

March 4, 2008

DRAFT

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

This Memorandum of Agreement (MOA) is intended to establish the basic principles Kittitas County (County) and the Department of Ecology (Ecology) will employ in order to evaluate the use of exempt ground water well and associated water withdrawals in the area commonly know as “upper” Kittitas County as shown on attachment 1.

I. BACKGROUND

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

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

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

II. PROVISIONS

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

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

2) SEPA Review – All new applications for division of land within the applicable area shall be subject to SEPA environmental review under Title 15 of the Kittitas County Code and Chapter 197-11 Washington Administrative Code (WAC).

3) Exempt well residential development standards – The Parties agree that, on an interim basis, new residential developments served by exempt wells will be limited to a total of one ground water exemption (5,000 gallons per day) for each 40 acres of land for all domestic, lawn, landscaping and non-commercial garden exempt uses on that land. In no case shall a development, regardless of acreage, be allowed more than a single exemption. Each exemption will be prorated for parcels smaller than 40 acres as described below in Section II.A.2.a. Development under a single exemption could involve use of multiple wells as long as the 5,000 gallon-per-day limit is not exceeded. In cases where a Group B public water system is established to serve a new residential development relying on an exempt well or wells, the Group B system must be managed by a Satellite System Management Agency or another management entity approved by Kittitas County.

a) Newly created parcels of less than 40 acres - For parcels of land equal to or less than 40 acres, each 5,000 gallon per day exemption will be apportioned at a rate of 125 gallons of water per day per acre of land. For purposes of determining the availability of water under the exemption, the parties recognize that each residential unit will require a minimum of 350 gallons per day (gpd) for all domestic purposes. The water required for outdoor water use, including non-commercial irrigation, will be included in the per-unit residential water demand. The applicant must specify the anticipated per-unit water demand for each residential unit in the division of land at time of platting. The applicant must also describe measures that will be used to ensure that actual water use will remain within the specified amount. The County shall require a note be added to the plat that incorporates all SEPA requirements and mitigation measures as conditions of the plat. The applicant may propose per-unit residential water demands greater than the 350 gpd minimum amount, provided that the land area (acreage) assigned to each unit increases commensurately with the water use in accordance with Attachment 2. For example, an applicant proposing per-unit water demands of 1,250 gpd, the amount determined by the Washington State Department of Health to be a design standard that accommodates full indoor use and outdoor residential water use, would need to propose 10-acre lots or assign 10 acres to each residential unit in a cluster plat. An applicant can augment water available for residential use by providing a source of water supplemental to the exempt well serving the development. Such a source could be water diverted or withdrawn under an existing state approved valid water right or water delivered through an irrigation district. A state approved valid water right could also be acquired and transferred for use. Once the mitigation program described in Section 2D is operational, the applicant

could pay a mitigation fee to Ecology to offset part or all of the development's water use. The amount of the mitigation fee would be based on costs for purchasing water at fair market value to offset the outdoor use and for transaction costs associated with the purchase.

Kittitas County will develop and apply enforceable conditions through SEPA and land use approval processes associated with new developments as appropriate to limit the potential for water use in excess of the amount specified by the applicant. Such enforceable conditions will be consistent with SEPA substantive authority provided under Chapter 15.04.200 of the Kittitas County Code and shall be consistent with the requirements of this agreement. Kittitas County will require developments subject to the requirements of this MOA to include water meters for each individual residential connection. Such meters must be of a type and design acceptable to Kittitas County. Meters will be read and reported in a manner prescribed by Kittitas County, including, but not limited to, direct reading by county staff, voluntary reading and reporting by residents, or reading and reporting by an approved Satellite System Management Agency or other management entity approved by the County. Readings must be made based on the schedule described in Table 1, with reporting to Kittitas County and Ecology occurring no later than 30 days after the last day of the reporting period.

TABLE 1

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

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

b) Existing Parcels – existing undeveloped residential lots 10 acres or greater in size shall be allowed to use the exemption consistent with the use levels set forth in Attachment 2. Allowable residential water use for

existing residential lots 10 acres or less in size shall be determined by the lesser of: 1) conditions on water use placed on the plat that created the lot, if applicable; 2) conditions on water use specified in the permit/approval of the public water system that is intended to serve the lot, if applicable; or 3) 1,250 gallons per day. An applicant can augment water available for residential use by providing a source of water supplemental to the exempt well serving the existing lot. Such a source could be water diverted or withdrawn under an existing valid water right or water delivered through an irrigation district. A valid water right could also be acquired and transferred for use. Once the mitigation program described in Section 2D is operational, the applicant could pay a mitigation fee to Ecology to offset part or all of the development's water use. All building permits Kittitas County shall issue for residential structures with in the area addressed by this agreement that will be served by an exempt well will be conditioned based upon the above provisions, unless and to the extent that the exempt domestic water use preceded the date of any rule adopted by Ecology to implement this agreement.

Existing lots of less than 10 acres that are subject to this agreement will need to comply with metering, reading, and reporting requirements in Section II.A.2.a above. The Parties agree to implement a program to promote voluntary implementation of residential water use efficiency and conservation measures for existing lots.

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

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

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

5) Data Collection and Management – In addition to metering and reporting provisions described in Section II.A.2 above, the Parties agree to develop

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

6) Hydrogeologic Investigation and Characterization Report required – The requirement for a Hydrogeologic Investigation and Characterization Report (Hydrogeologic Report) will apply to any new division of lands within the applicable area that involves the creation of buildable lots and that relies on the Ground Water Permit Exemption, Chapter 90.44.050 RCW

Unless a person proposing to create one or more buildable lots commits by written consent to use a water supply other than the groundwater exemption, Kittitas County shall require such a proponent to submit a Hydrogeologic Report as part of the State Environmental Policy Act (SEPA) process. The Hydrogeologic Report shall include a professional opinion regarding the likelihood that the division of land will and associated exempt well use would create a significant adverse impact on the natural or built environment. The Hydrogeologic Report shall be submitted in an independent report to be included with Project SEPA documents and be prepared by a hydrogeologist, licensed in the State of Washington. The Hydrogeologic Report shall include the information specified in Attachment 3. It is intended that Hydrogeologic Reports prepared under provisions of this section be based on existing, available information, and any conclusions drawn will be qualified based upon that limitation. Ecology shall make available to preparers of Hydrogeologic Reports relevant data in its records.

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

8) Rulemaking in support of MOA – By July 1, 2008, or as soon as practicable, Ecology shall adopt an emergency rule to implement the Interim Management

Measures. A non-emergency rulemaking process shall be promptly started before or shortly after the effective date of the emergency rule to replace the emergency rule.

9) Kittitas County actions in support of MOA – No later than 30 days after Ecology’s adoption of the emergency rule, Kittitas County shall have in effect standard State Environmental Policy Act enforceable conditions necessary to implement the Interim Management Measures and other terms of this MOA.

B. Ground Water Study – The Parties agree to initiate a ground water study intended to focus on portions of Kittitas County that are the subject of this agreement which are not being fully addressed in the current USGS ground water study of the Yakima River Basin.

1) The ground water study will define the hydrogeology of the study area, provide information regarding ground water occurrence and availability, document the extent of ground water and surface water continuity in the study area, and determine the extent of potential impairment resulting from exempt well use. Ecology and Kittitas County will continue to work with the Governor’s Office and the Washington State Legislature to secure funding for the study.

2) The initial phase of the study will involve development of a scope of work and establishment of an advisory committee and will commence upon the effective date of this Agreement. The advisory committee will provide input to the Parties concerning the scope and implementation of the study as well as provide recommendations to the Parties concerning the development of a long-term management program. Membership of the advisory committee will be mutually agreed upon by the Parties and will represent a broad spectrum of the public. Within 30 days after funding is available, the Parties shall meet to identify perspective members of the advisory committee and the committee shall convene within 90 days after funding is available or as otherwise agreed to by the Parties.

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

D. Mitigation Program – Ecology will continue to work with the Bureau of Reclamation (Reclamation), senior water right holders, Kittitas County, and the Yakama Nation to develop a program intended to provide one or more mechanisms by which

pending applicants, developers, and exempt well owners use the water market to acquire senior water rights for use as mitigation to offset water resource impacts associated with their junior water use. Water under the mitigation program would be offered in a manner consistent with the Yakima Water Bank (RCW 90.42.100-130) based applicable state law and any limitations or conditions associated with the water rights held in the trust water rights program for such purposes. The Parties agree to begin implementation of the mitigation program once the Department of Ecology, Reclamation, and the Yakama Nation have formally established the program's operational structure. Ecology shall develop a schedule within 90 days of approval of this agreement outlining the time frame in which such a mitigation program may be implemented.

III. TERM OF MOA AND RIGHT TO WITHDRAW

The MOA will expire three years from the effective date or upon conclusion of the ground water study described in Section 2B, whichever is sooner, unless extended in writing by the Parties. A party may withdraw from the agreement by providing advance written notice; however, such termination shall not be effective until the completion of the dispute resolution process on the issues that form the basis for the termination, unless the parties agree in writing to waive the dispute resolution process.

IV. MODIFICATION OF AGREEMENT

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

V. MUTUAL DEFENSE OF THIS MOA OR IMPLEMENTING ACTIONS.

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

VI. DISPUTE RESOLUTION

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

B. Formal Dispute Resolution Process – In the case of any disagreement arising from the implementation of the MOA, any party may initiate the formal dispute resolution process after the Parties have attempted in good faith to resolve the disagreement informally. To initiate the formal dispute resolution process, a requesting Party shall provide written notice to the other Party that describes the issues in dispute. Upon receiving a notice of formal dispute, the Parties' signatories or their designated representatives shall convene a meeting within 30 days to consider the dispute and may resolve any or all issues or refer any or all issues in dispute back to the originating individuals with specific instructions and a deadline for reporting back to the designated executives, or institute any other alternative dispute resolution procedures it deems useful under the circumstances. If the Parties' signatories or designated representatives fail to resolve the dispute within 30 days upon the meeting convened to resolve the dispute, or a dispute is not resolved within the timeframe established by the designated executives, the dispute resolution process shall then be deemed completed and any Party may withdraw from this MOA. Unless a party seeks to withdraw, upon completing the dispute resolution process, the designated executives shall prepare a joint statement of the remaining issues in dispute, which may also include a discussion of how to resolve such issues consistent with the MOA.

VII. RESERVATION OF AUTHORITY

Nothing in this MOA affects any authority Ecology may have to enforce the State of Washington's water resources laws including but not limited to RCW chapters 90.03, 90.14, 90.44., 90.54, or other appropriate requirements of state law.

VIII. CONCLUSION OF INTERIM PERIOD

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

IX. APPLICABILITY TO EXISTING WELLS

Nothing in this agreement shall apply to the historical use of existing wells already in service for beneficial use nor shall this agreement prohibit replacement and/or repair of existing wells should they become unusable for their historical purpose. Existing wells that will be utilized to serve additional lots or further development beyond their historical use shall be subject to this agreement.

VIII. SIGNATURES:

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

**KITTITAS COUNTY
BOARD OF COMMISSIONERS**

Jay J. Manning, Director

Commissioner Mark McClain, Chairman

Date: _____

Date: _____

Commissioner Alan A. Crankovich, Vice-Chairman

Date: _____

Commissioner David B. Bowen

Date: _____

ATTEST:

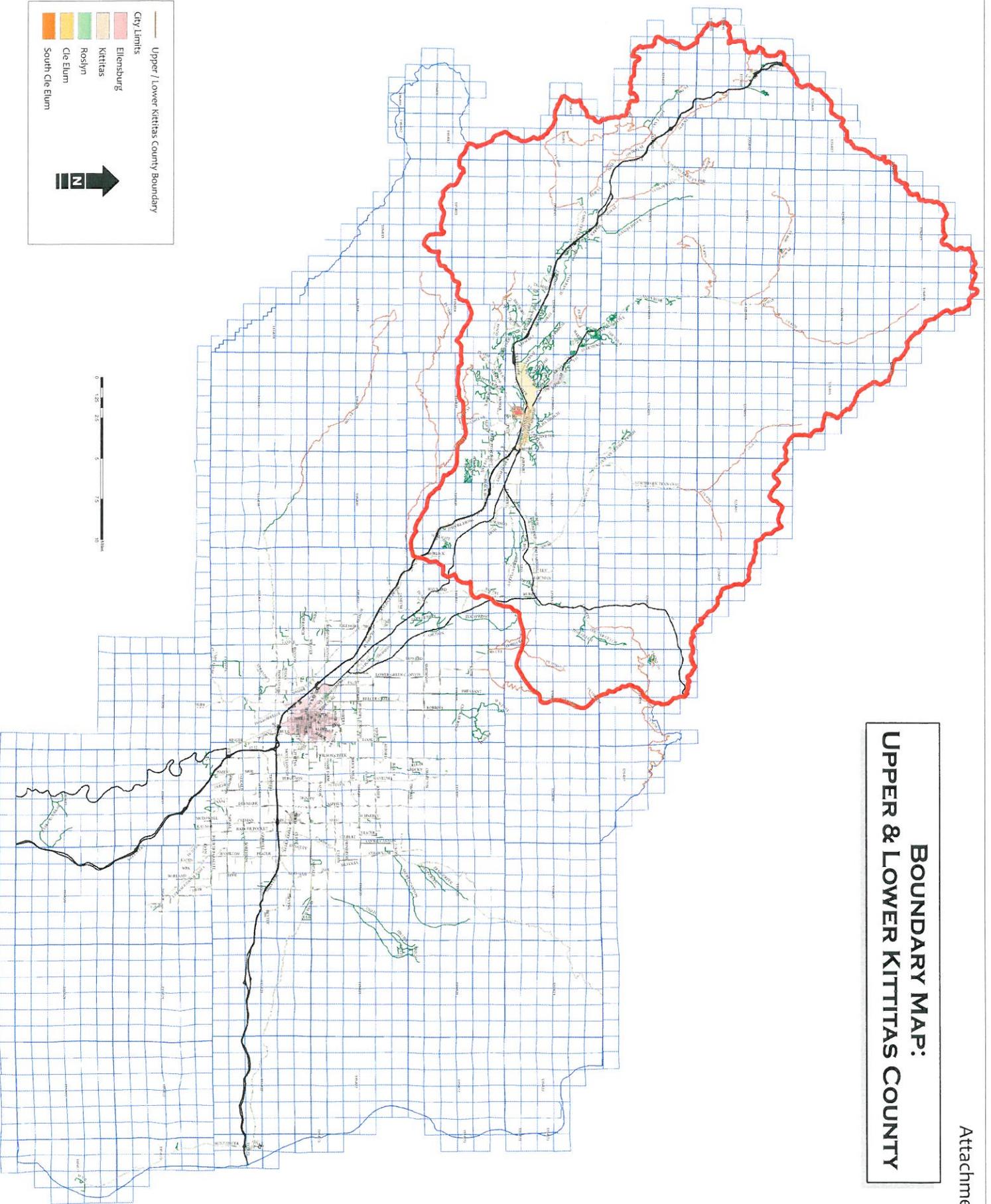
Julie A. Kjorsvik
Clerk of the Board

Approved as to form:

Gregory L. Zempel,
Prosecuting Attorney
WSBA

#19125

**BOUNDARY MAP:
UPPER & LOWER KITTITAS COUNTY**



ATTACHMENT 2

| LOT SIZE (IN ACRES) | ALLOWABLE WATER USE PER RESIDENTIAL UNIT (IN GALLONS) |
|---------------------|---|
| 3 or less | 375 |
| 4 | 500 |
| 5 | 625 |
| 6 | 750 |
| 7 | 875 |
| 8 | 1,000 |
| 9 | 1,125 |
| 10 | 1,250 |
| 11 | 1,375 |
| 12 | 1,500 |
| 13 | 1,625 |
| 14 | 1,750 |
| 15 | 1,875 |
| 16 | 2,000 |
| 17 | 2,125 |
| 18 | 2,250 |
| 19 | 2,375 |
| 20 | 2,500 |
| 21 | 2,625 |
| 22 | 2,750 |
| 23 | 2,875 |
| 24 | 3,000 |
| 25 | 3,125 |
| 26 | 3,250 |
| 27 | 3,375 |
| 28 | 3,500 |
| 29 | 3,625 |
| 30 | 3,750 |
| 31 | 3,875 |
| 32 | 4,000 |
| 33 | 4,125 |
| 34 | 4,250 |
| 35 | 4,375 |
| 36 | 4,500 |
| 37 | 4,625 |
| 38 | 4,750 |
| 39 | 4,875 |
| 40 | 5,000 |

ATTACHMENT 3

Kittitas County Public Health Department Hydrogeologic Investigation and Characterization Report Required Elements

For the proposed project please provide concise answers to the following set of questions or provide the following informational requirements. It is understood that such answers will be based on existing, available information and professional judgment. All information sources and data used to prepare the report shall be identified. Copies of all such sources and data shall be attached to the report. The Hydrogeologic Report shall be stamped, dated and signed in accordance with Chapter 18.220 RCW and WAC 308-15-075. Kittitas County shall return Hydrogeologic Reports that fail to meet the requirements outlined below to the applicant. The SEPA process will not proceed until an amended Hydrogeologic Report that meets the requirements is submitted by the applicant.

For the proposed project – Please describe project scope, including the specific project location, proposed water source or sources and location(s), water use amounts (peak, average) and timing (seasonal, time of day, etc.).

General Description – Using available information, please provide a description of the local geologic, hydrologic and hydro geologic setting including surface water features, ground water aquifers, water sources, recharge/discharge characteristics and surface water-ground water interactions.

Site Specific Description – Describe site-specific (local) geologic, hydrologic and hydrogeologic setting of all surface water features, ground water aquifers, water sources, recharge/discharge characteristics, and surface water-ground water interactions to include:

a. Specific locations of proposed and existing Project wells.

b. Surface water sources within ¼ mile of the well site or water source boundaries describing perennial, intermittent, gaining, losing, perched, seasonal flow characteristics and, minimum flows if any. *For spring sources within ¼ mile of the site include currently available data on development, flow history, seasonal fluctuations.*

c. Local aquifer characteristics: identify whether the aquifer is a porous media or a fracture system aquifer; identify and describe aquifer boundaries, ground water levels, gradients, flow direction, and recharge/discharge relationships with other surface water or ground water sources; estimate hydraulic conductivity, saturated thickness or available head, storativity or specific yield. For fracture system aquifers, identify and describe the orientation and inter-connectedness of fracture systems and any recharge-discharge relationships with unconsolidated sediment systems or surface water. *For perched aquifers within or near the site identify and describe depth, boundaries and location.*

d. Inventory and describe all State issued *ground water rights*, ground water claims and exempt wells located within a one (1) year and five (5) year area of pumping influence that would be created by the Project wells. For a porous media aquifer, the area of influence shall be determined by analytical model, numerical model, fixed radius, or hydrogeologic mapping methods. For fracture system aquifers, the area of influence shall be determined by hydrogeologic mapping and/or numerical model methods.

e. Inventory and describe all State issued *surface water rights* and surface water claims within a one (1) and a five (5) year area of pumping influence that would be created by the Project well(s). For a porous media aquifer, the area of influence shall be determined by analytical model, numerical model, fixed radius, or hydrogeologic mapping methods. For fracture system aquifers, the area of influence shall be determined by hydrogeologic mapping and/or numerical model methods.

f. Identify and describe existing surface water or ground water rights which may be adversely affected as a result the ground water withdrawals by the proposed project well(s).

g. Using existing or data or analysis or that which may be reasonably obtained identify whether the Project well(s) will reduce flows in one or more surface waters in the Yakima River basin, and if so, in what surface water(s), in what quantities and at what times.

3. Professional Opinion – Address the following questions: “Does the Project, as proposed, create a likelihood of adverse impacts to the natural and/or built environment, including existing water rights?” If an adverse impact is shown, mitigation will generally be required, absent showing of special circumstances.

5. Limitations – Include a statement of limitations regarding the limits of the intended use of the report, including scope, extent, and available data.

Professional Engineer/Hydrogeologist

Date