



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

August 3, 2009

Jay Manning, Director  
Department of Ecology  
P.O. Box 47600  
Olympia, Washington 98504-7600

Re: Invitation to Join Working Group on the Use of Permit-Exempt Wells for Stock-Water Purposes.

Dear Mr. Manning:

We are writing in response to the invitation to participate in the Working Group authorized by the Washington State Legislature in ESHB 1244(302)(17)(a). The Yakama Nation was invited to participate in this Group pursuant to the above legislative directive. We appreciate the invitation. However, for reasons stated this letter, we must decline the invitation to participate as a member. We ask, however, that Yakama Nation staff and other representatives continue to be allowed to attend as observers.

The Legislature stated that the purpose of the Work Group is to "... review issues surrounding the use of permit-exempt wells for stock-watering purposes..." *Id.* § 302(17)(b). The Group "... may develop recommendations for legislative action." *Id.* The Work Group grew out of efforts by certain parties to change the existing state statute that allows certain wells to be exempt from State permitting requirements by, under certain proposals, expanding the existing stockwater permit exemption even further. A number of dairy and stockwater users want to have an unlimited right to take stockwater without a state permit. This conflict is exacerbated by the ill-reasoned AGO opinion that relies on the poor grammar in the domestic exemption statute rather than the legislative history to determine legislative intent. It is clear to us that the intent of the legislature was to spare landowners the expense and effort of obtaining a state permit for very small uses at a time when they would likely have received a permit had they applied. Now, in a time of full appropriation when new water right applications would almost certainly be denied, certain interest groups are seeking to greatly expand these small limits (not just for stockwater) under the exempt well statute, and in the most extreme proposals remove the limits completely for all uses associated with the cattle and dairy industry.

In times of dwindling water supply, higher demands on the resource and our changing climate, the discussion of this work group or any others regarding exemptions from permit requirements should be about conservation, water use efficiency and stricter standards on water use, and not discussions on compromise that would impair the rights of senior water right holders.

This is a straight water right issue. As a holder of the largest irrigation right in the Yakima River Basin, we view any proposal to exempt large new uses of water from accountability under western water law as extremely irresponsible. The Yakama Nation opposes such efforts because continued unregulated state groundwater withdrawals will reduce available water supplies upon which the Yakama Nation depends for its water rights.

We are not as concerned about details of the claimed state law exemption since state law, cannot in any event, impair our rights. State law cannot impair the Nation's rights but, as a neighboring sovereign, the State has the duty to avoid impacting the water supply used by all. Anyone proposing such a new exemption should be required to apply for a permit and prove that neither senior rights nor the public interest will be impaired. Proponents should also be required to state why one particular industry should be given special privileges for exempt uses of water. It is our understanding that proponents have gone so far as to assert that all water uses associated with large scale cattle operations should be exempt from state permitting, including irrigation of fields growing cattle feed, industrial processing of cattle and dairy products, and even watering roads in the vicinity of cattle operations for dust control. This claim seems especially baseless given that water right permits are required for irrigation and processing of food grown for human consumption for areas within the jurisdiction of the state.

We cannot agree that there can be any increase in the exemption because of the impact of new water uses on the Yakama Nation's rights in a water short area. This letter will explain that any new state uses that impair our rights (whether permitted or not) must be barred.

## **I. Introduction.**

The Yakama Nation has senior adjudicated Treaty reserved rights in the Yakima Basin and unadjudicated Treaty rights throughout central Washington. The Nation's Treaty rights for surface water have been recognized by the court in *Ecology v. Acquavella*. The Yakama Nation has a Treaty right for fish and other aquatic life with a priority date of time immemorial as well as Treaty rights for irrigation and related purposes on the Yakama Reservation. The Nation fully reserves its right to resort to any and all other remedies available to it to protect its federally reserved rights from encroachment by the Department of Ecology or groundwater users withdrawing water under the auspices of state law or otherwise should Ecology not act to stop harm to senior water right holders.

State law, and actions pursuant to it, cannot act to impair the Yakama Nation's federally reserved rights. However, the State's actions here threaten to appropriate water from the water supply of the Yakima River and other basins in which the Yakama Nation holds Treaty water rights without authorization. Since the State lacks any power to appropriate water to which the Yakama Nation has a water right, the State's actions must act to stop these exempt well uses and regulate them -- not expand an irresponsible exemption even further. The State has conceded --

as it must – that the Yakima Basin is over appropriated. In the pending action before the Department on Kittitas County the Department just last week stated that:

Water supply in the Yakima Basin is limited and over-appropriated. Western portions of Kittitas County are experiencing rapid growth and growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flows of the Yakima River or its tributaries.

Department of Ecology Rule-Making Order (CR 103E –July 2009) (July 16, 2009) WSR 09-15-107.

The surface flows of the Yakima River form part of the Total Water Supply Available in which the Yakama Nation has an adjudicated water right. Given that Ecology admits that the water supply in the basin is “limited and over-appropriated” and that water rights as old as 1905 have been shut off in recent water short years, it is inexplicable how Ecology can even begin to justify allowing the exempt wells to continue to operate absent regulation. The Yakama Nation also has a Treaty right elsewhere for which water supply is limited. Neither Ecology nor those using water under state authority should be allowed to use water if it will interfere with the Yakama Nation’s rights. Ecology should regulate the exempt wells as it does other junior water right holders to protect senior water rights.

For that reason, we oppose any state exemption for permitting as is present in RCW 90.44.050. We also oppose the broad interpretations given to this statute by the State Attorney-General’s office AGO 2005 No. 17. The Attorney General wrongly interpreted the statute to exempt from state permit requirements stockwater above 5,000 gallons a day. The Attorney General’s opinion is inconsistent with case law and the legislative history of the statute.

## **II. The Yakama Nation’s Rights are Federally Reserved Rights Not Subject to State Law.**

The Yakama Nation’s Treaty right is a “federally reserved right and not subject to state regulation.” *Ecology v. Acquavella*, No. 77-2-01484-5 (Yak. County Sup. Ct.) Yakama Nation’s Conditional Final Order, (Sept. 12, 1996) at p. 2, lines 21- 23. The *Acquavella* Court went on to hold that “[n]one of the Yakama Indian Nation’s surface water rights in the Yakima Basin are subject to state law or oversight.” *Id.* p. 9, ¶ 9, lines 17-19. Applying these rulings the *Acquavella* court has held that the state laws such as the drinking water laws cannot affect the federally reserved rights of the Yakama Nation. *Ecology v. Acquavella*, No. 77-2-01484-5 (Yak. County Sup. Ct.) Memorandum Opinion Re: City of Roslyn’s Motion to Revise Order Limiting Post-1905 Diversions During Periods of Water Shortage, (Aug. 24, 2005) .

The State court’s ruling in *Acquavella* is consistent with other rulings which have all rejected limiting federally reserved or Treaty reserved rights based upon state law. “Federal water rights are not dependent upon state law or state procedures...” *Cappaert v. United States*, 426 U.S. 128, 145 (1976). State laws cannot act to limit nor impair federally reserved rights. *In*

*Re the General Adjudication of All Rights to the Use of Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739, 744-745 (1999).

Changes in state law, as in the City of Roslyn ruling in *Acquavella*, or in this case involving a possible change in the state permit exempt well statute cannot impact the Yakama Nation's rights. The State can, however, as a co-manager of the water resources in the Yakima Basin with the Yakama Nation and the United States must take steps to responsibly manage the water resources by regulating its water users or those purporting to withdraw water under state approval so as to protect senior rights. This the State has so far failed to do. The existence of the exempt well statute is an act of irresponsibility in this time of full appropriation and dwindling supply, and any expansion would be an abdication of the states responsibility to prevent impairment of senior rights.

## II. The Surface Water Rights are Over Appropriated.

Ecology admits that the Yakima Basin is over appropriated. In its agency findings Ecology states that:

- 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.

Department of Ecology Emergency Rule –Making Order, July 2009, *supra*. In tributaries in the Yakima Valley water rights even older than 1905 are curtailed regularly during water short periods. These affected tributaries include Manastash and Wenas Creeks.

As the litigation in *Acquavella* shows, there have been repeated periods of water shortage where junior proratable water right holders do not get their full water supply. Part of the Yakama Nation's irrigation right is also proratable under current rulings in *Acquavella* so it is also affected. Under applicable federal and state court rulings, the Yakima Basin is over appropriated.

The Yakama Nation has senior Treaty water rights for fish and other aquatic life with a time immemorial priority date. *Yakama Nation's Conditional Final Order*, *supra*, at pp. 3-4. *Ecology v. Acquavella*; *KRD v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034 (9<sup>th</sup> Cir. 1985). The Nation also has adjudicated Treaty irrigation rights for its Reservation. *Id.* After the Treaty of 1855 under which the Yakama Nation reserved its rights, many Yakima Basin off-reservation parties appropriated water under state law in the late nineteenth and early twentieth centuries. The State Supreme Court has ruled that:

... in May 1905 the United States began to withdraw from appropriation all unappropriated waters in the Yakima River. By 1906, all of the unappropriated waters of the river and its tributaries had been withdrawn from appropriation.

*Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 267 (1993) (*Acquavella II*).

The United States Bureau of Reclamation built a series of storage reservoirs and has managed the storage and natural flow in the Yakima Basin pursuant to court rulings. Water is managed in a unitary basis under a concept of the "Total Water Supply Available" defined as:

that 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.

*KRD v. Sunnyside*, Consent Decree (1945) quoted in *Ecology v. Acquavella*, Memorandum Opinion Re: Motion to Limit Treaty Water Right for Fish To Natural Flow, et.al, (April 2, 1996) at p. 11. The *Acquavella* court noted that "[t]his concept of TWSA underlies the entire scheme of water delivery and management within the Yakima Project and has so for the past 50 years." *Id.* The 1945 Consent Decree quoted above "established an allocation schedule which defined the obligations of the Bureau of Reclamation ..." concerning water deliver within the Yakima Basin. *KRD v. Sunnyside Valley Irrigation District*, 626 F.2d 95, 97 (9<sup>th</sup> Cir. 1980). "As a result of the consent decree, the parties, such as ... Sunnyside, were accorded certain non-proratable allocations of water, and others, such as ...Roza Irrigation District (Roza), were accorded proratable allocations of water ..." *Id.*

The Yakima Valley has had a series of water short years in recent years showing that the water supply is often inadequate even for these parties with water rights with priority dates of 1905 and earlier. The *Acquavella* court took judicial notice that "... KRD, Roza and other proratable entities' diversions have been reduced many times in short water years." Memorandum Opinion Re: Motion to Limit Treaty Water Right for Fish To Natural Flow, et.al, supra, at p. 15. A summary table prepared by the U.S. Bureau of Reclamation shows nine years up to the year 2002 when there were water short years during which proratable water right holders had to have their deliveries reduced. Interim Operating Plan for the Yakima Project (Nov. 2002) (Table 5-9) (excerpt). Thus there were repeated water short years including but not limited to 1977<sup>1</sup>, 1994<sup>2</sup> 1992-1993, and 2001. Most recently there was a water short year in 2005. "Under the Consent Decree, in times of shortage, the first to take a reduction would be the proratable entities. If the water situation was so poor, as it nearly was in 1994, that all proratable entities were shut down, then priority dates would come into play as between natural flow entities." Memorandum Opinion Re: Motion to Limit Treaty Water Right for Fish To Natural Flow, et.al, supra, at p. 22. In such a situation, the Yakama Nation's Treaty water right for fish and other aquatic life with a priority date of time immemorial "would be the most senior of all non-proratable water rights in the basin" and would take precedence over all rights in the Consent Decree. *Id.*

The Basin is operated on a one-bucket system where both storage and natural flow are part of the TWSA. *Id.* There is no distinction between natural flow and storage for purposes of providing water. *Ecology v. Acquavella*, Revised Order re: Motion to Limit Treaty Water Right For Fish to Natural Flow and Abatement of Non-Proratable Water Rights (July 16, 1996) at p.3.

<sup>1</sup> *KRD v. Sunnyside*, supra, 626 F.2d at 97

<sup>2</sup> Memorandum Opinion Re: Natural Flow, supra, at p. 22

Because the Basin is overappropriated, even certain parties with 1905 priority dates must be cut back in years of shortage. *Id.* This likelihood of junior right holders being cut back applies even more so for those with priority dates after 1905 such as the groundwater users who are the subject to this proposed rule. As the Court noted in the above *Acquavella* decision, “[a]ll Project 1905 priority date users, non-proratable and proratable, would take precedence over post-1905 non-Project water users.” Revised Order re: Motion to Limit Treaty Water Right For Fish to Natural Flow and Abatement of Non-Proratable Water Rights (July 16, 1996) at p.3 .

In light of this problem of post-1905 water right holders, the *Acquavella* Court entered orders shutting off during water short years a number of surface water right holders and others that have water rights with priority dates after May 10, 1905. *Ecology v. Acquavella, Order Limiting Post-1905 Diversions During Periods of Water Shortage* (June 10, 2004). Subject to certain terms provided in the Order, the Order provides “... those parties who have water rights to divert water from the Yakima River or its tributaries with a priority date later than May 10, 1905, under the terms of this Order, shall cease diversions of water from the Yakima River or its tributaries after the U.S. Bureau of Reclamation begins storage control... during any period of time when the proratable water users will receive less than their full entitlement ...” *Id.* at p. 2.

For these reasons, it is thus beyond dispute that the Yakima Basin is highly regulated and that it is overappropriated. Any action by Ecology or the groundwater users at issue to increase use that impairs TWSA or affects local streams is not permissible.

The areas outside of the Yakima Basin which affect the Yakama Nation’s Treaty rights are also overappropriated. The State cannot allow new uses in overappropriated basins. Although the Nation’s Treaty Rights have not yet been adjudicated in the other basins in Central Washington, we have participated in good faith in cooperative processes intended to conserve water and protect instream resources. We have joined in support of watershed plans in the Wenatchee and Entiat basins. These plans include minimum instream flows and small reservations to allow for residential development. A single cattle operation could more than use the reservations in each of these basins at the expense of other uses including domestic supply. We would consider creating new exemptions applicable in these watershed where we have signed on to watershed plans as a breach of faith that would invalidate the watershed plan.

### **III. Ground Water Pumping By the Exempt Wells Captures Surface Flow.**

Ecology has admitted in its findings that “[e]xempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.” Department of Ecology Proposed Rule Making – Findings. We agree with this but would go further and believe that such exempt wells in the upper valley will, in fact, impact the River. When such wells use water that would otherwise be destined for use by the Yakama Nation, such use is prohibited. Any stream flow intercepted by groundwater pumping during the storage control period will reduce Total Water Supply Available.

Groundwater pumping reduces stream flow by either intercepting flowing groundwater that would otherwise discharge to streams through springs or seepage or by inducing flow from streams into the aquifer. Dep’t of Ecology, Draft Report of Technical Advisory Committee on the Capture

of Surface Water by Wells at 9 (1998) (excerpt) (<http://ww.ecy.wa.gov/biblio/98154.html>); Winter et. al, Ground Water and Surface Water: A Single Resource, 2006. Groundwater pumping will over time capture streamflow commensurate with pumpage. Draft Report Of The Technical Advisory Committee On The Capture Of Surface Water By Wells, *supra*. In upper Kittitas County, there is no basis to believe that effects of groundwater pumping will not be felt locally and within a relatively short time.

Under state law ground and surface water must be regulated so as to protect the senior rights. RCW 90.54.020(9). Hydraulic continuity between surface and groundwater is recognized under the state groundwater and surface water statutes. *Postema v. PCHB*, 142 Wn. 2d 68, 80 (2000). Before Ecology can take an action here approving or facilitating these exempt wells, it must first make a determination as to the relationship with surface water and how the surface water rights will be impaired. *Id.* at 80-81.

Under state law Ecology cannot allow "economic considerations [to] influence permitting decisions." *Postema, supra*, 141 Wn. 2d at 82. If economic considerations cannot influence permitting decisions, neither the State nor the County should not be allowed use such economic considerations here either. . Moreover, the courts have refused to adopt a requirement that they balance equities in determining or administering Treaty or federally reserved rights. *Cappaert, supra*, 426 U.S. at 139, n. 4; *Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 277 (1993) (*Acquavella II*).

For that reason, we object to the any proposal to expand, or even continue, the stockwater exemption without regulation to protect other water right holders. The State admits that these wells are a state-based right subject to regulation by the State.

#### **IV. Conclusion.**

The Yakima Basin and other watersheds in Central Washington are fully or over-appropriated. The Yakama Nation holds Treaty Water Rights for instream and out of stream uses. The state has a duty to protect all senior rights, whether from Treaty or state-law appropriation, from impairment. Groundwater pumping unequivocally captures and reduces surface water supply. At a time when all water users are being encouraged to live within their means, creating an unlimited new exemption for the benefit of one industry is the most illogical and irresponsible proposal we have seen in recent times. We do not believe that, beyond stating these basic facts, further participation in a forum to discuss the concept of an expanded exemption would be productive. We believe our participation would be portrayed by some as acquiescence in the judgment of the committee, which is, of course heavily tilted toward the industry proposing the exemption. It would be equally wrong to portray our absence as acquiescence. By this letter we wish to make is absolutely clear that we oppose any expansion of the domestic exemption, whether for cattle or any other industry.

For the above reasons, the Yakama Nation respectfully asks Ecology to do the following:

- 1.) Allow Yakama Nation staff to attend the meetings as members of public;

- 2.) Accept this letter to record the Yakama Nation opposition to the stockwater exemption in RCW 90.44.050 and its opposition to the Attorney General's 2005 interpretation of that statute;
- 3.) Accept this letter to record the Yakama Nation's opposition to any expansion of the state permit exemption for stockwater.

Sincerely,

A handwritten signature in cursive script that reads "Ralph Sampson Jr.".

Chairman Ralph Sampson, Jr.

Governor Chris Gregoire  
Director Dan Newhouse  
Attorney General Rob McKenna  
Representative Brian Blake  
Representative John McCoy  
Representative Bruce Chandler  
Representative Judy Warnick  
Senator Jim Honeyford  
Senator Brian Hatfield  
Senator Bob Morton  
Senator Phil Rockefeller