ORDINANCE NO. 1294

AN ORDINANCE OF THE CITY COUNCIL OF CLE
ELUM AMENDING CLE ELUM MUNICIPAL CODE
CHAPTER 13.20, THE CURRENT WATER POLICY,
AND ESTABLISHING A NEW PROCEDURE FOR
TRANSFERING WATER RIGHTS TO THE CITY;
PROVIDING FOR SEVERABILITY; AND
ESTABLISHING AN EFFECTIVE DATE

WHEREAS, on March 9, 1998, the Cle Elum City Council passed Ordinance No. 1087, amending Cle Elum Municipal Code Chapter 13.20 due to limitations on water availability within the City water supply; and

WHEREAS, on February 14, 2007, the Yakima County Superior Court issued a Conditional Final Order ("CFO") in the matter of State of Washington, Department of Ecology v. James Acquavella, Yakima County Superior Court Cause No. 77-2-01484-5; and

WHEREAS, the CFO confirms a water right with a priority date of May 10, 1905 to the Bureau of Reclamation ("BOR") on behalf of the City of Cle Elum, pursuant to a Municipal Water Service Contract between the BOR and the City, in the amounts of 3 cubic feet per second (cfs) and 593 acre-feet per year for continuous municipal water supply; and

WHEREAS, the CFO further provided that the maximum quantity allowed under the BOR's May 10, 1905 water right and the City of Cle Elum's June 30, 1896 water right shall be no more than 6 cfs and 1,693 acre-feet per year; and

WHEREAS, the Municipal Water Service Contract provides that there may be a shortage of water made available by BOR to the City, on account of drought or other uncontrollable forces, and that neither BOR nor the United States are liable in the event of such shortage; and

WHEREAS, after making several water system repairs and installing meters, the City currently uses approximately 800 acre feet per year of its allotted 1,693 acre feet per year; and

WHEREAS, according to an analysis completed by the City Engineer, the City's existing water right combined with water to be supplied under the BOR Municipal Water Service Contract will be sufficient to meet demand projected to occur by the year 2016, but may lack sufficient water supply to serve the total demand projected to occur by the year 2026; and
WHEREAS, the potential shortfall in water supply is due primarily to new demands anticipated to be placed on the water system by growth anticipated to occur in the City’s adopted Urban Growth Area (“UGA”); and

WHEREAS, according to analysis completed by the City’s Engineer, irrigation water accounts for approximately 33.7% of the City’s annual production of water. This translates to 245 acre feet per year of water being used for this purpose; and

WHEREAS, the amount of water currently being used for irrigation could be reduced by conservation and/or the conversion to other land uses with a lower irrigation demand, which would allow water to be made available for other purposes, including for anticipated new residential and commercial development; and

WHEREAS, in January of 2007, in anticipation of receiving the CFO on the BOR water right, the City Council formed a committee to review the City’s water use policy, and if necessary propose suggested changes to the City Council; and

WHEREAS, on March 11th & 25th, April 22nd and September 23rd of 2008, the City Council held open record public hearings regarding the proposed changes to the City’s water policy; and

WHEREAS, the City Council understands that the amount of water owned by the City and available for the City’s future growth is limited, and that therefore owners of property annexing into the City should be required to convey existing water rights in an amount sufficient to provide water for existing and projected uses on the property to be annexed; and

WHEREAS, it is essential that the City’s water management policies foster desired development and growth while protecting the City’s ability to serve existing users as well as future users to whom the City has committed to serve; and

WHEREAS, the City’s water management policies should also foster conservation of water for current and future users, increase the total amount of water under City ownership and management, and facilitate infrastructure maintenance, repair and expansion to minimize water loss and maximize water conservation throughout the City’s water system; and

WHEREAS, achievement of the goals described above also requires that the City’s water management policies provide flexibility to the City Council, to permit it to tailor agreements to address the circumstances of specific proposed annexations, accept payment of fees and/or other consideration as partial satisfaction of annexing property owners’ obligations to convey water rights, use such fees for the subsequent purchase of other water rights, set maximum caps on water usage by annexing properties, and otherwise manage new connections to the City water system so as to foster needed new growth and development while protecting the City’s water system and ability to serve existing City residents and water customers;
NOW, THEREFORE, the City Council of the City of Cle Elum does hereby ordain as follows:

Section 1. Cle Elum Municipal Code Chapter 13.20, Amended. Cle Elum Municipal Code Chapter 13.20 (Water Connection and Water Transfer Requirements) is hereby amended to read as follows:

Chapter 13.20

WATER CONNECTION AND WATER TRANSFER REQUIREMENTS

Sections:
13.20.010 Applicability.
13.20.020 Purpose and Intent.
13.20.030 Conditions for Providing Utility Service Outside the City.
13.20.040 Hookup Fees, Connection Charges and Other Conditions.
13.20.050 Types of Water Rights.
13.20.060 Annexations.
13.20.070 Amount of Water and Payment in Lieu.
13.20.080 Payments Received by the City.
13.20.090 Form of Transfer and Conveyance of Water Right.
13.20.100 Severability.

13.20.010 Applicability.
This Chapter applies to all annexations of land (other than for municipal purposes) to the City greater than two acres approved after the adoption of this Chapter. This Chapter does not apply to annexations or development agreements in place prior to its approval.

13.20.020 Purpose and Intent.
The purpose of this Chapter is to ensure that, as new connections to the City water system are approved, either through connections to redevelopment or in-fill development within existing City boundaries, or connections to new development on land annexed to the City, there is adequate water to serve the City’s water needs including without limitation, service to residential, commercial, industrial and public spaces, while supporting these commitments through policies that conserve water.

The general intent in the application of this Chapter will be to permit two options for those that desire water delivery by the City. The options are listed below in order of the City’s preference:
1. Transfer to the City a water right in an amount equal to or greater than the amount required to serve the subject property; or
2. Transfer to the City a water right in an amount less than the amount required to serve the subject property and make payment to the
City in an amount sufficient to permit it to acquire the amount of water additionally required to assure service to the subject property.

13.20.030 Conditions for Providing Utility Service Outside the City.

For purposes of any application for annexation into the City or any application for water or sewer services or other municipal utility service, the City may extend service only upon satisfaction of the City's Engineer and City Council that the following standards have been met:

A. No connection shall be made to any applicant qualifying property or improvement, its heirs, successors and assigns, until and unless adequate safeguards have been made and accepted by the City to adequately defend, indemnify and hold the City harmless from and against any liability, appeals, judicial review, complaints, writs of review and other extraordinary or equitable relief, including reimbursement for any costs, fees, expert fees, expenses for any related legal, judicial, agency, administrative or appellate action(s) related to or arising out of such application or attempted transfer of water rights to the City.

B. Any connection of the City's water or sewer service to property located outside the City's corporate boundaries, and any transfer to the City of such water rights shall be permitted only upon the execution of forms prepared by the City which include but are not limited to: the execution of a perpetual and appurtenant no-protest annexation agreement, a no-protest local improvement agreement, a no-protest utility local improvement district agreement, and/or developer's extension agreement. The City expressly reserves its right to condition utility service upon the execution of any or all of these agreements upon terms and conditions as are determined to be necessary by the City Council and City Engineer.

C. Any transfer to the City may be further conditioned under the State Environmental Policy Act ("SEPA"), implementing SEPA regulations, Cle Elum Municipal Code Chapter 15.28, as may now exist or which may hereinafter be amended, adopted SEPA policies, developer agreements under RCW 36.70B.170, the requirements of interlocal agreements with Kittitas County, special purposes districts, or municipalities, or landowner agreements entered into under RCW Chapters 35.91 and 35.92.

D. Agreements with landowners and the City for purposes of siting or acquisition of properties for municipal facilities under RCW Chapters 35.91 and 35.92 may contain different terms and conditions than provided in this Chapter.

13.20.040 Hookup Fees, Connection Charges and Other Conditions.

Connection to properties outside of the City's municipal boundaries is discretionary. No water connection to any lot or parcel containing an improved structure may be made to persons or property outside the City
limits or current service boundaries without first having executed either a developers extension agreement, annexation agreement or no-protest annexation agreement as determined by the City Council. Fees and charges shall be no less than fees and charges or other conditions for applicable hookup and service within the City as currently exist or as may hereinafter exist in the future. The City may provide for different terms and conditions for the owners of any properties upon which it locates or seeks to locate any municipal utility facilities for purposes of Section 13.20.030 and this section for purposes of acceptance of water supplies into the City's supply system through utility/landowner agreements, development agreements, interlocal agreements with Kittitas County and other jurisdictions, no-protest annexation agreements, or developer extension agreements. To the extent permitted by law, the City may impose surcharges and rates different from those charged to classes of customers located within the City's boundaries; provided that, these rates, conditions, and charges are reasonably related to the cost and system impact of extending service requested by the owner of real property or lawful occupant, maintaining system capacity and operational reliability, maintenance, improvements, repairs, storage, pressure zone requirements and fire flow capability, and other factors determined to be reasonable and necessary by the City Council. Any customer granted water under these terms and conditions shall also be subject to mandatory City water conservation programs, including but not limited to conservation surcharges, conservation devices and equipment, time of use restrictions, and increased rates for usage above adopted rates by the City.

13.20.050 Types of Water Rights.

The various types of water rights subject to this Chapter include, but are not necessarily limited to, the following: Permits, Certificates, and Claims issued by or on file with the Washington State Department of Ecology, or any of its predecessors. The City may consider senior seasonal irrigation rights for their adequacy. The adequacy of any proposed water right shall be determined by the Mayor based on written analysis by the City Engineer and the City's legal counsel. The Mayor's decision shall be final, and shall be based on factors including but not limited to the following:

1. Annual volume of water rights equal to or exceeding the maximum annual water demand volume of the proposed annexation;

2. Instantaneous rate of water right equals or exceeds 125% of the maximum daily water demand volume of proposed annexation divided by 1,440 minutes per day;

3. Seniority of water right relative to US Water rights for the Yakima Project (1905);

4. Legal status of the water right, e.g. status in DOE v. James J. Acquavella, Yakima County Cause No. 77-2-01484-5;
5. Consideration of any condition or limitations of use applicable to the water right, e.g., interruption or curtailment of use due to stream flow conditions;

6. Physical availability of water at water right’s original or previous point of diversion;

7. Seasonal limitations on water right relative to the seasonal water demand of the proposed annexation;

8. Ability to change water right to City’s existing point(s) of diversion, for use in the City’s water service area, and to municipal water supply purposes with governmental approval on satisfactory terms and conditions (water right “transfer”);

9. Comments of Department of Ecology, Bureau of Reclamation or other entities about the water right; and

10. Clear ownership of the water right and ability to convey clear title and ownership to the City.

13.20.060 Annexations.

A. Requirement for Transfer and Conveyance of Water Rights. Prior to approval of any annexation subject to this Chapter, a property owner(s) who has petitioned for annexation shall transfer and convey water rights in the full amount deemed necessary to serve the property proposed for annexation based on the City’s equivalent residential unit calculation, as provided in Section 13.20.070.B, below.

B. Annexation/Development Agreement. As an alternative to the transfer and conveyance of water rights as set forth in Section 13.20.060.A above, and at the election of the City, the property owner(s) and the City may enter into an Annexation/Development Agreement, in which the City may: waive the requirement for transfer and conveyance of the full amount of water rights necessary to serve the property proposed for annexation where the property owner(s) agrees to make payments pursuant to Section 13.20.070 below in lieu of transfer and conveyance of water rights; limit total water usage on the property; implement conservation measures; and/or provide such other consideration to the City as determined by the City Council. The City and the property owner(s) may also enter into an agreement, at the election of the City, to delay the transfer and conveyance to the City of the water rights associated with the subject property until such future point in time as the City determines appropriate, for the purpose of accommodating potential delays encountered in the transfer process or to accommodate continued use of water rights associated with uses in existence at the time of annexation and anticipated to continue until further development of the subject property occurs. In determining whether to waive or delay the requirement for transfer and conveyance of the full amount of water needed by the property proposed for annexation, the City shall consider factors including but not limited to the following:

1. The amount of water available within the City’s water system for other new development, redevelopment, and/or annexations;
2. Prevailing and projected environmental conditions affecting the amount of the City's water supply, including snowpack, precipitation, drought, temperature, and ocean current patterns (including La Niña or La Niño systems);

3. Prevailing and projected rates of new development and annexation within the City and Kittitas County;

4. The availability of existing water rights for purchase and the legal and environmental potential for new water rights by the City; and

5. Potential tax revenue or other public benefits to be provided by proposed development associated with a proposed annexation.

As part of any such alternative Annexation/Development Agreement, the City may require the property owner(s) to:

1. Acquire adequate water rights and transfer and convey the same to the City;

2. Deposit an amount into the City water fund equal to the payment in lieu of transfer provided in Section 13.20.070, which sum is refundable to the extent of the successful transfer of the water rights; and/or

3. Submit and diligently pursue approval of the water right transfer and conveyance at the expense of the property owner(s).

13.20.070 Amount of Water and Payment in Lieu.

A. Amount of Water Available. The City shall have discretion to determine the amount of water available in the City water system, and to evaluate and prioritize all applications for municipal water delivery.

B. Water Use Determination. The water needed by development associated with property proposed to be developed, redeveloped, and/or annexed to the City shall be calculated in equivalent residential units ("ERUs"). The ERU calculation shall be based upon the City's development regulations in effect at the time the petition for annexation is submitted. The property owner(s) shall submit to the City a proposed ERU calculation based on the proposed development. The City Engineer shall review the ERU calculation and make a recommendation to the Mayor, who shall issue a water use determination, stating the amount of water rights to be transferred to the City. The Mayor's decision, which shall be final, shall be communicated in writing to the property owner(s) within twenty (20) days of the City Council's acceptance of the petition for annexation.

In the calculation of the amount of water rights that must be transferred to the City, credit shall be provided for any existing and previously approved connections to the City's municipal water system that are currently in use on the subject property. In addition, if the owners of property subject to an annexation request have an exempt well or wells and desire to transfer the water rights associated with said wells, as currently provided for in RCW 90.44.105, then credit shall also be
provided for the water use associated with said wells to the extent the water rights associated with the wells are transferred to the City.

C. Excess Water Rights. To the extent the water rights associated with the subject property exceed the anticipated water usage for the subject property as determined pursuant to subsection B above, the City in its sole discretion may negotiate an agreement with the property owner(s) to:

1. Provide for the owner(s) of the subject property to transfer and convey any amount of the excess water rights to the City, in which event the City shall pay to the property owner(s) an amount representing the then current market value of the excess rights, based on the cost per ERU stated in subsection D below; or

2. Allow said owner to transfer and convey the excess water rights to the City in exchange for credits to be applied to other property owned by said owner within the City's existing Urban Growth Area.

In the event the City acquires the excess water rights pursuant to subsection C.1 or C.2 above, the transfer of excess water rights will be processed simultaneously with and as part of the transfer process outlined in Section 13.20.090.

D. Payment in Lieu. In the event that the City determines through an annexation or development agreement pursuant to Section 13.20.060 above that the owners of property being annexed to the City may transfer and convey less than one hundred percent (100%) of the water required to serve the property proposed to be annexed, or in the event that the amount of water rights associated with property proposed to be annexed and successfully transferred to the City is less than the City Engineer determines to be sufficient to serve the estimated ERUs of anticipated water usage for the subject property, the owner(s) of the subject property shall pay to the City $3,500.00 per ERU of anticipated water usage of the subject property, less a credit for the number of ERUs of water rights successfully transferred and conveyed to the City. The City shall evaluate the cost per ERU every two years from the date of adoption of this ordinance and adjust the amount accordingly. Payment shall be made prior to the City's adoption of an ordinance annexing the subject property, at the rate per ERU in effect at the time of the annexation.

E. Payment of Costs. The owner(s) of property subject to the application of the provisions of this Chapter shall pay the City for all costs associated with the City's determination of the anticipated water usage for the subject property, determination of the adequacy of any proposed water right, and support or participation in a proceeding regarding a property owner's water transfer application. The term "costs" as used in this subsection shall include, but are not limited to, City staff time, engineering fees, attorneys fees, application fees, Kittitas County Water Conservancy Board Fees, publication fees, and any other fees or charges associated with processing and recording the transfer and acquisition of water rights.
F. **Commitment by City.** Nothing herein precludes the City from making commitments to provide municipal water service as part of an annexation or development agreement in which the owner of property subject to the annexation makes payment to the City as required in subsection D above.

G. **Remedies.** In the event a certificate of water availability or building permit is denied solely because of water unavailability and the property for which said certificate or building permit is sought was previously subject to the provisions of this Chapter resulting in the transfer and conveyance of water rights and/or payment in lieu thereof to the City, then the property owner(s), as the sole and exclusive remedy, shall receive a payment equal to the amount paid to the City for the remaining anticipated water usage of the subject property pursuant to subsections B and D above, minus a ten percent administrative fee and without interest from the date of the original application unless otherwise required by then-applicable law. The property owner(s) shall repay this payment to the City as a condition of subsequent issuance of a certificate of water availability and/or building permit.

H. **Appeal.** Any determination by the Mayor pursuant to this Chapter may be appealed by filing an appeal in the Kittitas County Superior Court within 21 calendar days of the date of the final decision.

13.20.080  **Payments Received by the City.**

All money paid to the City pursuant to this Chapter shall be paid to the City water fund. All money paid to the City pursuant to this Chapter shall be used by the City water utility for any or all purposes permitted by the laws of the State of Washington, including but not limited to purchase of available water rights, processing of applications for new water rights to be added to the City domestic water utility system, the financing of water conservation, and the maintenance and replacement of equipment and existing system components that have the effect of increasing the City’s available water supply.

13.20.090  **Form of Transfer and Conveyance of Water Right.**

The transfer of water rights pursuant to this Chapter shall be in such forms as may be approved by the City. Owners of property transferring water rights pursuant to this Chapter shall execute all documents required by the City and/or any other governmental entity that may be necessary to achieve the purposes of this Chapter. Those documents may include, but are not limited to, application(s) to change in point of diversion, change in place of use, change in purpose of use, and any other documents or forms.

For a water right transfer to be completed, the water right transfer (as defined in 13.20.050(8)) must ultimately be approved by the Department of Ecology and all appeal periods must have expired without challenge (or any appeals must successfully be resolved). In the event of an appeal or an adverse decision, the City may elect but is not required to litigate the
appeal, challenge the adverse decision, or abandon the proposed water right transfer. Any development, annexation or other agreement that provides for a water right transfer to the City shall also provide for the possible appeal of a transfer decision and for the payment of costs of appeal.

Upon completion of the water right transfer, the property owner(s) shall convey the water right to the City by Statutory Warranty Deed or other appropriate conveyance instrument, as determined by the City; provided, however, that the actual conveyance may be delayed, at the City’s election, to coincide with the City’s approval of the petition for annexation described in this Chapter, or as otherwise set forth in an agreement between the property owner(s) and the City.

13.20.100 Severability.

If any section, subsection, paragraph, sentence, clause or phrase of this Chapter or its application to any person or situation should be held to be invalid or unconstitutional for any reason by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this Chapter or its application to any other person or situation.

Section 2. Severability. If any section, subsection, paragraph, sentence, clause or phrase of this ordinance or its application to any person or situation should be held to be invalid or unconstitutional for any reason by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this ordinance or its application to any other person or situation.

Section 3. Effective Date. This ordinance or a summary thereof shall be published in the official newspaper of the City, and shall take effect and be in full force five days after passage and publication as provided by law.

PASSED by the City Council of the City of Cle Elum, Washington at a regular meeting thereof, held this 14th day of October, 2008.

Charles J. Giondo, Mayor

Approved as to form:

Michael R. Kenyon, City Attorney

Attestation:

Toni Fields, City Clerk

Page 10 of 10