

# Exempt Wells in the West



## **Exempt Wells Conference: Problems and Approaches in the Northwest**

**May 17, 2011**

**Walla Walla, Washington**



**Nathan S. Bracken**

**Western States Water Council**

# Western States Water Council (WSWC)



- Advisor to western Governors on water policy issues
- 18 Western States
- Provides collective voice
- Fosters collaboration
- Formal affiliate of the **Western Governors' Association (WGA)**

# Exempt Wells in the West: A Snapshot

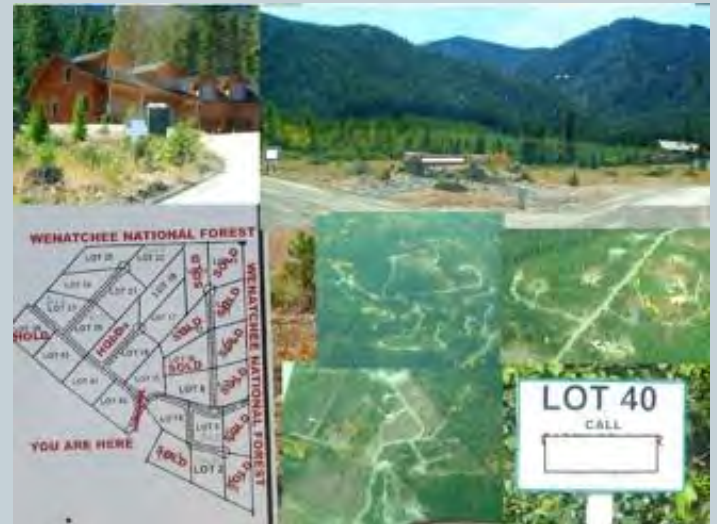


- Exempt from permitting and/or adjudication
- More than just domestic (livestock, industrial, etc.)
- Specified limits (gpd, af/year, acreage limits, etc.)
- Meters generally not required
- Well-drilling requirements generally apply
- Concerns vary among and within states

# The Two Main Perspectives on Exempt Wells



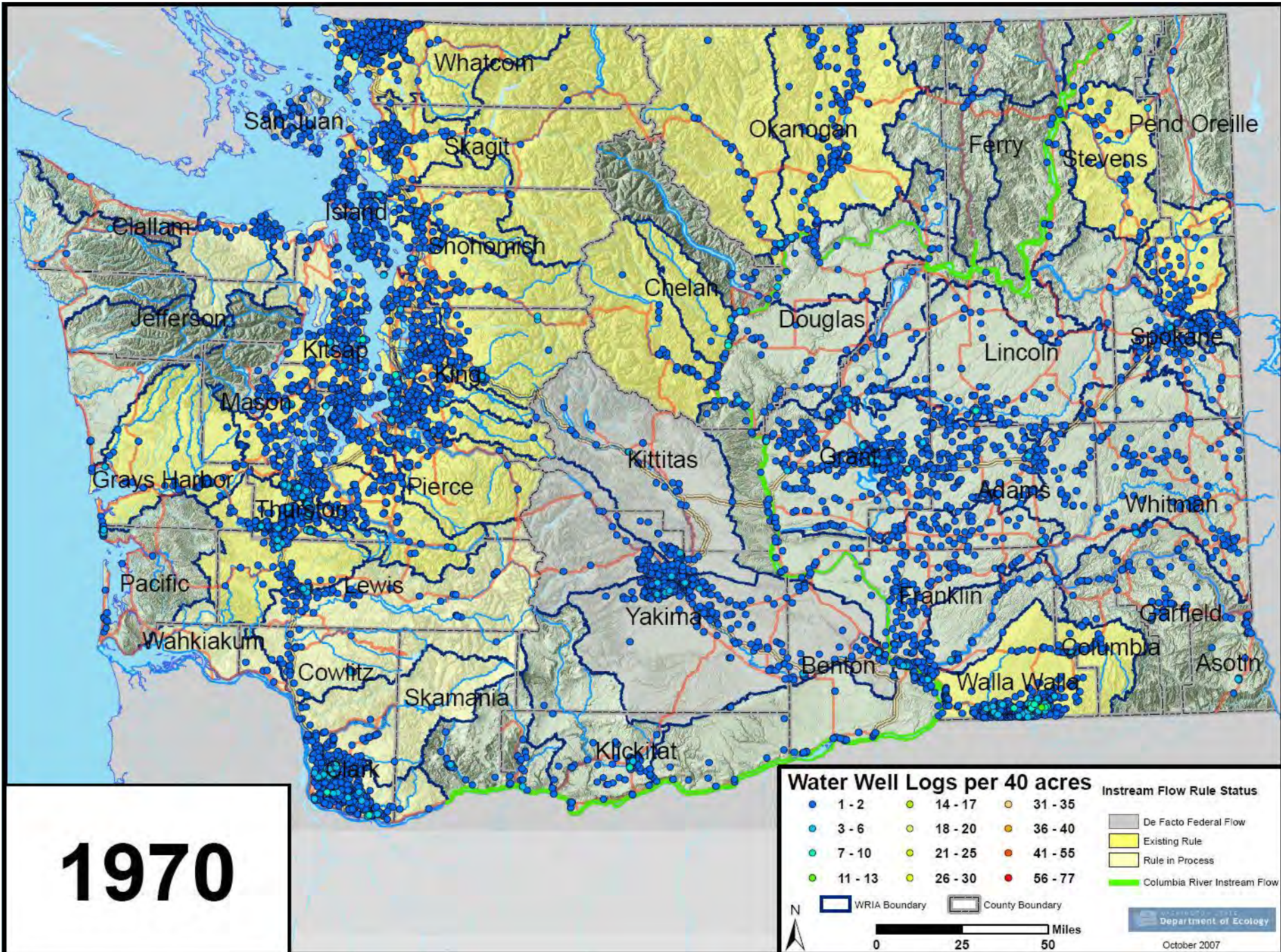
OR

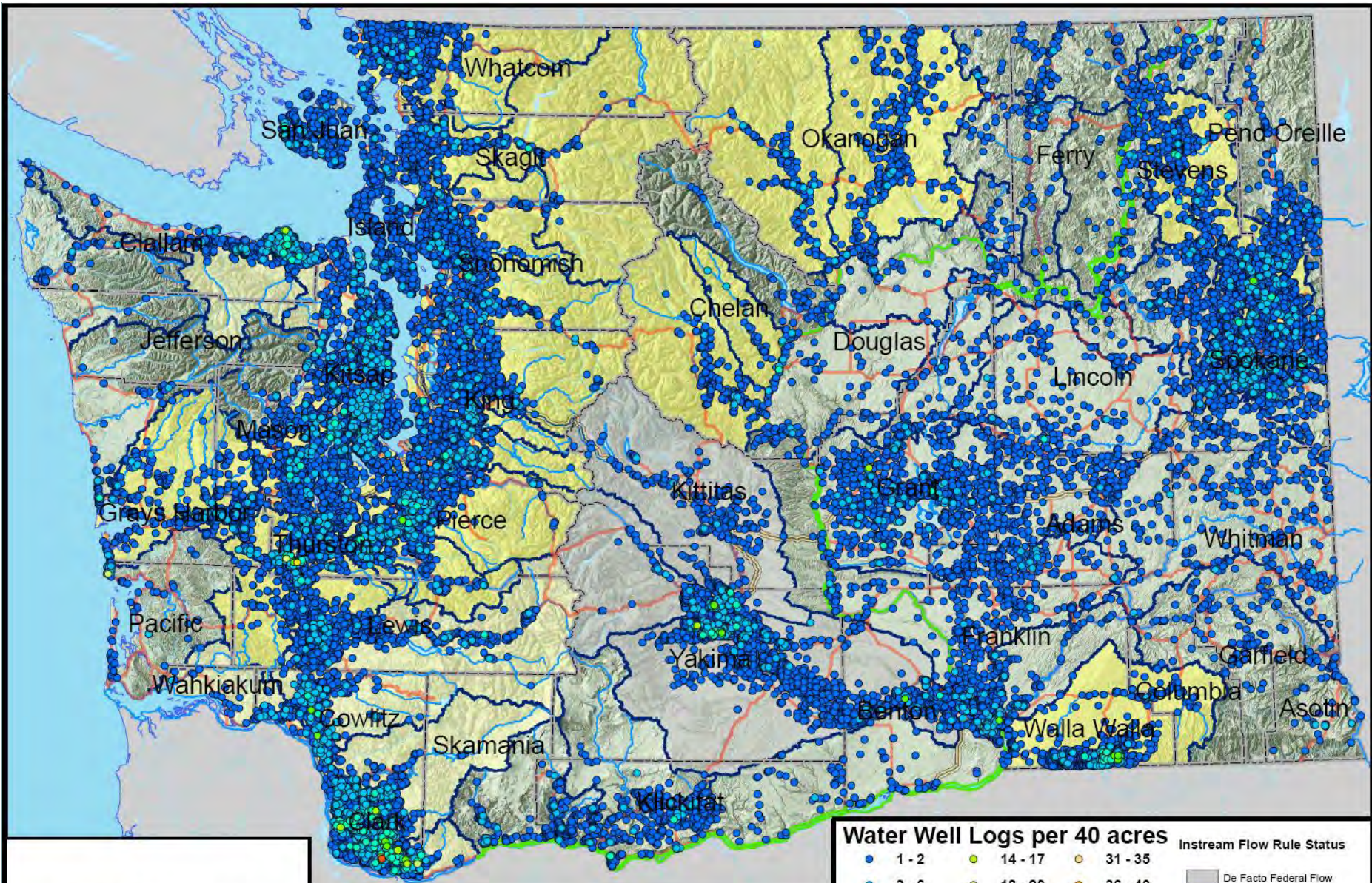


# Demand For Exempt Wells



growth + closed basin =  
exempt well demand





**1980**

**Water Well Logs per 40 acres**

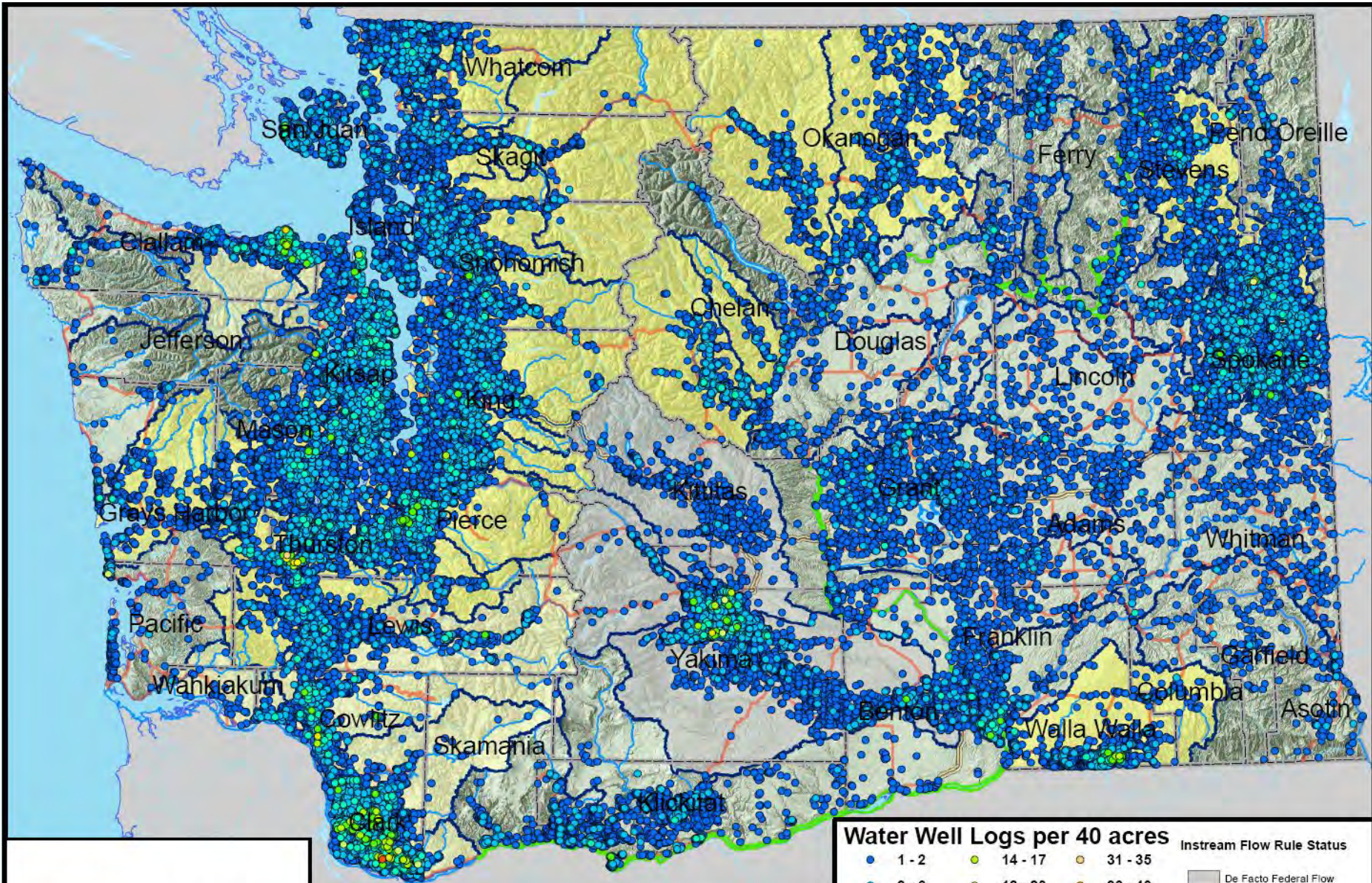
- 1 - 2
- 3 - 6
- 7 - 10
- 11 - 13
- 14 - 17
- 18 - 20
- 21 - 25
- 26 - 30
- 31 - 35
- 36 - 40
- 41 - 55
- 56 - 77

- Instream Flow Rule Status**
- De Facto Federal Flow
  - Existing Rule
  - Rule in Process
  - Columbia River Instream Flow

▭ WRIA Boundary    ▭ County Boundary

↑ N

▬ 0    25    50 Miles



**1990**

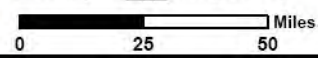
**Water Well Logs per 40 acres**

- 1 - 2
- 3 - 6
- 7 - 10
- 11 - 13
- 14 - 17
- 18 - 20
- 21 - 25
- 26 - 30
- 31 - 35
- 36 - 40
- 41 - 55
- 56 - 77

**Instream Flow Rule Status**

- De Facto Federal Flow
- Existing Rule
- Rule in Process
- Columbia River Instream Flow

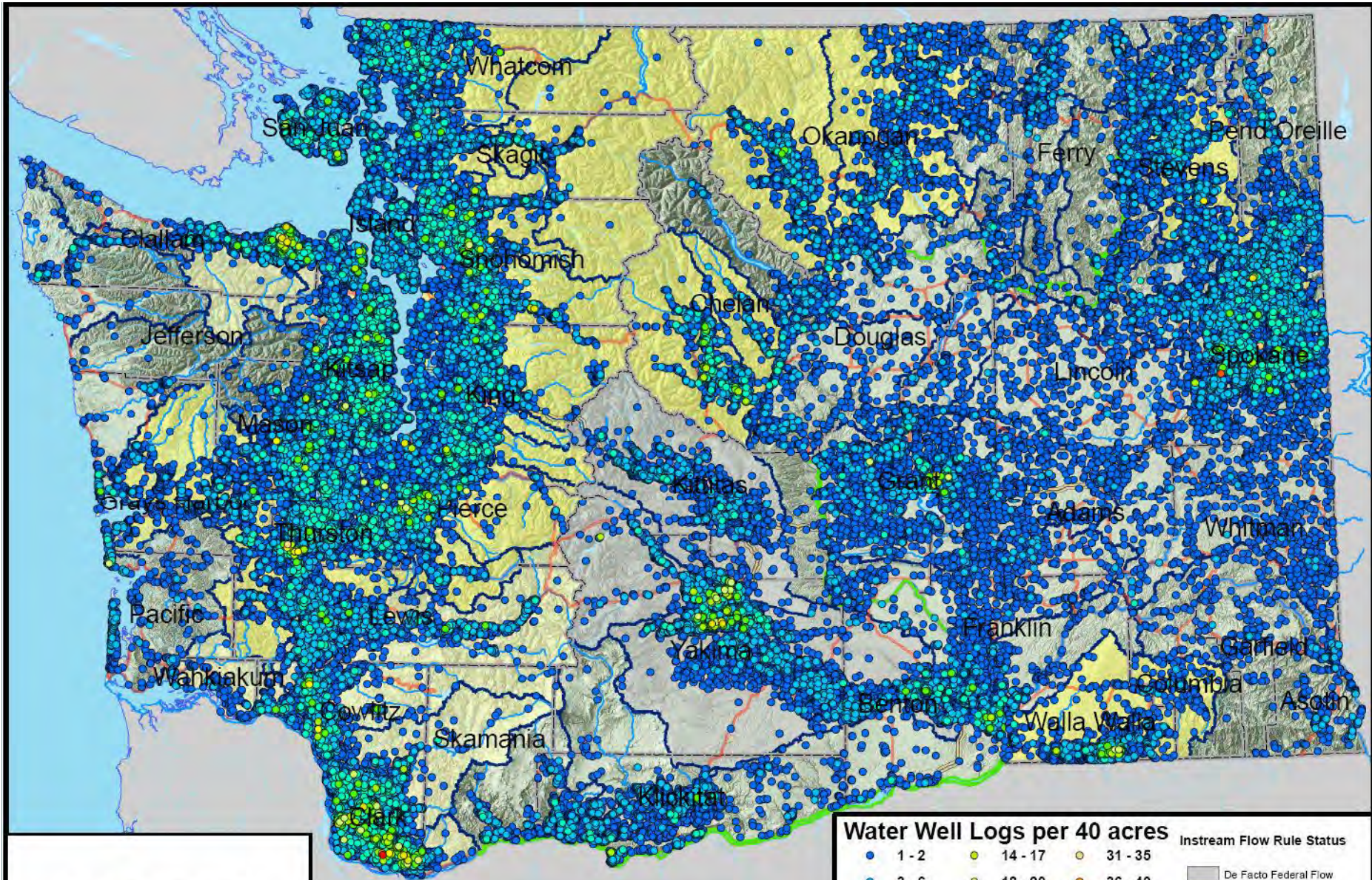
  WRIA Boundary    
   County Boundary



Department of Ecology

October 2007





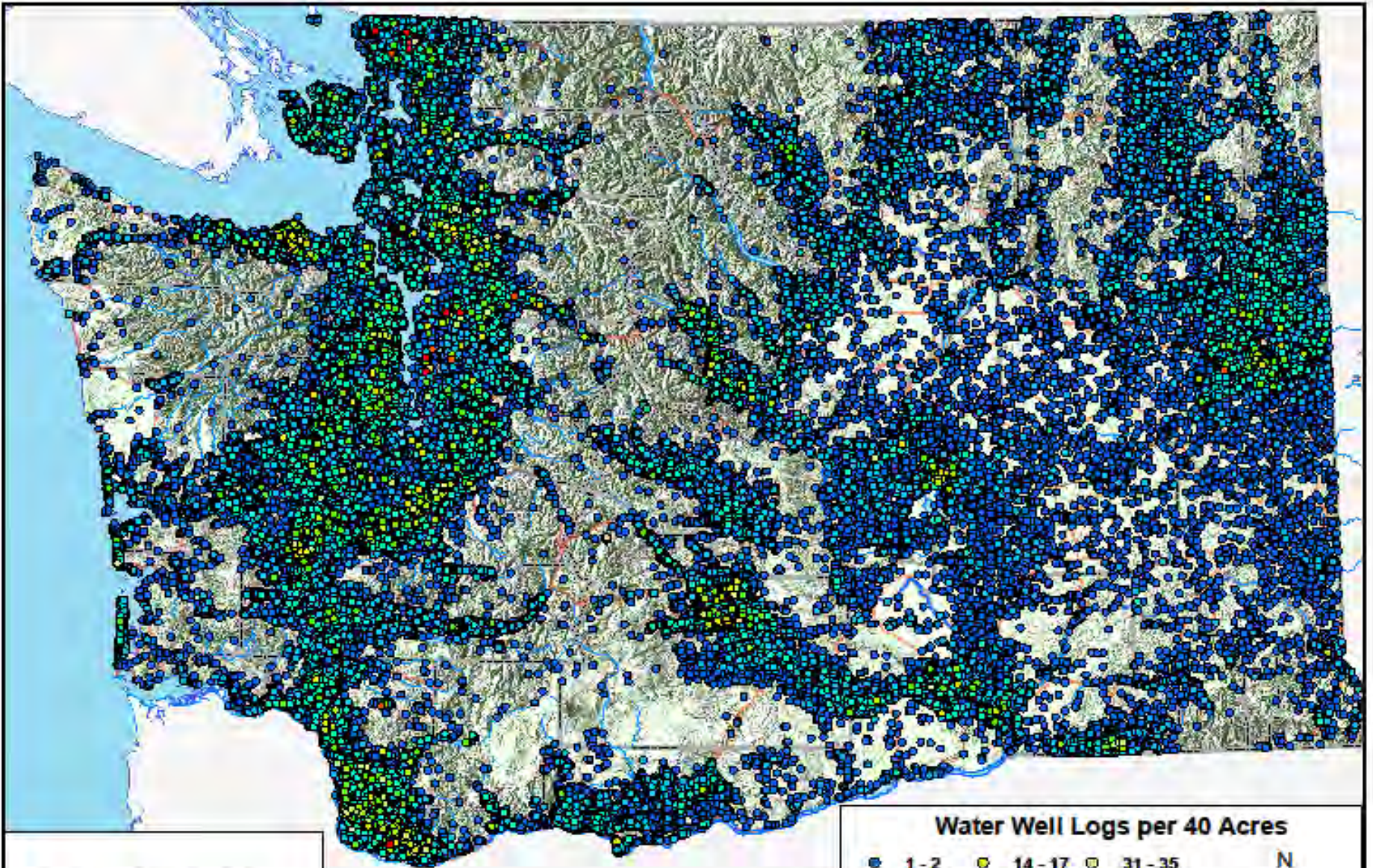
**2000**

**Water Well Logs per 40 acres**

- 1 - 2
- 3 - 6
- 7 - 10
- 11 - 13
- 14 - 17
- 18 - 20
- 21 - 25
- 26 - 30
- 31 - 35
- 36 - 40
- 41 - 55
- 56 - 77

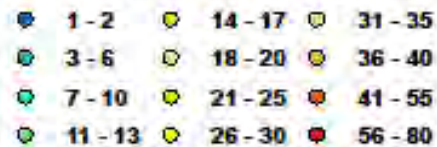
- Instream Flow Rule Status**
- De Facto Federal Flow
  - Existing Rule
  - Rule in Process
  - Columbia River Instream Flow

■ WRIA Boundary    ■ County Boundary  
 N  
 0 25 50 Miles



**2009**

**Water Well Logs per 40 Acres**



January 2009



# “Exempt” Subdivisions

## Concerns:

- Exempt wells used for dense, concentrated developments
- Located in closed basins
- Exemptions facilitate less desirable development practices
- Circumvent planning process



# Aquifers, Surface Flows, and Water Rights



## Possible impacts:

- Lead to pumping rates that exceed aquifer safe yield
- Deplete surface flows
- **Pumping “out of turn”**
- Environmental concerns

# Water Quality



- Naturally occurring inorganic contaminants
- Nitrates
- Pesticides
- Seawater intrusion
- Well maintenance and construction





# Administrative Challenges



- General lack of information about exempt wells:
  - Number of exempt wells
  - Location of those wells
  - Amount of water they withdraw and consume
- Complicates water rights admin. and planning
- Limited state resources complicate efforts to:
  - monitor exempt wells
  - quantify and mitigate their impacts
  - Enforce pumping limits

# Further Considerations



- Negative impacts do not occur in every instance
- Decline in irrigation may offset exempt domestic use
- Exempt wells do provide economic benefits
- Benefits may outweigh impacts in some cases
- Many exempt wells do not exceed limits



# Legal Questions and Recent Litigation



- Constitutional questions:
  - New Mexico – *Bounds* decision
    - ✦ District Court: exemption violated due process
    - ✦ Court of Appeals: upheld exemption
- Statutory and regulatory language:
  - Montana – “**physically manifold**”
  - Washington – **limit on** “stockwatering”
- **What qualifies as a “domestic” or “livestock” use**
  - South Dakota – *Longview* farms decision

# Monitoring Methods

## Metering:

- Shows withdrawals, but not consumption
- Accurate
- Incentive to comply
- Costs could be significant
- Well owners may resist
- **Won't stop new wells**

## Other Methods:

- Aerial infrared photography
- Self-reporting
- Improve well record info

# Options



## “Hammer” Approaches:

- Repeal exemption
- Significant, statewide reductions in pumping limits



## “Scalpel” approaches:

- Refine exemptions
- Target efforts in specific watersheds
- Collaboration
- Regulatory options



# Efforts to Reduce/Repeal Exemptions



- Montana – H.B. 104 (did not pass – 2007)
  - Reduce from 10 af/yr to 1 af/yr and ¼ acre limit
- Oregon – H.R. 2859 (did not pass – 2009):
  - Reduce single or group exemption from 15,000 to 1,000 gpd
- Oregon – H.B. 2566 (did not pass – 2007)
  - Repeal exemption
- Wash. – H.B. 1091 (did not pass – 2009 & 2010)
  - Cap stockwatering use at 5,000 gpd
- New Mexico – R. 19.27.5.9(D) (issued in 2006)
  - Limited domestic use from 3 to 1 af/year

# Other Recent Mitigation Efforts



- Montana – HB 602 (passed 2011)
  - Study to provide “clear policy” direction and legislation
- New Mexico
  - Domestic Well Management Areas (DWMA)
  - Municipal authority to limit exempt wells
- Oregon – S.B. 788 (passed 2009)
  - Requires filing of groundwater use and \$300 fee
- Oregon – Measure 49 (passed 2007)
- Washington – Kittitas County/Walla Walla
  - Efforts focused on specific areas of concern

# Collaboration is Critical



- Litigation and legislation will not end debate
- Collaboration gives stakeholders a say over outcome of disputes
- Negotiated solutions that produce workable results lessen likelihood of challenges
- **“Peace in the valley”** – water is a shared resource

# Conclusion



- **No “one-size-fits-all” approach**
- Early and robust stakeholder collaboration is key
- Targeted mitigation efforts are likely more feasible than broad, statewide efforts
- Successful approaches will likely need to allow for responsible development
- Public outreach and education vital
- An ounce of prevention is worth a pound of cure

# Questions?



Nathan S. Bracken  
Legal Counsel  
Western States Water Council  
[nbracken@wswc.utah.gov](mailto:nbracken@wswc.utah.gov)