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CLERK OF SUPERIOR COURT
OKANOGAN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR OKANOGAN COUNTY

CONFEDERATED TRIBES AND BANDS OF
THE YAKAMA NATION,

Plaintiff,

v.

OKANOGAN COUNTY,

Defendant.

Case No. **16-2-00312-7**

**COMPLAINT AND PETITION FOR
JUDICIAL REVIEW AND
DECLARATORY JUDGMENT**

I. NATURE OF THE ACTION

1. Plaintiff, the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), seeks a determination that the Zone Code and Zone Code Map, adopted by Okanogan County Ordinance 2016-4,¹ are invalid and in violation of the requirements of the Planning Enabling Act ("PEA") (Chapter 36.70 RCW), the Growth Management Act ("GMA") (Chapter 36.70A RCW), the State Environmental Policy Act ("SEPA") (Chapter 43.21C RCW), the Shoreline Management Act ("SMA") (Chapter 90.58 RCW), and other applicable provisions of state law.
2. Plaintiff also seeks a determination that environmental documents supporting

¹ Okanogan County Ordinance 2016-4, and its attachments, is available online at: <http://www.okanogancounty.org/planning/>.

1 Okanogan County Ordinance 2016-4—namely, the Draft Environmental Impact
2 Statement (“DEIS”), issued March 2, 2016, and the Final Environmental Impact
3 Statement (“FEIS”), issued on June 30, 2016—violated Chapter 14.04 of the Okanogan
4 County Code (“OCC”), the SEPA, and Chapter 197-11 WAC.²

5 II. JURISDICTION AND VENUE

- 6 3. This Court possesses jurisdiction over this matter pursuant to Wash. Const., art. IV, § 6,
7 common law, and under Chapters 7.16, 7.24, and 36.70C of the Revised Code of
8 Washington.
- 9 4. The jurisdiction of a growth management hearing board is limited to those counties that
10 are required or choose to plan under RCW 36.70A.040. *Moore v. Whitman County*,
11 143 Wn.2d 96, 18 P.3d 566 (2001). If a growth management hearing board does not
12 have jurisdiction to review a land use decision, an appeal of that decision may be filed
13 in Superior Court, under the Land Use Petition Act (“LUPA”). *Wenatchee Sportsmen*
14 *Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).
- 15 5. In the present matter, Okanogan County is not required to plan under RCW 36.70A.040
16 and has not “opted in” under RCW 36.70A.040. Therefore, Plaintiff does not have the
17 ability to appeal to a growth management hearing board. Further, the subject Zone
18 Code, Zone Code Map, DEIS and FEIS are not subject to review by a growth
19 management hearings board, or any other quasi-judicial body. Accordingly, judicial
20 review in Superior Court is available under LUPA.
- 21 6. Alternatively, if the Court determines that it lacks jurisdiction under LUPA, the Court
22 also has jurisdiction to review Okanogan County Ordinance 2016-4, pursuant to
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² The DEIS and FEIS are available online at: <http://www.okanogancounty.org/planning/>.

1 Chapters 7.16 and 7.24 of the Revised Code of Washington, common law, and the
2 inherent power of this Court under Wash. Const., art. IV, § 6.

3 7. Venue is proper in Okanogan County pursuant to pursuant to RCW 36.01.050.

4 **III. PARTIES, STANDING, AND VIOLATIONS**

5 8. Plaintiff, the Yakama Nation, is a federally recognized Indian tribe, pursuant to the
6 Treaty with the Yakama, 12 Stat. 951 (June 9, 1855). The Yakama Nation is a
7 sovereign nation.

8 9. The Yakama Nation has standing. The Yakama Nation is a co-manager of the fishery
9 resources within the State of Washington. In this role, the Yakama Nation advocates
10 for the protection of fishery resources. Through the Treaty with the Yakama, the
11 Yakama Nation, also has treaty-reserved fishing rights, which include the right to take
12 fish at their "usual and accustomed" places. The Yakama Nation's usual and
13 accustomed fishing areas include areas along the Columbia River, where its members
14 fish commercially. The Columbia River, and its tributaries, extends into Okanogan
15 County.
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18 10. Okanogan County's Zone Code and Zone Code Map have the potential to adversely
19 impact water resources, including the Columbia River. The Yakama Nation, as a co-
20 manager and because its members possess treaty-reserved fishing rights, is affected and
21 aggrieved by Okanogan County's adoption of the Zone Code and Zone Code Map. The
22 Yakama Nation is prejudiced through Okanogan County's adoption of the Zone Code
23 and Zone Code Map, and its deficient and related DEIS and FEIS, in that the fishery
24 resources that it manages may be damaged and its treaty-reserved fishing rights may,
25 likewise, be adversely impacted. A judgment in the Yakama Nation's favor, which

1 would require Okanogan County to adequately analyze the environmental impacts of
2 the Zone Code and Zone Code Map, as required by SEPA, and adopt a Zone Code and
3 Zone Code Map that complies with the PEA and the GMA, would redress the prejudice.

4 11. During Okanogan County's evaluation of the environmental impacts of the Zone Code
5 and Zone Code Map, Okanogan County failed to engage the Yakama Nation in direct
6 and timely government-to-government consultation. Regardless, the Yakama Nation
7 participated in the evaluation as a member of the public. The Yakama Nation
8 communicated its concerns to Okanogan County, in writing. The Yakama Nation
9 expressed numerous concerns about the Zone Code, Zone Code Map, in particular,
10 among others, cited Yakama Nation's concerns over inadequate analysis of the
11 environmental impact of the Zone Code and Zone Code Map.
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13 12. Accordingly, the Yakama Nation, therefore, has standing to challenge the actions at
14 issue pursuant to RCW 36.70A.280, RCW 36.70C.060, the PEA, and the SEPA.
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16 13. The Yakama Nation does not does not waive, alter, or otherwise diminish its sovereign
17 immunity, whether expressed or implied, by virtue of this lawsuit; nor does the Yakama
18 Nation waive, alter, or otherwise diminish the rights, privileges, remedies or services
19 guaranteed by the Treaty with the Yakama.

20 14. The Yakama Nation's contact information is as follows:

21 Confederated Tribes and Bands of the Yakama Nation
22 P.O. Box 151
23 Toppenish, WA 98948
24 Telephone: (509) 865-5121

25 15. The Yakama Nation is represented by:

R. Joseph Sexton, WSBA No. 38063
Amber Penn-Roco, WSBA No. 44403
Galanda Broadman, PLLC

1 P.O. Box 15146
2 Seattle, WA 98115
3 Telephone: 206-557-7509
4 Email: joe@galandabroadman.com
5 Email: amber@galandabroadman.com

6 16. Okanogan County is a county located in the State of Washington. Okanogan County is
7 governed by a three-member Board of County Commissioners. The Board of County
8 Commissioners made the decisions to adopt the Zone Code and Zone Code Map that
9 are at issue in this appeal.

10 17. The mailing address for the Board of Commissioners for Okanogan County is:

11 Board of County Commissioners
12 Okanogan County
13 123 Fifth Avenue North, Room 150
14 Okanogan, Washington 98840

15 18. The Okanogan County SEPA Responsible Official was responsible for the preparation
16 of the DEIS and the FEIS, which supported the adoption of the Zone Code and Zone
17 Code Map.

18 19. The mailing address of the Okanogan County SEPA Responsible Official is:

19 Mr. Perry Huston
20 Director of Planning
21 Okanogan County Office of Planning and Development
22 123 5th Avenue, Suite 130
23 Okanogan, Washington 98840

24 20. The Yakama Nation challenges the adoption of the Zone Code, the Zone Code Map,
25 DEIS and FEIS.

26 **IV. ALLEGED ERRORS**

27 21. The following errors in the Zone Code, Zone Code Map, DEIS and FEIS should be
28 considered in this appeal.

29 22. The Zone Code, Zone Code Map, and corresponding DEIS and FEIS fail to protect the

1 quality and quantity of groundwater used for public water supplies as required by
2 Washington law. *See, e.g.*, RCW 36.70.330(1), RCW 36.70.340, RCW 36.70.410, and
3 RCW 36.70.545.

4 23. The Zone Code, Zone Code Map, and corresponding DEIS and FEIS do not comply
5 with state law. *See, e.g.*, RCW 19.27.097, RCW 36.32.330, RCW 36.70.020(7), RCW
6 36.70.330, RCW 36.70.340, RCW 36.70.350, RCW 36.70.360, RCW 36.70.410, RCW
7 36.70.545, RCW 36.70.550, RCW 36.70A.050(4), RCW 36.70A.060(1), RCW
8 36.70A.170, RCW 58.17.040(6), RCW 58.17.110, RCW 90.58.340, and the other
9 applicable provisions of Chapter 36.70 RCW, Chapter 36.70A RCW, Chapter 58.17
10 RCW, and Chapter 90.58 RCW.

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12 24. The DEIS and FEIS 4 fail to comply with Chapter 43.21C RCW and Chapter 197-11
13 WAC.

14 **V. FACTS SUPPORTING THE ALLEGED ERRORS**

15 25. As a county in the State of Washington, Okanogan County is authorized to plan under
16 the PEA (Chapter 36.70 RCW). The PEA provides that:

17
18 The comprehensive plan shall consist of a map or maps, and descriptive
19 text covering objectives, principles and standards used to develop it, and
shall include each of the following elements:

20 (1) A land use element which designates the proposed general distribution
21 and general location and extent of the uses of land for agriculture, housing,
22 commerce, industry, recreation, education, public buildings and lands, and
23 other categories of public and private use of land, including a statement of
24 the standards of population density and building intensity recommended
25 for the various areas in the jurisdiction and estimates of future population
growth in the area covered by the comprehensive plan, all correlated with
the land use element of the comprehensive plan. The land use element
shall also provide for protection of the quality and quantity of groundwater
used for public water supplies and shall review drainage, flooding, and
storm water run-off in the area and nearby jurisdictions and provide
guidance for corrective actions to mitigate or cleanse those discharges that
pollute Puget Sound or waters entering Puget Sound;³

³ RCW 36.70.330.

1 The PEA also provides that “the development regulations of each county that does not
2 plan under RCW 36.70A.040 shall not be inconsistent with the county’s comprehensive
3 plan.”⁴ Development regulations include zoning regulations.⁵
4

5 26. The Washington State Department of Ecology has concluded, “most if not all of the
6 available water has already been allocated” in Water Resource Inventory Areas
7 (“WRIAs”) 48 and 49, the Methow and Okanogan River Watersheds.⁶ Large parts of
8 the water basins in Okanogan County are closed to new water appropriations. Water is
9 in such short supply that:

10 Ecology regularly sends out Administrative Orders under RCW 90.03
11 alerting water right holders they will be curtailed in favor of instream
12 flows for the Methow and Okanogan Rivers. This has been a common
13 occurrence in Okanogan County where users were curtailed or shut off
four out of the last five years on the Methow and three out of the last five
years on the Okanogan during times of low flow.⁷

14 27. The Zone Code and Zone Code Map do not include any provisions to protect the
15 quality and quantity of groundwater used for public water supplies. In fact, it has been
16 projected that:

17 Assuming future build-out with no new parcels and existing parcel size
18 regulations, 6 reaches would have water remaining in their reserves. The
19 Lower Methow would exceed its reserve, leaving 1,092 presently existing
20 parcels out of a total of 2,913 presently existing parcels unable to be
supplied by a well.

21 Assuming full build-out of all possible parcels under present zoning, 5
22 reaches would have water remaining in their reserve. The Upper Methow

23 ⁴ RCW 36.70.545.

⁵ RCW 36.70.545; RCW 36.70A.030(7).

24 ⁶ *Focus on Water Availability for the Methow Watershed, WRIA*, State of Washington: Department of Ecology –
Water Resources Program (Aug. 2012), available at [https://fortress.wa.gov/ecy/publications/documents/
1111052.pdf](https://fortress.wa.gov/ecy/publications/documents/1111052.pdf).

25 ⁷ *Comments on Board of County Commissioners Public Hearing on Code Amendment 2015-1 Okanogan County
Zone Code (OCC) Title 17A*, Futurewise (July 8, 2016), available at [http://www.mvcitizens.org/blog/wp-
content/uploads/2015/06/Appendix-to-the-MVCC-Zoning-Code-Comments-7-11-16.pdf](http://www.mvcitizens.org/blog/wp-content/uploads/2015/06/Appendix-to-the-MVCC-Zoning-Code-Comments-7-11-16.pdf) (citing Letter from
Washington State Department of Ecology to Perry Huston Okanogan County Planning, p. 3
(April 7, 2011)).

1 and Lower Methow would exceed their reserves. The Upper Methow
2 would have 127 parcels unable to be supplied by permit-exempt wells out
3 of a total of 1,948 possible parcels. The Lower Methow would have
24,313 parcels out of a total of 26,133 possible parcels unable to be
supplied by wells.⁸

4 28. The Zone Code and Zone Code Map allow the creation of the same number of lots that
5 will lack available water described above.

6 29. As a county in the State of Washington, Okanogan County is obligated to comply with
7 certain provisions of the GMA, Chapter 36.70A RCW. Under the GMA, Okanogan
8 County is known as a “Critical Areas and Resource Lands (“CARL”) jurisdiction.
9

10 30. The GMA requires every county in the state to designate—on or before September 1,
11 1991—agricultural, forest, and mineral resource lands of long-term commercial
12 significance, described as lands that are not already characterized by urban growth, are
13 devoted to agricultural, forest, and mineral resource production, and that have long-
14 term significance for the commercial production of these natural resources.⁹

15 31. The Zone Code and Zone Code Map violate the GMA; they do not include a
16 designation or zone for agricultural lands and forest lands of long-term commercial
17 significance and do not designate the valuable farm and ranch lands in Okanogan
18 County as agricultural lands of long-term commercial significance.
19

20 32. On October 16, 2015, Okanogan County published a Determination of Significance
21 (“Determination”).¹⁰ The Determination provided: (1) that Okanogan County was
22 considering a proposal to amend the Okanogan County Code; (2) that Okanogan
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25 ⁸ *Id.* (citing Methow Watershed Council Letter to the Okanogan County Commission Re: Okanogan
Comprehensive Plan and Watershed Planning, p. 2 (June 14, 2011)).

⁹ RCW 36.70A.170.

¹⁰ *SEPA Notice: Determination of Significance and Request for Comments on Scope of EIS Per WAC 197-11-908*,
Okanogan County Office of Planning and Development (Oct. 16, 2015), available at
<http://www.okanogancounty.org/planning/>.

1 County determined that the proposal is likely to have a significant adverse impact on
2 the environment; and (3) that an Environmental Impact Statement (“EIS”) was required
3 under the SEPA and would be prepared. *Id.* In essence, the Determination started the
4 environmental review process under the SEPA.

5 33. During Okanogan County’s environmental review of the Zone Code and Zone Code
6 Map, Okanogan County failed to engage the Yakama Nation in direct and timely
7 government-to-government consultation. Regardless, the Yakama Nation participated
8 in the environmental review process as a member of the public. On April 4, 2016, the
9 Yakama Nation submitted comments on the DEIS.¹¹

10
11 34. The DEIS does not meet the requirements for a nonproject EIS. The term “nonproject”
12 refers to “actions which are different or broader than a single site specific project, such
13 as plans, policies, and programs.”¹² In addressing the adequacy of a nonproject EIS for
14 a rezone, the Court of Appeals wrote that:

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16 In *Leschi v. Highway Comm’n*, 84 Wn.2d 271, 525 P.2d 774 (1974), a
17 majority of the Supreme Court held that the adequacy question is one of
18 law, subject to *de novo* review by the courts. The test to be applied is
19 “whether the environmental effects of the proposed action and reasonable
20 alternatives are sufficiently disclosed, discussed and that they are
21 substantiated by supportive opinion and data.” *Leschi v. Highway*
22 *Comm’n, supra* at 286, 525 P.2d at 785.¹³

23 35. WAC 197-11-440(6)(a) requires that for the elements of the environment significantly
24 affected by the proposed action, “the EIS shall describe the existing environment that
25 will be affected by the proposal, analyze significant impacts of alternatives including
the proposed action, and discuss reasonable mitigation measures that would

¹¹ Comments on Okanogan County’s Draft Environmental Impact Statement for Code Amendment 2015-1 OCC 17A Zone Code (Apr. 4, 2016), available at <http://www.okanogancounty.org/planning/>.

¹² WAC 197-11-774

¹³ *Ullock v. City of Bremerton*, 17 Wn. App. 573, 580, 565 P.2d 1179, 1184 (1977).

1 significantly mitigate these impacts.” In the *Ullock* decision, the Court of Appeals held
2 “that an EIS is adequate in a nonproject zoning action where the environmental
3 consequences are discussed in terms of the maximum potential development of the
4 property under the various zoning classifications allowed.”¹⁴

5 36. The DEIS fails to comply with these requirements. The DEIS fails to disclose and
6 discuss the allowed densities and allowed uses and their environmental impacts.
7 Nowhere in the DEIS is it even mentioned that the Minimum Requirement, Rural 1,
8 Rural 5, and Rural 20 zones allow apartments and manufactured home parks with
9 densities of five dwelling units per acre. Nowhere in the DEIS is it even mentioned that
10 this is an increase from the 4.5 dwelling units per acre allowed by the Minimum
11 Requirement Zone in the no action alternative.
12

13 37. There is no description of the existing environment and the proposed zoning’s impacts
14 on environment. For example, there is no disclosure and discussion of the impacts of
15 the wildfires that have impacted the county in last two summers and the impacts of the
16 allowed uses on wildfires despite the fact that wildfires were identified as an element of
17 the environment to be analyzed in the DEIS. As the *Okanogan County, Washington*
18 *Community Wildfire Protection Plan* states:
19

20 One challenge Okanogan County faces is the large number of houses in
21 the urban/rural fringe compared to twenty years ago. Since the 1970s, a
22 segment of Washington's growing population has expanded further into
23 traditional forest or resource lands and other rural areas. The “interface”
24 between urban and suburban areas and unmanaged forest and rangelands
25 created by this expansion has produced a significant increase in threats to
life and property from fires and has pushed existing fire protection
systems beyond original or current design or capability. Many property
owners in the interface are not aware of the problems and threats they face
and owners have done very little to manage or offset fire hazards or risks

¹⁴ *Id.*

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VII. SECOND CAUSE OF ACTION:

UNIFORM DECLARATORY JUDGMENT ACT

44. The Yakama Nation incorporates by reference all preceding paragraphs in this Petition as if they were fully set forth herein.

45. The Yakama Nation pleads this in the alternative to the foregoing cause of action to the extent the Court finds review improper under Chapter 36.70C RCW or a statutory or constitutional writ of certiorari.

46. Under Chapter 7.24 RCW, as an alternative, this Court has the authority to order the declaratory and/or injunctive relief sought herein.

47. The Yakama Nation and Okanogan County have a genuine dispute regarding Okanogan County's compliance or failure to comply with the PEA, the GMA, and the SEPA with respect to its Zone Code, Zone Code Map, DEIS and FEIS.

48. The Yakama Nation is entitled to a judgment declaring that Okanogan County has failed to comply with applicable law as set forth in the Prayer for Relief herein.

VIII. THIRD CAUSE OF ACTION:

CONSTITUTIONAL DECLARATORY JUDGMENT

49. The Yakama Nation incorporates by reference all preceding paragraphs in this Petition as if they were fully set forth herein.

50. This cause of action is pled in the alternative to the other causes of action in this Complaint and Petition.

51. This Court has the authority under the Washington State Constitution to issue declaratory and injunctive relief sought herein to the extent the Court finds the its Zone Code, Zone Code Map, DEIS and FEIS are not subject to review under Chapter 36.70C

1 RCW, Chapter 7.24 RCW, or a statutory or constitutional writ of certiorari.

2 52. The Yakama Nation and Okanogan County have a genuine dispute regarding Okanogan
3 County's compliance or failure to comply with the PEA, the GMA, and the SEPA with
4 respect to its Zone Code, Zone Code Map, DEIS and FEIS.

5 53. The Yakama Nation is entitled to a judgment declaring that Okanogan County has
6 failed to comply with the provisions of the PEA, the GMA, and the SEPA, and the
7 accompanying injunctive relief, as stated in the Prayer for Relief, below.
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9 **IX. FOURTH CAUSE OF ACTION:**

10 **WRIT OF CERTIORARI UNDER CHAPTER 7.16 RCW**

11 54. The Yakama Nation incorporates by reference all preceding paragraphs in this Petition
12 as if they were fully set forth herein.

13 55. This cause of action is pled in the alternative to the other causes of action in this
14 Complaint and Petition.

15 56. The Court has jurisdiction to review the Zone Code, Zone Code Map, DEIS and FEIS
16 pursuant to a writ of certiorari issued under RCW 7.16.030 *et seq.* to the extent the
17 Court determines it lacks jurisdiction to adjudicate the other causes of action pled
18 herein.
19

20 57. The Yakama Nation specifically requests the Court issue a writ of certiorari under
21 RCW 7.16.030 *et seq.* to Okanogan County to review the Zone Code, Zone Code Map,
22 DEIS and FEIS and order the relief requested herein.
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X. FIFTH CAUSE OF ACTION:

**WRIT OF CERTIORARI UNDER WASHINGTON STATE CONSTITUTION,
ARTICLE IV, SECTION 6**

58. The Yakama Nation incorporates by reference all preceding paragraphs in this Petition as if they were fully set forth herein.

59. This cause of action is pled in the alternative to the other causes of action in this Complaint and Petition.

60. The Court has jurisdiction to review the Zone Code, Zone Code Map, DEIS and FEIS pursuant to a writ of certiorari issued under Wash. Const., art. IV, § 6, to the extent the Court finds it lacks jurisdiction to adjudicate the other causes of action pled herein.

61. The Yakama Nation specifically requests the Court issue a writ of certiorari under Wash. Const., art. IV, § 6, to Okanogan County, to review the Zone Code, Zone Code Map, DEIS and FEIS, and order the relief requested herein.

XI. SIXTH CAUSE OF ACTION:

**WRIT OF REVIEW UNDER WASHINGTON STATE CONSTITUTION,
ARTICLE IV, SECTION 6 OR COMMON LAW**

62. The Yakama Nation incorporates by reference all preceding paragraphs in this Petition as if they were fully set forth herein.

63. This cause of action is pled in the alternative to the other causes of action in this Complaint and Petition.

64. The Court has jurisdiction to review the Zone Code, Zone Code Map, DEIS and FEIS pursuant to a writ of review issued under Wash. Const., art. IV, § 6 or the common-law, to the extent the Court finds it lacks jurisdiction to adjudicate the other causes of action

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