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Governor



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April 6, 2010

The Honorable Mark McClain, Chairman
The Honorable Alan A. Crankovich, Commissioner
The Honorable Paul Jewell, Commissioner
Kittitas County Board of Commissioners
2005 W. Fifth Ave., Suite 108
Ellensburg, WA 98926

Dear Chairman McClain and Commissioners Crankovich and Jewell:

I am writing in response to your March 30, 2010, letter requesting that I order the Department of Ecology (Ecology) to repeal its recently adopted emergency groundwater withdrawal rule, chapter 173-539A WAC. It is unclear to me if your letter is intended to be a petition under the Administrative Procedures Act, but as you will see below, we have treated it as such.

I want to assure you that I have continued to track the situation in Kittitas County. I am gratified that we have now put in place a solution that we have discussed for years. With Suncadia's cooperation, we have now put water into the water bank. As a result, landowners and developers have an affordable and straightforward way to develop their properties with accompanying senior water rights. This solution protects the landowner and senior water right holders. Thank you for your help in putting this much needed and innovative solution in place.

With the water bank's availability, the impact of Ecology's action is greatly reduced. I understand that many property owners – perhaps as many as 70 – have already put agreements in place with Suncadia and hundreds more have initiated discussions.

I understand that a second innovative approach – a domestic water reserve – is also under development. This will be a second mechanism for landowners and developers to bring water to their properties in a manner that protects senior water rights and streamflows. Thank you for working with Ecology on this approach.

In addition to the water bank and the domestic water reserve, Ecology, in partnership with the Bureau of Reclamation, counties, cities, irrigation districts, Tribes and many others, has made significant progress on a water supply, water quality and habitat enhancement plan for the entire Yakima basin. This plan, which I understand was developed with the support and involvement of Commissioner McClain representing Kittitas County, is another part of the water supply solution for the upper county. The plan protects senior water rights, enhances water supply for stream flows and the future needs of our citizens. I look forward to working with you to implement the plan in a timely and efficient way.



I continue to believe that a mutually acceptable path forward is the best path forward, and we have made significant progress. I ask that you and Ecology continue your effort to find areas of agreement. That said, it is important to understand that critical circumstances have changed that spotlight the importance of the water bank and other solutions that protect senior water rights.

With a lower than normal snow pack and a prolonged lack of precipitation, we are again facing the possibility of drought declaration. I understand that the Bureau of Reclamation recently stated that significant curtailment of post-1905 water rights is likely for the basin.

I am concerned about the lack of agreement between Ecology and the County, but I am even more concerned about senior water right holders being curtailed or shut down altogether, while new exempt wells, with 2010 priority dates, are drilled and groundwater pumped with no review for potential adverse impacts. In my opinion, it is unfair and wholly inappropriate to allow new withdrawals of groundwater in an area where towns, irrigators and other water users, who hold water rights issued more than a century ago, are prohibited from using water.

We have heard loudly and clearly from a number of senior water right holders their demand that we protect the water supply upon which they are so dependent. Among others, Roza Irrigation District, the Town of Roslyn, and the Yakama Nation have expressed their expectation that the already inadequate water supply not be further diminished.

Turning to your request that I order Ecology to repeal its emergency withdrawal of groundwater, RCW 34.05.350(3) (Emergency rules and amendments) allows for petitions to the governor to request the immediate repeal of an emergency rule within seven days of the action. The statute provides that the governor, within seven days after submission of the petition, shall either deny the petition in writing, or order the immediate repeal of the rule.

Your petition asserts two primary bases for repeal of the emergency rule:

Whether the conditions cited by the agency continue to meet the Administrative Procedures Act definition of emergency.

Whether the emergency rule is in conflict with RCW 34.05.350(2) which limits the adoption of identical or substantially similar emergency rules in sequence.

In response to your first question, I agree with Ecology that the emergency rule is necessary to protect the water supplies of senior water users in the Yakima River basin. As mentioned above, the Bureau of Reclamation is predicting that 2010 will likely result in partial or complete curtailment of post-1905 water users for a portion of this summer and rationing of water to senior users with 1905 water rights. Given the well documented connection between groundwater and surface water in the Yakima basin, taking additional water in the upper Kittitas basin without mitigation could further impact these senior water rights. Having some form of limit on new, unmitigated groundwater uses is necessary to avoid exacerbating already significant water shortage problems in the greater Yakima basin. Accordingly, I find Ecology's emergency rule to be consistent with the requirements of RCW 34.05.350(1).

For your second question, the relevant language of RCW 34.05.350(2) is that "identical or substantially similar rules may not be adopted in sequence unless conditions have changed or the agency has filed notice of intent to adopt the rule as a permanent rule." This action is necessary because conditions have indeed "changed." Recent forecasts of drought in the Yakima basin have increased water supply concerns there. Given heightened concerns over water supply, additional unmitigated groundwater withdrawals could trigger legal actions that would significantly disrupt progress in the basin. As noted above, the likelihood of curtailment has prompted a number of senior water right holders to demand that Ecology continue to protect their rights and to ensure that exempt wells continue to be limited. Further, as of February, water is now available in the water bank, allowing new development to proceed in the basin in a responsible manner.

For these reasons, I find that Ecology's emergency rule meets the requirements of RCW 34.05.350 and I am therefore denying your petition.

I agree that a more permanent and predictable approach to water management in Kittitas County is needed, and I am therefore directing Ecology to immediately proceed to permanent rulemaking. The agency rule must both protect senior water rights from the effects of new, unmitigated ground water withdrawals, and must provide reasonable access to water for responsible growth.

I am very encouraged by the availability of water in the water bank, a solution we have been working toward jointly for quite some time. I am also pleased with the joint efforts of Ecology and the County to develop a domestic water reserve program. This too will reduce the impact of the withdrawal on landowners. I have asked Ted Sturdevant to again meet with you to complete the domestic water reserve program as soon as possible.

I appreciate and share your support for new development in Kittitas County. But we must also protect the economy that relies on existing water rights, as well as salmon runs that rely on stream flows to survive. I am confident that if we commit ourselves to solutions that support all these values, rather than choosing one over another, we can ensure a bright future for the communities, economy and environment in the Yakima Basin.

Sincerely,



Christine O. Gregoire
Governor