

Chapter 173-539A WAC

UPPER KITTITAS EMERGENCY GROUND WATER RULE

NEW SECTION

WAC 173-539A-010 Purpose, area affected by rule and presumption of hydraulic continuity. (1) This chapter implements the exempt well management measures identified in the amended memorandum of agreement between Kittitas County and the department of ecology (ecology) by creating a partial withdrawal of ground water within upper Kittitas County, as delineated in Appendix 1, WAC 173-539A-990. This withdrawal requires mitigation for all new permitted withdrawals of ground water and for certain residential uses of ground water under the exemption provided in RCW 90.44.050. This chapter also requires measuring of new uses for residential purposes of ground water under the exemption within all of Kittitas County.

(2) Ecology designed the partial withdrawal and related requirements to minimize the adverse effects on flows in the Yakima River and its tributaries, while minimizing adverse effects on the local economy.

(3) The ground waters within upper Kittitas County are

presumed to be hydraulically connected to surface water and residential uses of water associated with new subdivisions or proximate short plats are required to be water budget neutral. Persons proposing to use ground water from these unconsolidated and glacial aquifers may alternatively elect to conduct a hydrogeologic assessment to demonstrate to Ecology the lack of hydraulic connection between the groundwater proposed to be used and the Yakima River and its tributaries.

(4) All new withdrawals may be subject to future curtailment due to conflicts with senior water rights, and all users without senior water rights are advised to obtain mitigation through senior trust water rights to avoid such curtailment.

(5) The requirements in this chapter do not apply to areas outside of Kittitas County.

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NEW SECTION

WAC 173-539A-020 Authority. RCW 90.54.050 provides that when lacking enough information to support sound decisions, ecology may withdraw waters of the state from new appropriations until sufficient information is available. Before withdrawing waters of the state, ecology must consult with standing committees of the legislature on water management. Further, RCW 90.44.050 authorizes ecology to establish metering requirements for exempt wells where needed. In 1999, ecology imposed an administrative moratorium on issuing any ground water permits for new consumptive uses in the Yakima basin, which includes Kittitas County. That moratorium did not apply to exempt withdrawals.

In 2007, ecology received a petition seeking unconditional withdrawal of all unappropriated ground water in Kittitas County until enough is known about potential effects from new exempt wells on senior water rights and stream flows. Ecology consulted with standing committees of the Washington state legislature on the petition and proposed withdrawal. Ecology then rejected the proposed unconditional withdrawal, and instead signed a memorandum of agreement (MOA) with Kittitas County, which this chapter implements by establishing a partial withdrawal and other requirements.

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NEW SECTION

WAC 173-539A-030 Definitions. The definitions provided below are intended to be used only for this chapter.

"Applicant" as used herein includes the owner(s) of the parcels that are the subject of the application.

"Application" as used in WAC 173-539A-050 and 173-539A-055 means a land use application to Kittitas County requesting:

- ✎ A subdivision;
- ✎ Short subdivision;
- ✎ Large lot subdivision;
- ✎ Administrative or exempt segregation;
- ✎ Binding site plan; or
- ✎ Performance based cluster plat.

"Common ownership" means any type or degree of legal or equitable property interest held by an applicant in any proximate parcel. Common ownership also includes a joint development arrangement between the applicant and any owner of a proximate parcel. A joint development arrangement must involve significant voluntary joint activity and cooperation between the applicant and the owner(s) of one or more proximate parcels with respect to the development of parcels in question. Joint activity and cooperation that is customary or required by land use or other legal requirements

does not itself constitute a joint development agreement. A joint development arrangement may be evidenced by, but is not limited to, agreements for coordinated development and shared use of services or materials for permitting, design, engineering, architecture, plat or legal documents, financing, marketing, environmental review, clearing or preparing land, and/or construction (including road construction), and agreements for common use of structures, facilities, lands, water, sewer, and/or other infrastructure, covenants, building materials, or equipment.

"Consumptive use" of a proposed withdrawal is the total depletion that the withdrawal has on any affected surface water bodies.

"Ecology" means the department of ecology.

"Exemption" or **"ground water exemption"** or **"exempt"** means the exemption from the permit requirement for a withdrawal of ground water provided under RCW 90.44.050.

"Group use" means use of the ground water exemption for two or more parcels. A group use includes use of the exemption for all parcels of a proposed development. It further includes use of the exemption for all parcels that are proximate and held in common ownership with the proposed new residential development where either:

(1) An exempt water withdrawal was commenced on such parcels within five years of the vesting date of the current application;

(2) Use of the exemption on such parcels is proposed in a land use application that is pending at the time of the hearing on the proposed development; or

(3) Use of the exemption on such parcels was proposed in a land use application that vested and was finally approved within such prior five years.

If a parcel that is part of a current application is later proposed to be divided into multiple parcels in a new application that vests more than five years following the vesting of the current application, the new uses of the exemption on the resulting multiple parcels will be considered a separate group use that is distinct from the original group.

"Hydrogeologic assessment" means the report prepared by a licensed hydrogeologist addressing the elements identified in WAC 173-539A-060.

"Lands" refers to both singular "land" and plural "lands."

"MOA" or **"Memorandum of Agreement"** means the "Memorandum of Agreement between Kittitas County and the State of Washington, Department of Ecology Regarding Management of Exempt Ground Water Wells in Kittitas County" of April 7, 2008. That agreement was amended by the parties on _____.

"New residential development" means any division of land involving an application that vested after July 8, 2008.

"New subdivision" or **"new proximate shortplat"** means a subdivision or proximate shortplat application that vested after the effective date of this rule.

"New use of the ground water exemption" means a use begun on or after July 8, 2008.

"New use for residential purposes" means any new use of the ground water exemption for a new or additional residential purpose

associated with an existing or new structure.

"Parcel" means any parcel, land, lot, tract or other unit of land.

"Proximate" means all parcels that either:

✎ Have any common boundary;

✎ Are separated only by roads, easements, or parcels in common ownership; or

✎ Are within five hundred feet at the nearest point.

"Proximate shortplat" means a shortplat that would be considered a group use with another subdivision or shortplat.

"Residential purposes" or **"residential use"** means all domestic use and/or lawn and noncommercial garden use of water on the parcel(s) in question under the ground water exemption, but not under a permitted water right. A residential purpose or use does not include stockwatering or industrial use. A dwelling unit is not required for a residential purpose to be present. Domestic use is a separate and distinct purpose of use from lawn and noncommercial garden use. Each use may have a different commencement date under the exemption. For purposes of this chapter all use limits refer to combined domestic and lawn and noncommercial garden use. All use of the lawn and noncommercial garden use may not exceed a one-half acre for either a group domestic use or a single domestic use.

"Total water supply available" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply

claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"Upper Kittitas County" is the area of Kittitas County delineated in WAC 173-539A-990.

"Vested" means that under the applicable land use laws an application is considered complete such that the application shall generally be reviewed under laws existing at the time of vesting, unless a special exception may apply. All applications for plat approvals including preliminary plat approvals which were approved by Kittitas County prior to July 8, 2008, are considered to be vested.

"Water budget neutral uses" means an appropriation where withdrawals of ground water of the state are:

(1) Proposed in exchange for discharge of at least an amount equivalent to the consumptive use of the appropriation; and

(2) Approved as water budget neutral by ecology under WAC 173-539A-045. The exchange water must derive from other water rights that are placed into the trust water right program.

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NEW SECTION

WAC 173-539A-040 Conditional withdrawal of public ground water in upper Kittitas County from new appropriations. Beginning on the effective date of this rule, the following public ground waters within upper Kittitas County are withdrawn from new appropriations:

(1) All ground water to be used for permitted uses, except to the extent that such use is determined to be water budget neutral pursuant to WAC 173-539A-045.

(2) All ground water to be used for exempt residential uses in excess of the limits and conditions which apply under WAC 173-539A-050 and 173-539A-055, except to the extent that such use is determined to be water budget neutral pursuant to WAC 173-539A-045.

(3) All ground water within the area depicted on Appendix 2, WAC 173-539A-995, to be used for exempt residential uses associated with a new subdivision or a new proximate shortplat, including any lot thereof, except to the extent that such use is determined to be water budget neutral pursuant to WAC 173-539A-045.

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NEW SECTION

WAC 173-539A-043 Determination of no hydraulic continuity.

If a person believes that a new appropriation of ground water would not be in hydraulic continuity with the Yakima River and/or any of its tributaries within upper Kittitas County, it may submit a hydrogeologic assessment to Ecology to demonstrate that such continuity does not exist. If upon review of such assessment, Ecology determines that lack of continuity has been shown, and so states in writing, the proposed new appropriation shall not be governed by the provisions of this rule.

NEW SECTION

WAC 173-539A-045 Water budget neutral uses. (1) Persons proposing to use ground water may apply to ecology for a permit to appropriate public ground water or, if seeking to use the ground water exemption, may submit to ecology a request for determination that the proposed exempt use would be water budget neutral.

(2) If a person offers mitigation to establish a water budget neutral use, they must obtain approval by ecology before commencing use. The proposed mitigation must provide water from one or more water rights that are placed into the trust water right program that reliably provide at least an equivalent amount of mitigation necessary to be water budget neutral. To the extent that ecology determines that the mitigation offered would not reliably mitigate to be water budget neutral, ecology may deny the request or limit its approval to a lesser amount. Ecology will send its determination on a mitigation request to the applicant and Kittitas County. This provision is not intended to relieve or reduce requirements for mitigation that may otherwise be applicable.

(3) As part of a permit application to appropriate public ground water or a request for a determination of water budget neutrality, applicants shall identify one or more water rights that would be placed into the trust water right program to offset the consumptive use associated with the proposed new use of ground water. If the applicant asserts the amount of estimated consumptive use is less than the amount to be withdrawn, the applicant shall provide a hydrogeologic assessment that shows the amount of consumptive use associated with its withdrawals.

(4) Applications for public ground water or requests for a determination of water budget neutrality will be processed concurrently, to the extent feasible, with any trust water right applications that are necessary to achieve water budget neutrality, unless:

(a) The applicant or requestor identifies a suitable trust water

right is already held by the state in the trust water right program;
and

(b) The applicant or requestor has executed an agreement to designate all or a portion of the trust water right for mitigation of the applicant's proposed use.

(5) Requests for a determination of water budget neutrality in connection with a residential use will be processed within 60 days of a complete application being filed; provided that Ecology may extend this period an additional 30 days if it so notifies the applicant and Kittitas County in writing or electronically. If ecology fails to act within this time period, the request for a determination of water budget neutrality will be deemed to be approved.

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NEW SECTION

WAC 173-539A-050 Limits on withdrawal for new residential uses of the exemption for new residential developments in upper Kittitas County. (1) This section applies only to applications for residential developments in upper Kittitas County that vest or vested on or after July 8, 2008, and administrative segregations which are recorded on or after the effective date of this rule.

(2) If the withdrawal of ground waters in WAC 173-539A-040 allows a new residential use of the exemption on lands involved with a new residential development, such residential development must not use more than 5,000 gallons per day (gpd) from the ground water exemption for residential purposes. When filing an application for

a new residential development, the applicant must file a sworn a sworn statement with ecology and Kittitas County that:

(a) Identifies all parcels that are part of the residential development;

(b) Identifies all joint development arrangements with respect to proximate parcels; and

(c) States that to the best of the applicant's knowledge and belief all such parcels and arrangements have been identified. If the application is approved, such statement shall be recorded against all such parcels in which the applicant holds a legal or equitable property interest. The residential development includes all parcels that are the subject of the application or a larger group use.

(3) In determining whether the 5,000 gpd exemption limit for a new residential development may be exceeded, each parcel will be assumed to use 1,250 gpd for residential purposes, unless a covenant is recorded on such parcel to use a lesser amount of the group withdrawal, but in no case less than 350 gpd. No person may use water on a parcel in excess of a covenant provided under this chapter; except such use may exceed the covenant, if the group use is separately metered, and the group use at the time of the excessive use on the parcel is not over 5,000 gpd. The burden of showing this exception is on the person using in excess of the covenant.

(4) If no residential unit will be built upon a lot and credit is to be given for no exempt residential water use on that parcel, a covenant shall be recorded providing that no exempt residential use will occur on the parcel.

(5) A developer should consider whether to place a covenant limiting water use on parcels within a current application if the developer intends to develop proximate lots within five years from the application date. Water use from the proximate parcels shall be considered to be part of a prior group use under conditions of the group use definition provided herein.

(6) Any covenant required under this chapter may include a statement that it or a restriction of it shall not apply if:

(a) The parcel in question is further divided after five years;

(b) A restriction contained in the covenant is based upon a provision of this chapter that is determined to be invalid by a final legal decision; or

(c) Ecology has issued a rule or the board of Kittitas County commissioners has passed a resolution that releases owners from the covenant or a restriction of it, provided the ground water study shows that the well or wells covered by the covenant are not significantly hydraulically connected to any surface waters.

(7) If the owner(s) of a parcel is dividing land using an administrative segregation, and intends that some or all of the new parcels created will use the RCW 90.44.050 exemption for residential purposes within five years of recording the survey, the owner(s) shall include a survey note which states this intent and identifies the parcels on which the exemption is intended to be used for these purposes.

(8) The limits on residential exempt uses established in this section shall not apply to the extent that use above any such limit is determined to water budget neutral under WAC 173-539A-045 and is

within the limits of RCW 90.44.050.

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NEW SECTION

WAC 173-539A-055 Limits on new residential uses of the exemption on individual parcels in upper Kittitas County. If the withdrawal of ground waters in WAC 173-539A-040 allows new residential uses of the exemption on a parcel, the following limits shall apply to all new residential uses of the exemption on such parcel: (1) **Parcels created after March 28, 2002, in upper Kittitas County:**

(a) Parcels **less than ten acres** created after March 28, 2002, may use water under the ground water exemption for residential purposes in an amount that does not exceed the lowest amount below:

(i) The amount stated in conditions or covenants on water use placed on the plat that created the parcel;

(ii) The amount stated in conditions on water use specified in the permit/approval of the public water system that is intended to serve the parcel; or

(iii) 1,250 gpd.

(b) Parcels **ten acres and greater** created after March 28, 2002, may use water under the ground water exemption for residential purposes in an amount that does not exceed the lowest amount below:

(i) The amount stated in conditions or covenants on water use placed on the plat that created the parcel;

(ii) The amount stated in conditions on water use specified in the permit/approval of the public water system that is intended to serve the parcel; or

(iii) An average rate of use of 125 gpd per acre up to a maximum of 5,000 gpd.

(c) This section does not restrict an owner from using more water through other legal permitted water rights.

(2) Parcels created on or before March 28, 2002, in upper Kittitas County:

(a) Parcels created on or before March 28, 2002, may use no more than 5,000 gpd for all residential purposes.

(b) Such use may be further restricted by covenants or conditions on water use placed on the plat or in a land use approval, conditions on a public water system approval, or if a legal restriction applies to such use.

(3) Notwithstanding subsections (1) and (2) of this section, if a parcel is part of a group use as defined herein, it shall be subject to any limitations that would apply to such group use.

(4) The limits on residential exempt uses established in this section shall not apply to the extent that use above any such limit is determined to water budget neutral under WAC 173-539A-045 and is within the limits of RCW 90.44.050.

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NEW SECTION

WAC 173-539A-057 Any water use under the exemption or a permitted right is subject to the priority system and existing statutes and regulations. Any water user under the exemption or a permitted right is subject to the priority system and existing statutes and regulations, and may be subject to regulation or curtailment based thereon. Nothing in chapter 173-539A WAC is intended to release exempt water rights covered by this regulation from the effect of those laws.

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NEW SECTION

WAC 173-539A-060 Hydrogeologic assessment. (1) Any hydrogeologic assessment submitted to ecology must be in the form of a written report, signed by a licensed hydrogeologist;

(2) The hydrogeologic assessment may be based on available existing information or other new information as needs require.

(3) The required elements of the report are as follows:

(a) Scope of the proposal including all of the following:

- ✎ The location;
- ✎ Proposed water source(s);
- ✎ Water use amounts; and
- ✎ The timing of the proposed use.

(b) General description including all of the following:

- ✎ The local geologic, hydrogeologic, and hydrologic setting;
- ✎ Identification of surface water and ground water features;
- ✎ Water sources;
- ✎ Recharge/discharge characteristics; and
- ✎ Surface water and ground water interactions.

(c) Consumptive use analysis;

- ✎ volume of effluent discharged;
- ✎ depth and configuration of dispersal system;
- ✎ hydraulic conductivity of the soil and other intervening geologic material above the water table, depth to ground water, climate, and evapo-transpiration rate,
- ✎ rate and timing of return flows to affected surface water bodies.

(d) Inventory and description of all of the following:

- ✎ All state issued surface water and ground water rights;
- ✎ All state issued surface water and ground water claims; and
- ✎ Exempt wells located within a one-year and five-year area of pumping influence.

(e) Identification and description of existing surface water or ground water rights that may be adversely affected by the proposed use of the ground water exemption.

(f) The licensed hydrogeologist's written professional opinion

on the potential of the proposal to cause impacts to the natural and built environment including surface water flows. Where consumptive use is asserted to be less than the amount withdrawn, the report shall contain an assessment supported by hydrogeologic data and analysis showing the predicted consumptive use associated with the withdrawal.

(g) A statement of the report's limitations regarding its intended use, including scope, extent, and available data.

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NEW SECTION

WAC 173-539A-070 Measuring and reporting water use. (1) For all uses of the ground water exemption for residential purposes within upper Kittitas County that commence after July 8, 2008, or within the remainder of Kittitas County that commence after the effective date of this rule, a meter must be installed for each residential connection or each source well that serves multiple residential connections in compliance with such requirements as prescribed by Kittitas County and WAC 173-173-100.

(2) Metering data must be collected and reported within thirty days of the end of the recording period to Kittitas County and ecology. The following table shows the recording periods and the due dates for each metering report:

Recording Period	Report Due No Later Than:
October 1 - March 31	April 30
April 1 - June 30	July 30
July 1 - July 31	August 30
August 1 - August 31	September 30
September 1 - September 30	October 30

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NEW SECTION

WAC 173-539A-080 Expedited processing of trust water applications and new water right applications or requests for a determination of water budget neutrality associated with trust water rights. (1) RCW 90.42.100 authorizes ecology to use the trust water right program for water banking purposes within the Yakima River Basin.

(2) Ecology may expedite the processing of an application for

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a new surface water right, a request for determination of water budget neutrality, or a ground water right hydraulically related to the Yakima River, under Water Resources Program Procedures PRO-1000, Chapter One, including any amendments thereof, if the following requirements are met:

(a) The application or request must identify an existing trust water right or pending application to place a water right in trust, if that such trust water right would have an equal or greater contribution to flow during the irrigation season, as measured on the Yakima River at Parker that would serve to mitigate the proposed use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for instream flow protection and mitigation of out-of-priority uses.

(b) The proposed use on the new application or request must be for domestic, group domestic, lawn or noncommercial garden, and/or municipal water supply purposes of use within the Yakima River Basin. The proposed use must be consistent with any agreement governing the use of the trust water rights.

(3) If an application for a new water right or a request for determination of water budget neutrality is eligible for expedited processing under subsection (2) of this section and is based upon one or more pending applications to place one or more water rights in trust, processing of the pending trust water right application(s) shall also be expedited.

(4) Upon determining that the application or request is eligible for expedited processing ecology will do the following:

(a) Review the application or request to withdraw ground water

to ensure that ground water is available from the aquifer without detriment or injury to existing rights, considering the mitigation offered.

(b) Condition the permit or determination to ensure that existing water rights, including instream flow water rights, are not impaired if the trust water right is from a different source or located downstream of the proposed diversion or withdrawal. The applicant or requestor also has the option to change their application to prevent the impairment. If impairment cannot be prevented, ecology must deny the permit or determination.

(c) Condition each permit or determination to ensure that the tie to the trust water right is clear, and that any constraints in the trust water right are accurately reflected.

(d) Condition or otherwise require that the trust water right will serve as mitigation for impacts to "total water supply available."

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NEW SECTION

WAC 173-539A-090 Educational information, technical assistance and enforcement. (1) To help the public comply with this chapter, ecology and Kittitas County may prepare and distribute technical and educational information on the scope and requirements of this chapter.

(2) When ecology finds that a violation of this rule has occurred, we shall first attempt to achieve voluntary compliance. One approach is to offer information and technical assistance to the person, in writing, identifying one or more means to legally carry out the person's purposes.

(3) To mitigate for potential impact of an exempt use to the total water supply available and to avoid potential future regulation in favor of senior water rights, ecology encourages exempt users to participate in a mitigation program through the Yakima Basin Pilot Water Bank or to obtain a senior water right.

(4) To obtain compliance and enforce this chapter, ecology may impose such sanctions as suitable, including, but not limited to, issuing regulatory orders under RCW 43.27A.190 and imposing civil penalties under RCW 90.03.600.

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NEW SECTION

WAC 173-539A-100 Appeals. All of ecology's final written decisions pertaining to permits, regulatory orders, and other related decisions made under this chapter are subject to review by the pollution control hearings board in accordance with chapter 43.21B RCW.

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NEW SECTION

WAC 173-539A-110 Regulation review. (1) The exempt well management requirements in this chapter will be reviewed after the upper county ground water study is complete or within five years of rule adoption whichever occurs first and may be revised as part of a long-term management program. Ecology and Kittitas County intend to develop the long-term management program after they have completed a ground water study that focuses on portions of Kittitas County not fully addressed by the current USGS ground water study of the Yakima River Basin.

(2) Ecology may review this chapter whenever:

(a) New information is available;

(b) A change of condition occurs;

(c) Statutory changes warrant the review; or

(d) Reviews described in WAC 173-539A-060 show changes are necessary.

(3) Kittitas County, or interested citizens may request that ecology exercise its discretion to review this chapter at any time.

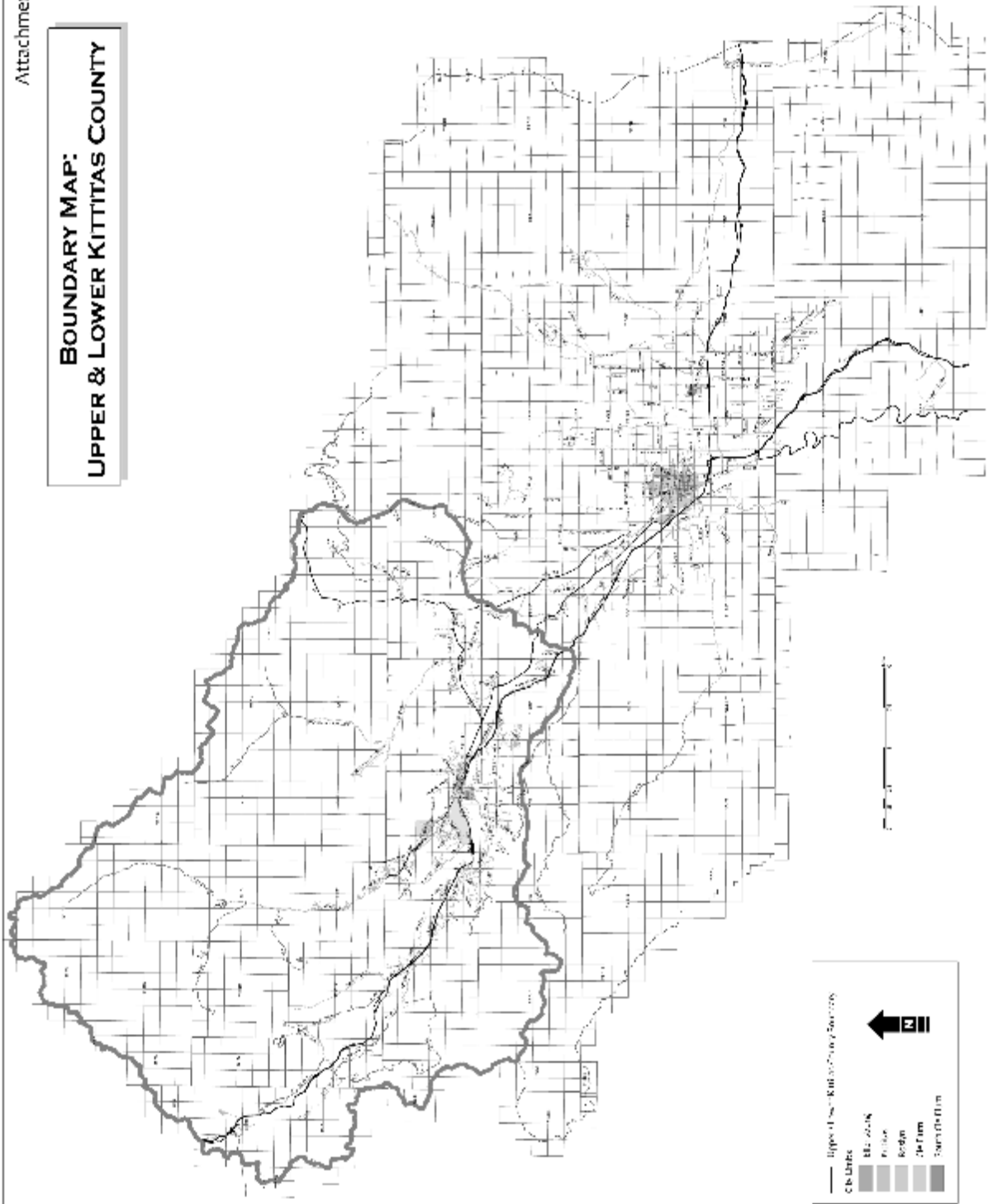
(4) If ecology begins a review of this chapter, it will consult with Kittitas County.

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NEW SECTION

WAC 173-539A-990 Appendix 1--Map of upper Kittitas County boundaries.

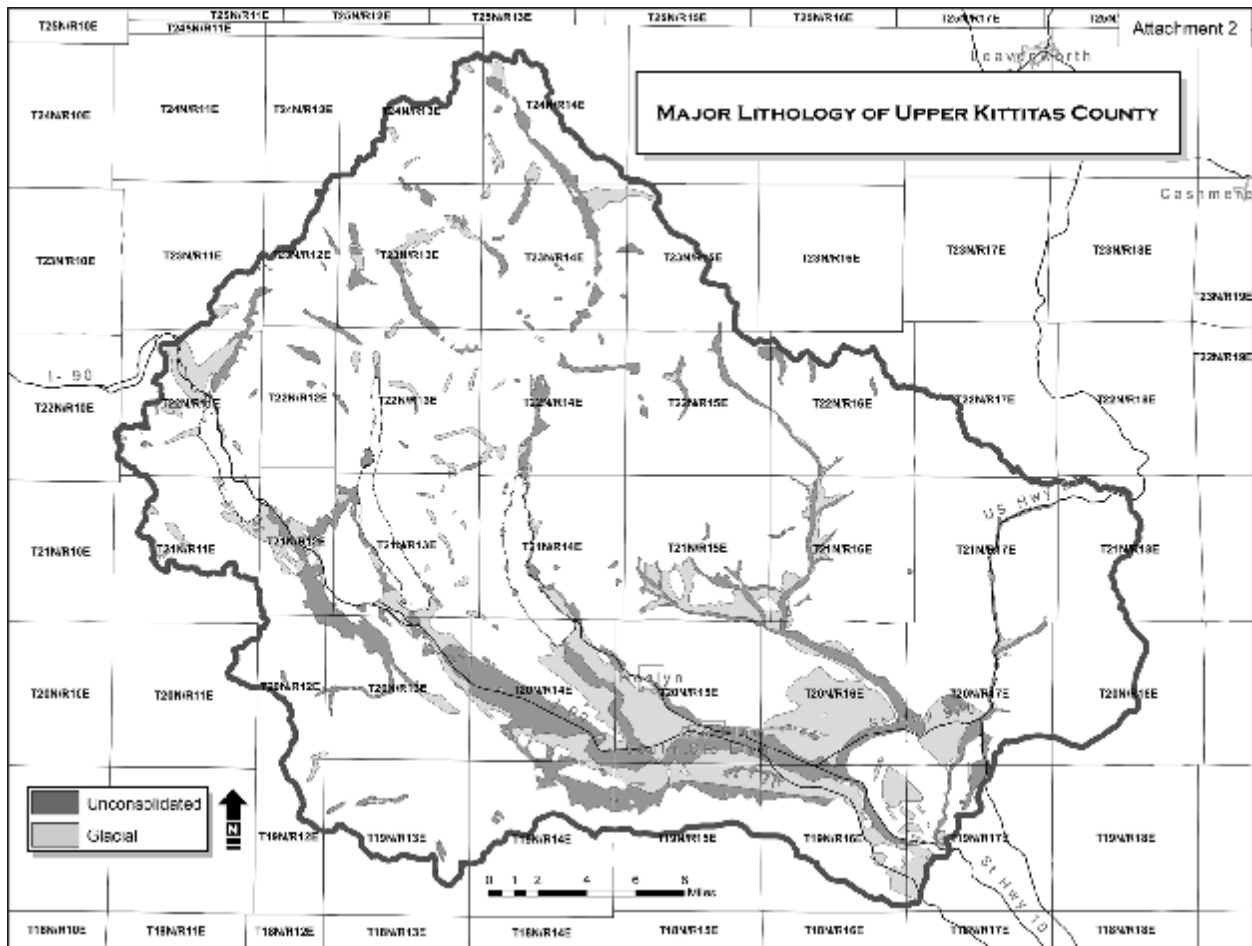
**BOUNDARY MAP:
UPPER & LOWER KITTITAS COUNTY**



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NEW SECTION

WAC 173-539A-995 Appendix 2--Map of unconsolidated and glacial aquifers within upper Kittitas County boundaries.



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