



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

Kittitas County Board of Commissioners
205 W 5th AVE STE 108
Ellensburg WA 98926-2887

Tuesday, February 26th, 2013

RE: Administrative Segregations

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

Please find attached correspondence to me from my fisheries staff. I concur with the findings of the report for the protection of treaty reserved rights. As you may know, substantial funding is being invested in the Yakima River Basin, to allow it to once again support a viable salmonid and resident fish population. The proposed land divisions may add to the cumulative negative effects that result in a degraded watershed.

Please contact my staff regarding your response to in the attached memo. John Marvin can be reached at 509-966-7406.

Sincerely,

Phil Rigdon
Deputy Director of Natural Resources
Yakama Nation

CC Yakama Nation Office of Legal Council
File

MEMORANDUM

TO: Phil Rigdon, Deputy Director, DNR
THROUGH: Mel Sampson, YKFP Manager
Pat Spurgin, Legal Policy Analyst
FROM: John Marvin, Habitat Biologist, YKFP
DATE: Tuesday, February 26th, 2013
RE: Kittitas County Administrative Segregations

Background

In January 2012, a petition for review of Kittitas County's 2011 administrative segregation ordinance was filed with the Growth Management Hearings Board on behalf of the Yakama Nation. Administrative segregations have been used in the county as an alternative to land subdivision. They cause concern because they have not historically been subject to a careful review to assure protection of water resources and other environmental values important to Treaty reserved rights.

On May 14, 2012, the FWLO Committee took action authorizing counsel to execute a settlement agreement that had been negotiated with Kittitas County that would eliminate segregations.

Kittas County adopted Ordinance 2012-006 on 09/18/2012, which eliminates any future segregation applications and provides existing applicants a three-month opportunity to complete the approval process for segregation or to convert the application to a subdivision application. The ordinance expressly terminates pending applications that are not acted upon within the three-month period. It further provides that applications are not exempted from any other zoning, water rights or environmental review requirements. The ordinance also specifies that the Yakama Nation would be given notice by the County of any application for final approval within the three month period, thus allowing tribal staff to identify any particularly objectionable applications.

On February 13, 2013, Kittitas County provided notification of 15 administrative segregations that had been accepted for final approval prior to the December 18, 2012 deadline. Yakama Nation has fourteen days to submit comments on the final 15 administrative segregations.

Staff Review

While administrative segregations may be permissible by state law (RCW 58.17.040(2)), the Kittas County review standards only exempt administrative segregations from specific sections of the subdivision code (Title 16) and not the remainder of the county code, comprehensive plan or state law. Administrative segregations are not reviewed for consistency with the State Environmental Policy Act (SEPA) (RCW 43.21C), Growth Management Act (RCW 36.7A), the

Shoreline Management Act (RCW 90.58), the Regulation of Public Groundwaters (RCW 90.44) or State Water Code (RCW 90.03). It is this lack of review that has the potential for significant adverse impacts to treaty-reserved resources, including fish and wildlife habitat and water resources.

State Environmental Policy Act

Kittitas County maintains that administrative segregations are categorically exempt from SEPA if under 9 lots. The SEPA rules (WAC 197-11), require a threshold determination for any proposal which meets the definition of action and is not categorically exempt (WAC 197-11-310(1)). Applications for administrative segregations meet the definition of action.

Nowhere in the SEPA (RCW 43.21C), its administrative code (WAC 197-11) or Kittitas County Code (KCC Title 15) can a categorical exemption be found for administrative segregations. State subdivision law (RCW 58.17.020) allows jurisdictions the flexibility of increasing the threshold for a short-subdivision from five to a limit of nine, but this flexibility does not affect environmental review under SEPA other than consistency with the categorical exemption for subdivisions of nine or less. Kittitas County code and state rules (KCC 15.04.090 and WAC 197-11-800(1)) exempt the construction of up to 9 dwelling units and WAC 197-11-800(6) exempts subdivisions; administrative segregations are not construction or a subdivision. Therefore, it is staff's opinion that administrative segregations require a threshold decision under SEPA, regardless of the number of parcels being created.

In addition, a number of the applications are excluded from from the SEPA categorical exemption in WAC 197-11-800(1)(b) because they are "*undertaken wholly or partly on lands covered by water*". When an agency is presented with an action that is "*undertaken wholly or partly on lands covered by water*", a threshold decision is required under WAC 197-11-310.

The failure to conduct SEPA environmental review on the individual segregations has the potential for significant adverse impacts to treaty-reserved resources, including fish and wildlife habitat and water resources. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers. Such a proliferation of consumptive groundwater use reduces the amount of flow in the Yakima River and its tributaries that is necessary for fish migration and passage, spawning and rearing unless appropriate mitigation for such impacts is required. Additional unmitigated development reduces the capacity of riparian and aquatic ecosystems and habitat necessary for fish migration, spawning and rearing.

Critical Areas, Shorelines and Flood Hazards

The administrative segregations in Kittitas County came to the staff's attention in December of 2010 when a letter from the Washington Department of Fish and Wildlife (WDFW) was received concerning File No SG-10-00018 (Brain). The application proposed eight lots spanning Taneum Creek, a critical area and Shoreline of the State, and included an easement and future bridge location over Taneum Creek. In its conditional approval dated 12/01/10, Kittitas County required the applicant to "*consult with the Washington Department of Fish and Wildlife and any*

other interested agencies to determine if a crossing over Taneum Creek will be allowed at the proposed location to serve lots 1-6.” Brent Renfrow, Area Habitat Biologist for WDFW, was consulted and submitted a letter to the applicant and the County indicating that the proposed bridge location is not a desirable location on the property. The Yakama Nation was never contacted for consultation on the proposed bridge, even though it is an “other interested agencies”.

A road and a bridge over Taneum Creek require a Substantial Development Permit under the Shoreline Management Act (SMA) (RCW 90.58) and the Kittitas County Shoreline Master Program (SMP), which would require the County to conduct SEPA review per KCC 15 and KCC 15A. A Substantial Development Permit also triggers CAO review per KCC 17A.03.015 and KCC 17A.03.015, which includes review for compliance with the Kittitas County Flood Prevention Ordinance No. 93-18.

Taneum Creek is a designated Shoreline of the State under the SMA (RCW 90.58) and the Kittitas County SMP. While administrative segregations do not meet the definition of “development” under the SMP (Section 5(3)(b)), the road and bridge are “development” and qualify as a “Substantial Development” (Section 5(3)(r)) and subject to a permit under Section 38 of the SMP. While administrative segregations do not themselves trigger a substantial development permit, Section 7 of the SMP (Application of Regulations) states that:

“These regulations shall apply to all lands and waters within the jurisdiction of these regulations which are deemed by the Act and the guidelines to be under the jurisdiction of the Act. Except as provided hereafter, all sections of these regulations and the Goals and Policy statements adopted as part of the Master Program, apply to all developments and uses whether or not a permit is required.”

The standard of Section 7 of the SMP is not a permit, but does require the proposal to be reviewed for consistency with the SMP. The example administrative segregation (File No SG-10-00018 - Brain) was never reviewed for consistency with the SMA or the Kittitas County SMP and was approved with an easement and bridge location in an inappropriate location.

Section 17A.03.015 of the CAO (land use activities to which this chapter applies) requires CAO review for “*Any activity which is not exempt from a threshold determination under the State Environmental Policy Act, as subject to the threshold exemptions established by the county SEPA ordinance.*”. As stated above, administrative segregations are not categorically exempt from SEPA review and therefore require a threshold determination and CAO consistency review if critical areas are present and require protection.

The failure to conduct Shoreline, Critical Areas and Flood Hazard review on the individual segregations that contain such natural features, has the potential for significant adverse impacts to treaty-reserved resources, including fish and wildlife habitat and water resources.

Project Permit Application Process

Section 15A.03.100 (Criteria for review of all project actions) of Title 15A (Project Permit Application Process) requires Kittitas County to analyze consistency between the proposed project and applicable regulations and the comprehensive plan. The consistency analysis integrates land use and environmental impact analysis, so that governmental and public review of a proposed project, involving development regulations under GMA (36.70A RCW) and environmental process under SEPA (43.21C RCW) run concurrently and not separately. Administrative segregations meet the definition of “Project Permit” in section 15A.02.080 and are not categorically exempt under SEPA. Section 15A.06.010 (Notice of decision issuance) requires a notice of decision to be provided that includes a statement of any threshold determination made under SEPA (43.21C RCW) and the procedures for administrative appeal, if any. Section 15A.06.020 (Order to include finding of fact) requires Kittitas County, in making an order, requirement, decision or determination, include in a written record of the case and the findings of fact upon which the action is based.

The Washington State Supreme Court in *Kittitas County v. Eastern Washington Growth Management Hearings Board* (Board) (No. 84187-0) held that “*several relevant statutes indicate that the County must regulate to some extent to assure that land use is not inconsistent with available water resources.*”.

A consistency analysis provides the opportunity to determine whether an administrative segregation is within the definition of either a large lot subdivision (KCC 16.08.100), short subdivision (KCC 16.08.186) or standard subdivision (KCC 16.08.200) based on the definitions adopted in the subdivision ordinance (KCC 16). Such analysis would find that the only divisions left under administrative segregations are divisions “not for sale” or subject to full compliance with YCC Title 16, and therefore subject to the potable water determination in RCW 58.17.110(2)).

The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers. Such a proliferation of consumptive groundwater use reduces the amount of flow in the Yakima River and its tributaries that is necessary for fish migration and passage, spawning and rearing unless appropriate mitigation for such impacts is required. Additional unmitigated development reduces the capacity of riparian and aquatic ecosystems and habitat necessary for fish migration, spawning and rearing.

Upper Kittitas County Groundwater Rules

On July 16, 2009, the Department of Ecology filed a temporary, emergency rule that closed northern Kittitas County to all new groundwater withdrawals. Ecology closed the upper basin to new withdrawals after two years of negotiations with the Kittitas County Board of Commissioners. A September 21, 2009 opinion from the Attorney General’s office confirmed Ecology’s legal authority to withdraw a water source within its jurisdiction from all new water uses, unless mitigated.

The Department of Ecology adopted a permanent rule (Chapter 173-539A WAC) for managing state law based ground water resources in upper Kittitas County. The rule was adopted on December 22, 2010, and became effective on January 22, 2011.

The rule withdraws from appropriation all unappropriated or unreserved groundwater in Upper Kittitas County with the exception of uses for structures for which a building permit was granted and vested prior to July 16, 2009 and uses which are determined to be water budget neutral (Chapter 173-539A WAC). The rule establishes a pathway for developers, contractors, and/or individuals to construct water budget neutral projects.

The rule applies to new uses of groundwater whether otherwise subject to the permit exempt provisions of RCW 90.44.050 or requiring a permit within the upper Kittitas area boundaries issued on or after July 16, 2009 (173-539A-025). Under WAC 173-539A-030, an "Applicant" is defined as:

"the owner(s) of parcels that are the subject of a land use application, a person making a request for water budget neutral determination, or a person requesting a permit to appropriate public groundwater."

Under WAC 173-539A-030, a "Land use application" is defined as:

- *Subdivision;*
- *Short subdivision;*
- *Large lot subdivision;*
- *Administrative or exempt segregation;*
- *Binding site plan; or*
- *Performance based cluster plat.*

The failure to determine compliance with WAC 173-539A on the individual segregations within the designated area has the potential for significant adverse impacts to treaty-reserved resources, including fish and wildlife habitat and water resources.

General Comments

It is staff's opinion that the administrative segregations provided by Kittitas County are inconsistent with state law and County code for failure to require environmental review under SEPA, in addition to a consistency analysis with the county code and comprehensive plan, including an analysis of impacts on water resources. Therefore, all of the proposals should be denied or processed under the appropriate standards in the County subdivision code (KCC Title 16).

File Specific Comments

SG-04-10271 Eason – A confusing mixture of boundary line adjustments and segregations to create what looks like 15, 3-acre lots in the Agriculture 20 zone. Even under current county interpretation of SEPA, this application would require SEPA review. It appears that 15, 3-acre lots are inconsistent with zoning and the comprehensive plan. The application requires a determination of adequacy for potable water. The proposed segregation is not consistent with

the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-04-11093 Poulsen - A confusing mixture of boundary line adjustments and segregations to create what looks like 18, 3-acre lots in the Commercial Agriculture zone. Even under current county interpretation of SEPA, this application would require SEPA review. It appears that 18, 3-acre lots are inconsistent with zoning and the comprehensive plan. This application spans Naneum and Coleman Creeks, both of which are Shorelines of the State and regulated by the Shoreline Management Act (RCW 90.58), the Kittitas County Shoreline Master Program, the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is *“undertaken wholly or partly on lands covered by water”*, and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-05-03091 Terra Design – The application and the survey do not match. A segregation to create 2, 20+ acre lots, and 1, 6-acre lot in the Rural 3 zone. The 2, 20+ acre lots span the the Yakima River, a Shorelines of Statewide Significance and regulated by the Shoreline Management Act (RCW 90.58), the Kittitas County Shoreline Master Program, the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The majority of the 2, 20+ acre lots are within the FEMA designated floodway, which is severely limited in development potential. The parent parcel contains numerous wetlands, in addition to a spring-fed side channel to the Yakima River. Side channels are valuable as off-channel habitat for a number of aquatic species.

The Yakima River, in this reach, is known to contain populations of Spring Chinook, Coho, Summer Steelhead and Bull Trout. Both Steelhead and Butt Trout are listed as Threatened under the Endangered Species Act (ESA). The main stem Yakima River between the Teanaway River and Keechelus Dam is the premier spring Chinook spawning and rearing area in the entire Yakima River basin. Roughly 50% of all spawning spring Chinook in the entire basin utilize this reach. Over 75% of the upper Yakima stock relies on this reach. Habitat quality is very good in this reach and is surpassed in the sub basin by perhaps only the American River. The large volumes of wood in the river, combined with a lack of natural confinement and perhaps a greater frequency of floods and disturbances, create a very complex habitat system.

The application is subject to the Upper Kittitas County Groundwater Rule (WAC 173-539A), and should be reviewed for conformity to such rule.

The license request is *“undertaken wholly or partly on lands covered by water”*, and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310.

The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-05-09011 Clarke - A confusing mixture of boundary line adjustments, segregation by intervening ownership, and segregations to create what looks like 5 lots in a variety of sizes ranging from 2 to 70 acres in the Agriculture 20 zone. It appears that 2-acre lots are inconsistent with zoning and the comprehensive plan. This application is located in an odd confluence of Dry Creek and a large irrigation canal. In addition to Dry Creek, there are a number of wetlands, floodplains, and un-named creeks, which are regulated by the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is "*undertaken wholly or partly on lands covered by water*", and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-06-00154 Morgan - A confusing mixture of boundary line adjustments, segregation by intervening ownership, and segregations to create what looks like 4 lots in a variety of sizes ranging from 4 to 7.5 acres in the Agriculture 20 zone. The application received a denial in 2007 for creating non-conforming lots in the Ag-20 zone. It appears that the lot configuration is inconsistent with zoning and the comprehensive plan. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-07-00099/ SG-07-00100/ SG-07-00101 Three Bar G Ranch Inc - A confusing mixture of boundary line adjustments, segregation by intervening ownership, and segregations to create what looks like 20 lots in a variety of sizes ranging from 1 to 130 acres in the Forest and Range and Highway Commercial zones. It is unclear why the application is split into three separate applications when they were all applied for simultaneously in 2007, other than an attempt to circumvent SEPA review. The application should be considered as one consistent with WAC 197-11-305(1)(a)(ii). Even under current county interpretation of SEPA, this application would require SEPA review. It appears that the lot configuration is inconsistent with zoning and the comprehensive plan. The application contains a portion of the the Yakima River, a Shorelines of Statewide Significance and regulated by the Shoreline Management Act (RCW 90.58), the Kittitas County Shoreline Master Program, the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18.

The application is subject to the Upper Kittitas County Groundwater Rule (WAC 173-539A), and should be reviewed for conformity to such rule.

The license request is "*undertaken wholly or partly on lands covered by water*", and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310.

The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-07-00126 Charlton - A segregation to create 5, 20-acre lots in the Commercial Agriculture zone. The application spans Caribou and Cooke Creeks, In addition to Caribou and Cooke Creeks, there are a number of wetlands and floodplains, which are regulated by the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is "*undertaken wholly or partly on lands covered by water*", and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-07-00139 M Charlton - A segregation to create 8, 20-acre lots in the Commercial Agriculture zone. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-08-00029 Charlton - A segregation to create 8 lots, in a variety of sizes ranging from 20 to 37 acres in the Commercial Agriculture zone. It appears that the two parent parcels used to create the segregation are over a mile apart. This application should be split into two separate proposals. The application spans Caribou and Cooke Creeks, In addition to Caribou and Cooke Creeks, there are a number of wetlands and floodplains, which are regulated by the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is "*undertaken wholly or partly on lands covered by water*", and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-08-00030 Western Pacific - A segregation to create 7, 20-acre lots and a 475-acre lot in the Agriculture 20 zone. This application is located in Dry Creek. In addition to Dry Creek, there are a number of wetlands, floodplains, and un-named creeks, which are regulated by the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is "*undertaken wholly or partly on lands covered by water*", and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-10-00018 Brain - A segregation to create 8 lots, in a variety of sizes ranging from 21.1 to 136.6 acres in the Forest and Range zone. The application proposes to create lots and access

spanning Taneum Creek, a Shorelines of the State and regulated by the Shoreline Management Act (RCW 90.58), the Kittitas County Shoreline Master Program, the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is *“undertaken wholly or partly on lands covered by water”*, and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-11-00005 Mystic Land - A segregation to create 4, 29-acre lots in the Forest and Range zone. The application is subject to the Upper Kittitas County Groundwater Rule (WAC 173-539A), and should be reviewed for conformity to such rule. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

SG-12-00001 Møllergaard - A segregation to create 4, 20-acre lots in the Agriculture 20 zone. The proposed segregations are along the right bank of the Yakima River, a Shorelines of Statewide Significance and regulated by the Shoreline Management Act (RCW 90.58), the Kittitas County Shoreline Master Program, the Kittitas County Critical Areas Ordinance (KCC 17A), and the Kittitas County Flood Prevention Ordinance No. 93-18. The license request is *“undertaken wholly or partly on lands covered by water”*, and therefore excluded from the SEPA categorical exemption in WAC 197-11-800(1)(b) and KCC 15.04.090, and a threshold decision is required under WAC 197-11-310. The proposed segregations would divide property that is not consistent with the protection of water resources due to an increased the risk of groundwater resource development demands by property purchasers.

cc Yakama Nation Office of Legal Counsel
File