



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for  
**Environmental Law & Policy**

July 13, 2007

Mr. Tom Tebb, Department of Ecology  
15 W. Yakima Avenue, Suite 200  
Yakima, WA 98902-3452

Re: WRTS File #: CG4-GWC7601-A@3

Mr. Tebb:

The Center for Environmental Law & Policy (CELP) is a public interest membership organization working to defend and develop ecologically and socially responsible water laws and policies. CELP speaks for the overall public interest in the public's water; its mission is to leave a legacy of clean, flowing water for Washington.

CELP is alarmed by Ecology's decision to approve the change of place of use and purpose of use for certificate 7601-A. This transfer is contrary to Washington law, fails to provide a sufficient technical analysis, and violates the spirit, if not the law, of the Columbia River Water Management Program. Approving this transfer is not in the public interest and is only accomplished through a tortured and illogical interpretation of Washington water law. If allowed to stand, this decision would set a precedent for more ill-advised, ill-conceived, and illegal water transfers.

### **Specific Comments**

#### **1. Given climate change concerns, issuance of water rights for a resort is not in the public interest.**

Consider climate change. The ROE fails to consider the impending impacts of climate change on Washington's water supplies. The threat of harm due to climate change is no longer speculation. As Ecology's Climate Change program notes, "Washington is especially vulnerable to climate change because of our dependence on snow pack for summer stream flows..."<sup>1</sup> Summer stream flows are particularly important in the Columbia River, as those are the crucial months for threatened and endangered fish species. While specific impacts to water resources due to climate change cannot be accurately predicted, sensible precautions can be taken to

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<sup>1</sup> *Climate Change in Washington State*, available at, <http://www.ecy.wa.gov/climatechange/>, last visited July 10, 2007.

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mitigate the effects. One simple and easy method is to ensure any future water withdrawn from the Columbia does not have a negative impact on stream flows during the summer months. This is the approach taken by the recent Columbia River Water Management Program, which forbids any new water rights from the Columbia if they impact summer flows. Ecology must begin to consider climate change when processing change applications.

**2. The new wells do not draw from the same body of public groundwater as the original wells as required by RCW 90.44.100**

Washington water law, via RCW 90.44.100, allows for an amendment to a *groundwater* right for construction of a new or additional well or to change the manner or place of use of the water only if the “additional or replacement well or wells shall tap the *same body* of public *groundwater* as the original well or wells.” RCW 90.44.100(2)(a) (emphasis added). It is clear on the face of the Goroch draft ROE that the proposed new well will not tap the same body of public groundwater as the original well. The original well withdraws water from an aquifer near the Okanogan River. The new well withdraws water from an aquifer 122 miles downstream, near the Columbia River. Further, it is undisputed that these aquifers are not connected to each other. If they were considered the same body of public groundwater the ROE would not have gone through the illogical mental acrobatics it did to draw an unreasonable conclusion that the wells tap the same body of groundwater.

A summary of Ecology’s logic is as follows: 1) the original wells draw from an aquifer hydraulically connected to the Okanogan River; 2) once pumping from these wells stop the exact amount of water formerly pumped from the aquifer will remain in the Okanogan River; 3) this exact amount of water will then travel 122 miles downstream from the Okanogan to the Columbia River without being used;<sup>2</sup> 4) the new wells draw from an aquifer hydraulically connected to the Columbia River; 5) pumping of the new wells will capture water that would otherwise flow to the Columbia River; 6) therefore making this withdrawal one from the “*same body* of public *groundwater*.”

Even using this tortured reasoning, the proposed change fails to meet the standard in RCW 90.44.100. The statute is explicitly simple in its language. The wells must tap the *same body of groundwater*. The statute does not say the new wells must tap a body of groundwater, or equivalent body of groundwater, or even the same groundwater. It requires the new well to withdraw water from the *same body* of groundwater as the original well. The change contemplated in this application has no physical possibility of this happening.

To allow this logic would create a situation that borders on science-fiction rather than science. If Ecology uses this logic to allow this change it should also use this logic in every impairment analysis conducted in which there is hydraulic continuity between an aquifer and a river and every downstream water right holder on the mainstem and tributaries of the river. Further, this logic would allow groundwater right amendments to move a point of withdrawal to essentially

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<sup>2</sup> There is no indication Ecology examined the number of exempt wells, inchoate municipal rights or other water rights along the route to determine whether the transferred water will in fact remain instream.

anywhere in the eastern half of Washington, given that every water right that taps a stream or groundwater body that eventually flows into the Columbia could be considered transferable to the Columbia under this analysis. This would have devastating environmental impacts on the already over-appropriated Columbia, as well as significant potential economic impacts on upstream watersheds. This approach should not be utilized to either approve change applications or mitigation water proposals.

### **3. Purpose of use violations and lack of technical analysis**

The draft ROE proposes to change part of a seasonal irrigation right to a year round municipal right, exacerbating impacts to the Columbia. The technical analysis associated with CG4-GWC7601-A@5 examines potential impacts to the Columbia, but fails to examine the impacts associated with this change. Without an analysis of potential impacts associated with changing a seasonal use to a year round use, this ROE lacks sufficient information necessary to show whether the change will cause impairment to existing rights. Allowing a seasonal change such as this violates Ecology's Water Resources Policy No. 1200(4)(f)(2), which requires that, when processing a change to the season of use of a water right, "the net effect on streamflows and instream values must be neutral or positive." None of the exceptions discussed in this policy apply here, particularly given ESA issues discussed below, nor does it appear that Ecology consulted with or discussed this problem with the Washington Department of Fish & Wildlife.

### **4. Improper Impacts to the Columbia River**

The technical analysis accompanying the draft ROE CG4-GWC7601-A@5 indicates that changing the point of withdrawal and season of use of the Gorocho rights would decrease flows in the Columbia River. While no technical analysis was done for CG4-GWC7601-A@3 it can be assumed, if approved, this change will also impact instream flows. This violates the terms of the Columbia River Water Management Program (CRWMP), Department of Ecology policy and, potentially, the federal Endangered Species Act (ESA).

#### **(a) Columbia River Water Management Program**

The CRWMP, codified at RCW 90.90, states that there should be "no negative impact on the Columbia river mainstem instream flows in July and August." RCW 90.44.030. This language was placed in the CRWMP to protect threatened and endangered fish species during a crucial time of year. The technical assessment associated with CG4-GWC7601-A@5 shows the impact on the Columbia River to be approximately 55 acre-feet per month for July and August.<sup>3</sup> Although the technical analysis fails to consider the impacts to the Columbia River associated with this change application, logic dictates pumping water under this right will further impact instream flows.

The relationship between this application and CRWMP requirements is unclear. However, given that the application will result in an increase in water usage from the Columbia River, it appears that the requirements and limitations of CRWMP should apply. Regardless, RCW 90.90.030

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<sup>3</sup> *Technical Memorandum*, Anna Hoselton, at page 12 (figure 9).

evinces a legislative intent that – *at a minimum* – Columbia River flows should not be depleted during the summer months. That intent is clearly violated in this change application.

**(b) Endangered Species Act**

While no technical analysis exists for potential impacts to Columbia River instream flows associated with this application, it appears that the proposed changes will also violate the Endangered Species Act. If approved, this change will obviously draw more water out of the river during the entire year, including critical summer months. Both the 2004 National Academy of Sciences report (Managing the Columbia River: Instream Flows, Water Withdrawals and Salmon Survival) and the 2000 NOAA Fisheries Bi-Op indicate that additional water cannot be removed from the Columbia during several months of the year without placing endangered species in jeopardy. NOAA Fisheries has established a “no net loss” requirement for Columbia River water appropriations that are subject to federal approval. The draft ROE is deficient for its failure to discuss impacts of increased depletions of flow in the Columbia on salmon survival or ESA requirements.

**(c) Granting a change to a water code violator is not in the public interest.**

On page 4 of the draft ROE, Ecology notes that between 1997 and 2002 Mr. Goroch used water quantities in excess of his authorized rights. The ROE for CG4-GWC7601-A@5 states it was 1999 and 2000 when Mr. Goroch used water illegally. In one five-year period Mr. Goroch violated his authorized quantities 40% of the time.

Furthermore, the information described in the “Site Visit” section of the ROE suggests the drilling and perhaps operation of an illegal well. The ROE notes the applicant’s consultant showed Ecology a well that he claimed to be the project well. However, the ROE then summarily states it is not the project well and subsequent “information from department records and conversations with the applicant and consultant were used to better understand the project.” Ecology must clarify and explain what “information” was used and the details of the “conversations” that defined the project. For what use is the well that is currently on the property being used? Is there a water right associated with this well? When was it drilled and, more importantly, has the applicant been using it?

It is not in the public interest to grant water rights to entities who exhibit a history of illegal water use. There appears to be such a history by Mr. Goroch and Sunsera. The change application should be denied.

We further request that Ecology provide us with information concerning the well on the property. If it is being used, we request that Ecology issue an enforcement order seeking immediate cessation of illegal water use on the Sunsera property.

**(d) History of water use is insufficient to determine whether this right was relinquished**

The investigation of the history of water use associated with this right is insufficient to determine whether part or all of this water was subject to relinquishment. RCW 90.14.180 states that any

unexcused nonuse of a water right for five consecutive years results in a relinquishment of the unused portion of the right back to the state. The investigation of this water right begins with the superceding certificate issued in February 1972, to Parm Dickson. Mr. Goroch purchased the property and the appurtenant right in April of 1977. The draft ROE fails to discuss the extent of water use during this five year period. The draft ROE does note that in 1983, air photos indicate mature green orchard rows. The implication is that Mr. Goroch planted these orchards in 1977 and raised them until 1983 when they were mature. While this may indicate Mr. Goroch's beneficial use of the water it does not indicate whether he received a valid right when he purchased the property in 1977.

**(e) The determined future development exemption to relinquishment is not satisfied.**

The draft ROE indicates that Mr. Goroch has not used his water from 2002 to the present. That water is therefore subject to relinquishment. The applicant claims that a "determined future development plan" exists and that the applicant is "aware of the statutory requirements." The draft ROE contains no discussion, analysis or apparent exercise of judgment by Ecology in determining whether the determined future development exemption to relinquishment is properly applied in this matter.

**Conclusion**

The change application must be denied because it does not meet the statutory requirements of RCW 90.44.100. More importantly the logic behind this proposed change approval creates terrible policy and should be re-examined. It is fraught with potential abuse, contrary to the water code, and not in the public interest.

Faced with the coming changes to our water resources due to climate change, Ecology must change as well. Ecology must become a regulator and steward of Washington's water resources instead of an enabler. After reading this draft ROE it is very clear Ecology has not yet assumed this responsibility. CELP implores Ecology to utilize the ample authority already delegated to it to begin responsible water management now, before the citizens of Washington are scrambling to catch up to drastically changed circumstances.

Sincerely,

*Patrick Williams*

Patrick Williams, Staff Attorney

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