

4 December, 2009

Dear Representative Blake, Chair Agriculture and Natural Resources Committee, and members of the committee;

Members of the Committee,

Aqua Permanente (AP) is a non-profit organization dedicated to protecting the water resource in the Yakima Basin for senior users and instream flows. These comments are submitted on behalf of that organization.

1. Background

Stirred by a series of forced curtailments in Kittitas County, local residents with post-1905 water rights formed Aqua Permanente ("AP") to protect their water rights. AP's core concern is the proliferation of new groundwater withdrawals from permit-exempt wells. AP believes that it is unjust that their members are forced to curtail their water use in times of shortage while more junior permit-exempt wells are allowed to pump water unabated. This concern led AP to file a petition in September 2007, pursuant to RCW 90.54.050, asking Ecology to close Kittitas County to future permit-exempt wells pending completion of hydrogeologic studies assessing the specific impact future permit-exempt wells will have on the Basin.

On April 7, 2008, Ecology signed a Final Memorandum of Agreement with Kittitas County and began implementation of an emergency rule. The emergency rule, adopted on July 8, 2008, and renewed on November 6, 2008, also failed to address the problem of unmitigated and unmetered groundwater withdrawals. Instead, the emergency rule instituted a series of steps that exempt well users must take prior to using their wells.

After additional months of meetings between Ecology and the county to agree to a permanent rule, Ecology adopted an emergency rule to close the upper portion of Kittitas County to new exempt wells. Since no agreement has been reached to date, the moratorium was renewed for an additional 120 days as of November 30, 2009.

2. At Issue

Because the Yakima Basin, of which includes Kittitas County, is already over-appropriated, permit-exempt well proliferation as practiced in the Yakima Basin allows junior water rights holders, *i.e.* permit-exempt well owners, to take water that may legally belong to more senior

water rights holders, *i.e.* post-1905 water rights holders, and stress instream flows, endangered species habitat, and water quality.

Kittitas County is an area of the state where the amount of water permitted for use is greater than the amount of water available. In times of shortage, this over-appropriation routinely leads to curtailment of junior water rights in order to protect more senior water rights. Simply put, there is not enough water to satisfy current water users, much less any new or future water users. This situation is particularly worrisome in light of two additional facts: 1) Kittitas County is a rapidly growing county with substantial increasing demand for water, and 2) the impacts of climate change in the county and the rest of the Basin will decrease the supply of water available for appropriation.

Though Kittitas County is experiencing explosive growth, Ecology has not issued any new ground water rights since the mid-1970s. This growing water deficit is being filled by permit-exempt wells, which are proliferating at an alarming rate despite over appropriation, routine curtailments, and Ecology's decades old freeze on the issuance of new groundwater rights.

This is troubling for the following two reasons. First, ground and surface waters in the Basin are hydraulically connected. Therefore exempt wells potentially tap into the same limited water supply that supports more senior water rights, instream flows, salmon habitat, and water quality and quantity in times of low flow. Second, Ecology has historically failed to subject permit-exempt wells to curtailment orders even though exempt wells are exempt only from the permitting process and not from the tenets of the water code establishing priority dates based on date of first use. These two factors coalesce to create an untenable situation: in times of shortage, users of new exempt wells take water that legally belongs to more senior users.

According to the USGS, the Yakima Basin is fully appropriated in average years and over-appropriated in dry years (USGS Report 5152 'The Hydrogeologic Framework of the Yakima River Basin Aquifer System.'). Appropriately, since the *Acquavella* litigation commenced in 1977, Ecology has stopped issuing new surface water rights. Since 1993, Ecology has also stopped issuing groundwater rights with the exception of permit-exempt wells. Though placing a moratorium on the issuance of new water rights *is* the responsible course of action in the Yakima Basin precisely because water is a scarce resource, the unrelenting pace of exempt well installations has undermined the

protections afforded by Ecology's actions. Instead of making the moratorium on new water rights complete, which is the only way to protect existing water sources in the Basin, WAC CH. 173-539A allows permit-exempt well withdrawals to continue.

WAC Ch. 173-539A purports to reduce the amount of water available for new residential developments, however the fundamental aspects of the exempt-well regime do not change: exempt-wells are still permitted; Ecology cannot say that exempt well withdrawals, in aggregate, do not adversely impact other legally protected water uses; and mitigation measures remain voluntary. Thus, WAC Ch. 173-539A fails to legally protect post-1905 surface water rights from competition from new exempt wells, fails to remediate the unsustainable burden that exempt wells imposes on Yakima Basin water users, fails to protect the public interest, and, in the context of global warming, exacerbates water availability problems.

3. Conclusion

For the foregoing reasons Aqua Permanente' opposes WAC Ch. 173-539A. Rather than allowing the continuing proliferation of unmetered, unmitigated exempt wells in the absence of more complete scientific data, Ecology should place a moratorium on exempt wells throughout the entire county. Ideally, the moratorium should last until, using accurate and comprehensive USGS data, the County can appropriately assess their impact on post-1905 water rights holders, instream flows, salmon habitat, or water quantity and quality.

Respectfully submitted,

Melissa Bates - Chair of Aqua Permanente'

Bachman, M., M. Ely, J. Vaccaro. Approaches for Assessing Groundwater Availability Under Competing Demands and Climate Change. American Geophysical Union (Fall 2008).
Yakama Nation, U.S. Bureau of Reclamation, Department of Ecology, Memorandum of Agreement (1999)

Facts pertaining to the Kittitas County Exempt Well Issue

Kittitas County residences and businesses are dependent on water from the Yakima River Basin. Ground and surface water in the Yakima Basin, including the waters within Kittitas County, are hydraulically continuous.

The Yakima Basin is over-appropriated in dry years, and as a result, is routinely subject to curtailment orders. Curtailment orders in Kittitas County affect post-May 10, 1905 surface water rights, but are not applied to groundwater

withdrawals from permit-exempt wells.

In the hydraulically continuous Kittitas County area, unregulated groundwater withdrawals deplete surface water, leading to disruption of surface water uses. Specifically, unregulated groundwater withdrawals combined with the effects of climate change means that water is becoming an increasingly scarce resource in Kittitas County. Increasing water scarcity will lead to more frequent curtailment orders impacting post-1905 water rights in the future.

In Kittitas County, thousands of permit-exempt wells have been drilled, are being drilled, or are slated for drilling in the period dating from 1905 to present.

Ecology is required by statute to protect public water supplies, including ground and surface water sources. Despite this duty, Ecology has not taken action to ensure that permit-exempt wells do not individually, or in aggregate, adversely affect post-1905 water rights, instream flows, salmon habitat, or quantity and quality of publically available water.

WAC Ch. 173-539A does not require that permit-exempt wells be subject to curtailment based on priority date as otherwise prescribed by the Washington water code. The effect is that in times of shortage, exempt well users are likely using water that belongs to post-1905 surface water rights holders.

WAC Ch. 173-539A does not *require* hydrogeologic studies aimed at establishing whether continued exempt well usage individually or in aggregate harms post-1905 water rights, instream flows, salmon habitat or quantity and quality of publically available water in times of shortage. Instead, WAC Ch. 173-539A makes hydrogeologic impairment reports discretionary, and allows private parties to provide such reports. Ecology does not have authority to delegate its water code-based impairment duties to private parties or local government as prescribed by WAC Ch. 173-539A.

Metering of exempt wells is the only way to ensure that permit-exempt wells are not exceeding their statutory allowable amount, yet WAC Ch. 173-539A does not require metering of all exempt wells.

Mitigation can offset adverse impacts caused by permit-exempt groundwater withdrawals, yet WAC Ch. 173-539A does not make mitigation mandatory.

Bachman, M., M. Ely, J. Vaccaro. Approaches for Assessing Groundwater Availability Under Competing Demands and Climate Change. American Geophysical Union (Fall 2008).
Yakama Nation, U.S. Bureau of Reclamation, Department of Ecology, Memorandum of Agreement (1999).