TO: Kittitas County Planning Department/Committee

RE: Mitigation Ideas and Options

DATE: August 16, 2013

I would like to resubmit the document below seeing how it is pertinent to the latest county water rule proposal. It is also extremely important that the county and planning committee understand that the citizens of Kittitas County need to have a clear, fair, and just path to mitigation.

Privately owned water banks pose more problems than answers. First, unelected bodies controlling water which is a requirement for a building permit. These private groups are not accountable to the public for which they provide water for; this can lead to unfair pricing, price fixing, and so on. Second, domestic drinking water should not be treated as a commodity, it is too important of a resource. The county cannot have unelected bodies in charge of protecting and expanding its tax base, that’s what local government, is for.

I strongly encourage all of you to understand that we have an opportunity here to create a system that will work for many years. A band aid fix that private water banks provide can leave homeowners priced out of the market. This only gets us back to the original problem; finding fair, even-handed mitigation. County run mitigation banks can also fund mitigation programs, listed below, that can add to the county’s water supply and help many citizens that do not have access to mitigation water. Private water banks cannot do this; they do not have long lasting benefits for the residents.

This can be an opportunity for a long lasting permanent solution to an issue that has plagued central Washington for generations.

Thank You For Your Time,

Jeremy Bach, Vice-President of Bach Drilling

3326 Wilson Creek Road

Ellensburg WA, 98926
TO: Kittitas County Planning Department/Committee

RE: Mitigation Ideas and Options

DATE: October 26, 2012

The ideas listed below could go hand in hand with a D.W.R.P. (Domestic Water Reserve Program) style program. Some of these ideas can be applied county wide giving landowners different options. Our county is made up of many types of geology. This is why various types of well construction need to be made available. This in conjunction with a county ran mitigation program could protect county residents from the constant threat of domestic water closures.

Thank you for your time and attention.

Jeremy Bach, Vice-President of Bach Drilling

3326 Wilson Creek Road

Ellensburg WA, 98926
1. Deep Well Drilling Option

The deep well drilling option could definitely be implemented in areas of the Upper Kittitas County and Lower Kittitas County where surface water interruption is thought to be occurring. It represents a feasible, long term, drilling method that gives all parties a level playing field. Furthermore, it will directly address the concerns that the Washington State Department of Ecology (D.O.E.) has with regard to protecting groundwater and shallow surface waters.

**UPPER COUNTY**

In many areas of the Upper County, where a clay layer is present, you encounter gravel/sand layers that contain adequate amounts of water for domestic use beneath that confining layer. These gravel/sand layers are usually embedded underneath hundreds of feet of clay. Using steel casing throughout these clay layers will seal off the surface water. In other areas where the clay layer is encountered, instead of finding adequate domestic water amounts within the gravel/sand layer, you must drill into the underlying bedrock.

**VALLEY FLOOR**

In Lower Kittitas County where clay layers are present steel casing can be driven into and past the clay into the sandstone. Most of the valley floor consists of gravel with clay layers and eventually sandstone. Once the steel casing is driven through these shallow gravel surface water formations into sandstone you can visibly see that the surface water has been sealed off. Finishing the fully steel cased well into a significant formation of sandstone not only increases the water quality but it also creates a barrier between surface and groundwater.

**FOOTHILLS AND MOUNTAINS**

When you encounter bedrock, you typically drive the steel casing into it another 3-5 feet until it stops. Should you keep driving on the steel casing, you risk damaging the overall integrity of the well. Wells of this type, drilled into bedrock, will seal off any surface water that may have been encountered before reaching the bedrock.

By simply stipulating, “when bedrock is encountered, the casing should be advanced up to 15 feet into the bedrock—or—until steel well casing refusal occurs,” AND, “once a significant layer of clay or sandstone is penetrated with steel casing,” will provide the same surface water protection results without excessive cost.

(4) If the ground water being sought for withdrawal has been determined by the department not to be hydraulically connected with surface waters listed as closed, the department may approve a withdrawal. When insufficient evidence is available to the department to make a determination that ground and surface waters are not hydraulically connected, the department shall not approve the withdrawal of ground water unless the person proposing to withdraw the ground water provides additional information sufficient for the department to determine that hydraulic continuity does not exist and that water is available.

3. Not allowing shallow wells to be drilled that are in direct connection to surface water.

4. D.W.R.P. County ran mitigation program that allows a level playing field to obtain mitigation water, including other types of stream enhancement programs. This can be a County owned set of rights, County acquired irrigation rights through the KRD system, relatively small scale County storage projects, or many other stream habitat/maintenance programs.

5. Stream augmentation wells. These wells are drilled with a water right for the area and then pumped directly into a stream in order to offset any in stream impacts and assure the desired amount of water is maintained during critical flow periods.
Good Morning Mr Hansen,

A few comments regarding this evenings public meeting that you should address or members of the planning commission should ask.

1. At the roll out of the plan a few months ago there were questions about enforcement. There was no enforcement language in the previous version presented and I cannot find the version prepared for this evening.
2. I read the FAQ's and noticed that while enforcement was a frequent question at the roll out, it has not been addressed.
3. Several enforcement questions:
   A) what happens if the set quantity based upon the appropriate average is exceeded.
   B) what happens when there is more than a postage size lawn, 500 sq ft, that is being irrigated with well water.
4. The county has a current requirement to monitor wells in several wells adjoining the old grasslands just to the east.
   A) what are the results of the monitoring. Is the 5000 gal per day exceeded? If yes what was done.
5) Present the history of monitoring and compliance on past county requirements based upon plat language before introducing new requirements with no obvious enforcement.
6) why is the draft language not available to the public to review so reasonable comments can be made. If it is available please provide me the link to the document as it was not obvious as I searched your site.

I support your efforts. I am unclear as to the purpose of this evenings meeting to inform PC and BOCC without giving the public the opportunity to review the proposed document. It is also unclear as to if there will be future opportunities to comment.

Thank you

Paul Bennett
August 14, 2013

Kittitas County Planning Commission

To Whom It May Concern:

This letter serves as notice of standing and that of our family in the matter of Recommendations to the Board of County Commissioners addressing requests of the Eastern Washington Growth Management Hearings Board regarding the Kittitas County Comprehensive Plan.

We also specifically object to the Comprehensive Plan Language regarding Water Rights-Chapter 2.2.2 of Comp Plan.

We find no statutory authority for Kittitas County to limit or restrict water rights or uses. Water rights and uses are within the limited purview of the State of Washington Department of Ecology.

As a matter of public policy, particularly by a county which has seen extreme damage from fires in the last year, it is not wise to limit the use of domestic water to within-home use.

We request notice of any further hearings or actions on this matter.

Thank you.

Pat Burke

Mary Burke

1351 Smithson Road
Ellensburg, Washington 98926
August 14, 2013

Kittitas County  
Board of Commissioners  
205 West 5th Avenue, Suite 108  
Ellensburg WA 98926-2882  
bocc@co.kittitas.wa.us

Re: Kittitas County Comprehensive Plan Development Regulations for Water

Dear Honorable Commissioners:

The Center for Environmental Law and Policy (CELP) is a non-profit advocacy organization dedicated to preserving and restoring the state’s rivers and aquifers. Since early 2009, CELP has urged Kittitas County to protect existing water rights in the land use decision making process, and to ensure sustainable use of water supplies. To those ends, CELP participated as an amicus curiae in Kittitas County v. EGMHB, 256 P.3d 1193 (Wash. 2011). As the County is well aware, in 2011, in Kittitas, the Supreme Court held that for Kittitas County to meet its responsibility under the Growth Management Act (“GMA”) to protect ground and surface water, the County is obliged to determine whether water is legally and physically available before granting new land use permits. See RCW 36.70A.070(5)(c)(iv).

Also in 2011, the USGS issued its Yakima River basin study which underscores the connection between the basin’s surface and ground waters, and establishes that groundwater pumping reduces available surface water.\(^1\) Of course, surface water in the Yakima basin has long been over-appropriated.\(^2\) The cumulative effect of these legal and scientific developments could not be clearer. Since surface waters are over-appropriated in the Yakima River basin, and ground water pumping threatens and diminishes the full exercise of surface water rights, Kittitas County can only meet its GMA obligation to protect surface water if it approves land use applications that rely upon new exempt wells that are fully mitigated.

It is in this context, that the County has issued its proposed development regulations. There is much to be applauded in County’s regulations, especially the inclusion of metering requirements. But the proposed development regulations have a critical shortcoming: they fail to require


mitigation for new permit exempt uses. Chapter 13.35.024(4); 13.35.027(2). Unless new permit exempt uses are water-budget neutral, the County’s proposed development regulations not only fall short of the GMA’s mandates, as clarified by the Washington Supreme Court in Kittitas, they fail to protect the property interests of senior water rights in the Yakima basin, which are already subject to curtailment during dry periods.

Development must be carried on in a manner that does not impair or diminish the surface water rights of existing Kittitas County residents, and essential flows in the Yakima River and its tributaries. The County can only issue new development and building permits where water is legally and physically available. Given that surface water rights in the basin are already over-appropriated, and the connection between ground and surface water, CELP urges the County to revise its proposed development regulations to only allow land use development based upon permit exempt wells where those new uses are fully mitigated, bucket for bucket. Anything less than that will put the senior water rights of current Kittitas County residents at risk, as well as critical flows in the Yakima River to protect fish, wildlife, and water quality.

We thank you for the opportunity to comment on the draft development regulations.

Very truly yours,

Suzanne Skinner
Executive Director
Date: August 16, 2012

To: CDS

Re: Amendment to Kittitas County Comprehensive Plan and Kittitas County Code Update with WSGMP

Mr. Hansen:

Please accept my written comments on the above-cited issue.

See attachments, 7 pages in total.

These are related specifically to the potable water/exempt well proposed code.

Respectfully,

Catherine Anne Clerf
60 Moe Road
Ellensburg, Washington 98926

RECEIVED
AUG 16 2013
KITTITAS COUNTY
CDS
From: Catherine Clerf (catherine.a.clerf@hotmail.com)
Sent: Fri 8/16/13 4:49 PM
To: Greg Zempel-PA (greg.zempel@co.kittitas.wa.us); NeilCaulkins KC-PAO
(neil.caulkins@co.kittitas.wa.us)

To: Gregory Zempel, Prosecuting Attorney
Neil Caulkins, Civil Deputy Prosecuting Attorney

Re: State v. Manning, Kittitas County Sheriff's Office No. S11-06514

Gentlemen:

I came to be in physical receipt earlier in this month of August 2013 of a copy of the "Filing Decline Memorandum," dated July 30, 2013, to Dave Houseberg of the Kittitas County Sheriff's Department with its 3-page attachment of a report authored by Deputy Prosecuting Attorney Candace Hooper, dated September 15, 2011.

I note the final paragraph of DPA Hooper's report of:

"Conclusion

It is my belief that there is insufficient evidence to charge any crimes at this time, but that further investigation might show sufficient evidence of one potential crime. However, that crime is now beyond the Statute of Limitations."

I am writing to the Prosecuting Attorney Office of Kittitas County at this late juncture to declare that had I known that there was any type of investigation, criminal or civil, by our Sheriff's Office in the time frame of July 1, 2009, to September 15, 2011, regarding the circumstances or events or actions taken by any one or more state employee with regard to the termination of the Memorandum of Agreement, adopted April 7, 2008, by the State of Washington, I would have come forward willingly as a witness to offer evidence in defense of any one or more state employee against Ms. Cooper's recited claims of: 1) False Reporting; 2) Official Misconduct; and 3) Intimidating a Public Servant.

To wit, I would have voluntarily declared myself a witness and provided my original handwritten notes which represented my transcription of what I personally heard during my attendance at the Kittitas County Republican Party regular monthly meeting on the second Thursday of the month held at the South Cle Elum Railroad Depot Cafe/Museum in June of 2009. I would have offered voluntarily under oath that not only did I hear what was said by
Commissioner Mark McClain, but so did a packed room of more than 60 people which included other county elected officials (as corroborated by the minutes of that specific KCRP meeting in each person’s "elected official report"), numerous precinct committee members and executive board members of the KCRP (as a quorum was established and is reflected in the minutes of this meeting), and many citizens, most of whom I personally can identify. My handwritten notes also reflect which elected county officials were in attendance at this KCRP meeting.

Succinctly and briefly, and I note that I am paraphrasing loosely the context of former Commissioner McClain's verbiage, McClain stated to the audience that he and the other two commissioners (Paul Jewell and Alan Crankovich) were only going through the motions to create the appearance of being engaged “in good faith” in the then ongoing dispute resolution process and were intentionally dragging out the negotiations to buy time and had no intention of agreeing to conditions and terms that were part of the MOA.

As I am not privy to the records of the KCSO's investigative report, I obviously have no way to confirm whether or not this witnessed statement made by McClain was ever reported to the KCSO investigator(s) and/or whether the Prosecuting Attorney Office was aware of this either.

As a citizen of Kittitas County who has disagreed with the county's position with regard to its refusal to accept its legal responsibilities to protect the property rights embodied by senior, pro-ratable, and junior water rights holders in the Yakima River Basin and concurs with the legal positions taken by the Department of Ecology, the Eastern Washington Growth Management Hearings Board, and the Supreme Court of the State of Washington, I am ashamed and appalled that the tactic of accusing former Department of Ecology head Jay Manning was seized upon by your former deputy prosecuting attorney Brent Bottoms and/or any one or more of your DPA staff and/or yourself as a means to concoct a basis to combat the termination of the Memorandum of Agreement of 2008 by any legal means. For whatever reason or reasons delayed Ms. Hooper’s “review” to a point in time such that the only potential criminal charge was beyond the statute of limitations at least belies some prudence and common sense on your part as the prosecuting attorney, especially given the legal opinion rendered in the interim by the Supreme Court of the State of Washington on the issue related to water and exempt wells.

I will end this unsolicited treatise by making a brief chronological recounting of the following incident which happened on the heels of the “illegal” termination of the Memorandum of Agreement by the Department of Ecology.

To wit: On the secondary Saturday of July 2009, I was privately informed of the “alleged” disappearance of the three 3-ring binders from the Community Development Services portion of the county’s Ruby Street building that embodied the administrative segregation applications by American Forest Resources/American Forest Land Company (aka the John Rudey “Teanaway” property). I note the following time line:

I informed you of the alleged disappearance the following day, Sunday.

I informed Director of Public Works Kirk Holmes on the alleged disappearance the following Monday. I gave DPW Holmes in our telephone conversation of that Monday morning the opportunity to substantiate whether or not some, all, or parts of these binders and their contents had, in fact, been removed from the building,. I further gave DPW Holmes approximately 24 hours to inform me of the outcome of his investigation in person at my office.
On the following Tuesday DPW Holmes confirmed to me in my office of the total disappearance of binders 2 and 3 and the disappearance of all of the contents of binder 1 save for the binder itself and a huge fold-out map.

Succinctly, after one attempt at an August subarea open house to engage a citizen to voluntarily return the binders and two attempts at two Upper County subarea plan public hearings in which I gave testimony and directly alluded to the disappearance of these three 3-ring binders in an attempt to persuade the “parties” involved in the binders' disappearance to voluntarily return them, noting that this time line spanned nearly four months, I point out that I was the citizen who reported the theft of public documents in late October 2009, not my own county government.

As this was a well-publicized event in the media, it obviously came to the attention of the State of Washington of “Bindergate,” as this incident came to be known.

It took until the following spring in May of 2010 for your PAO to release its decision not to prosecute any one with regard to the theft of public documents.

As to whether the eventual “disposition/resolution” of these two separate incidents of alleged criminal acts were then and are now somehow connected it any citizen's guess and pure conjecture and I have drawn my own conclusions and, of course, I am entitled to my own humble opinion.

Thank you for your indulgence to recount the history of events past, events of which most of the citizens and voters of this county are still to this date in a state of blissful ignorance.

Respectfully,

[Signature]

//ss//

Catherine Anne Clerf

60 Moe Road

Ellensburg, Washington 98926

*****************************************
FILING DECLINE MEMORANDUM

DATE: July 30, 2013

TO: Dave Houseberg
AGENCY: Kittitas County Sheriff's Department

FROM: Greg Zempel
Prosecuting Attorney

RE: Suspect: Jay Manning
Incident No.: S11-06514

I HAVE DECLINED TO FILE THIS CASE FOR THE FOLLOWING REASONS:

_____ There is insufficient evidence of a crime to file this case.
_____ I need additional investigation of information (see comments below).
_____ While there is sufficient evidence of a crime, the facts of this case do not justify filing criminal charges.
_____ X Other reasons (see comments below).

COMMENTS:

I have declined to charge this case based on the review of the materials by Candace Hooper and her resulting memorandum, which I have attached. The facts involved did not support the alleged charges sufficiently to charge Mr. Manning. The statute of limitations had expired at the time of review.

Very Truly Yours,

[Signature]

Gregory L. Zempel

CC: Robert K. Costello – Attorney for Department of Ecology
    Jeffrey P. Robinson – Attorney for Jay Manning
To: Greg Zempel  
From: Candace Hooper  
RE: State v. Manning, Sheriff’s Office Number S11-06514  
Date: September 15, 2011

I have reviewed in great detail the reports that have been given to us by the Kittitas County Sheriff’s Office. In addition, I have reviewed copies of the actual documents referenced in the reports, and statements that were taken by law enforcement. The sheriff’s office listed the complaints in essentially three categories, and I will follow those designations in expressing my opinion about the viability of this case.

1. False Reporting – RCW 42.20.040 and Official Misconduct – RCW 9A.80.010

The allegations here are that Jay Manning, the Director of Ecology, filed a document in an official report that contained a false statement. This statement is as follows: On July 16, 2009 Mr. Manning submitted a signed filing (A Rulemaking Order) to the Washington State Code Reviser which indicated “Ecology later invoked the dispute resolution process under the MOA. The MOA was terminated by Ecology on July 1, 2009.” Another similar document was signed under the authority of Mr. Manning and filed with the Code Reviser on July 31, 2009, also alleging that the MOA had been terminated by Ecology on July 1, 2009. The MOA refers to a Memorandum of Agreement which had been adopted on April 7, 2008 between Kittitas County and the State of Washington, Department of Ecology regarding management of exempt ground water wells in Kittitas County. In this MOA itself, it is provided that any party may initiate a formal dispute resolution process after the Parties have attempted in good faith to resolve a disagreement informally. If the parties’ representatives fail to resolve the dispute within 30 days or the time frame established by the designated executives, then any Party may withdraw from the MOA. The MOA explicitly states: 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.

The Sheriff’s Office has done a good investigation that convinces me that in fact, the Department of Ecology never gave Kittitas County advance written notice that they were terminating the Memorandum of Agreement (MOA). Not on July 1 or on any previous date. In fact, the dispute resolution process was just ongoing at the time Mr. Manning filed his document. No written notice was received by the county, and parties at meetings after July 1, 2009 discussed terms of the MOA and dispute resolution, indicating the MOA was still in place on July 8, 2009, and even on December 30,
2009. Parties also never agreed to waive dispute resolution. Thus, the statement that the MOA had been terminated was false.

RCW 42.20.040 states: Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.

It is clear that Mr. Manning’s statement is false. The question becomes whether it was “knowingly” false. Mr. Manning did not sign the MOA. Someone signed for him. Is it reasonable to suppose, however, that he was entirely ignorant of its terms? Was it a boilerplate memorandum that has terms that Mr. Manning has used in other places and times? Was it specifically crafted for this county and this issue? Since Mr. Manning has elected to wait to respond to this investigation until it has been turned over to a prosecutor, we do not know if he will claim he had forgotten or never knew how the MOA could be terminated, or whether he will claim that he thought it had been terminated or that he had been misinformed by someone that it had been terminated. Some statements were made by others at DOE which certainly suggest that they were misinformed about how the MOA was terminated. Thomas Tebb says DOE had given notice to Kittitas County that they were invoking the Dispute Resolution Process. There is a suggestion that he and Mark Schuppe thought (mistakenly) that this terminated the MOA. Schuppe says specifically, “I am aware that the memorandum agreement or the written agreement was terminated after we had invoked the dispute resolution clause of that agreement.” There is no evidence whether they had communicated to Manning that they had given the requisite notice to terminate the MOA (under a misapprehension of how the MOA was terminated). Before this case is charged, the prosecutor reviewing the evidence would want to see what Mr. Manning’s position is and whether it is reasonable. The prosecutor would have to prove beyond a reasonable doubt that Manning 1. Knew how the MOA should be terminated, and 2. Knew that DOE had not complied with those requirements. There is insufficient evidence on those points at this time. Further investigation might resolve those questions.

However, since it is a gross misdemeanor, the conduct is subject to a two year statute of limitations. July 16 and July 31, 2009 are beyond this statute of limitations. The prosecution is not possible.

Official Misconduct, RCW 9A.80.010 states: A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege: (a) He intentionally commits an unauthorized act under color of law; or (b) He intentionally refrains from performing a duty imposed upon him by law.

The facts do not fit this crime. Mr. Manning was not accused of refraining from performing a duty. Filing a document is an authorized act. Semantically, one could say that filing a document with a knowing falsehood in it might be considered unauthorized, however, since there is a specific special crime that encompasses that behavior (see above, 42.20.040), that would be the statute that would have to be filed. See State v. Shriner, 101 Wn.2d 576 (1984). Moreover, the crime of Official Misconduct is a gross misdemeanor, and therefore is subject to the same statute of limitations.
2. Intimidating a Public Servant – RCW 9A.76.180

The allegation is that the Department of Ecology threatened to initiate or continue a moratorium if the Board of Commissioners did not agree to a curtailment or if the Prosecutor did not withdraw his request for an Attorney General Opinion or change the questions in that request.

This statute is violated by a person if, "by use of a threat, he attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant."

Although the request for an attorney general opinion is an official action, and the prosecutor and commissioners are counted as public servants, and although it is clear that DOE was attempting to influence a public servant's actions by strong persuasion, the existence of a threat has not been shown.

The sheriff's office investigation did not reveal any explicit threats which fall under RCW 9A.04.010 (27). The alleged threat was something the Department of Ecology had a right to do, and which was not done with intent to harm anyone substantially, nor could it be called a wrongful action, in the sense that is meant for criminal prosecution.

3. Official Misconduct – 90.54.050

There was a suggestion that the nine rules that Department of Ecology enacted were improperly enacted since public hearings were held only for the first rule. However the Department of Ecology enacted these rules under the provisions of Emergency Rule making, which does not require public hearing. Whether or not the rules are properly considered Emergency rules is not within the scope of a criminal prosecution.

Conclusion

It is my belief that there is insufficient evidence to charge any crimes at this time, but that further investigation might show sufficient evidence of one potential crime. However, that crime is now beyond the Statute of Limitations.

Candace Hooper
Deputy Prosecuting Attorney
August 12, 2013

Kittitas County
Board of Commissioners
205 W 5th Ave, Ste 108
Ellensburg WA 98926-2887

Dear Sirs:

Thank you for the opportunity to comment. This letter is being provided to convey the Washington State Department of Ecology (Ecology’s) input on the Draft Proposed Regulations Regarding Adequate Provision of Potable Water distributed for comment by Kittitas County on July 16, 2013. Ecology’s input is organized by subject and references the proposed regulations where appropriate.

Legal Basis

Under the Growth Management Act (GMA) and other land use statutes, the County has the authority and responsibility to protect area resources (including surface and groundwater resources) and to plan and provide for development in locations where water resources can support the anticipated development. These authorities and responsibilities are found in the GMA, RCW 36.70A, and in other statutes, including RCW 58.17.110 and RCW 19.27.097. These authorities were discussed by the State Supreme Court in Kittitas County v. EWGMHB, 172 Wn.2d 144, 256 P.3d 1193 (2011). Ecology has reviewed the county’s draft Comprehensive Plan and draft Development Regulations with these overarching principles in mind. Ecology also considered its knowledge of the surface and groundwater resources in the county and in the entire Yakima Basin.

Scientific Basis

The U.S. Geological Survey conducted an extensive Yakima Basin groundwater study to develop a model demonstrating how groundwater moves from aquifer to aquifer and how it interacts with the Yakima River. Research conducted in support of this model documented a connection between surface water and groundwater. The final report and computer model released in 2011 represents the best available science on groundwater resources in the Yakima Basin.

Water Availability

Summary points describing Ecology’s understanding of water availability are as follows:

(1) Yakima River Basin area surface and groundwaters are hydraulically connected;

(2) Yakima Valley water resources are over-appropriated and it results in interruption of junior and proratable water rights during water short years;
(3) Some senior surface water rights within many Kittitas County tributary streams are at times curtailed to ensure more senior surface water rights are satisfied; and

(4) New groundwater uses within the Yakima River Basin will intercept water that would otherwise satisfy senior and pro-ratable water rights.

In summary, new un-mitigated uses of groundwater that require a reliable non-interruptible water supply cannot be supported in light of basin conditions.

Ecology's Comment on the proposed Draft Proposed Regulations Regarding Adequate Provision of Potable Water

Section 13.35.028 (Water Use Limitations) of the proposed Regulations would authorize new domestic or residential uses in Kittitas County of up to an average of 350 gallons of water per day (gpd). This provision, when compared to the pre-existing situation (no local limitation on new uses of groundwater that are exempt from state water right permitting) is a positive step toward controlling overuse of water. However, without mitigation for the consumptive use of the water, it falls short of providing new residential water users with a reliable potable water supply. A regulation that allows the unmitigated new use of water in the Yakima Basin puts new users at risk and further aggravates the already over-appropriated condition of the Yakima Basin. Additionally, local factors such as the potential for impairment of senior water rights on Yakima Basin tributary streams are not considered by the proposed regulation.

Ecology does not see any explanation in the county's materials describing the county's basis for concluding that these proposed new uses of groundwater throughout Kittitas County can be supported by the area water resources. Absent such a showing, Ecology does not think new unmitigated groundwater uses can be allowed when the laws under which the County proposes to update its ordinances require sufficient water to support land use.

Sincerely,

Mark Kemner, LHG
Section Manager, Central Washington Water Resources Program

MK:ss/130807
August 9, 2013

Kittitas County Planning Commission
Kittitas County Community Development Services
411 N Ruby ST, Suite 2
Ellensburg Washington  98926

Dear Planning Commissioners:

Subject: Comments on proposed the recommendations to the Board of County Commissioners addressing requests of the Eastern Washington Growth Management Hearings Board regarding the Kittitas County Comprehensive Plan and its noncompliance to the Growth Management Act

Sent via U.S. Mail and email to: cds@co.kittitas.wa.us

Thank for you for the opportunity to comment on proposed changes to the Kittitas County Comprehensive Plan and Development Code. We appreciate the significant improvements to the comprehensive plan; however the comprehensive plan and development regulations fail to achieve compliance. We identify those areas of noncompliance below.

The updated comprehensive plan and development regulations is also an opportunity for the county to protect its economic base, including agriculture, while also protecting water quality, saving taxpayers and ratepayer’s money over the long-term, and planning for the community’s preferred future. So we support the county’s innovative work to protect senior water rights holders and water quantity.

Futurewise is working throughout Washington State to create livable communities, protect our working farmlands, forests, and waterways, and ensure a better quality of life for present and future generations. We work with communities to implement effective land use planning and policies that prevent waste and stop sprawl, provide efficient transportation choices, create affordable housing and strong local businesses, and ensure healthy natural systems. We are creating a better quality of life in Washington State together. We have members across Washington State including Kittitas County.
The GMA Compliance 2013 Proposed Revisions to Comprehensive Plan Chapter 8 Rural and Resource Lands and the Draft Comprehensive Plan Language Regarding Water Rights—Chapter 2.2.2 of Comp Plan need to include measures to protect rural character

The comprehensive plan must include measures to protect rural character as defined in RCW 36.70A.030(15) and to implement the measures governing rural development required by RCW 36.70A.070(5)(c). In Kittitas County v. Eastern Washington Growth Management Hearings Board, the Washington State Supreme Court held that the comprehensive plan must include measures that “require or assure” compliance with the requirements of the Growth Management Act (GMA). Because Kittitas County’s comprehensive plan did not include these mandatory measures, it violated the GMA. In the May 31, 2013 Compliance Order, the Board again found that the comprehensive plan did not include the required measures governing rural development to protect rural character.

RCW 36.70A.070(5)(c) provides in full:

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

(iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and groundwater resources; and

(v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

1 RCW 36.70A.070(5)(c).
3 Id.
The GMA does not define “measures.” Where the GMA has not specifically defined a term, the courts “apply its common meaning, which may be determined by referring to a dictionary.” The courts frequently use Webster’s Third New International Dictionary. The most applicable definition from that dictionary is “to regulate or adjust by a rule or standard: govern ....” So measures must regulate by a rule or standard.

Our review of the GMA Compliance 2013 Staff Recommendation Description: Proposed Revisions to Comprehensive Plan Chapter 8 Rural and Resource Lands and the Draft Comprehensive Plan Language Regarding Water Rights—Chapter 2.2.2 of Comp Plan show they continue to lacks measures governing rural development and protecting rural character. For example, the only references to “visual” either identify the requirement to assure visual compatibility, use it as a descriptor, or “encourage” developers to approach project design in a flexible and creative manner to provide for and protect open spaces and visual gratification.” These are not rules or standards and are exactly the kind of “conditional rather than directive language” that the Washington State Supreme Court found to violate RCW 36.70A.070(5)(c). The adverse impacts of the failure to have measures to protect rural character can be seen in the aerial and ground photographs of Parcel No. 015135 enclosed with the paper original of this letter. Nothing protects the traditional rural character of Kittitas County on this site. It is entirely covered with buildings and gravel.

Further, we could find no measures protecting surface or ground water at all. This is very surprising given that surface waters are already over-allocated and the surface and ground waters are directly connected. As the Washington State Department of Ecology (Ecology) wrote:

The Yakima River Basin Surface Water Adjudication (Adjudication) and other applicable state and federal court decisions have clearly determined that the Yakima River Basin is over-appropriated. In other words, more surface water rights have been confirmed in the Adjudication than there is actual water flowing in the river.

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2 Id.
3 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY p. 1400 (2002).
4 GMA Compliance 2013 Staff Recommendation Description: Proposed Revisions to Comprehensive Plan Chapter 8 Rural and Resource Lands pp. 2 of 45, 3 of 45, 7 of 45, and 22 of 45.
6 Kittitas County Compas aerial photograph of Parcel # 015135; Kittitas County Assessor Property Summary Parcel Number: 015135 p. 2 of 2; 015135 Aerial with Zoning, all enclosed with the paper original of this letter.
In September 2011, the United States Geological Survey (USGS) released its final report on the 12-year Yakima Basin Groundwater Study. The USGS study confirms that groundwater and surface water are directly connected. It also demonstrates that withdrawing groundwater in the basin reduces streamflows. Any new consumptive water uses add to the existing water deficit in the basin.11

The Washington State Department of Ecology’s Focus on Water Availability Upper Yakima Watershed, WRIA 39 states “[t]here is currently no water available for new appropriations.”12 Water levels are declining in wells in the Kittitas County as they are in other parts of the Columbia Basin.13

We support Kittitas County’s regulations to manage water use and to require offsets for new water uses which we discuss below. However, effectively protecting surface and ground water requires measures in the rural element. Right now, the rural element contains nothing to meet the requirements of RCW 36.70A.070(5)(c). Simply changing some GPOs from may or should to shall, as has been proposed, will not address these deficiencies.

There needs to be a stronger connection between the capacity for rural growth and the available water resources. Without this connection the county is continuing the first come first served policy where those who development early have access to drinking water leaving the remaining land owners without any water resources for their land. Rural capacity should also be consistent with the rural population allocation so the county can achieve its planned growth. Excessive rural growth that requires the transfer of water rights from farms and ranches that provide incomes for Kittitas County residents to rural residential development should be avoided. For example, the Swift Water Ranches LCC transferred irrigation and stock water rights in the Teanaway River Valley for residential uses.14 So we recommend the following GPOs should be adopted to protect surface and ground water resources:

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14 Trust Water Right Agreement (SwiftWater Ranch) Exhibit A enclosed with the paper original of this letter.
GPO 8.14A Only allow comprehensive plan amendments, rezones, bonus densities, and other measures that increase rural densities where adequate supplies of potable water area available that will not adversely affect surface and ground water and agriculture.

GPO 8.14B Limit impervious surfaces in rural areas to ten percent to protect the water quality of streams, rivers, lakes, and wetlands.

We recommend that the rural element also include the following measures applicable to rural development to protect rural character:

- Limit the clearing of native vegetation to 35 percent of the lots or the total site to maintain vegetation and traditional landscapes.

- Require siting buildings in parts of the property that maintain traditional visual landscapes. The siting standards should include design standards for subdivisions, cluster subdivisions, and commercial lot development that require that residential and commercial buildings be located in the treed part of the property or along the edges of fields to maintain Kittitas County’s historic rural character. The creation of a wall of small lots, such as through clustering along a road, which blocks off views of forests, fields, and open space should be prohibited. Placing clusters in the middle of fields, which again results in a loss of open space, should not be allowed if there are alternative locations for the homes.

- Require the habitat conservation measures needed to maintain fish and wildlife habitat at the allowed densities. The enclosed *Landscape Planning for Washington’s Wildlife: Managing for Biodiversity in Developing Areas* includes recommendations for avoiding habitat fragmentation and degradation.\(^\text{15}\) The enclosed *Management Recommendations for Washington’s Priority Habitats: Managing Shrub-steppe in Developing Landscapes* also includes similar measures for parts of the county characterized by shrub-steppe habitats.\(^\text{16}\)

- Measures to protect nearby agriculture and forestry activities for incompatible uses. Apparently small impacts, such as having trash blow into hay fields, can create big problems for farmers and ranchers.\(^\text{17}\) Residences also bring other

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\(^\text{17}\) Brian Cortese, President of the Organization of Kittitas County Hay Growers & Suppliers (July 9, 2013) enclosed with the paper original of this letter.
adverse impacts on agriculture. So we recommend that residences be clustered away from adjacent agricultural uses, accesses be located so that they will not interfere with the movement of farm vehicles and not allow trash to blow onto fields. If homes, building sites, and nonresidential uses cannot be located away from agricultural uses, provide buffers between the agricultural uses.

The development regulations need to provide the measures to protect rural character described above

In Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board, the court of appeals held that Kitsap County’s Rural Wooded Incentive Program, a type of PUD, violated the GMA because it did not include measures to protect rural character required by RCW 36.70A.070(5)(c). Other than a few provisions to protect agricultural uses in the Performance Based Cluster Platting and Conservation Platting, the county’s development regulations fail to include measures to protect rural character and so violate the GMA. We recommend that measures, such as those we recommend for the comprehensive plan, be included in the development regulations.

The zones applied to the rural area and the three different types of LAMIRDS must comply with the Growth Management Act

Rural uses must comply with the requirements for rural areas

Allowed rural uses are not characterized by urban growth and that are consistent with rural character. Futurewise’s June 13, 2012 letter to Kittitas County Community Development Services analyzed rural character and urban growth in detail in the context of densities in Appendix 2. Much of that is applicable to non-residential uses as well. We are particularly concerned with the application of the General Commercial zone, or any commercial zone, outside urban growth areas and limited areas of more intense rural development (LAMIRDS). This zone allow urban growth such as auction sales, banks, funeral homes and mortuaries, hospitals, offices directly related to tourism and recreation, hotels and motels, retail sales, services, and public facilities.

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18 Professor Tom Daniels, What to Do About Rural Sprawl? p. 1 Paper presented at the American Planning Association Conference, Seattle, Washington (April 28, 1999) enclosed with the paper original of this letter; Arthur C. Nelson, Preserving Prime Farmland in the Face of Urbanization: Lessons from Oregon 58 Journal of the American Planning Association 467, p. 470 (1992), enclosed with the paper original of this letter. As the “Instructions for Authors” documents, the Journal of the American Planning Association is a peer reviewed scientific journal, downloaded on August 8, 2013 at: http://www.informaworld.com/smpp/title~db=all~content=t78204358~tab=submit~mode=paper_submission_instructions and enclosed with the paper original of this letter


20 RCW 36.70A.070(5)(b).

21 LAMIRD Allowed Use Comparison pp. 9 – 12 of (August 2013). We are assuming that the changes made to in the LAMIRD Allowed Use Comparison applies outside LAMIRDS too, if not then even more urban growth, such as trucking yards and terminals, would be allowed in the rural area.
With the exception of grocery stories, none are limited in size. None of the zones include limits on impervious surfaces or require the protection of native vegetation. No measures to protect rural character are required. The General Commercial zone and zones that allow similar uses in the rural area violate the GMA.

**Limited areas of more intense rural development must comply with the GMA requirements for LAMIRDS and the Kittitas County Comprehensive Plan Policies for LAMIRDS**

We continue to have grave concerns about the uses allowed in LAMIRDs in the “LAMIRD Allowed Use Comparison” table (August 2013). We appreciate the fact that the county has attempted to address what uses should be allowed in three types of LAMIRDs and which zones are allowed in which type of LAMIRD. However, the allowed uses do not meet the requirements for the three different types of LAMIRDs. This is also inconsistent with the Kittitas County Comprehensive Plan because it properly distinguishes between the three types of LAMIRDs.

Type 1 LAMIRDs are “[r]ural development consisting of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments.”22 Any development or redevelopment, other than an industrial area or an industrial use, within a mixed-use area or an industrial area under this subsection (5)(d)(i) must be principally designed to serve the existing and projected rural population. Any development or redevelopment in terms of building size, scale, use, or intensity shall be consistent with the character of the existing areas. The LAMIRD Allowed Use Comparison table does not limit the allowed uses to those that were in the LAMIRD in 1990 and does not limit the size and scale to the 1990 size and scale. For example, the LAMIRD Allowed Use Comparison table allows libraries, grocery stores, banks, funeral homes and mortuaries, hospitals, offices directly related to tourism and recreation, grocery stores, and vehicle and equipment service and repair in Type 1 LAMIRDs but these uses are listed exclusively in urban areas in the January 1992 telephone directory that serves Kittitas County.23 So none of these uses were in any of the Type 1 LAMIRDs in 1990. This violates the GMA and is inconsistent with the policies of the Kittitas County Comprehensive Plan.

Type 2 LAMIRDs are “[t]he intensification of development on lots containing, or new development of, small-scale recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location and setting, but that do not include new residential development.”24 The LAMIRD Allowed Use Comparison table does not identify which, if any, zones will be assigned to Type 2 LAMIRDs. Previously the LAMIRD Use Table in Kittitas County Code Section 17.15.070

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22 RCW 36.70A.070(5)(d)(i).
24 RCW 36.70A.070(5)(d)(ii).
did not limit uses in Type II LAMIRDs to recreation or tourist uses or require that they be small-scale or rely on a rural location and setting. This violated the GMA and was inconsistent with the policies of the Kittitas County Comprehensive Plan.

Type 3 LAMIRDs are “[t]he intensification of development on lots containing isolated nonresidential uses or new development of isolated cottage industries and isolated small-scale businesses that are not principally designed to serve the existing and projected rural population and nonresidential uses, but do provide job opportunities for rural residents.”\(^\text{25}\) The LAMIRD Allowed Use Comparison table does not limit uses in Type III LAMIRDs to isolated, small-scale businesses or cottage industries. It does not require that they protect rural character. This violates the GMA and is inconsistent with the policies of the Kittitas County Comprehensive Plan.

It appears from the LAMIRD Allowed Use Comparison that the county’s strategy is not to bring the zones applied to the LAMIRDs into compliance with RCW 36.70A.070(5)(d), the LAMIRD requirements, but instead to roll back the allowed uses those allowed in 2009. But that will not achieve compliance since the uses in 2009 also did not comply with the GMA. The better approach is to comply with RCW 36.70A.070(5)(d). If Kittitas County does not do it in 2013, it will just have to do it in 2014.

In addition, we are concerned that shooting ranges are allowed in the General Commercial zone in Type 1 and Type 3 LAMIRDs.\(^\text{26}\) Lawful LAMIRDs are generally small, with small lots. Allowing uses like this which require large sites and buffers from other developments is a mistake.

The other zones must comply with the GMA requirements for rural and resource lands

As the last compliance hearing, the Board did not reach whether the development regulations complied with the Growth Management Act because they were so closely tied to the requirement to include measures to protect rural character. So the development regulations must be amended to comply with the GMA. Here are a couple of examples of problem areas in addition to those we have already identified. KCC 17.31.040(1) allows so called “conservation plats” on commercial farmland in the Commercial Agriculture Zone. The conservation plats does not include the standards to protect farmland and the Washington Supreme Court upheld a prohibition on subdivisions on agricultural lands in the Lewis County decision because they fail to protect agricultural lands.\(^\text{27}\) Given the lack of standards both in the Commercial Agriculture zone and the “conservation plat” regulations that is the case here as well.

\(^{25}\) RCW 36.70A.070(5)(d)(iii).

\(^{26}\) LAMIRD Allowed Use Comparison p. 10 of 21 (August 2013).

While we appreciate the attempt to improve the Planned Unit Development (PUD), it continues to allow urban uses, such as multi-family dwellings and fails to include measures to protect rural character. It should not be allowed outside urban growth areas and LAMIRDs.

**We strongly support the Draft Proposed Regulations Regarding Adequate Provision of Potable Water**

As was documented above, Kittitas County does not have any water available for new appropriations. So we strongly support Kittitas County’s ground breaking work to require new developments to have safe water actually and legally available. This protects the purchaser of a lot or home because they will know they have water that will not be cut off in low water years as happened to junior water rights holders in 2001, 2004, and 2005. It also protects existing water rights holders because new unauthorized withdrawals are not allowed and so they stand a better chance of getting the water they have a right to use. We particularly support:

- Having water sources tested for contamination, including nitrate pollution.
- Requiring mitigation for all new water withdrawals.
- The measures to ensure that all lands in a common ownership only have one exempt withdrawal system.
- The limits on quantity of water that can be used for potable water and outdoor watering to share water with other land owners.
- Metering new water uses.

Thank you again for the opportunity to comment. If you require additional information please contact me at 206-343-6081 Ext 118 or tim@futurewise.org

Sincerely

Tim Trohimovich, AICP
Director of Planning & Law

Enclosures

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29 Rule-Making Order CR-103E Department of Ecology AO #10-15 (Nov. 5, 2010) and enclosed with the paper original of this letter.
Kittitas County Commissioner Paul Jewell
205 W 5th AVE STE 108
Ellensburg WA 98926-2887

Re: Kittitas County Proposed Domestic Water Policy

Dear Commissioner Jewell:

Thank you for meeting with us last week to discuss the county’s proposed domestic water regulations. As you know, the Kittitas County Farm Bureau (KCFB) is a voluntary, grassroots advocacy organization representing the social and economic interests of rural farm and ranch families in Kittitas County. Likewise, Washington Farm Bureau represents the interests of our more than 41,000 member families statewide. We appreciate this opportunity to share a high-level outline of our concerns and possible paths forward in writing.

KCFB has also become aware of other comments the county has received to date. These comments raise additional concerns because they suggest that the county adopt regulations that are even more stringent than those in the current county proposal. More specifically, it appears they are proposing a home-by-home mitigation approach similar to that required in the Upper Kittitas and Skagit subbasins.

A home-by-home moratorium approach is ill-advised as a matter of policy. It provides few public benefits. It is overly complicated because it unnecessarily relies on permit-based water banking mechanisms. And it is incredibly costly for rural landowners and state and local governments alike. It is also illegal. Such a moratorium approach would violate RCW 90.54.020(5), which ensures the legal availability of potable water supplies to satisfy future domestic uses. Neither the county nor the state has the legal authority to extinguish that clear statutory directive.
The approach suggested in these comments would also be unconstitutional. While KCFB is concerned about potential impacts on our members’ existing water rights, we are also concerned about the tremendous financial and constitutional takings liability Kittitas County will incur if it does not adequately protect the vested expectations and property rights of rural landowners. Please understand that these two critical objectives are not mutually exclusive.

To respect these statutory and constitutional realities, the county can and must design a more pragmatic, legally defensible and balanced program of water resource protection. Otherwise, county actions will be unlawful, resulting in devastating economic consequences in the county, and inviting unnecessary legal and constitutional challenges to protect the reasonable investment-backed expectations of rural landowners.

Any county regulation needs to at least recognize the potable domestic water mandate of RCW 90.54.020(5), and it must also honor the county’s previous assurances of adequate water supply to landowners. These previous county land use findings and assurances—that adequate water supplies would in fact be legally available to support future domestic development on their specific parcels—are consistent with the statutory mandate of RCW 90.54.020(5).

We do recognize that the Supreme Court’s recent Kittitas decision requires the county to adopt appropriate water resource protections, but the burden for such measures simply cannot lawfully be imposed through a home-by-home moratorium requiring full mitigation prior to the development of each residence and permit exempt domestic use. As the Washington Supreme Court held in Guimont, the due process protections of the Washington and United States constitutions require “society as a whole to shoulder the costs” of a “general society wide problem.” While we can all agree that the Yakima basin has serious water supply challenges that need to be resolved, it is simply not constitutional to focus the burden for solving those problems on rural property owners.

That is why the KCFB supports the implementation of water solutions through a capital budget approach, instead of a regulatory approach, to promote more efficient and effective water resource protections moving forward. This recommendation is consistent with the Yakima Integrated Plan legislation just enacted, which includes a call for more effective water banking mechanisms. KCFB provided strong support for that legislation, and KCFB intends to provide strong support for its successful implementation. We are deeply concerned, however, that county over-regulation could jeopardize the long-term success of the Yakima Integrated Plan
effort if it does not adequately protect the statutory domestic exemption and the vested rights of rural property owners. With a pragmatic approach, the county can avoid that result.

Our recommended approach is also consistent with the $137 million in state funding the 2013 legislature provided for Yakima basin projects. A small portion of that funding would go a long way toward achieving sufficient water supplies to ensure that new domestic uses do not reduce the Total Water Supply Available at the Parker gage. Expedited implementation would also help to meet the Integrated Plan’s development target of 50,000 acre feet of new water supplies to support future domestic uses.

In closing, we ask that you reject the complex and unworkable approaches recommended by some in the environmental community. KCFB and WFB envision a simpler approach that is lawful and better for rural landowners. Our recommendations also reflect a fair and balanced strategy that will be more cost-effective for county and state governments to implement.

Because it is easier to implement, our recommended approach will also free up scarce state and county resources to promote more effective water resource outcomes, consistent with the Yakima legislation’s clear directive to serve instream and out-of-stream needs.

To that end, we look forward to providing you additional support for our recommendations and legal reasoning in the days ahead. If you have questions or would like more detail on a specific issue, please contact Mark Charlton, President of the Kittitas County Farm Bureau, at 509-929-0314 or John Stuhlmiiller, Chief Executive Officer of the Washington Farm Bureau, at 360-870-6017.

Sincerely,

Mark Charlton, KCFB
The County's current proposal is inadequate. I think Commissioner Paul Jewell's work developing policies that would allow the County to purchase water rights and sell them to rural homeowners is the correct approach. Another approach would be for the County to purchase enough water rights to cover rural water users and then charge them a monthly charge the same way cities and other water districts do. I would prefer the private markets whenever possible but they seem to be incapable of providing a supply of water at a reasonable price.

My only objection to Commissioner Jewell's plan is the 350 gal/day limit. In a County that is increasingly prone to wildfires, green lawns have proven to be one of the best buffers against fire. They also increase the health, safety and welfare of homeowners by reducing dust, aid cooling and providing a safe clean environment for kids to play. No rural resident should be denied the water needed for the maintenance of a lawn. A domestic amount of 350 gallons per day is about 0.40 acre-feet of water per year. A well maintained lawn would require about one acre-foot of water per year based upon KRD's allotment of 2 acre-feet of water per acre per year. An adequate lawn and garden would be 1/2 acre.

The 500 square feet in the current proposal and Jewell's proposal is an area about 22 feet by 22 feet. That is way too small for a lawn.

You should have received a letter from the KC Farm Bureau. In that letter it states that a home-by-home moratorium is illegal because it violates RCW 90.54.020(5). In case you didn't look it up, that RCW is a general declaration of fundamentals for utilization and management of waters of the state.

RCW 90.54.020(5) states "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." That statue does not ensure "the legal availability of potable water" as the Farm Bureau would have you believe. All the statute does is declare the fundamental principle that government will protect potable water supplies from things like contamination, overuse or depletion. If anything the statute speaks against water withdrawal without mitigation in a water basin already fully allocated.

In summary I agree with the DOE's assessment. If I remember correctly Yakima County has decided to move ahead and purchase water rights for their rural residents. It is time for Kittitas County to stop stalling and move in the same direction. I would also like to say that I don't believe Kittitas County is the only entity at fault. The State Legislature and the DOE need to make sure the Counties have the tools they need. If that means changing state water law, then get it done.

Thank you for your time and considerations,
Roger Olsen
MEMO

To: Planning Commission
From: Neil A. Caulkins, Deputy Prosecuting Attorney
Re: Water Regulation For GMA Compliance
Date: August 15, 2013

Ch. 36.27 RCW sets forth the duties of the Prosecuting Attorney’s office as including advising the County on legal matters, drafting documents, and defending the County’s decisions. In pursuance of that duty, the Prosecutor’s Office has been working with the Commissioner’s Office, CDS, and the Health Department in helping them draft what is the current proposal before the Planning Commission regarding regulation of water use as part of the County’s GMA compliance process. Similarly, the Prosecutor’s Office stands ready to defend whatever decision the client makes on this, or any other issue. It is however important to clarify that the Prosecutor’s Office’s advice on this issue has not changed since it was initially given in October of 2012. The law and hydrology require that new uses be fully mitigated for the County to be fulfilling its GMA obligation to protect ground and surface water. That advice was more fully explained in a memo and proposal submitted in October of 2012, which is attached hereto. I wanted to make sure this advice is in the record of the current deliberation and is presented to the current Planning Commission.
MEMO

To: Planning Commission
From: Neil A. Calkins, Deputy Prosecuting Attorney
Re: Proposal Regarding Adequate Water Determination
Date: October 16, 2012

Kittitas County is in a position legally and scientifically that offers very few choices. It is the role of the Prosecuting Attorney to advise the County on what the law requires and what is in the County’s best interest. While the choice proposed regarding water availability for building and subdivision is unquestionably unpleasant, it appears to be what is legally required, and the potential consequences of not taking that step at this time are considerably worse.

The Supreme Court’s recent ruling on Kittitas County’s compliance with the Growth Management Act (“GMA”) basically held that the County has a responsibility under the GMA to protect ground and surface water and that such protection should very well take the form of a determination that would normally be conducted by the Department of Ecology. That determination was whether the applicant who was proposing to provide potable water using exempt wells was actually in compliance with the exempt well statute. While the County was litigating this issue, the USGS study of the Yakima basin came out and showed that the surface and ground waters of our area were connected and that pumping of ground water was reducing available surface water.¹ In a previous case, called Acquavella, the court held that the surface waters of the Yakima basin were already over-appropriated.² That means there were more folks with surface water rights than water to satisfy those rights. Therefore, if the surface waters are over-appropriated, and ground water pumping is making it worse, and the County has a GMA obligation to protect surface water, then the County can no longer approve land use applications that rely upon new exempt wells. If the County continues to approve applications that cause more exempt wells to come into existence, then it is approving the increased infringement of surface water rights and is failing at its GMA obligation of protecting surface water.³

Therefore, the proposal is to take exempt wells off of the table. Exempt wells are the only new withdrawal of water coming into existence, and the County cannot approve applications that would allow them to come into existence because new withdrawals exacerbate the present infringement of surface water rights and result in the County’s failure to protect surface and ground water. This proposal is an action consistent with the

³ Notice that the USGS study made the determination of whether an applicant was violating the exempt well statute pointless. Even if the applicant was complying, allowing an application to go forward and create additional withdrawals of water would further impair the surface water levels and the County would still be failing to protect surface water. Hence, just passing a regulation that provides for the County to make an exempt well statute compliance determination as a condition of approval will not satisfy the County’s GMA requirement to protect water resources.
Supreme Court's instruction to protect ground and surface water and that such protection could, and should, take the form of what otherwise would be a Department of Ecology action—essentially imposition of a moratorium.

Another way of looking at this is in the context of property rights. All the surface water is spoken for, which is what Acquavella tells us. Any additional ground water withdrawal will further reduce the available surface water, which is what the USGS study tells us. Therefore, the continued approval of applications that will rely upon exempt wells would condone theft from those folks with surface water rights. Development must be carried on in a manner that does not infringe the property rights of others, in this case those with surface water rights. It is a violation of property rights to allow new exempt withdrawals to come into existence that essentially take water from those who have a right to that water without paying for it.

The proposal promotes the public good. Exempt wells are, for the most part, in the most vulnerable position when a drought ensues, a water right holder claims infringement, and the Department of Ecology begins curtailment. By requiring property owners to have interests in water rights, rather than allowing them to depend upon exempt wells, those property owners will not be in danger of curtailment when the next drought hits.

While the proposal put forth is profoundly unpleasant, it is important to remember that the consequences of failing to act are potentially worse. One of the risks facing the County is that, should the County not act along the lines proposed, the Growth Management Hearings Board could find the County's regulation of water invalid under the GMA. That means that the County would be unable to process any building permit or subdivision application until it adopts compliant regulations along the lines of what is proposed. So, while the proposal is admittedly very unpleasant, the prospect of not being able to do anything until we take this very unpleasant action is worse. Another potential risk of not acting along the lines proposed is that the County could be liable in damages to water rights holders for impairment for applications using exempt wells approved by the County. This lack of good choices is a consequence of basically being out of water.
Draft Comprehensive Plan Language Regarding Water Rights-Chapter 2.2.2 of Comp Plan

Water rights are property rights held by individual citizens, irrigation entities, municipalities, public and private utilities and governments. Water rights are recognized by state law. Surface water rights within Kittitas County are being adjudicated in an action commonly known as *Acquavella*.

The Court has ruled in the *Acquavella* litigation that the surface waters of the Yakima basin are over-appropriated. The USGS study has shown that ground and surface waters are connected in the Yakima basin and that ground water pumping from exempt wells reduces the levels of available surface water. The Growth Management Act requires Counties to protect the quantity and quality of ground and surface water. The Washington Supreme Court has recently held that this protection of ground and surface water by municipalities planning under the Growth management Act will take the form of, among other things, determining whether an applicant has violated the exempt well statute or determining, at preliminary plat-stage, whether proposed provision of water is legally possible or actually met and making the actual possession of legal rights in an adequate amount of water a condition of final plat approval. Because of this heightened role of municipalities as articulated recently by the Washington Supreme Court, and the unique characteristics of the Yakima River basin—its surface waters being over-appropriated and the impairment of surface water levels caused by exempt well pumping in this hydrologically continuous aquifer, Kittitas County will require rights in water before issuance of building permits or subdivision approvals.

To allow continued un-mitigated use of exempt wells will impair senior water rights and violate the Growth Management Act requirement that the County protect quality and quantity of ground and surface water. To allow continued un-mitigated exempt well use would not serve the public interest. Because of the reality of hydrological continuity and surface water over-appropriation, allowing continued unmitigated exempt well use constitutes approval of theft of water from those with rights senior to these new exempt wells. Allowing continuing un-mitigated exempt well use fails to serve the public good because it creates a group of users who will be curtailed as soon as any water right holder with an earlier priority date complains of impairment during a drought. These new users will be better served by using or purchasing interests in senior water rights now rather than being vulnerable to curtailment later. Kittitas County recently eliminated its administrative segregation provisions partially because that process failed to protect ground and surface water.

Protection of ground and surface water will help protect rural character. Development that is less dense and involves larger lots will be less damaging to water quality and quantity than development that is denser and features smaller lots. By seeking to protect water quality and quantity by generally, in the rural areas, favoring development that is less dense and features larger lot sizes, the rural character will be maintained because rural character is typified by large lots and less dense development.
Chapter 13.35
ADEQUATE WATER SUPPLY DETERMINATION FOR BUILDING PERMITS

Sections
13.35.010 Authority.
13.35.020 Applicability.
13.35.025 Required Submissions
13.35.030 Group A Public Water System Requirements.
13.35.040 Group B Water System Requirements.
13.35.050 Individual Water System Requirements.
13.35.060 Shared Water System Requirements.

13.35.010 Authority.
The Health Officer of the Kittitas County Public Health Department has the authority, on behalf of the County, to ascertain whether there is evidence of an adequate water supply per Section 19.27.097 RCW, including whether proposed water systems comply with all state and local engineering, design and construction standards as set forth in the Joint Plan of Responsibility between the State of Washington Department of Health and the Kittitas County Public Health Department. (Ord. 2011-006, 2011)

13.35.020 Applicability.
An Adequate Water Supply Determination is required of all persons who are: 1) applying for a building permit with either a) a proposed new structure which will have potable water or b) a proposed change in the number of dwelling units for any existing structures; 2) proposing a new or supplemental water system; or 3) proposing extensive changes to the old water system where the changes have the potential to negatively impact the water systems flow; or 4) making applications, including but not limited to, long plats, short plats, binding site plans, large lot subdivisions, conditional uses that require water. An Adequate Water Supply Determination shall not be required for building permits that do not require a change in the water system or structures which will not have potable water plumbing. (Ord. 2011-006, 2011)

13.35.025 Required Submissions
All applications to which this chapter is applicable shall submit either 1) a letter from a water purveyor stating that the purveyor has adequate water rights and will provide such water for the applicant’s project; 2) an adequate water right for the proposed project; 3) a certificate of water budget neutrality from the Department of Ecology or other adequate interest in water rights from a water bank; or 4) proof of an exempt well that pre-exists the passage of this regulation, meets the provisions of County Code and all applicable regulations, and can be used solely by the applicant or as a shared or group system. An applicant relying on subsection (4) of this section shall also submit information on “proximate parcels” held in “common ownership” as those terms are defined in WAC 173-539A-030 and otherwise demonstrate how the proposed expanded use of a pre-existing exempt
well will not violate RCW 90.44.050 as currently existing or hereafter amended. No project to which this chapter is applicable shall be approved without one of these required submissions.

13.35.030 Group A Public Water System.
Applicants for an Adequate Water Supply Determination where the source is a Group A public water system shall provide to KCPHD:

1. A completed water adequacy application signed by the water purveyor along with any applicable fees;
2. The final water system identification number from the Department of Health; and
3. Verification that the Department of Health operating permit is either in Yellow or Green status. Applicants for a building permit expecting to be supplied with drinking water from a purveyor with an operating permit in Red status (inadequate) or in Blue status (operating without design approval, or exceeded number of DOH-approved connections) will not be approved by KCPHD. (Ord. 2011-006, 2011)

13.35.040 Group B Public Water System.
Applicants for an Adequate Water Supply Determination where the source is a Group B public water system shall provide to KCPHD:

1. A completed application signed by the water purveyor along with any applicable fees;
2. The final water system identification number from the Department of Health; and
3. Certification that the Group B public water system has been constructed and maintained in accordance with the KCPHD or DOH approved plans and specifications, including up to date monitoring and financial information. (Ord. 2011-006, 2011)

13.35.050 Individual Water System.
Applicants for an Adequate Water Supply Determination with an individual water system shall meet the following requirements:

1. Application. Submit a completed application with any applicable fees to KCPHD.
2. Groundwater Well as Water Source. The water quality and quantity of the groundwater well shall be evaluated for an Adequate Water Supply Determination by KCPHD.
   a. Water Quality. The water produced by the water source shall either:
      i. Pass a water quality test with results submitted to KCPHD; or
      ii. If the water fails the water quality test, then applicant shall
          1. Add a treatment system to raise the water quality to potable standards. All treatment system designs shall be submitted by a professional engineer and bear the engineer’s seal and signature. The treatment system shall comply with all applicable federal, state and local regulations and shall protect the health and safety of the users of the system; and
          2. File a notice with the County Auditor describing the treatment system.
   b. Water Quantity.
      i. All wells to be used in an individual water system shall be constructed prior to the issuance of an Adequate Water Supply Determination.
      ii. A well log recorded within the last ten (10) years demonstrating a minimum flow of five (5) gallons per minute (GPM) for at least a two (2) hour period shall be submitted to KCPHD.
          1. If a well log is not available or the well log indicates a flow of less than five (5) GPM for a two (2) hour period, then a four-hour draw down test shall be submitted to KCPHD.
          2. A well log that was recorded more than ten (10) years ago may be accepted at the discretion of the Health Officer.
iii. The minimum acceptable production level where the water source is a well is three hundred fifty (350) gallons per day for an individual water system.

3. Water Distribution System. When the water source is a well and produces less than five gallons per minute (5 GPM) according to the well log or four-hour draw down test, adequate flow equalization is required for periods of higher use within the dwelling unit. The water distribution system design shall be submitted by a licensed engineer, bear the engineer’s seal and signature, and meet the following requirements:
   a. Flow equalization tank requirements shall be determined by the following: (150)(5-X gpm) = gallons of tank capacity needed (where X = gallons per minute produced as determined by the four-hour draw down test). The required tank capacity could be as much as 715 gallons depending on the flow of the well.
   b. A booster pump and pressure tank shall be included in the water distribution system.

4. Cistern as a Water Source. When the proposed water source is a cistern, the applicant for a Water Supply Determination shall comply with Chapter 13.22 KCC. (Ord. 2011-006, 2011)

13.35.060 Shared Water System.
Applicants for an Adequate Water Supply Determination with a connection to a shared water system shall meet the following requirements:

1. Application. Submit a completed application with any applicable fees to KCPHD. This includes a valid Shared Well Users Agreement signed by both users of the well.

2. Groundwater Well as Water Source. The water quality and quantity of the groundwater well shall be evaluated for an Adequate Water Supply Determination by KCPHD.
   a. Water Quality. The water produced by the water source shall either:
      i. Pass a water quality test with passing results submitted to KCPHD; or
      ii. If the water fails the water quality test, then applicant shall:
         1. Add a treatment system to raise the water quality to potable standards. All treatment system designs shall be submitted by a professional engineer and bear the engineer’s seal and signature. The treatment system shall comply with all applicable federal, state and local regulations and shall protect the health and safety of the users of the system; and
         2. File a notice with the County Auditor describing the treatment system.

   b. Water Quantity.
      i. All wells to be used in a shared water supply system shall be constructed prior to the issuance of an Adequate Water Supply Determination.
      ii. A well log recorded within the last ten (10) years demonstrating a minimum flow of seventeen (17) gallons per minute (GPM) for at least a two (2) hour period shall be submitted to KCPHD.
         1. If a well log is not available or the well log indicates a flow of less than seventeen (17) GPM for the two (2) hour period, then a four-hour draw down test shall be submitted to KCPHD.
         2. A well log that was recorded more than ten (10) years ago may be accepted at the discretion of the Health Officer.
   iii. The minimum acceptable production level for a shared water supply system is seven hundred (700) gallons per day.

3. Water Distribution System. When the water source produces less than seventeen gallons per minute according to the well log, adequate flow equalization is required for periods of higher use within the two dwelling units. The water distribution system design shall be submitted by a licensed engineer, bear the engineer’s seal and signature, and meet the following requirements:
   a. Flow equalization tank requirements shall be determined by the following: (150)(17-X gpm) = gallons of tank capacity needed (where X = gallons per minute produced as determined by the four-hour draw down test). The required tank capacity could be as much as 2500 gallons depending on the flow of the well.
b. A booster pump and pressure tank shall be included in the water distribution system.  
(Ord. 2011-006, 2011)

(Add requirements in KCC 16.05.020 that binding site plans must satisfy the requirements of Ch. 13.35 KCC, in KCC 16.12.150 that preliminary plat approval requires compliance with Ch. 13.35 KCC, in KCC 16.32.050 that preliminary approval of short plat requires compliance with Ch. 13.35 KCC, and in KCC 16.36.015 that eligibility as a large lot subdivision requires compliance with Ch. 13.35 KCC.)
Doc Hansen

From: compplan
Sent: Friday, August 16, 2013 12:01 PM
To: Doc Hansen
Subject: FW: Written Reaction on the Draft Proposed Regulations Regarding adequate Provision of Water

Thanks;

Mandy Weed

From: William Schmidt [mailto:sigmarr@fairpoint.net]
Sent: Thursday, August 15, 2013 9:13 PM
To: compplan
Subject: Written Reaction on the Draft Proposed Regulations Regarding adequate Provision of Water

August 15, 2013

Planning Commission Members
Kittitas County
Community Development Services, Suite 2
411 N. Ruby Street
Ellensburg, WA 98926

Dear Commission Members:

I attended the Planning Commission meeting last night and gave testimony on the proposed drinking water changes. I emphasized two main points:

**Point 1:** The proposed 350-gallon per day restriction is arbitrary as a good share of the water used in a home goes back into the ground and eventually to the aquifer. A local attorney, Steve Lathrop, estimated that that amounts to about 70%. Additionally, in the proposal, livestock water is exempted, but how do you segregate it from the normal household uses? Both are usually on the same system.

**Point 2:** My wife and I own 76 acres of hay and pasture land two miles east of Ellensburg. This is all zoned Ag. 3. There are homes on four 3-acre lots, but the 76 acres could accommodate an additional 21 lots with homes. The 76 acres receive KRD irrigation water. My calculations show that we put back onto the land through surface irrigation about twenty times the amount of water that we would take out with individual homes on all of the 25 lots. A considerable amount of applied irrigation water ends up in the aquifer and the rest runs
into the senior right’s Cascade Canal or into creeks that empty into the Yakima River for downstream use by senior rights owners in the Yakima Valley. Somehow irrigation district land owners should be given credit for applied irrigation water that ends up in the aquifer or in other irrigation holdings with senior rights.

An additional consideration is that when Ag. 3 lands are built on, they are required to use a sprinkler system on the land. I know through years of experience creating and managing several subdivisions that applying sprinkler water to these parcels will greatly reduce the amount of water needed at each subdivision head gate. Suppose a subdivision gives up one-half of its allocation in exchange for the right to provide groundwater drinking water to the subdivision’s homes. The irrigation water given up can go back into the Yakima River for senior rights holders and fish or possibly into a water bank. This seems far fairer than any of the current proposals. I don’t know all the legal ramifications of this proposal, but I strongly believe it should be considered.

Sincerely,

William D. Schmidt
310 Mission View Drive
Ellensburg, WA 98926
Cell Phone:  509-899-0040
Email:  sigmarr@elltel.net
Thanks,

Mandy Weed

From: mspar89948@aol.com [mailto:mspar89948@aol.com]
Sent: Friday, August 16, 2013 3:03 PM
To: compplan
Subject: Wells

I am adding to my previous comments. Water proposed plan Section 13.03.125 as it now stands “a new use” could have a very high Financial Impact on people that have existing wells and have plans for other uses for THEIR LAND. May I suggest that existing wells be exempt for two years so as to give people time to finalize what they intended to do with the land. Approximately 75 day does not give anyone time to finalize any plans they might have for THEIR LAND. Thank You In Advance For Your Consideration In This Matter Michael Sparling- 2206 N Spar Lane- Ellensburg- 933-1386

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message id: 38eb45916c6dcbdac24bb8719d004a14
August 15, 2013

Planning Commission

I went to the Aug 14th hearing. Here are my observations & comments on well restrictions:

A. I had a feeling listening to some of the people giving comments at the hearing last night, that they could have financial interest in the outcome of the proposed well restrictions. Making their comments skewed to their interest.

B. Some of the people involved in making the decisions that will affect a great many property owners will not be impacted by their decisions.

C. 350 gallons seems really low during the summer but could be adequate during the winter.

D. Why aren’t Yakima & Benton Counties involved in this process?

E. Commissioner Paul Jewell’s ideas on well restrictions sounds like a good place to start.

Michael Sparling
2206 N Spar Lane
Ellensburg

933-1386
Dear Commissioners Jewell, O’Brien and Berndt:

The Yakima Basin Joint Board (YBJB) includes irrigation districts, water companies and municipalities which receive water from the reservoirs and tributaries in the Yakima River Basin. YBJB has reviewed a draft of Kittitas County’s proposed changes to the county comprehensive plan and development code as they relate to Domestic water.

A recent USGS sponsored study concludes surface and ground water in the Yakima River Basin are hydrologically connected. The withdrawal of any groundwater in the Yakima Basin which is hydrologically connected to the surface waters adversely impacts our member’s water rights. The Yakima River Basin has experienced numerous droughts, including single-year events in 1977, 2001 and 2005 and a 3-year event during 1992 through 1994. During low water years and droughts, some of the largest irrigation districts in the Basin have had their water deliveries substantially reduced. The reduced supply of water has led to significant economic hardships for some sectors of the agricultural community.

1. The Pro-ratable water supply that was delivered in the recent drought years is as follows: 1977 at 70%, 1979 at 94%, 1987 at 68%, 1988 at 90%, 1992 at 58%, 1993 at 67%, 1994 at 37%, 2001 at 37%, 2003 at 92%, 2004 at 92%, 2005 at 42%.
This situation is expected to worsen because of climate change. The University of Washington’s Climate Impacts Group recently predicted that climate change will cause declining snowpack and earlier snowmelt, which will result in significantly reduced water supplies. YBJB members have spent and continue to spend millions of dollars on the protection and enhancement of the Yakima Basin “Total Water Supply Available” ("TWSA") through conservation measures and enhancement of water supplies to avoid shortages and curtailment of water use during low water years or during droughts. These expenditures do not increase the water supply in years of shortage, but instead only reduce the impact of those shortages on YBJB members.

While the Washington State Supreme Court may have indicated Kittitas County is required, under the GMA to protect ground and surface water, the Supreme Court, as we understand the decision, did not give Kittitas County the authority to regulate water rights. The regulation of water rights, by statute, rests with the Washington State Department of Ecology. Nor should the County take actions that could lead to adverse impacts on existing water rights established under state law and the Acquavella water adjudication.

Of concern are the proposed changes to the County development code allowing landowners to withdraw ground water in the amount of 350 gallons per day without offsetting mitigation. While such ground water withdrawals may appear to be small in comparison to the water rights of senior and pro-ratable users, junior “pro-ratable” water right holders do not receive their full entitlement of their water rights in low water years or drought years even now. Accordingly, our members’ water users will be damaged by every withdrawal that further reduces supply.

Water rights in Washington State are based on first-in-time, first-in-right. In times of drought, newer surface water users have had to cease using water to supply 1905 and earlier rights. In the future senior users, both pro-ratable and nonpro-ratable, may seek curtailment of ground water rights with priority dates after 1905. To avoid future curtailment, new withdrawals of ground water must be mitigated. Otherwise, the County is creating a situation where people will think they have a water right, but that water right will be curtailed (stopped) during drought years.

Our members’ water users cannot be expected to approve any additional negative impact to their water rights. Allowing new consumptive use associated with domestic water supply without requiring offsetting mitigation will, in almost all cases, reduce the water supply for existing rights senior to the groundwater withdrawals. New water rights must be conditioned on real, substantial measures to offset impairment of existing rights.

To the extent such a condition can be incorporated into the County’s development code, YBJB will be supportive of the effort.

Respectfully,

[Signature]
David Brown
Chairman
copy: Maia Bellon, Director, Department of Ecology
Tom Tebb, Regional Director, Central Regional Office, Department of Ecology
Phil Rigdon, Deputy Director, Yakama Nation Dept. of Natural Resources