

2006 Report to the Legislature

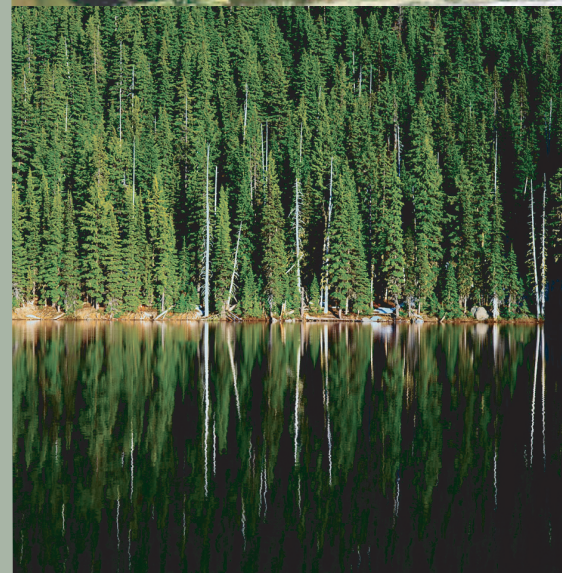
# Potential Water Solutions for Domestic Surface Water Users

Yakima Basin Camps & Cabin Owners

December 2006



Publication No. 06-11-044



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## **2006 Report to the Legislature**

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# **Potential Water Solutions for Domestic Surface Water Users**

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December 2006

Publication No. 06-11-044



## EXECUTIVE SUMMARY

Hundreds of surface water users in the Yakima Basin are under court order to cease all water use, including their in-house use, during dry years. Many of the water users being told to shut off are camps and cabin owners, including both seasonal and permanent residences, that have been using surface water since the 1930's or earlier. These individuals and camp representatives understand that future shut-offs are inevitable and have asked the State Legislature for help. The Legislature responded by passing Senate Bill 6861 directing the Department of Ecology (Ecology) to report on *“the issues surrounding competing users of surface water in areas where domestic water use has been curtailed by a court order and to suggest legislation or other solutions for resolving conflicts over limited water resources.”*

The worries over water for camps and cabin owners began in 2001 when a court order was entered in Yakima County Superior Court (the Court), requiring junior water right holders to shut off while the US Bureau of Reclamation (Reclamation) was rationing proratable water users. See the distribution of junior water right holders in Figure 1 below.

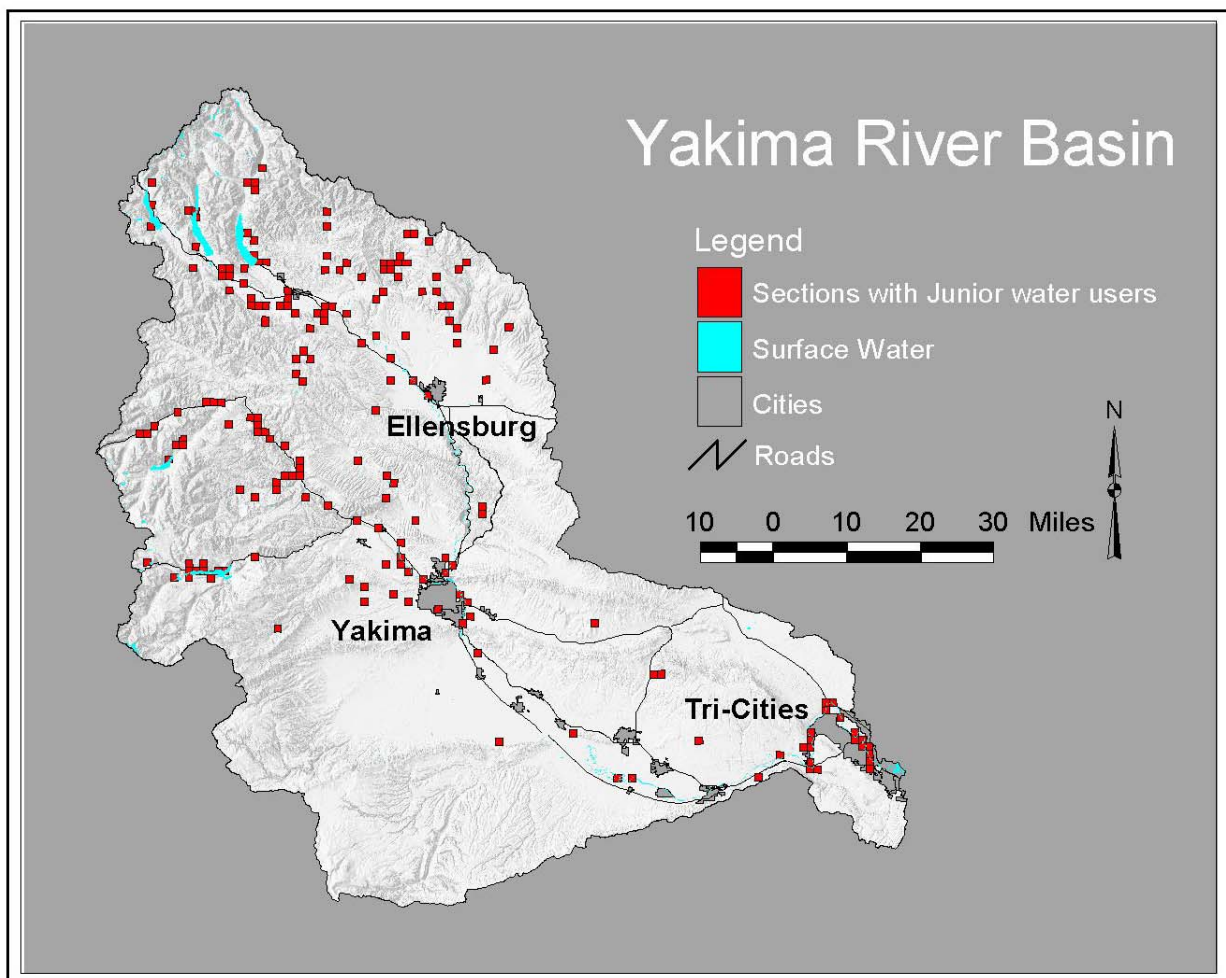


Figure 1: This map of the Yakima River Basin includes all the sections highlighted in red that contain junior surface water right holders. Their distribution is mainly in the higher elevations of the eastern Cascades.

The order only pertained to the 2001 irrigation season, and junior water users that rely on surface water for their in-house use were spared from curtailment. However things changed when severe drought conditions occurred again in 2004. The Court's ruling in 2004 stated that *all* junior surface water users (including domestic users) were ordered to shut-off any time Reclamation rations proratable water users in the future, not just during the 2004 irrigation season.

Proratables are water users that developed water rights associated with Reclamation's withdrawal of all unappropriated surface water in the Yakima Basin on May 10, 1905. Reclamation's withdrawal of water reserved their right to develop reservoirs and extensive water delivery systems across the Yakima Basin. Reclamation rations proratables when it determines there is not enough water to satisfy senior water rights (those with priority dates before 1905). Once rationing is announced, junior water right holders (those with priority dates after 1905) are notified that they cannot divert water.

In response to Senate Bill 6861, Ecology conducted a survey to identify the number of water users that rely on surface water, how they use water (in-house and/or outside irrigation), and how much water they use. Public outreach for the survey included meetings with camps and cabin owners, press releases, radio interviews, newspaper advertisements, an interactive website, and a mass mailing of the survey.

Ecology received 285 completed surveys from water users with and without water rights. Using information obtained from the surveys, information from the Court on confirmed post-1905 water right holders, and information from Ecology's efforts to mitigate for out-of-priority use during the 2005 drought, Ecology estimates that a maximum of 200 acre-feet per year of water is needed to mitigate or compensate for out-of-priority domestic water use. This estimate includes about 100 acre-feet for systems serving small towns and other Class A municipal group systems, with the remainder for smaller users.

Ecology has provided Legislature with the following possible options to address the needs of domestic surface water users. Of course the Legislature is not limited to the options presented here and may choose a combination of options, or something completely unique.

- Option 1: a form of water banking. This idea is based on an understanding that Ecology and Reclamation would work together to manage mitigation credits for purchased water to compensate for out-of-priority water use. Hypothetically, the Legislature may choose to fund the purchase of water and operational costs, or make an initial investment to establish a water bank that could be paid back by the water users.
- Option 2: well drilling. Currently, ground water is exempt from permitting for single and group domestic uses less than 5,000 gallons per day. Individuals seeking a more reliable water source have the option to drill a well; however ground water may also eventually be subject to curtailment.
- Option 3: small surface water exemption. The legislature could provide a small surface water exemption similar to the ground water exemption. A prospective exemption would provide a legal basis for those without rights to divert water in abundant water years, but all exempt and post-1905 water users would still be

curtailed in dry years. A retrospective surface water exemption would be highly controversial and likely challenged in court by senior water users.

- Option 4: taking no action. If no action is taken, Ecology will still be responsible for a compliance and enforcement program to protect existing senior water rights in times of drought. Monitoring all out-of-priority water users, especially those in remote areas is very expensive.

Ecology recommends Option 1, a form of water banking, as the most viable option based on expense to water users and taxpayers and its potential to help the most water users. Water banking has the most potential to resolve a wide variety of future disputes over water rights with more certainty for the affected cabin owners. While water banking is based on a complex agreement between Reclamation and Ecology, much of the planning and negotiations have been completed.

Water banking in the Yakima Basin could be fully funded with an initial investment of approximately \$300,000 based on an estimated purchase price of \$1,500 per acre-foot for 200 acre-feet of water rights. This sum could be repaid as water users enroll in a program to purchase mitigation credits for their out-of-priority water use. The cost to individual water users will vary, but should be affordable on a per cabin / residence basis. For example, an average city lot with irrigation in Eastern Washington uses approximately 400 gallons per day, or about 0.44 ac-ft / year. At \$1,500 per acre-foot, this would equate to a cost of \$672. Most of the water users surveyed are seasonal cabins without irrigation, so mitigation costs for these users could be on the order of \$150.

# TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	i
INTRODUCTION .....	1
BACKGROUND .....	2
Four Types of Water Users .....	2
Yakima Basin Adjudication.....	5
2001: Drought.....	8
2003: Ongoing Efforts to Find Solutions.....	8
2004: No Drought, But Prorationing .....	8
2005: Drought.....	9
2006: Working with Reclamation.....	10
EFFORTS TO REACH SURFACE WATER USERS.....	12
Public Outreach.....	12
SURVEY RESULTS .....	15
Survey Comments.....	17
OPTIONS FOR THE FUTURE.....	18
Water Bank .....	18
Drilling Wells.....	19
Small Surface Water Exemption.....	20
No Action.....	21
RECOMMENDATIONS.....	21
Public Comments .....	21
Ecology’s Recommendations.....	22
APPENDIX A. Senate Bill 6861 .....	A-1
APPENDIX B. Water User's Survey .....	B-1
APPENDIX C. Map of Subbasins in the Yakima Adjudication.....	C-1
APPENDIX D. Superior Court Order for 2001 Shut-Off.....	D-1
APPENDIX E. Draft MOU Between Reclamation and Ecology .....	E-1
APPENDIX F. Public Comments of Draft Report .....	F-1



## INTRODUCTION

Warm summer days are synonymous with going to summer camp and staying in cabins, but for many Washington residents these activities are becoming more difficult. In dry years, when water supplies are low, summer camps may be forced to close for entire seasons. Some recreational cabin owners must haul water from their permanent homes, due to water restrictions. Permanent mountain residents are particularly affected by the uncertainty caused by water-use curtailments. They face long periods without a water supply for indoor sanitary use, which can detrimentally affect public health and property values. Currently, anyone wanting to use water out-of-priority must find another permanent water source by obtaining a senior water right.

The Yakima County Superior Court has repeatedly ordered that all junior surface water users in the Yakima Basin shut off for the irrigation season to satisfy senior water rights. In 2001, junior water right holders were ordered to restrict their water use to in-house only. In 2004 and 2005, junior water users, including camps and cabin owners were ordered to cease all water use. These orders were not just a response to extraordinarily dry conditions in recent years. Water rationing in the Yakima Basin has occurred in ten of the last 27 years (see figure 2 below).



Figure 2: Reclamation has rationed water users three years in each of the last four decades.

In response to the recent water shut-offs, camps and cabin owners turned to the Legislature for help. Senators Delvin, Poulsen, Mulliken, Morton, and Honeyford sponsored Senate Bill 6861, which directed Ecology to study competing interests between domestic surface water users and other users, and provide options to address water needs (see a copy of the bill in Appendix A).

This report is divided into four major sections. It begins with a comprehensive background of water use in the Yakima Basin including a detailed description of the water right stake holders and a chronology of major events affecting water rights from 1850 to 2006 (see the timeline in Figure 5). Following the “Background” section, the “Efforts to Reach Surface Water Users” section describes Ecology’s press releases, public meetings, website release, and survey development and distribution. Then the “Survey Results” section describes the number of water users and the amount of water used by those surveyed. The results were used to estimate the total amount of water that may be needed for mitigation in dry years. A copy of the survey can be found in Appendix B. In the next section, the advantages and disadvantages of four possible “Options for the Future” are discussed. The report concludes with “Final Recommendations” citing Ecology’s most preferred option.

## BACKGROUND

The current predicament for surface water users in the Yakima Basin is the result of a long history of conflicts over water. This background section describes the water right stakeholders, and outlines the hundred-plus-year history of water use in the basin. The timeline in Figure 5 provides a good reference for the history of events.

### Four Types of Water Users

#### *Senior Water Users*

During the 1850s, individuals, partnerships, irrigation companies, and municipal corporations developed the first permanent water uses. Their operating authority to use water was by custom (territorial law and Washington’s 1891 water code). Like most places in the western United States, water in the Yakima Basin is governed by the prior appropriation system where the oldest uses, also known as “senior” uses, are the most reliable. Senior water rights have comparatively older priority dates; water right priority dates are based on the date of first water use. The prior appropriation system is described by the phrase *first in time, first in right*, meaning that senior water right holders are entitled to their full water allotment before other users with later priority dates receive any water, regardless of their proximity to the source.

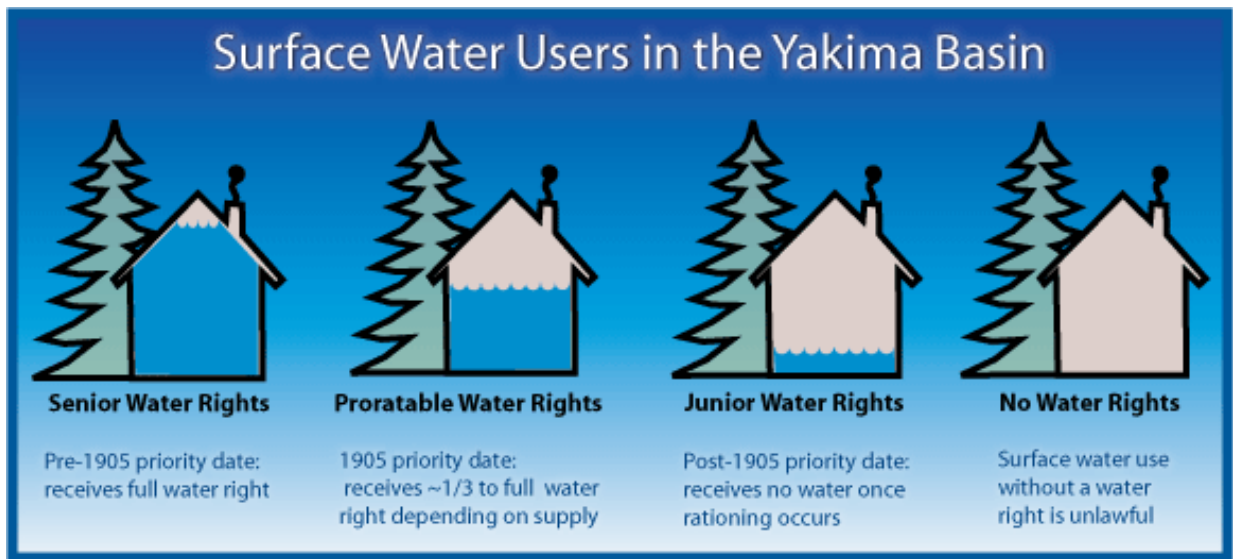


Figure 3: Surface water right holders in the Yakima Basin are characterized by their legal access to water as described in each caption. Out of the total water budget, seniors have a right to roughly 1 million acre-feet, proratables, roughly 1 million acre-feet, and juniors, roughly 100,000 acre-feet.

#### *Prorable Water Users*

Proratables are individual water users, municipalities, irrigation companies, and irrigation districts that agreed to participate in the federal government’s Yakima Reclamation Project

initiated on May 10, 1905. By doing so, Proratables enjoy a water right priority date of May 10, 1905.

History of the Yakima Reclamation Project

By the turn of the 20th century, the U.S. Government was interested in developing more of the arid lands in the west. In 1902, with passage of the Reclamation Act, Congress laid the framework for working with western states including Washington State to develop irrigation infrastructure. Hoping to expand productivity, the State of Washington responded by passing an act (codified as RCW 90.40) on March 4, 1905, allowing the United States government to exercise eminent domain to acquire water and property for reservoirs, irrigation works, and rights of way. This act provided a legal basis for the United States to file a *Notice of Withdrawal* claiming all remaining unappropriated water in the Yakima Basin. Washington State supported the withdrawal filed on May 10, 1905, in exchange for federal funds and cooperation with local irrigators to develop extensive irrigation storage and delivery systems.

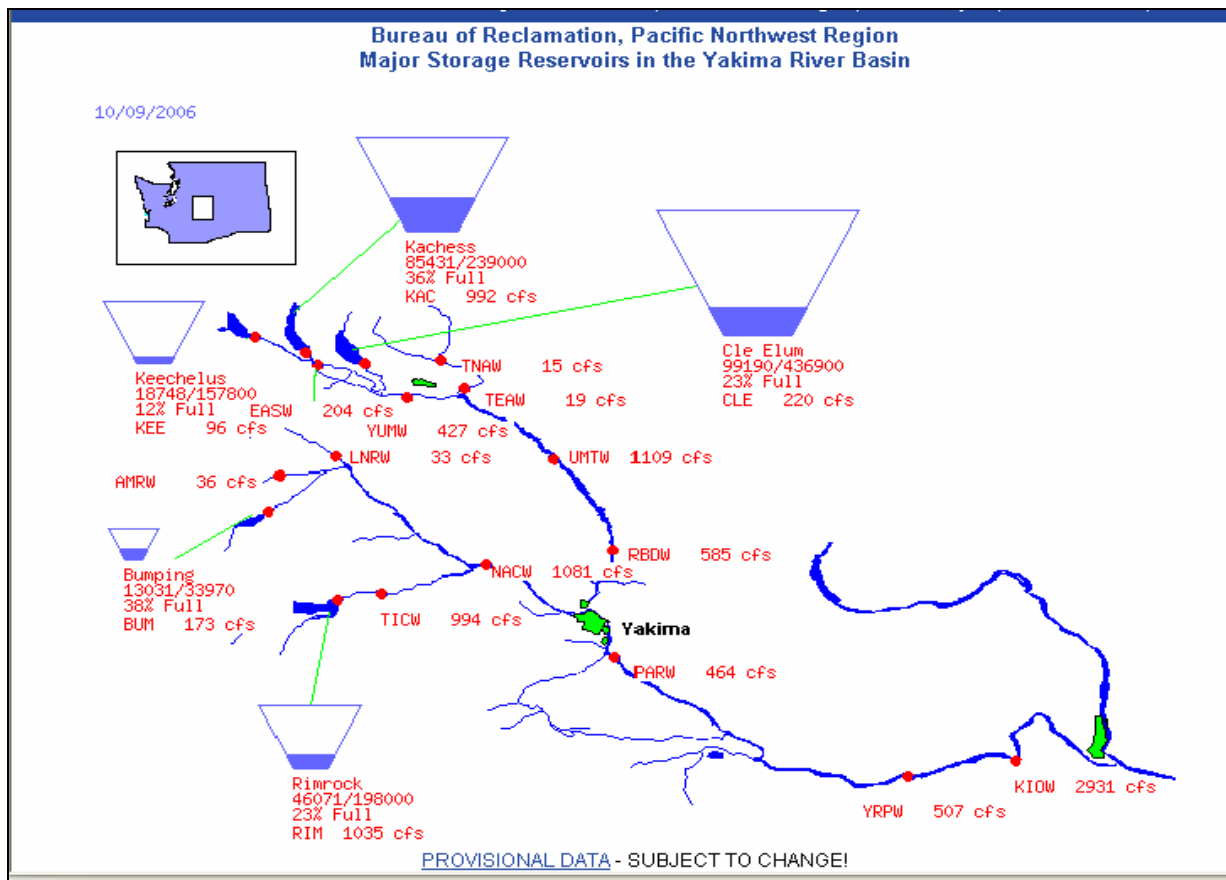


Figure 4: The above diagram is a copy of Reclamation’s website on October 9, 2006 ([www.usbr.gov/pn/hydromet/yakima/yaktea.html](http://www.usbr.gov/pn/hydromet/yakima/yaktea.html)). The partially filled bowls represent that day’s estimated water levels in the five reservoirs. These levels are low because October 9 is near the end of the irrigation season. The red text beneath each bowl describes the fullness of the reservoir with a ratio of current water volume over the maximum volume capacity, and the instantaneous flow in cubic feet per second (cfs). The red dots represent control points at which Reclamation measures stream flow in cfs.

These efforts were all part of the Yakima Reclamation Project. The US government appointed the Bureau of Reclamation to construct and manage reservoirs and delivery systems for the project. They worked with proratables through limiting agreements and contracts for storage and delivery of water. Figure 4 above shows a current view of the five reservoirs that were constructed during the Yakima Reclamation Project.

#### Rationing the Proratables

“Rationing” is the term used to describe Reclamation’s process of reducing the delivery of water to the May 10, 1905 water right holders. Reclamation’s decision to ration proratables is based on its estimate of the Total Water Supply Available (TWSA) in the Yakima Basin. TWSA is a calculation of the volume of water expected to be available to supply water users during the irrigation season. The estimate is based on actual stream flow, snow pack water content, reservoir conditions, and the climatic conditions anticipated between the times TWSA is calculated to the end of the irrigation season. When TWSA is insufficient to meet the full rights of all senior water users, Reclamation announces rationing. TWSA is first calculated on March 1 and is then updated monthly. In dry years, it may be updated twice a month.

Reclamation is contracted to deliver water to those proratable users who hold water rights based on the May 10, 1905 withdrawal. The complex task of managing the quantity of water to be delivered from specific points of diversion is outlined in the 1945 Consent Decree. This decree was the result of a negotiated agreement and federal case designed to settle the water rights of proratable water users and establish a prorationing framework. In 1951, Reclamation’s withdrawal of all unappropriated water for the Yakima Reclamation Project officially ended, but all the water from the withdrawal is now spoken for in the permits and certificates held by proratables.

The Bureau of Reclamation also delivers water to some senior and junior water right holders, making their management duties even more complex. During the early years of construction, Reclamation negotiated limiting agreements with senior water right holders in exchange for water delivery contracts. Senior water users that may have planned to continue expanding their operations or increase their diversion amounts based on senior claims agreed to “cap” their uses. Reclamation is responsible for storage and delivery based on limiting agreements.

#### Yakima River Basin Water Enhancement Project (YRBWEP)

In 1981, Reclamation filed for a new withdrawal to establish the Yakima River Basin Water Enhancement Project (YRBWEP). The project’s purpose is to preserve a priority date for water that may be managed to improve water supply reliability and restore stream flows for fish. In 1994, Congress enacted Title 12, Public Law 103-434 to provide authority for Reclamation to work with Ecology on a variety of storage, conservation, and water right acquisition projects of which YRBWEP is a part. Reclamation has requested extensions for YRBWEP’s completion date, and it remains in effect at the time of this report.

### *Junior Water Users*

There is a third group of water right holders who follow the senior and proratable water right holders known as “junior users.” Junior water right holders as a whole appropriate a much smaller fraction of TWSA than the other two groups of water users in the Yakima Basin. Junior water users are defined as those having priority dates after May 10, 1905. Even though essentially all remaining reliable surface water in the Yakima Basin was officially spoken for by May 10, 1905, individuals still appropriated water after 1905 in hopes of establishing a water right. After 1917, new water appropriations were managed through state-issued permits under RCW 90.03.250.

### *Water Users without Water Rights*

Surface water use without a valid water right has been unlawful since enactment of the state water code in 1917. Valid water rights consist of pre-1917 claims, water right permits, or certificates. Some surface water users without rights assume if the source originates on, or near their property, and is used for domestic purposes, then they are exempt from needing a water right. This misconception may stem from the fact that ground water use for domestic purposes and other small uses are exempt from permitting, but there is no statutory surface water exemption of any kind.

## **Yakima Basin Adjudication**

### *Chronology and Related Events*

In 1977, conflict over water in the Yakima Basin was finally given its day in court. Following the worst drought in the history of the Yakima Reclamation Project, an adjudication of water rights began in Yakima County Superior Court (the Court). A *general water right adjudication* is a legal process conducted through the State Superior Court that determines the validity and extent of existing water rights in a given area. In the Yakima Adjudication, the Court is reviewing all water right claims associated with the Yakima River and its tributaries. Roughly 3.5 million acre-feet of water courses through the Yakima River system each year. To complete the adjudication, the Court must make a ruling on the validity, extent, and priority date of each claim for it to be confirmed as a water right. This large undertaking is still in progress today, nearly 30 years later.

In the beginning, the Court’s first action was to require all surface water users to file claims describing their historical water use<sup>1</sup>. All claimants were grouped into two pathways, subbasins and major claimants. There are 31 subbasins that roughly correspond to the main tributaries of the Yakima River (see Appendix C for a map of the subbasins). Each subbasin’s proceedings have been held separately, like mini-adjudications within the overall adjudication. Major claimants are the larger water users with service areas that cross multiple subbasin boundaries. The Court has conducted hearings and made rulings simultaneously for the subbasin and major claimant pathways.

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<sup>1</sup> Ground water uses were not included in the Yakima Adjudication. However, ground water use can greatly impact surface water. In the future, wells may be scrutinized for their impact on surface water, especially if more frequent droughts occur.

Once the Court addresses all the claims for a particular subbasin, or grouping of major claimants, the judge may issue a Conditional Final Order (CFO). The first CFOs were issued in 1989 for the Tieton and Lake Cle Elum Subbasins. To date there are 29 out of 31 subbasins with CFOs. These orders remain conditional until all the subbasins are complete and a Final Decree is entered for the entire Yakima Basin.

#### Impacts on Domestic Surface Water Users

Camps and cabin owners also participated in the adjudication, filing claims in their respective subbasins. Some claims described recreational uses beginning as early as 1910. The first big wave of cabin construction occurred in the 1930s. Camps and cabin owners that participated in the adjudication were often confirmed water rights dating back 80 years or more. They were later surprised to discover their seemingly old priority dates were not old enough to assure their right to use water during low water years because they are junior to the 1905 proratables.

Some long-standing recreational users do not have confirmed water rights at all because they did not file a claim, failed to appear in court, or because their first use of water began after 1917 and they never acquired a state issued permit for their very small uses. Additionally, confusion over who should file claims for water use on land leased from the U. S. Forest Service kept some water users from participating in the adjudication. Camps and cabin owners with junior water rights were left hoping for heavy winter snows to ensure enough water would be available. And those with no water rights at all found themselves held accountable to Washington's long-standing water code with little remedy on how to achieve compliance and maintain their water use.

#### *Effects of the Adjudication*

The disparity between the "haves" and the "have-nots" during drought conditions is in fact one of the intended purposes of the adjudication. Certainty in who gets water when there is not enough for all makes it possible for the public to reliably plan for their crops, their property, and their families.

Confirmation of water rights in the Yakima Basin has paved the way for a new era of water management. As the adjudication nears completion, conflicts among water right claimants can be brought to resolution. Individuals are now able to lodge formal complaints against those who may be impairing their rights. Before the adjudication, there was not enough certainty in water rights to regulate against junior water users. While the adjudication is still pending, enforcement authority is retained by the Court. Enforcement authority will pass to Ecology when the Final Decree is issued. Ecology currently employs a water master dedicated to researching complaints and reporting his findings to the Court. Some subbasins have stream patrolmen appointed to monitor and regulate water according to confirmed rights. Stream patrolmen will become more common when the Final Decree is issued.

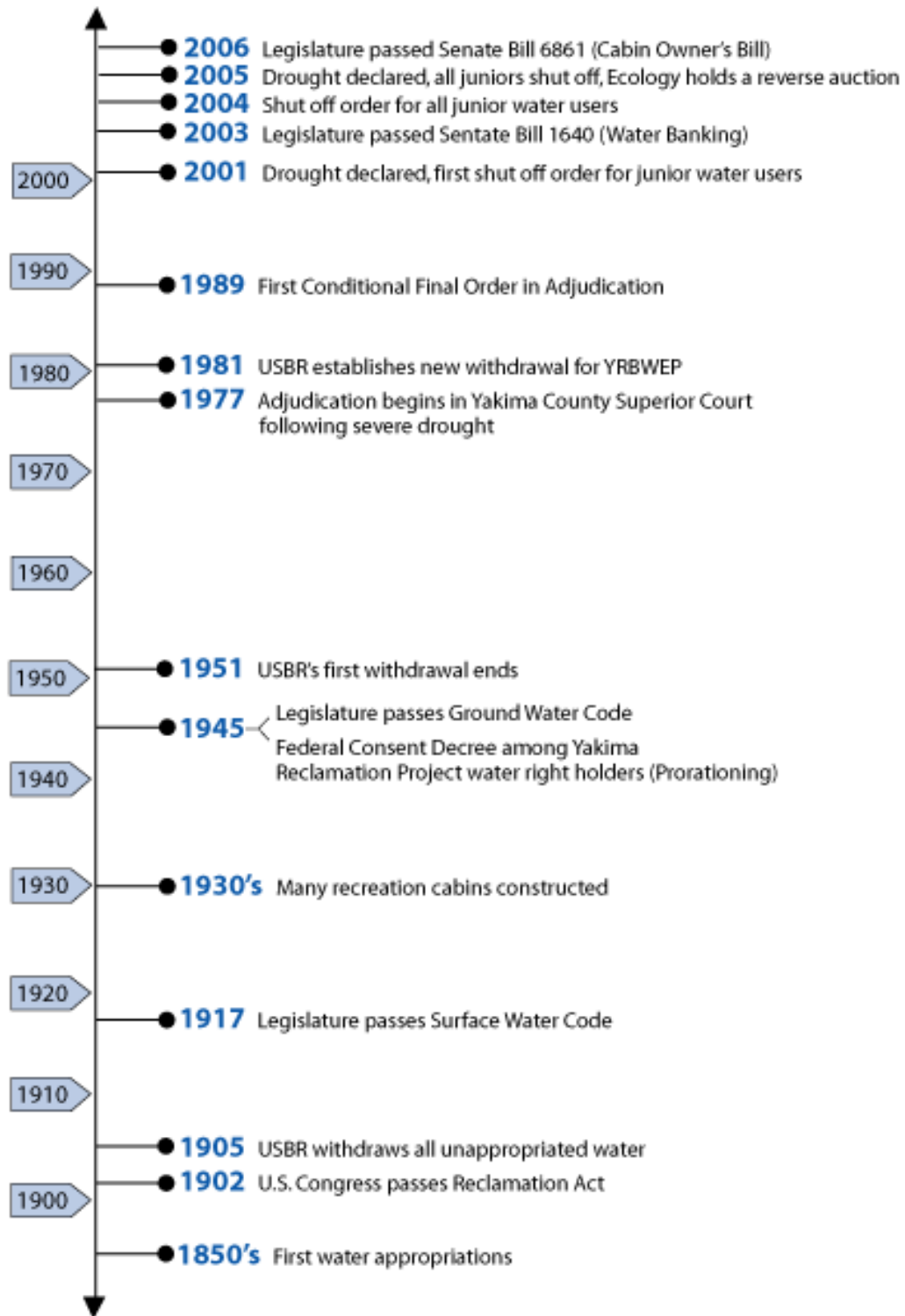


Figure 5: Timeline of Key Water Right Events in the Yakima Basin

## **2001: Drought**

On March 14, 2001, then-Governor Gary Locke declared a statewide drought, based on low snow pack levels in the Cascade Mountains and dry weather forecasts. Water levels in Reclamation's reservoirs were extremely low and proratables faced rationing down to 34% of their water allotments. In response, Roza Irrigation District (Roza), one of the largest proratable users, petitioned the Court on May 25, 2001 to shut off junior water users while Reclamation was rationing proratables in favor of senior water rights. Roza's petition to assert its May 10, 1905 priority date was later joined by Kittitas Reclamation District, Kennewick Irrigation District and the Sunnyside Division.

As a result, the Court entered an *Order on Show Cause RE: Motion to Limit Post 1905 Water Rights for the 2001 Irrigation Season* stating that junior diverters on the Yakima River and its tributaries be completely shut off when Reclamation rations water (See Appendix D for a complete copy of this order). The order pertained only to the 2001 irrigation season and excluded the small fraction of users diverting water for in-house purposes. Domestic users were excluded to give them an opportunity to find alternative water sources before the next drought or rationing period. The 2001 order was the first regional regulatory action made possible by a nearly complete adjudication. Water users across the Basin were reminded that May 10, 1905 marks the critical date separating the haves and the have-nots.

The Court directed Ecology to enforce the order by notifying junior water users of the shut-off order. As part of its mandatory compliance program, Ecology made field visits and reported water users' status to the Court. Junior water users that had participated in the adjudication were known with certainty by the Court. Ecology sent letters with a copy of the Court's order notifying junior water users to shut off. While no database of users without water rights exists, the Court's order began to raise awareness that such uses would be more scrutinized than they had in the past.

## **2003: Ongoing Efforts to Find Solutions**

The 2001 shut-off order heightened awareness concerning water uses in Washington State. When similar dry conditions developed in the early spring of 2003, then-Governor Locke responded by signing House Bill 1640: *Trust Water Right Program for Water Banking in the Yakima Basin*. Water Banking is a management tool that allows for water purchased by the state and/or water users to be stored in reservoirs to compensate for out-of-priority uses during dry years. As a first step, the bill directed Ecology to compile input from water users and identify areas most in need of new water management strategies. The report was due back from Ecology in 2004.

## **2004: No Drought, But Prorating**

2004 proved to be yet another dry year, but even though the reservoirs were low and Reclamation planned to ration water, an official drought was not declared. In the spring of 2004,



Roza Irrigation District and other proratable users again petitioned the Court to shut-off junior water users. Unlike in 2001, this petition extended the request for shut off of domestic users and was not limited to the 2004 irrigation season, but extended into the future, whenever Reclamation rations proratables. Water managers and water users discussed many solutions, but without an official drought declaration, state funds were not available to purchase water for regional mitigation efforts. Instead, efforts to mitigate for out-of-priority use were conducted on a smaller scale.

#### *Temporary Relief for Domestic Surface Water Users*

Camps and cabin owners were particularly angered and inconvenienced by the shut-off order. Summer camps faced total closure. In response to the need for water, Selah Moxee Irrigation District (SMID) agreed to provide mitigation water for five camps, split between the Upper Naches and Tieton subbasins, for the 2004 irrigation season. On June 14, 2004, SMID donated 0.7 cfs, or 15.2 acre-feet of water to mitigate for the camps' out-of-priority uses. SMID also approached Ecology to help facilitate seasonal water leases for individual cabin owners as well. However, Ecology declined to participate in any transactions with SMID, citing that their asking price for mitigation water was too high.

#### *Illegal Water Use More Scrutinized*

The events of 2004 also increased scrutiny around the issue of illegal water use. As in 2001, the Court's Order focused on junior water users and Ecology was again directed to send shut-off notification letters to junior water users and make field visits. Ecology received many complaints from junior water users citing an apparent inequity in which they were singled out by Ecology, while individuals without water rights continued to use water (except in the rare cases where illegal water users were brought to Ecology's and the Court's attention).

#### *Renewed Interest in Water Banking*

The events of the 2004 irrigation season made the Legislature's call for information on water banking even more urgent. In December of 2004 Ecology submitted its report to the Legislature on *Water Banking in Washington*<sup>2</sup>. Ecology examined water banking in other states and concluded that such an opportunity would greatly benefit water users in Washington State. However, water banking in the Yakima Basin would have limited effectiveness without some flexibility on the part of Reclamation (on behalf of the federal government). For this reason, the ongoing discussions between Ecology and Reclamation were essential in trying to create a structured mechanism for junior water users to compensate for their out-of-priority uses during water-short years.

## **2005: Drought**

Another bleak year was projected for the 2005 irrigation season. Governor Christine Gregoire declared a statewide drought on March 10, 2005. This action made \$2.1 million available from the state Drought Preparedness Account and the Legislature authorized an additional \$8.2

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<sup>2</sup> Water Banking in Washington, Washington Department of ecology, December 2004, publication No. 04-11-030, is available at: <http://www.ecy.wa.gov/pubs/0411030.pdf>.

million in emergency funding. Out of those funds, Ecology used \$308,185 to lease senior water rights for the irrigation season on behalf of junior water users. Qualified senior water rights were organized into a blind, reverse auction. These rights were required to have irrigation as a purpose of use; diversions located upstream from the Sunnyside Canal diversion near Parker, and provide at least ten acres of land to remain fallow through the end of the irrigation season. The goal was to mitigate for the out-of-priority uses of junior water users, while Ecology and Reclamation continued to work on developing a framework for water banking.

One beneficiary of Ecology's efforts in 2005 was the town of Roslyn. Like many water users affected by the shut-off orders, Roslyn has a complex history of water use. Established in 1886, Roslyn was a bustling coal mining town with some of the earliest water uses in the Yakima Basin. However, the Court confirmed a 1906 water right for the town of Roslyn based on the date they moved their surface water diversion to another source. Today, the town of Roslyn is the largest municipal water supplier in the Yakima Basin that relies exclusively on a surface water right junior to the Yakima Basin Project of 1905. Roslyn's water system recently underwent costly updates to make it more modern and efficient.

During the 2004 irrigation season, Roslyn was able to mitigate for their uses through a short-term lease of senior water rights from the near-by resort Suncadia, which had surplus senior water rights temporarily available as they developed their resort. However, Roslyn struggled to find a long-term solution. On November 10, 2004, the town of Roslyn petitioned the Court to revise its order limiting post-1905 diversions during periods of water shortage. Roslyn asked the Court to consider municipal use superior to irrigation uses and asked the Court to grant them a right to divert water during rationing. The Court issued a memorandum opinion ruling that Roslyn had up to a three-year transition period to permanently acquire and transfer senior water rights for their town and would need to make appropriate compensation for its out-of-priority water use.

In 2005, Roslyn was again in need of water to mitigate for their use during the irrigation season. The town was in the process of acquiring senior water rights, but could not use them to mitigate for out-of-priority water use until the transfer was complete. With the funds from the Legislature, Ecology brokered a lease of Suncadia's senior water rights as part of Ecology's efforts to mitigate for its out-of-priority use during the 2005 season. At the time of this report, Roslyn is still in the process of acquiring senior water rights.

## **2006: Working with Reclamation**

With a long history of rationing and a recent history of court mandated shut-offs, many water users in the Yakima Basin are concerned about their long term water availability. This sentiment was shared with the 2006 Legislature when recreational surface water users asked their Legislators to help find solutions for their water needs. In March of 2006 the Legislature passed Senate Bill 6861 which directs Ecology to define the scope of residential surface water use and make suggestions to mitigate for out-of priority uses during dry years.

Ecology first examined the most recent efforts assist camps and cabin owners. The seasonal leases provided by SMID in 2004 and Ecology's reverse auction in 2005 were generally sufficient to mitigate for out-of-priority uses and prevent impairment to seniors and proratables.

However, these efforts in 2004 and 2005 fell a bit short of fully meeting everyone's needs. Some users, including Reclamation, expressed concerns that future mitigation efforts must consider the impacts to the entire Yakima Reclamation Project.

### *Impacts on Reclamation's Project*

Reclamation expressed concern that even with mitigation, some post-1905 diverters have an affect on its storage and flow regulating responsibilities. The following scenarios may adversely affect Reclamations operations and should be addressed in any long-term future solutions:

1. Diversions located above Reclamation's reservoirs may intercept water on its way to storage.
2. Diverters that change their season of use, such as changing a right from irrigation to domestic, means that water would be diverted in winter months, when historically it had never been diverted before.
3. Diversions near river control points may require Reclamation to release water from storage reservoirs to meet target flows (required stream flow discharges).

These scenarios may not affect proratables directly, but many changes in local water use may influence Reclamation's greater water management responsibilities.

To resolve these deficiencies, Reclamation offered to work with Ecology instead of trying to find custom solutions for hundreds of water users. Reclamation and Ecology have been working on a Memorandum of Understanding (MOU) since 2003 as part of establishing a Yakima Water Bank. After the 2005 drought, Reclamation and Ecology increased their efforts to complete the MOU. This MOU will allow Ecology to implement a water exchange program to provide permanent solutions for water users without impacting the TWSA (see page 4 for a complete description of TWSA) in the Yakima Basin.

The current MOU draft language describes how Ecology would enter into a contract with Reclamation for water delivery on behalf of individual water users. In exchange, Ecology would then assign Reclamation a water right to be held in the state Trust Water Right Program.<sup>3</sup> For relatively small quantities required for residential and small municipal needs (less than 1,000 acre-feet annually), Reclamation could enter into a contract with reasonable limitations on the State without negatively impacting TWSA and its project operations. If the MOU is finalized, the agencies will negotiate a formal contract (see the latest Draft MOU in Appendix E).

Even though Ecology has been working on water exchange and banking in the Yakima Basin prior to the passage of Senate Bill 6861, other possible solutions for satisfying the water needs of camps and cabin owners have been considered. In this report, Ecology summarizes those four possible options and evaluates the benefits and risks in moving forward with their implementation (see "Options for the Future" beginning on page 18).

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<sup>3</sup> The Trust Water Program is part of the Washington Water Acquisition Program that manages water rights held by the state and kept instream. More information can be found at <http://www.ecy.wa.gov/programs/wr/instream-flows/wacq.html>.

## **EFFORTS TO REACH SURFACE WATER USERS**

### **Public Outreach**

Senate Bill 6861 directed Ecology to “make a reasonable attempt to contact all property owners” who may be affected by the competition for limited water in the Yakima Basin. To accomplish this task, Ecology developed a comprehensive communication and public outreach strategy to identify potential surface water users and encourage them to describe their water needs. These efforts included public meetings, workshops, press releases, website development, mailings and database development efforts documented in the following sections.

#### *Coordination with Cabin Owner Associations*

As soon as Senate Bill 6861 passed, many cabin owner groups that were instrumental in lobbying their Legislators began contacting Ecology. Ecology sponsored a meeting in its Yakima office on May 19, 2006 to discuss implementing the legislation. The cabin owner groups were motivated, solution-oriented, and provided good feedback to Ecology on how best to organize and identify affected water users. Based on that meeting, the following strategy was developed:

1. Use the existing network of cabin owner groups to encourage participation in the study.
2. Develop a survey to collect the information required in the legislation.
3. Develop a mailing list to send out surveys using the resources of Ecology, the Forest Service, the Court, and the Counties (Benton, Kittitas and Yakima).
4. Propose recommendations on “next steps” in the report for the Legislature to consider.

#### *Website Development*

Ecology staff began developing a website<sup>4</sup> for public information and involvement as soon as Senate Bill 6861 was passed. It eventually included the on-line survey, links to the bill, a guide to water demands, public meeting notices, a timeline for Ecology’s study, and contacts for State Legislators. The website (see Figure 6 below) also included an email listserv so interested parties could stay current on Ecology’s efforts to implement the legislation.

#### *News Media Outreach*

Ecology used print and radio ads to increase awareness of the legislation and encourage surface water users to complete surveys. Ecology sent out a news release on June 16, 2006 discussing dry year water issues and provided Ecology’s contact information, a link to Senate Bill 6861, and access to the on-line survey. Stories appeared in the Yakima Herald-Republic and Tri-City Herald, and interviews were aired on local radio and television stations.

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<sup>4</sup> <http://www.ecy.wa.gov/programs/wr/cro/sb6861.html>.

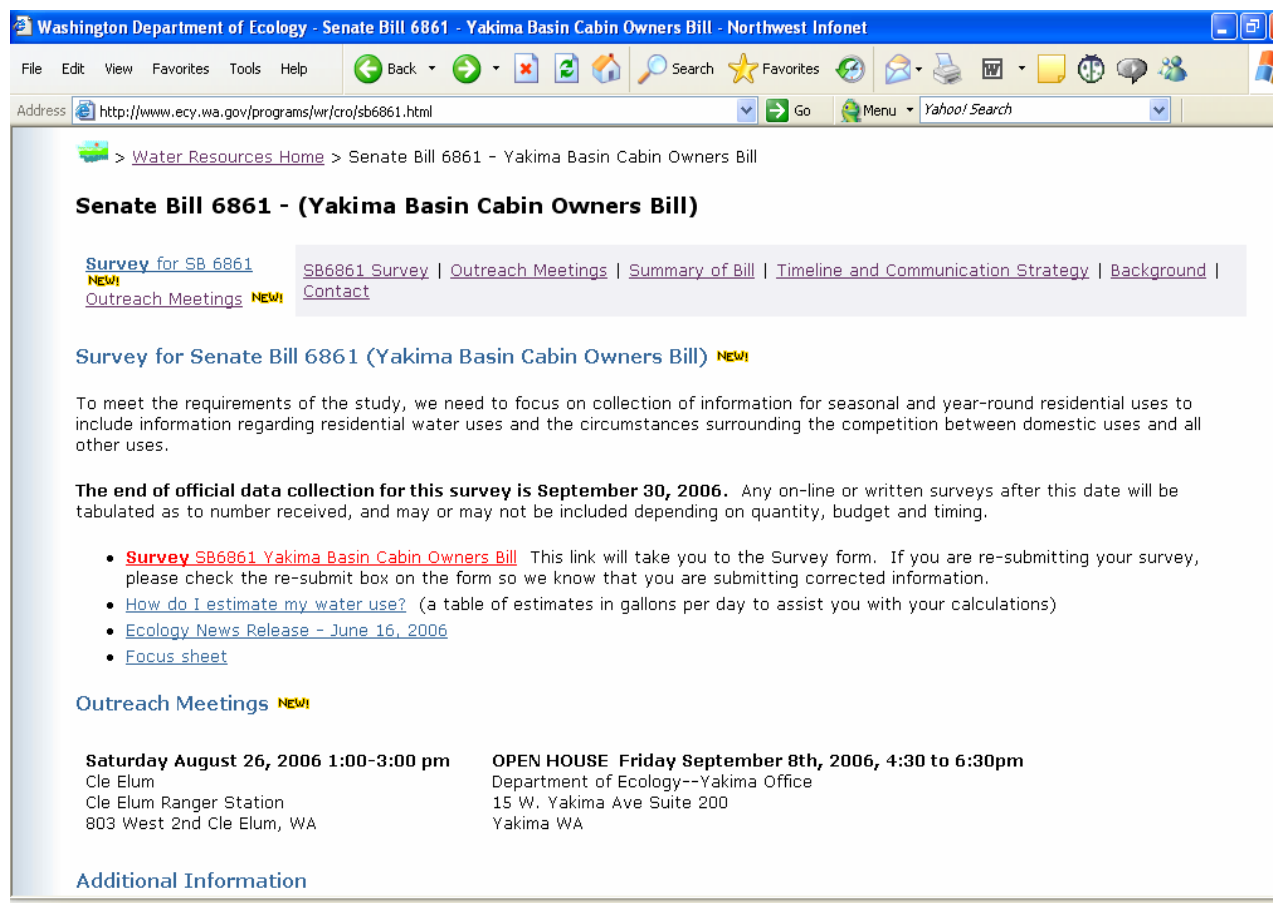


Figure 6: Ecology’s website dedicated to Senate Bill 6861.

The cabin owner meetings and open house were advertised in local papers on both sides of the mountains. These advertisements were condensed versions of the initial news release, containing the on-line survey’s website address, as well as the upcoming public meeting notices.

Advertisements were published in the following newspapers:

- Tacoma News Tribune, August 3, 2006
- Yakima Herald Republic, August 3, 2006
- Ellensburg Record, August 4, 2006
- North Kittitas County Tribune, August 11, 2006
- Washington Newspaper Publishers Association, August 14, 2006  
(77 newspapers statewide, mostly weekly papers)

### *Public Meetings*

In the summer of 2006, Ecology contacted cabin owner associations on the three main tributaries of the Yakima River to set up informational meetings. Whenever possible, Ecology tried to attend cabin association meetings to integrate its presentation with other issues concerning cabin owners. These meetings were advertised in local papers to promote attendance. Ecology staff traveled to each of the mountain passes to host meetings that cabins owners could attend while

visiting their cabins. Meetings were held on the weekends when cabin owner participation was likely to be high. Many of those attending Ecology's meetings were heads of cabin owner groups or associations, who then distributed Ecology's information to their constituencies.

Summer camps on the east side of the Cascades were also invited to discuss Senate Bill 6861. Each of the six camps were contacted and asked when they were available to meet. A meeting was held after hours at Ecology's Central Regional Office for the camp owners and representatives on August 30, 2006.

An Open House was held after business hours at Ecology's Central Regional Office on Friday September 8, 2006. The Open House was designed to give cabin owners that missed the other meetings, as well as the public at large another chance to discuss Senate Bill 6861 and provide input for this report. The following list includes all of Ecology's public outreach opportunities:

- White Pass Cabin Owners annual meeting on Sunday July 16, 2006; 50 people in attendance.
- Chinook Pass informational meeting on Sunday August 6, 2006; 100 people in attendance.
- Cle Elum area informational meeting on Saturday August 26, 2006; 20 people in attendance.
- Camp Administrator's informational meeting on August 30, 2006; 8 people in attendance.
- Public Open House at Ecology's Yakima office on September 8, 2006; 4 people in attendance.

## **Survey for Water Users**

### *Survey Development*

Consistent with the requirements of the legislation, Ecology developed a survey to identify affected water users. Seasonal and permanent residential users were the targeted audience for this survey. The Legislature required the following items to be included in the survey:

- Location of the residence at which surface water is used.
- Number of months that the residence is occupied.
- The amount of water needed for the residence when it is occupied.
- The specific use of the water used by the property owner (domestic, irrigation, and/or other).
- Property owner's contact information.
- Any other relevant information that Ecology determines is necessary for the survey.

Ecology added the following items:

- Type of water source (spring, creek, other).
- Type of system (single or group), and if a group system:

- The system name and number of units.
- Type of water right, if any.
- Space for comments, suggestions, and/or recommendations.

The water use survey has been available on-line since June 16, 2006 (see Appendix B for a complete copy of the survey). Ecology’s goal was to encourage early participation in the survey and to work with cabin owner associations to gather information. Hard copies of the surveys were handed out at all the camp and cabin owner meetings. “Word of mouth” was useful in getting surveys completed early. While Ecology was conducting meetings with camps and cabin owners, it was simultaneously developing a comprehensive database for a mass mailing of surveys to reach all surface water users.

*Survey Mass Mailing*

Ecology’s goal was to encourage as many water users to complete the on-line survey as possible by September 1, 2006. Knowing that an on-line survey would not be enough, Ecology sent out a mass mailing to the following groups:

- Individuals with leases or special use permits from the U.S. Forest Service.
- Individuals that own parcels coded “recreational” from Yakima County, Kittitas County and roughly half of Benton County.
- Junior water right holders and claimants identified by the Court.

In order to “fine-tune” this database and to better reach the target audience with the mass mailing, Ecology tried to eliminate overlapping entries and water users that are likely to be served by city water systems or ground water sources. Based on this database, Ecology sent out 1411 surveys representing 1032 dwellings on September 8, 2006. Along with the survey, each household on the list received an explanation for the survey, a focus sheets, and a return envelope. In response to the mass mailing, Ecology received 353 surveys, added to the 93 surveys entered on-line, for a total of 446 returned surveys. The surveys are separated into the following categories:

- 285 Surface water users
- 113 Well water users
- 33 Dry cabins
- 15 Municipal users

**SURVEY RESULTS**

In total, Ecology sent out 1411 surveys representing 1032 dwellings in the greater Yakima Basin. Of the 446 returned surveys, 285 surveys were entered by surface water users. Of the 285, 42 surveys were entered by junior water right holders. This number is significant because it allows Ecology to estimate the survey response rate, at least for junior water right holders. Of the 147 individual junior water right holders identified by the court, 42 of them entered surveys, for a

return rate of 29%. This is a high return rate for surveys in general. Unfortunately, this return rate cannot be assumed for water users without water rights. Ecology assumes a return rate of roughly 20% for these users, which is lower due to their lack of familiarity with water rights and fears of being singled out from this survey.

Almost all of the survey respondents had to estimate their water use, because metering information was not available. Survey responders were asked to estimate their gallons per day use and the months they occupy their cabins. Most surveys were fully completed (e.g. who, when, where and how much). However, some individuals tried to estimate water use for all the cabins in their group, but did not identify how many cabins that water served. Others estimated their water use for the whole season instead of gallons per day.

*Estimating annual water use*

Water users without water rights made up 245 out of the 285 surveys received. Ecology estimated this group’s annual water use by multiplying the gallons per day identified on the survey by the number of days the residence was occupied.<sup>5</sup> In cases where a water duty was not provided, Ecology used the table below to estimate water use. With these methods, Ecology estimates that the 245 surveyed water users without rights use 28 acre-feet per year. This estimate is probably higher than in reality,<sup>6</sup> since many cabins are rustic and use very little water. Also, few recreational cabins are occupied 50% of the time, but the estimates are intended to be liberal as to estimate maximum possible water use.

The following table provides guidelines for standardized water use in gallons per day (gpd). These criteria were initially developed by Ecology for mitigation in the 2005 drought and are considered to be liberal estimates of actual use.

<b>Type of Water Use</b>	<b>Total Use (gpd)</b>	<b>Consumptive Use<sup>7</sup> (gpd)</b>
Recreational/seasonal, no irrigation	100 gpd total use	30 gpd consumptive use
Recreational/seasonal, with irrigation	200 gpd total use	140 gpd consumptive use
Full-time/permanent residence, no irrigation	200 gpd total use	60 gpd consumptive use
Full-time/permanent residence, with irrigation	400 gpd total use	280 gpd consumptive use

Estimating consumptive use versus total quantities is important to consider for future mitigation efforts. Considering the range in these estimates, Ecology determined that the actual total water use represented by the surveys ranges from 10 to 30 acre-feet per year for those surveyed without water rights.

<sup>5</sup> The survey did not address the number of days in a year the residence is occupied, so Ecology assumed a 50% occupancy rate. For example, a recreational cabin in use from April to October was estimated to be occupied for a maximum of 105 days a year. If the owners use 100 gallons per day, then the annual use is 10,500 gallons, or 0.03 acre-feet per year.

<sup>6</sup> As a comparison, the American Forks Summer Homes Water Association reported an average use of ~780 gallons per cabin per month of total use from May to September of 2006. Comparatively, Ecology’s liberal estimate for these cabins is 1500 gallons per month per cabin.

<sup>7</sup> Consumptive use is the amount of water that is diverted, but not returned to the watershed through return flows.



Ecology also estimated water use for the 42 surveys returned by junior water right holders. These water users require 7.5 acre-feet per year for their water use. However, estimating all junior water users will provide the Legislature with a more comprehensive view of possible water needs. For this reason, Ecology consulted the Court's records to identify 158 acre-feet per year of consumptive water use as the total confirmed water rights for all junior domestic surface water users.<sup>8</sup> This total includes some larger Class A cabin groups as well as 84 acre-feet for the town of South Cle Elum. This total also includes some outdoor residential irrigation around homes and businesses.

Based on the survey results, Ecology estimates that a total of 200 acre-feet per year is needed to mitigate for all existing domestic surface water users facing curtailment in dry years. This total includes an extra 30 acre-foot margin of error to account for users that did not return the survey. Note that while the response rate was low, it is also likely that the larger users were accounted for in the survey, which leaves many users that are likely to be isolated individuals that use very small amounts of water. The bigger cabin groups are more familiar with accounting for their water use, as in water system plans for the Department of Health.

## **Survey Comments**

Ecology received many comments during the public meetings and as part of the surveys. The following represent some of the common themes presented to Ecology (in no particular order):

1. The water uses being studied are small.
2. The water uses being studied should not have to be metered.
3. The water uses being studied should not require a water right, but rather should be exempt like ground water exempt wells.
4. If a program existed to mitigate for small surface water diversions, users would pay.
5. If a mitigation program is developed it should be simple and affordable.
6. Junior water users and unauthorized water users should be treated the same (e.g. if junior water users are shut-off by the Court, unauthorized water users should also be shut off).
7. Junior water users with adjudicated water rights should be given preference over those without water rights.
8. A solution should be identified soon (more droughts are coming).

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<sup>8</sup> A database of junior surface water users was compiled in 2005 based on court records from the Yakima Adjudication. Their domestic water needs uses were generously estimated to arrive at a maximum total water duty.

## OPTIONS FOR THE FUTURE

This section outlines four possible options the Legislature may consider to resolve conflicts between competing interests for limited water. The options discussed here are water banking, drilling wells, legislative exemption for surface water, and no legislative action. Undoubtedly, the cost of any action or non-action taken by the Legislature may be scrutinized by taxpayers. For this reason, the cost to the state and the cost to water users are discussed, and how the options may affect some water users differently than others.

### Water Bank

Water banking allows those with water rights and those without to benefit from the same action. The Legislature has already authorized Ecology to work on water banking specifically in the Yakima Basin due to its complex, federalized system of storage reservoirs and delivery contracts with a variety of water users all across the basin. Ecology's work with Reclamation to develop a Memorandum of Understanding (MOU) may provide an avenue for water transfers within the Basin's challenging framework (see Appendix E: Draft MOU). In order for the MOU to be effectuated, three elements must be completed:

1. Completion of a Basis for Negotiation<sup>9</sup> (including SEPA, NEPA, and ESA review).
2. Acquisition of a water right or rights to serve as mitigation.
3. Execution of a contract with detailed terms for water storage, delivery, and repayment of Reclamation's costs.

The following scenario demonstrates how the water bank may operate. The State acquires senior water rights and transfers them to the Trust Water Program (temporarily or permanently). Junior water users could enroll in a program to obtain mitigation credit for their out-of-priority water use. With this mitigation, they would not be curtailed when Reclamation rations proratable users. Non-water right holders might also enroll in the program once junior water users have participated.

Compensation is a necessary component of any water bank between buyers and sellers. A water bank managed by Ecology requires funding from the Legislature to acquire one or more water rights to "seed" the bank (the initial deposit). Water rights can then be assigned or transferred as mitigation credits to prospective purchasers (withdrawal from the bank). Funding is also required to hire and retain staff to conduct the day-to-day business of the water bank. The bank could easily be designed to fully recover the cost of water and administrative costs through the sale of mitigation credits.

A key policy decision must also be made: How much of the water bank's operational costs should be subsidized by the state taxpayers versus the users of the water bank? The overall cost

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<sup>9</sup> The Basis of Negotiation begins a process allowing a federal entity to negotiate with other parties like Ecology.

of a water bank depends on the number of individuals it serves, how much water is needed for transfer, and the availability and cost of senior water rights. The first customers of the water bank may be junior domestic water users and then extended to include those with no water rights, and possibly expanded again to include larger water users.<sup>10</sup>

Based on the survey results and Ecology's experience with its current water acquisition program, a one-time initial funding level of \$300,000 would be needed to acquire 200 acre-feet of water at an estimated purchase price of \$1,500 per acre-foot. One full time employee (FTE) would be necessary to develop guidelines for enrolling in the Yakima Water Bank, conduct auctions to seed and run the bank, and handle the day-to-day operational task of running the program. The program could operate by requiring enrollees to pay for the water they use and the program costs (operating as a loan program), or under a one-time authorization by the Legislature with no cost to the enrollees (operating essentially as a grant program). Based on \$1,500 per acre-foot and 0.10 acre-feet per cabin, the average cost for cabin owner to buy mitigation, or water credits, for their water use may be as low as \$150 to enroll in the program.

Also, any diverters having an impact on Reclamation's storage and delivery systems<sup>11</sup> would be required to compensate for the impact by paying a relatively small additional annual fee (tens of dollars). For this reason, Ecology has been working with county governments to coordinate opportunities for concurrent billing with other assessments to maximize efficiency and minimize the cost of the program.

- **Pros of Water Banking:**
  - System is largely in place.
  - Permanent solution.
  - Self-sustaining program if the sale of mitigation credits covers the cost of acquired water.
  - Respects the existing water right priority system.
  - Requires little legislative action to authorize.
- **Cons of Water Banking:**
  - System is fairly complex.

## Drilling Wells

Many of the water users Ecology contacted had considered drilling a well to obtain water rights certainty. Under RCW 90.44.050, small ground water uses are exempt from the water right permitting process (e.g. generally 5,000 gallons per day or less). However, they also expressed that well drilling is expensive, ranging from thousands to many tens of thousands of dollars

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<sup>10</sup> A water bank would need to be structured and managed to observe the constitutional prohibition against the state lending credit to individuals. State funding programs need to provide benefit for the general public. In addition to the broad group of water users who could benefit from a Yakima Basin water bank, such a program could also be implemented to secure habitat and instream flow benefits for fisheries.

<sup>11</sup> For a full descriptions of the kinds of diversions that impact Reclamation, go to page 17: *2006: Working with Reclamation--Impacts to Reclamation's Project* section.

depending on site conditions. If the site conditions are too steep or remote, well drilling may be impossible at any cost.

Drilling an exempt well may provide relief from curtailment in the current legal climate, but in the future, ground water could be subject to curtailment just like surface water if the use is shown to impair other more senior water rights. Wells are assigned a priority date associated with the first use or drilling of the well. A water right holder has the option to transfer their surface water use and priority date to a well. Junior surface water users may choose to transfer their use to a well, but may still be subject to curtailment in the future. At least they would have an older priority date than newly drilled wells in their area.

- **Pros of well drilling:**
  - Statutory authority already exists for drilling wells.
  - Wells may yield better quality water for domestic use than surface supplies.
  - Little to no cost to state taxpayers
- **Cons of well drilling:**
  - Drilling a well may only be a temporary solution in the Yakima Basin since competition for water is very high.
  - Drilling a well does not result in a pre-1905 water right.
  - Well drilling is expensive for water user.

### **Small Surface Water Exemption**

Many of the water users Ecology contacted felt there should be an exemption for small surface water uses, similar to exemptions available in other states (e.g. Oregon, California), and like the ground water exemption in Washington. The Legislature could decide to amend the surface water code with an exemption for surface water. However, such legislation would most likely be prospective, meaning that surface water users would be allowed to divert water under a priority date coinciding with passage of the legislation. A prospective exemption would allow users without water rights to divert water legally during years of plenty, but these newly exempted users and junior water right holders would still be shut off in dry years.

A retroactive surface water exemption would impair the constitutional rights of senior water right holders and would be much more controversial. A retroactive exemption would likely be petitioned immediately by many senior and proratable water right holders. For the purposes of this report, and the list of pro's and con's below refer to a *prospective surface water exemption*:

- **Pros of a surface water exemption:**
  - A surface water exemption would achieve parity between junior water users and those without water rights (a benefit for those without water rights).
- **Cons of a surface water exemption:**
  - A surface water exemption does not solve curtailment of junior water users in water short years.
  - Statutory authority for a surface water exemption does not currently exist.

## **No Action**

The no action alternative is one that should always be considered, even if only for comparison purposes. At the present, Ecology is required to monitor junior water users during dry years. Expanding Ecology's compliance and enforcement program to include hundreds of small water users without water rights is very expensive. Most of these users are dispersed in the mountainous areas of upper Yakima and Kittitas Counties making routine observation and compliance assurance more expensive than the typical duties of a stream patrolman or water master. Several FTE's would be needed to seasonally expand Ecology's monitoring and enforcement staff since curtailment does not happen every year, but there have been three dry years in each of the last four decades (see Figure 2). If Ecology failed to carry out an effective monitoring program, proratable users could again request the Court to impose a remedy to juniors and those without rights causing impairment.

The no action option is also expensive and time consuming for the water user. Currently, the only way to secure a legal right to divert water in dry years is to apply with Ecology to have a senior water right transferred to another user. The transfer process can take 6 months to several years and cost hundreds to thousands of dollars depending on the availability and location of senior water rights. This process is often too challenging and expensive for most small water users to complete. Pooling resources to acquire water rights with the assistance of Ecology appears to be more feasible than "everyone for him or her self."

- **Pros of no action:**
  - No legislative time and effort required.
- **Cons of no action:**
  - Water users only have the option to obtain and transfer a senior water right.
  - Very high cost for enforcement efforts.
  - Surface water users will face future shut offs.

## **RECOMMENDATIONS**

### **Public Comments**

A draft of this report was published on Ecology's website on December 12, 2006 for a two week comment period. An announcement of its posting was sent out by e-mail to those individuals that signed up for the listserv and attended public meetings. These recipients were encouraged to pass the announcement along. During the two week comment period, 20 comments were received and can be reviewed in Appendix F. Two comments endorsed a small surface water exemption, 14 comments endorsed a form of water banking, and 4 individuals made general comments about this process.

## **Ecology's Recommendations**

Based on Ecology's study and the comments submitted by the public, Ecology has reached the following conclusions. Option 1: a form of water banking, is the only option that can potentially help all surface water users facing curtailment in dry years. Water banking is the least expensive option for water users and taxpayers compared to taking no action. This option also has the most potential to resolve a wide variety of future disputes over water rights, and provide certainty for the affected cabin owners.

While water banking includes a complex agreement with Reclamation, much of the planning and negotiations have been completed. Water banking in the Yakima Basin could be fully funded with an initial investment of \$300,000 based on a estimated purchase price of \$1,500 per acre-foot for 200 acre-feet of water rights to mitigate for all out-of-priority domestic surface water uses during dry years. One FTE would be needed to run the operational aspects of the water bank. This sum could be repaid as water users enroll in a program to purchase mitigation credits. The cost to individual water users will vary, but regardless of their circumstances, water banking provides the most certainty for legal access to water and is the most cost effective option.

# APPENDIX A

## Senate Bill 6861

### CERTIFICATION OF ENROLLMENT

#### SENATE BILL 6861

Chapter 170, Laws of 2006

59th Legislature  
2006 Regular Session

SURFACE WATER USES--REPORT

EFFECTIVE DATE: 6/7/06

Passed by the Senate February 14, 2006  
YEAS 47 NAYS 0

BRAD OWEN

\_\_\_\_\_  
President of the Senate

Passed by the House March 1, 2006  
YEAS 98 NAYS 0

FRANK CHOPP

\_\_\_\_\_  
Speaker of the House of Representatives

Approved March 22, 2006.

#### CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 6861** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

\_\_\_\_\_  
Secretary

FILED

March 22, 2006 - 3:03 p.m.

CHRISTINE GREGOIRE

\_\_\_\_\_  
Governor of the State of Washington

Secretary of State  
State of Washington

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SENATE BILL 6861

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Passed Legislature - 2006 Regular Session

State of Washington                      59th Legislature                      2006 Regular Session

By Senators Delvin, Poulsen, Mulliken, Morton and Honeyford

Read first time 01/30/2006. Referred to Committee on Water, Energy & Environment.

1            AN ACT Relating to studying the competing interests of domestic  
2 water users and other water users in regards to limited water supplies  
3 where a curtailment of domestic water right use has been enacted; and  
4 creating a new section.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            NEW SECTION. Sec. 1. (1) The department of ecology shall, by  
7 December 31, 2006, study and prepare a report to the appropriate  
8 committees of the legislature on ways that the department and other  
9 stakeholders can better understand the competing interests of domestic  
10 surface water users and other surface water users in regards to limited  
11 water supplies who are affected by a curtailment of domestic water  
12 right use that has been enacted by a court order.

13            (2) The study conducted under this section shall be limited to  
14 basins currently involved in a water rights adjudication and must:

15            (a) Provide a summary of the circumstances that have contributed to  
16 the competition between domestic water users and other water users;

17            (b) Include a survey involving the owners of the residences; and

18            (c) Recommend suggested legislation or other solutions for



1 resolving conflicts between competing interests for a limited water  
2 resource.

3 (3) The study shall focus on seasonal residential uses; however,  
4 other permanent residences may be included if the owners are  
5 experiencing similar problems.

6 (4) When surveying residents under this section, the department  
7 shall make a reasonable attempt to contact all property owners and  
8 obtain, at a minimum, the following information:

9 (a) The location of the seasonal or permanent residence and the  
10 number of days that the residence is in use;

11 (b) The months that the residence is occupied;

12 (c) The amount of water needed for the residence when it is  
13 occupied;

14 (d) The specific use of the water used by the property owner;

15 (e) The location of the permanent residence of the property owner;

16 and

17 (f) Any other relevant information that the department determines  
18 is necessary for the survey.

Passed by the Senate February 14, 2006.

Passed by the House March 1, 2006.

Approved by the Governor March 22, 2006.

Filed in Office of Secretary of State March 22, 2006.



## APPENDIX B

### Water User's Survey

### Survey: Senate Bill 6861

(Cabin Owner's Bill)

You are being contacted because you either own or lease property that may use surface water for domestic use in Benton, Kittitas, or Yakima County. Since 2001, the Superior Court in Yakima has ordered all surface water users with a right to use water after 1905 to stop during drought years. This year, the Legislature passed Senate Bill 6861 which directs Ecology to study the problem. This survey is being mailed out to those individuals that were confirmed or denied a post-1905 water right, those that applied for permits with the Department of Ecology or the US Forest Service, and those that are identified in county databases as owning property with a recreational parcel coding. The intent of the survey is to generate water use information for the Legislature, as they seek solutions for camps and cabins in the east Cascades that face shut-off during dry years. Those participating in the survey have their chance to be heard and are eligible to be part of the Legislature's future proposal.

This survey is also available on-line at the website for Senate Bill 6861. This page also contains background information and helpful links.

<http://www.ecy.wa.gov/programs/wr/cro/sb6861.html>

Please send the completed survey by September 30<sup>th</sup> to:

Attn: Kelsey Collins  
Dept. of Ecology  
15 W. Yakima Ave, Suite 200  
Yakima, WA 98902

If you have any questions or comments, feel free to contact Kelsey Collins at (509) 575-2640 or by e-mail at [kesi461@ecy.wa.gov](mailto:kesi461@ecy.wa.gov)

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Please provide the required the **\*Required Fields in this survey.**

*Check this box if you are re-submitting the form to provide more information*

**\*First Name:**

**\*Last Name:**

\* Mailing Address:

\* City:

\* State:

\* Phone

\* Postal (Zip) Code:

\* Email Address:

\* Address of Residence using Surface Water

\* Parcel Number

- [Yakima County Parcel Information](#)
- [Kittitas County Parcel Information](#)
- [Benton County Parcel Information](#)

\* Type of Residence   
(recreational, permanent)

\* Months Occupied   
(month - month, All Year)

\* Source of Water   
(springs, creek, other)

\* Type of System  (single user, group)

Number of units if Group

System Name (if applicable)

\* Do you have Outside Irrigation?  YES  NO (choose one)

\* Is the property on Forest Service Land?  YES  NO (choose one)

\* Estimated amount of water used during summer  (gallons per day **during Summer**)

\* Estimated amount of water used during winter  (gallons per day **during Winter**)

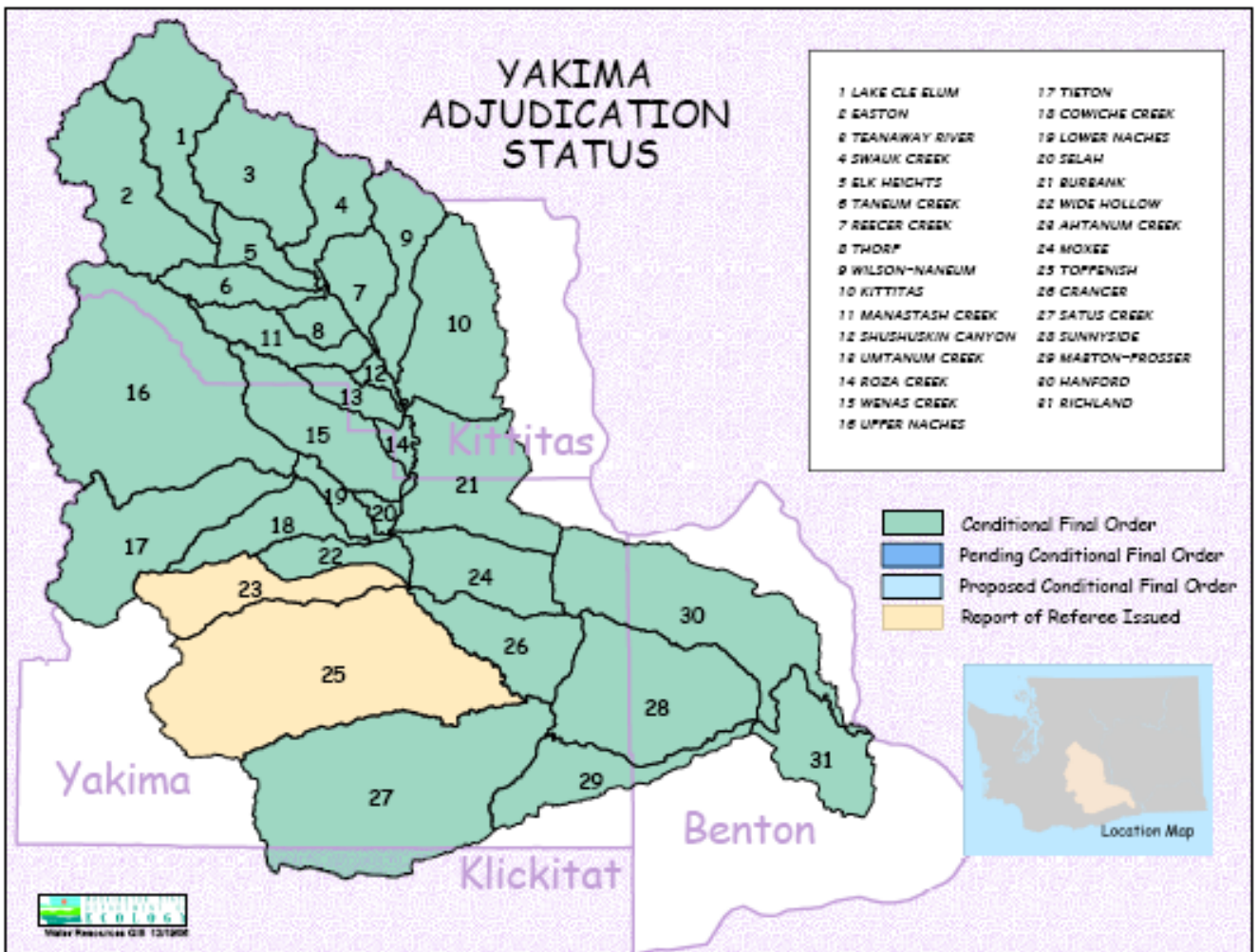
\* Water Right Type  (pre-1905, post-1905, none, unknown)

Comments/Suggestions  You can use this space to provide additional information

## APPENDIX C

### Map of Subbasins in the Yakima Adjudication

This map can be found at <http://www.ecy.wa.gov/programs/wr/rights/adjhome.html#status>, click on the link: “Map of the status of the Yakima River Basin Surface Water Adjudication”.





APPENDIX D

Superior Court Order for 2001 Shut-off

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION )  
OF THE RIGHTS TO THE USE OF THE )  
SURFACE WATERS OF THE YAKIMA RIVER )  
DRAINAGE BASIN, IN ACCORDANCE WITH )  
THE PROVISIONS OF CHAPTER 90.03, )  
REVISED CODE OF WASHINGTON. )

No. 77-2-01484-5

STATE OF WASHINGTON )  
DEPARTMENT OF ECOLOGY )

ORDER ON SHOW CAUSE  
RE: MOTION TO LIMIT  
POST 1905 WATER RIGHTS  
FOR THE 2001 IRRIGATION  
SEASON

Plaintiff, )

v. )

JAMES J. ACQUAVELLA, et al., )

Defendants )

THIS MATTER coming before the Court pursuant to the Motion  
of the Roza Irrigation District to limit the diversions of water from  
the Yakima River and its tributaries by those parties with a priority  
date subsequent to May 10, 1905, which Motion has been joined by  
Kittitas Reclamation District, Kennewick Irrigation District and the  
Sunnyside Division.

It appearing that entire State of Washington is suffering  
drought conditions this year and Governor Locke authorized the

ORDER ON SHOW CAUSE RE: POST 1905 DIVERSIONS

1 Director of the Department of Ecology (Ecology) to declare a  
2 statewide drought emergency on March 14, 2001. It further appearing  
3 that the Yakima River Basin is experiencing particularly severe  
4 drought impacts in this 2001 water year and the April 1 forecast of  
5 Total Water Supply Available (TWSA) predicts that the Yakima  
6 Project's proratable water right holders such as Roza Irrigation  
7 District and the Kittitas Reclamation District are likely to receive  
8 less than 30% of their water right entitlement this irrigation  
9 season.

10           It further appearing that the Court having previously  
11 entered Conditional Final Orders for Roza Irrigation District and  
12 Kittitas Reclamation District establishing the priority dates for the  
13 Districts diversions as May 10, 1905 and the Districts will not  
14 receive the full water supply for the 2001 irrigation season.

15           It further appearing that the Washington State Department  
16 of Ecology (DOE) has reported to the Court through the referee that  
17 the parties set forth in Exhibit 1 to this Order have a water right  
18 with a priority date subsequent to May 10, 1905.

19           It further appearing that the moving parties have advised  
20 the Court that they are not requesting the limited use of water by  
21 the parties on Exhibit 1 for indoor domestic use for human health and  
22 sanitation or for emergency firefighting or fire suppression, be  
23 terminated at this time, to the extent that the parties do not have  
24 water available from another source.

25           NOW THEREFORE IT IS HEREBY ORDERED that those parties set  
26 forth on Exhibit 1 to this Order with rights to divert water from the  
ORDER ON SHOW CAUSE RE: POST 1905 DIVERSIONS



1 Yakima River or its tributaries shall cease diversions of water from  
2 the Yakima River or its tributaries during the 2001 irrigation  
3 season, unless a party has mitigated the diversion by acquiring water  
4 rights with priority dates prior to May 10, 1905 that are transferred  
5 to augment the Total Water Supply Available.

6 IT IS FURTHER ORDERED that at the present time the parties  
7 listed on Exhibit 1, may continue to divert water for indoor domestic  
8 use for human health and sanitation, to the extent that the parties  
9 do not have other sources of water available for such use, provided  
10 that, this shall not be deemed to permit continued use of water for  
11 outdoor irrigation.

12 IT IS FURTHER ORDERED that at the present time, the parties  
13 may use water for emergency firefighting or fire suppression, to the  
14 extent the parties do not have other sources of water available for  
15 such use, provided that, this shall not be deemed to permit continued  
16 use of water for outdoor irrigation..

17 IT IS FURTHER ORDERED that DOE will appoint stream  
18 patrolmen for areas within its jurisdiction for the 2001 irrigation  
19 season to monitor compliance with the Court's Orders and will report  
20 violations to the Court and to the Roza Irrigation and Kittitas  
21 Reclamation Districts.

22 IT IS FURTHER ORDERED that the United States Bureau of  
23 Reclamation (BOR) shall have access to the measuring devices on the  
24 diversions from the main stems of the Yakima River, Tieton River and  
25 Naches River, for the purpose of monitoring compliance with the  
26 Court's Order and in order to provide appropriate information to the

ORDER ON SHOW CAUSE RE: POST 1905 DIVERSIONS

1 Court and to Roza Irrigation and Kittitas Reclamation Districts.

2 IT IS FURTHER ORDERED that this Order applies only to the  
3 2001 drought period and does not set precedent for water diversions  
4 in future years or on any issue including, but not limited to, the  
5 priority, validity and extent of the water right(s) at issue.  
6 Approval shall not be used as evidence of, nor waive any argument  
7 concerning, future curtailment of diversions necessitated by future  
8 shortages or unavailability of water.

9 So ordered this 28<sup>th</sup> day of June, 2001.

10  
11 Walter Stauffacher  
12 WALTER A. STAUFFACHER, Judge

13  
14 Presented by  
15 COWAN WALKER, P.S.

16 By: Thomas A. Cowan  
17 Thomas A. Cowan, WSBA #5079  
18 Attorneys for Roza Irrigation District

19 CONE, GILREATH, ELLIS, COLE & ANDERSON

20 By: John P. Gilreath  
21 John P. Gilreath WSBA #3369  
22 Attorneys for Kittitas Reclamation District

23 FLOWER & ANDREOTTI

24 By: Charles C. Flower  
25 Charles C. Flower WSBA #143  
26 Attorneys for Sunnyside Division

RETTIG, OSBORNE, FORGETTE, ILLER, O'DONNELL & ADAMSON, LLP

By: Brian Eiler  
Brian Eiler WSBA #16150  
Attorneys for Kennewick Irrigation District

ORDER ON SHOW CAUSE RE: POST 1905 DIVERSIONS

## **APPENDIX E**

### **Draft MOU between Reclamation and Ecology**

#### **DRAFT MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION AND THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY FOR WATER EXCHANGE IN THE YAKIMA BASIN**

### **PARTIES**

This Memorandum of Understanding (MOU) is entered into between the State of Washington (State), acting through the Department of Ecology (Ecology) and the U.S. Department of the Interior Bureau of Reclamation (Reclamation).

### **INTRODUCTION AND HISTORY**

In 1945, the Federal District Court for the Eastern District of Washington approved a consent Judgment providing for Reclamation to facilitate diversion of water from the Mainstem Yakima and Naches Rivers to enumerated parties from storage, return flows, natural flows and other sources, denominated as the Total Water Supply Available (TWSA) , according to parties' status as pro-ratable or non-proratable. All parties to the Consent Decree have water rights of May 10, 1905, or earlier priority.

In 1989, anticipating passage of federal legislation pertaining to water conservation in the Yakima Basin, the Washington Legislature enacted Chapter 90.38 RCW, authorizing the Yakima Basin Trust Water Rights Program. The Legislature recognized that the interests of the state would be served by developing programs, in cooperation with the United States and the various water users in the basin, that increase the overall ability to manage basin waters in order to better satisfy both present and future water needs.

In 1994, Congress authorized Phase II of Title XII, Yakima River Basin Water Enhancement Project of 1994, P.L. 103-434, (YRBWEP). Section 1203(i)(2) of Title XII (YRBWEP) reads as follows:

“The Secretary shall, to the maximum extent possible under applicable Federal, State, and tribal law, cooperate with the State of Washington to facilitate water and water right transfers, water banking, dry year options, the sale and leasing of water, and other innovative allocation tools used to maximize the utility of existing Yakima River basin water supplies.”

Similarly, RCW 90.42.100 authorizes Ecology to use the Trust Water Rights Program in the Yakima River Basin for water banking purposes.

Ecology and Reclamation have worked together for more than a decade to jointly identify and fund various conservation projects and water right acquisitions that advance the goals and objectives of Title XII. *Ecology v. Acquavella*, the adjudication of Yakima Basin surface water rights, in Yakima County Superior Court, initiated in 1977, is progressing towards conclusion. The Court has adjudicated thousands of claims to surface water rights in the Yakima Basin and conditionally determined the extent and validity of those rights. Further, the relative priority of surface water rights has also been conditionally determined.

In 2001, the Roza Irrigation District (Roza) first sought curtailment in *Ecology v. Acquavella* of junior users to protect “proratable” water users, like Roza, who rely on May 10, 1905 rights that are based on Reclamation’s initiation of the Yakima Irrigation Project. The Court entered an Order only for the year 2001 curtailing the use of water by certain water right holders with a priority date later than May 10, 1905 (“junior” rights).

In 2003, the Legislature enacted amendments to Chapter 90.42 RCW authorizing Ecology to use the Trust Water Right Program for water banking in the Yakima Basin. These amendments acknowledge the need for Ecology to manage water rights within the Trust Water Rights Program for a variety of objectives associated with transfers of existing water rights and future water uses. The purposes identified for the water bank were:

“To mitigate for water resource impacts, future water supply needs, or any beneficial use under Chapter 90.03, 90.44, or 90.54 RCW, consistent with any terms and conditions established by the transferor, except that return flows from water rights authorized in whole or in part for any purpose shall remain available as part of the Yakima Basin's total water supply available and to satisfy existing rights for other downstream uses and users...”

In 2004, a year of mild shortage, a call for curtailment of post May 10, 1905 rights was renewed with the Court. An Order in *Ecology v. Acquavella* curtailing certain junior rights was entered on June 10, 2004. This Order did not provide an exception for in-house domestic water use. This Order superseded the earlier 2001 Order. On March 11, 2005, the adjudication Court issued an Amended Order that remains in effect. The March 11, 2005 Order Limiting Post-1905 Diversions provides that when Reclamation imposes prorationing among May 10, 1905 rights, certain identified post-May 10, 1905 water users are immediately curtailed. The curtailment of the junior rights remains in effect until prorationing among May 10, 1905 rights ends.

The City of Roslyn filed a motion on November 10, 2004, seeking an exemption from the above Orders for its indoor domestic use. On August 24, 2005, the Court Commissioner in *Acquavella* issued his Memorandum Opinion Re: City of Roslyn’s Motion to Revise Order Limiting Post-1905 Diversions During Periods of Water Shortage.

Under the Order Limiting Post-1905 Diversions, junior users, if they wish to continue their use after prorationing is announced, must find an alternative supply that does not conflict with TWSA-based proratable water rights. Similarly, any new users would need to acquire senior rights if they want reliable access to water.

The senior water right acquisitions and proposed transfers generally lead to changes in point of diversion, place of use, or season of use. Changes in point of diversion and purpose or season of use can impact project operations by changing the location where a call for water occurs along the Yakima River or its tributaries, where return flows find their way back to the natural river course, and in the case of domestic or municipal supplies, when the call for water may occur. In a severe case, the transfers could cause impairment to pro-ratable users by reducing the TWSA. If water is to be transferred downstream a significant distance, the transfer can favorably affect project operations for instream flow improvements. Water transferred upstream for use depletes the river reach between the two points of diversion and can reduce operational flexibility by leaving a gap in flows which can, if necessary, be mitigated through drafts of storage water.

Certain existing users, especially in the upper basin, find their water rights to be inadequate. Others seek water rights, through transfer, for new uses. In both cases, these users may be at continued risk of curtailment of their junior or transferred senior water rights, without the use of Reclamation storage facilities.

Reclamation and Ecology desire to implement a water exchange program to provide a potential solution for these water needs without causing detriment or injury to TWSA-based water rights.

## **PURPOSE, OBJECTIVE AND SCOPE**

Ecology and Reclamation intend to use their best efforts to work collaboratively and in good faith to pursue and implement a program for water banking or exchange that requires the use of Reclamation storage facilities and the delivery of water under subsequent permits between Ecology and identified third-party water users. This program may also resolve supply issues for certain junior water right holders with Post-1905 priority dates, or facilitate transfers for certain senior water rights holders with interests in temporarily transferred trust water rights, and benefit aquatic resources in the Yakima River Basin, without impairing existing water rights, or reduce Reclamation's ability to manage, deliver and protect project water,.

This MOU outlines the relationship between Reclamation and Ecology for the water exchange process. This voluntary intergovernmental MOU is not a contract.

This MOU applies to the Yakima River and its tributaries from Wanawish Dam upstream and outside of the Yakama Reservation.

This document is for internal use only by the Department of Ecology and the Bureau of Reclamation. It does not alter or amend rights, procedures, or programs available to members of the public. Nothing herein affects Ecology's duties under existing law to review each application for the transfer of a water right to ensure that the transfer does not impair the water rights of any party.

## **DEFINITIONS**

“Assigns” means to designate trust water rights for purposes of storage or release of trust water rights pursuant to this MOU and related contracts or agreements.

“Permit” means an approval by Ecology authorizing the beneficial use of public waters under Chapters 90.03 or 90.44 RCW. The permit may be associated or consolidated with Ecology’s approval for a change to or transfer of an existing water right.

“Source” means an aquifer or surface water body, including a stream, stream system, lake, or reservoir and any spring water or underground water that is part of or tributary to the surface water body or aquifer that Ecology determines to be an independent water body for the purposes of water right administration. (WAC 173-152-020(5)).

“Trust water right” means a water right held by the state in accordance with Chapters 90.38 and 90.42 RCW.

“Value” means the amount of water calculated for “source availability matching” as described further in paragraph 7, of the “Water Exchange Management” section below.

## **PROCESS**

1. Ecology identifies the type and location of participants (existing Post-1905 domestic and municipal water users, certain transferred senior water rights requiring mitigation, or new domestic and municipal uses needing mitigation) and quantifies their water demand;
2. Ecology identifies senior water rights to be acquired for mitigation;
3. If the senior right is to be acquired from an individual or entity, Ecology negotiates the conditions of the trust water right prior to placement of the water right into the Trust Water Program (TWP);
4. Ecology issues appropriate instruments associated with the trust water right and accepts the water right or rights into the TWP.

Ecology and Reclamation may then execute a contract or agreement (or similar instrument) to implement the following general procedures:

1. Ecology identifies and assigns interest in the trust water right(s) to the United States as part of a bargained-for exchange for the use of storage and a water exchange agreement.
2. Reclamation will provide a water exchange agreement to Ecology for quantities of stored water commensurate with the calculated value (quantity) of the trust water rights assigned to the United States.
3. Concurrently, Ecology issues a permit to the designated water user as a state action.
4. Reclamation makes water available to Ecology for permits issued by Ecology to the water users. Reclamation is not a party to, nor bound by, Ecology-issued permits or any other agreements between Ecology and the water user under this MOU except to store and release water pursuant to contracts or agreements executed between Reclamation and Ecology. (See below.)
  - a. Ecology will not assign trust water rights to Reclamation if to do so would cause detriment or injury to existing water rights.
  - b. Reclamation would not accept assignment of an interest in any trust water rights that has the effect of increasing the consumptive use of any water right or impairing or reducing the Total Water Supply Available (TWSA) including storage, or undertaking or approving any other action that will have a localized impact on streams or river reaches, including impairing

the Yakama Nation's instream water right, even if such action does not otherwise increase consumptive use of water or reduce TWSA.

## **PRIORITIES**

This program may assist domestic and municipal water users with Post-1905 water rights, or water users who purchase and transfer senior seasonal water rights. The program may also assist certain transferred senior water rights requiring mitigation for impacts which change the location or timing of water use. Because of the relatively small amounts of water required, and pending *Acquavella* special considerations, the initial efforts of this program will focus first on these Post-1905 domestic and municipal water rights and certain transferred senior water rights that qualify for priority processing under Chapter 173-152 WAC where their uses are for domestic and municipal purposes. Subsequent efforts may include other water users.

## **WATER EXCHANGE MANAGEMENT**

1. Ownership: Pursuant to the intended storage and water exchange agreement between Reclamation and Ecology, Ecology will assign an interest in the water right to the United States in exchange for water to be stored on behalf of the Washington State Department of Ecology.

2. Delivery: The trust water right assigned to Reclamation will maintain its elements, including priority date. Reclamation will provide a water exchange agreement to Ecology for further permitting by Ecology to identified exchange program water users while ensuring flexibility, discretion, and protection of all river operations, maintenance and safety needs, and non-program water users and water right holders.

The maximum amount of water to be delivered will be limited to the consumptive amount of water associated with the trust water right exchanged for a contract or agreement under this MOU, less any amount required to benefit fisheries and other aquatic resources identified in Section 3 below.

Further, that amount will be limited to:

- The amount of water available at the original point of diversion of the trust water right assigned to Reclamation;

and,

- The amount of otherwise unused storage capacity in project reservoirs that is available for storage. The amount would be calculated on a month-to-month basis during the irrigation season and would identify a volume of stored water at the end of the irrigation season available for use until the beginning of the subsequent irrigation season.

3. Substantial Environmental Benefit/ Fisheries benefit: Ecology will ensure that a transfer and any new associated or consolidated permit will be prioritized in accordance with the Hillis Rule (WAC 173-152). This objective applies to all water rights placed into the TWP for the purpose described in this MOU.

The instream benefits may be demonstrated in one of three ways:

- a. Ecology acquires the water right(s) from a priority tributary stream identified by the state's water acquisition program or YRBWEP; or,
- b. For rights acquired on the main-stem Yakima River above Parker, Ecology retains from the transferred right a one-third portion of the acquired water right to be managed within the Trust Water Right Program for instream flow purposes to benefit the Yakima River below Parker if consistent with the other provisions of this MOU.
- c. As an Alternative to 3.b., a water user not wishing to convey one-third of the water right for instream flow purposes, may submit a proposal to Ecology and demonstrate the net benefits of that proposal to the natural environment. Ecology will review the proposal and consult with the Yakama Nation and the Washington Department of Fish and Wildlife to determine if the applications associated with the proposal can receive expedited processing in accordance with Chapter 173-152 WAC.

4. Costs: Reclamation will require Ecology to advance funds for its proportionate share of project construction and operation and maintenance (O & M) costs annually. Ecology may allocate proportionate shares of project costs in the price of program water to be charged to the users. (See also, General Provisions, paragraph 3.)

5. Non-Impairment:

- a. Ecology will include in each permit a provision stating that valid priority calls against the source trust water right, based on local limitations in water availability, would result in temporary curtailment of the use of water under the permit until the priority call for water ends.
- b. Ecology and Reclamation agree that implementation of this MOU shall not cause detriment or injury to the rights of other existing water users, and that the execution of any subsequent permits pursuant to this MOU shall not cause detriment or injury to the rights of existing water users or otherwise be inconsistent with this MOU.
- c. The parties intend to continue full use of the Water Transfer Working Group (WTWG) to examine each acquisition and permit for all water rights transferred or changed under this MOU and subsequent contracts or agreements. Ecology will perform an impairment analysis consistent with current procedures for transfers and changes to water rights.

6. Non-use and Reallocation: Where the water user does not beneficially use the water identified and deliverable under this program for its permitted use, Ecology may reallocate that water to another user. Applicants for a permit under this program must demonstrate a bona-fide beneficial water use and a reasonable schedule to put the water to use. If proposed for purposes other than domestic or municipal water supply purposes, infrastructure must be installed as required by the schedule in Ecology's permit or water right change authorization approving the use. For domestic or municipal purposes, the use must be identified in a water system plan if one is required pursuant to Chapters 246-290 and/or 246-293 WAC and infrastructure must be installed as required by the schedule in Ecology's permit or water right change authorization.



7. Source availability matching:

- a. Ecology will maintain an inventory and account of exchange program water rights and their associated permits. Reclamation and Ecology will jointly monitor the performance of this program.
  
- b. Ecology will use generally accepted techniques for calculating the consumptive use and normal return flow characteristics associated with each acquired trust water right. Depending on the circumstances, the consumptive use amount can be a single value expressed as acre-feet per year, or could vary seasonally and be expressed in acre-feet per month, or for short duration could be a single year or single month values based on climate for that period.
  
- c. Permits issued by Ecology will be conditioned to ensure that the quantity of water allowed does not exceed that amount of water available under the acquired trust water right (see POL-1022) and the availability of unused storage capacity to retain the trust water right for later release.

8. NEPA/SEPA Compliance: Reclamation and Ecology agree that contracts or agreements entered into pursuant to this MOU will be both Federal and State actions. Further, Reclamation and Ecology agree that permits between Ecology and water users will be State actions. Each agency will be responsible for its respective environmental compliance requirements.

## **GENERAL PROVISIONS**

1. Nothing in this agreement expands, alters or limits the property or other rights, authority, responsibilities, sovereignty, or jurisdiction of any party. Nothing herein shall act to waive, abrogate, define or diminish the Treaty rights of the Yakama Nation nor the sovereign rights of the State of Washington, the Yakama Nation or the United States.
  
2. Notwithstanding any other provision of this MOU, the parties acknowledge that Reclamation's actions are subject to federal reclamation law, as amended and supplemented, and the policies, rules and regulations promulgated by the Secretary of the Interior under federal reclamation law; and applicable federal law, including but not limited to, the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).
  
3. Notwithstanding any other provision of this MOU, the parties acknowledge that any contract or agreement executed under this MOU where Project benefits are afforded shall be subject to federal reclamation law, policies, and rules and regulations governing recovery of Project costs. The parties further acknowledge that the costs of development, review and approval of proposed actions, including but not limited to, environmental compliance activities preparation, negotiation and execution of or agreements, and any other costs of mitigation determined to be required, shall be incurred by Ecology. Any or agreement executed under this MOU that implements a joint federal and state program, as authorized and directed by federal law and funded through federal appropriations, shall be subject to federal cost sharing laws, policies and practices.

4. Nothing in this MOU is intended to create any right in any entity not a party to this MOU nor shall any entity be considered a third party beneficiary to this MOU. This MOU is not intended to bind or affect any non-signatory party, and the failure of any non-signatory party to object to any provision of this MOU cannot be viewed as waiving, affecting, or prejudicing any non-signatory party's rights, factual arguments, legal arguments or legal positions.

5. This MOU constitutes the entire MOU between and among the parties with respect to the subject matter of this MOU. Any modification of this MOU must be made in writing and agreed to by all the parties.

6. All actions called for by this MOU are subject to and contingent upon the availability and allocation of future federal and state appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals, as needed.

7. This MOU outlines the relationship between Reclamation and Ecology for the water exchange process. This voluntary intergovernmental MOU is not a contract.

**AMENDMENT AND SEVERABILITY**

Ecology and Reclamation enter into and continue this MOU voluntarily and in good faith. This MOU shall be effective upon the signatures of the officials listed below. This agreement may be amended or supplemented at any time by mutual consent of the parties. This MOU is severable from any contracts or agreements that are entered into pursuant to this MOU.

**TERMINATION OF MEMORANDUM**

This MOU is intended to have an indefinite term but shall terminate upon written notice by either Reclamation or Ecology.

**SIGNATURES**

\_\_\_\_\_  
J. William McDonald, Regional Director  
Pacific Northwest Region, Bureau of Reclamation

\_\_\_\_\_  
DATE

\_\_\_\_\_  
Jay Manning, Director,  
State of Washington Department of Ecology

\_\_\_\_\_  
DATE

## APPENDIX F

### Public Comments of Draft Report

#### OPTION 1: Water Banking

The only part of your report that I have concerns about is the amount of surface water that cabins use for domestic use. Actual water use is significantly less than your estimate.

We instated a metering system at the Union Creek Tract a year earlier than was required so you would have real use data, not just estimates. The results were sent to you earlier. I did not include cabin occupancy during the year with the information that I sent earlier. During the 91 days that we reported on the water metering the range of occupancy was 11 to 24%. At this location cabins are usually accessible from mid to late May and winter sets in between early to mid November. In 2006 winter came early and cabins that were not winterized by early November had their plumbing frozen. I know this all to well, since we have to replace all of our plumbing. So basically we can use water in our cabins six months a year.

Our water use was one gallon per day or 30 gallons per month times six months equals 180 gallons per cabin per year. One reason that our use rate is low is that most of us bring our drinking water from home because we do not trust the water from our open spring without boiling it. **Buchholz, C., Union Creek, Chinook Pass**

I am one of the owners in the American Forks Summer Homes Association. As the spokesman for the rest of the owners, I would like to go on record as supporting Option 1 of the WSDOE report. **Desmarais, G.L., American Forks, Bumping Lake**

I wish to go on record in support of option #1. I believe a water bank will be the most effective solution to our problem. I also want to encourage you to revisit your water usage estimates for cabins. My own experience is that cabins use far less water than you project. I can't speak for water users other than cabins but I do know that cabin owners feel your estimates are higher than necessary. I understand that it is better to have more water available than not enough and will support the higher estimate if you have confidence in your numbers. **Berriochoa, M., American Forks Cabins, Chinook Pass**

I am past president of the Teanaway Tract Recreational Association, which is a group of thirteen cabins which use surface water from small unnamed stream beds for domestic water. The drought restrictions on domestic water during drought years presented us with a real hardship. We are very pleased that the Department of Ecology is working hard to find a solution. We Teanaway Tract cabin owners support option number one being proposed by the department. It will provide a realistic, achievable solution for provision of domestic water for cabin owners, camps and other surface water users during drought years. **Burrows, R., Teanaway Tract Recreation Assoc., Cle Elum area**

Phone Message: Mr. Bridges feels that drilling wells is not a good option because it is still taking water from the Yakima Basin, and just makes things more complicated. He supports a water bank. **Bridges, B., Ski-Tur Snoqualmie Pass**

I am writing this letter in support of the Department of Ecology's (DOE) option #1 (water bank) contained in the recent draft report for "Potential Water Solutions for Camps and Cabin Owners". I writing this letter in several different capacities; as a private cabin owner at Rimrock Lake on the east side of White Pass, as President of the Hart Creek Cabin Owners Association representing 33 cabin owners and as Vice President of the Rimrock Cabin Owners Association representing all of the White Pass cabin owner associations with somewhere around 300 cabin owners, most of all if not all with junior water rights. Before my family owned a cabin I never realized the enjoyment that owning a cabin could bring. However, this enjoyment is overshadowed each year by not knowing if a water shortage will be declared and therefore forcing us to discontinue withdrawing surface water. Without water, there is little enjoyment in cabin ownership.

At Hart Creek, we have spent over \$40,000 in the last 8 years upgrading our community water system to meet the current DOE regulations. Now, each year is an unknown. As President of our cabin association, I have spent hundreds of hours dealing with this water issue - attending water court hearings, searching for senior water rights, talking to DOE and Bureau of Reclamation. As evidenced in the Draft Report, summer camps and cabin owners comprise such a very, very, very small amount of the overall water usage. I applaud the efforts of the DOE and Bureau of Reclamation in trying to resolve this problem. I know that it has been a long road but it appears that there is finally a solution – Option #1 (water banking). It was shown 2 (?) years ago when DOE received funding for the temporary purchase of senior water rights that there are sufficient senior water rights available to solve the problem. I have no doubt that each and every cabin owner and camp would jump at the chance to purchase enough senior water rights to put an end to this problem.

In know that one of the issues with option #1 would be receiving sufficient funding from the legislature to purchase senior water rights for the water bank. As a pilot program, why couldn't funds be collected from individual cabin owners, associations and camps in advance of the reverse water right auction as a source of funds. A base price per acre foot could be established prior to the water right acquisition based on the previous acquisition and then recalculated once the final cost is known. In doing this, we would eliminate the need for legislative funding. I am confident that all of the affected water users would participate in a program such as this. The Rimrock Cabin Owners Association would be more than willing to participate in any efforts such as this.

Please place my name on any list you may have for volunteers to help with any aspect of this water issue.

**Frymier, W., Hart Creek, White Pass**

As president of the Rimrock Cabin Owners Ass'n. comprised of 303 cabin owners in the White Pass corridor I am supporting the DOE proposal to the state legislature for the establishment of a Washington State water bank. Having been a part of the water issue questionnaire procedure, having attended public meetings for input, I feel DOE officials have given SB6861 sufficient response and research to justify the water bank concept for legislative action in the next legislative session. Rimrock Cabin Owners recommend the passage of legislation during the next session to resolve the water issues and to establish a permanent solution to the problem cabin owners and others face in the use of domestic water. **Filer, T., White Pass**

Given the alternatives under consideration, I would support the Water Bank approach. I would note that, being a water user residing in Yakima, I implicitly already have a vested right in the water from this drainage/watershed, and as such, I am not clear on why that right cannot move between my residence in Yakima and my cabin, since I cannot use the same water simultaneously at both locations. I have not seen this point considered anywhere in the material I have reviewed, and I believe it would be appropriate to comment on it. **Gaffney, W., Russell Creek, White Pass**

I have a cabin on Bumping Lake and would like to express my support for the proposed option #1 solution of water banking for cabin owners to legalize our use of small amounts of surface water. I own a cabin with a water line feeding two other cabins so I am speaking for them as well. We don't currently have any legal right to the water that I know of and would really like to have that. Our three cabins use very little water as none of these cabins have any plumbing except to the kitchen sink. Thank you for your help. **Halstead, T., Bumping Lake, White Pass**

As President of our Homeowner's Association, and on behalf of Ski-Tur Valley Maintenance Association (STVMA), I would like to let you know that we support Option 1, Water Banking, as the best viable option, and the one that you recommend. STVMA is located in Gold Creek Valley in Upper Kittitas County, near Snoqualmie Pass. We are in the upper reaches of the Yakima Basin, and we feel Option 1 is a good way to resolve the Water Rights Issue during drought or extremely dry conditions. **Haver, J., Ski-Tur Valley, Snoqualmie Pass**

We are cabin owners in American Forks in the Naches Ranger District and support DOE's Option 1. **Hordan, B. & E.**

As a cabin owner and board member of Bear Cove Cabin Association, a member of the Rimrock Cabin Owners Association (303 cabin members strong) and a supporter of the all White Pass corridor users, I am supporting the DOE proposal to the state legislature for the establishment of a Washington State water bank. The availability of potable water is the backbone of health, safety, recreation, education and commerce in the White Pass Corridor. After having been a part of the water issue questionnaire procedure, attendance at water availability public meetings, a small farm owner/operator and a WDM II for over 20 years, I am confident that DOE officials have given SB6861 sufficient research and response to justify the Water Bank concept for legislative action in the next legislative session. **Hoyt, L., Bear Cove, White Pass**

I am a co-owner of Cabin 4 in American Forks Summer homes. I support adoption of Option # 1 proposed by WSDOE in response to the study on Cabin Water Use required by the Legislature in Senate Bill # 6861. I appreciate the work the Washington State Department of Ecology put into this effort. *(This comment goes on to cite the same metering data presented by J. Selby below.)* **Selby, G., American Forks, Chinook Pass**

I am the President of American Forks Summer homes (cabins) and Water Association. We have 21 cabins and two other users (the Chinook Pass Packer and the WS game department cabin) on our water system. As President of the Association, I support the adoption of Option # 1 proposed by WSDOE in response to the study on Cabin Water Use required by the Legislature in Senate Bill # 6861. I would expect that you will receive individual responses from many of the owners. On behalf of the Association, I want to express our thanks for your effort and support! You and your fellow workers are to be complemented!

The American Forks Summer homes Water Association (AFSWA) metered their water usage for five months this past summer and fall. The 23 members (i.e. 23 users) used less than 90,000 gallons of water during the 5 months of measurement. The water usage during the winter drops to Zero or very little since the system is winterized in the fall to prevent freeze-up. Using the 90,000 gallons measured, the AFSWA water usage was an average of 18,000

gal/mo/23 units or ~ **780 gallons/cabin/month**. That is **less** than the estimate used by the WSDOE. However, that is not bad since it makes your estimated impact of water usage conservative! **Selby, J., American Forks, Chinook Pass**

### OPTION 3: Small Surface Water Exemptions

My comments are made from a fairly educated position in that I currently own a cabin above Rimrock lake in the Bootjack Summer home Group on White Pass. I have attended many court hearings to defend our water rights in conjunction with the U.S. Attorney as our water rights are actually held by the United States Forest Service (USFS). From these hearings I have acquired substantial knowledge of Washington Water Law.

While the Washington State Department of Ecology (DOE) has its preferred solution for the situation, I disagree that "Water Banking" is the best option. Water banking grants substantial authority and power to DOE, but is not a fiscally responsible solution. A faulty presumption is made by DOE that Cabins and Camps are causing the United States Bureau of Reclamation (USBR) to incur costs as a result of cabin / camp water use. Most cabins and camps are located above USBR reservoirs and do not make use of any USBR or irrigation district facility. Transfer of water to locations above USBR storage facilities has not been allowed.

DOE would like us and the Legislature to believe that water used at cabins and camps somehow disappears after use, never to be seen again. When in fact any competent Hydrologist will verify that all water returned to the ground above the reservoirs will eventually reach the reservoirs. We as cabin owners and camp patrons are not trucking water to town for use elsewhere! In fact a case may be made that with the copious amounts of liquid beverages brought to cabins and camps for consumption, there is actually a net gain of liquid volume.

Has the USFS been queried as to how they will pay for water banking? The water rights are actually theirs. With my limited experience in Federal budgeting I believe the USFS will either "pass through" the water banking cost to each cabin group or they will see it as a cost of doing business and accept it as their liability as the landlord. Cabins and camps are their customers and also Washington State's customers. Either way the water banking method creates much more bureaucracy on the Federal and State levels, both of which we as citizens and taxpayers want to see shrunk.

I fully support the alternative titled "Small Surface Water Exemption". DOE and the attorneys of the irrigation districts have manufactured this problem. If all water used in the cabins and camps eventually reaches the reservoirs, where is the consumption taking away from someone else?

These Attorneys represent districts made up of many of the very same members who also own cabins. In my small 8 cabin group alone, there are cabin owners with water rights in all of the following irrigation districts. Roza Irrigation District, Sunnyside Valley Irrigation District, Selah-Moxee Irrigation District, Kittitas Irrigation District, and Yakima-Tieton Irrigation District. These people all pay for water in those districts. When they are at their cabins, they are not using water in their home districts. This sounds too much like common sense! Why make these persons pay twice? A Small Surface Water Exemption would relieve the burden of paying twice and it would not require any additional personnel to administer the program.

Some other western states recognize that each person has an inherent right to enough domestic water for their daily personal needs. Whether they be at home, on vacation or at their cabins, camps etc..

I believe that fiscally the "Small Surface Water Exemption" is the best and most cost effective. DOE will never admit it but the issue is actually about control and building their empire. Please exempt small quantity surface water users. Save us all from an ever-expanding bureaucracy. Cabin owners and Camp patrons do not use any USBR or DOE facilities to support their water use. We have done just fine for 60+ years without the State and their bureaucratic form of assistance.

I will leave you with one last thought. Are you putting the Yakama Nation through this same exercise? Why not? **Stiles, R., Bootjack, White Pass**

1) Many cabin owners, including me, are disallowed by our federal use permit from occupying our cabins as a full-time residence. My annual residency averages approximately 30 days, total, during the summer months. (That's 30 days per year, total annual occupancy.) 2) My water usage is for household domestic consumption and includes no irrigation. 3) Water for fire protection should be included in the pending legislation. 4) The water which is consumed is not discharged to a treatment facility, rather, all diverted water flows back into the aquifer from which it came. 5) The minimal domestic water consumption by cabin owners on federal land should be declared non-significant by the Department of Ecology and the State of Washington. 6) Ecology and the State of Washington should establish, preserve, and defend the basic right to domestic water for human consumption. Other states, including California, have established precedent that every human being is entitled, by law, to a guaranteed share of water to sustain life. 7) This basic water right should be provided without fee, except for fees associated with managing and recording of said water right. 8) Ecology and the State of Washington should acknowledge the loss of real property value for any property which is deprived of a water right. 9) Ecology and the State of Washington should draft legislation which will result in a law that guarantees permanent, irrevocable water rights for cabin owners on federal lands. 10) Ecology and the State of Washington should ensure that said water rights are permanent, recorded on the title, and transferable to future owners of the same lot or property when the title to the property is sold or transferred. **R. Aker**

## GENERAL COMMENTS

Thank you very much for the update on the bill and all that the Dept of Ecology is trying to do to solve the small user of water for recreational cabins. American Forks Summer Homes and Water Association does not use as much water as you describe. Any help to solve our water problem long term so that we can continue to be "conservators of our national forests" will be appreciated. **Kanaya, B. and D., American Forks, Chinook Pass**

It would be helpful to clarify that cabin owners who have wells and who have a record of submitting a Water Right Claim are not part of the adjudication. And not part of the Proposed Solutions described in the report. However, it would seem to me that even with a well and claim we could be affected by a water shortage. The well drawing on shallow groundwater could go dry. Then we would be in the same boat as the cabin owner who wants to take a small amount of water from the river. **Craig, P., Indian Flats, Chinook Pass**

I read your draft report and by and large I agree with your recommendation. I do like the idea of a central authority purchasing on behalf of small water users. In essence what you are proposing would be similar to the function of the Denver Water Board in purchasing water rights and developing new water sources for most of Metro Denver, just without the water mains. My exceptions to what you wrote are:

- 1) Where access and geology is sufficient to make wells under 150 feet deep feasible, no surface water rights at all should be allowed to junior users of surface water rights. You are correct in noting the generally greater safety (and stability) of well water, which is especially important for domestic consumption. A creek can be seriously polluted with just one dead animal upstream. The fewer people authorized to divert water the easier enforcement is as well.
- 2) For this small and narrow focused a program one FTE is simply not warranted, especially paid at state salary levels. Perhaps this task can be subcontracted to Roslyn or an irrigation ditch company after the initial water bank creation. At least one seasonal fire marshal is needed to catch and fine for surface water theft which happens with virtual certainty. It will be much easier to catch illegal use if diversions are rarer. Also, I know that in Colorado no well drilling company would risk the fine, which I believe was \$10,000, for drilling a well that was not permitted and registered.
- 3) There is a false underlying assumption that the senior water rights will generally be sufficient, but the global warming projection for the Northwest is periods of greater rain mixed with periods of much more severe droughts. One source of runoff, glaciers, is coming to an end. Indeed a recent projection says there will be no Arctic ice sheet at all by 2060. At some point even adding reservoirs doesn't solve anything because of added evaporation from the expanded surface area. Domestic water use has a practical minimum level of use and can't really be prorated except by not using the cabins and camps. You haven't laid out the details of mitigation efforts or requested the specific legal authority needed. For example, are you going to require waterless toilets if there are multiple consecutive years of drought?
- 4) You would have gotten a more accurate idea of domestic water use if you had asked when the water system was installed (reflects toilet flush size), how many times a day a toilet is flushed plus the number of residents (for estimating drinking and showers). Irrigation usage can be estimated from hours of use and pipe size. You need to identify how to handle a follow-up after the 2007 court ordered deadline for water meters to know if usage matches your estimates, since this directly impacts costs and initial funds needed. Most people are terrible at estimating thing like water use. How many people for example, do you think know that a dripping faucet can leak 150 gallons of water a day? In the coldest mountain parts of Colorado, during winter, most residents deliberately left a faucet dripping to keep the water supply line from freezing. You need some way of knowing if the numbers are reasonable reflections of truth. People also obviously were using less water if they were hauling it from home than they will be if given legal rights.
- 5) Your discussion of comments sent in was too limited and would not even provide a footnote for an environmental impact statement or a commercial use permit. Even if you don't see merit in some of the ideas, that doesn't mean lawmakers will agree with you. The more comments they feel are covered the fewer legislative hearings and outreach needed.
- 6) The price of water to end users seems artificially low. In semi-arid Colorado water is much more valued, you haven't made a case for or against the legislature doing more than providing seed money which might or might not be repaid. I think lawmakers would appreciate more. If a constituent challenges a lawmaker they like to be able to point to an unbiased bureaucrat. Frankly, the overall report seems like it should have more appendices given the time allocated to the study. I am not even clear if the suggested water bank program would be able to exercise eminent domain.
- 7) The Superior Court only ordered meters below 2,000 feet elevation, but all approved diversions should be at the least crudely measured. Otherwise you have no way of knowing if people are living within the scope of their permitted usage.
- 8) You haven't included population growth estimates from the state demographer for the Basin. This is key to anticipating future costs and staffing needs.
- 9) An actual suggested bill worked out with the sponsors of Senate Bill 6861 would make a great Appendix and add weight to the proposal.
- 10) You don't distinguish between importance of uses enough. For example, if a summer camp includes a fishing lake for children to use that is impounded water behind a dam, such a use is central to the function of the camp.
- 11) You haven't discussed the economics or environmental impact of hauling in water either by individuals or commercial water companies with tanker trucks or the water needs of fire fighting. I know near the mountain property we owned in Colorado there was a 10,000 gallon water storage tank for the volunteer fire department to refill a pumper

truck. Some mountain residential areas without adequate aquifers routinely had water delivered for normal suburban household type usage. I assume there is some exemption for water used in fire fighting, but it also impacts what water is left for everyone when it is needed. A big fire can consume a lot of water and one question becomes where the water should come from. The inclination is to send water dropping helicopters to the nearest water that is deep enough.

12) Someone also needs to recommend to the legislator a definition for "to the extent that the parties do not have water available from another source," as this can be described in either economic or geographic terms.

I think you have a workable plan that just needs fleshing out. Your mandate in SB 6861 is the minimum you need to do, not the maximum.

**Johnson, W. L.**

Our water usage is minimal and doesn't effect the irrigation in the lower valley. This water system has been in place and maintained by the cabin owners long before DOE ever existed. We need relief from this intrusion by the state.

**anonymous, American Forks, Chinook Pass**