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August 18, 2009

Kittitas County Board of County Commissioners
Kittitas County Courthouse
205 West 5th, Suite 108
Ellensburg, WA 98926

Dear Commissioners:

Benton County is writing to comment on the First Amended Memorandum of Agreement between Kittitas County and The State of Washington, Department of Ecology Regarding Management of Exempt Wells in Kittitas County (MOU). All in all the proposed MOA needs to insure the County Commissioners retain their authority to represent the citizens they serve. Inasmuch as the County Commissioners are locally elected officials, we will not comment on whether the Board should sign the MOA. Instead, our comments are related to procedural concerns. The following are Benton County's comments related to the MOU and proposed WAC.

Amended MOU

Number 3, Page 2 -- The standard plat language, which would be required on all land divisions, could cloud the title on effected properties. There must be a mechanism to remove the note on the property title.

Number 9, Page 4 - The provision appears to reduce the County Commissioners Constitutionally established legislative authority. In addition, the provision suggests the Commissioners may be barred for considering meaningful public input if the DOE determines the proposal is mandated by the MOA.

Number 10, Page 4 - The provision contains two issues of concern. First, the proposed rule is adopted by reference. Although the MOA includes provisions to address substantial differences between the proposed rule and permanent rule, it does not define what "substantial" means. Any differences between the proposed and permanent rule should be fully disclosed to the Commissioners and public prior to adoption by the DOE. In addition, the MOA and proposed rules represent negotiated rule making, but this provision reduces the County's relationship in the MOA to a simple commenting agency. At a minimum, a difference identified by the DOE or the County should require additional negotiations prior to adoption.

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Proposed Rule WAC 173-539A

We believe there are several significant issues with the proposed rules that must be addressed.

WAC 173-539A-010(2) -- Subsection includes the statement "while minimizing adverse effects on the local economy." This is an interesting statement given the fact the DOE has provided no documentation that economic impacts were ever considered. Also, DOE has failed to document compliance with RCW 43.21H, State Economic Policy. [1]

Subsection 3 states: "The ground waters ... are presumed to be hydraulically connected to surface water..." This statement is not founded on science and erroneously presumes ALL ground water is connected to surface water. This essentially shifts the burden of proof away from the DOE and onto local landowners.

Subsection 4 essentially reiterates the basic tenets of Western Water Law ... first in time, first in right. Washington Water Law already addresses impairment of senior water rights and establishes curtailment of water use in situations of draught or impairment. Interestingly, the statement, "curtailment due to conflicts with senior water rights" may be an attempt to expand the DOE's interpretation of what impairment actually is. "Conflicts with senior water rights" simply does not automatically equate to actual impairment.

Subsection 5 completely describes the jurisdictional limitations of the proposed rule; however, the proposed rule includes suspicious language in later sections, which could prove to be problematic. [2]

WAC 173-539A-020 --- This section cites RCW 90.44.050 and suggests it authorizes the DOE to establish metering requirements for exempt wells. Unfortunately, RCW 90.44.050 does not contain any language that authorizes the DOE to establish metering requirements on all exempt wells. The language specifically states, "the department from time to time may require ". Based on the clear reading of the language, the DOE is authorized to require metering, but only in a few, limited instances. [3]

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1. RCW 43.21H.020 states: "All state agencies and local government entities with rule-making authority under state law or local ordinance shall adopt methods and procedures which will insure that economic values will be given appropriate consideration in the rule-making process along with environmental, social, health, and safety considerations."
2. The proposed rule includes statements like "Yakima River Basin", "measured at Parker" and "total water supply available" which are terms regularly used in the Yakima River Basin Watershed Plan, the Enhancement Program and Salmon Recovery documents.
3. RCW 90.44.050 states: "After June 6, 1945, no withdrawal of public groundwater's of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public groundwater for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under this chapter"

The section also cites an administrative moratorium, established in 1999, on issuing any new ground water permits in the Yakima basin and notes the administrative moratorium did not apply to exempt wells. It should be noted that the DOE did initiate rule making for the moratorium in 1999, but withdrew that rule making in 2003.[4] Whether the 1999 administrative moratorium applied to exempt wells is meaningless, given the withdrawal from rule making in 2003.

WAC 173-539A-030 - This section includes several definitions which are inconsistent with existing state statutes.

The definition of application includes "Administrative or exempt segregations". Under RCW 58.17, applications for "subdivision"[5] of property must show proof of potable water; however, RCW 58.17 also defines administrative or exempt segregations as being exempt from the provisions of the state subdivision code. It would appear the DOE is expanding the application of RCW 58.17 beyond the Legislative intent.

The definition of "common ownership" is problematic for several reasons. First, Washington State Law recognizes corporations, LLCs, etc. as separate legal entities; yet, the proposed definition would, in some cases, recognize these separate legal entities as a "common owner". In addition, the list of "joint development arrangements" is so broad that it is conceivable that all future subdivisions with the Upper Kittitas County will be considered "common ownerships".

"Group use" as defined in the proposed rules, expands the statutory definition of group domestic uses beyond the Legislative intent[6] to include parcels held in "common ownership" (see above).

The definition of "proximate" is also troubling and will severely restrict development of property (see comments related to common ownership and group use above). In addition, the definition of "proximate short plat" appears to allow the DOE to make arbitrary decisions and regulate otherwise similar development applications differently. It appears these definitions will increase regulatory oversight beyond the Legislative intent.

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extent that it is regularly used beneficially, shall be entitled to a right equal to that established by a permit issued under the provisions of this chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day."

4. See WSR 99-21-100 and WSR 03-06-035.
5. For purposes of this discussion, "subdivision" includes subdivisions, short subdivisions and binding site plans, *as* defined under RCW 58.17.
6. See RCW 70.119A

Within the definition of "residential purposes" or "residential use", the proposed rule includes a limitation that appears to be inconsistent with the law. Specifically, the rule states, "all use of the lawn and noncommercial garden use may not exceed a one-half acre for either a group domestic use or a single domestic use." Nothing in the statute suggests the limitations for exempt well use is an aggregate total.

The use of the definition of "Total Water Supply Available" or (TWSA) within the proposed rule appears to be an attempt by the DOE to bring WRIAs 37 and 38 into the water equation in Kittitas County. TWSA is a term specifically used in the Yakima Basin Enhancement legislation and should not be used for a sub-basin rule.

WAC 173-539A-040 - Throughout the proposed rule, the DOE uses the term "appropriation" universally to describe all water use. There is a fundamental difference between an appropriated water right and an exempt use. [7] Appropriated water rights are formal certificates or permits dedicating a specific amount of water to a specific use. While exempt wells are an assumed right under the law, they are neither permitted nor certificated.

WAC I73-539A-050(1) - This subsection includes language, which reiterates the proposed rule applies to administrative segregations. As previously discussed herein, RCW 58.17 requires applications for "subdivision"[8] of property to show proof of potable water; however, RCW 58.17 also defines administrative or exempt segregations as being exempt from the provisions of the state subdivision code. It would appear the DOE is expanding the application of RCW 58.17 beyond the Legislative intent.

Subsection 3 of the section establishes an assumed use of 1,250 gallons per day (gpd) on each parcel within a development. Most professionals utilize a 400 gpd per lot assumption when designing a development and there appears to be no justification for the amount assumed in the proposed rule. In addition, the Department of Health rules related to Group B water systems allows exempt wells to serve 14 or fewer residential hook-ups. Based on the 5,000 gpd limitation established by law and the 14 or fewer residential hook-ups established by rule, the 400 gpd assumption used by professionals would allow exempt wells to serve 12 lots. The proposed rule appears to be inconsistent with the Legislative intent.

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7. It should be noted the law does state that exempt wells are an assumed right, but also provides a mechanism for exempt well users to seek permits and certifications for their use.
8. For purposes of this discussion, "subdivision" includes subdivisions, short subdivisions and binding site plans, as defined under RCW 58.17.

Subsection 5 of this section introduces a 5-year "test" for proximate parcels and establishes a further limitation of water use on all proximate parcels. Again, this greatly limits the use of groundwater and ignores state law regarding legal entities.

Subsection 7 pertains to lots created through administrative segregations and requires the landowner to identify any lots, which would utilize an exempt well within a 5-year period. The requirement ignores several factors, including market conditions, agricultural financing, estate planning, etc., which often dictate whether a parcel is sold. The proposed rule could lead to additional an artificially "bloated" water demand assumption, which would not reflect the actual projected demand.

WAC 173-539A-055 - The entire section creates two separate classes of property owners, which is prohibited under the Washington State and US Constitutions. The proposed rules arbitrary set March 28, 2002 in determining how much water landowners are entitled to. It should be noted, March 28, 2002 is the date the Washington State Supreme Court issued the Campbell-Gwinn decision. While the DOE has continuously hailed this decision as the "be all, end all" there still is considerable debate over what the decision actually says. For example, the bright line "same time, same place, same person" test is not clearly defined in the decision, as was discussed in the minority opinion.

As previously discussed herein, the DOE has failed to provide any information supporting the limitations contained in subsection 1. Subsection 2 contains language, which will limit withdrawals through an approval of an unrelated development application. The specific language states, "...conditions on water use placed on the plat or **in a land use approval, . . .**" (Emphasis added). What this means, the DOE could demand the County condition a building permit for a barn to reduce water use. This provision greatly exceeds the legislative intent of the law.

WAC 173-539A-080 - Subsection 2 sites the "Water Resources Program Procedures PRO-1000, Chapter 1, but provides no additional information related to what it is. A search of the DOE website revealed the document in question is a departmental procedures handbook, which can be adopted by the Department with no public involvement, no public notice, no Legislative oversight, and does not require compliance with the APA.

Under subsection 2(a), the impact of utilizing a trust water right would be measured at Parker. Parker is located in the 15th District, well away from the area supposedly impacted by the proposed rule. The question is why Parker and not somewhere below the affected area of Kittitas County? The subsection also mandates that any identified trust water right must have a priority date earlier than May 10, 1905. With this limitation, how much trust water is actually available?

Subsection 2(b) appears to limit the use of trust water everywhere in the Yakima River Basin. The specific language states:

> *"The proposed use on the new application or request must be for domestic, group domestic, lawn or noncommercial garden, and/or municipal water supply purposes of use within the Yakima River Basin."*

Subsection 4 allows the DOE to condition or otherwise require the trust right is used to mitigate TWSA in the Yakima Basin. As discussed earlier, this provision appears to impact all water users in the Yakima River Basin, which is a much greater area than the rules allegedly affect.

WAC 173-539A-110 - Subsection 1 discusses the development of a "long-term management program" after completion of a groundwater study for the areas of Kittitas County not included in the USGS study. It is my understanding, the USGS study is focused on the basalt aquifers in the Yakima River Basin. How much of Kittitas County is not being studied? It appears this provision could lead to additional curtailment of water use throughout Kittitas County.

Subsection 3 allows any interested citizen to request the DOE review the proposed rules at any time. This seems overly broad and should be limited to water right holders and actual water users.

If you have any questions, please do not hesitate to contact me.

Sincerely,

BOARD OF COUNTY COMMISSIONERS

Max E Benitz

MAX E. BENITZ, JR. CHAIRMAN

CC: Attachment

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