

Methow Basin Closed Tributaries

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Water Resources Program



Summary

- Introduction to Basic Water Law
- Methow Basin Instream Flow Rule
- Closed Tributaries/Restricted Areas
- Moving Forward



Introduction to Basic Water Law

What is a Water Right?

A water right is a legal authorization to use

- a reasonable amount of public water
- for specific beneficial purposes.

Once you've begun using your water, you are establishing a vested right to use the water for that purpose consistent with applicable law.



Why Are Water Rights Required?

Our state's waters are a public resource and their use should return the maximum benefit to the public.

Water rights are required by law to ensure proper allocation and management of Washington's water resources.

Priority dates establish seniority by which water right holders and streamflows are protected. Streamflows in rules have their own seniority.



1917

- “All waters within the state belong to the public, subject to existing rights.”
- Subsequently, water law was based on the Prior Appropriation Doctrine: “*First in time, first in right.*”
- Permit system for using surface water.
- The Legislature mandated that the state administer the water resources.

RCW 90.03



1945

Ground Water Code

- Extended the 1917 surface water code to ground water.
- Created a permit system for all uses of ground water (well pumping).
- *Exempted withdrawals for domestic & industrial purposes (5,000 gpd), irrigation of ½ acre of lawn & stockwatering.*

RCW 90.44



1970 to Present

Statutes passed in the last 40 years added complication to the water code.

- Water Resources Act (1971) RCW 90.54
- Family Farm Act (1977) RCW 90.66
- Water Storage (1987) RCW 90.03
- Trust Water Rights (1989) RCW 90.42
- Water Re-use (1992) RCW 90.46
- Watershed Planning (1997) RCW 90.82
- Conservancy Boards (2001) RCW 90.80
- Municipal Suppliers (2003) RCW 90.03.370
- Columbia River Program (2006) RCW 90.90
- Streamflow Restoration (2018) RCW 90.94



What Criteria Are Used When Making New Water Right Decisions?

Water right permits are issued only if the following statutory requirements are met:

- The water use will be beneficial.
- There will be no impairment of existing water rights.
- There is water available for appropriation.
- The issuance of the requested water right will not be detrimental to the public's interest.



Methow Basin Instream Flow Rule

Chapter 173-548 WAC

- Originally developed in 1976, amended in 1988 and 1991 through a public process with stakeholder input.
- Was intended to help find balance between competing demands for water resources in the Methow Basin.
- Established minimum instream flows, a hierarchy of use, and closed selected tributaries.



Methow Basin Closed Tributaries

- Closed many tributaries to new uses, unless specifically allowed by Ecology.
- 1991 studies concluded shallow gravel aquifers were connected to closed streams.
- For many years, we allowed well construction in bedrock aquifers under the Rule to provide flexibility for rural development.
- Case law and results of recent legal challenges have tightened up what's allowable – to protect streamflows and senior water users.



Methow Basin Closed Tributaries

- *Postema* – “one molecule” impairment standard
- *Hirst* – Counties must evaluate legal water availability in making building permit/land use decisions
- Need to protect existing homeowners and water right holders, and protect prospective homeowners from legal risks
- Change to management in Restricted Areas



Methow Basin Closed Tributaries



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
1250 W Alder St • Union Gap, WA 98903-0009 • (509) 575-2490

December 4, 2018

Okanogan County Board of County Commissioners
123 5th Ave N, #150
Okanogan, WA 98840

Re: Technical Rationale for Water Availability Decisions Within the Bedrock Aquifers of Tributaries Closed Under WAC 173-548-050.

Dear Commissioners:

I'm writing to formally convey the Washington Department of Ecology's (Ecology) technical and policy position related to water availability within the upper reaches of tributaries closed to further consumptive appropriation in the Methow River Basin under WAC 173-548-050, also termed the "restricted areas."

I greatly appreciate your patience and understanding as we have been working together on these important topics over the last several months. Our goal is to determine whether water is both physically and legally available for use in these fragile tributary basins.

As we've discussed, much has changed since adoption of the first Methow Rule (WAC 173-548) in 1976 closed a number of streams tributary to the Methow River to appropriation. In 1991, the Rule was amended, further closing the groundwater determined by Ecology to be hydraulically connected to the closed streams. This rule amendment included permit exempt domestic wells, and provisioned that construction of a new well could be approved only if Ecology was provided with sufficient information to determine in writing that the groundwater source was not hydraulically connected to closed surface waters.

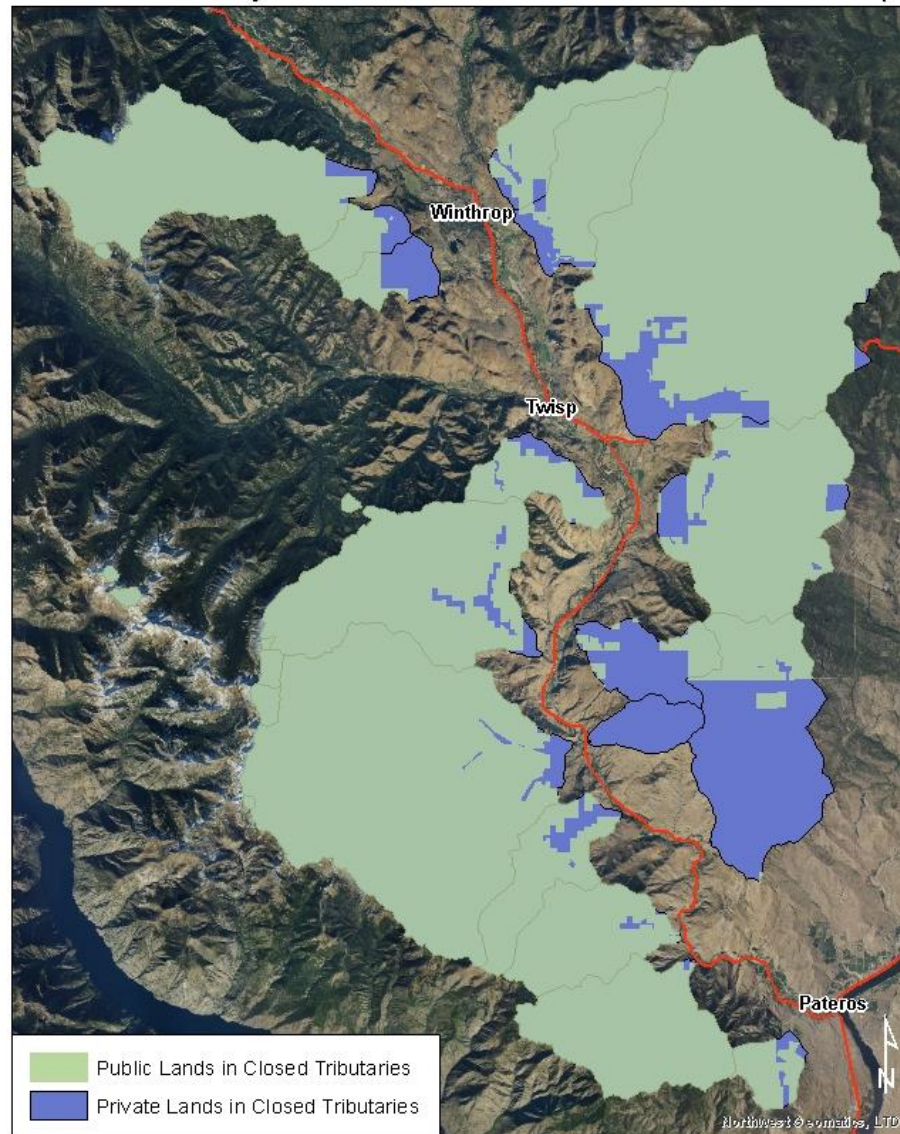
In the summer of 1991, our hydrogeologists studied and delivered reports on each of the closed tributary basins. They concluded that where the depth to bedrock is relatively shallow in the upper tributary reaches, the sedimentary aquifers are in direct hydraulic continuity with the closed streams. On the other hand, deeper fractured bedrock aquifers were *not believed* to be in direct hydraulic continuity with the closed tributaries, and therefore not part of the closure. Based on that understanding, Ecology allowed wells to be constructed into the bedrock aquifers of the closed tributary basins, though there may have been some indirect connection between bedrock wells and closed streams.

In 2000, however, the *Postema* decision made it clear that new applications for water rights impacting a closed stream must be denied due to a lack of water availability and impairment of instream flows, regardless of whether the effect or impairment is de minimis. The *Swinomish* decision applied this principle to permit exempt wells, further clarifying that there can be no impact, even if de minimis, on a senior instream flow right.

Courts also have made it clear that counties, when issuing building permits or making other land use decisions, must ensure that water is legally available. Recent case law adds to the County's risk of approving permits that rely on new domestic well withdrawals from fractured bedrock in the vicinity of closed tributaries in the upper Methow basin.



Methow Valley Closed Tributaries Land Ownership

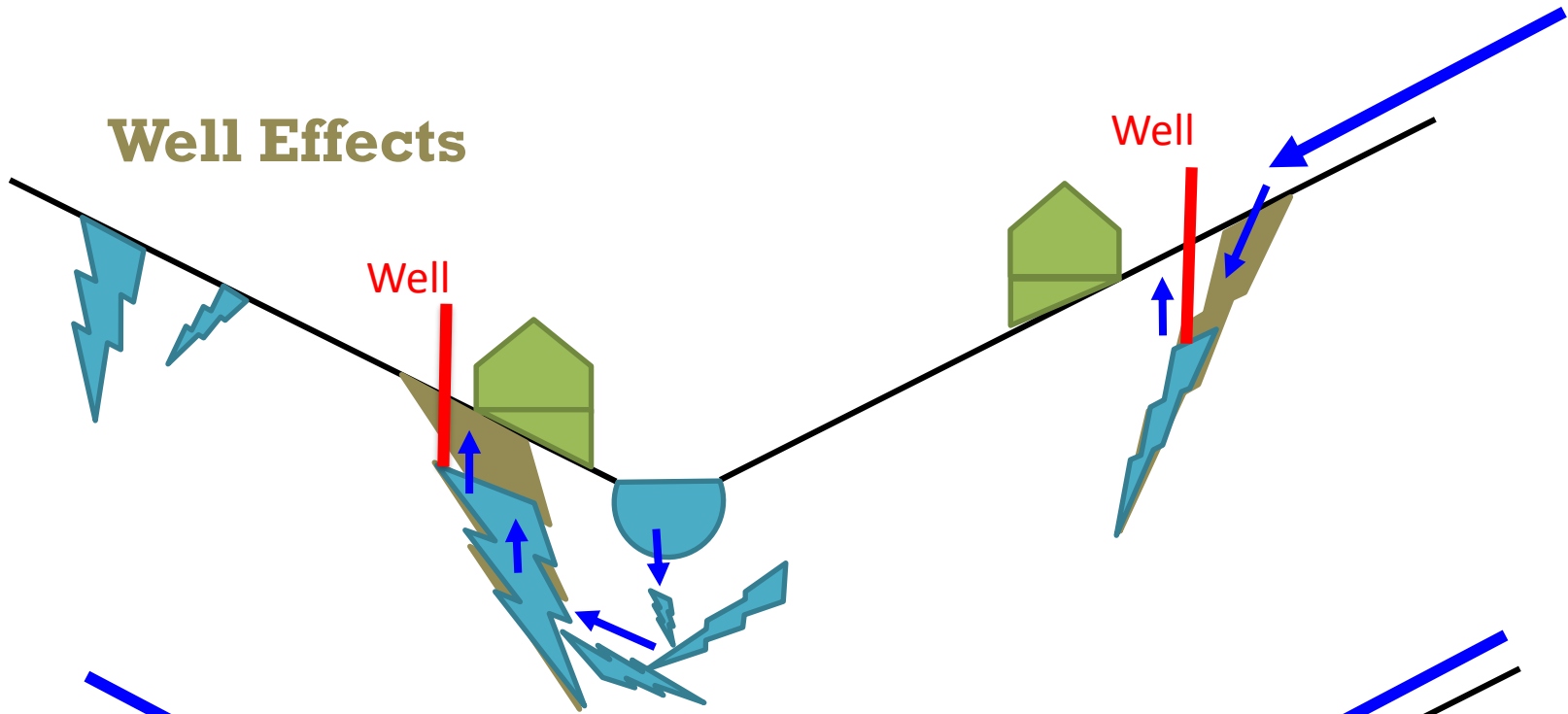


Methow Basin Closed Tributaries

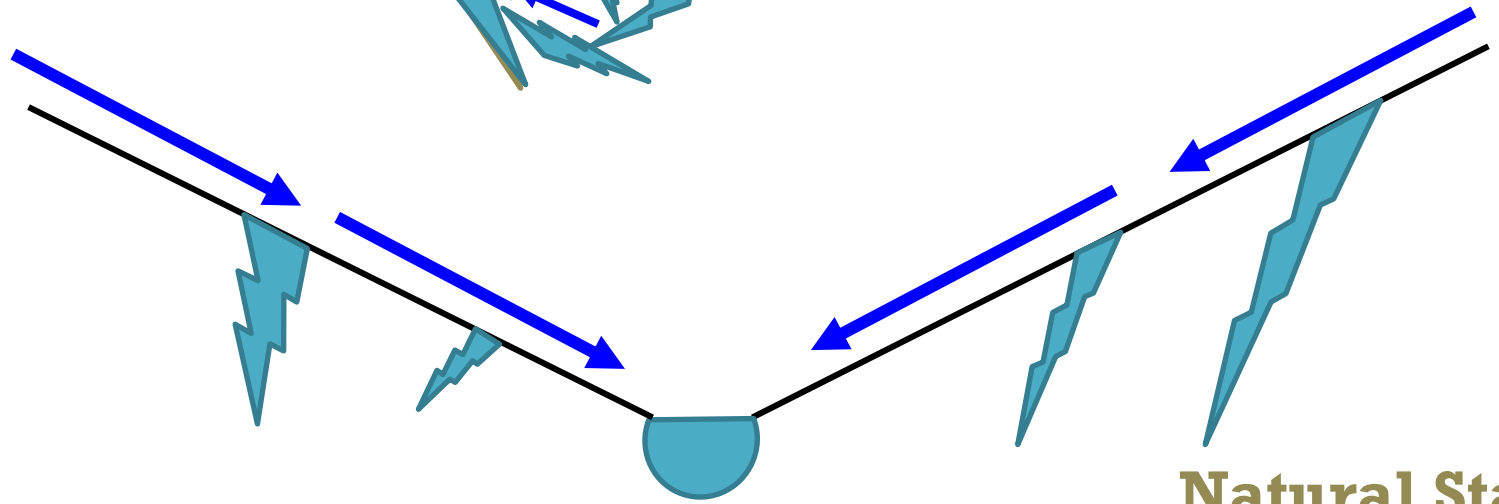
- Rule requires Ecology to determine whether each well will be allowed within restricted areas review for hydraulic continuity with closed streams
- Approval of each well in writing prior to construction
- Unique Rule - No other Rule in the state requires Ecology to make such a determination
- Complex hydrogeology – lack of certainty
 - Continuity
 - Availability – recharge capture
- Average of 3 new wells per year



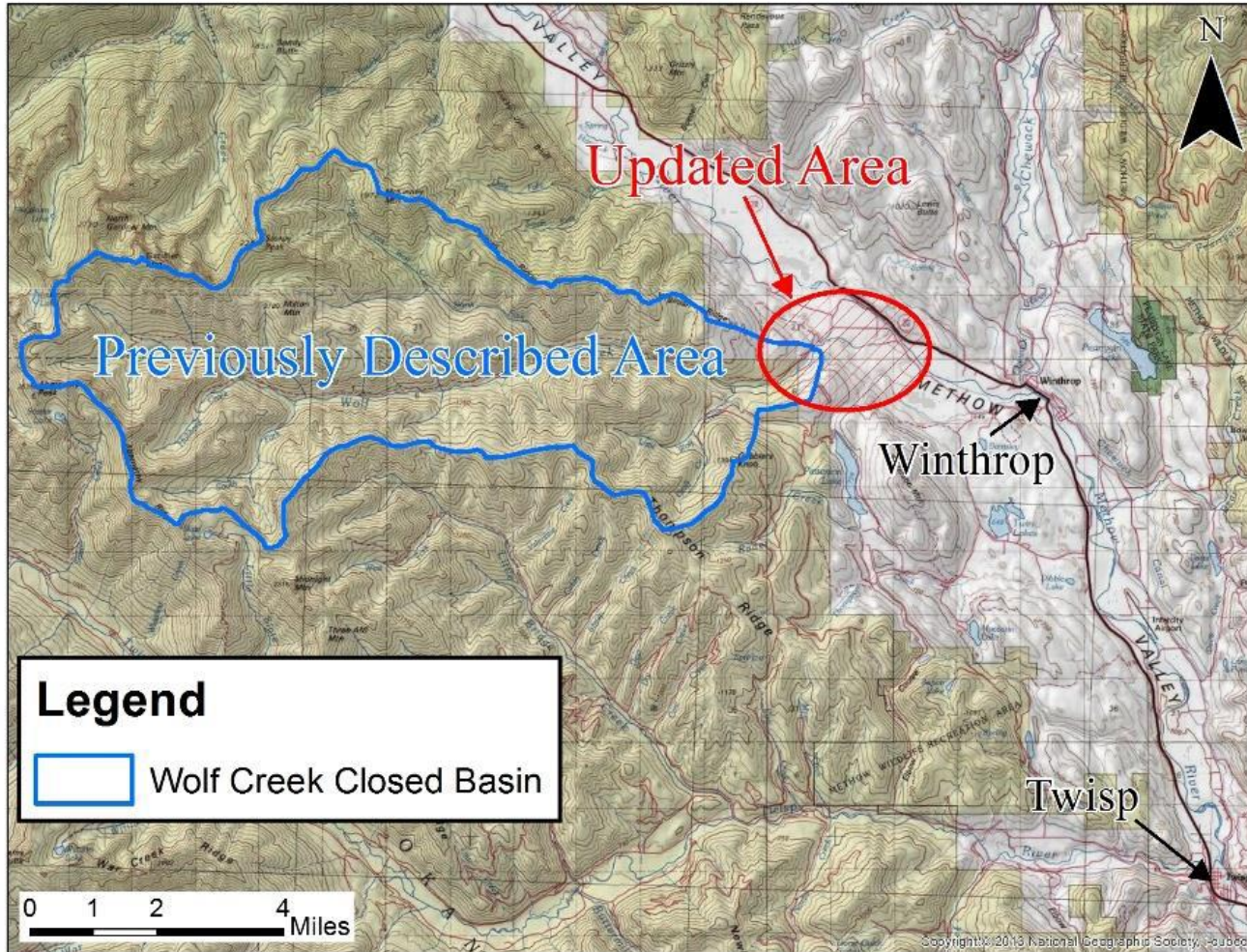
Well Effects



Natural State



Restricted Areas



What is changing?

- Recent field work to determine hydrogeology surrounding closed streams near the mainstem Methow
- Wells outside Restricted Area are not impacting the closed tributaries, but impact mainstem Methow
- Ecology is continuing to evaluate these streams and assist Okanogan County
- Balancing act to protect existing uses and streamflows when allowing new development.



Moving Forward

- We will engage with community/stakeholders in Comprehensive Planning to seek meaningful solutions for restricted areas
- Won't conduct hydraulic continuity analysis or approve new wells without suitable mitigation. New uses may be approved if impacts are offset. Other options?
- We will consider replacement well requests.
- Continue to assist County with technical questions outside restricted areas





Questions / Comments?

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