

June 1, 2018

Mr. Travis Thornton, Chair
Methow Instream Flow Rule Interpretation Study Group
Methow Watershed Council
PO Box 1212
Twisp, Washington 98856

Dear Chair Thornton and Study Group Members:

Subject: Comments on the interpretation of the Methow Instream Flow Rule.

Sent via email to: instreamrulecomments@gmail.com

Thank you for the opportunity to comment on the interpretation of the Water Resources Program in the Methow River Basin, WRIA 48, often referred to as the Methow Instream Flow Rule. As is discussed in more detail below, the Washington State Supreme Court's *Campbell & Gwinn* decision determined that a single domestic use "is a single use, by a single home ..."¹ Since this is an interpretation of the water codes on which the instream flow rule is based, this interpretation would apply to the Methow Instream Flow Rule.

Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. We have members across Washington State including Okanogan County.

In the *Campbell & Gwinn* decision the State of Washington Supreme Court had to decide whether a subdivision was entitled one permit-exempt well system for the entire subdivision or one permit-exempt well system for each lot in the subdivision. RCW 90.44.050 exempts from the requirement to obtain a permit from the State of Washington Department of Ecology before withdrawing groundwaters the "withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, ..."² There are other exemptions as well.

The supreme court analyzed RCW 90.44.050's permit-exemption for "single or group domestic uses" and wrote:

Here, the plain meaning of the domestic uses exemption is apparent from the language in RCW 90.44.050 and related statutes. RCW 90.44.050 plainly says that the exemption applies provided 5,000 gpd or less is used for domestic purposes. This is true, the statute provides, whether the use is to be a single use or group uses. That is, whether or not the use is a single use, by a single

¹ *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002).

² Underlining added.

home, or a group use, by several homes or a multiunit residence, the exemption remains at one 5,000 gpd limit, according to the plain language of the statute. The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gpd exemption for the project.³

The Methow Instream Flow Rule, in WAC 173-548-030(2), reserves two cubic feet per second on several reaches of the Methow River and certain tributaries for “Single Domestic and Stock Use.” Since the instream flow rules are adopted under the authority of the water codes and use the same terminology,⁴ the *Campbell & Gwinn* decision’s interpretation of single domestic use is controlling. Single domestic use is use “by a single home,” and not use by several homes, a multiunit residence, or a subdivision.⁵

I understand that some people are considering using the WAC 173-548-030(2) reserves for “Single Domestic and Stock Use” for other purposes. Instead of that approach, we recommend that a water for water mitigation program, such as a water bank, be developed for the other uses. Water banks have proved to be very successful in other areas such as Kittitas County. The State of Washington Department of Ecology has information on water banks on their website at: <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-rights/Trust-water-rights/Water-banks>

A mitigation program is better than modifying the reserves because the Methow River is not meeting its minimum flow. That is why the State of Washington Department of Ecology has to curtail the interruptible water rights in many years.⁶ Every time the reserve is used, the flow in the river is decreased. A water for water mitigation program would acquire senior water rights and transfer the right to use that water to the new use, so the instream flow is not reduced.

Futurewise is not opposed to the reservations, but we do think they should be used for their intended purpose, individual homes on existing lots and stock watering.⁷ That will reduce adverse impacts on senior water right holders including farmers and ranchers and instream flows.

Thank you for considering our comments. If you require additional information, please contact me at 206-343-0681 Ext. 118 or tim@futurewise.org.

³ *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002).

⁴ See the squib following WAC 173-548-050.

⁵ *State, Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002).

⁶ State of Washington Department of Ecology Letter to Okanogan County on the Scope of the EIS for the Amended Okanogan County Zoning Ordinance p. 2 (Nov. 13, 2015) enclosed with this letter.

⁷ WAC 173-548-030(2) also allocates water for other uses subject to certain limitations. Again, Futurewise does not oppose the use of those allocations as authorized.

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Very Truly Yours,

A handwritten signature in blue ink, consisting of a large, stylized letter 'S' followed by a flourish that loops back under the 'S'.

Tim Trohimovich, AICP, WSBA No. 22367

Director of Planning & Law

Enclosure



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

1250 W Alder St • Union Gap, WA 98903-0009 • (509) 575-24

November 13, 2015

Perry Huston, Director
Okanogan County Planning
123 Fifth Avenue North, Suite 130
Okanogan, WA 98840

Re: Scope of EIS – Amend Okanogan County Zoning Ordinance

Dear Mr. Huston:

Thank you for the opportunity to comment regarding the scope of Okanogan County's Environmental Impact Statement (EIS) associated with proposed changes to the County Zoning Ordinance. We have reviewed the documents and have the following comments.

WATER RESOURCES

Environmental review of zone designations should analyze and evaluate the likely impacts of the development allowed within each zone. Water use is essential for development, and causes environmental impacts which vary based on water availability and other factors. Ecology urges the County to prepare an EIS that fully and accurately discloses the wide-ranging impacts on water resources that would be caused by different zoning approaches, and includes analysis of development regulations that would prevent adverse impacts on groundwater supplies, existing water right holders, instream flows, and habitat for fish and wildlife. Further, the EIS should include a range of alternative planning approaches to minimize adverse impacts on water resources and on fish populations that depend upon water for habitat that would be caused by future development in rural Okanogan County.

Ecology's Water Resources Program provided comments on the Draft Okanogan County Comprehensive Plan on June 5, 2009, April 7, 2011, and June 21, 2013. Those comments identify potential impacts that could be caused by the proposed changes to the Zoning Ordinance. Therefore, Ecology requests that the EIS address the issues and concerns stated in these earlier letters, some of which are re-stated below:

- Water Resources is concerned for senior water right holders/users, which includes existing groundwater exempt uses. In addition to possible impairment to instream flows, other senior water right holders and existing exempt uses, Ecology fears the potential abuse of the groundwater exemption resulting from future developments as a



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consequence of the zone changes. Ecology has cautioned the County a number of times through SEPA comments regarding the abuse of groundwater exemption. The EIS should include analysis on the potential for violation of the groundwater permit exemption statute through the "daisy-chaining" of permit-exempt wells and provide alternatives for development regulations that would ensure that the County would prevent such violations under a new zoning ordinance.

- This action involves areas that may be subject to the Instream Resources Protection Plan for the Methow River basin (WAC 173-548), Okanogan River basin (WAC 173-549) and Columbia River (WAC 173-563). Ecology regularly sends out Orders alerting water right holders they will be shut off in favor of instream flows for the Methow and Okanogan Rivers. Because users are already being shut off in the Methow and Okanogan River basins, it is critical the County carefully consider how to evaluate water availability and legal water sources to support and sustain growth in Okanogan County. There should be analysis related to the limited availability of water in these basins and how proposed densities in various zones would or would not be viable as a result of water availability limitations.
- It is also important to note that on July 28, 2011, the Washington Supreme Court issued its decision in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011), a case which included a major issue relating to the respective roles of Ecology and local governments in the management of water resources. The Court concluded that in implementing RCW 19.27.097 and RCW 58.17.110, counties must ascertain that water is legally available, and not just physically or factually available, before they can approve applications for subdivisions and building permits. Under this holding of the Court, counties are not merely required to ascertain that water is physically available, for instance, through hydrogeological data showing that a well can successfully yield water, but must determine that there is an "appropriate provision for potable water supply" to approve a subdivision under RCW 58.17.110. The EIS should include analysis on whether and how there would be compliance with the *Kittitas* decision under proposed zones, and should describe and analyze approaches that would involve development of a mitigation system through the transfer of existing water rights into one or more water banks for mitigation for new permit-exempt uses when it is determined that no water is available for new uses under the reservations of the Methow Rule and to ensure that new permit-exempt wells will not injure holders of irrigation water rights that are subject to curtailment when the instream flows under the Methow Rule and the Okanogan Rule are not met. To include such approaches in the EIS, Ecology encourages the County to look to the system developed in Kittitas County that

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was instituted there in order for the County to comply with the Supreme Court's decision in the *Kittitas* case.

In essence, Okanogan County's EIS should fully consider and address impacts on groundwater resources, existing water right users, and instream flows, and include alternative zoning approaches that prevent adverse impacts on existing water right holders and instream flows. Thank you for your consideration of these comments in determining the scope of the County's EIS.

If you have any questions or would like to respond to these Water Resources comments, please contact **Tom Perkow**, Acting Section Manager at (509) 454-7647 or email at tom.perkow@ecy.wa.gov.

WATER QUALITY

Ecology-Water Quality has also previously commented on the Draft EIS for revisions to the Okanogan County Comprehensive Plan. Ecology remains concerned about the potential impacts to the quality of surface and ground waters in Okanogan County as a result of the drafted zone designations, particularly the zone of Rural 1 (R1, 17A.040). Ecology asks that the scoping of the EIS address the following:

Ground Water

- Minimum Requirement District that will be Rural-High Density (1 acre minimum), please describe how potential impacts to ground water from this density of on-site septic systems will be assessed to insure that groundwater quality will not be affected.
- Within the high density zones, please describe how areas of higher risk to ground water contamination from on-site septic systems will be identified, based on geology, soil types, water table characteristics, proximity to water bodies, groundwater monitoring, etc. Please explain how zone designations and limitations will mitigate the risk to ground water.
- Please describe how the need for mitigating (if any) effects of on-site septic systems on ground water quality will be identified. Explain how appropriate requirements will be identified.

Surface Water

- Within the high density zone designations, please describe how areas of higher risk to surface water contamination from development activities and/or installation of on-site septic systems will be identified, based on geology, soil types, water table characteristics, proximity to water bodies, etc. Please explain how zone designations and limitations

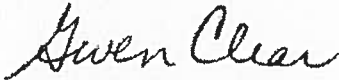
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mitigate the risk by specifying stormwater construction requirements or best management practices, required septic system type or technology, location, etc.

- Please describe how the need for mitigating the effects of on-site septic systems on surface water quality will be identified. Explain how appropriate requirements will be identified.

If you have any questions or would like to respond to these Water Quality comments, please contact **Mark Peterschmidt** by phone at (509) 457-7843 or email at mape461@ecy.wa.gov.

Sincerely,



Gwen Clear
Environmental Review Coordinator
Central Regional Office
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4843
e-cc: Perry Huston
Ben Rough