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futurewise.org

October 4, 2019

Mr. David Y. Gecas
Okanogan County Prosecutor's Office
PO Box 1130
Okanogan, WA 98840-1130

Dear Mr. Gecas:

Subject: Proposed agreement to avoid a motion for summary judgment in *Methow Valley Citizens Council and Futurewise v. Okanogan County*, Okanogan County Superior Court Case Nos. 15-2-00005-7 and 16-2-00313-5, Subject to ER 408
Send via U.S. Mail and email: DGecas@co.okanogan.wa.us

Futurewise and the Methow Valley Citizens Council (MVCC) appreciate the interim measures that Okanogan County has adopted while preparing a new Comprehensive Plan and zoning regulations. However, we remain concerned that the County continues to approve subdivisions using the two cubic feet per second (cfs) reserves that WAC 173-548-030(2) authorizes exclusively for single domestic uses and stock watering.

We have communicated to the County on numerous occasions our belief that this practice is not consistent with the law in written comments on subdivision applications¹ and in conversations with the Commissioners. You have recently referred the issue to the County's Risk Manager, but we have been given no date by which the Risk Manager will get an opinion from the risk management attorney, or by which the Commissioners will take action if the opinion is that the practice is inconsistent with the law. Consequently, we must advise you that if the County has not indicated its agreement to the measures proposed in this letter by October 21, 2019, Futurewise and MVCC will file a motion for partial summary judgment on this issue.

As you are aware, the revisions to the Plan and zoning regulations is far behind schedule. It is now over nine months since the stay of our case challenging the 2014 Comprehensive Plan and zoning regulations expired. The stay was issued on June 21, 2017, and provided that a new Plan would be adopted by December 31, 2018. A draft Plan was not released, however, until November 2018, and the Notice of Public Hearing on the Plan and accompanying DEIS was not published until July 18, 2019. Comments received indicate a need for extensive revisions to the Plan alternatives and the DEIS. There is no date in sight for adoption of the revised Plan and regulations.

As we have discussed, the Methow Instream Flow Rule, in WAC 173-548-030(2), reserves two cubic feet per second on seven reaches of the Methow River and certain tributaries for "Single Domestic

¹ MVCC has submitted comments objecting to the use of the reserves for subdivisions in several instances including the Jolley (5-17-17), Spencer Steffa (7-31-17 and 5-22-18), Salter (10-15-18), Nolin (11-30-18), Aleeta (12-7-18), Stanberry (1-8-19), and Neer (5-22-19) applications.

Mr. David Y. Gecas, Okanogan County Prosecutor's Office
October 4, 2019
Page 2

and Stock Use.” Wells using these reserves are exempt from permitting requirements and have priority over base flows.² The Washington State Supreme Court concluded in the *Campbell & Gwinn* decision that single domestic use is use “by a single home,” and not use by several homes, a multiunit residence, or a subdivision.³ This interpretation is consistent with Ecology’s report on the Methow Instream Flow Rule which defines “single domestic use” as “[w]ater used by a single household including up to one-half an acre lawn or garden irrigation.”⁴

The Planning Enabling Act, in RCW 36.70.692, provides that “county development regulations must ensure that proposed water uses are consistent with RCW 90.44.050 and with applicable rules,” including the Methow Instream Flow Rule. Because the Instream Flow Rule is more restrictive than RCW 90.44.050 and does not allow the two cfs reserves to serve group uses, County development regulations must provide that subdivisions and building permits on resulting parcels cannot be served by the reserves.

The County development regulations do not include these requirements. In fact, the Planning Department presented a Draft Resolution to the Board of County Commissioners at its July 1, 2019, meeting that specifically allows use of the two cubic feet per second reserves for subdivisions and building permits on resulting parcels.⁵ It is clear to my clients that the County is both implementing the law incorrectly and intending to continue this practice in any new Plan and regulations.

Consequently, Futurewise and the Methow Valley Citizens Council have reluctantly concluded that we must file a motion for summary judgment. However, if the County adopts an interim ordinance that limits the reserves authorized by WAC 173-548-030(2) to single domestic uses on lots legally existing on the date the *Campbell & Gwinn* decision was issued (March 28, 2002) until the new Comprehensive Plan and zoning regulations are adopted, as well as agreeing to include such a restriction in the revised regulations, Futurewise and the Methow Valley Citizens Council will not file the motion. We are open to other measures that would have the same effect. As noted above, we respectfully request a response by October 21, 2019.

Thank you for considering our requests. We appreciate that the process of replacing a Comprehensive Plan and Zoning Ordinance can be difficult, and we support a thoughtful process. If the County adopts this interim measure and indicates its intention to follow this practice in new regulations, my clients will be considerably less concerned about the continuing delay in completion of the revised Plan and Zoning Code.

² WAC 173-548-040(1).

³ *State Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4, 10 (2002). While this decision was interpreting RCW 90.44.050, the term “single domestic use” is the same as in the Methow Instream Flow Rule.

⁴ Kris G. Kauffman, P.E. James R. Bucknell, *River Basin Program Series, No. 4 Water Resources Management Program Methow River Basin (Water Resources Inventory Area No. 48)* p. 23 (State of Washington, Department of Ecology Policy Development Section Water Resources Management Division Reprinted Nov. 1977) last accessed on Oct. 4, 2019 at: <https://fortress.wa.gov/ecy/publications/documents/7611005.pdf>. See also p. 10 of the report for the same definition.

⁵ “A resolution adopting policies for governing the administration of permit exempt wells as defined by RCW 90.44.050 Water Resource Inventory Area #48 as listed in Washington Administrative Code 173-548” (undated).

Mr. David Y. Gecas, Okanogan County Prosecutor's Office
October 4, 2019
Page 3

If you require additional information or would like more detail on our proposal, please contact me at telephone 206-343-0681 Ext. 102 and email: tim@futurewise.org.

Very Truly Yours,

A handwritten signature in blue ink, consisting of two large, stylized, overlapping loops that resemble the letter 'S'.

Tim Trohimovich, WSBA No. 22367
Director of Planning and Law
Attorney for Futurewise and Methow Valley Citizens Council

cc: Mr. Mark Johnsen sent via email: mjohnsen@karrtuttle.com
The Honorable Arian Noma sent via email: anoma@co.okanogan.wa.us