



March 2, 2015

Robert 'Doc' Hansen  
Kittitas County Planning Official  
Kittitas County Development Services  
411 North Ruby St. – Suite 2  
Ellensburg WA., 98926

RE: Proposed Amendments to Kittitas County Code Chapter 13.25  
File No. SE-15-00001

Dear Mr. Hansen:

I am writing this on behalf of the Confederated Tribes and Bands of the Yakama Nation to comment on the proposed amendment to the Kittitas County Code Chapter 13.25 and on the County's comments in its SEPA checklist dated February 9, 2015 related to this and other proposed Code amendments. The SEPA checklist relates to two sets of proposed changes to the Kittitas County Code. These comments relate solely to the proposed changes to the Kittitas County Chapter 13.25.

The Confederated Tribes and Bands of the Yakama Nation is a federally recognized Indian tribe under the Treaty of June 9, 1855 (12 Stat. 951). Under Article III of the Treaty, the Yakama Nation reserved rights to fish at all usual and accustomed places, together with the privilege of hunting and gathering roots and berries, both within and outside of its reservation. The Yakama Nation has a vested interest in any land use policy or regulation that has the potential to affect any of its treaty reserved rights including the Yakama Nation water rights. Kittitas County is completely within the Yakama Nation's ceded lands under the Treaty of June 9, 1855.

The Yakama Nation is concerned about comments in the SEPA checklist and in the proposed changes of the Code which, depending on how they are implemented by the County and others, might threaten to impair the water supply to which the Nation is entitled as a senior water right holder in the Basin. The SEPA checklist says the reason for these changes to the cistern code has to do with the low snow pack this season (SEPA checklist para. 7). After commenting on the "change" the comments end with the statement that:

The amount of water taken from the overall supply from such a change is negligible, would not in any way deplete the amount of water available to the rest of the County or Yakima Basin.

Id. at para. 7

It is not clear what the goals of the comments and the proposed amendments are but the comments apparently assume that there will be an increase in consumptive use of water caused by these proposed amendments to the County Code. The comments assert, without any evidence, that the County's constituents have a right to divert or withdraw this water but that this additional use will not have any impact on the water supply for the Basin. If the County is indeed proposing to issue land use decisions based on the erroneous assumption that there is additional water available for consumptive, the County is in error. For some years it has been beyond dispute by all that any increase in consumptive use of water in Kittitas County cannot be allowed without mitigation to protect senior water right users. Any increased use of an amount of water can affect the already over appropriated water supply and impair senior water rights especially in a water short year. The Courts have confirmed this and it is up to Department of Ecology and not the County to help implement this.

The Yakama Nation has senior Treaty water rights for fish and other aquatic life with a time immemorial priority date. *KRD v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034 (9<sup>th</sup> Cir. 1985). The Nation also has adjudicated Treaty irrigation rights for its Reservation. In addition to the Yakama Nation's rights, other non-Indian parties have also appropriated water in the Basin under state law in the late nineteenth and early twentieth centuries. The State Supreme Court has ruled that:

... in May 1905 the United States began to withdraw from appropriation all unappropriated waters in the Yakima River. By 1906, all of the unappropriated waters of the river and its tributaries had been withdrawn from appropriation.

*Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257, 267 (1993) (*Acquavella II*).

The Yakima Valley has had a series of water short years in recent years showing that the water supply is often inadequate even for these parties with water rights with priority dates of 1905 and earlier. The *Acquavella* court took judicial notice that "... KRD, Roza and other proratable entities' diversions have been reduced many times in short water years." Memorandum Opinion Re: Motion to Limit Treaty Water Right for Fish To Natural Flow, et.al. (April 2, 1996), at p. 15. A summary table prepared by the U.S. Bureau of Reclamation shows nine years up to the year 2002 when there were water short years during which proratable water right holders had to have their deliveries reduced. Interim Operating Plan for the Yakima Project (Nov. 2002) (Table 5-9) (excerpt) (attachment 5). There were thus many water short years including but not limited to 1977<sup>1</sup>, 1994<sup>2</sup> 1992-1993, and 2001. There may be another another water short year in 2015. In water short years, parties with priority dates junior to 1905 will need to be shut down to protect senior rights. After that, senior proratable users with 1905 priorities would need to be reduced. Memorandum Opinion Re: Motion to Limit Treaty Water Right for Fish To Natural Flow, supra, at p. 22. In such a situation, the Yakama Nation's Treaty

<sup>1</sup> *KRD v. Sunnyside, supra*, 626 F.2d at 97

<sup>2</sup> Memorandum Opinion Re: Natural Flow, supra, at p. 22

water right for fish and other aquatic life with a priority date of time immemorial “would be the most senior of all non-proratable water rights in the basin” and would take precedence over all rights in the Consent Decree. *Id.* The State Supreme Court has already rejected the argument suggested by the County that it can take small amounts of senior parties’ water rights as it suggests here. *Postema v. PCHB*, 142 Wn. 2d 68, 92 (2000). As a federally reserved right, the Yakama Nation’s Treaty rights are protected from any such impairment of its water supply. Regardless of State law, the County and the State lack the authority to impair federally reserved rights. *In Re the General Adjudication of All Rights to the Use of Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739, 744-745 (1999). “Federal water rights are not dependent upon state law or state procedures...” *Cappaert v. United States*, 426 U.S. 128, 145 (1976).

After the SEPA checklist was issued, the County released a copy of the proposed amendments with a public hearing set for March 10, 2015. Among other changes, the proposed amendments to the Code seek to make a number of the changes to the cistern water system requirements including the elimination of the current requirement that cisterns are only allowed as a water source “... for a single dwelling unit residence upon a showing that no other potable water source is available upon the property as detailed in Section 13.25.080.” Proposed amendments to KCC 13.25.020. The proposed amendments also would eliminate the requirement that an applicant it submit a notarized statement that “water budget neutrality is not available for the property.” KCC 13.25.080.1.a. The proposed amendments would allow community Group A public water systems to provide water for these cisterns but would apparently eliminate the requirement under the County Code that the community Group A system has to change its service area or obtain a place of use amendment from Ecology. See, Proposed Amendment to KCC 13.25.080.

The County’s proposed amendments collectively would, if adopted, facilitate an increased use of cisterns but are silent on how any increased use it apparently foresees will be mitigated to protect senior water right holders in the Yakima Basin. We object to the extent there will be an increased in consumptive use that will either impair TWSA or will have any negative localized effect on fish bearing streams in Kittitas County.

The Nation also objects to the extent there will be any increased but unmitigated use of rain water as part of this new increased cistern use. Under the County Code 13.03.030 potable water can be supplemented with rainwater. The Nation objects to rainwater under either the current or proposed Code to the extent it allows increased unmitigated and unpermitted uses of rainwater since such water is not legally available to use under such circumstances. The County with Ecology must require mitigation for the use of this rainwater before it can take any land use planning action here. As we approach what appears to be likely a water short season in 2015 the County should be tightening up on uses of water not loosening them.

Rainwater is part of the Total Supply Available (TWSA). In the Yakima Basin rain water is already part of the water supply available to provide for existing senior water right holders and instream flow. Under the 1945 Consent Decree in *Kittitas v. Sunnyside* and in *Ecology v. Acquavella*, the “total water supply available” is defined as:

...that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs 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...

*KRD v. Sunnyside*, Civil No. 21, (Jan. 31, 1945) ¶ 18, Consent Decree (emphasis added); See also, *Revised Order Re: Motion to Limit Treaty Water Right for Fish to Natural Flow and Abatement of Non-Proratable Water Rights*, *Ecology v. Acquavella*, No. 77-2-1484-5 (July 16, 1996).

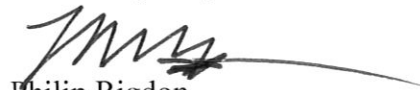
Using rainwater that is already part of the water supply for senior water right will impair their water rights and cannot be allowed unless mitigated. While we dispute Ecology's position that certain rainwater collection within the State's jurisdiction is not subject to the State's permit requirements, we agree with Ecology that when rainwater collection will "... negatively affect instream values or existing water rights" Ecology must regulate the storage and use of such water to protect senior water right holders. *Compare*, Water Resources Program Policy, (POL 1017) (Oct. 9, 2009).

We also object to a change in place of use of a Group A system's water right for this purpose absent compliance with applicable state law and, independently, proof that such changes will not impair senior rights. The County's proposal to allow transfer of a right from a Group A system to a cistern or cisterns must comply with applicable state law. Elimination of the reference to State law requirements for approval of changes in place of use (including the requirements under RCW 90.03.386) cannot eliminate the state law requirements.

The County or Ecology cannot take actions that will impair, or facilitate others through the County Code, to impair the water supply available for the Nation's water rights. While the County lacks authority to impair the Nation's rights, the County should not take actions here under State law where there is not water legally available for any increased use.

The Nation reserves the right to make any argument or use any remedy to protect its Treaty rights here. If you have any questions please contact me at 1-509-865-5121 extension 4655.

Yours very truly,



Philip Rigdon  
Deputy Director, Department of Natural Resources