



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

Board of Commissioners
Okanogan County, Washington
123 Fifth Avenue North, Room 150
Okanogan, WA 98840

Sent via email to: ljohns@co.okanogan.wa.us

19 December, 2016

Dear County Commissioners:

Thank you for the opportunity to comment on Okanogan County Ordinance 2016-5, concerning determinations of water availability with respect to building permit applications. The Center for Environmental Law & Policy (CELP) is a non-profit organization with members throughout Okanogan County and Washington State. Our mission is to protect and restore freshwater resources, including rivers and drinking water aquifers, in order to promote public values. We have longstanding interests in the rivers and aquifers of Okanogan County.

CELP agrees that Okanogan County, like other counties in Washington, must address the recent Washington Supreme Court decision in *Whatcom County v. Western Washington Growth Management Hearings Board*, No. 91475-3 (2016) (“*Hirst*”). *Hirst* requires that counties protect water supplies by determining that water is legally available when issuing building permits. Ordinance 2016-5 appears to have been enacted in response to *Hirst*. CELP agrees that Okanogan County is required to make determinations of water availability and that establishing a procedure to do so is appropriate.

However, we have significant concerns regarding both the procedural and substantive provisions of Ordinance 2016-5. As written, the ordinance fails to adequately protect senior existing uses of water, including both instream flows and out-of-stream users. Procedurally, the notice provisions in the ordinance are inadequate. Further, the ordinance’s substantive requirements direct hearing examiners to apply an incorrect standard when determining water availability, and do not provide any workable standard for evaluating the effects of multiple permit-exempt withdrawals on a river or stream reach.

1. Water in the Okanogan and Methow River WRIAs is already over-appropriated.

It is critical that water availability for development in Okanogan County be properly assessed when making land use decisions. The main river systems in the County are the Methow and Okanogan Rivers (WRIAs 48 and 49). Water is scarce in both of these basins; many streams and the associated

groundwater are already over-appropriated. A 2006 study¹ found that permits and certificates have been issued for an amount of water greater than the mean annual flow in 7 of 10 Okanogan Basin streams examined.² Appropriations from these streams were generally many times higher (500% to 88,700%) than summer low flows.³ Approximately one-third of the summer low flows in the Okanogan River itself and its largest tributary, the Similkameen River, have also been appropriated.⁴ Water flows have been identified as a limiting factor for threatened and endangered salmonid species in both the Methow and Okanogan basins, including Upper Columbia River Spring-Run Chinook and Upper Columbia Steelhead.⁵

Ecology's instream flow rules recognize that water is not available for new uses in many areas of the County. All perennial streams in the Okanogan River Basin except the Middle and Lower Okanogan and Similkameen Rivers are closed to appropriations in summer.⁶ Many streams and lakes in the Methow Basin are also closed to further appropriations.⁷ The Methow Basin closures specifically bar use of new permit-exempt wells.⁸ The Instream Flow Rule for the Okanogan Basin contains an exemption for single domestic and stockwatering uses.⁹ Under the permit-exempt well statute, such uses would include domestic uses not exceeding 5000 gallons/day, watering of a lawn or garden up to one-half acre, or stockwatering.¹⁰ However, the exception fully applies only until the aggregate of such uses "begins to significantly affect the quantity of water available for instream uses," at which time water is available for in-house use only.¹¹ *Id.*

Groundwater and surface water in the Basin are highly connected and groundwater is also scarce. The United States Geological Survey reported that groundwater resources were "limited," resulting in low summer streamflows.¹² The same study noted that streamflows had a "high potential" to be affected by groundwater withdrawals.¹³ Groundwater appropriations already exceed annual recharge in three of five major sub-basins in the Okanogan, and in the basin overall.¹⁴ Summer streamflows are also very

¹ ENTREX, Inc., Level 1 Watershed Technical Assessment Final Report (draft), Okanogan River Watershed Resource Inventory Area 49, September 2006 ("ENTRIX 2006").

² ENTRIX 2006 at 3-25.

³ *Id.*

⁴ ENTRIX 2006 at 3-26.

⁵ See <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Interior-Columbia/Upper-Columbia/Index.cfm> for various federal documents relating to listing and protection of these species.

⁶ WAC 173-549-027(2).

⁷ WAC 173-548-050.

⁸ *Id.*

⁹ WAC 173-549-070.

¹⁰ RCW 90.44.050.

¹¹ WAC 173-549-070. This provision might seem to authorize domestic use of permit-exempt wells as a default position. The Rule, however, provides no guidance on the interpretation of "significantly affect the quantity of water available." Further, the core ruling of the *Hirst* decision is that a county may not simply rely on Ecology's rules in determining water availability, but must make its own determination.

¹² United States Geological Survey, "Groundwater/Surface-Water Interactions in the Tunk, Bonaparte, Antoine, and Tonasket Creek Sub-Basins, Okanogan River Basin, North-Central Washington, 2008. Scientific Investigations Report 2009-5143 ("USGS 2009") at 25.

¹³ USGS 2009 at 25.

¹⁴ ENTRIX 2006 at 3-27.

low in most of the sub-basins, and the water in these streams is grossly over-appropriated. For example, Tunk Creek has a low monthly summer flow of just 0.1 cfs, but a total of 1.3 cfs in water rights (1300% of the low flow) exist for diversion from the creek.¹⁵ The same ratio in other streams ranges from 47% to 88,700%.¹⁶ These rights are most likely to be exercised during the summer irrigation season, when streamflows are at their lowest.

In addition to being important for instream values, including resident and anadromous fish, the Basin's water supplies are critical for non-aquatic wildlife. The (endangered) sharp-tailed grouse depends on habitat in the Basin, particularly in the Tunk Valley, which remains largely unfragmented. The Washington DNR owns approximately 20% of the Valley, including more than a thousand acres which was purchased to provide grouse habitat. These birds depend on open space as well as riparian habitat as a food source. Reduced streamflows (such as those generated by the over-appropriation of Tunk Creek described above) that adversely affect riparian habitat therefore pose a threat to this species.

Much of the water used in the county comes from permit-exempt wells. Over 3000 exempt wells are already in use in WRIA 49.¹⁷ The Methow Instream Flow Rule provided a reservation of 2 cfs in each of seven sub-basins for future domestic and stock-watering uses.^{18, 19} As early as 1991, an Ecology study found that approximately 942 permit-exempt domestic wells were drilled in the Methow Basin between 1976 and 1990.²⁰ The same study concluded that domestic water use (mainly from permit-exempt wells) potentially exceeded the reserved amount in three of seven sub-basins.²¹ The number of such wells continues to grow; a 2015 study by the Department of Ecology found that 1238 new permit-exempt wells were drilled in the County between 2008 and 2014.²² Increased domestic use from new permit-exempt wells has the potential to further deplete groundwater and streamflows. Building permit determinations of the type contemplated in Ordinance 2016-5 are therefore critically important in protecting instream resources.

2. The Ordinance's notification provision is inadequate.

The purpose of Section 4 is to provide notice to other water users who might be affected by the proposed withdrawal. Notice is to be sent to the applicant, adjoining landowners, "holders of water right certificates in the reach potentially affected by the application," Ecology, and the County Health Department. While all of these parties clearly have an interest in a new application to withdraw water,

¹⁵ ENTRIX 2006 at 3-24 (Table 3.3-3).

¹⁶ *Id.*

¹⁷ ENTRIX 2006 at 3-14.

¹⁸ Under the Washington Supreme Court's decision in *Swinomish Indian Tribal Cmty. v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013), the validity of these reservations is questionable.

¹⁹ The reservations were set aside from surface water; however, the Rule also provides that groundwater in hydraulic continuity with surface water is subject to the same limitations. WAC 173-548-030; WAC 173-548-060.

²⁰ Washington Department of Ecology, "Recent Water Use in the Methow River Valley: An Estimate," Publication No. 91-20 (1991) at 9.

²¹ *Id.* at 12-16.

²² Washington Department of Ecology, "Permit-Exempt Domestic Well use in Washington State," Publication Number 15-11-006 (2015) at 7.

this list is not inclusive enough to ensure that all parties who might be affected by a withdrawal receive notice.

Most importantly, all existing permit-exempt well users in the area must be notified. They would have rights to use water that are senior to the proposed use, and are likely to be impaired by new withdrawals. These users are entitled to notice and an opportunity to be heard, so that they may object to impairment of their rights. An example of such impairment comes from the Little Spokane River Valley, where users of existing permit-exempt wells report that new permit-exempt wells are associated with reduced production from their wells. In some cases, existing wells have gone dry as a result of new withdrawals.²³ However, because certificates of water rights are generally not issued to permit-exempt well users, the notice provision of Section 4 fails to include them.

Both the State Departments of Natural Resources and Fish & Wildlife should be notified. DNR is a large landowner in the Okanogan Basin²⁴, and holds water rights that might be affected by new withdrawals. WDFW, as the agency charged with protecting fish, has a great interest in any effect on streamflows.

The Indian Tribes whose landholdings or treaty fishing rights would potentially be affected by diminished streamflows should also receive notification. The Colville Tribe in particular owns approximately 20% of the land in the Tunk Valley and would potentially be affected by any development or new water uses there.

3. The Ordinance sets forth an improper standard for water availability and may violate the Water Code.

The ordinance directs the hearing examiner to apply an improper standard to determining water availability. Under Section 6, an applicant would have to show that the proposed appropriation complied with Court decisions and applicable regulations if it is in an area where ground water is “hydraulically connected to a stream that is closed to certificated appropriation or *consistently below minimum base flows* established under Chapter 90.54 RCW . . .” (emphasis added). Presumably no such proof is to be demanded if a withdrawal is proposed from a new well in connectivity with a stream that is not *consistently* below minimum flows.

But “*consistently* below minimum base flows” is not the standard for determining whether an instream flow is met, or whether water is legally available. The core principle of Washington water law is the prior appropriations doctrine: first in time is first in right. RCW 90.03.010. An instream flow is a water right like any other, and may not be impaired by a junior withdrawal.²⁵ Under the standards

²³ “Private Wells Aren’t Able to Keep Up With Increased Demand,” Spokane Spokesman-Review, January 13, 2013. Available online at: <http://www.spokesman.com/stories/2013/jan/13/water-wait/> (last accessed December 14, 2016).

²⁴ As one example, DNR owns approximately 20% of the land in the Tunk Valley and is a senior water right holder there.

²⁵ RCW 90.54.290(3); *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 82, 11 P.3d 726 (2000).

applied by the Washington Supreme Court, even a minimal impairment of the flow is not permitted.²⁶ Where the instream flow is unmet for even part of the year, a new appropriation for an uninterrupted use, including a permit-exempt well that would reduce streamflow is not permissible.

If a hearing examiner, following the Ordinance, were to approve use of a permit-exempt well (which requires an uninterrupted water supply) in hydraulic continuity with a stream whose instream flow is unmet even part of the time, he or she would be violating the prior appropriations principle as well as the laws protecting instream flows. A landowner who constructed a home and began using water in reliance on the examiner's decision would be vulnerable to potentially having his or her water use curtailed to protect senior water users.

Because this provision of Okanogan County's ordinance conflicts with state law regarding prior appropriations and protection of instream flows, it is unlawful. It is black-letter law that a county ordinance must be consistent with state law.²⁷ Ecology alone has the statutory authority to set instream flows, and any permit to appropriate water must be conditioned to protect them.²⁸ Issuing a permit that allows water use resulting in violation of an instream flow or a closure established by Ecology is clearly beyond the authority of a County hearing examiner.

4. The ordinance does not contain workable standards for determining whether multiple permit-exempt wells on a river reach are permissible.

Section 7 of the ordinance provides that the examiner *may* consolidate hearings where more than one application is proposed on a river reach, "to assure that the cumulative impact of such applications will not raise any issues as to availability." CELP agrees that it is important to consider the cumulative impacts of permit-exempt wells; indeed, the cumulative impact of many such wells has become a problem in many areas. However, this standard is so vague as to be non-workable.

First, consolidation of such hearings should be mandatory, not discretionary, so that the cumulative impacts of wells may best be considered. Second, and more importantly, the phrase "will not raise any issues as to availability" provides almost no guidance as to what is permissible. Mere qualitative consideration of proposed wells cannot predict their effect on other users, including senior out-of-stream water rights or instream flows. Any consideration of multiple wells should start from the amount of water to be used by each, and determine the potential effect of the aggregated withdrawals. In the absence of any restriction on water use (e.g., indoor use only), or any agreement to limit use (perhaps as part of a mitigation scheme, as in the Dungeness Basin), this analysis should assume that each well would withdraw the maximum allowable quantity of 5000 gallons/day, and that the large majority of this would be consumptive use (mainly irrigation). The analysis should then consider whether these proposed withdrawals would be likely to interfere with senior water rights, or to impair instream flows in the relevant basin.

²⁶ *Postema*, 142 Wn.2d at 97.

²⁷ *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 226-7, 351 P.3d 151 (2015).

²⁸ RCW 90.03.247.

Third, approving a number of permit-exempt wells at a single hearing risks confounding the prior appropriations principle. It should be made clear that even though approvals might be granted simultaneously, the relative priorities of the withdrawals would be determined by the actual establishment of beneficial use from the respective wells.

It is critically important that Okanogan County's mechanisms to address its obligations to protect water resources under the GMA, as interpreted by Hirst, be consistent with the Water Code and with the prior appropriations system, in order to protect both senior out-of-stream users and the instream flows established by Ecology.

Thank you again for the opportunity to provide comments. Please contact our office if you have any questions.

Sincerely,

/s/ Dan Von Seggern

Dan J. Von Seggern
Staff Attorney