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RE: Okanogan County and Issues Relating to the Methow River Basin Instream Flow Rule

Dear Mr. Kisielius:

I am writing to you in your capacity as counsel for Okanogan County on certain matters concerning the management of water resources in the context of land use regulation. During a telephone conversation several months ago, you informed me that County officials wanted to know the Department of Ecology's interpretation of a term in the Methow River Basin Instream Flow Rule, WAC 173-548. Specifically, the County wants Ecology to pronounce its interpretation of the term "Single Domestic and Stock Use" for the reservations of water established in the Rule (commonly referred to as "single domestic use").

Based on this request, Ecology sought an informal legal opinion from the Attorney General's Office, Ecology Division (AGO) on interpretation of the Rule, and on a County ordinance that involves application of the Rule. After receiving legal advice from the AGO, Ecology has taken positions on interpretation of the Rule and the relevant ordinance. On behalf of Ecology, I am communicating Ecology's positions on the following two issues:

1. Under WAC 173-548-030, does the term "single domestic use" allow use of water from reservations for homes that are part of a subdivision?
2. If the answer to the first question is "no," does Okanogan County's ordinance only authorize subdivisions that would lawfully rely on water from the reservations for "single domestic use" because only one new home that would receive water through its own well would be allowed through approval of such a subdivision?

Additionally, I will explain Ecology's position on how its interpretation of the Rule relates to existing homes in subdivisions that are using water from the reservations, and parcels of land in existing subdivisions where building permits for the construction of homes that would rely on water from the reservations have not yet been approved.

BRIEF ANSWERS

With regard to Question 1, it is Ecology's position that water from the reservations for "single domestic use" is not legally available to support the County's approval of residential subdivisions. This conclusion is supported by the Rule's express language and the Washington Supreme Court's decision in *Department of Ecology v. Campbell & Gwinn*, 146 Wn. 2d 1, 43 P.3d 4 (2002).

Question 2 relates to the County's current ordinance, which includes an exception to a moratorium on the approval of subdivisions with homes that would rely on water from the "single domestic use" reservations for their water supply. This provision allows the division of a parcel of land with one existing home for the construction of an additional home. It is Ecology's position that this provision allows water use that does not comply with the Rule because any subdivision that is approved would involve a "group domestic use" of water for two homes, rather than "single domestic use."

BACKGROUND

There is a long-running controversy in Okanogan County over the interpretation and implementation of the Methow Basin Instream Flow Rule with respect to permit-exempt groundwater withdrawals for water supply to new homes. The County has approved subdivisions of land for residential development based on water supply from reservations of water that were established under the Methow Rule for so-called "single domestic use."

The County has enacted a series of ordinances that are intended to bring it into compliance with the Washington Supreme Court's decision in *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016).¹ See Okanogan County Code 17A.400. The current ordinance includes a moratorium on the approval of subdivisions that would rely on permit-exempt groundwater for water supply. Okanogan County Ordinance 2020-06.² However, it also includes an exception to the moratorium that allows for the subdivision of a parcel of land where one home is currently located into two parcels so that an additional home can be constructed on the second parcel. This exception provides, in relevant part, that the moratorium "shall not apply to the subdivision of land . . . where the land has an existing single-family residence with an existing water supply, and such land is to be subdivided to allow one additional lot to be created containing a new legal single domestic water supply. . . ." *Id.*³

¹ In *Hirst*, the Supreme Court held that a county's comprehensive land use plan and zoning code were unlawful under the Growth Management Act because they were inadequate to ensure the protection of streams regulated under an Ecology instream flow rule. *Hirst*, 186 Wn.2d at 668 ("We hold that the County's comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows."). In response to the *Hirst* decision, the Legislature enacted the Streamflow Restoration Act. However, that new law does not include the Methow Basin as a watershed where permit-exempt groundwater use is allowed notwithstanding conflicts with minimum instream flows and closures of water bodies set by instream flow rules. RCW 90.94.020(2); RCW 90.94.030(2)(a). In the fifteen basins where permit-exempt groundwater use in conflict with flows is allowed, watershed planning is required to project new permit-exempt groundwater uses and identify projects that will offset their projected impacts on stream flows, over a twenty-year period. However, the Methow Basin is not one of these watersheds.

² New provisions in this ordinance have not yet been codified in the Okanogan County Code because the chapter its provisions will be included in, OCC 17A.400.120, was last updated in 2018.

³ Earlier versions of the ordinance allowed for sequential subdivisions of lots into two lots that would enable the construction of an additional home. However, the current ordinance only allows one subdivision: "a property may only be subdivided one time, and may not be re-divided, on the basis of this exception. That is, once land with a single-family residence with an existing water supply is subdivided to allow one additional lot, neither lot can rely on this exception to support a future re-division of that lot." Okanogan County Ordinance 2020-06.

The Methow Valley Citizens Council is challenging the County's recent approval of a subdivision under an earlier version of this ordinance through an appeal of the County's land use decision, and contends that the proposed permit-exempt groundwater use constitutes "group domestic use" rather than "single domestic use," and is thus unlawful under the Rule.

In this context, the County has requested Ecology to pronounce its interpretation of the term "single domestic use" under the Rule, and its position on the legality of the County's ordinance.

ANALYSIS

1. Under WAC 173-548-030, does the term "single domestic use" allow use of water from reservations for homes that are part of a subdivision?

Landowners in the Methow Valley want to develop subdivisions with new homes that would rely on the exemption from permitting requirements for domestic groundwater use for their water supply. RCW 90.44.050 provides exemptions from water right permitting requirements for certain uses of groundwater, including "single or group domestic uses in an amount not exceeding five thousand gallons a day."

A provision in the statute governing subdivisions provides, in relevant part, that "[a] proposed subdivision. . . shall not be approved unless the . . . county legislative body makes written findings that: . . . appropriate provisions are made . . . for potable water supplies." RCW 58.17.110(2)(a). Thus, to approve a subdivision application, Okanogan County is required to determine that there is adequate water supply to serve the proposed new homes.

Moreover, RCW 58.17.110(4) provides that "[i]f water supply is to be provided by a groundwater withdrawal exempt from permitting under RCW 90.44.050, the applicant's compliance with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 is sufficient in determining appropriate provisions for water supply for a subdivision, dedication, or short subdivision under this chapter." The Methow River Basin Instream Flow Rule is an applicable rule that was adopted pursuant to RCW 90.22 and 90.54. Thus, in order for Okanogan County to approve an application for a subdivision that proposes to rely on permit-exempt groundwater use for its water supply, it must determine that such water use would comply with the Methow Rule.

The Methow Rule established minimum instream flows (termed as "base flows") for four reaches of the Methow River and some of its tributaries. WAC 173-548-020. The Rule also established "reservations" of certain quantities of water from each of these reaches and tributaries of the River that have been set aside for certain out-of-stream uses of water. WAC 173-548-030(1). These reservations include allocations of 2 cubic feet per second of water from each of the reaches and tributaries for "Single Domestic and Stock Use." WAC 173-548-030(2).

This subsection of the Rule provides that "Single Domestic and Stock Use" is of higher priority than all other use categories under the Rule, including the instream flows. Further, WAC 173-548-040(1) states that "[a]s between rights established in the future pertaining to waters allocated in WAC 173-548-030(2)(a) and (b), all rights subject to this program shall be regulated in descending order of category priority regardless of the date of the priority of right." Therefore, water from the reservations for so-called "single domestic use" can be used without interruption when the minimum instream flows are not met.

In contrast, all other classes of water use from the reservations, including "Public Water Supply, Irrigation, and Other Uses," are interruptible and subject to curtailment at times when

the flows are not met. As such, water supply from a reservation of water for a type of use other than “single domestic use” could not qualify as an “appropriate provision for water supply” to support the County’s approval of a subdivision under RCW 58.17.110. This is because it is not feasible to supply water for a home when supply would be cut off when a minimum flow is not met, which has historically occurred on a regular basis in the Methow Basin.

Under WAC 173-548-030, the reservations of water that are of the highest priority and not subject to curtailment when the minimum instream flows are not met are designated for “Single Domestic and Stock Use,” and not “group domestic and stock use” or “single or group domestic uses.” The term “single domestic use” is commonly not considered to be applicable for homes created through a subdivision of land, which entails “group domestic use.” This reading is supported by the *Campbell & Gwinn* decision, which concluded that permit-exempt groundwater use to supply homes in a subdivision project proposed by a real estate developer constituted group domestic use under RCW 90.44.050.

Campbell & Gwinn involved a dispute over a proposed residential subdivision where twenty new homes would each receive water supply from their own individual permit-exempt wells. The total quantity of water needed to supply all twenty homes would exceed the 5,000 gallon per day limit for the group domestic exemption from permitting requirements under RCW 90.44.050. The proponent of the project contended that each individual home qualified for its own exemption for single domestic use not exceeding 5,000 gallons per day, which could collectively allow a maximum total of 100,000 gallons per day for all the homes if they each used the maximum quantity allowed under the exemption. In contrast, Ecology contended that all the homes in the subdivision could qualify for only one exemption for group domestic use not exceeding 5,000 gallons per day, which the proposal could not qualify for because all the homes would require water in excess of the quantity limit. On those grounds, Ecology asserted that the proponent was required to apply for and obtain a water right permit.

The Supreme Court ruled in favor of Ecology and held that permit-exempt groundwater use to supply homes in a subdivision constitutes group domestic use under RCW 90.44.050:

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 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.*

Campbell & Gwinn, 146 Wn. 2d at 12 (emphasis added).

Based on the express language in the Rule stating that the reservations provide water for single domestic uses, and not group domestic uses, and this Supreme Court holding, the term “single domestic use” in the Methow Rule does not allow use of water from the reservations for homes in subdivisions. This is because, under *Campbell & Gwinn*, water supply for homes in subdivisions constitutes group domestic water use under RCW 90.44.050.

Moreover, language in the supporting document for the Rule, which is titled as “Methow River Basin Water Resources Management Program” (“Rule Supporting Document”),⁴ supports this interpretation. In the 1970s, Ecology worked with Methow Valley residents to prepare the water resources management program that resulted in adoption of the Methow Rule. As part of the community involvement process, Ecology sent a questionnaire requesting opinions on future water planning and allocation to all addresses in the basin. Additionally, a group of area citizens known as the Methow River Basin Steering Committee issued a series of basin policy statements. Ecology utilized the Committee’s policy statements and the results of the basin-wide questionnaire in its formulation of the management program, and the Rule that Ecology adopted to effectuate the management program. Rule Supporting Document at iv. Based on this input, key public concerns were identified. The Rule Supporting Document states:

The residents of the Methow Basin feel strongly that the rural and agricultural character of the area should be maintained. There is also strong local support for an expansion of irrigated acreage and additional associated agricultural uses.

Basin residents are concerned that the existing late summer low flows in some stream reaches may be insufficient to meet current needs and that future development might further endanger these existing uses.

The Methow Basin’s economy is becoming increasingly recreation oriented and there is concern that recreational subdivisions and related activities will severely encroach upon the amount of land and water available for future irrigation/agriculture.

Id. at 1.

Further, the Methow River Basin Advisory Committee’s Policy Statement states that:

The Methow Valley has experienced, and will continue to experience, rapid subdivision of its rural lands. Looking into the future, if these subdivided lots are occupied and the occupants demand water, will there be an adequate supply? And more importantly, will this demand [a]ffect existing users? Water is not an unlimited resource and there must be a limit upon its demands for use.

We recommend that the Department of Ecology, upon request from rural subdivision developer for a water right, initiate a thorough and comprehensive investigation as to the adverse effects issuance of that water right would have on other users. If it can be determined that such issuance would be detrimental, then such water rights should be denied. The purpose of this recommendation is to prevent “mining” of aquifers, as well as surface runoff.

Id., Appendix A at 25 (emphasis added). This statement can be read to show intent that any party who wanted to develop a “rural subdivision” should have to apply for a water right permit, because they could not access water from the reservations for single domestic use.

In conclusion, in light of the express language in the Rule stating that the reservations provide water for single domestic uses, and not group domestic uses, and *Campbell & Gwinn*, it

⁴ Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division, Reprinted Nov. 1977).

is Ecology's interpretation that the term "single domestic use" in the Methow Rule does not allow for the use of water from the reservations for homes that are part of a subdivision.

2. If the answer to the first question is "no," does Okanogan County's ordinance only authorize subdivisions that would lawfully rely on water from the reservations for "single domestic use" because only one new home that would receive water through its own well would be allowed through approval of such a subdivision?

Since, on the first question, Ecology has taken the position that the water from reservations for single domestic use is not available for homes that are developed through the approval of subdivisions, Ecology proceeded to consider whether a unique aspect of Okanogan County's current ordinance, Ordinance 2020-6, carves out an exception that lawfully allows such use.

This ordinance extended a moratorium on the approval of subdivisions that would rely on water from the reservations for their water supply. However, there is one key exception to this moratorium: if the owner of a parcel with one home on it wants to divide the parcel into two parcels, water from a reservation is recognized as a viable water supply for a new home constructed on the second parcel. Okanogan County Ordinance 2020-6 (the moratorium "shall not apply to the subdivision of land . . . where the land has an existing single-family residence with an existing water supply, and such land is to be subdivided to allow one additional lot to be created containing a new legal single domestic water supply. . .").

One could argue that this provision of the ordinance does not allow water use that would conflict with the Rule because the approval of a subdivision would only result in the construction of a single additional home that would have its own well (in addition to the existing home with its own well) such that there would be "single domestic use" that would qualify for water from a reservation. However, this argument is flawed because approval of the subdivision would actually result in group domestic use that does not qualify as being single domestic use under the Rule. Instead, water service for two homes in the subdivision, which is more than a single home, would be required.

In conclusion, it is Ecology's position that Okanogan County's ordinance does not only authorize subdivisions that would lawfully rely on water from the reservations for "single domestic use" under the Rule. Even though only one additional new home is allowed through a subdivision under the exception to the moratorium, water would be used to serve multiple homes in the subdivision, including the preexisting home. This would violate *Campbell & Gwinn's* holding that water used to serve multiple houses in a subdivision constitutes group domestic water use, and not multiple single domestic water uses. *Campbell & Gwinn*, 146 Wn. 2d at 12 ("The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use.").

3. The application of this interpretation of the Rule to past and future land use decisions made by Okanogan County.

Ecology anticipates that the County will want to know Ecology's positions on how its interpretation of the term "single domestic use" for the reservations of water in the Methow Rule applies to land use decisions that were made by the County in the past, and to future County decisions on land use applications.

First, it is Ecology's understanding that existing homes that are using permit-exempt groundwater from the reservations are not and cannot be affected by this interpretation of the

Rule. The building permits issued for those homes, including the determinations that there was adequate legal water supply to support them through water from a reservation, are subject to the doctrine of *res judicata* and cannot be reopened.

Second, it is Ecology's position that this interpretation of the Rule should be applied when the County processes any applications for subdivisions that are currently pending, or are filed in the future. Accordingly, the County should consider whether to amend the current ordinance to remove its exception to the moratorium on approval of new subdivisions that would rely on water from the reservations for water supply.

Lastly, Ecology recognizes that the County will need to determine how to evaluate future applications for building permits to construct homes in subdivisions that were earlier approved by the County and would rely on permit-exempt groundwater under a reservation for water supply. A possible approach for the County to take could be based on the dates that the subdivisions were approved. Under such an approach, applications for building permits to construct homes on parcels in subdivisions that were approved by the County prior to the date of the Supreme Court's decision in *Campbell & Gwinn* (March 28, 2002) could be approved based on the County's earlier determinations that there was adequate legal water supply for the proposed subdivisions. In contrast, parcels in subdivisions that were approved by the County after the date of the Supreme Court decision could be subject to the interpretation of the Rule based on *Campbell & Gwinn* when evaluating future applications for building permits to construct homes. Under this approach, in applying RCW 19.27.097, water from a reservation for "single domestic use" could not serve as evidence of adequate legal water supply to support the issuance of building permits for homes on parcels in subdivisions that were approved after March 28, 2002.

I hope that this information will be useful to you and your clients at Okanogan County. Please do not hesitate to contact me if you would like to discuss this matter.

Sincerely,



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AMR/CM

cc: David Gecas, Chief Civil Deputy Prosecuting Attorney, Okanogan County
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