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MAR 11 2014

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BOARD OF COUNTY COMMISSIONERS

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TO: Gary Berndt, County Commissioner
Paul Jewell, County Commissioner
Obie O'Brien, County Commissioner

FROM: Roger Beck, Managing Director

CC: Paul Eisenberg

DATE: March 3, 2014

This Comment Letter was originally submitted without the second page.

We reiterate the problems with the county's proposal and these important facts:

- Proposed water mitigation plan violates GMA by harming, instead of protecting, existing water resources in the Yakima basin. Encourages the improper taking of water out of priority and will impair all categories of existing water rights in the lower county. The violation of GMA will later be extended to the upper county when the DOE rule is withdrawn.
- Contrary to misleading statements, the program will not provide legally sufficient and reliable water mitigation and it will not protect junior exempt wells from curtailment.
- The county is proposing to comply with one set of state statutes by violating another set of state statutes. These violations will result in new litigation by those harmed by the County's flagrant violation of these statutes, resulting in measurable harm caused to other water right owners. DOE will be complicit by agreeing not to carry out its statutory duties, leaving damaged parties no option but to seek relief through litigation. Will those who are misled and proceed under this flawed program, have financial recourse against those misled them?
- There are other, simpler and less risky ways to comply with GMA. Cle Elum, under then Mayor Gary Berndt, simply required new development and new uses to bring water rights. Development pays for development.
- Suncadia has successfully provided durable, reliable, non-curtable senior water right mitigation to over 400 exempt wells. Those assignments of portions of a senior water rights held in trust became legally attached to the land in a manner that prevents a secondary market and prevents the rights from being transferred down basin.
- The non-profit Western Washington Water Trust / Masterson Water Bank charges \$4,700 per mitigation certificate. Their costs are subsidized and DOE does more of the processing burden than they do for other banks. Yet despite not including all related costs, their costs

- The alternative to legally and properly analyzing and mitigating the assignment of senior water to an exempt well would be to create a rural water utility company. Such a utility would take the water at its historical point of diversion, treat it, store it, and pump it to its rural points of use in piping systems. This avoids all the local impacts and impairment issues resulting from wells. However, if one compares the cost to construct, operate and maintain such a low density rural water utility, the cost of mitigation certificates attached to exempt wells seems very reasonable indeed. That is the legitimate alternative comparison for a legal water supply.
- Suncadia and other water banks can assist with a better plan, if the county simply requires demonstration of reliable water supply for permits including temporarily assisting with TWSA compliance. We and other mitigation banks can show you how we have done this and can continue to do it. We can address this problem, in a transparent way that has no cost or risk for Kittitas County or its taxpayers or the State. We have proposed a set of best practices for water banking that addresses concerns about transparency, cost, fairness, and conflicts-of-interest.
- There are conflicting explanations of the county program as described by the county and by DOE. We think the citizens are being misled, with the expectation that the settlement, and that the proposed inadequate mitigation can also be moved to the upper County, and whether it continues after the proposed 18 months. . DOE has repeatedly told us that the settlement will extend the upper County rule to the lower County at the end of 18 months. You should seek written clarification from DOE regarding the sufficiency of the mitigation during the 18 month period, and what will happen at the end of the 18 month period.
- The County and Ecology are claiming the interim rule only applies to the upper County. But the proposed development regulations clearly state that the interim regulations apply to the entire County. We need immediate written assurance that this County mitigation will not extend to the upper county, and that it will never impair Suncadia's water rights before any action is taken.
- The BOC as a whole should not be misled by one commissioner's attempt to insert a personal water agenda into the GMA compliance. There needs to be full and careful analysis of what we think will prove to be indefensible actions being contemplated. The county and its citizens need to be fully aware and offered a clear statement of the costs and obligations the County will be undertaking in advance
- If the County insists on starting water banking program it will severely diminish the value of our property rights in the water rights we now own in the trust water program. We will seek just compensation from the County for this lost value.
- If the County damages Suncadia's mitigation water banking program, others will be reluctant to bring their senior water forward.
- The County says it desires to keep water in the upper County however there are profound opposite and unintended consequences for the proposed actions of the County's water bank.

- The County says it desires to keep water in the upper County however there are profound opposite and unintended consequences for the proposed actions of the County's water bank. Senior right holders wishing to monetize their rights will have little option other than sell their rights to users farther down the basin, reducing, instead of protecting, the quantity of senior water in the upper and lower Kittitas County basin. Downstream transfers are easy.

March 3, 2014

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Kittitas County Board of Commissioners.

Public comment re. Water settlement.

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1. It is not a secret that the so-called water conservation is a tactic used by a group of profiteers whose interests are other than water conservation.
2. Water rights are available for purchase/lease through different sources – this indicates that there is plenty of water. Nobody is talking water shortage if you pay for it. It is all about \$\$\$.
3. Illusion of water shortage (therefore allowing less water per household) is a tactic to put more development on the same amount of water. This goes contrary to Supreme Court's mandate that the county protects rural character from sprawl. The county is exposing itself to more lawsuits.
4. Majority of household water (washing, flushing) is returned back to the aquifer through septic systems.
5. One true way to conserve water is to limit residential irrigation to 1 acre maximum even with surface water right. 1 acre is more than sufficient for enjoyment of a property. There is no point of irrigating 3 or 5 acres "for the looks".
4. If not prevented sprawl will assume a new appearance: Kittitas County will turn into a dust bowl subdivided into 5, 10 and 20 acre parcels with single family residences. Farms will disappear and county's main economy will be based on property taxes. We do not have look far to see results of tax-based economy – federal system that so far resulted in more than \$17 trillion national debt. Turning farmland into residential "tax farms" will have devastating results on future of Kittitas County.
5. Water conservation must not be misused as a way of water brokerage. Water is a resource that must be managed to everybody's benefit, not sold to the highest bidder.

Stan Blazynski
1811 E 3rd Ave.
Ellensburg.

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KITITAS COUNTY BOARD OF COMMISSIONERS
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PA

March 3, 2014

Paul Jewell, Chairman
Obie O'Brien Gary Berndt
Kittitas County Commissioners
Kittitas County Courthouse
Ellensburg, Washington 98926

Gentlemen:

We oppose the proposed Settlement Agreement between Futurewise, the Kittitas County Conservation Coalition, RIDGE, the Washington Department of Ecology and Kittitas County, and resulting ordinances.

1. There is no recognition of existing water rights. Existing rights and uses of water are recognized and set forth in RCWs 90.03 (surface waters 1917), 90.44 (ground waters 1945) and further in 90.14, 90.38. and 90.80 among others. Language recognizing these laws must be included in the Settlement Agreement.
2. While the County presents the agreement for "new rights and uses" the agreement states otherwise on p. 2 at 4th WHEREAS "... based on the County's commitment to secure mitigation for CURRENTLY unmitigated domestic users of ground water in the county."
3. The agreement is not binding upon Futurewise and Ecology. P. 2 4th WHEREAS "Futurewise and Ecology INTEND to support the County's ordinance before the GMHB as compliant with the GMA . . ."
4. At 6th WHEREAS the County (all parties) commits to "provide the necessary resources to facilitate successful implementation of this Settlement Agreement."
Does this mean BEFORE any other monetary resources or responsibility of the County?
What defines "successful implementation"?
5. Is the "County's mitigation water suitability map" the same as that of Ecology? P. 3 e)
6. P. 3 2. Mitigation for Historic Use. Under what statute does the County find the "senior water right suitable for mitigation (with a priority date of May 10, 1905 or before)" defined as "senior"?
Washington Ground Water 90.44 Law 90.44 was passed in 1945. Senior water rights, surface and ground, exist before those dates and after 1905.

The Settlement Agreement is neither specific nor prudent in listing the regulatory and monetary responsibilities of the County, does not recognize or protect the water rights and uses of Kittitas County citizens as required under state law, is inconsistent with much of Washington water law and will cause confusion and egregious expense and economic harm.

We most earnestly ask you to reject the Settlement Agreement.

Pat Burke *Pat Burke*

Mary Burke *Mary Burke*

March 2, 2014

Karen Poulsen
3591 Tjossem Rd.
Ellensburg, WA 98926

Kittitas County Commissioners
205 W 5th Ave, Ste. 108
Ellensburg, WA. 98926

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MAR - 1 2014

1st 2nd 3rd
KITTITAS COUNTY BOARD OF COMMISSIONERS

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PA

Re: Written comments on Kittitas County's Proposed Amendments to the Comprehensive Plan, Chapter 2 (Water Rights) and Chapter 8 (Rural and Resource Lands)

Dear Commissioners Jewell, O'Brian and Berndt:

I request that this comment letter be included in the public record.

I believe that Kittitas County's blanket requirement that all landowners within the Yakima River drainage wishing to drill a well for domestic water must buy a water right from a senior water rights holder oversteps the county's legal authority for several reasons.

1) Because I own stock in Ellensburg Water Co. (not an irrigation district) I am a Water Purveyor with a senior water right I shouldn't have to buy a water right from some other purveyor who converted a surface water right to a ground water right.

2) Because I have the right to use and use and reuse my water right for surface water and water percolated from the surface before it leaves the boundaries of my property and those rights can't be taken from me as my ownership rights come from a Land Patent issued before there was a Washington State I believe that Kittitas County has no jurisdiction to require me to buy a water right to drill a domestic well.

3) Kittitas County has gone beyond the scope of RCW 58.17.170(3).

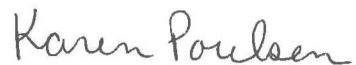
4) Kittitas County failed to allow The Kittitas County Farm Bureau (which was an intervener in the GHB's case Kittitas Co. Conservation v. Kittitas Co.) an opportunity in the settlement discussions which deprived the Farm Bureau and the members it represents any input into issues that greatly impact the farm community.

5) The new Conservation Plat is a fine idea to allow farmers to have some flexibility and conserve farmland. However, to fully conserve to the most agricultural land this should be allowed on any Ag 20 parcel meeting the underlying parcel size. Therefore, if a parcel is 40 acres it has 2 development rights and that could be used as best fits the land. By your proposed rules there will be a house PLOPPED in the middle of each parcel and the land becomes useless to modern farming practices. If the land owner has 400 acres the land owner has 20 development rights. As a farmer I'd much rather farm by one group of 20 houses in a corner than 4 groups of 5 houses or 20 houses scattered all over the 400 acre farm.

6) As a property owner GPO 8.21B and GPO 8.28 are completely off the wall especially in the commercial ag zone. There is no rural character living and farming next to two interstate freeways. Also, this is private property. The county has no right to require wildlife habitat networks and public access on conservation plats or the surrounding farmland.

Please give consideration to those of us whose families have been here for many generations.

Sincerely,

A handwritten signature in cursive script that reads "Karen Poulsen".

Karen Poulsen

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March 2, 2014

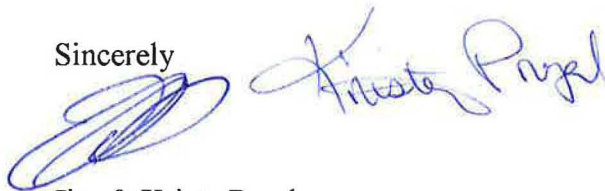
Kittitas County Commissioners
205 W. 5th Ave.
Ellensburg, WA 98926-2887

Re: Public Hearing Feb. 26, 2014, Groundwater Conservation Plan

Commissioners, Paul Jewell, Gary Berndt, & Obie O'Brien.

I want to applaud the Commissioners on the decision they made last Wednesday evening at the fairgrounds meeting. I want you to know my wife and I are concerned about the groundwater supply in light of the problems facing states now in the Ogallala Aquifer of the Midwest states and the USGS Yakima River Basin Groundwater Study. I am afraid there is much more to be done before we get a complete idea of all the groundwater potential future problems and how to replenish and grow the water supply. My wife and I are new residents to Kittitas County, but we are both life long residents of Washington State and we want our home to retain and grow in value for the rest of what time we have in retirement. We live in Cascade View Estates and have water supplied by West Side Improvement and what I observed from our time here is that this Class B Water District appears to be taking short cuts to supplying and maintenance of this system. I feel most developers take as much as they can without returning much of the profits. When fire hydrants are not bagged when placed out of service, this could have deadly consequences if there should be a fire. We have water pressure problems all the time and occasional outages without any prior notice and I am concerned about water purity when they are making repairs and no county inspector is watching. I would like to propose that Kittitas County form a Public Utility District to purchase these water districts and eventually control the entire basins water supply located in Kittitas County. I believe there have been times when the government has annexed land for the public good, such as highway right-of-ways. I have over 33 years of working for various cities and counties on the west side of the state with former certifications for construction and inspection of water systems and if I may be of any assistance please let me know and I'd be glad to help by volunteering to assist Kittitas County by serving on a county committee. I formerly served on the Citizens Advisory Committee to the Mayor for the Revitalization of Down Town Everett back in 1974.

Sincerely



Jim & Kristy Pryal
160 Fieldstone Court
Ellensburg, WA 9826
(509) 962-1019

Jeff Watson

From: Tom Ring <ringt@Yakama.com>
Sent: Monday, March 03, 2014 4:56 PM
To: CDS User
Subject: Yakama Nation DNR Comments on Proposed Futurewise Settlement and associated code changes
Attachments: YN to Kittitas BOC on Groundwater Proposed Settlement with FW March 2014.pdf
Follow Up Flag: Follow up
Flag Status: Completed



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

March 3, 2014

Kittitas County Board of Commissioners
205 W 5th AVE STE 109
Ellensburg WA 98926-2887

RE: Proposed Settlement with Futurewise and Associated Changes in Ordinances as Presented at February 26 Public Hearing and on Kittitas County Website

Dear Commissioners Jewell, O'Brien and Berndt:

Thank you for the opportunity to comment on the proposed settlement among Kittitas County, Futurewise, and others and the proposed changes to the Kittitas County codes published on the Kittitas County Website under the heading of Kittitas County Meeting GMA compliance on Land Use and Water Use – 2014. I am writing to offer qualified support for the County's proposals, while reserving for the Yakama Nation all rights and recourse available to it to protect its Treaty rights.

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 as well as on its Reservation, 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 decision that has the potential to affect any of its Treaty reserved rights, including the Yakama Nation's Time Immemorial priority date water rights for fish and other aquatic life in streams in Kittitas County. Kittitas County is completely within the Yakama Nation's ceded lands under the Treaty of June 9, 1855. In addition, the Yakama Nation holds Treaty water rights for irrigation on the Yakama Reservation, a large portion of which are proratable. Water uses within Kittitas County affect the water supply concerning which the Yakama Nation has a Treaty right. The Yakama Nation's Time Immemorial instream flow water rights are the senior water rights in the Yakima Basin. As such they are senior both to any new or existing out of stream uses and to any water rights that may be acquired to mitigate for more junior rights.

We have provided testimony on this subject matter several times over recent years. We have consistently advocated that the County or other entities take responsibility for ensuring that impacts to both instream flow and Total Water Supply Available be fully mitigated. This is necessary because the Yakima basin is over appropriated. Any reduction in supply caused by junior water users constitutes clear impairment of senior water rights and is contrary to law. Mitigation for groundwater pumping is necessary because decades of study has consistently shown the interdependent nature of surface and groundwater in the basin and that pumping from the basin's aquifer system, including pumping from so-called deep aquifers reduce surface water supply in the basin. With those cause and effect relationships defined, it is clear that any proposed further groundwater pumping must include provisions requiring full mitigation for the effects of pumping on the Yakima River and its tributaries.

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

Kittitas County has made remarkable progress in recent years to recognize scope of the water problems in the basin and work toward both local and basin scale solutions. We are pleased that the County is moving toward full mitigation of water supply impacts associated with County land use decisions. The County is also to be praised for proposing to preemptive extend the mitigation coverage to the rest of the County (within the Yakima Basin) to protect new and existing domestic groundwater users from curtailment in the event of an action such as the moratorium in the upper county. We view the proposed settlement and code changes as major steps in the right direction and encourage the County to continue in the direction of full mitigation.

We feel compelled to include a number of caveats along with our general encouragement of your approach. Given the complexity (and possible ambiguities) of the proposed settlement, changes in county codes, and the unknowns regarding leasing and acquiring the mitigation water, we offer these comments in support of the general approach that county has taken, but must reserve all rights and remedies as the process plays out. We note with concern the lack of full mitigation in lower County tributaries during the 18 month initial period. The Yakama Nation does not agree to or acquiesce in any impairment of its Time Immemorial instream flow Treaty right either during the initial 18 months or during the permanent phase. In the event that impairment of these rights is deemed to have occurred, whether by County land use decision or otherwise, the Yakama Nation reserves all rights and remedies available to us to correct the situation. The Yakama Nation cannot agree to as yet unseen county ordinance language replacing the upper county moratorium. Our current understanding is that the upper county moratorium in the State's rule would continue unchanged during the 18 month interim period. This is clear in the County FAQ page, and should be made clear in the settlement and code revisions, and we reserve the right to act accordingly if this is not correct. We reserve all rights to take necessary actions during that transition from rule to ordinance if the moratorium under the rule does not continue and if there are not otherwise steps taken to mitigate for harm to our senior rights. We believe that continuing review by the Water Transfer Working Group provides a necessary check on the mitigation system as it progresses and should be incorporated into the County process. We note that the County is not proposing to mitigate for all existing uses associated with existing exempt wells. While we understand the County's priorities here, junior users should be made aware of the likelihood that other junior uses will eventually be curtailed in favor of senior water rights. Our support for domestic use mitigation does not imply acquiescence in unmitigated consumptive use for outdoor watering or for any other junior uses.

We also are concerned and do not agree with the 13 year limit on the enforceability of this proposed agreement while suggesting that the State rule be permanently revoked. The State rule is already insufficient to mitigate for all junior users but revocation of it without clear mitigation in place under other means will make things worse rather than better. We reserve the right to comment further on this proposal in the future.

I very much appreciate the leadership the commissioners have shown on this issue under very challenging circumstances and look forward to continuing to work together with the County on a domestic water use policy that protects and enhances the fisheries and agricultural resources on which our communities depend.

I can be reached at 509-856-5121 ext 4655.

Respectfully,



Phil Rigdon,
Yakama Nation Department of Natural Resources

J.P. Roan
13991 Reecer Creek Road
Ellensburg, WA 98926

February 26, 2014

Commissioner Paul Jewell
Kittitas County
205 W 5th Ave. Ste. 108
Ellensburg, WA 98926-2887

RE: Concerns with *Futurewise v. Kittitas County* Proposed Settlement Agreement

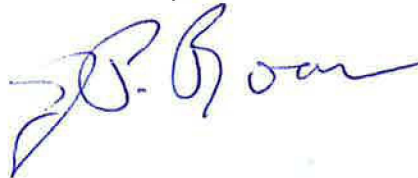
Dear Commissioner Jewell:

I am writing to express my concerns about the proposed settlement agreement in *Futurewise v. Kittitas County*. Specifically, I object to a provision in the proposed settlement that would allow Kittitas County to issue building permits without regard to the effects of new development on existing water rights. I am a claimant in the Yakima River adjudication, *Ecology v. Aquavella*, and I own confirmed water rights from Reecer Creek (01419) and First Creek (00648), both of which are used in the lower county. Unmitigated development in the area could adversely affect these confirmed water rights.

I am also concerned with the County's proposal to lease water rights to potential buyers even for a relatively short period. RCW 90.42.100 specifically prohibits the use of temporary water rights from the State Trust Water Rights Program. I do not believe leased water rights would provide adequate or reliable water supplies to property owners.

I ask that you remove that provision from the settlement and do not enact provisions to the county code to implement it.

Sincerely,



J.P. ROAN

ENCLOSURES

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FEB 27 2014

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KITTITAS COUNTY BOARD OF COMMISSIONERS

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Debbie Myers

From: Kurt Shara [kshar2@fairpoint.net]
Sent: Monday, March 03, 2014 4:53 PM
To: Kittitas County Commissioners Office
Cc: Doc Hansen
Subject: Public Trust Doctrine.

Commissioners Jewell, Berndt and O'Brien,

I believe the Public Trust Doctrine is an important reference when arguing the policy for having a public water bank functioning in any county where rural lands are currently only provided senior water rights by private water right holders. In other words, public banking of water rights by Kittitas County strengthen the argument the policy **is in the public interest**.

Please add this email to the public testimony for the of the public hearing on compliance issues started on February 26, 2014.

Thank you!

Jan Sharar
390 Cattail Road
Ellensburg, WA 98926

Underline in Ecology insert by me.

From The Center for Progressive Reform Website.

The Public Trust Doctrine: Protecting Water Resources

Decades of unwise water policies and practices have left water resources in the United States overdrawn and increasingly overwhelmed. In many parts of the country, the warning signs are obscured by flowing rivers and streams and plentiful tap water from the kitchen faucet. But upon closer examination, the signs are clear: river flows are low and wells are becoming depleted. Meanwhile, the projected trends are not reassuring. Demands for water resources from urban and suburban development are competing with demands for aquatic ecosystem restoration and preservation. Worse, climate change promises to exacerbate the problem by fundamentally altering the fresh water cycle.

Much of the battle to preserve and protect water resources happens at the state and local levels – in any number of policy choices advocated and made by individuals, organizations, companies, and governments. In recent years, water activists have begun to deploy a new tool geared to shape these decisions. Long-established in legal jurisprudence, the *public trust doctrine* holds that certain natural resources belong to all and cannot be privately owned or controlled because of their intrinsic value to each individual and society. While water resources protected under the doctrine may not be *monopolized* by private entities, they nevertheless face great strains today from private use and misuse.

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The Center for Progressive Reform

455 Massachusetts Ave., NW, #150-513
Washington, DC 20001

WA. DEPT. of Ecology website

The Public Trust Doctrine

The Public Trust Doctrine is a legal principle derived from English Common Law. The essence of the doctrine is that the waters of the state are a public resource owned by and available to all citizens equally for the purposes of navigation, conducting commerce, fishing, recreation and similar uses and that this trust is not invalidated by private ownership of the underlying land. The doctrine limits public and private use of tidelands and other shorelands to protect the public's right to use the waters of the state. (Visit the [MSRC Web site](#) and search for the State Supreme Court case *Caminiti v. Boyle*, 107 Wn. 2d 662, 732 P.2d 989)

The Public Trust Doctrine does not allow the public to trespass over privately owned uplands to access the tidelands. It does, however, protect public use of navigable water bodies below the ordinary high water mark.

Protection of the trust is a duty of the State, and the Shoreline Management Act is one of the primary means by which that duty is carried out. The doctrine requires a careful evaluation of the public interest served by any action proposed. This requirement is fulfilled in major part by the planning and permitting requirements of the Shoreline Management Act. (Court case: [MSRC Web site](#) and search for *Portage Bay v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 593 P.2d 151)

Jeff Watson

From: Kittitas County Commissioners Office
Sent: Tuesday, March 04, 2014 8:40 AM
To: Obie OBrien; Paul Jewell; Gary Berndt
Cc: Neil Caulkins; Doc Hansen; Jeff Watson; Lindsey Ozbolt
Subject: FW: Public Trust Doctrine.

*Julie Kjorsvik
Clerk of the Board
Kittitas County Board of Commissioners
205 West 5th Ave. Room 108
Ellensburg, WA 98926
509.962.7508
<http://www.co.kittitas.wa.us>*

From: Kurt Shara [mailto:jkshar2@fairpoint.net]
Sent: Monday, March 03, 2014 4:53 PM
To: Kittitas County Commissioners Office
Cc: Doc Hansen
Subject: Public Trust Doctrine.

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Much of the battle to preserve and protect water resources happens at the state and local levels – in any number of policy choices advocated and made by individuals, organizations, companies, and governments. In recent years, water activists have begun to deploy a new tool geared to shape these decisions. Long-established in legal jurisprudence, the *public trust doctrine* holds that certain natural resources belong to all and cannot be privately owned or controlled because of their intrinsic value to each individual and society. While water resources protected under the doctrine may not be *monopolized* by private entities, they nevertheless face great strains today from private use and misuse.

The Center for Progressive Reform’s [Restoring The Trust: Water Resources & The Public Trust Doctrine, A Manual For Advocates](#) explores the specific application of the public trust doctrine to the protection of surface water and groundwater resources. The *Manual* introduces water and environmental advocates to both the opportunities and limitations of applying the doctrine to water protection efforts and encourages reconsideration and reassessment of the legal doctrine to confront the challenges facing modern freshwater management at the state level. The *Manual* identifies areas where the public trust doctrine applies to existing state water laws and in litigation.

CPR Materials on Water Resources and the Public Trust Doctrine:

- **The Manual.** [Restoring the Trust: Water Resources & the Public Trust Doctrine: A Manual for Advocates](#) (pdf, 500 kb download), CPR White Paper 908, by CPR Member Scholar Alexandra B. Klass and CPR Policy Analyst Yee Huang.
- **The Accompanying Index.** [Restoring the Trust: Water Resources & the Public Trust Doctrine: An Index of State Constitutional and Statutory Provisions and Cases on Water Resources & the Public Trust Doctrine](#) (pdf, 560 kb download).
- **Webinar** on water resources and the public trust doctrine, featuring CPR Member Scholar Alexandra B. Klass, Earthjustice Attorney Isaac Moriwake, and CPR Policy Analyst Yee Huang:
 - [Audio and Slides](#)
 - [Slides only](#) (pdf format)
- **CPRBlog entries** on water resources and the public trust doctrine by CPR Policy Analyst Yee Huang:

-
- [Water Resources & the Public Trust Doctrine: A Primer](#),
 - [The Public Trust Doctrine in Action: Increasing the Trust Principal](#),
 - [Lights! Camera! Action! The Roles of the Public Trust Doctrine in Water Litigation](#),
 - [Protecting the Invisible: The Public Trust Doctrine & Groundwater](#).
- **Related Scholarship.** Read Alexandra B. Klass, [Modern Trust Principles: Recognizing Rights and Integrating Standards](#), 82 Notre Dame Law Review 699 (2006) [pdf].

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455 Massachusetts Ave., NW, #150-513
Washington, DC 20001

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The Public Trust Doctrine does not allow the public to trespass over privately owned uplands to access the tidelands. It does, however, protect public use of navigable water bodies below the ordinary high water mark.

Protection of the trust is a duty of the State, and the Shoreline Management Act is one of the primary means by which that duty is carried out. The doctrine requires a careful evaluation of the public interest served by any action proposed. This requirement is fulfilled in major part by the planning and permitting requirements of the Shoreline Management Act. (Court case: [MSRC Web site](#) and search for *Portage Bay v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 593 P.2d 151)

Local governments should consider public trust doctrine concepts when developing comprehensive plans, development regulations and shoreline master programs. There are few "bright lines," however, as the Public Trust Doctrine is common law, not statutory law. The extent of its applicability can only be determined by state court decisions. The document below is a good introduction to the case law in Washington State.

- The [Public Trust Doctrine and Coastal Zone Management in Washington State](#), Johnson, Ralph W., Craighton Goeple, David Jansen and Rachel Pascal, 1991.

For a national perspective, consider:

- **Putting the Public Trust Doctrine to Work**, 2nd Ed., by David Slade, examines the issue from a national perspective. Copies available for purchase from the [Coastal States Organization](#).

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490

February 28, 2014

The Honorable Paul Jewell, Chair
The Honorable Obie O'Brien
The Honorable Gary Berndt
Kittitas County Commissioners
205 West 5th Avenue, Suite 108
Ellensburg, WA 98926

RECEIVED

1st 2nd 3rd
KITTITAS COUNTY BOARD OF COMMISSIONERS
CDB PA PH

RE: February 26, 2014, Public Hearing on the GMA Compliance on
Water and Land Use Issues - 2014

Dear Commissioners Jewell, O'Brien and Berndt:

Thank you for the opportunity to attend and testify in support of the proposed Settlement Agreement and development regulations for the Growth Management Act (GMA) Compliance on water and land use issues. It was a full room with a lot of information presented on a complex topic. I was impressed with the quality of the presentations made by the Board and County staff. The information was presented in a manner that highlighted the key elements of both the land and water issues.

I am writing this letter to recommend one change to the implementing ordinance, and to recommend several areas on which the county and Ecology should focus their continued public education efforts.

First, I recommend the following change to proposed ordinance:

13.35.025 Interim Measures

(1) Effective Period – 3/31/14-10/30/15 and applicable to all areas within the Yakima River drainage, not subject to Upper Kittitas County Ground Water Rule (Chapter 173-539A WAC).

Some comments during the February 26, 2014, Public Hearing suggested that some members of the public think the proposed Settlement Agreement and implementing ordinance are going to be *less stringent* than the existing Upper Kittitas County Ground Water Rule (Chapter 173-539A WAC). The above change to the provision of the ordinance would make clear that during the Interim Measures period, the department's Upper County rule will continue to apply in the Upper County and the Interim Measures will apply in the rest of the county that is within the Yakima River basin.

The Honorable Paul Jewell
The Honorable Obie O'Brien
The Honorable Gary Berndt
February 28, 2014
Page 2

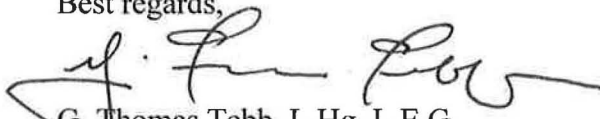
Our public education efforts should include focus on the topic above as well as a second topic, explained below. As to this topic, I do not believe any changes to the proposed ordinance are required for the permanent measures period. However, our public education efforts should inform the public that, once the permanent measures are in effect, the proposed ordinance will provide essentially equivalent protection of water resources in form and function to the existing Upper Kittitas County Groundwater Rule throughout the county. Indeed, this equivalency expectation is the reason why Ecology was willing to commit to propose a repeal of the Upper Kittitas rule as part of the settlement agreement. Our public education efforts can point to the Settlement Agreement, Section 11 for support of the equivalency commitment. Section 11 provides: "...**the long-term management measures and or mitigation program are essentially equivalent in form and function...to the Upper Kittitas County Groundwater Rule (Chapter 173-539A WAC)**".

The second topic on which I believe our public education should focus is the concern about how the settlement agreement and proposed ordinance might impact property owners who may already have senior surface or groundwater rights. Comments during the February 26, 2014, Public Hearing suggested that some individuals were worried that senior rights might be impacted. Our information and education efforts must tell these property owners that nothing in the Agreement or implementing ordinances will preempt, cause injury or impair in any manner existing water rights, claims and land patents. Indeed, the county's proposed ordinance operates only prospectively – establishing new conditions for the new uses of groundwater. Nothing in the agreement or proposed ordinance restricts existing rights. The priority system of water rights remains untouched and, if there is ever basin-wide litigation among surface and groundwater users, our understanding is that a court would determine water rights based on the priority system. Our education efforts should advise the public that the goal of the program is to avoid litigation – as the mitigation requirements for new uses are designed to prevent impacts to senior rights.

Ecology believes that the above one recommended clarification to the ordinance and two topics to focus ongoing public information and education are important to the success of the proposed program. We stand by to assist in the ongoing efforts to inform and educate the general public about the short and long term management programs, that will provide an improved Domestic Ground Water Mitigation Program and that reflects our intended outcome.

Please feel free to contact me directly at (509) 574-3989 for further clarification.

Best regards,



G. Thomas Tebb, L.Hg. L.E.G.
Central Regional Director

GT:DH:cmr (140201)

Jeff Watson

From: Kittitas County Commissioners Office
Sent: Friday, February 28, 2014 11:48 AM
To: Gary Berndt; Obie OBrien; Paul Jewell
Cc: Lindsey Ozbolt; Doc Hansen; Neil Caulkins
Subject: FW: Comments on the GMA Compliance on Water/Land Use Issues - 2014
Attachments: Amendment to Rural Non-LAMIRD Table for Compliance w Suggestions Feb 21 2013.docx

*Julie Kjorsvik
Clerk of the Board
Kittitas County Board of Commissioners
205 West 5th Ave. Room 108
Ellensburg, WA 98926
509.962.7508
<http://www.co.kittitas.wa.us>*

From: Tim Trohimovich [mailto:Tim@futurewise.org]
Sent: Friday, February 28, 2014 10:57 AM
To: Kittitas County Commissioners Office
Cc: Doc Hansen; Neil Caulkins
Subject: RE: Comments on the GMA Compliance on Water/Land Use Issues - 2014

Dear Commissioners and Staff:

I just realized I failed to include the file "Amendment to Rural Non-LAMIRD Table for Compliance w Suggestions Feb 21 2013.docx" referenced in our February 25, 2014 comment. Here is that file. I am sorry I omitted it.



**Tim Trohimovich, AICP
Director of Planning & Law**

email: tim@futurewise.org
web: www.futurewise.org

816 Second Avenue, Suite 200
Seattle, WA 98104-1535
p 206 343-0681 Ext. 118

Our mission at Futurewise is to promote healthy communities and cities while protecting working farms, working forests, and shorelines for this and future generations.

From: Tim Trohimovich
Sent: Tuesday, February 25, 2014 4:44 PM
To: 'bocc@co.kittitas.wa.us'

Cc: 'doc.hansen@co.kittitas.wa.us'; 'neil.caulkins@co.kittitas.wa.us'

Subject: Comments on the GMA Compliance on Water/Land Use Issues - 2014

Dear Commissioners:

Enclosed please find a comment letter from Kittitas County Conservation Coalition, RIDGE, and Futurewise. As the letter states, we strongly support the settlement and proposed comprehensive plan and development regulation amendments. We also appreciate all of your hard and the hard work of your staff on these important issues.

I look forward to seeing all of you at the public hearing tomorrow, February 26th.



Tim Trohimovich, AICP
Director of Planning & Law

email: tim@futurewise.org
web: www.futurewise.org

816 Second Avenue, Suite 200
Seattle, WA 98104-1535
p 206 343-0681 Ext. 118

Our mission at Futurewise is to promote healthy communities and cities while protecting working farms, working forests, and shorelines for this and future generations.

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17.15.060 Allowed Uses in Rural Non-LAMIRD Lands

17.15.060.1 Allowed Uses in Rural Non-LAMIRD Lands

P Permitted PA Permitted Administrative CU Conditional Use * See KCC Chapter 17.08 Definitions	Rural Non-LAMIRD							
	Rural Residential ⁴⁸		Rural Working		Rural Recreation			Rural Residential & Rural Recreation
	Agriculture 5 ⁴⁹	Rural 5 ⁴⁹	Agriculture 20 ⁴⁹	Forest & Range ⁴⁹	Master Planned	General Commercial	Rural Recreation ⁴⁹	PUD
A. Agriculture								
Animal boarding*	CU		CU	CU ³⁷	CU	CU		
Agriculture processing*	CU ²³		CU ²³	CU ³⁷	P			
Agriculture production*	P ²⁴	P	P	P ²⁴	P ²⁴	P ²⁴	P ²⁴	P ²⁴
Agriculture sales,* Produce stand	P ²² / AC		P ²² / AC	P ²² / AC	P			
Agriculture Sales,* Other	CU		CU	CU				
Feedlot*			CU	CU ³⁷				
Grazing*	P	P	P	P	P	P	P	P
Nurseries	P		P	CU ³⁷	P			
Riding academies	CU		CU	CU	CU		CU	
Small-scale event facility*	AC ⁴⁵ / CU	AC ⁴⁵ / CU	AC ⁴⁵ / CU	AC ⁴⁵ / CU				
B. Civic Uses/Community Services								
Cemetery	P ²¹	P ²¹	P ²¹	CU ³⁷				
Clubhouses, fraternities and lodges*	AC ⁴⁴	AC ⁴⁴	AC ³	AC ³⁵	AC		AC	
Cultural and education facilities					P		P	
Libraries			P ³			P		
Meeting facilities					P			
Museums and galleries						CU		
Religious institutions	CU		CU	CU	CU	CU	CU	
Schools, public or private*	P ²⁵		P ²⁵	CU			CU	
C. Commercial								
Auction sales of non-agriculture products						CU		
Bank						CU		
Bed and breakfast*	AC	AC	AC	AC ³⁷			PAC	
Clinic*								
Day care facilities*						CU		
Funeral home/mortuary						CU		
Hospital*						CU		
Hospital, animal or veterinary*			CU			CU		

P Permitted PA Permitted Administrative CU Conditional Use * See KCC Chapter 17.08 Definitions	Rural Non-LAMIRD							
	Rural Residential ⁴⁸		Rural Working		Rural Recreation			Rural Residential & Rural Recreation
	Agriculture 5 ⁴⁹	Rural 5 ⁴⁹	Agriculture 20 ⁴⁹	Forest & Range ⁴⁹	Master Planned	General Commercial	Rural Recreation ⁴⁹	PUD
Hotel/motel					P ⁶			
Office*						P ¹⁷		
Restaurant				CU ³⁶	P	CU	CU	
Retail sales,* general				CU ³⁶	P	CU ¹⁸	CU ⁴⁸	
Retail sales,* lumber and building materials								
Retail sales,* vehicles								
Services					P ²⁰	CU ⁴⁸		
Shooting range*			CU ³¹	CU ^{37, 31}			CU ³¹	
Tavern				CU ³⁶	P	CU		
Temporary sales office					P			
Vehicle/equipment service and repair*	P ¹⁶		P ¹⁶	CU ³⁶	P ⁴²	P ⁴²		
D. Industrial								
Airport*	CU		CU	CU	CU	CU	CU	
Asphalt/Concrete plants				CU ³⁷				
Forest product processing* (portable)	P	P	CU	CU ³⁵				
Forest product processing* (permanent)			CU	CU ³⁷				
Freighting and trucking yard or terminal*				CU		CU		
Hazardous waste storage*								
Hazardous waste treatment*								
Junkyard*								
Manufacturing*								
Mini-Warehouse						CU ^{45 14}		
Refuse disposal/recycle*			CU ¹⁹	CU ^{19, 37}				
Research laboratories								
Wastewater treatment								
Warehousing and distribution	PA ⁴⁷	PA ⁴⁷	PA ⁴⁷ /CU ⁴⁶	PA ⁴⁷				
Wholesale business								
E. Recreation								
Campground*	CU ¹²	CU ¹²	CU ¹²	CU ^{12, 37}	CU ¹³	CU ¹²	CU ¹²	
Golf course*	CU	CU	CU	CU ³⁷	CU		CU	
Guest ranch*	CU	CU	CU	CU ³⁷			CU	
Parks and playgrounds*	P	P	P ³	P	P	P	P	P

P Permitted PA Permitted Administrative CU Conditional Use * See KCC Chapter 17.08 Definitions	Rural Non-LAMIRD							
	Rural Residential ⁴⁸		Rural Working		Rural Recreation			Rural Residential & Rural Recreation
	Agriculture 5 ⁴⁹	Rural 5 ⁴⁹	Agriculture 20 ⁴⁹	Forest & Range ⁴⁹	Master Planned	General Commercial	Rural Recreation ⁴⁹	PUD
Recreation, indoor*					P	CU	CU	p ²⁶
Recreation, outdoor*	AC	AC	CU	CU	AC	AC	AC	p ²⁶
Recreational vehicle park*	CU	CU			CU		CU	
Recreational vehicle storage							CU	p ²⁶
Stadiums								
Trails	PA	PA	PA	PA	PA	PA	PA	PA
F. Residential								
Accessory dwelling unit*	PA ²⁷	PA ²⁷	PA ²⁷	PA ^{27, 37}			PA ²⁷	PA ²⁷
Accessory living quarters*	p ²⁸	p ²⁸	p ²⁸	p ^{28, 37}	p ²⁸		p ²⁸	p ²⁸
Adult family home*	p ⁴¹	p ⁴¹	p ⁴¹	p ⁴¹	p ⁴¹	p ⁴¹	p ⁴¹	p ⁴¹
Boarding house			CU ²⁹	CU ^{29, 37}				
Convalescent home			CU	CU ³⁴				
Dwelling, single-family*	p ³³	p ⁴⁰	P	p ³⁴	p ¹	PA ²	P	P
Dwelling, two-family*	P		p ³	p ³⁴	p ¹		CU	P
Dwelling, multiple-family*					p ¹			P
Farm labor shelter*	CU ⁴		CU ⁴	CU ^{4, 37}				
Group home*	CU	CU		CU			CU	
Home occupation*	P/CU ⁵	P/CU ⁵	P/CU ⁵	P/CU ^{5, 37}	P/CU ⁵		P/CU ⁵	P/CU ⁵
Manufactured home*	P	P	P	p ³⁷	P	PA ²	P	P
Mobile home	p ³⁸	p ³⁸		p ³⁴				
Special care dwelling*	p ³⁰	p ³⁰	p ³⁰				CU ³⁰	p ³⁰
Temporary trailer	p ⁷	p ⁷	p ⁷	p ^{7, 37}	p ⁷	p ⁷	p ⁷	p ⁷
G. Resource								
Forestry*	P	P	P	p ³⁴				
Forest product sales*				P				
Mining and excavation*	CU	CU ³⁹	CU	p ³⁴				
Rock crushing*		CU ³⁹		p ³⁴				
H. Utilities and Public Facilities								
Electric vehicle infrastructure*	p ³²	p ³²	p ³²	p ³²	p ³²	p ³²	p ³²	p ²⁶
Public facilities*	CU	CU	CU	CU ³⁷		CU		
Utilities	p ⁹	p ⁹	p ¹⁰	p ⁹	p ¹¹	p ⁹	p ⁹	p ⁹
Watershed management activities*	PA	PA	PA	PA	PA	PA	PA	

17.15.060.2 Footnotes Associated with Rural Non-LAMIRD Use Table.

1. Provided use is integrated into and supports the on-site recreational nature of the master planned resort and short-term visitor accommodation units constitute greater than fifty percent (50%) of the total resort accommodation units.
2. No new residence shall be permitted except that related to the business or enterprises allowed in this zone such as janitor or night watchman. Any such residence shall meet the requirements of the residential zone.
3. Not permitted in the Agriculture Study Overlay Zone. Clubhouses, fraternities and lodges limited to facilities that serve traditional rural or resource activities (such as granges).
4. Provided:
 - a. The shelters are used to house farm laborers on a temporary or seasonal basis only, regardless of change of ownership, if it remains in farm labor-needed status;
 - b. The shelters must conform with all applicable building and health regulations;
 - c. The number of shelters shall not exceed four (4) per twenty (20) contiguous acres of land area;
 - d. The shelters are owned and maintained by the owner or operator of an agricultural operation which clearly demonstrates the need for farm laborers;
 - e. Should the parent agricultural operation cease or convert to non-agriculture use, then the farm labor shelters shall conform with all applicable buildings and health regulations.
5. No sign advertising a home occupation shall exceed sixteen (16) square feet in size. Home occupations with no outdoor activities or noise are permitted; home occupations with outdoor activities or noise are a conditional use. In-home daycares with six (6) or fewer individuals receiving care in a twenty-four (24) hour period are permitted; in-home daycares with seven to twelve (12) individuals receiving care in a twenty-four (24) hour period require a Conditional Use Permit.
6. Provided short-term visitor accommodation units constitute greater than fifty percent (50%) of the total resort accommodation units.
7. When used for temporary occupancy for a period not-to-exceed one (1) year related to permanent home construction or seasonal/temporary employment.
8. Public transportation deadhead stations permitted; passenger terminals are a Conditional Use.
9. Utilities are defined and regulated by KCC Chapter 17.61, Utilities.
10. Utilities are defined and regulated by KCC Chapter 17.61, Utilities. Not permitted in the Agriculture Study Overlay Zone.
11. Utilities are defined and regulated by KCC Chapter 17.61, Utilities. Limited to the capital facilities, utilities, and services necessary to maintain and operate the master planned resort.
12. In considering proposals for location of campgrounds, the Board shall consider at a minimum the following criteria:
 - a. Campgrounds should be located at sufficient distance from existing rural residential/residential development so as to avoid possible conflicts and disturbances;
 - b. Traffic volumes generated by such a development should not create a nuisance or impose on the privacy of nearby residences or interfere with normal traffic flow;
 - c. Landscaping or appropriate screening should be required and maintained where necessary for buffering;
 - d. Adequate and convenient vehicular access, circulation and parking should be provided;
 - e. Public health and safety of campers and those reasonably impacted by the campground (i.e. health, water, sanitation).
13. Campgrounds and Recreational vehicle sites with power and water are permitted; campgrounds and recreational vehicle sites without power and water require a conditional use permit.
14. The following standards shall apply to the approval and construction of mini-warehouses:
 - a. A mini-warehouse proposal (application) must include plans for aesthetic improvements and/or sight screening;
 - b. All buildings with storage units facing property boundaries shall have a minimum setback of thirty-five (35) feet;
 - c. No commercial or manufacturing activities will be permitted within any building or storage unit;
 - d. Lease documents shall spell out all conditions and restrictions of the use;
 - e. Signs, other than on-site direction aids, shall number not more than two (2) and shall not exceed forty (40) square feet each in area.
15. Permitted when conducted wholly within an enclosed building (excluding off-street parking and loading areas).
16. Limited to farm implement repair and maintenance.
17. Limited to offices directly related to tourism and recreation.
18. Retail sales are limited to groceries and sales directly related to tourism and recreation. Structural footprint containing all of these activities may not exceed 4,000 square feet.
19. Limited to composting facilities.
20. Limited to those services typically found on other destination resort properties and designed to serve the convenience needs of the users and employees of the master planned resort. Shall be designed to

- discourage use from non-resort users by locating such services well within the site rather than on its perimeter.
21. No new cemeteries. Existing cemeteries may expand or enlarge in compliance with applicable standards and regulations.
 22. When located not less than forty-five (45) feet from the centerline of the public street or highway and selling goods produced on site.
 23. Hay processing and small-scale processing of agricultural products produced on the premises are permitted without a conditional use permits.
 24. Excluding swine and mink, provided a minimum of one (1) acre is available. When located in the Liberty Historic Overlay Zone, this use is subject to the provisions of KCC Chapter 17.59.
 25. Existing schools are permitted; new schools require a conditional use permit. Not permitted in the Agriculture Study Overlay Zone.
 26. Where the use is only serving a residential PUD and where all applicable standards are met. Electric Vehicle Infrastructure subject to provisions of KCC Chapter 17.66.
 27. Subject to the following requirements:
 - a. ADUs shall be allowed as a permitted use within designated UGAs;
 - b. ADUs shall be subject to obtaining an Administrative Use permit in areas outside UGAs;
 - c. Only one ADU shall be allowed per lot;
 - d. Owner of the property must reside in either the primary residence or the ADU;
 - e. The ADU shall not exceed the square footage of the habitable area of the primary residence;
 - f. All setback requirements for the zone in which the ADU is located shall apply;
 - g. The ADU shall meet the applicable health department standards for potable water and sewage disposal;
 - h. No mobile homes or recreational vehicles shall be allowed as an ADU;
 - i. The ADU shall provide additional off-street parking;
 - j. An ADU is not permitted on the same lot where a special care dwelling or an Accessory Living Quarters exists.
 - k. An ADU must have adequate acreage to meet maximum density within the zone classification.
 28. Subject to the following requirements:
 - a. Accessory Living Quarters shall be located within an owner-occupied primary residence; .
 - b. Accessory Living Quarters are limited in size to no greater than fifty percent (50%) of the habitable area of the primary residence;
 - c. The Accessory Living Quarters are subject to applicable health district standards for water and sewage disposal;
 - d. Only one (1) Accessory Living Quarters shall be allowed per lot;
 - e. Accessory Living Quarters are to provide additional off-street parking;
 - f. Accessory Living Quarters are not allowed where an Accessory Dwelling Unit or Special Care Dwelling exists.
 29. Maximum of four (4) boarders and two (2) bedrooms dedicated to the use.
 30. Subject to the following requirements:
 - a. The Special Care Dwelling must meet all setback requirements for the zone in which it is located;
 - b. The Special Care Dwelling must meet all applicable health department requirements for potable water and sewage disposal;
 - c. Placement is subject to obtaining a building permit for the manufactured home;
 - d. Owner must record a notice to title prior to the issuance of building permit which indicates the restrictions and removal requirements;
 - e. The Special Care Dwelling unit cannot be used as a rental unit;
 - f. The Special Care Dwelling unit must be removed when the need for care ceases;
 - g. A Special Care Dwelling is not permitted on the same lot where an Accessory Dwelling Unit or Accessory Living Quarter exists.
 31. Structures and facilities associated with the operation of shooting ranges are permitted and subject to all associated Kittitas County building codes and regulations. Shooting Ranges may be operated in conjunction with other permitted or conditional uses for the specified zone. Shooting Ranges are subject to periodic inspection and certification as deemed necessary by the Kittitas County Sheriff's Department. In considering proposals for the location of Shooting Ranges a detailed site plan shall be required; the Board's review of said site plan and the proposal as a whole shall include, but not be limited, to the following criteria:
 - a. The general health, safety, and welfare of surrounding property owners, their livestock, their agricultural products, and their property.
 - b. Adherence to the practices and recommendations of the "NRA Range Sourcebook."
 - c. Adherence to the practices and recommendations of the "EPA Best Management Practices for Lead at Outdoor Shooting Ranges."

- d. Proposed shooting ranges in areas designated as agricultural land of long-term commercial significance shall comply with RCW 36.70A.177(3) as currently existing or hereafter amended, and shall be limited to lands with poor soils or those unsuitable for agriculture.
32. Subject to the provisions of KCC Chapter 17.66, Electric Vehicle Infrastructure.
 33. Single family homes located in Twin Pines Trailer Park, Central Mobile Home Park, or Swiftwater shall be subject to the provisions of KCC Chapter 17.24, Historic Trailer Court Zone.
 34. When located in the Liberty Historic Overlay Zone, this use is subject to the provisions of KCC Chapter 17.59.
 35. Limited to facilities that serve traditional rural or resource activities (such as granges). Allowed as a permitted use in the Liberty Historic Overlay Zone, subject to the provisions of KCC Chapter 17.59.
 36. Allowed only as a conditional use in the Liberty Historic Overlay Zone, subject to the provisions of KCC Chapter 17.59.
 37. Prohibited in the Liberty Historic Overlay Zone. **Temporary asphalt plants only.**
 38. As of September 1, 1998, mobile homes are no longer allowed to be transported and placed within Kittitas County. Those units presently located in Kittitas County that are to be relocated within Kittitas County must have a fire/life inspection approved by the Washington State Department of Labor and Industries. Mobile homes located in Twin Pines Trailer Park, Central Mobile Home Park, or Swiftwater shall be subject to the provisions of KCC Chapter 17.24, Historic Trailer Court Zone.
 39. Permitted when located within an established mining district; conditional use permit required when located outside established mining district.
 40. Single family homes located in Twin Pines Trailer Park, Central Mobile Home Park, or Swiftwater shall be subject to the provisions of KCC Chapter 17.24, Historic Trailer Court Zone.
 41. Pursuant to RCW 70.128.140.
 42. Permitted when conducted wholly within an enclosed building (excluding off-street parking and loading areas).
 43. Includes truck stop operations. Minor repair work permitted.
 44. Limited to facilities that serve traditional rural or resource activities (such as granges).
 45. Use shall not exceed 10,000 square feet and no more than eight (8) events shall occur within a calendar year.
 46. Existing facilities are permitted; new facilities require a conditional use permit. Limited to agricultural products. Excludes controlled atmosphere and cold storage warehouses.
 47. Limited to seasonal, non-structural hay storage.
 48. Services limited to resource based industries
 49. **Lots greater than one-half (1/2) acre will not have more than fifty percent (50%) of the lot covered with impervious surfaces in Agriculture 5, Rural 5, Agriculture 20, Forest & Range, and Rural Recreational Residential zones.**

(Ord. 2013-001, 2013;)

Kittitas County Conservation Coalition



816 Second Avenue, Suite 200
Seattle, Washington 98104 www.futurewise.org
(206) 343-0681 Ext. 118



P.O. Box 927
Roslyn, WA
98941

February 25, 2014

The Honorable Paul Jewell
The Honorable Gary Berndt
The Honorable Obie O'Brien
Board of Commissioners for Kittitas County
205 W 5th AVE STE 108
Ellensburg Washington 98926-2887

Dear Commissioners Jewell, Berndt, and O'Brien:

Subject: Comments on the GMA Compliance on Water/Land Use Issues - 2014

Send via email to: bocc@co.kittitas.wa.us; doc.hansen@co.kittitas.wa.us;
neil.caulkins@co.kittitas.wa.us

We strongly support the proposed settlement and amendments

Thank you for the opportunity to comment on the proposed comprehensive plan development regulations for the GMA Compliance on water and land use issues. The Kittitas County Conservation Coalition, RIDGE, and Futurewise strongly support the proposed settlement and these amendments. The amendments and proposed settlement protects senior water rights holders, assures that current rural residents and their families will have the right to use water in their homes, and provides standards so that future lot buyers will be assured that the property they buy has a legal right to drinking water. Water is essential for our homes, our farms and ranches, and our businesses. Without the important protections in the proposed settlement many rural Kittitas County residents will face real hardships in low water years. The Board of Commissioners for Kittitas County is showing real leadership in working to resolving this important issue.

We also support the proposed measures to better protect rural character in rural Kittitas County. They will protect Kittitas County's quality of life as growth continues in Kittitas County.

We believe this package has the potential to resolve the areas of non-compliance with the Growth Management Act facing the county. We very much appreciated the opportunity to work with Commissioner Jewel and county staff. They were all helpful and professional during the process of discussing and resolving these issues. We thank all of you for your help.

We do have a few suggestions set out below.

Exhibit A: GMA Compliance 2014 Staff Recommended Revisions to Planning Commission Recommendation Description: Proposed Revisions to Comprehensive Plan Chapter 8 Rural and Resource Lands

We agree that the comprehensive plan amendments in Exhibit A are significant improvements to the existing comprehensive plan, will protect Kittitas County residents and property owners, and protect the rural environment and rural character. We strongly support them.

We do have two suggestions to clarify the language of the Comprehensive Plan amendments. On page 9 of 45 proposed GPO 8.14C reads “[d]evelopment shall be located distances from streams, rivers, lakes, wetlands, critical areas determined necessary and as outlined within existing Shorelines Management Program, the Critical Areas Ordinance and other adopted resource ordinances in order to protect ground and surface waters.” It would seem clearer to add a “the” and delete “existing” since the county will be updating its shoreline master program and critical areas regulations in the near future. So the GPO could read as follows with our suggested addition double underlined and our suggested deletion double struck through:

GPO 8.14C: Development shall be located distances from streams, rivers, lakes, wetlands, critical areas determined necessary and as outlined within the ~~existing~~ Shorelines Management Program, the Critical Areas Ordinance and other adopted resource ordinances in order to protect ground and surface waters.”

Similarly, we recommend a clarification to GPO 8.57 on page 22 of 45 to clarify the policy. So the GPO could read as follows with our suggested addition double underlined:

GPO 8.57 ~~Encourage~~ Require ~~landowners and~~ developers to approach project design using techniques in a flexible and creative manner to provide for and protect which provides open spaces and a visual gratification rural environment characteristic of Kittitas County including preservation of open spaces, adequate buffering between development and natural areas, and preservation of critical areas and forested lands.

Exhibit B: GMA Compliance 2013 Staff Recommended Revisions to Planning Commission Recommendation Description: Amend Definition KCC 17.08.033 Agriculture Production, KCC 17.050 Allowed Uses in Resource Lands, KCC 17.15.060 Allowed Uses in Rural Non-LAMIRD Lands, KCC 17.15.080 Allowed Uses in Urban Lands and KCC 17.56 Forest and Range Zone Chapter 17.08

As part of our discussion, we believed we had all agreed that for lots greater than one-half acre in the Agriculture 5, Rural 5, Agriculture 20, Forest & Range, and Rural

Recreational zones impervious surfaces would be limited to half of the lot. We did not see this provision in Exhibit B. Limitations on impervious surfaces are needed to protect rural character and water quality.

In a recent review of these studies, Schueler concludes that “this research, conducted in many geographical areas, concentrating on many different variables, and employing widely different methods, has yielded a surprisingly similar conclusion – stream degradation occurs at relatively low levels of imperviousness (10-20%)”. Recent studies also suggest that this threshold applies to wetland health. Hicks found a well-defined inverse relationship between freshwater wetland habitat quality and impervious surface area, with wetlands suffering impairment once the imperviousness of their local drainage basin exceeded 10%.¹

Suggested language clarifying this point is in “Amendment to Rural Non-LAMIRD Table for Compliance w Suggestions Feb 21 2013 .docx” in footnote 49. Our suggestions are shown in redline and highlighted in yellow. This file also includes our other recommendations related to land uses which are also shown in redline and highlighted in yellow.

Exhibit B makes other changes to the allowed use table for Rural Non-LAMIRD Lands in Kittitas County Code (KCC) 17.15.060.1. We support a number of those changes, but have concerns about two. First, agricultural sales and produce stands are no longer allowed in the Forest & Range zone. A significant amount of land in the Forest & Range zone is used for farming and ranching. Product stands can help bolster farm and ranch incomes and we recommend that this use not be deleted from that zone.

Second, footnote 37 in KCC 17.15.060.1 is modified to add the note “temporary asphalt plants only” to “Prohibited in the Liberty Historic Overlay Zone.” Footnote 37 is applied to many uses, such as feedlots and nurseries, that have no connection to asphalt plants so we recommend that this addition be deleted.

We also recommend that restaurants and retail sales uses not be allowed in the Rural Recreation zone. Despite its name, that zone is primarily a residential zone applied to relatively remote areas. These uses would be incompatible with those zones in increase impacts on neighboring uses.

We further recommend that convalescent homes not be allowed in the Agriculture 20 and Forest & Range zones. Again, these are low densities zones and these relatively intensive

¹ Chester L. Arnold, Jr. & C. James Gibbons, *Impervious Surface Coverage: The Emergence of a Key Environmental Indicator*, 62 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 243, p. 248 (1996) and enclosed with this letter with the filename “9373702.pdf.” The Journal of the American Planning Association is a peer reviewed journal, see the Instructions for Authors webpage enclosed with this letter with the filename “JAPA Instructions for Authors.pdf.”

uses that put significant demands on emergency services first responders and do not make sense in zones applied to such rural areas.²

Exhibit C: GMA Compliance 2013 Staff Recommended Revisions to Planning Commission Recommendation Description: Amend Section 17.15.070 Allowed Uses in Rural LAMIRD Lands

Like the other proposed provisions, we agree that the development regulation amendments in Exhibit C are significant improvements to the earlier limited area of more intense rural development (LAMIRD) provisions. We believe they will help protect Kittitas County residents and property owners, the rural environment, and rural character. We strongly support them.

We do have a clarifying recommendation for footnotes 50 and 51 in Table 17.15.070.1, Rural LAMIRD Use Table on page 8 of 8. Rather than refer to “existing” LAMIRDs we think it is clearer to refer to LAMIRDs existing on a certain date. We inserted March 31, 2014, but another current date would work too. Here are our suggestions with our additions double underlined and our deletion double struck through.

50. Any new Type 3 LAMIRD is required to be at least one-half mile from another Type 3 LAMIRD, and will permit only one business and/or businesses associated with the primary business in the new LAMIRD Type 3. Type 3 LAMIRDs existing as of ~~March 31, 2014~~ are not limited to one business.
51. Permitted only within ~~existing~~ Type 3 LAMIRDs existing as of March 31, 2014.

Criteria for Conditional Uses

In our discussions we had also agreed to amend KCC 17.60A.010.7, the criteria for conditional use permits, to add “E. Has sufficient supply of water legally available for the intended use without adversely impacting surface and ground water flows.” We still think this makes sense and recommend it be adopted.

Proposed Amendment to Chapter 2, Comprehensive Plan Regarding Water Rights and Development Regulations Regarding Adequate Provision of Potable Water

The Kittitas County Conservation Coalition, RIDGE, and Futurewise strongly support these amendments and proposed development regulations. Water in the Yakima basin is over allocated and priority dates entitling water rights holders to use water in low water years are old, 1905 for many low water conditions. This puts many property owners in a real bind. How will property owners with wells drilled after 1905 get the water they need

² Jeffrey S. Jones, MD, Paul R. Dwyer, MD, Lynn J. White, MS, Russ Firman MD, *Patient Transfer from Nursing Home to Emergency Department: Outcomes and Policy Implications* 4 ACADEMIC EMERGENCY MEDICINE 908 p. 910 (1997) “Each year >25% of patients living in NHs are transferred to a hospital or an ED for evaluation and treatment.” Accessed on Feb. 24, 2014 at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1553-2712.1997.tb03818.x/pdf> and enclosed with this letter. Academic Emergency Medicine is a peer reviewed scientific journal. Please see the *Academic Emergency Medicine Peer Review Policy & Procedure* enclosed with this letter.

for their families, homes, and businesses? Without the important protections in the proposed regulations and settlement agreement many rural Kittitas County residents will face real hardships in low water years.

The amendments and proposed settlement protects senior water rights holders, assures that current rural residents and their families will have the right to use water in their homes, and provides standards so that future lot buyers will be assured that the property they buy has a legal right to drinking water. Water is essential for our homes, our farms and ranches, and our businesses. The Board of County Commissioners for Kittitas County is showing real leadership in working to resolving this important issue. The commissioners are to be congratulated for their real wisdom and foresight.

The Settlement Agreement

For the reasons we explained above, the Kittitas County Conservation Coalition, RIDGE, and Futurewise strongly support the settlement agreement. With this agreement Kittitas County is solving a very serious problem facing many current and future residents and businesses. This is a model many areas of the state would be wise to follow. Again, we thank the Board of County Commissioners for their leadership and hard work. We also thank county staff for their hard work on these important issues.

However, the agreement contains several dates for events that have passed. We recommend that those dates be updated.

If you require more information please contact Tim Trohimovich at 206-343-0681 Ext. 118 or tim@futurewise.org

Very Truly Yours

Tim Trohimovich
Director of Planning & Law, Futurewise

Doug Kilgore
RIDGE

Kittitas County Conservation Coalition

Enclosures

Jeff Watson

From: Lindsey Ozbolt
Sent: Friday, February 28, 2014 7:59 AM
To: 'bbest@fairpoint.net'
Cc: Doc Hansen; Jeff Watson; Julie Kjorsvik
Subject: GMA Compliance Hearing 2.26.14

Hello Ms. Best,

You are receiving this email because you placed your email address on a sign-up list to receive the GMA Compliance documentation Exhibits and Staff report that were presented at last night's Board of County Commissioners Public Hearing.

The information you have requested can be found at this link: <http://www.co.kittitas.wa.us/cds/comp-plan/2013/maps-text.aspx>

Please let us know if we can be of further assistance.

Regards,

Lindsey Ozbolt
Planner II

Kittitas County Community Development Services
411 North Ruby St., Suite 2
Ellensburg, WA 98926
Phone: 509-962-7637
Email: lindsey.ozbolt@co.kittitas.wa.us

February 26, 2014
The Honorable Paul Jewell
The Honorable Gary Berndt
The Honorable Obie O'Brien
Board of Commissioners for Kittitas County
205 W 5th AVE STE 108
Ellensburg Washington 98926-2887

Dear Commissioners Jewell, Berndt, and O'Brien:

Subject: Comments on the GMA Compliance on Water/Land Use Issues - 2014

Thank you for this opportunity to comment on the current proposals for Comprehensive Plan compliance.

The Kittitas County Conservation Coalition would like to thank the Commissioners, CDS staff and the County Attorney's office for their commitment to resolving the long outstanding issues regarding compliance. We would also like to thank the Department of Ecology and the State Attorney General's office for their guidance and assistance in developing the Water Settlement Agreement.

KCCC supports the agreement under consideration as it will allow residents and businesses to move forward with a certainty that has been absent for a long time. The protection of water resources and senior water rights is of the utmost importance.

The assurance that current rural domestic water users will be provided for is one of the outstanding provisions in the agreement.

Under the agreement new water users will be able to buy a right at a reasonable cost through the County water bank, allowing new development to proceed without the excessive, uncontrolled cost of using a private water bank.

It is KCCC's sincere hope that this agreement will be carried far into the future. It demonstrates that recognizing the issues and applying the principals of cooperation, determination and hard work can resolve most issues without costly and lengthy legal battles.

Again thank you for the opportunity to comment on and support the proposal before you tonight.

Sincerely,

Marge Brandsrud
Chair person Kittitas County Conservation Coalition



February 26, 2014

Commissioner Paul Jewell
Kittitas County Board of Commissioners
205 W. Fifth Ave, Ste. 108
Ellensburg, WA 98926-2887

Transmitted via email to paul.jewell@co.kittitas.wa.us

RE: Comments on groundwater mitigation settlement agreement

Dear Commissioner Jewell:

We are writing to comment on the proposed settlement agreement between Futurewise, the Department of Ecology, and Kittitas County to mitigate for domestic groundwater uses in Kittitas County. Suncadia generally supports rulemaking that clarifies water availability in Kittitas County, and we are pleased that the County recognizes that groundwater development is integrally related to surface water supplies in the Yakima River basin. We also support efforts to extend the water mitigation requirements that exist in upper Kittitas County to the lower County. Suncadia is deeply concerned, however, about several parts of the proposed settlement, including the interim mitigation program and exemptions from the statutorily mandated impairment analysis that is required for a water rights permit.

The interim mitigation program is of concern because it would violate state law. RCW 90.42.100(3)(b) prohibits the issue of temporary water rights from a water bank program for building permits requiring potable water. The proposed interim mitigation program relies on leased water, which is by definition a temporary right. In addition, a temporary water right does not meet the requirements of an adequate water supply under the state building code (RCW 19.27.097) or subdivision requirements (RCW 58.17.110). A water supply is adequate for the intended use of the building if its amount is sufficient to serve for the expected needs of the building's occupants for the expected useful life of the building.¹ There is no guarantee that homes built on the basis of an 18-month leased water right will have access to permanent, year round water at the end of the lease term.

¹ 17 Op. Att'y Gen. (1992).

In addition, the settlement agreement exempts water right applicants from undergoing a complete impairment analysis as required by RCW 90.03.290 and RCW 90.03.380. Before the Department of Ecology can issue a water rights permit, it must evaluate 1) the impact of the new appropriation to the Total Water Supply Available within the Yakima River Basin and 2) what the local impact will be as a result of the new use. Section 1(c) of the settlement agreement (describing the interim mitigation program) eliminates the local impact analysis by focusing exclusively on the Total Water Supply Available (TWSA) at Parker gage. Section 3.3 of the settlement agreement only requires the County to purchase water sufficient to mitigate with regard to TWSA. Allowing development without regard to its impacts on local water supplies violates the Growth Management Act's requirement to protect rural water supplies.²

Finally, we believe the proposed groundwater mitigation program is unnecessary. Efforts to create a water bank by the County would be duplicative of and competitive with functions readily available in the private sector. By our calculation, an additional eight private water banks have been developed since Suncadia pioneered that portion of the settlement agreement. Based on the County's calculations of need for development, sufficient water is already available in the established water banks. Furthermore, the existing water bank programs are working to address the County's water supply needs. They have been successfully transferring water rights on a small scale, in an efficient manner, and at a reasonable cost. There is substantial risk and cost associated with operating a water bank. We do not see how the government can or should perform a function that is already providing for new groundwater users, at no cost or risk to the County's taxpayers.

For the above stated reasons, we strongly urge the Board of County Commissioners to reject the interim measures included in the proposed settlement agreement and refrain from adopting provisions in the County Code to implement water banking in the Yakima Basin.

The proposed county actions to issue building permits under the proposed settlement agreement is not the equivalent of Mitigation Water Bank certificate, nor does not provide real and durable Senior water right mitigation to any Junior water right holder, who may be misled to rely upon it.

To help you and the citizens of the county to better understand the issues surrounding water rights, the risks of impairment, the process the law and the details of these issues, we have prepared the attached Water Rights Primer for the Yakima Basin. A significant part of the work mitigation water banks undertake relate to these matters.

Thank you for your consideration.

² See *Kittitas County v. Growth Management Hearings Board*, 172 Wn.2d 144, 178 (2011) ("The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources.").

Comments on groundwater mitigation settlement agreement
February 26, 2014

Sincerely,



Paul Eisenberg

Senior Vice President, New Suncadia LLC

CC:

Maia Bellon, Department of Ecology

Gary Berndt, Kittitas County Board of Commissioners

Obie O'Brien, Kittitas County Board of Commissioners

Doc Hansen, Kittitas County Department of Community Development



A Water Rights Primer for the Yakima Basin

The following is a summary of critical facts and issues regarding water rights in the Yakima basin. The issues affecting water rights mitigation in the Yakima basin is unfortunately complex, but this overview is intended to make these matters understandable.

What are water rights, the restrictions and conditions on them, and what is the Doctrine of Prior Appropriations and what why does it matter? Water rights in Washington are real property rights and they are separate from land ownership. The purchase of land does not automatically include water rights. This means that ownership of water, like ownership of other property, is protected under the Constitution. Once a basin is fully appropriated, the right to use water becomes a property right. It cannot be taken or reallocated without just compensation.

Like other asset ownership, water rights are subject to many rules and limitations. The sale of water rights individually or through water banking does not constitute becoming a water utility. Water utilities own water rights as well as the infrastructure to withdraw, treat, store and deliver the physical water to customers. The ability of any water utility to provide water to its customers is only as good as the quality of its infrastructure and the underlying water rights. Unlike water utilities, mitigation water banks only convey certificates that perpetually pledge the beneficial use rights to a portion of a Senior water right that is held in trust by the State. Unlike utilities, mitigation banks do not deliver any physical water to their customers. In fact, the WUTC has no jurisdiction over the market driven prices that water utilities pay for their water.

Some of the key limitations governing each water right in Washington are the following.

- Water rights are administered by the Washington Department of Ecology (DOE) in accordance with State Law, general property rights, certain contracts and agreements with the Federal Government, and Native American treaty rights.
- Each water right is legally established with a specific priority date assigned to it together with restrictions that are imposed at the time it is granted. Water rights generally have these restrictions:
 - A priority date. Earlier claims have priority for use of water over newer claims. This is often stated as “First in time is first in right.” In the Yakima Basin, water rights are further divided into “Senior” and “Junior” rights. This important distinction arose in 1905 when the Federal Bureau of Reclamation (BOR) agreed to build a series of retention reservoirs and at the same time claimed all then unappropriated water rights in the Yakima River Basin for the Federal government. Legally established water rights dated prior to May 10, 1905 are

considered "Senior" meaning they have priority over the BOR's water rights. Water rights with a priority date after 1905 are considered "Junior" and they only allow water to be taken when that does not impair the Senior water right owners' ability to obtain all the water the Senior owners are entitled to. If a lower priority water right owner takes water out of priority that is considered an improper impairment of the more Senior rights.

- The maximum annual quantity of water that can be withdrawn or diverted under each right is usually stated in acre feet and the short hand reference is "Qa" for "quantity acre feet". Some rights have more detailed seasonal or monthly restrictions on these quantities.
 - The maximum annual quantity of water that can be consumed under each right (put to "beneficial use") is usually stated in acre feet and the shorthand reference is "Qu" for "quantity usable". Some rights allow more water to be diverted or withdrawn, particularly when the water must be conveyed in irrigation canals. Getting the useable water to its point of use requires extra "conveyance" water that cannot be use and must be returned back to the system. Some rights do not require conveyance water and then Qa and Qu are the same. Some rights also have more detailed seasonal or monthly restrictions that further limit these quantities.
 - The maximum rate at which the water can be withdrawn or diverted at any instant in in time under each right is usually stated in cubic feet per minute, and the shorthand reference is "Qi" for "quantity instantaneous".
 - Each right as a specific place, or point, where the water is allowed to be withdrawn or diverted.
 - Each right has a specific allowed place of use of the water.
 - The water right must be put to beneficial use continuously and that use must be documented. If it is not put to beneficial use for specified periods of time, the water rights are subject to complete or partial termination ("relinquishment due to non-use.") Certain exceptions to relinquishment have been created together with changes in the definition of "beneficial use" in order to allow water banking to work, and to allow water to be placed in trust with DOE and then left in a stream fish and habitat conservation purposes.
 - To protect other water rights, Treaty rights, BOR contract compliance and for other reasons any change to the above restrictions, change in ownership, division of a water right, cannot be done unless a process and analysis is done, and the changes are approved.
- In some places, ground water and surface water are physically separate (not in hydraulic continuity.) In those instances surface water rights and ground water rights (wells) are claimed separately. However it is established scientific fact that in the Yakima Basin surface water and ground water are

connected (are in hydraulic continuity) so all water rights are covered by one set of claims. This means that all wells are subject to the same water rights rules and priority dates as surface water. Any well drilled after May 10, 1905 has only a Junior water right. Unless supplemented with a Senior water right, use of that well during periods of low flow can be suspended to protect senior water rights owners.

- When DOE analyzes a new water right claim or proposed changes to an existing water right they must determine at least four things in accordance with RCS 90.03.290.
 - That water is physically and legally available.
 - That the water will be put to beneficial use as defined in the statutes.
 - That the claim or change will not impair or adversely affect other water right holders.
 - That the appropriation will not detrimentally affect the public welfare.
- The analysis can be a relatively simple or it can be a very complex and extensive process depending on the specific facts. For example there are many kinds of potential impacts on other water rights, including changes in the timing of taking water relative to water availability, the rate at which it is taken, the place it is used, a change in the purpose for which it is used, changes in the point and method of taking the water that could create local interference with other water right owners' ability to obtain their water, local impacts on streams with fish or listed species are present, or effectively "moving" the water from one sub basin to another.
- By its very nature, the mitigation of Junior water right wells using a Senior water right inherently brings virtually all of the restrictions into play, requiring careful analysis for approval. Specifically, it changes a specific Senior water right's historical place of use from one place to many different places, changes the beneficial use ownership from the original owner to multiple new users, changes the point and method of taking the water from its original place and method to numerous places using wells, may move all or a portion of the points of taking water up stream which could impair intervening water right holders ability to obtain their water, and may change all or a portion of the point of taking the water from the original main stem river up into multiple places in its multiple tributary streams and sub-basins. If a junior well impairs other water rights, or if it is located in a tributary where it will reduce flows in a fish bearing stream, or a stream with listed species, then secondary mitigation will be required for these impacts. This is often very difficult to achieve. A significant portion of the complex work mitigation water banks must complete is ensuring that each of these factors is analyzed and sufficiently proven for each well seeking mitigation. Properly following this process protects the successfully mitigated well from future curtailment, and makes the purchase of the Senior water right mitigation certificate a sound investment, sufficient to satisfy the requirements of building permits and lenders.
- It should be apparent that creating a proper and reliable mitigation water bank is not simple. The consequences of ignoring or bypassing the analysis and process above may result in the mitigation impairing another Senior or established Junior water right, and/or impairing BOR and Treaty rights

that affect water rights for fish or listed species. If the local analysis is not properly performed, approved through a proper public process, and all needed secondary mitigation performed, then the mitigation of the Junior well may fail. Damaged parties will be able to take legal action, including action outside of DOE's processes, to stop the improper taking of water. The damaged parties with causes of action might include people who relied on the flawed mitigation and obtained loans, or made loans based upon it. Following the DOE process, including public notice, and appeal periods avoids these risks.

What happens when there is a shortage of water? As can be seen from the above, all water rights are not equal and changes to water rights can be very complex, affecting other rights and agreements. During years when there is not enough water to satisfy all the claims, low priority water rights such as Junior water rights, begin to "fall out of priority." This starts with the youngest priority date water right, and progress towards older rights. As a water right falls out of priority the water right owner must stop taking water. If they do not, and they continue to take water "out of priority" they will "impair" the legal rights and ability of higher priority water right owners to receive their water which will damage those owners. If a user does not cease voluntarily, an impaired user with a higher priority date (whether Junior or Senior) can demand that DOE order the lower priority user to stop taking water. If DOE does not act, the higher priority water right holder can go to court to seek an injunction and/or sue for damages. The consequences of impairment can be substantial for party causing the harm.

There are other parties outside the basin that are affected by water usage in the basin who have the right to intervene regarding changes or out of priority water use. For example, the Yakima river flows to the Columbia River. The quantity of water reaching the Columbia is measured. A complex set of valid claims on that portion of the water that is supposed to reach the Columbia can be impaired if more water is taken out in the upper parts of the basin, causing downstream impairment. Other parties with those rights, including the Federal government, can intervene to protect their water rights. A concept commonly called "TWSA", short for Total Water Supply Available, is a factor that DOE must monitor and the total water taken by all users must remain within the TWSA limits. This is a more complex topic, but this explanation is sufficient for the purpose of this overview.

It is a fact in the Yakima basin that all Junior water rights fall out of priority every summer. The Yakima basin is significantly oversubscribed compared to the water available in summer months. Virtually all exempt wells are assigned a Junior water right when they are drilled. If they continue to operate when out of priority, they impair more senior rights. In some cases where the exempt wells are on tributary streams, and where those stream flows are measured, very real harm is caused to those more Senior water right owners whose ability to take their water is improperly reduced by the Junior user's impairment. This becomes most acute during the months when the irrigation water use peaks and river flows minimize. These facts very clearly demonstrate why the very Junior water rights associated with exempt wells cannot be considered a reliable year round source of water sufficient to issue building permits for homes or other structures.

As explained further below, legitimate mitigation water bank programs have been carefully crafted over a period of almost a decade to create a solution that allow exempt wells to meet the requirements for building permits, while complying with all the restrictions, avoiding inference or impairment of other water rights, complying with the BOR agreements, Treaty rights, and negative impacts on fish bearing stream and listed species.

The most important point is that there are no shortcuts in this process. Any effort that attempts to ignore or bypass the details and reality of water rights in Yakima basin, runs the very real risk of causing measurable damage, breaching the BOR agreement, breaching treaty rights, impairing other water rights. The results of relying on inadequate and bogus mitigation could be substantial financial harm with resulting litigation and significant liability to a variety of parties.

How does water banking successfully solve the problems resulting from all these constraints and rights? Suncadia, its attorneys, its consultants, the Governor's Office, the Department of Ecology (DOE) and private parties worked for many years, during multiple legislative sessions to create a reliable and workable mitigation water banking program. In summary a specific Senior water right is placed in trust and then, on a case by case basis, small portions of that senior water right are permanently assigned to each specific Junior water right well using documents recorded on the deed of the property. This effectively ties the Senior water right to the benefitted property. Once this is completed, if the Junior water right well falls out of priority it may continue to take water based on its portion of that Senior water right held in trust by the State. That right is Senior even to the Bureau of Reclamation's rights.

In order to do this legitimately, a process must be followed to ensure that the specific Senior water right can mitigate for each specific Junior well, without impairing any other water right, affecting listed species, impacting a fish bearing stream, or violating any of the agreements referenced above. This is called a local impact analysis. If that local analysis is not done, or if a specific Senior water right is not permanently pledged to the property with a Junior water rights well, then no reliable, permanent source of water has been created for the Junior water rights well, because the water can cease to be available, can be blocked by an impairment claim, or can be blocked by a violation of the BOR agreement, or treaty rights. Due to the temporary nature, and the potential for challenges to the mitigation water by a number of parties, such mitigation is illusory, and does not meet the requirement for a building permit.

These factors make clear why the key features and processes of mitigation water banking must exist and cannot be bypassed for the mitigation to be successful. Following are more details about the mitigation water banking features and process.

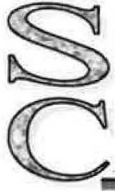
- A DOE administered Trust Water Bank that can hold water deposited for mitigation water banking. DOE determines:
 - Each water right must be demonstrated to be valid not to have been relinquished.
 - Water right must be examined to determine that it has sufficient year round rights in terms of Q_a , Q_u , Q_i for the purpose.

- DOE must also examine the existing point of diversion/withdrawal. Then must create a map of the Green zone for that specific water right showing the area within which exempt wells can be physically mitigated without impairment to any other water users, or fish bearing streams, listed species, bypassed water users. Can also create a red zone in which that specific water right cannot provide mitigation, and a yellow zone where it needs to be carefully analyzed for potential local impacts. That must be published for comment and reviewed so other water rights holders can comment or object if they believe they will be negatively impacted.
- A water bank trust account is established.
- After the DOE analysis, if the water is suitable, the water bank places its mitigation water into the bank's trust account where it is temporarily held for the water bank.
- A DOE trust account is also established, and as increments of the senior water right is pledged to a specific property, that increment is transferred into the DOE trust account where it will be held in perpetuity.
- The preceding approach avoids the costs and complexity of dividing the mitigation water into a large number of small individual rights, which would be very expensive and even more complex. Instead, when a mitigation certificate is approved, a document is recorded on the title of the benefitted property permanently. That cannot be removed or resold

There are now 9 mitigation water banks in the Yakima basin. There is no monopoly on mitigation water banks and additional new mitigation banks can form at any time. These banks have successfully processed over 500 reliable and durable individual Senior water rights mitigation certificates. An additional 1,200 developer mitigation certificates have been processed. The banks are doing this at a very low cost compared to the traditional methods of acquiring, partitioning, and transferring water rights directly that can cost \$50,000 or more for each process.

Reliable and durable Senior water right mitigation for Junior users is important. Financial institutions such as banks and savings and loans are concerned with the quality of the collateral upon which they lend money. A sophisticated lender will either require proof that a property is served by an established water utility, or that it has otherwise obtained a reliable water supply. In the Yakima basin, exempt wells alone cannot meet this test, but exempt wells backed up by legitimate Senior water right mitigation certificates do meet this requirement. Buyers of mitigation must be aware of these facts, and not be misled by unreliable programs that deliver no certainty of mitigation.

Real estate owners and agents are required by law to fully disclose important facts about the property they are selling. If a property does not have a genuine source of reliable water, this fact must be disclosed in writing. The market place has already proven that disclosure that a property does have a legitimate Senior water right mitigation certificate significantly enhances the value of the property.



SC Aggregate Company, Inc.

1572 Robinson Canyon Road

Ellensburg WA 98926

509-925-5622

February 26, 2014

Kittitas County
Board of Commissioners
205 W Fifth Ave. Suite 108
Ellensburg WA 98926-2887

RE: Purposed County Comprehensive and Code Modifications

Dear Commissioners:

While we generally support the proposed changes to the county comprehensive plan and Chapter 13.35 KCC regarding the use of water, we wish to object to the county engaging in the acquisition or distribution of mitigation water in any form or the undertaking of a county water bank.

Preliminarily, however, there are some common misconceptions about water and the rights to it that need to be corrected prior to any constructive discussion about how to manage it. Water is a real property right with all the associated attributes and benefits. For over 150 years in the Western United States, the appropriation of water can only be accomplished if there is water available from the particular source, it can put to a beneficial use, its use will not harm the use of water rights held by others, and it is in the public interest. Once acquired, a water right can be used to the exclusion of others according to its priority date.

There is no universal “right” for any person or property to have access to water. No one has a right to water outside the bounds of long established water law any more than one has a right to any other form of property absent its legal acquisition. If you want it, you must buy it. Water is also not a “utility” as some have naïvely implied. When a particular source of water is fully appropriated, there is simply no more water available for anyone else to use. In Kittitas County, all of the senior water rights – those perfected before May 10, 1905 – are owned by somebody, and any junior or new use is, in fact, unlawfully taking water from those who own it. The fundamental flaw in the county’s proposal to actively engage in water banking is its apparent view that everyone has a right to have water available to make use of their property, and it is the county’s duty to make it so.

However, it is not the place or purpose of county government to inject itself as a middleman and facilitator for private developments or to seek legislative favors and subsidies to the direct detriment of the private sector. Under law of long standing, anyone wishing to build or develop is required to demonstrate that they have a permanent, adequate water supply to support development or building permits. If not, they must either acquire water for their project or abandon it. Kittitas County has for years both actively ignored this requirement and promoted continued development that has exacerbated the severe over allocation of the total water supply available and the impairment of senior rights. It now proposes to create a new county bureaucracy which will have as its sole purpose the providing of senior mitigation water for new private development without providing any relief from the risk of curtailment to thousands of current, junior water users.

When one wants to build a house in the country, they must buy the land, drill the well, install the septic system, build the road, extend the power and so forth – all of which are required by the county for building and occupancy permits. Heretofore, the water was just taken without regard to who actually owns it or has the right to use it. Now the right to take water will need to be formally established. But it is impossible for the county to justify why it has any more of a role in the acquisition of water for a new house than it would in any other county required element of a private development.

The legislature provided for water banking over ten years ago, and there are at least nine private water banks presently operating in Kittitas County, with more on the way. This active growth proves there is no monopoly in the water banking business. But, what the county is saying is that it can provide the water banking service more efficiently and at lower cost than the private sector. Do you really expect anyone to believe that? The providing of actual, legal mitigation water is a veritable tar pit of complexity, and the taxpayers will rue the day and rightfully castigate you if you put them in it. But, as a taxpayer, it is particularly offensive to have our county commissioners propose that the county directly compete with private enterprise, let alone suggest you can do it better.

The county is proposing the creation of a totally new government agency that is duplicative of and competitive with functions readily available in the private sector. It has neither the expertise in water banking nor the staffing to implement its proposal. Frankly, it has no concept of the legal requirements and processes necessary to identify, acquire and qualify mitigation water for even a fraction of the county, undertake the creation of a functioning water bank, process water transfers that actually provide mitigation for particular uses without harming others, or which gives property owners a reliable and permanent assurance of proper mitigation while at the same time preserving and protecting existing water rights. Moreover, the county is totally naïve as to the true cost and time involved in accomplishing what will be required to do all of this.

A close examination of the practical aspects of the county getting into the water banking business is instructive:

1. For the next eighteen months, new development and building permits will only be required to be TWSA (total water supply available) neutral within the Yakima River

basin. The actual impacts new uses may have on existing local water rights and users will continue to be ignored, even though the law does not allow for this accommodation. Accordingly, anyone acquiring a so called “water right”¹ from the county during this interim period and meeting only the stated requirement is getting a very inferior and misleading product. It is not a water right in any sense. It will be subject to curtailment when senior users make a call on water or if the new use impairs senior rights.

2. The county apparently is proposing to lease water for this interim period, to be replaced at some point by a permanent right. This is simply not legal under RCW 90.42.100 which requires a permanent water supply from the outset for any use requiring an adequate and reliable water supply. This legal restriction cannot be waived or ignored by the county or the Department of Ecology.
3. It is unclear how the county intends to fund both the acquisition of mitigation water, in whatever form, and the administration of its program over the short or long term. However, there are only two possibilities: It will charge the full cost of acquiring, permitting, monitoring,² and otherwise administering the water banking program, in which case it is simply not credible that it can do so at lower cost than the private sector; or, it will charge a portion of the cost to the user and subsidize the balance of the cost with taxpayer funding,³ in which case it will be an unconstitutional use of public funds for private benefit.
4. For water provided during the interim period, the disclosures the county will need to make to users will be ominous at best: “What you are buying is not a water right; it has no seniority and is subject to being shut off if water is short or others in your area are harmed; you have no assurance that what you are buying will in any way mitigate for your water use or that adequate mitigation water even exists in your area should it be required in the future; upgrading to an actual right may be costly, if it is even available; the county (will/will not) guaranty that you have a permanent right to water that cannot be reduced⁴.” This is just a sampling of what the county will have to tell its buyers.
5. For the county to put the permanent measures in place, it will need to acquire a senior water right that is either already in the State water trust program or can be. That is the easiest and least expensive part. But, senior water does not exist in all parts of the Yakima River drainage in the county, so, absent extraordinary measures, the county program can never benefit the red and a goodly portion of the yellow areas after the

¹ This term is not defined in proposed Chapter 13.35 KCC, but is inherently misleading as it implies some form of special status and an authorization of use and priority that may not exist in fact. The county fact sheet purports to define senior and junior water rights but is not codified.

² It has always been a requirement that wells be metered, and there are regular reporting requirements as well. It must be assumed that the county will need some form of permanent, annual charge to cover this cost. Private water banks do not typically do the monitoring, leaving it to the owner to report directly to Ecology.

³ Whether through general taxes, an excise tax of some sort, state or federal grant, or other funding derived from a government source, it is taxpayer funding.

⁴ The county will need to think hard about how it chooses to stand behind what it is selling.

initial period. Once the program is undertaken, to what extremes is the county prepared to go in making water available to all, or what will its response be when it has assisted some owners and developers to obtain senior water for their private gain, but elects not to help those in the difficult areas?

For the permanent program, the county will need to acquire senior water rights from several tributaries together with the Yakima mainstem before it will be able to cover even most of the green portions of the county. Each such right will then need to be reviewed by Ecology to determine local impacts and exactly where it will actually mitigate for new uses – and where it will not. This is the same process all water banks have to follow, and there will be no special dispensations for the county or significant legal due process challenges will quickly follow. If the county attempts to obtain a permit covering a large area, the result will be an irregular patchwork of eligible lands, and there will likely be portions of green areas – places close to tributaries, for example – for which actual mitigation will not be possible as there will be no way of protecting against a reduction in stream flows. The alternative is to process permit applications one at a time; something that is unworkable when dealing with a large number of properties. This summary of the process required to implement the permanent program cannot begin to relate how incredibly complex, difficult, and time consuming it really is. And, it does not address the time and detail necessary to actually perfect a water right after a permit is granted to a specific property.

6. The county is proposing to undertake a function that is also being provided by the private sector. Accordingly, it will be held to the same standards of care and subject to the same degree of liability as a private water bank. Sovereign immunity will not be available. Moreover, the State in many cases requires sellers of land to make certain disclosures to buyers or the transaction can be voided. People buying from the county, and people to whom they may sell, will hold the county liable in the event of a problem with their water availability or the right to use their property, and lenders and their underwriters will appreciate having the county as a very big target when the litigation starts.

It is neither appropriate nor necessary for the county to directly engage in the effort of providing mitigation water or incurring the large risks to county taxpayers a county water banking program would carry with it. Private water banks already are available and can immediately offer both water budget neutral and actual water right permit options to most of the same areas to which a county program might actually serve. Some private banks have already gone through the processes necessary to comply with the proposed permanent measures, meaning that buyers can actually get on the path for certificated water rights today – without taxpayer money and any taxpayer risk.

There are difficult parts of the county where water will always be expensive, if it is even available at any cost. But, prices in the generally green areas are already competitive and will be more so as additional senior water is dedicated to mitigation. When a water well costs \$10,000-12,000 and a septic system about the same, it is pretty hard to argue that a permanent, senior water right is too expensive at a fraction of that total.

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Every private well in the county not already mitigated, and all wells to come, have the direct problem of being subject to curtailment. But it is a private, not a public, problem. It can and should be solved without public money. There is a role for the county in coordinating its permitting processes with those of Ecology and the private water banks. It should not, however, attempt to engage in water banking.

Respectfully submitted,



F. Steven Lathrop, President
SC Aggregate Company, Inc.

FSL/rlc

Ellensburg Water Company

The 10,000 ac of EWC was granted 44,040 ac ft
of water in YB adjudication = 4.4 ac ft / ac
(plus 2.2 ac ft of return flows)

1 ac ft = 325,850 gal @ 4.4 ac ft = 1,433,740 gal / ac

$\frac{1}{2}$ Consumption = 716,870 gal / ac

$\frac{1}{2}$ Conveyance = 716,870 gal / ac

(Water I have available for reuse)

I am in a 20 ac zone. \therefore 1 exempt well

using 5000 gal/day uses 1,825,000 gal / yr

On 20 ac I have $716,870 \times 20 = 14,337,400$
gal available for reuse.

That is 7 times the water needed for an exempt
well.

Tell me why I have to buy another water right?

KRD

Yakima
river

Cascade
IRRIGATION

EWC

0

6

6

0

6

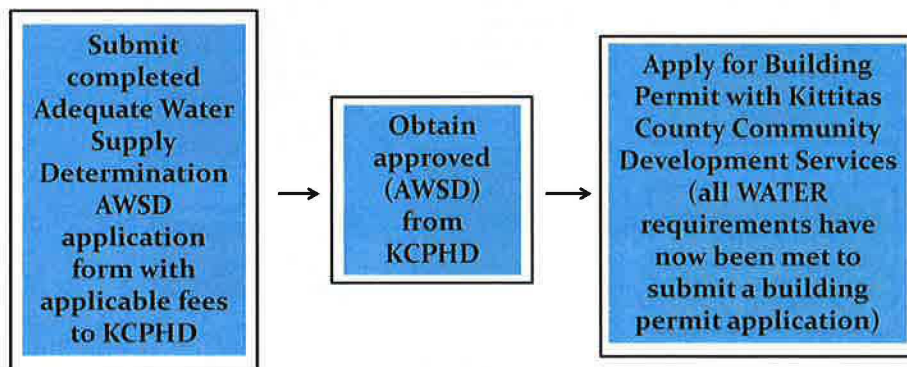
Adequate Water Supply Determination Process

Feb 26, 2014

Robin Read, Public Health Administrator
Holly Myers, Environmental Health Supervisor

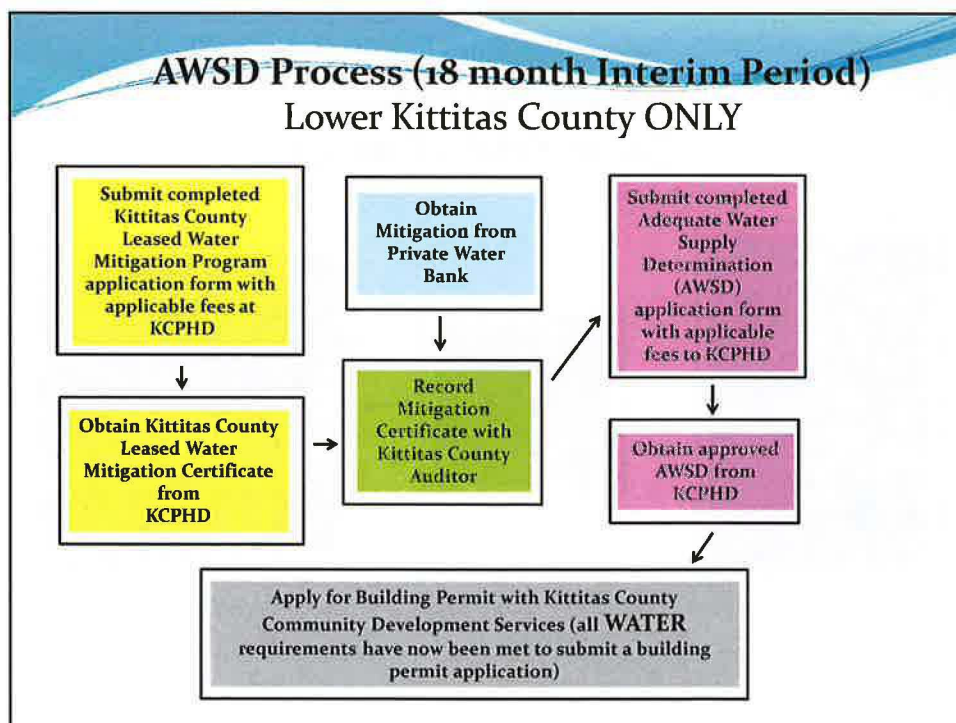


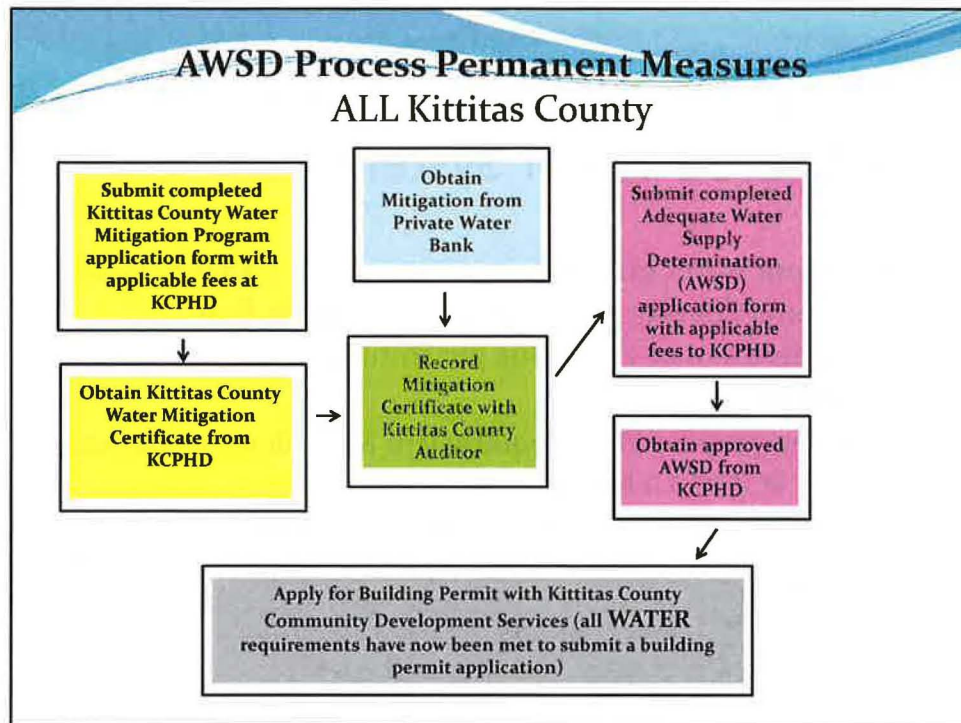
Current AWSD Process (Lower Kittitas County)



Kittitas County Leased Water Mitigation Program (proposed)

- Kittitas County may offer mitigation for new domestic uses related to a building permit application through a county-secured leased water right
- New uses mitigated through the County's program will be limited to indoor domestic use and up to 500 square feet of outdoor use only
- Building permit applicants will be required to record their Kittitas County Mitigation Certificate as a deed restriction with the County Auditor prior to Adequate Water Supply Determination application





Changes to Well Flow Requirements for Individual Water System

- Current water quantity requirements for individual water system (Chapter 13.35.050(b)(ii)) minimum flow requirement of 5 gallons per minute for a 2 hour period
 - New proposed flow requirement is 2 gallons per minute for 2 hour period

**Reduced flow allows for more flexibility for applicants and builders however, storage may be recommended for adequate flow during peak use times*

Changes to Well Flow Requirements for Shared Water System

- Current water quantity requirement for a shared water system (Chapter 13.35.060 (2b)) minimum flow requirement of 17 gallons per minute for at least a 2 hour period
 - New proposed flow requirement is 5 gallons per minute for at least a 2 hour period

**Reduced flow allows for more flexibility for applicants and builders however, storage may be recommended for adequate flow during peak use times*

Gentlemen,

Thank you for this opportunity to comment on the future of sustainable legal water supplies for the people of Kittitas County.

INTRODUCTION. My name is Jan Sharar and I am a member of the board of the Kittitas County Conservation Coalition and a citizen of Kittitas County. Tonight I speak as a private citizen.

THANK YOU! Thanks to Commissioner Paul Jewell in particular for his personal courage to address the issue of protection of water supplies. Thanks also to the entire Board of County Commissioners for the foresight to address sustained water availability for the future. Finally, thank you to Jeff Watson and Doc Hansen from CDS.

THE NEGOTIATION PROCESS was productive and done in a way I believe all who participated felt their input was respected.

THE POLICIES CONTAINED IN THESE DOCUMENTS address the legal basis and scientific basis for use of wells for rural development.

Key to the **legal basis** is consistency with Washington Water Code, existing authorities and responsibilities found in the Growth Management Act and rulings from the Supreme Court and Eastern Washington Growth Management Hearings Board.

Key to the **scientific basis** is the fact that surface and ground water is hydraulically connected. This was shown conclusively in the U.S. Geological Survey modeling of ground water flows in the majority of the Yakima River Basin.

IT IS A FACT that groundwater has been over-appropriated in the Basin and this often results in curtailment of water supplies to junior right irrigation companies in order to guarantee that surface water rights are satisfied. Because of this, new unmitigated uses of water cannot be defended in this Basin.

POLICIES THAT ALLOW unmitigated new uses of ground water put new users at risk and further exacerbate the already over-appropriated conditions in the Yakima River Basin.

I AM EXCITED TO THINK that with the approval of the Settlement Agreement and related ordinances and comprehensive plan and development regulations that my county will not only be in compliance with the laws governing water and land use **but a leader** in these areas.

I CLOSE WITH A QUOTE – “Thousands have lived without love but none without water” – WH Auden - author and poet (1907 – 1973).

Jan Sharar (jkshar2@fairpoint.net)

