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The policy should be amended to remove the statement "In the rest of the state, a well report showing physical availability, proof of potability, and demonstration of meeting other requirements imposed by local governments of water is sufficient proof of an adequate water supply." (draft policy at p. 4). This statement is a grossly inaccurate characterization of legal requirements.

The Washington Supreme Court's Kittitas County and Hirst decisions establish a continuing duty on local GMA and land use jurisdictions to make a finding of legal water availability as part of building and subdivision permit processes. RCW Ch. 90.94 did not alter these rulings, nor could it given the constitutional dimension of senior water rights as a form of property right. Rather, RCW Ch. 90.94 only subordinates the seniority of instream flows to junior permit-exempt wells used for domestic and lawn and garden irrigation purposes.

Thus, counties (whether a WRIA rule exists or not) must determine whether new permit-exempt wells will impair senior users, which might include other wells or surface water diverters, tribal or other permitted instream rights, and potentially rights limited or conditioned by Ecology's Surface Water Source Limitation (SWSL) process. Also, use of permit-exempt wells for other purposes (e.g., commercial, industrial, stockwater) do not enjoy the flow subordination created by the statute and county permits for such uses must consider legal water availability.

Ecology cannot use its policy-making effort to waive the legal availability determination that counties are required to make pursuant to the Growth Management Act, land use laws, and court decisions.

Ecology's statement should further explicitly state that it does not cover these circumstances, i.e., the policy does not revoke or in any way affect the duty of local land use jurisdictions (usually counties) to assess legal availability for other water users. The policy needs to state clearly and with specificity that impairment law still applies.