



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

January 20, 2010

Ted Sturdevant, Director
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
Fax: 360-407-6989

Re: Draft MOA regarding exempt wells in upper Kittitas County

Dear Mr. Sturdevant,

We are writing in response to the request in your letter to the Yakama Nation dated January 15, 2010 for comments on the proposed MOA. We reiterate the three basic points we made at the time of the first Listening Session in Cle Elum two years and have repeated in subsequent written comments with regard to exempt well development in upper Kittitas County. We believe these points still summarize the situation. We will not repeat all of our previous comments and testimony, but we do incorporate by reference the documents we have previously submitted to Ecology and Kittitas County on this matter including but not limited to the letter of November 2, 2008, the comment letter of February 20, 2009 on one of the proposed rules for WAC 173-539A for permit exempt wells in upper Kittitas County, and the comment letter of April 2, 2008 on an earlier draft MOA. These letters lay out the technical and legal basis for requiring any new consumptive uses to be fully mitigated for impacts to Total Water Supply Available and the Yakama Nation's Time Immemorial Treaty Rights for instream flow to protect fish and other aquatic life.

First Point

Pumping and consumptively using groundwater captures an equivalent amount of surface water. This is a fundamental principle of groundwater hydrology and applies everywhere including upper Kittitas County. Any new consumptive use of groundwater in upper Kittitas County will reduce and instream flow locally the water supply generally in the Yakima Basin. Ecology's document "Ground Water and Surface Water: A Single Resource in the Yakima Basin" dated September 25, 2009, which was transmitted to Kittitas County, summarizes some of the basic science on this topic. This is not only a

basic law of groundwater hydrology, but has also been recognized in case law by Washington State's highest court.

The current draft MOA has been improved in two areas with regard to our first point. First the current draft removes the inappropriate distinction between alluvial and bedrock aquifers. The laws governing groundwater flow apply to both types of aquifers. Allowing unmitigated groundwater pumping in the bedrock aquifers is neither technically appropriate nor legally valid. Second, since Ecology is now proposing to contract with USGS to perform the study of groundwater interactions with surface water in the bedrock areas, we are more assured of the objectivity of the study within its parameters.

Second Point

There is not surface water available in the Yakima Basin for new appropriations. This point should not require a lengthy explanation. We have been laboring through a thirty-three year long adjudication precisely because claims for the use of surface water exceed available water supply. The May 10th, 1905 priority date water rights that make up nearly half of the irrigation rights in the basin have not been fully satisfied several times in the recent past. In such years, all post-1905 surface water rights have been cut off entirely unless mitigation has been provided to offset their consumptive use. The adjudication did not cover groundwater, but there can be little doubt that the result would be the same for post-1905 groundwater uses. Owning fee property does not mean that one has a water right for that property. Drilling an exempt well only confers a right equivalent to that which would be obtained by applying and obtaining a state water right. Without mitigation for impairment to senior water right holders, no water right should be issued. Any application for new consumptive uses would fail the legally required tests of water availability, non-impairment, and public interest.

Third Point

The only legal and fair way for those who propose additional consumptive uses in upper Kittitas County is through the acquisition and retirement and/or transfer of existing rights to consumptively use water in the basin as mitigation for their use. We do not accept the rationale for allowing a 150-day window for unmitigated new uses. Such new uses would seek to take water from long established fishery and agricultural uses that form the backbone of the Yakima basin economy. This is neither legal nor fair.

Some Kittitas County developers have chosen to mitigate for their water use for a decade. Part of their cost of doing business is the cost of acquiring and transferring water rights. It has never made sense to us for the state and county to place responsible developers at a competitive disadvantage by continuing to allow other developers unfettered access to water through exempt wells which does not require a state permit. Regardless, developers who have chosen not to acquire water are enjoying only a temporary advantage. As was the case with post-1905 surface water users, we expect junior groundwater users will eventually be required to mitigate for the reduction in water

supply to senior users caused by their groundwater use or will have that use curtailed as happened to the post-1905 surface water users.

As we have previously stated, Ecology should be encouraged to establish a mitigation program or not eliminate, even temporarily, its withdrawal of upper Kittitas County. The amount of new water that can be consumptively used in upper Kittitas County without impairing senior water rights is zero. That is the stark reality in a fully appropriated basin like the Yakima. Only by acquiring and retiring or transferring existing consumptive use rights and ensuring that total water supply available and instream flow rights are fully mitigated can new consumptive uses be authorized in this area.

Please contact me or Philip Rigdon, YN Department of Natural Resources for further correspondence on this matter (509-865-5121 ext 655, prigdon@yakama.com).

Sincerely,

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

Ralph Sampson, Jr., Chairman
Yakama Tribal Council

Cc: Tom Tebb
Kittitas County Commissioners