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January 24, 2020

The Honorable Chris Branch
The Honorable Andy Hover
The Honorable Jim DeTro
Board of Commissioners for Okanogan County
c/o Laleña Johns, Clerk of the Board
123 Fifth Avenue North, Room 150
Okanogan, Washington 98840

Dear Commissioners Branch, Hover, and DeTro:

Subject: Comments on Ordinance 2019-11 for the January 27, 2020, public hearing

Send via email: ljohns@co.okanogan.wa.us; DGecas@co.okanogan.wa.us

Thank you for the opportunity to comment on Ordinance 2019-11. Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable, and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. Futurewise has members across Washington State including Okanogan County.

In summary, Futurewise supports Ordinance 2019-11, however three changes are needed so that Ordinance 2019-11 complies with state law and meets the needs of Okanogan County. Before discussing these changes, we summarize why Ordinance 2019-11 matters.

Why Ordinance 2019-11 matters

The Washington State Department of Ecology worked with Methow Valley residents to prepare the Water Resources Management Program for the Methow River Basin and the Methow Instream Flow Rule in chapter 173-548 WAC.¹ As part of the community involvement work, a questionnaire requesting opinions on water allocation and future planning was mailed to all addresses in the basin.²

Based on this public outreach, key public concerns were identified. As the *Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* documents:

The residents of the Methow Basin feel strongly that the rural and agricultural character of the area should be maintained. There is also strong local support for an expansion of irrigated acreage and additional associated agricultural uses.

¹ Kris G. Kauffman, P.E. James R. Bucknell, River Basin Program Series, No. 4 *Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. iv (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977) last accessed on Jan. 24, 2020 at: <https://fortress.wa.gov/ecy/publications/documents/7611005.pdf> and enclosed in a separate email with the filename “7611005.pdf.”

² *Id.*

Basin residents are concerned that the existing late summer low flows in some stream reaches may be insufficient to meet current needs and that future development might further endanger these existing uses.

The Methow Basin's economy is becoming increasingly recreation oriented and there is concern that recreational subdivisions and related activities will severely encroach upon the amount of land and water available for future irrigation/agriculture.³

The Methow Valley resident's concerns that development would encroach on the water available for agriculture has proven to be well founded. The State of Washington Department of "Ecology regularly sends out Orders alerting water right holders they will be shut off in favor in instream flows for the Methow and Okanogan Rivers. Because users are already being shut off in the Methow and Okanogan River basins, it is critical the County carefully consider how to evaluate water availability and legal water sources to support and sustain growth in Okanogan County."⁴ Many of the curtailed water users are farmer and ranchers.

Improper use and overuse of the two cubic foot per second (cfs) reserves adversely impacts agriculture and recreation. That is because each time the reserves are used to support a new development, the water in the Methow River and, for some developments, its tributaries is reduced. Overtime, this means that the water rights holders will be curtailed earlier and earlier in the growing season. This harms the agricultural industry. The reduced flows also harm the recreational industry because low flows mean that opportunities for fish production and fishing, rafting, and other forms of water-based recreation are reduced. The Methow Instream Flow Rule was also motivated by Methow Valley residents "concern that existing low flows, and those that are likely to accompany increased development in the area, will be inadequate to protect the local salmon and sport fishery."⁵

The Methow Valley residents concerns that future development would displace water needed for farms and ranches, salmon, and sport fish are some of the reasons why the reserves are limited to single domestic and stock uses.⁶ Ordinance 2019-11, by adopting interim regulations that prevent improper use of the two cfs reserves helps keep water in the Methow River and its tributaries. This helps support the agricultural industry, the recreational industry, the Okanogan County economy, and the quality of life of county residents.

Ordinance 2019-11 must apply to all divisions of land

The Methow Instream Flow Rule, in WAC 173-548-030(2), reserves two cubic feet per second on seven reaches of the Methow River and certain tributaries for "Single Domestic and Stock Use."

³ *Id.* at p. 1.

⁴ State of Washington Department of Ecology letter to Okanogan County Planning Re: Proposed Revisions to Okanogan County Comprehensive Plan p. 1 (Jan. 2, 2019) enclosed in a separate email.

⁵ Kris G. Kauffman, P.E. James R. Bucknell, River Basin Program Series, No. 4 *Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 2 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977)

⁶ *Id.* at pp. 1 – 3, p. 10, p. 13.

Wells using these reserves are exempt from the water right permitting requirements and have priority over the instream flows.⁷ They do not have to be curtailed if the instream flows are not being met in the Methow River or the regulated tributaries. This is important because the instream flows are not met in a typical year.

On March 28, 2002, the Washington State Supreme Court concluded in the *Campbell & Gwinn* decision that single domestic use is use “by a single home,” and not use by several homes, a multiunit residence, or a subdivision.⁸ This interpretation is consistent with Ecology’s report on the Methow Instream Flow Rule which defines “single domestic use” as “[w]ater used by a single household including up to one-half an acre lawn or garden irrigation.”⁹

The Planning Enabling Act, in RCW 36.70.692, provides that “county development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules,” including the Methow Instream Flow Rule. In addition, RCW 58.17.110(2), adopted in 1969, requires that proposed subdivisions “shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for ... potable water supplies” RCW 58.17.110 requires counties to determine that applicants for subdivisions “have demonstrated that an adequate water supply is legally available before authorizing approval.”¹⁰ Those determinations must protect instream flows.¹¹

Responding to the *Hirst* decision, the legislature adopted RCW 58.17.110(4), which went into effect on January 19, 2018. RCW 58.17.110(4) provides that:

If water supply is to be provided by a groundwater withdrawal exempt from permitting under RCW 90.44.050, the applicant’s compliance with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW is sufficient in determining appropriate provisions for water supply for a subdivision, dedication, or short subdivision under this chapter.

Reading these provisions together, we see that RCW 58.17.110(2) and (4) require short and long subdivisions using permit-exempt wells to comply with instream flow rules that regulate permit-exempt wells. RCW 36.70.692 requires the county’s regulations for land divisions to include these requirements.

Ordinance 2019-11 in Okanogan County Code (OCC) 17A.400.120 requires compliance with the Methow Instream Flow Rule for most land divisions as state law requires. We appreciate and

⁷ WAC 173-548-040(1).

⁸ *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002). While this decision was interpreting RCW 90.44.050, the term “single domestic use” is the same as in the Methow Instream Flow Rule. This decision was issued on March 28, 2002.

⁹ Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977). See also p. 10 of the report for the same definition.

¹⁰ *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 684, 381 P.3d 1, 16 (2016).

¹¹ *Hirst*, 186 Wn.2d at 666, 381 P.3d at 7 – 8.

support these provisions. Unfortunately and illegally, OCC 17A.400.120D.6 allows certain subdivisions to use the 2 cfs Methow Instream Flow Rule reserves. This violates RCW 36.70.692, RCW 58.17.110, and WAC 173-548-030. OCC 17A.400.120D.6 must be deleted from Ordinance 2019-11. Allowing subdivisions to be created in violation of RCW 58.17.110 and WAC 173-548-030(2) means that these lots have no legal source of water. As will be documented in the following section, Okanogan County cannot approve building permits for those lots unless they have a water source other than the reserves in WAC 173-548-030(2). It also means that any wells on those lots are junior to other water rights holder and the instream flows. So these wells are subject to curtailment either by Ecology or a senior water rights holder who cannot obtain the amount of water to which they are entitled. This creates a high level of uncertainty for the lot owners.

Once it becomes known that there are lots in the county that do not have legal water sources, it will also create uncertainty for lot buyers. They may choose to buy in other counties where the county complies with state law and makes sure subdivisions provide new lots with water sources that are both physically and legally available. This will put the county at a disadvantage compared to counties that comply with state law.

Ordinance 2019-11 must limit the use of the two cubic foot (cfs) per second reserves to lots created before March 28, 2002

RCW 19.27.097, independent of the subdivision statutes, requires building permits to comply with the instream flow rules. As we have seen, WAC 173-548-030(2), reserves two cubic feet per second on seven reaches of the Methow River and certain tributaries for “Single Domestic and Stock Use.” This does not include subdivisions.¹² So lots created on or after the date the *Campbell & Gwinn* decision was issued, March 28, 2002, making clear that subdivisions are group uses cannot use the WAC 173-548-030(2) reserves as water sources. They must use other physically and legally available sources of water. RCW 19.27.097 prohibits the county from approving building permits for lots created on or after March 28, 2002 that require water and propose to use the WAC 173-548-030(2) reserves.

While the Land Use Petition Act’s (LUPA) 21-day appeal permit would bar appeals of some subdivisions, LUPA does not excuse building permits applications from the requirement to comply with RCW 19.27.097 and the instream flow rules.¹³ And those building permits can be challenged under LUPA whether the subdivision was appealed or not.¹⁴

Perhaps more importantly, like the lots created relying on the reserves in violation of WAC 173-548-030(2), the wells serving these houses are junior to other water rights holders and the instream flows. These wells are subject to curtailment either by Ecology or a senior water rights holder who cannot obtain the amount of water to which they are entitled. This creates a high level of uncertainty for the

¹² *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002); Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977).

¹³ RCW 36.70C.130.

¹⁴ RCW 36.70B.020(4); RCW 36.70C.020(2)(a); RCW 36.70C.030(1).

home buyers and homeowners. This is likely to reduce the price buyers are willing to pay and may make financing for these houses difficult or impossible to obtain at typically interest rates. It may also cause buyers to purpose houses in counties that ensure that new homes have physically and legally available water sources.

Ordinance 2019-11 should not repeal Ordinance 2019-5

The information needed to resolve the issues with the closed basins designated as water study areas by Ordinance 2019-5 is different than the issues around the Methow Instream Flow reserves. They may also have different timelines. We recommend that Ordinance 2019-11 not repeal 2019-5. Maintaining both 2019-5 and 2019-11 would allow each matter to be studied independently.

Thank you for considering our comments. If you require additional information, please contact me at telephone 206-343-0681 Ext. 102 or email: tim@futurewise.org.

Very Truly Yours,



Tim Trohimovich, AICP & WSBA No. 22367
Director of Planning and Law

Enclosures