



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, November 5th, 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
Scott Nicolai, Yakima Subbasin Habitat Coordinator, YKFP
FROM: John Marvin, Habitat Biologist, YKFP
DATE: Tuesday, November 5th, 2013
RE: Kittitas County Administrative Segregations - SG-12-00002, SG-12-00003,
SG-12-00004 Neversweat

Latest Developments

On October 29, 2013, three additional administrative segregation applications were received from Kittitas County for review and comment. The applications for the three segregations were filed in June of 2012; the County never approved the applications. In writing, on June 12 2013, the Kittitas County Community Development Services (KCDS) rendered all three applications null and void in accordance with Ordinance 2012-0006, codified in Kittitas County Code (KCC) 16.06. All the applications are associated with Plum Creek.

On June 25, 2013, the applicant appealed the administrative decision to the Board of County Commissioners (BOCC) under KCC 15A.07.010. A closed record hearing with the BOCC was held on September 5, 2013, with the appellants and the prosecuting attorney submitting written briefs. The appellants brief asserted four arguments for the reversal of the voiding; 1) the applications were vested prior to the adoption of Ordinance 2012-006 on September 18, 2012; 2) the permit applications were not processed under statutory requirements; 3) the applicants were denied due process; 4) Ordinance 2012-006 is too vague and does not address pending applications. The Kittitas County Prosecuting Attorney addressed the appellants' four issues: 1) administrative segregations are not vested under state law; 2) regulating time limits on a permit process is not a land use control; 3) the county did not violate any timing requirements 4) the applications were subject to the December 18, 2012 sunset in Ordinance 2012-006 (KCC 16.06.040), and should therefore be null and void.

The BOCC issued its final order on October 1, 2013 reversing the voiding of the applications and directing staff to complete processing under current the code. However, the appellants filed a Land Use Petition Act (LUPA) appeal in the Grant County Superior Court on October 18, 2013. The appeal asks to overturn the BOCC order concluding that the applications were subject to Ordinance 2012-006, and that they were not vested to the codes in effect on June 21, 2012. The appeal is pending. The County has filed a motion to dismiss the petition, saying that no final decision has been made since the matter was referred to County staff for completion of processing, and LUPA therefore does not apply.

Staff Analysis

Staff believes that the Prosecuting Attorney's conclusion that administrative segregations allowed under Chapter 16.06 KCC (2011), as it existed at the time of the Plum Creek applications (June 2012), are not vested under state law, and that the sunset provision in Ordinance 2012-006 has rendered the applications null and void. Indeed, it is not clear that the applications even constituted "project permit" applications, such that they could be subject to acceptance under project permit review laws and ordinances. The 2011 ordinance defined administrative segregations in the context of a 2005 ordinance as something different from all divisions of land for sale, lease or transfer. If no actual project activity, or sale, lease or transfer are implicated by the segregation, is made possible by the segregation, then there is simply nothing to vest under project permit review laws. Accordingly, the change to the ordinance in 2012 simply eliminates the any segregation process that was not rooted in some other subdivision exemption that existed at the time of application.

Unfortunately, The BOCC did not uphold the the County's determination that the applications were void, and issued a confusing and legally unsupported order to continue processing of the applications. The BOCC final order states *"The Board of County Commissioners finds that, because the required document submittals and review processes are so different between an administrative segregation and the "divisions of land" described in RCW 58.17.020, that an administrative segregation is not a "division of land, as defined in RCW 58.17.020" and so is not subject to Administrative Decision and instruct County Staff to complete processing of the applications."* *The Board of County Commissioners finds (1) no explanation why the applications' processing was ceased and a decision not rendered within the statutory timeframe, and (2) that the appropriate remedy is as argued by Plum Creek-that the administrative decision voiding the applications be reversed and that the County staff be directed to continue processing the applications."* The BOCC goes on to order, *"The Board of County Commissioners hereby reverses the administrative decision voiding the applications that are the subject of this appeal and hereby directs staff to both consider them "deemed complete" and to continue processing them subject to the County's **current** regulation."* [emphasis added]. The Board appears to agree with the Prosecuting Attorney that the applicants have no vested rights, but "reverses" the voiding and directs staff to process subject to the County's **current** regulation.

This direction is ambiguous because processing the applications under the current provisions may mean either (1) KCC 16.06 (Ordinance 2012-0006) sunseting of all "unapproved" applications as of December 18, 2012 (which would still render the applications null and void) or (2) treating the applications as "preliminarily approved" and all necessary information having been timely submitted to allow a final decision. There is no basis for treating the applications as preliminarily approved. By operation of the ordinance, the applications are nullified unless there was preliminary approval as of September 2012. The applications cannot be brought back into existence in an administrative process, and the BOCC cannot offer an administrative remedy for the lawful effect of the ordinance.

If however, KCDS processes the applications under the code that was in effect in June of 2012, then the following comments are submitted for consideration.

Legal Effect of Segregation:

Any further approval of the segregations must give the applicant notice that the administrative segregation does not create a lot that can be legally sold, leased or transferred, and that any new use of water must comply with the Upper Kittitas Groundwater Rule (WAC 173-539A).

State Environmental Policy Act

Kittitas County continues to maintain that administrative segregations are categorically exempt from SEPA if under 20 lots consistent with KCC15.04.090(a) and WAC 197-11-800(1)(d). Staff respectfully disagrees. In an October 10, 2013 response letter, KCDS states:

*“In this particular case, because administrative segregations are considered divisions of land which would permit a lot of record, they are considered the necessary “license” as defined by SEPA, and **construction** of 20 units or less are exempt from SEPA per WAC 197-11-800(1)(d).”* [emphasis added]

An administrative segregation is not a license for construction; that is a building permit. As noted, it has not been established that segregations under the 2011 ordinance actually results in a transferrable lot. However, even if lots are created, administrative segregations would be best characterized as a minor land use decision, like a subdivision or a variance, which are addressed by WAC 197-11-800(6).

The County has mistakenly continued to assert that, because it has adopted a SEPA categorical exemption for minor construction activities including construction of 20 residential dwelling units, any division of land that might provide building sites for twenty residences is also exempt. This flies in the face of the provisions of WAC 197-11-800(6)(a), which exempts minor land use decisions, such as short plats (except on lands covered by water). Short plats include subdivisions creating up to nine lots. RCW 58.17.020(6). The County’s interpretation of the scope of the minor residential construction exemption cannot be reconciled with the specific and clear difference in the SEPA rules between treatment of minor construction activities and land use decisions. Segregation approval also does not include residential construction approval. It follows that the residential construction exemption is not applicable to divisions by means of a segregation.

In addition, the Kittitas County Prosecuting Attorney in his August 6, 2013 brief, and the Kittitas BOCC in its October 1, 2013 Final Order both concluded that an administrative segregation is **not** a division of land as defined in RCW 58.17.020. Therefore, an administrative segregation should not be considered a license for construction or a division of land and subject to a threshold determination under SEPA.

The KCDS did agree with staffs’ analysis in a February 13, 2013 comment letter that any license proposed to be “*undertaken wholly or partly on lands covered by water*” be subject to a threshold determination under SEPA. All three of the current applications contain lands covered by water, and are therefore subject to a threshold determination under SEPA. The effects of any

development on those lands on riparian and aquatic habitat warrants consideration of the potential for significant adverse environmental impacts.

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 in a manner 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 also reduces the capacity of riparian and aquatic ecosystems and habitat necessary for fish migration, spawning and rearing.

General Comments

It is staff’s opinion that the Plum Creek administrative segregations provided by Kittitas County are inconsistent with state law and County code and should be denied, particularly given the failure to require environmental review under SEPA analysis of impacts on water resources. We note that applicants can always seek approval of subdivisions of the properties under KCC Title 16, which will provide a proper environmental and land use review.

History

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. 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 review and comment.

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. Staff submitted comments on those applications on February 26, 2013. The Kittitas County Planning Official, Doc Hansen, sent a response to those comments on October 10, 2013.

cc Yakama Nation Office of Legal Counsel
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