



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490

June 25, 2010

Catherine Bambrick, Administrator  
Kittitas County Public Health Department  
507 North Nanum Street, Suite 102  
Ellensburg, WA 98926

Dear Ms. Bambrick:

Thank you for your June 14, 2010, letter related to making water availability decisions in upper Kittitas County.

While we anticipate discussing our position in more detail when we meet with the Board of County Commissioners in early July, I felt it important to provide our initial reactions within the time frame requested in your letter.

To be frank, I am troubled by both the rationale provided and direction that Kittitas County Public Health wishes to pursue when making water availability determinations on subdivisions of land and new building permits.

As you know, all new unmitigated withdrawals of groundwater in the upper portion of Kittitas County are halted under the current emergency rule, unless projects were issued building permits before July 16, 2009. On June 24, 2010, Ecology announced a permanent rule proposal that largely mirrors the emergency rule.

For more than three years we have sought to find a common platform for managing groundwater in upper Kittitas County. While we may come from different perspectives, I believe we do share many fundamental interests. We want to be certain there is enough water to meet our current and future needs. We want a program that is fair to citizens, protects senior water rights, sustains important fisheries, and allows for new growth and economic development.

More and more water is being made available through the new water banks that are now up and running. We are ironing out the kinks in making water-budget-neutral determinations at Ecology, which will make it easier for developers and homeowners to gain access to a legal and reliable supply of water.

We also believe more information is needed about the relationship between surface water and groundwater in the upper reaches of the basin to help provide a clearer path for making groundwater decisions.

Always looming are the inherent risks in a water-short basin. These risks are real, both in terms of a lack of adequate water supply and the threat of legal actions against new and recently-established water users.

Lending institutions may hesitate to take on added risk by granting mortgages on properties where new unmitigated water uses do not comply with the state's rule and may infringe on the rights of more senior water right holders.



Ms. Cathy Bambrick  
Kittitas County Public Health Department  
June 25, 2010  
Page 2

I believe we share the same goal of making sure landowners and those who support landowners such as lending institutions have a secure and legal right to water before development begins.

Indeed, we believe the County has the authority and obligation to consider whether water is both physically and legally available when making building permit decisions in the context of RCW 19.27.097 and RCW 58.17.110.

As we explained in our January 2010 legal brief to the Court of Appeals, we believe current laws applying to Kittitas County make the County responsible for exercising its best judgment and make its best effort to determine whether appropriate legal provisions have been made for water and whether there is an adequate water supply.

As your letter acknowledges, RCW 19.27.097 requires that each applicant for a building permit provide evidence of an adequate water supply for the intended use of the building. Acceptable forms of evidence recognized by the statute include water right permits and “another form sufficient to verify the existence of an adequate water supply.” The statute expressly provides that applications for water rights are not sufficient proof of an adequate water supply. The phrase “an application for a water right shall not be sufficient proof of an adequate water supply” indicates the Legislature’s intent that a building permit applicant must demonstrate *legal* as well as physical availability of adequate water.

Rules adopted by state agencies have the force of law. In an area where Ecology has adopted a rule prescribing that new groundwater uses cannot occur without mitigation to ensure water-budget-neutrality, a county cannot make the finding of adequate water supply required by this statute when the building permit applicant has not provided evidence that they have a legally supported water supply. If the applicant wants to develop a new water supply in the area covered by the rule, then they must submit a water-budget-neutral finding by Ecology or they cannot meet the requirement to provide “another form sufficient to verify the existence of an adequate water supply.”

You reference the *Rettkowski* case and indicate that you think that decision suggests a county lacks the authority to require proof by the applicant of a legal water supply. Not only would this conclusion require the county to ignore the specific language in RCW 19.27.097 discussed above, it is not supported by any language in the *Rettkowski* decision. In *Rettkowski*, the Supreme Court ruled that Ecology lacked the authority to determine the priorities of competing water rights in a basin or to take enforcement action to address disputes between water right claimants. However, the Court did not say that Ecology or local governments lack the authority to consider in the first instance whether an individual has met an Ecology regulation that precludes the establishment of new water rights absent a water-budget-neutral finding by Ecology. The county’s action of examining whether an individual has obtained a water-budget-neutral determination from Ecology in compliance with Ecology’s rule would not amount to the county determining water right priorities – which was the subject of the *Rettkowski* case.

In summary on the legal points, we believe state law authorizes and requires the county to examine whether a building permit applicant has a legal right to water as a precondition to acting on the application. Nothing in the *Rettkowski* case changes or modifies this express authority and obligation.

Ms. Cathy Bambrick  
Kittitas County Public Health Department  
June 25, 2010  
Page 3

Even setting aside the legal debate over the county's authority, failure to consider Ecology's unambiguous rule regarding water availability is extremely poor public policy, exposes people to regulation and lawsuits, and does a disservice to the citizens of Kittitas County.

Citizens expect county and state government to work harmoniously and provide the best assistance and advice possible in achieving their development goals. The County's actions will place unnecessary additional risk on prospective property developers, home builders and homeowners when that development is dependent on new groundwater appropriations. Further, it creates confusion and an atmosphere of conflicting state and local requirements that simply does not serve the public.

Should the County proceed as described in your letter, you can expect that Ecology will continue to provide information to the public regarding our view of the County's obligations and the risks that individuals are assuming if they proceed to develop new water supplies that do not comply with Ecology's rule. Beyond that, we will consider all available legal avenues available to us so that we can ensure only development of new water supplies that are secure.

In closing, we continue to believe the best course of action for the County and the State is to exercise our respective authorities to assist applicants for new developments in obtaining secure water rights.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Thomas Tebb". The signature is fluid and cursive, with a long horizontal stroke at the end.

G. Thomas Tebb, L.Hg. L.E.G.  
Central Regional Director

GT:cmr (100603)

cc: The Honorable Alan Crankovich, Kittitas County Board of Commissioners  
The Honorable Paul Jewell, Kittitas County Board of Commissioners  
The Honorable Mark McClain, Kittitas County Board of Commissioners