



## BOARD OF YAKIMA COUNTY COMMISSIONERS

Regular Meeting  
Work Session

Friday, July 7, 2023, at 9:00 am

BOCC Conference Room, Room 232, 128 N 2nd Street, Yakima, WA 98901 or Zoom

Yakima County Welcomes You to Join Our Open Public Meeting In-Person or Virtually.

**Meeting Link:**

<https://us06web.zoom.us/j/84767080878?pwd=MjBKcjFsRmpWYik1NW9qU1V4VnVFdz09>

**Meeting ID:**

847 6708 0878

**Meeting Passcode:**

352892

**Meeting Phone Number:**

1-206-337-9723 (ID & Passcode Above)

1. CALL TO ORDER

2. PUBLIC COMMENT

If you would like to speak during Public Comment, please raise your hand or if on Zoom type your name in the chat box and the Commissioner will call on you in order. Written communication and e-mail messages are encouraged and should be sent to the Clerk of the Board at least 24 hours prior to the meeting at [JULIE.LAWRENCE@CO.YAKIMA.WA.US](mailto:JULIE.LAWRENCE@CO.YAKIMA.WA.US).

3. PROPOSED AMENDMENTS TO YCWRS (60 Minutes)

- Tom McDonald to present his final legal opinion of the proposed amendments.

Documents:

[YCWRS MEMO.PDF](#)

4. HUMAN RESOURCES UPDATE (15 Minutes)

5. ASSIGNED COUNSEL (30 Minutes)

- o Paul Kelley to discuss DAC office space in GAB.

6. AGENDA ITEM REVIEW (10 Minutes)

Review of all Agenda items Submitted for Tuesday's Regular Agenda Meeting.

7. ALLOWING COURTHOUSE USAGE AFTER 5PM (20 Minutes) - Commissioner Curtis

- After Hour Usage
  - Planning Commission - BOCC Basement Conference

Room

- Court Weddings - Courts

- Taskforce to Review Options

8. EXECUTIVE SESSION (20 Minutes)

The Board will meet in executive session for a discussion with legal counsel about current or proposed litigation as allowed by RCW 42.30.110(1)(i).

9. EXECUTIVE SESSION (20 Minutes)

- o The Board will meet in executive session for a discussion with legal counsel about legal risks of current or proposed action as allowed by RCW 42.30.110(1)(i).

10. COMMISSIONER UPDATES/ GENERAL DISCUSSION

11. NEW BUSINESS

12. ADJOURN

All work sessions are recorded and will be available to view on the BOCC website at <https://www.yakimacounty.us/AgendaCenter/Board-of-Commissioners-2>.

**M E M O R A N D U M  
CONFIDENTIAL  
ATTORNEY CLIENT PRIVILEGE**

**To: Joseph A. Brusic, Prosecuting Attorney                      File No.: 60752  
Don L. Anderson, Chief Civil Deputy Prosecuting Attorney**

**From: Tom McDonald, Special Deputy Prosecuting Attorney**

**Date: June 30, 2023**

**Subject: Yakima County Code Title 12.08 Updates**

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You have asked me to review and provide a legal analysis of the comments that the County has received in regard to Yakima County's proposed revisions to Title 12.08 of the County Code. In particular, you asked for the analysis of the memorandum from the Taylor Consulting Group which provided comments on behalf of the Yakima County Association of Realtors and the Yakima County Farm Bureau (Taylor comments).

In preparing my analysis, I reviewed Title 12.08 (12.08) with the proposed revisions, the comments to the revisions, and background documents including the Board of County Commissioners Ordinance No. 13-2017 adopted in December 2017 (2017 Ordinance). I researched and reviewed relevant case law, legislation, and regulations. I also reviewed the Yakima County Water Resources System (YCWRS) Background Report, which shows the Board was well informed of the issues that led to creation of the YCWRS.

In summary, based on review and analysis, I find that the comments provide a good critique of several of the proposed amendments. Many of the comments are based on the water code and the exemption from the requirement to obtain a groundwater permit. There is however a failure to also recognize the County's obligations under the Growth Management Act. The County may want to review a few of the proposed amendments based on the comments.

## General Analysis

The 2017 Ordinance as amended went into effect on January 1, 2018. The Ordinance approved amendments to 12.08 in further response to the Washington State Supreme Court's decisions regarding counties planning authority under the Growth Management Act (GMA) regarding water resources. In particular, the Court's decisions in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 256 P. 3<sup>rd</sup> 1193 (2011) (*Kittitas*) and *Whatcom County v. Futurewise, Hirst et al* 186 Wn.2d 648, 381 P.2d 1 (2016) (*Hirst*).<sup>1</sup>

In 2013, after the *Kittitas* decision, the County amended 12.08 creating the Yakima County Water Resources System ("YCWRS"). After the *Hirst* decision, the County adopted the 2017 Ordinance that approved revisions in 12.08 to the YCWRS program. As defined, the YCWRS is a service provided to the public. Specifically, it is currently defined in 12.08.010(23) as follows:

*"Yakima County Water Resource System (YCWRS)" is a water system organized pursuant to RCW 36.94.140, which provides service to the public in the form of "mitigated" or "water budget neutral" water supplies for domestic use through the withdrawal of domestic supply from a groundwater permit exempt well. The service area of the water system is all of the privately held property in Yakima County within the Yakima River watershed except those areas within the corporate limits of a City, within the exterior boundaries of the Yakama Reservation, or within the service areas of Type A and Type B water systems in existence prior to Jan. 1, 2018. The YCWRS holds senior water rights and allows the use of such rights by the public when wells are constructed and metered according to YCWRS procedures.*

The County is now considering additional revisions to 12.08, including revising the definition of the YCWRS. The County received written comments and testimony at a public hearing in October 2022. As stated above, my analysis focuses on the comments in the memorandum for Taylor Consulting Group (Taylor) which focuses on key comments made in the public hearing regarding the proposed amendments and in particular the proposed amendments to the YCWRS.

The Taylor comments make good points. However, while the comments are applicable outside the Yakima River Basin, many of the comments have limited application in the Basin and for Yakima County where all the surface water rights are adjudicated, and where it is well documented that groundwater withdrawals impact the surface waters. With that said, the comments still make several valid points regarding the YWCRS amendments, which I address below.

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<sup>1</sup> The history of the development of the YCWRS is provided in an undated County report titled Yakima County Water Resources (YCWRS) Background Report. A copy of the Report is attached.

I believe it is helpful and important to first consider the overarching question that the comments raise. That is the County's authority to regulate the use of water and specifically, the groundwater uses that are exempt from obtaining a water right permit from the Department of Ecology (Ecology) in RCW 90.44.050 (Exemption). The comments correctly state the law regarding the Exemption. The Exemption allows a person to withdraw up to 5,000 gallons per day (gpd) for domestic and commercial use, withdraw an unquantified amount of water to irrigate ½ acre of lawn and garden, and withdraw an unquantified amount of water for stock. Further, one is not limited to one exempt use and can "stack" the exemptions.

However, the Exemption cannot be read in isolation. As with permitted water rights, the use of water under the Exemption is defined and limited by other laws and regulations. Most notable are the laws and regulations under the GMA. The GMA became law in 1990 and is primarily codified in Ch. 36.70A RCW. The GMA requires cities and counties to develop comprehensive land use planning. A mandatory element in developing comprehensive plans of land use is to provide for the protection of the quality and quantity of groundwater used for public water supplies. RCW 36.70A.070(1). In rural areas, the County plan must govern rural development by protecting surface water and groundwater resources. RCW 36.70A.070(4)(iv).

In reviewing the comments, I believe there is a fundamental misunderstanding of the interplay between the County's role under GMA and the application of the Water Code which Ecology administers under various laws and regulations. In *Hirst*, the Supreme Court analyzed the County's obligations under the GMA with Ecology's administration of the Water Code and specifically the rights afforded persons under the Exemption.

The Supreme Court was unequivocal in its finding that a county has nondiscretionary obligations to address water resource issues in land use planning that are independent of the Water Code and Ecology's regulations. Relevant to this matter, the Court in *Hirst* found that while Ecology is responsible for issuing groundwater permits, the County is responsible for land use decisions that affect groundwater resources. The county makes the determination of whether water is available for land use development. The court held that when read as a whole, the GMA places the burden on counties to protect groundwater resources and requires the counties to assure that water is both factually and legally available. The County cannot and should not rely on Ecology's rules and regulations.

The *Hirst* case involved Ecology's regulation that set minimum instream flows and closed basins from further appropriation for the Nooksack River and its tributaries. The regulation however allowed water use under the Exemption in closed basins. The Court found that under its independent duty under the GMA to protect the water resources, the County cannot rely on Ecology's regulation because the evidence showed that the use of the Exemption under the regulation would impair the minimum instream flows or surface waters closed from further appropriation.

The Court held that in issuing building permits and subdivision approvals, the County must apply the same standards as Ecology does in issuing groundwater permits, which is to recognize the impacts of groundwater withdrawals on surface waters.

The Court did not limit its decision to the protection of the groundwater resources to avoid impairment of instream flows. It held that when making a determination of water availability the County must not allow the impairment of senior water rights resulting from any uses under Exemption. In implementing the YCWRS, Yakima County is seeking to protect impacts to senior adjudicated senior rights. There is no excess water supply in the Yakima River drainage within Yakima County. As stated in the Ordinance, the groundwater is in continuity with the surface water of the Yakima River and its tributaries. Any new groundwater users would necessarily impact the surface water, thereby impairing senior water including instream flow rights held by municipalities, irrigators, irrigation districts, the federal government, and the Yakama Nation, while impacting the Bureau of Reclamations management of the Total Water Supply Available (TWSA) for the Yakima River Basin.

In 2018, the state legislature passed legislation that included a response to *Hirst*. Laws of 2018, Chapter 1. This is also known as the Streamflow Restoration Act and the “Hirst fix”. It is codified primarily in Ch. 90.94 RCW. Relevant sections of the legislation also amended the GMA, Ch. 37.70A, the building code at RCW 19.27.097, and the code regulating the approval of the subdivision of land at RCW 58.17.110. The legislation provides some clarity as to what a county can consider in making a determination of water availability for permit applications of developments that seek to use water under the Exemption. In my opinion, none of these amendments change the obligations of the County under the GMA to protect the groundwater resources and to deny development that would impair senior water rights.

The *Hirst* fix amended the GMA by providing the counties with the discretion to rely on Ecology’s instream flow regulations for the purpose of complying with the mandate under the GMA to consider and protect surface and groundwater resources. RCW 36.70A.590. If the county does rely on Ecology’s in-stream flow regulations, the county development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW when making decisions under RCW 58.17.110 and RCW 19.27.097.

The subdivision code provides the requirements for approval of subdivisions and plats, including provisions for a potable water supply. RCW 58.17.110. The legislation added a section that states that if the water supply is to be provided by the Exemption, 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.

The building code in RCW 19.27.097 was significantly amended in the *Hirst* fix. Generally, it still requires an applicant for a permit for a building that necessitates a potable water supply to provide evidence of available water. If the available water supply is based on the Exemption, the *Hirst* fix provides special requirements for individual water basins defined by Water Resource Inventory Areas (WRIAs). In the Yakima River WRIAs (collectively, Yakima Basins), Ecology may impose requirements to satisfy adjudicated water rights. RCW 19.27.097(1)(e) (Subsection (1)(e)). The legislation also added language that provides that any use of water under the Exemption associated with a water well that is constructed in accordance with the provisions of chapter 18.104 RCW before the effective date of the legislation, January 18, 2018, is deemed evidence of adequate water supply for the purposes of a building permit. RCW 19.27.097(5) (Subsection (5))

Under Subsection (1)(e), the adjudicated rights are the result of the approximate 40 year adjudication of the Yakima Basins in *Ecology v. Acquavella*. The adjudicated water rights include all the surface diversionary water rights, non-diversionary stock water, and the non-diversionary instream flows necessary to protect tribal time immemorial rights to fish. See *Ecology v. Yakima Reservation Irrigation District* 121 Wn.2d 257, 850 P.2d 1306 (1993). The water in the Yakima Basins is fully allocated to these adjudicated water rights, with several irrigation districts subjected to being prorated when storage and required flows in the Yakima River are not adequate to meet all the adjudicated rights.

To protect the adjudicated water rights and avoid any new impacts to the available water supply, Ecology has imposed requirements for all new uses to be fully mitigated in the Yakima basins. As stated above, the Court in *Hirst* held that in issuing development permits a county must apply the same standards as Ecology does in issuing groundwater permits. Therefore, the County is complying with the GMA and the *Hirst* decision in also requiring mitigation for new uses under the Exemption.

The protection of adjudicated water rights in Subsection (1)(e) must also be read with the language in Subsection (5) which as stated above provides that a permit-exempt groundwater withdrawal authorized under RCW 90.44.050 that is associated with a well constructed in accordance with the well construction laws before January 19, 2018 (pre-2018 well), is deemed to be evidence of an adequate water supply in RCW 19.27.097. Subsection (5) has no limitation on its applicability and could be interpreted to allow an applicant for a building permit to not have to show evidence of an available water supply for a new use of water under the Exemption from a pre-2018 well, whether or not the well was first developed for that use. This interpretation could allow impairment to adjudicated water rights from a new withdrawal of water contrary to the intent of Subsection (1)(e) which is specific to the Yakima Basins.

Ecology addresses the applicability of Subsection (5) in the Yakima Basins in the recently adopted Policy No. 2094 (effective December 1, 2022) (Policy 2094). Policy 2094 states that subsection (5) does not apply in the Yakima Basin. This limitation is not consistent with the broad language in subsection (5). Policy 2094's limited application of subsection (5) may however be considered a requirement imposed by Ecology under subsection (1)(e) to protect adjudicated water rights for any new uses of water from the pre-2018 wells.

Policy No. 2094 could also be Ecology's attempt to interpret the intent of the legislature in passing Subsection (5) and to also apply the specific requirement in Subsection (1)(e) to protect the adjudicated rights in the Yakima Basin. Specifically, the question is whether the legislature intended to allow a new use of water under the Exemption simply because there is a pre-1918 well on the property if such use would impair adjudicated senior water rights in the Yakima Basin. At best, the language is ambiguous and confusing, and applying subsection (5) in the Yakima Basin is subject to different interpretations.

Regardless of the application of subsection (5), it is important, in my opinion, for the County to not take action that will impair the adjudicated water rights because there is currently an insufficient amount of water to fully serve all current water rights. During periods of drought, which are getting more common, the irrigation districts served by the Bureau of Reclamation, referred to as the "pro-ratable" irrigation districts, received only about 40 percent of their water supply. These districts would bear the brunt of reductions in flow due to new consumptive uses.

The amendments to YCWRS actually provide an interpretation of subsection (5) and exempt an applicant from showing evidence of an adequate water supply if a structure served under the Exemption was permitted and lawfully established prior to January 1, 2018. This date should be January 19, 2018, if the intent is to apply subsection (5). See proposed amendments in Section 12.08.050(4). In my opinion, the legislature intended to protect the adjudicated water rights in the Yakima Basin, and it is a legally supported and reasonable position to require an applicant for a new use of water under the Exemption from a pre-2018 well to provide mitigation to protect the adjudicated water rights. I discuss below the specific Taylor comments regarding the YCWRS amendments to Section 12.08.050(4).

In conclusion, Yakima County is obligated under the mandatory elements of the GMA, as interpreted by the *Hirst* Court, to provide for protection of the quality and quantity of groundwater by not allowing development through the County permitting process that would impact the water resources to the detriment of senior adjudicated water rights. The County must independently find the water is legally and factually available. In my opinion, the *Hirst* fix did not change the County's obligations. While the amendments to RCW 19.27.095 in the *Hirst* fix leave open for different interpretations, the requirement of providing evidence of an adequate water supply for exempt uses from a pre-2018 well, in my opinion, mitigation is



required for new uses under the Exemption from the pre-2018 wells to protect the adjudicated rights in the Yakima Basins.

### **Review of Specific Comments**

The above analysis responds to several of the comments that are critical of the County's authority under 12.08 and the proposed amendments regarding the implementation of the YCWRS and the regulation of water use under the Exemption. The comments also express concern regarding other subject matters in the proposed amendments. I provide below an analysis of the primary comments by each section of 12.08.

It is important to note as a preliminary matter that the YCWRS is only used when the County is acting on an application for a permit for a proposed development to provide mitigation for new water use under the Exemption.

In section 12.08.010(16) the definition of a public water system is amended to reflect the definition in the State Department of Health rules. The comment states that under 12.08, this definition may limit the ability to connect to approved Group A and Group B public water systems. I do not know why this definition may limit the ability to connect to public water systems, and it is my opinion that it does not. A person should be able to connect to approved water systems that have existing permitted water rights. However, connection to a YCWRS system that is served under the Exemption will need to comply with the requirements of the YCWRS.

In section 12.08.010(23) the definition of a YCWRS domestic well is amended to include minor commercial or industrial uses, such as office or shop restrooms. The comment states that the County cannot regulate the use of water under the Exemption for industrial and commercial uses. This is a correct statement to the extent that the County is not involved in the permitting or approval of the industrial or commercial use under the GMA. As discussed above, the County's duty under the GMA is to not authorize development that would use additional water supply under the Exemption that would not be protective of the groundwater resources and result in an impairment to existing water rights.

Sections 12.08.010(23) and (24) are new definitions of YCWRS Group A and Group B Wells. The comments state that the definitions will include only those Group A and B water systems that utilize the groundwater utility. In regard to the Group A definition, the comments state that the definition will preclude existing water rights from being used for new Group A water systems. It would be helpful to have a more detailed explanation as to why the definition will preclude the use of existing water rights.

Based on the language in the amended definition, I do not agree that it precludes any use of existing water rights for Group A systems. The definition specifically states that the YCWRS Group A Well is a well permitted under the YCWRS, which is defined as providing "service to the public in the form of 'mitigated' or 'water

budget neutral' water supplies for domestic use through the withdrawal of domestic supply from a groundwater permit-exempt well”.

The comment also states that the definition of a Group B well would preclude the use of existing wells and wells in confined aquifers. Again, the definition specifically states that the YCWRS Group B Well is a well permitted under the YCWRS. If the applicant can show that a well is in a confined aquifer, such that it has no impact at all on the surface water, the well may not need to mitigate under the YCWRS. However, in considering any County permit and approval, the County must still comply with the GMA in regard to considering and protecting the water resources. Providing evidence of no impact on the surface water will be difficult based on the hydrogeological studies that show continuity with groundwater and surface water, which is recognized in the Ordinance.

It should be noted that the proposed amends the definition of YCWRS to clarify that it does not apply to non-YCWRS Group A and Group B water systems in existence prior to January 1, 2018, that have not reached the capacity of connections or allowed water exemption,

Section 12.08.020 provides that the utilities division is established under the county public services department to develop, design, and operate county domestic water systems. This section is not being amended. The Taylor comments question the legitimacy of the utility.

The term “utility” is not used in 12.08. However, the YCWRS is defined as being organized under Ch. 36.94 RCW to provide “mitigated water supplies for domestic use through the withdrawal of domestic supply from a groundwater permit-exempt well”. Ch. 36.94 RCW authorizes the County to create a water system which could be described as a utility. A “system of water” means and includes a water distribution system, including dams, reservoirs, aqueducts, plants, pumping stations, transmission and lateral distribution lines, and other facilities for the distribution of water. RCW 36.94.010 (2)(a). In my opinion, 12.08 is properly created and authorized under Ch. 36.94 RCW.

The YCWRS does not deliver water through pipes and pumps. However, it is a program providing mitigated water for water use under the Exemption. The water use is monitored for compliance purposes with meters on the groundwater wells. The meters are owned by the County. The water system is also defined under Ch. 36.94 RCW as any part of the general water system facilities. RCW 36.94.010(2)(c). Therefore, while the YCWRS water system is not the traditional water system of distribution lines and pumps, it could be described as operating as a part of such facilities and governed under 12.08 and authorized in Ch. 36.84 RCW.

In my opinion, the YCWRS is a properly created water management program under 12.08. In addition to Ch. 36.94 RCW, the YCWRS is also acting

under the authority of the state building code, Ch. 19.27 RCW. The YCWRS provides a legal service to meet the water availability requirements of the building permit conditions in RCW 19.27.097 and can have conditions and requirements common with a water system including metering, inspections, and fees.

Section 12.08.050(4) is a proposed subsection clarifying that applicants for a building permit to improve, repair, or replace a residential structure served by an existing permit-exempt well does not need evidence of available water supply if the structure was permitted or lawfully established prior to January 1, 2018. As stated above, this is in my opinion the County's application of the amendments to the RCW 19.27.097(5) under the *Hirst* fix.

The Taylor comments are critical of the specific language requiring that an applicant for a building permit file the application within 60 months from the last use of the Exemption. Taylor's comment is that the 60 months is arbitrary and is an attempt to enforce the state relinquishment laws. Taylor's comment states that this language requires the repairs and replacement of structures within 60 months of the last use of the Exemption from the well. The proposed language actually states that an application for the repairs and replacement must be filed within 60 months of the last use of the Exemption for a structure that was lawfully permitted prior to 2018. It does not state that the repairs and replacement must be completed within 60 months of the last use of the water.

The comment does make a good point because the 60 months is not explained. Taylor's comments associate the 60 months with the relinquishment laws which provides that water right is lost or relinquishment when the water is not used for 5 continuous years (60 months) and such nonuse does not fall with specific statutory exemptions. RCW 90.14.130. Taylor's comment is correct that the County does not have the authority to relinquish a water right. Ecology has that authority. Ecology issues an appealable order relinquishing a right. RCW 90.14.130. Further, under the law, there are causes for nonuse of the water that exempt the right from relinquishment, which Ecology has the sole authority to determine. However, I do not read the proposed amendment in 12.08.050(4) as the County attempting to relinquish any rights.

Statutory relinquishment is applied to water rights established under the laws prior to the enactment of the 1917 water code, rights created by custom, rights established in a general adjudication, diversionary riparian water rights, and rights obtained through the permit process under RCW 90.03.330, RCW 90.44.070 and 080. See RCWs 90.14.160, 170, and 180. Under Ch. 90.14, the rights established under Exemption are not identified as those rights specifically subject to the statutory relinquishment based on 5 years of continuous nonuse of the water. This does not foreclose the loss of any such right under common law abandonment which provides for the loss of a water right if it is stopped being used and the intent was to abandon the use. See *Okanagan Wilderness v. Town of Twisp*, 133 Wn.2d 769, 947 P 2d 732 (1997).

Regardless of the applicability of the relinquishment statute, Ch 90.14 RCW, the County has a valid concern that if the water use established under the Exemption was abandoned or has not been exercised for an extended period of time, such as 60 months, issuing a building permit that allows the water use for either the original use or for a new purpose under the Exemption without mitigation would cause a new impact on the water resources and impairment to adjudicated rights in violation of the GMA under RCW 19.27.097(1)(e).

The 60 month period is also consistent with other land use regulations that allow uses to continue that would otherwise no longer be authorized under current regulations and zoning. Yet, when those uses cease or expand, they likely will be required to comply with the current regulations and zoning. For example, under the Yakima County Code, a nonconforming use may continue to exist as long as it is not abandoned or discontinued for a period of 18 months. YCC 19.33.060. If the structure or building was destroyed or damaged, and an application for a building permit is filed prior to the 18 months for the same sized and purposed use, the nonconforming use may continue under the new building permit. The YCWRS, as a program is triggered by the County's land use permitting regulations, is providing the same opportunities for the use of water from the pre-2018 wells.

To the extent the County, under 12.08.050(4), is seeking to comply with the requirement of RCW 19.27.097(1)(e) to protect adjudicated water rights from impairment consistent with Ecology's requirements of mitigation in the Yakima Basins for new uses, the 60 month period for the repairs and replacement of a structure since the last use of the Exemption is reasonable and lawful. As explained above, Ecology's Policy No. 2094 provides that RCW 19.27.097(5) which allows a pre-2018 well to be evidence of water availability for the Exemption does not apply in the Yakima Basins. Even though this interpretation is debatable, the Policy also states that in WRIAs where Subsection (5) does apply, Counties may still condition the use of the Exemption with mitigation, metering, and reporting to be in compliance with the GMA. Ecology and the state legislature have the authority to clarify and to seek amendments to the law regarding these pre-2018 wells and specifically, how Yakima County is to implement this law without violating an obligation to not allow impairment of the adjudicated water rights in the Yakima Basin.

Section 12.08.150 requires that any building within two hundred feet of an existing public water system main water line for the purpose of residential, business, industrial, or institutional use chapter must connect to and obtain water from the public water system. The amendment allows the County public services director to grant a variance to this requirement, if it would not be contrary to the public interest and if the requirement would cause peculiar, exceptional, and undue hardship on the owner of the property. This section was in the code prior to the 2017 Ordinance and is not related to the YCWRS. The comment does raise legitimate concerns about the lack of a defined process to obtain the variance

including any ability to appeal. In my opinion, this exception to the connection to a public water system is not intended to be a variance as generally authorized when addressing a hardship for the reasonable use of property in other land use decisions. I recommend that it not be defined as a variance. The public services director should be able to grant an exemption, not a variance, to the connection upon recommendation of staff. There is no legal requirement to provide a right for an appeal.

Section 12.08.440 provides that a YCWRS domestic well permit for a permit exempt well may only be obtained concurrently with a building or land use permit. The amount of water withdrawal permitted shall not exceed 5,000 gallons per day. The comments state that this language may cover uses under the Exemption that the Ordinance and YCWRS cannot and should not cover, such as a building permit for a greenhouse that can use the exemption for irrigation. The General Analysis above addresses the County's authority in this regard to this comment. The County should authorize development that would require a new use of water under the Exemption because of its duty to manage and protect surface and groundwater resources to avoid impairment to minimum instream flows and senior water rights. Further, it is not clear why the amendment would raise the concern stated in the comment when this section relates only to a YCWRS domestic well which is defined as a well that provides water for human consumption and normal household use and minor commercial or industrial uses, such as office or shop restrooms, where the legal withdrawal of water from the well is permitted under the YCWRS.

Section 12.08.440 authorizes liens for all water charges on the property served. The liens will attach upon the public services director certifying delinquencies. The amendment states that the director will issue the certification when the delinquencies are for three years or more. The comment questions the authority of the County to declare liens and whether YCWRS is a utility that has the power to issue liens. Counties do have the authority to declare liens for unpaid charges. I am not clear about the comment's reference to the YCWRS, which as defined is a water system that provides a service in the form of mitigated water rights for withdrawal of domestic supply under the Exemption.

Section 12.08.701 authorizes the County to have free access at all reasonable times to all parts of the buildings, structures, and premises supplied with water from the system of the county, for the purpose of inspecting the condition of water pipes and fixtures used, the manner in which they are being used and the purpose for which they are being used. There is not a proposed amendment to this section, and it is my understanding that it pre-dates the YCWRS. However, the comments challenge this language as allowing unconstitutional searches or illegal trespassing. I do not practice constitutional law regarding unlawful searches and seizures. However, I agree that how the County implements this section could raise the issue of unlawful entry and trespass. Considerations could include requirements to provide prior notice unless, immediate access for emergencies, and conditions of access in the building permit application and permit.

## **General Comments**

In my opinion, the YCWRS is legally sound and should assist the County residents and developments in compliance with the GMA as well as the water code. However, the language and structure of the YCWRS are not easily understandable for those without experience in these areas. The terms can provide some greater clarification. I also believe that while 12.08 can be described as creating a utility and the YCWRS is properly within 12.08, the use of the term “utility” for the implementation of the YCWRS, as defined, creates some confusion. In my opinion, the YCWRS is a water management program within the water system as a whole.

The County has been actively involved in other efforts to address the limitations on growth from lack of water supply. The County is actively involved in the Yakima Basin Integrated Plan. The Yakima Basin Integrated Plan is a collaborative effort that offers a thirty-year approach to meeting the basin’s water needs. Further, the County is planning to develop a water bank with the purchase of senior water rights that will be provided to the YCWRS program for mitigation needs.

The YCWRS will provide the support for the creation of a water bank under a water bank agreement with Ecology. It would be productive to start discussions for eventually replacing the relevant portions of the YCWRS with a water bank or other mechanism to meet the same purpose. I am willing to assist in this regard.

## **Conclusion**

In conclusion, the proposed amendments to 12.08 are in compliance with the law and specifically the County’s authority and obligations under the GMA. There are some amendments that should be revisited. I am available to assist the County with any further amendments. I hope this is responsive to your request. Please let me know if you would like more research and analysis on any of the comments.