Opinion

Rob McKenna

Attorney General of Washington

WATER—WATER RIGHTS—WELLS—INTERLOCAL COOPERATION ACT—Interpretation of statutes exempting certain withdrawals of groundwater from permitting requirements, and authorizing the Department of Ecology to withdraw waters from appropriation

1. **The statutory exemption from the permitting requirement for use in watering lawns and noncommercial gardens is not included within the exemption for domestic use.**

2. **The Department of Ecology lacks the authority to impose lower or different limits on exempt withdrawals of groundwater than are provided in statute by "partially withdrawing" the waters from additional appropriation.**

3. **The authority of the Department of Ecology to withdraw waters from new appropriations applies to both permitted and permit-exempt uses of groundwater.**

4. **The Interlocal Cooperation Act is not an independent source of agency authority.**

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September 21, 2009

The Honorable Gregory L. Zempel
Kittitas County Prosecutor
205 West Fifth, Room 213
Ellensburg, WA 98926-3129

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Jay J. Manning, Director
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Dear Prosecutor Zempel and Director Manning:

By two letters previously acknowledged, you both have requested our opinion on several questions related to groundwater. Prosecutor Zempel initiated this request by asking for our opinion on four questions. Director Manning subsequently posed three additional, but related, questions. Combining your questions into a single list, very slightly paraphrasing them, and placing them into the order in which we respond, your questions are:

1. **Does RCW 90.44.050 restrict groundwater withdrawals without a permit for lawn and noncommercial gardening purposes to a subpart of the 5,000 gallons per day allocated to single or group domestic use, and thus also limit those domestic uses of the exemption to a remainder?**

2. **If RCW 90.44.050 does not limit groundwater withdrawals for lawn and noncommercial gardening purposes to a subpart of the 5,000 gallon-per-day limit imposed upon single or group domestic use, may the Department of Ecology implement a rule imposing such a limit by permanently adopting the third version of WAC 173-539A, the Upper Kittitas Groundwater Rule?**

3. **Does the Department of Ecology have authority under RCW 90.54.050(2) and related statutes to withdraw groundwater of the state from new appropriations for permitted uses and permit-exempt uses under RCW 90.44.050, but allow an exception for new appropriations that are mitigated in an equal or greater amount by existing trust water rights?**

4. **If the answer to question 3 is "yes," does the Department of Ecology have authority, under RCW 90.54.050(2) and related statutes, to withdraw groundwater from new permit-exempt appropriations under a condition that withdraws water for new exempt uses above a certain quantity from appropriation, unless the amount of use above this quantity is mitigated in equal or greater amount by a trust water right?**

5. **Does RCW 90.44 preempt the local legislative authority of a county from setting a numeric gallon-per-day limit or group-use limit upon the lawn and noncommercial gardening exemption from permitting?**

6. **Does RCW 90.44.050 preempt a county from using its available authority to limit new residential uses of groundwater (including both permitted and permit-exempt uses) proposed as part of a subdivision or building application to a specified quantity, unless the consumptive amount of use above this quantity is mitigated in an equal or greater amount? For purposes of this question, consumptive use is the amount of water by which the withdrawal would reduce flows or levels of any surface water.**

7. **Could the Department of Ecology and a county impose such a limit by entering into an agreement?**

Prosecutor Zempel posed questions 1, 2, 5, and 7 above, while Director Manning posed questions 3, 4, and 6.

BRIEF ANSWER

State law allows for certain withdrawals of groundwater that are exempt from its general permitting requirement. These "exempt withdrawals" can be used for certain limited purposes, including water for lawns and noncommercial gardens not exceeding one-half acre, and for single or group domestic uses not exceeding 5,000 gallons per day. State law also provides the Department of Ecology with the authority to withdraw water from further appropriation if the department lacks sufficient information upon which to make sound decisions. Based upon these provisions of state law, we conclude:

1. In response to your first question, the use for watering lawns and noncommercial gardens is not included within the 5,000 gallon-per-day limit for single or group domestic uses.

2. In response to both your second and fourth questions, we conclude that the Department of Ecology lacks the authority to impose lower or different limits on exempt withdrawals by "partially withdrawing" the waters of the applicable area from additional appropriations.

3. 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.

4. We are unable to respond to your fifth and sixth questions because they inquire about an issue pending in litigation.

5. Finally, in response to your seventh question, we conclude that the Interlocal Cooperation Act is not an independent source of agency authority, and that therefore the authority for Ecology and the county to enter into an agreement is limited based upon their statutory authority.

BACKGROUND

As a general rule, anybody who wants to use public groundwater must receive a permit from the Department of Ecology (Ecology) before drilling or digging a well or withdrawing water. RCW 90.44.050. The statute imposing this requirement also recognizes an exception for certain withdrawals of water that are exempt from this permitting requirement. A second statute allows Ecology to "withdraw various waters of the state from additional appropriations" based

upon Ecology's conclusion that it lacks sufficient information and data to make sound decisions. RCW 90.54.050(2). That is, Ecology may determine that no new appropriations of water rights may occur until it acquires sufficient information to support its decision-making process. RCW 90.54.050(2). Your questions relate to both of these statutes.

You both pose your questions with regard to groundwater in an area referred to as "Upper Kittitas County," an area that includes Cle Elem, Roslyn, and the surrounding area on the east slope of the Cascades to the King County line. This region forms a part of the headwaters of the Yakima River Basin, in which an action seeking a general adjudication of surface water rights has been proceeding for over thirty years. *Dep't of Ecology v. Acquavella*, 100 Wn.2d 651, 652–53, 674 P.2d 160 (1983). Although that litigation concerns surface water, Ecology has also had an administrative moratorium on the issuance of any groundwater permits in effect throughout the Yakima basin for a number of years. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 6, 43 P.3d 4 (2002). We understand that this moratorium remains in effect, and that Ecology has not issued any new groundwater permits in the Yakima River Basin since 1993. *See id.* Until recently, that moratorium was not applied to withdrawals that are exempt from the general permit requirement. RCW 90.44.050. Such exempt withdrawals[1] were, accordingly, the only method available for obtaining a new appropriation of groundwater in the Upper Kittitas.

Several years ago a private organization petitioned Ecology to preclude the drilling of any new exempt wells. The petition asked Ecology to withdraw the waters of the Upper Kittitas from further appropriation, citing insufficient information regarding the availability of groundwater in the area. Ecology rejected this proposal, and instead agreed with Kittitas County to a series of interim measures, short of withdrawing the basin from all new appropriations. Under that agreement, new residential construction could continue to take place, obtaining water using exempt withdrawals. Those withdrawals, in some cases, would be restricted to using less water than the 5,000 gallons per day that are exempted from permitting under RCW 90.44.050.

Ecology and the county entered into a Memorandum of Understanding describing these interim measures. To implement that agreement, Ecology adopted WAC 173-539A as an emergency rule. Wash. St. Reg. 08-15-020 (July 8, 2008; adopting first version of WAC 173-539A as an emergency rule). An administrative rule adopted on an emergency basis is valid for only 120 days, and expires at the end of that period. RCW 34.05.350(2). When the first set of rules expired, Ecology adopted a second set of emergency rules on the same subject, also denominated as WAC 173-539A. Wash. St. Reg. 08-23-012 (Nov. 6, 2008; adopting second

[1] Our discussion of necessity uses forms of the word "withdraw" in very different ways. The word can be used to mean the act of removing groundwater through a well; however, RCW 90.54.050(2) authorizes Ecology to "withdraw various waters of the state from additional appropriations" using the word in the sense of making water no longer available for appropriation. In order to respond to your questions, we must discuss both withdrawal of water from the ground, and withdrawal of groundwater from availability for appropriation. Context makes the differing uses of the word clear.

version of WAC 173-539A as an emergency rule). When those rules, in turn, expired at the end of 120 days, Ecology adopted a third version of WAC 173-539A, also as an emergency rule. Wash. St. Reg. 09-07-068 (Mar. 13, 2009; adopting third version of WAC 173-539A as an emergency rule). Like the first two versions, the third version of WAC 173-539A restricted, but did not prohibit, the use of water from new exempt withdrawals for residential purposes. WAC 173-539A-055.

At the time Prosecutor Zempel posed his questions, the third version of WAC 173-539A, was in effect. Prosecutor Zempel attached copies of them to his opinion request, and his questions specifically reference the approach to groundwater in the Upper Kittitas set forth in those rules.

Director Manning's questions are based on changed circumstances. After Prosecutor Zempel posed his questions, the third version of the emergency rules expired. Ecology adopted a fourth version of WAC 173-539A, which was dramatically different than the prior three. Wash. St. Reg. 09-15-107 (July 16, 2009; adopting fourth version of WAC 174-539A as an emergency rule). The fourth version states: "Beginning on the effective date of this rule, all public groundwaters within the upper Kittitas County are withdrawn from appropriation." WAC 173-539A-040 (fourth version, adopted July 16, 2009). Rather than continuing to authorize new exempt withdrawals under certain restrictions, as provided in the first three versions of WAC 173-539A, the fourth version withdraws the groundwater of the basin from new appropriation. This rule thus sets forth a moratorium against new exempt withdrawals within the Upper Kittitas for the duration of the fourth version of the emergency rules. "No new appropriation or withdrawal of groundwater shall be allowed, *including those exempt from permitting* . . . ." WAC 173-539A-040 (emphasis added). The fourth version of the rule provides an exception to the prohibition against new uses for "water budget neutral projects" using a "trust water right program to offset the consumptive use associated with the proposed new use of groundwater." WAC 173-539A-050(2) (fourth version, adopted July 16, 2009). Like the earlier versions, however, the fourth version of WAC 173-539A is also an emergency rule, and we understand that consideration of permanent options continues. Director Manning's questions assume the fourth version of the rule as background, but ask about other options that might be considered.[2]

Accordingly, we consider both sets of questions together, because they seek our views regarding the legal options open to both Ecology and the county. Our role in providing this opinion is to address the legal issues you have asked about, but not attempt to resolve a specific dispute or comment on particular facts. We understand that your discussion of available options has continued while we have considered your opinion requests. The full range of legal options

[2] On July 31, 2009, Ecology adopted a fifth version of the rule that maintained the provisions of the fourth version discussed in this opinion, but added definitions and a clarification regarding the applicability of the rule. Wash. St. Reg. 09-16-075 (July 31, 2009).

you ask about remain appropriate for our consideration, even though the approach Ecology has taken in temporarily adopting emergency rules has evolved.[3]

ANALYSIS

1. Does RCW 90.44.050 restrict groundwater withdrawals without a permit for lawn and noncommercial gardening purposes to a subpart of the 5,000 gallons per day allocated to single or group domestic use, and thus also limit those domestic uses of the exemption to a remainder?

No. RCW 90.44.050 provides four different purposes for which groundwater may be withdrawn without a permit. Each of those purposes is a separate exemption from the permit requirement. Use of water for lawns and noncommercial gardens not exceeding a half-acre in area does not count against the 5,000 gallon-per-day limit for single or group domestic use.

Prosecutor Zempel posed this question based on the third version of Ecology's administrative rules. That version included a provision that limited the amount of water that could be used for both domestic uses, and lawn and noncommercial garden use, to 5,000 gallons per day. WAC 173-539A-050(3) (third version).

Water law in Washington is premised upon the doctrine of "prior appropriation." *Campbell & Gwinn*, 146 Wn.2d at 7–8. "Under the prior appropriation doctrine, a water right may be acquired where available public water is appropriated for beneficial use, subject to existing rights." *Id.* at 8 (citing RCW 90.03.010). This is true of both surface water and groundwater. *Id.* "'Subject to existing rights, all natural ground waters of the state . . . are hereby declared to be public ground waters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise.'" *Id.* (quoting RCW 90.44.040).

Statutes governing rights to groundwater date from legislation enacted in 1945. In part, those statutes extend prior law governing rights to surface water to the appropriation and beneficial use of groundwater. RCW 90.44.020. Applications for permits for rights to groundwater are accordingly governed by the same principles as applications for rights to surface water. "Thus, before a groundwater permit may be issued to a private party seeking to appropriate groundwater, Ecology must investigate and affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare." *Campbell & Gwinn*, 146 Wn.2d at 8 (citing RCW 90.03.290).

[3] Because both the third and the fourth versions of WAC 173-539A are relevant to different questions, we attach both versions for ease of reference, and indicate which version we cite in our analysis below.

Your questions relate to a statutory exception to this requirement for a permit to withdraw groundwater:

> After June 6, 1945, no withdrawal of public groundwaters 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 groundwaters 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 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.

RCW 90.44.050.[4]

Under this statute, exempt withdrawals can be used for four different purposes. As explained in a recent appellate decision:

> The overall scheme of [RCW 90.44.050] is to require a permit except for certain "small withdrawals." The 1945 legislature defined a "small withdrawal" as (1) any amount of water for livestock, (2) any amount of water for a lawn or for a noncommercial garden of a half acre or less, (3) not more than five thousand

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[4] We recently summarized this statute as stating four points:

> (1) a general rule requiring a water right permit for any withdrawal of public groundwater; (2) a proviso excepting identified categories of withdrawals from the general rule—i.e., allowing them without a permit; (3) a second proviso allowing Ecology to require persons making withdrawals excepted from the permit requirement to provide information about the means and amounts of such withdrawals; and (4) a third proviso giving persons, authorized by the statute to withdraw less than 5,000 gallons a day without a permit, the option to obtain a water right through the generally applicable permit process.

AGO 2005 No. 17, at 3.

> gallons per day for domestic use, and (4) not more than five thousand gallons per day "for an industrial purpose."

Kim v. Pollution Control Hearings Bd., 115 Wn. App. 157, 160, 61 P.3d 1211 (2003).

In his first question, Prosecutor Zempel asks whether withdrawals of water for the second listed purpose, "the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area," are included within the 5,000 gallon-per-day limit for the third listed purpose, "single or group domestic uses." RCW 90.44.050. The Court of Appeals' explanation of the statute in *Kim*, quoted above, would seem to answer this question in the negative. As the court explained, the statute allows four separate exempt uses, and the use for watering lawns or noncommercial gardens is not limited by volume. *Kim*, 115 Wn. App. at 160.

Kim involved using water from an exempt withdrawal for purposes of a commercial nursery. *Id.* at 158. The question before the court was whether this constituted "an industrial purpose" within the meaning of the fourth-listed purpose in the statute. *Id.* at 160. We therefore do not rest our answer to the first question on *Kim* alone, since the quoted passage from that case is not the court's holding.

It does, however, correctly reflect the ordinary language of the statute. As we explained in an earlier opinion, of the four categories of exempt withdrawals, "the third (single or group domestic use) and the fourth (industrial use) are expressly limited to withdrawals of less than 5,000 gallons a day." AGO 2005 No. 17, at 4. We contrasted this phrasing with the statutory description of the exemption for stock watering, noting the absence of any language limiting the amount of water. AGO 2005 No. 17, at 4. The same is true for the exemption for watering lawns and noncommercial gardens. RCW 90.44.050. Our earlier conclusion that the 5,000 gallon-per-day limitation for domestic and industrial uses does not apply to stock watering would accordingly apply equally as well to the watering of lawns and noncommercial gardens. AGO 2005 No. 17, at 4.

Prosecutor Zempel's question raises a slightly different issue, however.[5] It asks not merely whether the 5,000 gallon-per-day limitation could be applied to the watering of lawns and gardens, but whether one exempt use is a subset of another exempt use. Prosecutor Zempel asks whether the use for watering lawns and noncommercial gardens comes within the exemption for domestic use, such that it would count toward the 5,000 gallon-per-day domestic limit. From a certain perspective, it would make sense to think of the watering of a lawn or garden as a type of domestic use of water. The word "domestic" can be used to mean, "connected with the supply,

[5] We note that the question of whether the 5,000 gallon-per-day limit does or does not apply to stock watering is currently at issue in a pending case. "The attorney general has, since statehood, consistently declined to issue opinions on questions already in litigation before the courts, or where litigation is imminent, believing that in such a case the proper tribunal to resolve the question is the court itself." AGLO 1971 No. 129, at 2. As noted in text, however, your question is subtly, but significantly, different than the question of whether the 5,000 gallon-per-day limit applies to stock watering. Not only do you ask about a different exemption, but you ask whether one exemption is subsumed within another.

service, and activities of households and private residences," a concept that could include watering the lawn or garden. *Webster's Third New International Dictionary* 671 (2002). The Legislature listed lawn and garden watering as a separate exemption from domestic uses, however, and so we cannot reasonably conclude that one is included within the other. To do so would render the exemption for lawn and garden watering meaningless, and the Legislature is presumed not to include unnecessary language within a statute. *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). We therefore conclude that the exempt use for watering lawns and gardens is not limited to some portion of the 5,000 gallons per day that are allowed for domestic use.

This does not mean that the exemption for watering lawns and noncommercial gardens is unlimited. While the statute does not limit the volume of an exempt withdrawal of waters for this purpose, it does limit the acreage to which the water can be applied. The statute permits the use of an exempt withdrawal "for the watering of a lawn or of a noncommercial garden *not exceeding one-half acre in area.*" RCW 90.44.050 (emphasis added).

2. If RCW 90.44.050 does not limit groundwater withdrawals for lawn and non-commercial gardening purposes to a subpart of the 5,000 gallon-per-day limit imposed upon single or group domestic use, may the Department of Ecology implement a rule imposing such a limit by permanently adopting the third version of WAC 173-539A, the Upper Kittitas Groundwater Rule?

No. Prosecutor Zempel asks question 2 in the context of the third version of Ecology's administrative rules. This question requires us to determine whether RCW 90.54.050(2) gives Ecology the authority to impose lower or different limits on the amount of exempt withdrawals of groundwater, rather than precluding new exempt withdrawals entirely. RCW 90.54.050(2) gives Ecology the authority to withdraw waters from availability for further appropriation, and not the authority to modify the statutory provisions addressing exempt withdrawals set forth by the Legislature in RCW 90.44.050.

The third version of the rule continued to allow new exempt withdrawals, but restricted the use of water differently than does RCW 90.44.050. As described in response to the first question, RCW 90.44.050 makes four types of uses of groundwater exempt from permitting requirements, limiting two of those types of uses to not more than 5,000 gallons of water per day and limiting a third based on acreage. *Kim*, 115 Wn. App. at 160. The third version of the rules restricted exempt withdrawals differently, including counting the use of water for purposes of lawns and noncommercial gardens within an overall limit on all domestic residential water use at a particular parcel. WAC 173-539A-050(3) (third version).

Ecology relied upon RCW 90.54.050(2) as its authority to restrict new exempt withdrawals without banning completely all new exempt withdrawals. WAC 173-539A-020 (third version). Prosecutor Zempel asks whether Ecology had the authority to do this.

The statute reads:

> In conjunction with the programs provided for in RCW 90.54.040(1), whenever it appears necessary to the director in carrying out the policy of this chapter, the *department may by rule* adopted pursuant to chapter 34.05 RCW:
>
> (1) Reserve and set aside waters for beneficial utilization in the future, and
>
> (2) *When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available.* Before proposing the adoption of rules to withdraw waters of the state from additional appropriation, the department shall consult with the standing committees of the house of representatives and the senate having jurisdiction over water resource management issues.
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> Prior to the adoption of a rule under this section, the department shall conduct a public hearing in each county in which waters relating to the rule are located. The public hearing shall be preceded by a notice placed in a newspaper of general circulation published within each of said counties. Rules adopted hereunder shall be subject to review in accordance with the provisions of RCW 34.05.240.

RCW 90.54.050 (emphasis added).[6]

Ecology described its action in the third version of the rules as a "partial withdrawal" of the basin from new appropriations. WAC 173-539A-010(2) (third version); *see also* WAC 173-539A-020 (third version). However, the import of RCW 90.54.050 is that some water that was available for appropriation before Ecology acts will no longer be available after Ecology acts. RCW 90.54.050(2) (authorizing Ecology to withdraw water from "additional appropriations," not to restrict the size of appropriations). This is not what happened under Ecology's "partial withdrawal" approach. Both before and after Ecology adopted the third version of its rule, characterized as "partially withdrawing" the Upper Kittitas basin, new exempt withdrawals could commence. The only difference was how many wells it would take, and how many parcels would need to be developed, to pump the same amount of water. *See* AGO 1997 No. 6, at 6–7 ("Applying the permit requirement should not turn on an artificial choice of drilling several holes in the ground rather than one, where the withdrawal is for a single purpose."). Ecology's "partial withdrawal" did not "withdraw" the waters from availability for appropriation at all; it merely changed the amount of water available for particular parcels, potentially dividing the water among more parcels. All else being equal, it may be that Ecology's approach would result

[6] The statute cross-referenced in RCW 90.54.050 directs Ecology to adopt administrative rules to, among other things, "develop and implement . . . a comprehensive state water resources program which will provide a process for making decisions on future water resource allocation and use." RCW 90.54.040(1).

in a reduction in the overall amount of new groundwater uses in an area. However, RCW 90.54.050(2) does not give Ecology the authority to reduce groundwater use by whatever means it determines; rather, the statute provides to Ecology the authority to withdraw groundwater from appropriation.

This is not to say that exempt withdrawals are exempt from regulation. As discussed more fully in the context of your third question, RCW 90.44.050 merely exempts certain uses of groundwater from the *permitting* requirement. RCW 90.44.050 (merely exempting such uses from "this section"). Exempt withdrawals are not exempt from other regulatory authority found elsewhere in the water code. This principle, however, should not obscure the distinction between withdrawing water from new appropriations, on the one hand, and regulating the allocation of water among users, on the other. A water right obtained through a permitting process or by way of exempt use are equivalent. RCW 90.44.050 (right obtained through exempt use is "a right equal to that established by a permit"). We do not address Ecology's regulatory authority applicable to all such rights after a water right is acquired, but we do conclude that Ecology lacks the authority to regulate the volume of a water right that may be obtained through the use of exempt withdrawals.

The "partial withdrawal" concept is also inconsistent with RCW 90.54.050 in that the statute authorizes the withdrawal of groundwater "*when sufficient information and data are lacking to allow for the making of sound decisions.*" RCW 90.54.050(2) (emphasis added). The lack of available information to make sound decisions relates to the decision-making process in which Ecology would ordinarily engage when evaluating applications for water rights, or in deciding to permanently close the basin. Other than in the context of exempt withdrawals, for which no permit is required, Ecology would ordinarily evaluate the availability of water and the potential for a new appropriation to impair an existing right, among other factors. *Campbell & Gwinn*, 146 Wn.2d at 8. The Legislature would not likely have intended to authorize Ecology to regulate the amount of water that may be withdrawn based upon a *lack* of information relevant to the subject, when the Legislature has exempted those withdrawals from the permitting process in the first place. RCW 90.44.050; *see also State v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995) (the court's fundamental objective in construing a statute is to ascertain and carry out the intent of the Legislature).

Ecology's approach of "partially withdrawing" waters from availability for appropriation might be defended based upon an argument that its authority to "withdraw various waters of the state from additional appropriations" (RCW 90.54.050(2)) necessarily includes the lesser authority to restrict those withdrawals. *See Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 637, 201 P.3d 346 (2009) (concluding that a trial court's authority under CR 41(d) to stay all proceedings included the lesser power to stay part of the proceedings); *see also State ex rel. Bowen v. Kruegel*, 67 Wn.2d 673, 680, 409 P.2d 458 (1965) ("because the greater includes the lesser" the state's constitutional authority to classify cities and enlarge their limits by annexation includes the power to delegate annexation decisions to cities). The "partial withdrawal" contemplated by the third version of Ecology's rules—that is, establishing lower limits on exempt withdrawals than those set forth in RCW 90.44.050—is not something lesser than, but

included in, a complete withdrawal. Here, the third version of WAC 173-539A did not close the area in question to further appropriation, fully or partially. The rules merely limited the amounts of exempt withdrawals without any limit on the total amount of water withdrawn.

Finally, our task is not merely to construe RCW 90.54.050 in isolation; we must harmonize it with RCW 90.44.050. "The construction of two statutes shall be made with the assumption that the Legislature does not intend to create an inconsistency. Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . which maintains the integrity of the respective statutes." *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (alteration in original) (citation and internal quotation marks omitted). RCW 90.54.050 and RCW 90.44.050 are best harmonized by concluding that RCW 90.54.050 authorizes Ecology to "withdraw various waters from the state from additional appropriations" (RCW 90.54.050(2)), but does not imply the authority to impose different limits upon exempt withdrawals than are stated in RCW 90.44.050.

3. Does the Department of Ecology have authority under RCW 90.54.050(2) and related statutes to withdraw groundwater of the state from new appropriations for permitted uses and permit-exempt uses under RCW 90.44.050, but allow an exception for new appropriations that are mitigated in an equal or greater amount by existing trust water rights?

Yes. Ecology has the statutory authority to withdraw groundwater in an area entirely from appropriation if it lacks sufficient information and data to allow for the making of sound decisions regarding water rights. This includes both new permitted and permit-exempt uses. Ecology may, at the same time, issue permits for new water rights or authorize new exempt withdrawals where the new appropriations of water are mitigated by existing trust water rights.

Director Manning asks about Ecology's authority to withdraw the Upper Kittitas from further appropriation of groundwater under RCW 90.54.050(2).[7] This statute authorizes Ecology to withdraw water from availability for further appropriation when it lacks sufficient information and data upon which to make sound decisions. RCW 90.54.050(2).

Director Manning asks whether the withdrawal of water from new appropriations would apply to exempt uses, in addition to permitted uses of groundwater. It is readily apparent that if Ecology withdraws water from new appropriation under RCW 90.54.050(2), no new permits can be issued authorizing new appropriations. RCW 90.54.050(2) (referring to withdrawing waters from further appropriation). As discussed above, however, RCW 90.44.050 exempts certain uses of groundwater from the permitting requirement, and so we must consider whether the withdrawal of waters from appropriations applies to new exempt withdrawals.

[7] RCW 90.54.050 is set forth in full in response to your second question.

The plain language of RCW 90.44.050 makes clear that the withdrawal of water from further appropriation under RCW 90.54.050(2) applies to new exempt uses.[8] RCW 90.44.050 begins by requiring a permit from Ecology before anybody can use groundwater, or drill or dig a well. The statutory provision for exempt uses is stated as an exception to that rule. RCW 90.44.050. The statute, however, exempts the exempt withdrawals only from "the provisions of *this section*." RCW 90.44.050 (emphasis added). That is, exempt withdrawals are only exempted from the requirement of obtaining a permit; they are not made exempt from other laws governing groundwater rights. RCW 90.44.050. Furthermore, if Ecology exercises its authority under RCW 90.54.050, the water is withdrawn "from additional appropriations." RCW 90.54.050(2). The right to an exempt withdrawal of groundwater is a water right equivalent to a right obtained through a permit. RCW 90.44.050; *see also Campbell & Gwinn*, 146 Wn.2d at 9 (referring to party making an exempt withdrawal as an "appropriator" of a water right). Since RCW 90.44.050 treats an exempt use as an "appropriation" of water, we therefore conclude that Ecology's exercise of its authority to withdraw water from additional appropriation under RCW 90.54.050(2) affects future exempt wells in the same way as it affects other future appropriations of water rights.

Director Manning also asks whether a rule that withdraws water from further appropriation could also authorize new exempt withdrawals if the new withdrawals are mitigated in an equal or greater amount by existing trust water rights. This aspect of the question addresses the fourth version of Ecology's rules for the Upper Kittitas. They provide that even though the waters of the basin have been withdrawn from availability for further appropriations, certain "water budget neutral" appropriations may still be made if the amount of consumptive use is offset by mitigation from trust water rights. WAC 173-539A-050 (fourth version).

Ecology is authorized by statute to acquire water rights by various means, other than condemnation, and apply them to a "trust water rights" program. RCW 90.38.020. The purpose of the program is to use the waters of the Yakima basin more efficiently, "to better satisfy both present and future needs for water in the Yakima river basin." RCW 90.38.005(1)(c). The program makes water available for new uses by encouraging more efficient use of water by the holders of existing water rights. A "trust water right" is statutorily defined to mean "that portion of an existing water right, constituting net water savings, that is no longer required to be diverted for beneficial use due to the installation of a water conservation project that improves an existing system." RCW 90.38.010(3). The term also includes any other water right acquired by Ecology under the authority of RCW 90.38 for the management of a trust water rights program in the Yakima River Basin.[9] RCW 90.38.010(3). Trust water rights can be exercised if Ecology determines that "no existing water rights, junior or senior in priority, will be impaired[.]" RCW 90.38.040(5)(a).

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[8] RCW 90.44.050 is set forth in full in the course of our response to the first question.

[9] RCW 90.38 is limited in its application to the Yakima River Basin. RCW 90.38.005(3).

The rule provides that a person desiring to use groundwater shall either apply to Ecology for a permit, or if seeking to commence a permit-exempt use, submit a request for a determination that the proposed exempt use would be "water budget neutral." WAC 173-539A-050 (fourth version). In either case, the applicant would need to identify one or more water rights that would be placed into the water right trust program in order to offset the consumptive use that would result from the proposed new use of water, or show that the state already holds a suitable trust water right that has been designated for the proposed use. WAC 173-539A-050 (fourth version); *see also* WAC 173-539A-060 (fourth version) (describing expedited process of trust water rights applications). In other words, the fourth version of the rule contemplates new uses of water, either through a permit or through an exempt well, if that new use is fully mitigated by an applicable trust water right.

Application of the trust water rights program is not inconsistent with Ecology's decision to withdraw the waters from availability for new appropriation under RCW 90.54.050(2). The use of a trust water right to compensate for the effect of a new use of water, either based upon a permit or using an exempt withdrawal, results in no net impact or effect on appropriated water rights. It is therefore consistent with the purpose of the withdrawal authority in RCW 90.54.050(2) to preserve the status quo when insufficient information exists to make sound decisions. We, accordingly, answer this portion of Director Manning's question by concluding that Ecology may authorize new permitted or permit-exempt uses of water that are fully mitigated for consumptive use by trust water rights, even if Ecology has withdrawn the applicable area's waters from new appropriation under RCW 90.54.050(2).

4. **If the answer to question 3 is "yes," does the Department of Ecology have authority, under RCW 90.54.050(2) and related statutes, to withdraw groundwater from new permit-exempt appropriations under a condition that withdraws water for new exempt uses above a certain quantity from appropriation, unless the amount of use above this quantity is mitigated in equal or greater amount by a trust water right?**

Our response to the fourth question is dictated by our answer to the second question. Director Manning poses the fourth question with reference to the fourth version of the rules, but otherwise focuses upon the same core issue as the second question. As we concluded above, Ecology's authority to withdraw water from new appropriations does not extend to imposing lower or different limits on the uses of water using new exempt withdrawals. This question assumes the authority to establish lower limits by requiring that any amount above such a limit be mitigated.

Director Manning asks not only about authority derived from RCW 90.54.050(2), but directs our attention generally to "related statutes" as well. For example, RCW 90.54.050(1) authorizes Ecology to "[r]eserve and set aside waters for beneficial utilization in the future[.]" RCW 90.54.040(1) authorizes Ecology to implement a comprehensive state water resources program, in order to make decisions on water resource allocation and use. We have identified nothing in these statutes that would alter our analysis and conclusions.

5. **Does RCW 90.44 preempt the local legislative authority of a county from setting a numeric gallon-per-day limit or group-use limit upon the lawn and noncommercial gardening exemption from permitting?**

6. **Does RCW 90.44.050 preempt a county from using its available authority to limit new residential uses of groundwater (including both permitted and permit-exempt uses) proposed as part of a subdivision or building application to a specified quantity, unless the consumptive amount of use above this quantity is mitigated in an equal or greater amount? For purposes of this question, consumptive use is the amount of water by which the withdrawal would reduce flows or levels of any surface water.**

We must respectfully decline to respond to your fifth and sixth questions, because they raise an issue currently pending in litigation. It is the longstanding policy of this office to decline to provide opinions on matters that are the subject of litigation. *See supra* note 5.

Both questions ask whether counties are preempted from imposing limits on water usage. Prosecutor Zempel poses question 5 narrowly, focusing on whether a county may impose a numeric limit on the number of gallons per day that may be withdrawn for purposes of watering a lawn or noncommercial garden. Director Manning frames question 6 more broadly, asking whether a county may limit new residential uses of groundwater, both permitted and permit-exempt, under its general police powers or under its Growth Management Act or other authorities, such as the authority to act upon subdivision or building applications. The essential issue raised by both questions is whether state law precludes counties from regulating water usage by assigning to Ecology the authority to regulate water rights and by exempting certain withdrawals from the permitting process. In this regard, Director Manning calls our attention to, among other principles, the Growth Management Act, including a provision under which county comprehensive plans are to address the protection of surface water and groundwater resources. RCW 36.70A.070(5)(c)(iv).

This issue is raised in a case currently pending before Division III of the Washington Court of Appeals, in which the county is a party. *Kittitas County v. Kittitas County Conserv.*, No. 271234 (Wash. Ct. App. Div. III May 16, 2008). That case is before the court on review of a decision of the Growth Management Hearings Board for Eastern Washington. *Kittitas County Conservation Ridge v. Kittitas County*, No. 07-1-0015 (Final Decision And Order, Mar. 21, 2008). The board, in that case, found that the Growth Management Act provides counties with, not only the authority, but the responsibility to protect the quality and quantity of water. It concluded that the county's development regulations failed to adequately protect water quality and quantity, regarding the way in which it allowed exempt withdrawals to be used in new development. According to the board, the county did not comply with the Growth Management Act for this reason. *Id.* at 30. The county has appealed from the board's decision, arguing that its authority to regulate the use of water is preempted by state law. Opening Brief Of Kittitas County, at 29–30, *Kittitas County*, No. 271234 (Apr. 3, 2009) (citing RCW 90.44.050); *see also* Kittitas County Farm Bureau's Brief, at 2–3, *Kittitas County*, No. 271234 (June 25, 2009)

(arguing that Ecology has the exclusive authority to regulate water rights); Opening Brief Of BIAW, at 28–29, *Kittitas County*, No. 271234 (Apr. 23, 2009) (same). In response, the opposing parties contend that statutes governing Ecology's authority to regulate water rights, including RCW 90.44.050 governing exempt wells, can be harmonized with the Growth Management Act and the authority it grants to counties to protect water resources. Brief Of Respondents Kittitas County Conservation, Ridge, and Futurewise, at 29-33, *Kittitas County*, No. 271234. They argue that the county not only had the authority, but the duty, to preclude excessive withdrawals of groundwater through exempt withdrawals. *Id.* at 32-33.

Questions five and six thus present an issue that is already pending before the Court of Appeals. For this reason, we respectfully decline to address these questions.

7. Could the Department of Ecology and a county impose such a limit by entering into an agreement?

The Interlocal Cooperation Act authorizes state and local agencies to enter into agreements to jointly perform any function that those agencies have the authority to perform. RCW 39.34.030(1), .080. Such agreements, however, are not a new source of authority, but merely provide a method of exercising authority that both contracting parties already have by operation of law. As we have observed: "A crucial prerequisite to an interlocal agreement is that each party must independently have the authority to enter into the services which are the subject of the agreement . . . ." AGO 2004 No. 2, at 4 n.9. As our analysis regarding questions 2 and 4 demonstrates, Ecology lacks the authority to establish different limits on exempt withdrawals than those set forth in RCW 90.44.050. Whether the county has the authority to establish such limits independently is a matter presently in litigation. *See* Questions 5, 6 *supra*.

We trust that the foregoing will be useful to you.

ROB MCKENNA
Attorney General

Jeff T. Even

JEFFREY T. EVEN
Deputy Solicitor General
(360) 586-0728

wros
enclosure

WSR 09-15-107

EMERGENCY RULES

DEPARTMENT OF ECOLOGY

[Order 09-07 -- Filed July 16, 2009, 8:31 a.m. , effective July 16, 2009, 8:31 a.m.]

Effective Date of Rule: Immediately.

Purpose: This fourth emergency rule establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington. The partial withdrawal and restrictions are designed to prevent new uses of water that negatively affect flows in the Yakima River and its tributaries. The withdrawal allows for continued development using the ground water 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.

Statutory Authority for Adoption: RCW 90.54.050.

Other Authority: Chapter 43.27A RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, and during 2004 when USBR prorated May 10, 1905, water rights. The town of Roslyn's municipal supply and another one hundred thirty-three single domestic, group domestic, and municipal water systems throughout the basin are subject to curtailment when USBR prorates the May 10, 1905, water rights. Water supply in the Yakima Basin is limited and overappropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0;

Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: July 16, 2009.

Jay J. Manning

Director

OTS-2512.2

Chapter 173-539A WAC

UPPER KITTITAS EMERGENCY GROUND WATER RULE

NEW SECTION

WAC 173-539A-010 Purpose. The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County during the pendency of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.

[]

NEW SECTION

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 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 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 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 later invoked the dispute resolution process under the MOA. The MOA was terminated by ecology on July 1, 2009.

[]

NEW SECTION

WAC 173-539A-030 Definitions. The definitions provided below are intended to be used only for this chapter.

"Ecology" means the department of ecology.

"Exemption" or **"ground water exemption"** means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"Total water supply available" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"Upper Kittitas County" is the area of Kittitas County delineated in WAC 173-539A-990.

"Water budget neutral project" means an appropriation or project where withdrawals of ground water of the state are proposed in exchange for discharge of at least an equivalent amount of water from other water rights that are placed into the trust water right program.

[]

NEW SECTION

WAC 173-539A-040 Withdrawal of unappropriated water in upper Kittitas County. Beginning on the effective date of this rule, all public ground waters within the upper Kittitas County are withdrawn from appropriation. No new appropriation or withdrawal of ground water shall be allowed, including those exempt from permitting, except as provided in the following sections.

[]

NEW SECTION

WAC 173-539A-050 Water budget neutral projects. (1) Persons proposing to use ground water shall apply to ecology for a permit to appropriate public ground water or, if seeking to use the ground water exemption, shall submit to ecology a request for determination that the proposed 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 shall identify one or more water rights that would be placed into the trust water right program to offset the consumptive use associated with the proposed new use of ground water.

(3) 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.

(4) No new exempt withdrawal under RCW 90.44.050 may be commenced unless ecology has approved a request for determination that the proposed exempt use would be water budget neutral. Such a request must comply with subsections (2) and (3) of this section.

[]

NEW SECTION

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. (1) RCW 90.38.040 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for a new surface water right, a request for a determination of water budget neutrality, or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application or request must identify an existing trust water right or pending application to place a water right in trust, and that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application or request must be for domestic, group domestic, lawn or noncommercial garden, municipal water supply, stock watering, or industrial purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water right.

(3) If an application for a new water right or a request for a determination of water budget neutrality is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application or request is eligible for expedited processing, ecology will do the following:

(a) Review the application or request to withdraw ground water to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit or determination to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant or requestor also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit or determination.

(c) Condition each permit or determination to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

[]

NEW SECTION

WAC 173-539A-070 Educational information, technical assistance and enforcement. (1) To help the public comply with this chapter, ecology may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has occurred, we shall first attempt to achieve voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

[]

NEW SECTION

WAC 173-539A-080 Appeals. All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

[]

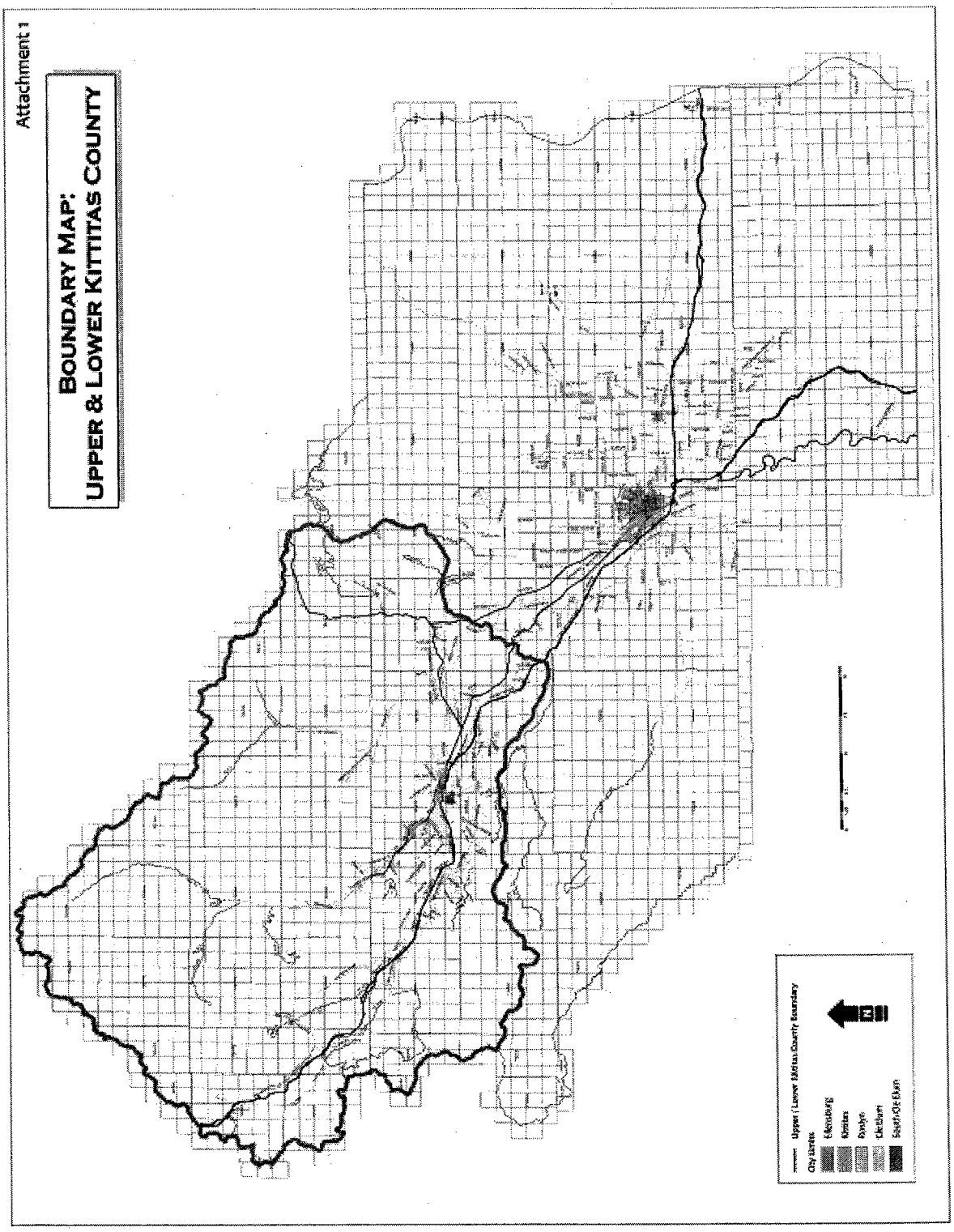
NEW SECTION

WAC 173-539A-090 Repeal. If ecology intends to lift the administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, it shall prior to doing so issue a notice repealing this chapter.

[]

NEW SECTION

WAC 173-539A-990 Appendix 1 -- Map of upper Kittitas County boundaries.



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WSR 09-07-068

EMERGENCY RULES

DEPARTMENT OF ECOLOGY

[Order 08-11 -- Filed March 13, 2009, 8:57 a.m. , effective March 13, 2009, 8:57 a.m.]

Effective Date of Rule: Immediately.

Purpose: This third emergency rule establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington for the purpose of implementing a memorandum of agreement (MOA) entered into with Kittitas County on April 7, 2008. The partial withdrawal and restrictions are designed to minimize the potential for a new use of water that negatively affect flows in the Yakima River and its tributaries and does this in a way that minimizes effects on economic development.

Statutory Authority for Adoption: RCW 90.54.050.

Other Authority: Chapter 43.27A RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, including the town of Roslyn's municipal supply. Water supply in the Yakima Basin is limited and over-appropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 12, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0;
Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: March 13, 2009.

Jay J. Manning

Director

OTS-2053.3

Chapter 173-539A WAC

UPPER KITTITAS GROUND WATER RULE

NEW SECTION

WAC 173-539A-010 Purpose. (1) This chapter implements the exempt well management measures identified in the memorandum of agreement between Kittitas County and the department of ecology (ecology) by creating a partial withdrawal of ground water within upper Kittitas County that limits the use of the ground water exemption (RCW 90.44.050) for residential purposes. This chapter also requires measuring of new uses for residential purposes of ground water under the exemption within all of Kittitas County.

(2) Ecology designed the partial withdrawal and related requirements to minimize the adverse effects on flows in the Yakima River and its tributaries, while minimizing adverse effects on the local economy.

(3) Based on technical research, Kittitas County may consider the potential for impairment of existing water rights, along with any other environmental impacts, during review of certain land use applications. The county may require mitigation or other ways to manage risks to reduce or eliminate impacts.

(4) The requirements in this chapter do not apply to areas outside of Kittitas County. Other than the metering requirement of WAC 173-539A-070, the requirements of this chapter apply only in Upper Kittitas County.

[]

NEW SECTION

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 exempt wells where needed.

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 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 then rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County, which this chapter implements by establishing a partial withdrawal and other requirements.

[]

NEW SECTION

WAC 173-539A-030 Definitions. The definitions provided below are intended to be used only for this chapter.

"Applicant" as used herein includes the owner(s) of the parcels that are the subject of the application.

"Application" as used in WAC 173-539A-050 and 173-539A-055 means a land use application to Kittitas County requesting:

- A subdivision;
- Short subdivision;
- Large lot subdivision;
- Administrative or exempt segregation;
- Binding site plan; or
- Performance based cluster plat.

"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 the applicant and any owner of a proximate parcel. A joint development arrangement must involve 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 the 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, and construction (include road construction), and agreements for common use of structures, facilities, lands, water, sewer and other infrastructure, covenants, building materials, or equipment.

"Ecology" means the department of ecology.

"Exemption" or **"ground water exemption"** means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"Group use" means use of the ground water exemption for two or more parcels. A group use includes use of the exemption for all parcels of a proposed development and all parcels that are proximate and held in common ownership with the proposed new residential development where use of the exemption commenced or will commence within five years of the date the current application was filed.

"Hydrogeologic assessment" means the report prepared by a licensed hydrogeologist and/or others approved by Kittitas County in consultation with ecology addressing the elements identified in WAC 173-539A-060.

"Lands" refers to both singular "land" and plural "lands."

"MOA" or **"Memorandum of Agreement"** means the "Memorandum of Agreement between Kittitas County and the State of Washington, Department of Ecology Regarding Management of Exempt Ground Water Wells in Kittitas County" of April 7, 2008.

"New residential development" means any division of land involving an application that vested after July 8, 2008.

"New use of the ground water exemption" means a use begun on or after July 8, 2008.

"New use for residential purposes" means any new use of the ground water exemption for a new or additional residential purpose associated with an existing or new structure.

"Parcel" means any parcel, land, tract or other unit of land.

"Proximate" means all parcels that either:

- Have any common boundary;
- Are separated only by roads, easements, or parcels in common ownership; or
- Are within five hundred feet at the nearest point.

"Residential purposes" means all domestic use and/or lawn and noncommercial garden use of water on the parcel(s) in question under the ground water exemption. A dwelling unit is not required for a residential purpose to be present. Domestic use is a separate and distinct purpose of use from lawn and noncommercial garden use. Each use may have a different commencement date under the exemption. For purposes of this chapter all use limits refer to combined domestic and lawn and noncommercial garden use. All use of the lawn and noncommercial garden use may not exceed a one-half acre as required in RCW 90.44.050 whether such use is in connection with a group domestic use or a single domestic use.

"Total water supply available" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"Upper Kittitas County" is the area of Kittitas County delineated in WAC 173-539A-990.

"Vested" means that under the applicable land use laws an application is considered complete such that the application shall generally be reviewed under laws existing at the time of vesting, unless a special exception may apply. All applications for plat approvals including preliminary plat approvals which were approved by Kittitas County prior to July 8, 2008, are considered to be vested.

[]

NEW SECTION

WAC 173-539A-050 New use of the exemption for new residential developments in upper Kittitas County. (1) This section applies only to applications for residential developments that vest or vested on or after July 8, 2008.

(2) Any new residential development within upper Kittitas County must not use more than 5,000 gallons per day (gpd) from the ground water exemption for residential purposes. When filing an application for a new residential development, the applicant must file a sworn statement with ecology and Kittitas County that:

(a) Identifies all parcels that are part of the residential development;

(b) Identifies all joint development arrangements with respect to proximate parcels; and

(c) States that to the best of the applicant's knowledge and belief all such parcels and arrangements have been identified. If the application is approved, such statement shall be recorded against all such parcels in which the applicant holds a legal or equitable property interest. The residential development includes all parcels that are the subject of the application or a larger group use.

(3) For use of the 5,000 gpd exemption limit for a new residential development, ecology and the county will assume each parcel will use 1,250 gpd for residential purposes, unless a condition is recorded as a covenant to use a lesser amount of the group withdrawal. If no exempt lawn or noncommercial garden watering will occur, and a covenant so restricting such use is placed on the parcel, ecology and the county will assume each parcel will use a maximum of 350 gpd unless a condition is recorded as a covenant to use a lesser amount of the group withdrawal.

[]

NEW SECTION

WAC 173-539A-055 New uses of the exemption for residential purposes in upper Kittitas County. (1) New uses for residential purposes on parcels created after March 28, 2002, in upper Kittitas County:

(a) Parcels **less than ten acres** created after March 28, 2002, may use water under the ground water exemption for residential purposes in an amount that does not exceed the lowest amount below:

(i) The amount stated in conditions or covenants on water use placed on the plat that created the parcel;

(ii) The amount stated in conditions on water use specified in the permit/approval of the public water system that is intended to serve the parcel; or

(iii) 1,250 gpd.

(b) Parcels **ten acres and greater** created after March 28, 2002, may use water under the ground water exemption for residential purposes in an amount that does not exceed the lowest amount below:

(i) The amount stated in conditions or covenants on water use placed on the plat that created the parcel;

(ii) The amount stated in conditions on water use specified in the permit/approval of the public water system that is intended to serve the parcel; or

(iii) An average rate of use of 125 gpd per acre up to a maximum of 5,000 gpd.

(c) This section does not restrict an owner from using more water through other legal permitted water rights.

(2) **New uses for residential purposes on parcels created on or before March 28, 2002, in upper Kittitas County:**

(a) Parcels created on or before March 28, 2002, must use no more than 5,000 gpd for all residential purposes.

(b) Such use may be further restricted by covenants or conditions on water use set forth in the plat, a land use approval, or a public water system approval, or by any other legal restriction that applies to such use.

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NEW SECTION

WAC 173-539A-060 Hydrogeologic assessment. (1) If Kittitas County requires a hydrogeologic assessment, the hydrogeologic assessment must be:

(a) Submitted to Kittitas County and ecology in the form of a written report, signed by a licensed hydrogeologist and/or others approved by Kittitas County in consultation with ecology; and

(b) Available as part of the project review under the State Environmental Policy Act.

(2) The hydrogeologic assessment may be based on available existing information or other new information as required by Kittitas County.

(3) The required elements of the report are as follows:

(a) Scope of the proposal including all of the following:

- The location;
- Proposed water source(s);
- Water use amounts; and
- The timing of the proposed use.

(b) General description including all of the following:

- The local geologic, hydrogeologic, and hydrologic setting;
- Identification of surface water and ground water features;

• Water sources;

• Recharge/discharge characteristics; and

• Surface water and ground water interactions.

(c) Site-specific description.

(d) Inventory and description of all of the following:

• All state issued surface water and ground water rights;

• All state issued surface water and ground water claims; and

• Wells located within a one-year and five-year area of pumping influence.

(e) Identification and description of existing surface water or ground water withdrawals that may be adversely affected by the proposed use of the ground water exemption.

(f) The preparer's written professional opinion on the potential of the proposal to cause impacts to the natural and built environment including surface water flows.

(g) A statement of the report's limitations regarding its intended use, including scope, extent, and available data.

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NEW SECTION

WAC 173-539A-070 Measuring and reporting water use. (1) For all uses of the ground water exemption for residential purposes within upper Kittitas County that commence after July 8, 2008, or within the remainder of Kittitas County that commence after the effective date of this rule, a source meter must be installed at the point of withdrawal, in compliance with such requirements as prescribed by Kittitas County and WAC 173-173-100.

(2) Metering data must be collected and reported within thirty days of the end of the recording period to Kittitas County and ecology. 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 1 - June 30	July 30
July 1 - July 31	August 30
August 1 - August 31	September 30
September 1 - September 30	October 30

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NEW SECTION

WAC 173-539A-080 Expedited processing of trust water applications and new water right applications associated with trust water rights. (1) RCW 90.42.100 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for a new surface water right or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application must identify an existing trust water right or pending application to place a water right in trust, if that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application must be for domestic, group domestic, lawn or noncommercial garden, and/or municipal water supply purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water rights.

(3) If an application for a new water right is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application is eligible for expedited processing ecology will do the following:

(a) Review the application to withdraw ground water to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit.

(c) Condition each permit to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

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NEW SECTION

WAC 173-539A-090 Educational information, technical assistance and enforcement. (1) To help the public comply with this chapter, ecology and Kittitas County may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has occurred, we shall first attempt to achieve

voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To mitigate for potential impact of an exempt use to the total water supply available and to avoid potential future regulation in favor of senior water rights, ecology encourages exempt users to participate in a mitigation program through the Yakima Basin Pilot Water Bank or to obtain a senior water right.

(4) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

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NEW SECTION

WAC 173-539A-100 Appeals. All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

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NEW SECTION

WAC 173-539A-110 Regulation review. (1) The exempt well management requirements in this chapter will be reviewed after the upper county ground water study is complete or within five years of rule adoption whichever occurs first and may be revised as part of a long-term management program. Ecology and Kittitas County intend to develop the long-term management program after they have completed a ground water study that focuses on portions of Kittitas County not fully addressed by the current USGS ground water study of the Yakima River Basin.

(2) Ecology may review this chapter whenever:

(a) New information is available;

(b) A change of condition occurs;

(c) Statutory changes warrant the review; or

(d) Reviews described in WAC 173-539A-060 show changes are necessary.

(3) Kittitas County, or interested citizens may request that ecology exercise its discretion to review this chapter at any time.

(4) If ecology begins a review of this chapter, it will consult with Kittitas County.

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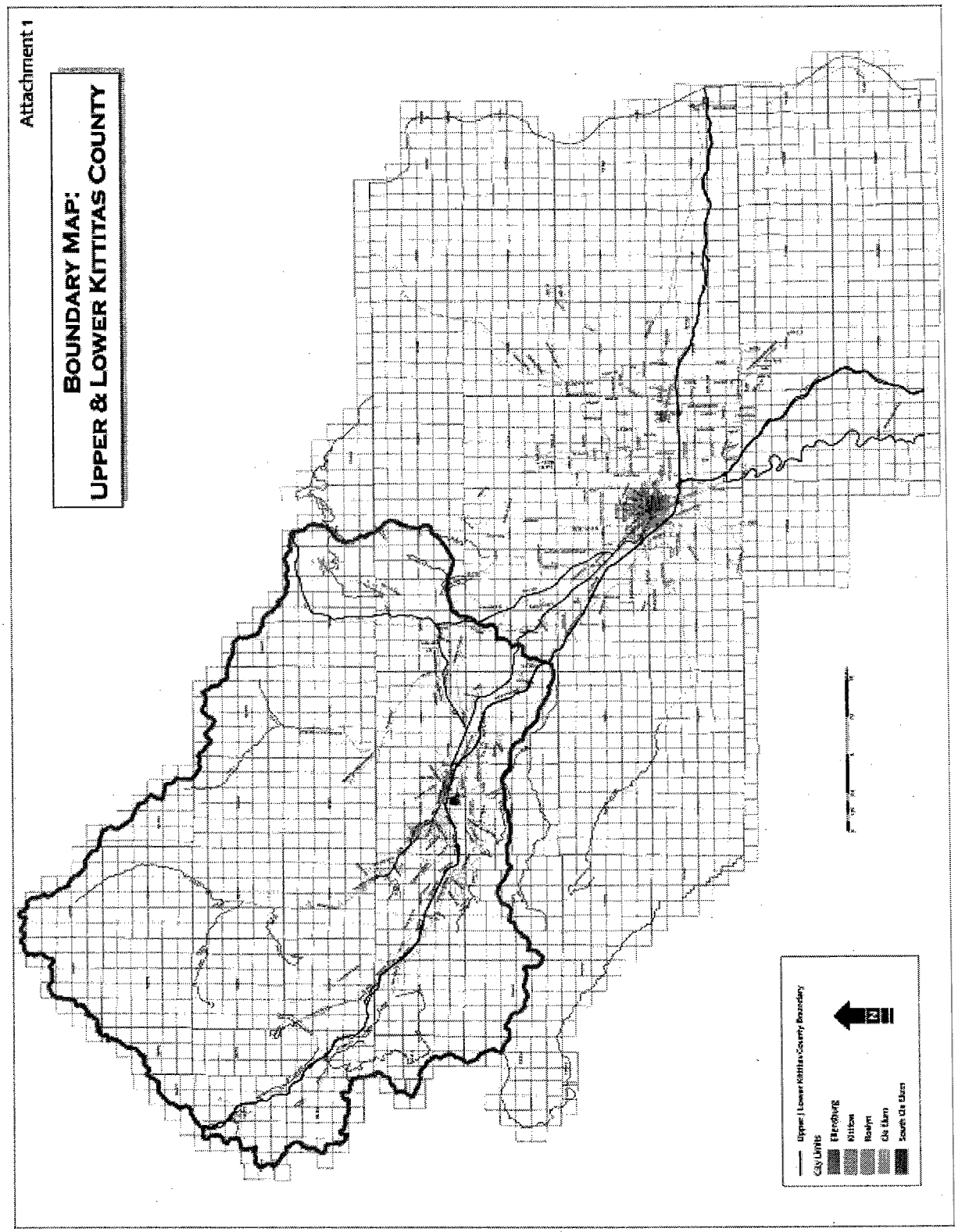
NEW SECTION

WAC 173-539A-990 Appendix 1 -- Map of upper Kittitas County boundaries.



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