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No. 271234

Kittitas County Cause Nos. 08-2-00195-7; -8-2-00210-4; 08-2-00224-4;  
08-2-00231-7; 08-2-00239-2

Consolidated under No. 08-2-00195-7

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

KITTITAS COUNTY, a political subdivision of the State of Washington,  
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),  
CENTRAL WASHINGTON HOME BUILDERS (CWHBA),  
MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO.,  
TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU,  
and SON VIDA II,  
Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and  
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD,

Respondents.

**KITTITAS COUNTY'S RESPONSE  
TO AMICUS BRIEF OF  
CENTER FOR ENVIRONMENTAL LAW AND POLICY**

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October 7, 2010

**KITTITAS COUNTY'S  
RESPONSE TO CELP  
AMICUS BRIEF**

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**I. INTRODUCTION**

Appellant Kittitas County (“County”), respondent before the Growth Management Hearings Board for Eastern Washington (“Hearings Board”), submits this response to the “Brief of Amicus Curiae Center for Environmental Law and Policy” (CELP Amicus brief) filed herein by the Center for Environmental Law and Policy (“CELP”) dated September 16, 2010. The CELP Amicus brief misstates the issues in this case, the facts regarding the position of Kittitas County, misconstrues the responsibilities under Chapters 19.27 and 58.17 RCW, and cites to no authority for its assertion that water rights, specifically exempt wells, are subject to a county’s development regulations.

**II. ARGUMENT**

**a. The Issue in This Case**

The issue on appeal in this case is “Does Kittitas County’s failure to require that all land within common ownership or scheme of development be included within one application for a division of land (KCC 16.04) violate RCW 36.70A.020(6, 8, 10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130, and 36.70A.177?” The issue is not

1 whether state law precludes the County from regulating water usage.<sup>1</sup>

2 New issues may not be raised for the first time on appeal by amici curiae.<sup>2</sup>

3 The County respectfully asks that the CELP Amicus brief be disregarded  
4 as not relevant to the issue before the Court and raised for the first time on  
5 appeal by amici curiae.

6 **b. Kittitas County's Position**

7 While the issue of whether or not state law prevents the County  
8 from regulating water usage is not before the Court, it is a topic of some  
9 interest in this case. Therefore, some time will be spent clearly outlining  
10 the County's position. The County believes that it is the Department of  
11 Ecology ("DOE") which has the authority to: 1) regulate what is a  
12 permitted vs. permit-exempt groundwater usage; 2) has oversight over  
13 well construction (and therefore has the ability to be aware of when a well  
14 is proposed that does not comport with state water law regarding permits);  
15 and 3) has the authority to initiate adjudication in superior court to  
16 determine the amount and priority of water available for individual water  
17 rights. The County has the authority to make determinations regarding the  
18 provisions for potable water supply at subdivision stage, and regarding  
19

20  
21 <sup>1</sup> CELP Amicus brief at 5.

<sup>2</sup> *Harmon v. DSHS*, 134 Wn.2d 523, 544, 951 P.2d 770 (1998).

1 evidence of an adequate water supply at building permit stage. These  
2 determinations of potable and adequate water supply do not include the  
3 ability to determine an applicant's legal right to water.

4 i. DOE's Authority Under State Water Law

5 In most areas of the state<sup>3</sup>, there are two ways to obtain the legal  
6 right to groundwater. According to RCW 90.44.050, a prospective user  
7 may: 1) obtain a permit to appropriate groundwater from DOE; or 2)  
8 qualify as a permit-exempt use. DOE has the authority to issue  
9 groundwater permits. RCW 90.03.290 requires that before a permit to  
10 appropriate groundwater may be issued, DOE must affirmatively find: 1)  
11 that water is available, 2) for a beneficial use, and that 3) an appropriation  
12 will not impair existing rights, or 4) be detrimental to the public welfare.<sup>4</sup>  
13 DOE's evaluation of whether there is impairment of existing water rights  
14 at the permit evaluation stage has been referred to as a "tentative  
15 determination."<sup>5</sup> In a basin with unmet minimum stream flows, a showing  
16 of hydraulic continuity connecting groundwater to surface water is not  
17

18  
19 <sup>3</sup> DOE's proposed rule for Upper Kittitas County, Chapter 173-539A WAC, has  
20 expanded the permit or permit-exempt options. The rule proposes that permit-exempt  
21 uses must also mitigate use (in a way that is very similar to the permit requirement of not  
22 impairing existing water rights.)

23 <sup>4</sup> *Postema v Pollution Control Hearings Board*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000)

24 <sup>5</sup> *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 227, 858 P.2d 232 (1993)

1 enough for DOE to deny a permit, there must also be evidence that the  
2 proposed new use would impair existing surface water rights.<sup>6</sup>

3 There are four possible ways to qualify as a permit-exempt use: 1)  
4 any withdrawal of public groundwater for stock-watering purposes; 2) the  
5 watering of a lawn or of a noncommercial garden not exceeding one-half  
6 acre in area; 3) a single or group domestic uses in an amount not  
7 exceeding five thousand gallons a day; or 4) an industrial purpose in an  
8 amount not exceeding five thousand gallons a day.<sup>7</sup> A permit-exempt use  
9 is exempt only from the permitting process: it still must comply with other  
10 aspects of state water law, such as notice of intent to construct a well.  
11 Once a permit-exempt well has been put to beneficial use, it is treated the  
12 same as a perfected water right and subject to the first in time, first in right  
13 water laws.<sup>8</sup> DOE is responsible for enforcing through the courts what is a  
14 legal permitted versus permit-exempt groundwater use.<sup>9</sup>

15  
16 While permit-exempt uses are, by definition, free from DOE's  
17 permitting process (including the tentative water right determination),  
18 DOE is still notified of all potable water wells constructed in the state  
19

20 <sup>6</sup> *Postema*, 142 Wn.2d at 93

21 <sup>7</sup> RCW 90.44.050

22 <sup>8</sup> *State v. Campbell & Gwinn*, 146 Wn.2d. 1, 9, 43 P.3d 4 (2002)

23 <sup>9</sup> *Campbell & Gwinn*, 146 Wn.2d. at 6

1 through a Notice of Intent.<sup>10</sup> Therefore, prior to a groundwater well being  
2 constructed, DOE is aware of the proposed well and has the ability to  
3 make a determination regarding whether a proposed groundwater use is a  
4 permit or permit-exempt use.<sup>11</sup> The authority to receive a Notice of Intent  
5 cannot be delegated to a county or other municipality.<sup>12</sup>

6 In contrast to the “tentative determinations” made at permit stage,  
7 DOE does not have the authority to perform a water right adjudication.<sup>13</sup>  
8 Once a groundwater use is permitted or an exempt well has been put to  
9 beneficial use (i.e. equal to a perfected right), DOE cannot curtail the use  
10 but must begin a water rights adjudication in superior court if it needs to  
11 determine the priority of the rights and the amount of water available  
12 under each.<sup>14</sup>

13  
14 ii. County’s Authority Under the Growth Management  
Act

15 In stark contrast to DOE’s authority to regulate the use of  
16 groundwater up to the point of adjudication and the superior court’s ability  
17

18 <sup>10</sup> RCW 18.104.040, 043 and 048.

19 <sup>11</sup> *Campbell & Gwinn*, 146 Wn.2d. at 5. This is exactly how DOE became aware of the  
20 issue in the *Campbell & Gwinn* case, by receiving Notice of Intent to construct a well  
from the developer.

21 <sup>12</sup> RCW 18.104.043(8)

<sup>13</sup> *Reitkowski*, 122 Wn.2d at 234

<sup>14</sup> RCW 90.44.220

1 to determine the legal right to water, under the Growth Management Act  
2 (“GMA”) the County does not have the authority to do any of the above  
3 actions. The County’s authority is limited to determining if a land  
4 subdivision has made adequate provision for potable water,<sup>15</sup> and  
5 determining whether there is an adequate water supply in terms of quality  
6 and quantity of water available when considering a building permit  
7 application.<sup>16</sup> The County’s ability to determine if appropriate provisions  
8 are made at subdivision stage is a different standard than what is required  
9 at building permit stage. Neither the language of RCW 58.17.110 or RCW  
10 19.27.097 implies that the County has the ability to determine if there is a  
11 legal right to the water. This is consistent with and complimentary to  
12 DOE’s authority to make tentative water right determinations as part of  
13 the permitting process and oversee what is a legal permitted versus permit-  
14

15 \_\_\_\_\_  
16 <sup>15</sup> RCW 58.17.110: At subdivision stage, the County “shall determine: (a) If appropriate provisions are made for... potable water supplies”.

17 <sup>16</sup> RCW 19.27.097: At building permit stage: “Each applicant for a building  
18 permit of a building necessitating potable water shall provide evidence of an adequate  
19 water supply for the intended use of the building. Evidence may be in the form of a water  
20 right permit from the department of DOE, a letter from an approved water purveyor  
21 stating the ability to provide water, or another form sufficient to verify the existence of an  
22 adequate water supply. In addition to other authorities, the county or city may impose  
23 conditions on building permits requiring connection to an existing public water system  
24 where the existing system is willing and able to provide safe and reliable potable water to  
25 the applicant with reasonable economy and efficiency. An application for a water right  
shall not be sufficient proof of an adequate water supply.”

1 exempt use. RCW 19.27.097 lists evidence that a county 'may' accept in  
2 determining an adequate water supply. A water right permit can provide  
3 evidence of the quantity of water available (which would need to be  
4 supplemented with evidence of the water quality), while a letter from a  
5 water purveyor would provide evidence of both quality and quantity of  
6 water. For an exempt well, there would need to be another form sufficient  
7 to show both water quantity (a draw down test) and quality (a  
8 bacteriological test) as required by KCC 16.24.210. For the County to  
9 make a determination that there is not a legal right to the water would be  
10 infringing upon the superior court adjudication process. Similarly, for the  
11 County to make a determination that an applicant requires a permit versus  
12 a permit-exempt use would be infringing upon DOE's permitting process.

13  
14 **c. 1992 Attorney General Opinion Supports the County's  
Position**

15 The CELP Amicus brief misconstrues the 1992 AG Opinion.<sup>17</sup>  
16 The 1992 AG Opinion has several fatal flaws, most significantly the fact  
17 that one year after the AG Opinion was issued, the *Rettkowski* case was  
18 decided.<sup>18</sup> *Rettkowski* nullified the conclusion as to DOE's ability to  
19 regulate water rights in the 1992 AG Opinion, and calls into question other  
20

21 <sup>17</sup> Wash. Atty. Gen Op. No. 17, 1992 WL 512197

22 <sup>18</sup> *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232 (1993)

1 conclusions regarding local building authorities' ability to determine the  
2 legality of water rights. What is left in the 1992 AG Opinion is something  
3 that all parties appear to agree on: that a local building authority is to  
4 determine quality and quantity when evaluating a building permit  
5 application.

6 The 1992 AG Opinion states that local building departments  
7 should consider water quality, quantity and "laws regarding...  
8 appropriation of waters of the state."<sup>19</sup> The opinion concludes that "any  
9 applicant for a building permit...must prove that he has a right to take the  
10 water."<sup>20</sup> The opinion supports this statement with the footnote that even  
11 a water right might not be sufficient as DOE has the ability to "regulate  
12 the appropriation of water under a priority system commonly described as  
13 'first in time shall be the first in right.'"<sup>21</sup> *Rettkowski* quashes this idea  
14 that DOE has the ability to regulate perfected water rights. The *Rettkowski*  
15 court held "that DOE had no authority to issue these cease and desist  
16 orders without first utilizing a general adjudication pursuant to RCW  
17 90.03 in order to determine the existence, amount, and priorities of the  
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<sup>19</sup> Atty. Gen Op. No. 17 at 5

21 <sup>20</sup> *Id.*

22 <sup>21</sup> Atty. Gen Op. No. 17 at Footnote 5

1 water rights claimed.”<sup>22</sup> Similarly, if the 1992 AG Opinion is to be  
2 followed regarding requiring applicants to prove they have a right to the  
3 water, this would put the County in the position of DOE in the *Rettkowski*  
4 case – i.e. trying to determine the amounts of water available under a  
5 water right and the priority of that right. *Rettkowski* made it clear that this  
6 can only be done in a formal adjudication in superior court. The County  
7 has no authority to determine the legality of an applicant’s water right.

8           The County agrees that both quality and quantity of water should  
9 be considered by the County at building permit stage. If an applicant  
10 submits an application for a permit-exempt well which includes  
11 satisfactory draw-down and bacteriological test results, then there is  
12 evidence of both quality and quantity of water and the County has no  
13 reason to deny the building permit application. The fact that DOE, CELP,  
14 and other entities continue to rely on the 1992 AG Opinion demonstrates  
15 the fragile nature of their argument in that there is continued reliance on a  
16 non-binding opinion that has been nullified in part by *Rettkowski*.  
17

18           **d. CELP Confuses DOE for the County.**

19           The CELP Amicus brief misstates the County’s position. CELP  
20 confuses DOE’s position with the County’s position by stating that: “a

21 <sup>22</sup> *Rettkowski*, 122 Wn.2d at 234.

1 county cannot make the finding of adequate water supply required by  
2 [RCW 19.27.97] when the building permit applicant has not provided  
3 evidence that they have a legally supported water supply.<sup>23</sup> Contrary to  
4 CELP's assertion, this is NOT Kittitas County's position. The CELP  
5 Amicus brief is quoting a DOE letter to Kittitas County.<sup>24</sup> For a "friend"  
6 of the court to so confuse the County's and DOE's positions is concerning.

7 **e. CELP Misstates the Law**

8 **i. Blurring of RCW 19.27 and 58.17**

9 CELP repeatedly combines the County's responsibilities under  
10 Chapters 58.17 and 19.27 RCW.<sup>25</sup> The statutes outline the County's  
11 responsibilities for two very different stages in the GMA process, and  
12 have different language. Per RCW 58.17.110, the County "shall  
13 determine: (a) If appropriate provisions are made for... potable water  
14 supplies".<sup>26</sup> Per RCW 19.27.097, an applicant for a building permit "shall  
15 provide evidence of an adequate water supply". Determining appropriate  
16

17 <sup>23</sup> CELP Amicus Brief at 12, citing CELP's Exhibit 2.

18 <sup>24</sup> CELP Amicus brief, Exhibit 2: June 25, 2010 Letter from Thomas Tebb, Ecology, to  
Cathy Bambrick, Kittitas County

19 <sup>25</sup> CELP Amicus brief at 7: "adequate water is available before granting permits for  
subdivisions or new building permits.", 10: "water availability determinations", 13: "it is  
the applicant's burden to 'provide evidence' that water is available for a new subdivision  
or building", 15: "accurate water availability determinations", 16: "accurate water  
20 availability determinations", 16: "whether water is available", 17: "available for proposed  
subdivisions", 17: "accurate water availability determinations to comply with the GMA",  
21 <sup>26</sup> RCW 58.17.110

1 provisions does not equal provision of evidence of an adequate water  
2 supply. To continually combine the two is misleading. Additionally,  
3 CELP adds a whole new word to the statutes: "accurate". Nowhere in  
4 RCW 58.17.110 or RCW 19.27.097 does the word accurate appear.

5 ii. CELP Misstates and Misapplies *Postema* Holding

6 CELP improperly extends the holding of *Postema* when it states in  
7 the CELP Amicus brief that "counties must deny the [building permit]  
8 application if the withdrawal would have any effect on the flow or level of  
9 the surface water."<sup>27</sup> *Postema* addresses the issue of whether DOE can  
10 deny a permit for a groundwater appropriation based on a determination  
11 that hydraulic continuity exists between groundwater and surface water.<sup>28</sup>  
12 For open streams, the *Postema* court "hold[s] that hydraulic continuity of  
13 an aquifer with a stream having unmet minimum flows is not, in and of  
14 itself, a basis for denial of a groundwater application...However, where  
15 there is hydraulic continuity and withdrawal of groundwater would impair  
16 existing surface water rights...then denial is required."<sup>29</sup> The groundwater  
17 appropriation must be found to impair an existing water right before the  
18

19 <sup>27</sup> CELP Amicus brief at 13.

20 <sup>28</sup> *Postema*, 142 Wash.2d at 77-78: "The primary issues common to these appeals  
concern... whether hydraulic continuity requires denial of a groundwater application on  
the basis that a proposed withdrawal will impair existing rights..."

21 <sup>29</sup> *Postema*, 142 Wash.2d at 93.(Emphasis added).

1 permit can be denied. It is only in streams which have been closed by rule  
2 where hydraulic continuity plus de minimis impact on surface water is  
3 basis enough to deny the groundwater permit.<sup>30,31</sup> CELP also extends the  
4 *Postema* holding to: 1) parties not included in the *Postema* litigation (i.e.  
5 counties), and 2) extends DOE's authority to deny a groundwater permit to  
6 the County's ability to deny a building permit application. To suggest that  
7 *Postema* gives the County the ability to make a determination of when a  
8 water right will be impacted and that this allows the County to deny  
9 building permits under the GMA is not supported by any authority and is  
10 contrary to law. To suggest that *Postema* gives the County the ability to  
11 deny a building permit application proposing an exempt well is also not  
12 supported by any authority and is contrary to law. Exempt wells are by  
13 definition exempt from the permitting process and *Postema* and RCW  
14 90.03.290 do not even give DOE authority over exempt wells because  
15 there is no permit to be issued. *Postema* does not stand for the proposal  
16

17  
18 <sup>30</sup> *Postema*, 142 Wash.2d at 95: "we hold that a proposed withdrawal of groundwater  
19 from a closed stream or lake in hydraulic continuity must be denied if it is established  
20 factually that the withdrawal will have any effect on the flow or level of the surface  
21 water."

22 <sup>31</sup> RCW 90.03.290(1): When Ecology receives a groundwater permit application, it is  
23 Ecology's "duty to investigate the application, and determine what water, if any, is  
24 available for appropriation." It appears that it is on this basis that *Postema* holds that if a  
25 basin is closed, Ecology does not need to determine whether there is impairment of water  
rights because there is no water available for appropriation.

1 that the County has such authority.

2 Furthermore, CELP misstates what is truly happening in Kittitas  
3 County. DOE has not closed the Yakima River basin (contrary to CELP's  
4 assertion).<sup>32</sup> Chapter 173-539A WAC prevents additional appropriations  
5 because there is not enough information for DOE to make sound  
6 management decisions per RCW 90.54.050.<sup>33</sup> This is a temporary  
7 withdrawal that will exist only "until sufficient information is available."<sup>34</sup>  
8 The basin has not been closed, therefore, *Postema's* holding regarding  
9 closed basins does not apply.

10 iii. CELP Misstates and Misapplies the *Campbell &*  
11 *Gwinn* Holding

12 CELP improperly extends the holding of *Campbell & Gwinn*.<sup>35</sup> In  
13 *Campbell & Gwinn*, DOE brought an action against a land developer in  
14 superior court to stop the installation of proposed exempt wells. The  
15 *Campbell & Gwinn* court held that "the [permit] exemption is not intended  
16 for use by a developer to provide water for group uses by multiple homes  
17

18 \_\_\_\_\_  
19 <sup>32</sup> CELP Amicus brief at 6: "Ecology has exercised this authority in the Upper Kittitas  
20 basin by, inter alia, closing the basin to new appropriations..." and at 11:  
21 "Where...Ecology has closed a basin to further withdrawals..." CELP then cites the  
22 emergency rule Chapter 173-539A WAC.

<sup>33</sup> WAC 173-539A-010 and 020

<sup>34</sup> WAC 173-539A-020

<sup>35</sup> *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002)

1 each withdrawing up to 5,000 gpd. Moreover, whether the exemption  
2 applies must be determined with regard to who is planning the  
3 construction of wells”.<sup>36</sup> This case was an action that DOE took as part of  
4 DOE’s authority to issue permits under RCW 90.44.050. CELP’s  
5 assertions that “Counties are obligated to deny subdivision and building  
6 permit applications”<sup>37</sup> when the applicants are proposing to install wells in  
7 violation of *Campbell & Gwinn* is a distortion of the *Campbell & Gwinn*  
8 holding. CELP extends the *Campbell & Gwinn* holding to: 1) parties not  
9 included in the *Campbell & Gwinn* litigation (i.e. counties), and 2) DOE’s  
10 authority to halt wells that would require a groundwater permit to the  
11 County’s ability to deny a subdivision or building permit application. The  
12 issue in *Campbell & Gwinn* is restricted to when a proposed use qualifies  
13 for an exemption to the permitting process under RCW 90.44.050. DOE  
14 is the only agency with the authority to issue groundwater permits, and is  
15 the only agency which can enforce *Campbell & Gwinn*. *Campbell &*  
16 *Gwinn* does not stand for the proposal that the County has such authority.

17  
18 CELP also turns to *Campbell & Gwinn* to make the assertion that:  
19 “where there is no water available for appropriation, property owners may

20  
21 <sup>36</sup> *Campbell & Gwinn*, 146 Wn.2d at 21.

22 <sup>37</sup> CELP Amicus brief at 14

1 not simply drill their own permit-exempt wells because their new  
2 appropriation would interfere with senior water rights.”<sup>38</sup> What *Campbell*  
3 & *Gwinn* actually states is that “once the appropriator perfects the right by  
4 actual application of the water to beneficial use, the right is otherwise  
5 treated in the same way as other perfected water rights.”<sup>39</sup> This distinction  
6 between CELP’s assertion regarding “new appropriations” vs. “perfected  
7 water right” is that CELP attempts to use *Campbell & Gwinn* to assert that  
8 wells that qualify for the permit exemption can be halted prior to  
9 construction.<sup>40</sup> However, the actual language used by the court is that a  
10 well which meets the exemption in Chapter 90.44.050 RCW can be  
11 regulated only after it has been put to beneficial use. *Campbell & Gwinn*  
12 further clarifies that in allowing exempt wells to be constructed prior to a  
13 tentative water right determination, “the Legislature has obviously  
14 discerned that [failure to protect existing rights] is an acceptable risk for  
15 small exempt uses.”<sup>41</sup>

17 CELP misunderstands the nature of the permit-exemption in

18 <sup>38</sup> CELP Amicus brief at 19

19 <sup>39</sup> *Campbell & Gwinn*, 146 Wn.2d at 9

20 <sup>40</sup> Yet CELP admits that DOE does not have the authority to stop construction of permit-  
21 exempt wells prior to construction: “because permit-exempt wells are, by definition, not  
22 subject to review and approval by Ecology before construction...” CELP Amicus brief at  
23 15.

24 <sup>41</sup> *Campbell & Gwinn*, 146 Wn.2d at 18.

1 *Campbell & Gwinn*. CELP claims that *Campbell & Gwinn* holds that  
2 “permit-exemption entitles developers to only a single permit-exempt well  
3 for a single development project” and that “multiple exempt wells for a  
4 single project” is prohibited.<sup>42</sup> CELP also claims that the Kittitas County  
5 “cannot lawfully approve new subdivision or building permits where an  
6 applicant intends to rely on more than one permit-exempt well for a single  
7 development.”<sup>43</sup> What *Campbell & Gwinn* actually says is that “whether  
8 or not the use is a single use, by a single home, or a group use, by several  
9 homes or a multiunit residence, the exemption remains at one 5,000 gpd  
10 limit.”<sup>44</sup> The key in *Campbell & Gwinn* is not the number of wells, but  
11 that the amount of water used does not exceed 5,000 gpd by one  
12 developer. *Campbell & Gwinn* allows the use of multiple withdrawals up  
13 to the 5,000 gpd limit to qualify as permit-exempt. *Campbell & Gwinn*  
14 does not stand for the proposal that the County has the authority to deny  
15 building permits applications.  
16

17 The fact that the County does not require disclosure of land in  
18 common ownership cannot be a violation of the GMA. The county does  
19 not violate the GMA by failing to take information required for a decision

20 <sup>42</sup> CELP Amicus brief at 14

21 <sup>43</sup> CELP Amicus brief at 17

22 <sup>44</sup> *Campbell & Gwinn*, 146 Wn.2d at 12

1 it does not make in an action in which it does not participate. It makes no  
2 sense to assert that by not requiring information that could be used by a  
3 different entity to make a decision in an action to which a county is not  
4 even a proper party, that the county has violated the GMA's mandate that  
5 it protect water resources. The fact that a county does not amass  
6 information that is useless to any decision it has authority to make does  
7 not mean that the county is shirking its responsibility under the GMA to  
8 protect water resources.

9 **f. Other Means of Accomplishing the Goal of Protection**  
10 **of Resources Under the GMA.**

11 The County can only do what it is authorized to do by law. Under  
12 the GMA, as one of many non-prioritized goals, the County is to "[p]rotect  
13 the environment and enhance the state's high quality of life, including air  
14 and water quality, and the availability of water."<sup>45</sup> When managing rural  
15 areas, the County is to generally "protect the rural character of the area, as  
16 established by the county, by...[p]rotecting...surface water and  
17 groundwater resources."<sup>46</sup> But also under the GMA, the County is only  
18 specifically authorized to determine if appropriate provisions are made for  
19 potable water at subdivision stage, and that there is evidence of an  
20

21 <sup>45</sup> RCW 36.70A.020(10)

22 <sup>46</sup> RCW 36.70A.070(5)(b)(iv)

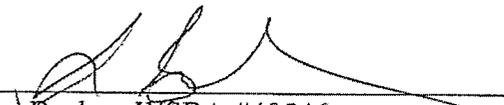
1 adequate water supply at building permit stage. The County is not given  
2 the authority to make a legal determination of what water is available, or  
3 what legal form that water appropriation should take.

4 As stated in Kittitas County's Response to DOE's Amicus brief,<sup>47</sup>  
5 there are many other ways that Kittitas County accomplishes the goal of  
6 protection of ground and surface water that does not require 1) that the  
7 County collect information that it does not need and 2) that the County  
8 exceed its authority under state water law.

9  
10 **III. CONCLUSION**

11 The fact that Kittitas County does not require disclosure of  
12 land in common ownership as part of a development application does not  
13 violate the GMA.

14 Respectfully submitted this 7 day of October  
15 2010.

16   
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18 Deputy Prosecuting Attorney  
19 Attorney for Kittitas County

20  
21 <sup>47</sup> Kittitas County's Response to Amicus Brief of Department of Ecology, pg. 7-9