



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

Kittitas County  
Community Development Services  
ATTENTION: Lindsey Ozbolt  
411 N. Ruby St., Suite 2  
Ellensburg, WA 98926

RECEIVED

JAN 25 2013

KITTITAS COUNTY  
CDS

Tuesday, January 15, 2013

RE: Downs Short Plat (SP-12-00007)

I appreciate the opportunity to provide comments regarding the proposed Downs Short Plat (SP-12-00007).

Please find attached correspondence to me from my fisheries staff. I concur with the findings of the report for fisheries protection. 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 division may add to the cumulative negative effects that result in a degraded watershed.

Please contact my staff regarding your response to the comments noted 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  
Scott Nicolai  
File

## MEMORANDUM

TO: Phil Rigdon, Deputy Director, DNR  
THROUGH: Scott Nicolai, Yakima Subbasin Habitat Coordinator, YKFP  
FROM: John Marvin, Habitat Biologist, YKFP  
DATE: Tuesday, January 15, 2013  
RE: Downs Short Plat (SP-12-00007)

Kittitas County is accepting public comments on the Downs Short Plat (SP-12-00007) until January 22, 2013. The project proposes to subdivide 23.71 acres into 2 single-family lots of 11.14 acres and 12.42 acres with water provided by individual wells. The proposal is located approximately 6 miles northeast of Cle Elum, along the Teanaway River.

### **Groundwater**

The project proposes to provide potable water by individual wells. Staff sees nothing in the record that the proponent has, or proposes to acquire any water rights. On July 16, 2009, the Department of Ecology filed a temporary, emergency rule that closed northern Kittitas County to all new groundwater withdrawals. The Department of Ecology adopted a permanent rule (Chapter 173-539A WAC), effective on January 22, 2011, for managing ground water resources in upper Kittitas County. The new rule withdraws from appropriation all 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. The rule establishes a pathway for developers, contractors, and/or individuals to construct water budget neutral projects by identifying water rights that can be placed into the trust water right program to offset their consumptive use of groundwater.

The Washington State Supreme Court (Court) issued its opinion in *Kittitas County v. Eastern Washington Growth Management Hearings Board* (Board) (No. 84187-0) on July 28, 2011. In its opinion, the Court found that Kittitas County violated the Growth Management Act (GMA) on a number of issues, including the failure to protect water resources.

The Court affirmed that the Board correctly interpreted and applied the law when it found that the County's subdivision regulations violate the GMA by failing to protect water resources. The Court affirmed the Board's conclusions that resulted from connecting the GMA's mandates to protect water resources with the Courts interpretation of RCW 90.44.050 in *Campbell & Gwinn* " that the total group groundwater use in a residential development must be considered, rather than the separate use of each residential lot, for purposes of determining if use is in excess of 5,000 gallons per day for permit exemption." *Campbell & Gwinn*, Slip. Op. at p. 34. In *Campbell & Gwinn*, the Court interpreted the permit exemption of RCW 90.44.050 and held that commonly owned developments are not exempt from the state groundwater permit requirement if the total

development uses more than 5,000 gallons of water per day. The Supreme Court in *Kittitas County* 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. The GMA directs that the rural and land use elements of a county's plan include measures that protect groundwater resources. RCW 36.70A.070(1), (5)(c)(iv). Additional GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.

*Kittitas County, supra*, Slip Op. at p. 38 (citation omitted)

The Court concluded "... that the County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning." Slip Op. at pp. 38-39

The GMA requires that counties provide for the protection of groundwater resources and that county development regulations comply with the GMA. The Court affirmed that the Board properly interpreted the GMA's mandate to protect water to at least require that the County's subdivision regulations conform to statutory requirements by not permitting subdivision applications that effectively evade compliance with water permitting requirements. The proposal should be required to conform to the findings of the Washington State Supreme Court (Court) in its opinion in *Kittitas County v. Eastern Washington Growth Management Hearings Board* (Board) (No. 84187-0).

### **Shorelines and Critical Areas**

The proposal lies at the confluence of Mason Creek and the Teanaway River, with the southeastern property line being the right bank of Mason Creek.

Mason Creek is documented to contain populations of summer steelhead, and is designated as critical habitat for steelhead by the US National Marine Fisheries Service. Steelhead are listed as Threatened under the Endangered Species Act (ESA).

The Teanaway River is documented to contain populations of spring chinook, coho, summer steelhead and bull trout. The Teanaway River is designated as critical habitat for steelhead by the US National Marine Fisheries Service and for bull trout by the US Fish and Wildlife Service. Both Steelhead and Bull Trout are listed as Threatened under the Endangered Species Act (ESA).

The Teanaway River is a Shoreline of Statewide Significance under the Shoreline Management Act (SMA) (RCW 90.58) and regulated by the Kittitas County Shoreline Master Program (SMP) and the SMA. According to the SMA and the SMP, Shoreline jurisdiction is never less than 200 feet from the ordinary high water mark (OHWM). While a field survey has not been completed, a review of aerial photographs indicates that at least some of the proposal is within SMA jurisdiction. There also appear to be a

number of associated wetlands directly adjacent to the proposal, with wetland buffers potentially extending onto the subject property.

Kittitas County is currently in the process of a comprehensive update of its SMP, which to date has provided draft maps of a channel migration zone (CMZ). The draft CMZ maps indicate that half of the proposed sub-division is within the CMZ, with the other half encompassed by the alluvial fan from Mason Creek (Attachment A). Both the CMZ and alluvial fan are geologically hazardous areas that may not be appropriate for residential development.

Recent LIDAR(Light Detection And Ranging) data acquired by the Yakama Nation in the Teanaway Basin indicates that the southwestern boundary of the proposal may consist of a dike or other kind of flood control structure. The SMA and Kittitas County have been regulating land use in SMA jurisdiction since 1971, and a flood control structure constructed since 1971 would require a substantial develop permit.

Mason Creek is a designated critical area under the Growth Management Act (RCW 36.70A) and regulated by the Kittitas County Critical Areas Ordinance (CAO) (KCC 17A). Mason Creek should be designated as a Type 2 water, with an associated 100 foot riparian buffer. A review of aerial photographs indicates there may be two potential wetlands along the southwestern parcel line, in addition to numerous potential wetlands directly adjacent to the southwest parcel line.

#### **Staff Recommendation**

- The proposal is within jurisdiction of, and should be required to conform to Chapter 173-539A WAC. The proposal should also be required to be consistent with the findings of the Washington State Supreme Court (Court) in its opinion in Kittitas County v. Eastern Washington Growth Management Hearings Board (Board) (No. 84187-0).
- The proposal is within jurisdiction of, and should be required to conform to the Kittitas County Shoreline Master Program and the Shoreline Management Act (RCW 90.58).
- The proposal is within jurisdiction of, and should be required to conform to the Kittitas County Critical Areas Ordinance (KCC 17A).

c: file  
Yakama Nation Office of Legal Council



**FISHERIES RESOURCE MANAGEMENT**  
**Confederated Tribes and Bands**  
**of the Yakama Nation**

Post Office Box 151, Fort Road  
Tappanish, WA 98948

FISHERIES RESOURCE MANAGEMENT

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