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September 24, 2020

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

Dear Commissioners Branch, Hover, and DeTro:

**Subject: Comments on Ordinance 2020-6 for the September 28, 2020, public hearing**  
Send via email: [ljohns@co.okanogan.wa.us](mailto:ljohns@co.okanogan.wa.us); [DGecas@co.okanogan.wa.us](mailto:DGecas@co.okanogan.wa.us);  
[spalmer@co.okanogan.wa.us](mailto:spalmer@co.okanogan.wa.us)

Thank you for the opportunity to comment on Ordinance 2020-6. Futurewise works throughout Washington State to support land-use policies that encourage healthy, equitable, and opportunity-rich communities, and that protect our most valuable farmlands, forests, and water resources. Futurewise has members across Washington State including Okanogan County.

The Methow Valley Citizens Council (MVCC) raises a strong community voice for protection of the Methow Valley's natural environment and rural character. MVCC has many members in Okanogan County.

In summary, Futurewise and MVCC support Ordinance 2020-6 and we appreciate that the Board of County Commissioners has adopted the ordinance. Thank you. However Ordinance 2020-6 subsections 2 and 3 must be deleted so that Ordinance 2020-6 complies with state law and meets the needs of Okanogan County. Ordinance 2020-6 must also limit the use of the two cubic foot (cfs) per second reserves to lots created before March 28, 2002, to again comply with state law. Before discussing these necessary changes, we summarize why Ordinance 2020-6 matters.

## Why Ordinance 2020-6 matters

### Ordinance 2020-6 helps to protect the agricultural, tourism, and related industries

The Washington State Department of Ecology worked with Methow Valley residents to prepare the Water Resources Management Program for the Methow River Basin and the Methow Instream Flow

Rule in chapter 173-548 WAC.<sup>1</sup> As part of the community involvement work, a questionnaire requesting opinions on water allocation and future planning was mailed to all addresses in the basin.<sup>2</sup>

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

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

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

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

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

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

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<sup>1</sup> Kris G. Kauffman, P.E. James R. Bucknell, River Basin Program Series, No. 4 *Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. iv (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977) last accessed on Sept. 22, 2020 at: <https://fortress.wa.gov/ecy/publications/documents/7611005.pdf> and enclosed in a separate email with the filename "7611005.pdf."

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at p. 1.

<sup>4</sup> State of Washington Department of Ecology letter to Okanogan County Planning Re: Proposed Revisions to Okanogan County Comprehensive Plan p. 1 (Jan. 2, 2019) enclosed in a separate email with the filename: "Ecology-Comments-Okanogan-County-Comp-Plan-Revision Jan 2019.pdf."

Methow Valley residents “concern that existing low flows, and those that are likely to accompany increased development in the area, will be inadequate to protect the local salmon and sport fishery.”<sup>5</sup>

The Methow Valley residents concerns that future development would displace water needed for farms and ranches, salmon, and sport fish are some of the reasons why the reserves are limited to single domestic and stock uses.<sup>6</sup> Ordinance 2020-6, by adopting interim regulations that prevent improper use of the two cfs reserves, helps keep water in the Methow River and its tributaries. This helps support the agricultural industry, the recreational industry, the Okanogan County economy, and the quality of life of county residents.

### Ordinance 2020-6 helps to protect existing water rights holders, including residents, farmers, and ranchers

Wells are running dry in the Methow Valley.<sup>7</sup> Peter Morgan declares that “[a]ccording to Charles Miller from MVM Drilling, this is happening all over the East Side of the Methow, particularly the south facing slopes where less snow falls or melts off more quickly. Also in the Chelan Valley on the south facing areas there.”<sup>8</sup> Peer-reviewed studies show that wells going dry are a sign of ground water depletion, also referred to as reduced ground water storage.

Our findings suggest that declining groundwater levels are threatening drinking water reliability and agricultural productivity, and consequently, have key implications for both domestic and agricultural water security. Ongoing reductions to groundwater storage are drying groundwater wells in the western US, and this manifestation of water scarcity warrants innovative groundwater management transcending status quos.<sup>9</sup>

Allowing the approval of more lots that violate the Methow Instream Flow rules while existing residential wells are going dry makes no sense.

### Ordinance 2020-6 must apply to all divisions of land including condominiums

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

<sup>6</sup> *Id.* at pp. 1 – 3, p. 10, p. 13.

<sup>7</sup> Declaration of Kent Woodruff p. \*1 (Aug. 24, 2020) enclosed in a separate email with the filename: “Declaration of Kent Woodruff 8-24-20 well went dry.pdf;” Declaration of Randall H. Brook p. \*1 (Aug. 24, 2020) enclosed in a separate email with the filename: “Randy Brook signed Declaration Neighbor well went dry.pdf;” Declaration of Peter Morgan p. \*1 (Sept. 11, 2020) enclosed in a separate email with the filename: “Dry Well Declaration of Peter Morgan Sept 2020.pdf.”

<sup>8</sup> Declaration of Peter Morgan p. \*1 (Sept. 11, 2020).

<sup>9</sup> D Perrone and S Jasechko, *Dry groundwater wells in the western United States* 12 ENVIRON. RES. LETT. 104002 [p. 1] (2017) accessed on Sept. 22, 2020 at: <https://iopscience.iop.org/article/10.1088/1748-9326/aa8ac0> and enclosed in a separate email with the filename: “Perrone\_2017\_Environ.\_Res.\_Lett.\_12\_104002.pdf.” Environmental Research Letters is peer-reviewed. Peer review models on IOP journals accessed on Sept. 22, 2020 at: <https://publishingsupport.iopscience.iop.org/questions/peer-review-models-on-iop-journals/> and enclosed in a separate email with the filename: “Peer review models on IOP journals.pdf.”

The Methow Instream Flow Rule, in WAC 173-548-030(2), reserves two cubic feet per second on seven reaches of the Methow River and certain tributaries for “Single Domestic and Stock Use.” Wells using these reserves are exempt from the water right permitting requirements and have priority over the instream flows.<sup>10</sup> They do not have to be curtailed if the instream flows are not being met in the Methow River or the regulated tributaries. This is important because the instream flows are not met in a typical year.

On March 28, 2002, the Washington State Supreme Court concluded in the *Campbell & Gwinn* decision that single domestic use is use “by a single home,” and not use by several homes, a multiunit residence, or a subdivision.<sup>11</sup> This interpretation is consistent with Ecology’s report on the Methow Instream Flow Rule which defines “single domestic use” as “[w]ater used by a single household including up to one-half an acre lawn or garden irrigation.”<sup>12</sup>

The Planning Enabling Act, in RCW 36.70.692, provides that “county development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules,” including the Methow Instream Flow Rule. In addition, RCW 58.17.110(2), adopted in 1969, requires that proposed subdivisions “shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for ... potable water supplies ...” RCW 58.17.110 requires counties to determine that applicants for subdivisions “have demonstrated that an adequate water supply is legally available before authorizing approval.”<sup>13</sup> Those determinations must protect instream flows.<sup>14</sup> RCW 58.17.060 was amended in 1990 to apply the requirements for written findings that appropriate provisions are made for potable water to short subdivisions.<sup>15</sup>

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

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

Reading these provisions together, we see that RCW 58.17.060 and RCW 58.17.110(2) and (4) require short and long subdivisions using permit-exempt wells to comply with instream flow rules

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<sup>10</sup> WAC 173-548-040(1).

<sup>11</sup> *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002). While this decision was interpreting RCW 90.44.050, the term “single domestic use” is the same as in the Methow Instream Flow Rule. This decision was issued on March 28, 2002.

<sup>12</sup> Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977). See also p. 10 of the report for the same definition.

<sup>13</sup> *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 684, 381 P.3d 1, 16 (2016).

<sup>14</sup> *Hirst*, 186 Wn.2d at 666, 381 P.3d at 7 – 8; RCW 58.17.110(4).

<sup>15</sup> Wash. Laws, 1990 1st Ex. Sess. Ch. 17 § 51.

that regulate permit-exempt wells. RCW 36.70.692 requires the county's regulations for land divisions to include these requirements.

Ordinance 2020-6 subsection 1 requires compliance with the Methow Instream Flow Rule for land divisions as state law requires. We appreciate and support Ordinance 2020-6 subsection 1.

However, Ordinance 2020-6 subsection 2 has the effect of undoing Ordinance 2020-6 subsection 1. Ordinance 2020-6 subsection 2 has this effect because Okanogan County Code (OCC) 16.04.070 exempts various land divisions from the requirement to obtain subdivision approval. More troubling OCC 16.04.070 does not require a determination of water adequacy for these land divisions or any subdivisions. Similarly, RCW 58.17.040 only exempts various land divisions from the requirement to obtain subdivision approval and does not require a determination of water adequacy for these land divisions or any subdivisions. So read literally, since OCC 16.04.070 and RCW 58.17.040 do not require water adequacy reviews for any land divisions or subdivisions, all subdivisions are exempt from Ordinance 2020-6. This does not appear to be the County's intent and so Ordinance 2020-6 subsection 2 should be deleted.

Unfortunately and illegally, Ordinance 2020-6 subsection 3 allows certain short subdivisions to use the two cfs Methow Instream Flow Rule reserves. This violates RCW 36.70.692, RCW 58.17.060, RCW 58.17.110, and WAC 173-548-030. Ordinance 2020-6 subsection 3 must be deleted. Allowing short subdivisions to be created in violation of RCW 58.17.060, RCW 58.17.110, and WAC 173-548-030(2) means that these lots have no legal source of water.

As will be documented in the following section, Okanogan County cannot approve building permits for lots created using the provisions in Ordinance 2020-6 subsections 2 and 3 unless they have a water source other than the reserves in WAC 173-548-030(2). It also means that any wells on those lots are junior to other water rights holder and the instream flows. So these wells are subject to curtailment either by Ecology or a senior water rights holder who cannot obtain the amount of water to which they are entitled. This creates a high level of uncertainty for the lot owners.

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

### **Ordinance 2020-6 must limit the use of the two cubic foot (cfs) per second reserves to lots created before March 28, 2002**

RCW 19.27.097, independent of the subdivision statutes, requires building permits to comply with the instream flow rules. As we have seen, WAC 173-548-030(2), reserves two cfs on seven reaches of the Methow River and certain tributaries for "Single Domestic and Stock Use." This does not

include subdivisions.<sup>16</sup> So lots created on or after the date the *Campbell & Gwinn* decision was issued, March 28, 2002, making clear that subdivisions are group uses cannot use the WAC 173-548-030(2) reserves as water sources. They must use other physically and legally available sources of water. RCW 19.27.097 prohibits the county from approving building permits for lots created on or after March 28, 2002 that require water and propose to use the WAC 173-548-030(2) reserves.

While the Land Use Petition Act's (LUPA) 21-day appeal permit would bar appeals of some subdivisions, LUPA does not excuse building permit applications from the requirement to comply with RCW 19.27.097 and the instream flow rules.<sup>17</sup> And those building permits can be challenged under LUPA whether the subdivision was appealed or not.<sup>18</sup>

Perhaps more importantly, like the lots created relying on the reserves in violation of WAC 173-548-030(2), the wells serving these houses are junior to other water rights holders and the instream flows. These wells are subject to curtailment either by Ecology or a senior water rights holder who cannot obtain the amount of water to which they are entitled. This creates a high level of uncertainty for the home buyers and homeowners. This is likely to reduce the price buyers are willing to pay and may make financing for these houses difficult or impossible to obtain at typically interest rates. It may also cause buyers to purpose houses in counties that ensure that new homes have physically and legally available water sources.

Thank you for considering our comments. If you require additional information, please contact Tim Trohimovich at telephone 206-343-0681 Ext. 102 and email: [tim@futurewise.org](mailto:tim@futurewise.org) or Lorah Super at telephone 509-997-0888 ext. 2 and email [lorah@mvcitizens.org](mailto:lorah@mvcitizens.org)

Very Truly Yours,



Tim Trohimovich, AICP & WSBA No. 22367

**Director of Planning and Law**



Lorah Super

**MVCC Program Director**

Enclosures (in additional emails)

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<sup>16</sup> *State Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002); Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977).

<sup>17</sup> RCW 36.70C.130.

<sup>18</sup> RCW 36.70B.020(4); RCW 36.70C.020(2)(a); RCW 36.70C.030(1).