

**FIRST AMENDED MEMORANDUM OF AGREEMENT
BETWEEN
KITTTAS COUNTY AND THE STATE OF WASHINGTON, DEPARTMENT
OF ECOLOGY
REGARDING MANAGEMENT OF EXEMPT GROUND WATER WELLS IN
KITTTAS COUNTY**

This Memorandum of Agreement (MOA) is intended to establish the basic principles Kittitas County (County) and the Department of Ecology (Ecology) will employ in order to evaluate the use of exempt ground water well and associated water withdrawals. Unless otherwise specified, this MOA applies to the area commonly known as “upper” Kittitas County as shown on attachment 1. The Amendment supersedes and replaces the prior MOA on this subject dated April 7, 2008.

I. BACKGROUND

A private organization in Kittitas County, Aqua Permanente, submitted a petition to Ecology requesting a moratorium be imposed on use of new exempt wells in Kittitas County until sufficient information is known about potential effects from such wells on senior water rights and stream flows.

Ecology was required to act on the petition by November 9, 2007. On that date, the Parties entered into an Agreement in Principle for the development of this MOA. Based upon the Agreement in Principle, Ecology declined the request to categorically withdraw ground waters in Kittitas County from appropriation pending further study. The Agreement in Principal provided the framework for this MOA, including provisions for implementation of interim management strategies and development of a comprehensive ground water study and long-term management plan for the area known as upper Kittitas County. This MOA formalizes obligations of the County and Ecology (Parties) regarding those provisions.

Kittitas County and Ecology agree, subject to available funding, as follows:

II. PROVISIONS

A. Interim Management Measures – The Parties agree to establish and implement a number of interim measures for the term of this MOA, during which time ground water studies will be conducted to provide the basis for development of long-term strategies for use of ground water and exempt well use in Kittitas County. The interim management measures are as follows:

- 1) **Applicable area** – Unless specifically stated otherwise, the interim measures described below will apply only to what will be referred to as “upper Kittitas County,” the boundaries of which are identified in Attachment 1.

2) Exempt well residential development standards -- In making decisions on a land use application or a building permit application with respect to provisions for potable water or adequate water supply where use of the exemption is relied upon, the County shall apply the provisions of Chapter 173-539A WAC or a permanent rule that replaces that emergency rule, subject to subsection 10 below. With respect to a particular land use decision, if Ecology provides a written comment indicating that a provision of Chapter 173-539A or a permanent rule does not apply to that decision, the County shall not be required to apply it to that decision, unless that comment is withdrawn prior to the County taking action.

3) Notice to prospective buyers and existing well owners – Kittitas County will continue to place language on the face of plats that discloses risks to current and future land owners associated with reliability of water supply. The Parties agree to the following standard plat language:

The approval of this division of land includes no guarantee that there is a legal right to withdraw groundwater within the land division. The approval of this division of land provides no guarantee that use of water under the ground water exemption (RCW 90.44.050) for this plat or any portion thereof will not be subject to curtailment by the Department of Ecology or a court of law.

Further, Kittitas County will advise in its application instructions provided to land use applicants to consider whether to place a covenant limiting water use on parcels within a current application if the developer intends to develop proximate lots within five years from the vesting date of the application, in that water use from such proximate parcels may be considered part of the group use, as set forth in the emergency rule or the permanent rule which replaces it.

Ecology will collaborate with Kittitas County in the preparation of pamphlets, display ads, and other outreach tools that would serve to assist the public and the development industry in understanding the limitations of surface and ground water supplies in the Yakima Basin and the potential risks associated with reliance on exempt wells as well as junior ground and surface water rights for water supply. An initial set of outreach tools will be completed and made available for distribution by July 1, 2008.

4) Metering and Data Collection -- Kittitas County will require developments subject to the requirements of this MOA to include water meters for each individual residential connection. Such meters must be of a type and design acceptable to Kittitas County. Meters will be read and reported in a manner prescribed by Kittitas County, including, but not limited to, direct reading by county staff, voluntary reading and reporting by residents, or reading and reporting by an approved Satellite System Management Agency or other management entity approved by the County. Readings must be made based on

the schedule described in Table 1, with reporting to Kittitas County and the Department of Ecology occurring no later than 30 days after the last day of the reporting period. Kittitas County may set a fee to recover costs it incurs in administering this program. If Kittitas County obtains information that a person or household may be using the exemption in a manner that is inconsistent with the emergency rule or a permanent rule which replaces, it shall in good faith share that information with Ecology.

a) TABLE 1

Reporting Periods	Last Day of Reporting Period
October – March	March 31
April – June	June 30
July	July 31
August	August 31
September	September 30

Kittitas County and the Department of Ecology will each determine appropriate measures for addressing water use in excess of the amount specified by the applicant or for water use in excess of 5,000 gpd. The parties agree to collaborate prior to taking any enforcement action. When penalties are deemed necessary by the Department of Ecology, the Department of Ecology will seek if authorized by law to place any funds recovered through such penalties in the Mitigation Account it establishes for payment of mitigation fees. Funds deposited pursuant to this provision will be exclusively used to acquire water to offset water resource impacts associated with exempt well use in Kittitas County.

5) Data Collection and Management of Existing Group Exempt Uses -- The Parties agree to develop mechanisms that provide for reporting of source meter data from existing Group A and Group B public water systems that rely on exempt wells as a water source. Source meter data will help determine the impacts of group domestic systems on water resources. In developing such mechanisms, the Parties agree to stress voluntary reporting measures and collection of information by Satellite System Management Agencies (SSMA) or other management entities deemed acceptable to Kittitas County. Kittitas County will encourage public water systems that are served by exempt wells in areas not subject to the provisions of this MOA to provide source meter data on a voluntarily basis. Metering data obtained through agreed upon mechanisms will be considered part of the public record. Kittitas County may set a fee to recover costs it incurs in administering this program.

6) Mitigation for exempt withdrawals from unconsolidated sediments – The County recognizes that Ecology intends to amend the current emergency rule before permanent adoption to require full mitigation of all affects on stream flow during all periods when senior downstream water rights are curtailed if the

exempt water withdrawal will occur from the unconsolidated water bearing sediments identified on Attachment 2. This requirement will apply to subdivisions, proximate short plats, and building permits involving such lands.. In preparing recommendations on applications where the provisions for water supply rely in any part on exempt wells, County staff shall indicate that the use of exempt wells is appropriate or adequate only if the mitigation required by the rule is obtained.

7) New Group B Public Water Systems Using the Exemption -- In cases where a Group B public water system is established to serve a new residential development relying on an exempt well or wells, the Group B system must be managed by a Satellite System Management Agency or another management entity approved by Kittitas County.

8) Technical Assistance – Ecology agrees to provide technical assistance to Kittitas County, prospective water users and other stakeholders in assessing potential impacts of exempt well use on ground and surface water resources. Ecology will provide comments on the adequacy of a Hydrogeologic Report as part of the SEPA process or if otherwise requested as part of review of a land use application. The County may request consultation with Ecology on the adequacy of the Hydrogeologic Report prior to Ecology submitting formal comments. Ecology will support a request to the state legislature for funding to retain a watermaster and/or other staff to provide additional technical support to Kittitas County.

9) Kittitas County actions in support of MOA – No later than 90 days after approval of this First Amendment to the MOA, the Kittitas County Board of Commissioners intends to enact any ordinances and to adopt any policies necessary to effectuate this MOA, including, but not limited to, any amendments to development regulations necessary to allow land use decisions that are consistent with the emergency rule or a permanent rule which replaces it.

10) Effect of Permanent Rule on the County -- If the permanent rule substantively differs from the attached proposed rule, , and such differences are unacceptable to the County, this agreement will not bind the County to apply or take action that would support those unacceptable differences. The County shall provide Ecology notice of any such unacceptable differences during the comment period on the permanent rule, and if a difference arises from a change to the permanent rule after the comment period, within 60 days after the permanent rule takes effect.

B. Ground Water Study – The Parties agree to initiate a ground water study intended to focus on portions of Kittitas County that are the subject of this agreement

which are not being fully addressed in the current USGS ground water study of the Yakima River Basin.

- 1) The ground water study will define the hydrogeology of the study area, provide information regarding ground water occurrence and availability, document the extent of ground water and surface water continuity in the study area, and estimate the extent and timing of any effect on stream flows resulting from exempt well use by well location during times that downstream water rights are or are likely to be subject to curtailment. Ecology and Kittitas County will continue to work with the Governor's Office and the Washington State Legislature to secure funding for the study.
- 2) The initial phase of the study will involve development of a scope of work and establishment of an advisory committee and will commence upon the effective date of this Agreement. The advisory committee will provide input to the Parties concerning the scope and implementation of the study as well as provide recommendations to the Parties concerning the development of a long-term management program. Membership of the advisory committee will be mutually agreed upon by the Parties and will represent a broad spectrum of the public.

C. Long-Term Management Program – Based upon the findings of the study described in Section II.B, the Parties in consultation with the advisory committee will develop a proposed long-term water management program that will, to the extent practicable, provide quantities of ground and surface water adequate for existing demand, including streamflows adequate to protect instream values and protection of existing water rights; provide a reliable supply of water for new uses within Kittitas County; and allow for the efficient management of water resources in the County. The program may consider a variety of options, including but not limited to, provisions similar to the interim measures described above, an ongoing ground water monitoring program, and a formal exempt well mitigation program.

D. Mitigation Program – Ecology will continue to work with the Bureau of Reclamation (Reclamation), senior water right holders, Kittitas County, and the Yakama Nation to develop a program intended to provide one or more mechanisms by which pending applicants, developers, and exempt well owners use the water market to acquire senior water rights for use as mitigation to offset water resource impacts associated with their junior water use. Water under the mitigation program would be offered in a manner consistent with the Yakima Water Bank (RCW 90.42.100-130) based applicable state law and any limitations or conditions associated with the water rights held in the trust water rights program for such purposes. The Parties agree to begin implementation of the mitigation program once the Department of Ecology, Reclamation, and the Yakama Nation have formally established the program's operational structure.

III. TERM OF MOA AND RIGHT TO WITHDRAW

This amendment to the MOA will take effect upon the first date that both the County and Ecology have signed this amendment. The MOA will expire on April 7, 2011, or upon

conclusion of the ground water study described in Section II.B, whichever is sooner, unless extended in writing by the Parties. While the amended MOA is in effect, subject to any applicable statutory limitations, Ecology agrees that it will not take regulatory action to withdraw the ground waters of upper Kittitas County from appropriation, except as provided in the emergency rule or a permanent rule with replaces it. A party may withdraw from the agreement by providing advance written notice; however, such termination shall not be effective until the completion of the dispute resolution process on the issues that form the basis for the termination, unless the parties agree in writing to waive the dispute resolution process.

In the event that an Attorney General Opinion concludes Ecology lacks authority to limit exempt uses as set forth in the proposed rule, or Kittitas County lacks authority to implement such a rule in its land use decisions, the County will not be obligated to enforce such limits pursuant to this MOA, which shall otherwise continue to be in effect.

IV. MODIFICATION OF AGREEMENT

This agreement may be modified by written consent of both parties at any time during the term of the agreement as may be necessary to amend, change, or modify the agreement.

V. MUTUAL DEFENSE OF THIS MOA OR IMPLEMENTING ACTIONS.

In the event that this MOA or Kittitas County implementing ordinances or actions are legally challenged on issues relating to this MOA, upon request of Kittitas County, Ecology will seek to intervene in support of the MOA, the ordinances, or other actions to the extent such ordinances and actions are consistent with this agreement. In the event that this MOA or Ecology rules or enforcement actions implementing this MOA are legally challenged on issues relating to this MOA, upon request of Ecology, Kittitas County will seek to intervene in support of the MOA, rules or enforcement actions to the extent such rules and actions are consistent with this agreement.

VI. DISPUTE RESOLUTION

- A. Good Faith Commitment to Resolving Disputes** – The Parties agree to devote such time, resources, and attention as needed to attempt to resolve disagreements concerning this MOA at the earliest time possible. In the event that any disagreement arises among the Parties concerning this Agreement, including disagreements regarding the meaning of, or any Party’s compliance with, this MOA, the Parties shall first attempt to resolve such disagreements on an informal basis.

- B. Formal Dispute Resolution Process** – In the case of any disagreement arising from the implementation of the MOA, any party may initiate the formal dispute resolution process after the Parties have attempted in good faith to resolve the disagreement informally. To initiate the formal dispute resolution process, a requesting Party shall provide written notice to the other Party that describes the issues in dispute. Upon receiving a notice of formal dispute, the Parties’

signatories or their designated representatives shall convene a meeting within 30 days to consider the dispute and may resolve any or all issues or refer any or all issues in dispute back to the originating individuals with specific instructions and a deadline for reporting back to the designated executives, or institute any other alternative dispute resolution procedures it deems useful under the circumstances. If the Parties' signatories or designated representatives fail to resolve the dispute within 30 days upon the meeting convened to resolve the dispute, or a dispute is not resolved within the timeframe established by the designated executives, the dispute resolution process shall then be deemed completed and any Party may withdraw from this MOA. Unless a party seeks to withdraw, upon completing the dispute resolution process, the designated executives shall prepare a joint statement of the remaining issues in dispute, which may also include a discussion of how to resolve such issues consistent with the MOA.

VII. RESERVATION OF AUTHORITY

Nothing in this MOA affects any authority Ecology may have to enforce the State of Washington's water resources laws including but not limited to RCW chapters 90.03, 90.14, 90.44., 90.54, or other appropriate requirements of state law. Both parties reserve all authority to themselves and grant none to the other by virtue of entering into this agreement.

VIII. CONCLUSION OF INTERIM PERIOD

If determined that the regulatory measures implemented under this agreement are no longer valid or necessary due to scientific information developed as a result of the groundwater study required under this agreement those regulatory measures implemented as a result of this agreement will no longer be in force.

IX. APPLICABILITY TO EXISTING WELLS

Nothing in this agreement shall apply to water rights existing nor shall this agreement prohibit replacement and/or repair of wells existing as of July 8, 2008 that serve those water rights should the wells become unusable for their historical purpose. Such existing wells that will be utilized to serve additional lots or further development beyond their historical use shall be subject to this agreement.

X. INVALIDITY

If any provision of this MOA or any rule or ordinance adopted pursuant to this MOA is found by a court or administrative body of competent jurisdiction to be invalid, void, or illegal, the County will not be obligated to enforce such provisions pursuant to this MOA, which shall otherwise continue to be in effect.

XI. THIRD PARTY BENEFICIARIES

This MOA does not create any third party beneficiaries.

XII. SIGNATURES:

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

**KITTITAS COUNTY
BOARD OF COMMISSIONERS**

Jay J. Manning, Director

Commissioner Alan A. Crankovich, Chairman

Date: _____

Date: _____

Commissioner Mark McClain,

Date: _____

Commissioner Paul Jewell

Date: _____

ATTEST:

Julie A. Kjorsvik
Clerk of the Board

Approved as to form:

Gregory L. Zempel,
Prosecuting Attorney
WSBA#19125