# Second Annual Water Law in Eastern Washington CLE - May 21 & 22, 2025

## Addressing Governor Ferguson’s Housing Initiatives and Water Availability: We can accommodate our needed housing with are available water, but only if we are smart about it.

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### Washington’s water is publicly owned.

The water in Washington state is publicly owned.[[1]](#footnote-1) “Private individuals and organizations, however, may acquire a right to use these public waters. … This is known as a water right or a right of appropriation.”[[2]](#footnote-2) RCW 90.03.010 provides in part that: “As Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right.”

### Washington’s water is already allocated, water levels are declining, stream flows are shifting, shortages are likely, and wells are running dry.

However, all of Washington’s water is already allocated to a water user. According to Ria Berns, who manages the Washington State Department of Ecology’s Water Resources Program, “[e]ven when there is enough snowpack and enough water flowing through Washington’s rivers and streams, it’s all spoken for ….”[[3]](#footnote-3)

Worse, available water is declining. “Groundwater levels are declining in most aquifer layers and groundwater subareas across eastern Washington.”[[4]](#footnote-4) Over use of aquifers has caused wells to run dry.[[5]](#footnote-5) In 2012, Ecology warned the 25 communities who rely on the Odessa aquifer for drinking water that their municipal wells may go dry within a decade.[[6]](#footnote-6)

“The timing of surface water supplies is shifting earlier in the season, especially in the snowmelt-dominated Cascades watersheds.’[[7]](#footnote-7) “Local increases in out-of-stream demands are expected, converging with local decreases in water supply, such as in the Yakima River Basin. The combination of lower supplies at critical times and locally increasing demands leads to increasing frequency of instream flow deficits and resulting prorationing or curtailments.”[[8]](#footnote-8) “Increases in summer residential demand of over 20% are expected to occur in [Water Resource Inventory Areas] WRIAs showing declining summer supplies and that include municipalities using surface water sources (such as WRIA 37). Similarly, WRIAs with the largest expected increases in summer demand lie over aquifer layers with declining groundwater levels …, while also including municipalities using groundwater sources.”[[9]](#footnote-9)

### We are also polluting our water supplies.

We are not only over using our water resources, we are polluting them. From the Canadian border to the Oregon border, ground water has become contaminated with the nitrates, putting the children who drink the water at risk of methemoglobinemia or “blue baby syndrome.”[[10]](#footnote-10) We are also contaminating our ground water with other pollutants such as the forever chemicals PFAS.[[11]](#footnote-11)

So what can we do? A lot.

### Stop polluting groundwater drinking sources.

The Growth Management Act requires counties and cities to designate and protect aquifer recharge areas.[[12]](#footnote-12) We need to do a better job of protecting these important water sources. So do the state agencies.

### Plan and zone for housing types to have little or no outdoor irrigation and higher densities.

“[I]ncreasing irrigation efficiency (less water applied per unit area irrigated) may decrease total residential water demand by 5% to 25% over” the baseline scenario.[[13]](#footnote-13) Increasing efficiency and reducing or eliminating outdoor irrigation will help accommodate the necessary housing units. Higher density housing types also use less water per capita for outdoor irrigation.[[14]](#footnote-14) Most multi-family housing types also use less indoor water on a per capital basis than single-family homes, although the difference is much less than for outdoor use.[[15]](#footnote-15) Appliance and water fixture age which is related to water efficiency is also an important factor in determining water use.[[16]](#footnote-16)

In addition to conserving water, low-rise multifamily housing, walk-up apartments and condominiums (two to three floors), and mid-rise apartments and condominiums are the most affordable housing types.[[17]](#footnote-17) All Washington cities and counties need more affordable housing. Statewide at least half of the housing built over the next twenty years will need to be affordable for residents at the lowest income levels.

In addition to planning and zoning for housing that is affordable and conserves water, we should not plan for housing that over uses water for landscaping irrigation and excessive indoor water use and that results in water losses from long water lines. Large lots and low densities increase water demand, increase leakage from water systems, and increase costs to water system customers.[[18]](#footnote-18) Accommodating the same population and jobs in the existing urban growth areas and at higher densities can reduce future water demands and costs.[[19]](#footnote-19)

### Comprehensive plans need to take into account legal and physical water availability.

All counties and cities fully planning under the Growth Management Act must include a capital facility plan element that identifies the public facilities and services need to accommodate its planned growth and to plan for providing those facilities.[[20]](#footnote-20) “[A] “capital facility” as contemplated by RCW 36.70A.070(3) is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such the ‘public services’ listed in RCW 36.70A.030([31]). Capital facilities include the ‘public facilities’ listed in RCW 36.70A.030([32]), but are not necessarily limited to facilities falling under the ‘public facilities’ definition.” “‘Public facilities’ include … domestic water systems ….”

As part of planning for future growth, counties and cities should review available water resources to ensure they will have sufficient legally and physically available water to support their population and employment projections now and in the future. In considering whether they will have sufficient physical water, the jurisdiction should consider the ground water declines and changing surface water flows documented in credible projections and scientific studies such as the State of Washington Department of Ecology’s *2021 Washington State Legislative Report Columbia River Basin Long-Term Water Supply and Demand Forecast* which includes a 20-year forecast that is updated every five years.[[21]](#footnote-21) They should also consider senior water rights holders in their basins including the Indian Tribes and Nations that in many watersheds have the most senior water rights.[[22]](#footnote-22) In Washington State those rights are typically unqualified unless they have been adjudicated, but will likely be quantified through adjudications or other means.

RCW 36.70.330(1) requires that the land use elements of comprehensive plans for counties and cities that do not fully plan under the Growth Management Act “shall also provide for protection of the quality and quantity of groundwater used for public water supplies.” This also requires consideration of existing and future water sources and whether they are legally and physically available.

### Counties are required to adopt water quantity regulations as part of the 2024 – 2027 comprehensive plan and development regulations updates.

For fully planning counties, RCW 36.70A.070(1) provides that “[t]he land use element shall provide for protection of the quality and quantity of groundwater used for public water supplies.”[[23]](#footnote-23) RCW 36.70A.070(5)(c)(iv) provides that “[t]he rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by: … Protecting surface water and groundwater resources.” The Growth Management Act (GMA) in RCW 36.70A.590 also provides that:

For the purposes of complying with the requirements of this chapter [the GMA] relating to surface and groundwater resources, a county or city may rely on or refer to applicable minimum instream flow rules adopted by the department of ecology under chapters 90.22 and 90.54 RCW. 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 19.27.097 and 58.17.110.

Development regulations must comply with the GMA including these requirements.[[24]](#footnote-24) These development regulations are required because overuse of surface or ground water often harms senior water rights holders and fish and wildlife habitat.[[25]](#footnote-25)

The Growth Management Act now requires periodic updates to the comprehensive plan and development regulations every ten years.[[26]](#footnote-26) One of the purposes of the periodic updates to comprehensive plans and development regulations is to incorporate provisions adopted since the last periodic update.[[27]](#footnote-27) The legislature adopted RCW 36.70A.590 in 2018, after most of the last periodic updates were done.[[28]](#footnote-28)

To comply with RCW 36.70A.070(1), RCW 36.70A.070(5)(c)(iv), and RCW 36.70A.590, comprehensive plans and development regulations should adopt policies and regulations to ensure development complies with the water codes, the applicable instream flow rules, the watershed plans updated under RCW 90.94.020, and the watershed restoration and enhancement plans required by RCW 90.94.030.

RCW 36.70A.590 requires the policies and development regulations to ensure that proposed water uses are consistent with RCW 90.44.050. To comply with RCW 90.44.050 for residential permit exempt wells, the policies and development regulations must require that the County when determining if a development, land division, or use qualifies for a permit exempt well under RCW 90.44.050 ensure that the water used by the parent parcel that existed in 2002, any lots created from the parent parcel, and any development built on or after 2002 on those lots does not in total exceed the 5,000 gallons a day allowed by RCW 90.44.050. Under the State Supreme Court’s *Campbell and Gwinn* decision, each lot is entitled to one 5,000 gallon per day permit exempt withdrawal for single or group domestic uses under RCW 90.44.050.[[29]](#footnote-29) A “developer may not claim multiple exemptions for the homeowners.”[[30]](#footnote-30) So each lot that existed in 2002, the year the *Campbell and Gwinn* decision was decided, is entitled to one permit-exempt withdrawal under RCW 90.44.050.

As lots are subdivided or developed over time, part or all of the permit exempt withdrawals are used by the lots created or the development authorized. To qualify for a permit-exempt groundwater withdrawal authorized under RCW 90.44.050, the lot must have some remaining water from the parent parcel’s single 5,000 gallon per day permit exempt withdrawal for single or group domestic uses.

Therefore, the required development regulations can only authorize the use of a permit exempt-well or well system for single or group domestic uses if the water use does not exceed the 5,000 gallons a day allowed by RCW 90.44.050 including the parent parcel that existed in 2002, any lots created from the parent parcel, and any development built on or after 2002. To comply with RCW 36.70A.590, the proposed policies and development regulations must include this important limitation. Therefore, we recommend the water quantity development regulations comply with the applicable state water laws including limiting each lot that existed in 2002 to one permit-exempt withdrawal under RCW 90.44.050 including the water used by any land divisions or developments and also comply with RCW 36.70A.590.

These regulations will protect senior water rights holders, instream flows, and fish and wildlife. These regulations also help to protect families that buy lots and houses that rely on permit exempt wells. Developments that are approved in violation of RCW 36.70A.590 and RCW 90.44.050 do not have a legal water right.

Counties that do not fully plan under the Growth Management Act must comply with RCW 36.70.692 which provides that “[f]or the purposes of complying with the requirements of this chapter, 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 19.27.097 and 58.17.110.” So those counties have to adopt similar regulations to ensure that water use on lots that existed or were created after the *Campbell and Gwinn* decision and use water from permit exempt wells also comply with RCW 90.44.050.

1. *Dep't of Ecology v. U.S. Bureau of Reclamation*, 118 Wn.2d 761, 766, 827 P.2d 275, 278 (1992). [↑](#footnote-ref-1)
2. *Dep't of Ecology*, 118 Wn.2d at 766, 827 P.2d at 278–79. [↑](#footnote-ref-2)
3. Conrad Swanson, *Trump keeps talking about taking PNW water — is that possible?* The Seattle Times (Updated Feb. 23, 2025 at 7:00 am) last accessed on May 12, 2025, at: <https://www.seattletimes.com/seattle-news/climate-lab/trump-keeps-talking-about-taking-pnw-water-is-that-possible/>. [↑](#footnote-ref-3)
4. Hall, S.A., Adam, J.C., Yourek, M.A., Whittemore, A.M., Yorgey, G.G., Scarpare, F., Liu, M., McLarty, S., Asante-Sasu, C., McClure, S., Turk, J., Haller, D., Padowski, J., Deshar, R., Brady, M.P., Rajagopalan, K., Barber, M.E., Weber, R., Stockle, C.O., Goodspeed, H.L., Gustine, R.N., Kondal, A., Yoder, J., Deaver, B., Downes, M., Tarbutton, S., Callahan, M., Price, P. Roberts, T., Stephens, J., Valdez, W., *2021 Washington State Legislative Report Columbia River Basin Long-Term Water Supply and Demand Forecast* p. ES-5 (Publication No. 21-12-006, Washington Department of Ecology, Olympia, WA.: 2022) last accessed on May 12, 2025, at: <https://apps.ecology.wa.gov/publications/SummaryPages/2112006.html>. [↑](#footnote-ref-4)
5. Mike Prager, *Private wells aren’t able to keep up with increased demand: Especially as housing development takes over more and more farmland* The Spokesman-Review (Jan. 13, 2013) last accessed on May 12, 2025, at: <http://www.spokesman.com/stories/2013/jan/13/water-wait/> [↑](#footnote-ref-5)
6. Shannon Dininny, Associated Press, *Columbia Plateau aquifers declining: Crisis looming for three-state area, report says* The Spokesman-Review (Feb. 6, 2013) last accessed on May 12, 2025, at: <http://www.spokesman.com/stories/2013/feb/06/columbia-plateau-aquifers-declining/>. [↑](#footnote-ref-6)
7. Hall, S.A., Adam, J.C., Yourek, M.A., Whittemore, A.M., Yorgey, G.G., Scarpare, F., Liu, M., McLarty, S., Asante-Sasu, C., McClure, S., Turk, J., Haller, D., Padowski, J., Deshar, R., Brady, M.P., Rajagopalan, K., Barber, M.E., Weber, R., Stockle, C.O., Goodspeed, H.L., Gustine, R.N., Kondal, A., Yoder, J., Deaver, B., Downes, M., Tarbutton, S., Callahan, M., Price, P. Roberts, T., Stephens, J., Valdez, W., *2021 Washington State Legislative Report Columbia River Basin Long-Term Water Supply and Demand Forecast* p. ES-3 (Publication No. 21-12-006, Washington Department of Ecology, Olympia, WA.: 2022). [↑](#footnote-ref-7)
8. *Id.* p. ES-5. [↑](#footnote-ref-8)
9. *Id.* p. ES-6. [↑](#footnote-ref-9)
10. State of Washington Department of Ecology, *Sumas-Blaine Aquifer Nitrate Contamination Summary* p. 27 (Publication No. 12-03-026: June 2012, revised February 2013) last accessed on May 12, 2025, at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1203026.html>; Washington State Departments of Agriculture, Ecology, Health, Yakima County Public Works Department, and US Environmental Protection Agency, *Lower Yakima Valley Groundwater Quality: Preliminary Assessment and Recommendations Document* p. ES-2, p. 12 (Publication 10-10-009: Feb. 2010) last accessed on May 12, 2025, at: <https://fortress.wa.gov/ecy/publications/SummaryPages/1010009.html>; Economic and Engineering Services, Inc., Technical Memorandum Review of Existing Groundwater Nitrate Studies Task 3 – Walla Walla Water Quality Assessment pp. 4 – 5 (Draft Report: June 2003) last accessed on May 12, 2025, at: <https://fortress.wa.gov/ecy/publications/publications/1203306.pdf> [↑](#footnote-ref-10)
11. Washington State Department of Health, PFAS Testing Results Dashboard last accessed on May 12, 2025, at: <https://doh.wa.gov/data-and-statistical-reports/washington-tracking-network-wtn/pfas/dashboard>. [↑](#footnote-ref-11)
12. RCW 36.70A.170; RCW 36.70A.060(2). [↑](#footnote-ref-12)
13. D.A. Sampson, Ray Quay, and Mitch Horrie, *Building type, housing density, and water use: Denver Water data and agent-based simulations* 58 Journal of the American Water Resources Association 355 p. 355 (2022) last accessed on May 12, 2025, at: <https://asu.elsevierpure.com/en/publications/building-type-housing-density-and-water-use-denver-water-data-and>. The Journal of the American Water Resources Association (JAWRA) is peer reviewed. JAWRA Instructions for Authors webpage last accessed on May 12, 2025, at: <https://onlinelibrary.wiley.com/page/journal/17521688/homepage/forauthors.html#1>. [↑](#footnote-ref-13)
14. *Id.* p. 359. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* p. 355. [↑](#footnote-ref-16)
17. Washington States Department of Commerce, Local Government Division Growth Management Services, *Guidance for Updating Your Housing Element: Updating your housing element to address new requirements* p. 35 (Aug. 2023) last accessed on May 12, 2025, at: <https://deptofcommerce.app.box.com/s/1d9d5l7g509r389f0mjpowh8isjpirlh>. [↑](#footnote-ref-17)
18. United States Environmental Protection Agency, *Growing Toward More Efficient Water Use: Linking Development, Infrastructure, and Drinking Water Policies* pp. 3 – 5 (EPA 230-R-06-001: January 2006) last accessed on May 12, 2025, at: <https://www.epa.gov/smartgrowth/growing-toward-more-efficient-water-use>. [↑](#footnote-ref-18)
19. *Id.* at p. 8. [↑](#footnote-ref-19)
20. RCW 36.70A.070(3). The folly planning counties are Benton County, Chelan County, Clallam County, Clark County, Columbia County, Douglas County, Ferry County, Franklin County, Garfield County, Grant County, Island County, Jefferson County, King County, Kitsap County, Kittitas County, Lewis County, Mason County, Pacific County, Pend Oreille County, Pierce County, San Juan County, Skagit County, Snohomish County, Spokane County, Stevens County, Thurston County, Walla Walla County, Whatcom County, and Yakima County. The cities in these counties also fully plan under the Growth Management Act. [↑](#footnote-ref-20)
21. Hall, S.A., Adam, J.C., Yourek, M.A., Whittemore, A.M., Yorgey, G.G., Scarpare, F., Liu, M., McLarty, S., Asante-Sasu, C., McClure, S., Turk, J., Haller, D., Padowski, J., Deshar, R., Brady, M.P., Rajagopalan, K., Barber, M.E., Weber, R., Stockle, C.O., Goodspeed, H.L., Gustine, R.N., Kondal, A., Yoder, J., Deaver, B., Downes, M., Tarbutton, S., Callahan, M., Price, P. Roberts, T., Stephens, J., Valdez, W., *2021 Washington State Legislative Report Columbia River Basin Long-Term Water Supply and Demand Forecast* p. ES-1 (Publication No. 21-12-006, Washington Department of Ecology, Olympia, WA.: 2022). [↑](#footnote-ref-21)
22. Robin McPherson and Adjudication Staff, *Water Resources Adjudication Assessment Legislative Report: Watersheds Proposed for Urgent Adjudication and Future Assessment* p. 10 (Water Resources Program Washington State Department of Ecology Olympia, Washington: Sept. 2020, Publication 20-11-084) last accessed on May 12, 2025, at: <https://apps.ecology.wa.gov/publications/documents/2011084.pdf>. [↑](#footnote-ref-22)
23. Benton County, Chelan County, Clallam County, Clark County, Columbia County, Douglas County, Ferry County, Franklin County, Garfield County, Grant County, Island County, Jefferson County, King County, Kitsap County, Kittitas County, Lewis County, Mason County, Pacific County, Pend Oreille County, Pierce County, San Juan County, Skagit County, Snohomish County, Spokane County, Stevens County, Thurston County, Walla Walla County, Whatcom County, and Yakima County. [↑](#footnote-ref-23)
24. *Kittitas Cnty. v. E. Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 164, 256 P.3d 1193, 1203 (2011) *citing* RCW 36.70A.130(1); *accord* RCW 36.70A.290(2). [↑](#footnote-ref-24)
25. See for example, State of Washington Department of Ecology Water Resources Program, *WRIA 11 Nisqually Watershed Water Availability* p. 3 (Publication 20-11-011 Revised Sept. 2022) last accessed on Oct. 14, 2024, at: <https://apps.ecology.wa.gov/publications/SummaryPages/2011011.html>. [↑](#footnote-ref-25)
26. RCW 36.70A.130(1)(a), (5). [↑](#footnote-ref-26)
27. *Thurston Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 344, 190 P.3d 38, 45 (2008); RCW 36.70A.130(1)(a). [↑](#footnote-ref-27)
28. Laws of 2018, Ch. 1 § 102. [↑](#footnote-ref-28)
29. *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 14, 43 P.3d 4, 110 (2002)*.* [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)