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**AUG 14 2009**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

84187-0

No. 26547-1

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

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KITTITAS COUNTY and CENTRAL WASHINGTON HOME  
BUILDERS ASSOCIATION, et al.,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT  
HEARINGS BOARD, et al.,

Respondents.

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RESPONSE TO BRIEF *AMICUS CURIAE*  
OF PACIFIC LEGAL FOUNDATION

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ORIGINAL

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## I. INTRODUCTION

Pacific Legal Foundation, a law firm dedicated to corporate interests, submits a brief on behalf of itself. Pacific Legal Foundation's amicus brief adds nothing to the briefing filed by the parties, and misstates the holding of the Growth Board. Pacific Legal Foundation's arguments should be rejected.

## II. ARGUMENT

### A. Pacific Legal Foundation Misstates the Legal Issue and the Record

In formulating the question presented in their brief, Pacific Legal Foundation argues that this court should resolve this case by answering: “[w]hether *Thurston County* forbids Growth Boards from applying increased scrutiny to a county's determination of appropriate density requirements.” Amicus Brief at 2. But no party has argued that the Board applied the wrong level of scrutiny in evaluating Kittitas County's Comprehensive Plan or, indeed, that any increased level of scrutiny is applicable or was applied. This formulation of the question *Amicus* avows it seeks to address is thus not relevant to the Court's review, which is limited to the issues raised by the parties. The Washington Supreme Court has long maintained that it need not consider issues raised only by *amicus*. *Rabon v. City of Seattle*, 135 Wn.2d 278, 291, n. 4, 957 P.2d 621 (1998).

Having adopted its own faulty premise, Pacific Legal Foundation next engages in a creative-writing exercise in support of its issue statement, misrepresenting that the Board in this case applied the wrong standard of review. Pacific Legal Foundation claims that “KCCC<sup>1</sup> argued that because two of the County’s rural areas allowed density more intense than one dwelling unit per 5 acres, the designations were presumptively invalid[.]” Amicus Brief at 2. Pacific Legal Foundation then claims that “[t]he KCCC Growth Board applied a presumption of invalidity to Kittitas County’s rural densities.” Amicus Brief at 6. This is a blatant misstatement of the arguments raised to the Growth Board, and to the Board’s reasoning. As the KCC petitioners correctly argued to the Board, there is a presumption of validity to the decisions made by Kittitas County. AR 653. Rather than applying a presumption of invalidity, the Board properly found that the KCC petitioners had carried our burden of proof in showing that zoning of one dwelling unit per three-acres to one dwelling unit per acre, or in the case of the PUD zone, no maximum rural density, is urban, not rural. The Board held:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence that the action of the County,

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<sup>1</sup> Pacific Legal Foundation appears to mean Kittitas County Conservation, one of the petitioners to the Growth Board and Respondent to this appeal.

complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds that the densities allowed by regulations Agriculture-3 and Rural-3 are urban in the rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act.

AR 2303 (emphasis added).

B. Pacific Legal Foundation Incorrectly Argues that the Growth Board Used a Bright-line Rule, and Improperly Applied a Presumption of Invalidity

The substance of Pacific Legal Foundation's argument does nothing to aid this court in answering the issues raised by the parties in this appeal. Pacific Legal Foundation first provides a cursory historical analysis of decisions decided prior to *Thurston County* by the Western and Central Growth Boards. This analysis provides no useful information to the inquiry before this court, which is limited to the question of whether the Eastern Board below, deciding this matter after the *Thurston County* case, properly applied the law. Amicus Brief at 6-9.

Pacific Legal Foundation next attempts to argue, using other cases, that the Eastern Board has modified the GMA by changing the

presumption of validity in other cases. Amicus Brief at 10. This characterization is both irrelevant to the inquiry posed in this case and mistaken. Pacific Legal Foundation relies exclusively on a 6-page section of the Eastern Board's *Futurewise v. Pend Oreille County*, 2006 WL 3749673 (2006) decision, and argues that this section supports Pacific Legal Foundation's claim that "the Eastern Growth Board determined that prior decisions by all three Growth Boards created a presumption that certain densities are invalid under the GMA." Amicus Brief at 10. But nowhere in the cited section does the Eastern Board say anything of the kind. Instead, the *Futurewise v. Pend Oreille* Board expressly repudiated bright line rules. *Id.* at \* 11. The Board in that case also correctly noted that smaller rural lot sizes require a more searching inquiry as to whether they are rural in character, as they are required to be by the GMA, than do large lots where rural character is more readily apparent. The *Pend Oreille* Board held:

Where the lot size is less than 10 acres in rural areas of a county, the Board must more carefully examine the number, location and configuration of those lots. It must determine whether such lots constitute urban growth; presents an undue threat to large-scale natural resource lands; thwarts the long-term flexibility to expand the UGA; or, will otherwise be inconsistent with the goals and requirements of the Act.

*Id.* at \* 11. This approach – looking more closely at smaller lot sizes, and “more carefully examin[ing] them” – is bedrock common sense, and is neither a bright-line rule nor does it shift the burden to the County to justify its lot sizes. Urban lots are small; there are no 50 acre residential lots in cities. It is equally self-evident that a massive lot is rural, and wasting time in complicated analysis of large lot sizes serves no one. As the lot size shrinks, the Growth Board must more carefully evaluate the evidence in the record to determine if petitioners have met their burden of proving that a particular lot size is too small to be consistent with the rural character of that particular jurisdiction.

The considerations that the Eastern Board identified in the *Pend Oreille* decision are also closely grounded in the GMA. The GMA prohibits urban growth outside urban growth areas and repeats this prohibition in the requirements for rural areas. RCW 36.70A.110(1); .070(5)(b); *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 359, 190 P.3d 38, 52-53 (2008). The GMA requires that the rural element include measures to protect natural resource lands. RCW 36.70A.070(5)(c)(v). The GMA requires that urban growth areas may need to expand in the future into lands currently rural. RCW

36.70A.110(2). And of course the county's actions must comply with the goals and requirements of the GMA. RCW 36.70A.290(2).

Pacific Legal Foundation, noting the County's failure to develop a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act, next argues that the Board's decision in this case means that "[t]he Board upheld petitioners' challenge based on the County's failure to satisfy its Board-created burden of proof justifying its designation of certain rural densities." Amicus Brief at 13; AR 2303. But the GMA itself requires the County to develop a written record in the rural element, and the Board did not shift the burden of proof in acknowledging this legal requirement. RCW 36.70C.070(5) provides:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but **shall develop a written record explaining how the rural element harmonizes the planning goals** in RCW 36.70A.020 and meets the requirements of this chapter.

(Emphasis added). In the absence of a written record from the County explaining why these urban densities should be allowed in the rural area and how these densities harmonize the GMA goals, the Board properly

considered the evidence presented by the KCC petitioners that 3 acre and less zoning is urban, not rural, and properly found that the KCC petitioners had met their burden of proving that the County's plan violated the GMA.

Pacific Legal Foundation misrepresents the record in claiming that “[w]ithout providing any explanation beyond the reasoning in *Pend Oreille*, the Board concluded that the County's designation of one dwelling per 3 acre rural densities constitutes an urban density.” Amicus Brief at 12. But the record contained and the Board cited an extensive array of evidence, including the lot sizes for agricultural and natural resource lands, holdings of the Court of Appeals, the size of farms in Kittitas County, “numerous studies and publications” about water quality and failed septic systems, and evidence from the Department of Ecology regarding the effect of small parcels on Kittitas County's water shortage. AR 2294-2296 (Final Decision and Order at 8-10).

Indeed, the adverse effects of the residential growth permitted by Kittitas County's high rural densities has led the Washington State Department of Ecology to terminate an interlocal agreement between Kittitas County and the Department of Ecology and to adopt an emergency rule withdrawing from appropriation, including exempt wells, “all unappropriated ground water within upper Kittitas County during the

pendency of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral,” as defined in the rule. WAC 173-539A-010; 020; 990 (Enclosed as Appendix A). As the Department of Ecology wrote in the Washington State Register when it adopted the emergency rule on July 16, 2009:

The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, and during 2004 when USBR [United States Bureau of Reclamation] prorated May 10, 1905, water rights. The town of Roslyn's municipal supply and another one hundred thirty-three single domestic, group domestic, and municipal water systems throughout the basin are subject to curtailment when USBR prorates the May 10, 1905, water rights. Water supply in the Yakima Basin is limited and overappropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

Wash. St. Reg. 09-15-107 accessed on August 11, 2009 at: <http://apps.leg.wa.gov/documents/laws/wsr/2009/15/09-15-107.htm> and enclosed as Appendix B. (The rule was further amended on July 31, 2009 our rule citations are to that amended rule.)

As we argued in our Respondent's Brief, the GMA requires that  
Kittitas County's:

[R]ural element shall include measures that  
apply to rural development and protect the  
rural character of the area, as established by  
the county, by:

....  
(iv) Protecting critical areas, as  
provided in RCW 36.70A.060, and surface  
water and groundwater resources;

RCW 36.70A.070(5)(c).

This Kittitas County clearly has not done. Rural densities must be  
'consistent with rural character.' *Thurston County*, 164 Wn.2d at 359, 190  
P.3d at 52-53. Kittitas County's failure to adopt rural densities that protect  
rural character, including surface and ground water resources, to such a  
degree that Ecology must step in and adopt an emergency rule supports the  
Eastern Board's conclusions that Kittitas County's rural densities violated  
the GMA.

Rather than relying on a bright-line rule, the Board ruled "[t]he  
Petitioners have carried their burden of proof and shown by clear and  
convincing evidence that the action of the County, complained of herein,  
is clearly erroneous in view of the entire record before the Board."  
AR 2303 (Final Decision and Order at 17) (emphasis added).

The GMA is designed to protect counties from unplanned, destructive growth patterns. Pacific Legal Foundation's argument that "the Growth Boards' continuing application of 'Bright-Line' rules renders local planning decisions meaningless" is misplaced hyperbole. Amicus Brief at 13. In this case, Kittitas County ignored all evidence in the record and chose arbitrary three-acre, and greater, rural densities for some of its land. These densities will damage farming, endanger the aquifer, strain already overstressed rural roads and services, harm surface water quality, reduce wildlife, and lead to a County with rural areas that look like sprawling suburbs. See Brief of Respondents KCC *et al.*, at 13-18. The Kittitas County Commissioners do have tremendous discretion to structure their comprehensive plan to suit local circumstances, but it must be done within the GMA's mandates. The Growth Board's duty is to check counties which, like Kittitas, have made arbitrary or politically-motivated decisions that violate the GMA and which will have disastrous long-term consequences for the region. The Growth Board properly evaluated the evidence in the record in this matter, and Pacific Legal Foundation's attempt to rewrite the parties' issues, the Board's decision and the record to argue that the Board resorted to a bright-line rule or created an improper shift in the burden of proof, must be rejected.

### III. CONCLUSION

For the reasons discussed herein and in Respondents' opening brief, the Growth Board's Final Decision and Order should be affirmed.

DATED this 12th day of August, 2009.

Respectfully submitted,

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\_\_\_\_\_  
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# APPENDIX A

## Chapter 173-539A WAC

### UPPER KITTITAS EMERGENCY GROUND WATER RULE

#### NEW SECTION

**WAC 173-539A-010 Purpose.** The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County during the pendency of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.

#### NEW SECTION

**WAC 173-539A-020 Authority.** RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for exempt wells where needed.

In 1999, ecology imposed an administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, which includes Kittitas County. That moratorium did not apply to exempt withdrawals. In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new exempt wells on senior water rights and stream flows. Ecology consulted with standing committees of the Washington state legislature on the petition and proposed withdrawal. Ecology rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County. Ecology later invoked the dispute resolution process under the MOA. The MOA was terminated by ecology on July 1, 2009.

NEW SECTION

**WAC 173-539A-030 Definitions.** The definitions provided below are intended to be used only for this chapter.

"**Consumptive use**" of a proposed withdrawal is the total depletion that the withdrawal has on any affected surface water bodies.

"**Ecology**" means the department of ecology.

"**Exemption**" or "**ground water exemption**" means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"**Total water supply available**" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"**Upper Kittitas County**" is the area of Kittitas County delineated in WAC 173-539A-990.

"**Water budget neutral project**" means an appropriation or project where withdrawals of ground water of the state are proposed in exchange for discharge of water from other water rights that are placed into the trust water right program where such discharge is at least equivalent to the amount of consumptive use.

NEW SECTION

**WAC 173-539A-040 Withdrawal of unappropriated water in upper Kittitas County.** (1) Beginning on the effective date of this rule, all public ground waters within the upper Kittitas County are withdrawn from appropriation. No new appropriation or withdrawal of ground water shall be allowed, including those exempt from permitting, except:

(a) Uses of ground water for a structure for which a building permit is granted and the building permit application vested prior to July 16, 2009; and

(b) Uses determined to be water budget neutral pursuant to WAC 173-539A-050. Consumptive use will be calculated using the following assumptions: Thirty percent of domestic in-house use on a septic system is consumptively used; ninety percent of outdoor use is consumptively used; twenty percent of domestic in-house use that is treated through a wastewater treatment plant which discharges to surface water is consumptively used.

(2) The exception for water used at structures provided in subsection (1)(a) of this section shall not apply or cease to apply if the structure is not completed and a water system that uses the new appropriation is not operable within the time allowed under the

building permit, which may not in any case exceed three years from the date the permit application vested. The exception does not reflect ecology's view on when the priority date for an exempt water right commences and is established only to avoid potential hardship. All new withdrawals may be subject to future curtailment due to conflicts with senior water rights, and all users without senior trust water rights are advised to obtain mitigation through senior trust water rights to avoid such curtailment.

#### NEW SECTION

**WAC 173-539A-050 Water budget neutral projects.** (1) Persons proposing to use ground water shall apply to ecology for a permit to appropriate public ground water or, if seeking to use the ground water exemption, shall submit to ecology a request for determination that the proposed exempt use would be water budget neutral.

(2) As part of a permit application to appropriate public ground water or a request for a determination of water budget neutrality, applicants or requestors shall include the following information:

(a) Identification of one or more water rights that would be placed into the trust water right program to offset the consumptive use associated with the proposed new use of ground water;

(b) A site map;

(c) The area to be irrigated (in acres);

(d) A soil report, if proposed discharge is to a septic system and the applicant or requestor proposes to deviate from the values in WAC 173-539A-040 (1) (b);

(e) A property covenant that restricts or prohibits trees or shrubs over the septic drain field; and

(f) A copy of the sewer utility agreement, if the proposed wastewater discharge is to a sanitary sewer system.

(3) Applications for public ground water or requests for a determination of water budget neutrality will be processed concurrent with trust water right applications necessary to achieve water budget neutrality, unless:

(a) A suitable trust water right is already held by the state in the trust water right program; and

(b) The applicant or requestor has executed an agreement to designate a portion of the trust water right for mitigation of the applicant's proposed use.

(4) Applications to appropriate public ground water or requests for determination of water budget neutrality that do not include the information listed in subsection (2) of this section will be rejected and returned to the applicant.

(5) To the extent that ecology determines that the mitigation offered would not reliably mitigate to be water budget neutral,

ecology may deny the request or limit its approval to a lesser amount.

(6) Unless accepted by WAC 173-539A-040 (1) (a), no new exempt withdrawal under RCW 90.44.050 may be commenced unless ecology has approved a request for determination that the proposed exempt use would be water budget neutral. Such a request must comply with subsections (2) and (3) of this section.

#### NEW SECTION

**WAC 173-539A-060 Expedited processing of trust water applications, and new water right applications or requests for a determination of water budget neutrality associated with trust water rights.** (1) RCW 90.38.040 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for a new surface water right, a request for a determination of water budget neutrality, or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application or request must identify an existing trust water right or pending application to place a water right in trust, and that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application or request must be for domestic, group domestic, lawn or noncommercial garden, municipal water supply, stock watering, or industrial purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water right.

(3) If an application for a new water right or a request for a determination of water budget neutrality is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application or request is eligible for expedited processing, ecology will do the following:

(a) Review the application or request to withdraw ground water to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit or determination to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant or requestor also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit or determination.

(c) Condition each permit or determination to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

NEW SECTION

**WAC 173-569A-070 Measuring and reporting water use.** (1) For all uses of the ground water exemption for residential purposes within upper Kittitas County that commence after July 8, 2008, a meter must be installed for each residential connection or each source well that serves multiple residential connections in compliance with such requirements as prescribed in WAC 173-173-100.

(2) Metering data must be collected and reported within thirty days of the end of the recording period to ecology. The following table shows the recording periods and the due dates for each metering report:

<b>Recording Period</b>	<b>Report Due No Later Than:</b>
October 1 - March 31	April 30
April 1 - June 30	July 30
July 1 - July 31	August 30
August 1 - August 31	September 30
September 1 - September 30	October 30

NEW SECTION

**WAC 173-539A-080 Educational information, technical assistance and enforcement.** (1) To help the public comply with this chapter, ecology may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has

occurred, we shall first attempt to achieve voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

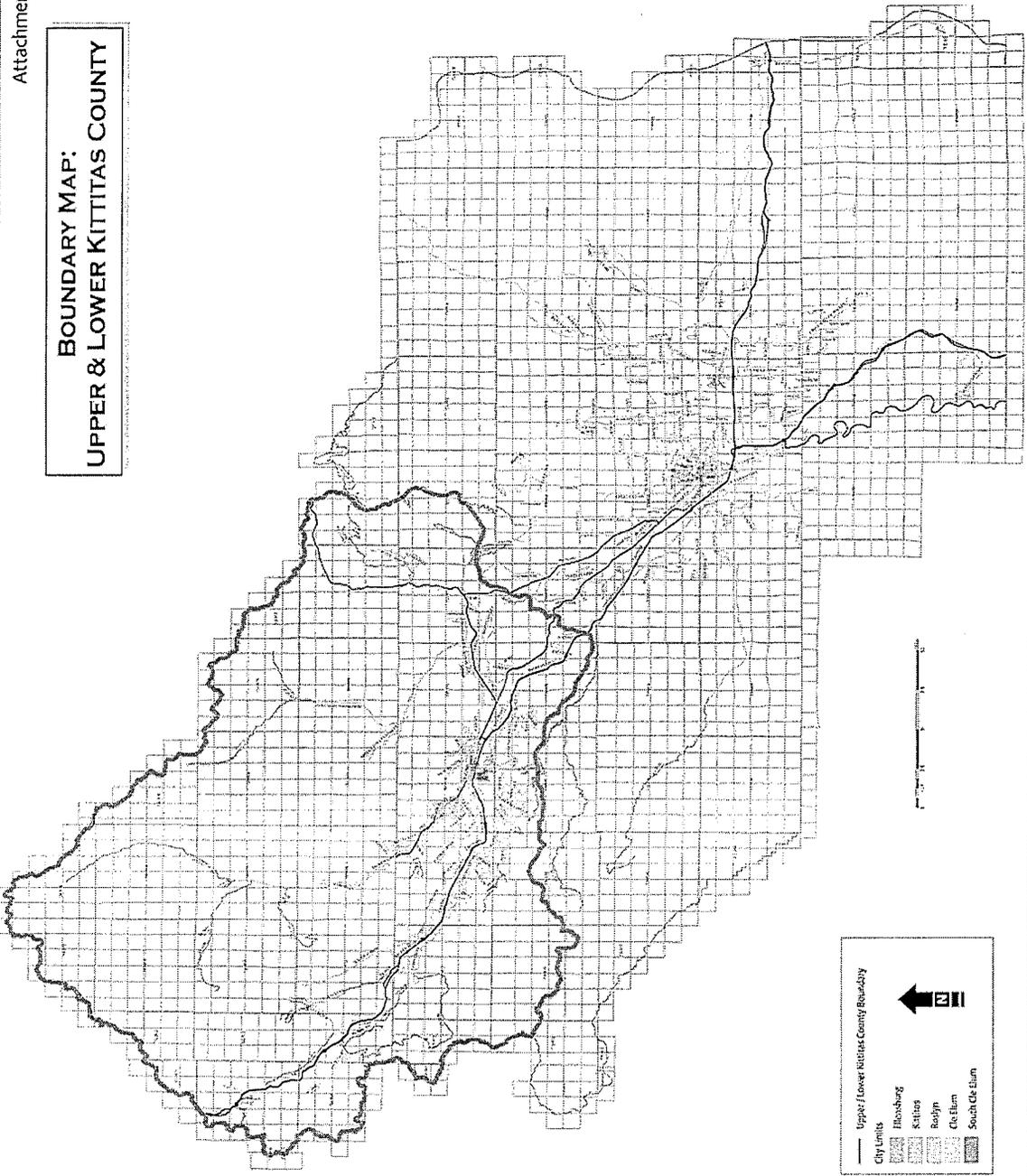
NEW SECTION

**WAC 173-539A-090 Appeals.** All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

NEW SECTION

**WAC 173-539A-990 Appendix 1--Map of upper Kittitas County boundaries.**

**BOUNDARY MAP:  
UPPER & LOWER KITITAS COUNTY**



# APPENDIX B

## WSR 09-15-107

## EMERGENCY RULES

## DEPARTMENT OF ECOLOGY

[ Order 09-07 -- Filed July 16, 2009, 8:31 a.m. , effective July 16, 2009, 8:31 a.m. ]

Effective Date of Rule: Immediately.

Purpose: This fourth emergency rule establishes a partial withdrawal of ground water within a portion of WRIA 39 in Kittitas County, Washington. The partial withdrawal and restrictions are designed to prevent new uses of water that negatively affect flows in the Yakima River and its tributaries. The withdrawal allows for continued development using the ground water exemption or new permits when the new consumptive use is mitigated by one or more pre-1905 water rights held by ecology in the trust water right program of equal or greater consumptive quantity.

Statutory Authority for Adoption: RCW 90.54.050.

Other Authority: Chapter 43.27A RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The Yakima Basin is one of the state's most water-short areas. Water rights with priority dates as old as 1905 were shut off during the 2001 and 2005 droughts, and during 2004 when USBR prorated May 10, 1905, water rights. The town of Roslyn's municipal supply and another one hundred thirty-three single domestic, group domestic, and municipal water systems throughout the basin are subject to curtailment when USBR prorates the May 10, 1905, water rights. Water supply in the Yakima Basin is limited and overappropriated. Western portions of Kittitas County are experiencing rapid growth and this growth is being largely served by exempt wells. Exempt wells in this area may negatively affect the flow of the Yakima River or its tributaries.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's Own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted Using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0,

Amended 0, Repealed 0.

Date Adopted: July 16, 2009.

Jay J. Manning

Director

OTS-2512.2

### Chapter 173-539A WAC

#### UPPER KITTITAS EMERGENCY GROUND WATER RULE

##### NEW SECTION

**WAC 173-539A-010 Purpose.** The purpose of this rule is to withdraw from appropriation all unappropriated ground water within upper Kittitas County during the pendency of a ground water study. New ground water withdrawals will be limited to those that are water budget neutral, as defined in this rule.

□

##### NEW SECTION

**WAC 173-539A-020 Authority.** RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for exempt wells where needed.

In 1999, ecology imposed an administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, which includes Kittitas County. That moratorium did not apply to exempt withdrawals. In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new exempt wells on senior water rights and stream flows. Ecology consulted with standing committees of the Washington state legislature on the petition and proposed withdrawal. Ecology rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County. Ecology later invoked the dispute resolution process under the MOA. The MOA was terminated by ecology on July 1, 2009.

□

##### NEW SECTION

**WAC 173-539A-030 Definitions.** The definitions provided below are intended to be used only for this chapter.

"Ecology" means the department of ecology.

"Exemption" or "ground water exemption" means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

**"Total water supply available"** means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

**"Upper Kittitas County"** is the area of Kittitas County delineated in WAC 173-539A-990.

**"Water budget neutral project"** means an appropriation or project where withdrawals of ground water of the state are proposed in exchange for discharge of at least an equivalent amount of water from other water rights that are placed into the trust water right program.

□

#### NEW SECTION

**WAC 173-539A-040 Withdrawal of unappropriated water in upper Kittitas County.** Beginning on the effective date of this rule, all public ground waters within the upper Kittitas County are withdrawn from appropriation. No new appropriation or withdrawal of ground water shall be allowed, including those exempt from permitting, except as provided in the following sections.

□

#### NEW SECTION

**WAC 173-539A-050 Water budget neutral projects.** (1) Persons proposing to use ground water shall apply to ecology for a permit to appropriate public ground water or, if seeking to use the ground water exemption, shall submit to ecology a request for determination that the proposed exempt use would be water budget neutral.

(2) As part of a permit application to appropriate public ground water or a request for a determination of water budget neutrality, applicants shall identify one or more water rights that would be placed into the trust water right program to offset the consumptive use associated with the proposed new use of ground water.

(3) Applications for public ground water or requests for a determination of water budget neutrality will be processed concurrent with trust water right applications necessary to achieve water budget neutrality, unless:

(a) A suitable trust water right is already held by the state in the trust water right program; and

(b) The applicant or requestor has executed an agreement to designate a portion of the trust water right for mitigation of the applicant's proposed use.

(4) No new exempt withdrawal under RCW 90.44.050 may be commenced unless ecology has approved a request for determination that the proposed exempt use would be water budget neutral. Such a request must comply with subsections (2) and (3) of this section.

□

NEW SECTION

**WAC 173-539A-060 Expedited processing of trust water applications, and new water right applications or requests for a determination of water budget neutrality associated with trust water rights.** (1) RCW 90.38.040 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for a new surface water right, a request for a determination of water budget neutrality, or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application or request must identify an existing trust water right or pending application to place a water right in trust, and that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application or request must be for domestic, group domestic, lawn or noncommercial garden, municipal water supply, stock watering, or industrial purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water right.

(3) If an application for a new water right or a request for a determination of water budget neutrality is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application or request is eligible for expedited processing, ecology will do the following:

(a) Review the application or request to withdraw ground water to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit or determination to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant or requestor also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit or determination.

(c) Condition each permit or determination to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

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NEW SECTION

**WAC 173-539A-070 Educational information, technical assistance and enforcement.** (1) To help

the public comply with this chapter, ecology may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has occurred, we shall first attempt to achieve voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

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NEW SECTION

**WAC 173-539A-080 Appeals.** All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

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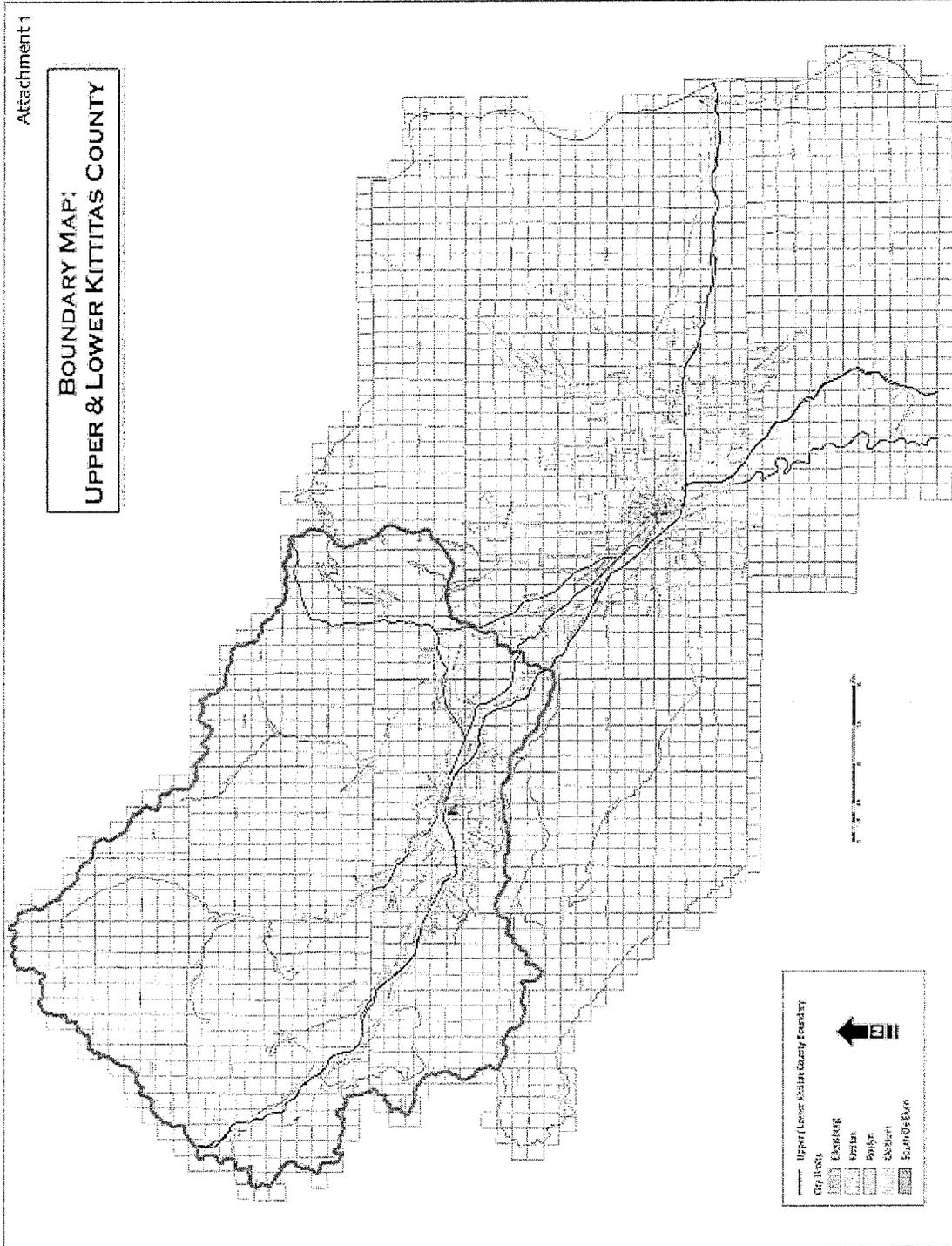
NEW SECTION

**WAC 173-539A-090 Repeal.** If ecology intends to lift the administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, it shall prior to doing so issue a notice repealing this chapter.

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NEW SECTION

**WAC 173-539A-990 Appendix 1 -- Map of upper Kittitas County boundaries.**



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

KITTITAS COUNTY,

Petitioner,

NO. 26547-1

and,

DECLARATION OF SERVICE

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, a Washington not-for-profit corporation; MITCHELL F. WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., INC., TEANAWAY RIDGE LLC; AND KITTITAS COUNTY FARM BUREAU,

Petitioners/Intervenors.

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; KITTITAS COUNTY CONSERVATION, RIDGE; FUTUREWISE; and WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE AND ECONOMIC DEVELOPMENT,

Respondents.



1 STATE OF WASHINGTON )  
2 ) ss.  
3 COUNTY OF KING )

4 I, FLORITA COAKLEY, under penalty of perjury under the laws of the State of  
5 Washington, declare as follows:  
6

7 I am the legal assistant for Gendler & Mann, LLP, attorneys for respondents Kittitas  
8 County Conservation, RIDGE, and Futurewise herein. On the date and in the manner  
9 indicated below, I caused the Response to Brief *Amicus Curiae* of Pacific Legal Foundation  
10 to be served on:

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12 Futurewise  
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14 Seattle, WA 98104

Gregory McElroy  
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DATED this 12<sup>TH</sup> day of AUGUST, 2009, at Seattle, Washington.

  
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FLORITA COAKLEY

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