

FILED

JUL 29 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

NO. 313948

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ARTHUR GRESH,

Petitioner,

v.

OKANOGAN COUNTY AND MAZAMA PROPERTIES, LLC,

Respondents.

DEPARTMENT OF ECOLOGY'S AMICUS CURIAE BRIEF

ROBERT W. FERGUSON
Attorney General

ALAN M. REICHMAN, WSBA #23874
DAVID F. STEARNS, WSBA #45257
Assistant Attorneys General
PO Box 40117, Olympia, WA 98504-0117
(360) 586-6770

Attorneys for State of Washington
Department of Ecology

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. IDENTITY AND INTEREST OF AMICUS CURIAE2

III. ISSUES ADDRESSED BY AMICUS CURIAE4

IV. ARGUMENT5

 A. Background.....5

 B. The County Correctly Determined That There Is Adequate Legal Water Supply Secured Through Permit-Exempt Groundwater Use to Serve The 12 Parcels In Mazama Properties’ Proposed Subdivision9

 C. Under RCW 90.44.050, When A Well Is Used To Supply Water For One Permit-Exempt Purpose Of Water Use, A Permit Is Not Required To Use The Well To Supply Water For Another Permit-Exempt Use14

V. CONCLUSION19

TABLE OF AUTHORITIES

Cases

Dep't of Ecology v. Campbell & Gwinn,
146 Wn.2d 1, 43 P.3d 4 (2012)..... 6, 11, 13, 15, 16

Five Corner Family Farmers v. State,
173 Wn.2d 296, 268 P.3d 892 (2011)..... 6, 15, 16

Kim v. Pollution Control Hearings Bd.,
115 Wn. App. 157, 61 P.3d 1211 (2003)..... 13

Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.,
172 Wn.2d 144, 256 P.3d 1193 (2011)..... 3, 11, 19

Postema v. Pollution Control Hearings Bd.,
142 Wn.2d 68, 11 P.3d 726 (2000)..... 6

Statutes

RCW 18.104 18

RCW 19.27.097 6

RCW 36.70C..... 4

RCW 43.21A.064..... 2

RCW 43.21C.030(c) 9

RCW 43.21C.031(1)..... 9

RCW 58.17.110 3, 6

RCW 58.17.110(2)..... 3, 4, 5, 10

RCW 90.03 2, 18

RCW 90.03.290 2

RCW 90.03.380	2
RCW 90.03.600	3
RCW 90.03.605	3
RCW 90.14	2
RCW 90.44	2, 18
RCW 90.44.050	1, 3, 4, 5, 11, 12, 13, 14, 15, 16, 17, 18, 19
RCW 90.44.060	2
RCW 90.44.100	2
RCW 90.44.500	3
RCW 90.54	2

Other Authorities

Okanogan County Code § 16.24.010(Q)	10
Okanogan County Code § 16.20.010(C)(5)	10
Okanogan County Code § 16.20.080(B)	10
Op. Att’y Gen. 6 (2009)	17

Regulations

WAC 173-548	6
WAC 197-11-330	9
WAC 197-11-330(3)	13
WAC 197-11-340	9
WAC 197-11-350	9

WAC 197-11-360(1)..... 10

I. INTRODUCTION

The State of Washington, Department of Ecology (Ecology) offers this amicus curiae brief to assist the Court in addressing water resources issues that have been raised in this appeal. This case involves an area of the law which is becoming more important and is rapidly evolving: the interplay between land use regulation by local governments and the management and regulation of the state's water resources by Ecology.

Appellant Arthur Gresh (Gresh) is challenging Okanogan County's approval of Mazama Properties, LLC's application for a rezone to authorize development of a residential and commercial project in Okanogan County. Gresh asserts that the County violated the State Environmental Policy Act (SEPA) by issuing a determination of non-significance and not requiring preparation of an environmental impact statement based on its finding that the proposal would not likely cause significant environmental impacts. Gresh contends that the project's use of groundwater will cause significant environmental impacts because such use would violate RCW 90.44.050, the provision in the Groundwater Code that exempts certain groundwater uses from water right permitting requirements.

It is Ecology's position that the County correctly applied RCW 90.44.050 in determining that Mazama Properties has access to an

adequate, legally sound supply of water to serve its proposed development. By limiting the subdivision's use of water to a maximum of 2,880 gallons per day (gpd), the County correctly ascertained that Mazama Properties' proposed use of permit-exempt groundwater complies with RCW 90.44.050. Consequently, the County acted lawfully in issuing the determination of non-significance related to Mazama Properties' rezone proposal.

Accordingly, Ecology supports the County's request that the decision of the superior court be affirmed by this Court.

II. IDENTITY AND INTEREST OF AMICUS CURIAE¹

Ecology is the primary administrator of water resources in Washington. *See* RCW 43.21A.064; RCW 90.03; RCW 90.14; RCW 90.44; RCW 90.54. Ecology administers Washington's water permitting system through the issuance of decisions on water right applications for surface water diversions and groundwater withdrawals. RCW 90.03.290; RCW 90.44.060. Ecology also processes and issues decisions on applications for changes and transfers of existing water rights. RCW 90.03.380; RCW 90.44.100. Ecology has the authority to ensure that water resources are used lawfully, including regulating permit-exempt groundwater wells that are used inconsistently with the statutory

¹ Ecology's interests in participating as amicus curiae are further explained in the Department of Ecology's Motion for Leave to File Amicus Curiae Brief.

allowances in the Groundwater Code. *See, e.g.*, RCW 90.03.600; RCW 90.03.605; RCW 90.44.500. Moreover, Ecology provides technical assistance to counties in carrying out land use regulatory activities that affect water resources. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 180, 256 P.3d 1193 (2011) (Ecology “ought to assist counties in their land use planning to adequately protect water resources”).

The evolving interplay between land use regulation by local governments and the regulation of the state’s water resources by Ecology is of fundamental importance to the state-wide management of water. In *Kittitas County*, the Supreme Court held that, under RCW 58.17.110(2), counties must ascertain that water is *legally* (as well as physically) available in order to determine that an adequate supply of water is available to support the approval of a subdivision. *Kittitas Cnty.*, 172 Wn.2d at 179–180. Since that decision, Ecology has acted to assist counties throughout the state in carrying out this requirement. This case provides the opportunity to provide greater clarity on how counties can act to meet the requirements of RCW 58.17.110 in scenarios where subdivision applicants propose to supply water to their developments through the groundwater permit exemptions.

Ecology’s interest in this case is two-fold. First, this case may have statewide ramifications related to the interplay between Ecology’s

state-wide water resources management authority and counties' land use regulatory authority when such local authority addresses water resources. Second, Ecology has an interest in ensuring that counties correctly apply legal authorities that exempt certain uses of groundwater from permitting requirements when counties determine whether subdivision applicants have adequate supplies of potable water to supply their proposed developments. Additionally, Ecology wants to ensure that the Court is apprised of all the legal authorities that are relevant to the water resources issues before the Court in this case.

III. ISSUES ADDRESSED BY AMICUS CURIAE²

1. Whether, under RCW 58.17.110(2) and RCW 90.44.050, the County correctly ascertained that there is adequate legal water supply secured through permit-exempt groundwater uses to serve the six residential and six commercial parcels in Mazama Properties' proposed subdivision.

2. Whether a well originally drilled for one permit-exempt groundwater use (single domestic use) can only be used for that purpose

² The Respondents assert that the superior court erred in denying Respondents' motion to dismiss Gresh's petition for judicial review of the County's rezone approval on the ground that Gresh failed to timely appeal the County's earlier decision to approve the Nordic Village Long Plat. Respondents' Br. at 17-31. This raises the issue whether, under the Land Use Petition Act, RCW 36.70C, and SEPA, Gresh is barred from challenging the County's rezone approval and accompanying SEPA determination of non-significance when he did not earlier appeal the approval of the Nordic Village Long Plat. Ecology is not taking any position on this jurisdictional issue, and other related jurisdictional issues raised by the Respondents.

unless a permit is obtained from Ecology in order to use the water for other permit-exempt uses (in this case, group domestic use, and industrial use).

IV. ARGUMENT

A. Background

In June 2007, the County approved Mazama Properties' predecessor's application for the Mazama Bridge Short Plat, a 4-lot residential development. Response Brief of Mazama Properties, LLC and Okanogan County (Respondents' Br.) at 3–5.

Under RCW 58.17.110(2), a local government cannot approve an application for a subdivision unless it determines that “appropriate provisions are made for . . . potable water supplies” to serve the proposed development. RCW 90.44.050 provides that certain uses of groundwater are exempted from the Groundwater Code's requirement that a permit must be applied for and obtained to gain permission for the use of water. The authorized permit-exempt groundwater uses are for single or group domestic use in an amount not exceeding 5,000 gpd, the watering of a lawn or noncommercial garden not exceeding one-half of an acre, stock-watering purposes, or an industrial use not exceeding 5,000 gpd.³

³ It must be recognized that RCW 90.44.050 only exempts these water uses from water rights permitting requirements. The statute states that a right established under an exemption is “a right equal to that established by a permit” Thus, permit-exempt

Under RCW 58.17.110, the County determined there was adequate water supply to support the Mazama Bridge Short Plat under the groundwater permit exemption for group domestic use because the four lots would require no more than 5,000 gpd of water. A total of 5,000 gpd of water was apportioned among the four lots, and 2,880 gpd was allocated to Lot 1. Respondents' Br. at 3–5.

In 2010, Mazama Properties applied to the County to further subdivide Lot 1 into 12 lots (six residential, and six commercial) through an application for approval of the Nordic Village Long Plat. Under RCW 58.17.110, the County determined there was adequate water supply under the group domestic and industrial groundwater permit exemptions because water service to the 12 lots collectively would not exceed the

uses must also comply with other water law requirements, including the requirement that permit-exempt water use cannot cause impairment of water rights that are senior in priority. *Five Corner Family Farmers v. State*, 173 Wn.2d 296, 310 n.3, 268 P.3d 892 (2011); *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 17 n.8, 43 P.3d 4 (2012). Proposed permit-exempt groundwater uses are thus subject to the provisions of water management rules adopted by Ecology. *Five Corner Family Farmers*, 173 Wn.2d at 310 n.3 (“Department may close groundwater bodies to new appropriations”). Consequently, permit-exempt groundwater uses would not be lawful if they violate such rules by withdrawing groundwater that is in hydraulic continuity with a surface water body that is subject to minimum flow levels that are not being met, or a water body that is closed to further appropriations. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000). This brief does not address application of the water management rule for the Methow River Basin, WAC 173-548, which must be considered by Okanogan County in making water availability determinations related to land use applications, because this case does not involve any issue relating to the interpretation or application of WAC 173-548. Adequacy of legal water supply will again be subject to review when the County evaluates applications for building permits related to the subject development. Respondents' Br. at 13–14; RCW 19.27.097. Relevant provisions of WAC 173-548 should be considered by the County during the evaluation of building permit applications.

2,880 gpd apportioned to Lot 1 under the earlier approval of the Mazama Bridge Short Plat. The County issued a mitigated determination of non-significance (MDNS) under SEPA for this proposal based on its finding that preparation of an environmental impact statement (EIS) was not required because the proposal, as mitigated through conditions of approval, would not likely cause significant environmental impacts. *Id.* at 5-7.

In order to receive final plat approval, Mazama Properties was required by the County to gain approval from the Washington Department of Health (DOH) to develop and operate a water system to serve the subdivision. To support Mazama Properties' water system application, DOH required Mazama Properties to submit a Water User's Agreement that would limit the amount of water that could be used by each lot. *Id.*, App. B. After receiving the Water User's Agreement from Mazama Properties, DOH approved the Group B Water System for the Nordic Village Long Plat. *Id.* at 10. The water use limitations set forth in the Water User's Agreement are inscribed on the face of the Nordic Village Long Plat. These limitations specify that the six residential lots are limited to withdrawing a maximum of 350 gpd per lot, and the six commercial lots are limited to withdrawing a maximum of 120 gpd per lot, which amounts to a total maximum quantity of 2,820 gpd for the entire

subdivision. *Id.* Thus, water use for the Nordic Village Long Plat is limited so that it will not exceed the maximum quantity of 2,880 gpd that was allocated to Lot 1 in the County's approval of the Mazama Bridge Short Plat, and such that total water use for all the lots originally approved for the Mazama Bridge Short Plat cannot exceed 5,000 gpd. After DOH approved Mazama Properties' water system plan, the County issued its final approval of the application for the Nordic Village Long Plat. *Id.* at 11.

Subsequently, in 2011, Mazama Properties filed an application with the County requesting to rezone the six lots designated for commercial use in the Nordic Village Long Plat from "urban residential" to "neighborhood commercial" to gain more flexibility in the types of businesses that could be operated on the commercial lots. The County determined that the proposed rezone would not result in any need for additional water supply or cause any different environmental impacts than under the existing zoning for the property, and issued a determination of non-significance (DNS), that was independent of the earlier MDNS related to the application for the Nordic Village Long Plat. *Id.* at 11–12. Gresh appealed the issuance of the DNS to the Okanogan County Board of Commissioners. The Board of Commissioners denied Gresh's appeal, affirmed the DNS, and approved Mazama's rezone application. *Id.* at 14.

Under the Land Use Petition Act, Gresh filed a petition for review of the County's rezone approval in Okanogan County Superior Court, which affirmed the County's decision. Gresh filed an appeal and sought direct review of the superior court's decision by the Supreme Court. The Supreme Court denied Gresh's request for direct review and transferred the case to this Court.

B. The County Correctly Determined That There Is Adequate Legal Water Supply Secured Through Permit-Exempt Groundwater Use to Serve The 12 Parcels In Mazama Properties' Proposed Subdivision

Under SEPA, an EIS must be prepared if a proposal would significantly affect the quality of the environment. RCW 43.21C.030(c); RCW 43.21C.031(1). The agency reviewing a proposal must issue a "threshold determination" on whether to require the project proponent to prepare an EIS. WAC 197-11-330.

If the agency determines that "there will be no probable significant adverse environmental impacts from a proposal," the agency shall issue a DNS. WAC 197-11-340. Or, if any significant adverse environmental impacts that would be caused by a proposal can be offset through mitigation conditions, a MDNS can be issued based on requiring the project proponent to comply with such mitigation conditions. WAC 197-11-350. If it is determined "that a proposal may have a probable

significant environmental impact,” then a determination of significance must be issued to require the preparation of an EIS. WAC 197-11-360(1).

In this case, the County issued a MDNS for the Nordic Village Long Plat based on the inclusion of conditions requiring that no more than 2,880 gpd of water be used collectively by all the parcels in the subdivision. Later, when the County evaluated Mazama Properties’ rezone application, it issued a DNS based on its determination that the proposed rezone would not result in any need for additional water supply or cause any different environmental impacts than under the existing zoning for the property. These threshold determinations should be upheld because the County correctly determined that there is adequate, lawful water supply to serve the Nordic Village Long Plat.

Under RCW 58.17.110(2), in evaluating Mazama Properties’ application for the Nordic Village Long Plat, the County was required to determine that there would be appropriate provisions for potable water supply for the proposed subdivision before the application could be approved. *See also* Okanogan County Code (OCC) §§ 16.20.010(C)(5), 16.20.080(B), & 16.24.010(Q) (Okanogan County ordinances requiring that the County must determine that a proposed subdivision is served by adequate water supply). The County was required under RCW 58.17.110(2) to ascertain that water is *legally* (as well as physically)

available in order to determine that an adequate supply of water is available to support the approval of the subdivision. *Kittitas Cnty.*, 172 Wn.2d at 179–180.

Mazama Properties proposed to secure water supply for the subdivision by using water under two of the four categories of permit-exempt groundwater uses provided under RCW 90.44.050: for “group domestic uses” in an amount not exceeding 5,000 gpd, and “for an industrial purpose,” not exceeding 5,000 gpd. In *Department of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002), the Supreme Court interpreted the statutory exemption for group domestic use and held that a residential development project is limited to one group domestic use of groundwater not exceeding 5,000 gpd. *Kittitas Cnty.*, 172 Wn.2d at 177 (citing *Campbell & Gwinn*, 146 Wn.2d at 4 (“commonly owned developments are not exempt and therefore must comply with the established well permitting process if the total development uses more than 5,000 gallons of water per day”). Under *Campbell & Gwinn*, a developer cannot circumvent water right permitting requirements by slicing up a common development into multiple subdivisions, or other units, and “daisy-chaining” permit-exempt wells which collectively would supply more than 5,000 gpd of water.

Thus, the County was required to ensure that the entire project, beginning from its genesis as the proposal for the Mazama Bridge Short Plat, would need and use no more than 5,000 gpd of water under the group domestic exemption. The County met this requirement by viewing the overall common development project in the context of the water permit exemption as being the Mazama Bridge Short Plat, where water use was limited to a maximum of 5,000 gpd, with 2,880 gpd of the water being allocated to Lot 1. When Mazama Properties proposed to further subdivide Lot 1 through its application for the Nordic Village Long Plat, the County properly limited total water use for the new subdivision to a maximum of 2,880 gpd, to ensure that 5,000 gpd for the overall common development initially established through the Mazama Bridge Short Plat could not be exceeded. The Water User's Agreement for the Nordic Village Long Plat set water use limitation which are inscribed on the face of the plat, and specify that the six residential lots are limited to withdrawing a maximum of 350 gpd per lot, and the six commercial lots are limited to withdrawing a maximum of 120 gpd per lot, which amounts to a total maximum quantity of 2,820 gpd for the entire subdivision.

Ecology agrees with Gresh that violation of the Groundwater Code, RCW 90.44.050, would create a conflict with a state law relating to protection of the environment, which could cause significant adverse

environmental impacts triggering the requirement for preparation of an EIS under SEPA. WAC 197-11-330(3); Brief of Petitioner (Gresh Opening Br.) at 23–24. However, Gresh is wrong in arguing that the County’s approval of the Nordic Village Long Plat, and the subsequent rezoning, allow Mazama Properties to violate RCW 90.44.050. By setting these water use limitations, the County met its obligation to ensure that water right permitting requirements were not circumvented by “morphing” permit-exempt groundwater uses in contravention of *Campbell & Gwinn* through the further subdivision of a lot that was created in an earlier subdivision.

Moreover, as discussed below, the category of permit-exempt use for “an industrial purpose” is distinct from the permit-exempt category for domestic use. The commercial parcels in the subdivision can be supplied with water under the industrial exemption, independent of supply to the residential parcels under the group domestic exemption. *See Kim v. Pollution Control Hearings Bd.*, 115 Wn. App. 157, 61 P.3d 1211 (2003) (holding that a commercial nursery can be supplied with groundwater under the “industrial” exemption). Notwithstanding, it was appropriate for the County to take a cautious approach here to ensure compliance with RCW 90.44.050, by limiting the entire subdivision to 2,880 gpd of water

based on the scope of the original development proposal (the Mazama Bridge Short Plat).

Thus, the water use limits are mitigation conditions which warranted the County's issuance of a MDNS for the Nordic Village Long Plat proposal. And it was lawful for the County to issue the DNS for the subsequent rezone proposal because the water use limits remained in place for the subdivision and the County correctly ascertained that the proposed rezone would not result in any need for additional water supply.⁴

C. Under RCW 90.44.050, When A Well Is Used To Supply Water For One Permit-Exempt Purpose Of Water Use, A Permit Is Not Required To Use The Well To Supply Water For Another Permit-Exempt Use

Gresh erroneously argues that the County's approval of the Nordic Village Long Plat violates RCW 90.44.050 and allows significant adverse environment impacts because that statute only authorizes Mazama Properties to supply water for a single residence. *See* Gresh Opening Br. at 16–23. Gresh's arguments fail for two reasons. First, RCW 90.44.050 does not limit the use of a well in the manner that Gresh suggests. This statute does not require that the permit-exempt category of use for which a

⁴ Ecology agrees with the Respondents' position that any possibility of adverse environmental impacts is "remote and speculative" because Gresh offered no evidence that the water allocated to each lot is not sufficient for all the uses under the proposed rezone, or that the allocated groundwater withdrawals will have a significant effect on the environment. Respondents' Br. at 35. The superior court was correct in pronouncing in its Memorandum Decision Final Judgment and Order that courts "may not speculate that public agencies will not do their duty or that property owners will necessarily ignore the plat limits" CP at 40.

well is first drilled is to be the only category of use which the well can ever serve. Second, no water right permit from Ecology is needed to modify the permit-exempt uses which may be supplied from a well, so long as the uses fall within the categories of exempt use authorized by RCW 90.44.050.

Gresh erroneously attempts to rely on the Supreme Court's decisions in *Campbell & Gwinn*, and *Five Corner Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011), to support his argument that permit-exempt use is limited to water for single domestic supply of just one lot in the subdivision (attributed to Lot 1 in the Mazama Bridge Short Plat), and that Mazama Properties must obtain a permit from Ecology in order to supply water for group (not single) domestic uses, and commercial uses. Gresh erroneously asserts that the Supreme Court held in *Campbell & Gwinn* that RCW 90.44.050 "requires that the exemption under which a well is drilled is the only exemption under which the well can be used without a permit." Gresh Opening Br. at 16. To the contrary, the Supreme Court held in *Campbell & Gwinn* that a common residential development cannot be sliced into multiple components, whether in the form of single homes or additional subdivisions, each of which would require no more than 5,000 gpd of water, to side-step water right permitting requirements. *Campbell & Gwinn*, 146 Wn.2d at 12-14. In

Campbell & Gwinn, the Court's focus was on an effort to evade the 5,000 gpd water quantity limit for permit-exempt domestic use specified in RCW 90.44.050. *See Id.* at 18. The Court did not consider any issue over whether use of a well is limited in the manner advanced by Gresh.

Further, Gresh misreads *Five Corner Family Farmers* in asserting that its holding compels that a development or project can qualify to use water under only one of the four permit-exempt categories of use under RCW 90.44.050, because "each [use] is available only individually, not collectively." Gresh Opening Br. at 19–20. The decision in *Five Corner Family Farmers* does not support Gresh's interpretation. In *Five Corner Family Farmers*, the Supreme Court held that RCW 90.44.050 provides four distinct categories of permit-exempt groundwater uses: stock-watering purposes with no quantity limitation; single or group domestic use in an amount not exceeding 5,000 gpd; the watering of a lawn or noncommercial garden not exceeding one-half of an acre; and industrial use not exceeding 5,000 gpd. *Five Corner Family Farmers*, 173 Wn.2d at 313.

Nowhere does the *Five Corner Family Farmers* opinion pronounce that someone who constructs a permit-exempt well can only use such a well to supply water under just one of the exemptions. To the contrary, in providing four distinct categories of permit-exempt uses, the Legislature

authorized each category of use, and did not restrict them so that water can only be used under just one of the categories. Op. Att’y Gen. 6 (2009), at 6–9. Further, RCW 90.44.050 does not require that a separate well must be constructed to supply water under each specific permit-exempt category of use. Respondents’ Br. at 37-41. Indeed, it would be nonsensical to require water users to bear the expense of drilling multiple wells in such a scenario.

Gresh is mistaken in arguing that Mazama Properties must obtain a permit in order to supply water for domestic use to five additional residences (in addition to a single home attributable to Lot 1), and water for industrial use to serve the six commercial parcels. This is because no permit is required if prospective water uses fall within the four categories of permit-exempt uses provided under RCW 90.44.050, as they do here.

Gresh correctly explains that Mazama Properties’ predecessor submitted a Water Well Report form (well log) with Ecology in 2006 indicating that the well associated with the Mazama Bridge Short Plat (and, now, the current subdivision) was constructed to supply water for “domestic use,” and that the box for “industrial use” was not checked. Gresh Opening Br. at 5. However, Gresh’s argument that Mazama Properties’ permit-exempt water use is limited to authorize service to only one home in the Nordic Village Long Plat as a result of the submission of

that form is without merit. *See* Gresh Opening Br. at 20; Respondents' Br. at 41–43.

Ecology regulates the construction of water wells under authority provided in RCW 18.104. However, the regulation of well construction is independent of Ecology's authority and responsibility to manage and regulate water resources under RCW 90.03, 90.44, and the other chapters that comprise Washington's Groundwater Code. Thus, information provided to Ecology on a well log, or any other form associated with well construction, does not create limitations with respect to water rights⁵—and cannot, on its own, establish a lawful right to use water, which must instead be established pursuant to the Water Code. Thus, indicating on the well log that the newly constructed well would supply water for domestic use did not create a limitation such that the well was “locked in” for domestic use only, and cannot be used to supply water for industrial use to serve the commercial lots, so long as such use is in compliance with RCW 90.44.050 and other applicable water resources law.

⁵ Information provided on a well log, or other forms related to well construction, can be considered in ascertaining a water user's intent, which may be relevant in analysis of the validity and scope of a water right. However, indicating an intention for a particular purpose of water use does not, per se, preclude the well from being used to pump water to serve other purposes in the future.

V. CONCLUSION

Okanogan County correctly processed Mazama Properties' land use proposals to ensure compliance with the groundwater permit exemption statute, RCW 90.44.050, by setting proper water use limitations. In doing so, Okanogan County acted in accordance with the Supreme Court's decision in *Kittitas County* to ensure that there is an adequate legal water supply to support Mazama Properties' proposed subdivision. Accordingly, Ecology supports the County's request for this Court to affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 26th day of July 2013.

ROBERT W. FERGUSON
Attorney General



ALAN M. REICHMAN, WSBA #23874
DAVID F. STEARNS, WSBA #45257
Assistant Attorneys General
Attorneys for State of Washington
Department of Ecology
(360) 586-6770