that Ecology's stick is bigger than KCC's stick? Geez, thanks for rolling all of the public that own property in Kittitas County into the Ecology vs. KCC "gang equivalent" territorial war against each other. We get it: You have the big stick. You have authority in WA State to control surface water rights. Enough with the bullying, can't we just move forward? I am sure I could convince KCC to apologize in public to pump the Ecology ego if that is what it takes to get out of this fight.

I get the impression that it is more of a fight with Ecology and the County than it is and effort to find a resolution. What can be done to turn this around?

Commenter(s)

Hurwitz, Dave
Vincent, Betty

Response

Please see the summary response on page 3.

Comment # 370

I agree that there was a need to curb in the misuse of new exempt wells in the creation of unchecked cluster housing in the Upper County, but this is not the way to do it. It has gone way beyond reason and has delved into power plays between agencies, to the detriment of everyone.

While I feel the county's interpretations of the land use policies were wrong and caused the issue, I feel that the state shares the blame for allowing the problem to continue unitl all new wells impact the older ones.

Commenter(s)

Ceraold, Frances
Rooney, Tracy

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 371

Based on the following facts, I support mitigation and metering for all new withdrawals of groundwater in the proposed area of Upper Kittitas County:

- All surface water in the Yakima River Basin is claimed, possibly/probably even over allocated.

- Ground water and surfaced water are connected.

- There is no recent study of ground water in the upper Yakima River Basin in Upper Kittitas County.

- The current zoning codes, titles codes, Comp Plan and failure to do a critical area study for Kittitas County land use in rural areas do not protect water quality and quantity.

- The Kittitas County Board of County Commissioners shows little or no interest in stopping the LLC shell game that started this water issue.

- There were over 6,000 building lots created in the past several years (many thru the LLC shell game, property line shuffle, and exempt segs) that are counting on a permit-exempt well for development.

Commenter(s)

Link, Deidre

Response

Thank you for your comment.

Comment # 372

It's my understanding that the original complaint was brought to Ecology by a citizen group protesting that the county had bypassed the rules relating to lot-density for exempt wells, by allowing three different LLCs, all owned by the same individuals, to put three 14-lot developments adjacent to each other. This resulted in allowing that particular development group to have a 42-lot exempt well development.

Shame on the county officials that did so. but I also understand that particular problem has been resolved. So why not drop the moratorium/permanent rule mess?

I think it's because this issue fits the Governor's and Ecology agenda for tighter state control of development. So the complaint moves on under the ruse that exempt well s are diminishing senior water rights.

Commenter(s)

Griswold, Steve

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 373

As stated in WAC 173-539A-020, the proposed rule is being considered under Ecology's authority in RCW 90.54.050. While we do not question Ecology's authority to take this action, we do have concerns with Ecology's utilization of that authority in the manner proposed. We believe Ecology is utilizing this authority in a transparent attempt to impose a permanent moratorium in Upper Kittitas County as a method to further statewide agency goals related to the use of exempt wells. We have little doubt it is Ecology's goal to prove this action in Upper Kittitas County to produce a working model that can be presented elsewhere throughout the Yakima Basin and Washington State. Ecology is exerting its authority granted by RCW 90.54.050 to force the citizens of Kittitas County to suffer the cost and the consequences of its attempt to circumnavigate the exemption allowed under RCW 90.44.050.

Commenter(s)

Kittitas County

Response

Ecology has crafted this rule to respond to the present circumstances as precisely as possible. Although Ecology was petitioned to address all of Kittitas County, the subsequent rules have been limited to the Upper Kittitas County area. That is because the basis of the rule, and the earlier rule, was a withdrawal of unappropriated water where necessary information was lacking to make water resource management decisions. If the county's performance of its responsibility under GMA relative to the ground water permit exemption was the defining issue, Ecology would have proposed a rule that addressed the entire county. Please also see the summary response on page 3.

Comment # 374

We are looking at this problem politically instead of the full science of the basin's hydrogeology.

Commenter(s)

Hinkle, Representative Bill

Response

Ecology disagrees. We are working on a water management problem as it relates to new uses of ground water in the Upper Kittitas area. Please also see the response to Comment #375 and the summary response on page 3.

Comment # 375

The emergency rule was in response to a number of issues, most of which have no root in water supply.

I think the emergency is largely a legislative issue and not a water related emergency.

Commenter(s)

Okanogan County
Coe, Bruce

Response

Ecology disagrees. Kittitas County was ignoring Ecology's comments on SEPA review, the need for a water right permit for large developments, and the impacts of prospective ground water uses on streams that are either fully appropriated or have resident and anadromous fish species. These issues are water supply issues.

Comment # 376

Is the moratorium in place because no one wanted to jeopardize the chance that the largest water park in the Pacific Northwest that's coming in? Or was it some black helicopter conspiracy that Suncadia, who is in major financial trouble, holds all the cards on anyone getting water now as long as you can pay for it. Did some palms get greased there?

Commenter(s)

Conner, Kelli

Response

Thank you for your comment. Please see the summary response on page 3.

Comment # 377

There is no need for a moratorium. Due to the very slow economy there is virtually no development taking place that would have a noticeable effect on ground water or adversely affect other's water right(s).

Commenter(s)

Mundy, Bill

Response

Ecology disagrees. Since July 2009, Ecology has approved water budget neutral requests for more than 1280 residential units and associated landscape irrigation within the upper Kittitas area.

Comment # 378

The Okanogan County commissioners have asked the Department of Ecology to undertake the review of WAC 173-548, which is the Methow rule. This emergency rule was adopted as a result of pressure brought about by the panic over what was projected to be tremendous growth driven by the Early Winter Ski Resort proposal some 30 years ago. Bear in mind the ski resort never came to be.

In this response to my commissioners on May 2010, Director Sturdevant suggested, "There has not been sufficient information to support a rule writing process in the Methow."

The Methow Valley is one of the most scrutinized pieces of real estate on the planet. And I can assure you that there is not enough information to support revisions to a rule adopted in the

Methow Valley 30 years ago to deal with the scenario that never came to be. You certainly don't have enough information to adopt a rule here.

Commenter(s)

Okanogan County

Response

The Methow rule (WAC 173-548) and the Okanogan rule (WAC 173-549) were adopted in 1977 and 1976, respectively. Neither rule was developed as a result of the Early Winters Resort proposal. Ecology worked with citizen groups and published basin plans for each basin and then adopted rules because they were highly appropriated basins, had significant fisheries, and many applications for new water rights had been filed. The 1994 amendment to the Methow rule was proposed in response to development pressure in the Methow valley generally and closed tributary streams specifically.

Comment # 379

An Indian tribe requested a moratorium in Mason County. Ecology's response letter used the same arguments that we have used here to justify not acting. We need to be consistent statewide.

Commenter(s)

Hinkle, Representative Bill

Response

Ecology also denied the Aqua Permanente petition and instead negotiated an agreement with the county.

Comment # 380

We cannot let our efforts be driven by those with a vision of the landscape that they have been unsuccessful at achieving at the ballot box or local government hearing rooms. On the same token, it's not an issue of private property rights. Those are comprehensive planning issues and the responsibility of local government and the citizens who elect them.

Commenter(s)

Okanogan County

Response

Thank you for your comment. Kittitas County has consistently maintained it has no authority to address water rights. Until the Supreme Court issues its decision, the issue will not be resolved. Kittitas County would need to adopt Ecology's position in the RIDGE case to incorporate water right considerations into its comprehensive plans.

Comment # 381

Shouldn't growth be controlled with zoning? This is something I understand. If this property was zoned as unbuildable we would not have bought it, we certainly wouldn't have drilled a

well, and planned our life around living on it. We have neighbors bordering two sides and the front that have wells and houses, yet we can't do the same on ours.

Commenter(s)

Brannian, Beth

Response

Please see the response to Comment #375.

Comment # 382

The role of local government as the land-use authority in the State of Washington has been long established and generally accepted in law. The role of Ecology as the responsible agency in the allocation of water resources and the protector of the environment is also well established in law. As currently proposed, it appears Ecology has declared that its authority over water resources trumps local government's authority relative to land-use. It is not necessary for one governmental authority to trample the other.

We believe Ecology has every right to insist that the actions of local governments do not cause unacceptable impact to the environment or result in the impairment of water rights. This does not, however, require that Ecology take over the land-use authority of the upper Kittitas Basin (or any other basins in the state).

It is Ecology's responsibility to inform the local land-use authority that their respective decisions can carry adverse implications to the water resource management in the affected area. It is then the local government's responsibility to alleviate those impacts as they lawfully see fit. This action may lead to a moratorium on all building permits. However, it is more likely that local governments will opt to "mitigate" the consequences of their land-use decisions in a manner that allows for growth without unacceptable impacts to water resources or water right holders.

It is our position that the role of Ecology is to accurately inform land-use decision makers of the asserted impacts to water resources that are predicted as a result of their land-use plans and land-use decisions. The affected land-use authority is then obliged to take what action they deem necessary to eliminate the concerns of the water resource management authority (Ecology). This clear definition of roles is necessary to keep the governance issues properly defined and to avoid the usurpation of local authority by a state agency or of state authority by local government.

Ecology's responsibility is to define the adverse impacts that are being asserted in a quantitative, unbiased, and scientifically defensible manner. Then, provided that the local land-use authority can define mechanisms that alleviate those adverse impacts, Ecology's role would end with that determination.

Commenter(s)

WA Ground Water Association

Response

Please see the summary response on page 3 and the response to Comment #62 regarding governance.

Comment # 383

Comprehensive planning issues are the responsibility of local government and the citizens that elect them. Responsibility of the Department of Ecology is different and your efforts are being deluded by the inclusion of political maelstrom that surrounds this issue.

Commenter(s)

Okanogan County

Response

Please see the response to Comment #380.

Comment # 384

From the Washington Real Estate Fundamentals book:

> "Exercises of the police power must meet constitutional limitations. As a general rule, the land use law or regulation will be considered constitutional if it meets these four criteria:
>
> - It is reasonably related to the protection and public health, safety, morals or general welfare.
> - It applies in the same manner to all property owners who are similarly situated; it is not discriminatory.
> - It does not reduce a property's value so much that the regulation amounts to a confiscation.
> - It benefits the public by preventing harm that would be caused by the prohibited use of the property."

This rule meets none of these criteria. It is discriminatory because it does not apply to the whole county or state. It is equal to confiscation, as how much do you think a recreational lot is worth that you can't build on? I did not buy my land to camp on. Well, I don't know if this is Washington State law or not, but it's in the Washington Real Estate Fundamentals book that the Rockwell Institute uses, the most respected real estate school in the state.

Commenter(s)

Merbs, Chad

Response

Please see the responses to comments #373 and #375.

Comment # 385

To pursue this argument, one has to assume that ground water = surface water. That is extremely problematic, because if it is true, then the ultimate end game is that either the Yakima River Adjudication process or Western Water Law will end up deciding when and if wells can be permitted and the state will lose control of the process.

If the permanent rules prevail long enough to set precedent then Ecology may survive Western Water Law based challenges, but I doubt it will survive for long.

Commenter(s)

Griswold, Steve

Response

It is not necessary to assume that ground water and surface water are interconnected. There is an abundance of evidence to demonstrate it. Over the past 11 years, USGS performed a $6.5 million study for Ecology, USBR, and Yakama Nation. The products of the study, including the description of the conceptual flow model and water budget report, are available on the USGS website. Please also see the response to Comment #386.

Comment # 386

I'm surprised no one has sued yet frankly. The taking issue here is guys like me who have wells drilled, and there's many of us here, who did everything by the rules.

You are going to make a really wrong decision and there will be nothing to do but litigate, which means a class action lawsuit.

Class action lawsuit, that's about it. You have to spend money. Laws don't mean anything unless you have money to back it up. It will take a class action lawsuit.

I'm surprised that you haven't been sued yet. I'm surprised that people haven't rallied together to do a class action lawsuit against the state and Ecology for causing all this damage.

Commenter(s)

Hinkle, Representative Bill
Merbs, Chad
Merbs, Jerad

Response

Ecology is not surprised there hasn't been a lawsuit. The economic analysis shows that one of the primary benefits of the rule is the likelihood that it would prevent or avoid the need for a lawsuit that would bring *all ground water users* in the Yakima basin into the Acquavella adjudication.

The Washington Supreme Court has held that beneficial use of water under the state's water code is the limit and the measure of a water right.

> "An appropriated water right is established and maintained by the purposeful application of a given quantity of water to a beneficial use upon the land. Such a right is appurtenant to the land, perpetual, and operates to the exclusion of later claimants." ***Department of Ecology v. Grimes***

A well, absent beneficial use, is not a water right. A beneficial use, absent compliance with the state's water codes is not a water right. A class of water users, or prospective water users,

without water rights in an adjudication of water rights will not gain much for its costs in bringing the lawsuit.

Comment # 387

Should this matter be heard in a court of law I offer myself as a witness to the inappropriate actions of Ecology personnel; that the actions by Ecology are unseemly, unscientific, and contrary to customs; and to solemnly swear that this moratorium has had a negative financial impact.

Commenter(s)

Barschaw, Valeria

Response

The plaintiff in any lawsuit has the privilege of choosing its witnesses.

Comment # 388

The proposed rule is a bold move to coerce and cow property owners into submission, into letting Ecology steal their property rights in the form or a "need" that does not exist.

This "rule" is flying under obviously false colors, being, in effect, a strangulatory zoning banning all building by property owners. Ecology appears to have outgrown its britches, believing that it can arbitrarily lay down "the law" on property owners, no matter how convoluted or outrageous "the law" -- or "rule," as you've dubbed it -- may be.

Every word -- and the apparent intent – of the proposed rule, is built upon a false "need" or "threat." Ecology has no right over Washington State, in general, or Kittitas County, in particular, property owners. Neither temporary nor permanent building bans are valid or in any way, shape, or form credible.

Commenter(s)

Smithson, Julie Kay

Response

Please see the summary response on page 3.

Comment # 389

"The rights and privileges associated with land ownership are also considered part of the real property. Think of real property as the land plus a bundle of rights. The owner's bundle of rights includes the right to possession, use, enjoyment and encumber, will and sell, or do nothing at all."

"Appurtenance, in addition to the basic bundle of ownership rights, a landowner has appurtenance rights that goes along with or pertains to a piece of land. They are air rights, water rights, solid mineral rights, oil, gas, and support rights."

This is the Constitution. Amendment 5 of our Constitution is, “No person shall be deprived of life, liberty or property without due process of law.” And I don’t know if you consider that to be doing due process of law. I don’t.

Commenter(s)

Merbs, Chad

Response

The rule complies with the APA. It defines how state agencies are to satisfy due process under the constitution when the state proposes to adopt rules or regulations. Please also see the response to Comment #386.

Comment # 390

The moratorium and proposed rules are profoundly wrong on so many levels that I can’t see them ever making it through the court challenge that is almost a certainty, so why pursue them.

Commenter(s)

Griswold, Steve

Response

Ecology disagrees. Please also see the response to Comment #389.

Comment # 391

It is further disingenuous for the current county commissioners or any past county commissioner of the last approximately 16 years to have made and continue to make the argument that The Department of Ecology does not have the authority to impose a moratorium on a county that has refused to accept the following facts:

a. The Yakima River Basin is an “over-allocated” river basin.

b. That Yakima River Basin is subject to the authority of the federal Bureau of Reclamation.

c. The Department of Ecology has its responsibilities to adhere to its settlement agreement with the Bureau of Reclamation and the Yakima Nation regarding the Yakima River Basin.

d. The Washington State Legislature authorized the Department of Ecology to protect senior, proratable, and junior surface water rights, in that order, from impairment.

e. Ground water is extrinsically and explicitly linked to surface water.

f. Past and present county commissioners have consistently chosen to ignore the Growth Management Act insofar as not requiring quantified and qualified water source(s), per state law, before approving Final Plats, with few exceptions to this intentional egregious oversight, and by so doing have overtly maintained a county policy that expediently benefited and continues to benefit rural residential developers and land speculators without legal and/or

sufficient and/or immitigable water rights to the detriment of existing water rights holders, not just in Kittitas County, but in the entire Yakima River Basin.

g. Kittitas County commissioners do not have the authority to supersede or rewrite or reinterpret Western water law and/or state law regarding water rights.

Commenter(s)
Clerf, Catherine

Response
Thank you for your comment. Ecology generally agrees.

Comment # 392
It is my understanding that the action to require mitigation of new wells is in response to the over-development of the Upper Kittitas county. The extent of this development often resulted in subdivisions of acreage into many small lots by developers, who manipulated ground water regulations to their advantage. I too, am sickened by these actions, and now these greed-driven developers have potentially taken away my dreams to retire on our land in Kittitas County, and certainly have contributed to its substantial devaluation.

Commenter(s)
Rattray, Jane and Mark

Response
Please see the summary response on page 3.

Comment # 393
Our county has abused land use by allowing cluster platting, so doing nothing is not an option.

Commenter(s)
Sanders, Jim

Response
Thank you for your comment. Please see the summary response on page 3.

Comment # 394
I just read the news that our three wonderful county commissioners plan to accept building permits - regardless of Ecology concerns. Very typical of those guys; they have no respect for any (state) agency / rules - and little respect for county rules; unless they implemented the rule.

Please lobby your agency director and our governor to go to court, if necessary (which it will be) to squash our commissioners, about this issue.

For at least the past 10 years (probably longer) there has been an on-going effort by our commissioners to “do what they want” and not follow Ecology, Washington State Growth

Management regulations, to ignore UGA rules, most likely don't follow state records management and retention rules, etc.

Over the years, they have allowed their developer buddies to virtually buy Upper County and break-up large parcels of land into hundreds of 3-acre lots; ignoring wildlife corridors, water issues, road use, fire/police requirements, creating "cluster housing" in rural areas, fight wind farms, etc. - all to sell lots for second homes; not even full time residences. Why does our county have only two prosecutors for criminal actions; and six for civil actions? Is that ratio common to all counties? Or, does that represent the results of misguided decisions by our Commissioners? They would rather use taxpayer money to get their way than follow any rules set by any entity, higher than the county.

Pull state highway funds, educational funds, etc away for this county - if they continue to ignore state requirements. Don't let them play games or sweet talk their way out of this. They have been doing that for years and years – and getting away with it.

Commenter(s)

Hoban, Mike

Response

Thank you for your comment.

Comment # 395

You state it on the record, this is based on emergency. But you won't define your emergency. What if there is [not?] an emergency? And you put them out of business and you destroyed his dream of building, and then I gain? Or they gain because they get senior water rights. Is that fair?

Commenter(s)

Voice of Independence

Response

Please see the summary response on page 3.

Comment # 396

In Oregon, voters handily approved Measure 37 requiring just compensation for regulatory takings. Passed handily just for such insane policies like this. It requires that an entity that creates a regulation that would change your future potential on a piece of property, that they have to pay you the difference. Perhaps that's what it's going to take to get you to stop and listen to the people that pay your salary.

Commenter(s)

Conner, Kelli

Response

Ecology believes that administrating the water codes under the prior appropriation doctrine is not easily likened to regulatory takings in the land use and zoning context.

Public Involvement

Comment # 397

I find it hard to believe that two women can form a group, find an environmental loophole with a state agency, and with a few commissioners they can't fully reach an agreement, can literally kill an entire portion of a county.

The rule cannot just be based on the opinions of a few vocal community members.

Commenter(s)

Conner, Kelli
Ferrell, Susan

Response

The APA allows any Washington citizen to petition its government. The petition was denied in 2008 and Ecology proposed and took public testimony on a draft rule. Kittitas County asked the Attorney General for an opinion on certain elements of that rule. The opinion was that Ecology exceeded its authority. Consequently, Ecology withdrew the earlier proposed rule and proposed the current rule that is within its authority.

Comment # 398

We live in a democracy where people need to be heard, need to be able to air their differences. And where a cooperative and reasonable outcome needs to come from these kinds of discussions.

Commenter(s)

Coe, Bruce

Response

Thank you for your comment.

Comment # 399

My husband and I are just one of the many who have been impacted by the undue and unjustified stress put on the property owners of the Upper Kittitas County. Our little community is in the fight of our lives for the right to have water. I hope my heartfelt letter gets just as much attention as the original letter of the group "Aqua Permanente" to Governor Christine Gregoire, which started this water war.

Commenter(s)

Windh, Carole

Response

Thank you for your comment. Aqua Permanente's 2008 petition to the Governor was denied.

Comment # 400

I think commenting on the proposed rule is an exercise in futility, as I believe Ecology is like a battle ship that has reached full speed ahead on the senior water rights mitigation agenda, and will adopt the proposed rules in spite of any common sense or objectively based analysis that is contrary to those rules and regardless of the consequences of what I feel is an unjust solution to a non-problem.

Commenter(s)

Griswold, Steve

Response

A review of this comment response document should indicate that comments we received have been considered. Please see the response to Comment #397.

Comment # 401

It is my observation that the lack of the slide show actually allowed one Ecology employee to go "off script" and thereby admitted the underlying truth. It is fact that what was stated is that Ecology "intends" to implement the permanent rule on October 15, 2010.

I personally stood up and pointedly asked if I had heard the statement correctly. Speaking clearly and succinctly the entire room was told that Ecology intends to implement the permanent rule on October 15, 2010.

I pressed the issue further and asked what was the point of taking testimony if this was already cast in stone and therefore no impact of the testimony could be considered? Mr. Tebb stated they might consider an alteration (which was in fact the case when they extended the time to submit written comments from August 11 to August 25), but that there would be no further public involvement (beyond accepting comments).

This is intolerable.

Commenter(s)

Barschaw, Valeria

Response

October 15, 2010 would have been the earliest date that Ecology could file the final rule based on the CR-102 filed with the Code Reviser's Office. Emergency rules with the same requirements as those in the proposed final rule have been in place since July 2009. Ecology expected a significant number of comments on the proposed rule and identified the earliest date that we expected we could review all of the comments, consider them, respond to all the comments, and consider any amendments to the proposed rule.

Comment # 402

I'm kind of thinking what are the comments going to do? Here everyone is here asking to work with us and these are the guys with the power that are just going to step right in and just make the decision and just tell you how it is basically. So our comments I kind of feel are useless.

I really lack faith in the systems of this country on all levels of government. Just all the way up. I mean I've got political views and I'm for liberty and the Constitution and that kind of thing. Most people can't even define those kinds of things and I'm not really good at it.

The problem I really see is that like everyone was talking about, like the litigation or the mitigation, is that it's not even a democracy any more. They are just stepping in like the bail-out. Where did I get to vote no? No one asked me, no one asked anybody.

Commenter(s)

Merbs, Jerad

Response

Thank you for your comment. Please see the response to Comment #401.

Comment # 403

During the lengthy time that I stayed for this meeting, all testimony was in opposition to the proposed rule. The citizens who spoke clearly outlined how they were victims. Our Senator, County Commissioner, and Representatives likewise testified in opposition; both to the rule and to Ecology's unfit handling of this matter.

I can continue to recount the comments and testimony, but they are already a matter of public record; are they not?

So the victim that wanted Ecology to reveal what "emergency" had been in effect and/or abated by the action of Ecology should have received a prompt truthful answer. Did he? The victim who testified and posed the inquiry of where was the due process, should have received a prompt and truthful answer from Ecology -was that done?

Commenter(s)

Barschaw, Valeria

Response

Official testimony/comments received at a public hearing are part of the public record. The APA does not permit Ecology to respond to comments or questions during the taking of public testimony. Responses to each comment are contained in this concise explanatory statement. Please also see the summary response on page 3.

Comment # 404

The first fact that I share is that upon arriving at the July 2010 hearing in Cle Elum I was greeted by an Ecology employee who solicited my signature on a form. When I inquired why, she informed me that it was "required so the meeting room expense could be paid." Noticing

that many people had already arrived, I questioned whether there was any impact of one more signature. She then admitted that my signature was, in fact, not required - like she had initially stated. This employee's ability to commit a bold-faced lie to a citizen is deplorable.

Commenter(s)

Barschaw, Valeria

Response

Thank you for your comment. The form an Ecology staff member requested you sign was a sign-in sheet. Ecology requires attendees to sign-in so the fiscal office can pay for facility charges.

Comment # 405

In the meeting room itself, Ecology had no public address system. This made the communication of information difficult for many and impossible for some; particularly the hearing handicapped. The inability of Ecology to be prepared for public communication is demonstrative of the agency's lack of concern for the citizenry. Ecology showed no compassion that the citizens had volunteered their time to participate and "hear" what was going on. The Ecology employees were paid to be present, whether they made any effort to perform well for the stated purpose. The fact is they did a poor job and got paid highly for it.

The Ecology had a planned slide show presentation but was not technically capable of doing so. Again, unable to perform; but paid as if they had executed it brilliantly. However, it is offensive that it was considered a successful public "hearing."

Commenter(s)

Barschaw, Valeria

Response

Thank you for your comment. Ecology requested a public address system when we reserved the room. When Ecology staff arrived at the facility we were told that the microphones and PA system had been moved to a different location due to summer break and they did not know where they were being stored. We regret the inconvenience this caused for those attending the meeting.

Testimony was received and recorded for the record. Comments were allowed by oral testimony during the hearing, or by written format through postal mailings, emails, or facsimiles.

Comment # 406

This [rule/study] is not a county issue any longer, because they have not involved the county citizens, held public hearings, to see what the citizens would like to do!

Commenter(s)

Knudson, Desmond

Response

Thank you for your comment.

Comment # 407

I would say that the temporary rules that we have had, the whole long series of those, was a surprise and there was no notice that was coming. The surprise element prevents any planning by people. That's not appropriate.

Commenter(s)

Grinnell, Roy

Response

Thank you for your comment.

Comment # 408

Quoting G. Thomas Tebb, Central Regional Director, Ecology, in a June 25, 2010, letter to Catherine Bambrick, Administrator, Kittitas County Public Health Department: "We also believe more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin to help provide a clearer path for making groundwater decisions."

While this may be true, it also applies statewide and must be determined prior to enacting any new rule banning use of exempt wells, without strong scientific evidence to the contrary that would support such a rule.

Commenter(s)

Smithson, Julie Kay

Response

This rule applies to the Upper Kittitas area only. Please see the summary response on page 3.

Comment # 409

I respectfully ask that the time limit for written comments be extended to 60 days so involved and concerned citizen groups will have the time to thoroughly respond to the issues raised at this hearing.

Leave open the comment period for an additional several weeks, until the 27th of August or somewhere in there, which would be about 30 days past the next meeting. I think there's a lot of questions out there that you haven't answered and a lot of questions that will probably be developed as people have more time to think.

Commenter(s)

Senger, Steve
Central WA Home Builders

Response

Ecology extended the comment period for the rule another two weeks until August 25, 2010 in response to the public's requests.

Comment # 410

We appreciate the Department of Ecology's (Ecology) extension of the deadline for written comments in order to provide more opportunity for as many comments to be received by Ecology for consideration as possible.

Commenter(s)

Kittitas County

Response

Thank you for your comment. Please also see our response to Comment #409.

Relation to Other Areas

Comment # 411

America is just too big, and it is too big of a problem. The population is too big, and it's going to get bigger. You are not going to stop development, you are not going to stop people breathing. They are going to need a place to live. All the people that lose their homes on the south end of the country over here and all the devastation that's going on. They are going to be coming this direction no matter what you do. You are not going to stop people moving into other areas to look for a better way of life.

Commenter(s)

Merbs, Jerad

Response

The rule does not stop new development. It allows for new development when water rights are transferred to the proposed use or mitigation credits based on a pre-1905 water right are acquired.

Comment # 412

I have the next question from very, very limited research. I found this is the biggest water basin in North America. Canada, America, Mexico, right here. I could be wrong. Please prove me wrong because in my black helicopter kind of mind, if they seize the biggest water basin, Canada, America, Mexico, based on emergency conservation. If the water table is this high, because we are the deepest, what would happen to every other water table?

This is the precedent right now, this is history.

Commenter(s)

Voice of Independence

Response

The Mississippi and Missouri river basin is the largest in North America. Of basins lying *entirely within* the State of Washington, the Yakima basin is the largest basin.

Comment # 413

The consequences of a permanent moratorium will in fact impact real people, real businesses, and real jobs. Is this of any concern to your agency? Is this just the start of the proliferation of moratoriums by the Department of Ecology and cohorts of environmental extremist? ‘

Commenter(s)

Windh, Carole

Response

Of course, Ecology is concerned. That is why Ecology attempted for two years to reach an agreement with Kittitas County on a more moderate approach to address the problems arising from its approval of subdivisions in the upper county area. Please also see the summary response on page 3 and the response to Comment #397.

Comment # 414

I feel that the area is being singled out, and water availability has been inappropriately considered when a study has yet to determine there is a groundwater shortage.

Commenter(s)

Kenny, Lorna

Response

Please see the summary response on page 3.

Comment # 415

The legal basis of Ecology’s prior “emergency rules” as stated in, WAC 173-539A-020 “Authority,” is RCW 90.54.050 which provides that when lacking enough information to support sound decisions, Ecology may withdraw waters of the state from new appropriations until sufficient information is available. This “lack of information” appears to exist for groundwater use from permit-exempt wells in other communities for both domestic and stock water use, yet Ecology relies on the same legal basis to support its decision to not implement permit-exempt well restrictions elsewhere.

Commenter(s)

R&R Heights Land Company

Response

Ecology considered each petition within the context of the resource management needs of the basin. Ecology denied the petition by the Squaxin Island Tribe and is working with the Tribe and the County to address the instream flow and ground water impacts issues in the Johns Creek basin.

Comment # 416

Why not do it for the entire county?

I still have not heard a real reason to impose this ridiculous moratorium on just our part of the county.

In what circumstances would the lower county also have restrictions on drilling?

Commenter(s)

Conner, Kelli
Mirly, Ken

Response

Please see the summary response on page 3.

Comment # 417

Why not cut off water to the entire Yakima Basin?

No evidence has been discussed from the USGS study being conducted in the lower portion of the Kittitas County to justify why there are no restrictions on exempt wells in the lower portion of the county. This appears to be an inequitable application of Washington State law and science. As such, any restrictions on the use of permit-exempt ground water wells in Upper Kittitas County should only be implemented if similar coordinated restrictions are also placed throughout all other rural communities in the entire Yakima Basin (and arguably state-wide); and such restrictions should apply to both domestic and stock water use from permit-exempt wells.

If water is indeed scarce, then the exempt well rule should apply to all of Kittitas County, and in fact all of the Yakima River basin. The line drawn through Kittitas County is arbitrary.

Commenter(s)

Lussier, Dave
R&R Heights Land Company

Response

Please see the summary response on page 3.

Comment # 418

Should not the west side of the state be out of water? How many wells are drilled over there? Is there a connection between the water over there and over here? Maybe they're using up all the water. Why not stop development everywhere?

Commenter(s)

Geiger, Jesse

Response

The rule is about ground water in the Upper Kittitas area. If Ecology proposed a rule to address ground water in Western Washington, it would not include Kittitas County in the rule. The purpose of this rule has no relationship to water resources management in Western Washington.

Comment # 419

Why not cut off the entire state?

We have more water and less population to supply all the way to the Columbia River compared to the population west of the mountains. Seattle, Eatonville, etc., are not in a "state of emergency" and are allowed to use non-exempt wells. What makes Upper Kittitas County so special?

If we are in fact in an emergency all of the State of Washington should be placed in the same category as "Upper" Kittitas County.

If you are going to put these rules here, you put them everywhere. You just don't impact us. I mean that is to me point blank discrimination. I think as a community, we really need to start looking at a class action lawsuit.

I do understand the authority held by Ecology to protect senior surface water rights in this state, but what I don't understand is why Ecology does not apply a statewide ban on all exempt wells if Ecology thinks is of the opinion that exempt wells from anywhere in the state affect surface water. Do I want to see a ban across the state? No, but at least that would not unfairly just pick on the innocent property owner in upper Kittitas County.

While the County understands that water is an increasingly valuable and scarce resource which needs to be managed appropriately, the ability to fairly and uniformly apply Washington water law to all residents of the state should be considered in the development of the proposed rule.

Commenter(s)

Conner, Kelli
Hamberlin, Del and Dianna
Hurwitz, Dave
Kittitas County Attorney
Velie, Linda
Wise, Susie

Response

Please see the summary response on page 3. Please also see the response to Comment #417.

Comment # 420

The rest of the state had better take notice as the governor's trough, the state water bank system, grows, so will the demand in other parts of Washington.

Is cutting off the entire state your long-term plan? Is this just a test case?

Commenter(s)
Conner, Kelli
Sanders, Jim

Response
Please see the summary response on page 3. Please also see the response to Comment #417.

SEPA

Comment # 421
Ecology must consider the total environmental and ecological factors to the fulfilling of deciding major matters. Ecology is required to consider the provisions of SEPA.

Commenter(s)
Sanders, Jim

Response
We agree. Ecology's SEPA checklist and threshold determination was published on June 16, 2010.

Comment # 422
I read something about it saying it was nonsignificant. To whom, I don't know. But it says right here, "Washington's SEPA, " that's the State Environmental Policy Act, "requires an environmental impact statement to be prepared in connection with all actions of the state and local agencies," which the Department of Ecology is, "that may have a significant effect on the environment, which this definitely is having a significant impact on the environment, our environment. If you deemed it to be insignificant, then I think you failed to do your impact statement.

Commenter(s)
Merbs, Chad

Response
In its SEPA threshold determination, Ecology determined that the proposed rule would not have a significant adverse impact to the environment.

Water Rights and Water Supply

Comment # 423
I have owned my 2.9 acres of property for 34 years I believe it had water rights but because they were not used they were taken away. Fine. I can still drill a well and the property will not be worthless. Wrong.

Commenter(s)

Geiger, Jesse

Response

The commenter is correct. All water rights in Washington are subject to a beneficial use requirement. Although, the Legislature has exempted or excused some reasons for non-use of a water right, it is risky to assume that one may always restart use of an unexercised water right or begin a new water use, even a permit-exempt use.

Comment # 424

I live on the Teanaway. We have 200 acres with three houses on it. When we drilled the well for one of my sons, we also used that same well for my house. That was all right, when we only came over occasionally on weekends, but now we need another well and the rule says we can't have one.

Commenter(s)

Conner, John

Response

Thank you for your comment. Some important information is missing to determine whether or how the rule affects your use of water. However, you do indicate that your water use will increase. You should contact the Central Regional Office to fully evaluate your options and provide information about when your existing use of water began.

Comment # 425

Water rights are indeed a property right. But one thing that should be made clear is not everybody who has property has a water right. You get a water right either by appropriating it through the state process or through a federal process such as reserving it by treaty as the Yakama Nation did.

So if a piece of property never did have a water right established on it, there is no water right to take. So if a person is in that position with their property, as was the case, for example, with Suncadia, they simply went out and bought lots of water and established their resort. I'm afraid that's the way it has to work going off into the future.

I want to embrace one point that was made. This is not a particularly huge problem quantitatively. I'm not saying it's not a big problem economically to you all. What I'm saying is in terms of the amounts of water that we are talking about, this is not a particularly large problem.

Someone mentioned Seattle. Agriculture in the Kittitas Valley uses several times the amount of water as the entire city of Seattle. For Trendwest to develop several thousand lots, they bought essentially a few farm fields worth of water. They retired those water rights and created this large resort with it.

The fact that it is a small problem doesn't let you off the hook. The court found in 2001 that no amount of post 1905 surface water was okay to use when the May 10, 1905, water users were not getting their full supply. But it does mean that the amount of water that needs to be acquired and put through this mitigation program is not really terribly large. So I think we need to move on with that mitigation-type solution

Commenter(s)

Yakama Nation

Response

Ecology agrees. Our effort should be to avoid impacts from new uses that cannot be effectively mitigated and to identify and implement affordable and effective mitigation for those new uses that can do it. In the context of the entire Yakima basin water management scheme, the upper Kittitas issue is a fairly small one when measured by volume – 1,000 acre-feet of consumptive use would offset many years of residential development impact.

Comment # 426

If I have water rights, you are allowing me to build a house or whatever I want to do, if I give up my water rights to the trust account, whatever that is going to be?

Commenter(s)

Merbs, Jerad

Response

The commenter misstates the rule requirements. If you have a new appropriation of water, you can offer a pre-1905 water right for management in the trust water right program to serve as mitigation. Alternatively, the proposed rule allows you to buy such a pre-1905 right (or a mitigation credit based on a trust water right previously created) and convey it to the trust water right program.

Comment # 427

Will we ever be able to sell the parcels of acreage and or build on these lands, which have not been overdeveloped but left in its pristine condition for 26 years?

Commenter(s)

Rattray, Jane and Mark

Response

If you and a willing buyer reach agreement, you can sell the parcels of land you own. There is, however, no guarantee that you can build on any parcel of land. If effective mitigation of a proposed new use can be provided, you would be able to build a home on the parcel provided that no other restrictions would prevent it.

Comment # 428

Cluster developments should not be allowed.

Commenter(s)

Adams, Floyd

Response

Thank you for your comment. Land use and subdivision rules are within the jurisdiction of Kittitas County.

Comment # 429

Ecology has requested that Kittitas County make determinations regarding the validity of a water right by enforcing the "group use" definition by denying "land use applications" as defined by the proposed rule.9 In a May 4, 2010 email, Ecology communicated to Kittitas County that the County was to make determinations of when a proposed use for land subdivision falls under the permit-exemption clause in RCW 90.44.050 and proposed WAC 173-539A-040(3). This method of implementing the rule exceeds the County's legislative authority.

RCW 90.44.050 and the proposed rule clearly state that it is Ecology who will determine whether to issue a permit or water budget neutrality determination. Neither RCW 90.44.050 nor WAC 173-539A gives the County any authority to make a determination of when a permit vs. water budget neutrality is required. It is Ecology that has the authority to determine if a proposed groundwater use meets the permit-exemption under RCW 90.44.050. The County has no legislative authority to deny a subdivision application under RCW 58.17, or a building permit under RCW 19.27 based upon the type of groundwater use that the applicant is proposing. Ecology also considers RCW 19.27.097 as authority for the County to make determinations regarding what form of water right an applicant for a building permit should have. RCW 19.27.097 states that:

> Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. . . An application for a water right shall not be sufficient proof of an adequate water supply.

Ecology argues that this language gives the County the authority to make a determination of when the above "evidence" is valid. RCW 19.27.097 outlines three scenarios when the evidence may" be sufficient. These scenarios are when the applicant has: 1) a water right permit from Ecology, 2) a letter from a water purveyor for an existing public water system stating the ability to provide the applicant with water, and 3) another form sufficient to verify the existence of an adequate water supply (according to Ecology, this includes a water budget neutral determination under the proposed rule). All three pieces of "evidence" are determinations that can only be made by Ecology.

A statute that states the applicant "may" provide a determinations made by Ecology (permit, group water system approved by Ecology, water budget neutrality) is very different from requiring the County to make a decision as to which of these things the applicant should have. That is Ecology's role. Otherwise, Kittitas County will be in the position of acting for Ecology

in making the determination of which form is acceptable when issuing a building permit. This would exceed the legislative authority granted the County by the legislature.

Commenter(s)

Kittitas County Attorney

Response

The County comments that neither RCW 90.44.050 nor Ecology's rule gives the County authority to enforce Ecology's rule. The comment mischaracterizes what Ecology expects of the County. Ecology does not expect that the County will enforce Ecology's rule. Nor does Ecology believe the County's authority to act comes from RCW 90.44.050 or Ecology's rule.

Ecology expects that the County, when it makes its own land use and building permit decisions, will consider whether applicants have the legal authority to provide water to their proposed developments. This does not amount to enforcing Ecology's rule, it amounts to implementing the County's own obligations that come from RCW 19.27 and RCW 58.17, with an awareness of other legal requirements (including those found in Ecology's rule).

In considering whether an applicant has the legal authority to provide water to a proposed development, Ecology believes the County has the legal authority and obligation to consider whether water is both physically and legally available when making land use and building permit decisions in the context of RCW 19.27.097 and RCW 58.17.110. Ecology's view of these legal requirements is explained in more detail in the January 2010 legal brief Ecology submitted to the Court of Appeals in *Kittitas County and Central Washington Home Builders, et al, v. Kittitas County, RIDGE, Futurewise, and the Eastern Washington Growth Management Hearings Board.* That case was subsequently transferred to the State Supreme Court where a decision is pending.

Ecology believes current laws applying to Kittitas County make the County responsible for exercising its best judgment and make its best effort to determine whether appropriate legal provisions have been made for water and whether there is an adequate water supply. RCW 19.27.097 requires that each applicant for a building permit provide evidence of an adequate water supply for the intended use of the building. Acceptable forms of evidence recognized by the statute include water right permits and "another form sufficient to verify the existence of an adequate water supply." The statute expressly provides that applications for water rights are not sufficient proof of an adequate water supply. The phrase "an application for a water right shall not be sufficient proof of an adequate water supply" indicates the Legislature's intent that a building permit applicant must demonstrate *legal* as well as physical availability of adequate water.

Rules adopted by state agencies have the force of law. In an area where Ecology has adopted a rule prescribing that new groundwater uses cannot occur without mitigation to ensure water-budget-neutrality, a county cannot make the finding of adequate water supply required by this statute when the building permit applicant has not provided evidence that they have a legally supported water supply. If the applicant wants to develop a new water supply in the area covered by the rule, then they must submit a water-budget-neutral finding by Ecology or they cannot meet the requirement to provide "another form sufficient to verify the existence of an adequate water supply."

The County suggests that because this statute describes what evidence an applicant may provide, the statute cannot be the source of the authority or obligation for the County to make a determination regarding whether an applicant has made the showing required to obtain the land use or building permit. Ecology disagrees with the County's reading of the statute. Read as a whole, the statute obviously contemplates that the decision-making entity (the local government) is the entity that determines whether the evidence offered by the applicant meets the statute's requirements.

Even setting aside the legal debate over the county's authority, failure to consider Ecology's unambiguous rule regarding water availability is extremely poor public policy, exposes people to regulation and lawsuits, and does a disservice to the citizens of Kittitas County.

Once the Supreme Court rules in *Kittitas County and Central Washington Home Builders, et al, v. Kittitas County, RIDGE, Futurewise, and the Eastern Washington Growth Management Hearings Board*, Ecology may propose amendments to the proposed rule if the Supreme Court's decision clarifies the roles, responsibilities, and authority of Ecology and the County.

Comment # 430

We are just trying to wrap up a 30-year long surface water adjudication in this basin. There is really no doubt at the end of that time that it will be a definitive finding that there simply isn't water that Ecology can appropriate away in the future.

The proof of that is the fact that in several recent years, 2005, 2001, three times in the '90s, couple times in the '80s, again in the '70s, the May 10, 1905, water right holders have gotten down as low as 30 percent of the supply that they use to irrigate a couple hundred thousand acres of farmland in the Yakima basin. That's why others like Roslyn have been shut down is because the 1905 water users were not getting their supply.

The way this worked is that in the early 20th century the Bureau of Reclamation had requested the State of Washington come in and do studies to determine how much water could reliably be stored and delivered, and how much land could be irrigated with that water. And they developed a program to use all of it. And so basically anybody who came along after May 10, 1905, is living on borrowed water.

Commenter(s)

Yakama Nation

Response

Thank you for your comment.

Comment # 431

The Legislature gave the authority to perform water right adjudications to the courts, not Ecology. The proposed rule appears to make a determination about rights for groundwater use in Upper Kittitas relative to rights for groundwater use elsewhere in the basin.

Commenter(s)

Kittitas County Attorney

Response

Ecology does not agree with the commenter's inference. Adjudications do not determine if water is available to prospective water users or if new permits should be granted. They determine the final extent and validity of claims to existing water right. The proposed withdrawal of unappropriated water is based on RCW 90.54.050. It is neither directly or indirectly an adjudication of an existing right.

Comment # 432

The governor's contention that all ground water or all waters in the state, including rain, are allocated is flawed. According to the governor's study from 2000, in the section discussing the formalized registration act of 1967, later reviewed in 1975 I think, Ecology has recorded about 169,000 claims under the act, but only litigation could establish how many of the claims represent valid water rights.

Have you done litigation on 169,000 claims? If not, then how can the government state that all water in Washington State is allocated and controlled by the state? How many of these pre-1917 claims are invalid? Let's have the state do an inventory and move to take back the invalid claims.

Commenter(s)

Sanders, Jim

Response

Ecology is responsible for administering the water codes enacted by the Legislature. Washington declared in 1917 that all surface waters and in 1945 that all ground waters of the state were owned by the state for the benefit of its citizens.

Ecology acknowledged receipt of the claims during the four claim registration periods, but did not determine the validity of the information provided on the claim. More than 166,000 claims are now on file with the Claims Registry. A water right claim is only a statement that you claim to have a perfected right and currently, claims can only be given legal certainty through an adjudication. Currently, only a small portion of Washington's pre-code rights (including claims) has been confirmed through adjudication.

Ecology agrees that the need for reliable information on the extent, validity, and relative priorities of existing water rights is essential for water resource management and planning. There is no current timeline set for adjudicating the remaining claims. Streamlining the adjudication process to be more timely and cost-effective will require legislative modification, additional funding, or both.

Comment # 433

The state has ignored the use-or-lose-it rule of water rights and in some cases has assisted abuse. Suncadia is an example of a water right that has lost the right to most of the water claimed as they have not used the claimed amount for over five years. Five years, use it or lose it.

Commenter(s)

Sanders, Jim

Response

When Ecology investigates a water right change request, the agency is required by law to perform a tentative determination of the extent and validity of the water right. This involves looking back at the history of water use under the original water right. It may be determined that a water right has been entirely, or partially, relinquished (returned) back to the public waters of the state. This occurs if the water has not been used for a period of five or more years, and no sufficient cause exists for the non use.

In Suncadia's case, Yakima County Superior Court had first determined the right acquired to be valid in the amounts stated in the Conditional Final Orders. Since Ecology approved the transfers in 2002, Suncadia's water rights have been managed in accordance with an annual water management plan that identifies the amounts to be used at the resort, by the city of Cle Elum, and for mitigation for off-site development. The balance of the rights not needed currently for the resort are managed for instream flow purposes, or at times have been leased to KRD or Roslyn to help them with water shortages during drought.

Comment # 434

If surface water rights are not being used or not fully used, should those rights be adjusted accordingly?

Commenter(s)

Mirly, Ken

Response

RCW 90.14 provides that water must be beneficially used under a water right or, after a specific period, the user can lose their water right through relinquishment back to the state. While relinquishment is an operation of law, formally adjusting water rights to account for relinquishment occurs either through a departmental order or an adjudication, both very costly processes.

Comment # 435

If there are senior water rights down in the lower valley and they decide to take their crops out for a few years, do they lose their water rights for five years because they have taken their crops out for five years?

Commenter(s)

Wise, Susie

Response

RCW 90.14 provides that water must be beneficially used under a water right or, after a specific period, the user can lose their water right through relinquishment back to the state. The law also provides for certain circumstances under which a water right would not be subject to

relinquishment. These sufficient causes for non-use of water for a period of five or more consecutive years include: active military service, drought conditions, court proceedings, or water use for municipal water supply purposes. A permanent change of crops is not a sufficient cause for non-use.

Comment # 436

Reassess the water rights each farmer has: Is the land still used for farming, do they have more water rights then needed for their land and the current uses, or other reasons that I have no knowledge of that would affect water right uses.

Commenter(s)

Hamberlin, Del and Dianna

Response

Ecology agrees that the need for reliable information on the extent, validity, and relative priorities of existing water rights is essential for water resource management and planning. There is no current timeline set for adjudicating water rights across the state. Streamlining the adjudication process to be more timely and cost-effective will require legislative modification, additional funding, or both.

Comment # 437

The stated purpose of the proposed rule, to protect senior water right holders from impairment, needs to be quantitatively and qualitatively reevaluated as to whether or not senior water right holders and irrigation districts really need all the water they are currently allocated.

Commenter(s)

R&R Heights Land Company

Response

A general adjudication is a legal process conducted through a superior court to determine the extent and validity of existing water rights. Yakima County Superior Court has evaluated evidence of water use over the past 25 years in the Yakima River Basin (*Aquavella*) Surface Water Adjudication (Cause No. 77-2-01484-5). The judge has entered conditional final orders for all 30 major claimants (irrigation districts, cities, United States, etc.) and for all 31 subbasins (individual water users). The court has confirmed all surface water rights in the Yakima Basin, which are now enforceable against other water users and can be protected from impairment.

The time to refute a surface water right claim was during the evidentiary and exception hearings in the *Aquavella* case. Ecology will not be quantitatively or qualitatively reevaluating the courts orders in this pending case.

Comment # 438

We understand water rights and the farmers and Indians right to use of the water, but why are they allowed the “use it or loss it” attitude? For an example, take a drive through Thorp,

Ellensburg, all of Yakima County and beyond to the Columbia River in Washington during the heat of the day. Crops are being watered, along with lawns and yet the bar ditches are full and running with wasted water from leaks in the canal and run off from the watering of their lawns. Evaporation is another major issue not addressed.

Commenter(s)

Hamberlin, Del and Dianna

Response

The Yakima Basin has a unique water management system. The United States Bureau of Reclamation (USBR) manages the Yakima River by Total Water Supply Available (TWSA). You may think of the basin as one bucket that is filled by storage, return flows, snowmelt, and other precipitation. The USBR accounts for water by adding 1) natural flow 2) releases from the five storage reservoirs and 3) return flows from irrigation to serve diversion needs above the Parker Gage (just downstream of the Sunnyside Diversion dam) and meet target flows over Parker Dam. Therefore, any return flows that are generated by leaky canals or inefficient irrigation practices are accounted for in the USBRs management of river operations and are reused again by a downstream user.

Operational spill and tail water from fields may be indicative of relatively low water conveyance or application efficiency; however, it is not necessarily wasteful and prohibited by law.

Comment # 439

We have senior water rights and are very concerned that we will have enough water in the future if developments continue to use their class B wells.

Commenter(s)

Adams, Floyd

Response

In Washington State, a water right is needed to divert or withdraw waters of the state. A water right allows the water right holder to use a predefined quantity of water for a designated purpose. While Group B water systems are commonly “permit-exempt” groundwater uses and are excused from needing a state permit, they still are considered to be a water right. In 1917, the Washington Legislature enacted the Water Code, basing water law on the legal concept of “first in time, first in right.” This means that a senior water right cannot be impaired by a junior water right. Seniority is established by priority date: the date an application was filed for a permitted water right, or the date that water was first put to beneficial use in the case of claims and permit-exempt groundwater uses.

When Ecology evaluates an application for a new water right, we consider how the new withdrawal may affect existing groundwater users. In addition, Ecology evaluates the physical availability of water for new water rights.

Unfortunately, permit-exempt groundwater uses, since they do not require a permit, are not required to meet these tests of availability and impairment before they begin using water. However because permit-exempt groundwater uses must meet all other applicable water laws,

they are still subject to calls of impairment by senior water right users. The senior water right holder is responsible for "calling" the water of the junior users if a shortage exists that interferes with the senior's water right. Through this process, the junior permit-exempt water user can be curtailed to protect the senior user's water right.

Comment # 440

Other municipalities that have well permits with priority dates junior to Roslyn that have wells in hydraulic continuity with surface water, continue to expand and develop making Roslyn's situation worse.

Small lot development in agricultural areas using senior and junior water rights for domestic type uses that are unmetered or measured continue to make Roslyn's situation worse and promotes development outside of the City contrary to the Growth Management Act. Permit-exempt wells are being used as a water supply in the conversion of forest and agricultural resource lands into low density sprawl pattern of development throughout the Yakima Basin while adjacent senior water rights holders are required to be curtailed or acquire mitigation water.

Commenter(s)

City of Roslyn

Response

Ecology recognizes that pumping from groundwater wells diminishes stream flows relied upon by senior surface water right users and reduces legally required flows for fish. Groundwater withdrawals in Upper Kittitas County intercept these water supplies where they begin at the headwaters of the Yakima River, preventing the water from reaching farms and cities (including Roslyn) downstream that rely on this water for their livelihoods. Allowing new groundwater withdrawals that further deplete an already over-committed water supply is unfair to senior water right holders, harmful to the water-dependent economy and fish runs, and bad public policy. This rule protects those who have a right to the water first.

New groundwater uses developed under the groundwater permit exemption are still subject to the doctrine of prior appropriation – first in time, has first in right – and a court or senior right holder may take action to restrict these junior uses if they are taking water out of turn. This is one reason that Ecology started the rule-making process in Upper Kittitas County to withdraw ground water from any new unmitigated appropriations.

The best insurance policy for any post-1905 water user in the Yakima Basin is to obtain coverage under a senior water right. This will provide them the assurance their water supplies will remain intact during years of drought when water use may be rationed or curtailed. Unmitigated groundwater users are at risk of both expensive litigation and curtailment of their water use.

Comment # 441

This is a "Paper" water issue and not a "Wet" water issue. Please stop referring to both as if they are the same. Solving the "Paper" water issue does not solve the "Wet" water issue that

the emergency rule is trying to stop and is predicated on. Addressing the "Wet" water can and will solve the "Paper" water issue, so let's get our priorities straight and work on the groundwater study, water storage, and conservation.

Commenter(s)

Kirkpatrick, Marc

Response

The "paper" is evidence of the water right. In the Yakima Basin, the Yakima County Superior Court has evaluated evidence of water use over the past 25 years in the Yakima River Basin (*Aquavella*) Surface Water Adjudication (Cause No. 77-2-01484-5). The judge has entered conditional final orders for all 30 major claimants (irrigation districts, cities, United States, etc) and all 31 subbasins (individual water users), thereby confirming all surface water rights in the basin. Ecology will not be quantitatively or qualitatively reevaluating the courts orders in this pending case.

Ecology disagrees that the issue is not a "wet" water issue. Tributary streams all across the Upper Kittitas area have been very highly appropriated for more than 125 years. These streams do not have sufficient flow during the August to November period in most years to meet the needs of existing rights. That is not a paper problem. Similarly, twice in the past decade (2001 and 2005) the Yakima valley has experienced basin-wide shortfalls of more than 500,000 acre-feet. That water was needed to meet the water supply for only water users with rights of May 10, 1905 and earlier. That is not a paper problem.

Comment # 442

- Ground water and surface water are connected throughout the valley.
- The Yakima Basin surface water rights are fully appropriated and subject to curtailment orders.
- We are all connected through TWSA (Total Water Supply Available) and ground water withdrawals reduce TWSA.
- Increased ground water pumping and use in the tributaries reduces stream flows needed for fish and other aquatic wildlife.
- Ground water withdrawals reduce stream flow and have created a water shortage in drought years that did not exist before 1977.
- The USGS Estimates of Ground-Water Pumpage from the Yakima River Basin Aquifer System, Washington, 1960-2000, Scientific Investigations Report 2006-5205 indicates that 200,000 additional acre-feet of ground water rights were allowed to be withdrawn in permitted wells between 1960 and 2000.
- Ground water pumping and consumptive use reduces stream flow by either intercepting flowing ground water that would otherwise discharge to streams or by intercepting flows from the streams into the aquifer.

Commenter(s)

City of Roslyn

Response

Thank you for your comments. See response to Comment #439. Ecology largely agrees with your statements, except for the following, "Ground water withdrawals reduce stream flow and has created a water shortage in drought years that did not exist before 1977." Ecology recognizes that pumping from groundwater wells diminishes stream flows in the Yakima Basin that are fully appropriated (and in some areas over appropriated). However it is inaccurate to suggest groundwater withdrawals only began having an effect on stream flow in 1977.

Comment # 443

Please provide me the water right information for the pump that is located along I-90 that is removing water from Lake Keechelus.

Commenter(s)

Marion, Fred

Response

Please contact the Yakima Basin Watermaster for water use information. WSDOT operates the pump plant for the I-90 project under a temporary permit issued by Ecology. In 2009, WSDOT acquired a pre-1905 water right near Ellensburg that offsets the consumptive water losses associated with WSDOT's dust control and highway construction activities for the I-90 expansion.

Comment # 444

It doesn't make sense that the first water rights issued withdrew out of the stream or right next to the stream.

Commenter(s)

Hinkle, Representative Bill

Response

Thank you for your comment.

Appendix A: Copies of all written comments

Letters are included in alphabetical order.

Bettyle Adams

From: Bettyle Adams [betadams@peoplepc.com]
Sent: Friday, August 20, 2010 2:06 PM
To: 'kittitas@ecy.wa.gov.'
Subject: Proposed permanent rule for new wells

RECEIVED
AUG 20 2010
DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

To: Mark Schuppe
Department of Ecology

We are addressing our concerns regarding the proposed permanent rule for new wells in upper Kittitas County.

We have Senior water rights and are very concerned that we will have enough water in the future if developments continue to use their class B wells.

Cluster developments should not be allowed.
Concern about septic tanks which can run down into our water systems of Fowler Creek and Peterson Creek.

Granite Creek is a small basin which helps feed Fowler Creek and Peterson Creek.
A large percentage of the water flowing in the basin is shallow 5' to 50'. The best producing wells are shallow.
There is a well on the old bed of Granite Creek. If Granite Creek changes course again the water will run right through the well.
Is test drilling being done to see how much water is flowing? Will it affect the water of our water rights?

The addition of more developments with chip sealed and blacktop roads will cause more pollutants to drain into Fowler Creek, which is our irrigation water.

Look at the situation of the lower Yakima Valley with nitrates entering a large percentage of the wells.

Our water rights must be preserved as much as larger companies mineral rights are preserved.

Thanking you for your every consideration in the above matter, I am

Very truly,

Floyd Adams
661 Fowler Creek Road
Cle Elum, WA 98922

Aqua Permanenté
protecting the waters of the Yakima Basin

August 25, 2010

Department of Ecology
Central Regional Office
Water Resources Program
Yakima, Washington

Via e-mail to Kittitas@ecy.wa.gov

Re: Comments on Draft Ch. 173-539A WAC (Upper Kittitas Ground Water Rule)

Dear Dept. of Ecology,

Thank you for the opportunity to provide comments on the draft permanent rule for Kittitas County groundwater. These comments are submitted on behalf of the Center for Environmental Law & Policy, and Aqua Permanente, two non-profit public interest organizations with longstanding interests in protecting all water resources of the Kittitas Valley and the Yakima basin, for the benefit of existing water right holders and environmental values.

We generally support adoption of the draft permanent rule for Kittitas County and thank the Department of Ecology for taking an approach that is consistent with our September 2007 petition seeking basin closure until sufficient information is known to ensure protection of senior water rights and instream flows.

Section -010: This section should explicitly note that it applies to permit-exempt wells, and that the geographic scope covers the entirety of Kittitas County.

Section -030:

- "Consumptive use" definition is too limited. Impacts on water quality, location and timing of return flow are factors that should be referenced and implemented.
- "Existing use of the ground water exemption" definition should not provide for or allow grandfathering. See -040 discussion below.
- "Land use application" definition invites Kittitas County to create a new term for land division that could then be interpreted to fall outside the rule. We encourage you to add a generic definition that includes all land use decisions.

Section -040: Subsections (1)(a) and (3) effective authorization of water for grandfathered parcels is not supported in the law, which establishes that permit-exempt (as well as permitted) groundwater uses are subject to the "first in time" priority rule and cannot trump

senior water rights. In the Kittitas Valley, interruptible surface water rights are affected by junior groundwater rights. Regardless of the rule disclaimer in subsection (2), it is inappropriate and legally improper for the Department to adopt a rule that encourages such use through grandfathering. We urge you to reconsider this approach.

Section -050: We agree with the concept and requirement of water budget neutrality in all future water allocations and further that the Department make such determinations for all proposals, whether permitted or permit-exempt. With respect to Subsection (3) we object to a determination regarding offsets for consumptive use due to "return flow" concepts. On-site septic systems are not necessarily permanent structures. Return flow from septics can be compromised in quality, or the system can fail to function properly if not maintained. Ultimately, wastewater should not be legally considered a substitute for freshwater unless treated to the highest level (ie, a level at which such water could be consumed like freshwater, including as drinking water supply). Outside watering should be debited at 100% unless an individual properly can demonstrate return flow. Wastewater effluent can return to the river at locations far from the original withdrawal. Rule-based assumptions crediting return flow to consumptive use should not be adopted.

Section -060: We respectfully question the wisdom of establishing an process for expediting applications while the agency is experiencing suffered substantial budget and personnel cuts that prevent it from accomplishing basic duties. This section will establish expectations by applicants that it seems quite possible cannot be met. In the (worse) alternative, it would require the Department to elevate the processing of Upper Kittitas County water rights above other CRO and statewide activities that may be of greater import. With respect to subsection (2)(b), we appreciate the inclusion of a requirement that proposed new uses must be consistent with agreements governing the trust water right. Because there are numerous trust water transactions occurring in the Yakima Basin, and because many of these rights contain conditions and limitations designed to protect senior rights, instream flows, and the public interest, it is essential that the Department recognize and limit use of such rights as required in associated agreements in order to assure reliable, permanent mitigation.

Section -070: Metering and reporting is essential. We ask that you require consistent and reliable metering equipment and that the requirement be extended to all exempt wells using water for outdoor uses (because that use has been deemed "unlimited").

As a final general note, mitigation is a critical concept in the Department's ability to process water rights in the Yakima Basin. It is essential that water resources mitigation be real in every way, in terms of validity of mitigation rights, and location, quantity, quality, and timing, for proposed new uses. We appreciate Ecology's efforts to achieve a balance between development pressures and the absolute necessity of protecting senior water rights and environmental flows. The number and quantity of water budget neutrality and mitigation requests that are now "stacking up" in your offices is impressive and may not be suitable for processing.

Thank you again for the opportunity to comment on the draft permanent rule governing Upper Kittitas for your attention to this matter. We look forward to your response.

Yours very truly,

Rachael P Osborn on behalf of

Rachael Paschal Osborn, Center for Environmental Law & Policy
25 W. Main, Suite 234, Spokane, WA 99201
509-209-2899 / rosborn@celp.org

Melissa Bates, Aqua Permanenté
120 Elk Haven Rd., Cle Elum, WA 98922
peohpoint@mac.com

CC: Tom Tebb, Department of Ecology
Kittitas Board of County Commissioners
Joe Mentor, Suncadia
Phil Rigdon, Yakama Nation

Johnson, Roger E. (ECY)

From: Chad Bala [bala.ce@gmail.com]
Sent: Wednesday, June 30, 2010 12:38 PM
To: ECY RE Kittitas Rules
Subject: SC Aggregate Company LLC Trust Water Right

Mark,
hope things are going well for you. I am emailing you inquiring about the SC Aggregate Company LLC Trust Water Right Agreement along with CS4-01724CTCLsb7 (KITT-09-05) applications. I have heard that these agreements etc. have been granted final approval and I would like to request a copy of these final documents.

thanks again.

chad

--
Chad Bala
Terra Design Group, Inc
PO Box 686
Cle Elum, WA 98922
Cell Phone # (509) 607-0617

RECEIVED
AUG 25 2010
DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

To the Department of Ecology
Via: Fax to Mark Schuppe at: (509) 575-2809

As a matter of public record I submit the following observations, facts and opinions regarding the well moritorium in Kittitas County and rule proposal by the Department of Ecology (DOE).

The first fact that I share is that upon arriving at the July 2010 hearing in Cle Elum I was greeted by a Department of Ecology employee who solicited my signature on a form. When I inquired why, she informed me that it was "required so the meeting room expense could be paid". Noticing that many people had already arrived I questioned whether there was any impact of one more signature. She then admitted that my signature was, in fact, not required – like she had initially stated. This employee's ability to commit a bold faced lie to a citizen is deplorable.

In the meeting room itself the DOE had no public address system. This made the communication of information difficult for many and impossible for some; particularly the hearing handicapped. The inability of DOE to be prepared for public communication is demonstrative of the agency's lack of concern for the citizenry. DOE showed no compassion that the citizens had volunteered their time to participate and "hear" what was going on. The DOE employees were paid to be present, whether they made any effort to perform well for the stated purpose. The fact is they did a poor job and got paid highly for it.

The DOE had a planned slide show presentation but was not technically capable of doing so. Again, unable to perform; but paid as if they had executed it brilliantly. However, it is offensive that it was considered a successful public "hearing".

It is my observation that the lack of the slide show actually allowed one DOE employee to go "off script" and thereby admitted the underlying truth. It is fact that what was stated is that the DOE "intends" to implement the permanent rule on October 15, 2010.

I personally stood up and pointedly asked if I had heard the statement correctly. Speaking clearly and cicinctly the entire room was told that the DOE intends to implement the permanent rule on October 15, 2010. I pressed the issue further and asked what was the point of taking testimony if this was already cast in stone and therefore no impact of the testimony could be considered? Mr. Tebb stated they might consider an alteration (which was in fact the case when they extended the time to submit written comments from August 11 to August 25), but that there would be no further public involvement (beyond accepting comments).

This is intolerable.

During the lenghty time that I stayed for this meeting, all testimony was in opposition to the DOE rule. The citizens who spoke clearly outlined how they were victims. Our Senator, County Commissioner, and Representatives likewise testified in opposition; both to the rule and to the DOE's unfit handling of this matter.

I can continue to recount the comments and testimony, but they are already a matter of public record; are they not? So the victim that wanted DOE to reveal what "emergency" had been in effect and/or

abated by the action of DOE should have received a prompt truthful answer – did he? The victim who testified and posed the inquiry of where was the due process, should have received a prompt and truthful answer from the DOE – was that done? The repeated testimony and outcries pointing to an absence of scientific proof should have been provided that evidence – shouldn't they? Even though Representative Warnick testified that funds were available for scientific research, for years – did it get done? And where is the financial report that TRUTHFULLY measures the dramatic impact this moritorium has brought to bear on an already fragile community?

Does anyone remember the sign in Seattle that read "Will the Last Person Leaving, Please Turn Out the Lights?" The financial impact of that time is much like what has happened in "Upper Kittitas County". The DOE has chosen to turn a blind eye to the detrimental impact of the well moritorium in Kittitas County. Their economic impact statement was written only to be self-serving and not to measure the facts.

Again, this is intolerable.

Please remove the moritorium and reject the proposed rule by DOE.

Should this matter be heard in a court of law I offer myself as a witness to the inappropriate actions of DOE personnel; that the actions by DOE are unseemly, unscientific, and contrary to customs; and to solomenly swear that this moritorium has had a negative financial impact.

Submitted this 25th day of August, 2010

Valeria S Barschaw
Citizen of Upper Kittitas County
1087 Hidden Valley Rd
Cle Elum, WA 98922-9145

P.S. Here are my comments regarding the hearing from Feb 11, 2009 in Cle Elum.

#1 The petitioners don't care about who is hurt.

#2 My concern is this kind of action is not sincere about making Kittitas County cleaner and greener. Instead, it's about money and power – making state government more intrusive while reducing the green in your wallet.

#3 I appreciate the participatory efforts of the DOE at this hearing. The only physical evidence that supported such a dramatic shift from the prior year's meetings was the absence of Jay Manning. The meeting was noticeably improved.

RECEIVED
AUG 0 9 2010
DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

Beth Brannian
PO Box 5963
Bellingham, WA 98227

Cell 360 303-2200
Home 360-671-2712

solarwind137@gmail.com

August 2, 2010

Mark Schuppe
Department of Ecology
Central Regional Office
15 West Yakima Ave., Ste. 200
Yakima, WA 98902-3452

kittitas@ecy.wa.gov

Dear Mr. Schuppe,

I am requesting a written confirmation of receipt of this comment letter from DOE, and also a written response from DOE to all of my questions contained in my comment letter.

I do not understand how you could give my partner, Jerry Stougard, a permit to drill an exempt well and then not allow us to build a home and utilize our property. Could you please explain to me what we are to do. $200,000.00+ has been invested in this property, 1630 Teanaway Terrace, which we planed to build our retirement home on. We have worked for years on this property, limbing trees and eliminating ground fuel (fire prevention), thousands of dollars of rock were purchased to improve the driveway and parking area, creating a campsite where we park our travel trailer from Spring to Fall, bringing in power and installing 600 feet of under ground wiring in preparation for the house we were going to build when we retire in a few years. In May of 2008, we had our well drilled, installed a pump, dug water lines and installed hydrants that would service the house, barn, and shop that we had planned to build there in the future.

We could start over somewhere else, but now this property is not even salable for what we have invested in it. Why would someone buy a property that they can not build on? If we knew when we bought this property that we would only be allowed to "camp" on it, we would of bought a membership to "Thousand Trails" instead.

Shouldn't growth be controlled with zoning, this is something I understand. If this property was zoned as unbuildable we would not have bought it, we certainly wouldn't have drilled a well, and planned our life around living on it. We have neighbors bordering two side and the front of this property that have wells and houses, yet we can do the same on ours.

Only after Jerry bought the property and installed a road, power, and water did the rules get changed in mid project. What happened to being grandfathered in under the rules and laws that governed when we spent the dollars on the improvements leading to eventually building on this property. If we were not going to be able to utilize our well without buying water shares why didn't it state the conditions of use on the permit. For example, "before you can use this well, that Ecology is giving us a permit for, you had better obtain a water share before you invest $24,000.00 into a hole in the ground."

If you want this land to remain forrest and not a homesite why don't you buy it from us? Then you can do whatever you want or don't want with it.

We cannot afford to start over. We cannot recover financially from this situation. I know others have written letters with more facts, figures, and detailed information about laws and why this whole situation is unjust. There are many other ways to conserve water, so I am not going to write here what you already know. To my limited knowledge no one has done a study that proves that the exempt wells have any impact on surface water, but you already know that as well.

Beth M Bannier

Schuppe, Mark (ECY)

From: Diana Burchak [burchakfamily@gmail.com]
Sent: Monday, August 16, 2010 4:01 PM
To: Schuppe, Mark (ECY)
Subject: Fowler Creek drainage area
Attachments: water.doc

Attached is the letter that I am sending to your office. Please contact me if you have any questions.
Dennis Burchak

August 16, 2010

WA State Department of Ecology
Central Regional Office
Attn: Mark Schuppe
15 W Yakima Avenue
Suite 200
Yakima, WA 98902-3452

Dear Mr Schuppe,

As Senior Water Right's holders on Fowler Creek, we would like to voice our concern regarding the influx of the projected large developments in the Granite Creek area and numerous wells that have been drilled in this drainage area.

The five wells on Section 3 are pumping water to the Granite Creek development. (See the Well Log for their specific locations.) It would appear to us that the underground source of these waters are one and the same as those supplying Fowler and Peterson Creeks with their stream flows.

Further, there are two Class A wells that are located in the old Granite Creek Creek bed. (This channel changed course in the 1980's due to extreme run-off and resultant downed timber.) This underground water source is also most likely a source of the Fowler Creek drainage area.

The well, located upon our property, was producing one gallon per minute when it was originally drilled. It appears to be more than co-incidental that the output of this well has decreased as more and more wells have been drilled in our area.

We have been metering our irrigation water use since advised to do so by the Department of Ecology. As we, and our adjacent property owner are the final senior water rights holders on Fowler Creek, it is most obvious to us that by the end of the irrigation season there is no excess of water flowing in the creek. For this reason we firmly believe that any transfer of water rights out of the Fowler Creek drainage area would negatively affect the stream flow, our senior water rights, and negate water budget neutrality. It is our hope that, as part of your groundwater study in our Upper County, you will include the Fowler Creek drainage area.

Thank you for consideration of our concerns. Please contact us if you have any Questions or comments. (Telephone 509-674-2461 \ burchakfamily@gmail.com)

Sincerely,

Dennis & Diana Burchak
410 Fowler Creek Road

Johnson, Roger E. (ECY)

From: Bill Clarke [bill@clarke-law.net]
Sent: Tuesday, August 24, 2010 5:49 PM
To: ECY RE Kittitas Rules
Subject: Comment letter on Kittitas Groundwater Rule
Attachments: CWHBA-KCAR to Ecology 8.24.10.pdf

Attached is a comment letter from the Kittitas County Association of REALTORS® and Central Washington Homebuilders Association. Please contact me if you have further questions.

Bill Clarke

Please Note New E-mail: bill@clarke-law.net

BILL CLARKE
ATTORNEY AT LAW & GOVERNMENT AFFAIRS
CAPITOL COURT BUILDING
1110 CAPITOL WAY SOUTH, SUITE 225
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Central Washington
Home Builders Association
"Building and Supporting our Communities Since 1955"

Kittitas County
ASSOCIATION OF REALTORS®

August 24, 2010

Mark Schuppe
Department of Ecology
Central Regional Office
15 West Yakima Avenue, Ste. 200
Yakima, WA 98902-3452

RE: Comments on Proposed WAC Chapter 173-539A
Upper Kittitas County Ground Water Rule

Dear Mark:

These comments are submitted on behalf of Kittitas County Association of REALTORS® and Central Washington Home Builders Association, ("Associations") who collectively represent the majority of businesses and individuals involved in the development and sale of residential real estate in Kittitas County. Aside from landowners themselves who properties are impacted by Ecology's ongoing groundwater moratorium in Upper Kittitas County, no one has been affected by the moratorium more than the members of the Associations.

1. It is Improper for Ecology to Adopt A Permanent Rule Without First Obtaining Necessary Technical Information, and Putting in Place a Functional and Affordable Mitigation System.

The Associations believe that it is improper for Ecology to adopt a permanent groundwater rule before undertaking the necessary studies to better understand the complex technical issues associated with groundwater in Upper Kittitas County. Further, we believe that is improper for Ecology to adopt a permanent groundwater rule that continues the groundwater moratorium without first putting in place a functional mitigation system that addresses the severe economic consequences of moratorium on Kittitas County's citizens, landowners, and businesses. During the ongoing moratorium, Ecology has relied heavily on RCW 90.54.050 for the proposition that when it is lacking

necessary information, it may withdraw waters of the state, including exempt groundwater, from appropriation. We believe that Ecology is obligated to give equal authority to another provision of the Water Resources Act, RCW 90.54.020(5), which states that "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs."

Ecology has been heavily involved in groundwater issues in the Yakima Basin since 1999, when numerous groundwater permit decision were appealed by the Yakama Nation and U.S. Bureau of Reclamation. Rather than understanding the technical issues and developing alternatives to the ongoing necessity of exempt well use, Ecology adopted an emergency rule in 2009. That said, we acknowledge it is likely Ecology will in fact adopt the permanent rule absent necessary technical information and mitigation strategies, just as it adopted the emergency rule and moratorium. For this reason, while we believe that Ecology should not adopt a permanent rule, the remainder of this comment will focus on necessary changes to the rule assuming it will be adopted. While the rule proceeds forward, we are pleased to see that the groundwater study for Upper Kittitas County funded by the State Legislature will proceed forward, in hopes that it will create better understanding of technical groundwater issues, more precise regulation of actual impacts, and meaningful mitigation where necessary to avoid impacts to senior water rights.

2. Definition of "Common Ownership" is Overly Broad and Unworkable

Proposed WAC 173-539A-030 defines the term "common ownership" in an attempt to clarify the meaning of the State Supreme Court's decision in Campbell & Gwinn, in which the Court held that RCW 90.44.050 allows for one 5,000 gallon per day exempt "per project." The proposed definition goes far beyond the "per project" concept in Campbell & Gwinn and should be narrow and clarified. Specifically, the proposed definition would find "common ownership" when adjacent parcel owners, who have no familial or business relationship, merely cooperate in joint development arrangements. Given that the proposed rule applies to rural parts of Kittitas County, with large lot land use patterns, parcel owners often cooperate to both save costs, improve project design and layout, and to minimize environmental impacts from development.

For example, if adjacent property owners work together to hire a single engineering firm to design roads and utilities, and then with a contractor to coordinate road and utility construction, the result will be cost savings to the project and improved design, as roads are compatible and can be planned to improve safety. In addition, construction can occur at a single time, rather than in multiple stages as would be the case in uncoordinated development by adjacent landowners. The proposed "common ownership" definition discourages landowners from hiring the best qualified engineering and construction firms who are capable of creating development plans for multiple landowners. Instead, to avoid Ecology's "common ownership" definition, landowners will be encouraged to pursue uncoordinated and piecemeal planning and

development that will negatively impact project design, safety, cost, and environmental impact.

Finally, Ecology's proposed definition simply lacks logic. In no sense of the word "ownership" would it be thought that adjacent landowners with no family or business connection, and who could independently develop land if they so chose, would be consider common owners. Where there is no actual, legal ownership between adjacent lot owners, Ecology must follow the 5,000 gallon per day principle from Campbell & Gwinn.

3. "Water Budget Neutral" Concept is Too Narrow

The proposed rule appears to rely exclusively on "water budget neutral determination" process as the only mechanism to avoid the impact of the moratorium. See, e.g., proposed WAC 173-539A-050; 030. While the water budget neutral process has developed as a necessity to avoid the impacts of Ecology's groundwater moratorium, this concept should be viewed as the sole mitigation strategy in Upper Kittitas County.

The rule needs to include some additional flexibility to allow for mitigation strategies such as off-site and on-site storage, water transfers, deep well withdrawal, and other types of mitigation strategies that could be developed in future years. The current water exchange process provides one type of mitigation that will provide relief for some landowners, but Ecology's rule should acknowledge that other types of mitigation may be developed in the future.

4. Ecology Should Commit to Specific Timelines for Expedited Processing for Development Projects

Even the groundwater moratorium is now over a year old, Ecology is still working out various processing and review issues associated with water budget neutral determinations needed for subdivision and building permit applications. While the proposed rule includes language that such applications can be expedited (see proposed WAC 173-539A-060), development projects require more certainty as to when Ecology will issue specific decisions. By enacting the moratorium, Ecology is placing itself in the midst of real estate transactions and the land development permitting process, and should provide applicants with specific timelines for action.

RCW 90.80.80(4) requires Ecology to review county water conservancy board decisions within 60 days. We think this is an appropriate model for Ecology to follow in the water budget neutral process as well. By having a specific timeline in rule, parties to real estate transactions and in development projects will have greater certainty in structuring agreements.

5. Small Business Economic Impact Statement and Cost Benefit Analysis Invalid

Ecology's Small Business Economic Impact Statement (SBEIS) and Cost Benefit Analysis (CBA) fail to meet statutory requirements and are grossly inaccurate. RCW Chapter 19.85 requires Ecology to analyze the impacts of the rule on small business,

including an analysis of cost impacts and jobs that may be gained or lost. Instead of actually analyzing how the rule will impact the real estate development and construction industry in Kittitas County, Ecology's SBEIS and Cost Benefit Analysis are premised are an artificial narrow scope that avoids any meaningful analysis. The SBEIS states that "the proposed rule does not directly affect current or future businesses that have or use established water rights." SBEIS, at 2. This narrow scope is different from how Ecology has analyzed job and economic impacts in other recent water resource rulemaking processes.

By constraining the scope of the SBEIS only to what Ecology considers a "direct" effect, the SBEIS analyzes only the impact to small business that would build a new facility in Upper Kittitas County in an area not served by public water. It is deeply troubling to the Associations that Ecology would adopt a permanent groundwater moratorium for which only limited mitigation is available, and in so doing refuse to actually analyze the impacts of this rule on the development community. We can assure you that the "direct effect" between Ecology's groundwater moratorium and negative economic consequences to the real estate development community is much more evident than is Ecology's theory of "direct effect" between groundwater and surface water that underpins its moratorium.

Similarly, the Cost Benefit Analysis creates a false baseline based on Ecology's presumption of future litigation relating to groundwater. CBA, at 4. While we agree that risk of litigation over exempt groundwater withdrawals exists under the pre-moratorium status quo, such litigation is in fact hypothetical. The correct baseline is not the emergency rule, or the hypothetical litigation baseline, but the pre-moratorium situation regarding groundwater use.

We understand that the SBEIS and CBA are clearly not intended to analyze actual economic impacts of the rule, but rather, to construct an administrative framework to assist Ecology in defending the rule if it is appealed. The documents are grossly inaccurate and fail to meet the rulemaking requirements in RCW Chapters 19.85 and 34.05.

6. Upper Kittitas Rule Should Include Reopener/Amendment Provisions Similar to Other Ecology Water Resource Rules

Unlike other Ecology water resource rules in which rule adopted occurs after completion of technical review, the Upper Kittitas rule is proceeding in advance of technical review. There is considerable work to be done both in terms of technical review, and in making the existing rule structure function as well as possible for the time being. For example, Ecology must continue to refine and improve the water exchange process, and additional mitigation options could become available before the technical groundwater work is complete. For this reason, the rule must include a process or language through which the rule can be modified over time. There are examples of this in other Ecology water resource rules, such as the Skagit Instream Flow Rule, which includes provisions regarding periodic review of the rule and modifications to the rule based on hydrologic investigation. See WAC 173-503-140; 116.

CONCLUSION

As you know, we disagree with Ecology's decision to adopt a groundwater moratorium in Upper Kittitas County as we believe better alternatives existed. While the moratorium remains in place, we urge Ecology to work with all parties to obtain credible science, and to develop mitigation strategies that assist all property owners in obtaining water supply without impacting senior water rights holders. This proposed rule, though a permanent rule, should be viewed an interim measure until better science and mitigation can be developed for Upper Kittitas County.

Sincerely,

SS per authorization

Steve Stenger, President
Central Washington Homebuilders Association

RW per authorization

Roger Weaver, President
Kittitas County Association of REALTORS®

RECEIVED

AUG 16 2010

DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

The exempt well moratorium in Upper County

I have a small farm on Upper Peoh Point Road on which hay is grown using junior water rights from the KRD canal. It also has an old farm house with a domestic well dating back many years. I am totally confused regarding this moratorium even though I have followed the history and reasoning documented in both the Tribune and Daily record. Perhaps you could answer my questions, give me clarification, consider my reasoning and make this thing comprehensive in the big picture. This is what I understand – please correct me if I am wrong.

1. There is a fear held by senior water rights holders that a proliferation of exempt wells in the Upper County would adversely affect the withdrawal of their water supply.
2. That this fear is only generated by exempt wells in Upper County only, and that the other basins that contribute to the Lower Yakima Basin do not have the effect of causing fear of loss.
3. I was taught in school that water is never really lost, that it just moves in a cycle. For instance: the water that is used for my hay field is recharging the ground supply, running off as surface water that eventually goes into the Yakima River as does the recharged ground water as it reaches its holding capacity. Some of this irrigation water is retained by the crop and is exported out of the County as the moisture content of the hay is around 10% of the weight. So it is a very tiny portion of the water that is put on the fields that ends up going out of the county. The same applies to any other livestock or plant material. It is simply recycled through the material and again ends up in the Yakima River with again a very small proportion being retained as a sort of reservoir. This is true for all domestic use of water too. It is simply recycled and ends up in the Yakima whether it is used for gardening, washing, toilets etc. If your were to make a claim that there was a fear of pollution of the Yakima it would make more sense than claimed that the water was being "consumed"
4. This portion of water that is exported from the Upper County in the form of hay exports etc. is undoubtedly balanced out with the imports of liquid foodstuffs for human consumption which again would end up in the Yakima River.
5. Since there has never been a study done on an aquifer in Upper County we can at least put our imaginations to work. Imagine an underground lake, with its deepest point being along the Yakima and Cle Elum Rivers, that it gradually thins out and laps up against the ridges on either side and is replenished on the west side by Snoqualmie. Now imagine what would happen in a decade long drought. It is no longer being recharged at full rate by Snoqualmie; the exempt wells along the edges of the aquifer are the first to fail as the water table shrinks. The last wells to fail would be the ones at the deepest portion of the aquifer and the down river wells. So why is there a fear that Upper County wells would adversely affect Lower County wells when in

effect the Upper County wells are acting only as a temporary holding tank for the flow into the Yakima River?

6. Using imagination again I try to put myself in the other person's shoes. Imagine that there were 100 new exempt wells put in use in the hills above my farm. I would indeed have the fear that I could run out of water but could take solace in the fact that the new wells would run out before mine. Imagine also that I am a senior water rights holder in the Lower Valley and have for many decades relied on the waters of the Yakima to irrigate my fields and orchards. I too might feel threatened but perhaps more from irate citizens of the Upper County who perceive the rights of the senior holders to deny and withhold any chance of economic growth in the Upper County. Such imbalances and misuse lead to consequences that are indeed hard to imagine.
7. I assume that the Suncadia water bank gets its water from upstream water and that the water is not purchased downstream and shipped upstream even although the rights were purchased from senior downstream holders. Why then the funny little map that limits the purchase of this water right to a narrow area essentially running down either side of the Yakima River. I assume that what we are talking about is the ability to dig a well and use the water if the property is located in certain areas and the owner has the wherewithal to pay the purchase price. You keep on calling this mitigation – it is not mitigation. There is no creation of more water. The amount of water is exactly the same. The only thing I can see is that it takes money out of someone's pocket and puts it in somebody's else.
8. Lastly I agree that there was a need to curb in the misuse of new exempt wells in the creation of unchecked cluster housing in the Upper County but this is not the way to do it. It has gone way beyond reason and has delved into power plays between agencies to the detriment of everyone.
9. Follow the money! Where does it go?

Frances Cerraolo

FRANCES CERRAOLO
3881 UPPER PEOH PT. RD.
CLE ELUM WA. 98922

Schuppe, Mark (ECY)

From: roger childs [rogerhc2@yahoo.com]
Sent: Wednesday, August 11, 2010 2:57 PM
To: ECY RE Kittitas Rules
Subject: Upper Kittitas Ground Water Rule

Attention: Mark Schuppe
My wife and I are retired and live on a fixed income. We invested in land 8 years ago to supplement and prolong our retirement income. We own four three acre parcels on which we had wells drilled as a requirement to sell the properties. We, like many others, went through the permit process, paying the fees and getting the certifications needed to use the wells. That right has been taken away by the moratorium. We are in favor of the scientific study to be completed before any permanent rules are put in place. We have also investigated the availability of water from Suncadia. If we were to go this route, our cost would be approximately $24,000 to get Ground Water Mitigation Certificates for our properties. Three of our properties appear to be in the yellow zone and one in the red zone. We understand this may even be a concern to buy water for our properties. We feel we should not have to buy these rights but that all wells drilled before the moratorium should be grandfathered for usage. If you want to meter wells to restrict usage, we agree. We also suggest that if you are to change the rules, it should be for new well permits and allow the grandfathered existing wells to be used as planned.

In September 2009, we signed a purchase agreement to sell one of our three acre parcels. In May 2010, the buyer backed out of the agreement because of the water issue! Our loss as well as the counties!

Regards,
Roger and Karen Childs
2411 170th PL S E
Bellevue, WA 98008
425-746-9184

Michael R. Kenyon
Bruce L. Disend
Shelley M. Kerslake

Karl L. Sand
Chris D. Bacha
Margaret J. King
Bob C. Sterbank
Renée G. Walls
Sara B. Springer
Rachel B. Turpin

August 25, 2010

Mark Schuppe
Department of Ecology
15 W. Yakima Ave., Suite 200
Yakima, WA 98902

Sent via E-mail to:
kittitas@ecy.wa.gov

RE: City of Roslyn's Comments on Emergency Rule Upper Kittitas Ground Water Rule WAC 173-539A

Dear Mr. Schuppe:

The City of Roslyn thanks the Department of Ecology for the opportunity to comment on the above-proposed Ground Water Rule.

The following points are used as a background to the City's comments:

- Ground water and surface water are connected throughout the valley.
- The Yakima Basin surface water rights are fully appropriated and subject to curtailment orders.
- We are all connected through TWSA (Total Water Supply Available) and ground water withdrawals reduce TWSA.
- Increased ground water pumping and use in the tributaries reduces stream flows needed for fish and other aquatic wildlife.
- Developers currently have the option of using the existing transfer process to acquire and transfer water rights to meet proposed needs.
- Ground water withdrawals reduces stream flow and has created a water shortage in drought years that did not exist before 1977.
- The USGS Estimates of Ground-Water Pumpage from the Yakima River Basin Aquifer System, Washington, 1960-2000, Scientific Investigations Report 2006-5205 indicates that 200,000 additional acre feet of ground water rights were allowed to be withdrawn in permitted wells between 1960 and 2000.

F:\APPS\CIV\ROSLYN\Letter\Comments of Proposed Groundwater 8-25-10.doc/kis/08/25/10

- Ground water pumping and consumptive use reduces stream flow by either intercepting flowing ground water that would otherwise discharge to streams or by intercepting flows from the streams into the aquifer.
- Developers should not expect their projects will be supplied water at the expense of senior water rights holders.
- Other municipalities that have well permits with priority dates junior to Roslyn that have wells in hydraulic continuity with surface water, continue to expand and develop making Roslyn's situation worse.
- Small lot development in agricultural areas using senior and junior water rights for domestic type uses that are unmetered or measured continue to make Roslyn's situation worse and promotes development outside of the City contrary to the Growth Management Act.
- Permit exempt wells are being used as a water supply in the conversion of forest and agricultural resource lands into low density sprawl pattern of development throughout the Yakima Basin while adjacent senior water rights holders are required to be curtailed or acquire mitigation water.

Overview

The City of Roslyn has spent much time and expense, in fact over 9 years and over $600,000, to acquire and transfer senior water rights to be used by Roslyn as mitigation water in order to avoid being curtailed when there is a call on the river in the Yakima basin. Accordingly, the City is well aware of the issues surrounding water use and shortages of water in the upper Kittitas County Basin.

The City has worked diligently with Ecology and other senior water users to reach an agreement on the use of water rights to be used as mitigation in times of water shortages so that the City is not required to shut water off to its citizens when an order of curtailment is entered. In fact, the City is currently in the final stages of implementing these agreements and is required to continue to monitor its uses and provide data to Ecology on a yearly basis in order to be able to utilize its mitigation water. Nevertheless, while the City was incurring this commitment of time and resources, development has continued outside of the City and throughout the County that has completely ignored the realities of water shortages and the related curtailment orders. Not only fairness, but also common sense, dictates that all water users in Kittitas County should be subject to mitigation and monitoring.

Within this background, the City generally supports the Department's draft permanent Upper Kittitas Ground Water Rule and would like to thank the Department for its efforts to address the previous concerns expressed by the City in this current version of the rule. Below please find some more specific comments with respect to specific provisions.

1. Withdraw of Groundwater for Appropriation.

> WAC 173-539A-010 Purpose. The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County pending completion of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.

Comment: The City supports the withdraw from appropriation of all unappropriated ground water within the upper Kittitas County pending the completion of a ground water study. We interpret this to mean exempt and non-exempt ground water. Likewise, the City supports the requirement that future ground water withdrawals be required to be "water budget neutral."

2. Applicability. Proposed Rule:

> WAC 173-539A-025 Applicability. This rule applies to new uses of ground water relying on the authority of the exemption from permitting found at RCW 90.44.050, as defined in WAC 173-539A-030, and to any new permit authorizing the withdrawal of public ground water within the upper Kittitas area boundaries issued on or after July 16, 2009.

Comment: The rule is proposed to only apply to new uses of ground water initiated after July 16, 2009. The City remains concerned that the exemption of the pre-July 16, 2009 group of ground water users ignores the real and present risk that all or many of such users are having on senior users like the City of Roslyn. The City's concern, however, is tempered by the language in the "advisory" rule (WAC 173-539A-027) that puts all users of groundwater on notice that they should obtain mitigation to avoid curtailment. Accordingly, if a senior water right holder believes that it is being impaired by a pre-July 16, 2009 ground water user it can seek mitigation. To that end, please see the City's comments under the WAC 173-539A-027.

3. Advisory Provision. Proposed Rule:

> WAC 173-539A-027 Advisory. All unmitigated withdrawals that began after May 10, 1905, may be subject to future curtailment due to conflicts with senior water rights. All unmitigated users are advised to obtain mitigation through senior trust water rights to avoid such curtailment.

Comment: The City fully supports this provision as it is consistent with what is required of all surface water users. In addition to being indispensible in the permitting of water rights in the basin, the City requests that this advisory provision be publicized prominently and in fact should be identified as a next step for regulatory action.

4. **Definitions.** Proposed Rule: WAC 173-539A-030

Comment: The City is concerned with the limited scope of the definition of "land use application." Instead, the Department's definition of "land use application" needs to be more broad and encompassing or the same or similar to the definition set out in RCW 36.70C.02, namely: "(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses; (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter."

Additionally, the City doesn't understand why the definitions of "new use," "group use," and "existing use" all allow an expansion of the "pre- July 16, 2009" withdrawals to additional property for a period of 5 years. Vesting in property development is only for what was applied for and allowed at the time of the land use application and approval. Allowing additional expansions to existing applications or approvals will only encourage developers to seek amendments and expansions of existing projects (with the impact of an additional increase in consumptive use of ground water) and provides a vesting that goes beyond that recognized in real property or water law. It simply isn't necessary or prudent. Most of these concerns can be addressed by tightening up the definitions.

5. **Withdrawal of Water.** Proposed Rule: WAC 173-539A-040

Comment: See comment under paragraphs 2 and 4.

6. **Water Budget Neutrality Determination Compliance.** Proposed Rule: WAC 173-539A-050

Comment: The City supports the concept and requirement of "water budget neutrality" but has some concerns regarding how such requirements will be monitored or enforced. For example, the standard letter requires the property owner to record a covenant against trees/shrubs over a septic system and to record an instrument confirming acquisition of the proposed trust water

quantity. Who is going to confirm that these recordings occur and that their content is correct? The rule is silent. In addition, the standard letter states that "any valid priority calls against trust water right No XYZ, based on local limitations of water availability, will result in temporary curtailment of the use of water until the priority call for water ends." How will this be enforced? If a house is built and occupied, how does Ecology propose to curtail water usage? When will use be allowed to resume? Upon mitigation? The City is concerned that the Department is already underfunded and understaffed to follow through with enforcement. Additionally, the general enforcement powers and procedures seem inadequate for this type of noncompliance.

7. **Expedited Processing.** Proposed Rule: WAC 173-539A-060

Comment: The City is concerned that the proposed rule provides for expedited consideration of water budget neutrality determinations for new exempt wells. Why is this an urgent priority particularly in this economy? How is this to occur? As a result of the economic downturn, the Department of Ecology is in the process of reducing its staff even further to implement across-the-board budget reductions. In most regions of the state, Ecology does not have any staff processing water right permit applications, some of which have been waiting for years.

The Department of Ecology effectively has little to no staff capability for compliance and enforcement presently and yet determinations for new exempt wells are to be expedited? While the City, better than anyone, understands that the process of acquiring mitigation water for even existing development can be lengthy, we fail to see why new development applications should be expedited. Additionally, the expedited process furthers our concerns under paragraph 6 and 8 regarding enforcement.

8. **Metering and reporting.** Proposed Rule:

> WAC 173-539A-070 Measuring and reporting water use. (1) For residential uses (domestic use and irrigation of not more than ½ acre of noncommercial lawn and garden) of ground water within upper Kittitas County that begin after July 8, 2008, a meter must be installed for each residential connection or each source well that serves multiple residential connections in compliance with the requirements of WAC 173-173-100.
>
> (2) For all other uses within upper Kittitas County that begin after November 25, 2009, including permit-exempt uses, a meter must be installed for each source well in compliance with such requirements as prescribed in WAC 173-173-100.
>
> (3) Water users must collect and report metering data to ecology within thirty days of the end of each recording period.
>
> The following table shows the recording periods and the due dates for each metering report:

Recording Period
Report Due No Later Than:
October 1 - March 31 April 30
April - June 30 July 30
July 1 - July 31 August 30
August 1 - August 31 September 30
September 1 - September 30 October 30

Comment: The City fully supports this rule and the use of uniform quality meters and the measuring and reporting of water use as an essential part of allowing ground water withdrawals. It is absolutely essential for having accurate information about water usage and for any enforcement or mitigation program. Without metering, the entire premise of the concept of water neutrality would not work and the City would not be able to support new withdrawals of groundwater. Additionally, in order for the requirement for reporting to be meaningful, the City requests that it must be followed up with prompt aggressive enforcement for failing to report.

Summary

In summary, the City supports the regulation and implementation of mitigation for ground water withdrawals and believes it is necessary in order for Department's to properly process water rights in the Yakima Basin. The mitigation, however, cannot just be on paper and must be real and must include metering. A review of the number of requests, as well as the quantity of some of the requests for water budget neutrality and mitigation, underscores the need to have each permit reviewed carefully, just as our mitigation rights have been, as well as subsequent metering and monitoring in order to ensure that real mitigation occurs.

Very truly yours,

KENYON DISEND, PLLC

Margaret J. King
For the City of Roslyn

Schuppe, Mark (ECY)

From: Catherine Clerf [cclerf1341@fairpoint.net]
Sent: Monday, August 23, 2010 6:51 PM
To: Schuppe, Mark (ECY)
Subject: Permanent Rule Comments: Management of Exempt Ground Water Wells in Kittitas County

MON 23 AUG 2010 @ 1850 PDT

To: Mark Schuppe, Department of Ecology, Central Regional Office
15 West Yakima Avenue, Ste. 200, Yakima, WA 98902-3452
e-mail: msch461@ecy.wa.gov

Re: Chapter 173-539A WAC
Management of Exempt Ground Water Wells in Kittitas County
Permanent Rule Public Comment

I hereby submit my comments on the proposed permanent rule encompassing Management of Exempt Ground Water Wells in Kittitas County as follows:

1. It is incumbent upon the Department of Ecology to perform the Upper County groundwater study as funded in the initial amount of $700,000 as agreed upon by Kittitas County commissioners and the Department of Ecology. That is the explicit premise in which the state legislature approved the initial $700,000 funding. If a change in how this money should be spent, then the change needs to be re-debated in the state legislature in the next 2011 session.

2. It is disengenuous for the current county commissioners (Crankovich, Jewell, and McClain) and any past county commissioner, including current 13th District Representative William (Bill) Hinkle, Perry Huston, and David Bowen (who notably approved the original Memorandum of Agreement between the DOE and the county), to name a few, to NOW declare to prefer that this initial $700,000 funding, and any future funding, for an Upper County ground water study should be used instead to purchase water rights in behalf of future rural residential exempt well users.

3. It is further disengenuous for the current county commissioners or any past county commissioner of the last approximately 16 years to have made and continue to make the argument that The Department of Ecology does not have the authority to impose a moratorium on a county that has refused to accept the following facts:
a. The Yakima River Basin is an "over-allocated" river basin.
b. That Yakima River Basin is subject to the authority of the federal Bureau of Reclamation.
c. The Department of Ecology has its responsibilities to adhere to its settlement agreement with the Bureau of Reclamation and the Yakima Nation regarding the Yakima River Basin.
d. The Washington State Legislature authorized the Department of Ecology to protect senior, proratable, and junior surface water rights, in that order, from impairment.
e. Ground water is extrinsically and explicitly linked to surface water.
f. Past and present county commissioners have consistently chosen to ignore the Growth Management Act insofar as not requiring quantified and qualified water source(s), per state law, before approving Final Plats, with few exceptions to this intentional egregious oversight, and by so doing have overtly maintained a county policy that expediently benefited and continues to benefit rural residential developers and land speculators without legal and/or sufficient and/or mitigatable water rights to the detriment of existing water rights holders, not just in Kittitas County, but in the entire Yakima River Basin.
g. Kittitas County commissioners do not have the authority to supercede or rewrite or reinterpret Western water law and/or state law regarding water rights.

Succinctly, present and past Kittitas County commissioners have been approving rural residential development under the banner of and in the disguise of "economic development", development that has always unsustainable, development that blatantly disregards the rights of existing water rights holders, and development that in foresight and hindsight was doomed to implode the microeconomy of Kittitas County, including its small towns, as part and parcel of and participation in a national and global real estate bubble bursting leading to the inevitable financial collapses nationally and globally that have been playing out since 2007.

Further compounding the travesty of years of exceedingly poor decisions by current and past county commissioners is the fraudulent claim that the Upper County moratorium imposed by the Department of Ecology is responsible for the economic downturn as regards any and all Upper County rural land development. In fact, Kittitas County commissioners are simply witnessing the results of what they have wrought with the complete participation of the real estate community, the development community, the financial community, the title insurance community, the appraisal community, and the building trades community. In short, homes became a commodity and the commodity crashed and these same communities refuse to accept their responsibility in having willingly participated and refuse to accept their responsibility in accepting the NEGATIVE financial outcomes of commodities trading, which is, in actuality, what these communities have been engaging in, commodities trading.

As I have pointed out in years of testimony at Kittitas County public hearings, rural residential development is not sustainable in the Yakima River Basin until public policies embrace increased permanent water storage capabilities and/or water creation with water distribution by cost-effective means. Further, the agricultural sector is a large component of the economy of the State of Washington, as well as being responsible for our state being one of the top exporter states in the nation. Hence, I believe that public policies at the county and state levels need to be enhanced and strengthened to ensure that expansion of our state's agricultural sector, an economic substrate which is wholly sustainable and which provides a broad and expandable revenue base, affecting and reaching into nearly every county in the state, is a priority and not an afterthought.

The years of playing a very carefully calculated game of cat-and-mouse by successive trios of Kittitas County commissioners, who have chosen to ignore the law and who have acted solely to benefit but a few to the
detriment of many, are very near to their end: I support the Permanent
Rule as it has been thus far drafted.

Respectfully,

Catherine Anne Clerf
60 Moe Road
Ellensburg, Washington 98926

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Johnson, Roger E. (ECY)

From: Rhoda Ducati [rhodaducati@hotmail.com]
Sent: Wednesday, August 25, 2010 12:32 PM
To: ECY RE Kittitas Rules
Subject: Stop DOE actions in Upper Kittitas County

How would you feel if you got a speeding ticket and were never told how fast you were going above the speed limit? In an area where no speed limit existed?

How would like it if you were told your only two choices were: #1 Expend years to take it to Court (during which time your license is suspended); or #2 pay a substantial fine and it won't show up on your record and you get to drive in that unmarked zone?

Would you feel outraged if this happened to your son or daughter? Would you feel the same way if this happened to your next door neighbor too?

Well hang on – because there is no air bag to deploy and help you in this mess. This scenario is precisely what is happening to the people of Upper Kittitas County over the use of underground water.

This citation (via a moritorium/rule) has been issued by the Department of Ecology and they have decreed that without ANY evidence to support their position that the "selected" people of Upper Kittitas cannot have an exempt well – UNLESS they are willing to pay an extra fee first. In other words, if you are rich - you can afford to buy all the wells you want. But if you are feeling the pain and agony of this recession, you are destined to die of thirst.

Sadly, the Department of Ecology has admitted it is not here to help preserve or conserve water. They are only going to see that it gets sold to the rich at the expense of the poor people of Upper Kittitas County. **The DOE should be stopped**.

Rhoda Ducati

Johnson, Roger E. (ECY)

From: Susan Ferrell [susanf@ellensburg.com]
Sent: Tuesday, August 24, 2010 4:39 PM
To: ECY RE Kittitas Rules
Subject: From Susan Ferrell

Hello!
I am writing to say that I am against the moratorium that you have imposed on the Upper County. I feel that there needs to be objective scientific information used to determine whether or not there is a real affect on the water in the basin from the domestic wells being drilled ... it cannot just be based on the opinions of a few vocal community members. It is very unfortunate that you took the route you took and SO many residents in the upper county had to be hurt. I hope in the future you take the time to really research alleged 'problems' before you would ever do this again.
Best regards,
Susan Ferrell
Ellensburg

Johnson, Roger E. (ECY)

From: tom frank [coco398198@yahoo.com]
Sent: Sunday, August 08, 2010 5:12 PM
To: ECY RE Kittitas Rules
Subject: Upper Kittitas water rights

Dear Sirs: I have a registered well in upper Kitittas county that has been pumping water since august 2006. I am seeking a building permit for a residence because I have been using a trailor and will be retiring in 2 years. According to the Kitittas county water availability form for a BUILDING PERMIT I have an exempt well because it has been in use before 7/2009. On the form it states that I am required to put a meter system in before a building permit will be granted along with a bacteria test. As far as the metering system is concerned will the state or county read the meter and charge me for water use periodically?

Thank You for your concern
Mr. Frank

Schuppe, Mark (ECY)

From: fitterers [fitterers@fairpoint.net]
Sent: Monday, August 09, 2010 4:53 PM
To: Schuppe, Mark (ECY)
Subject: response to kittitas co. wells

how can a logical descision on a resource like the water moritorium be made with out a study being done, before a major descision? as a life long resident and seven generations that have lived in this county i find it difficult to have an agency like doe tell our comminities this is the way it will be , without justification and a study to prove this.
sincerely jon fitterer president fitterers furniture inc.

08/10/2010
Department of Ecology
Attn: Mark Schuppe

I have owned my 2.9 acres of property for 34 years I believe it had water rights but because they were not used they were taken away fine. I can still drill a well and the property will not be worthless wrong. Someone who does not want the upper county to develop is saying that the few wells that are being drilled are using up all the irrigation water. So you want to make this rule permanent with out any study, conservation, more storage or banning wells state wide. Question should not the west side of the state be out of water how many wells are drilled over there is there a connection to the water over there and over here maybe their using up all the water why not stop development everywhere. Have you or Tom Ring or any else been down there to see where the water comes from and where it goes? Tom Ring stated everywhere there is ground water there is a connection to surface water. Well Thank God that some of that water goes into the ground because if it did not what would Tom Ring do with it all. It's funny when we flood up here and the ground can't hold any more water all of a sudden nobody owns that water! It must be different water. You need to show proof that all this ground water is being recharged from the rivers and lakes and that there is a connection to the loss of so much irrigation water. So far all I hear is opinions very few hard facts. Well I have an opinion, which is just as valid as everyone else's what you are doing is wrong and you know it. I remember when they use to dam the Teanaway River off completely for irrigation the river was dry past Red Bridge Road and I don't know of any one who had there well dry up. You could stop every well in the upper county from pumping water and you would not see one drop of water difference in the rivers. If someone wants to buy property now to develop it let him or her find water but people who have owned property for years should be able to drill wells. Tax relief is not the answer it is the loss in value that is hurting people who wanted property for retirement. The impact on our economy has been huge but no one cares. From what I see Ecology could care less to have proof that new wells are making this huge difference in the amount of water available. I moved here in 1966 and I have not complained about other people moving here now it seems that the ones that have been here for a short while want to stop any else from moving here. I know there is a better answer than a total ban and so do you. By the way I don't know of any water rights for sale in the Teanaway.

Jesse Geiger
2780 Red Bridge Rd.
Cle Elum, Wa 98922
509-674-6789

Johnson, Roger E. (ECY)

From: Steve Griswold [griz98922@gmail.com]
Sent: Monday, August 23, 2010 8:45 PM
To: ECY RE Kittitas Rules
Cc: Steve.Griswold@plumcreek.com
Subject: Exempt Well Rules
Attachments: Wells.docx

Please open the attached file for my testimony

Objection to Permanent Rules regarding exempt wells in Upper Kittitas County.

I think the following is an exercise in futility, as I believe the DOE is like a battle ship that has reached full speed ahead on the senior water rights mitigation agenda, and will adopt the proposed rules in spite of any common sense or objectively based analysis that is contrary to those rules and regardless of the consequences of what I feel is an unjust solution to a non-problem.

It's my understanding that the original complaint was brought to the DOE by a citizen group protesting that the county had bypassed the rules relating to lot density for exempt wells, by allowing 3 different LLCs, which were all owned by the same individuals, to put 3, 14 lot developments adjacent to each other, which resulted in allowing that particular development group to have a 42 lot exempt well development. **Shame on the county officials that did so**, but I also understand that particular problem has been resolved. So why not drop the moratorium/permanent rule mess?

I think it's because this issue fits the Governor's and DOE's agenda for tighter state control of development. So the complaint moves on under the ruse that exempt well s are diminishing senior water rights.

To pursue this argument, one has to assume that ground water = surface water. That is extremely problematic, because if it is true, then the ultimate end game is that either the Yakima River Adjudication process or Western Water Law will end up deciding when and if wells can be permitted and the state will lose control of the process.

If the permanent rules prevail long enough to set precedent then the DOE may survive Western Water Law based challenges, but I doubt it will survive for long. The real answer is to keep things as they are where ground water is ground water and surface water is surface water.

If we've lost that important distinction, then question is "Do Exempt Wells Diminished Water Rights?"

So far the DOE has not provided any credible evidence that Upper County exempt have impacted water availability. They have emphatically declared it is so, but since those that say so are closely aligned with the mitigation agenda and Yakima River Adjudication process that their declarations should be viewed with the same skepticism that the Bush administration's emphatic declarations of WMDs in Iraq. And here the same tactics are being used, say it often and emphatically and ignore or squelched contrary testimony. And once again, unintended consequences and collateral damage are forsaken in stubborn pursuit of a biased goal.

Back to answering the question in hand, does ground water = surface water? The "ground water equals surface water" analogy some folks use to make their argument is the concept of a fish bowl full of marbles and water with in it. The marbles represent the ground water layer and the straw represents the well. When water is sucked out via the straw the water in the bowl lowers. Anybody can picture it so it's a great sound bite that can be repeated often and emphatically. What they fail to add is that the well water is placed back in the bowl via the drain fields that are invariably associated with exempt

wells. Once this is pointed out then the claim becomes that only a fraction of the water is returned to the ground to become, at some point in time, surface water.

In reality, the aquifers in any glaciated mountainous valley that has been formed like the east slope of the Cascades is nothing like a fish bowl full of marbles. We have lava flows on top of sedimentary folds, with faults complicated by andosite dikes, pyroclastic deposits and any number of highly variable ash deposits...and that's just the geologic plate tectonics issues. Add to that the climatic influence of massive ice age glaciers and floods the like we never seen in our lifetimes as the glaciers retreated and you can imagine how complex things are down below us. There aren't many neatly laid out horizontal layers of uniformly graded till that act like marbles in fish bowl. Instead picture a valley that has been bulldozed by a glaciers, flooded then inundated with landslides of epic portions on top of the pot hole style lakes left by the glaciers retreat. Our aquifers are more like underground reservoirs that may or may not have outlets that may find the way to the valley bottom. Pumping water out of them via wells is more likely to add to the water available to the Yakima River than it is likely to diminish it. Marbles in a fish bowl...seriously?

But we seem to be sold on the Governor's mitigation agenda, so I'd better get back to the absurd assumption that the return water percentage via traditional drain fields is 70%. But since around 2002 the County has required infiltrator style drain fields that are likely to return a much higher percentage of water and I doubt that includes factoring in the imported liquids in the form of bottled, canned, cartooned and jugged beverages that are also invariably associated with the folks using the wells. So that number is suspect at best and more likely pure baloney.

The next inconsistency is the assumption that all of the aquifers act like the marbles in the fish bowl and are directly connected Yakima River (which for the sake of the analogy would be a spigot in the side of the fish bowl). If that were true, all of the wells that are drawing water from an elevation above the spigot (Yakima River) would go dry in drought years.

The reason this doesn't happen and why we don't see water pouring out of the bottom of the aquifers along the banks of the river is that most of the aquifers are more like underground reservoirs that can be pumped all year long bringing what was locked up ground water to the surface and actually giving that water a shot at getting to the river. So in drought years, the senior water right holders are more likely to benefit from exempt wells being pumped to full capacity to add water to the surface than they are to prevent them...consistent with my previous rant.

Also, if wells diminish surface water, why does the city of Tacoma have well fields (multiple wells) above the Howard Hansen Dam, (a city water reservoir)? Same question for the Roza irrigation wells?

The argument that wells diminish surface water doesn't hold water when objective reasoning is applied.

Development v Consumptive Use?

My next point of disagreement with the proposed rules is only relevant if the DOE proceeds with the permanent rules in spite of the reasoning described above.

In all other areas of the state's purview, the DOE requires measures to mitigate the increased run off caused by development, but in Upper Kittitas County, exempt wells = water consumptive development that decreases runoff or surface water?

The following is based on what I understand are the assumptions used to justify the mitigation measures in the rules:

The water use of a single family dwelling is 350 gallons per day and that 70% of that is returned to the ground. If so, the net use is 105 gallons per day or 38,325 gallons per year. If it's assumed each well is associated with a dwelling, what impact does the dwelling have on the annual run off?

Let's assume 3600 square feet of each exempt well dwelling is covered by the roofs of homes, outbuildings and driveways. That 3600 square feet multiplied by the annual rainfall (in feet) over the dwelling gives the number of cubic feet of water of water that the dwelling increases the runoff to the surrounding area. (1 cubic foot = 7.48 gallons.)

So each dwelling would contribute extra runoff to the surrounding area, proportionally to the amount of rainfall at that location:

So if a dwelling in lower county has an annual rainfall of 1.2 feet then the annual extra runoff would be 32,314 gallons or 6,000 gallons less the assumed consumption.

If we go to Cle Elum and use 1.5' of annual rainfall the extra runoff = 40,392 gallons or 2,000 gallons more than consumption.

In Easton, at 2.8 feet, the extra runoff is almost double the consumption and near Snoqualmie Pass, with 6.7 feet, the extra runoff is over 4.5 times the consumption.

So if the dwellings associated with the exempt wells are increasing the run of more than the consumption, why is mitigation required?

Although I disagree with the assumption that exempt wells diminish down stream flows, the reasoning above strongly suggest that the DOE has improperly included the Upper County exempt wells as the issue, when (if there really was an issue with wells v water availability) the impact of lower county wells are much more likely to be the problem

I have another point of disagreement with the proposed rules and again it's only relevant if the DOE proceeds with the permanent rules in spite of the the various arguments and reasoning described above.

<u>Senior Water Rights Only?</u>

The senior water rights the DOE has proposed for mitigation precede the construction of the Upper County reservoirs. Those senior water right holders downstream of the reservoirs allow the impoundment of the water by junior right holders because the junior folks can impound the water and deliver it to the senior folks when they really need it. So any junior holder should be able to provide

their share of impoundable water as mitigation as it is more valuable to the senior folks and definitely more valuable than un-impounded senior water rights.

If un-impounded senior water rights are acceptable for well mitigation then the increased run off created by the development associated with wells should also be accepted as mitigation.

In Summary

The moratorium and proposed rules are profoundly wrong on so many levels that I can't see them ever making it through the court challenge that is almost a certainty, so why pursue them.

Fix the proximity problems in the exempt well rules and move on.

John Steven Griswold

203 Elk Haven Road

Cle Elum, WA 98922

Johnson, Roger E. (ECY)

From: Trish Griswold [griswoldtrish@hotmail.com]
Sent: Monday, August 02, 2010 11:52 AM
To: ECY RE Kittitas Rules
Subject: water resources program

I attended the Upper Kittitas Ground Rule public hearing on July 28,2010. I would like to comment. I am a teacher and I have seen what the emergency exempt well closure has created through unintended consequences. There are families that have been forced to leave our area with upset children. I believe in regulating our resources but I believe an emergency closure has created hysteria. I am seeing large agricultural land owners creating large clusters development designs to get it through before the water is "taken away" from them. I feel that they would have waited had this moratorium had gradually been put into place as in the Walla Walla area where the 5? year study had no emergency closures. I was appalled to find out that the DOE has had money for scientific testing but has failed to begin it's work yet our community has had to suffer. Property tax base change alone in Suncadia is equivalent to one teacher salary? I have never been one to be afraid of my government but sadly am headed in that direction. My husband and I have lived here for 30 years. We have slowly acquired four 5 acre parcels to make open space which we use for hay and livestock. We felt that the higher price for the 5 acre parcels would assure other rights as our children collect the means to build on our land. it seems that our dreams may be taken away by our own government....a sad day. Please lift the moratorium while the study takes place. When we get the information we can make reasonable decisions pertaining to shared resources.

Trish Griswold
Cle Elum, WA

Department of Ecology
Central Regional Office
Attn: Mark Schuppe
15 West Yakima Ave., Ste. 200
Yakima WA 98902-3452

August 5, 2010

RECEIVED
AUG 0 9 2010
DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

Dear Mark

A "state of emergency "was installed by Washington State Department of Ecology and signed by Gov. Gregoire. This decision has cut off WATER to Upper Kittitas County and has turned this area into a rotting, unproductive graveyard.

This decision based on information that we have heard, in the Public Meeting of July 28th 2010, read in the Tribune newspaper and from 3 attorneys we have talked to, was made without merit. This decision was made on very old geological data and to date there are no current up to date geological tests or studies to confirm your decision.
No proof was been available to us that shows that the ground waters we draw off or would draw off affect the downstream flows.

The waters in question in the area that my husband and I own are dammed. Without these dams, if a drought was to prevail, during times of growth (July thru Sept) or when the fish are spawning the farmers and the fish would be in great peril. These "storage tanks", paid for by us taxpayers, have allowed storage of water and controllable water in times of need for said growing periods and spawning. Without these dams the water would be not be available, having already passed them by and ended in the ocean.

My husband Del, age 70 and myself, age 67 are only two people of many people in Upper Kittitas County that are directly affected by the Washington State Department of Ecology, Ted Sturdevant and Gov. Gregoire's decision to cut off our water source(s) to land we own.

We personally own 16 acres of land in Upper Kittitas County. In the past 40 years we purchased said property, saved our money, built a home, subdivided into 3 acre parcels, developed a road and added a well to each parcel as we could afford. We were advised to drill the wells in order to increase the marketability of each parcel and assure a potential buyer the water was available. Each well had the original WATER WELL REPORT filed with the Department of Ecology, State of Washington as they were drilled. At no time were we notified that our efforts and monies spent were in peril of being wasted or lost.

Our property has gone from investment and our retirement to worth no value at all. We cannot sell it, build on it or use it for any purpose without WATER.

A year ago we sold one 3 acre parcel on contract. Said payments, plus some of our savings are used to supplement our 92 year old mother's care in an assisted home.

On July 12 we received a letter from the buyers attorney stating that because of the "—moratorium on new exempt wells" the buyers have decided to allow the property to be foreclosed. We not only cannot sell our remaining lots and are getting this one back as well.

We understand WATER RIGHTS and the farmers and Indians right to use of the water, but why are they allowed the "use it or loss it" attitude?
For an example, take a drive thru Thorp, Ellensburg, all of Yakima County and beyond to the Columbia River in Washington during the heat of the day. Crops are being watered, along with lawns and yet the bar ditches are full and running with wasted water from leaks in the canal and run off from the watering of their lawns. Evaporation is another major issue not addressed.

Population is another issue that has NOT been addressed. Kittitas County has a very small population. There are two cities in Upper County, Roslyn and Cle Elum, both of which have a population of 3000 plus or minus. These two cities are downstream from the sources of water in question. From the "dams" to the top of Snoqualmie Pass, the majority of the land is Alpine Wilderness, Forest Service Land or owned by the "Railroad". The balance, a very small portion is in private ownership and most of those lands are in areas that development is very restricted because of hilly terrain.
Upper Kittitas County's' use of the waters in question now and in the future is a drop in a bucket.

We have more water and less population to supply all the way to the Columbia River compared to the population west of the mountains. Seattle, Eatonville, etc., are not in a "state of emergency" and are allowed to use non-exempt wells. What make Upper Kittitas County so special?

It's hard and it hurts to believe that the State of Washington government and/or its' entities can render this situation without studies, solutions or compensations. It's not the American way.

If we are in fact in an emergency all of the State of Washington should be placed in the same category as "Upper" Kittitas County.

Please do not adopt this rule until:

1. Studies are made based on current up to date geological findings. As we understand, money is available but no contract has been signed for these studies and that the money may be taken by the State for other uses.
2. Work with the farmers and Indians for better water management.
3. Re-assess the water rights each farmer has: Is the land still used for farming, do they have more water rights then needed for their land and the current uses, or other reasons that I have no knowledge of that would affect water right uses.
4. Will the State compensate us for the loss of our investments, the loss of jobs, the loss to small businesses in the Upper County, and the loss to Kittitas County and the State of Washington in regard to taxes and revenues?

5. What will the State of Washington will do with the land in Upper Kittitas County without water? Dam it all for more water storage? Turn it into a State Park?
6. A look at the Dams (water storage) that have enable the farmers and Indians water availability and control of water they would not have without said dams.
7. Allow all property in the Upper County water without having to spend time and money to purchase water rights. NOTE: Several large developers in the County have already purchased WATER RIGHTS and will not share. This rule will not affect them. It just affects the individual such as my husband and I.
8. Study and compare population, availability and use of water, by agriculture, residential and commercial in the entire State.
9. If METERING is a solution, then pass a law to do so. Allow 500 gallons a day for each residential parcel and more for Commercial land based on type of business so that the small businesses can survive.
10. See what other States have done, such as Arizona, Nevada and California. They all have less water available then Eastern Washington and a lot more population. Learn from others!

Time is of the essence. The life blood of the owners in Upper Kittitas County has stopped flowing and at the moment we are DEAD.

Thank you
Del and Dianna Hamberlin
P O Box 237
Ronald, Washington 98940
509-674-1064 (didel1313@gmail.com)

1CC: Gov. Gregoire, US Senator Cantwell and Patty Murray & Sec. of State S. Reed.

Johnson, Roger E. (ECY)

From: Mike Hoban [mkhoban@hotmail.com]
Sent: Monday, June 28, 2010 9:04 AM
To: ECY RE Kittitas Rules
Subject: building permit statement

To: Mark Schuppe

Hello,

I just read the news that our 3 wonderful county commissioners plan to accept building permits – regardless of DOE concerns.

Very typical of those guys – they have no respect for any (state) agency / rules - and little respect for county rules; unless they implemented the rule.

Please lobby your agency director and our governor to go to court, if necessary (which it will be) to squash our commissioners, about this issue.

While I agree that an property owner (current owners – not future owners and not land developers) should be allowed to build – something needs to be done to accommodate those folks. Problem is, for at least the past 10 years (probably longer) there has been an on-going effort by our commissioners to "do what they want" and not follow DOE, Washington State Growth Management regulations, to ignore UGA rules, most likely don't follow state records management & retention rules, etc. Over the years, they have allowed their developer buddies to virtually buy Upper County and break-up large parcels of land into Hundreds of 3 acre lots; ignoring wildlife corridors, water issues, road use, fire/police requirements, creating "cluster housing" in rural areas, fight wind farms, etc – all to sale lots for second homes; not even full time, live here, residence.

Why does our county have (only) two prosecutors for Criminal actions; and six for Civil actions? Is that ratio common to all counties? Or, does that represent the results of mis-guided decisions by our Commissioners??? They would rather use tax payer money to get their way – than follow any rules set by any entity, higher than the county.

Pull state highway funds, educational funds, etc away for this county – if they continue to ignore state requirements. Don't let them play games or sweet talk their way out of this. They have been doing that for years and years – and getting away with it. We need an true, accurate study done in Upper County of our surface & ground waters; volumes, recharge rates, impact from snow levels, rains, etc – not just "talk". Detailed studies and data would benefit everyone now and in the future. This county should probably have to sponsor and build their own, new, water reservoir – and/or water shed for future growth / needs.

Thanks for your time

Mike Hoban
2351 Pasco Road
Cle Elum, WA 98922

LABOR, COMMERCE,
RESEARCH & DEVELOPMENT
RANKING REPUBLICAN
WATER, ENERGY &
TELECOMMUNICATION

Washington State Senate

SENATOR JANÉA HOLMQUIST
13TH LEGISLATIVE DISTRICT

EARLY LEARNING & K-12
EDUCATION
ASSISTANT RANKING REPUBLICAN
TRANSPORTATION

August 25, 2010

Mark Schuppe
Department of Ecology
Central Region Office
15 West Yakima Avenue, Suite 200
Yakima, WA 98902-3452

Dear Mr. Schuppe,

I am submitting these comments on the proposed rule changes in WSR 08-15-021, and also on the proposed rule's accompanying Small Business Economic Impact Statement and Preliminary Cost Benefit and Least Burdensome Analyses, and CR-102.

Over the past three years, I have and continue to hear from my constituents that we are heading in the wrong direction over an as-of-yet unproven water problem. We should not move forward with anything, especially a permanent rule, before having a firm scientific basis which establishes that a problem exists.

Since the moratorium was announced, the area's economy has suffered, people have lost their jobs, families have lost their homes, and businesses have closed their doors as a direct result of the moratorium. Under the proposed WSR 08-15-021, the area's economy will continue to stagnate and my constituents will continue to suffer.

Keeping these facts in mind, I marveled as I read the Small Business Economic Impact Statement and the Preliminary Cost Benefit and Least Burdensome Analyses. The Small Business Economic Impact Statement (2010) reads, "Ecology expects little or no job impacts to come from this proposed rule" (p. 6). This is in stark contrast with the reality of Upper Kittitas County's economy.

I have found other issues with the Small Business Economic Impact Statement:

- The baseline for the Small Business Economic Impact Statement should compare conditions under the proposed rule versus the day before the moratorium was announced, not between the current emergency rule versus conditions under the proposed rule. *The current report conceals the moratorium's real economic damage.*

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- The statement fails to capture and report the full negative economic impact of the proposed rule on small businesses. The statement also fails to relate the negative economic impacts that have been felt throughout the value chain within the area. For example, from manufacturer to supplier to builder and, ultimately, to the consumer.

The impact statement (2010) states that, "We have assessed the impacts of the proposed rule by analyzing and comparing water right management under the proposed rule, in contrast to current practices" (p. 1). This statement mistakenly compares the proposed rule to the emergency rule that we are under now. ***It should compare the proposed rule in contrast to the day before the moratorium was first announced.*** Such an analysis would reveal a significant negative economic impact on small businesses.

To give you a more concrete example, most construction companies are small businesses. Under the proposed rules, their ability to construct new homes will be significantly restricted, thus undermining their revenues. If the construction company cannot find or afford water, the business would have to close its doors and lay off its employees.

Additionally, I think we all agree that the rules will present a burden to those in the construction industry and to future home owners who will bear the increased costs of mitigation. This, in turn, impacts their disposable income over the life of their mortgage. Even a small business owner in the area that uses city water (that we'll assume is operating on a senior water right) will still be affected. As a result of a more expensive house and a reduced disposable income, constituents have less money to spend at this small business. Consequently, this proposed rule would cause businesses to lose sales and revenue over time.

As another example: If construction companies are building less, then they'll be purchasing fewer building supplies impacting building suppliers' revenues. These suppliers are also small businesses in the impacted area. The statement is silent in regards to these impacts. The moratorium has and will continue to impact Upper Kittitas County's economy up and down the value-chain.

Data is available on the impacts of the moratorium. For example, by reviewing sector-specific job loss data from the area, one can gain a glimpse of the negative economic impact of the July 16, 2009 moratorium. For example, in regards to the construction industry in Kittitas County, the Employment Security Department reported, "On the average, mostly construction jobs in the county dropped from 1,080 in 2008 to 730 in 2009, a 32.4% decline" (as cited in Daily Record, July 29, 2010, p. A3). Additionally, I contacted DSHS to determine the percentage increase in Temporary Assistance For Needy Families (TANF) recipients. According to data from ESA-EMAPS using the ACES Data Warehouse as of August 2010 for the cities of Cle Elum, Easton, Ronald, Roslyn, and South Cle Elum, there has been an increase of 28.8% in TANF recipients from June 2009, the month before the moratorium, to June 2010. This data *only includes* TANF recipients within the moratorium's boundaries in Upper Kittitas County. This data sheds light on the degree to which my constituents have been negatively impacted.

From the data provided to me by DSHS, I also discovered that between June 2009 and June 2010 there has been a 33% increase in the number of people who received food stamps in Cle Elum, Easton, Ronald, Roslyn, and South Cle Elum (Data from ESA-EMAPS using the ACES Data Warehouse as of August 2010). This data helps substantiate the other data and is yet another indicator of the extent of the negative impacts of the moratorium.

Frankly, the Small Business Economic Impact Statement needs to be redone, so that the true economic impact on small businesses is properly measured and professionally reported. The Statement makes no attempt to quantify the economic damage of the moratorium that the proposed rule seeks to make permanent.

The Preliminary Cost Benefit and Least Burdensome Analyses also has some issues:

- Uses the wrong baseline.
- Alleged benefits of adopting the rules are non-substantive and unrealistic. Salmon restoration projects are benefits of grant funding, not the proposed rules, and the proposed rules will not reduce the risk of litigation.
- Ignores pre-existing protections of instream flows.
- The actual benefit of the proposed rules is near zero; and, therefore, the net costs of the proposed rules exceed the net benefits.
- This report implies no water storage projects will be completed within the next 20 years. Water storage's positive impact is not mentioned.

Like the Small Business Economic Impact Statement, this report again uses the wrong baseline. In fact, it uses a different baseline: July 16, 2009 versus the proposed rules. While Director Manning announced the moratorium on the morning of July 16, 2009, the harsh negative economic fallout in Upper Kittitas County began the moment that announcement was made. Consequently, the best date upon which to rest the baseline of both reports is the day before the moratorium's public announcement, July 15, 2009.

In the "Benefits Summary," Ecology asserted that $4,032,953 in benefits from salmon restoration projects would be enjoyed because of the proposed rule. I disagree. These benefits exist because the State has already invested in them. This figure should be discounted because this is not a benefit of the proposed rules, rather of grant funding.

Additionally, instream flows for salmon and other fish are already protected. If instream flows fall too low, then junior water right holders' water allotments will be prorated, ensuring proper flow, and thus preserving the benefits of the salmon restoration projects. Therefore, neither the State's investment in the restoration projects, nor protecting instream flows are direct benefits of the existing and proposed rules.

Ecology also claims almost $150 million in litigation risk reduction. This is entirely speculative. Even with the proposed rules, the State and water users are still exposed to the same litigation risk.

Therefore, there is no real reduction in litigation risk. However, I will add that increased water storage will reduce, perhaps, eliminate any litigation risk.

The entire report also ignores the fact that Ecology, the Governor, and the Legislature are working to realize water storage solutions meant to relieve pressure on Upper County and other Yakima River Basin water users. Increased water storage could eliminate the need for litigation. This report implies, by not mentioning the impact of increased water storage at any time throughout the 20-year analysis, that there will be no water storage projects within 20 years. Is that the position of Ecology – no water storage in the Yakima River Basin within 20 years?

Taking these arguments into consideration, **this reduces the total benefits of the proposed rules to near zero. Consequently, the net costs would exceed the net benefits.**

Additionally, I wanted to let you know that the CR-102 that was filed with a summary of the proposed rule is also deficient. It fails to mention the metering requirement in the rules. I consider metering a significant requirement that should have been, at the very least, mentioned in the summary.

I think it is fair to request that Ecology use the same baseline in all of its documentation and to expect that a good faith effort be made in the compilation of the Small Business Economic Impact Statement and the Preliminary Cost Benefit and Least Burdensome Analyses.

Because Ecology has not done its due diligence in considering the impacts to small businesses and the citizens and landowners of Kittitas County, the Department lacks a firm basis upon which to decide the most prudent course of action. Therefore, the Department should refrain from adopting WSR 08-15-021.

If you wish to discuss my comments with me, please feel free to contact me at my office at (509) 766-6585.

Sincerely,

Janéa Holmquist

Senator Janéa Holmquist
13th Legislative District

cc: Governor Christine O. Gregoire
Director Ted Sturdevant, Department of Ecology
Regional Director, Tom Tebb, Department of Ecology
Senator Bob Morton
Kittitas County Commissioner Mark McClain
Kittitas County Commissioner Paul Jewell
Kittitas County Commissioner Alan Crankovich

Okanogan County Commissioner Andrew Lampe
Okanogan County Commissioner Don Hover
Okanogan County Commissioner Mary Lou Peterson
Okanogan County Director of Planning Perry Huston
Benton County Commissioner Max Benitz, Jr.

Johnson, Roger E. (ECY)

From: Linda Horish [horishj@wildblue.net]
Sent: Saturday, August 14, 2010 1:07 PM
To: ECY RE Kittitas Rules
Subject: Well Ban

Where are the scientific facts to back a permanent ban on new wells in Upper Kittitas County? DOE & the governor are taking this too far without having any due cause. The governor and DOE are enabling Cle Elum to slowly die. Don't put the cart before the horse.

Paul and Linda Horish
Cle Elum,WA 98922

Johnson, Roger E. (ECY)

From: Dave [Sledhead.Dave@comcast.net]
Sent: Thursday, August 12, 2010 5:03 PM
To: ECY RE Kittitas Rules
Subject: Dave Hurwitz comment letter regarding proposed WAC 173-539A - UPPER KITTITAS GROUND WATER RULE

DOE,

I corrected a few spelling errors in my previously submitted comment letter. Please use the version below for my public comments.

Dave Hurwitz

Email your comments to: kittitas@ecy.wa.gov
Mail your comments to:
Department of Ecology
Central Regional Office
Attn: Mark Schuppe
15 West Yakima Ave., Ste. 200
Yakima WA 98902-3452

WA State Department of Ecology,

Included are my comments, concerns, suggestions and questions regarding your proposed new Chapter WAC 173-539A - UPPER KITTITAS GROUND WATER RULE, as documented on your website at the following link: http://www.ecy.wa.gov/laws-rules/wac173539a/p0812a_2010.pdf

I am requesting a written confirmation of receipt of this comment letter from DOE, and also a written response from DOE to all of my questions contained in my comment letter.

I emphatically oppose the current wording and intent of WAC 173-539A. What the Department of Ecology (DOE) is referring to as a so-called Ground Water Rule and/or water moratorium for upper Kittitas County until a ground water study takes place, is in actuality an anti-growth anti-people building ban. And the proposed ban has zero scientific evidence that supports the DOE's current temporary or the proposed new permanent building bans, unless property owners first obtain senior water rights pre-dating May 10, 1905, which are not available to the entire region in the upper county affected by this proposed rule.

Currently there is a "red zone", "yellow zone" and "green zone" locations in the upper county (although I have been unable to find a decent map, here is a link to a poor one located on your website: http://www.ecy.wa.gov/programs/wr/cwp/images/cro/kitt_map_lg.jpg), and only those properties in the "green zone" are allowed to buy water from the Suncadia Water Bank according to information I have been able to obtain. I understand that the Swauk drainage properties must buy water from senior water rights holders that are only located in that drainage, of which none are for sale today. The same scenario as in the Swauk drainage applies for the Teanaway drainage. I see no reference to drainages or zones in this permanent rule. Will all property owners in the upper county be allowed to buy from the Suncadia Water Bank if this rule is put into place? And if so, this senior water rights option will soon be depleted, so what will happen after this occurs?

Quote from G. Thomas Tebb, Central Regional Director, DOE – June 25 letter to Catherine Bambrick, Administrator, Kittitas County Public Health Department:

> *"We also believe more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin to help provide a clearer path for making groundwater decisions."*

I couldn't agree more that "*more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin*" and this also applies throughout the state. This information must be determined prior to enacting any new rule banning use of exempt wells, without strong scientific evidence to the contrary that would support such a rule, which is why the current temporary moratorium should end and the new proposed rule should not be enacted.

I do understand the authority held by DOE to protect senior surface water rights in this state, but what I don't understand is why DOE does not apply a statewide ban on all exempt wells if DOE is of the opinion that exempt wells from anywhere in the state affect surface water rights. Do I want to see a ban across the state? No, but at least that would not unfairly just pick on the innocent property owner in upper Kittitas County.

> ***WAC 173-539A-010 Purpose.*** *The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County pending completion of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.*

Per the above section of the proposed new rule the DOE will no longer allow additional buildings or new "*unappropriated*" exempt wells in the upper county until "*completion of a ground water study*" that the DOE seems unwilling to move forward with. Why is that? According to published reports, the DOE is currently sitting on $700,000 from the state that was appropriated for this study, yet nothing is happening. My guess is because the study will most likely prove that the aquifer in the upper county is doing just fine and not affecting surface water that provides downstream river flows to senior water right holders, and this fact would (or should I say "should") end the current and proposed DOE building ban. And again I will state the building ban is the true intent of this permanent rule.

If DOE feels they need more funds before beginning the study, then why doesn't DOE just charge a "reasonable" fee of possibly $200 for all property owners in the entire county with "*unappropriated*" existing exempt wells, and possibly property owners that would like to drill a new well on their property could be charged a similar fee, say $300. That would bring in quite a bit of extra revenue for DOE to perform this study, and in the meantime people could move on with their lives and not be sitting on nearly worthless property if they are located in the red or yellow zone in the upper county where they can't buy from the Suncadia Water Bank.

The DOE statement "*water budget neutral*" is perplexing to me and seems to be a disingenuous statement. For this to statement to be truthful, wouldn't this actually mean that let's say if "family A" desired to sell their current property and house in the upper county that is on an exempt well without senior water rights to "family B", and "family A" was a 2 person family and "family B" was made up of 3 or more individuals, they would not be allowed to do so by DOE because there is no way this exchange could be considered "water budget neutral"? I see no language in this rule that would change anything in regards to existing buildings. What about if "family A" just wanted to stay in their current house, but they had two babies that were born during the current or proposed bans, would they have to move out of their house in the upper county because their family with their two additions would not be considered "water budget neutral"? Or if they were permitted to stay, would they be allowed a building permit to enlarge their small home to make room for their growing kids? What about seasonal families becoming permanent

families? Where does "water budget neutral" not apply, and if it does not apply to all non-neutral water budget uses, why is DOE trying to apply this new rule to basically only new building permits? Would this rule even have a chance of holding up in court in its current "selective" application to certain property owners, but not applied fairly to all?

> ***WAC 173-539A-020 Authority.*** *RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for permit-exempt wells where needed.*
>
> *In 1999, ecology imposed an administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, which includes Kittitas County. That moratorium did not apply to permit-exempt withdrawals. In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new permit-exempt wells on senior water rights and stream flows. Ecology consulted with standing committees of the Washington state legislature on the petition and proposed withdrawal. Ecology rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County.* ***Ecology proposed a rule in January 2009 and Kittitas County questioned ecology's authority for the proposed rule. Ecology later invoked the dispute resolution process under the MOA and the MOA was later terminated.***

It appears that all this fuss and fighting resulting in the current and proposed new ban is all because DOE wants to teach the Kittitas County Commissioners (KCC) a lesson that DOE is the "big daddy" in town, and that DOE's stick is bigger than KCC's stick? Geez, thanks for rolling all of the public that own property in Kittitas County into the DOE vs. KCC "gang equivalent" territorial war against each other. We get it. You have the big stick. You have authority in WA State to control surface water rights. Enough with the bullying, can't we just move forward? I am sure I could convince KCC to apologize in public to pump the DOE ego if that is what it takes to get out of this fight. Would that be enough for DOE?

> ***WAC 173-539A-027 Advisory.*** *All unmitigated withdrawals that began after May 10, 1905, may be subject to future curtailment due to conflicts with senior water rights. All unmitigated users are advised to obtain mitigation through senior trust water rights to avoid such curtailment.*

If property owners use "*unmitigated*" water (exempt wells), as most do in the upper county and across eastern WA State as a whole, and they do not have senior water rights that date prior to May 10, 1905, they are subject to have their water use curtailed. Why is this "advisory" even in this proposed rule that only applies to upper Kittitas County? And how would this action be any different for any junior water right holders anywhere in the entire state of WA? If the answer is no difference for junior water right holders anywhere in the state, then this inflammatory section of the proposed rule should be removed, as its sole purpose seems to be to frighten property owners, and more importantly scare potential lenders away from financing all real estate in the upper county if their property does not have a senior water right to go along with the exempt well that serves the residence. This would create an even more negative valuation of properties in the upper county than that which will occur if the remaining portions of this proposed rule are enacted.

WAC 173-539A-050 Water budget neutral projects. (1) Persons proposing a new use of ground water shall apply to ecology for a permit to appropriate public ground water or, **if seeking to rely on the ground water permit-exemption, shall submit to ecology a request for determination that the proposed permit-exempt use would be water budget neutral.**
(2) As part of a permit application to appropriate public ground water or a request for a determination of water budget neutrality, applicants or requestors shall include the following information:
(a) Identification of one or more water rights that would be placed into the trust water right program to offset the consumptive use (as calculated pursuant to subsection (3) of this section) associated with the proposed new use of ground water;
(b) A site map;
(c) The area to be irrigated (in acres);
(d) A soil report, if proposed discharge is to a septic system and the applicant or requestor proposes to deviate from the values in subsection (3) of this section;
(e) A property covenant that prohibits trees or shrubs over the septic drain field; and
(f) A copy of the sewer utility agreement, if the proposed wastewater discharge is to a sanitary sewer system.
(3) Consumptive use will be calculated using the following assumptions: Thirty percent of domestic in-house use on a septic system is consumptively used; ninety percent of outdoor use is consumptively used; twenty percent of domestic in-house use treated through a wastewater treatment plant which discharges to surface water is consumptively used.
(4) Applications for public ground water or requests for a determination of water budget neutrality will be processed concurrent with trust water right applications necessary to achieve water budget neutrality, unless:
(a) A suitable trust water right is already held by the state in the trust water right program; and
(b) The applicant or requestor has executed an agreement to designate a portion of the trust water right for mitigation of the applicant's proposed use.
(5) Applications to appropriate public ground water or requests for determination of water budget neutrality that do not include the information listed in subsection (2) of this section will be rejected and returned to the applicant.
(6) To the extent that ecology determines that the mitigation offered would not reliably mitigate to be water budget neutral, ecology may deny the request or limit its approval to a lesser amount.

This section is very disconcerting me, as I am aware of numerous individuals who own just one small parcel in the upper county, who have bought their property over the last 2 to 10 years, with plans to retire there when they are financially able to do so. Many of these average folks live and work on the west side of the Cascade Mountains in the Puget Sound area during the weekdays where there are more jobs with better pay available, and they then travel to the upper county nearly every weekend to spend relaxing "stress relieving" time on their dream property with family and sometimes with friends. Some of these individuals camp out, some have trailers, and some have outbuildings such as garages, barns and pole buildings (some even with small living quarters). Many of these property owners have already drilled theirs wells and are using water from them every weekend. Others have waited to drill their wells and

waited to build their dream homes due to cost or other more pressing financial necessities such as sending their children to college or possibly dealing with health issues as they age and prepare for retirement. Most have spent a good portion if not all of their retirement funds for their upper county properties. Also keep in mind the lower income property owners that have not been able to afford home ownership on the west side of the mountains where they work and possibly rent their living quarters. They have been able to scrape by, save a little here and there, and just barely afford to buy less expensive property in the upper county to be able to build their dream home someday - which might only be a 1000 SQ FT 2 bedroom house that might not seem like much to many, but to them it would be their castle.

Why does DOE plan to tell all of these people through this permanent rule that DOE just doesn't care, and those that could afford to build by July 16, 2009 won the lotto, and the rest of you property owners must let your dreams die and your property will be worthless, so just get over it?

How sad for so many innocent property owners that had no involvement in the DOE vs. KCC authority battle, but will pay for it with their current livelihood or their future retirement. And in this sad event, they will still be considered the luckier ones. The less lucky will pay for the DOE decision with their lives due to stress leading to heart attacks, or outright suicide over losing their financial stability and their dreams...

I hope DOE officials are happy with their decision in regards to this rule and that you all will sleep well at night in your dream homes, many of which more than likely use exempt water wells, and who will also not be affected by your proposed upper Kittitas County building ban.

Sincerely,

Dave Hurwitz
18449 196th Ave SE
Renton, WA 98058

Schuppe, Mark (ECY)

From: SAWS Treasurer [saws-treas@snowmobile-alliance.org]
Sent: Tuesday, August 24, 2010 4:49 PM
To: Schuppe, Mark (ECY)
Subject: I absolutely am opposed to the proposed WAC 173-539A - Upper Kittitas Ground Water Rule

You have absolutely no proof whatsoever that there is a problem and here in this proposed WAC you are taking extreme measures! I personally know of several couples, including my husband and I, that have invested hundreds of thousands of dollars getting their dream property ready to build for retirement, which includes drilling a well, putting in a septic system, and bringing in utilities, ie power and phone, and now they can't get a building permit!?!?! I am truly astonished that you people are so uncaring about the effect on peoples lives this rule will have. I am also very saddened that our Governor did not side with the people on this issue when it came before her. Believe me, I will be telling every one I know to never vote for any Democrat again! Apparently you folks in the Dept of Ecology are nothing but environmental Nazis.

Disgusted property owner,
Marisa Hurwitz
PO box 58031
Renton, WA 98058

Schuppe, Mark (ECY)

From: =RisRocket [risrocket@comcast.net]
Sent: Tuesday, August 24, 2010 4:52 PM
To: Schuppe, Mark (ECY)
Subject: RE: I absolutely am opposed to the proposed WAC 173-539A - Upper Kittitas Ground Water Rule

You have absolutely no proof whatsoever that there is a problem and here in this proposed WAC you are taking extreme measures! I personally know of several couples, including my husband and I, that have invested hundreds of thousands of dollars getting their dream property ready to build for retirement, which includes drilling a well, putting in a septic system, and bringing in utilities, ie power and phone, and now they can't get a building permit!?!?! I am truly astonished that you people are so uncaring about the effect on peoples lives this rule will have. I am also very saddened that our Governor did not side with the people on this issue when it came before her. Believe me, I will be telling every one I know to never vote for any Democrat again! Apparently you folks in the Dept of Ecology are nothing but environmental Nazis.

Disgusted property owner,
Marisa Hurwitz
PO box 58031
Renton, WA 98058

Johnson, Roger E. (ECY)

From: duane kenny [kc7wxy60@yahoo.com]
Sent: Thursday, July 29, 2010 4:27 PM
To: ECY RE Kittitas Rules
Subject: Kittitas County Well Mortorium

To: Mark Schuppe

As a landowner in the Upper Kittitas County I am opposed to a further well mortorium for the Upper County. I feel that the area is being singled out and water availability has been unappropriately considered when a study has yet to determine if even there is a groundwater shortage.

I feel that DOE is not doing what is necessary to mitigate groundwater withdrawl to accommodate future land endeavors. These are hard times and DOE and Kittitas County are making it even more of a hardship to be a landowner in the Upper County.

Lorna Kenny, Landowner

Johnson, Roger E. (ECY)

From: Marc Kirkpatrick [mkirkpatrick@encompasses.net]
Sent: Monday, August 02, 2010 10:27 AM
To: ECY RE Kittitas Rules
Cc: Warnick, Judy; Bill Hinkle; Holmquist, Janea; Paul Jewell; Alan Crankovich; Mark D. McClain
Subject: UKC Permanent Rule
Attachments: DOE-2010-08-02.pdf

Mr. Mark Shuppe,

Attached is our comment letter for the proposed permanent rule affecting the Upper Kittitas County. Please don't hesitate to call or email with questions or comments.

Regards,

Marc Kirkpatrick
Principal
mkirkpatrick@encompasses.net
(509) 674-7433 x224

Encompass Engineering & Surveying
Together With
Baima & Holmberg

Western Washington Division | 165 NE Juniper Street, Suite 201 | Issaquah, WA 98027 | Phone: (425) 392-0250 | Fax: (425) 391-3055
Eastern Washington Division | 108 East 2nd Street | Cle Elum, WA 98922 | Phone: (509) 674-7433 | Fax: (509) 674-7419

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ENGINEERING & SURVEYING
Together with
Baima & Holmberg

August 2, 2010

Wash. State Dept. of Ecology
15 West Yakima Ave., Suite 200
Yakima, WA 98902

Re: Kittitas County Permanent Rule

Att: Mr. Mark Shuppe

Dear Mr. Shuppe,

This letter is in regards to the proposed permanent rule that Ecology is planning on adopting sometime in November. Our office and many of our clients affected by the year long ruling, strongly oppose this adoption. I am the owner of Encompass Engineering & Surveying and have felt first hand what damaging affect this temporary rule has had on our business, families, friends, and clients. Below is a list of comments, questions and suggestions that we believe supports our position.

1. Trying to find the **logic** in this ruling only makes things even more frustrating for the people living within it.
    a. This is a "Paper" water issue and not a "Wet" water issue. Please stop referring to both as if they are the same. Solving the "Paper" water issue does not solve the "Wet" water issue that the emergency rule is trying to stop and is predicated on. Addressing the "Wet" water can and will solve the "Paper" water issue, so let's get our priorities straight and work on the groundwater study, water storage, and conservation.
    b. How does buying Suncadia's mitigation water, "Paper" water, improve the basin's "Wet" water? Does someone turn up a faucet when the purchase is made?
    c. Suncadia's "green zone" covers less than 10% of the moratorium area and is located directly adjacent to the Yakima River. This will encourage development of homes and water withdrawal where we all can agree has the biggest impact/continuity to the "Wet" water of the Yakima River Basin. Is this in the best interest of the downstream senior water right holders?
    d. Increasing the demand of senior water rights and decreasing overall land values, can and will cause many prime farm lands with senior water rights to turn them fallow. During difficult farm years, the only thing valuable for farmers to supplement with will be their water rights. See Ellensburg's old golf course along I-90 for example.
    e. The selling and transfer of water rights may make sense on paper, but not on the ground. Our County was subjected with unnecessary flood damage during the 2009 January flood. An improper decommissioning or abandonment of the Masterson Ditch along

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Phone: (509) 674-7433 Fax: (509) 674-7419

www.EncompassES.net

Redbridge Road caused the County and many of the residents, cattle & land to receive serious damages and costing them and taxpayers thousands of dollars. After the water rights were purchased from Masterson Ditch, who became responsible for the ditch maintenance?

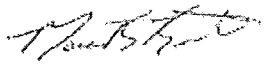
f. The Small Business Economic Impact Statement prepared by ? of Ecology in June 2010 is revolting. A proper analysis needs to be completed by the State's Chamber of Commerce and Kittitas County's Economic Development Group. I would be embarrassed if an employee of my office prepared such a document for public review.

2. Propose a plan or steps towards an overall solution that gives everyone hope and the ability to support Ecology in their on going effort to manage the water's of the state.
   a. WSDOT construction along the I-90/Snoqualmie Pass has an impact on the "Wet" water storage in Lake Keechelus. WSDOT was able to mitigate by purchasing "Paper" water rights and also dredge the lake to mitigate for its "Wet" water impact. This is a great example of finding a logical solution. Now we need to do the same for the general public that does not just put the burden on the single land owner. Create/maintain storage in our existing reservoirs is a long term solution that can be done immediately.
   b. Stop re-inventing the wheel. Nation wide there are similar situations that have been dealt with. If there is an assumption to be made, make it towards using one of the many tools we already have as a nation. Placing a moratorium on the citizens of Upper Kittitas County tells the public you have given up and are out of ideas.
   c. "Paper" Water Mitigation from Suncadia needs to be readily made available in the "yellow" and "red" zones. Ecology needs to make general/conservative assumptions so not to complicate the process that Suncadia is trying to follow. If not, this process will fail and any confidence in Ecology's ability to find a solution will diminish.
   d. The Groundwater Study needs to occur prior to any rule making so that we can get it right the first time. We and the Dept. of Ecology do not have the right to make assumptions that ultimately affect the livelihoods of citizens working hard to stay alive in this already challenging economy.

Thank you for the opportunity to provide written comments and I hope that you and others at Ecology can find away to turn this ship in the right direction. Please do what you think is right and don't just follow order's from a miss-informed few.

Best Regards,

Encompass Engineering & Surveying



Marc K. Kirkpatrick
Owner

Kittitas County, Washington
BOARD OF COUNTY COMMISSIONERS

District One
Paul Jewell

District Two
Alan Crankovich

District Three
Mark McClain

RECEIVED
AUG 26 2010
DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

August 25, 2010

Washington State Department of Ecology
Central Regional Office
Attn: Mark Schuppe
15 West Yakima Avenue, Suite 200
Yakima, WA 98902-3452

Mr. Schuppe:

We appreciate the opportunity to submit written comments on WAC 173-539A. We further appreciate the Department of Ecology's (Ecology) extension of the deadline for written comments in order to provide more opportunity for as many comments to be received by Ecology for consideration as possible.

We have several concerns with the proposed rule as well as the Preliminary Cost Benefit and Least Burdensome Analysis (PCBLBA) and the Small Business Economic Impact Statement which were published in support of this proposed action.

WAC 173-593A

As we have stated many times in the past, the Kittitas County Board of Commissioners fundamentally objects to Ecology's action in considering adoption of this rule and in the imposition of previous and related emergency rules which have enacted a moratorium on all ground water withdrawals in Upper Kittitas County since June 16, 2009. We are certainly supportive of a groundwater management strategy that is based upon the best available science and takes into consideration a balanced approach that is considerate of all stakeholders. We believe this proposed rule falls well short of such an approach.

As stated in WAC 173-539A-020, the proposed rule is being considered under Ecology's authority in RCW 90.54.050. While we do not question Ecology's authority to take this action, we do have concerns with Ecology's utilization of that authority in the manner proposed. We believe Ecology is utilizing this authority in a transparent attempt to impose a permanent moratorium in Upper Kittitas County as a method to further statewide agency goals related to the use of exempt wells. We have little doubt it is Ecology's goal to prove this action in Upper Kittitas County to produce a working model which can be presented elsewhere throughout the Yakima Basin and Washington State. Ecology is exerting its authority granted by RCW 90.54.050 to force the citizens of Kittitas County to suffer the cost and the consequences of its attempt to circumnavigate the exemption allowed under RCW 90.44.050.

The definition of "New use of the ground water exemption" as included in WAC 173-539A-030 is also objectionable. Throughout the past year with the passage of related and substantively

Johnson, Roger E. (ECY)

From: Suzanne Becker [suzanne.becker@co.kittitas.wa.us]
Sent: Wednesday, August 25, 2010 4:06 PM
To: ECY RE Kittitas Rules
Cc: Greg Zempel; Neil Caulkins; Paul Jewell; Mark D. McClain; Alan Crankovich
Subject: Kittias County Legal Comments to Proposed WAC 173-539A
Attachments: Kittitas County Legal Comments on Proposed WAC 173-539A.pdf

Attached are the Kittitas County legal comments to proposed WAC 173-539A. The same has also been faxed to Ecology in case of any problems opening the attached document.

Thank you.

Suzanne Becker
Civil Deputy Prosecuting Attorney
Kittitas County
205 W. 5th Ave, Rm. 213
Ellensburg, WA 98926
(509) 962-7520

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KITTITAS COUNTY LEGAL COMMENTS TO PROPOSED WAC 173-539A

Kittitas County is committed to working with Ecology to find a legal solution to groundwater management. There are many legal concerns with the proposed rule, including: 1) Ecology's limited authority to impose a permanent moratorium on permit-exempt groundwater; 2) rule-making procedural failure to produce a Small Business Economic Impact Statement (SBEIS); 3) a flawed Cost Benefit and Least Burdensome Analyses (CBLBA) that conflicts with the lack of SBEIS; and 4) an unresponsive implementation plan on how Ecology intends to implement and enforce the rule.

LEGISLATIVE INTENT

There are two concerns with Ecology's authority to issue the proposed rule: 1) that it provides for a permanent moratorium on new water uses in Upper Kittitas County, which modifies Ecology's statutory authority for a temporary moratorium on groundwater appropriations; and 2) that the rule limits perfection of beneficial uses to five years, which Ecology has no authority to do. Furthermore, Ecology's implementation of the rule would also require Kittitas County to exceed its legislative authority.

WAC 173-539A-020: Ecology does not have Statutory Authority for a Permanent Moratorium of Groundwater

Ecology only has a limited or conditional authority to issue a moratorium on groundwater appropriations. It is only when "sufficient information and data are lacking" that the Legislature has given Ecology the ability to issue a moratorium.[1] From a plain reading of the statute, when there is sufficient information and data, Ecology no longer has the authority to issue the moratorium. However, the proposed rule does not account for this conditional authority. It is a permanent rule and prevents all new uses of water *regardless* of whether there is sufficient information.[2] In other words, the Legislature allows Ecology to issue a moratorium only when

[1] RCW 90.54.050

[2] Proposed WAC 173-539A-040 makes no exception for new uses where there is sufficient information to determine if water budget neutrality is necessary.

Ecology needs more information to make sound management decisions. However, the proposed rule improperly extends Ecology's authority to withdraw groundwater to all situations. Ecology acknowledges this over-reaching of authority in its Cost Benefit and Least Burdensome Analysis, stating that "once the Upper Kittitas Groundwater Study is complete, a new rule would be proposed and adopted to replace this rule."[3] The appropriate approach would be to include a sunset clause that details when the proposed rule is no longer effective.

The County recognizes Ecology has a role in the protection of senior water rights, but this role is limited by the legislature. While water budget neutrality is consistent with RCW 90.54.050(2) when used to preserve the status quo during temporary moratoriums[4], the use of water budget neutrality when paired with a permanent moratorium looks very much like permitting, which is prohibited by RCW 90.44.050. Additionally, the legislature gave the authority to perform water right adjudications to the courts, not Ecology. The proposed rule appears to make a determination about rights re groundwater use in Upper Kittitas relative to rights re groundwater use elsewhere in the basin.[5] The latest scientific study indicates that Kittitas County has the lowest amount of groundwater pumpage in the entire basin.[6] This leaves the County with a question: if the purpose of the rule is to protect senior water rights, why does the proposed rule only prohibit new uses of groundwater in the area of the basin that has the least amount of groundwater pumping and population? While the County understands that water is an increasingly valuable and scarce resource which needs to be managed appropriately, the ability

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[3] Preliminary Cost Benefit and Least Burdensome Analysis (CBLBA), p 6

[4] AGO 2009 No. 6, p 14

[5] The proposed rule appears similar to the facts in *Rettkowski*, where Ecology (believing that an area was over-appropriated) attempted to make determinations regarding water rights without going through a formal water right adjudication. *Rettkowski v. Ecology*, 122 Wash.2d 219, 858 P.2d 232 (1993)

[6] In a 2009 USGS report, it was determined that "[m]ost of the pumpage in 2001 was in the lower part of the basin, especially in Yakima County, which is also the location of most of the groundwater rights, groundwater claims, and population. The least pumpage occurred in Kittitas County, the least populous county in the study area and the county with the smallest number of groundwater rights." Hydrogeologic Framework of the Yakima River Basin Aquifer System, Washington; USGS, Scientific Investigations Report 2009-5152, p61. Additionally, J.J.Vacaro of the USGS further clarified in a presentation to the Kittitas County Board of Commissioners that Kittitas County used approximately 3% of the total groundwater pumped in the Yakima River basin.

to fairly and uniformly apply Washington water law to all residents of the state should be considered in the development of the proposed rule.

WAC 173-539A-030: Ecology does not have the Authority to Limit Existing Use to Five Years of the First Beneficial Use

The proposed rule improperly restricts perfection of a water right to five years of the first beneficial use.[7] Once an exempt well is put to beneficial use, Ecology does not have the authority to limit that use to less than the statutory amount per RCW 90.44.050. Ecology even acknowledges this in an internal email: "We have proposed a five year "perfection" period (based on due diligence?). I don't see where we have in law the authority to do this."[8] The effect of imposing this five year period is that a group B water system that was designed and installed prior to the emergency rule would be artificially capped at less than the 5,000 gpd amount allowed by RCW 90.44.050 and less than the full capacity that the group B system was designed for. The County believes that the five year limit should be removed from the proposed rule.

WAC 173-539A-050: Kittitas County has no Authority to Make Determinations Regarding What Form of Water Right is Appropriate Under Land Division and Building Permit Statutes

Ecology has requested that Kittitas County make determinations regarding the validity of a water right by enforcing the "group use" definition by denying "land use applications" as defined by the proposed rule.[9] In a May 4, 2010 email, Ecology communicated to Kittitas County that the County was to make determinations of when a proposed use for land subdivision falls under the permit-exemption clause in RCW 90.44.050 and proposed WAC 173-539A-040(3).[10,11] This method of implementing the rule exceeds the County's legislative authority.

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[7] Proposed WAC 173-539A-030: Existing Use of the ground water exemption: "The water right is perfected within the five years following the first regular beneficial use for that purpose."

[8] Exhibit A: November 3, 2009 Email from Tryg Hoff, Ecology, re: Upper Kittitas Withdrawal Emergency Rule #6

[9] Proposed WAC 173-539A-030: Definitions

[10] Exhibit B: May 4, 2010 Email from Kurt Walker, Department of Ecology to Holly Duncan, Kittitas County Public Health Department.

RCW 90.44.050 and the proposed rule clearly state that it is Ecology who will determine whether to issue a permit or water budget neutrality determination. Neither RCW 90.44.050 nor WAC 173-539A gives the County any authority to make a determination of when a permit vs. water budget neutrality is required. It is Ecology who has the authority to determine if a proposed groundwater use meets the permit-exemption under RCW 90.44.050. The County has no legislative authority to deny a subdivision application under RCW 58.17, or a building permit under RCW 19.27 based upon the type of groundwater use that the applicant is proposing.

Ecology also considers RCW 19.27.097 as authority for the County to make determinations regarding what form of water right an applicant for a building permit should have.[12] RCW 19.27.097 states that:

> Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply... An application for a water right shall not be sufficient proof of an adequate water supply.

Ecology argues that this language gives the County the authority to make a determination of when the above "evidence" is valid. RCW 19.27.097 outlines three scenarios when the "evidence may" be sufficient. These scenarios are when the applicant has: 1) a water right permit from Ecology, 2) a letter from a water purveyor for an existing public water system stating the ability to provide the applicant with water, and 3) another form sufficient to verify the existence of an adequate water supply – which according to Ecology includes a water budget

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[11] The "group use" definition appears to be based upon the holding in *Campbell & Gwinn*. In *Campbell & Gwinn*, a developer proposed to rely upon the exempt well exception for a single development of 20 lots, and sent Ecology notice of intent to drill forms for twenty wells. Ecology filed a motion for declarative and injunctive relief to stop the wells from being drilled. The Appeals court agreed with Ecology, holding that "the statute's plain language directs that the exemption is not intended for use by a developer to provide water for group uses by multiple homes each withdrawing up to 5,000 gpd." *State v Campbell & Gwinn*, 146 Wash.2d 1, 21, 43 P.3d 4 (2002) However, Yakima county (where the development was located) was not a party to the *Campbell & Gwinn* case, nor did the *Campbell & Gwinn* court hold that a county has the authority to make a *Campbell & Gwinn* determination regarding the groundwater exemption in RCW 90.44.

[12] July 7th, 2010 meeting with Kittitas County Board of Commissioners

neutral determination under the proposed rule. All three pieces of "evidence" are determinations that can only be made by Ecology. A statute that states the applicant "may" provide a determinations made by Ecology (permit, group water system approved by Ecology, water-budget neutrality) is very different from requiring the County to make a decision as to which of these things the applicant should have. That is Ecology's role. Otherwise, Kittitas County will be in the position of acting for Ecology in making the determination of which form is acceptable when issuing a building permit. This would exceed the legislative authority granted the County by the legislature.

PROCEDURAL ISSUES

Regulatory Fairness Act: No Small Business Economic Impact Statement was Prepared Despite Extensive Evidence of Impact (RCW 19.85)

A Small Business Economic Impact Statement (SBEIS) is required "[i]f the proposed rule will impose more than minor costs on businesses in an industry ..."[13] When a SBEIS is required, the analysis "must compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rules..."[14] No SBEIS analysis was performed, as there is a conclusion that no small businesses are required to comply with the proposed rule.[15] This argument is contradicted by Ecology's own SBEIS, CBLBA, CR-102 Proposed Rulemaking Notice, common sense, and extensive evidence to the contrary.

The SBEIS contains several contradictory conclusions. First, it determines that no small businesses are required to comply with the proposed rule.[16] However, later the SBEIS lists multiple small businesses that may be impacted by the proposed rule, including Land

[13] RCW 19.85.030(1).

[14] RCW 19.85.040

[15] June 2010 Small Business Economic Impact Statement (SBEIS), p 4 Conclusions: "Because no small businesses are required to comply with rule, Ecology has determined that this is a minor cost as defined in RCW 19.85.020(2). RCW 19.85.030 exempts Ecology from needing to prepare a Small Business Economic Impact Analysis."

[16] SBEIS, p 2 "Small businesses are not required to comply with the proposed rule."

Subdivision and Development (Code 2331), Residential Building Construction (Code 2361), Nonresidential Building Construction (Code 2362), and Land Subdivision (Code 2372).[17] That Ecology can create such a list in one section of the SBEIS, and then discount all such impacts in another begs logic.

The next argument for avoiding a SBEIS analysis is that only small businesses which are seeking a new water appropriation would be impacted by the proposed rule.[18] This is followed by attempts to avoid SBEIS analysis in two ways: 1) by arguing that businesses can avoid costs by locating in an area where there is an existing water service, and 2) by arguing that any cost the business might incur by obtaining a senior water right is balanced by an equal gain in value from the water right.[19] These arguments must fail. First, many of the small businesses listed by the SBEIS include land development. These businesses cannot just relocate in an area where there is an existing water service. Land development is (by definition) located in areas where there is not existing services – that is why it is land development, not simply construction services. Second, the SBEIS ignores the definition of "minor cost." RCW 19.85.020(2) defines "minor cost" as "a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll." The definition is not a cost that is balanced by a possible gained value – it is simply any outright cost over a certain amount to a small business. The County believes that by admitting small businesses will incur costs to obtain water budget neutrality and metering, a SBEIS must be performed.

WAC 173-539A-070: Metering Costs are not Accounted for in SBEIS

The SBEIS also ignores the metering requirement of the proposed rule. This places a universal requirement on all users of groundwater that meters be installed.[20] Ecology estimates

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[17] SBEIS, p 6

[18] SBEIS, p 3 "These businesses are required to comply with the rule if they would rely on a new appropriation of groundwater."

[19] SBEIS, p 3-4

[20] Proposed WAC 173-539A-070: "(2) For all other uses within upper Kittitas County that begin after November 25, 2009, including permit-exempt uses, a meter must be installed for each source well in compliance with such requirements as prescribed in WAC 173-173-100."

these costs from $300 to $750 for installation of each small to medium water system.[21] On top of these installation costs will be the ongoing metering costs of maintenance and reporting which the SBEIS does not account for. Again, small businesses that use groundwater, or install residential wells as a part of their business (land development and construction) will be required to install meters, however, there is no analysis of the impact to small business because of this additional cost.

Decrease in Property Value is Ignored in SBEIS

The SBEIS also ignores many other costs associated with the proposed rule, including the decrease in land value, and the ripple effect that the rule has on the entire Upper Kittitas County economy. Kittitas County is currently bracing for land owners affected by the rule to petition the county to request a reduction in the assessed value of affected property.[22] The County has posted links to the petition on the Kittitas Groundwater Moratorium website.[23] The effects of the proposed rule will likely impact property values in Upper Kittitas County, most significantly in the areas where water is currently not available from the Suncadia water bank. Any decrease to value of land purchased for construction and development in Upper Kittitas County should be counted as a cost to small business in the SBEIS.

SBEIS and CBLBA have Different Assumptions of the Rule's Impacts

The SBEIS ignores the conclusions of the Cost Benefit and Least Burdensome Analyses (CBLBA). The CBLBA estimates that 3000 new residences will be seeking water through permit-exempt withdrawals in the next 20 years.[24] Each of these residences will presumably be developed and constructed by a small business. The CBLBA estimate is that the cost per residence of obtaining a water right is $5700, with an additional $800 to $1300 for "expected

[21] CBLBA, p7. Ecology notes that these costs were estimated from a "[s]urvey of well drillers, pump installers, and Ecology's metering coordinator."

[22] http://www.co.kittitas.wa.us/assessor/forms.asp

[23] http://www.co.kittitas.wa.us/response/200907-doegwwm.asp

[24] June 2010 Cost Benefits and Least Burdensome Analyses, p 7

taxes and fees" for a total of $6500 to $7000 per residence.[25] However, the SBEIS then draws a different conclusion: that the value of the water right will equal the cost. If the value is $5700, but the cost is $6500 to $7000, then the value of the right does not equal the cost. Any construction company or developer who is building these residences will have to pay an additional $800 to $1300 in taxes and fees over and above the value of the water right.

The ability to develop land is handled very differently in the SBEIS vs. the CBLBA. In the CBLBA, the base assumption is that the proposed rule will allow for the continued development of land, and counts this as the major benefit under the CBLBA. Per the CBLBA, "[a]llowing this opportunity to develop could allow 3000 new lots at $83,780 in increased land value... Ecology believes this development is 80 percent more likely to occur under the rule than without the proposed rule."[26] However, the SBEIS states that the land development will not happen. To count the development of the land as a major benefit of the proposed rule in the Cost Benefit analysis, but then to turn around and state that land development will not happen for the SBEIS is baffling. Again, the County believes that if there is procedural compliance with rule-making procedures, then the SBEIS and CBLBA should rely on the same basic assumptions about the impacts of the rule.

SBEIS Ignores Extensive Evidence of Impact to Small Business from the Rule

Finally, the SBEIS avoids extensive evidence that small business is heavily impacted by the rule. As a result of the emergency rule, small land development and construction has ground to a halt in upper Kittitas County. There has been extensive feedback on the proposed rule's effect on business. Ms. Tokarsyck, the Executive Director of the Cle Elum Chamber of Commerce, estimates that 80% of land development is now out of business, and that other business in the area is directly impacted from this decline.[27] Mr. Clarke, representing the Central Washington Home Builders Association, reports "devastating impacts on the development community,

[25] CBLBA, p7 footnote #5

[26] CBLBA, p 11

[27] Letter from Ms. Tokarsyck, Cle Elum Chamber of Commerce to Mr. Schuppe, Ecology re: Small Business Impact Statement - Publication No. 10-11-016

landowners, and economy in Kittitas County."[28] Additionally, many people spoke at the public hearing on July 28th regarding the groundwater moratorium's economic impact on the region. Included was Mr. Senger, Senger Construction, who followed up his comments at the public hearing with a letter where he reports that the groundwater moratorium canceled all but one of his construction contracts, and forced the firing of eight full time employees.[29] Not one person at the public hearing stated that business was not impacted as a result of the rule.

The County feels that the rule-making procedure was not followed as a SBEIS analysis was not performed as required by statute for the following reasons: 1) there was no true analysis of what costs small land development and construction business would incur under the proposed rule, 2) costs such as obtaining water rights and metering were ignored by the SBEIS, and 3) the SBEIS ignored substantial evidence regarding the true impacts to business. The County requests that an accurate SBEIS be performed per the statutory requirements.

Cost Benefit Analysis is Flawed (RCW 34.05.328(d))

The Cost Benefit and Least Burdensome Analysis (CBLBA) is not a true economic analysis, misinterprets and misuses development right values, and is directly at odds with Ecology's assumptions in other parts of the rule-making file. The County asks that it be re-done as an honest economic analysis of the proposed rule.

<u>The Method of Economic Analysis is Flawed.</u>

In order to perform a cost benefit analysis, there must be an estimate of future costs. This means that there must be: 1) an estimate of what those costs are in present cost dollars, and 2) those present costs must be adjusted for inflation. When adjusting present costs for inflation, costs typically rise over time – if a bottle of water costs $1 today, then one year from now it will cost more because of inflation. Economists typically use a simple equation to calculate how to adjust present costs for inflation. It is:

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[28] June 10th, 2010 Letter from Mr. Clarke, Central Washington Home Builders Association to Mr. Sturdevant, Ecology, re: Kittitas County Water Supply Issues

[29] July 28th, 2010 Letter from Mr. Senger, Senger Construction to Mr. Sturdevant, Ecology, re: Exempt Well Moratorium Permanent Rule Hearing

Future Costs = Present Costs x (Inflation Rate)$^{\text{time period}}$

This equation takes into account the fact that a cost 20 years from now will be inflated much more than a cost a year from now because it is a longer time period in the future. Ecology's cost analysis fails to follow this simple formula and treats any future cost equally, regardless of whether it is one year or twenty years from now. For an economic analysis to assume that interest rates will remain static over 20 years is flawed and violates common sense. See the table below for an example of Ecology's present costs adjusted for inflation vs. costs adjusted for inflation that take into account how far in the future the costs are incurred.

Year	Present Value	Ecology Costs Adjusted for Inflation Future Value = Present Value x (Inflation Rate)	Correct Inflation Adjusted Cost Future Value = Present Value x (Inflation Rate)^Time (in years)
1	1	1.02	1.02
2	1	1.02	1.05
3	1	1.02	1.08
4	1	1.02	1.10
5	1	1.02	1.13
6	1	1.02	1.16
7	1	1.02	1.19
8	1	1.02	1.21
9	1	1.02	1.24
10	1	1.02	1.28
11	1	1.02	1.31
12	1	1.02	1.34
13	1	1.02	1.37
14	1	1.02	1.41
15	1	1.02	1.44
16	1	1.02	1.48
17	1	1.02	1.51
18	1	1.02	1.55
19	1	1.02	1.59
20	1	1.02	1.63
		20.49	26.07

The Calculation of the Benefits of the Rule is Flawed

The calculation of the benefits of the proposed rule is based upon a flawed assumption. The CBLBA states that the overwhelming benefit of the proposed rule is based upon an estimate of development right values (DRV) for the purposes of Transfer of Development Rights (TDR) program.[30] The CBLBA assumes that without the proposed rule, all new residential land use development will be subject to litigation and that therefore the entire development right value (DRV) is the benefit of the proposed rule.[31] There are several flaws in this analysis.

A DRV is defined as "a landowner's property right to use and subdivide a lot to the extent allowed by zoning regulations."[32] The equation for calculating the development right value is:

[Market-value Assessment] — [Current-use Assessment] = [Development Value]

A DRV is transferred between two sites: a sending site which sells the DRV, and a receiving site which purchases the DRV. The receiving site will purchase DRVs in order to develop the receiving site property further than the receiving site zoning will allow. The values for the market value assessment and the current use assessment are from January 2008 data from the Kittitas County Assessor's Office.[33] The ability to install an exempt well with or without the risk of litigation over water rights is very different from a DRV.

First, the transfer of development right value estimate (DRV) is something entirely different from the value of a water right or water budget neutrality. The DRV is based on a number of factors – only one of which is the utilities available to a property. The DRV are based on these factors: 1) The characteristics of the property (access, available utilities and infrastructure, views, etc.), 2) the property's physical location, and 3) the availability of development rights for purchase.[34] For Ecology to use the entire development right value when

[30] CBLBA p 11

[31] CBLBA, p10-11

[32] May 19, 2009 Cascade Land Conservancy: Transfer Development Rights Program (TDR), p113 http://cascadeagenda.com/files/tdr/Kittitas%20County%20TDR%20Program%20-%20CLC%20Findings%20and%20Recommendations%20%28Updated%20Report%202%20of%202%29%20%20may09.pdf

[33] TDR p 114

[34] TDR, p113

only a small portion might be impacted by the proposed rule is inherently flawed. Additionally, the cost estimates developed to allow for the sale of development rights is different from ability to install an exempt well. To use one for the other is to compare the cost of apples and oranges.

Second, the CBLBA ignores the fact that the DRVs are from January 2008, almost one and a half years before the proposed rule. Therefore, the 2008 development right values are those that *include the risk* of adjudication litigation. Put another way, the 2008 development right values are for land with permit-exempt wells without any purchase of senior water rights, i.e. land that has the risk of water right litigation. Therefore, the 2008 development right values reflect that litigation risk. For Ecology to assess the presumed benefit of the proposed rule, the analysis would have to be performed for the current market value and current use assessments (2010 values) in order to compare to the higher litigation risk 2008 development values. The assumption that the development right value falls to zero without the proposed rule is illogical – the TDR Report was able to calculate a 2008 development right value without the proposed rule.

Finally, the CBLBA does not address the fact that the proposed rule is most likely to hinder land development, not help it. The emergency rules have effectively stopped land development in Kittitas County. Market value assessments are likely lower than prior to the proposed rule. Yet no reason is given why the proposed rule will act in a different way. Instead, there are unfounded assumptions that "this development is 80 percent more likely to occur under the rule than without the proposed rule" without giving any rational basis for this assumption.[35] The CBLBA ignores reports that land development has halted by 80% since the groundwater moratorium.[36]

Ecology Fails to Account for Many Costs of the Proposed Rule

On the cost side of the equation, there is a failure to account for many costs associated with the proposed rule. These costs include the decrease in the value of property in Upper Kittitas County, the ongoing costs of metering, and the impact that the rule has on the economic health of Upper Kittitas County.

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[35] CBLBA, p 11

[36] Letter from Ms. Tokarsyck, Cle Elum Camber of Commerce to Mr. Schuppe, Ecology re: Small Business Impact Statement - Publication No. 10-11-016

The County feels that the CBLBA fails to meet procedural rule-making requirements as it grossly misuses and misstates the rule's benefits, and fails to account for many of the rule's costs. The County asks for an honest Cost Benefit and Least Burdensome Analysis that addresses the true benefits and costs of the rule.

Least Burdensome Analysis is Flawed (RCW 34.05.328(e))

The Least Burdensome Analysis ignores an obvious option. It concludes that it has only three options: 1) complete closure of groundwater extractions, 2) no new rule, or 3) the proposed rule. There is another alternative. RCW 90.54.040(3) provides:

> The department is directed to review all statutes relating to water resources which it is responsible for implementing. When any of the same appear to the department to be ambiguous, unclear, unworkable, unnecessary, or otherwise deficient, it shall make recommendations to the legislature including appropriate proposals for statutory modifications or additions. Whenever it appears that the policies of any such statutes are in conflict with the policies of this chapter, and the department is unable to fully perform as provided in subsection (2) of this section, the department is directed to submit statutory modifications to the legislature which, if enacted, would allow the department to carry out such statutes in harmony with this chapter.

Ecology "shall" recommend statutory modifications to the legislature. This is how the Stock Water Working Group (of which Ecology is a member) is approaching the exempt well issue.[37] When the only alternatives proposed by the CBLBA are extremes, either shutting down all groundwater extractions or doing nothing, it is a flawed analysis.

Implementation Plan for the Proposed Permanent Rule is Nonresponsive (RCW 34.05.328 (3)(a))

RCW 34.05.328(3)(a) requires the agency to place in the rule making file an implementation plan that details how the agency intends to: (a) Implement and enforce the rule, including a description of the resources the agency intends to use; (b) Inform and educate affected persons about the rule; (c) Promote and assist voluntary compliance; and (d) Evaluate

[37] Exhibit C: Stock Water Working Group Report, January 2010, p 2-3

whether the rule achieves the purpose for which it was adopted, including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcomes. Publication No 09-11-020 contains Ecology's response to this question. There is no description of how Ecology intends to implement and enforce the rule, no description of what Ecology expects of Kittitas County under this rule, nor are there any milestones for Ecology to assess the progress of the rule. The milestones are particularly important for a rule that has conditional authority – without milestones, there is no way for Ecology to determine when there is "sufficient data."

Additionally, as described above, the County does not have the authority to implement the proposed rule as Ecology has communicated it should be implemented. The lack of an implementation plan both obscures what Ecology expects Kittitas County's role in implementation will be, and obscures the fact that Kittitas County does not have the authority to perform as Ecology seems to expect. The County believes that a true implementation plan should be developed that addresses all of these issues.

The Rule Making File Is Insufficient (RCW 34.05.328 (2))

For the reasons stated above, the documentation placed in the "rule making file" is insufficient to persuade a reasonable person that:

(1) the probable benefits of adopting the rule outweigh the probable costs, and
(2) that the proposed rule is the least burdensome to those it places a burden upon to achieve the goals.

A reasonable person would not be so persuaded because:

(1) The only quantified benefit listed in the Cost Benefit Analysis is not a benefit from the baseline. This rule will result in less development and so the effect it will have on developmental rights from the baseline is a cost. Additionally, many of the costs are understated in the analysis.
(2) It is not difficult to find a less burdensome alternative; one example would be to ask the legislature for additional authority to evenly regulate permit-exempt groundwater.

This approach is being taken by the Stock Water Working Group, and there is no reason that Ecology should not at least consider it as an alternative for Upper Kittitas County.[38]

Summary of Objections

The County wishes to see the proposed rule be withdrawn, and the current emergency rule expire, with Ecology working towards a permanent legislative solution. The County believes that additional legislation to resolve the apparent conflict between RCW 90.54.050 and 90.44.050, and the limitations of current administrative authority for Ecology to manage permit-exempt wells in light of senior water rights would be the most appropriate approach. The County's objections to the proposed rule include, but are not limited to:

1) Ecology's claims to authority in adopting this proposed rule will expire with the obtaining of information/concluding of a water study. The rule should have a sunset clause that it terminates with the conclusion of the Groundwater Study.

2) Ecology does not have the authority to limit perfection of existing use of groundwater to five years. This should be removed from the rule.

3) Ecology has not properly complied with RCW 34.05.328(3) regarding a full implementation plan.

4) Ecology has not properly complied with RCW 34.05.328 (1)(e) regarding least burdensome alternative.

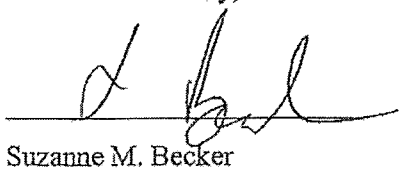
5) Ecology has not properly complied with RCW 34.05.320(1)(j) regarding preparation of a small business economic impact statement.

[38] Exhibit D: January 11, 2010 Memorandum Re: Need for Legislation in the 2010 Session

Conclusion

It is the County's position that the stated purpose of the rule as well as its apparent implementation are contrary to state law. The County requests that the proposed rule not be adopted. In the alternative, The County requests that Ecology adopt the addition of a sunset clause, remove the five year limitation on existing use, conduct a proper Cost Benefit and Least Burdensome Analysis and Small Business Economic Impact Analysis, and provide a complete implementation plan that does not require the County to exceed its authority.

For Kittitas County,



Suzanne M. Becker
Deputy Prosecuting Attorney
Kittitas County

EXHIBITS

Cameron, Jackie (ECY)

From:	Hoff, Tryg (ECY)
Sent:	Tuesday, November 03, 2009 9:29 AM
To:	Tebb, G. Thomas (ECY); Barwin, Robert F. (ECY); Schuppe, Mark (ECY); Reichman, Alan (ATG); Wilson, Mary Sue (ATG); Sheffels, Evan (ECY); Slattery, Ken (ECY)
Cc:	Downes, Melissa M. (ECY); Mackie, Thomas L. (ECY); Wessel, Ann (ECY); Burns, Travis (ECY); Ferguson, Sarah (ECY)
Subject:	RE: Upper Kittitas Withdrawal Emergency Rule #6

I've had some concerns about the "perfected use of the exemption" too. It comes from the recent AGO and further interpretations of what it means and says.

First, the AGO indicated that the department does not have the authority to limit the amount of the exemption absent a closure, in which case the exemption should no longer be allowed as a further appropriation. One should then conclude, if you can't limit the amount of the exemption, you also cannot not limit the uses. You either get the statutory benefits of the exemption or you don't.

This brings the second concern. When do you vest in getting the exemption, or not? Traditional water code proponents would describe this as when it is put to beneficial use. Some have even argued that you can separate these uses as if you could "perfect" one use, but not the others. This flies directly in the face of the AGO in saying you cannot limit the amounts of the exemption.

Regular beneficial use is a very blurry threshold. In economic theory you receive benefits as soon as you act on something the a rational consumer would consider beneficial. As an example, someone purchasing a band-aid is already receiving benefits from it. He does not have to physically put it on the cut to have beneficial use, the mere fact that it's available to use in his first aid kit provides benefits for him. So as example I would say that beneficial use starts at the pump test. When the person that financed the well drilling determines that water is able to be extracted from the well in sufficient quantities to benefit him, it is regularly and beneficially used. From here this person relies on the fact that water is available and that his plans to use it can be exercised. Denying him this right at this point could also be argued that it reduces the amount of his statutory right to the amounts of the exemption. Again, Traditional water code proponents might argue he hasn't put it to beneficial use. However, the fact that a person might hook additional pipes to his well (water withdrawal device), and even faucets, toilets, sprinklers, fountains does not make him perfect the exemption and the full limits of the exemption any more. Once a person pumps water during the pump test he has put that water to beneficial use. He makes decisions on how to use what's available to him and expects a reliance on his ability to use it. He does not expect the government to say he can't use it sometime in the future. This again would be limiting the amounts of the exemption.

We have proposed a 5 year "perfection" period (based on due diligence?). I don't see where we have in law the authority to do this.

I believe the priority date and perfection of the exemption starts when adequate water has been withdrawn for a person's uses. This is at the pump test and completion of the well.

How would anyone be able to manage the alternatives?

Tryg

EXHIBIT A

507 N. Nanum St., Suite 102
Ellensburg, WA 98926
(509) 962-7005

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From: Walker, Kurt (ECY) [mailto:KWAL461@ECY.WA.GOV]
Sent: Monday, May 24, 2010 2:41 PM
To: Holly Duncan
Cc: James Rivard; Mackie, Thomas L. (ECY)
Subject: Shoval Developments

Holly,

I wanted to follow up with our conversation we had this morning regarding the subdivisions developed by Eli Shoval in Section 7, T. 19 N., R. 15 E. As we discussed, Mr. Shoval has developed a series of contiguous subdivisions (46 lots) with associated Group B water systems (11 wells).

Project Name	Proponent	Lots Created
Oren Estates	Eli Shoval	6
Shira Estates	[1]Shira LLC	6
Oak Tree Estates	[1]Oak Tree Estates LLC	6
Keegans Corner	[1]Oren Development LLC	6
Lightning Ridge	Eli Shoval	6
Carmel Views	[1]Oren Development LLC	8
Wedgewood	Eli Shoval	8*

[1]Corporations managed by Eli Shoval. *Approved Final Plat within the first week of March 2010.

It appears that these subdivisions rely on the permit-exemption under RCW 90.44.050 as basis of groundwater withdrawals. However, a permit-exemption is inadequate to serve the developments (46 lots). In a formal opinion, the Office of the Attorney General states that, "A group of wells drilled by the same person or group at or about the same time in the <u>same area for the same purpose</u> or project should be considered a single "withdrawal" and would **not** be exempt from the permitting requirement contained in RCW 90.44.050 if the total amount withdrawn for domestic use exceeds 5000 gallons per day." (Emphasis added) As a result, water use within the listed subdivisions will require a water right.

While the Group B water systems may have connections to serve, there is not an exception within WAC 173-539A (Rule) which would allow non-permit-exempt uses to begin. In other words, only groups which are consistent with water use under RCW 90.44.050 qualify to be excepted from the Rule under WAC 173-539A-040(3).

Folks who are interested in connected to these groups require a permit, so you can send them our way if they come to you first.

I hope this helps clarify how the Rule applies to groups which can not utilize the permit exemption as their basis for groundwater withdrawals.

EXHIBIT B

Best,

Kurt Walker
WA Department of Ecology, CRO
Water Resources Division
(509) 454-4237
kwal461@ecy.wa.gov

Notice: All email sent to this address will be received by the Kittitas County email system and may be subject to public disclosure under Chapter 42.56 RCW and to archiving and review.

message id: 38eb45916c6dcbdac24bb8719d004a14

Stock Water Working Group Report

During the 2009 Legislative Session and over the past several months, there have been legislative hearings, several media stories, and a lawsuit filed concerning the stock water exemption under the groundwater code. In the 2009 Legislative Session, the Legislature adopted ESHB 1244, which required the Department of Ecology (Ecology) to convene a Stock Water Working Group (Working Group). The Working Group met four times during the interim to review issues surrounding the use of permit-exempt wells for stock-watering purposes. Furthermore, the stakeholders from the Working Group met an additional two times to discuss the proposals that were brought forth by Working Group members. The Working Group does not have specific recommendations to bring forth at this time. However, the Working Group has discussed various issues as noted below. The Working Group presented these issues to the Senate Environment, Water and Energy Committee and the House Agriculture and Natural Resources Committee on December 4, 2009. Finally, the Working Group would like to continue discussions on how best to address the issues surrounding the use of permit-exempt wells for stock-watering purposes.

Legislative History:

According to State Archives, there are no documents regarding the legislative history from when the Ground Water Code was enacted in 1945. In looking at the Journals from the House and the Senate, House Bill 536 (Representative H. Rosellini) and Senate Bill 366 (Senator Albert Rosellini) were introduced on February 26, 1945. House Bill 536 was referred to the House Judiciary Committee and Senate Bill 366 was referred to the Senate Appropriations Committee. On March 2, the House Judiciary Committee reported the bill without recommendation. The House bill was read the second time on March 3, the second reading being considered the third, and the bill was placed on final passage. The bill passed with a vote of 96 yeas and 3 absent or not voting. On March 4, the Senate read House Bill 536 for the first time, suspended the rules and read the bill for the second time, and referred the bill to the Senate Judiciary Committee. The Senate Judiciary Committee reported the bill back with a do pass recommendation on March 6. The Senate passed the bill on third reading on March 7, with a vote of 42 yeas, 1 nay, and 3 absent or not voting. The Senate moved to postpone indefinitely Senate Bill 366 on March 8. House Bill 536 was approved by the Governor on March 19 and took effect on June 7, 1945.

There have been few court cases dealing specifically with the stock water exemption. However, in *DeVries v. Washington* PCHB 01-073 (2001), the Pollution Control Hearing Board (PCHB)

EXHIBIT C

interpreted the stock water exemption as limited to 5,000 gallons per day for all uses. The PCHB felt that "[t]o read this section otherwise would result in an unlimited, and uncontrollable, potential withdrawal of groundwater." The PCHB stated that "in construing a statutory exemption a court must narrowly construe the exemption in a manner that gives maximum effect to the objectives of the general rule from which the exemption is made." Additionally, the PCHB stated that stock watering is "all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them. But again, the total withdrawal is constrained by the 5,000 gallons per day limitation." The PCHB also stated that "the use of water for washing the milk barn and milking equipment, suppressing dust, misting dairy cows, and providing for dairy worker sanitation is water used in an agricultural process as opposed to an industrial process." The Devries case was settled while on appeal to the Superior Court, and no appellate level court has ruled on the question of what is included under the stock water exemption.

Additionally, there have been a few formal opinions from the Attorney General dealing with permit exempt wells. In 2005, Attorney General Opinion No. 17 (Opinion) interpreted the language of the groundwater exemption, specifically the stock water exemption. The Opinion stated that RCW 90.44.050 authorizes groundwater withdrawals for stock-watering purposes without a water right permit and does not limit the amount of such withdrawals to any specific quantity. The Opinion also concluded that Ecology lacks statutory authority to require a permit as a condition to the withdrawal of groundwater for stock-watering purposes, or to categorically limit the amount of water that may be withdrawn for such purposes. The Attorney General was not asked to define "stock-watering purposes" and did not address the question of what uses are included within that term. On September 21, 2009, the Washington Attorney General's Office issued a formal opinion that upheld Ecology's authority to halt new groundwater appropriations when not enough is known about the adequacy of the resource. However, the Opinion also stated that the agency cannot alter the numeric limits or amounts of water exempted from a permit.

Legislative Directive (operating budget, page 107, ESHB 1244):

(17) (a) The department shall convene a stock water working group that includes: Legislators, four members representing agricultural interests, three members representing environmental interests, the attorney general or designee, the director of the department of ecology or designee, the director of the department of agriculture or designee, and affected federally recognized tribes shall be invited to send participants.

(b) The group shall review issues surrounding the use of permit-exempt wells for stock-watering purposes and may develop recommendations for legislative action.

(c) The working group shall meet periodically and report its activities and recommendations to the governor and the appropriate legislative committees by December 1, 2009.

Formation of the Stock Water Working Group:

Ecology contacted various interested parties and requested that the interested parties determine among themselves who would represent the stakeholders on the Working Group. Additionally,

Ecology contacted the Speaker of the House and the Majority Leader of the Senate and requested that they nominate legislators to participate on the Working Group. Further, Ecology contacted the other agencies included in the proviso and asked that they send someone to participate on the Working Group. Finally, Ecology contacted the 29 federally-recognized tribes seeking their participation on the Working Group.

Stock Water Working Group Members:

Senator Phil Rockefeller, 23rd Legislative District, Co-Chair
Representative Bruce Chandler, 15th Legislative District, Co-Chair
Senator Brian Hatfield, 19th Legislative District
Senator Jim Honeyford, 15th Legislative District
Senator Bob Morton, 7th Legislative District
Representative Brian Blake, 19th Legislative District
Representative John McCoy, 38th Legislative District
Representative Judy Warnick, 13th Legislative District
Evan Sheffels, Department of Ecology
Lee Falconer, Department of Agriculture
Maia Bellon, Office of the Attorney General
Chris Cheney, Washington Dairy Federation
Ed Field, Washington Cattle Feeders Association
Jack Field, Washington Cattlemen's Association
John Stuhlmiller, Washington Farm Bureau
Mo McBroom, Washington Environmental Council (WEC)
Rachael Paschal Osborn, Center for Environmental Law and Policy (CELP)
Peter Dykstra, Trust for Public Lands

Recommendations:

The Working Group would like to continue discussions on the stock water exemption. The Working Group recognizes that, in the existing budget climate, it is difficult to consider proposals that will cost the state money and may harm the industry. The Working Group feels that it is premature to propose legislation at this point as there are still details to be resolved in order to address the stock water exemption. The following topics were offered for the Working Group's consideration:

- Defining "stock-watering purposes".
- Providing a process for Ecology to tentatively confirm the extent and validity of the water rights put to beneficial use by existing operations under the authority of the exemption.
- Providing a process for existing operations that rely upon the exemption to have their authorized withdrawal quantities and beneficial uses of water registered and verified by Ecology.

- Establishing clear quantity limits for new livestock operations that intend to rely upon the exemption in the future.
- Providing a process to recognize and protect from relinquishment the reduced water use of registered livestock operations.
- Facilitating more efficient consolidation and movement of livestock and their associated water requirements among registered livestock operations.
- Creating mechanisms to manage the use of the permit exemption and ensure that existing water rights are not impaired.

Summaries of Working Group Meetings

First Meeting of the Working Group:

The Working Group was convened by the Department of Ecology on August 4, 2009. The Working Group nominated Senator Rockefeller and Representative Chandler as co-chairs. Prior to the first meeting, Ecology distributed a survey to the Working Group members asking them to list their top five issues or concerns with the stock water exemption. The survey results were discussed at the first meeting. Based on the results, four themes were gleaned from survey responses.

- Historical use
- How much is the existing use/status quo - what is going on now
- Potential impact to other water users
- Future needs (industry/growth/water use/barriers)

Additionally, the Working Group discussed the Legislative Directive, the process under which members of the Working Group were selected, and ground rules for the Working Group. The Working Group discussed the need for a work plan that would include information to be researched, possible tours, and potential briefings. Ken Slattery with Ecology provided the Working Group with some background on permit-exempt withdrawals and the water code. Maia Bellon from the Attorney General's Office discussed the 2005 Attorney General's Opinion on the stock water exemption. The Working Group discussed the lack of legislative history around the 1945 Groundwater code. The Working Group also discussed the following:

- The nature of problem and challenges to livestock industry
- How big is the stock water issue
- A lack of data
- Tribal concerns
- Closed basins and possible curtailment
- Cumulative impacts of exempt wells that are used for stock watering purposes.
- Not wanting to put family farms in peril by changing the stock water exemption, but also the need for people to use water that they are authorized to use

Finally, the Working Group discussed that if permit exempt wells are the bigger issue then the report should reflect that. However, the Working Group determined that they should refrain

from considering the broader issue of permit exempt wells as the proviso was specific to stock water. The Working Group also agreed that a webpage should be maintained with information about each meeting, including the agendas, minutes, and handouts. This webpage is located on Ecology's website at: http://www.ecy.wa.gov/programs/wr/hq/swwg.html.

Second Meeting of the Working Group:

At the September 3, 2009 meeting of the Working Group, there were a number of presentations from Working Group members. Ecology gave a presentation on Hydrology, Geology, Aquifer Recharge, Stream Flow Data, and Well Use Data. The agricultural industry members gave a presentation on its Needs, How it Operates, Well Use Data, Future Outlooks, and Current Concerns. They additionally provided a video presentation of operations in Eastern Washington that currently rely on the exemption. Bob Lee from Senate Committee Services provided information about the history and trends of the state's livestock industry. Maia Bellon from the Attorney General's Office discussed the implications of the Rettkowski decision, specifically that the decision calls into question Ecology's ability to regulate a junior water right holder in favor of a senior water right holder. Finally, the environmental organizations gave a presentation on the environmental concerns around the exemption.

Third Meeting of the Working Group:

The Working Group met on September 30, 2009 to discuss various proposals brought by members. The proposals included the following:

- From Jack Field, Washington Cattlemen's Association: Forage-based operations (cow-calf, stocker operators, and sheep operations) should remain on exempt wells.
- From Ed Field, Washington Cattle Feeders Association: The CAFOs need assurances that their established operations will be protected, and that they will be able to expand and develop as economic circumstances dictate.
- From Chris Cheney, Washington Dairy Federation: Any changes proposed must allow for the orderly growth of our industry. The definition should be agreed to and codified with no "sharp shooting" of minutiae. We don't have a ready solution to propose as to what is an appropriate amount of water that is less than unlimited.
- From Mo McBroom, Washington Environmental Council: There needs to be policies that take into account the needs of the existing industry, and also gets at the following issues: (1) A prospective quantity limit (with protections for existing facilities); (2) A prospective definition of stock watering use that allows for drinking, cleaning of animals, misting, but does not include dust control, irrigation or other uses not directly related; (3) Recording and reporting of water use for existing and prospective operations; and (4) Safeguards to ensure limits can be effectively put in place where there is impairment of senior water rights, including streamflows.
- From Senator Rockefeller: A "package" of ideas intended to provide a fair and balanced resolution of this very complex and controversial topic, though many could be enacted independently and may stand individually upon their own merits. The proposals address the following topics:

- A definition of "stock-watering purposes"
- Not affecting existing stock water permit exempt well users
- Adopting a sustainability policy for ground water
- Ground water data and management
- Establishing a volumetric cap for the stock water exemption
- Requiring water users that need additional ground water above the volumetric cap in the exemption to obtain a water right permit
- Regulation among water rights based upon priority dates
- General stream adjudications
- Assisting new livestock operations to find water

- From Representative Chandler: Just recently the Attorney General came out with a formal opinion affirming DOE's authority to close basins and rejecting their ability to limit the four uses of exempt wells (of which stock-watering is one). In addition, there is the pending litigation wherein the stock water use of an exempt well of Easterday Ranches is being challenged by the Center for Environmental Law & Policy. With this litigation in the courts, I think it makes much more sense for this work group to meet after the courts have weighed in on this issue.
- From Senator Honeyford and Morton: Having this taskforce evaluate legislative proposals to amend the stock watering exemption from various parties currently engaged in a lawsuit feels like we are being put in the position of acting as mediators.
- From Representative Warnick: We should take a look at Department of Ecology's z-draft from last session.

Stakeholder Meetings of the Working Group:

October 22, 2009 Meeting:

The stakeholders and agency representatives of the Working Group met on October 22, 2009 to discuss the proposals from the previous meeting. The group discussed the potential for conceptual agreement, using the intent section of Ecology's z-draft from last session as a starting point:

FINDINGS—INTENT: The legislature finds that effective water resource management and a stable livestock industry are vital to the economic and environmental well-being of the state. The legislature further finds that achievement of these goals is hindered by controversy (or uncertainty) surrounding the exemption from water right permit requirements for withdrawals of public groundwater for "stock-watering purposes" pursuant to RCW 90.44.050. Therefore, in order to promote the clarity needed for both a sustainable livestock industry and effective water resource management, the legislature intends to:

1. Define "stock-watering purposes"
2. Provide a process for Ecology to tentatively confirm (and register?) the extent and validity of the water rights put to beneficial use by existing operations under the authority of the exemption.

3. Provide a process for existing operations that rely upon the exemption to have their authorized withdrawal quantities and beneficial uses of water registered and verified by Ecology.
4. Establish clear quantity limits for new livestock operations that intend to rely upon the exemption in the future.
5. Provide a process to recognize and protect from relinquishment the reduced water use of registered livestock operations.
6. Facilitate more efficient consolidation and movement of livestock and their associated water requirements among registered livestock operations.
7. Create mechanisms to manage the use of the permit exemption and ensure that existing water rights are not impaired.

November 24, 2009 Meeting:

The group continued its discussions on the intent section of Ecology's z-draft from last session and the seven topics that were identified in the meeting notes from the October 22 meeting.

On the first topic, "define 'stock-watering purposes,'" there was discussion about the impacts a broad vs. narrow definition will have on the legislation.

On the second topic, "provide a process for Ecology to tentatively confirm (and register?) the extent and validity of the water rights put to beneficial use by existing operations under the authority of the exemption," the group discussed the potential retroactive effect of confirming an existing operation's water use. The group also discussed the Municipal Law litigation and the stock water litigation currently pending in Franklin County.

On the third topic, "provide a process for existing operations that rely upon the exemption to have their authorized withdrawal quantities and beneficial uses of water registered and verified by Ecology," the group discussed establishing a process similar to the claims registry because there has not been litigation against that statute. Ecology's z-draft goes farther than the claims registry in that there is an extent and validity review. The group discussed the possibility of setting up a two-part process, a claims process for existing operations (leaving validation of the right up to Superior courts) and a registry/confirmation process for operations who would like the ability to transfer their water use to another operation.

On the fourth topic, "establish clear quantity limits for new livestock operations that intend to rely upon the exemption in the future," Ecology's z-draft establishes a quantity limit of 10 acre feet but it would include all of the exempt uses, stock water, domestic, lawn and garden, and industrial use. The z-draft discusses limitations in areas in which there has been curtailment or in which instream flows are not being met. There was discussion that new operations would need closer to 50 acre feet of water for their operations. The group discussed whether it makes sense for stock water operations to jump ahead of other users.

On the fifth topic, "provide a process to recognize and protect from relinquishment the reduced water use of registered livestock operations," the group discussed the use of the Trust Water Rights Program to protect water from relinquishment. The group discussed the need to establish a process that encourages efficiency.

On the sixth topic, "facilitate more efficient consolidation and movement of livestock and their associated water requirements among registered livestock operations," the group discussed the circumstances that make stock water operations different from other farming operations.

On the seventh topic, "create mechanisms to manage the use of the permit exemption and ensure that existing water rights are not impaired," the group discussed the need to address the broader issue of exempt wells. The group discussed the need to look at impairment and water availability on a basin wide basis.

Fourth Meeting of the Working Group:

At the December 2 meeting, the full Working Group began the discussion with reports from the caucuses on the preferred methods for addressing the seven topics that were identified in the meeting notes from the October 22 meeting.

After a discussion on these topics, Senator Rockefeller discussed his proposals first introduced at the September 30th meeting. Six topics from his package of ideas were discussed:

1. Adopting a sustainability policy for ground water;
2. Ground water data and management;
3. Requiring water users that need additional ground water above a volumetric cap in the exemption to obtain a water right permit;
4. Regulation among water rights based upon priority date;
5. General stream adjudications; and
6. Assisting new livestock operations to find water.

The Work Group concluded that they would prefer to continue discussing these issues.

Conclusions:

The Working Group believes that the discussions concerning the issues surrounding the use of permit-exempt wells for stock-watering purposes have been fruitful. However, there is some concern from some Working Group members that it is premature to weigh in on this issue as there is litigation currently pending in Franklin County. Moreover, challenges to the Municipal Water Law of 2003 are currently before the Washington State Supreme Court on, among other things, a challenge that the law is unconstitutional because it has a retroactive effect as opposed to being curative legislation. Some members would prefer to wait on proposing legislation addressing the stock water exemption until direction is received from the Supreme Court on when water legislation is considered retroactive as opposed to curative. Nonetheless, the Working Group would like to continue discussions.

Memorandum

To: Members of the Stock Water Working Group

From: Senator Phil Rockefeller, Working Group co-chair

Date: January 11, 2010

Re: Need for Legislation in the 2010 Session

I would like to take this opportunity to provide my comments to the Stock Water Working Group. The Stock Water Working Group has met over the course of the interim to discuss the complex issue of permit exempt wells that are used for stock watering purposes. I believe there are a number of fundamental things upon which nearly all the Group would agree. Among them are:

- The livestock industry is an important part of our state's economy and an important part of many communities in our state.
- No one intends to use the state's water management programs to harm this industry, and this industry should be treated fairly as with all other sectors of the economy seeking an assured water supply for its activities.
- While there are many reasons for it, the simple fact is that the information about the state of the state's ground water resources is woefully lacking, and over time it is critical that the state make greater investments in collecting and analyzing ground water data.
- There are tens of thousands of exempt wells currently in use, and it would be impractical and unacceptable to bring these existing uses under the Code permit system. Where declining water sources are causing conflicts among users, which may include exempt well uses, other Water Code tools must be employed to resolve those conflicts.
- Some of these existing tools are limited in their effectiveness and ways should be explored to improve them (e.g., the supreme court's Rettkowski decision limiting administrative authority to protect senior rights during times of water shortage)

We have elements in place that would provide for balanced legislation. Some of these elements were the subject of brief discussion, including:

- A definition of "stock-watering purposes"
- Not affecting existing stock water permit exempt well users
- Adopting a sustainability policy for ground water
- Ground water data and management
- Establishing a volumetric cap for the stock water exemption

EXHIBIT D

- Requiring water users that need additional ground water above the volumetric cap in the exemption to obtain a water right permit
- Regulation among water rights based upon priority dates (a Rettkowski fix)
- General stream adjudications
- Assisting new livestock operations to find water

These ideas were presented and discussed at the October 2, 2009 meeting of the Working Group. I believe that we need to pursue legislation at the earliest practicable opportunity. With the court case in Franklin County scheduled to be heard in late March, it would be my hope that we move legislation this session. I look forward to working with all of you in pursuit of that goal.

Sincerely,

Phil Rockefeller

State Senator, 23rd Legislative District

Chair, Senate Environment, Water & Energy Committee

Schuppe, Mark (ECY)

From: Desmond Knudson [desmond@elltel.net]
Sent: Tuesday, August 24, 2010 8:14 AM
To: Schuppe, Mark (ECY)
Subject: Permanent Rule Comments: Management of Exempt Ground Water Wells in Kittitas County

August 24, 2010

To: Mark Schuppe, Department of Ecology, Central Regional Office
15 West Yakima Avenue, Ste. 200, Yakima, WA 98902-3452
e-mail: msch461@ecy.wa.gov

Re: Chapter 173-539A WAC
Management of Exempt Ground Water Wells in Kittitas County
Permanent Rule Public Comment

I hereby submit my comments on the proposed permanent rule encompassing Management of Exempt Ground Water Wells in Kittitas County as follows:

It is incumbent upon the Department of Ecology to perform the Upper County groundwater study as funded in the initial amount of $700,000 as agreed upon by Kittitas County commissioners and the Department of Ecology. That is the explicit premise in which the state legislature approved the initial $700,000 funding. If a change in how this money should be spent, then the change needs to be re-debated in the state legislature in the next 2011 session.

Further more, it is disengenuous for the current county commissioners (Crankovich, Jewell, and McClain) , to NOW declare to prefer that this initial $700,000 funding, and any future funding, for an Upper County ground water study should be used instead to purchase water rights in behalf of future rural residential exempt well users.

This not an county issue any longer, because they have not involved the county citizens, held public hearings, to see what the citizens would like to do!

Thank you,
Sincerely,
Desmond Knudson
s//s
desmond@elltel.net
1661 Vantage Hwy
Ellensburg WA 98926
509-925-9002

Johnson, Roger E. (ECY)

From: Gary Lewis [Gary_D_Lewis77@Hotmail.com]
Sent: Sunday, August 08, 2010 8:21 AM
To: ECY RE Kittitas Rules
Subject: Comment, Kittitas County Well Moratorium

Importance: High

Gary D. Lewis
2521 Vantage Highway
Ellensburg, WA 98926

Gary_D_Lewis77@Hotmail.Com

Department of Ecology
Central Region Office
15 W. Yakima Ave
Suite 200, Yakima, 98902-2809.

Dear Department of Ecology:

I am completely and totally ***opposed*** to the Kittitas County Well Moratorium.

In my opinion there is just as much, if not more evidence which supports more well drilling into ground water supplies for home use where the majority of that water will return to surface water systems which will improve stream flow, surface water supplies, and wild life habitat.

Thank You Very Much,

Sincerely,

Gary D. Lewis

Johnson, Roger E. (ECY)

From: deidre link [linkdal@televar.com]
Sent: Monday, August 16, 2010 3:46 PM
To: ECY RE Kittitas Rules
Subject: permanent rule-groundwater-comments

Deidre Link

560 Hawk Haven Rd.

Cle Elum, WA 98922

August 16, 2010

Department Of Ecology

15 West Yakima Ave., Suite 200

Yakima, WA 98902-3452

To Whom It May Concern,

Thank you for this opportunity to comment on the proposed permanent rule for ground water withdrawal in Upper Kittitas County. I am a member of Aqua Permanente', one of the groups that originally petitioned for a closure to new permit exempt wells in all of Kittitas County. For the record, I make the following comments as an individual and resident of Kittitas County.

Based on the following facts I support mitigation and metering for all new withdrawals of groundwater in the proposed area of Upper Kittitas County:

1) All surface water in the Yakima River Basin is claimed, possibly/probably even over allocated.

2) Ground water and surfaced water are connected.

3) There is no recent study of ground water in the upper Yakima River Basin in Upper Kittitas County.

4) The current zoning codes, titles codes, Comp Plan and failure to do a critical area study for Kittitas County land use in rural areas do not protect water quality and quantity.

5) The Kittitas County BoCC shows little or no interest in stopping the LLC shell game that started this water issue. And lastly,

6) There were over 6,000 building lots created in the past several years (many thru the LLC shell game, property line shuffle and exempt segs) that are counting on a permit exempt well for development.

I support the start of a groundwater study for the upper basin of the Yakima River in Kittitas County. As far as I know the funding to start the study is still there, use the funds before they get shuffled somewhere else in these hard economic times.

Many at the hearings spoke on the economic impact of the closure. I know there will be an impact due to the need to purchase a water right and meter. What no one will ever know is the true impact of the current emergency closure because, concurrent with the closure there was a total collapse of the housing and banking industries. I do know lower Kittitas County and surrounding counties that do not have a closure to new permit exempt wells are not experiencing any building booms; draw your own conclusions. I do believe there were some individuals in the upper county that suffered from the closure but by and large it is the special interests that are opposed to ANY mitigation or metering. In the *long term,* it is protection of the quantity and quality of water in the Yakima Basin that demands mitigation and metering.

Thank you again for the opportunity to comment.

Regards,

Deidre Link

Johnson, Roger E. (ECY)

From: Lussier, Dave [dlussier@suncadia.com]
Sent: Wednesday, August 25, 2010 3:04 PM
To: ECY RE Kittitas Rules
Cc: Dave Lussier
Subject: kittitas county, DOE permanent rule

My background:
- I am a homeowner, taxpayer, voter residing with my wife and children in a single family residence in Roslyn, WA
- We moved to Washington from Colorado 5 years ago.
- 3 years ago we purchased a 3 acre parcel in the area of Kittitas County known as upper Peoh Point
- Before closing on the 3 acre parcel, we were assured by county officials that the land is zoned for residential use. The land has a pre-existing exempt well being used by the parcel next door.
- Our goal was to build our home, finish raising our children, and retire on this new parcel
- The county will no longer approve a building permit on this land
- My family currently uses an average of 241 gallons per day. This is calculated from 5 years of water bills from the Town of Roslyn. This is not the "consumptive use", but the gross amount into my home as measured by the water meter. Most reasonable people would categorize this as a tiny amount of water.

My comments:
- If water is indeed scarce, then it needs to be measured and its use metered. This should apply to all users regardless of how senior their water right is. Again, if a thing is scarce it needs to be measured and its use metered.
- if water is indeed scarce, then the exempt well rule should apply to all of Kittitas County, and in fact all of the Yakima River basin. The line drawn through Kittitas County is arbitrary.
- Transferring money from our joint checking account to Suncadia's checking account does not create more usable water.
- Our land values have been permanently damaged due to the arbitrary actions of unelected officials
- Our local economy has been devastated
- I would start up my plans for building this new home as soon as DOE announces they will not extend the temporary rule and will not put in place a permanent rule
- Allow the water study to be executed and completed

Final comment:
DOE actions over the last 2 years have severely harmed my family's dreams, goals, and finances. The arbitrary rules regarding new water uses from exempt wells should not be made permanent.

Sincerely,
Dave Lussier
509-649-2999

Johnson, Roger E. (ECY)

From: Fred Marion [marionf@inlandnet.com]
Sent: Friday, August 06, 2010 8:36 AM
To: ECY RE Kittitas Rules
Subject: Comments on the Proposed Groundwater Rule for Upper Kittitas

Please provide me the water right information for the Pump that is located along I90 that is removing water from Lake Keechelus.

We have a water moratorium in Kittitas county yet I see contractors removing surface water for dust control every day.

Sincerely,
Fred Marion
Kittitas County Resident
509-307-6108

=======
Email scanned by PC Tools - No viruses or spyware found.
(Email Guard: 7.0.0.18, Virus/Spyware Database: 6.15600)
http://www.pctools.com
=======

Johnson, Roger E. (ECY)

From: jim mclean [clinton5555@hotmail.com]
Sent: Thursday, July 01, 2010 8:12 PM
To: ECY RE Kittitas Rules
Subject: Comments on the Proposed Groundwater Rule for Upper Kittitas

Great job guys...the water been promised to us in the Yakima valley. ☺

The New Busy think 9 to 5 is a cute idea. Combine multiple calendars with Hotmail. Get busy.

Johnson, Roger E. (ECY)

From: jim mclean [clinton5555@hotmail.com]
Sent: Thursday, July 01, 2010 8:10 PM
To: ECY RE Kittitas Rules
Subject: Comments on the Proposed Groundwater Rule for Upper Kittitas

THANK YOU FOR DOING YOUR JOB WELL. THAT WATER IS OURS IN the yakima valley. Your actions have been right on. your latest prop....is great...kittas been stealing our water for years.

The New Busy is not the old busy. Search, chat and e-mail from your inbox. Get started.

Johnson, Roger E. (ECY)

From: Keith Moon [borregokid1@yahoo.com]
Sent: Saturday, August 07, 2010 8:14 AM
To: ECY RE Kittitas Rules
Subject: Kittitas County Groundwater Rule Making Process

I am in support of the proposal to mitigate water for new building in the Upper County. The real estate problems and the collapse of the housing market started long before the moratorium went into effect. The timber industry collapse along with high gas prices had already lead to an exodous from the upper county. From 2006-2010 our school enrollment declined 10%. Real estate was being speculated on at unsustainable levels. Its absurd to think that the moratorium has anything to do with the collapse in real estate prices. Sapphire Skies the biggest developer had already drilled dozens of wells and has had property for sale for several years with few buyers and even fewer homes being built. To my knowledge Sapphire Skies has never commented on the moratorium and they are the biggest real estate speculator in the Upper County with 10,000 acres. Has the moratorium really hurt their sales? As far as collapsing real estate prices Suncadia recently had some of their properties revalued from 100 million dollars to 42 million dollars. That had nothing to do with the moratorium. Suncadia has plenty of water yet their business also fell off a cliff with the rest of the national economy. The moratorium is simply a convenient scapegoat for many over the collapse in real estate and the ensuing loss of jobs in the Upper County. If anything property owners should support mitigation and the end of wild speculation in the Upper County. That will stabilize prices over the long run.

It is unfortunate though that the only source of water comes from Suncadia with a relatively high price tag of $10,000. We live in a county with a staggering amount of water that is used for the two least productive uses growing hay and stock watering. Agriculture uses over 400,000 acre feet of water. Maybe the State or the County should be looking at an affordable source of mitigated water?

Keith Moon
803 East First Street
Cle Elum, Wa 98922

Johnson, Roger E. (ECY)

From: Ryan Munsey [Ryan.Munsey@sterlingsavings.com]
Sent: Friday, August 06, 2010 11:21 AM
To: ECY RE Kittitas Rules
Cc: Judy @ The Chamber of Commerce
Subject: letter from Cle Elum/Roslyn Chamber
Attachments: letter.pdf

Mr. Shuppe,

Here is a letter from the Cle Elum/Roslyn Chamber of Commerce.

Please let me know if you have any questions.

Ryan Munsey
Vice President
Cle Elum/Roslyn Chamber of Commerce

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R & R Heights Land Company, Inc.
103 S. 2nd St.
P.O. Box 687
Roslyn, WA 98941
Tel: (509) 649-2211
FAX: (509) 649-3300

R & R HEIGHTS
LAND COMPANY

August 25, 2010

Department of Ecology
Central Regional Office
Attn: Mark Schuppe
15 West Yakima Ave., Ste. 200
Yakima WA 98902-3452

VIA Electronic Mail
kittitas@ecy.wa.gov
msch461@ecy.wa.gov

Dear Mr. Schuppe:

Thank you for the opportunity to comment on the Department of Ecology's (DOE) permanent rulemaking for the Proposed Upper Kittitas Ground Water Rule ("Proposed Rule"). We oppose the Proposed Rule and offer the following brief comments for your consideration.

No Basis for the Rule or Limited Application of the Rule:
The legal basis of DOE's prior "emergency rules" as stated in, WAC 173-539A-020 "Authority," is RCW 90.54.050 which provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. This "lack of information" appears to exist for groundwater use from permit-exempt wells in other communities for both domestic and stock water use, yet DOE relies on the same legal basis to support its decision to ***not*** implement permit-exempt well restrictions elsewhere. In addition, no evidence has been discussed from the USGS study being conducted in the lower portion of the Kittitas County to justify why there are no restrictions on exempt wells in the lower portion of the county. This appears to be an inequitable application of Washington State law and science. As such, any restrictions on the use of permit-exempt ground water wells in Upper Kittitas County should only be implemented if similar coordinated restrictions are also placed through out all other rural communities in the entire Yakima Basin (and arguably state-wide); and such restrictions should apply to both domestic and stock water use from permit-exempt wells.

Basin-Wide Solutions
We encourage the County, DOE and other water resource manager to continue a dialogue and explore coordinated short and long-term water management solutions through such efforts as the Yakima River Basin Water Enhancement Project. Rather than spend millions of dollars for a rule that only applies to a small amount of water by domestic users in half of Kittitas County, DOE should instead concentrate our limited public resources on a strategy, such as storage, that will have broader, sustainable long term benefits for users and the protection of water resources.

Hydro-Geologic Studies
In terms of obtaining more information about groundwater and groundwater use in Upper Kittitas County to better determine if such use is creating a water shortage for senior water right holders downstream, it seems there is a lot of information readily available from state and federal studies for DOE and other water managers to base decisions on. How does DOE reconcile information from other groundwater experts, such as the Washington State Ground Water Association, that have

information contrary to DOE's "lack of information" about groundwater use and the degree of impacts to surface water?

We believe tax payer resources should only be spent on the Upper Kittitas County Groundwater Study if DOE can document and reference other studies reviewed and why that existing scientific information is deemed unreliable or lacking in scope to the degree that water management decisions and scientific assumptions cannot be made without the full scope of the Upper Kittitas County Groundwater Study.

What recourse will property owners have if the Upper Kittitas County Groundwater Study is inconclusive or does not provide the evidence of impairment to support the restrictions imposed under the Proposed Rule?

If the study is in fact needed, DOE should wait until the study is complete before implementing the Proposed Rule or any other restrictions on permit-exempt wells in Upper Kittitas County.

Vested Rights and Contract Liability- Group Use

If limitations on the use of permit-exempt wells are to continue, DOE should make the provisions of the Proposed Rule effective from the date of enactment and not retroactively to July 16, 2009, when the first emergency rule was issued, or any other prior date. Other timelines set in the Proposed Rule for determining "existing" and "new" uses appear to be wholly arbitrary and offer no benefits toward protecting the water resource.

Any existing well should be considered an existing use exempt from the Proposed Rule's restrictions. And any existing Group B water system approved by the County or the Washington State Department of Health should be allowed full use of that approved system up to 5,000 gallons per day without mitigation and without any time limits for activating approved connections to the system's capacity.

Lot owners in Kittitas County are confused as to when they have a vested right to use water from an existing or new well or Group B water system lawfully created at the time. DOE should appreciate the inequities and liability created when a lot owner has lawfully invested in an individual well or purchased a lot in a development with an existing, approved Group B water system, only to be told that they now have no legal right to use that water without adequate mitigation because of an arbitrary five year time limit. In many cases, private investments and contractual commitments have been made to secure water service to lot owners on a Group B water system, and the Proposed Rule exposes developers to liabilities for breach of contract.

More specifically, the Proposed Rule's definition of an "Existing use of the ground water exemption" for a group use includes use of such water that was beneficially used prior to July 16, 2009; and: "The water right is perfected within the five years following the first regular beneficial use for that purpose. Water to serve a parcel that is part of a group use begun within five years of the date water was first regularly and beneficially used on one or more parcels in the group is an existing use if the group use remains within the limit of the permit exemption." WAC 173-539A-030.

WAC 173-539A-040 "Withdrawal of unappropriated water in upper Kittitas County," also sets a vesting date and makes exception to the Proposed Rule for those with a building permit issued prior July 16, 2009, but the well/water system must be operable within three years; if not, then one must buy mitigation water.

These five-year and three-year time frames appear to be wholly arbitrary and unrealistic for most construction build-out periods and general real estate market conditions. If a group use exists and has been approved by the County or the Washington State Department of Health, the owner of that system should be allowed full use of that approved system.

If DOE continues to pursue the Proposed Rule, the definition of "Existing use of the ground water exemption" should be amended to include any existing permit-exempt well as of the date the Proposed Rule is enacted. This would significantly reduce developer and seller contract liabilities for water service and reduce public hardship. If DOE does not amend this definition, we believe there should be some "safe harbor" provision in the Proposed Rule that retroactively protects entities from legal action by third parties as a result of the Proposed Rule's restrictions.

Common Ownership

The Proposed Rule tries to taint properties under "common ownership," as defined in the Proposed Rule, to one groundwater well exemption. The definition in the current rule[1] is extremely broad and should not equate certain contractual arrangements to be "common ownership" for the purposes of the rule and water availability. Oftentimes sharing costs, especially for road building, clearing and grading is simply the most cost effective way to do business for individuals or entities that happen to want to develop their property close in time. If there is only one logical access point into an existing development, which is also the only access available to an adjacent newly proposed residential development (so the road is a shared access or a non-exclusive access easement) and the new development is required to meet county road standards and pave the existing access road, and the adjoining owners decide to share in the cost because the paved road benefits everyone, the rule would tie the new development to the existing development and limit it, in combination with the existing development, to one groundwater well exemption. This can be an inequitable result. Nor should "common ownership" be inferred simply because there is any type or degree of legal or equitable property interest held by an applicant in any proximate parcel.

"Common ownership" needs to be reviewed in the totality of the circumstances and not presumed simply because a contractual arrangement exists between parties or because an applicant has a property interest in any proximate parcel.

Mitigation Water Bank – DOE Accountability

WAC 173-539A-060, "Expedited processing of trust water applications, and new water right applications or requests for a determination of water budget neutrality associated with trust water rights," indicates that RCW 90.42.100 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin and that ecology may expedite review of such applications as part of implementing the Proposed Rule.

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[1] **"Common ownership"** means any type or degree of legal or equitable property interest held by an applicant in any proximate parcel. Common ownership also includes a joint development arrangement between an applicant and any owner of a proximate parcel. A joint development arrangement is defined as involving significant voluntary joint activity and cooperation between the applicant and the owner(s) of one or more proximate parcels with respect to the development of parcels in question. Joint activity and cooperation that is customary or required by land use or other legal requirements does not itself constitute a joint development arrangement. A joint development arrangement may be evidenced by, but is not limited to, agreements for coordinated development and shared use of services or materials for permitting, design, engineering, architecture, plat or legal documents, financing, marketing, environmental review, clearing or preparing land, or construction (including road construction); covenants; agreements for common use of building materials, equipment, structures, facilities, lands, water, sewer, or other infrastructure.

The water bank program has independent validity regardless of the Proposed Rule because certain projects are too large to be served by the quantities allowed under a permit-exempt well (5,000 gpd), and must instead be served by secured water rights.

The water bank program can be a viable program but ecology should be held accountable to the public for administration of the trust program and the water bank.

Suncadia Resort has clearly become an important partner for DOE's ability to implement this portion of the Proposed Rule. Suncadia has senior water rights that serve as the initial deposit into DOE's water bank program. This is clearly a benefit and some people are financially able to take advantage of the opportunity. However, many believe that Suncadia is being unjustly enriched through this process, namely by "double-dipping" on their historic mitigation requirements imposed on Suncadia in 2003 by DOE for water use associated with the Master Planned Resort (MPR) and projected off-site induced housing development. Such mitigation requirements were established in water rights transfer documents approved by DOE[2] and in the County's Environmental Impact Statement for the Resort[3].

Since the water bank market was not a viable option for Suncadia in 2003, presumably DOE's intent was to allocate, at no cost to the public, so much water for instream flows to mitigate for off-site induced housing development on an "umbrella" basis rather than on a "parcel-by-parcel" basis as is now being done with Suncadia's water as part of implementing the Proposed Rule. It may be that Suncadia has exceeded its historical mitigation requirements (486 acre-feet per year, see footnote 3) and Suncadia water being sold now is wholly independent from that obligation, but DOE should have an accounting of Suncadia's compliance history readily available. It would not be in the public's interest for the public to pay for a private developer's (Suncadia) historical mitigation requirements simply because a market exists. In this case, Suncadia's water sales to the public could total $20 million or more.

This perception exists and we ask that DOE please document, in its formal response to these comments, an up to date accounting of how Suncadia's water rights (the "Lamb-Anderson" water rights) now being sold through the water bank to mitigate for off-site induced housing development in Upper Kittitas County, are allocated toward Suncadia's historical mitigation requirements that DOE imposed on Suncadia in 2003 for the MPR and projected off-site induced housing development. This documentation is also consistent with DOE's reporting requirements under the February 11, 2010 Trust Water Rights Agreement with Suncadia.

Impairment and Impacts to Agriculture

The water bank has created an inflated market for the sale of senior irrigation water rights to mitigate for third party domestic use. It may be that Suncadia's set value of nearly $50,000 per acre foot is enough incentive for others to sell, leaving a significant amount of farm acreage fallow, with primarily irrigation districts left to supply water to support an agricultural-based economy. However,

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[2] Water Rights Change Application for *Acquavella* Court Claim No. 01724 for Claimant Name of Pautzke, Change Application Nos. CS4-01724(A)CTCL, CS4-01724(B)CTCL, CS4-01724(C)CTCL, CS4-YRB07CC01724@1, CS4-YRB07CC01724@2, CS4-YRB07CC01724@3

[3] The Cle Elum UGA EIS estimates consumptive use of water associated with off-site induced housing development to be 692 acre-feet per year, which includes 486 acre-feet for such development in the unincorporated area of Kittitas County. Cle Elum UGA EIS pg. 3.4-30.

even the customer base and water needs of irrigation districts (senior and junior) have seemingly changed over the decades with subdivision of "irrigable acreage" and conversion out of crop production.

The stated purpose of the Proposed Rule, to protect senior water right holders from impairment, needs to be quantitatively and qualitatively re-evaluated as to whether or not senior water right holders and irrigation districts really need all the water they are currently allocated.

Economic Impacts

The economic studies do not reflect the true economic impacts to Kittitas County. The January 7, 2009 Cost Benefit Analysis estimated the benefits at $18.6 million; and in June 2010, this estimate went up to $153.69 million. In 2009, the costs were estimated at 3.2 million and in 2010, this estimate jumped to $16.2 million. The 2010 cost estimate, while higher and based on more current data, still does not fully reflect the economic impacts to the County as a result of the Proposed Rule. The scope of DOE's cost-benefit analysis and small business economic impact statement is narrow, resulting in an underestimate of true economic impacts to the County and should be re-evaluated.

In sum, we ask that DOE not pursue the Proposed Rule until more information is obtained and presented to the public to substantiate the proposed restrictions on permit-exempt wells in Upper Kittitas County.

Thank you for the opportunity to comment.

Sincerely,

Via Electronic Mail
Annew@inlandnet.com
Anne Watanabe
Vice President
Acquisitions and Development

cc: Kittitas County BOCC, julie.kjorsvik@co.kittitas.wa.us
Rep. Judy Warnick, warnick.j@leg.wa.gov
Rep. Bill Hinkle, repbill@billhinkle.us
Sen. Janea Holmquist, holmquist.janea@leg.wa.gov

Johnson, Roger E. (ECY)

From:	Jane Rattray [jrattray@carevariance.com]
Sent:	Friday, August 06, 2010 7:42 AM
To:	Anderson, Chris (ECY)
Cc:	Beitel, Judy (ECY); ECY RE WEBMASTER
Subject:	Feedback via Ecology's Contact Us web page (WR) - Upper Kittitas County New Exept Wells Rule

RE: Upper Kittitas Emergency Ground Water Rule - Public Comment

I am writing in response and in opposition to the permanent curtailment of new exempt wells.

I pride myself in being somewhat of a conservationist. My husband and I own 40 undeveloped acres in Teanaway Terrace. Twenty-six years ago we bought our first 10 acres and shortly thereafter added two adjacent parcels. We are now faced with the inability to place a planned retirement home on one of the parcels and potentially sell our long-held other parcels in 10-20 years to support our retirement.

It is my understanding that the action to require mitigation of new wells is in response to the over-development of the Upper Kittitas county. The extent of this development often resulted in subdivisions of acreage into many small lots by developers, who manipulated ground water regulations to their advantage. I too, am sickened by these actions, and now these greed-driven developers have potentially taken away my dreams to retire on our land in Kittitas County, and certainly have contributed to its substantial devaluation.

In support of the ground water ruling, Governor Gregoire mentions two innovative solutions which contribute to *water budget neutrality* 1) Suncadia's water bank and 2) the Domestic Water Reserves Program.

As you are aware, the Teanaway River area is located in the "Unsuitable" area of Upper Kittitas County. This means we will not benefit from Suncadia's water bank. With regards to the second option, the *Domestic Water Reserves Program*, it is my understanding that this refers to irrigation water; which is supported by the Kittitas Reclamation District (KRD).

A letter, dated April 6, 2010 to Tom Tebb, KRD made several points, two are as follows. 1) "KRD water cannot be used as mitigation water, nor can it be used as potable water." 2) KRD "receives water from natural resources that come from creeks running through the borders…by and large these water rights are not available to participate in the sale or lease as described in the Domestic Water Reserves Program."

Governor Gregoire is appearing similar to Marie Antoinette, known for the quote, "Let them eat cake" in reference to the people who were starving in her kingdom. Similarly, the people in Upper Kittitas County with exempt wells on the Teanaway River should go live in Suncadia or within their water rights. This appears to be Governor Gregoire's plan for growth and development in Upper Kittitas County.

This leaves many questions unanswered for my husband and I.

1. Will we ever be able to sell the parcels of acreage and or build on these lands which have **not** been over-developed but left in its pristine condition for 26 years?
2. Will we be allowed to collect rain water or snow melt and use it, or do we need to purchase this right, and by whom?
3. How will we get household water and a building permit for our planned retirement home?
4. How will we be able to gain Water Budget Neutrality?
5. How much will this cost?

6. Will financial compensation be available such as in grants awarded to private forest owners who create habitats for endangered species?
7. How willing is the Department of Ecology to assist the people of "Unsuitable" zones to become Water Budget Neutral?
8. The Department of Ecology states they will educate the people. Will this education be directed at the consequences of not complying with Water Neutrality and the sanctions or will your education have real substantive value in how to achieve water neutrality?

A better solution would have been to increase the number of acres per well, restrict the number of homes to a particular number of acres, and/or decrease the number of gallons of water per day per household. Some of these measures you are accomplishing, however, to require owners to comply with the Water Neutrality requirement without the infrastructure in place is the equivalent to a building ban on the Teanaway River, and the sacrifice of our dreams of the past 26 years..

There should have been a grandfather clause giving longstanding landowner/citizens the opportunity to fulfill their retirement dreams and the need for a supply of household water without losing invested dollars in this hard economic time.

I see this permanent ban on exempt wells and building as a punishment for being conservative. We left our 40 acres in its natural state for 26 years.

Why can't people who are not farmers have one well, for one dwelling on 10 – 17 acres of land solely for household use?

Jane and Mark Rattray
Teanaway Terrace, CleElum

Johnson, Roger E. (ECY)

From: Tracy Rooney [tracyr@msn.com]
Sent: Wednesday, August 25, 2010 8:59 AM
To: ECY RE Kittitas Rules
Cc: Tracy Rooney
Subject: Comments on the proposed permanent ban on unmitigated water wells in upper Kittitas County

I support the Growth Management Act and what it's trying to do.

I do not support how Kittitas County's Commissioners' decided to interpret the GMA and their continued approvals of new sub-divisions that rely on exempt wells.

I'm okay with a policy that prohibits "new" wells w/o offsetting water if the Upper County ground water study indicates that this is the proper course of action AND that the state partners with the county to fund & implement a marketplace that serves all of the county and not just specific watersheds.

I'm opposed to the new policy effecting older exempt wells that were in service prior to the ban. In effect, I guess I'm asking for two levels of exempt wells. Those that are older and were placed into service within the spirit of the law as written in the 40's. And a second class for the newer ones that were put into service after the developers and county ran rampant with new sub-divisions. While I feel that the county's interpretations of the land use policies were wrong and caused the issue, I feel that the state needs to share some of the blame for allowing it to have continued to the point that the new wells would or could impact the older ones.

I'm also concerned about the impact on real estate lending and its many related consequences in the county that the new regulation could have on properties using older exempt wells and feel that the state should do a thorough analysis on this point.

Sincerely,

Tracy Rooney
13610 Teanaway Rd
Cle Elum, WA 98006

Comments also can be submitted by e-mail to kittitas@ecy.wa.gov.

Johnson, Roger E. (ECY)

From: Jim [jimsanders4@gmail.com]
Sent: Wednesday, July 28, 2010 3:14 PM
To: ECY RE Kittitas Rules
Subject: July 28 Meeting with DOE

Mark Schuppe,
I would like to comment at the meeting tonight.

Thank you,

Jim Sanders
200 Colfax Road
Cle Elum, WA 98922

--
NOTE: My email address has changed.

Karla Schoon
4587 Airport Road
Cle Elum, WA 98922
509-674-9721

August 24, 2010

Department of Ecology
Central Regional Office
Attn: Mark Schuppe
15 West Yakima Ave., Ste. 200
Yakima, WA 98902

Re: Public comment of proposed Upper Kittitas Ground Water Rule Chapter 173-539A WAC

As a citizen of the upper Kittitas County, I implore you to withdraw this proposed permanent ground water rule because it is based on speculation and inaccurate information. It is quite possible that the impact of exempt wells on senior water rights may be grossly overestimated. There needs to be a clear foundation of facts that are not debatable before a permanent water rule of this nature is put in place. The inaccurate information I refer to is contained in the **Small Business Economic Impact Statement, for Chapter 173-539A-WAC, dated January 2009, 09-11-002.**

The information in this document is grossly inaccurate and highly misleading. I propose that until it can be corrected to reflect the true current economic conditions of small business in the Upper Kittitas County – it should be removed AND NOT USED as a basis upon which to move this ground water rule forward. This impact statement in no way reflects the real damage already sustained by this community as a result of the recent year's water moratorium. This impact must be measured quantitatively (meaning real numbers that reflect actual records of business loss or gain and numbers from job loss or gain as documented by the Washington State unemployment records and small business tax returns), for the period of time that has occurred as of the date the initial moratorium was put in place to present.

Therefore, Ecology should not be able to proceed in the adoption process of this Ground Water Rule since the SBEIS is inaccurate and untrue. Ecology should not be able to use this information to ensure that the proposed rule is consistent with legislative policy.

On Page 3 under *Impacts to Businesses in the Kittitas Groundwater Area,* it states "Most businesses are not directly affected by the proposed rule for the Kittitas Groundwater Area." This is totally false and misleading. Public testimony was given on July 28th, 2010 at the public hearing for this rule that directly refutes these findings. I would refer you to direct testimony given by Steve Senger of Senger Construction – how his business has lost most of its work and has had to lay off eight full time employees. He is only one of numerous small business owners who have suffered excessively as a result of DOE's current actions. Many other business

owners provided the same type of testimony about the negative impacts of the current water moratorium. These testimonies were substantiated by the comments of our elected lawmakers; State Sen. Janea Holmquist and Rep. Bill Hinkle.

The truth of the matter is the year long moratorium has grossly impacted the Upper County through job loss, home loss, business loss, reduced property values (resulting in lost revenue that pay for county services, roads, education, etc.), not to mention the destroyed dreams of retirement and plans for homes that may never be realized. Vacant lands are no longer looked at as investment opportunities but are now described as "camping lots". Two huge segments of the economy, real estate and construction, have been nearly wiped out. Many of our workers have lost their lively hoods here altogether – they have been forced to move out of the area to find work, or travel long distances to seek work in other counties to support their families. The engineering company Encompass, owned by Marc Kirkpatrick, has had to open an office in Issaquah to generate income to keep its doors open here. It was once a thriving business in Cle Elum with many employees.

All of this loss has had a huge trickledown effect on the local economy overall because people who are no longer working cannot afford to purchase goods, go to restaurants, theatres, or buy clothing, gas, groceries, etc. I would imagine the real losses are in the hundreds of thousands of dollars – maybe more. The damage to this community is real, NOT ASSUMED, and more damage lingers in our future if this water moratorium stands and becomes a permanent rule while we wait for the completion of a water study.

The yearlong moratorium has already had a far reaching and disproportionate impact on small business. It has crippled the local economy and actually reduced property values. I can't even imagine the effects of a permanent ruling that would last for 3 more years while a water study is conducted. I question whether Ecology can even do its job and facilitate a water study, since it has not been able to do so in the several years since the initial petition request was put forth by Aqua Permente in 2007.

Now, I would ask you to look into the future and consider the possible results of a water study that **does not support** the claim that exempt wells are negatively impacting senior water rights holders and in stream flows, etc. in the Upper Kittitas County area. It's possible since we have the highest recharge rates in the Yakima Basin area and most water pumped out of exempt wells is returned to the ground through septic systems and outside watering. So, how will the State of Washington compensate the citizens and property owners for all the loss they have sustained economically? How will the State replace lost values to our real estate, lost income to families due to loss of jobs, and the lost capital due to small businesses going under?

Please think rationally – use common sense – and have some consideration for the real economic damage already sustained by the Upper County due to the present water moratorium. There are many other paths that could be pursued before such a permanent ruling is put in place. Find another more equitable means to control development in the area. We all want to do what is right to create a long term water management program for our area

and the greater Yakima Basin area. I ask you please go back to the drawing board – meet with the Kittitas County Commissioners – try again – get creative – find solutions – let the new water study prove or disprove the need for a ground water rule such as you are proposing.

Thank you for reviewing my comments.

Karla Schoon

Cc: Governor Christine Gregoire

Johnson, Roger E. (ECY)

From:	Scott, Donna [donna.scott@pse.com]
Sent:	Thursday, August 05, 2010 1:53 PM
To:	ECY RE Kittitas Rules
Cc:	Scott, Donna
Subject:	Comments Related to Proposed Moratorium Rule In Upper Kittitas County
Attachments:	Class B Well Documents.pdf

To: Department of Ecology

Will you please help me understand the proposed water moratorium rule as it applies to me?

In 2005, I developed 2 contiguous 40-acre parcels in upper Kittitas County into two plats. One parcel (#20-17-32000-0006) was divided into 7 lots and is called Hidden Valley Vistas. The second parcel (#20-17-32000-007) was divided into 5 lots and is called Hidden Valley Meadows.

During the platting process, a Class B well was approved to serve the 12 lots in Vistas and Meadows. Water lines and meters were installed to service each lot, and each lot owner is subject to a Water Users Agreement which was recorded on July 21, 2005. A copy of the approval of the Class B well is included in the attached pdf file. Also included is a letter from the Department of Health documenting the well's identification number (#AB115K) and the recorded Water Users Agreement, which limits each lot owner's daily usage to 415 gallons (so that the usage of the well does not exceed 5,000 gallons per day).

I have sold 10 of the 12 lots. I still own 1 lot in Vistas (Parcel #20-17-32057-0004, property tax account #21017) and one lot in Meadows (Parcel #20-17-32058-0005, property tax account #21014). I do not intend to build on or sell my remaining two lots for another 10 years.

One lot on Vistas has a home on it that was constructed in 2008. Two lots on Meadows have homes on them that were constructed in 2008 and 2009. Water from my well is currently being used and metered on all 3 homes.

Will you please help me understand how the proposed water moratorium applies to my situation? I am afraid of losing my water rights for the well I constructed and paid for. I am not a "developer". The 2005 platting process to divide the land I owned was a one-time project intended to fund my future retirement.

Please help me understand the implications of the proposed rule to my situation. I cannot believe that the DOE intends to do harm to folks like me who are just trying to "get by".

Also, is there a possibility that my two 40-acre parcels have senior water rights attached to them? Can you tell me if they do, or how I might research this myself? If those underlying parcels have senior water rights, would those rights carry over to the lots in the Vistas and Meadows plats?

Sincerely,

Donna Scott
13444 64th Terrace NE
Kirkland, WA 98034
(425) 462-3276

Kittitas County Health Department

Health Department

Administration
Personal Health
507 Nanum Street, RM 102
Ellensburg, WA 98926-2898
Tele: (509) 962-7515
Fax: (509) 962-7581

Environmental Health
411 N. Ruby Street, Suite 3
Ellensburg, WA 98926-2898
Tele: (509) 962-7698
Fax: (509) 962-7052

May 31, 2005

Donna Scott
P.O. Box 90868
Bellevue, WA. 98009

RE: Approval of Hidden Valley Meadows/Vistas Group B Water System, 12 connection public water system located off of Hidden Valley Rd.

7 LOTS: Hidden VALLEY VISTAS PLAT

5 LOTS: HIDDEN VALLEY MEADOWS PLAT

(The 2 PLATS are contiguous pieces)

ID# Pending Kittitas County

Dear Ms. Scott,

The Group B Water System Application and Information Package for the above referenced project received in this office has been reviewed, and in accordance with the provisions of WAC 246-291, is hereby **FULLY APPROVED.**

Approval of this water system has been conditioned upon the agreement that future management or ownership of the water system shall be provided by a Satellite Management Agency, if such management or ownership can be made with reasonable economy and efficiency, or upon periodic review of the system's operational history to determine its ability to meet the department's financial viability and other operating requirements.

A Water Facilities Inventory form has been completed, and an identification number will be assigned. This number must be used on all future water samples to ensure proper credit toward your sampling requirements. At least one coliform drinking water sample every twelve months and one nitrate sample every thirty-six months is required to be submitted to a certified laboratory.

Sincerely,

Holly Duncan
Environmental Health Specialist

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
1500 West 4th Avenue, Suite 305 • Spokane, Washington 99204
FAX: (509) 456-2997

June 10, 2005

Ms. Donna Scott
Hidden Valley Meadows
PO Box 90868
Bellevue, Washington 98009

RE: HIDDEN VALLEY MEADOWS; PWS ID AB115K; KITTITAS COUNTY; NEW GROUP B WATER SYSTEM

Dear Ms. Scott:

The Group B Water System Application & Information Package for the above-referenced project received in this office on May 23, 2005 has been reviewed by the Kittitas County Health District. In accordance with the provisions of WAC 246-291-030 and the Joint Plan of Operations between Kittitas County and the Washington State Department of Health, the above-mentioned water system is hereby assigned an identification number.

A Water Facilities Inventory has been completed (copy enclosed), and an identification number assigned, **# AB115K**. This number must be used on all future water samples to ensure proper credit toward your sampling requirements. At least one coliform drinking water sample every twelve months and one nitrate sample every thirty-six months is required to be submitted to a certified laboratory.

The issuance of a PWS Identification number is solely to facilitate water system tracking within the ODW data system and does not constitute or imply DOH-ODW approval of the system.

Ms. Scott, because there is such a vast difference in the cost and operating requirements between a Group B system vs. a Group A system, *and* because it looks as though this system is intending to serve a population of 35, I feel it is important to notify you of the following. Should this system ever exceed the a total population of more than 25 people for more than 60 days per year, it **will** be reclassified as a Group A system. As such, you would then be required to:

- Hire a Certified Operator
- Sample for coliform at least once a month
- Have a Sanitary Survey at least once every five years
- Prepare and distribute a Consumer Confidence Report annually
- Complete a Susceptibility Assessment

RECORDED WATER Users Agreement for WELL (CLASS B) servicing HIDDEN VALLEY VISTAS & HIDDEN VALLEY MEADOWS. ALL 12 LOTS HAVE WATER meters INSTALLED AND ARE SUBJECT to THIS WATER USERS Agreement.

AUDITORS NOTE Portions of this document poor quality for imaging

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Page: 1 of 11
07/21/2005 12:36P
Kittitas Co Auditor STWT TITLE AGR 29.00

WHEN RECORDED RETURN TO:
Perkins Coie LLP
10885 NE Fourth St., Suite 700
Bellevue, Washington 98004
Attn.: Kyle L. Branum

REVIEWED BY
KITTITAS COUNTY TREASURER
DEPUTY
DATE 07-21-2005

Document Title: Water Users Agreement
Reference Number of Documents Released: None.

Abbreviated Legal descriptions:

HIDDEN VALLEY VISTAS PLAT P-04-05, RECORDING NUMBER 200506100060, BOOK 9 OF PLATS, PAGES 150 & 151 (RECORDED JUNE 10, 2005)
BEING A PORTION OF THE NW1/4, SEC. 32, TOWNSHIP 20 NORTH, RANGE 17 EAST, W.M.

HIDDEN VALLEY MEADOWS PLAT P-04-06, RECORDING NUMBER, 200506100061, BOOK 9 OF PLATS, PAGES 152 & 153 (RECORDED JUNE 10, 2005)
BEING A PORTION OF THE NW1/4, SEC. 32, TOWNSHIP 20 NORTH, RANGE 17 EAST, W.M.

18393 29

Assessor's Property Tax Parcels/Account Numbers: 20-17-32000-0006; 20-17-32000-0007

WATER USERS AGREEMENT

This Water Users Agreement ("Agreement"), dated July 8th, 2005, is made and entered into by and among those persons executing this Agreement (collectively, the "Parties" and individually, a "Party").

NOW, THEREFORE, the Parties hereby agree as follows:

A. OWNERSHIP OF WELL 1 AND WATERWORKS

Each Party, who is an owner of a Lot (as defined below), shall be and is hereby granted an undivided 1/12th interest in and to the use of "Well 1" (which is identified on Lot 2 of Plat-04-05 as set forth in Exhibit B-1) and water system for such Well 1 that is constructed on that certain real property located in Kittitas County, Washington, described on Exhibit A attached hereto (the "Property"). Each lot described on Exhibits B-1 and B-2 (a "Lot") shall be entitled to receive a supply of water for one residential dwelling on each Lot and shall be furnished a reasonable supply of potable and healthful water for domestic purposes. Notwithstanding anything to the contrary in this Agreement, a Party's water supply shall not exceed 415 gallons

12 LOTS.

WATER METER WERE INSTALLED for ALL 12 LOTS During the PLATTING process.

per Lot owned by such Party per day based on the original 12 Lots. Any resubmittal of any lot will require a separate source of water supply for any lots in addition to the original 12 Lots.

B. WATER SYSTEM

The Well 1 water system, waterworks equipment, the pumphouse and water distribution pipes, and initial well water quality tests shall be collectively referred to herein as the "Water System".

C. COST OF MAINTENANCE OF WATER SYSTEM

Each Party hereto covenants and agrees that it shall equally share the maintenance and operational costs of Well 1 and Water System herein described. The expense of water quality sampling as required by the State of Washington and Kittitas County shall be shared equally by the Parties. The Parties, by mutual agreement, may establish and maintain a reserve account at a mutually agreed upon banking institution. Each party, by mutual agreement, may be entitled to receive an annual statement from said banking institution regarding the status of the reserve account. The monetary funds in the reserve account shall be utilized for the sole purpose of submitting water samples for quality analysis and maintaining, repairing or replacing Well 1 and common waterworks equipment or appurtenance thereto.

D. EASEMENT OF WELL 1 SITE AND PUMPHOUSE

There shall be an easement for the purpose of maintaining or repairing Well 1, Water System and any appurtenances thereto within the 100 foot radius area designated on Exhibit B-1 (the "Easement"). The Easement shall allow the repair and maintenance of the Water System and anything necessary to the operation of the Water System. The Parties shall promptly execute all documents requested by Purveyor, provided that such documents are necessary (as determined by the Purveyor) for the Easement and/or the maintenance, repair or operation of the Water System.

E. WATER LINE EASEMENTS

Water line easements on the Property are shown on the recorded plats in Kittitas County. No permanent type of building shall be constructed upon the water line easement except as needed for the operation of Well 1 and Water System.

F. MAINTENANCE AND REPAIR OF PIPELINES

All pipelines in the Water System shall be maintained so that there will be no leakage or seepage, or other defects that may cause contamination of the water or injury, or damage to persons or property. Pipe material used in repairs shall meet approval of the Health Officer. Cost of repairing or maintaining common distribution pipelines shall be borne equally by the Parties. Each Party in this Agreement shall be responsible for the maintenance, repair, and replacement of pipe supplying water from the common water distribution piping to their own

particular dwelling and Lot. Water pipelines shall not be installed within 20 feet of a septic tank or within 10 feet of sewage disposal drainfield lines.

G. PROHIBITED PRACTICES

The Parties herein, their heirs, successors and/or assigns, will not construct, maintain or suffer to be constructed or maintained upon the Property and within 100 feet of Well 1 herein described, so long as the same is operated to furnish water for public consumption, any of the following: septic tanks and drainfields, sewerlines, underground storage tanks, county or state roads, railroad tracks, vehicles, structures, barns, feeding stations, grazing animals, enclosures for maintaining fowl or animal manure, liquid or dry chemical storage, herbicides, insecticides, hazardous waste or garbage of any kind. The Parties will not cross connect any portion or segment of the Water System with any other water source without prior written approval of the Kittitas County Department of Public Health and/or other appropriate governmental agency. In an effort to conserve water and reduce water consumption, each Party shall (a) landscape its respective Lot(s) with drought tolerant plants and with minimal lawn areas and (b) install and use only low flow plumbing fixtures in the residential dwelling on each Lot.

H. WATER SYSTEM PURVEYOR

Donna Scott is initially designated "Purveyor" of the water system until such time as Donna Scott resigns from such position or the applicable homeowner's association appoints a different Purveyor. The Purveyor shall be responsible for arranging submission of all necessary water samples as required in the Washington Administrative Code, and Kittitas County Rules and Regulations and handling emergencies such as system shutdown and repair. The Purveyor shall provide his/her name, address and telephone number to the Health Officer and shall serve as a contact person to the Health Officer. The Purveyor shall organize and maintain the water system records and notify the Health Officer and all parties, service connections and lots that are included in this agreement, of the water quality tests that are required by WAC 246-290 and Kittitas County Rules and Regulations. Water System records shall be available for review and inspection by all Parties to this Agreement and the Health Officer.

I. PROVISIONS FOR CONTINUATION OF WATER SERVICE

The Parties shall maintain a continuous flow of water from Well 1 and Water System, herein described in accordance with public water supply requirements of the State of Washington and Kittitas County. In the event that the quality or quantity of water from Well 1 becomes unsatisfactory as determined by the Health Officer, the Parties shall develop a new source of water. Prior to development of, or connection to a new source of water, the Parties shall obtain written approval from the Health Officer. Each Party shall share equally in the cost of developing the new source of water and installing the necessary equipment associated with the new source. At such time as the total population served by the Water System exceeds 25 people for more than 60 days per year the Water System will be reclassified as a Class "A" system and will be subject to additional requirements as outlined in WAC 246-290.

J. RESTRICTION ON FURNISHING WATER TO ADDITIONAL PARTIES

The Parties shall not furnish water from Well 1 and Water System herein described to any other persons, properties or dwelling without prior consent of all Parties and written approval from the Kittitas County Department of Public Health.

K. HEIRS, SUCCESSORS AND ASSIGNS; AMENDMENTS

This Agreement and the covenants set forth herein shall run with the land and shall be binding on all parties having or acquiring any right, title, or interest in the Property or any Lot described herein or any part thereof, and it shall pass to and be for the benefit of each owner thereof. No amendment or modification of this Agreement shall be valid unless set forth in a written instrument signed by the Parties.

L. ENFORCEMENT OF AGREEMENT ON NON-CONFORMING PARTIES AND PROPERTIES

The Parties shall establish the right to make reasonable regulations for the operation of Well 1 and Water System, such as the termination of service if bills are not paid within forty-five days of the due date, additional charges for disconnection, reconnection, etc. Any Party not conforming with the provisions of this Agreement shall be subject to interest charges of 18% per annum together with all collection fees, costs and expenses.

[The remainder of this page left intentionally blank.]

For good and valuable consideration, the receipt and sufficiency are hereby acknowledged, the terms and conditions of the foregoing Water Users Agreement are hereby acknowledged and agreed to by the following Lot owners:

By: Donna J. Scott
Name: Donna J. Scott

Date Signed: _____ __, 200__

By:_____
Name: _____

Date Signed: _____ __, 200__

By:_____
Name: _____

Date Signed: _____ __, 200__

STATE OF WASHINGTON)
) ss.
COUNTY OF King)

THIS IS TO CERTIFY that on this 8th day of July, 2005, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn, personally appeared Donna J. Scott, to me known to be the individual that executed the within and foregoing instrument, and acknowledged the said instrument to be his/her free and voluntary act and deed.

DATED: July 8, 2005.

JANELLE YEUNG
COMM. EXP.
NOTARY
PUBLIC
NOVEMBER 27, 2005
STATE OF WASHINGTON

Janelle Yeung
Print Name: Janelle Yeung
Notary Public in and for the State of Washington, residing at
Bellevue, WA
My commission expires: Nov 27, 2005

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

THIS IS TO CERTIFY that on this _____ day of _____, _____, before me, the undersigned, a notary public in and for the state of Washington, duly commissioned and sworn, personally appeared _____, to me known to be the individual that executed the within and foregoing instrument, and acknowledged the said instrument to be his/her free and voluntary act and deed.

DATED: _____, _____.

_____
Print Name: _____
Notary Public in and for the State of Washington, residing at
_____
My commission expires: _____

EXHIBIT A

Legal Description of Property

LOT 2 OF HIDDEN VALLEY VISTAS, AS DESCRIBED AND/OR DELINEATED ON KITTITAS COUNTY PLAT NUMBER P-04-05, AS RECORDED JUNE 10, 2005 IN BOOK 9 OF PLATS, PAGES 150 & 151, RECORDED UNDER AUDITOR'S FILE NUMBER 200506100060, RECORDS OF KITTITAS COUNTY, STATE OF WASHINGTON; BEING A PORTION OF THE NORTHWEST QUARTER OF SECTION 32, TOWNSHIP 20 NORTH, RANGE 17 EAST, W.M., KITTITAS COUNTY, STATE OF WASHINGTON.

200507210010
Page: 8 of 11
07/21/2005 12:36P
Kittitas Co Auditor STMT TITLE AGR 28.00

EXHIBIT B-1

[attached]

200507210010
Page: 9 of 11
07/21/2005 12:36P
29.00
Kittitas Co Auditor STWT TITLE AGR

7 LOTS
WATER SOURCE: CLASS B WATER SYSTEM
SEWER SOURCE: SEPTIC
ZONE: AG-5

EXISTING LEGAL DESCRIPTION:

LOT 1E OF THAT CERTAIN SURVEY AS RECORDED OCTOBER 23, 1997, IN BOOK 23 OF SURVEYS, PAGE 10, UNDER AUDITOR'S FILE NUMBER 199710230011, RECORDS OF KITTITAS COUNTY, STATE OF WASHINGTON; BEING A PORTION OF THE NORTHEAST QUARTER OF SECTION 36, TOWNSHIP 20 NORTH, RANGE 17 EAST, W.M., IN THE COUNTY OF KITTITAS, STATE OF WASHINGTON.

NOTES:

1. LOT 2 WILL BE LIMITED TO THE ACCESS EASEMENT DESCRIBED ON THE FACE OF THE PLAT. NO DIRECT ACCESS WILL BE GRANTED OFF OF HIDDEN VALLEY ROAD.

2. ADJACENT PROPERTIES MAY BE SUBJECT TO SUBDIVISION IN THE FUTURE.

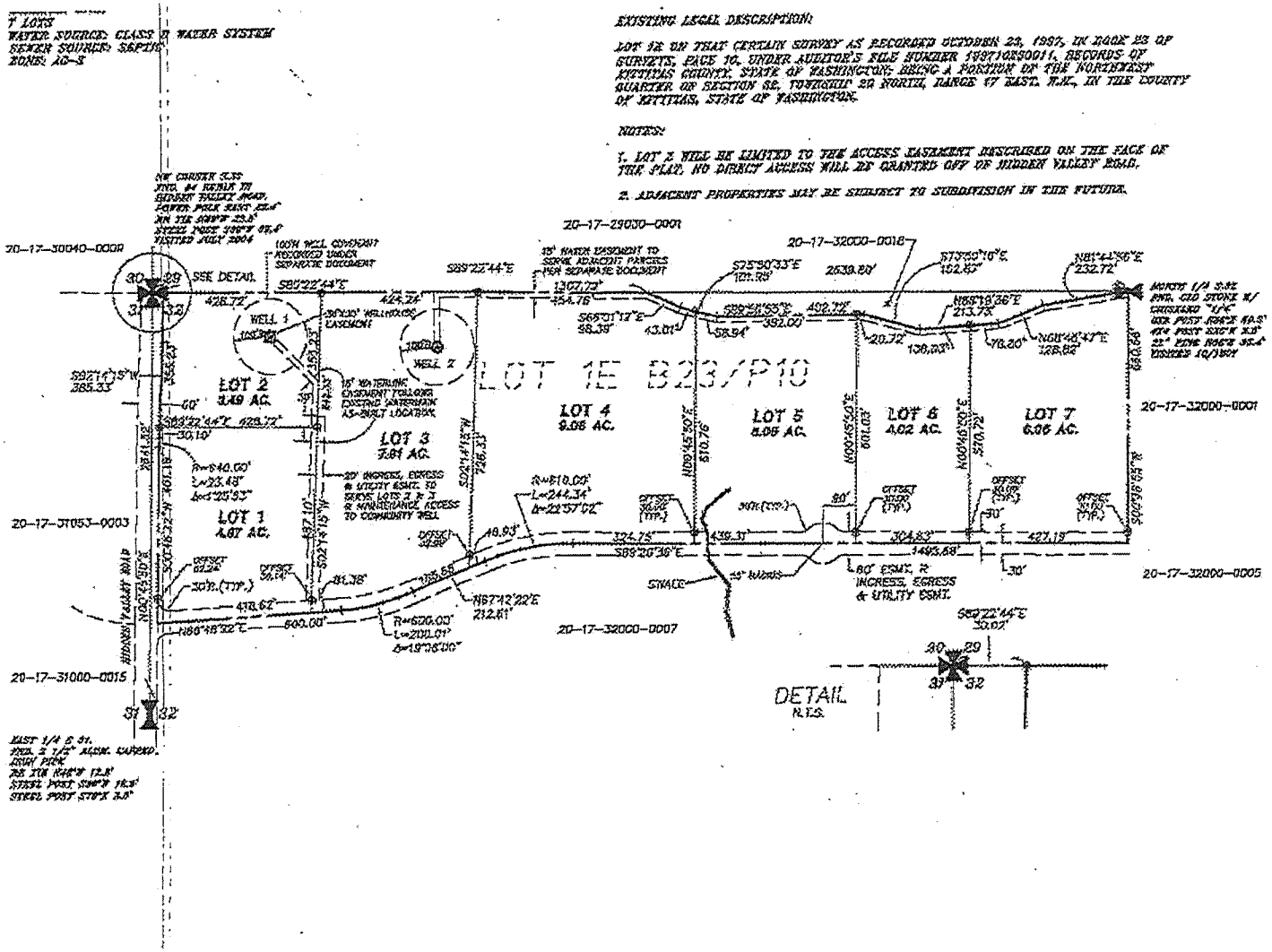


EXHIBIT B-2

[attached]

200507210010
Page: 11 of 11
07/21/2005 12:39P
29.00
Kittitas Co Auditor STWT TITLE AGR

WATER SOURCE: CLASS B WATER SYSTEM
SEWER SOURCE: SEPTIC
ZONE: AO-3

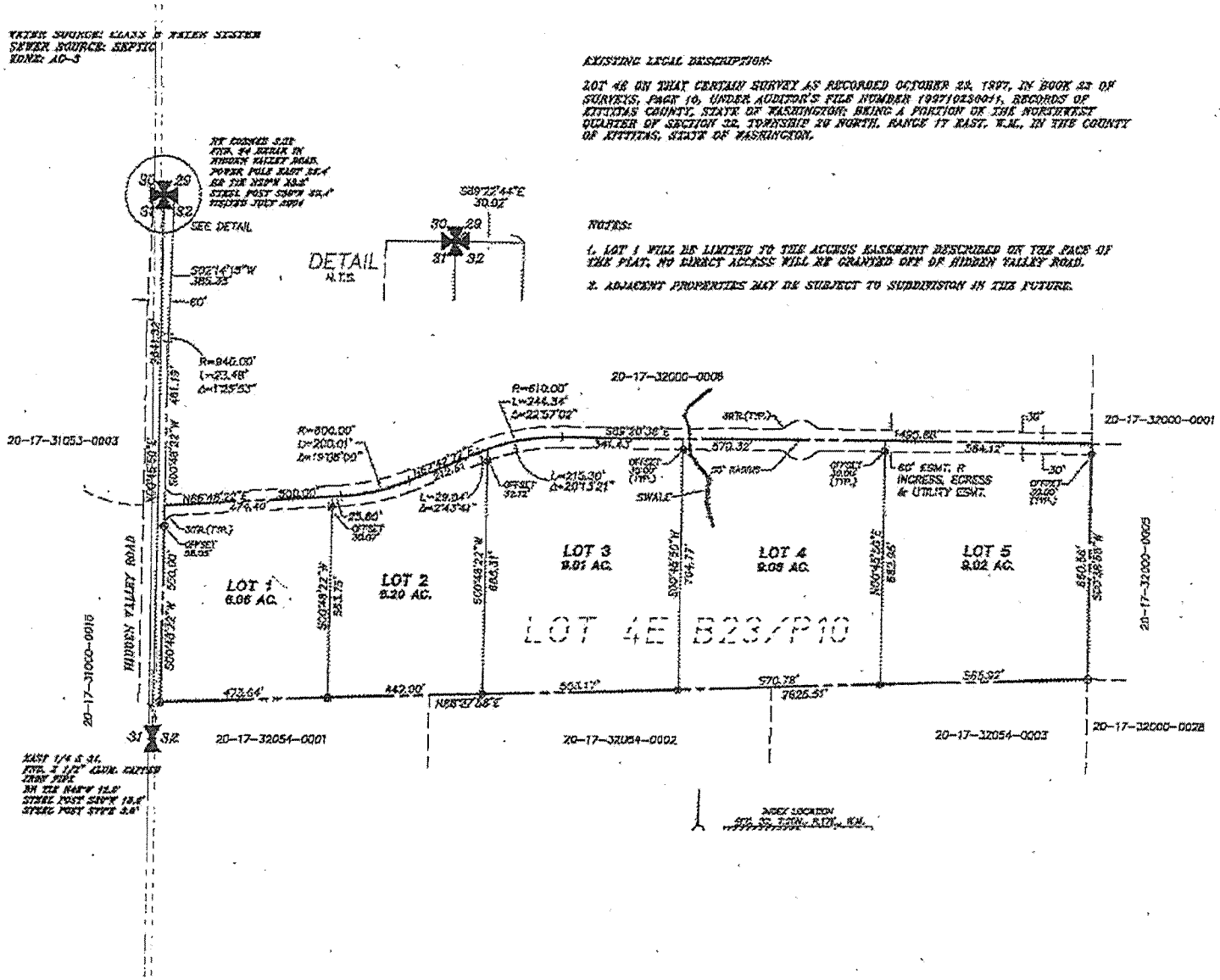
EXISTING LEGAL DESCRIPTION:

LOT 4E ON THAT CERTAIN SURVEY AS RECORDED OCTOBER 28, 1997, IN BOOK 23 OF SURVEYS, PAGE 10, UNDER AUDITOR'S FILE NUMBER 199710230044, RECORDS OF KITTITAS COUNTY, STATE OF WASHINGTON; BEING A PORTION OF THE NORTHWEST QUARTER OF SECTION 32, TOWNSHIP 20 NORTH, RANGE 17 EAST, W.M., IN THE COUNTY OF KITTITAS, STATE OF WASHINGTON.

NOTES:

1. LOT 1 WILL BE LIMITED TO THE ACCESS EASEMENT DESCRIBED ON THE FACE OF THE PLAT. NO DIRECT ACCESS WILL BE GRANTED OFF OF HIDDEN VALLEY ROAD.

2. ADJACENT PROPERTIES MAY BE SUBJECT TO SUBDIVISION IN THE FUTURE.



Johnson, Roger E. (ECY)

From:	Steve Senger [steve@stevesenger.com]
Sent:	Friday, July 30, 2010 1:42 PM
To:	ECY RE Kittitas Rules; Alan Crankovich; bocc@co.kittitas.wa.us; hinkle.bill@leg.wa.gov; warnick.judy@leg.wa.gov; Holmquist, Janea; 'cwhba'
Subject:	Water Moratorium 1
Attachments:	Water Moratorium 1.pdf

Please find attached a letter with comments for the Permanent Rule hearing in Cle Elum on 7/28/10. Thank you for your time.

Have an awesome day,

Steven E. Senger, CGB, CGP

Senger Construction, LLC / **SC Design,** *Zero Energy Home Designs*

PO Box 730
Cle Elum, WA 98922
Office:509-674-7774
Cell: 509-607-0300
Fax: 509-674-4815
Steve@stevesenger.com
www.stevesenger.com

President - Central Washington Home Builders Association - Kittitas Chapter 2008, 2009
President Elect – Central Washington Home Builders Association, 2011
Past President - Central Washington Built Green Association 2008

CGB - Certified Graduate Builder
CGP – Certified Green Professional
NAHB – Certified 3rd Party Built Green Verifyer

SENGER CONSTRUCTION, LLC

"Your Personal Contractor for Life"

July 28, 2010

Ted Sturdevant, Director
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

RE: Exempt Well Moratorium Permanent Rule Hearing

Dear Ted:

As a local General Contractor both residing in and building homes in Upper Kittitas County for the last 11 years this water moratorium issue has been close to my heart. While I feel some good progress is occurring, I do still have a couple of issues that greatly concern me.

I read the Small Business Economic Impact Statement Publication no. 10-11-016 as required by Chapter 173-539A WAC, Water Resources Program for the Upper Kittitas Groundwater area that in essence states, Small businesses are not required to comply with the proposed rule if they are located in an established water right area.

It is appalling to me that this study would stand as a valid Small Business impact statement regarding the true economic impact that this moratorium and Permanent Rule will and has had on small businesses in the Upper Kittitas County.

As just one (1) small business employer in the upper county, prior to the moratorium my small construction firm had between 3 and 4 million dollars of new construction projects on my desk ready to start and every one of those projects but one were cancelled as a direct **impact** of the imposed water moratorium. This was not as a result of a poor economy but a direct result of the water moratorium. This caused my small firm to lay off 8 full time employees not to mention the scores of sub contractors that would have been employed and all of the materials that would have been purchased, as well as new owners utilizing their homes partaking of our local upper county services stores etc. Not all of these employees have found gainful employment even to this day and are no longer purchasing latte's, gas, clothes, food, restaurant visits or visiting any of our local small businesses. This dollar volume of work would have been a good year for my business in any economy.

This example is but one (1) small business and is an incredibly small percentage of the whole when looking at the impact on small business that this issue has and will continue to cause. How can a Small Business Impact Statement not take facts like these into consideration?

PO Box 730 Cle Elum, WA 98922 (509) 674-7774 (800) 820-2449
Web Site: http://www.washington-home-builder.com ***E-mail:*** Steve@stevesenger.com
By Referral Only™
SENGECL964CC

Traditionally the Upper Kittitas County area has been somewhat insulated from National economic swings as it derives much of its business from the vacation and tourism business primarily from the West side of the mountains. In the 11 years I have been building homes in the Upper County I have only built 1 home for a client that lives here in the county. ALL of my clients have either been from the Seattle Metropolitan area or other states, moving here either to vacation or to retire. Most of these projects are self funded and do not require bank financing making many of these people less impacted by the poor economy and causing them to see this as a time that things are on sale. Yet if a person walks down Main Street and speaks to the shop owners they will find that those still in business are and have been hanging on by a thread trying to keep their doors open. This is again a direct impact of the moratorium and therefore the proposed Permanent Rule.

This moratorium was put into place with an Emergency Rule due to the lack of information required to make an educated scientific study of the issues raised by the action. The Legislature has set aside $800,000 dollars for a water study to give The Department of Ecology and Kittitas County the scientific information needed to make informed decisions about our water as we move forward with this issue. It is my understanding that no study has been contracted at this time and the county is in a position to lose this funding if the study is not contracted within the next 60 days, so I would implore that this become a priority for both BOCC and Ecology to make this happen in a timely fashion so the funds are not redirected to the general fund to cover budget shortfalls.

I would respectfully ask that the time limit for written comments be extended to 60 days so involved and concerned citizen groups will have the time to thoughtfully respond to the issues raised from this meeting.

Finally, what is the rush to get to the permanent rule? Is there a statute that is requiring this? We have one opportunity to get this right so let's make sure we do the due diligence required to make this a viable system that will allow property owners to enjoy their property and regain the value that it once had. If this is fueled by a statute, I would ask that the BOCC agree to keep the current rule in place while the important details of this Permanent Rule are fleshed out with all the parties involved.

Sincerely,

Steven E. Senger

Johnson, Roger E. (ECY)

From: Ronald Slater [winchester4440@ronaldslater.com]
Sent: Saturday, July 17, 2010 10:54 AM
To: kittitas@ecy.wa.gov.

Dear Sir. I wish to speak at your meeting on the 28 of July. Ronald Slater 15096745781

Schuppe, Mark (ECY)

From:	Julie Smithson [propertyrights@earthlink.net]
Sent:	Thursday, August 12, 2010 3:21 PM
To:	ECY RE Kittitas Rules
Cc:	Schuppe, Mark (ECY); jaym461@ecy.wa.gov; Nightingale, Barbara (ECY); Nightingale, Barbara (ECY)
Subject:	My Official Comments regarding the proposed "WAC 173-539A - Upper Kittitas Ground Water Rule" (spelling errors corrected)
Importance:	High

My Official Comments regarding the proposed "WAC 173-539A - Upper Kittitas Ground Water Rule" (spelling errors corrected)

August 11, 2010; revised on August 12, 2010, to correct the spelling of Kittitas County (I was having a blonde moment!)

To:

The Washington State Department of Ecology, Central Regional Office

Attention: Mark Schuppe

15 West Yakima Avenue, Suite 200

Yakima, Washington State 98902-3452

kittitas@ecy.wa.gov or msch461@ecy.wa.gov or 509-454-4258; Fax: 509-575-2809

jaym461@ecy.wa.gov; barbara.nightingale@ecy.wa.gov; bnig461@ecy.wa.gov

BCCed to: ***Let your imagination run wild!***

WA State Department of Ecology:

This entire email, including all headers, is to be construed and accepted as My Official Comments regarding the proposed "WAC 173-539A - Upper Kittitas Ground Water Rule."

The proposed new Chapter WAC 173-539A - Upper Kittitas Ground Water Rule, here: http://www.ecy.wa.gov/laws-rules/wac173539a/p0812a_2010.pdf (9 pages; 520.83 KB) is a bold move to coerce and cow property owners into submission, into letting the Washington State Department of Ecology steal their property rights in the form of a "need" that does not exist and a premise that is entirely false.

"WAC 173-539A-020 Authority. RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering

requirements for permit-exempt .lls where needed." - Page 1 http://ww. .cy.wa.gov/laws-rules/wac173539a/p0812a_2010.pdf (9 pages; 520.83 KB)

I expect to receive written confirmation of receipt of this comment letter from the Washington State Department of Ecology, as well as a formal written response to all of my questions contained in this comment letter. From this point forward, I expect to be immediately added to your mailing list to receive all future paperwork generated by this scheme, er, "rule."

I "call it like I see it," and carefully do research -- and much reading and studying -- before arriving at the parts that make up My Official Comments regarding the proposed "WAC 173-539A - Upper Kittitas Ground Water Rule," including, but not limited to, the fact that this "rule" is flying under obviously false colors, being, in effect, a strangulatory zoning banning all building by property owners. The Washington State Department of Ecology appears to have outgrown its britches, believing that it can arbitrarily lay down "the law" on property owners, no matter how convoluted or outrageous "the law" -- or "rule," as you've dubbed it -- may be.

Every word -- and the apparent intent -- of WAC 173-539A, is built upon a false "need" or "threat." The Washington State Department of Ecology has no right over Washington State, in general, or Kittitas County, in particular, property owners. Neither temporary nor permanent building bans are valid or in any way, shape or form credible.

The senior water rights -- pre-dating May 10, 1905, which are, as you well know, unavailable to the entire region affected by this proposed rule -- are a moot point. The good and honest people of Kittitas County have been coerced, threatened, stymied, stressed, and lied to enough for several lifetimes, and for what? So the Washington State Department of Ecology can waltz in and tap-dance on their heads? I think not. Where you have no rights, you do not belong. It's clear that you've come to Kittitas County with a Trojan horse, its belly filled with ominous portent, its entire purpose to deceive, take the rights of others, trample the economic health of this entire county, and then prance about at will -- as though you can. My first reaction is, "How dare you?" You, however, will likely snicker at this, because you expect astonishment and dismay from the property owners of Kittitas County. You expect property owners to lay down and let your steamroller make them part of the pavement. This is the technique employed by bullies. It is no wonder that state -- and federal -- agencies have lost the respect of citizens. Treat people like they have no rights and you will get two reactions: people will either forget their rights, and you will "win" by default, or people will learn their rights and how to protect those rights, and they will read your collective pedigrees. Your steamroller has keys in the ignition, but don't expect those keys to remain. Your perceived authority has far overstepped the bounds given it when the Washington State Department of Ecology was created.

The colored "zones" ostensibly give the Washington State Department of Ecology the ability to tell the citizens and property owners of Kittitas County who may purchase water from the Suncadia Water Bank.

The Swauk and Teanaway drainage property owners are now told they must purchase water from senior water rights holders in only those drainages, of which none are for sale. Does the Washington State Department of Ecology intend to use this "rule" as a leverage tool to force all property owners in the upper county to buy from the Suncadia Water Bank if this rule is put into place? As you well know, this option will soon be depleted. What then?

Quoting G. Thomas Tebb, Central Regional Director, DOE, in a June 25, 2010, letter to Catherine Bambrick, Administrator, Kittitas County Public Health Department: "We also believe more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin to help provide a clearer path for making groundwater decisions." While this may be true, it also applies statewide and must be determined prior to enacting any new rule banning use of exempt wells, without strong scientific evidence to the contrary that would support such a rule.

The current temporary moratorium must end immediately. The new proposed "rule" must be immediately sent straight to the nearest shredder -- do not pass go or collect two hundred dollars!

WAC 173-539A-010 Purpose. The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County pending completion of a ground water study.

Words and phrases floated throughout the nine-page "proposed rule" read like what they are, just so much language deception. The Washington State Department of Ecology expects property owners to believe that things like "water budget neutral," "may be subject to," "mitigated," "unmitigated," "advised to obtain," "curtailment," "permit exempt use," "property covenant," "consumptive use," "mitigation," "appropriate," "... To the extent that ecology determines that the mitigation offered would not reliably mitigate to be water budget neutral ..." -- your use of words and phrases that are either undefinable or deliberately vague and subject to the interpretation of ... guess who? You! -- speaks volumes for your utter disdain of the property owners of Kittitas County and Washington State, excepting, I'm sure, yourselves.

Pages 2-4 here: http://www.ecy.wa.gov/laws-rules/wac173539a/p0812a_2010.pdf (9 pages; 520.83 KB) supposedly define the important terms used throughout the 9 pages. They fail miserably. I have spent over a decade assembling a glossary that currently stands at 3,333 pages. Its definitions originate with various state and federal agencies and the definitions are hyperlinked to the documents from which they were gleaned. Many times these definitions are like those the Washington State Department of Ecology uses: chockfull of language deception and completely ambiguous.

Per the "proposed rule," the Washington State Department of Ecology would no longer allow additional buildings or new "unappropriated" exempt wells in the upper county until "completion of a ground water study" that the Washington State Department of Ecology sits on like the proverbial dog in the manger. Why is the Washington State Department of Ecology sitting on $700,000 appropriated for this study? Will the study prove that the aquifer in the upper county is doing just fine and not affecting surface water providing downstream river flows to senior water right holders, which should end the current and proposed Washington State Department of Ecology building bans. The actual intent of all this hocus-pocus is to remove many property owners from Kittitas County. Are there some Washington State Department of Ecology employees -- and/or their families and/or friends -- that have plans for properties currently owned by others? One must suspect that that is so.

"Domestic in-house use" is apparently an issue of concern for the Washington State Department of Ecology. I have the perfect solution: each of you remove your homes' plumbing and install outhouses! Buy washtubs for bathing!

It's not "your way or the highway," Washington State Department of Ecology, though that is what you've apparently come to believe. The magic date of July 16, 2009, was likely also chosen capriciously. Is there no end to the control freak mentality that seems to have swept over the Washington State Department of Ecology like a tsunami, leaving little but flotsam and jetsam in its wake?

The fact that those employed by the Washington State Department of Ecology are not the only ones with dreams, goals, plans, etc., must have been lost on you, but there are many wonderful people in Kittitas County and Washington State that have come to loathe your actions, and overwhelmingly, rightfully so.

For your edification, I've included a smattering of definitions for words/phrases you've used, just to help you -- as though you needed help ... -- understand how obnoxious your definitions and verbiage are to property owners and cognizant citizens.

To coin a new word, the ludicro of it all would be funny, if it weren't. Draconian. Back off, "Ecology," and reconsider your approach to the property owners of Kittitas County. A sincere apology should be immediately forthcoming, after you shred both the temporary and "proposed rule" bans.

You are a mere state agency. You have no individual rights.

Julie Kay Smithson

213 Thorn Locust Lane

London, Ohio 43140-8844

propertyrights@earthlink.net

"Definitions"

Consumptive use – Recreation activities, which consume natural resources. Hunting and fishing are regarded as consumptive recreation because wildlife [is] consumed. Rockhounding is consumptive because nonrenewable resources are removed. – Green River Resource Management Plan, Rock Springs Field Office, Wyoming (Bureau of Land Management) http://www.blm.gov/rmp/WY/application/rmp_browse.cfm?rmpid=87&idref=28461 2. The quantity of water absorbed by the crop and transpired or used directly in the building of plant tissue together with that evaporated from the cropped area. (U.S. Bureau of Reclamation, 1952, p. 3.) The quantity of water transpired and evaporated from a cropped area or the normal loss of water from the soil by evaporation and plant transpiration. (Blaney, 1951b, p. 190.) (see also Water requirement and Blaney, 1951a, p. 4.) The quantity of water discharged to the atmosphere or incorporated in the products of the process in connection with vegetative growth, food processing, or an industrial process (MacKichan, 1957, p. 2.) – USGS (U.S. Geological Survey) "Science in your watershed: general introduction and hydrologic definitions, by W.B. Langbein and Kathleen T. Iseri http://water.usgs.gov/wsc/glossary.html

Consumptive Use – [general] (1) That part of withdrawn water that is evaporated, transpired, incorporated into products or crops, consumed by humans or livestock, or otherwise removed from the immediate water environment (USGS). (2) Water whose state, chemical, or biological characteristics are altered sufficiently to render it useless to further beneficial uses (BOR). Also referred to as water consumption or water consumed. – U.S. Geological Survey, National Handbook of Recommended Methods for Water Data Acquisition, 11.M. Glossary http://pubs.usgs.gov/chapter11/chapter11M.html 2. Consumptive Use means that portion of Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to evaporation, incorporation into products, or other processes. – "For the purposes of this Compact, and of any supplemental or concurring legislation enacted pursuant thereto, except as may be otherwise required by the context." Great Lakes Basin Water Resources Compact, Confidential, Draft, Not for Distribution. http://www.allianceforlakes.com/conservation/Draft_Compact_2005.pdf (18 pages) 3. Water removed from available supplies without direct return to a water resource system for uses such as manufacturing, agriculture, and food preparation. http://www.epa.gov/ogwdw/pubs/gloss2.html 4. Use of resources that reduces the supply, such as logging and mining. – Daniel Boone National Forest Glossary of Terms http://www.srs.fs.usda.gov/r8/boone/documents/planning/revplan/glossary.pdf (Page 3 of 18 pages; 158.92 KB)

5. The use of water by plants, animals, and/or humans. This includes evapotranspiration but does not include water that returns to the surface or groundwater system. With reference to Colorado River entitlements, it means diversion form the river less return flows to the river. – U.S. Bureau of Reclamation Glossary http://www.usbr.gov/lc/region/g2000/wmtt/09Glossary.pdf (page 6 of 16 pages; 85.98 KB)

Consumptive use [irrigation] – The total amount of water taken up by vegetation for transpiration or building of plant tissue, plus the unavoidable evaporation of soil moisture, snow, and intercepted precipitation associated with vegetal growth (ASAE). – U.S. Geological Survey, National Handbook of Recommended Methods for Water Data Acquisition, 11.M. Glossary http://pubs.usgs.gov/chapter11/chapter11M.html

Consumptive use, net – The consumptive use decreased by the estimated contribution by rainfall toward the production of irrigated crops. (Simons, 1953, p. 12.) (See Effective precipitation (3).) Net consumptive use is sometimes called crop irrigation requirement. – USGS (U.S. Geological Survey) "Science in your watershed: general introduction and hydrologic definitions, by W.B. Langbein and Kathleen T. Iseri http://water.usgs.gov/wsc/glossary.html

Consumptive Uses – Uses of a resource that reduce the supply. Examples include irrigation, domestic and industrial water use, grazing, and timber harvest. – Appendix H (Biological Assessment and Evaluation for Revised Land and Resource Management Plans and Associated Oil and Gas Leasing Decisions) http://www.fs.fed.us/ngp/final/pdf_feis/Appendix_H.pdf

Consumptive waste – The water that returns to the atmosphere without benefiting man. (Thomas, 1951, p. 217.) – USGS (U.S. Geological Survey) "Science in your watershed: general introduction and hydrologic definitions, by W.B. Langbein and Kathleen T. Iseri http://water.usgs.gov/wsc/glossary.html

Mitigate – To lessen the severity. – http://permanent.access.gpo.gov/websites/fsfedus/www.fs.fed.us/r1/gallatin/projects/darroch-eagle/ea/glossary.pdf and Appendix H (Biological Assessment and Evaluation for Revised Land and Resource Management Plans and Associated Oil and Gas Leasing Decisions) http://www.fs.fed.us/ngp/final/pdf_feis/Appendix_H.pdf 2. To lessen the impacts of, alleviate, or avoid to the extent reasonably feasible. – City of Scottsdale, Arizona, Planning, Building and Zoning Reference Guide Glossary. http://www.scottsdaleaz.gov/generalplan/Glossary.asp

Mitigating measures – Modifications of actions that (I) avoid impacts by not taking a certain action or parts of an action; (2) minimize impacts by limiting the degree or magnitude of the action and its implementation; (3) rectify impacts by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate impacts over time by preservation and maintenance operations during the life of the action; or (5) compensate for impacts by replacing or providing substitute resources or environments. – The Forest Ecosystem Management Assessment Team (FEMAT) http://pnwin.nbii.gov/nwfp/FEMAT/ The Pacific Northwest Information Node, National Biological Information Infrastructure, Chapter 9 Glossary http://pnwin.nbii.gov/nwfp/FEMAT/Chapter_9.htm

Mitigation – Activities that will avoid, reduce the severity of, or eliminate an adverse environmental impact. http://www.nps.gov/yose/planning/sfbridge/ch4.htm and Yosemite National Park, Merced Wild and Scenic River Revised Comprehensive Management Plan and Supplemental Environmental Impact Statement (SEIS) Chapter VIII: Glossary http://www.nps.gov/yose/planning/mrp/html/14_rmrp_ch8.htm 2. Mitigation, in an

environmental context, refers to equence of considerations designed to ıp manage environmental impacts, which includes (in order of preference) avoid, minimize, rectify, reduce and offset. The concept originated from a Memorandum of Agreement between the U.S. EPA derived from a Department of the Army – Environmental Protection Agency 1990 on Mitigation. – Pages 3-4 and 26-27, Environmental Offsets (Preliminary Position Statement No. 9), July 2004, Environmental Protection Authority of Western Authority – "Environmental offsets aim to ensure that significant and unavoidable adverse environmental impacts are counterbalanced by a positive environmental gain, with a goal of achieving a 'net environmental benefit'. In light of the State's recent alignment with the sustainability philosophy, it has potential to be a useful management tool -- enabling development to occur, but not at the total expense of the environment. It is important to recognize that environmental offsets represent a 'last line of defence' for the environment, only being used when all other options to avoid and mitigate environmental impacts have been exhausted. This Preliminary Position Statement sets out the EPA's view on environmental offsets. The EPA considers that environmental offsets should be included, where appropriate, as part of approvals for environmentally acceptable projects to maintain and wherever possible enhance the State's environment. To this end, this position statement establishes a purpose, scope and principles for environmental offsets that the EPA will consider in future advice and recommendations. I anticipate that this Position Statement will provide the basis for developing a whole of government policy on environmental offsets. This Position Statement has been termed Preliminary in that the EPA welcomes comments. Such comments should be made to the Chairman, Environmental Protection Authority, GPO Box K822, Perth 6842 WA [Western Australia] by 8th September 2004." http://www.epa.wa.gov.au/docs/1863_Offsets%20PS9.pdf 3. Mitigation includes: (a) Avoiding an impact altogether by not taking a certain action or parts of an action; (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; (e) compensating for the impact by replacing or providing substitute resources or environments. – (DOI/NPS) Majority of definitions adapted from "A Park and Recreation Professionals' Glossary," California Department of Parks and Recreation Planning Division, January 1, 2003; other definitions from California State Law, CEQ (NEPA), and Santa Barbara County. Draft Gaviota Coast Feasibility Study & Environmental Assessment http://www.nps.gov/pwro/gaviota/gaviota_draft_report_232-234.pdf 4. Avoiding the impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree of magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and/or compensating for the impact by replacing or providing substitute resources or environments. – Draft Environmental Impact Statement, Pit 14 Coal Lease-by-Application, DOI/BLM http://www.wy.blm.gov/nepa/rsfodocs/pit14/DEIS/09chap5-ref-glos.pdf (pages 15-18 of 18) 5. Actions taken to avoid, reduce, or compensate for the effects of environmental damage. Among the broad spectrum of possible actions are those that restore, enhance, create, or replace damaged ecosystems. – DOI/USFWS http://www.fws.gov/midwest/FoxRiverNEPA/documents/AppendixA.pdf 6. Measures designed to counteract environmental impacts or to make impacts less severe. http://pacific.fws.gov/planning/LPOccp/v2.pdf 7. National Environmental Policy Act Guidelines 1508.20 states: "Mitigation" includes: (a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing or providing substitute resources or environments. As used in cultural resource compliance procedures: Any treatment of historic or prehistoric property that will offset adverse effects that may result from an agency's action. Municipal and industrial (M&I) water: Water delivered to industries and cities for uses, including human consumption, livestock and wildlife, recreation, and tourism development. – U.S. Bureau of Reclamation Glossary http://www.usbr.gov/uc/envdocs/eis/navajo/pdfs/deis_glossary.pdf 8. To moderate or compensate for an impact or effect. – U.S. Army Corps of Engineers, Lower Snake River Juvenile Salmon Migration Feasibility Report and Environmental Impact Statement, Chapter 10, Glossary

http://www.nww.usace.army.mil/lsi. .ial_fseis/study_kit/Main_Report/chap. .htm 9. Includes avoiding an impact by not taking certain actions, minimizing impacts by limiting the degree or magnitude of the action and its implementation, rectifying the impact by repairing, rehabilitating, or restoring the affected environment, reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, and compensating for the impact by replacing or providing substitute resources or environments. – Appendix H (Biological Assessment and Evaluation for Revised Land and Resource Management Plans and Associated Oil and Gas Leasing Decisions) http://www.fs.fed.us/ngp/final/pdf_feis/Appendix_H.pdf 10. The abatement or reduction of an impact on the environment by (1) avoiding a certain action or parts of an action, (2) employing certain construction measures to limit the degree of impact, (3) restoring an area to preconstruction conditions, (4) preserving or maintaining an area throughout the life of a project, (5) replacing or providing substitute resources to the environment or (6) gathering archaeological and paleontological data before disturbance. – McGregor Range Draft Resource Management Plan Amendment and Environmental Impact Statement, Prepared for United States Department of the Interior Bureau of Land Management, Las Cruces (New Mexico) Field Office, January 2005. http://www.nm.blm.gov/lcfo/mcgregor/docs/Draft%20RMPA_EIS_01_05_low.pdf (DOI/BLM) Glossary (Pages 259-268 of 282) 11. Measures taken to reduce adverse impacts on the environment. Steps taken to avoid or minimize negative environmental impacts. Mitigation can include: avoiding the impact by not taking a certain action; minimizing impacts by limiting the degree or magnitude of the action; rectifying the impact by repairing or restoring the affected environment; reducing the impact by protective steps required with the action; and compensating for the impact by replacing or providing substitute resources. – Patuxent Wildlife Research Center Glossary (USGS, United Nations) http://www.pwrc.usgs.gov/educatnl/glossary/index.cfm 12. Methods used to alleviate or lessen the impact of something. – City of Scottsdale, Arizona, Planning, Building and Zoning Reference Guide Glossary. http://www.scottsdaleaz.gov/generalplan/Glossary.asp 13. Avoiding or minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact by preservation and maintenance operations during the life of the action. http://permanent.access.gpo.gov/websites/fsfedus/www.fs.fed.us/r1/gallatin/projects/darroch-eagle/ea/glossary.pdf 14. Actions to avoid, minimize, reduce, eliminate, replace, or rectify the impact of a management practice. – Bureau of Land Management "This glossary defines terms used by the Forest Service and Bureau of Land Management to explain natural resource concepts and management activities specific to this final environmental impact statement and proposed plan amendment." http://www.mt.blm.gov/ea/ohv/Glossary.pdf (Page 3/195 of 7 pages; 68 KB) 15. One or all of the following: (1) Avoiding an impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of an action and its implementation; (3) rectifying an impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action; and (5) compensating for an impact by replacing or providing substitute resources or environments. – CALFED (Joint Federal and State program to address water-related issues in the Delta of the Sacramento-San Joaquin rivers), Upper San Joaquin River Basin Storage Investigation, Phase 1 Investigation Report (Page 122 of 128, Glossary covering Pages 116-127; 4.5 MB) http://calwater.ca.gov/Tribal/CALFED_Water_Storage_Projects/San_Joaquin/Phase_I_Investigation_Report.pdf 16. Actions taken to avoid, reduce, or compensate for the effects of environmental damage, including activities that restore, enhance, create, or replace damaged ecosystems. Interstate Technology and Regulatory Council (ITRC) http://www.itrcweb.org/Documents/ECO-2.pdf (page 104/B-1 of 154 pages) 17. 1.) Restoring, replacing, or creating ecological habitats (usually wetlands) in one area to compensate for loss of natural habitats in another area due to development. Synonym: compensatory restoration 2.) Avoiding, minimizing, or reducing ecosystem losses. – National Park Service PCA (Plant Conservation Alliance) Restoration Working Group (RWG) Library, Glossary of Terms in Ecology and Restoration http://www.nps.gov/plants/restore/library/glossary.htm 18. The compensation for functions and values that are lost on a converted wetland through restoration, enhancement, or creation. – Part 502 – Terms and Abbreviations Common to All Programs, Subpart A – Common Terms – M.440.502.A.00 – 502.00 –

M.440.502.A.00 Amendment 3(August 2005. Definitions, NRCS (Nat . Resources Conservation Service) eDirectives (electronic directives system), United States Department of Agriculture (USDA) http://directives.sc.egov.usda.gov/viewDirective.aspx?id=1638 (50 unnumbered pages) 19. Includes the following: (1) Avoiding an impact altogether by not taking a certain action or parts of an action. (2) Minimizing impacts by limiting the degree of magnitude of the action and its implementation. (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment. (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (5) Compensating for the impact by replacing or providing substitute resources or environments. – The Inventory of Assessed Federal Coal Resources and Restrictions to Their Development, August 2007, Appendix 2, Glossary of Terms. Prepared by the U.S. Departments of Energy, Interior and Agriculture. http://www.fossil.energy.gov/epact/epact437_final_rpt.pdf (Pages A-2-1/61 through A2-10/70 of 94 pages; 3.25 MB) 20. An activity designed to avoid, minimize, rectify, eliminate, or compensate for impacts of a proposed project. A mitigation measure should be a solution to an identified environmental problem. – National Park Service, Yosemite Valley Plan SEIS (Supplemental Environmental Impact Statement), Volume IB Part 2, Glossary http://www.nps.gov/yose/planning/yvp/seis/vol_Ib_p2/gloss_1.html See also In-lieu fee

Mitigation (Heritage Resources) – Actions taken to reduce or eliminate adverse effects caused to heritage resources. Avoidance is not considered a mitigation measure. – Appendix H (Biological Assessment and Evaluation for Revised Land and Resource Management Plans and Associated Oil and Gas Leasing Decisions) http://www.fs.fed.us/ngp/final/pdf_feis/Appendix_H.pdf

Mitigation Banking – Creates "mitigation credits" that can be purchased by developers in lieu of compensatory restoration. – National Park Service PCA (Plant Conservation Alliance) Restoration Working Group (RWG) Library, Glossary of Terms in Ecology and Restoration http://www.nps.gov/plants/restore/library/glossary.htm

Mitigation Banks – 1.) Sites selected for habitat restoration or creation 2.) Market-based banks that exchange "mitigation credits" on the developing site for wetland restoration/creation requirements on another site. – National Park Service PCA (Plant Conservation Alliance) Restoration Working Group (RWG) Library, Glossary of Terms in Ecology and Restoration http://www.nps.gov/plants/restore/library/glossary.htm

Mitigation Measure – A measure applied to a project that would avoid, reduce or repair a program impact. http://www.laschools.org/peir/docs/10-Acronyms-Glossary-jks.pdf

Mitigation measures – Modifications of actions that (1) avoid impacts by not taking certain actions or parts of an action; (2) minimize impacts by limiting the degree or magnitude of the action and its implementation; (3) rectify impacts by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate impacts over time by preservation and maintenance operations during the life of the action; or (5) compensate for impacts by replacing or providing substitute resource or environments. – Gauldy Project, Siuslaw National Forest, Corvallis, Oregon http://www.fs.fed.us/r6/siuslaw/projects/nepa/gauldy/gauldy-ea-glossary.pdf http://www.fs.fed.us/r6/siuslaw/projects/nepa/gauldy/

Mitigation Monitoring and Reporting Program – Included as part of the Final Program EIR (Environmental Impact Report), the mitigation monitoring plan will list all required mitigation measures and will specify when the measure needs to be applied (e.g., before, during or after construction), and the agency or district department responsible for verifying compliance. http://www.laschools.org/peir/docs/10-Acronyms-Glossary-jks.pdf

Water budget – A summation of ...puts, outputs, and net changes to a particular water resource system over a fixed period. (Also, water balance model). http://www.epa.gov/ogwdw/pubs/gloss2.html 2. An accounting for the amount of water entering (irrigation and precipitation) and the amount of water leaving (evaporation, CU, deep percolation) a given plot of land to determine efficiency and estimate deep percolation. – U.S. Bureau of Reclamation, Colorado River Salinity Control Program, Uintah Basin Unit, Monitoring and Evaluation Report, FY 2006; U.S. Department of Agriculture, Natural Resources Conservation Service, April 12, 2007. http://www.usbr.gov/uc/progact/salinity/pdfs/UintaBasinME2006Report.pdf (50 pages; 3.06 MB) 3. An irrigation tool that keeps track on a daily basis of the amount of plant available water in the soil over a 12-month period. It sums soil water depletion by evapotranspiration using one of the climatonomic estimators and deducts water inputs from precipitation or irrigation. This yields the amount of irrigation water needed to be applied to bring the soil back to field capacity within the root zone of the crop being irrigated. Water applications in excess of field capacity are assumed lost to percolation or runoff. – NRPH [National Range and Pasture Handbook] Glossary (Terms used in the Grazing Land Applications (GLA) software are identified by a "GLA" after the term name) September 1997 ftp://ftp-fc.sc.egov.usda.gov/GLTI/technical/publications/nrph/nrph-glossery.pdf (63 pages)

RECEIVED
AUG 0 9 2010
DEPARTMENT OF ECOLOGY - CENTRAL REGIONAL OFFICE

8/4/2010

Mark Schuppe
Department of Ecology
Central Regional Office
15 West Yakima Ave., Ste. 200
Yakima, WA 98902-3452

Dear Sir,

I am writing this letter to publicly go on record in opposition of the proposed WAC 173-539A regarding water in upper Kittitas county. While I would agree this is a complicated issue with many interests to serve you have chosen to make a final decision based on speculation. In documentation on your web site you refer to the word "may" I think that the answer lies with a comprehensive ground water study that looks at the impact of all facets of this issue. This would include mapping aquifers, measuring well depths, well log history's, and monitoring static level changes at different times of year. A study would also incorporate seasonal data from snowpack and rain fall stream flows and seasonal changes in surface water. The study should include the financial impact to county, small cities, individual property owners like myself, as well as developers and speculators.

I would like to explain the situation as this directly effects me and my family. I was born in Ellensburg and raised in Kittitas county. Although I moved away for my career with the Bellingham Fire Department I have always called this region home. In the fall of 2004 I found this property on Teanaway Terrace I purchased it on January 3 of 2005 with the plan to make it my retirement home. Part of the appeal was that it was a well established area with a mix of permanent and vacation homes on large properties of 10 acres and greater. The property I purchased was surveyed and short platted in September of 1992 (tax parcel number 20-16-26000-0014). In 2006 I built my road and began camping at the site. In 2007 I had underground power installed to the property. In May of 2008 I applied for and received a permit from Ecology to install my domestic exempt well. The well was completed on June 3, 2008 and Ecology received my well log on June 13, 2008 (unique Ecology well tag BAF-987). I installed a pump and have been using the water in my camp trailer since that time. I was preparing to move forward with plans for a small two bedroom home for the two of us when the moratorium hit in July of 2009. Since that time I have explored several options with the Kittitas County and the States water bank. I am in the Teanaway so I have been told I can't use the Suncadia water from the water bank. No water bank water exists for my area. My property is in the red zone. It seems very unfair to have such a devastating impact on a person that thought he was in compliance with all rules and permits as I went along in the process. I have nearly $200,000 tied up in the dream and it is rapidly being destroyed and turned into a nightmare as others continue to build In nearby areas yet I seem to have no recourse.

At the same time it is clear that conservation and better education could help reduce the water currently being used in this region. As I drive around the area I see open ditch irrigation, sprinkling of yards and gardens in the heat of the day, fountains and water feature landscaping, the planting of non native plants that require much more

water. I would also like to see a greater effort of public education about conservation in the home from efficient washers and toilets to low flow shower heads. All new construction would be compliant by current code. The 5000 gallon per day exempt well figure often used by anti growth groups is very unrealistic in today's world. A modern efficient home with a septic tank built today would draw less than three hundred gallons per day. Seventy percent or greater would be returned to ground water in a properly designed septic system.

As an innocent property owner caught in the middle I can't begin to tell you about the stress this has put on me and my family. I didn't enter into this as a speculative venture for the future. This property was my retirement dream and my retirement savings. At our age we don't have the time or ability to financially recover from the negative impact of this decision.
I encourage the Department of Ecology not to support any plan that does not provide realistic options for all private property owners in the region. It would seem that instead of the unattainable water budget neutral plan a better plan using conservation, up to date appliances, modern building codes, a properly designed septic system and natural landscaping could be water budget minimal.

What recourse do I have?

Jerry P. Stougard

Jerry P Stougard
PO Box 5963
Bellingham, WA 98227-5963
(360) 671-2712

Cle Elum Roslyn Chamber of Commerce
Box 43 401 West 1st Street
Cle Elum, Washington 98922

Washington State Department of Ecology
Attention: Mark Shuppe

Water Resources Program
PO Box 47600
Olympia, WA 98504-7600

Re: Small Business Economic Impact Statement - Publication No. 10-11-016

Mr. Shuppe;

The Cle Elum Roslyn Chamber of Commerce representing small business in Kittitas County takes exception to the conclusion that the proposed rule only affects businesses that are seeking new appropriations of groundwater and the determination that this is a minor cost therefore exempting Ecology from needing to prepare a Small Business Economic Impact Analysis.

The current moratorium and this proposed rule has eliminated 80% of the number one industry in our region of Kittitas County. Those developers, if they are still in business, are now 20% of what they were three years ago. The impact goes well beyond that, consultants, surveyors, equipment rental, hardware stores, lumber, banking, grocery stores, restaurants, gas stations, hotels ... the list is endless ... are all grossly impacted by these rules.

The analysis also implies that purchasing water rights is an easy economical option for people, which it is not. A water bank is in place that covers a small area within the boundary of the rule but outside of this program finding someone willing to sell a senior water right is not an easy task.

We appreciate the opportunity to comment and strongly disagree with the conclusions contained in Publication No. 10-11-016 and believe a Small Business Economic Impact Analysis is required of Ecology when an action such as the temporary or the proposed permanent rule.

Respectfully submitted on behalf of the Cle Elum Roslyn Chamber Board of Directors

Sincerely,

Judy Tokarsyck

Judy Tokarsyck
Executive Director
Cle Elum Roslyn Chamber of Commerce
401 West 1st Street
Cle Elum, WA 98922 (509) 674-5958

Johnson, Roger E. (ECY)

From: Linda Velie [lindaveliesnodgrass@gmail.com]
Sent: Wednesday, August 25, 2010 11:23 AM
To: ECY RE Kittitas Rules
Subject: Comments on the Proposed Groundwater Rule for Upper Kittitas

I am communicating my HUGE concern about the Proposed Groundwater Rule for Upper Kittitas. My husband and I put our life savings into a little home just above the Teanaway River, and lately there has been discussion of subdividing the acreage across the river from us into a huge subdivision. I know that has been put on hold, thank goodness. Now there's discussion about water rights.

This rule would reduce to NO VALUE, the property we purchased after a lifetime of work, so that we could retire in the beautiful Teanaway River Valley. This is our PERMANENT, not seasonal, residence. There are just two of us living here. We have not cultivated the 6 acres we bought. It's natural woods, and scruff, with our home on it.

I emphatically oppose the current wording and intent of WAC 173-539A. What the Department of Ecology (DOE) is referring to as a so-called Ground Water Rule and/or water moratorium for upper Kittitas County until a ground water study takes place, is in actuality an anti-growth anti-people building ban. And the proposed ban has zero scientific evidence that supports the DOE's current temporary or the proposed new permanent building bans, unless property owners first obtain senior water rights pre-dating May 10, 1905, which are not available to the entire region in the upper county affected by this proposed rule.

Currently there is a "red zone", "yellow zone" and "green zone" of locations in the upper county, and only those in the "green zone" are allowed to buy water from the Suncadia Water Bank according to information I have been able to obtain. I understand that the Swauk drainage properties must buy water from senior water rights holders that are only located in that drainage, of which NONE are for sale today. The same scenario as in the Swauk drainage applies for the Teanaway drainage. I see no reference to drainages or zones in this permanent rule. Will all property owners in the upper county be allowed to buy from the Suncadia Water Bank if this rule is put into place? And if so, this senior water rights option will soon be depleted, so what will happen after this occurs?

Quote from G. Thomas Tebb, Central Regional Director, DOE – June 25 letter to Catherine Bambrick, Administrator, Kittitas County Public Health Department:

> *"We also believe more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin to help provide a clearer path for making groundwater decisions."*

I agree that "*more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin*" and this also applies throughout the state. This information must be determined <u>prior</u> to enacting any new rule banning use of exempt wells, without strong scientific evidence to the contrary that would support such a rule, which is why the current temporary moratorium should end and the new proposed rule should not be enacted.

I do understand the authority held by DOE to protect senior surface water rights in this state, but what I don't understand is why DOE does not apply a statewide ban on all exempt wells if DOE is of the opinion that exempt wells from anywhere in the state affect surface water rights. Do I want to see a ban across the state? No, but at least that would not unfairly just pick on the innocent property owner in upper Kittitas County.

> ***WAC 173-539A-010 Purpose.*** *The purpose of this rule is to*

withdraw from appropriation all unappropriated ground water within upper Kittitas County pending completion of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.

Per the above section of the proposed new rule the DOE will no longer allow additional buildings or new "*unappropriated*" exempt wells in the upper county until "*completion of a ground water study*" that the DOE seems unwilling to move forward with. Why is that? According to published reports, the DOE is currently sitting on $700,000 from the state that was appropriated for this study, yet nothing is happening. My guess is because the study will most likely prove that the aquifer in the upper county is doing just fine and not affecting surface water that provides downstream river flows to senior water right holders, and this fact would (or should I say "should") end the current and proposed DOE building ban. And again I will state the building ban is the true intent of this permanent rule.

If DOE feels they need more funds before beginning the study, then why doesn't DOE just charge a "reasonable" fee of possibly $200 for all property owners in the entire county with unappropriated existing exempt, and possibly property owners that would like to drill a new well on their property could be charged a similar fee, say $300. That would bring in quite a bit of extra revenue for DOE to perform this study, and in the meantime people could move on with their lives and not be sitting on nearly worthless property if they are located in the red or yellow zone in the upper county where they can't buy from the Suncadia Water Bank.

The DOE statement "*water budget neutral*" is not clear to me. For this to statement to be truthful, wouldn't this actually mean that if let's say "family A" wanted to sell their current property and house in the upper county that is on an exempt well without senior water rights to "family B", and "family A" was a 2 person family and "family B" was made up of 3 or more individuals, they would not be allowed to do so by DOE because there is no way this exchange could be considered "water budget neutral". I see no language in this rule that would change anything in regards to existing buildings. What about if "family A" just wanted to stay in their current house, but they had two babies that were born during the current or proposed bans, would they have to move out of their house in the upper county because their family with their two additions would not be considered "water budget neutral"? Or if they were permitted to stay, would they be allowed a building permit to enlarge their small home to make room for their growing kids? What about seasonal families becoming permanent families? Where does "water budget neutral" not apply, and if it does not apply to all non-neutral water budget uses, why is DOE trying to apply this new rule to basically only new building permits? Would this rule even have a chance of holding up in court in its current "selective" application to certain property owners, but is not applied fairly to all?

WAC 173-539A-020 Authority. *RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for permit-exempt wells where needed.*

In 1999, ecology imposed an administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, which includes Kittitas County. That moratorium did not apply to permit-exempt withdrawals. In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new permit-exempt wells on senior water rights and stream flows. Ecology consulted with standing

committees of the Washington state legislature on the petition and proposed withdrawal. Ecology rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County. ***Ecology proposed a rule in January 2009 and Kittitas County questioned ecology's authority for the proposed rule. Ecology later invoked the dispute resolution process under the MOA and the MOA was later terminated.***

WAC 173-539A-027 Advisory. *All unmitigated withdrawals that began after May 10, 1905, may be subject to future curtailment due to conflicts with senior water rights. All unmitigated users are advised to obtain mitigation through senior trust water rights to avoid such curtailment.*

If property owners use "*unmitigated*" water (exempt wells), as most do in the upper county and across WA State as a whole, and they do not have senior water rights that date prior to May 10, 1905, they are subject to have their water use curtailed. Why is this "advisory" even in this proposed rule that only applies to upper Kittitas County? And how would this action be any different for any junior water right holders anywhere in the entire state of WA? If the answer is no different for junior water right holders anywhere in the state, then this inflammatory section of the proposed rule should be removed, as its sole purpose seems to be to frighten property owners, and more importantly scare potential lenders away from financing all real estate in the upper county if their property does not have a senior water right to go along with the exempt well that serves the residence. This would create an even more negative valuation of properties in the upper county than that which will occur if the remaining portions of this proposed rule are enacted.

WAC 173-539A-050 Water budget neutral projects. (1) Persons proposing a new use of ground water shall apply to ecology for a permit to appropriate public ground water or, **if seeking to rely on the ground water permit-exemption, shall submit to ecology a request for determination that the proposed permit-exempt use would be water budget neutral.**
(2) As part of a permit application to appropriate public ground water or a request for a determination of water budget neutrality, applicants or requestors shall include the following information:
(a) Identification of one or more water rights that would be placed into the trust water right program to offset the consumptive use (as calculated pursuant to subsection (3) of this section) associated with the proposed new use of ground water;
(b) A site map;
(c) The area to be irrigated (in acres);
(d) A soil report, if proposed discharge is to a septic system and the applicant or requestor proposes to deviate from the values in subsection (3) of this section;
(e) A property covenant that prohibits trees or shrubs over the septic drain field; and
(f) A copy of the sewer utility agreement, if the proposed wastewater discharge is to a sanitary sewer system.
(3) Consumptive use will be calculated using the following assumptions: Thirty percent of domestic in-house use on a septic system is consumptively used; ninety percent of outdoor use is consumptively used; twenty percent of domestic in-house use treated through a wastewater treatment plant which discharges to surface water is consumptively used.
(4) Applications for public ground water or requests for a

determination of water budget neutrality will be processed concurrent with trust water right applications necessary to achieve water budget neutrality, unless:
(a) A suitable trust water right is already held by the state in the trust water right program; and
(b) The applicant or requestor has executed an agreement to designate a portion of the trust water right for mitigation of the applicant's proposed use.
(5) Applications to appropriate public ground water or requests for determination of water budget neutrality that do not include the information listed in subsection (2) of this section will be rejected and returned to the applicant.
(6) To the extent that ecology determines that the mitigation offered would not reliably mitigate to be water budget neutral, ecology may deny the request or limit its approval to a lesser amount.

This section seems very disconcerting me, as I am aware of numerous individuals who own just one small parcel in the upper county, who have bought their property over the last 5 to 10 years. Some live and work on the west side of the Cascade Mountains in the Puget Sound area during the weekdays where there are more jobs with better pay. Others, like us, LIVE in our homes here. Many of these property owners have already drilled theirs wells and are using water from them every weekend. Others have waited to drill their wells and build their dream homes due to cost or other more pressing financial necessities such as sending their children to college or possibly dealing with health issues as they age and prepare for retirement. Most have spent a good portion if not all of their retirement funds for their upper county properties. Also keep in mind the lower income property owners that have not been able to afford home ownership on the west side of the mountains where they work and rent their living quarters. They have been able to scrape by, save a little here and there, and just barely afford to buy less expensive property in the upper county to be able to build their dream home someday - which might only be a 1000 SQ FT 2 bedroom house that might not seem like much to many, but to them it would be their castle.

PLEASE tell me that our little home will NOT become a place without water...we own our home, we own our land, we have a well. We do not want to live in fear that we may lose our right to use the water from our well.

Thank you.

Linda Velie

509 674 5927

206 790 4506 (cell)

Johnson, Roger E. (ECY)

From: Betty Vincent [cleelumrealestate@gmail.com]
Sent: Monday, August 23, 2010 12:04 PM
To: ECY RE Kittitas Rules
Subject: Kittitas County Water situation

Hello,
I am a resident of Upper Kittitas County. I am writing to express my concerns about the water situation. It appears there are words in the last draft agreement that state that anyone with an exempt well could be cut off of water usage. This is something that really scares me. Lenders will not lend on properties and people will have the value of their properties decreased drastically. I have a client who has acreage in the Teanaway, he was asking $165k for 6+ acres and now that land is nothing more than a nice camping spot worth not even half of what it was. From studies in other areas, it has been concluded that ground water is ground water and is not coming back up to the surface unless it is pulled back up by a pump... which says that the down stream surface water users are not being impacted by our using ground water. I was quite shocked to read in the paper that we were about to loose $700k for the study unless we used it... which tells me that someone was sitting on it and not looking for some kind of resolution.
I get the impression that is is more of a fight with the DOE and the County than it is and effort to find a resolution. What can be done to turn this around? Look at the HUGE amount of water that goes to the Seattle side of the mountains from the Chester Morris water shed. We are getting the water from the other side of those same mountains and NOT any where close to a fraction of the number of users. Yes, we have drought years, but we also have flood years (it's a normal 7 year cycle), it all balances out. I really do not believe there is a shortage of water, but there sure seems to be a shortage on people trying to get along, come up with solid proof there is a problem and the if so, to come to a solution... instead of crying "wolf".
Thank you,
Betty Vincent
PO Box 617
Easton WA 98925

Appendix B: Transcripts from public hearings.

DEPARTMENT OF ECOLOGY

STATE OF WASHINGTON

WATER RESOURCES PROGRAM

UPPER KITTITAS GROUND WATER RULE

CHAPTER 173-539A WAC

PUBLIC HEARING

July 28, 2010

Walter Strom Middle School

Multi-purpose Room

2694 State Route 903

Cle Elum, WA

HEARINGS OFFICER JUDY BEITEL: So let the record show that it is now 7:06 p.m. on July 28th, 2010. And this hearing is being held at Walter Strom Middle School in Cle Elum. The hearing is on the proposed rule for the upper Kittitas ground water rule in Kittitas County.

Notice of this hearing was published in the State Register on July 7th, 2010. Legal notice of this hearing was published in the Ellensburg Daily Record and the Cle Elum North Kittitas County Tribune newspapers on July 14th and 21st, 2010.

In addition, the rule proposal notice was mailed or e-mailed to over 500 interested parties. Any testimony received at this hearing along with any written comments received by the end of the comment period will be a part of the official hearing record for this issue.

The comment period closes on August 11th. Those providing comments will receive a copy of the Responsiveness Summary and Concise Explanatory Statement prepared by ecology in response to the public comments.

If you would like to send written comments, please mail them to Mark Schuppe, Department of Ecology, Central Regional Office, 15 West Yakima Avenue, Suite 200, Yakima, Washington 98902-3452. They can be faxed to the attention of Mark Schuppe at 509-575-2809 or e-mailed to Kittitas@ecy.wa.gov by 5 o'clock p.m. on August 11th, 2010.

1 You may also provide your written comments to me
2 tonight. All comments provided at this hearing will receive
3 the same consideration as comments that are given orally
4 tonight. They will receive the same considerations as the
5 ones faxed in or mailed in as well.
6 Currently, I have 25 people who have indicated they
7 want to make comments tonight. I would ask you to please
8 summarize your lengthy comments and then you can provide
9 written ones of the longer comments to ecology.
10 I will call the names in the order that I received
11 your cards. Please state your name and any organization
12 that you are representing. During the public comments, you
13 may ask questions for the record, but we cannot answer any
14 questions and we cannot enter into any discussion.
15 If you have questions that are not for the record,
16 staff will be available after the hearing to answer any
17 questions.
18 Okay, the first person I have is Richard or Carol
19 Brewster? No, pass? Okay. Joe Gardner.
20 MR. JOE GARDNER: My question was acknowledged at
21 the start.
22 HEARINGS OFFICER JUDY BEITEL: Again, I would
23 just like to reiterate, if you do, I would like you to come
24 up here so the reporter can get your comments. Alan
25 Crankovich?

1 MR. ALAN CRANKOVICH: I'd like to thank you for
2 this opportunity to speak. I'm Alan Crankovich, Kittitas
3 County District 2. I represent the district that includes
4 the area defined as Upper Kittitas County for the purpose of
5 defining the boundary for the current moratorium you are
6 considering for adoption of this permanent rule.
7 Tonight I am speaking as one member of the board of
8 county commissioners. Formal comment of Kittitas County
9 will be submitted before the end of the comment period.
10 And I will be brief because you've heard my position
11 before. But before I begin, Commissioner Jewell, who has
12 been instrumental in ongoing negotiations, was unable to
13 attend this evening because he is on a well deserved
14 vacation with his family, and Commissioner McClain had a
15 prior commitment.
16 For nearly three years there has been countless hours
17 of effort by many to reach an acceptable resolution to this
18 issue. During this process, some progress has been made,
19 such as a conceptual domestic water reserve program which
20 would include the lease or purchase of senior water rights
21 for mitigation for water-short years. And more recently the
22 creation of a water bank in which water rights may be
23 acquired.
24 While the water bank has provided relief for some, the
25 area in which it can be applied is limited and still doesn't

1 provide opportunity for others in areas categorized as in
2 the red zone.
3 Overall, there are still more questions than answers.
4 You have also heard concerns from numerous other counties in
5 how this issue may ultimately effect them. Their letters
6 have been directly sent to ecology and I request that they
7 become a part of the official record.
8 As they have indicated, and I also believe, this issue
9 should be addressed by the legislature. From July 16, 2009,
10 to today, my position remains that a moratorium is not the
11 answer. The impact to our citizens, businesses and
12 communities cannot be considered as an acceptable level of
13 collateral damage in an effort to achieve an agency goal.
14 I respectfully ask you to give full attention to and
15 carefully weigh the testimony from those whose lives have
16 been directly impacted by this action as you consider
17 adoption of this permanent rule.
18 HEARINGS OFFICER JUDY BEITEL: Thank you.
19 (Applause). The next one is Kelli Conner.
20 MS. KELLI CONNER: Good evening. My name is
21 Kelli Connor. My husband and I own and operate the sawmill
22 in the Teanaway Valley. I find it hard to believe that two
23 women can form a group, find an environmental loophole with
24 a state agency, and with a few commissioners they can't
25 fully read an agreement, can literally kill an entire

1 portion of a county.
2 All this has been done with no evidence whatsoever
3 that there was ever a problem with exempt wells. Public
4 input from long-time well-drillers in our area confirmed
5 there has not been a well gone dry after another one was put
6 in. Nothing at a state, local or federal level is ever done
7 without exacting an economic impact study.
8 Was this done for our upper county? No. I can tell
9 you as a person on the ground level of the construction
10 industry that since the moratorium, business in the upper
11 county is now nonexistent. All of our business is either
12 from a dribble from Ellensburg, quite a bit from Grant
13 County, and a bit from Wenatchee and from the other side of
14 the pass, not from our locals. They can't build anything.
15 Water banks have always been baffling to me since this
16 popped up. Water rights as far as I've always been
17 explained by many of the farmers that we talk and
18 communicate with, is they always have a "use it or lose it"
19 policy. They nag you to no end, they monitor your wells,
20 and you are only allowed to irrigate between the months of
21 May and September.
22 But suddenly Suncadia can take a water right, and
23 irrigate the water right, meter it out to different people
24 in the county, and year-round. Never could figure that one
25 out.

I still have not heard a real reason to impose this ridiculous moratorium on just our part of the county. Why not do it for the entire county? Was it because no one wanted to jeopardize the chance that the largest water park in the Pacific Northwest that's coming in? Or was it some black helicopter conspiracy that Suncadia, who is in major financial trouble, holds all the cards on anyone getting water now as long as you can pay for it.

Did some palms get greased there? Heck, why not cut off the entire state until the study is done? Or is that your devious long-term plan and this is just a test case?

Farmers don't have hefty retirement packages like you people do. Some of them counted on selling a chunk of their land for when they want to retire and slow down. Some would like their children or their grandchildren to build a little parcel next to them and live close by for when they grow older. You've killed these dreams.

In Oregon, voters handily approved Measure 37 requiring just compensation for regulatory takings. Passed handily just for such insane policies like this. It requires that an entity that creates a regulation that would change your future potential on a piece of property, that they have to pay you the difference. Perhaps that's what it's going to take to get you to stop and listen to the people that pay your salary.

1 I find it ironic that Jay Manning, the one originally
2 from the Department of Ecology that was so Gung ho on the
3 moratorium is now the Queen Gregoire's jester. She's the
4 one requesting that you draft a proposal making this
5 permanent.
6 I wondered if the county commissioners that signed on
7 to that management agreement originally are going to get a
8 sweet position too, you know, that would at least explain
9 why they signed the death certificate for all their
10 constituents.
11 Perhaps I will say in closing, if you insist on
12 imposing your socialist ideals on the upper county, maybe
13 you should pass Vaseline out to all the residents so that
14 when we're bent over, it's not so painful. (Applause).
15 HEARINGS OFFICER JUDY BEITEL: If there's going
16 to be a lot of testimony and you are really going to want to
17 support these people, but I encourage us to hold our
18 applause to the very end and then we'll all have a round for
19 everyone who is doing that. (Inaudible response.) Perry
20 Huston? Perry Huston?
21 MR. PERRY HUSTON: That would be me. I'm still
22 up right, but I'm about half deaf, so if you can't hear me,
23 let me know. My name is Perry Huston, P-e-r-r-y,
24 H-u-s-t-o-n. I'm the director of planning and community
25 development for the Okanogan County, Washington. I'm here

at the direction of the Okanogan County Board of County Commissioners.

I will also disclose for the record I was a Kittitas County commissioner during the period of January 1999 to December 2006.

I'll start with the recommendations that my comments will subsequently support. One, rescind all versions of the Upper Kittitas County rule and continue the work to finish the hydrogeologic study and to set in place an ongoing monitoring program for both ground and surface water supplies in Kittitas County.

Two, continue the efforts in progress to resolve the ambiguities and inconsistencies regarding implementation of the Campbell-Gwinn decision.

Number 3, relying on existing laws regarding impairment to resolve proven impairment complaints. The emergency rule that was implemented was in response to a number of issues, most of which have no root in water supply. History as always tells the story.

The 2002 Cambell-Gwinn decision was a case that originated in the Yakima County. The attorney general was Christine Gregoire, who also authored the attorney general's opinion that laid the foundation for the 5 to 4 Supreme Court decision.

Representing the appellant was the just then assistant

1 attorney general Brian Faller. The counsel representing the
2 Environmental Law and Washington Environmental Council who
3 filed a brief was Jay Manning. When this controversy reared
4 up some four or five years ago, the head of the Department
5 of Ecology was Jay Manning.
6 The assistant attorney general working with the
7 Department of Ecology was Brian Faller. The governor was
8 and is, of course, Christine Gregoire. A lot of ownership
9 in what is arguably a predetermined outcome.
10 The Okanogan County commissioners have asked the
11 Department of Ecology to undertake the review of WAC
12 173-548, which is the Methow rule. This emergency rule was
13 adopted as a result of pressure brought about by the panic
14 over what was projected to be tremendous growth driven by
15 the Early Winter Ski Resort proposal some 30 years ago.
16 Bare in mind the ski resort never came to be.
17 In this response to my commissioners on May 2010,
18 Director Sturdevant suggested, "There has not been
19 sufficient information to support a rule writing process in
20 the Methow."
21 The Methow Valley is one of the most scrutinized
22 pieces of real estate on the planet. And I can assure you
23 that there is not enough information to support revisions to
24 a rule adopted in the Methow Valley 30 years ago to deal
25 with the scenario that never came to be. You certainly

1 don't have enough information to adopt a rule here.
2 Now on that note, I don't think you have enough
3 information or any real indication of pending disaster to
4 justify this effort. Let's direct all of the effort being
5 expended in this multi-rural writing effort to gathering and
6 developing the information needed to make informed decisions
7 of this magnitude.
8 Develop new monitoring programs for ground water,
9 measure those against surface flow, precipitation levels,
10 measure that data against the amount of new ground water
11 withdrawals. If any of that has been done to any measurable
12 degree, county officials don't seem to know about that.
13 It is time to put politics and speculative impacts
14 aside and create a useful approach to resolving this issue.
15 Efforts are underway to resolve the confusion driven by the
16 implementation of the Campbell-Gwinn decision. The fruits
17 of that effort should have general application and will
18 certainly have application here. Let's put our effort into
19 accomplishing a firmer legal approach to the use of exempt
20 wells before we dot the landscape with individual area-
21 specific rules.
22 The Department of Ecology has the rules on the books
23 to deal with proven impairment complaints. Use those tools
24 to take defensible action on proven cases of impairment.
25 That's the way western water law works.

1 Now, my concern is we spend so much time and resources
2 in debating the legal issues. We never get around to
3 directing any real effort to the question of water supply,
4 more specifically to monitoring water supply.
5 One day we will have supply issues that will be
6 resolved only by new and better storage capacity and water
7 management.
8 The Columbia River initiative achieved little results
9 in terms of storage, but I am still hopeful. There are
10 still plans lying around from modification of the gates of
11 Lake Cle Elum, other relatively inexpensive projects that
12 increase storage.
13 The greater storage capacity opportunities from a
14 responsive management practices are created, let's work on
15 that. It's my belief that in the end, what truly suffers
16 from a lack of focus on the real issues is the resource
17 itself.
18 The legal debate is a distraction from what should be
19 the centerpiece of the discussion which is supply. We need
20 to get on task and keep focused on the issue of water
21 supply. We put our attention and effort on everything but a
22 focus in comprehensive planning of water supply management.
23 We cannot let our efforts be driven by those with a vision
24 of the landscape that they have been unsuccessful at
25 achieving at the ballot box or local government hearing

1 rooms.
2 On the same token, it's not an issue of private
3 property rights. Those are comprehensive planning issues
4 and the responsibility of local government and the citizens
5 who elect them.
6 Responsibility of the Department of Ecology is
7 different. And your efforts are being deluded by the
8 inclusion of political maelstrom that surrounds this issue.
9 Let's get to work on the real solutions and frankly the
10 adoption of this rule is not one of those solutions. Thank
11 you for hearing my comments.
12 HEARINGS OFFICER JUDY BEITEL: Thank you.
13 (Applause) Jeremy Bach.
14 MR. JEREMY BACH: Hi, MY name is Jeremy Bach. I
15 live in Ellensburg, 3326 Wilson Creek Road, represent Bach
16 Well Drilling and all my customers as well.
17 My question is -- I know you can't answer it, but Tom,
18 you mentioned earlier about opening your toolbox. I'd like
19 to know why you haven't opened your toolbox on programs like
20 drilling deep mitigation wells, allowing people to still
21 drill while stealing off any surface water.
22 You guys have totally taken a blind eye to that. It's
23 been brought up a lot. And it would work in the entire
24 upper county, not the green zone, red zone, wherever. You
25 guys allow these same type of constructions and ideas to be

done in the lower valley in Yakima during times of emergency drought. And those wells use thousands of gallons a day. And you are talking about ones that are a couple gallons a minute.

I would like to know why I guess you guys are all committed on mitigation water banks, but you close your eyes to every other idea that doesn't cost that much to the consumer.

HEARINGS OFFICER JUDY BEITEL: Thank you. Jim Sanders? No?

MR. JIM SANDERS: Yes, yes, yes. Before I get to my notes, I've got some questions I would like to ask. I know you can't answer them right now. Why didn't the study start three years ago? Why are you still waiting?

I know why. I think it's obvious, you are hoping you won't have to do the study. You are hoping the county will come up with a water bank reserve plan and spend the money on that and you won't have to do the study.

The supreme court indicates, and you said you did a cost benefit analysis; is that public?

MR. TOM TEBB: There's a copy of that in the back room.

MR. JIM SANDERS: Cool, thank you. The supreme court has indicated that in order for you to place any -- there's an obligation on ecology to consider the total

1 environmental and ecological factors to the fulfilling of
2 deciding major matters.
3 Ecology is required to consider the provision of SEPA,
4 environmental and an economic impact to the area. So in
5 your cost benefit analysis, did you include in your cost the
6 cost that we have incurred?
7 Okay. Our city governor had three choices: Do
8 nothing, but since our county had abused land use by
9 allowing cluster platting, this was not an option.
10 Stop the drilling of new wells while a scientific
11 study proceeds to determine if there's a problem; stop all
12 development in the county during a recession to inflict the
13 most pain to enforce compliance.
14 Our city governor chose the last option and has
15 succeeded in setting upper county back 10 years.
16 Compliance? We have people that are happy to spend 10,000
17 dollars to build on a house that they've already drilled a
18 well years ago.
19 We have a lower county newspaper that proclaims the
20 moratorium has had some impact on the economy of upper
21 county, but probably no more than 10 percent. That was
22 earlier this week by the way.
23 The governor's concept of ground water and surface
24 water does not apply to control low river systems. Water
25 reservoirs provide for the strong flows in summer, I think

1 May and September somebody said, that irrigation is done,
2 they are needed for basin farmers. Without them, the
3 current level of allocation would be impossible.
4 Senior water rights prior to 1917 would have been
5 based on natural river flow because, there was no
6 reservoirs, so these reservoirs provided additional water
7 during the growing season. So thank God for the federal
8 funding that we all paid for.
9 The reservoirs and the strong river flows provide
10 inflow into ground water that would otherwise be outflow
11 during low flow periods of a natural flowing river. Natural
12 resources management and the environmental department states
13 during high flow periods, ground water recharge tends to
14 occur through the riverbed, whereas ground water often
15 contributes to low flow recharge. In other words, the fall,
16 the river's down, it might start drawing ground water.
17 They also state a possible advantage of reducing the
18 water table prior to the rainy season is that it may
19 increase the potential for ground water recharge. Again, I
20 hate to get into the science, but that's probably something
21 we will find out with a real study.
22 These reservoirs serve all Washingtonians from the
23 source to the Columbia River. Without them, lower ground
24 water tables would mean deeper and fewer wells from the
25 summit to the Columbia River. Lower river flows in summer

1 would make irrigation impossible except for the most senior
2 water rights holders, as you said.
3 Cities on the Yakima River, such as Roslyn, could not
4 be sustained. The conclusion I draw from that is that
5 there's a positive impact of ground water on river flow, but
6 it's only during low water conditions.
7 Since the reservoirs ensure a high flow during the
8 irrigation period, there is no negative ground water impact
9 on the Columbia River and other controlled-flow river
10 systems in Washington.
11 I believe that the successes that you stated, that
12 you've done already in Washington, were on uncontrolled
13 rivers. This means there is equitable sharing of the
14 federally-funded reservoir water as there should be. We all
15 paid for it.
16 Next point, the governor's contention that all ground
17 water or all waters in the state, including rain, by the
18 way, are allocated as flawed. According to the city
19 governor's study -- the 2000 release, I don't know how many
20 she's done -- in the section discussing the formalized
21 registration act of 1967, later reviewed in '75 I think,
22 ecology has recorded about 169,000 claims under the act, but
23 only litigation could establish how many of the claims
24 represent valid water rights. Have you done litigation on
25 169,000 claims? You can't answer.

1 If this is the case, then how can the government state
2 that all water in Washington State is allocated and
3 controlled by the state? How many of these pre-1917 claims
4 are invalid? Let's have the state do an inventory and move
5 to take back the invalid claims.
6 Since that time, the state has ignored the
7 use-or-lose-it rule of water rights and in some cases has
8 assisted abuse. Suncadia is an example of a water right
9 that has lost the right to most of the water claimed as they
10 have not used the claimed amount for over five years. Five
11 years, use it or lose it.
12 The market is the state water bank system developed by
13 this governor and the DOE. The demand is the water
14 moratorium imposed on the upper county and the new
15 requirement to purchase mitigation water from the market.
16 The rest of the state had better take notice as the
17 governor's trough, the state water bank system, grows, so
18 will the demand in other parts of Washington.
19 I'm not going to go into the rest of this, it will be
20 in the record. But there is an impact on everybody in this
21 room, whether you are here for the moratorium or against it.
22 Roslyn -- I don't have the right numbers here I know, but
23 Roslyn appealed their assessment, 165 million or so, give or
24 take 10 or 20 million. They claimed it's only worth 66, 67
25 million.

1 The state came back last week and said no, it's only
2 worth 45 million.
3 The tax rate in this county, the money that's taken
4 for schools and police and fire, is going to be reduced this
5 year. The county is going to have to deal with that this
6 year. But next year, no problem. They will -- they won't
7 reassess the properties in Roslyn, in the cities.
8 My property will be reassessed by then. I've given up
9 hope that this county is going to come back. So all of us
10 that have been affected by this moratorium that have land
11 that we cannot sell or build are going to get reassessed,
12 our property values are going to go down. Yours won't in
13 Cle Elum and Roslyn and other places.
14 The tax, the amount of taxes needed to support this
15 county won't change. Everybody's tax is going up except
16 mine, mine will go down. Until they do reassessments on the
17 rest of the county. We all know that even the houses in Cle
18 elum and Roslyn have lost an enormous amount of value in the
19 last year and a half.
20 HEARINGS OFFICER JUDY BEITEL: Thank you.
21 Senator Janea Holmquist?
22 SENATOR JANEA HOLMQUIST: For the record, I'm
23 Janea Holmquist, state senator of the 13th legislative
24 district, and have been to all of these hearings and I have
25 never been so frustrated as a local elected official.

1 And over the last two years, I've been hearing from
2 the citizens that elect me that they really feel that the
3 state is moving in the wrong direction, that we would be
4 adopting emergency temporary rules and now looking at a
5 proposed permanent rule without the scientific
6 justification. And I can tell you that I am also very
7 frustrated as a legislator that that money has been there
8 and we haven't yet even started that study.
9 Since the moratorium was announced, I can say for sure
10 that the area's economy has suffered, people have lost their
11 jobs, families have lost their homes, and businesses have
12 closed their doors as a direct result of the moratorium, a
13 direct result of the state's actions.
14 And under this proposed permanent rule, the area's
15 economy will continue to stagnate and my citizens will
16 continue to suffer.
17 And keeping these facts in mind, I marveled, I don't
18 know how many of you actually read the Small Business
19 Economic Impact Statement, but keeping these facts in mind,
20 I marveled as I read that Small Business Economic Impact
21 Statement, as well as the Preliminary Cost Benefit and the
22 Least Burdensome Analysis.
23 Now if you look at that Small Business Economic Impact
24 Statement on page 6, I'll quote, it says, "Ecology expects
25 little or no job impacts to come from this proposed rule."

1 This is in stark, stark contrast with the reality of upper
2 Kittitas County's economy.
3 And I've also found some other issues with the Small
4 Business Economic Impact Statement and I will just highlight
5 them. And then I have a letter that is all ready to go off
6 to Mark with the details.
7 But the base line that is used for the Small Business
8 Economic Impact Statement should compare conditions under
9 this proposed permanent rule versus the day before the
10 moratorium was announced, not between the current emergency
11 rule we are living under and the proposed permanent rule.
12 And therefore the current report does not show the
13 moratorium's real economic damage in my mind.
14 It also fails to relate the negative economic impacts
15 that have been felt throughout the value chain within the
16 area; for example, from manufacturer to supplier, to builder
17 and ultimately to the consumer.
18 And I'll just give you a couple examples of the
19 obvious negative economic impact that we have been feeling
20 in the upper Kittitas County. For example, we have
21 construction companies who are small businesses. And under
22 these proposed rules that we are here to testify on today,
23 their ability to construct new homes will be significantly
24 restricted, thus undermining their revenue, common sense.
25 If the construction company cannot find water or

1 afford the water, then that business could potentially close
2 their doors or lay off employees.
3 Another example, a construction company buys their
4 supplies from the suppliers; right? Well, the suppliers in
5 our area are also small business owners. This Small
6 Business Economic Impact Statement is completely silent in
7 regard to these impacts.
8 The moratorium has and will continue to impact Cle
9 Elum's economy up and down the value chain and I have no
10 doubt that that's a truth.
11 I think there is data available on the impacts of the
12 moratorium that we should be using and looking, reviewing
13 unemployment rates, vacancy rates of businesses, reductions
14 in collections of sales taxes from the area. And then I
15 think we could gain a real true sense of the true potential
16 real negative economic impact.
17 And frankly, I think the Small Business Economic
18 Impact Statement needs to be completely redone to capture a
19 report on these obvious sources of economic loss to small
20 businesses and to the citizens in the area.
21 Quickly on the Preliminary Cost Benefit and the Least
22 Burdensome Analysis, I also read these. I'll quickly just
23 point out three points, and again I have details outlining
24 the rest of it.
25 The alleged benefits of adopting these rules I found

1 to be very nonsubstantive and somewhat unrealistic. For
2 example, the salmon restoration projects in my mind are
3 benefit of grant funding, they are not benefits of these
4 proposed rules. And the proposed rules will not eliminate
5 the risk of litigation. And that again I think is something
6 we have to make clear.
7 I think the actual benefit of the proposed rules is
8 closer to zero and therefore the net costs exceed the net
9 benefits.
10 One thing I also notice is that this report implies
11 there will be no water storage projects completed in the
12 next 20 years in the Yakima River basin. So my question is
13 is that really the position of our governor and the
14 Department of Ecology is that there will be absolutely no
15 water storage started in the next 20 years? And at the very
16 least I think water storage's impact should have at least
17 been mentioned in this report and it wasn't even mentioned.
18 Additionally, one quick point on the CR 102 that was
19 filed with the summary of the proposed rule, I found that to
20 be deficient because it fails to even mention the metering
21 requirement in the rules. And I consider metering a
22 significant requirement that should have been at the very
23 least mentioned in the summary.
24 In conclusion, I am still mystified that we are even
25 moving forward and looking at a proposed permanent rule

1 without scientific justification. It makes me ill. And I
2 think at the very minimal fair request is that ecology use
3 the same base line in its documentation and that we have a
4 good faith effort in compiling information for the Small
5 Business Economic Impact Statement and the Preliminary Cost
6 Benefit as well as the Least Burdensome Analysis. And
7 because at this point ecology has not done its due diligence
8 in considering the impact to small businesses, the citizens
9 and the landowners impacted, I think that you lack a firm
10 basis necessary to decide what is the most prudent course of
11 action and ask I ask you to refrain from adopting these
12 permanent rules. Thank you for your time. (Applause).
13 HEARINGS OFFICER JUDY BEITEL: Karla Schoon?
14 MS. KARLA SCHOON: I'm going to be very brief.
15 Janea pretty has much addressed everything I was going to
16 just talk about. If you haven't got a copy of the Small
17 Business Economic Impact Statement, I would encourage you to
18 pick one up and read it. The first thing that really struck
19 me, as Janea just said, is that most businesses are not
20 directly affected by the proposed rule for the Kittitas
21 County ground water area.
22 That is an absolute farce. And Janea went over the
23 impacts and what is resulted, which is very substantial.
24 From people losing their jobs to businesses closing as she
25 said. Lost revenue to the county for services that we are

1 going to need in the future, lower values for our properties
2 and retirement plans lost, dreams lost, families who can't
3 earn a living here. I mean it just goes on and on and on
4 and on.
5 So please, redo this thing and come up with something
6 that reflects the reality of what the past year and a half
7 have cost us. Let alone adding three or four more years
8 while you do your study.
9 And in light of the fact it sounds like by September
10 something you are going to know if those 7 or 800,000
11 dollars are actually going to be available for the study?
12 If they are not going to be available, then I ask you to
13 withdraw your proposal for a permanent rule because it's
14 contingent upon that study. Thank you very much.
15 (Applause).
16 HEARINGS OFFICER JUDY BEITEL: Ken Mirly?
17 MR. KEN MIRLY: My name is Ken Mirly, I'm a
18 property owner in the Ellensburg area. I would like to
19 speak against the moratorium. I believe it's a bad idea. I
20 think the water bank program is a bad idea.
21 I think what we need, as many people have already
22 pointed out, we need some scientific analysis done before we
23 get into making permanent rules, making a moratorium or any
24 such substantive changes to our environment.
25 I have a number of questions that come to my mind. A

1 lot of them center around the scientific study that needs to
2 be done.
3 To start off with, what's the relative annualized
4 average volumes of water under review, surface water flow,
5 aquifer size, well extractions?
6 On the back of an envelope, if we take the thousands
7 of wells that have been drilled at 5,000 gallons per day or
8 whatever the allocation is versus the amount of acre feet of
9 water that's flowing down the Yakima River and it's
10 tributaries every day, I mean, what percent is it that the
11 wells are extracting?
12 I suspect from preliminary conversations with some
13 scientific people, it's a relatively small percentage. I
14 don't think we have a problem that can't wait until this
15 study is done. I think jumping to a moratorium is way
16 premature.
17 I don't think we have reliably established that water
18 volume extraction by exempt wells now and in the foreseeable
19 future is a significant percentage of all available water.
20 But if it is, where is the data that says that? The data
21 isn't there because we haven't done the study.
22 I think we should forestall any permanent regulations
23 until such time as this information is better understood.
24 Other questions come to my mind: What is the
25 scientific or geological connection between ground water and

1 surface water in Kittitas County? Obviously there's some
2 connection but what exactly is it? We need the scientific
3 study to answer these questions. Exactly how and to what
4 extent would a prohibition on ground water extraction
5 improve or maintain surface water flow?
6 Is the ground so porous that a reduction in
7 underground aquifer water volume would significantly reduce
8 surface stream flows? Is the subterranean water contained
9 in one big, contiguous enclosure or is ground water found in
10 various quantities, separated by dry layers of non-porous
11 rock?
12 If ground water extraction does affect surface water
13 flow, is this interaction independent of well depth? We
14 talked about well depth, maybe deep wells is the answer, or
15 part of the answer.
16 Is there value in regulated shallow wells but not deep
17 wells as opposed to a moratorium? We have to regulate
18 something. Is there value in regulating how well water is
19 used as opposed to simply prohibiting the drilling of new
20 wells? Is there value in investigating and perhaps
21 tightening up the regulations on how surface water is used?
22 Someone already broached this subject.
23 If surface water rights are not being partially or
24 fully utilized, should those rights be adjusted accordingly?
25 If we are all in this together, the gentleman here left, but

1 if we are all living in this society together and we have a
2 limited amount of water to share, then I think it's
3 appropriate that surface water right holders as well as
4 those wanting to withdraw water from the aquifer have to
5 solve this problem together.
6 More detail questions like what happens when the
7 volumetric rights in Suncadia's water bank are fully
8 utilized, can senior water right holders other than Suncadia
9 sell or lease portions of their water to mitigate water
10 usage by exempt wells?
11 And finally, what set of circumstances would have to
12 be present for the lower county region to also have
13 restrictions placed on well drilling? Thank you.
14 HEARINGS OFFICER JUDY BEITEL: Thank you. Doug
15 Kilgore?
16 MR. DOUG KILGORE: Pass.
17 HEARINGS OFFICER JUDY BEITEL: Representative
18 Bill Hinkle.
19 REPRESENTATIVE BILL HINKLE: Thank you. For the
20 record my name is Bill Hinkle and I represent the 13th
21 District and I live in the upper county. And you know, it's
22 a good thing that we live in a well ordered society now
23 because we don't have pitch forks and torches here. But I
24 want you to remember that everybody has a tool shed and a
25 book of matches at home still. I couldn't resist that, you

always have to start out with something humorous.

You know, this is very frustrating for us. I usually am not upset in my stomach when I get up to talk. I talk a lot. But today my stomach is just churning and it's because of what's before us.

Tom, I've talked to you, I talked to Ted, I went to the governor about this. We are trying to find solutions here. As I went through this rule again last night, I realized, I guess to my astonishment, we are taking such a huge bite here administratively, far greater than I have seen any agency do administratively without really substantiating an enabling statute. I mean the statutes you quote are not being executed I think or are not being carried out consistently state-wide.

When we had this talk once before about the answer to Mason County and the request over there for a ground water moratorium was made by an Indian tribe. I'm not sure of the details there.

But I saw the letter in response to why you didn't institute a moratorium there. You basically used our arguments to justify not acting there which we have been trying to make. And it really didn't pass the straight face test when it comes down to it.

I think that's the thing you have got to remember is that people here, they are smart. You can tell by the

1 comments we have heard today.
2 By the way, Janea always provides a good technical
3 critique, I love it. And Commissioner Huston, our former
4 Commissioner Huston, I think did a very good job with
5 presenting a lot of the technical aspects too. I just want
6 to stay amen to both of those testimonies.
7 But the reality is we have to be consistent state-
8 wide. And I think it's dangerous when we as a state start
9 to move a direction administratively that really should be
10 reserved to the legislature.
11 Now, people have said it's up to the legislature to
12 fix this thing. We did try to fix this. We ran legislation
13 this year. We had a hearing but we couldn't even get a
14 vote.
15 Now, nobody here is going to say that we want to do
16 away with senior water rights. I think we all support
17 senior water rights. We probably all support building
18 storage too because that's a long-term answer is storage.
19 We all understand that.
20 But the reality is is there really a crisis that we
21 say there is right now. I would argue there is not. In
22 fact, had we been doing something with the money that has
23 been allocated prior to this year, if we had actually been
24 monitoring the precipitation and ground water recharge this
25 year, we would probably find there's 120 percent recharge of

1 the ground water in this upper county.
2 I mean it's kind of preposterous for most of us who
3 have been around wells and constructing things to think that
4 there's not a lot of water here. There's a lot of water
5 here.
6 And if you just listen to your own geohydrologist --
7 and I won't mention his name, but you know who I am talking
8 about -- and he mentioned three times to Jay Manning before
9 this was instituted, "Please don't do this because there's
10 not the scientific substantiation to do it."
11 The reality is that sure, it's probably -- there's a
12 lot of water connected, but does it matter? And that's my
13 frustration. Where we are going down here with the study
14 that's being done and finalized, and the study we are
15 proposing, we are going to make the assumption because it's
16 connected, and because there's this one (inaudible), that
17 there's somehow impairment, that there's somehow the
18 inability for someone to withdraw their water.
19 Well, it's just not true. What we need to understand
20 is not is there connection, that's the wrong question. What
21 is the geohydrology? How is this impacted? What is our
22 recharge like?
23 We haven't looked really at the aquifer recharge
24 areas. I know we didn't do it as the commissioner. Maybe
25 it's something we need to look at. But the reality is we

1 have to have a real look at the real science here. We can't
2 govern by legal theory when it comes to people's livelihood.
3 That is the issue.
4 This is a matter of the lifeblood of a community,
5 water. We are cutting it off. In the worst economy of the
6 world. This is like cutting your arm off in King County and
7 expecting the medics to show up, the best medic system in
8 the world. And guess what? No one shows up. There is no
9 one there to fix this thing. We have shut down the medic
10 units. We are shutting down the economy.
11 Now, you also have the possibility of taking this, I
12 think a lot of people would argue that -- I'm surprised no
13 one has sued yet frankly. The taking issue here is guys
14 like me who have wells drilled, and there's many of us here,
15 who did everything by the rules.
16 And you know, contrary to popular opinion, five years,
17 I think it's noble of you to provide a five-year window for
18 us to get our things built, but frankly some of us are still
19 working a few years. It's going to be at least 13 years
20 before I retire and the way the economy is going it might be
21 more like 15 or 20.
22 So the reality is that we can't always meet that
23 deadline. We buy our houses, we buy our property, I should
24 say, we build or we drill wells and we build roads and we do
25 things as we have money in preparation for this.

1 And we are not the only people that do this. We are
2 talking about guys who are even developing, they might want
3 to do a little subdivision just for the retirement. Because
4 guess what? They are a business person.
5 They don't have a state retirement, they don't have a
6 corporate retirement. They are invested in property.
7 That's all they've got. And basically with this rule, we
8 are doing away with that in many respects.
9 Now, I know, and I appreciate the efforts on the parts
10 of Suncadia and some of the others to put together a working
11 water bank.
12 I think it's funny that, by the way, they had to
13 spend, I don't know, 3 million dollars buying water rights
14 so they could do the resort and to buy a number of water
15 rights in reserve. And when it came to this year, we said
16 can they even use them? Your own people, you said we aren't
17 even sure we can use them.
18 Well, when we realized the absurdity of that, we went
19 ahead and figured out, oh, yes, we can use these water
20 rights to mitigate. But there was no plan when the permit
21 was done.
22 So we have a history of creating a huge cost to just
23 one private company, let alone what we cost every citizen
24 here. And you are asking us to trust that situation will
25 work well. I just don't know.

1 In a sense, let me just bring out one more thing.
2 Fundamentally, if you are asking us to put a lot of trust in
3 DOE and the ability of you to fund the processing of permits
4 and applications; correct? I mean there's a lot of yes, we
5 need you to do this and by the way, if we don't fund you,
6 guess what happens? What happens if we cut back budgets?
7 The worst budget year again we're going to have, 3.8
8 billions dollars, at least, maybe 5 billion dollars by the
9 next biennium. And we're thinking that we are going to be
10 relying on DOE to do processing of these permits or these
11 applications.
12 The problem is is that we saw this happen before back
13 in '97 when there was an order from the court to DOE to
14 start processing water rights. And what happened? By 1999
15 we had an agreement with the bureau and with the Indians to
16 say well, we won't actually issue any permits until we do a
17 ground water study. This was 1999, this is how long now?
18 So my fear is what we have done is set up a house of
19 cards that could fall based on whether we fund you or not,
20 based on political issues like what happens if we go through
21 Olympia, just in September probably, because we are so far
22 upside down having relied on federal money that didn't show
23 up, by the way.
24 And we find out that oh, by the way, we are going to
25 rob every little piece of money that's not spent in the

capital budget. Every little piece we can we are going to take out and going to put it right here because we have a terrible budget crunch. What happens then?

So I agree with the lady that said -- I forgot her name, I'm sorry -- that said if we don't get the study working now, soon, and don't expend this money, we should not have a rule like this because then there's no hope for people whatsoever.

I just have a couple more comments, and I apologize for doing this. So what's my solution? I guess my solution is if we are going to have a mitigation bank, and it looks like we may end up having it, I doubt if you are going to take this thing away.

There's been a lot of money expended and a lot of effort. It has to work. It has to be timely and it has to work. And we've had this talk before. And I appreciate the effort you've made in making that work. I'm not here to beat on you because I think there's been some effort here. But the question is is it a sustainable plan? That's my real fear is that it's not a sustainable plan.

So let's get that done first. Let's make sure we are working on storage, this 20-year window that we keep saying about it. I think there's other things we could do.

And we need to pull our hats off a bit and let the air get to our brains and say: Okay, am I going to pursue

1 something that's going to take 20, 25 years, or am I going
2 to look at other issues that could actually provide
3 solutions now, provide water now? So we take this whole
4 prorated issue completely. I think that's a really
5 important thing.
6 Last of all, I know that Senator Holmquist,
7 Representative Warnick and myself are committed to looking
8 for legislative fixes. We want to work with the DOE on
9 this, but we want to fix the real problems.
10 I think we have to look legislatively at trying to get
11 away from the posting of a decision and actually say let's
12 look at how water is really used and make sure we protect
13 somebody's ability to withdraw their water, but not govern
14 on this one molecule connection.
15 Then what happens is those people that have water
16 banks can put it to good use in an area where it's really
17 needed. And no one is going to argue that. If you are
18 actually impacting that, no one can argue that.
19 But I find it funny that the first place we're issuing
20 water rights is the place where it really is withdrawing out
21 of the stream. That's right next to the stream. It just
22 doesn't make sense to me.
23 We know what's happening here, you know what's
24 happening here is true. But you see, we are going at this
25 thing just completely back asswards. We are looking at

1 politically what we are doing instead of really looking at
2 the full science of the geohydrology basin-wise. We have to
3 do that.
4 And in the end, we have to remember that these are
5 people that we are affecting. You know, the enabling
6 statute for fish and wildlife, and I wish we had the same
7 enabling statute for DOE, says that nothing in this statute
8 or nothing in this title will prevent the free use of
9 individual private property.
10 I didn't quote that exactly, it's a paraphrase. The
11 reality is that's what we should remember as we do this.
12 Now, we want to protect senior water rights, that's a
13 property right too.
14 But we also want to make sure that these exempt wells,
15 which are the foundation of what we have done in this
16 state -- in 1945 we said we own the water, so we are going
17 to take care of issuing these water rights.
18 We are going to have exempt wells. We made a rule and
19 we set ourselves up for this crash. We really set ourselves
20 up for this crash when we quit letting western water laws
21 take care of water rights and withdrawals, both ground and
22 surface, and decided the state owns everything in the
23 ground.
24 And then we let this now how many years, 45 on the --
25 I'm not good at math, 45 years, 55, 65 years now of rural

1 development in this state is based on the exemption. And we
2 are saying we are going to do away with it in one county, at
3 least part of the county, we can't do that. That has to be
4 a deliberate action of the legislature.
5 And I implore you, let's stop and consider, let's come
6 back, let's focus our efforts on things that will solve the
7 problem long term. Let's really get focused on that study.
8 Let's do a good job and a thorough job of making sure we
9 analyze this so we have real information.
10 Let's take the same approach you took in Mason County
11 because there is no real emergency here. It's not about
12 land use; is it? I think it's about how we manage water
13 long term. Thank you. (Applause).
14 HEARINGS OFFICER JUDY BEITEL: Thank you. Next I
15 have John Conner.
16 MR. JOHN CONNER: I live on the Teanaway. I
17 don't know what the general problem is with the water in the
18 entire county, but we have 200 acres. And there are three
19 houses on it.
20 Now, when we drilled the well for one of my sons, we
21 also used that same well for my house. That was all right,
22 when we only came over occasionally on weekends. But now we
23 need another well but the rule is we can't have one. I
24 think we just need common sense when we look at these
25 problems and not have a general rule that applies when it

1 shouldn't.
2 HEARINGS OFFICER JUDY BEITEL: Thank you.
3 (Applause) Representative Judy Warnick.
4 REPRESENTATIVE JUDY WARNICK: For the record, I'm
5 Judy Warnick, state representative, 13th district. And I'm
6 not going to be as long as Bill. It's getting late and I
7 still have an hour and a half drive yet.
8 But I wanted to take a little bit different tact on
9 this, or approach on this tonight. I agree with a lot of
10 the comments that have been made, so I won't repeat those.
11 But I'm the ranking member, which means I'm the
12 republican side of the capital budget. It doesn't mean I
13 have a lot of power, but I saw what was happening with the
14 capital budget, the supplemental capital budget, which is
15 the last part of the two-year cycle.
16 We were losing funds. Losing funds from capital
17 projects to operating, to the operating side. As
18 Representative Hinkle said, we are way out of balance again.
19 So I went to work trying to save that 700,000-dollar budget
20 item for Kittitas County. It was originally just for a
21 study.
22 When the study wasn't happening, I know the governor
23 and the Office of Financial Management was looking for funds
24 that had not been used in the first year of the budget
25 cycle, sweeping them. So we started talking to a lot of the

1 stakeholders trying to figure out what else we could do with
2 that money, what other tools we could use that 700,000
3 dollars for.
4 We had companies step forward, the ecology, we worked
5 with them, that there are other options. And part of it was
6 the water transfer.
7 I agree, I think the study is absolutely necessary. I
8 was told early on that the USGS study would be available by
9 now. May not have the information that we need, but it
10 would be available. It still hasn't come forward.
11 But like I said, looking at trying to save that
12 700,000 dollars from being swept, I had one small item put
13 in the budget this year, 37,000 versus 700,000, 37,000 that
14 the governor vetoed. It would have gone to a project in
15 Kittitas County. Nothing to do with water, but it would
16 have gone there. But she vetoed that because they needed
17 that money.
18 So working with the stakeholders, like I said,
19 ecology, the tribes were involved, the commissioners. I was
20 on the phone with them and the prosecutor's office on a
21 daily basis almost towards the end of session trying to get
22 a budget proviso, which I think there's a copy of it in the
23 back that explains what we were trying to do, what the other
24 options were.
25 There's a date of September 30th, 2010. The money

1 does not go away on September 30th. It is a date that we
2 would like to see an agreement put in place for this
3 domestic water reserve program.
4 If it doesn't happen, we still have the money for the
5 study at this point. We may have a special session by the
6 end of September. We may have another one by the end of the
7 year the way we are going. But we still have 700,000
8 dollars at this point with Kittitas County's name on it
9 primarily for the study. And that's what I would like to
10 see it go for.
11 It also, we put in as an extra option, that part of it
12 could go for a study and part could go for water rights
13 transfers and water banking.
14 So it's more than one size fits all. We don't have to
15 put it all into the study or put it all into the water bank.
16 But we worked very, very hard to create all these tools and
17 all these options without creating a policy direction one
18 way or the other.
19 I'd like to talk on just a couple of other comments,
20 observations. This would have been a perfect year to do a
21 study, 2010, with the water availability the way it was. It
22 would have been a perfect year to study the recharge. I
23 wish we would have done that, but we can't go on wishes.
24 The economic impact, I haven't had a chance to fully
25 review the study, the impact study, but I agree, there has

1 been a huge impact. Not just on our private folks here in
2 Kittitas County. It's a huge impact on the county itself
3 and the state.
4 We are not realizing the sales tax revenue that we
5 could have with the construction that could have been
6 developed here. So it's affecting all of us. How they are
7 saying that there is no impact or very little impact, I
8 question that as well.
9 I again urge very, very careful consideration to the
10 Department of Ecology before your October 15th decision. I
11 very, very much support not doing the permanent rule at this
12 point, but part of the 700,000 that we still have our
13 fingers on for a study and part for a water banking or water
14 reserve program, we can do it all. We just need to come
15 back to the table and keep talking.
16 So please, please think very carefully before you
17 issue a final report, final rule. Thank you.
18 HEARINGS OFFICER JUDY BEITEL: Thank you.
19 (Applause) Chad Merbs.
20 MR. CHAD MERBS: Hello. My name is Chad. I just
21 wanted to read a little bit out of this Washington Real
22 Estate Fundamentals book.
23 UNIDENTIFIED PERSON: Can you please talk up?
24 MR. CHAD MERBS: I'll get loud. This talks about
25 the land use controls and land use rules or laws.

1 Exercises of the police power must meet constitutional
2 limitations. As a general rule, the land use law or
3 regulation will be considered constitutional if it meets
4 these four criteria -- which the moratorium does not: It is
5 reasonably related to the protection and public health,
6 safety, morals or general welfare. It doesn't meet that
7 criteria.
8 It applies in the same manner to all property owners
9 who are similarly situated. It is not discriminatory, which
10 it is, because it doesn't apply to the whole county or
11 state.
12 It does not reduce a property's value so much that the
13 regulation amounts to a confiscation, which it does. How
14 much do you think a recreational lot is that you can't build
15 a house on, some out in the Sunlight Waters, if you want to
16 investigate that. To me it does equal confiscation because
17 it makes my land totally useless unless I want to camp on
18 it, which is not the reason I bought it.
19 Number 4, "It benefits the public by preventing harm
20 that would be caused by the prohibited use of the property."
21 Well, I don't know if this is Washington State law or not,
22 but it's in the Washington Real Estate Fundamentals book
23 that the Rockwell Institute uses, the most respected real
24 estate school in the state. That's just one thing there.
25 And I had a question for you guys, which I think was

1 already answered. You did your environmental impact
2 statement? That's a question.
3 HEARINGS OFFICER JUDY BEITEL: We'll answer
4 after.
5 MR. CHAD MERBS: Well, I think I read something
6 about it saying it was nonsignificant. To whom, I don't
7 know. But it says right here, "Washington's SEPA," that's
8 the State Environmental Policy Act, "requires an
9 environmental impact statement to be prepared in connection
10 with all actions of the state and local agencies," which the
11 Department of Ecology is, that may have a significant effect
12 on the environment, which this definitely is having a
13 significant impact on the environment, our environment.
14 I don't know if the study was done or not. If you
15 deemed it to be insufficient, then I think you failed to do
16 your impact statement. And you certainly didn't do an
17 economic impact statement.
18 I've got a couple more here. "The rights and
19 privileges associated with land ownership are also
20 considered part of the real property. Think of real
21 property as the land plus a bundle of rights. The owner's
22 bundle of rights includes the right to possession, use,
23 enjoyment and encumber, will and sell, or do nothing at all.
24 Appurtenance, in addition to the basic bundle of
25 ownership rights, a landowner has appurtenance rights that

1 goes along with or pertains to a piece of land. They are
2 air rights, water rights -- water rights -- solid mineral
3 rights, oil, gas and support rights.
4 This is the Constitution. Amendment 5 of our
5 Constitution is, "No person shall be deprived of life,
6 liberty or property without due process of law." And I
7 don't know if you consider that to be doing due process of
8 law. I don't. I think it's just crazy to try to implement
9 a rule or force anything on us without doing a science
10 first. It's pretty crazy. Something about getting the cart
11 before the horse.
12 And obviously I'm against the moratorium. It's pretty
13 ridiculous to think that 30 or 40,000 people in the upper
14 county are sucking aquifers dry. If you want to investigate
15 water problems, why don't you go to the west side where you
16 have 3 million people sucking up the water.
17 I have land out by the lake there, and now it's
18 useless as long as this is going on. So my investment may,
19 I don't know, it might equal a 10th of what I'm spending.
20 So I don't appreciate it. And I think you guys are going to
21 make a really wrong decision and there will be nothing left
22 to do but litigate, which means class action lawsuit.
23 But, you know, it's our right to go use our property
24 to its best and full use. And when we bought our property
25 in this county, no one bought any property with the idea

1 that they are going to take away our right to use water or
2 even drill for it. So that's all I have to say.
3 HEARINGS OFFICER JUDY BEITEL: Thank you.
4 (Applause). Roy Grinnell?
5 MR. ROY GRINNELL: My name is Roy Grinnell. I'll
6 make a few comments. There's been a lot of good comments
7 made this evening. I'll try not to repeat too many of them.
8 I would say that the temporary rules that we have had,
9 the whole long series of those, was a surprise and it's --
10 there was no notice that that was coming. And the surprise
11 element of that prevents any planning by people. That's not
12 appropriate.
13 This permanent rule is just the action of making the
14 whole temporary rule permanent pretty much unchanged. I've
15 heard DOE people say that themselves, that the permanent
16 rule is just about the same as the temporary rule that we
17 have now.
18 We need a lot more information before we make such a
19 rule cutting off these exempt water wells. We were just
20 about maybe to get some information with the study, but
21 although there's money, or some money for a study, nobody is
22 starting a study. Nobody is doing anything to get that
23 information going.
24 I don't think there's enough information to determine
25 that there is, indeed, a problem. There's not enough

1 information actually demonstrating the linkage between
2 ground water exemption and the actual water used, if those
3 withdrawals that affects stream flows.
4 The rule and the documents surrounding it imply that
5 there are ways to get water rights, to get mitigation of
6 water withdrawals. That is perhaps the case in some areas.
7 As the map shows, there's a few areas in the upper county
8 that that's true, if you have the money to pay for it.
9 But in most of the areas, there isn't even any ability
10 to find a water right to use to offset for that. There's a
11 big red blotch over most of it.
12 There doesn't seem to be any real likelihood that
13 there will be water available in the Teanaway basin, but
14 there might be for the Swauk, but that isn't known for sure.
15 So without any way to mitigate these supposed effects
16 of ground water withdrawals and the inability to get
17 permission to withdraw water, it has rendered property
18 pretty much useless. It's worth less than a tenth than it
19 was before when it was just bare forest land. It can't be
20 used for whatever it was intended to be used for.
21 The whole premise of the exempt water withdrawals is
22 that the ability to have water, get water on your property
23 and use it is a part of the land. It's not separable from
24 the land. It should be an inalienable part of owning the
25 land. And the previous speaker touched on that point.

1 It's the premise behind this 1945 law, it's the
2 premise behind western water law forever is that you could
3 get water on your land if you had it -- unless you were in
4 California and sold it to the Los Angeles water district
5 when they were raping the land. But I never sold my water
6 rights and I don't think anybody did before me on my land.
7 There was discussion at some point during all these
8 emergency rules and temporary moratoriums we have had that
9 there would be some kind of window opened, but it somehow
10 depended on agreement with the county that they would or
11 wouldn't do something. That kind of window should be
12 provided period as part of this rule if there is going to be
13 a permanent rule.
14 DOE can just set up a window and set a date in the
15 future when the permanent rule goes into effect. There
16 should be a window that allows people to do things they were
17 planning to do and have a time frame for planning. It's
18 unreasonable not to provide that kind of window.
19 That window should be for a whole construction season,
20 but it should be for a period of time that's sometime far
21 enough out where people can plan and arrange to do
22 something. It shouldn't be something that opens today
23 without any notice and closes five months from now. It
24 should be for five months in a period in the future where
25 it's actually usable where people can do something with it.

1 Touching on the cost benefit analysis. It does not I
2 don't believe adequately consider the cost on actual,
3 individual owners and the economic losses on them.
4 And I agree with the comments about the small business
5 ownership. It's laughable to presume that the only direct
6 impacts are very minor because maybe that's only on the well
7 drillers. Yeah, but what about all the other construction
8 businesses? That's direct enough impact and all the other
9 suppliers and everybody else. That's direct enough impacts
10 to consider direct.
11 If one other option for providing some window or way
12 around the rule to alleviate the hardships would be to
13 perhaps allow exempt wells for single users to be put in.
14 Because DOE's documents say: Well, the average single user
15 is 350 gallons a day, not 5,000 gallons a day. That's a
16 possibility.
17 So I don't think there should be a permanent
18 moratorium put in at all. I think we need to have the
19 studies done to actually show the causative relationships,
20 and then address the issues at that time. Thank you.
21 HEARINGS OFFICER JUDY BEITEL: Thank you.
22 (Applause). Mike Krotkramer (phonetic)?
23 MR. MIKE KROTKRAMER: I'll pass.
24 HEARINGS OFFICER JUDY BEITEL: And I'll go to the
25 next one, Kathleen Masterson?

1 MS. KATHLEEN MASTERSON: I'll pass.
2 HEARINGS OFFICER JUDY BEITEL: Tom Ring?
3 MR. TOM RING: Thanks. My name is Tom Ring and
4 I'm the hydrogeologist for the Yakama Nation Water Resources
5 Program, so please hold your applause until the end.
6 It's a pleasure to speak to you. I will be very
7 brief. We have interacted with ecology and the county
8 commissioners on this issue and the state legislators for
9 some time now. And I just wanted to reiterate three basic
10 points.
11 The first is that pumping water from wells and
12 consumptively using that water as a matter of basic
13 hydrogeologic principles reduces surface water supplies.
14 The second point is there is no unappropriated surface
15 water in the Yakima basin to be had. And the third point is
16 that that should point you to a mitigation-type solution.
17 So to get back to the first, I won't go into the
18 details of hydrogeology, let's just suffice it to say that
19 mass is conserved that producing aquifers don't actually
20 produce water, they simply convey it from recharge area to
21 discharge area.
22 That applies whether we are talking about gravel,
23 bedrock, shallow wells, deep wells. That's just a basic
24 fact. You don't need to do a study to determine that basic
25 fact. A study will allow you to determine how long it takes

1 for those effects to be felt and where they are felt, which
2 stream a well will affect.
3 We believe, and I believe Representative Warnick can
4 correct me if I'm wrong, we did support her initiative to
5 add some flexibility, the Yakama Nation did, to the use of
6 that money so that if it was determined to just move ahead
7 with mitigation rather than just spend money on the study,
8 that we bless that idea.
9 The second point about surface water not being
10 available, we are just trying to wrap up a 30-year long
11 surface water adjudication in this basin. And there is
12 really no doubt at the end of that time that it will be a
13 definitive finding that there simply isn't water that
14 ecology can appropriate away in the future.
15 The proof of that is the fact that in several recent
16 years, 2005, 2001, three times in the '90s, couple times in
17 the '80s, again in the '70s, the May 10, 1905, water right
18 holders have gotten down as low as 30 percent of the supply
19 that they use to irrigate a couple hundred thousand acres of
20 farmland in the Yakima basin. That's why others like Roslyn
21 have been shut down is because the 1905 water users were not
22 getting their supply.
23 The way this worked is that in the early 20th century
24 the Bureau of Reclamation had requested the State of
25 Washington come in and do studies to determine how much

1 water could reliably be stored and delivered, and how much
2 land could be irrigated with that water. And they developed
3 a program to use all of it. And so basically anybody who
4 came along after May 10, 1905, is living on borrowed water.
5 Water rights are indeed a property right. But one
6 thing that should be made clear is not everybody who has
7 property has a water right. You get a water right either by
8 appropriating it through the state process or through a
9 federal process such as reserving it by treaty as the Yakama
10 Nation did.
11 So if a piece of property never did have a water right
12 established on it, there is no water right to take. So if a
13 person is in that position with their property, as was the
14 case, for example, with Suncadia, they simply went out with
15 a whole bunch of lunch bags full of 100 dollar bills and
16 bought lots of water and established their resort. I'm
17 afraid that's the way it has to work going off into the
18 future.
19 I don't want to get into rebutting what other people
20 said, but I want to embrace one point that was made. This
21 is not a particularly huge problem quantitatively. I'm not
22 saying it's not a big problem economically to you all.
23 What I'm saying is in terms of the amounts of water
24 that we are talking about, this is not a particularly large
25 problem. Someone mentioned Seattle. Agriculture in the

1 Kittitas Valley uses several times the amount of water as
2 the entire city of Seattle.
3 For Trendwest to develop several thousand lots, they
4 bought essentially a few farm fields worth of water and
5 retired those water rights and created this large
6 multi-hundred-dollar resort with it.
7 So the fact that it is a small problem doesn't let you
8 off the hook. The court found in 2001 that no amount of
9 post 1905 surface water was okay to use when the May 10,
10 1905, water users were not getting their full supply.
11 But it does mean that the amount of water that needs
12 to be acquired and put through this mitigation program is
13 not really terribly large. So I think we need to move on
14 with that mitigation-type solution and that's --
15 UNIDENTIFIED MAN: Can I ask you a question?
16 HEARINGS OFFICER JUDY BEITEL: Afterwards, you
17 can talk to him afterwards. The next one is Glen Smith.
18 UNIDENTIFIED MAN: It's a good question.
19 HEARINGS OFFICER JUDY BEITEL: Glen Smith? He's
20 coming.
21 MR. GLEN SMITH: My name is Glen Smith for the
22 record. I'm a legislative representative for Washington
23 State Ground Water Association. I'm here tonight to urge
24 that we do not move ahead with the permanent ruling. And I
25 want to cover a couple of things in broad brush fashion

first, and I want to get into some specifics.

A legislative handout that our association utilized this year read, entitled, "Washington's current water law does not provide enough consideration toward ensuring that its citizens have access to water to meeting their most basic domestic needs."

What we have here is a state that's increased in population in 70 years. It's grown from 1.7 million to nearly 7 million.

So we have a situation here. The game plan is changing, it is changing every single day. Our state is growing. But the water issue we are talking about, it's hard to believe that it's occurring right here in the Evergreen state.

Current Washington water law provides and protects water needed for fish, wildlife and farm stock. Conversely, water for people is allocated and managed under the prior appropriation principle and is therefore subject to the denial and cease and desist order usages.

Recent Seattle Times article here, "Resources Take the Lead at Western Governors Meeting." And this occurred in Whitefish, Montana. I love it. It's a great spot on the earth. But bottom line, a few comments were made here in this article about water. "The fight over natural resources is taking center stage in a meeting of governors from the

1 west, led off by straight talk about the water that has been
2 the source of bitter battles predating many of the states
3 themselves. A growing population combined with long
4 unsettled arguments over water rights will only create more
5 problems. And the sooner those problems are dealt with, the
6 better the governors were told."
7 Now, here's a stat that you are all familiar with, I'm
8 sure, in this room because you are in an agricultural belt.
9 I am from the city, but this is an astonishing number:
10 About 75 percent of the region's water goes towards
11 agriculture. And there's more spillage that occurs, waste.
12 And, of course, we have a water law situation now that
13 if you don't use that water, it's subject to being taken
14 away over time, so let's use as much as we possibly can. If
15 it even means waste, we can do that too. So the motivation
16 needs to change as our state continues to grow.
17 There is still too little known about the
18 interconnection of different water aquifers, rivers and
19 basins the governors were told. And a real strong comment,
20 there is consensus we can't manage what we can't measure and
21 what we don't understand.
22 Our position paper that's being presented during this
23 public hearing tonight, I will just read it so I stay on
24 track and we can button up sooner for Glen: Since September
25 2007, Washington State Ground Water Association, and I'm

1 going to read directly from that, so you are at home just
2 typing away. As introduced and encouraged, two important
3 avenues be quickly brought to the forefront when considering
4 water resource concerns in the upper Kittitas County region:
5 One, the timely conducting of a water study by an
6 experienced, respected and unbiased scientific source which
7 still unfortunately is not underway. And that's been
8 commented on by quite a number of you tonight. It's very
9 sad.
10 I don't know what it is, the situation where between
11 county and the state and we can't get together, so the
12 carrot, we can't deliver the carrot to get the study
13 started. I'm going to leave that up to you in this audience
14 tonight and beyond.
15 Number 2, begin exploring sensible, feasible water
16 mitigation avenues that can be effectively implemented and
17 managed by local Kittitas County government along with the
18 complementary direction of the Washington State Department
19 of Ecology.
20 After nearly three years of often contentious debate,
21 questionable decision making and legal determinations, the
22 recent upper Kittitas County process for moving forward has
23 been the acceptance of the fact that mitigation is, indeed,
24 the avenue through which water can be utilized in areas of
25 the upper county without causing a violation of water rights

1 as interpreted by ecology.
2 However, the remaining issue which still must be
3 resolved is one of governance. The role of local government
4 as the land use authority in the State of Washington has
5 long -- been long established and generally accepted in law.
6 The role of ecology ss the responsible agency and the
7 allocation of water resources and the protector of the
8 environment is also well established in law.
9 As currently proposed, it appears ecology is declared
10 that its authority over water resources trumps local
11 government's authority relative to land use. It is not
12 necessary for one governmental authority to trample the
13 other.
14 Washington State Ground Water Association believes
15 ecology has every right to insist that the actions of local
16 governments do not cause unacceptable impact to the
17 environment as a result in the impairment of water rights.
18 This does not, however, require that ecology take over
19 the land use authority of the upper Kittitas basin or any
20 other basin in the state.
21 It has long been the position of Washington State
22 Ground Water Association that the issues raised in defense
23 of the upper Kittitas County moratorium, and in defense of
24 ecology's existing rule, can each be addressed without state
25 government taking over the land use authority that is

1 already vested in local government.
2 It has been expressed emphatically by a direct vote of
3 the people of this state that they desire land use planning
4 to be accomplished at the local government level. Any
5 attempt by ecology to usurp that authority will be in direct
6 contradiction to the expressed desire of the citizens
7 residing in Washington State.
8 Now, in recent weeks, some very nifty developments
9 have been occurring. This is a great opportunity, a bridge,
10 a lifeline, a whatever you want to call it, because Central
11 Washington Home Builders Association and Washington
12 Association of Realtors, they have really been whacked by
13 this whole situation in upper county.
14 And as a result of that, they are pouring a lot of
15 time and effort and energy and resources into trying to come
16 up with feasible answers and conclusions. And Washington
17 State Ground Water Association certainly embraces that
18 process.
19 We have been a part of those meetings. We thank the
20 two associations I just named for that. We are going to
21 encourage that some very important bridge building occur.
22 If we want to talk about budgets and tax and money
23 being thrown around, this project for the state taxpayer has
24 been unbelievably horrible from a financial standpoint.
25 It's been a Peric victory at best for ecology. I

1 don't think they would even claim that. So we are going to
2 encourage that ecology and Kittitas County Commissioners get
3 together and start really hammering this out. But bring the
4 aid of some strong associations who have very real stakes in
5 this whole process. And that is, of course, your local
6 realtors and your homebuilders.
7 These people can help. They have great ideas. Get
8 them to the table, get these stakeholders to the table.
9 We'd like to be a part of that too. I'll close on that
10 thought and thank you very much.
11 HEARINGS OFFICER JUDY BEITEL: Thank you.
12 (Applause) Steve Senger?
13 MR. STEVE SENGER: My name is Steve Senger. I
14 live at 380 Colfax Road in Cle Elum. As a local general
15 contractor, both residing in and building homes in upper
16 Kittitas County for the last 11 years, this water moratorium
17 issue has been close to my heart.
18 While I feel some good progress is occurring,
19 specifically through what the previous speaker just spoke
20 about, Glen, I do have still a couple of issues that greatly
21 concern me.
22 I read the Small Business Economic Impact Statement,
23 Number 10-11-016, as required by Chapter 173-539A WAC, water
24 resources program for the upper Kittitas County ground water
25 area. And it basically states as you've heard, small

1 businesses are not required to comply with the proposed rule
2 if they are located in an established water right area.
3 That's all they have to say.
4 It is appalling to me that this study would stand as a
5 valid impact statement regarding the true impact that this
6 moratorium and permanent rule will and has had on small
7 businesses in upper Kittitas County.
8 As just one small business employer in the upper
9 county, prior to the moratorium, my small construction firm
10 had between 3 and 4 million dollars of new construction
11 projects on my desk ready to start. And all of those
12 projects but one were cancelled as a direct result of the
13 water moratorium.
14 This caused my small firm to lay off eight full time
15 employees, not to mention the scores of subcontractors that
16 would have been employed, and all the materials that would
17 have been purchased as well as new owners utilizing their
18 homes, partaking of our local upper county services and
19 stores, etc.
20 Not all of these employees have found gainful
21 employment even to this day and are no longer purchasing
22 lattes, gas, food, clothes, restaurant visits, visiting any
23 of our local small businesses.
24 This dollar volume of work would have been a good year
25 for my business in any economy. This example is but one

1 small business and is an incredibly small percentage of the
2 whole when looked at -- when looking at the impact on small
3 businesses that this issue has and will continue to cause.
4 How can a small business impact statement not take facts
5 like these into consideration?
6 Traditionally the upper Kittitas area has been
7 somewhat insulated from the national economic swings as it
8 derives much of its business from vacation and tourism,
9 business primarily from the west side of the mountains.
10 In the 11 years I have been building homes in upper
11 county, I have only built one home for a client who lives
12 here in the county. All of my clients have either been from
13 the Seattle metropolitan area or other states, moving here
14 either to vacation or to retire.
15 Most of these projects are self-funded and do not
16 require bank financing, making many of these people somewhat
17 less impacted by the poor economy and causing them to see
18 this is a time that everything is on sale.
19 Yet if a person walks down main street and speaks to
20 the shop owners, they will find that those that are still in
21 business are and have been hanging on by a thread trying to
22 keep their doors open. This is a direct impact of the
23 moratorium and therefore the proposed permanent rule.
24 This moratorium was put into place with an emergency
25 rule due to the lack of information required to make an

1 educated scientific study of the issues by the action. The
2 legislature has set aside 800,000 dollars for a water study
3 to give the Department of Ecology and Kittitas County the
4 scientific information needed to make informed decisions
5 about our water as we move forward with this issue.
6 It is my understanding that no study has been
7 contracted at this time and the county is in the position to
8 lose the funding if not contracted within the next 60 days.
9 We have just heard different.
10 I would implore that this become a priority for both
11 the board of commissioners and ecology to make this happen
12 in a timely fashion so the funds are not redirected to the
13 general fund to cover budget shortfalls.
14 I would respectfully ask that the time limit for
15 written comments be extended to 60 days so involved and
16 concerned citizen groups will have the time to thoroughly
17 respond to the issues raised at this meeting.
18 Finally, what is the rush to get to a permanent rule?
19 We have since heard it's Governor Gregoire's. Is there a
20 statute that's requiring this? Apparently not.
21 We have one opportunity to get this right, so let's
22 make sure we do the due diligence required to make this a
23 viable system that will allow property owners to enjoy their
24 property and regain the value it once had.
25 That's all I have to say. Thank you very much.

1 HEARINGS OFFICER JUDY BEITEL: Thank you,
2 (Applause). Dave Whataill?
3 MR. DAVID WHATAILL: Dave Whataill, representing
4 Central Washington Homebuilders Association. I have my
5 comments in detail, so I'm not going to go through those. I
6 just want to make two points and one request.
7 First, get the study going. You don't need a
8 Memorandum of Agreement, an agreement in principle, a
9 moratorium, or even this permanent rule to do the study.
10 Now, the agreement that you need to get with the
11 county was for the oversight group that was going to lay out
12 the scope. That was done, no problem.
13 Move forward with it. Why should you move forward
14 with it? Because we think the department's rule making
15 process would be more informed, more effective and less
16 suspect than it is right now on the basis of lack of
17 information.
18 The second point is on your definition on common
19 ownership, I guess it's an attempt to grasp every possible
20 Campbell-Gwinn petition. It goes too far in describing
21 joint development arrangement to include services.
22 You are directly affecting businesses that are doing a
23 common, maybe even a common project between two property
24 owners such as a survey, but because it's a joint agreement
25 between two property owners, it potentially could be

1 considered a joint ownership.
2 And finally, the request, I think you've heard enough
3 from the audience tonight to support the suggestion that you
4 leave open the comment period for an additional several
5 weeks, until the 27th of August or somewhere in there, which
6 would be about 30 days past the next meeting. I think
7 there's a lot of questions out there that you haven't
8 answered and a lot of questions that will probably be
9 developed as people have more time to think. Thank you.
10 HEARINGS OFFICER JUDY BEITEL: (Applause) Bruce
11 Coe.
12 MR. BRUCE COE: My name is Bruce Coe, 3942 Hidden
13 Valley Road of Cle Elum. For full disclosure, I'm a senior
14 water rights holder. I can hardly say anything better than
15 what's been said before me. So if you would just adopt it
16 by reference, especially the good parts of all the comments
17 that have gone before, I won't have to say much of anything
18 else.
19 A few comments, most senior water rights holders stand
20 to make a little money on this deal. And there is -- for me
21 to be enriched at the pain of my fellow citizens disturbs me
22 greatly. I'm not sure that there's a reason for this.
23 I think the emergency is largely a legislative
24 emergency and not an emergency of water. But if you are
25 going to go ahead with this, there's some things that I

1 really need to get out of this deal. I need predictability
2 and stability in a trust process.
3 I need to know our legislators in particular will
4 honor the conditions of a trust agreement that I have with
5 the state if I choose to put water in a trust. I need to
6 know that there's not going to be any extractions or
7 punishments if I take water in and out of the trust. I need
8 to know especially that our governor will honor my trust
9 agreement with an agency if I do that.
10 I want to bounce a little bit off of what
11 Representative Hinkle said earlier. He said, well, we still
12 have a tool shed and matches, so be careful about the bon
13 fires. But I guess we don't have the water to put the bon
14 fires out, so we would be getting into a dangerous
15 situation.
16 I hate to criticize without having solutions. One of
17 the things that I have seen, and I've been fighting these
18 water wars for about 25 years, it bugs me to see
19 municipalities get off scott free when they go to people
20 that live in rural Kittitas County and say you have to foot
21 the bill for our water deals. Why are we not encouraging
22 the municipalities to stand at the same standards of
23 conservation? Most of the population, therefore, most of
24 the water usage happens in the municipalities.
25 Municipalities tend to say: Well, we have got the

1 water, we have got the water rights, we have the
2 distribution. We have the billing network. Oh, and by the
3 way, those water bills make a lot of money for the
4 municipalities.
5 We can ask people to put 1.4 per gallon per flush
6 meters in their toilets and 1.5 gallon per minute
7 restricters on their showerheads. I don't know about you,
8 but I know what I would do with those restricters, I would
9 take them out.
10 But really, if we are going -- let's share the burden.
11 Let's get our municipalities on board. Conservation is the
12 tool here. If you enact conservation measures instead of a
13 moratorium. Moratorium is the failure of politics,
14 moratorium is the failure of reason, moratorium is a failure
15 of common sense. There's just no other way to look at it
16 than that.
17 We live in a democracy where people need to be heard,
18 need to be able to air their differences. And where a
19 cooperative and reasonable outcome needs to come from these
20 kinds of discussions. Moratorium, crazy. Boneheads use
21 moratorium to rule.
22 So I think there's a couple of things. One, let's get
23 the municipalities involved, let's work with conservation
24 while you are developing the results of the ground water
25 study, while the results of the ground water study are being

1 produced.
2 I think most people can get along with what's called
3 an ERU, an equivalent residential unit, equivalent usage of
4 250 gallons per day. You need to drop -- instead of having
5 an exempt well drawing 5,000 gallons a day, which very few
6 people use, let's drop it down to 250. Let's be generous at
7 400 gallons a day, a mere one million gallons a year per
8 exempt well should be enough to satisfy anybody's use for a
9 single family residence.
10 Conservation is immediate, conservation makes sense to
11 people, conservation requires metering on some level so that
12 you know that people are conserving, getting municipalities
13 wound up in the solution instead of letting them use however
14 much water they want to, getting institutions like Central
15 Washington University involved in conservation measures.
16 That is the way to proceed with this. The wholesale
17 seizure of people's property rights by preventing them from
18 developing and using their property the way they wish to use
19 their property, no matter whether it makes sense to the
20 Department of Ecology, or to fish in the stream for that
21 matter, is insane. Thank you very much.
22 HEARINGS OFFICER JUDY BEITEL: Thank you.
23 (Applause). Joe Mentor.
24 MR. JOE MENTOR: Thank you. My name is Joe
25 Mentor. And I am the water rights attorney for Suncadia and

1 hopefully could answer a couple of the questions that were
2 asked earlier about Suncadia's water supply.
3 Trendwest Resorts, which was Suncadia's predecessor,
4 bought the land that Suncadia Resort is on now. It was
5 timberland and had no water that's associated with it.
6 So starting in 1996, Suncadia and its predecessors
7 began to acquire water for the resort project. We bought
8 several different water rights in various places in Kittitas
9 County. Most of the supply has an 1884 priority date.
10 These are existing surface water rights that were
11 transferred to use on the resort property.
12 In about 2000, Kittitas County commissioners required
13 Suncadia to provide a water supply in addition to the resort
14 requirement for induced offsite development.
15 As modified by the Department of Ecology, this
16 requirement imposed on Suncadia an obligation to purchase
17 471 acre feet of consumptively used water. In 2002, the
18 Washington legislature authorized Suncadia to use that water
19 in the trust water program for water banking purposes.
20 Since that time, we have been working to establish the
21 upper Kittitas County water bank. Three times during that
22 period, in 2001, 2003 and 2005 I believe, we made transfers
23 to the trust program to mitigate for the drought-related
24 impacts of the city of Roslyn and the Kittitas Reclamation
25 District.

1 Since it took us about seven years, but starting in
2 2009 in October, we reached agreement on a trust water right
3 program with ecology. And since that time, we have had
4 requests for about 870 residential units, we have signed
5 letters of intent to provide mitigation for 383. We have
6 signed contracts for 138 connections for which escrow
7 accounts were open. 63 of those have been sent to the
8 Department of Ecology and 57 have been approved.
9 We have closed on the transfer of mitigation
10 certificates for 49 units and our focus has been to provide
11 water for those who are trying to build or sell property
12 during the 2010 construction season.
13 With all that effort, we've only committed 12 acre
14 feet of water and we have enough left for over 2,000 homes.
15 Now, this is a program that I believe is working,
16 although as with any new program, it could always be
17 improved. We will work with the Department of Ecology and
18 effected parties, including the Yakama Indian Nation, water
19 right holders, home builders, realtors, well drillers and
20 others to suggest improvements for the program and would
21 like to submit specific suggestions for the record for this
22 rule.
23 We do have a few examples that I'd just like to
24 identify. First of all, the rule requires a person to sign
25 a covenant to protect an onsite septic system from planting

1 trees and shrubs. I don't think that's necessary. It adds
2 a great deal of cost to the transfers of water for
3 mitigation.
4 Secondly, I think we need to identify the fish
5 critical basins and start collecting stream data now in
6 those areas. We can't continue to talk about what to do in
7 those areas and then find ourselves without the data in
8 order to make decisions.
9 And my great fear is that by November or December,
10 we'll come to a realization that we don't have the
11 information we need and don't have the study that we need,
12 and we don't have the stream data to develop that study, and
13 we'll have to wait another year in order to be able to
14 provide water for people in those places.
15 Suncadia has been and continues to be deeply concerned
16 about the economic impacts that a moratorium would have on
17 the upper county. But under our state's water law, the
18 first in time is the first in right. All water rights,
19 including those for small domestic users, are subject to the
20 prior appropriation plan.
21 Water rights are property rights and to allow for some
22 to use water without water rights and not others violates
23 the property rights of those who have surface water rights.
24 As Tom Ring from the Yakama Nation pointed out, ground
25 water and surface water are for the most part connected. As

1 he pointed out to me many years ago, ground water usually
2 comes from some place and it goes some place else.
3 Finally, as an attorney who's participated in the Aqua
4 Vella (phonetic) adjudication for a number of years, I know
5 this basin is officially over-appropriated.
6 The Bureau of Reclamation withdrew all previously
7 unappropriated water from further appropriation on May 10,
8 1905, and there has been no new water available since then.
9 So we'll continue to -- so with those facts in mind,
10 and despite our concerns about a moratorium, we do support
11 the requirement that new users mitigate for their impacts.
12 And we'll continue our best efforts to help implement the
13 mitigation program in a straightforward, cost effective and
14 especially timely manner. Thank you.
15 HEARINGS OFFICER JUDY BEITEL: Thank you.
16 (Applause). Can you please state your name for the record?
17 MR. ROGER WEAVER: Yes, I'm Roger Weaver, and I'm
18 speaking in the capacity as president of the Association of
19 Realtors.
20 Present company excluded, the last time I said this,
21 none of you have been in the department. That's how long I
22 have been. I said for years the Department of Ecology has
23 forced us to do the wrong thing to do the right thing. The
24 perfect example of this is the whole relinquishment idea.
25 You've heard this story, there is not a realtor, an

1 attorney or anyone in town that doesn't advise their client
2 with senior water rights to pour it to the coals whether you
3 are using it or not.
4 Tom brought up the fact, I have been one of those 40
5 percent water people several times in the junior district.
6 I remember the pain of that. But I also remember the anger
7 of coming down off my hill and watching the senior water
8 rights people running it down the highway.
9 Conservation has to be an issue. Let's put in
10 integrity in the process. Are we really after land use or
11 are we after preserving the resource?
12 Conservation has to be a part of that. In two fell
13 swoops, if you were to eliminate relinquishment, cut the
14 5,000 gallons to one, and start giving people incentive to
15 conserve, we'll get a bunch of that over-appropriated water
16 back for you, Tom, in this basin. Because those are
17 measurable things.
18 We allow the bureau to be only 50 percent effective.
19 And that's the Bureau of Reclamation. But it's a two-edged
20 sword. You have got to have the slop to get the push to get
21 it everywhere else, and then get it back to the river. It
22 becomes a factor of a pretty specific argument when it comes
23 to water and to distribution.
24 I do applaud the water trust program. I see it as a
25 good temporary measure to solve the problem. The same way

1 as I see the permanent rule as being a temporary until we
2 get the water study done.
3 And as far as economic impact, I can give you a
4 specific -- this may be good news to some of you. There are
5 65 less realtors in our county. But anyway, I think again,
6 we have got to get integrity back in the process and
7 conservation has to be a part of it.
8 The senior water rights people are taking a little bit
9 different attitude too. There's a lot of technology out
10 there that's available for water management, but again, they
11 have to have the incentive.
12 There is one I've given them recently because I
13 compare what's happened here, we've seen the conversion of
14 home sites go to campsites. I said to some of our senior
15 water rights people, what happens if you don't have any
16 alternative use for your Timothy ground or for your
17 irrigated ground, if you can't convert your marginal ground
18 to a home site, and you can't then put the circle on the
19 ground where you really want to put it or change the method
20 of irrigation?
21 Land values is going to get their attention and have
22 the same kind of impact everywhere as we have seen up here.
23 That's been a very measurable, very definitive thing.
24 Remember that: Home site to campsite, there's a huge
25 difference on a per-acre basis.

1 The one good thing that I see that has really come out
2 of the water transfer thing I talked to Mr. Tebb about, the
3 water transfer program does allow us one real positive thing
4 that we can do, that we could never do before. As strapped
5 as the municipalities are, we now have the possibility to
6 take water from the surface to the ground in areas outside
7 of UGA where the municipalities could never afford to get
8 the infrastructure and create economic development and
9 create jobs. That's one really good positive thing that's
10 come out of the water transfer program.
11 But anyway, if you could cut down the exempt things
12 and let us conserve water because that also would be the
13 most measurable form of a system and a device that we could
14 put in effect immediately.
15 And then let's talk about lining ditches. There's --
16 we did a project -- some of you may remember this. Exit 106
17 is going to become a regional retail center. And I
18 represented the land property at the time who also was some
19 of the water you are getting to use now because that came
20 out of the Ellensburg. And we drilled 22 dry wells there to
21 prove that 33 acres was not wetlands. And then we were able
22 to prove that, then we were able to sell that water, get it
23 up here.
24 But guess what? That little brushy spot by the
25 interstate I spoke before, we are irrigating the ground to

1 make it a wetland. I guess this is not an uncommon
2 practice.
3 But anyway, we do have that possibility now to create
4 jobs to get water to places where we couldn't get it before
5 with your program. And that I applaud, and I applaud the
6 efforts of Suncadia and Joe. We have been at this a long
7 time.
8 But it's always got to be temporary. You've got to
9 have the study, and I don't see how you can do the study
10 without any serious talk of conservation. Thank you.
11 HEARINGS OFFICER JUDY BEITEL: Thank you. This
12 is all that I have on my cards tonight, but I will open it
13 up and ask if there is anyone else that would like to come
14 forward and comment at this time. Go ahead, come up. If
15 you could just please state your name for the record.
16 MS. SUSIE WISE (phonetic): My name is Susie
17 Wise. And basically, I'd like to start out by saying that
18 water is the lifeblood of the community. This moratorium is
19 bleeding this community.
20 And the one thing that -- the issue that was brought
21 up of conservation, that's a really important issue. But I
22 live at Lake Cle Elum. I watched that lake. And it always
23 fascinates me when we have a drought year and they don't
24 shut that lake down. They let that water go. So it always
25 amazes me.

1 If you know you are going to have a drought, close
2 those lakes off so that the reservoirs will fill up. All
3 that water is going down the river and it's being wasted.
4 To me that's just poor management.
5 And, you know, the other thing is you will see this
6 down in the lower valley, this was brought up by the last
7 gentlemen, about the ditches that aren't lined. I mean
8 there's other issues that are effecting us, not the wells.
9 It's just bad management from all around. Those need to be
10 effected, those need to be looked at as well.
11 The other thing is I can't even tell you how angry I
12 am when I heard Janea Holmquist say that there's no economic
13 impact.
14 You can tell my friend and her children who are losing
15 their home because they lost their job because of this
16 moratorium, you tell them that, that there's no economic
17 impact. And that's all over this town. That's all over the
18 upper county. It's even starting to effect the lower
19 county. There's a residual. It's not just builders, not
20 just real estate agents, it's everybody.
21 The other thing is, you know, I got to say this. I
22 have an exempt well, 5,000. 5,000 gallons a day that I am
23 allowed to use. I have at least 45 hundred gallons a day
24 that I don't use. Can I sell those?
25 Now, the other thing is, and I guess this is a point

1 that I have to question. If there are senior water rights
2 down in the lower valley and they decide to take their crops
3 out for a few years, do they lose their water rights for
4 five years because they have taken their crops out for five
5 years?
6 I mean if you are going to put these rules here, you
7 put them everywhere. You just don't impact us. I mean that
8 is to me point blank discrimination. I think as a
9 community, we really need to start looking at a class action
10 lawsuit.
11 You know, I'm going to -- I just have to end with the
12 fact that it's our lifeblood. This is our life. This is
13 everything to us.
14 This is not just a home, it's not a vacation home.
15 This is everything to us. And we are trying to survive
16 here. And I don't want to take away from the irrigators
17 down here, but I don't want to be screwed because you guys
18 haven't done your job by doing the study that the money has
19 already been set aside for.
20 Now, I'm angry and I'm emotional about this. When I
21 see people's lives impacted as negatively as they have been
22 for a moratorium that has no basis to it, that just
23 infuriates me because you need to do your job because you
24 failed. You've known this since 1999? Hello. What are you
25 getting paid for? I'm sorry. (Applause).

1 UNIDENTIFIED MAN: My name is the voice of
2 independence. I do a radio show on 1230 AM KLAV Talk Las
3 Vegas.
4 Thank you for bringing the Constitution for starters.
5 Thank you for your interpretation of the Constitution. I
6 had a great question for you. That's really all I want to
7 say, is this authority. We all need to back up and just
8 really get to the basis of this authority.
9 Your authority of RCW 90.54.050, it provides that when
10 lacking enough information, lacking enough information. You
11 gain authority when you lack information.
12 Yet you are hearing all this testimony. Maybe I'm for
13 this, maybe I have an angle that I can benefit from this.
14 Maybe I come out on top. Because it sounds like if you have
15 senior water rights, you are sitting in a really good
16 position. Am I correct? If I have senior water rights, am
17 I in a good position? Yes or no.
18 HEARINGS OFFICER JUDY BEITEL: We can't enter
19 into any discussion --
20 UNIDENTIFIED MAN: When can we get questions --
21 I've called you guys, called the governor, no one seems to
22 want to answer the question.
23 So if I have senior water rights, does that mean I'm
24 like the big boys, I don't have to do all this stuff right
25 here? Because it seems like you are only going after the

1 little guy and then the little well. The big boys that have
2 all the water, maybe I'm not against it.
3 Maybe I want to enter into an agreement and acquire
4 them. But like the gentleman said, will it be honored?
5 Because you are making this rule based on lack of
6 information. Over and over and over I'm going to come back
7 to it, because these are your words.
8 And you didn't let me finish. I felt it was kind of
9 rude when you cut me off, but it's fine. I get my chance
10 now.
11 You are making these decisions right here, without
12 information. So let's do a hypothetical. What happens with
13 this study? If I had senior water rights, I'm not going to
14 want the study either because the study might find there's
15 enough water.
16 So then what happens if I have senior water rights?
17 What happens if I don't? Will this -- maybe this rule will
18 not come in effect? Is there a chance -- I'm asking you if
19 there's not enough information, could you be wrong in your
20 evaluation? Could you be wrong in your evaluation? I
21 question the constitutionality of your interpretation.
22 Because the United States Constitution and the Washington
23 State Constitution trumps you.
24 We are a supreme law of the land. And just because
25 you ruffle some paperwork doesn't mean that it's legal by

1 constitutional law.
2 I'll ask you very simply, has the law ever been
3 repealed by our supreme courts? I know you won't talk to
4 me, it's a great question.
5 If you are against immigration or for immigration in
6 Arizona, that law is being debated right now. It doesn't
7 matter if you are for or against it. It might be found
8 unconstitutional. That means those legislators made the
9 wrong decision. And that was legislators voted in.
10 You are a bureau, this is made up of a governor
11 utilizing authority power. I don't remember what your quote
12 was, one gentleman about only jackasses or something -- no,
13 dictators. Look up the definition of a dictator. Dictators
14 make proclamations, dictators make moratoriums. A rule of
15 law without a legislative branch with no oversight based
16 with lacking information.
17 There's a chance you might be so right. We might be
18 thanking these people. So let's leave that door open. We
19 might be thanking these people down the road for preserving
20 our water. I say thank you and may owe you an apology. I
21 reserve the right to that. I'm not deciding whether I'm for
22 it or against it.
23 But if you are going to take all this authority based
24 on lacking information, that seems ludicrous. That's like a
25 parent making a decision with his child, sure you can go

1 over there. Don't you want to know the information? Or
2 saying no, you can't, when everything is fine: Because I
3 said so, because I said so.
4 This is what you are doing: Because I said do. Bill
5 Hinkle, where did he go? It was a great speech, Mr. Hinkle,
6 it was a great speech. So was Obama's. Those are even
7 better speeches.
8 Did they repeal the Patriot Act like they promised?
9 No, they added to his power. Is he really going to do what
10 he says or is he going to leave early? He didn't take the
11 time to listen to you people. He got in his speech, second,
12 third, and out the door he went. I'm not saying I'm against
13 him, I'm not saying I'm for him. But he should be shaking
14 your hands because he's your representative.
15 I'm here shaking your hands because I do a radio show,
16 because I care. And I stand to gain. And all you stand to
17 gain. If we end up with senior water rights we gain.
18 But is that fair to the next guy, is that fair to our
19 kids, to our kids' kids that want to live the American
20 dream? Isn't that socialism, isn't that fascism? Is this
21 democracy? Is this what America was founded upon?
22 You sit there and you won't even answer me when we are
23 quoting the Constitution to you. We are quoting the
24 Constitution. You won't interpret it and put legislation
25 with authoritative power based on a dictatorship with money

1 that is appropriated to do a study when you won't even do
2 the study.
3 So I ask you again, is there a chance that you might
4 be wrong? You state it on the record, this is based on
5 emergency. But you won't define your emergency.
6 What if there is an emergency? And you put them out
7 of business and you destroyed his dream of building, and
8 then I gain? Or they gain because they get senior water
9 rights. Is that fair?
10 Why don't you appropriate the money, do your study and
11 use common sense. What does common sense tell you, that
12 somebody that lived here, a city like Roslyn -- and I'm not
13 against Suncadia. I've golfed there. I'm probably one of
14 the best golfers there. I'll challenge any of you, I'll
15 take you. I play a mean game of golf. Heads up, let's do
16 it. I'm not against it.
17 Some days I feel guilty, but you think it's funny they
18 brought a whole bunch of 100 dollar bills and bought up
19 water on a proclamation from 1904? Has anybody read that?
20 Has anybody in this room read that proclamation from 1904?
21 Have you? Has anybody?
22 Why do you laugh? We need to read these documents.
23 Maybe that document is not even constitutional because the
24 Washington State Constitution trumps the department of
25 proclamation, a federal bureau.

1 When was our Washington State Constitution written?
2 How shortly after was this federal mandate put on the
3 citizens of Washington State?
4 Read into this. Look at what's going on with our
5 water. Not just right now with this, but follow it
6 backwards and you can see that there's only one thing we can
7 do, it's in our Constitution, it's nullification. We
8 nullify it and do what Gandhi did, peacefully, peacefully,
9 not comply.
10 What's the independence, democratic, republican, all
11 you, you let this happen. Independence is where it is at.
12 You need to be my congressman, you need to be my
13 congresswoman because I trust you. I don't know you, but I
14 would trust you with my water because you are good people
15 like me. Maybe we don't agree on the war, maybe we don't
16 agree on immigration, but we agree on this. And I'd vote
17 for you.
18 Somebody stand up and run because that's how we are
19 going to change this. I wanted Bill Hinkle to be here. He
20 knew it. I wanted to ask him: Are you going to draft
21 legislation? Let's see the legislation, draft it,
22 Mr. Hinkle, put it up for vote, force the vote.
23 Let's stand in front of their house with protest signs
24 with our legislation demanding that it be allowed on the
25 floor, demanding that it be voted on. Do you understand how

1 politics works, with these committees and subcommittees and
2 appropriations?
3 Money is sitting there waiting to be appropriated.
4 And if we don't get this study now, turn on C-SPAN and
5 figure out that an appropriation is the most powerful thing.
6 In government, the more that you appropriate, the
7 bigger the committee you are in charge of, the more that
8 money is going be spent. And the money is going to be
9 looked over, it's going to be set aside. The next thing you
10 know, there's going to be more paved roads to certain
11 places. There's going to be more special sidewalks to
12 certain places.
13 You all see it. You've got eyeballs. You see what's
14 getting developed. All roads leads to Rome; don't they?
15 All roads lead to Rome. They're seizing it.
16 I have the next question from very, very limited
17 research. And I'm a idiot. I'm a high school drop-out punk
18 rocker. But I found this is the biggest water basin in
19 North America. Canada, America, Mexico, right here.
20 I could be wrong. Please prove me wrong because in my
21 black helicopter kind of mind, if they seize the biggest
22 water basin, Canada, America, Mexico, based on emergency
23 conservation. If the water table is this high, because we
24 are the deepest, what would happen to every other water
25 table?

1 This is the precedent right now, this is history. If
2 you want to see it or not, laugh at me, think I'm extreme, I
3 could bring up other issues in the county. A couple of you
4 know it. You remember me out there with the signs.
5 This is the biggest water basin in North America. Am
6 I correct or incorrect? Why don't you answer these
7 questions? Isn't that a good question. Wouldn't that be
8 something you want in your study, if this is the largest
9 water basin in North America?
10 Do you realize that Grand Coulee Dam is the largest
11 generation of power in North America? Canada, America,
12 Mexico, nothing makes more power. Isn't that amazing? Yet
13 we are having a water shortage here.
14 It reminds me of the term WMD's, weapons of mass
15 destruction, imminent threat. Remember that term, "imminent
16 threat"? Do your research, read the Constitution. You'll
17 understand why he used the term "imminent threat." It was
18 the only loophole. So right now they are using the
19 emergency act on water that isn't -- there is no shortage.
20 Where is this over-appropriation? Where is an
21 example? I mean it seems like if there is something over-
22 appropriated, if I have a thousand dollars and I want to
23 give 11 hundred to the schools, well, that's a hundred
24 dollars over-appropriated; right? So I have to make a
25 cutback or go get more money and put it in my appropriation

1 committee.
2 So is there a well that went dry somewhere? Is there
3 a golf course that didn't get water? I mean what happened
4 to make you say that we were over-appropriated. You might
5 be right.
6 Oh, I understand it now. I call you guys on the
7 phone, I read the websites, I read the proclamation from
8 1904, I read the Washington State Constitution, I read the
9 case law. And I can't find a single case of water being
10 over-appropriated.
11 Can anybody here tell me where there's one case where
12 somebody turned on their faucet where there wasn't water
13 appropriated? Did we find weapons of mass destruction?
14 Just because someone told us they were there, doesn't
15 mean they're there. Maybe they were there and they got
16 hidden. I don't know, I'm an idiot. I live here, man. But
17 maybe they weren't ever there. And maybe there isn't an
18 over-appropriation and maybe there is. So do your study
19 before you take dictatorial powers and effect these good
20 people's life. God bless America.
21 HEARINGS OFFICER JUDY BEITEL: Thank you
22 (Applause). Is there anyone else wanting to make a comment?
23 Let's just go ahead.
24 (Recess taken.)
25 HEARINGS OFFICER JUDY BEITEL: We have a couple

1 more, then I will be closing this out. Again, staff will be
2 available to answer any questions that you may have. Please
3 go ahead and state your name for the record.
4 MS. KIM COE: Hello, my name is Kim Coe. I
5 represent myself and no one else. And I'm a senior water
6 rights owner.
7 I just want to say that it is my community that helps
8 me. And so when I need help I go to my community and not to
9 a government agency.
10 So, as I sit here and am looking at the Department of
11 Ecology, I'm not quite sure how to ask you for help. But I
12 think that you are a part of our solution, not necessarily
13 our problem if we look at you that way.
14 So what I ask you to do, you have spent years dealing
15 with water rights as we have also. And you have knowledge
16 and you have creativity. Please supply all of that to the
17 situation and help us come up with a creative solution, not
18 a desperate solution, but a solution that will make us all
19 better. Thank you. (Applause).
20 HEARINGS OFFICER JUDY BEITEL: Go ahead and state
21 your name for the record.
22 MR. JERAD MERBS: Hello, my name is Jerad Merbs.
23 HEARINGS OFFICER JUDY BEITEL: I would ask you to
24 please be quiet.
25 MR. JERAD MERBS: That's fine. It's all right.

1 My statement isn't really about everything that everyone
2 else has said already accept I kind of look at the big
3 picture of things somewhat. People are kind of wondering
4 why -- no one can really pinpoint why the emergency, what's
5 the emergency. I think it's just to have an excuse, maybe,
6 just a theory.
7 The whole time -- my brother brought this up, you
8 know, I'm kind of thinking what are the comments going to
9 do? Here everyone is here asking to work with us and these
10 are the guys with the power that are just going to step
11 right in and just make the decision and just tell you how it
12 is basically. So our comments I kind of feel are useless.
13 I really lack faith in the systems of this country on
14 all levels of government. Just all the way up. I mean I've
15 got political views and I'm for liberty and the Constitution
16 and that kind of thing, getting -- most people can't even
17 define those kinds of things and I'm not really good at it.
18 The problem I really see is that like everyone was
19 talking about, like the litigation or the mitigation, is
20 that it's not even a democracy any more. They are just
21 stepping in like the bail-out. Where did I get to vote no?
22 No one asked me, no one asked anybody.
23 Same thing with the power these people have to just
24 jump in on their little act from whatever year it was. And
25 it is kind of like the radio show guy said, you know, I

1 think the Constitution and some of the stuff that the real
2 water rights or whatever everyone
3 is arguing over goes way back to what the rules of -- the
4 details of, you know, when it's applied and when you get the
5 water rights and all that stuff.
6 It's more like the water business. When I saw a lot
7 of the rich people start scrambling for water rights so they
8 could do their developments, the businessmen, and so they
9 could do their resorts and stuff.
10 It seems the state is stepping into the same business.
11 You know, everyone is in a hard time right now. It doesn't
12 matter if you are democratic or republican, they are just up
13 there doing what they want to do. Everyone is like vote
14 them out. We have people standing in front of the mailbox
15 saying "vote out Obama."
16 I don't know how you vote for anything. Once they are
17 voted, they are in. That's it. Hopefully you made the
18 right choice. But 90 percent of the time, as soon as the
19 palms start getting greased, you know, it sounds like a
20 conspiracy theory, your typical thing.
21 But I think there's a big picture behind the whole
22 thing. I don't think there's an emergency. I definitely
23 don't think there's a water shortage in upper Kittitas
24 County.
25 I was born in Alaska but I grew up in southern

California. If you want to see a drought go down there. Those are real droughts. And the same thing as the radio show guy, even during the drought, the faucets never stopped running. We couldn't water lawns or wash our cars and stuff like that. And you get fined for doing stuff like that.

I mean, you guys are water specialists, the Department of Ecology. Like he said, it's the biggest water basin in North America. It's like you are dreaming up a job. I don't really see how there could be a water shortage.

It all comes down to the study. Again, it comes down to the study. It should have been done ahead of time, it should have started a long time ago. Who is going to conduct the study?

And are those scientists, the people who do the study, are they biased? You know, here is BP buying all the scientists. There's always some big crooked scheme behind water or oil or some kind of basic need or staple that we have to survive.

I don't think anyone should be deprived of the rights that come with their land. Those are property rights. That's what makes the fabric of our country important is that those things were founded and written down on a piece of paper a long time ago. And we are losing that so much.

I hear a lot of republicans bitching about the fact that socialism and all that, taking our rights away and they

are. It doesn't matter which side you are on. They are constantly taking our rights away, every day. And this is the same thing.

Here we are, they are constantly coming up with a different thing. It's just the way it's going to be. And I really think -- I think it's a failure. I think they are going to get their way.

I think they will get their way. And what they want, they want to gain control like the lady sitting here early on in the night, can we buy into it? The guy said yeah, that's a great idea. We like that one. Of course they do.

And if I read it right on this darned thing, I could get it wrong, I get a lot of things wrong, the trust account, basically and I'm probably wrong and you can't answer me if I am, if I have water rights, you are allowing me to build a house or whatever I want to do, if I give up my water rights to the trust account, whatever that is going to be?

And then of course you guys are going to have control, whatever, that water reservoir, however you are going to do it. Then I must have gotten something else confused too because this other guy here said that there's a couple reservoirs built, and that must be private or public, I'm not sure, but this guy over here said that right in the paper there wasn't going to be one built for 20 years.

1 So it's exactly what it looks like, exactly what it
2 looks like. They want to take your rights away and then not
3 do anything they promised to do. Just like the federal
4 government has done to us for years and years and years.
5 So America is just too big, and it is too big of a
6 problem. And the population is too big, and it's going to
7 get bigger. You are not going to stop development, you are
8 not going to stop people breathing.
9 They are going to need a place to live. All the
10 people that lose their homes on the south end of the country
11 over here and all the devastation that's going on. They are
12 going to be coming this direction no matter what you do.
13 A study, why even have a study? Are you going to stop
14 people from drinking water, using water? Conservation is
15 the best thing I have heard. That's just about the
16 simplest, most logical thing I've heard.
17 But yeah, taking rights away and turning our country
18 upside down more and more. It's our own government, it's
19 our own elected officials that keep on doing this stuff
20 crooked and not holding up to what they say they are for.
21 And there's always some kind of money involved. It's
22 sick. I'm disgusted that people are asking for your
23 forgiveness.
24 Here you are, you are just taking this. I don't know,
25 I hope I'm wrong about the look in your eye. You are up

1 there smirking and you got this little smile with everyone
2 that's been talking in here.
3 So, you know, I just think we are screwed pretty much.
4 That's my statement. It's not official. All of us can talk
5 and complain and everything. Class action lawsuit, that's
6 about it. And that's what the system has created, it's own
7 little swirly-woos.
8 You have got to spend money. Laws don't mean anything
9 unless you have money to back it up. It will take a class
10 action lawsuit.
11 Like I said before, I'm surprised that you haven't
12 been sued yet. I'm surprised with all the money that's came
13 to this county in the last five years, that people haven't
14 rallied together to do a class action lawsuit against the
15 state and the DOE and all causing all this damage.
16 Because in the long run, like I said, you are not
17 going to stop people breathing, you are not going to stop
18 people moving into other areas to look for a better way of
19 life.
20 That's what it is, you are clamping down on control so
21 when it comes time to use it, they are on top, they are
22 making money, everyone is divvied out. I think that's not
23 freedom, it's definitely not freedom. That's it.
24 HEARINGS OFFICER JUDY BEITEL: Thank you. Is
25 there anyone else that would like to make a comment at this

time?

Okay. We'll go ahead and close. All comments provided at this hearing along with any written comments received by 5 o'clock, August 11, 2010, will be a part of the official hearing record for this proposal.

Again all comments received will be responded to in the Responsiveness Summary and the Concise Explanatory Statement. For those of you providing comments tonight, please make sure you have given me your card so we can put you on the list to receive that Responsiveness Summary.

The next step is adoption. The agency director or his designee will look at all the public comment, the Responsiveness Summary, staff recommendations, and will make a decision about adopting the proposed rule.

Adoption is currently scheduled for no earlier than October 15, 2010. The proposed rule will become effective 31 days after it's filed with the Office of the Code Reviser.

If we can be of further assistance, please don't hesitate to contact Mark Schuppe. He is your agency assistant contact. You can find other information on our website and the contact for the website is on this rule proposal notice and it's also up here.

On behalf of the Department of Ecology, thank you for coming tonight. We appreciate your cooperation. And let

1 the record show that this hearing was adjourned at 9:32 p.m.
2 Thank you for coming.
3 (Proceeding concluded at 9:32 p.m.)
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1 REPORTER'S CERTIFICATE

2 STATE OF WASHINGTON)
) ss.
3 COUNTY OF CHELAN)

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5 This is to certify that I, Cathy S. Olsen, Certified
6 Court Reporter in and for the State of Washington, residing
7 at Wenatchee, reported the within and foregoing deposition;
8 said hearing being taken before me on the date herein set
9 forth; that pursuant to RCW 5.28.010 the witness was first
10 by me duly sworn; that said examination was taken by me in
11 shorthand and thereafter under my supervision transcribed,
12 and that same is a full, true and correct record of the
13 testimony of said witness, including all questions, answers
14 and objections, if any, of counsel.
15 I further certify that I am not a relative or employee
16 or attorney or counsel of any of the parties, nor am I
17 financially interested in the outcome of the cause.
18 IN WITNESS WHEREOF I have hereunto set my
19 hand this 10th day of August, 2010.
20 _____
21 CATHY S. OLSEN, CCR
CCR # 1929
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