



DEPARTMENT OF  
**ECOLOGY**  
State of Washington

# **Mitigation Options for Domestic Water Use in the Yakima Basin**

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**Implementing Section 302(10) of ESSB  
6052, Chapter 4, Laws of 2015**

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# **Mitigation Options for Domestic Water Use in the Yakima Basin**

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**Implementing Section 302(10) of ESSB  
6052, Chapter 4, Laws of 2015**

*by*

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# Introduction

In the 2015-2017 Operating Budget, under Section 302(10) of ESSB 6052, Chapter 4, Laws of 2015, the Legislature directed Ecology to:

“[E]valuate mitigation options for domestic water use in areas of the Yakima basin for which mitigation water is unavailable and access to water from water banks is unsuitable. The department must recommend solutions for providing mitigation water for domestic use in such areas.”

This report describes the current status in the basin, identifies and evaluates mitigation options, and makes recommendations for solutions for domestic water supply. Both Yakima and Kittitas counties have been actively engaged, working cooperatively and proactively with the Department of Ecology to use best available science to address domestic water use within the Yakima Basin.

Stakeholders provided comments on a preliminary draft of this report. Comments were incorporated in the body of the text or responded to in Appendix A.

# Background

The Yakima Basin, not unlike other watersheds in the state, is experiencing development constraints due to lack of water availability. Kittitas County in particular experiences these constraints as a result of over-allocation of water in the basin and a high demand for new water uses in a part of the state that has a limited water supply. This report focuses on Kittitas County, as this area of the Yakima basin has encountered significant development constraints.

In 2007, the Washington Supreme Court ruled that Kittitas County failed to protect rural character and water resources in their comprehensive plan. Seven years later parties to this case developed a settlement agreement essentially stating that the impacts from all new uses of water must be mitigated. New uses include uses under new water rights and uses under the groundwater exemption. In Kittitas County, areas referred to as red zones are without identified senior water rights sufficient to mitigate for new uses. East Kittitas County in the Sage Hills area includes the region most extensively delineated as a red zone (See Figure 1).

Yakima County resides in the downstream reaches of the Yakima Basin. In Yakima County, no mitigation is required to develop a water supply using the groundwater exemption. This is because unlike Kittitas County, Yakima County has no administrative rule excluding new development using the groundwater exemption. In contrast, Ecology issues no new water right permits anywhere in the Yakima Basin without mitigation. And there are basins in Yakima County that currently have no water banks that serve them. Projected development in these areas would rely on the permit exemption.

Potential water supply options for the red zones in Kittitas County can be lumped into two categories:

- Accessing water under current statutory authority; and
- New approaches which require legislative action.

Under current law, local and state governments, working in partnership with landowners and water right holders, can develop direct water supplies as well as seek new mitigation approaches. This report identifies those options, and points out where changes to law may provide additional opportunities to address constraints in the red zones.

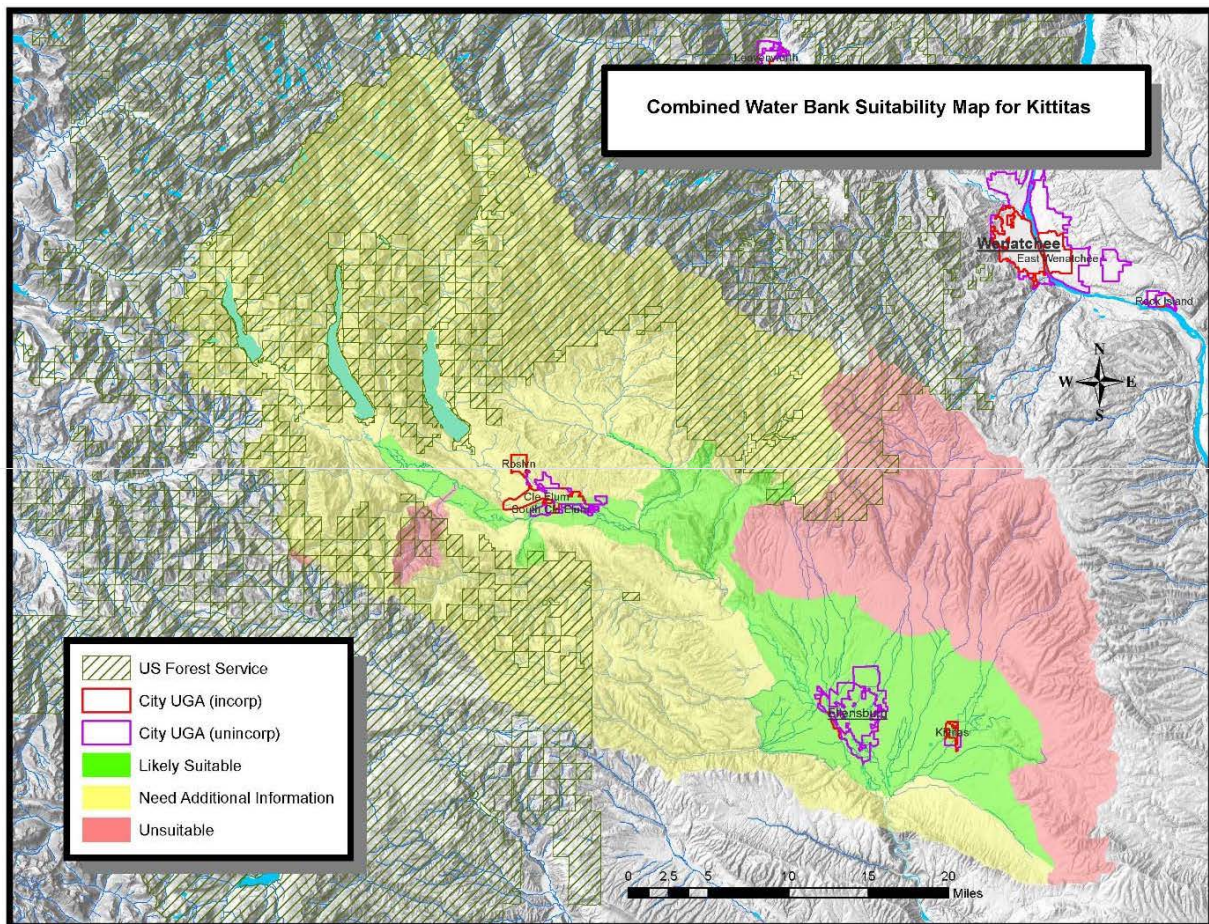


Figure 1. Area Map, including cities' UGAs and combined water bank coverage

## Options available under current authorities

Under current legal authority, new domestic uses in the Kittitas County red zones may choose to pursue one of four options to obtain access to water:

- Cisterns. CISTERN WATER SYSTEM REQUIREMENTS, Chapter 13.25 of Kittitas County Code, defines licensing and operational requirements for potable water haulers. It also lays out specifications for cistern systems and defines adequate operations of onsite storage of water for domestic purposes.
- Municipal water service. The cities of Ellensburg and Kittitas provide potable water within their respective city limits and incorporated areas. These water supplies can potentially be used as a reliable source of domestic water beyond these areas when consistent with the Growth Management Act. Opportunities may exist to expand service to the urban growth areas (UGAs) adjacent to the cities, or even to areas outside their UGAs.
- Expanding water banks. Several water banks can currently provide suitable mitigation outside the red zones in Kittitas County. When an existing bank acquires additional senior water rights, they can provide additional mitigation opportunities at the local level. New water banks may also be established, noticeably reducing the red zone in their respective areas.
- Condemnation. Statute provides local government, quasi governments, and individuals with the option to condemn or transfer water from an inferior to superior use “for the greatest public benefit.” This water could then be put to beneficial use to support new domestic uses.

Each of these domestic water supply options is discussed in greater detail, with considerations of feasibility for providing water supply or mitigation in the Yakima Basin. It is important to note that water rights held by the Yakama Nation are both federally reserved and the most senior in the basin. Condemnation proceedings would not apply to Yakama Nation rights.

## Cisterns

Cistern use is not uncommon in our state. It is an essential option in areas where fresh water supplies are scarce, are of poor water quality, or when water is not legally available. Households in Kittitas County without a source of viable water for a portion of the year are prime candidates to rely upon cisterns for their water supply.

Domestic cisterns are typically supplied from one of three sources:

- Pumping water from a pre-existing well during times when water is available then storing it for times when water is unavailable;
- Getting water delivered by truck from a licensed water hauler, or
- Catching rain water off rooftops.

In Kittitas County, the primary water supply for cisterns would originate from a licensed water hauler. The County has established requirements for water haulers to maintain public health and safety which include:

- Licensing details and renewal criteria;



- Specifications for transportation and water treatment;
- Design specifications for cisterns used for residential supply;
- Minimum standards for the water source used by the hauler;
- Recordkeeping for the cistern owner, and
- An inspection of the onsite infrastructure by the local health district.

Kittitas County adopted CISTERN WATER SYSTEM REQUIREMENTS in 2011 with standards for domestic use of cisterns. At this time, there are no licensed haulers in Kittitas County.

It is important to note that the Department of Health has not approved trucked water as a public drinking water supply. Cistern use is therefore limited to single domestic supplies. Additionally, Kittitas County code indicates that the trucked water must be supplied by a Group A public water system and have a dedicated connection signed off by a purveyor.

In general, cisterns can provide a viable water supply option for new domestic uses in the red zones in Kittitas County. Currently, Ecology is not aware of any residential building permits issued by Kittitas County using a cistern for its water supply.

## **Municipal water supply**

Extending water utility services to rural areas is a balancing act and one that thoughtful planning can support. Statute also supports expanding water service to rural areas when doing so maintains “appropriate rural density.” Under RCW 36.70A, the Growth Management Act (GMA), extension of urban water service must support “appropriate rural densities and uses that are not characterized by urban growth and are consistent with rural character.”

According to their 2012 Comprehensive Plan, the City of Ellensburg provides water for 11,823 households, businesses, and publicly owned buildings within their city limits. The City’s water system plan indicates an intent to expand its water service area to include the UGA. They could extend even further beyond the UGA if GMA’s rural service standards are met.

Figure 1, on page 2, shows the UGA for the cities of Ellensburg and Kittitas and their proximity to the red zones. At a minimum, the distance between the UGA and the outer edge of the red zone ranges between 2.5 to 3 miles. For rough “planning level” work, utilities generally estimate that water system expansion costs about \$1,000,000 per linear mile. Therefore, service extension would likely start at more than two million dollars, and depending on the specific location of demand, could run into the tens of millions of dollars, to provide municipal water service to the red zones.

Although providing new domestic water supply for the red zones from a municipal supplier is likely feasible under the law, it may be cost-prohibitive at this time.

## Expansion of water banks

In Kittitas County, nine water banks exist that may sell mitigation credits for new uses outside the red zone, areas marked as yellow or green (See Figure 1). Ecology is continually working with water right holders to obtain additional water rights to expand water availability. Currently, Ecology is focusing its efforts in the Teanaway and Big Creek basins to reduce the size of the red zone.

New acquisitions could lead to new water banks or expansion of existing banks that would noticeably reduce the red zones in these areas of the county. The current banks hold a total 1000 acre-feet of water rights for mitigating new domestic uses in the county. Approximately 10 percent of this water has been allocated, and enough water remains to accommodate future anticipated growth until about 2030. These quantities represent a significant portion of the need in Kittitas County.

At this time, existing banks cannot supply water to new domestic uses in the red zones because they lack all the elements necessary for success. For these banks to expand their service area or for new banks to emerge, they must include:

- A willing seller with a water right that has been changed to instream flow and mitigation purposes and is held by Ecology in the Trust Water Rights Program.
- Mitigation water that is suitable to offset the impacts of the new use. To make a water right suitable:
  - It must have an appropriately senior priority date to be reliable among the water users competing for water during low-water years; and
  - It must be located in the right place (typically upstream of the new use) in order to mitigate impacts to senior water right holders.

Once the seller and the agencies (Ecology, Washington Department of Fish and Wildlife, the Yakama Nation and the Bureau of Reclamation) determine the water right is suitable, the seller receives payment and the buyer receives a mitigation certificate.

To establish a suitable water bank in the Yakima Basin, sufficiently senior water rights located in specific areas of the basin where demand exists or is anticipated must be available to transfer to instream flow and mitigation purposes. The most sought after rights are those that have both spatial and temporal priority sufficient to carry them through a poor water year. For instance, during the 2015 drought, water rights established as early as 1884 in the Teanaway basin and 1874 in Manastash basin were curtailed. Water users with rights dating back before statehood had to stop their use for a portion of the season to protect more-senior rights. Because the GMA requires an adequate water supply for new residences, rights that are subject to frequent interruption are not suitable on their own to mitigate for new domestic uses.

In addition to being sufficiently senior, water rights used for mitigation for new domestic uses must be located in the right place. This presents a significant challenge in the Upper Kittitas area. Many of the most senior water users are typically located lower in the tributary basin than the new residential parcels being developed. Purchasing a senior water right which is lower in the basin may meet the temporal requirements, but may not be located in a place that mitigates the new uses.

## Condemnation

Under RCW 90.03.040, governments and individuals may obtain new water through a condemnation action. Under the law, the entity requesting condemnation makes a case to superior court stating their use “will serve a public purpose, is necessary for the public interest and the Condemned Property and Water Rights are necessary for this purpose.” The government or individual seeking to condemn the water right petitions superior court making the case that the new use will result in a transfer from an inferior to superior use. If the court finds in favor of the entity requesting condemnation, the new user would be required to pay compensation to the water right holder that loses their water right.

Condemnation has been used fairly infrequently. A success action may include any of the following:

- Parties that come forth to the court with a negotiated plan to transfer the water in exchange for compensation, and/or
- Extenuating circumstances where the water right may be subject to relinquishment.

One example of successful condemnation involved the cities of Olympia, Lacey, and Tumwater and the American Bottled Water Corporation (ABWC). The cities acquired a water right held by ABWC at the site of the previous Olympia Brewery under the general eminent domain authority and a condemnation action. This case was factually unique; the plans and legal status of ABWC were in significant jeopardy, eventually leading to a bankruptcy declaration. This uncertainty may have contributed to the decision to enact a condemnation proceeding. Another example of condemnation that led to a denial involved the City of Winlock and an irrigator. In this case, the court denied the petition because the irrigation was ongoing and the water was being put to beneficial use.

While available under current law, this option has the potential to create significant conflict, instead of supporting collaborative solutions to address water supply needs for all users. The feasibility of using condemnation for new domestic water supplies should be viewed cautiously because of the potential for negative outcomes for the community as a whole. No potential condemnations cases have been identified in Kittitas County.

Water rights held by the Yakama Nation are both federally reserved and the most senior in the basin. Condemnation proceedings would not apply to Yakama Nation rights.

## Potential Options Requiring New Statutory Authority

Recently, Ecology has worked with stakeholders to explore options that may improve reliability of rural water supplies, while continuing to protect senior water rights, fish and instream resources. Some of the options that stakeholders have suggested would require changes to statute. Suggestions have included priority for domestic use, authority to use overriding

considerations of the public interest, and broadening mitigation options<sup>1</sup>. No single option discussed had broad-based support.

Of the statutory change options discussed, only one would help address water availability for new domestic uses where water for water mitigation is not possible (i.e. red zones) in the Yakima Basin. This option would require a statutory priority for domestic uses over other out-of-stream uses.

## Priority for domestic use

Washington law does not recognize priority of one beneficial use over another. Twelve of 17 western states that rely on prior-appropriation provide a statutory or constitutional priority for domestic use. Enacting this kind of approach in Kittitas County would likely require a mechanism to compensate the senior out-of-stream water right holders if impaired by new domestic water uses. As a legal property right, their water right is protected under the constitution. Also, only water rights administered by the state would be subject to this approach.

To prioritize domestic water uses, the Legislature could amend the water code to clarify that diversionary beneficial uses are not all equal. Establishing this priority could ensure rural domestic water supplies, but would impact senior out of stream water right holders in the basin. Any action would only apply to state managed water rights, and would not apply to federal and Tribal reserved rights. Water rights held by the Yakama Nation are both federally reserved rights and the most senior in the basin. A domestic priority could not preempt the Nation's rights.

Another important consideration is the specific definition of “domestic use.” It can be characterized as the “in-house” use of water for cooking, cleaning, and sanitation. However, domestic use may also be interpreted to include irrigation of a small yard or garden, as is described in the statutory exemption from water right permitting (up to ½ acre of non-commercial lawn or garden). In-house domestic uses have much less impact on instream resources than outdoor uses do.

Overall, the applicability of a domestic priority is an important distinction and would have to be clearly stated in any legislative proposal. See Appendix B for *Comparative analysis of Western States' approaches to managing small domestic withdrawals*.

## Other stakeholder ideas

Recently, stakeholders have discussed opportunities to provide water for new uses through conservation measures that apply to pre-existing uses. Current statute encourages efficiency and conservation programs that “utilize an appropriate mix of...incentives, cost share..., regula[tion]” and education. Previous attempts to develop a more directed approach to conservation in statute failed to pass the Legislature. However, conserved water as mitigation for a new use may be challenging in Kittitas County as conservation frequently does not reduce consumptive use.

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<sup>1</sup> For more information on these options, please refer to [Finding Rural Domestic Water Solutions While Protecting Instream Resources](http://www.ecy.wa.gov/programs/wr/wrac/rwss-leg.html) available at <http://www.ecy.wa.gov/programs/wr/wrac/rwss-leg.html>, last downloaded on December 3, 2015.

The conversation with stakeholders is ongoing. Other options have been brought forth and continue to be discussed. In the 2015 session, SB 5965 (*Evaluating mitigation options for impacts to base flows and minimum instream flows*) would have required Ecology to gather information to help inform these conversations. While SB 5965 did not pass, Ecology recognized the value in promoting a greater shared understanding of water resources mitigation among state policy makers. To support the rural domestic water supply conversation, Ecology is developing a report similar to the one specified in SB 5965. This report will evaluate options available for mitigating the effects of permit-exempt groundwater withdrawals on instream flows, and may help identify potential solutions for the red zones in Kittitas County.

## Conclusion

Options to provide water for new domestic uses in the red zones of Kittitas County exist, but each requires some additional work to be feasible for implementation:

- Cisterns are an option available today, provided that licensed water haulers are available to supply water.
- Extending municipal water service may be an option in the future to supply domestic water supply. Careful planning will be necessary to ensure compliance with GMA goals, and the significant costs would have to be accepted by new water users.
- Expanding water banks under existing authorities is also a longer term possibility, because it requires successful acquisition of appropriate water rights.
- Condemnation is an available approach, but one that should be cautiously engaged. Ecology is not promoting this option, especially in Kittitas County due to the history of litigation and conflict.

New statutory authorities could be explored by the Legislature, including the creation of a domestic use priority over other out of stream water uses.

Of all the options discussed in this report, using cisterns is the most feasible in the short term. There are no regulatory barriers in place for single domestic systems. With a licensed water hauler in the county, new domestic uses can be approved using this source of water.

## APPENDIX A: Other options offered by the public for Kittitas County mitigation

Comments	Response
<p>Tributary augmentation: transfer water from irrigation canals to dewatered creeks to provide flows for fish passage</p>	<p>For these projects to be feasible, they must respond to site specific factors. These factors can include:</p> <ul style="list-style-type: none"> <li>• Are irrigation canals in proximity to where the domestic need exists?</li> <li>• Will senior water rights located downstream be impaired by a consumptive use?</li> <li>• Are irrigators willing and able to part with their water rights during a drought year? For instance in 2015 water rights as old as 1883 were shut off due to the drought.</li> </ul> <p>Transfers that occurred in 2015 resulted in pulse flows and were non-consumptive. A continuous supply that can be consumed is required to offset an exempt well. Opportunities may exist in the lower portions of a stream system but the red zones are primarily located above the irrigation canals. However in general, most canals are not located in such a way to deliver mitigation water to tributaries where needed for domestic use mitigation. Due to this level of specificity, it may not be a successful approach for increasing the availability of mitigation options in the current red zones.</p>
<p>Groundwater storage: Using ASR or SAR projects to infiltrate and store water underground and recover it for use at a later date</p>	<p>Under RCW 90.44.460, the Legislature articulated their policy on aquifer storage and recover (ASR); “to promote new and innovative methods of water storage.” The statute goes on to recognize the necessity for permitting and directs Ecology to develop protocol and implement the program. ASR or shallow aquifer recharge (SAR) almost exclusively rely upon site specific factors. Initial feasibility assessments reveal very limited opportunities for ASR in Kittitas County. Due to this level of specificity, it is unlikely to be a successful approach for increasing the availability of mitigation options in the current red zones.</p>

Comments	Response
<p>Floodplain enhancements: reconnecting the channel to the flood plain to provide additional water storage with release throughout the year</p>	<p>Actions to improve storage need to be quantified, what volume of water is retimed? The agency is currently working on a pilot project to quantify the contribution and results will be most applicable for the specific site. It is being explored as a mitigation option for site specific cases. Due to this level of specificity, it is unlikely to be a successful approach for increasing the availability of mitigation options in the current red zones.</p>
<p>Limiting the amount of water pumped under the exemption to provide water for additional exempt wells</p>	<p>Water-for-water mitigation in-time and in-place is required for any new uses. At best, limiting the use of an exempt well only slows the depletion of existing mitigation credits in areas where they are available. To create an effective strategy, an extreme level of oversight would be required to 1) identify suitability of conservation, 2) ensure proper legal deeds and restrictions were put in place, and 3) ensure water use restrictions were monitored and enforced.</p> <p>Overall, while possible, the amount of cost for such an administrative structure for this option would have to be borne on the new domestic users and would be significant. Evaluating the exact cost would be difficult without detailed analysis, and is beyond the scope of this report. Additional evaluation could be accomplished if the legislature provided Ecology a longer time frame and additional resources.</p>
<p>Develop program to offset the impacts associated with rural exempt wells through a combination of fees, meters, conservation and acceptance of de minimis impacts</p>	<p>This comment initiates a framework to provide water for additional uses via an administrative mechanisms with appropriate checks and balances. However small, it would result in impairment to senior water right holders and therefore is not feasible in the Yakima basin, where senior water right holders are already subject to regular curtailment. Also additional impairment, however small, is not allowed under law.</p>

Comments	Response
Condemnation, domestic priority and out of kind mitigation are inappropriate to include in this report because doing so “could give false credibility to” them.	Condemnation is an option under statute. Ecology does not recommend it as an option and the report states that. Domestic priority exists in the majority of western states and has been discussed with stakeholders. This report only mentions it and does not identify out of kind mitigation as feasible.
How would Ecology pursue condemnation?	Ecology does not recommend condemnation. Local governments may choose to pursue this approach. The report identifies it only because it is a current legal option.
Due to the externalities associated with extending municipal water supplies, more details should be provided.	Due to the nature of the proviso, this report provides a cursory review of options. Additional evaluation could be accomplished if the Legislature provided Ecology a longer timeframe and additional resources.



## APPENDIX B: Comparative analysis of Western State’s approaches to managing small domestic withdrawals

Originally presented at Rural Water Supply Strategies Workgroup: July 21, 2014

Throughout the west, 15 of 17 states allow development of wells in rural areas without a permit where alternative sources of potable water are not available. Commonly referred to as exempt wells, these small scale distributive uses are free from the administrative processes associated with a traditional water right. To manage the potential proliferation of exempt wells, states have enacted a variety of limitations on this use. Common approaches include designating regional control areas with more intensive management strategies, such as prohibiting further exempt well development and other restrictions specific to a region as determined by the state engineer. A few states also restrict the types of water use from exempt wells.

In addition 12 of 17 western states recognize a domestic priority alongside the exemption. Some jurisdictions tie these considerations inextricably to one another in statute. In other states, policy development has led to collaborative management of these exceptions. A few states openly acknowledge that the domestic priority has rarely been invoked due in part to the practicality of the mechanisms by which to invoke it, i.e. condemnation or drought declaration. The chart below provides additional details on how western states approach exempt well and domestic use priority management.

State	Is single domestic use exempted from water rights permitting?	Is domestic use a priority in statute or state constitution?
AK	Yes. Limited to 5,000 gallons per day (GPD). But, exempt use is subject to appropriation and can be curtailed to “supply water to lawful appropriators...or to protect the public interest”	Yes (for public water supplies). Public water supply preference when competing applications are received.
AZ	Yes. Limited to 35 GPM. But, cannot be used for subdivision in a protected groundwater region.	Yes.
CA	Yes. But, counties may create limits for exempt wells.	Yes (for municipal supplies), “permit by a municipality... shall be considered first in right, irrespective of whether it is first in time” -- California Water Code §1460

State	Is single domestic use exempted from water rights permitting?	Is domestic use a priority in statute or state constitution?
CO	<p>Yes. Limited to 15 GPM / 21,000 GPD, and limited to in house and domestic animal use only.</p> <p>State law was changed in 1972 to provide an exemption for single domestic use for every lot of record at the time the law passed. The law states that exempt wells are outside the prior appropriations system.</p> <p>Within designated groundwater basins, a minimum lot size of 35 acres or larger is required, or cluster developments cannot exceed one acre foot per year (af/yr) use per 35 acres to be exempt from permitting.</p> <p><i>Also, if the state engineer finds that a proposed subdivision's water supply will cause "material injury" to existing wells or water rights, the development may proceed regardless. The county's board of commissioners must approve it and the developer must provide prospective buyers with notice of the state engineer's findings.</i></p>	<p>Yes. In times of scarcity, domestic uses are prioritized; not necessarily applicable to new uses/users.</p>
ID	<p>Yes. Limited to 13,000 GPD for single domestic use.</p> <p>Idaho Department of Water Resources has issued moratorium orders that prohibit further consumptive uses of water. However, in an effort to avoid numerous individual domestic wells in a subdivision, IDWR does exempt subdivisions from the moratorium in cases where each unit served by a community well satisfies the exemption requirement.</p>	<p>Yes.</p>
KS	<p>Yes</p>	<p>Applies to conflicting uses</p>
MT	<p>Yes. Limited to 35 gpm or 10 af/year, and limited to single domestic use. But, all wells in controlled groundwater areas require a permit.</p>	<p>No.</p>
ND	<p>Yes.</p>	<p>Yes.</p>

State	Is single domestic use exempted from water rights permitting?	Is domestic use a priority in statute or state constitution?
NE	Yes. Limited to 50 GPM. Local jurisdictions (a natural resource district) may require single domestic users to obtain a permit for a well that could be in hydraulic continuity to surface water.	Yes.
NM	No. Although state engineer may not deny issuing a permit for single domestic use (under state law). Limited to 2 af / year. State engineer may choose to include additional restrictions on domestic wells in Critical Management Areas.	Yes.
NV	Yes. Limited to 2 af / year, and single domestic use only.	No, but Nevada's groundwater code contains a legislative declaration that it is the policy of the state "to recognize the importance of domestic wells as appurtenances to private homes and to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects."
OK	Yes. Limited to domestic use plus irrigation not to exceed 3 acres.	No, except for domestic users with rights established prior 1963.
OR	Yes. Limited to 15,000 GPD.	Yes. In times of scarcity, domestic uses are prioritized; not necessarily applicable to new uses/users.
SD	Yes	Domestic is "the highest use...take[s] precedence over all appropriated rights...exercised...consistent with the public interest"
TX	Law of capture. Property owner is entitled to any water below their property, regardless of impact to others.	N/A. Yes, for surface water, but moot issue for domestic groundwater users.
UT	No.	Yes. In times of scarcity, domestic uses are prioritized; not necessarily applicable to new uses/users.
WY	No. State engineer may deny based on determination that approval is not in the public interest. Notwithstanding a finding of lack of water by the state engineer, county commissioners may approve a subdivision even without water availability. The developer must provide notice to prospective buyers of these findings.	Yes.