

NO. 45269-3-II
(Clark County Superior Court Cause No. 12-2-02455-7)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KLICKITAT COUNTY,

Appellant/Cross Respondent,

v.

FRIENDS OF THE WHITE SALMON RIVER and
FRIENDS OF THE COLUMBIA GORGE,

Respondents/Cross Appellants.

RESPONDENTS/CROSS APPELLANTS' OPENING BRIEF

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GLOSSARY

BiOp	Biological Opinion
BZ Corner	BZ Corner Rural Center
CAO	Critical Areas Ordinance
Comp. Plan	Klickitat County Comprehensive Plan
Condit Dam EIS	Environmental Impact Statements for the Condit Dam Removal
County	Klickitat County
CRBG	Columbia River Basalt Group aquifer
DNS	Determination of Non-Significance
DOE	Washington Department of Ecology
EIS	Environmental Impact Statement
ESA	Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44.
FERC	Federal Energy Regulatory Commission
FFR	Forests, Farming, and Ranching Resource Protection Project
Forest Service	United States Forest Service
Friends	Friends of the White Salmon River and Friends of the Columbia Gorge
FWA	Fordyce Water Association
HE	Klickitat County Hearing Examiner
Husum	Husum Rural Center

KCC	Klickitat County Code
MDNS	Mitigated Determination of Non-Significance
NMFS	National Marine Fisheries Service
Ordinance	Klickitat County Ordinance No. 0060512-1
ORV	Outstandingly Remarkable Value
PEA	Planning Enabling Act, ch. 36.70 RCW
RL	Resource Lands zoning
RR-2	Rural Residential zoning with a two-acre minimum lot size
RR-2 Overlay	The component of the Rezone that authorized individual landowners to rezone their properties from RL zoning to RR-2 zoning
Resolution	Klickitat County Resolution No. 08612
Rezone	The changes in zoning and allowable densities authorized by the Ordinance and Resolution
River or White Salmon	White Salmon River
SEPA	State Environmental Policy Act, ch. 43.21C RCW
WDFW	Washington Department of Fish and Wildlife
Wild & Scenic EIS	Final Environmental Impact Statement for the Lower White Salmon National Wild and Scenic River Management Plan
Wild & Scenic MP	Lower White Salmon National Wild and Scenic River Management Plan

I. INTRODUCTION

This appeal concerns a major rezone of land in Klickitat County along the corridor of the White Salmon River, one of Washington's few federally designated Wild and Scenic Rivers. The Rezone area encompasses salmon and steelhead habitat recently restored by the removal of Condit Dam, including numerous tributary streams. The Rezone area also includes two small, designated rural centers, Husum and BZ Corner, which previously had been zoned to accommodate higher densities. The Rezone shifted development away from these rural centers and spread it out into the surrounding farm and forestland and along the federally designated River.

Rather than prepare an environmental impact statement ("EIS") assessing the significant adverse impacts of the County's plans to authorize new, sprawling development throughout the White Salmon River valley, the County offered a hollow promise that it will account for future impacts on an ad hoc basis. The Superior Court saw right through the County's approach, finding that the County's actions violated the State Environmental Policy Act ("SEPA"), constituted an unlawful delegation to individual landowners of the County's zoning power, and authorized illegal spot zoning.

Now, the County on appeal tries to save the Rezone proposal by setting forth a flawed, three-part justification for the County's analysis. First, despite the fact that the County issued a Mitigated Determination of Non-Significance ("MDNS") for its SEPA review—which, by definition, necessarily involves significant environmental impacts that would be mitigated—the County now argues that the Rezone does not, in fact, pose any significant impacts. The County is flatly wrong: the proposed Rezone of approximately one thousand acres of land along the River would spur residential sprawl, thus impairing the capacity of the land to support terrestrial wildlife and negatively impacting the underlying aquifer and tributaries that provide cold, clean water for federally protected fish species. The County violated SEPA by never analyzing these impacts.

Second, recognizing the frailty of its position, the County next argues that it has accounted for the Rezone's significant environmental impacts with mitigation. The County's position is again wrong, because its alleged mitigation measures are speculative, incomplete, and fail to address the Rezone's significant impacts.

Finally, the County argues that any unmitigated environmental impacts of the Rezone were "addressed by EIS"—thus allegedly satisfying the County's SEPA duties. The County's position here stretches SEPA's procedures beyond their breaking point. The prior EISs relied on by the

County on appeal were prepared by other agencies for other projects completely unrelated to the Rezone, and the County never explained or evaluated their relevance, nor addressed significant new information about the actual proposal under review. The County simply did not address the Rezone's impacts as required by SEPA.

The Superior Court correctly held that the County violated SEPA by failing to prepare an EIS, failing to consider a reasonable range of alternatives, failing to consider adverse impacts, and improperly relying on incomplete mitigation measures. The Superior Court's ruling is amply supported by the record, which includes extensive comments submitted by the U.S. Forest Service ("Forest Service"), the Washington Department of Fish and Wildlife ("WDFW"), and the Washington Department of Ecology ("DOE"), among others, all of whom expressed significant concerns about the Rezone. Further, the Superior Court correctly held that the County unlawfully delegated to certain landowners the right to change the zoning of individual parcels of land, and also unlawfully authorized spot zoning.

Respondents/Cross Appellants (collectively "Friends")¹ ask this Court to uphold the Superior Court's decision that the County violated

¹ Respondents/Cross-Appellants are Friends of the White Salmon River and Friends of the Columbia Gorge, whose members reside on and near the affected lands and use the River and surrounding lands for work and recreation. *See* CP 1561–1614 (Declarations of

SEPA, unlawfully delegated its zoning powers, and unlawfully authorized spot zoning. On cross-appeal, Friends asks this Court to give effect to the Superior Court’s decision by vacating the Rezone or remanding to the Superior Court with instructions to do so. The Superior Court erred by failing to award the relief that Friends was entitled to.

II. ASSIGNMENT OF ERROR

The Superior Court’s decision was correct, except for its decision to reserve a remedy on the judgment, pending appeal. The Superior Court erred in failing to grant the relief to which Friends was entitled. Specifically, the Superior Court erred by failing to vacate the County’s Ordinance and Resolution.

III. RESTATEMENT OF THE ISSUES ON APPEAL

- A. Did the Superior Court correctly decide that the County violated SEPA by (1) failing to consider adverse impacts, (2) improperly relying on incomplete mitigation measures, (3) failing to address unmitigated impacts, (4) failing to prepare an EIS for the extensive Rezone, and (5) failing to adequately consider a reasonable range of alternatives?
- B. Did the Superior Court correctly decide that the County unlawfully delegated to certain individual landowners the right to rezone their individual parcels of land?
- C. Did the Superior Court correctly decide that the County unlawfully authorized spot zoning?

Jan Muir, Paul Poknis (Appendix (“App.”) 29–40), Joy Markgraf, Steve Stampfli, David Turner, Patricia L. Arnold, David Hammond (App. 41–46), Keith Brown, and Marlene Woodward).

To provide consistency in citation format for this Court, Friends has adopted the County’s citation formatting. *See Cnty Op. Br.* at 1 n.1.

IV. RESTATEMENT OF THE CASE ON APPEAL

A. The Rezone area and the White Salmon Wild and Scenic River

The Rezone area contains approximately one thousand acres of land and is currently dominated by rural farmland and forestland that primarily consist of larger parcels ranging from twenty acres to hundreds of acres in size. The Rezone area also contains some smaller lots in areas where more concentrated development traditionally has been allowed, which are limited to the designated rural centers of BZ Corner and Husum and land adjacent to State Route 141 that was already zoned for two-acre minimum lots.²

The County enacted the Rezone via Ordinance O060512-1 (“Ordinance”) and Resolution No. 08612 (“Resolution”).³ For the majority of the land in the Rezone area, the County reduced the minimum lot size from twenty acres to new minimums of one to two acres, thus increasing

² See AR 458–72 (corrected) (aerial land use maps) (App. 13–28); CP 1431–36 (GIS maps of showing existing versus proposed zoning); AR 210766 (Ex. 30) (aerial map) (App. 7–12); AR 210116 (Comprehensive Plan Map for the Husum/BZ Corner Sub-Area). The County attempts to portray the existing landscape as a “confusing mix of 1/4 acre to 20 acre lots” where development sprawls across the landscape. See *Cnty Op. Br.* at 2. As the maps reveal, however, that portrayal is a far cry from reality. See AR 216278–79 (Ex. 187) (maps showing lot sizes) (App. 1, 2). Indeed, the purpose of the Resource Lands (“RL”) zone, which previously applied to most of the lands affected by the Rezone, was to “provide land for present and future commercial *farm and forest operations*.” AR 215919 (Ex. 151) (KCC 2.26.8) (emphasis added). As explained in the Comprehensive Plan, the RL zone was created to ensure the “continued success” of farm and forest operations “while minimizing conflicts between farm and forest practices and various nonfarm uses.” AR 210115 (Comp. Plan at 156d).

³ AR 2–10 (Ordinance); AR 53–54 (Resolution).

allowable residential density ten to twentyfold.⁴ Indeed as the Superior Court noted: “And it appears conclusively here, everybody concedes, [the Rezone] provides for greater density, not less density.”⁵

Carving through the middle of the Rezone area is the White Salmon River, which originates on the southern flanks of Mount Adams and drains into the Columbia River near the City of White Salmon, Washington. The Rezone includes land within and adjacent to the federally designated Lower White Salmon Wild and Scenic River.⁶

In 1991, the Forest Service, which administers the Wild and Scenic River, prepared a Management Plan and EIS for the River’s management.⁷ The Management Plan includes specific recommendations for how public

⁴ AR 5; *see also* CP 1436 (maps showing existing and proposed zoning); AR 216278–79 (Ex. 187) (maps showing proposed zoning and acreage) (App. 1, 2). The County argues that the Rezone does “not significantly alter allowable densities.” *Cnty. Op. Br.* at 2. The County conveniently ignores the following sentence in the Ordinance itself: “On balance, the proposal is expected to increase capacity for growth.” AR at 5. That is the inescapable reality from which the County cannot hide.

⁵ TR (Summary Judgment Hearing, Feb. 28, 2013) at 47:14–15.

⁶ 16 U.S.C. § 544k(c) (designating the White Salmon River as a Wild and Scenic River); *see also* AR 216284, 216290 (Ex. 187) (maps of Rezone and Wild and Scenic River Boundary) (App. 3, 4). Congress passed the Wild and Scenic Rivers Act to recognize and preserve “certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values.” 16 U.S.C. § 1271. The Act seeks to preserve “selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.” *Id.*

⁷ *See* AR 200125–438 (Ex. 4) (Wild & Scenic EIS); AR 211226–277 (Ex. 106) (Wild & Scenic Management Plan (“MP”)).

and private land should be regulated in order to protect the River's outstandingly remarkable values ("ORVs").⁸

The White Salmon is one of very few rivers in the region that offers a semi-primitive recreational experience,⁹ and the Forest Service has designated whitewater recreation opportunities as an ORV of the River.¹⁰ The River has the longest vertical-wall gorge in the region, extending from Trout Lake to BZ Corner, and is known for its natural character, bedrock geology, caves, and numerous waterfalls, seeps, and springs.¹¹ The sustained and reliable flows throughout this river segment, resulting from glacial runoff and augmented by many springs flowing into the river, are rare in the region and benefit fish, recreation, and irrigation.¹² The River's resident fish population is considered one of the State's most

⁸ See AR 211250–51 (Ex. 106) (Wild and Scenic MP). The ORVs include (1) white water recreation; (2) certain Native American cultural resources; (3) resident fish populations; and (4) the unique hydrology feeding the river, including seeps and springs. *Id.* at 211233–34.

⁹ See AR 200235 (Ex. 4) (Wild & Scenic EIS).

¹⁰ See AR 211233 (Ex. 106) (Wild & Scenic MP). Recreational use of the river has increased about twenty percent each year between 1984 and 2011, from around 2,000 annual visits to more than 30,000. See AR 200284 (Ex. 4) (Wild & Scenic EIS); AR 211385 (Ex. 108) (2010 Forest Service Outfitter Guide Permit Public Notice). The River has become an economic engine for the local community. See AR 432–33 (comment from Jaco Klinkenberg, Wet Planet Whitewater, explaining economic benefits of river recreation); AR 252 (comment from Richard Till, Friends of the Columbia Gorge, explaining that nearly two million dollars is brought into the community each year in rafting guide fees alone, not including added concessions and local purchasing); AR 211278–383 (Ex. 107) (2009 Forest Service Recreation Use Study); AR 211384–87 (Ex. 108) (2010 Forest Service Outfitter Guide Permit Public Notice).

¹¹ AR 211233–34 (Ex. 106) (Wild & Scenic MP).

¹² *Id.*

important, and the River is known for its habitat quality, diversity of species, abundance, and size of fish.¹³

The construction of Condit Dam on the River in 1913 blocked upstream access to the River and its tributaries for multiple species of anadromous¹⁴ salmonids¹⁵ that are now listed for protection under the federal Endangered Species Act (“ESA”).¹⁶ However, the breach of Condit Dam in October 2011 and subsequent removal from the River in 2012 restored these species’ access to upstream sites for the first time in nearly one hundred years.¹⁷ At least four species listed as threatened under the ESA depend on the habitat provided by the River and its tributaries, springs, and seeps.¹⁸

In 2006, the National Marine Fisheries Service (“NMFS”) prepared a Biological Opinion (“BiOp”) pursuant to the ESA reviewing

¹³ *Id.* at 200212. Resident fish are designated as an ORV. AR 211233–34 (Ex. 106) (Wild & Scenic MP).

¹⁴ Anadromous fish spend the majority of their lives in the ocean, but return to the river or stream of their birth for breeding purposes.

¹⁵ The salmonid taxonomic family includes salmon and trout.

¹⁶ 16 U.S.C. §§ 1531–1544. *See* CP 1609 (Brown Decl.); AR 211837–66 (Ex. 121) (Federal Register Listing Notice); AR 211867–967 (Ex. 122) (Condit Dam Biological Opinion (“BiOp”)).

¹⁷ CP 1609 (Brown Decl.).

¹⁸ These species include the Columbia River steelhead (*Oncorhynchus mykiss*), the Lower Columbia River evolutionarily significant unit (“ESU”) of the Coho salmon (*Oncorhynchus kisutch*), the Lower Columbia River ESU of the Chinook salmon (*Oncorhynchus tshawytscha*), and the Chum Salmon (*Oncorhynchus keta*). *See* U.S. Fish & Wildlife Serv., *Listed Animals*, http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp. The ESA listings of these species were based in part on poor habitat conditions and the inadequacy of protective regulations already in place. *See* AR 211859 (Ex. 121) (ESA listing notice).

the proposed removal of Condit Dam.¹⁹ According to that BiOp, major limiting factors for listed fish species include reduced tributary stream flow, degraded tributary water quality, and elevated water temperatures in tributaries.²⁰ NMFS determined that the removal of Condit Dam was beneficial for threatened and endangered fish because “temperatures will be restored to the cooler conditions needed by rearing . . . juveniles.”²¹ Importantly, the removal of Condit Dam restored several tributary streams that had been previously submerged under the reservoir behind the dam.²²

The health of the River and its tributaries is critical to the recovery efforts for the federally listed fish species. NMFS’s proposed White Salmon Recovery Plan identifies two White Salmon tributaries, Rattlesnake Creek and Indian Creek, as “priority locations” for the recovery of steelhead, and includes the goals of reducing summer water temperatures and addressing flow regimes.²³ The Recovery Plan also identifies a segment of the main stem of the River from the former Condit Dam site to Husum Falls, as well as Rattlesnake Creek and Indian Creek, as “High Priority Reaches for Habitat Protection/Restoration and Proposed

¹⁹ AR 211867–967 (Ex. 122) (Condit BiOp).

²⁰ *Id.* at 211901.

²¹ *Id.* at 211930.

²² See AR 216266–77 (Ex. 186) (PacifiCorp report to Federal Energy Regulatory Commission (“FERC”) documenting several unnamed streams, Nos. 2–6, 9, and 13) (App. 52–63).

²³ See AR 212276–77 (Ex. 124). NMFS has since finalized and adopted the Final Recovery Plan for the White Salmon River. 78 Fed. Reg. 41911 (July 12, 2013).

Actions.”²⁴ These are the very same areas that the County has now rezoned to allow sprawling residential lots as small as one and two acres.²⁵

A number of other key fish and wildlife species and priority habitats also occur within the Rezone area. The record includes maps and a report prepared from WDFW data documenting the numerous fish and wildlife species²⁶ and identifying multiple priority habitats.²⁷ While this report is extensive, it is not exhaustive: Friends’ expert witness Ted Labbe, a former WDFW biologist, explained that much of the wildlife habitat in the Rezone area has not yet been inventoried or surveyed.²⁸

B. The County’s SEPA Review and Decision

The County failed to prepare an EIS for the Rezone. The County initially proposed the Rezone in 2007.²⁹ Multiple agencies and numerous

²⁴ *Id.* at 212287–89. “The mainstem from the top of the reservoir to Husum Falls is the geographic area with the highest protection value.” *Id.* “Rattlesnake Creek . . . provides the most significant restoration activity.” *Id.* Indian Creek “provided historical spawning and rearing habitat for salmon and steelhead.” *Id.* at 212288. The County was alerted to the importance of these fish-bearing tributaries and the probable significant impacts the Rezone would have on fish. *See* AR 211565 (Ex. 112) (letter from WDFW cautioning the County against adopting the Rezone due to possible impacts on fish-bearing tributaries). The County itself has identified Rattlesnake and Indian Creeks as major spawning tributaries, especially for steelhead. *See* AR 212359 (Ex. 125) (Klickitat County Salmon Recovery Strategy).

²⁵ *See* CP 1435 (GIS maps showing proposed zoning and valuable tributaries) (App. 9).

²⁶ These species include threatened bull trout, several species of threatened or endangered salmon and steelhead, elk, mule deer, black-tailed deer, lynx, pacific pond turtle, and western gray squirrel. AR 260–70 (corrected) (report); AR 271 (corrected) (map).

²⁷ The priority habitats identified in the Rezone area include cliffs/bluffs, oak-pine mixed forest, oak forest, wetlands (palustrine), and rivers (riverine upper). *Id.*

²⁸ CP at 537 (Dec. 19, 2011 Tr. at 204, lines 19–25).

²⁹ *See* AR 5 (Ordinance); AR 209853 (Ex. 8) (2007 DNS).

local residents expressed concern that the dramatic increase in residential development authorized by the Rezone would harm wildlife, negatively impact aquifer levels, increase the likelihood of groundwater contamination, increase stormwater runoff and contamination, and degrade water quality.³⁰ In response to an administrative appeal³¹ and the extensive public and agency opposition to the proposal, the Board of County Commissioners remanded the DNS to the County Planning Department for further analysis.³²

The County then hired Aspect Consulting to prepare a report to evaluate potential impacts to ground and surface water quality and quantity from the Rezone (the “Aspect Report”).³³ The Aspect Report admitted that increased groundwater withdrawals from wells in hydrologic continuity with tributaries could have a significant impact on stream baseflows and surface water temperatures.³⁴ The Aspect Report stated, “impact[s] may be mitigated by locating wells in areas that are not in continuity with the White Salmon tributaries.”³⁵ The Aspect Report,

³⁰ AR 808–11 (County Planning Commission summary of testimony). WDFW submitted a comment “finding it astonishing that” WDFW had not yet been consulted, and recommending that the County “reject a ‘case by case’ process for dealing with proposals that may impact wildlife resources.” AR 211565 (Ex. 112).

³¹ AR 215297–318 (Ex. 141) (Administrative Appeal Brief for 2007 DNS).

³² AR 209854–856 (Ex. 9) (Resolution No. 11908).

³³ See AR 200027–107 (Ex. 2).

³⁴ *Id.* at 200067.

³⁵ *Id.* at 200035.

however, provided no explanation of how this potential mitigation measure might be accomplished.

The Aspect Report did not address impacts to wildlife. The County did not engage in any further analysis of the Rezone's impacts on wildlife, nor did it consider alternative zoning scenarios that might reduce impacts on wildlife—effectively ignoring WDFW's comments on the matter.³⁶

On October 15, 2010, the County issued an MDNS for the Rezone that relied on the Aspect Report.³⁷ The MDNS did not make any legislative changes to the proposed Rezone. Nor did the County adopt any of the mitigation measures that had been recommended by the commenting expert agencies.

In response to the MDNS, multiple administrative appeals were filed and numerous comments were submitted by expert agencies and the public.³⁸ The appeals and comments raised the same concerns that the County had previously failed to address. Thus, throughout the County's

³⁶ AR 211571–75 (Ex. 114) (WDFW Mar. 3, 2010 Comment Letter) (App. 47–51).

³⁷ See AR 152–54 (MDNS). The MDNS also purported to incorporate by reference the Wild & Scenic EIS and the Condit Dam EIS. *Id.* at 151–52. The County later adopted an MDNS addendum that also purported to incorporate by reference the Sundoon Development EIS and the Whistling Ridge Wind Energy Project EIS. AR 200005 (Ex. 1) (MDNS Final Addendum). All four of these EISs were prepared by agencies other than Klickitat County, and two of the projects (Sundoon and Whistling Ridge) are located miles away from the Rezone area. AR 200125–438 (Ex. 4) (Wild & Scenic EIS); AR 200497–202119 (Ex. 5) (Condit Dam EIS); AR 208549–209852 (Ex. 7) (Sundoon EIS). AR 202120–208548 (Ex. 6) (Whistling Ridge EIS).

³⁸ AR 210714 (Ex. 28) (Friends Appeal), AR 210739 (Ex. 29) (Yakama Nation Appeal), AR 211221 (Ex. 105) (Forest Service Appeal), AR 210651–71 (Ex. 25) (agencies' comments); AR 210672–713 (Ex. 27) (public comments).

attempt to increase development throughout the Rezone area, there have been consistent and uniform comments pointing out that the Rezone will cause significant adverse impact to the environment.

Throughout the process, impacts to water quantity and quality, wildlife and habitat, and the rural character of the landscape were central concerns raised. For example, WDFW alerted the County that domestic water withdrawals have created problems for neighboring Skamania County.³⁹ WDFW cautioned against allowing new domestic water withdrawals near the White Salmon River and its tributaries because similar withdrawals near the Wind River have impacted tributaries to the point of “jeopardizing in-stream fish habitat.”⁴⁰ WDFW elaborated that even “[u]nder *existing* zoning[,] stream flow in [the White Salmon River’s] tributaries is jeopardized by domestic residential well withdrawals from groundwater that is in hydraulic continuity with surface waters.”⁴¹ WDFW urged the County to exercise caution, stating that increasing residential well systems in the Rezone area would “risk depletion of shallow aquifers, which are critical water sources for streams and wetlands that sustain fish and wildlife.”⁴² WDFW also described the

³⁹ AR 211573–74 (Ex. 114) (WDFW letter).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² AR 215971 (Ex. 155) (Letter from WDFW to County Planning Commission). At baseline levels, the river and its tributaries suffer from degraded conditions. In 2008,

range of species and habitats in the Rezone area and the significance of that habitat, which WDFW referred to as “especially valuable,” “relatively un-fragmented,” and of “special significance”—as well as the threats to this habitat posed by the Rezone.⁴³

Reports conducted by DOE confirmed that the River’s tributaries suffer from poor water quality due to high temperatures.⁴⁴ Water quality samples taken in August 2011 from Rattlesnake Creek, a fish-bearing tributary of the River, did not meet the applicable water quality standard with regard to fecal coliform bacteria.⁴⁵ Poor water quality due to fecal coliform bacteria is also an issue for stretches of the tributary Gilmer Creek, as well as the main stem River.⁴⁶ Fecal contamination in this area is “suspected to be from residential properties.”⁴⁷

The Forest Service sent multiple letters to the County requesting that it conduct a more thorough analysis of impacts to water quality and

there were “several segments of the mainstem White Salmon and tributaries listed as impaired waterways.” AR 212265 (Ex. 124) (NMFS Recovery Plan); AR 212448–61 (Ex. 128) (Water Quality Listings). The County’s own documents indicate that critical fish-bearing tributaries, including Rattlesnake and Buck Creeks, have suffered from limiting habitat factors such as “low summer flows” and “high summer stream temperatures.” AR 212384–88 (Ex. 125) (Klickitat Salmon Recovery Strategy).

⁴³ AR 211571 (Ex. 114) (WDFW Mar. 3, 2010 Comment Letter) (App. 47–51).

⁴⁴ AR 212448–61 (Ex. 128).

⁴⁵ AR 603.

⁴⁶ AR 212265–66 (Ex. 124) (NMFS Recovery Plan).

⁴⁷ AR 611.

quantity.⁴⁸ In one of its letters, the Forest Service stated that the Aspect Report arrived at a conclusion that “isn’t well supported and is partially based on improper assumptions,” and asked the County to conduct an adequate analysis.⁴⁹ In particular, the Forest Service questioned the proposed mitigation measure of locating residential wells in areas that are not in hydraulic continuity with the River’s tributaries: “Although mitigation is proposed, the effectiveness and feasibility is questionable due to uncertainties and reliance on uncompleted studies and costly infrastructure.”⁵⁰ The agency concluded, “[t]he mitigation measures proposed [in the Aspect Report] are not consistent with the scale of development proposed, and fail to reduce the potential for impairment of the river’s ORV’s.”⁵¹

The Forest Service also noted that the Aspect Report “includes flawed and incomplete analysis” with respect to groundwater impacts.⁵² The Forest Service explained that in light of the removal of Condit Dam, the Aspect Report did not “thoroughly consider potential interactions

⁴⁸ See, e.g., AR 210664 (Ex. 25) (Feb. 16, 2010 Forest Service letter asking the County to “conduct a more detailed analysis of potential zoning change effects on” the River).

⁴⁹ See *id.* at 210666–67 (Feb. 4, 2010 Forest Service letter stating that “[t]he Aspect report doesn’t adequately address temperature increases due to groundwater withdrawal in the White Salmon River.”); see also AR 446 (April 13, 2012 Forest Service comment stating that the County had provided “no details on the workings of the ground water system”).

⁵⁰ *Id.* at 210666.

⁵¹ AR 211222 (Ex. 105) (Nov. 4, 2010 Forest Service letter to County).

⁵² AR 211223 (Ex. 105).

between changes caused by the proposed development and changes to the volcanic and gravel aquifers with the loss of Northwestern Lake.”⁵³ The agency urged the County “to conduct a more detail[ed] analysis of potential zoning effects on the Quaternary volcanic and gravel aquifer and ultimately the White Salmon River system.”⁵⁴

Numerous citizens also alerted the County to the Rezone’s potential adverse impacts on water quality and quantity.⁵⁵ Concerns were raised regarding uncertainties about the water table and private well levels.⁵⁶ A local rafting company underscored the connection between the main stem River and its tributaries and expressed concerns about the impacts of water quality on commercial raft trips.⁵⁷

Finally, multiple commenters objected to the County’s proposal to significantly increase density in the Rezone area and the proposed RR-2 overlay.⁵⁸ Multiple commenters, including the Husum/BZ Community Council, objected to the County’s proposal to authorize transfers of

⁵³ AR 210666 (Ex. 25).

⁵⁴ *Id.* at 210667.

⁵⁵ *See, e.g.*, AR 502 (James Gibbs letter); AR 216048–50 (Ex. 168) (Columbia Riverkeeper letter).

⁵⁶ *E.g.*, AR 500 (James and Pamela Tindal letter).

⁵⁷ AR 432–33 (comment from Jaco Klinkenberg, Wet Planet Whitewater), AR 897 (testimony of Jaco Klinkenberg, Wet Planet Whitewater).

⁵⁸ CP 892 (Apr. 5, 2012 Tr. at ¶¶ 9–11) (testimony of Lane Smith); *see also* AR 387–503 (Public Comment); AR 210672–713 (Ex. 27) (Public Comment). An area resident informed the County that “the majority of individuals who live in this region do not want to see this plan enacted.” AR 210701 (Ex. 27) (Public Comment).

development rights as part of the Rezone.⁵⁹ Concerns also were raised about the Rezone resulting in unlawful delegation and spot zoning.⁶⁰

C. Administrative Appeal

Friends timely filed an administrative appeal of the County's MDNS.⁶¹ The parties engaged in mediated settlement negotiations but were unable to come to agreement. In 2011, the Planning Department issued an addendum to the MDNS.⁶²

In addition to Friends' appeal, the Forest Service also attempted to file an administrative appeal, but its appeal was not timely.⁶³ The agency nonetheless asked the County to withdraw the Rezone, designate critical aquifer recharge areas, and implement the Wild & Scenic Management Plan's standards and guidelines.⁶⁴

During the administrative appeal, Friends retained hydrological expert Mark Yinger to review the Aspect Report and testify on hydrological issues.⁶⁵ Mr. Yinger testified that "[t]here is no location on the planned lots along these tributaries where a landowner could drill a

⁵⁹ See, e.g., CP 872 (Apr. 5, 2012 Tr. at ¶¶ 2–25) (testimony of Todd Collins on behalf of the Husum/BZ Community Council).

⁶⁰ See, e.g., AR 397 (Public Comment).

⁶¹ AR 210714–38 (Ex. 28).

⁶² See AR 200001–26 (Ex. 1).

⁶³ See AR 211221–25 (Ex. 105).

⁶⁴ *Id.*; see also AR 210664–67 (Ex. 25).

⁶⁵ AR 213–26; CP 430–89 (Dec. 19, 2011 Tr. at 97–156); CP 710–722 (Dec. 20, 2011 Tr. at 374–86.)

new well so the well is not in hydraulic continuity with the tributaries.”⁶⁶ Mr. Yinger confirmed that extracting water from the only available aquifers identified in the Aspect Report (the underlying shallow aquifer and the deeper Columbia River Basalt Group (“CRBG”)) would very likely lessen the amount of groundwater that regularly transfers from these aquifers to surface tributaries.⁶⁷

The authors of the Aspect Report assumed that deeper aquifer fault blocks would operate to compartmentalize new wells.⁶⁸ Under cross-examination at the administrative hearing, Erick Miller, one of the Aspect Report’s two authors, admitted he did not have evidence to support the report’s conclusion that fault blocks were present throughout the deeper aquifer.⁶⁹ Jay Chennault (the other author) also conceded he had no evidence to conclude that fault blocks in the deeper aquifer would prevent

⁶⁶ AR 539 (Report of Mark Yinger). Regarding Rattlesnake Creek, Mr. Yinger stated that there is no way to drill a new well without impacting the amount of water that the shallow aquifer transfers to surface tributaries. CP 719 (Dec. 20, 2011 Tr. at 383, lines 3–19); CP 720 (Dec. 20, 2011 at 384, lines 6–16).

⁶⁷ CP 446 (Dec. 19, 2011 Tr. at 113). With regard to stream temperatures, Mr. Yinger testified that groundwater is far cooler than surface water and that without sufficient groundwater, surface tributaries would heat up and thus diminish water quality and harm threatened and endangered fish that utilize these cool water tributaries for spawning. CP 451–54 (Dec. 19, 2011 Tr. at 118–21); *see also* AR 539–40. The Aspect Report itself confirms this risk. AR 200067 (Ex. 2) (“A reduction in flows has the potential to impact surface water temperatures.”).

⁶⁸ *See* AR 200051 (Ex. 2) (Aspect Report).

⁶⁹ *See* CP 557–58 (Dec. 19, 2011 Tr. at 224–25).

interference between new wells and existing wells.⁷⁰ They also conceded that further study was needed.⁷¹

After the administrative appeal hearing, the County's Hearing Examiner held in favor of the County and directed it to draft an opinion. County counsel drafted the opinion, which the County Hearing Examiner adopted with only one minor change.⁷² The matter then went before the Board of County Commissioners, which approved the Ordinance and Resolution on June 5, 2012.

D. Superior Court Decision

Friends challenged the Rezone in Superior Court. The parties filed cross-motions for summary judgment. The Superior Court ordered partial summary judgment in favor of Friends on six counts and entered a

⁷⁰ See CP 632 (Dec. 20, 2011 Tr. at 296, lines 14–16). Mr. Miller further conceded that “you’d have to pipe the water up Rattlesnake Creek” to ensure that new wells would not impact tributary baseflows. CP 571 (Dec. 19, 2011 Tr. at 238, lines 2–3). Under cross-examination, Mr. Chennault confirmed that, for lots near tributaries, extraordinary measures would need to be taken to pipe water in from another location so as to not impact flows in the tributaries. CP 687–88 (Dec. 20, 2011 Tr. at 351–52).

⁷¹ Under cross-examination during the administrative appeal hearing, Mr. Chennault admitted that

there is uncertainty whether—how much hydraulic conductivity exists between the alluvial aquifer and the stream. And so . . . [y]ou would do a study, I guess to see if it was in—how much hydraulic conductivity it would be in, and you could potentially drill into a deeper aquifer that wasn’t in hydraulic conductivity.

CP 688 (Dec. 20, 2011 Tr. at 352, lines 13–21). Neither Mr. Miller nor Mr. Chennault opined on whether drilling into the deeper aquifer or piping water up Rattlesnake Creek would be legally allowable, economically feasible, or reasonable and capable of being accomplished.

⁷² CP 301 (First Amended Complaint) (explaining that the Hearing Examiner adopted the County’s findings of fact and conclusions of law, except for the addition of paragraph 1.4).

judgment on these claims under CR 54(b).⁷³ Specifically, the Superior Court held that

the County violated SEPA by failing to prepare an EIS for this extensive rezone. The County failed to adequately consider a reasonable range of alternatives, failed to consider adverse impacts, and improperly relied upon the FFR Program, which is incomplete and has never been finalized as mitigation. The court also concludes the County unlawfully delegated the right to individual landowners to upzone their land, and the RR-2 overlay constitutes unlawful spot zoning.⁷⁴

The County now appeals.

V. SUMMARY OF ARGUMENTS

The County's characterization of the SEPA process in this case rests on false premises and does not reflect the SEPA process that actually took place—let alone a *lawful* SEPA process. First, the County argues that there are no probable, significant impacts resulting from the Rezone. Second, the County argues that if there are any significant impacts, they will be mitigated. Finally, the County argues that if there are any significant impacts, they were previously addressed in prior EISs.

When each premise of the County's arguments is addressed, its fatal flaws are easily exposed. First, beginning with the County's argument that there are no significant environmental impacts: not only is this argument a post-hoc rationalization crafted by the County's lawyers, it

⁷³ CP 1536–42.

⁷⁴ CP 1540–41.

is also flatly wrong and must be rejected. Indeed, there is *no analysis* of the Rezone’s impacts on listed fish and wildlife anywhere to be found in either the MDNS or the environmental checklist on which it is based. The County’s claims that there are no impacts are baseless, because the County never conducted the analysis required by law in the first place to determine whether there would be any such impacts. Moreover, the County’s first argument is inherently inconsistent with SEPA: the purpose of an MDNS is to address probable, significant adverse environmental impacts through mitigation measures. The County cannot legitimately claim to have found no probable, significant adverse environmental impacts, and yet simultaneously issue an MDNS that purports to reduce significant impacts below the threshold for significance.⁷⁵

Second, the mitigation measures proffered by the County are speculative and do not excuse the County’s failure to prepare an EIS. The County admits that its proposal to create a “Forests, Farming, and Ranching Resource Protection Project” (“FFR”) that would authorize transferrable development rights is only conceptual at this stage. This is a far cry from the County’s duties to finalize any mitigation measures *prior*

⁷⁵ See WAC 197-11-350; *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 53, 252 P.3d 382 (2011).

to issuing a threshold determination⁷⁶ and to ensure that any mitigation measures relied upon are “reasonable and capable of being accomplished.”⁷⁷ Other mitigation measures cited by the County are simply a mirage: there is insufficient capacity for new well hookups from community water associations, it would be impossible to drill new wells that would not be in hydraulic continuity with tributaries, and 200-foot water resource setbacks are already required under existing regulations.

Finally, the County’s argument that the significant environmental impacts of the Rezone were previously disclosed and considered “by EIS” is meritless.⁷⁸ If a proposal has unmitigated, probable, significant environmental impacts, then an EIS is required. That much is clear from the plain language of the statute.⁷⁹ There is no dispute here that the County did not prepare an EIS. Instead, the County attempts to use prior EISs previously prepared for entirely unrelated projects. The County did not follow the required procedures for incorporating material from these EISs,

⁷⁶ WAC 197-11-350 (“The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.”); *id.* at 197-11-350 (“[I]f the lead agency specifies mitigation measures on an applicant’s proposal that would allow it to issue a DNS, and the proposal is clarified, changed, *or conditioned* to include those measures, the lead agency shall issue a DNS.”); *see also Moss v. City of Bellingham*, 109 Wn. App. 6, 24, 31 P.3d 703 (2001) (“The problem with [the City’s] approach is that the MDNS process . . . focus[es] on mitigating impacts *before* a threshold determination is made, not after. . . . [T]he DNS should not have been issued until the project proposal was properly conditioned.”) (emphasis added).

⁷⁷ WAC 197-11-660(1)(c).

⁷⁸ *See Cnty Op. Br. at 20.*

⁷⁹ *See* RCW 43.21C.031(1) (“An environmental impact statement . . . shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact.”).

and even if it had, the allegedly incorporated EISs do not address the proposal, issues, or impacts involved here. The County’s attempt to circumvent the basic requirements of SEPA fails.

Finally, the Superior Court also correctly held that the County unlawfully delegated zoning authority to individual landowners and unlawfully authorized spot zoning, because part of the Rezone proposal—the “RR-2 Overlay”—only benefits a select group of landowners, is not supported by adequate justification, and is inconsistent with the County’s Comprehensive Plan.

VI. ARGUMENT IN OPPOSITION TO COUNTY’S OPENING BRIEF

A. Standards of Review

Threshold SEPA decisions by agencies to prepare MDNSs are reviewed under the “clearly erroneous” standard.⁸⁰ Under this standard, the reviewing court will overturn the agency’s determination if, after reviewing all the evidence, the court is left with “the definite and firm conviction that the agency has committed a mistake.”⁸¹ The “clearly erroneous” standard, which is broader than the “arbitrary and capricious

⁸⁰ *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

⁸¹ *Lands Council v. Wash. St. Parks & Rec. Comm’n*, 176 Wn. App. 787, 309 P.3d 734 (2013). “The court should examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision.” *Cougar Mtn. Ass’n v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988).

standard[,] . . . avoids placing the responsibility for an ultimate decision within the sole subjective discretion of the administrative or legislative body.”⁸² The record must demonstrate that environmental factors were considered in compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal’s environmental impacts.⁸³

The Court of Appeals reviews de novo whether the County has met its burden of demonstrating SEPA compliance.⁸⁴ A county hearing examiner’s legal conclusions interpreting or applying SEPA are reviewed de novo and are not entitled to any deference.⁸⁵ In addition, no deference is owed when the application of law to facts was clearly erroneous.⁸⁶ Further, findings of fact are upheld only if supported by substantial evidence, *i.e.*, evidence that would persuade a fair-minded person of the truth of the statement asserted.⁸⁷

⁸² *Cougar Mtn.*, 111 Wn.2d at 750.

⁸³ *Wenatchee Sportsman*, 141 Wn.2d at 176.

⁸⁴ *Lands Council*, 176 Wn. App. at 795–76; *Bellevue v. King County Review Bd.*, 90 Wn.2d 856, 867, 586 P.2d 470 (1978).

⁸⁵ *City of Federal Way*, 161 Wn. App. at 38.

⁸⁶ *Id.* at 42.

⁸⁷ *Id.* at 43; *see also Wenatchee Sportsman*, 141 Wn.2d at 176.

Finally, unlawful delegation and spot zoning are legal issues that appellate courts review de novo.⁸⁸ Decisions by local governments will be overturned if they are arbitrary and capricious.⁸⁹

B. Findings of Fact in the County Hearing Examiner’s SEPA Decision, Which the Superior Court Reversed, are Not “Verities on Appeal.”

Throughout its brief, the County mistakenly claims that numerous findings of fact in the County Hearing Examiner’s SEPA decision are “verities on appeal.”⁹⁰ The County further argues that the “Hearing Examiner Decision findings are [all] accepted as true” because “Friends failed to challenge the Examiner’s findings” at the Superior Court.⁹¹ The County’s arguments fail for a number of reasons.

First, no applicable law or rule required Friends, while at the Superior Court, to specifically assign error to each of the Hearing Examiner’s numerous findings. The “verities on appeal” concept is based on the Rules of Appellate Procedure, which apply only to proceedings at the Court of Appeals and the Supreme Court of Washington.⁹² Thus, RAP

⁸⁸ See *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969) (reviewing *de novo* a spot zoning claim); *Anderson v. Island County*, 81 Wn.2d 312, 317–18, 501 P.2d 594 (1972) (engaging in *de novo* review and finding clear example of spot zoning); see also *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861, 871, 947 P.2d 1208 (1997).

⁸⁹ *Anderson v. Island County*, 81 Wn.2d at 317.

⁹⁰ See, e.g., *Cnty Op. Br.* at 18.

⁹¹ *Id.* at 18, 23.

⁹² See RAP 1.1 (“These rules govern proceedings in the Supreme Court and the Court of Appeals for review of a trial court decision and for direct review in the Court of

10.3(g), which requires a party to include in its appellate brief a separate assignment of error for each erroneous finding of fact, simply did not apply at the Superior Court. Instead, CR 8(a) required only a “short and plain” statement of the claims.

Second, to the extent that Friends *was* required to challenge the Hearing Examiner’s findings before the Superior Court, that is exactly what Friends did in its complaint and summary judgment briefing.⁹³

Third, the County completely ignores the fact that the Superior Court *reversed* the Hearing Examiner’s SEPA decision by granting summary judgment in favor of Friends.⁹⁴ Therefore, the Hearing Examiner’s findings were invalidated. The County is the appellant before this Court, having lost at the Superior Court. As respondent, Friends is not

Appeals of an administrative adjudicative order under RCW 34.05.518.”); *see also* *Haley v. Highland*, 142 Wn.2d 135, 161, 12 P.3d 119 (2000).

⁹³ *See, e.g.*, CP 295–301 (First Amended Complaint); CP 1261–64; 1288–90; 1293–94 (Plaintiffs’ Motion for Partial Summary Judgment); CP 1356–57 (Plaintiffs’ Response to Cnty’s Motion for Partial SJ); CP 1399–1402 (Plaintiffs’ Reply in Support of Motion for Partial SJ). And the RAP has a liberal construction rule providing that the rules “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). On this basis, courts are loathe to resolve cases on the basis of a mechanical reading of the rules. *See, e.g., Green River Cmty. College Dist. 10 v. Higher Educ. Pers. Bd.*, 107 Wn. 2d 427, 431, 730 P.2d 653 (1986) (noting that while scrupulous observance of RAP 10.3 and RAP 10.4 would require citations to the Board’s findings and conclusions, the nature of the challenge was clear and the challenged findings were set forth in the appellants’ brief, and thus proceeding to the merits).

⁹⁴ *See* CP 1536–42 (Final Order and Judgment and Letter Opinion granting Friends’ motion for partial SJ); CP 302–03 (First Amended Complaint – request for relief)

required to assign error when it seeks to uphold the Superior Court—that requirement applies to the *appellant*.⁹⁵

Finally, as discussed above, legal conclusions made by hearing examiners cannot be accepted as verities, because appellate courts review them de novo. Neither can mixed questions of law and fact, which are reviewed under the clearly erroneous standard. Nor can findings unsupported by substantial evidence.⁹⁶ All such findings by the Hearing Examiner would not be treated as verities on appeal—even had they *not* been invalidated by the Superior Court.

C. The Superior Court Correctly Held that the County Violated SEPA.

1. The Superior Court Correctly Held that the County’s MDNS is Clearly Erroneous Because the County Failed to Consider Adverse Impacts.

SEPA seeks to promote efforts that will prevent or eliminate damage to the environment.⁹⁷ Before deciding whether to adopt the Rezone, the County was required to consider all factors to the “fullest

⁹⁵ See RAP 10.3(a)(4); *Anderson v. Pierce County*, 86 Wn. App. 2d 290, 307, 936 P.2d 432 (1997) (explaining that appellant was required to assign error).

⁹⁶ See *Thornton Creek Legal Fund v. City of Seattle*, 113 Wn. App. 34, 66 n.67, 52 P.3d 522 (2002) (rejecting party’s contention that hearing examiner’s findings were verities on appeal, and instead concluding that the findings should be reviewed under the substantial evidence standard).

⁹⁷ RCW 43.21C.010. This includes surface water, groundwater, public water supplies, animals, habitat for wildlife, unique species, wildlife migration routes, fish habitat, fish migration routes, land and shoreline use, aesthetics, and recreation. WAC 197-11-444.

extent possible” and to shape its decision “by deliberation, not default.”⁹⁸ For any proposed action that will have a probable significant effect on the quality of the environment, the County must prepare an EIS.⁹⁹ In determining significance, the County must consider whether the proposal may “[a]dversely affect endangered or threatened species or their habitat,” impact “environmentally sensitive or special areas,” including “parks, prime farmlands, wetlands, [and] wild and scenic rivers,” and the “degree” a proposal may “[c]onflict with local, state, or federal laws or requirements for the protection of the environment.”¹⁰⁰

a. Impacts to Threatened and Endangered Fish

The Superior Court correctly held that the County violated SEPA by failing to disclose or consider how the elevated water use resulting from increased development in the Rezone area might decrease water quantity and quality in tributary streams and thereby harm listed fish species.¹⁰¹ Specifically, the County failed to examine the probable, significant adverse impacts to federally listed fish caused by the

⁹⁸ *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 490, 513 P.2d 36 (1973).

⁹⁹ RCW 43.21C.031(1).

¹⁰⁰ WAC 197-11-330(3)(e)(i), (ii), (iii). Examples of significant actions include those where “there was major opposition to a project, a primary change of direction in the use or activity on a large area, a meaningful threat posed to flora or fauna, or the perceived beginning of accelerating development.” *Cougar Mtn. Ass’n v. King County*, 111 Wn.2d 742, 751, 765 P.2d 264 (1988).

¹⁰¹ *See* CP 1541–42.

construction and operation of new residential wells in areas in hydraulic continuity with the River's tributaries. Indeed, both the MDNS and the environmental checklist on which it is based *fail to make any mention* of the existence of fish habitat in the affected area—let alone the Rezone's potential impacts on this habitat.¹⁰² The County's failure to disclose these impacts was in direct violation of SEPA's express requirement to take into account adverse impacts on listed species and their habitat.¹⁰³

The County received numerous requests from federal agencies, state agencies, concerned citizens, and local business owners asking it to disclose and analyze the impacts of the Rezone on listed fish species.¹⁰⁴ Despite these requests, the County failed to even acknowledge—let alone analyze—such impacts.

For its analysis of impacts to water resources, the County relied on the Aspect Report, which admitted that development pursuant to the

¹⁰² See AR 200108–24 (MDNS and Environmental Checklist). The Aspect Report analyzed the potential impact of dam removal on groundwater supplies, but it did not analyze the impacts of the Rezone on listed fish returning to the White Salmon River after the removal of Condit Dam. AR 200052 (Ex. 2). The County was well aware of the potential adverse impacts of the Rezone on fish, having received numerous public raising the issue. See, e.g., AR 491 (comment advising that the Aspect report failed to consider risks to fish-bearing tributaries); AR 250 (comment discussing the return of fish above Condit Dam and to Rattlesnake Creek). Condit Dam was breached on October 26, 2011, more than seven months before the County adopted the Rezone.

¹⁰³ See 197-11-330(2)(e)(ii).

¹⁰⁴ See *supra* notes 42, 48, 55 and accompanying text.

Rezone could have a significant impact on tributary streams.¹⁰⁵ Any impact to tributaries in this area will necessarily affect the protected fish that use these tributaries for spawning, rearing, thermal refuge, and other aspects of their life cycle.¹⁰⁶ Despite being advised of these impacts by commenters, the County failed to disclose and consider how the potential for significant impacts to baseflows in tributaries would adversely impact the listed fish that use these tributaries as part of their life cycles.¹⁰⁷ The Aspect Report admits that stream baseflows are important to maintain.

¹⁰⁵ See AR 2000065 (Ex. 2). The County attempts to distract this Court by focusing on impacts to the *main stem of the River itself*, and largely ignores impacts to the River's *tributaries, seeps, and springs*. See *Cnty Op. Br.* at 22. The County discusses only two tributaries—Rattlesnake and Indian Creeks—while ignoring the potential impacts of the Rezone on numerous other named and unnamed tributaries documented in the record. See AR 201641 (Ex. 5) (Condit Dam EIS); AR 216275–77 (Ex. 186) (Pacifcorp report to FERC) (App. 52–63); CP 1435, 1437 (App. 8, 64). As for Rattlesnake and Indian Creeks, the County states that because the Rezone reduces allowable densities near those creeks, it also reduced the potential for wells in continuity with those creeks. See *Cnty Op. Br.* at 22. The County ignores the fact that, prior to the Rezone, new wells for concentrated residential development were effectively *prohibited* because depending on the soil type, on-site wells and on-site septic systems are not allowed on lots under 2 acres in size. See AR 210997 (Ex. 46); see also AR 209869 (Ex. 11) (2007 Staff Report) (explaining the Rezone proposal as follows: “Approximately 250 acres of current RC zoning is proposed for downzoning to RR1 *because of lack of public water (and public sewage disposal)*”) (emphasis added).

¹⁰⁶ See generally AR 211901–02 (Ex. 122) (NMFS BiOp); AR 212270 (Ex. 123) (NMFS Proposed Recovery Plan). As hydrologist Mark Yinger explained in his testimony, sprawling development prevents water and sewer services from being provided in a coordinated fashion. See CP 527–28 (Dec. 19, 2011 Tr. at 194–95) (explaining that community water and sewer can be provided in a coordinated fashion in the two designated rural centers and that focused development in these rural centers will prevent habitat degradation and fragmentation). The County's own experts admitted that new residential wells in the Rezone area could significantly impact flows in tributary streams. See, e.g., AR 200035 (Ex. 2) (Aspect Report). Mr. Yinger further described the resulting increases in temperature in low-flow months in the many tributaries, streams, seeps, and springs that feed into the River. AR 539–40 (Feb. 3, 2012 Mark Yinger Technical Review Memorandum).

¹⁰⁷ Cf. AR at 539 (“Any increase in groundwater withdrawals will very likely have a significant impact on flow and thus temperature in these fish bearing tributaries.”).

However, the word “fish” appears only five times in the Aspect Report,¹⁰⁸ and never in conjunction with discussion of impacts on stream baseflow. The County violated SEPA by failing to analyze or disclose the impacts of the Rezone on federally listed fish.¹⁰⁹

Rather than accept its responsibility to address impacts to ESA-listed fish as required by SEPA, the County tries to hide behind non-final and uncertain mitigation measures, arguing that such measures would alleviate any adverse impacts. The County, however, failed to ensure that its mitigation actually addresses impacts to fish species and that it is reasonable and capable of being accomplished. The County, through the Aspect Report, admitted that “[s]treamflow impacts for White Salmon River tributaries where groundwater withdrawals are in hydraulic continuity are considered a significant impact.”¹¹⁰ Then it offered up the hopeful yet unsupported assertion that “[t]his impact may be mitigated by locating wells in areas and/or in aquifers that are not in significant

¹⁰⁸ AR 200073–74 (Ex. 2) (Aspect Report).

¹⁰⁹ The County also attempts to convey that Friends did not adequately raise arguments related to the impacts of increased road development on fish. *See Cnty Op. Br.* at 27–28. This is a red herring. The Rezone authorizes the development of more residential properties, which in turn will require the construction of access roads, driveways, parking areas, and other impervious surface. As the record confirms “[r]oads affect salmonid habitat in the White Salmon drainage by reducing natural infiltration and increasing hydroconfinement leading to altered flow regimes and peak flows.” AR 212265 (Ex. 124) (Proposed Recovery Plan). The County never adequately disclosed or considered the impacts of increased road densities on listed fish.

¹¹⁰ AR 200071.

continuity with these tributaries.”¹¹¹ Yet under cross-examination, the Aspect Report’s authors both admitted that this possible “mitigation” measure was actually not reasonable or capable of being accomplished.¹¹²

In an attempt to shore up the shortcomings of its analysis, the County asserts that two prior EISs—prepared by other agencies for entirely unrelated proposals—satisfactorily address the significant impacts of the Rezone.¹¹³ The County’s reliance on other EISs is an implicit recognition that there will be probable, significant environmental impacts, because EISs are required only when a proposal is likely to result in significant impacts.¹¹⁴ Moreover, the County cannot rely on other EISs unless they “adequately address environmental considerations” relevant to the proposal under consideration,¹¹⁵ such as impacts, the long-range character of environmental problems, and environmental values.¹¹⁶ Here, the two EISs relied on by the County fail to provide what is missing from

¹¹¹ AR at 200071, 200035 (Ex. 2) (Aspect Report).

¹¹² See CP 570–73 (Dec. 19, 2011 Tr. at 237–39); CP 686–90 (Dec. 20, 2011 Tr. at 350–53).

¹¹³ See, e.g. *Cnty. Op. Br.* at 20. The County’s Brief never discusses an additional two EISs that the County supposedly incorporated by reference and included in the administrative record. See AR 202120–208548 (Ex. 6) (Whistling Ridge EIS); AR 208549–209852 (Ex. 7) (Sundoon EIS). The County’s failure to discuss these EISs is not surprising, because they have nothing to do with the current action. Instead, they both address projects that are located miles away from the Rezone area—one of them in a different county. Neither of these EISs contains any disclosure or analysis that is relevant to the Rezone proposal.

¹¹⁴ See RCW 43.21C.031.

¹¹⁵ RCW 43.21C.034.

¹¹⁶ RCW 43.21C.030(2)(b), (c)(i), (f).

the County's analysis, and they certainly do not allow the County to avoid its duty to prepare an EIS for the Rezone.

The first unrelated EIS cited by the County, the Condit Dam EIS, evaluated the impacts of dam removal, *not* the impacts of allowing residential sprawl, new exempt wells, and stormwater runoff throughout the Rezone area. The Condit Dam EIS *does not* contain an analysis of how sprawling development on one- and two-acre lots in the Rezone area would affect the water quality and quantity in tributaries of the River, or affect listed fish in the River. Instead, the focus of the Condit Dam EIS is the impact of *dam removal* on the environment and the recovery of threatened and endangered fish.¹¹⁷ The County's MDNS states that the Condit Dam NEPA EIS documents "identified and evaluated a range of reasonable alternatives to the proposal, identified probably [sic] significant impacts associated with the proposal and its alternatives, and addressed mitigation measures."¹¹⁸ The readily apparent flaw in the County's reliance on this document is that the "proposal"—removing a dam—bears no resemblance to the Rezone and its impacts.¹¹⁹

¹¹⁷ The Condit Dam EIS evaluates impacts to fish associated with reservoir sediments and concrete from the dam removal flowing downstream, the increased level of mercury in fine sediments, barrier falls, pH levels, turbidity, and other impacts specific to dam breaching and removal. AR 202049, 202059–70, 202005–15, 201594–637, 200630 (Ex. 5).

¹¹⁸ AR at 200100 (Ex. 3) (MDNS).

¹¹⁹ The County belatedly claims that the Condit Dam EIS was incorporated because it "addresses current fisheries resources." *Cnty. Op. Br.* at 23 (citing AR 202065–66;

The second unrelated EIS cited by the County, the Wild & Scenic EIS, was prepared in 1991 by the Forest Service (the same agency that found the County's analysis of the Rezone lacking), and it does not evaluate the context or intensity of residential sprawl that is likely to occur under the Rezone. The Wild & Scenic EIS studied the impacts of development under 1991 zoning laws. In that analysis, the Forest Service recognized that build-out of the Husum and BZ Corner Rural Centers would be contingent on the development of community sewage disposal systems, community drinking water, and stormwater systems.¹²⁰ The Forest Service concluded that the River's ORVs would be protected by investing in community sewage and water systems to allow greater

201607–16). The MDNS, however, contains no such assertion or analysis. Aside from the fact that this argument is a post-hoc rationalization, the first citation is patently inapposite: it addresses measures for mitigating impacts from “release of reservoir sediments following the breaching of Condit Dam.” AR 202065 (Ex. 5) (Condit Dam EIS). The second citation likewise fails to provide the County any support as it simply discusses natural barriers to fish passage above the dam and descriptions of the native fish populations generally. The Condit Dam EIS does not address the negative impacts to fish from authorizing sprawling development throughout the White Salmon River Valley.

Furthermore, the fact that the County allegedly “considered the impacts of dam removal” has no bearing on whether the Condit Dam EIS documents were properly incorporated by reference to address impacts of the Rezone. *See Cnty. Op. Br.* at 31–32; AR 136 (HE Order at 2.6.6) (citing Aspect Report). Despite this being a challenged finding—for example, there is zero evidence that the County actually considered the impacts of the Rezone on fish species or habitat following dam removal—it is not actually relevant. That the White Salmon River would remain a “gaining river” following dam removal, *see* AR 200052 (Ex. 2) (Aspect Report), has nothing to do with whether the Condit Dam EIS documents account for the impacts of the Rezone.

¹²⁰ *See, e.g.*, AR 200358 (Ex. 4) (Wild & Scenic EIS) (figures estimating number and location of likely residences); *id.* at 200359–60 (analysis of residential development under the preferred alternative); *id.* at 200318, 200361.

densities within rural centers, while maintaining large-lot zoning in surrounding areas.¹²¹

Further, the Wild & Scenic Management Plan, for which the White Salmon EIS was prepared, expressly states that the Plan would need to be revised if anadromous fish were ever reintroduced to the river above Condit Dam.¹²² Because anadromous fish were not present in 1991, the White Salmon EIS did not and *could not* have addressed impacts to anadromous fish habitat from the County's current plans to allow residential sprawl.¹²³ Simply put, neither of the two allegedly incorporated EISs addressed the impacts of the Rezone on fish species that have now returned to the river since Condit Dam was removed.

Further, when attempting to incorporate the prior EISs, the County failed to point to any particular location in either EIS containing the requisite analysis, thus violating the procedural requirement to identify

¹²¹ *See id.* at 200318, 200361.

¹²² AR 211243 (Ex. 105).

¹²³ The County's failure to acknowledge this change in circumstances is a plain violation of SEPA's rules on incorporation, which require the County to acknowledge any substantial changes or new information indicating that the proposal is likely to have significant environmental impacts. WAC 197-11-600(4)(d)(ii). The removal of Condit Dam, the draining of Northwestern Lake, and the subsequent revitalization of tributaries that had been previously submerged has dramatically changed the hydrogeography of the area since the two EISs were prepared. *See* AR 216266-67 (Ex. 186) (Pacificorp report to FERC) (App. 52–63). The removal of Condit Dam changed the circumstances and presented new information that the County was required to consider before issuing an MDNS. Courts must reverse and remand an MDNS when it relies on inaccurate information. *See, e.g., Kettle Range Conservation Group v. Wash. Dept. of Natural Res.*, 120 Wn. App. 434, 470, 85 P.3d 894, 909 (2003) (reversing and remanding an MDNS and watershed analysis that relied on inaccurate sediment models).

and describe the relevance of any material that is being incorporated.¹²⁴ The County's entire discussion of these prior EISs consists of a single, generic sentence in which the County asserted that the prior EISs "identified and evaluated a range of reasonable alternatives to the proposal, identified probably [sic] significant impacts associated with the proposal and its alternatives, and addressed mitigation measures."¹²⁵ The County never identified or described *what* material from the EISs the County believed was relevant, *why* such material was relevant, or *how* such material evaluated the environmental impacts of the proposed Rezone. By failing to identify and describe *any* relevant material from the prior EISs, the County violated the requisite procedures for incorporation.

In conclusion, because the County failed to disclose and consider probable, significant adverse impacts to fish species and habitat, failed to adequately mitigate those significant impacts, and improperly relied on inapposite EISs in a failed attempt to save its flawed analysis, the County's MDNS is clearly erroneous.

b. Impacts to Terrestrial Wildlife

The County's MDNS is also clearly erroneous because the County failed to conduct an adequate analysis of the Rezone's potential impacts on terrestrial wildlife and habitat. As detailed in the WDFW's expert

¹²⁴ See WAC 197-11-635(2).

¹²⁵ AR 200110 (Ex. 3) (MDNS).

analysis, the Rezone would reduce habitat suitability for native wildlife by one-third to one-half.¹²⁶ This is quite plainly a probable, significant adverse environmental impact.¹²⁷

The County attempts to shift its burden to disclose and consider such impacts to Friends, stating that Friends “failed to identify wildlife of concern other than by passing reference.”¹²⁸ Even if it were permissible to shift the burden to Friends, the County is mistaken. The record contains substantial evidence demonstrating the presence of *specific* wildlife species, including state and federally listed species, that would be adversely impacted by the proposal. In particular, WDFW detailed the presence of elk and deer winter range, the state-listed western gray squirrel, and oak woodlands (a WDFW-designated priority habitat) in the Rezone area.¹²⁹ Regarding western gray squirrels, WDFW plainly stated:

[w]hile Western gray squirrel populations generally persist at or below human densities of one dwelling unit per 20 acres, they do not typically persist at densities greater than or equal to one dwelling unit per five acres. WDFW expects that Western gray squirrel populations will likely not persist on lands rezoned from Resource Lands to Rural Residential-2 [*i.e.*, a two-acre minimum lot size] under this proposal.¹³⁰

¹²⁶ See AR 211572 (Ex. 114) (WDFW Mar. 3, 2010 Comment Letter) (App. 47–51).

¹²⁷ See *Swift v. Island County*, 87 Wn.2d 348, 360, 552 P.2d 175 (1976) (voiding SEPA threshold determination that ignored numerous agency reports expressing concern over environmental impacts).

¹²⁸ *Cnty Op. Br.* at 25.

¹²⁹ AR 211565–78 (Ex. 112–115); AR 215969–73 (Ex. 155).

¹³⁰ AR at 211572 (Ex. 114) (WDFW Comment).

This is a significant adverse environmental impact that would be caused by the Rezone.¹³¹

In part two of the same flawed, three-step argument the County employed regarding impacts to fish, it attempts to rely on alleged mitigation measures to reduce any probable, significant adverse environmental impacts to wildlife and habitat (impacts the County initially said were non-existent).¹³² The County first points to its preexisting critical areas ordinance (“CAO”). There is substantial evidence in the record, however, demonstrating that the CAO would be insufficient to prevent the Rezone’s significant impacts to wildlife and habitat. This is primarily because the CAO is applied only on a case-by-case basis.¹³³ As explained by Mr. Labbe, the CAO’s effectiveness is practically and legally limited to areas where WDFW has mapped existing habitats and species sites. If an animal site or habitat is not mapped, it will not be protected by a case-by-case approach.¹³⁴ As Mr. Labbe emphasized, “[i]t is often impossible to address these concerns . . . when an individual property

¹³¹ In addition to WDFW’s comments, Friends submitted maps and a report prepared from WDFW data documenting species found in and near the Rezone area, thus documenting specific species and habitats known to exist in the planning area that would be adversely impacted by the Rezone. *See* AR 260–70 (corrected) (report); AR 271 (corrected) (map).

¹³² *Cnty Op. Br.* at 25–26.

¹³³ *See* AR 423–24.

¹³⁴ *See* CP 537 (Dec. 19, 2011 Tr. at 204, lines 19–25).

owner comes forward with a development proposal.”¹³⁵ Despite this plain evidence in the record, the County continues to improperly stand behind the CAO as “mitigation” for the Rezone, instead of addressing probable, significant, adverse impacts of the Rezone on wildlife and habitat.

In addition, the County’s reliance on the speculative FFR program to mitigate impacts to wildlife subverts the very purpose of SEPA. The FFR is not finalized and has not been implemented.¹³⁶ SEPA instructs lead agencies to look before they leap—not to take a leap of faith.¹³⁷

To complete its now well-worn three-step argument, the County—in one sentence—states that any adverse impacts (which it first stated do not exist, and next stated were mitigated) were addressed in prior EISs adopted by other agencies for unrelated projects.¹³⁸ Specifically, the County references the Wild & Scenic EIS.¹³⁹ The County apparently believes that by simply referencing this entire document in one sentence—as opposed to specifically evaluating the prior analysis through the lens of

¹³⁵ AR 423–4 (Labbe Comment Mar. 30, 2012). Mr. Labbe further explained that “site level management plans are alone insufficient to protect” western ground squirrels, that “additional efforts are needed at earlier planning stages, before land is parcelized and landowners’ expectations are raised by zoning changes,” and that “it is likely that there will only be SEPA review on a fraction of the properties, and it will be done in a piecemeal fashion.” AR 419–26 (Labbe Comment, Mar. 30, 2012).

¹³⁶ The significant problems associated with using the FFR as mitigation are discussed in more detail *infra* Part VI.B.2.

¹³⁷ See *infra* notes 171, 172, and accompanying text.

¹³⁸ See *Cnty Op. Br.* at 27.

¹³⁹ See *id.*

the new proposal—it has satisfied its SEPA duties. As addressed above,¹⁴⁰ such a cursory approach is insufficient for incorporating material in a new SEPA decision. But even assuming the County did properly incorporate the Wild & Scenic EIS, its contents do not support the County’s assertion.

The Wild & Scenic EIS did not examine the type, location, or scope of development that would be allowed under the Rezone.¹⁴¹ The County broadly states that the Wild & Scenic EIS “addresses impacts from residential growth.”¹⁴² But the question is whether the 1991 document disclosed and addressed the significant impacts that are likely to result from *this* Rezone.¹⁴³ The incorporation of other documents is allowed only where the types of impacts analyzed in the prior document are similar enough to the types of impacts at issue for the current proposal to allow for meaningful use.¹⁴⁴

Moreover, the agency relying on existing documents must expressly “compar[e]” the environmental consequences of the prior action and the new action and must “independently review the content of the

¹⁴⁰ See *supra* Part VI.C.1.a.

¹⁴¹ See AR 200128 (Ex. 4) (describing alternatives considered).

¹⁴² *Cnty Op. Br.* at 20.

¹⁴³ Importantly, even if the Forest Service *had* contemplated the intensity of development authorized under the Rezone when it prepared the EIS in 1991, the *context* (*i.e.*, the geographic location) of such development was not evaluated. The Wild & Scenic EIS does not evaluate the impacts of allowing sprawling development outside of designated rural centers and proximate to numerous tributaries, streams, and seeps. Further, the Condit Dam was still blocking fish passage and the reservoir behind it was covering numerous tributaries.

¹⁴⁴ See RCW 43.21C.034.

existing documents and determine [whether] the information and analysis to be used is relevant and adequate.”¹⁴⁵ The County failed to make any of these required findings here.

If the County *had* completed the required process for incorporating prior documents, it would have been forced to acknowledge that the focus and purpose of the Wild & Scenic EIS was to set forth standards and guidelines to protect the River’s ORVs—*not* to analyze the impact of the changes in the location and densities of residential development that would be allowed under the County’s Rezone. The purpose of the Wild & Scenic EIS was to “provide a basis for comparing management alternatives and selecting a management plan for the 7.7 mile section of the White Salmon River (RM 5–12.7), located above Condit Dam and Northwestern Lake.”¹⁴⁶ The purpose was *not* to allow residential sprawl throughout the Rezone area. The County’s MDNS fails to compare the Wild & Scenic EIS and its underlying proposal to the County’s current rezone, and also fails to evaluate whether the prior analysis was “relevant and adequate” to evaluate the Rezone, as was required by SEPA.¹⁴⁷

¹⁴⁵ *Id.*

¹⁴⁶ AR 200143 (Ex. 4); *see also id.* at 200163 (describing Alternative 6, the preferred alternative).

¹⁴⁷ RCW 43.21C.034.

The State's expert wildlife agency, the WDFW, consistently underscored the likely significant impacts of the Rezone on wildlife.¹⁴⁸ The record illustrates the potentially dramatic decline of species and habitats under the Rezone,¹⁴⁹ and WDFW expressed "grave concerns" about such impacts.¹⁵⁰ The agency also noted that "[t]he proposed Husum-BZ Corner subarea plan is a move away from [the Wild and Scenic River Management Plan's] vision of compact rural centers, and towards greater development in outlying rural areas."¹⁵¹ WDFW recommended that the proposal not go forward, that alternatives be considered and, in the alternative, that significant mitigation measures be implemented.¹⁵² WDFW also plainly stated that "[t]he rezone will undoubtedly have a significant impact on the environment."¹⁵³

In light of these impacts, the County needed to prepare an EIS with specific, concrete mitigation proposals if it wished to reduce the Rezone's impacts to species and habitats throughout the Rezone area. The County's site-specific CAO and conceptual FFR fail to satisfy the County's SEPA obligations. Nor do the Wild & Scenic and Condit Dam EISs, issued by

¹⁴⁸ See AR 211572 (Ex. 114); see also AR 211402–564 (Ex. 111).

¹⁴⁹ See AR 211413 (Ex. 111); AR 211572 (Ex. 114).

¹⁵⁰ AR 211576 (Ex. 115).

¹⁵¹ AR 211577 (Ex. 114).

¹⁵² *Id.* As Mr. Labbe explained, "development under densities typical of the RR-2 zone would cause native species to decline to between one-half and one-third of those we expect to see on development densities typical of the Resource Lands zone." AR 420 (WDFW Comment, Mar. 30, 2012).

¹⁵³ AR 420 (WDFW Comment, Mar. 30, 2012).

other agencies for unrelated projects, address the impacts of the Rezone, and thus they do not cure the County's inadequate analysis. The Superior Court correctly held that the MDNS is clearly erroneous because it fails to consider adverse impacts to wildlife and habitats.

c. Impacts to a Federally Designated Wild and Scenic River

SEPA required the County to consider the degree to which the Rezone is likely to affect any federally designated Wild and Scenic Rivers.¹⁵⁴ But here, the County failed to disclose and consider how the Rezone will negatively impact the White Salmon Wild and Scenic River, and to consider alternatives that are consistent with the Wild & Scenic River Management Plan.

The Wild & Scenic Management Plan included specific recommendations for land use practices and regulations necessary to prevent adverse impacts to the Wild and Scenic River's ORVs.¹⁵⁵ The Management Plan cautions against impacts associated with sprawl and the creation of parcels below 20-acres.¹⁵⁶ The Management Plan states that development should be directed to the Husum and BZ Corner Rural

¹⁵⁴ WAC 197-11-330(3)(e)(i) (when determining project's significance, lead agency must address adverse impacts to wild and scenic rivers); *id.* at 197-11-330(3)(e)(iii) (when determining project's significance, lead agency must address any conflicts with "federal laws or requirements for the protection of the environment").

¹⁵⁵ *See, e.g.*, AR 211242-51 (Ex. 106).

¹⁵⁶ AR 210664-67 (Ex. 25); AR 211212-220 (Exs. 101-104).

Centers at higher densities where it is feasible to provide water and sewer through coordinated systems, instead of the individual wells and septic drainfields.¹⁵⁷ Beyond the Rural Centers, the Forest Service recommended the area remain predominately rural.¹⁵⁸ In contrast to the County's position, the Wild & Scenic Management Plan concluded that lot sizes less than twenty acres *outside* the designated Husum and BZ Corner Rural Centers *would result in significant adverse impacts to the environment.*¹⁵⁹

In comments addressing the Rezone proposal, the Forest Service repeatedly explained how the Rezone would adversely affect the Wild and Scenic River, and urged the County to evaluate these likely impacts and implement the Forest Service's recommendations stated in the Wild & Scenic Management Plan.¹⁶⁰ The County did not heed the Forest Service's repeated requests and simply went forth as planned by rezoning hundreds of acres of farmland and forestland in and around the River and its tributaries, thus authorizing sprawling development outside of the rural

¹⁵⁷ AR 211251. Notably, the Forest Service in the Management Plan and EIS properly characterized the Husum Rural Center as the small area along highway 141, which is in stark contrast with the County's repeated mischaracterization of Husum as a much larger rural area extending from the former site of Condit Dam for several square miles north to the Husum Rural Center. *Compare* AR 200299 (Ex. 4) (description of residential uses), AR 200300 (map of land uses), and 200303 (description of commercial uses in Husum and BZ Corner) *with Cnty Op. Br.* at 7 and AR 126, 137 (Hearing Examiner Findings 2.5.1 and 2.7.1).

¹⁵⁸ *See* AR 211250.

¹⁵⁹ *Cf.* AR 211250 (Ex. 106) (setting forth the standard and guideline: "Allow no new residences to be developed on lots less than 20 acres which currently contain 1 or more dwelling units").

¹⁶⁰ *See* AR 210664-671.

centers—in direct contrast to the prescriptions of the Wild & Scenic Management Plan.¹⁶¹

Although the standards and guidelines in the Wild & Scenic Management Plan provide a framework for disclosing the degree to which the Rezone conflicts with federal management guidelines, the County argues that there can be no conflict with the federal Wild and Scenic designation because “[t]he designation carries with it no regulatory requirements.”¹⁶² But SEPA expressly requires disclosure of the “degree” to which a proposal may “conflict” with federal laws and requirements, including the Wild and Scenic Rivers Act.¹⁶³ The County’s Rezone decision does, to a *degree, conflict* with federal laws designed to protect the White Salmon Wild and Scenic River, even if that conflict would not amount to a *violation* of federal law. The County misreads the requirements of the SEPA regulations: if the County were limited to evaluating the impacts only of “violations” of federal law, then such an analysis would never become necessary, because any project that violated federal law would be prohibited by the federal Supremacy Clause.¹⁶⁴ One

¹⁶¹ See, e.g., AR 211242–51 (Ex. 106); see also *id.* at 211252 (identifying the County as a key partner in ensuring the goals and objectives of the plan are met); *Swift*, 87 Wn.2d 348 at 360 (voiding SEPA threshold determination that ignored numerous agency reports expressing concern over environmental impacts).

¹⁶² *Cnty Op. Br.* at 34.

¹⁶³ WAC 197-11-330(3)(e)(iii); see also WAC 197-11-330(3)(e)(i) (agency must evaluate impacts to “sensitive or special areas,” including “wild and scenic rivers”).

¹⁶⁴ U.S. CONST. art. XI, § 2.

of the most basic canons of interpretation is to construe a statute or regulation so that no parts are superfluous.¹⁶⁵ SEPA requires that the public must be adequately informed—during the SEPA process—of a proposal’s inconsistencies with federal, state, and county laws for protecting the environment.¹⁶⁶ To hold otherwise would render this requirement meaningless.

Notwithstanding the Hearing Examiner’s erroneous legal conclusions on which the County now relies to argue that it fulfilled its SEPA duty,¹⁶⁷ the County failed to provide full disclosure and evaluation of conflicts with the Wild and Scenic Rivers Act and the Forest Service’s corresponding protections for the Wild and Scenic River. The mere fact that the County attempted to “incorporate by reference” the Wild & Scenic EIS¹⁶⁸ does not mean that the County satisfied SEPA’s requirements to evaluate and make public the likely impacts of the actual proposal under consideration—namely, the Rezone and the residential sprawl it authorizes. The County attempts on the one hand to rely on the Wild & Scenic EIS to purportedly analyze the impacts of its Rezone,¹⁶⁹ while on

¹⁶⁵ See, e.g., *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010).

¹⁶⁶ See WAC 197-11-330(3)(e)(iii).

¹⁶⁷ See *Cnty Op. Br.* at 34–35. To the extent the Hearing Examiner’s observations were factual findings, they are unsupported by the record. Friends challenged these findings below. See CP 1277–78 (Plaintiffs’ Amended. Mot. for Partial SJ at 55–56).

¹⁶⁸ See *Cnty Op. Br.* at 34–35; AR 200110 (Ex. 3) (MDNS).

¹⁶⁹ *Id.*

the other hand it fails to disclose how the Rezone is inconsistent with the Wild & Scenic Management Plan, and fails to consider any alternatives that might protect the River's ORVs that were designated by that Management Plan. The County's MDNS is therefore clearly erroneous.

2. The Superior Court Correctly Held that the MDNS is Clearly Erroneous Because the County's Proposed Mitigation Does Not Lower the Rezone's Impacts Below "Significant."

The County may issue an MDNS "only if a proposal is likely to have a 'probable significant adverse environmental impact'"¹⁷⁰ and there are "mitigation measures that the agency or applicant will implement" to reduce the impacts below the level of significance.¹⁷¹ Because the purpose of an MDNS is to clarify or change features of the proposal to reduce environmental impacts below a level of significance, the SEPA regulations require any mitigation measures that the County intends to rely on to be in place *prior* to the threshold determination.¹⁷² When an agency decides to issue an MDNS, it must ensure that mitigation measures "shall be

¹⁷⁰ *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 53, 252 P.3d 382 (2011)(quoting WAC 197-11-360(1)).

¹⁷¹ WAC 197-11-350(1); *see also* WAC 197-11-350(2) ("If a proposal continues to have a probable significant adverse environmental impact, even with mitigation measures, an EIS shall be prepared.").

¹⁷² WAC 197-11-350; *see also City of Federal Way*, 161 Wn. App. at 53; *v. City of Bellingham*, 109 Wn. App. 6, 24-25 P.3d 703 (2001) (explaining that the SEPA regulations "focus on mitigating impacts *before* a threshold decision is made, not after," and holding that "the DNS should not have been issued *until* the project proposal was properly conditioned") (emphasis added).

reasonable and capable of being accomplished.”¹⁷³ The agency must also show sufficient consideration of environmental factors.¹⁷⁴

Here, as the Superior Court correctly observed, the County cannot rely on mitigation that is incomplete and has never been finalized.¹⁷⁵ Thus, the County cannot rely on the proposed FFR, which is only conceptual.¹⁷⁶ The program is merely a template and the County has never finalized or approved fundamental elements of the program,¹⁷⁷ let alone conditioned the Rezone on such elements. The County references a WDFW letter that supports the FFR approach in theory,¹⁷⁸ but that letter also explicitly recognizes that further work is necessary and that WDFW biologists will need to review a final program to ensure that wildlife resources are in fact protected.¹⁷⁹ Further, the comments submitted by WDFW on the FFR

¹⁷³ RCW 43.21C.060; *see also Anderson v. Pierce County*, 86 Wn. App. 290, 299, 936 P.2d 432 (1997).

¹⁷⁴ The record must show that environmental factors were considered in compliance with the procedural requirements of SEPA and that the decision to issue an MDNS was based on information sufficient to evaluate the proposal’s environmental impact. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000) .

¹⁷⁵ CP 1552; *see also supra* notes 171, 172, and accompanying text.

¹⁷⁶ *See* AR 55–57 (FFR Guidance).

¹⁷⁷ *Id.* In its briefing before the Superior Court, the County emphasized this point, explaining that “this template ‘cannot be used [or] utilized without County Commissioner approval.’” CP 951 (Cnty’s Mot. for Partial SJ, lines 4–5 (citing Resolution 08612, n.1)).

¹⁷⁸ *Cnty Op. Br.* at 29–30.

¹⁷⁹ AR 507–08 (Mar. 29, 2012 Comment). Mr. Labbe’s testimony reinforces this interpretation of WDFW’s comments. AR 424.

must be considered in their proper context. WDFW expressly advised the County that its concerns articulated in prior letters still applied.¹⁸⁰

To date, the FFR has not been completed, was not incorporated into the Rezone, and cannot be relied upon as a valid mitigation measure.¹⁸¹ The County's reliance on the FFR is clearly erroneous because SEPA requires that "[m]itigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker."¹⁸² The County violated this requirement by failing to explain and analyze how specific mitigation measures might relate to the specific impacts of the Rezone and by failing to explain how such measures would actually reduce the impacts below significance.

¹⁸⁰ See AR 508 (Mar. 29, 2012 WDFW Comment); CP 1104 (WDFW e-mail explaining that its comments on the MDNS Addendum did not supersede its prior comments and that the "previous comments are still relevant").

¹⁸¹ As the County's counsel observed during the Superior Court hearing, conceding incomplete nature of FFR: "Your honor is right. There is an implementation phase. It will take several steps for it to be implemented." TR (Summary Judgment Hearing, Feb. 28, 2013) at 52: 24–25).

¹⁸² WAC 197-11-660(1)(b). The rules pertaining to the use of mitigation for the issuance of an MDNS make clear that the project must actually be changed to incorporate the mitigation measures prior to the issuance of an MDNS. See WAC 197-11-350(3) ("[I]f the lead agency specifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is clarified, changed, or conditioned to include those measures, the lead agency shall issue a DNS.") (emphasis added) and WAC 197-11-350 ("The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.") (emphasis added). Mitigation must be fleshed out and imposed prior to the issuance of an MDNS, not afterwards to shore up an MDNS. Cf. *Moss*, 109 Wn. App. at 24–25.

Second, the County attempts to rely on hypothetical mitigation measures regarding new wells and use of existing water systems alluded to in the Aspect Report, but that report never determined that it is actually possible for new wells in the Rezone area to be placed in locations not “in continuity with the White Salmon tributaries.”¹⁸³ In fact, the Aspect Report highlights its own uncertainty by describing this alleged mitigation as a “possible” measure that “may” alleviate the Rezone’s significant impacts.¹⁸⁴ Further, neither the Aspect Report nor the County’s MDNS and environmental checklist ever explain how the Rezone’s significant impacts (as acknowledged in the Aspect Report) would actually be mitigated.¹⁸⁵ There is no explanation of where these wells could be located, or how the recommendation would be feasible. The Aspect Report merely dismisses in one sentence what it itself identifies as a likely and

¹⁸³ AR 200035. While the Aspect Report declared that “[o]ne of the purposes of this hydrologic study is to inform the public and decision makers of reasonable Alternatives that would avoid or minimize adverse impacts or enhance the water resources of the Subarea,” the Aspect Report offered no alternative zoning options that would minimize the impacts to agricultural lands, tributary streams, wildlife, threatened and endangered salmon, etc. Instead, the Aspect Report merely offered a limited analysis of the one alternative provided to it by the County. AR 200043 (Ex. 2).

¹⁸⁴ *Id.* at 200035, 200038.

¹⁸⁵ The Aspect Report also claims that natural vegetation along streams can offset rising stream temperatures. AR 200035 (Ex. 2). While buffer vegetation may ensure shading of tributaries, the Aspect Report identified rising temperatures in tributaries resulting from decreased transfer of groundwater to surface tributaries, and shading will not prevent that impact from occurring.

significant impact.¹⁸⁶ Further, the authors of the Aspect Report admitted they had no empirical evidence to support their recommendations.¹⁸⁷

Finally, hydrologist Mark Yinger explained why the alleged mitigation measure alluded to in the Aspect Report is *not* reasonable or capable of being accomplished. Mr. Yinger explained that the Aspect Report mischaracterized the relationship between the shallow Quaternary aquifer, the deeper CRBG aquifer, and surface water in the main stem of the White Salmon River and its tributaries.¹⁸⁸ The Aspect Report hypothesized that the deeper aquifer is “anticipated to have limited hydraulic continuity” with the shallow aquifer and the White Salmon River.¹⁸⁹ The Aspect Report also made unsupported claims regarding the existence of fault blocks, which the authors alleged would prevent interference between new wells. Mr. Yinger explained that the Aspect Report had no basis to characterize the aquifer as confined.¹⁹⁰ Because these assumptions in the Aspect Report were without a basis in fact, the Report grossly underestimates the potentially significant impacts of new wells on tributaries, fish species, and existing groundwater wells.

¹⁸⁶ See AR 200035 (Ex. 2) (“This impact may be mitigated by locating wells in areas that are not in continuity with the White Salmon tributaries.”).

¹⁸⁷ CP 567–69 (Dec. 19, 2011 Tr. at 235–36).

¹⁸⁸ CP 446–48 (Dec. 19, 2011 Tr. at 113–15); see also AR 214–15 (report of Mr. Yinger).

¹⁸⁹ AR 200034 (Ex. 2).

¹⁹⁰ CP 446–48 (Dec. 19, 2011 Tr. at 113–15); see also AR 214–15 (report of Mr. Yinger).

To justify its use of an MDNS, the County also argues that the impact of new residential development and associated water demands would be mitigated by connecting new homes to existing community water systems, including that of the Fordyce Water Association.¹⁹¹ There are several fundamental problems with this purported mitigation measure. First, the County admits that the measure would cover only about 25% of the anticipated new residential homes that would need water.¹⁹² This leaves 75% of the anticipated new residential homes still without water.

Next is the reality that the FWA system is tapped out.¹⁹³ As a result, most of the new homes the County claimed could be served by the FWA would instead have to drill individual wells to meet water demands from new development. In adopting the Rezone, the County rezoned significant amounts of land within the FWA service area for intensive residential development, without ever consulting with the FWA to verify the County's assumptions about use of FWA water.¹⁹⁴

¹⁹¹ See, e.g., AR 1124, n.34 (Cnty's Hearing Ex. Sur Reply) ("Of the 444 new residences, 115 can be served by existing available connections from the Fordyce or City of White Salmon Public Water Systems."); AR 216249 (Ex. 184).

¹⁹² *Id.*; *Cnty Op. Br.* at 12.

¹⁹³ See AR 216249 (Ex. 184) (letter from Paul Poknis, FWA President stating, "[w]e are at our physical capacity now of 125 hook ups.") (App. 65). The FWA does not have the ability to expand. *Id.* Moreover, the County never disclosed and considered the extent to which new residential wells would impact *existing* FWA wells. AR 216296, 216299 (Ex. 187) (maps of FWA Service Area and critical buffers) (App. 5, 6).

¹⁹⁴ See CP 867-68 (Apr. 5, 2012 Tr. at 23-24) (testimony of Paul Poknis, FWA President). The City of White Salmon is also limited in its ability to provide water service

Finally, the County cannot simply punt mitigation of the adverse effects of the Rezone by relying on future “site specific analysis under its Zoning Ordinance and Shoreline Management Plan (as well as its Critical Areas Ordinance).”¹⁹⁵ Addressing localized impacts on a case-by-case basis is not a substitute for addressing the large-scale impacts of a major Rezone.¹⁹⁶ The purpose of an MDNS is “to allow clarifications or changes to a proposal *prior to* making the threshold determination.”¹⁹⁷ The Superior Court correctly held that the County improperly relied on mitigation that was neither complete nor final.

3. The Superior Court Correctly Held that the County Violated SEPA by Failing to Prepare an EIS.

For every proposed action that has a probable significant effect on the quality of the environment, the County is required to prepare a detailed statement addressing (1) the environmental impact of the proposed action, (2) any adverse environmental effects that cannot be avoided, (3) alternatives to the proposed action, (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity of the environment, and (5) any irreversible and

to the Rezone area, not only because its service area does not cover all of these lands, but also because of limitations on its overall water supply. *See* AR 210653 (Ex. 25).

¹⁹⁵ AR 200109 (Ex. 3) (MDNS).

¹⁹⁶ *See supra* notes 133–135 and accompanying text.

¹⁹⁷ WAC 197-11-350 (emphasis added).

irretrievable commitments of resources.¹⁹⁸ Any action that would create “a reasonable likelihood of more than a moderate adverse impact on environmental quality” is deemed significant and requires an EIS.¹⁹⁹

SEPA review must include direct, indirect, and cumulative impacts to elements of the environment.²⁰⁰ “Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.”²⁰¹ Moreover, “impacts shall include those that are likely to arise or exist over the lifetime of a proposal or . . . longer.”²⁰² Whether a rezone requires an EIS depends “upon the extent to which the change in zoning classification will allow substantial intensification of use.”²⁰³

¹⁹⁸ RCW 43.21C.030(2)(c).

¹⁹⁹ WAC 197-11-794(1). The evaluation of “significance” must take into account both the context and intensity of the impact. WAC 197-11-794(2). The context varies with the physical setting and the location. *Id.* Intensity depends on the magnitude and duration of the impacts. *Id.*

²⁰⁰ WAC 197-11-792(2)(c) (defining scope of review); *id.* at 197-11-752 (defining impacts); *id.* at 197-11-444 (defining elements of the environment).

²⁰¹ WAC 197-11-060(4)(d); *see also id.* (providing example of a “zoning ordinance [that] will encourage or tend to cause particular types of projects or extension of sewer lines [that] would tend to encourage development in previously unsewered areas”).

²⁰² WAC 197-11-060(4)(c); *King County v. Wash. St. Boundary Review Bd.*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993) (Requiring EIS when 700 acres were annexed for denser development).

²⁰³ Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 13.01[1], at 13-11 (2013) (hereinafter “Settle”).

a. An EIS is Required Because of the Scale of the Rezone and the Density it Authorizes.

In skirting the EIS requirement here, the County focused on the intensity of residential development (the number of houses), without taking into account the context (spread across the landscape). The County argues that the Rezone permits the same number of total dwellings as the prior zoning,²⁰⁴ but even if that assertion were correct, it conveniently ignores the fact that the dwellings would be spread out across a much larger acreage—an area roughly *five times* the size of the previously designated rural centers of Husum and BZ Corners. By rezoning to allow sprawl, the County (among other problems) abandons the opportunity for cost-effective community water and sewer systems.

Furthermore, the Rezone sets a precedent for future development—broader than that which would have occurred under current zoning. In *King County v. Boundary Review Board*, the Supreme Court of Washington employed a “broader analysis of the probability that land use changes will follow the proposed action, even if development is not the direct and immediate result of the government action.”²⁰⁵ The Court held that “[a]n EIS is required if, based on the totality of the circumstances, future development is probable” and the development is likely to have

²⁰⁴ *See Cnty Op. Br.* at 2.

²⁰⁵ 122 Wn.2d 648, 662, 860 P.2d 1024 (1993).

more than a moderate effect on the quality of the environment.²⁰⁶ Thus, an EIS is appropriate for rezones where a “zoning change would permit uses with a reasonably high potential, in relative or absolute terms, for having ‘more than a moderate effect on the quality of the environment.’”²⁰⁷

Adverse environmental consequences that result from new use and development possibilities “should be carefully considered before deciding whether to rezone.”²⁰⁸ The Rezone authorizes the conversion of a large, sparsely populated area into a sprawling residential landscape—unprecedented in this part of the County.²⁰⁹ The County itself admits that the Rezone will increase the capacity for growth.²¹⁰ The Superior Court

²⁰⁶ *Id.* at 663.

²⁰⁷ Settle § 13.01[1], at 13-12–13-13 (citing multiple cases where legislative rezones required EISs and quoting *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wn.2d 267, 278, 552, P.2d 674 (1976)). Settle distinguishes single-site rezones affecting a particular parcel of land from major rezones affecting many parcels of land and owners. “Major rezones” encompass a “major area of the community and diversely owned parcels of land” and are “likely to require EIS preparation as a proposal for ‘legislation’ significantly affecting the quality of the environment.” Settle § 13.01[1] at 13-13 (citing *Fleming v. City of Tacoma*, 81 Wn.2d 292, 299, 502 P.2d 327 (1972); *Byers v. Bd. of Clallam County Comm’rs*, 84 Wn.2d 796, 802, 529 P.2d 823 (1974)). Furthermore, “area-wide zoning actions are held significant even though they cannot affect the environment without subsequent implementation if they would induce expectations of environmentally significant development which future decisionmakers may be reluctant to disappoint.” Settle § 13.01[1], at 13-14 (citing *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 816–17, 576 P.2d 54 (1978); *Byers* 84 Wn.2d at 802; *Barrie v. Kitsap County*, 93 Wn.2d 843, 853, 613 P.2d 1148 (1980)).

²⁰⁸ Settle § 13.01[1], at 13-13.

²⁰⁹ AR 450, 458–72 (corrected) (App. 13–28).

²¹⁰ AR 5.

correctly held that an EIS is required for a major rezone affecting significant rural acreage along a Wild and Scenic River.

b. The County’s Attempt to Mischaracterize the Affected Area Categorically Fails.

The County asserts that its “goal” with the Rezone was to “encourage growth within Husum and BZ Corner, ‘an area which has seen greater concentration of growth, grading, and land division than the surrounding Resource lands and Forest Resource areas.’”²¹¹ Instead of evaluating the environmental effects of the Rezone as required by law, the County is attempting to redefine on appeal the geographic boundaries and characteristics of the rezoned lands. Specifically, the County mischaracterizes and redefines the designated Husum and BZ Corner Rural Centers to encompass hundreds of acres of farmland and forestland outside these designated rural centers.²¹²

The County does this to confuse the issues, attempting to co-opt wildlife expert Ted Labbe’s statement that focusing development within the “Rural Center of Husum” would minimize negative impacts to

²¹¹ *Cnty Op. Br.* at 7. The County does not make the source of the quoted material clear. The source is the Hearing Examiner Decision, at AR 954.

²¹² The County argues that it is planning for future growth “in Husum” to focus development on lands that are already developed, to reduce habitat fragmentation, and to ensure that development occurs where community water and sewer can be economically provided. *Cnty Op. Br.* at 7, 46. The Hearing Examiner adopted the County’s flawed redefinition of “Husum” in a finding that “[t]he County is focusing residential development in Husum and BZ Corners,” which are “already characterized by development and land division.” AR 126, 137 (Hearing Examiner Findings 2.5.1, 2.7.1). If these statements were actually true, the parties would not be engaged in litigation.

tributary streams, prevent fragmentation of wildlife habitat, and allow for the coordinated provision of community water and sewer services.²¹³ “Husum” is a small, designated rural center; it does not include hundreds of acres of farm and forestland.²¹⁴ The County’s efforts to redefine designated geographic areas and the nature of the affected lands in an attempt to downplay the Rezone’s environmental effects are unavailing.

The Washington legislature has defined “rural character” as referring to patterns of land use and development “that reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.”²¹⁵ Allowing the majority of the Rezone area to be developed at one- and two-acre densities, as the County has done here, would change the existing rural landscape into a sprawling residential landscape.²¹⁶ A series of historic aerial photographs in the record show that the majority of the Rezone area has been in continuous use as forest or

²¹³ AR 425 (March 30, 2012 comment letter from Ted Labbe). Responding to the County’s mischaracterization of his statement, Mr. Labbe clarified his understanding that “Husum” means the Husum Rural Center—not the hundreds of acres of rural lands between the Husum Rural Center and Condit Dam. *Id.*

²¹⁴ Contrary to the County’s revisionist definition of the geographic boundaries of Husum and BZ Corner, the County’s own Comprehensive Plan (prior to the Rezone) defines these areas as the formally designated Rural Centers in the Comprehensive Plan. See AR 210114–16 (Ex. 12) (Comprehensive Plan and map).

²¹⁵ See RCW 36.70A.030(15)(e).

²¹⁶ Importantly, the Rezone invites the creation of new houses with new exempt wells—which would put pressure on the River’s tributaries—thus affecting spawning habitat for listed species and potentially causing precipitous declines in wildlife habitat. AR 419–26 (March 30, 2012 comment letter from Ted Labbe); see also AR 211572 (WDFW comment describing the precipitous decline in wildlife that would occur if residential development densities were to exceed one dwelling per five acres).

agricultural land for decades.²¹⁷ The Rezone area is *not* characterized by development and land divisions below five acres in size, as is falsely asserted by the County. Given the fact that the entire stated “goal” of the Rezone was based on these false premises, it is not surprising that the County severely underestimated the Rezone’s likely environmental impacts and erroneously failed to prepare an EIS.

In conclusion, the Rezone would *not* focus residential development within Husum and BZ Corner. The Rezone invites sprawl on hundreds of acres of rural land *outside* of Husum and BZ Corner. Mr. Labbe testified that he supported focusing future residential development in Husum—the Rural Center—to reduce habitat fragmentation and efficiently provide public water and public sewer systems.²¹⁸ The County’s misdirection does not justify its failure to prepare an EIS.

²¹⁷ See AR 450, 458–72 (corrected) (App. 13–28). For example, the area between Graves Road and Northwestern Lake Road is nearly entirely orchard and forestland. *Id.* at 463–64. The area between Northwestern Lake Road and Willow Lane has been reforested in the last twenty years, evidencing active forest management—not rural residential sprawl. *Id.* at 465–66. The area along Fordyce Road, also called the “Big Bend,” is characterized by active forest management and agricultural uses. *Id.* at 467–68. Only the Husum Rural Center has seen a readily apparent modest increase in residential development over the last twenty years. *Id.* at 469–70.

²¹⁸ See CP 527–28 (Dec. 19, 2011 Tr. at 194–95).

4. The Superior Court Correctly Held that the County Failed to Consider a Reasonable Range of Alternatives.

The Superior Court correctly held that the County failed to consider a range of alternatives.²¹⁹ SEPA requires all agencies “to the fullest extent possible” to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”²²⁰ Further, the SEPA rules require an agency, during the threshold determination process under SEPA, to “take into account . . . that . . . [t]he same proposal may have a significant adverse impact in one location but not in another location,”²²¹ to consider alternatives and require threshold review to be completed before any choices among alternatives are made,²²² and to consider alternatives in all “environmental documents.”²²³ The “discussion of alternatives ‘is of major importance,

²¹⁹ CP 1532-33.

²²⁰ RCW 43.21C.030(2)(e). This requirement is separate from and independent of SEPA’s EIS requirement to include a detailed study of “alternatives to the proposed action.” RCW 43.21C.030(2)(c)(iii).

²²¹ WAC 197-11-330(3)(a).

²²² WAC 197-11-055, -070.

²²³ WAC 197-11-655. The term “environmental documents” is broadly defined as “any written public document prepared under [SEPA],” WAC 197-11-744, and thus includes MDNSs.

because it provides a basis for a reasoned decision among alternatives having differing environmental impacts.”²²⁴

Here, during the SEPA process, the County considered the Rezone only in relation to the existing zoning, despite being asked by the public and state agencies to consider other alternatives, like ten- or five-acre minimum lot sizes, protections for the River, and legislative changes to prevent serial partitions of designated Resource Lands.²²⁵ The County utterly failed to meet its duty to consider alternatives.

The County now argues on appeal that it considered “a full range of alternatives,” and cites the Aspect Report for this proposition.²²⁶ However, the use of the word “alternatives” in the Aspect Report is a misnomer.²²⁷ These are not *alternatives* in the sense that they describe different zoning proposals. Rather, these are different *scenarios* of potential impacts caused by the same exact thousand-acre Rezone.²²⁸ The County’s attempt to cast these scenarios as “alternatives” was rejected by the Superior Court,²²⁹ and should likewise be rejected by this Court.

²²⁴ *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 481, 245 P.3d 789 (2011).

²²⁵ *See, e.g.*, AR 210, 436, 444, 492, 502–03 (Public Comment)

²²⁶ *Cnty Op. Br.* at 12.

²²⁷ The County only presented Aspect Consulting with the existing zoning and one alternative that changed the zoning. *See* AR 200043–44 (Ex. 2) (“The County has identified two land use alternatives, each with three different build-out scenarios.”).

²²⁸ *See id.*

²²⁹ *See* CP 1541–42.

The County had an obligation—during the SEPA process—to present the public with a range of alternatives and to evaluate the relative impacts of those alternatives.²³⁰ The County’s approach here has violated the fundamental purpose of SEPA: to disclose and consider all reasonable alternatives. The County is asking this Court to read alternatives into the analysis that simply were not presented to the public in the first instance. This is not lawful and the County’s position should be rejected, consistent with the Superior Court’s holding.

C. The Superior Court Correctly Held that the County Unlawfully Delegated its Zoning Authority to Individual Landowners and Unlawfully Authorized Spot Zoning.

The County adopted an “RR-2 Overlay” as part of its Rezone, which authorized individual landowners to elect to rezone their property from RL to RR-2. The Superior Court correctly held that the County’s “RR-2 Overlay” is an unlawful delegation of the County’s inherent zoning powers to individual landowners, and unlawfully authorizes spot zoning.²³¹ On appeal, rather than defend the Overlay based on its terms, the County advances a series of straw man arguments regarding the

²³⁰ The County does not assert that the alternatives analysis in the White Salmon EIS satisfied its SEPA duties with respect to the MDNS. The County has thus waived this argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 810, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”). But even if that argument had been properly raised, it fails, as explained above. *See supra* notes 120–123, 141–143 and accompanying text (explaining that the Wild & Scenic EIS did not evaluate impacts from *this* Rezone proposal).

²³¹ CP 1541–42.

applicability of the federal Constitution.²³² Because the County’s “zoning action does not bear a substantial relationship to the general welfare of the affected community,”²³³ the Superior Court correctly found the County’s actions unlawful.

1. The County Unlawfully Delegated Zoning Decisions to Individual Landowners.

The County’s decision authorized certain landowners to elect to rezone their property from Resource Lands (“RL”) to Rural Residential with a two-acre minimum lot size (“RR-2”).²³⁴ Essentially, the County has authorized individual landowners to make significant zoning changes on their own properties, entirely at their own discretion.

Planning and zoning are the exercise of the government’s police power, and this power cannot be delegated away.²³⁵ The County violated

²³² See *Cnty Op. Br.* at 40–44.

²³³ *Save Our Rural Env’t v. Snohomish County*, 99 Wn.2d 363, 368, 662 P.2d 816 (1983). Leading commentators have characterized Washington court’s rationale for voiding illegal spot zoning as a denial of substantive due process (*i.e.*, zoning not in furtherance of the public health, safety, or welfare), a denial of equal protection (*i.e.*, the conferral of a discriminatory benefit upon one landowner to the detriment of others), and a violation of zoning enabling acts (*i.e.*, inconsistency with a comprehensive plan). See Stoebuck & Weaver, 17 Wash. Prac., Real Estate § 4.18 (2d ed. 2013) (collecting and analyzing cases).

²³⁴ AR 6 (Ordinance), 182 (MDNS Addendum).

²³⁵ See *Lutz v. Longview*, 83 Wn.2d 566, 570, 520 P.2d 1374 (1974). For example, The Washington Supreme Court held that a rezoning was not subject to referendum because “[a]mendments of the zoning code, or rezones, usually are decisions by a municipal legislative body implementing the zoning code and a comprehensive plan.” *Leonard v. Bothell*, 87 Wn.2d 847, 850, 557 P.2d 1306 (1976). Rezones are “quasi-judicial acts” that involve power vested by the legislature in local governmental decision-making bodies. *Id.* at 850–53. This power cannot be delegated away. See *id.* at 854 (explaining that rezoning decisions require an informed choice by individuals who possess

this prohibition against delegating zoning authority when it granted a select group of property owners the ability to choose their own zoning. The Superior Court correctly found the County’s action unlawful.

2. The County Unlawfully Authorized Spot Zoning.

The Superior Court also correctly held that the RR-2 Overlay authorizes illegal spot zoning.²³⁶ First, it allows new RR-2 properties (owned by landowners who “opt in” to this zoning) surrounded by RL zoning, and vice versa. Second, it is not supported by adequate justification. And finally, it is inconsistent with the County’s Comprehensive Plan.

The Washington Supreme Court has defined “spot zoning” as

arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan. Spot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole.²³⁷

Spot zoning that benefits one or a few persons “with no substantial relationship to the public health, safety, general welfare or morals, in conflict with either the comprehensive zoning plan or ordinance is

the requisite expertise and understanding—*i.e.*, the local governmental body, not its citizens at large).

²³⁶ CP 1536–42.

²³⁷ *Smith v. Skagit County*, 75 Wn.2d at 743–44.

arbitrary and capricious and unlawful.”²³⁸ The main inquiry in a case alleging spot zoning is “whether the zoning action bears a substantial relationship to the general welfare of the affected community.”²³⁹

The RR-2 Overlay allows landowners to make disparate zoning decisions on their own individual properties, scattered throughout the Rezone area. The result will be islands of land zoned Resource Lands, surrounded by Rural Residential lands, or vice versa. This end result provides economic benefits to landowners who choose to opt in and rezone their properties, while degrading the River and the property rights of their neighbors who wish to retain the rural character of their land and remain under current, low-density zoning. A few landowners will thus receive a discriminatory benefit at the expense of surrounding landowners. Where a zoning action grants a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large “without adequate public advantage or justification,” the action is unlawful and must be overturned.²⁴⁰ The Superior Court correctly found the Rezone unlawful.

In addition, the County has not provided adequate justification that the RR-2 Overlay bears a “substantial relationship to the public

²³⁸ *Save Our Rural Env't*, 99 Wn.2d at 363, 368.

²³⁹ *Save Our Rural Env't*, 99 Wn.2d at 368; *Parkridge v. City of Seattle*, 89 Wn.2d 454, 460, 573 P.2d 359 (1978).

²⁴⁰ *See Anderson v. Island County*, 81 Wn.2d 312, 325, 501 P.2d 594 (1972).

health, safety, general welfare, or morals.”²⁴¹ The County claims that the RR-2 Overlay is in the public interest “if River setbacks were doubled.”²⁴² However, correspondence between the County and WDFW, as well as the statements of the County’s own experts, reveal that the claimed benefits are a mirage: 200-foot setbacks are *already required*.²⁴³ Thus the County’s purported justification for the RR-2 Overlay fails.²⁴⁴

Another hallmark of an illegal spot zoning action is one that is inconsistent with a comprehensive plan.²⁴⁵ Here, the Rezone is inconsistent with the Comprehensive Plan in several respects. For instance, the Comprehensive Plan states that “[f]uture growth should occur

²⁴¹ *Smith v. Skagit County*, 75 Wn.2d at 743–44.

²⁴² *Cnty Op. Br.* at 38.

²⁴³ *See, e.g.*, CP 1092 (Sept. 27, 2011 WDFW email stating that the 200-foot buffer in the RR-2 Overlay does not differ from existing zoning); *see also* AR 200066 (Ex. 2) (Aspect Report) (stating that the County’s Critical Areas Ordinance establishes protective buffers of 200 feet).

²⁴⁴ Contrary to what the County would have this Court believe, *Save Our Rural Environment* actually cuts against the County’s position. In that case, the Court lamented traditional zoning concepts that do not meet “the community’s present and future land use needs for water and sewage, roads and community services, and fail to protect the environment” 99 Wn.2d at 369. But here, the County cannot hide from the unmistakable reality that the RR-2 Overlay is antithetical to the public interest because it allows for dispersed development in places where current zoning and the Comprehensive Plan disfavor it *because* of a lack of community infrastructure. The Hearing Examiner’s legal conclusions about the public interest, masked as “findings,” do nothing to alter the realities about the lack of community infrastructure outside of rural centers. Nor do they address the serious and wide-ranging unmitigated environmental impacts to fish and wildlife. The upshot is that the RR-2 Overlay does not “benefit the welfare of the community as a whole.” *Smith v. Skagit County*, 75 Wn.2d at 743.

²⁴⁵ *Smith v. Skagit County*, 75 Wn.2d at 743–44. The County argues that the direction in its Comprehensive Plan is not mandatory. *See Cnty Op. Br.* at 45, 48 (arguing, without providing support, that the word “should” in the Comprehensive Plan affords wide discretion). The County ignores its *statutory obligation* to ensure *consistency* under the plain language of the Planning Enabling Act (“PEA”), which provides that “development regulations . . . shall not be inconsistent with the county’s comprehensive plan.” RCW 36.70.545.

primarily in the existing urban centers and rural communities. Rural areas should not be developed at low densities.”²⁴⁶ The Rezone is inconsistent with this provision because it encourages sprawling land use patterns outside of existing rural centers. On this point, the County recycles its mischaracterization of the Rezone area, once again equating the Rural Centers of BZ Corner and Husum with the entire Rezone area.²⁴⁷ For the reasons described in detail above,²⁴⁸ this argument is meritless: the County’s decision cannot be validated by mischaracterizing the locations of the Husum and BZ Corner Rural Centers.

In addition, the Comprehensive Plan states that “unsewered areas with severe soil limitations for development should not be developed at a density greater than one unit per five acres.”²⁴⁹ Here, however, the County completely failed to disclose or identify whether the areas being rezoned to allow for two-acre minimum lot sizes actually have any “severe soil limitations.”²⁵⁰ In other words, the County has not shown consistency with this requirement.²⁵¹

²⁴⁶ AR at 209957 (Ex. 12).

²⁴⁷ See *Cnty Op. Br.* at 46–47.

²⁴⁸ See *supra* Part VI.C.3.b.

²⁴⁹ AR 209958 (Ex. 12) (Comp. Plan).

²⁵⁰ AR 160 (Environmental Checklist) (merely stating that the types of soils found in the Rezone area are “varying”).

²⁵¹ County counsel’s post-hoc rationalization about future site-specific compliance with state health codes, see *Cnty Op. Br.* at 45–46, does not save the County’s flawed decision. The fact that this rationale is nowhere to be found in the County’s own decision-making process defeats this argument alone. See *Somer v. Woodhouse*, 28 Wn.

Other inconsistencies with the Comprehensive Plan are readily apparent. For instance, the Plan’s wildlife goals include developing a fish and wildlife inventory and management plan, protecting significant wildlife habitats, and encouraging “cluster development . . . so that the county can remain in its natural condition.”²⁵² The Rezone does exactly the opposite: it removes large portions of existing rural center zoning and instead spreads development across the entire White Salmon River Valley. The County’s action does not develop “a fish and wildlife inventory,” nor does it require “cluster development.”²⁵³ In addition, the Comprehensive Plan requires protection of “agricultural lands still in production from suburban growth” through the use of “zoning limitations.”²⁵⁴ In contrast, the Rezone invites a checkerboard land use pattern, authorizing the conversion of existing agricultural lands into smaller parcels and residential sprawl.

In conclusion, the County unlawfully delegated its zoning authority to individual landowners and authorized illegal spot zoning by singling out beneficiaries for private gain without regard to the welfare of

App. 262, 272, 623 P.2d 1164 (1981) (“[A]gency action cannot be sustained on post hoc rationalizations supplied during judicial review.”). But even if taken at face value, the argument fails. Hollow promises of future compliance with state health codes cannot cure a rezoning decision that *by its own terms* is inconsistent with the Comprehensive Plan.

²⁵² AR 209971–72 (Ex. 12) (Comp. Plan).

²⁵³ *Id.*

²⁵⁴ *Id.* at 209965–66.

the broader community and in a manner inconsistent with the Comprehensive Plan. The Superior Court’s decision should be upheld.

VII. STATEMENT OF THE ISSUES ON CROSS APPEAL

- A. Did the Superior Court err by failing to grant Friends the relief to which it was entitled for the County’s unlawful actions?
- B. Did the Superior Court err by concluding that its ruling provided relief to Friends?

VIII. STATEMENT OF THE CASE ON CROSS APPEAL

Friends was the prevailing party below. The Superior Court granted summary judgment in favor of Friends on all claims raised in Friends’ motion, and also denied the County’s summary judgment motion in its entirety.²⁵⁵ Specifically, the Superior Court held that in adopting the Rezone (via passage of the Ordinance and Resolution), the County violated SEPA, unlawfully delegated its zoning authority, and unlawfully authorized spot zoning.²⁵⁶

Despite these rulings, the Superior Court failed to provide Friends with the relief to which it was entitled. Instead, the Court “reserve[d] its ruling on the appropriate relief” pending appeal.²⁵⁷ Moreover, in certifying the case for appeal pursuant to CR 54(b), the Court erroneously held that

²⁵⁵ CP 1536–42.

²⁵⁶ CP 1541–42.

²⁵⁷ CP 1538.

“Plaintiffs’ un-adjudicated claims *are addressed by the relief provided by this ruling,*” even though the court did not provide relief.²⁵⁸

As the Superior Court correctly held, the County violated SEPA by taking action without first preparing an EIS (among other SEPA errors), unlawfully delegated its police power zoning authority to individual landowners, and unlawfully authorized spot zoning.²⁵⁹ The Superior Court failed, however, to award Friends the relief to which it was entitled—namely, vacating the unlawfully adopted Rezone.²⁶⁰ The Court of Appeals should remedy the Superior Court’s failure to provide relief, either by vacating the Rezone on appeal or by remanding to the Superior Court with instructions to do so.

IX. ARGUMENT IN SUPPORT OF CROSS APPEAL

Friends prevailed at the Superior Court. The Superior Court correctly held that the County unlawfully adopted the Rezone without preparing an EIS and without evaluating alternatives, that the County unlawfully delegated its zoning powers to individual landowners, and that the County unlawfully authorized spot zoning.²⁶¹ However, despite the Superior Court’s decision that the Rezone was unlawfully adopted and

²⁵⁸ CP 1537 (emphasis added).

²⁵⁹ CP 1541–42.

²⁶⁰ The Superior Court also denied a motion for reconsideration filed by Friends requesting relief. CP 1674 (Order); *see also* CP 1618 (Plaintiffs’ Motion for Reconsideration and to Amend the Final Judgment).

²⁶¹ CP 1541–42.

unlawful in substance, the County defiantly continues to implement the Rezone by accepting and processing land use applications filed under the Rezone, and advising landowners that the Rezone is valid.²⁶²

Friends requests that the Court of Appeals award Friends the relief to which it is entitled. Specifically, the Rezone is unlawful and must be vacated. Washington courts have long held that where an agency unlawfully takes action without first conducting the environmental analysis required under SEPA, the action is *ultra vires* and invalid.²⁶³ Here, the County was expressly prohibited by the SEPA rules from adopting the Rezone without first issuing the required EIS: “Agencies shall not act on a proposal for which an EIS has been required prior to seven days after issuance of the FEIS.”²⁶⁴ One of the “central purposes of

²⁶² See, e.g. CP 1641 (certificate of notice sent to Friends regarding continued processing of new land division applications pursuant to the Rezone).

²⁶³ See, e.g., *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 626–29, 632, 860 P.2d 390 (1993), *op. revised*, 866 P.2d 1256 (1994) (trial court invalidated solid waste management plan update because county failed to prepare EIS prior to adoption); *State v. Grays Harbor County*, 122 Wn.2d 244, 256 n.12, 857 P.2d 1039, 1046 n.12 (1993) (“[A]gency action which does not comply with SEPA is unlawful and outside the agency’s authority.”) (citing *Settle* § 20(h), at 263 (1993)); *Noel v. Cole*, 98 Wn.2d 375, 379–81, 655 P.2d 245 (because an agency failed to prepare a required EIS, its action was *ultra vires*), *superseded by statute on other grounds by Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997); *King County v. Wash. St. Boundary Review Bd.*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993) (“In cases involving reversal of a DNS, it is necessary to remand to the agency for preparation of an EIS and enjoin the agency action until the statement is complete.”); *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 817–18, 576 P.2d 54 (1978) (vacating comprehensive plan amendment for failure to make threshold determination under SEPA); *Eastlake Community Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 487–98, 513 P.2d 36 (1973) (renewal of building permit issued for lakeside development was unlawful and invalid because city failed to prepare EIS).

²⁶⁴ WAC 197-11-460(5).

SEPA is to insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making.”²⁶⁵ Furthermore, SEPA is “intended to prevent action which is ill-considered from an environmental perspective.”²⁶⁶ Because the County unlawfully took action without first conducting the requisite environmental analysis, the action is *ultra vires* and must be vacated.

Moreover, in addition to the County’s numerous SEPA violations, the Superior Court also correctly held that the *substance* of the Rezone is unlawful because it delegates the County’s zoning authority to individual landowners and authorizes spot zoning.²⁶⁷ The Klickitat County Commissioners lacked authority to delegate their zoning power to individual landowners, and to authorize spot zoning. Thus, the Rezone is *ultra vires*, facially invalid, and must be vacated.²⁶⁸

Here, if the County wishes to allow sprawl throughout the White Salmon River valley, it must at the very least prepare an EIS,²⁶⁹ and it must also correct the Rezone’s fundamental substantive problems—namely, the County’s unlawful delegation of zoning authority and

²⁶⁵ *Noel*, 98 Wn.2d at 380 (citing RCW 43.21C.030(2)(b)).

²⁶⁶ *Id.* (citations omitted).

²⁶⁷ CP 1542.

²⁶⁸ See *Pierce v. King County*, 62 Wn.2d 324, 340, 382 P.2d 628 (1963) (spot zoning was “void”); *Smith v. Skagit County*, 75 Wn.2d at 745–46 (because county resolution was “illegal spot zoning . . . the amendments to the interim zoning code, maps and comprehensive plan . . . are void”).

²⁶⁹ See *Juanita Bay Valley Ass’n v. City of Kirkland*, 9 Wn. App. 59, 73–74, 510 P.2d 1140 (1973).

authorization of spot zoning. In accordance with the applicable law and in light of the Superior Court's rulings that the Rezone was unlawfully adopted and is unlawful in substance, this Court should declare the Rezone invalid and vacate the Ordinance and Resolution adopting the Rezone. In the alternative, this Court should instruct the Superior Court to provide the requested relief.

X. CONCLUSION

For the foregoing reasons, Friends asks this Court to uphold the Superior Court's determinations that in adopting the Rezone, the County violated SEPA, unlawfully delegated its zoning authority to individual landowners, and authorized spot zoning. Furthermore, because the Rezone is unlawful, this Court should declare the Rezone invalid and should vacate the County's Ordinance and Resolution authorizing it, or should instruct the Superior Court to do so.

Dated this 24th day of April 2014.



Ralph O. Bloemers, WSBA #30216
Counsel for Friends of the White Salmon
River and Friends of the Columbia Gorge

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I served the foregoing
RESPONDENTS/CROSS APPELLANTS' OPENING BRIEF on the
parties listed below by e-mail and regular mail:

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lorih@klickitat.wa.us

Dated this 24th day of April 2014.



Ralph O. Bloemers, WSBA #30216

CRAG LAW CENTER

April 24, 2014 - 4:01 PM

Transmittal Letter

Document Uploaded: 452693-Respondents Cross-Appellants' Brief.pdf

Case Name: Klickitat County v. Friends of the White Salmon River and Friends of the Columbia Gorge

Court of Appeals Case Number: 45269-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondents Cross-Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

The Appendix to the brief has been previously filed in electronic form, separately from this brief. The Appendix was filed separately because it contains numerous color maps, photographs and charts and because it is large. Counsel will provide 8 full color copies of the Appendix to the Case Manager for this case for attachment to the brief and the convenience of the Court.

Sender Name: Ralph O Bloemers - Email: ralph@crag.org

A copy of this document has been emailed to the following addresses:

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nathan@gorgefriends.org

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APPENDIX

Klickitat County v. Friends of the White Salmon and Friends of the Columbia Gorge – Court of Appeals Division II - Case No. 45269-3-II

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Proposed Zoning & Acreage Husum

Prepared by Joanna Malaczynski for
Crag Law Center on behalf of
Friends of the White Salmon River,
Friends of the Columbia River Gorge,
Citizens for Common Sense on the White Salmon

Data Source: Klickitat County



Klickitat CO Parcels

2 Acre Proposed Density

ZONING

Extensive Agriculture

Forest Resource

General Rural

Open Space

Resource Lands

Rural Center

Rural Residential 1

Rural Residential 2

0 1,000 2,000 3,000 4,000 Feet

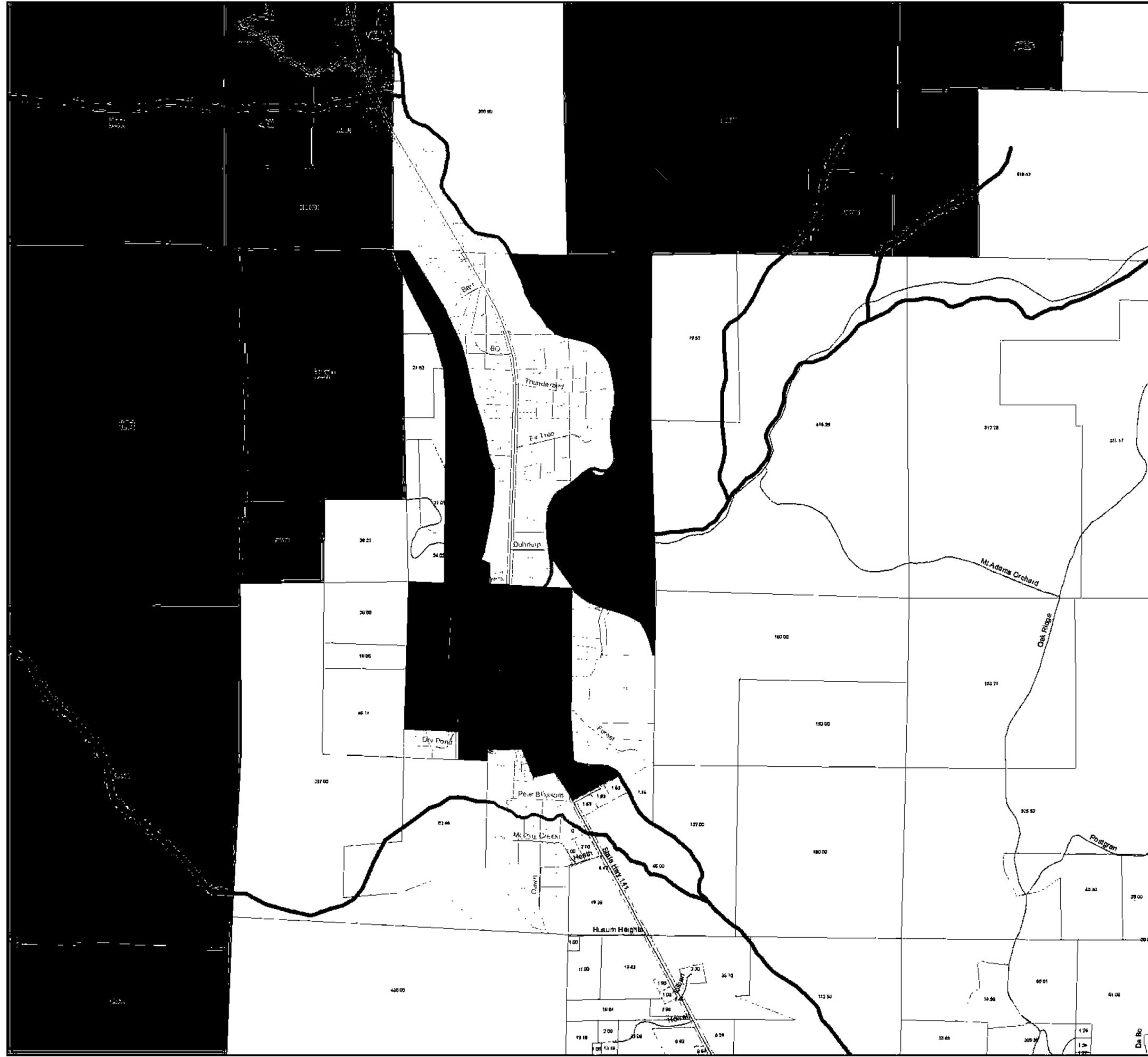


Proposed Zoning & Acreage

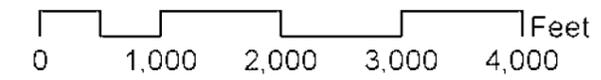
BZ Corner

Prepared by Joanna Malaczynski for
 Crag Law Center on behalf of
 Friends of the White Salmon River,
 Friends of the Columbia River Gorge,
 Citizens for Common Sense on the White Salmon

Data Source: Klickitat County



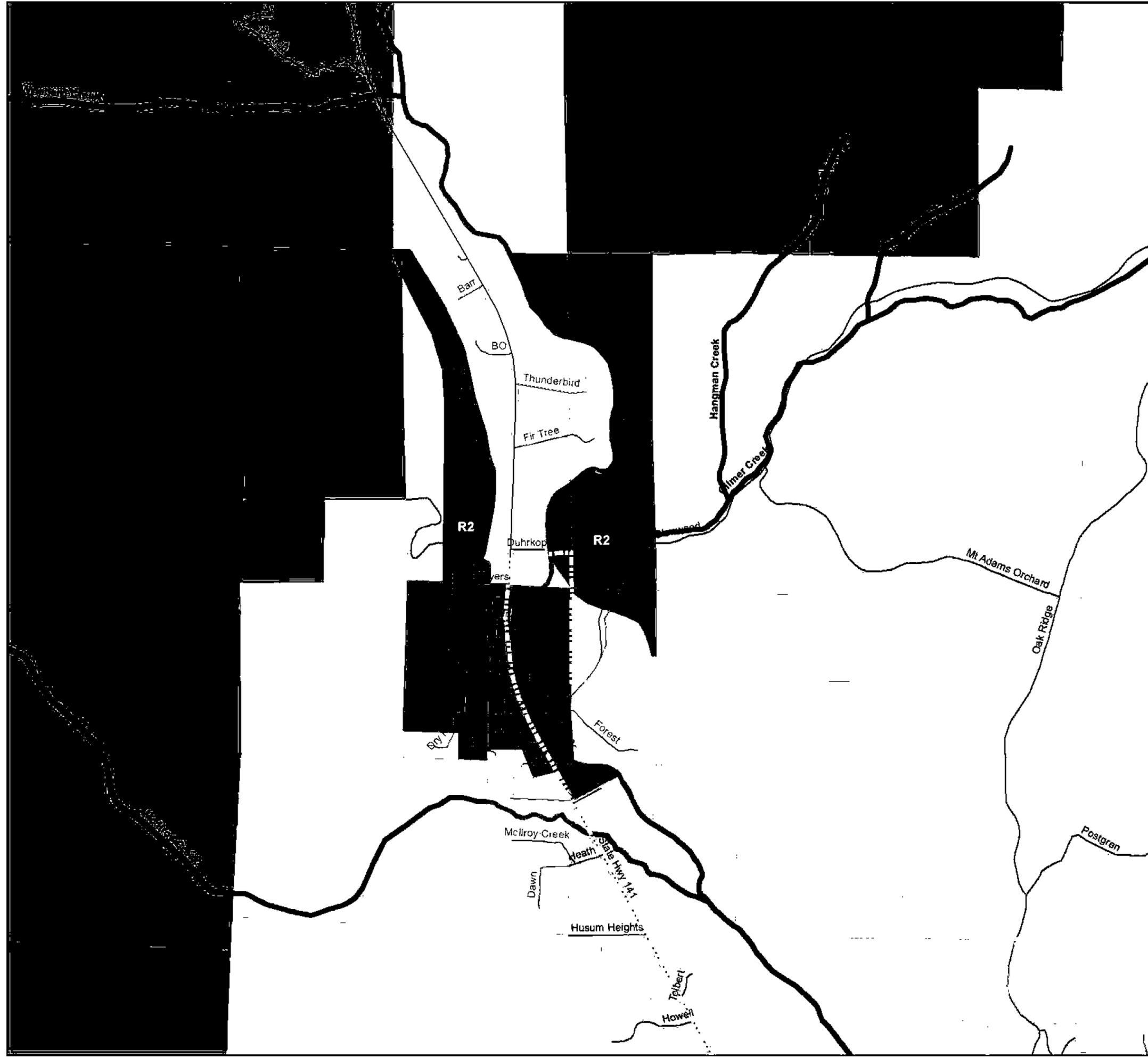
- Klickitat CO Parcels
- 2 Acre Proposed Density
- ZONING**
- Extensive Agriculture
- Forest Resource
- General Rural
- Open Space
- Resource Lands
- Rural Center
- Rural Residential 1
- Rural Residential 2



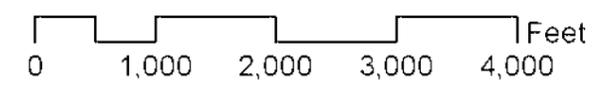
Proposed Zoning & Wild and Scenic Rivers (Area Boundary) *BZ Corner*

Prepared by Joanna Malaczynski for Crag Law Center
on behalf of Friends of the White Salmon River,
Friends of the Columbia River Gorge,
Citizens for Common Sense on the White Salmon

Data Source: Klickitat County



- Wild & Scenic Boundary
- Klickitat CO Parcels
- Proposed 2 Acre Density
- ZONING**
- Forest Resource
- Resource Lands
- Rural Center
- Rural Residential 2

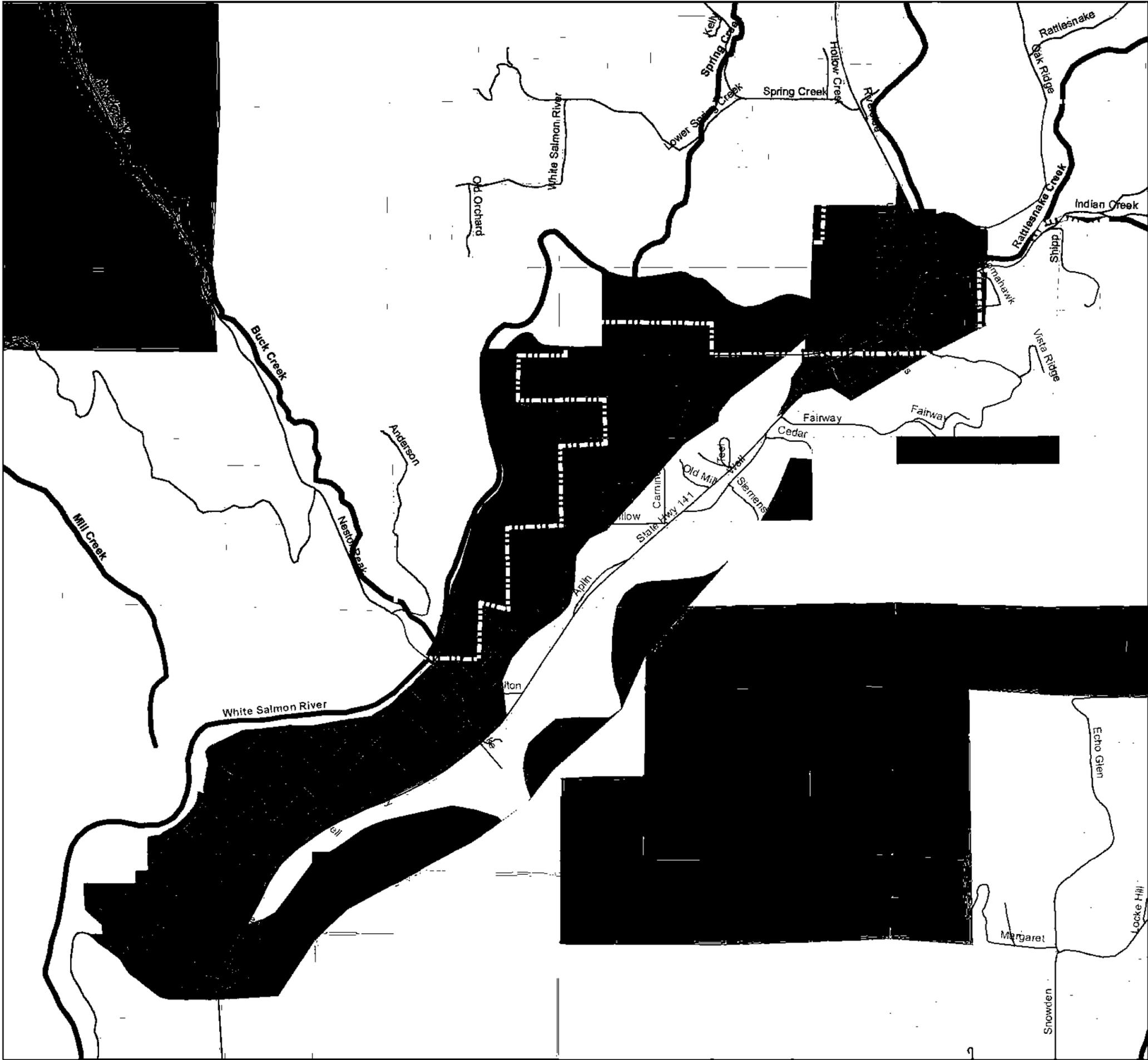


Proposed Zoning & Wild and Scenic Rivers

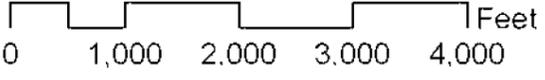
Husum

Prepared by Joanna Malaczynski for Crag Law Center on behalf of Friends of the White Salmon River, Friends of the Columbia River Gorge, Citizens for Common Sense on the White Salmon

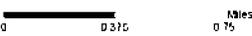
Data Source: Klickitat County



- Wild & Scenic Boundary
- Klickitat CO Parcels
- Proposed 2 Acre Density
- ZONING**
- Extensive Agriculture
- Forest Resource
- General Rural
- Open Space
- Resource Lands
- Rural Center
- Rural Residential 1
- Rural Residential 2



**Fordyce Wells - Critical Groundwater Basin:
 1/4 and half mile buffers around wells**



Legend

-  Creek
-  River
-  2007 SMP Jurisdiction
-  Current Zoning
-  Wild & Scenic Boundary
-  Proposed Zoning
-  Parcels

**Proposed
 ReZone
 Husum Area Map**

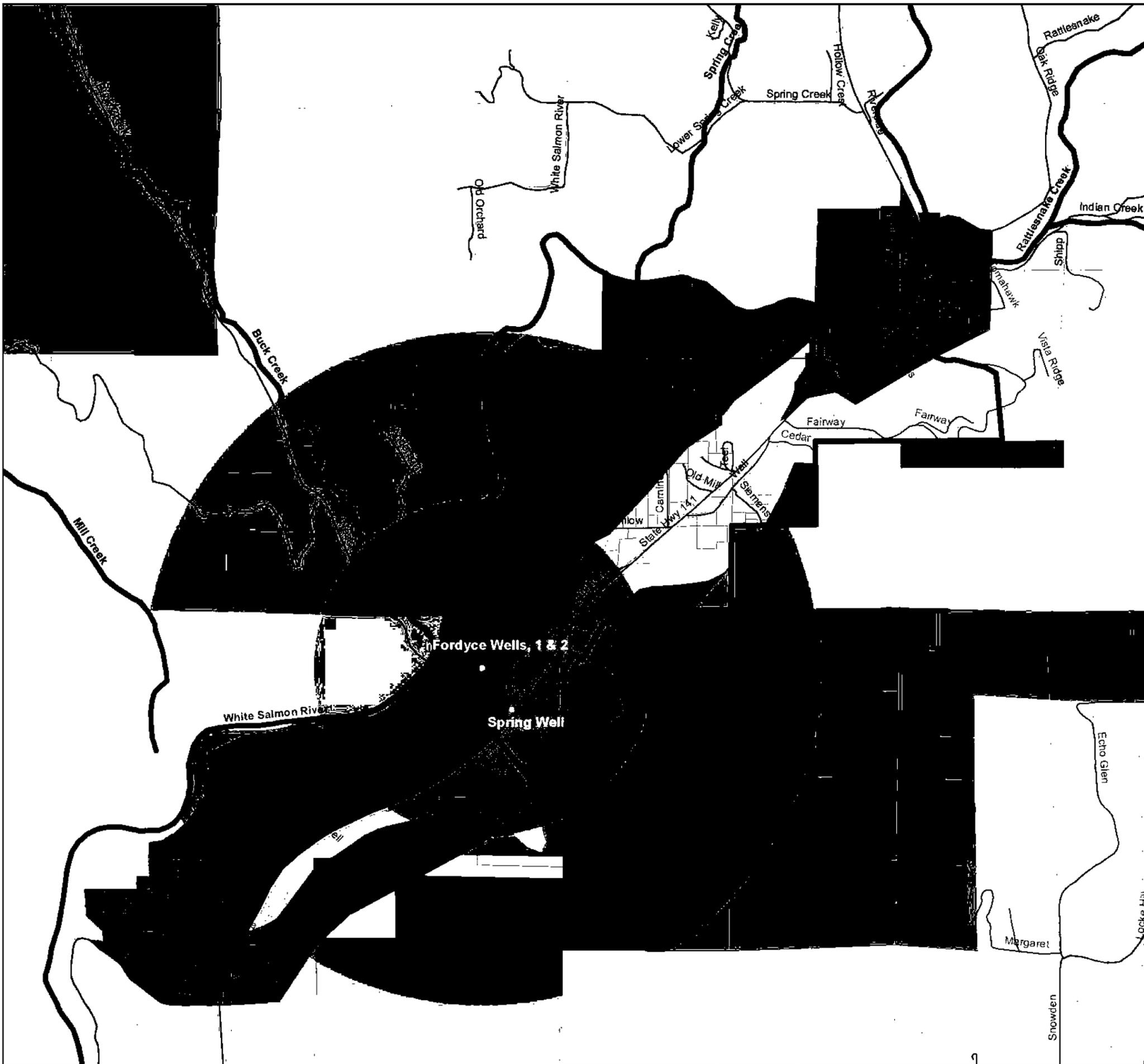
Map produced by Klickitat County
 Buffers overlaid by Joanna Malaczynski
 on behalf of Crag Law Center

Proposed Zoning & Proposed Fordyce Well Service Area (Revised)

Husum

Prepared by Joanna Malaczynski for Crag Law Center on behalf of Friends of the White Salmon River, Friends of the Columbia River Gorge, Citizens for Common Sense on the White Salmon

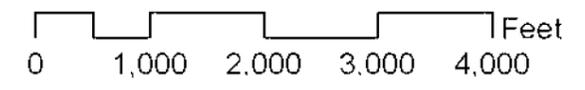
Data Sources:
 Wells - Mark Yinger / 1994 Fordyce Report
 Other - Klickitat County



-  Fordyce Revised Proposed New Service Area
-  Fordyce Wells - Half Mile Radius
-  Fordyce Wells - One Mile Radius
-  Klickitat CO Parcels
-  Proposed 2 Acre Density

ZONING

-  Extensive Agriculture
-  Forest Resource
-  General Rural
-  Open Space
-  Resource Lands
-  Rural Center
-  Rural Residential 1
-  Rural Residential 2



Klickitat County Existing and Proposed Zoning Before and After Vignettes of Former Dam Area and Husum Rural Center Area

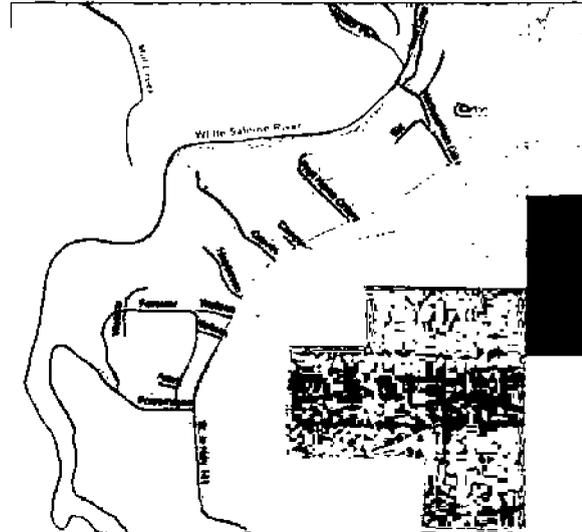
Prepared by Joanna Malaczynski for Craig Law Center
on behalf of Friends of the White Salmon River
Friends of the Columbia River Gorge
Citizens for Common Sense on the White Salmon
February 2012

Data Source: Klickitat County (Zoning);
WA DNR (Tributaries)

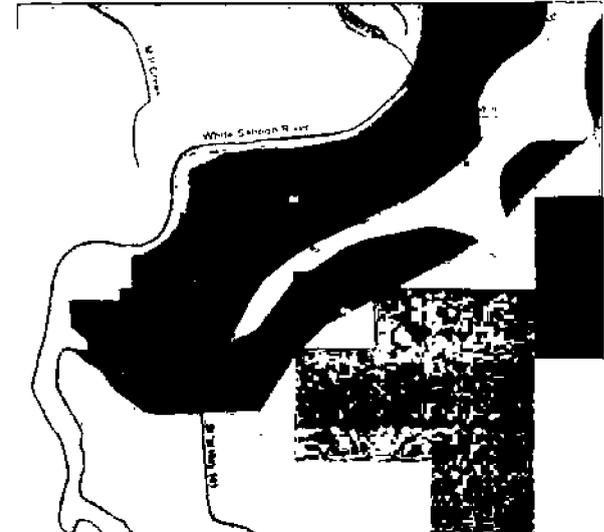
ZONING

- Extensive Agriculture (EA)
- Forest Resource (FR)
- General Rural (GR)
- Open Space (OS)
- Resource Lands (RL)
- Rural Center (RC)
- Rural Residential 2 (RR2)
- RC Rezoned to Rural Residential (RR1)
- RR1 & RR2 Expansion Due to Rezoning
- Wild & Scenic River Overlay (RSO)

0 1000 2000 FT



Former Dam - Existing Zoning



Former Dam - Proposed Zoning



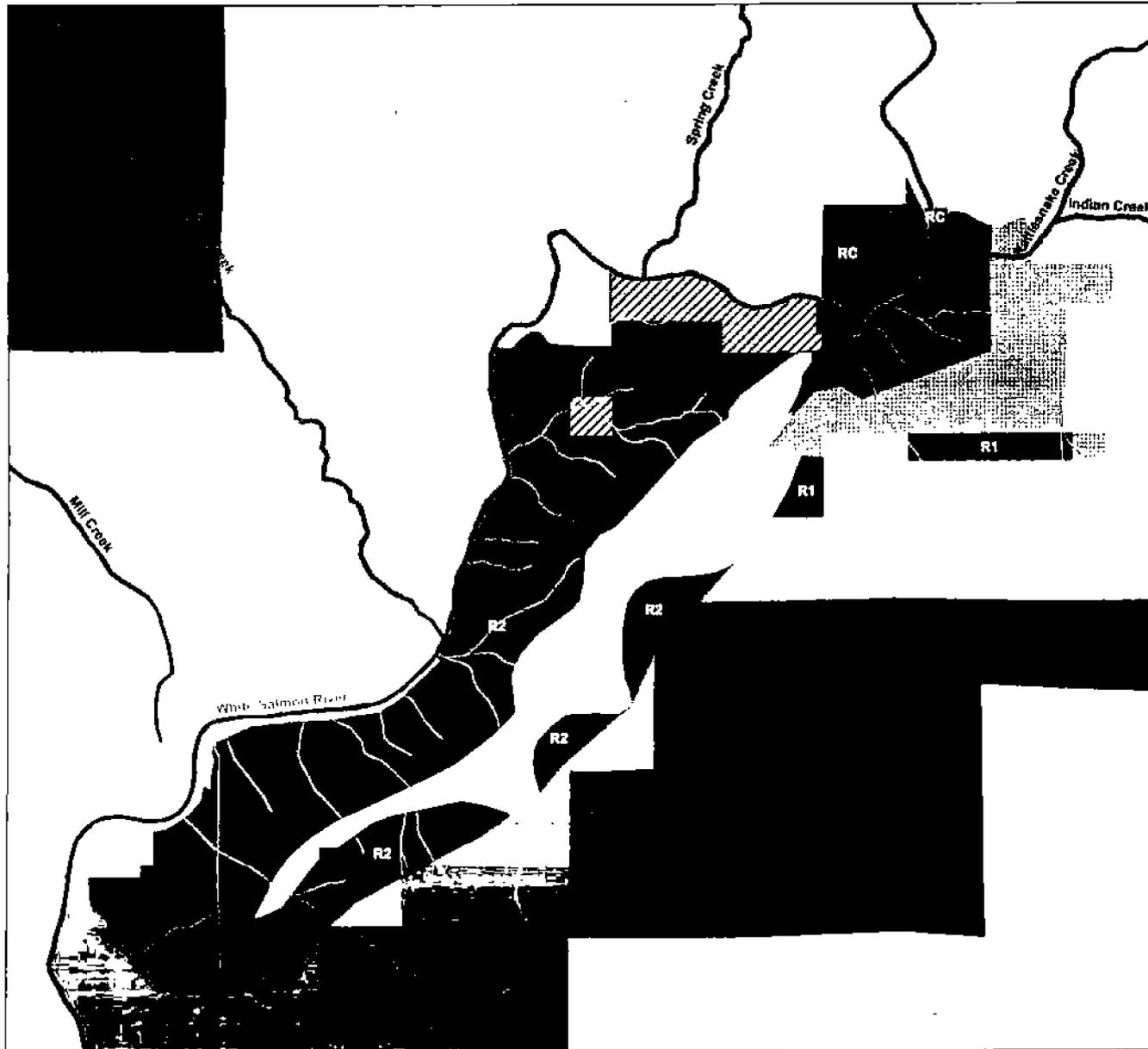
Husum Rural Center - Existing Zoning



Husum Rural Center - Proposed Zoning

0-000001436

0-000001435



Proposed County Zoning & Valuable Tributaries South Klickitat County

Prepared by Joanna Malaczynski for Crag Law Center
on behalf of Friends of the White Salmon River,
Friends of the Columbia River Gorge,
Citizens for Common Sense on the White Salmon
February 2013

Data Source: Klickitat County (Zoning),
WA DNR (Tributaries)

ZONING

-  Extensive Agriculture (EA)
-  Forest Resource (FR)
-  General Rural (GR)
-  Open Space (OS)
-  Resource Lands (RL)
-  Rural Center (RC)
-  Rural Residential 2 (RR2)
-  RC Rezoned to Rural Residential (RR1)
-  RR1 & RR2 Expansion Due to Rezoning
-  Wild & Scenic River Overlay (RR2)

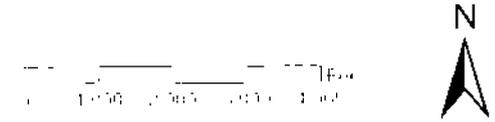
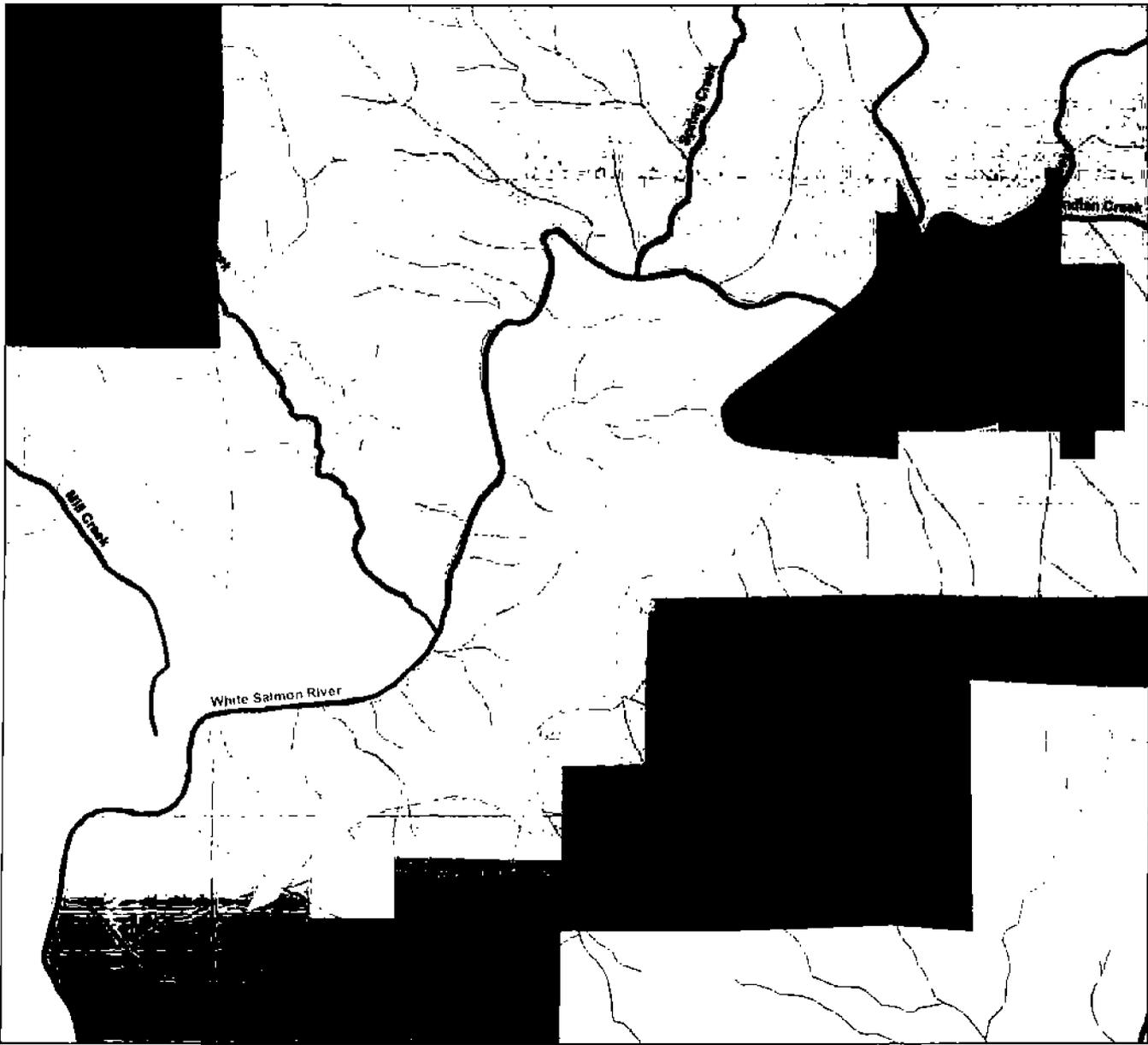


Exhibit 306



Proposed County Zoning

South Klickitat County

Prepared by Joanna Malaczynski for Crag Law Center on behalf of Friends of the White Salmon River, Friends of the Columbia River Gorge, Citizens for Common Sense on the White Salmon February 2013

Data Source: Klickitat County (Zoning); WA DNR (Tributaries)

- Extensive Agriculture (EA)
- Forest Resource (FR)
- General Rural (GR)
- Open Space (OS)
- Resource Lands (RL)
- Rural Center (RC)
- Rural Residential 2 (RR2)
- Wild & Scenic Boundary
- Klickitat CO Parcels
- RC Rezoned to Rural Residential (RR1)
- Wild & Scenic River Overlay (RR2)

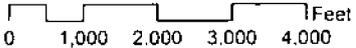
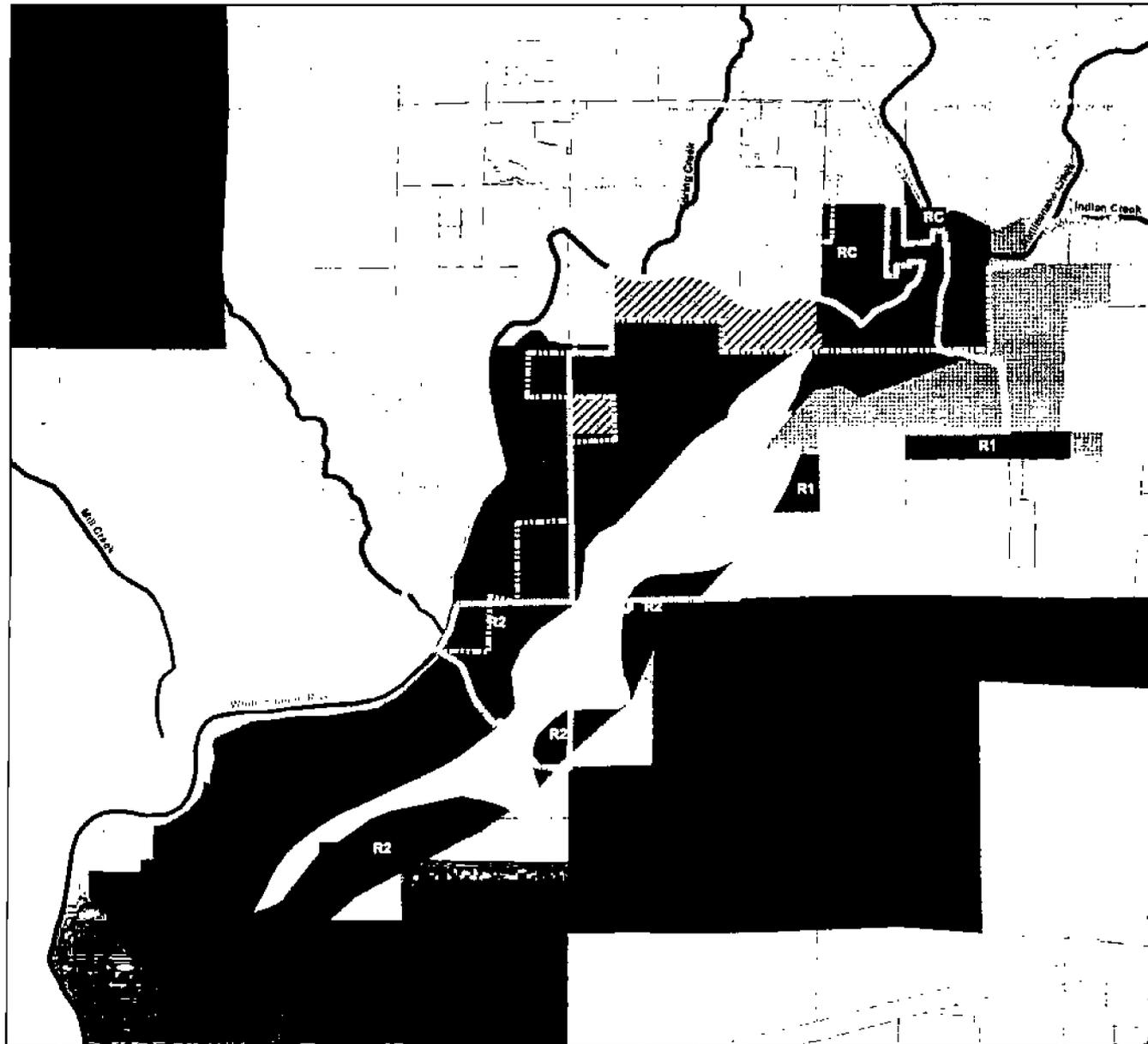


Exhibit 305

0-000001434

0-000001433



Proposed County Zoning & Water as a Resource

South Klickitat County

Prepared by Joanna Malaczynski for Crag Law Center
on behalf of Friends of the White Salmon River,
Friends of the Columbia River Gorge,
Citizens for Common Sense on the White Salmon
February 2013

Data Source: Klickitat County

- Fordyce Water Service Area
- Wild & Scenic Boundary
- Klickitat CO Parcels

ZONING

- Extensive Agriculture (EA)
- Forest Resource (FR)
- General Rural (GR)
- Open Space (OS)
- Resource Lands (RL)
- Rural Center (RC)
- Rural Residential 2 (RR2)
- RR1 & RR2 Expansion Due to Rezoning
- RC Rezoned to Rural Residential (RR1)
- Wild & Scenic River Overlay (RR2)

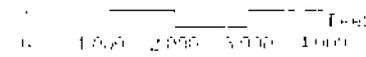
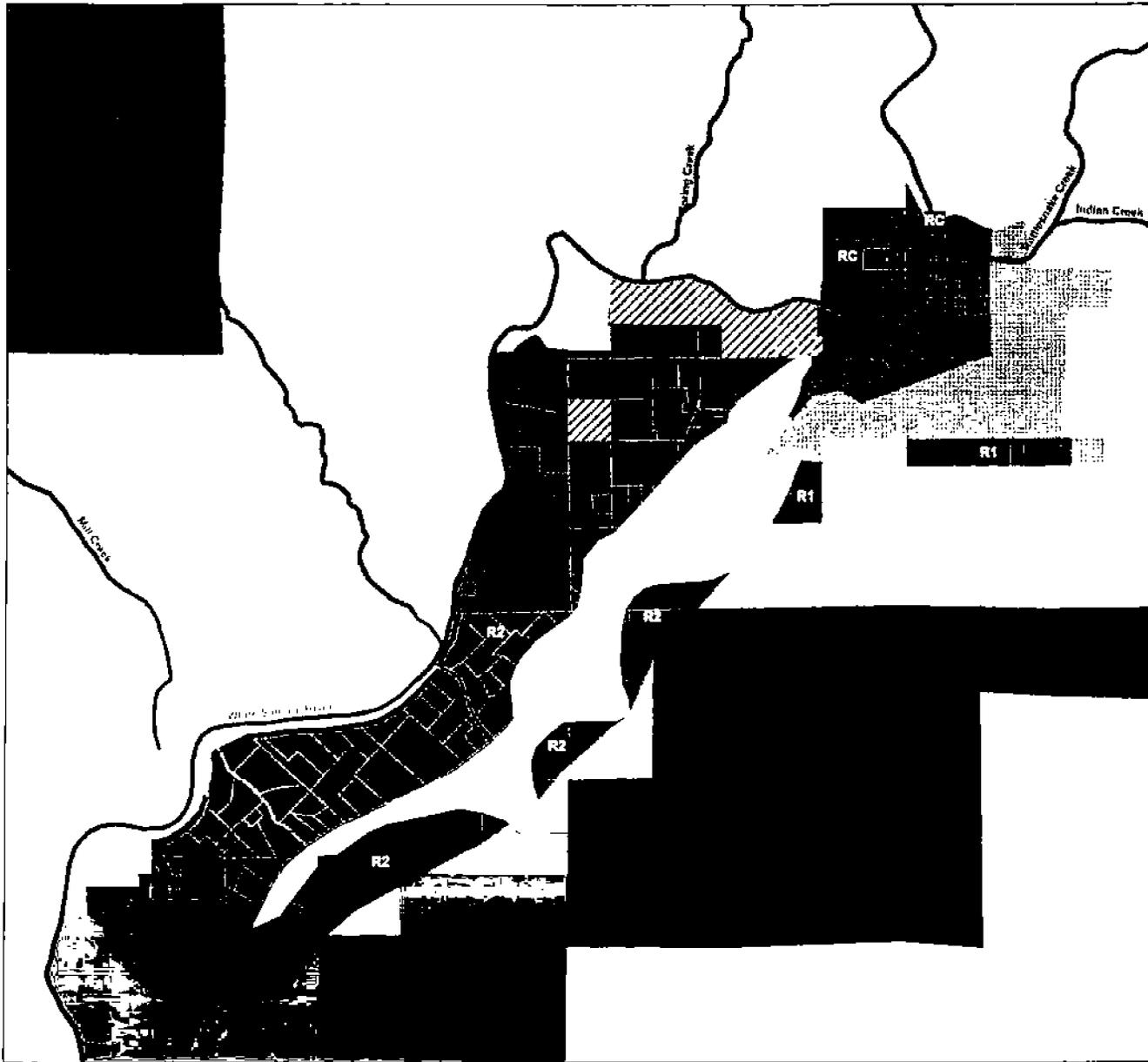


Exhibit 304



Proposed County Zoning South Klickitat County

Prepared by Joanna Malaczynski for Crag Law Center on behalf of Friends of the White Salmon River, Friends of the Columbia River Gorge, Citizens for Common Sense on the White Salmon February 2013

Data Source: Klickitat County

- Klickitat CO Parcels
- Wild & Scenic River Overlay (RR2)
- ZONING**
- Extensive Agriculture (EA)
- Forest Resource (FR)
- General Rural (GR)
- Open Space (OS)
- Resource Lands (RL)
- Rural Center (RC)
- Rural Residential 2 (RR2)
- RC Rezoned to Rural Residential (RR1)
- RR1 & RR2 Expansion Due to Rezoning

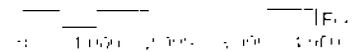
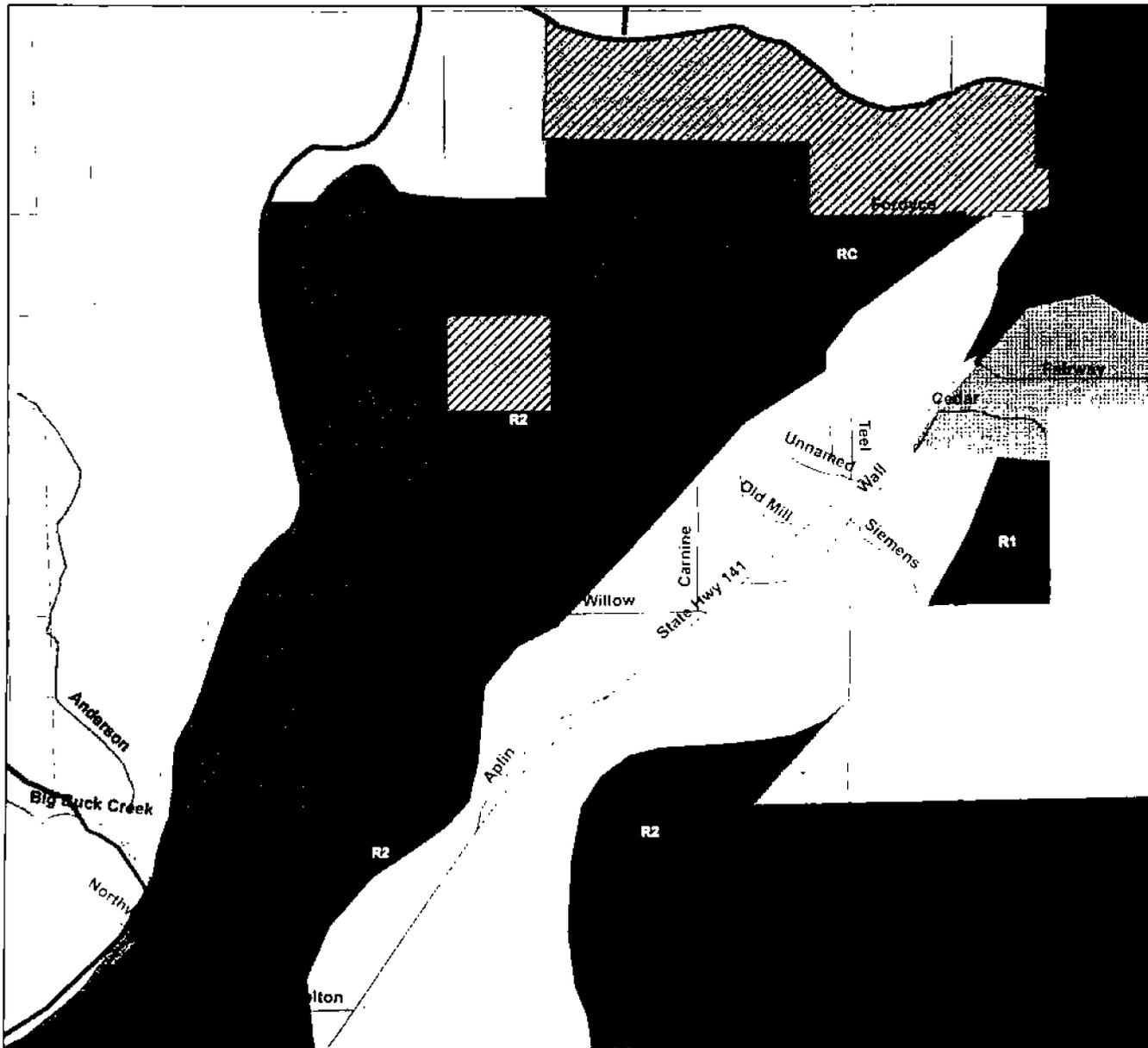


Exhibit 303

0-000001432

0-000001431



Proposed County Zoning Spot Zoning

South Klickitat County

Prepared by Joanna Malaczynski for Crag Law Center
on behalf of Friends of the White Salmon River,
Friends of the Columbia River Gorge,
Citizens for Common Sense on the White Salmon
February 2013

Data Source: Klickitat County

- Klickitat CO Parcels
- ZONING**
- Extensive Agriculture (EA)
 - Forest Resource (FR)
 - General Rural (GR)
 - Open Space (OS)
 - Resource Lands (RL)
 - Rural Center (RC)
 - Rural Residential 2 (RR2)
 - RC Rezoned to Rural Residential (RR1)
 - RR1 & RR2 Expansion Due to Rezoning
 - Wild & Scenic River Overlay (RR2)

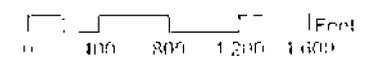
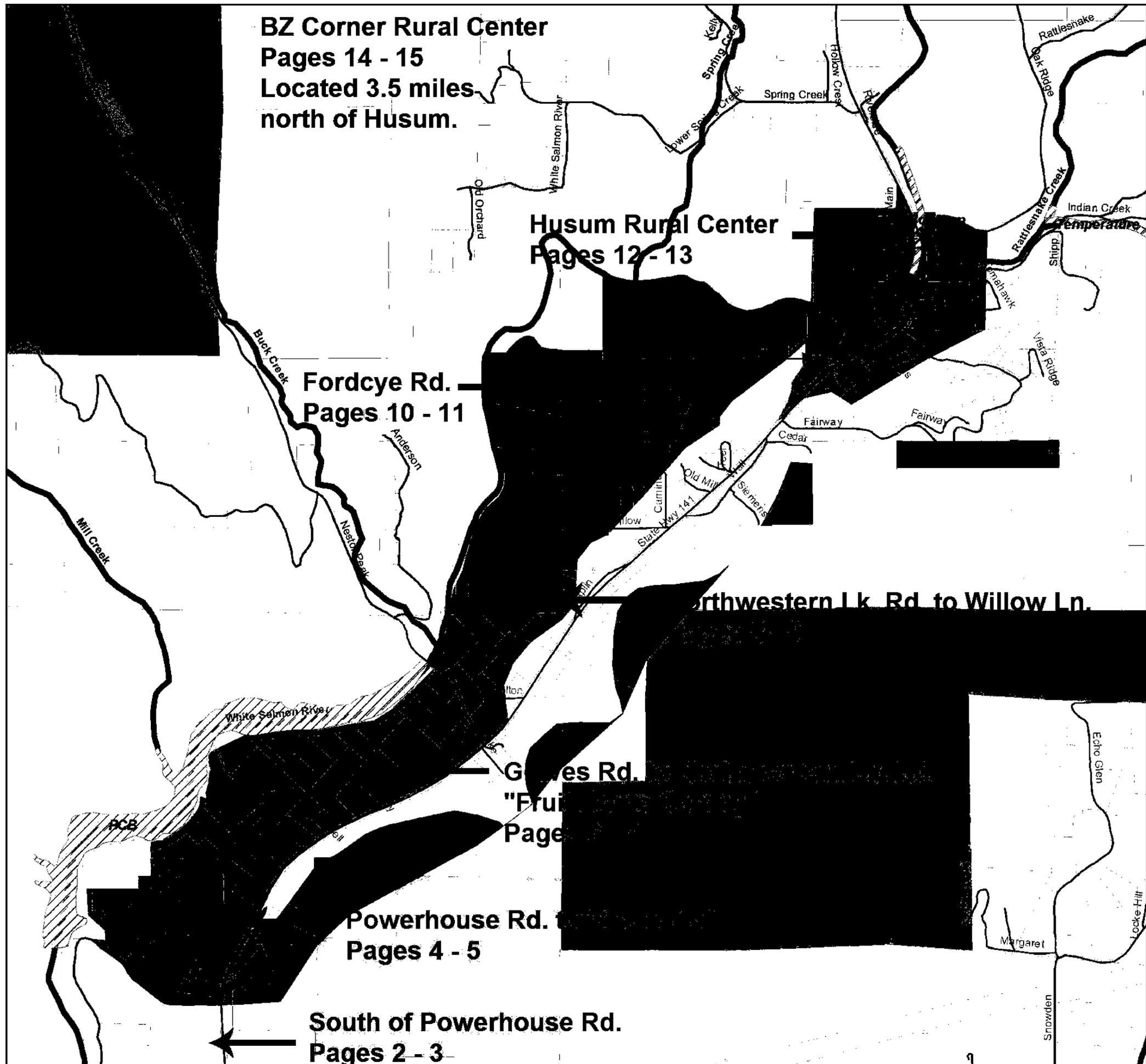


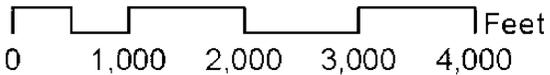
Exhibit 302



**Overview of Aerial
Photography Maps submitted
on 4/12/2012 by Friends
of the Columbia Gorge.**

**Supplement to document titled:
"Land Use in the
Husum/BZ Corner Subarea
1993 through 2011"**

-  Water Quality - Section 303(d)
-  Klickitat CO Parcels
-  Proposed 2 Acre Density
- EXISTING ZONING**
-  Extensive Agriculture
-  Forest Resource
-  General Rural
-  Open Space
-  Resource Lands
-  Rural Center
-  Rural Residential 1
-  Rural Residential 2



Land Use in the Husum/BZ Corner Subarea 1993 through 2011

**Prepared by
Richard Till, Conservation Legal Advocate
Friends of the Columbia Gorge**

The following series of aerial photographs depict land use patterns in portions of the Husum/BZ Corner Subarea from 1993 and 2011.¹ The series includes pairs of aerial photographs from 1993 and 2011 of segments of the Subarea. The series begins aerial photographs of the area just south of Powerhouse Road, which is the southern boundary of the Husum/BZ Subarea. The series then moves north through the Subarea. The maps show lands that would be rezoned from Resource Land to Rural Residential with 1- and 2-acre minimum lot sizes as well as the current Husum Rural Center and BZ Corner Rural Center. The maps clearly show that the majority of land outside of Husum and BZ Corner has been continuously used for agriculture or forestry since 1993. The majority of these rural lands have not been converted to residential use.

¹ Photographs were obtained using Google Earth. Dates and locations can be verified through Google Earth: <http://www.google.com/earth/index.html>.

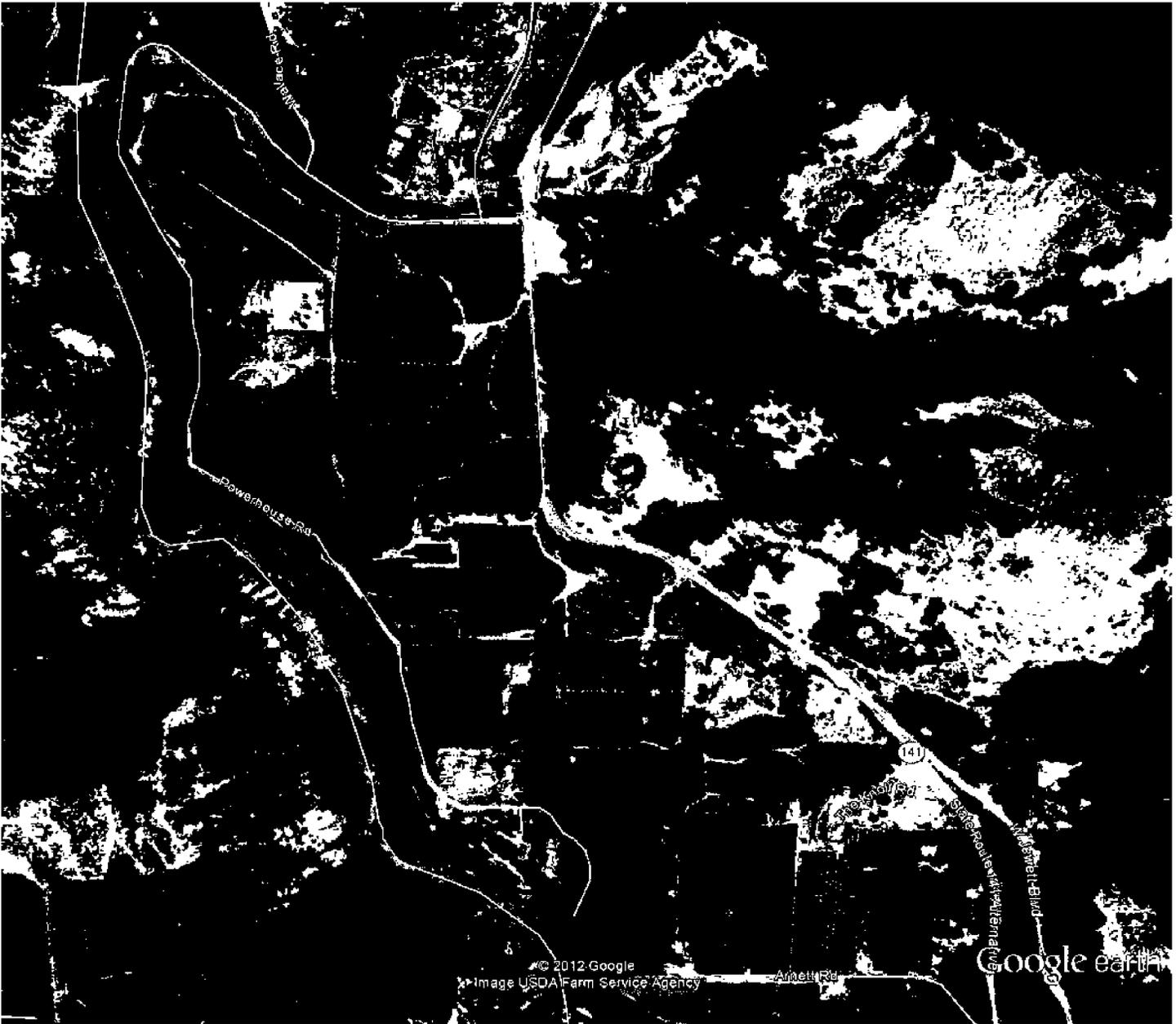


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South of Powerhouse Road 11/3/2011

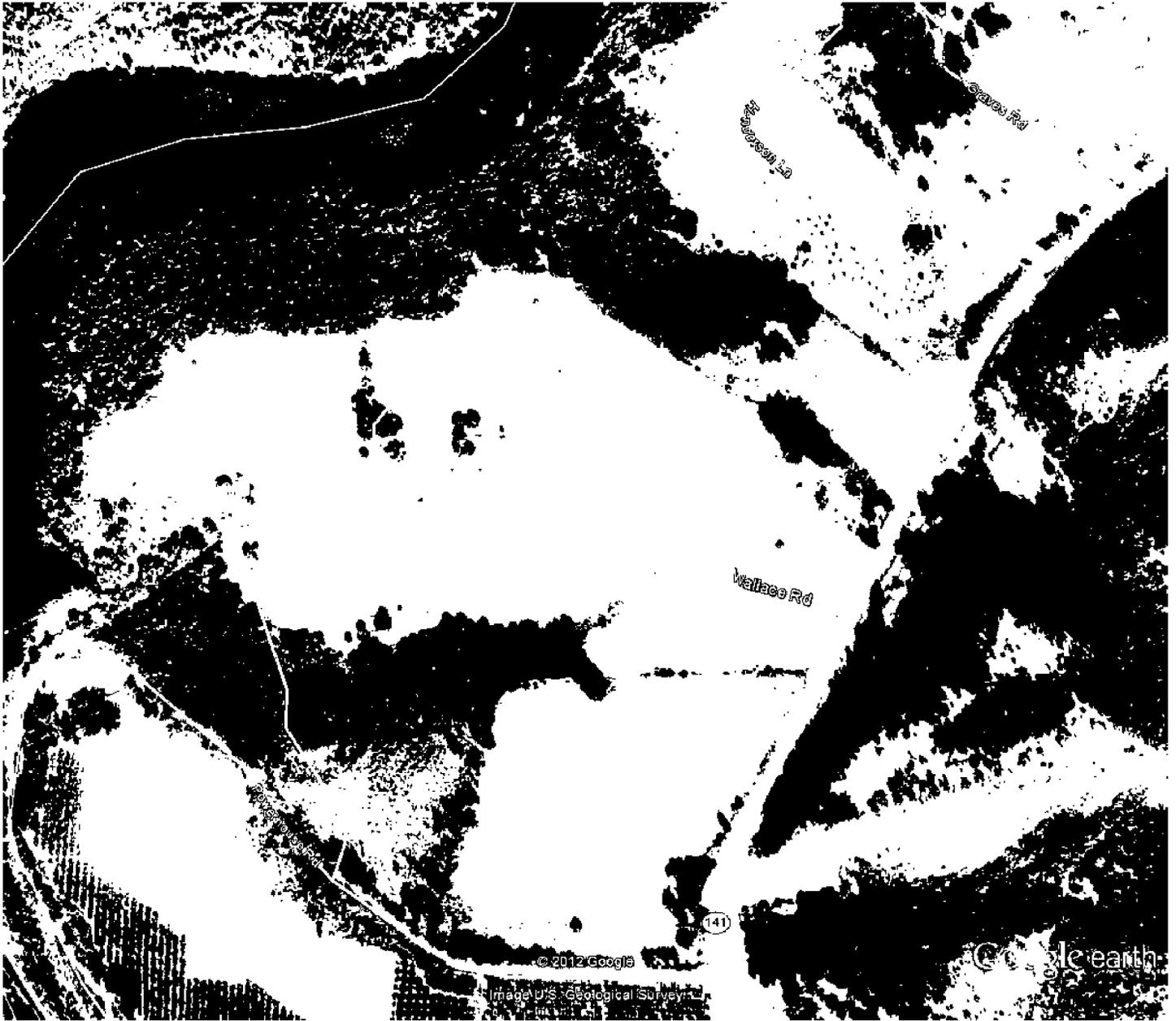


Google earth

feet
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Powerhouse Rd. to Graves Rd. 7/30/1993



Google earth

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Google earth

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The Wallace Road loop and new private roads connecting to Powerhouse Road were constructed after 1993. Despite the land being designated Resource Land, Wallace Road appears to have been constructed in anticipation of future residential development. The to the south is currently zoned as Large-Scale Agriculture within the Columbia River Gorge National Scenic Area and is currently in agricultural production. Land to the north is forested or in agricultural use and land to the east is an active quarry .

Graves Rd. to Northwestern Lk. Rd. 7/30/1993 - "Fruit Home Colony"



The area around near Fruit Home Ln. and Colony Rd was mapped as the "Fruit Home Colony" subdivision in the early 1900s. It is evident that the area was not developed as a subdivision and has been in agricultural or forest use since 1993, as evidenced by the orchards, forests, and open space depicted in the aerial photographs. Pursuant to Washington State law, subdivisions mapped but not developed prior to the creation of modern subdivision statutes are invalid. Consequently, the area near Fruit Home Colony cannot be considered "developed" just because there is a historic subdivision map depicting small lots.

Graves Rd. to Northwestern Lk. Rd. 7/30/1993 - "Fruit Home Colony"



Google earth

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Fordyce Rd. 7/30/1993 - "The Big Bend"



Google earth

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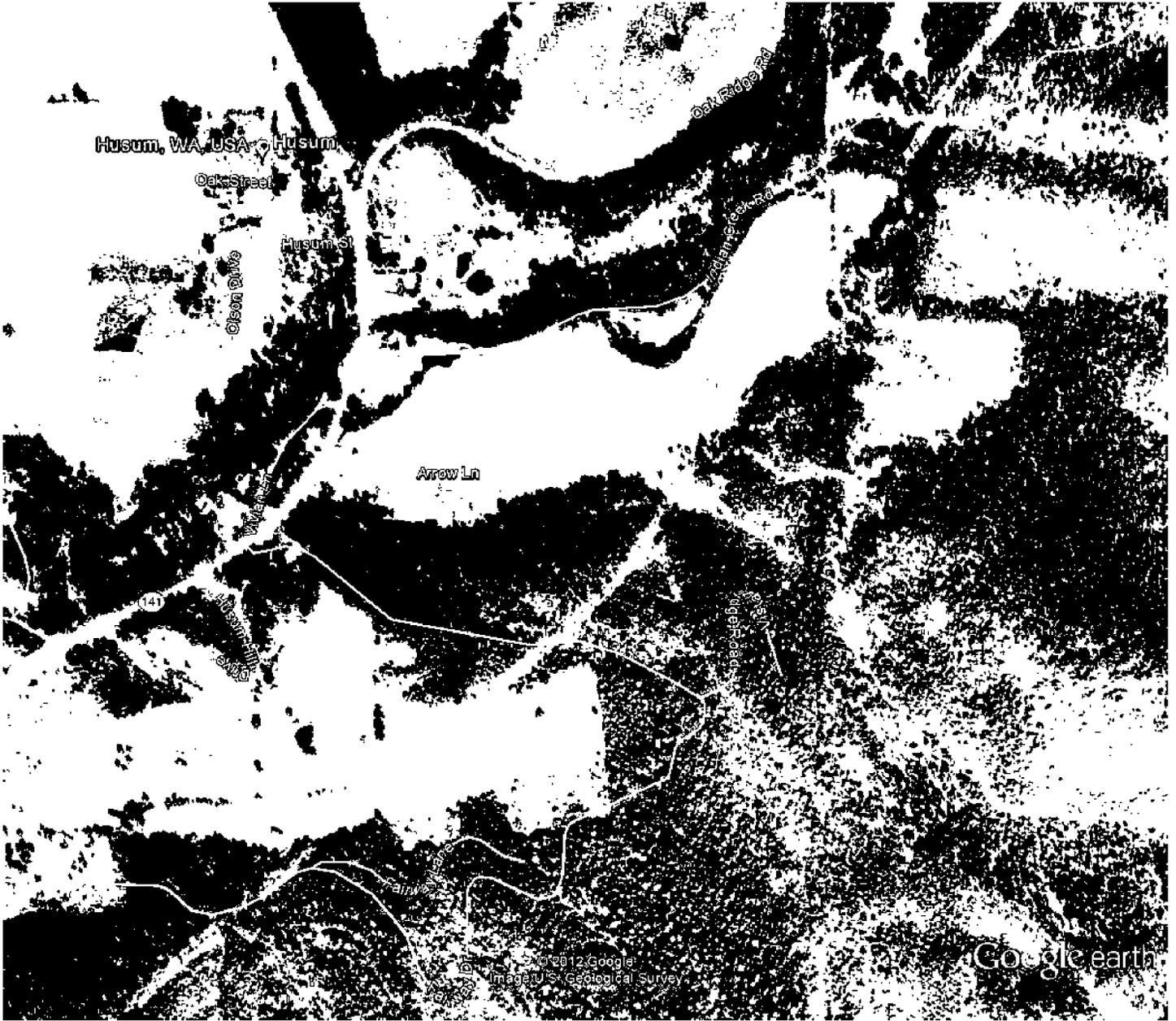
Fordyce Rd. 11-3-2011 - "The Big Bend"



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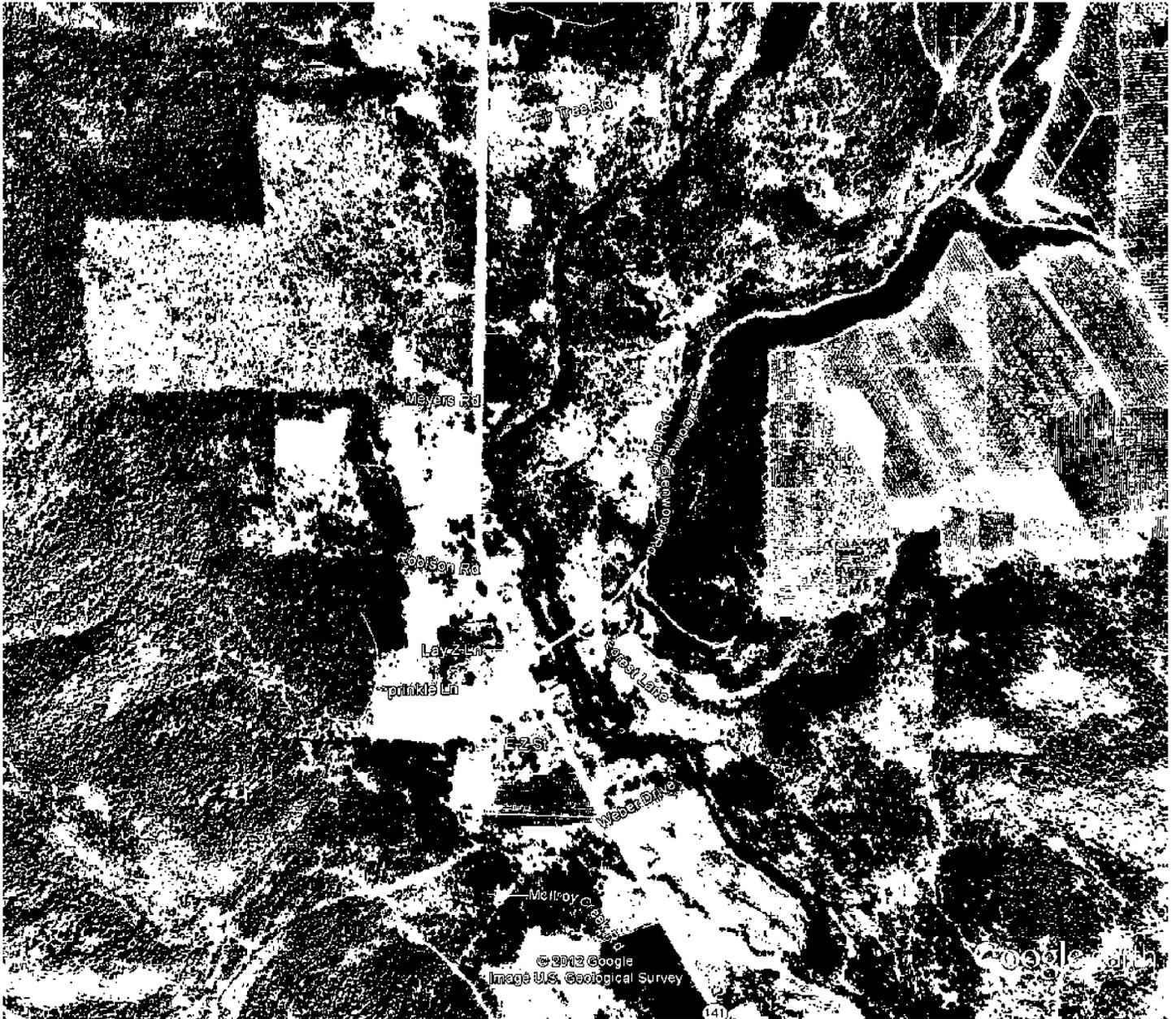




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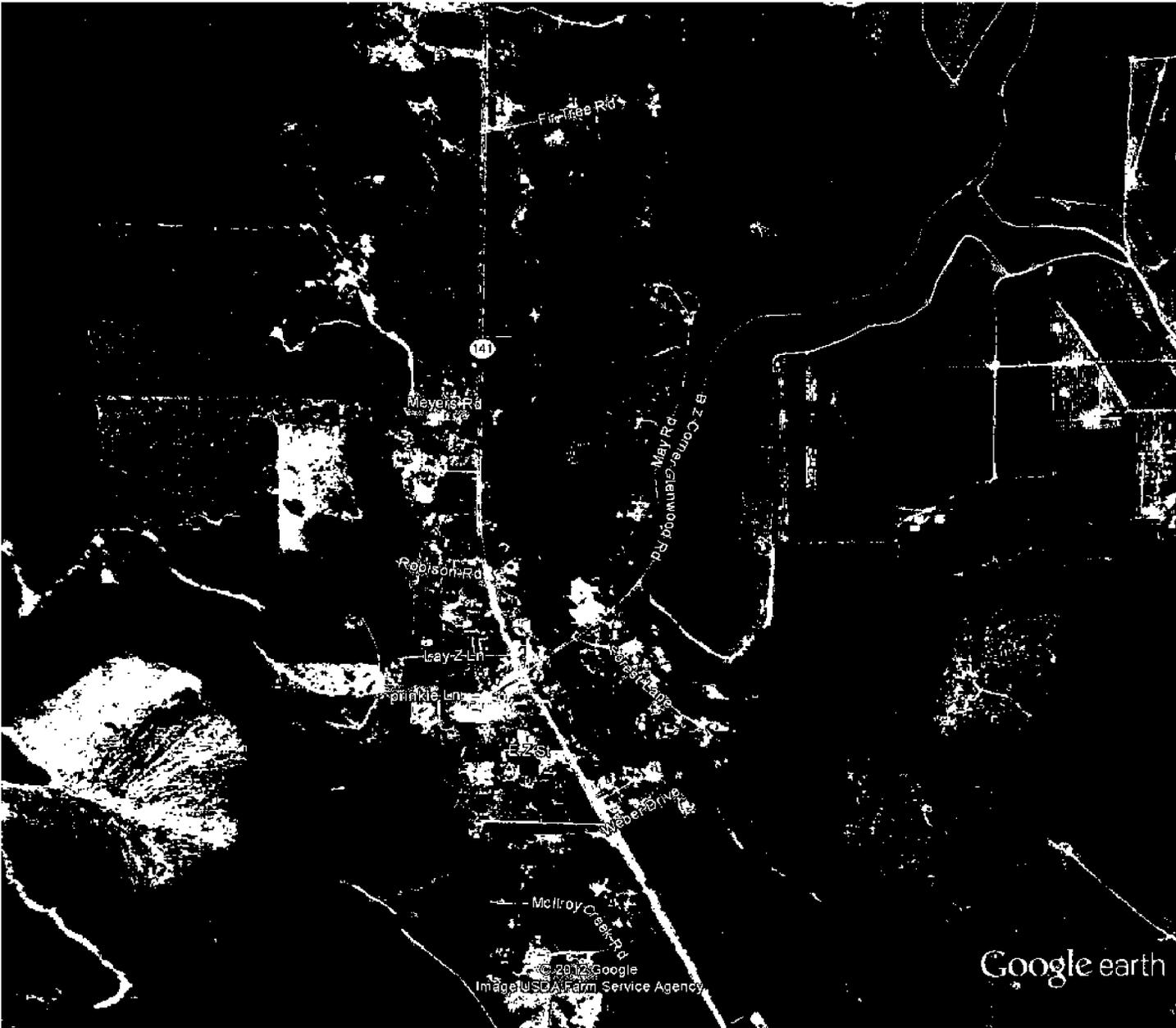




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SCOTT G. WEBER, CLERK
CLARK COUNTY

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

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FRIENDS OF THE WHITE SALMON RIVER, a Washington non-profit corporation, and FRIENDS OF THE COLUMBIA GORGE, an Oregon non-profit corporation.

Plaintiffs/Petitioners,

v.

KLICKITAT COUNTY.

Defendants/Respondent.

NO. 12-2-02455-7

DECLARATION OF
PAUL POKNIS

I, PAUL POKNIS, make this declaration based upon my personal knowledge and belief and declare as follows:

1. My name is Paul Poknis. I live at 20 Cottonwood Lane that is just a gravel driveway off of Fordyce road just south of Husum. I am 63 years old and retired, for medical reasons, from my home remodeling business.

2. I am the President of the Fordyce Water Association, a small-non-profit entity that supplies water to the town of Husum and to homes south along highway 141 to what used to be known as Northwestern Lake Road.

3. I have been in this position for sixteen years that is about as long as the Fordyce Water Association has been in existence. I am not paid for my work there. I chose to get involved because I come from a waterline construction family and it looked like a good fit. And this is my home.

DECLARATION OF PAUL POKNIS - 1

Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
Tel. (503) 525-2727

33

0-000001571

1 4. My wife Pat, who is recently retired from 34 years in the public school system as
2 an educator and administrator, and I have lived in the valley since 1976. We were the last family,
3 with our son Jonathan, to live in a little white house that was on the property that would become
4 the Raft and Kayak Launch Site in BZ Corners.

5 5. In 1981 we bought property just south of Husum and moved onto the property in
6 1985. We live on half of what used to be a "Schoolhouse Forty." A small creek, which is about a
7 six-foot wide channel, runs the length of our property and eventually empties into the White
8 Salmon River. This creek has been recognized as a 'shelter stream' for the salmon that have been
9 making their way upstream since the hole was blasted in Condit Dam in October 2011.

10 6. When I moved here in 1976 the issue that was front and center was our local
11 Public Utility District's effort to throw up about half a dozen dams in the river canyons above BZ
12 Corners. A fifty-foot high earthen dam across the Trout Lake Valley just above the town of
13 Trout Lake was also in the works.

14 7. Looking back and thinking of the over thirty thousand people who floated or
15 kayaked our river this year it seems an insane idea. Those thousands of people also ate out at our
16 local restaurants – maybe had a beer at the pub in White Salmon – or played a round of golf at
17 Husum Hills - good clean money that has helped revitalize not only the town of Husum but the
18 entire valley from White Salmon to Trout Lake. And buildings that would have sat idle in
19 Husum are now alive with visitors from all over the world, enjoying the river that, if our local
20 PUD had their way, might not have been.

21 8. And now to my point. I believe that had it not been for the efforts of the Friends
22 of the White Salmon that our local PUD would have rolled right over the local population and we
23 would have been left with a dead river.
24
25
26

DECLARATION OF PAUL POKNIS - 2

Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
Tel. (503) 525-2727

0-000001572

1 9. Since their inception as a non-profit organization the Friends of the White Salmon
2 River – all volunteers - have worked to keep the local population up on events of the day not only
3 concerning the river but also the valley around it. The Friends of the White Salmon has been
4 working to restore and preserve the wild and scenic beauty that makes this place special since
5 1976. The Friends of the White Salmon website is extremely helpful in that regard especially
6 now with the removal of Condit Dam. And now that the euphoria has worn off the Friends of the
7 White Salmon are working to bring all the river users together to work out an agreement on river
8 use that everyone can live with.
9

10 10. I am a supporter of the Friends of the White Salmon for the work they have done
11 and the work that they are doing. I support them for bringing a legal challenge to ensure our
12 county adheres to state law designed to make sure we consider our available options, disclose the
13 impacts of our action and plan consistent with state law.
14

15 11. There is no question my neighbors and I will be adversely affected if the County's
16 decision to rezone hundreds of acres of farm and forestland along the river to allow large-lot
17 residential subdivisions.

18 12. During the update process I personally presented a petition to the County Planning
19 Department signed by all the landowners along Fordyce Road, representing roughly 250 acres,
20 asking that we remain in the 'Rural Resource' designation. Klickitat County ignored our request
21 and threw the land along Fordyce Road into the 2-acre category, without so much as an
22 explanation why. That's how little they thought of me and my neighbors and our request. From
23 a property tax standpoint, this could be devastating to the mostly retired population who are just
24 interested in raising horses, or grazing cattle, or growing alfalfa.
25
26

1 13. So what does a person like myself do? I play by the rules, I participate in my
2 democracy, I gathered the signatures, I drove the fifty miles to Goldendale, only to see that the
3 County will not let the landowners along Fordyce Road have any say in the matter if they want to
4 protect their land. Instead, the County attempts to be fair by giving certain landowners the option
5 to choose to change the zoning on their land. The result is a private decision for private gain –
6 some land with dense zoning immediately adjacent to rural resource land – and a zoning decision
7 that has no relation to the public's interest in the river or the surrounding landscape.
8

9 14. The land my wife and I live on is home to a diversity of plants and animals.
10 Wildlife is abundant – from cougar down to the river otter I found playing in our creek one day. I
11 enjoy the presence of these wild animals and increased residential development on neighboring
12 land will negatively impact the wildlife.
13

14 15. All I have ever been looking for from our county government is an attempt at a
15 balanced approach to land use planning – instead of an approach that benefits a few large
16 landowners. People live here for the natural beauty – and visitors come to experience the same
17 thing. All I have asked is for the County government to consider an alternative that the
18 community could support, an alternative that would not threaten the very character of this place
19 and the fish, wildlife and water supplies that makes it special place. I have submitted some
20 wildlife pictures taken with several trail cameras I have set up around our property. Please
21 reference Exhibit#1. These are just a few of the several hundred pictures I have on file. Thank
22 you.
23

24 Executed in Husum, Washington this 5th day of September 2012.

25
26

Paul Poknis

DECLARATION OF PAUL POKNIS - 4

Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
Tel. (503) 925-2727

0-000001574

Exhibit 1 – Photo A – Nursing Elk



Exhibit 1 to Declaration of Paul Poknis

Exhibit 1 – Photo B - Bobcat



Exhibit 1 to Declaration of Paul Poknis

0-000001576

Exhibit 1- Photo C - Elk



Exhibit 1 to Declaration of Paul Poknis

Exhibit 1 – Photo D – Elk Herd



Exhibit 1 to Declaration of Paul Poknis

0-000001578

Exhibit 1 – Photo E - Bear



Exhibit 1 to Declaration of Paul Poknis

0-000001579

Exhibit 1 – Photo F - Buck

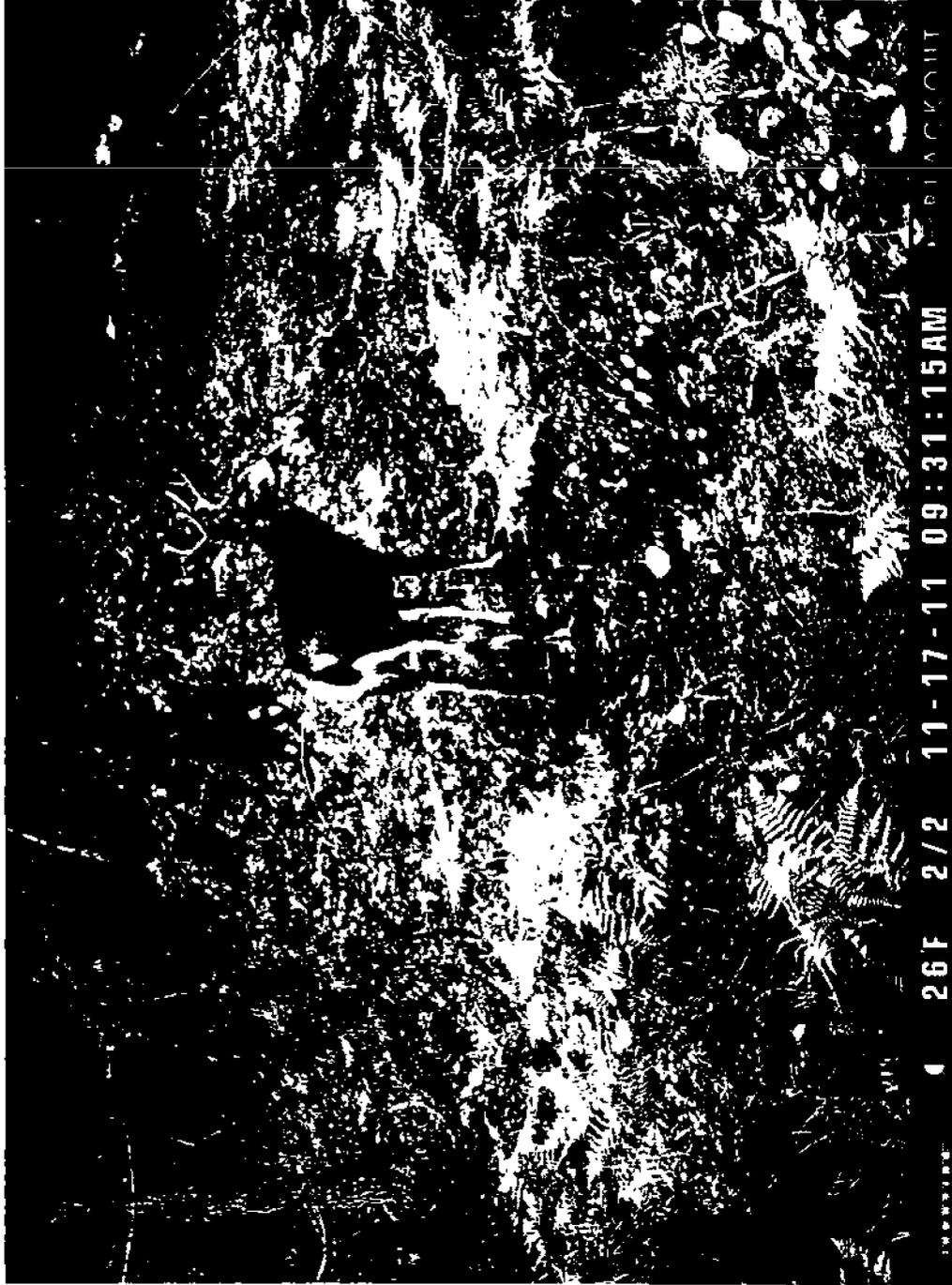


Exhibit 1 to Declaration of Paul Poknis

Exhibit 1 – Photo G – Confluence of Creek and White Salmon River



Exhibit 1 to Declaration of Paul Poknis

Exhibit 1 – Photo H - Bear



Exhibit 1 to Evaluation of Paul Colne

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SCOTT G. WEBER, CLERK
CLARK COUNTY

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

FRIENDS OF THE WHITE SALMON RIVER, a Washington non-profit corporation, and FRIENDS OF THE COLUMBIA GORGE, an Oregon non-profit corporation.

NO. 12-2-02455-7

Plaintiffs/Petitioners,

DECLARATION OF DAVID HAMMOND

v.

KLICKITAT COUNTY.

Defendants/Respondent.

I, DAVID HAMMOND, make this declaration based upon my personal knowledge and belief and declare as follows:

1. I am over 21 years of age.
2. My wife and I have been living in the Husum and BZ Corners area for 10 years.

We currently reside in Skamania County, immediately across the White Salmon River from the area that Klickitat County has rezoned for rural residential development. My wife and I live, work and play in and around the area that has been rezoned by Klickitat County.

3. I am a supporter of Friends of the Columbia Gorge. By challenging Klickitat County's rezoning decision for failure to comply with applicable laws, the Friends of the Columbia Gorge is working to protect my personal interests, which are explained below.

20

1 4. I am whitewater enthusiast and I was first attracted to this area for its pristine
2 beauty, laid-back lifestyle, and of course, beautiful rivers. I have earned a living, at least part of
3 the year, as a whitewater rafting guide on the White Salmon River. I also regularly kayak on the
4 White Salmon River. I have attached as Exhibit 1 a photo of me kayaking on the White Salmon
5 River and other photos I have taken of the river and its tributaries.
6

7 5. Over the years, I have been surprised and dismayed to watch new houses being
8 built within sight of the White Salmon, detracting from its wild & scenic character. I thought that
9 the river had protected status as a Wild & Scenic River. I have since learned that it is up to the
10 County to enforce the law and plan to ensure that future land use patterns are consistent with the
11 Wild & Scenic River Management Plan prepared by the Forest Service in coordination with the
12 County and the local community.
13

14 6. Over the last several years I have also been tracking forest practice applications on
15 the Washington Department of Natural Resource's website to track proposed clearcuts near my
16 home and areas where forest lands are at risk of being converted to new houses. I have
17 personally observed new roads and clearcuts that could be part of long-term plans for residential
18 development. Klickitat County's decision to rezone over 1,000 acres of land along the river
19 opens the door additional clearcuts and the permanent conversion of forest lands near my home
20 and along the White Salmon River.
21

22 7. Over the past few years, my wife and I have scrimped and saved to purchase land
23 near the former Northwestern Lake, which is now the free-flowing White Salmon River, and built
24 a home by my own labor. Our home is adjacent to the Husum/BZ rezone area. We have also
25 recently started a family of our own, and want to pass this area on to our daughter in a better
26 condition than we found it. We went to great lengths to build our house as ecologically minded as

1 possible. It is small, passive solar, made of sustainably harvested local lumber, and insulated with
2 sheep's wool.

3 8. I am not opposed to new development in the area, rather I am opposed to
4 sprawling and uncoordinated development across the landscape. The Husum/BZ rezone simply
5 does not address some key issues affecting current full time residents of the area.
6

7 9. Klickitat County's action does not provide adequate protection for the existing
8 groundwater supply and quality. A well supplies our water like most of our neighbors. When the
9 Condit Dam was removed and Northwestern Lake was drained, most of our neighbors lost their
10 wells due to the groundwater levels dropping. Our own water level dropped significantly. Our
11 experience highlights the fragility and interconnected nature of the groundwater supply of this
12 area.
13

14 10. I have a university degree in Geology from West Virginia University, and I do not
15 believe that the area will support the development of hundreds of new wells needed to supply
16 sprawling development across the landscape. I and other property owners may be personally
17 affected if groundwater levels drop any further, which is a significant risk if the County's
18 proposed zoning is implemented.
19

20 11. Klickitat County's rezone does not adequately address the impacts from increased
21 traffic and more entrances and exits on Highway 141. Highway 141 is already a very busy road.
22 The proposed plan makes no provisions for turnouts, extra lanes, etc., that would prevent or
23 reduce impacts from the substantial increase in traffic. I would be personally affected by this
24 increase in traffic because I rely on Highway 141 and Northwestern Lake Rd., as they pass
25 through the area that Klickitat County has rezoned, to access our home.
26

DECLARATION OF DAVID HAMMOND - 3

Crag Law Center
917 SW Oak Street, Suite 417
Portland, OR 97205
Tel. (503) 525-2727

0-000001603

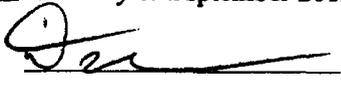
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12. Klickitat County's rezone will degrade the rural character of my community. Sprawling housing developments across the rural landscape will change the character of the community. The rezone allows extensive development near my land, which would adversely affect my family's quality of life.

13. Klickitat County's action would degrade the quality of my experience of kayaking and rafting on the White Salmon River by increasing development visible from the river, potentially harming water quality in the river, and reducing flows in tributary streams, seeps, and waterfalls along the White Salmon River.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge, information, and belief.

Executed in White Salmon, Washington, ~~Oregon~~ this 5th day of September 2012.



David Hammond

Exhibit to the Declaration of David Hammond



David Hammond kayaking on the White Salmon River

0-000001605



David Hammond and friends kayaking and rafting on the White Salmon River



A tributary to the White Salmon River



State of Washington
Department of Fish and Wildlife
2108 NE Grand Blvd., Vancouver WA 98661 (360) 696-6211

March 3, 2010

Curt Dreyer, Director
Klickitat County Planning
228 W. Main St, CH-17
Goldendale, WA 98620

RE: WDFW Follow Up Comments on the Husum-BZ Corner Subarea Plan

Dear Mr. Dreyer:

Thank you for the opportunity to comment on Klickitat County Husum-BZ Corner subarea plan. The Washington Department of Fish and Wildlife (WDFW) has reviewed this land use proposal and offers the following comments for your consideration.

WDFW appreciates Klickitat County's deliberative process to evaluate potential impacts from this major land use decision, which would affect the development potential on approximately 2,000 acres of the Lower White Salmon River valley. This area harbors high biological diversity, yet is under intense development pressure with forests that are at risk of catastrophic wildfire. Below, we organize our comments around the topics of wildlife habitat, watershed protection, consistency with other plans, and Resource Lands zoning.

Wildlife Habitat – The BZ Corner-Husum-White Salmon corridor harbors important wildlife habitat, including elk and deer winter range, oak woodlands, and State-threatened Western gray squirrel. The valley's mix of pine forest, oak woodlands, open agricultural areas, and stream-riparian corridors represents especially valuable low elevation winter range habitat for elk and deer. Western gray squirrel populations occupy relatively unfragmented pine-oak forests. The area's oak woodlands hold special significance due to the number of imperiled plant and animal species they harbor, as well as their food-value to certain wide-ranging bird and mammal species.

The wildlife value of these lands is related to the close juxtaposition of different habitats, with currently little fragmentation by roads or other development. As human densities increase, road construction and development will intensify, thereby jeopardizing wildlife habitat. It is difficult to summarize and predict impacts to wildlife from this proposed land use change, but WDFW's new management recommendations "Landscape Planning for Washington's Wildlife" offers some insights for policy-makers (<http://www.wdfw.wa.gov/hab/phsrecs.htm>).

As human densities increase in the White Salmon River Valley, the percentage of native species persisting in developed areas will decline, but this decline can be partially mitigated for using tools like cluster development or other conservation practices (REF, p. 1-1). Figure 1.2 below is taken from the WDFW landscape planning document and illustrates these expected changes and the choices before us.

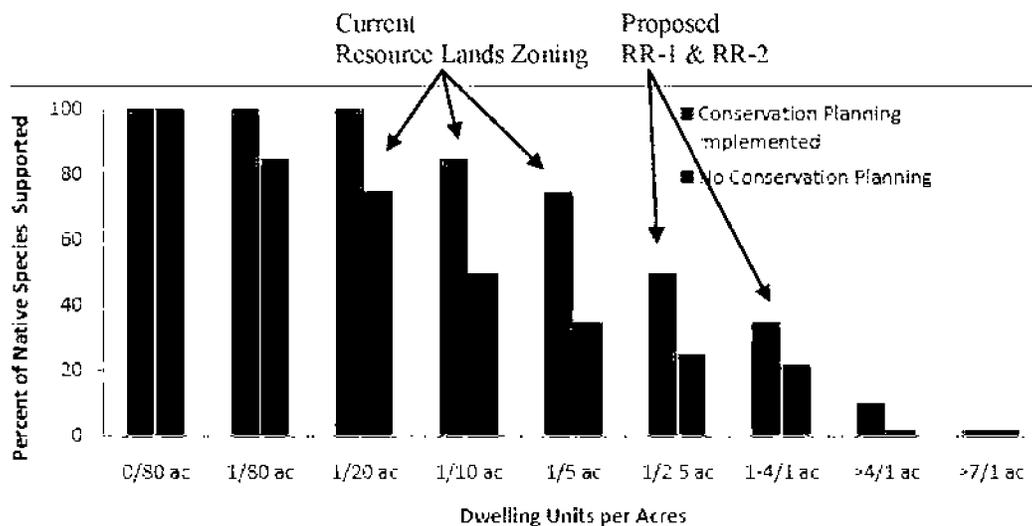


Figure 1.2. Percent of Washington's native bird, mammal, amphibian, and reptile species able to persist as dwelling density increases across the undeveloped to urban gradient. Based on data in the Species and Development Database in Appendix 5 of this document (some density categories are represented as ranges).

This habitat and wildlife diversity decline will obviously not affect all species equally. Large, wide-ranging species like deer and elk may continue to make intermittent use of the valley bottom as they transit through the area, but may suffer higher mortality from traffic fatalities or winter range displacement. Smaller, less mobile amphibians and reptiles would likely see increased habitat and population fragmentation leading to localized extinctions. Certain species occupying only the valley lowlands will likely suffer greater impacts from the new proposed development, as compared to wide-ranging species, or those who can also persist in surrounding forested uplands.

One species in particular, Western gray squirrel, is of particular interest because it is listed as threatened in Washington State and has a history of catastrophic declines. While Western gray squirrel populations generally persist at or below human densities of one dwelling unit per 20 acres, they do not typically persist at densities greater than or equal to one dwelling unit per five acres. WDFW expects that Western gray squirrel populations will likely not persist on lands rezoned from Resource Lands to Rural Residential-2 under this proposal.

WDFW appreciates that Klickitat County seeks to maintain the current Resource Lands zoning along the valley between Husum and BZ Corner, thereby maintaining a critical east-west open space and wildlife movement corridor across the center of the subarea.

However, we are concerned with the proposed intensification of land use in the area between Husum and White Salmon, and with associated increases in traffic which will have deleterious impacts to wildlife. If Klickitat County pursues this large-scale rezone, we strongly encourage the County to require proactive conservation practices like cluster development, low impact development, and road crossing improvements for fish and wildlife.

Watershed Protection – WDFW appreciates the fine work performed by Aspect Consulting on behalf of Klickitat County in the November 3, 2009 hydrologic assessment of the Husum/BZ Corner subarea. The assessment helps clarify some of the water challenges before the community, and helps document assumptions behind Klickitat County's water and land use planning. This analysis and report go beyond what is normally required for small communities considering comprehensive plan changes of this magnitude and the County should be recognized for its leadership in the development of this important planning tool.

The Aspect Consulting hydrologic assessment highlights potential stream flow impacts from groundwater withdrawal on White Salmon River tributaries as one immediate management challenge in the watershed. Streams like Rattlesnake, Indian, and Spring creeks are naturally flow-limited, yet represent important native fish strongholds that will likely become even more significant following removal of Condit Dam. Under existing zoning, stream flow in these tributaries is jeopardized by domestic residential well withdrawals from groundwater that is in hydraulic continuity with surface waters.

WDFW is concerned with potential stream flow impacts to Lower White Salmon River tributaries because of documented problems in similar areas of neighboring Skamania County. The 2003 WRIA 29 Wind-White Salmon level 1 technical assessment describes stream flow impacts on Trout and Bear creeks, and the lower Wind River (p. 4-14 to 4-16) related to domestic water withdrawals. Stream flows in Trout and Bear creeks have already been impacted by water withdrawal, jeopardizing in-stream fish habitat.

Though we are generally pleased with the Aspect Consulting study, WDFW does have some questions about certain assumptions made in the study. We question the assumption that there will be no new agricultural land uses, and that existing agriculture will decline with expansion of 2-acre rural residential lots. The study also uses a modest 3% population growth rate for the subarea, but it is useful to know that Washington State Office of Financial Management small area population growth data indicate that Husum/BZ Corner and North White Salmon grew by 10.9% and 13.2%, respectively over the period 2000-2009 (<http://www.ofm.wa.gov/pop/smallarea/default.asp>).

WDFW requests the hydrologic report be submitted to Washington Department of Ecology and the east WRIA 29 planning unit for peer review. A formal peer review process would help highlight the report's assumptions and appropriate uses in land use decision-making. It would also be worthwhile to consider the report's findings in relation

to any other available watershed data – the east WRIA 29 watershed planning forum would be an excellent venue for such a discussion.

Consistency with Other Plans – Beyond issues surrounding the applicability of the Aspect Consulting study, WDFW requests that Klickitat County review the Husum-BZ Corner subarea plan for its consistency with other plans and planning efforts. Two important plans to consider are the 1991 Lower White Salmon National Wild and Scenic River Management Plan, Husum and White Salmon community wildfire protection plans, and the ongoing east WRIA 29 White Salmon watershed planning effort.

The 1991 Lower White Salmon National Wild and Scenic River Management Plan highlights important land management goals for this area, and discusses the need to maintain buffers of undisturbed natural vegetation along the river and limit new development. It recommends residential development limits of one dwelling unit per 20 acres, except in Husum and BZ Corner where two units/acre (or four units/acre for development on a community sewer system) could be accommodated. The management plan identifies the need for land acquisition by the USFS to safeguard more than 700 acres of diverse oak woodlands and late-succession pine-oak forests in the river corridor.

WDFW would also like to see land use decision-making better coordinated with community wildfire protection and watershed planning, since both water and wildfire have profound impacts on fish and wildlife habitat. The east WRIA 29 watershed planning unit is an important forum for such coordination, and though a watershed plan has not yet been developed we suggest that the County work with watershed stakeholders to more explicitly address water needs from this proposed rezone proposal. Similarly, the County's land use decision-making has impacts on the community's ability to plan and prepare for wildfire. There is a critical need for better coordination among the various wildfire response stakeholders including Washington Dept. of Natural Resources, Underwood Conservation District, and local fire districts and we encourage the County to be a part of this discussion.

'Resource Lands' Zoning – WDFW has had difficulty in the past evaluating potential development impacts for wildlife on lands zoned 'Resource Lands' (RL). However, we do wish to acknowledge that this zoning designation provides a higher level of habitat protection as compared to the Rural Residential-2 (RR-2) designation. Though frequently confusing and not transparent, the RL designation incentivizes use of more progressive practices such as cluster development to better maintain habitat connectivity.

In whatever form the subarea plan is adopted, WDFW encourages Klickitat County to implement measures that would encourage habitat conservation. As these lands develop, there will be an ongoing need to remedy fish and wildlife passage across roads, restore and preserve oak woodlands, and protect other habitat values. Tools like those discussed in our new "Landscape Planning for Washington's Wildlife" publication will be critical to meeting these needs.

The challenge with planning and permitting growth in rural settings like the Lower White Salmon River Valley is to incorporate opportunities for development while protecting critical areas, rural character, water resources, and other public values. WDFW prefers retention of the existing Resource Lands zoning in portions of the subarea outside of Husum and BZ Corner, since this zoning designation is more compatible with fish and wildlife habitat protection as compared to the proposed RR-2 designation. If approved, WDFW recommends additional measures to avoid and minimize habitat impacts, including techniques like cluster and low-impact development.

We look forward to working with Klickitat County and area residents to protect the Lower White Salmon River valley's treasured natural heritage. If you have any questions or wish to talk more about our perspective, please do not hesitate to contact me.

Sincerely,



Ted Labbe, Biologist
Priority Habitats and Species Program
ted.labbe@dfw.wa.gov
360-906-6731

CC: Jennifer Davis, WDFW Technical Assistance Manager
Dave Howe, WDFW Region 5 Habitat Program Manager
Anne Friesz, WDFW Region 5 Assistant Habitat Program Manager
David Anderson, WDFW Region 5 Wildlife Biologist
Laurie Morgan, Washington State Dept. of Ecology
Janet Rogerson, Washington State Dept. of Commerce
Jeanette Burkhardt, Yakama Tribe Watershed Planner
Dan Harkenrider, USFS Columbia River Gorge NSA Manager



Condit Hydroelectric Project
Klickitat and Skamania Counties, Washington
FERC No. P-2342

Removal of Project Facilities: Monthly Decommissioning Progress Report

Prepared for the Federal Energy Regulatory Commission
For the Period
November 1, 2011 through November 30, 2011

The Federal Energy Regulatory Commission's (FERC) Order Accepting Surrender of License, Authorizing Removal of Project Facilities, and Dismissing Application for New License (115 FERC ¶61,232; May 18, 2006) together with Order on Rehearing, Denying Stay, and Dismissing Extension of Time Request (135 FERC ¶61,064; April 21, 2011) require PacifiCorp Energy to decommission and remove the Condit Hydroelectric Project with generation scheduled to cease in the fall of 2011. On May 20, 2011, FERC-Portland Regional Office (FERC-PRO) issued a letter authorizing construction to proceed on Northwestern Lake Bridge Stabilization and the City of White Salmon Water Transmission Line Relocation. Subsequently, FERC-PRO issued a letter on June 8, 2011 that authorized the balance of the construction work to remove the project facilities.

1. Progress of Work

Following the breach of Condit Dam through the drain tunnel on October 26, 2011, fluvial processes occurred during the month of November to bring about significant change throughout the former reservoir area as well as the downstream reach to the mouth of the White Salmon River. The free-flowing river transported a significant amount of sediment through the project area and down-cutting of the riverbed progressed toward the 1912 river channel elevations. Sediment deposition at the lower reach of the river that has historically been influenced by backwater effects of the Bonneville pool has resulted in a braided channel at the Underwood In-lieu Site. In addition, a visible sand bar formed in the Columbia River at the mouth of the White Salmon River. The emergence of the sand bar was reported to the U.S. Army Corps of Engineers and the U.S. Coast Guard per the project permit issued by the Army. A bathymetric survey of the Columbia River in the vicinity of the sand bar was scheduled for December 2, 2011.

2. Status of Construction

Post-breach monitoring of sediment transport, woody debris management, water quality and cultural resources continued through the month. Construction activities included demobilization of equipment that had supported activities leading to the breach, installation and maintenance of signs and fencing to support the closure to public access of the former reservoir area, and removal of community docks.

During the first week of the month, a few floating logs that did not immediately pass through

the drain tunnel were removed at the dam using the skyline yarder rigged with a grapple. No log jams occurred and the need to yard out logs quickly diminished. With the river flowing freely through the tunnel, the skyline yarder and its crew were placed on standby status, but available around-the-clock for recall to address woody debris removal from the face of the dam as needed. To ensure a clear running path for the skyline cables crossing over the dam above the tunnel, the end of the gate house, railings and the radial gate operators were removed from the dam.

As part of the sediment management process, aerial survey photographs of the former reservoir area were taken on November 4 to be used in the preparation of the sediment assessment report (attached). Some mechanical grading was performed on the west river bank downstream from Northwestern Lake Bridge, including along Northwestern Park, to cut back near-vertical slopes.

At Northwestern Lake Bridge, the original concrete footings and H-pile foundations for Pier 2 and Pier 3 were removed to the maximum practical extent and to a depth below the river bottom at the time. The temporary work bridge was dismantled and temporary fill that had been placed at pier 3 was removed. Equipment and materials were removed from the site and the work areas were restored with seed and hydro-mulch. By the end of November, down-cutting and transport of sediments from under the bridge revealed more of the original concrete footings and H-piling from the bridge. In addition, 75 wood pilings of unknown origin were revealed in the immediate vicinity of the bridge. The piles may have been related to earlier bridges or may have provided a temporary structure for bridge construction. The piles appeared to have been broken off below the mud line in the reservoir at the time.

The piles were arrayed to prevent safe boat passage under the bridge. The piles, along with river bank erosion resulting in steep banks, required the closure of the boat take-out in Northwestern Park. The U.S. Forest Service, commercial rafting companies and American Whitewater were notified of the dangerous conditions and the closure of the take-out. Signs were also placed to notify boaters at the river.

3. Construction Difficulties

Access to many areas of the project remained restricted due to ongoing erosion of the river banks and the resultant risks of instability.

4. Contract Status

The prime contractor is JR Merit of Vancouver, Washington.
Subcontractors active during this period include:

- Wildish Standard of Eugene, OR – Northwestern Lake Bridge stabilization
- Staton Companies, Eugene, OR – demolition of old bridge piers
- Tom Arnold Logging of White Salmon, WA – skyline yarder system
- James Dean Construction of White Salmon, WA – bridge site restoration and grading
- Riverbend Engineering of Albuquerque, NM – sediment transport monitoring
- Ellis Ecological Services of Estacada, OR – water quality monitoring

5. Critical Events and Dates

- June 27, 2011 – mobilization at Northwestern Lake Bridge
- July 7, 2011 – City of White Salmon contractor mobilized for water transmission line
- July 18, 2011 – mobilization at Condit Dam
- August 18, 2011 – fish salvage from plunge pool
- September 1, 2011 – commence tunneling at base of dam
- October 17, 2011 – complete Northwestern Lake Bridge stabilization
- October 25, 2011 – complete relocation of water transmission line
- October 26, 2011 – breach dam at tunnel
- February 23, 2012 – file sediment behavior report and grading plan for former reservoir
- April 30, 2012 – complete removal of original cofferdam and crib dam
- August 31, 2012 – complete removal of dam
- October 31, 2012 – complete re-vegetation of former reservoir

6. Foundations

No new foundations were constructed during the month.

7. Sources of Major Construction Materials

No new construction materials were brought to site during the month.

8. Materials Testing and Results

None required during the period.

9. Instrumentation

Water quality monitoring for pH and turbidity at stations upstream of the bridge near the confluence with Buck Creek and at the powerhouse continued through the month. The powerhouse instruments that had been damaged from the breach flow were replaced and recalibrated on November 16. Manual sampling was conducted during the interim period. The instrument at the Buck Creek location was reset several times to keep the probe submerged in the river as the channel evolved.

Five water quality monitoring buoys in the Columbia River measured turbidity and temperature from locations upstream of the mouth of the White Salmon River; at the mouths of the White Salmon River, Little White Salmon River, and Wind River; and at Cascade Locks. Four weekly summary reports were submitted to the State of Washington Department of Ecology.

10. Photographs

See appendix A, attached.

11. Erosion Control and Other Environmental Measures

Silt fencing was maintained around the staging areas at the boat ramp for the dam, around the temporary stockpile near the surge tank and at the yarder and along Powerhouse Road. The fencing was removed from the Northwestern Bridge work areas as part of the restoration

work at that location.

Oil absorbent pads and spill containment features were used under all stationery equipment around the site. Spill containment diapers were maintained under all mobile equipment.

12. Other Items of Interest

Two regulatory site inspections occurred during the month:

- November 9 -Federal Energy Regulatory Commission Portland Regional Office
- November 29 – Washington Department of Ecology

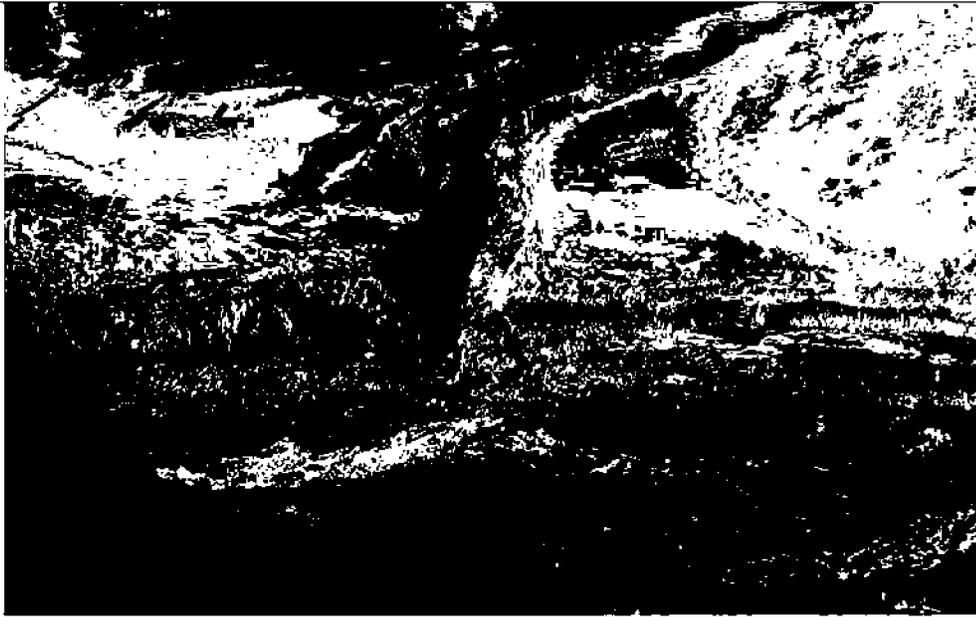
About 4 inches of snow fell on November 16 heralding the first winter storm of the season.

Per the Department of the Army permit for the project, a bathymetric survey of the forebay at Bonneville Dam area was conducted on November 15, 2011.

Attachments:

- A.** Project photos
- B.** Aerial photogrammetry

Appendix A
Project Photographs – November 2011



Mill Creek entering
White Salmon River
approximately 0.8-miles
upstream of dam.



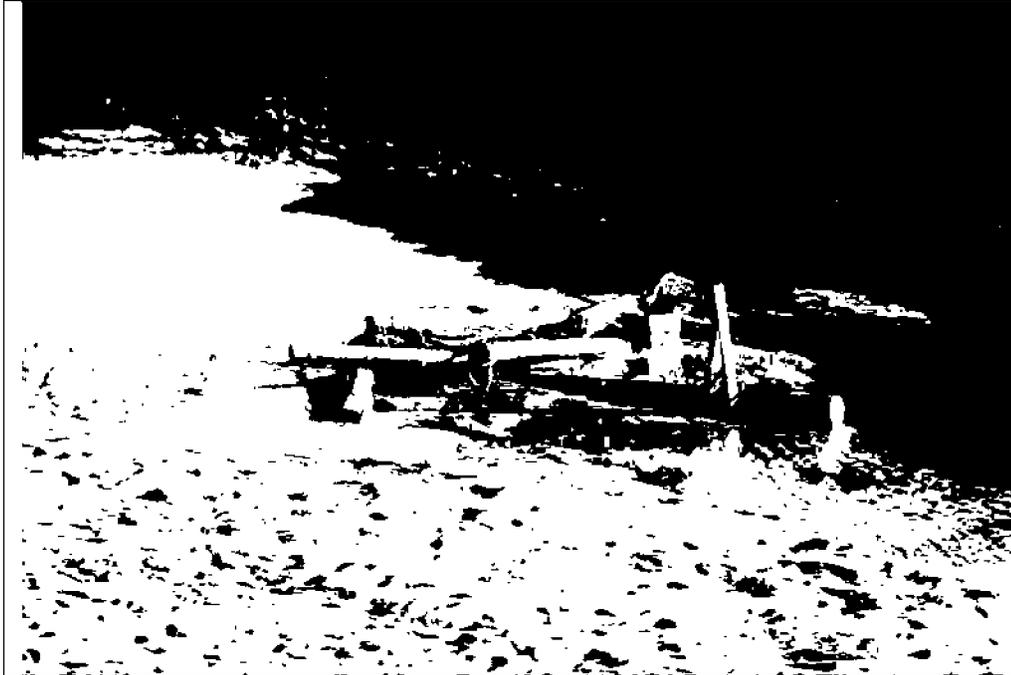
Condit Dam
approximately 1 week
after breach.



Underwood In Lieu
Fishing Access site and
mouth of White Salmon
River on November 1,
2011



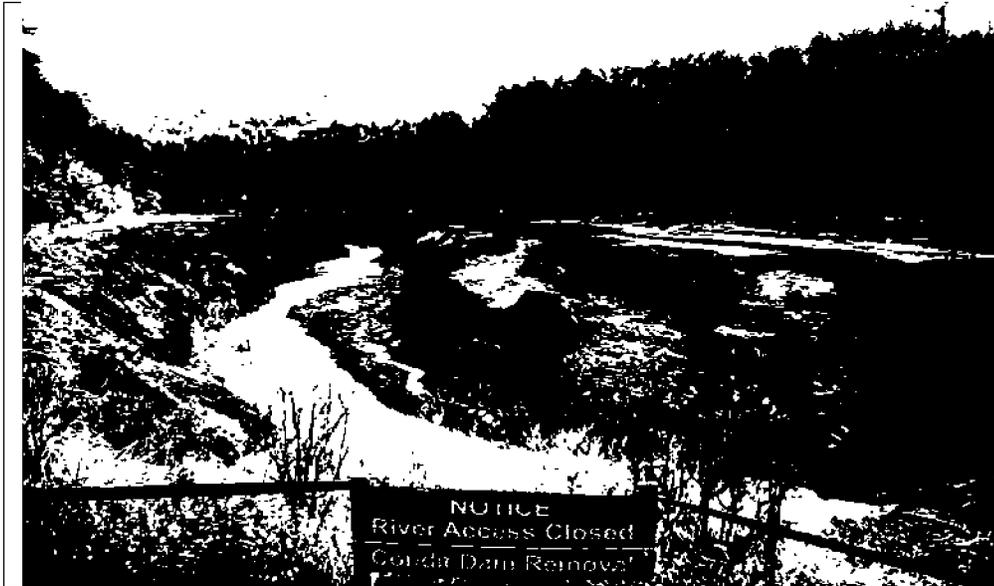
Sand bar in the Columbia
River on November 30,
2011



Abandoned City of White Salmon water pipeline. Prior to breach, this line was replaced with a pipeline crossing the river at the bridge.



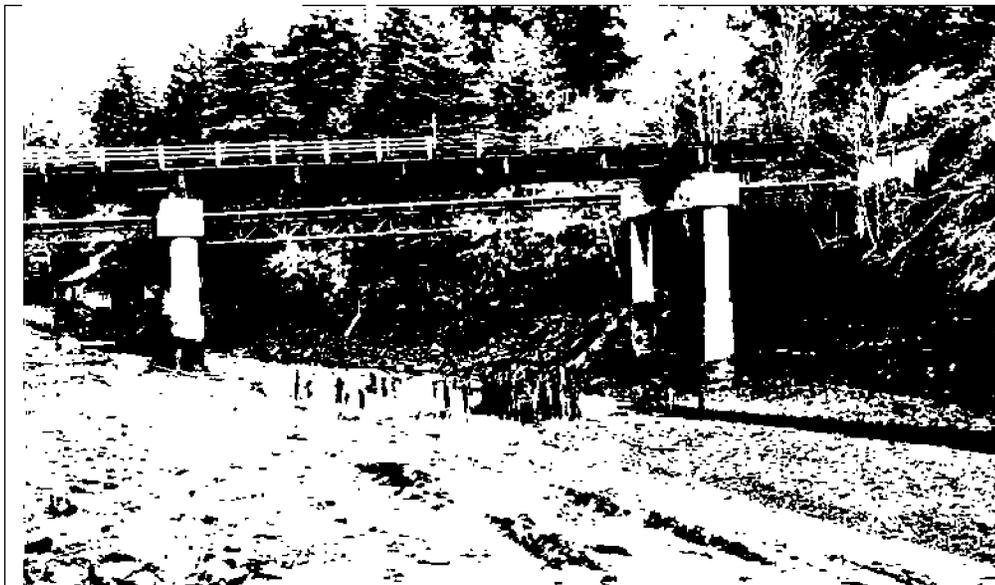
White Salmon River drain tunnel (lower left) on downstream side of dam.



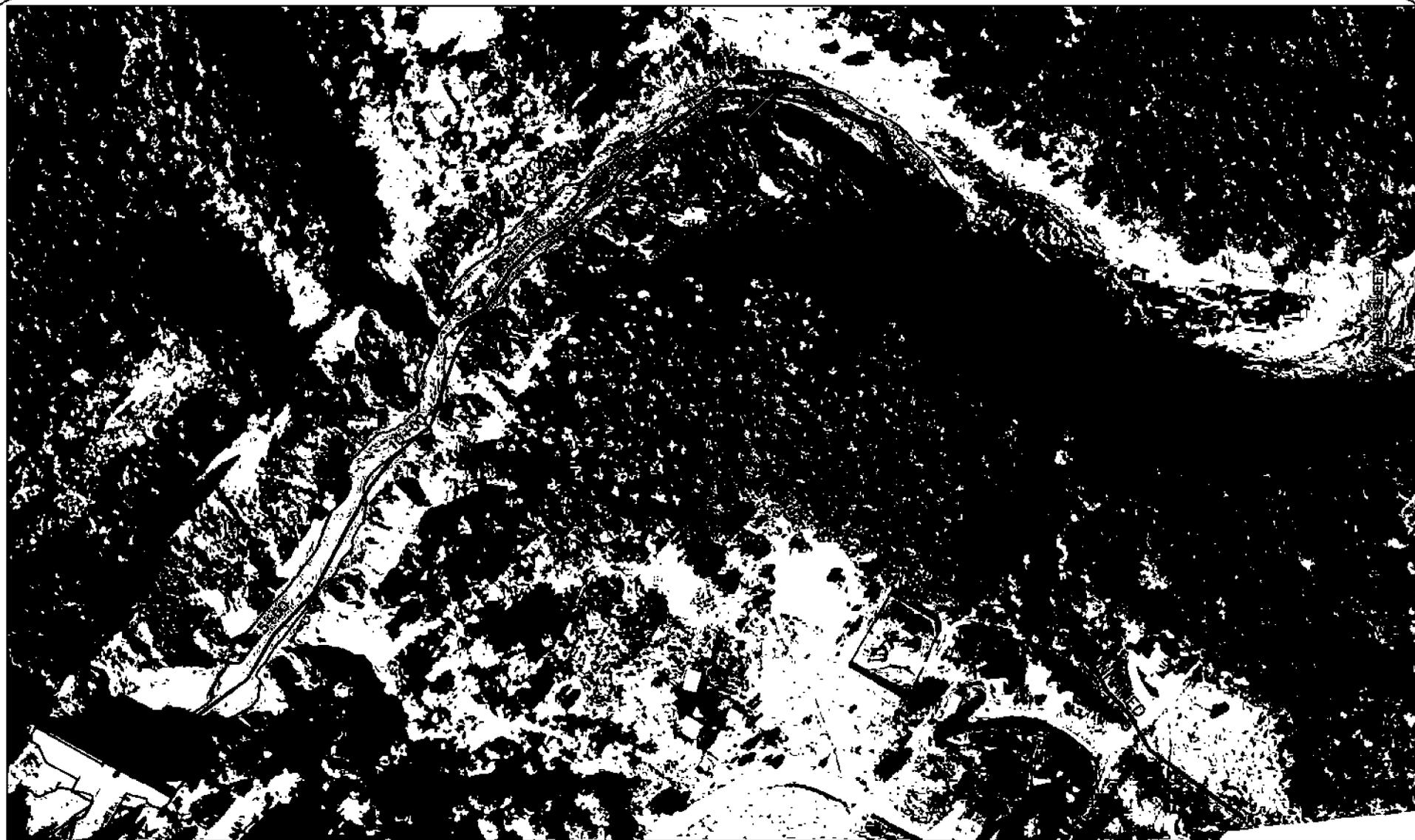
Looking upstream at White Salmon River approximately 0.5-miles upstream of dam.



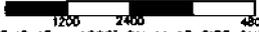
Original cofferdam (falls) upstream of dam.



Exposed wooden piles
under Northwestern Lake
Bridge.



 1912 SURVEY ALIGNMENT AND STATION VALUES
 11-4-2011 WATER SURFACE



 SCALE IS 1" = 1200' ON 11x17 SIZE SHEET
 ALL OTHER SHEETS USE SCALE BAR
 HORIZONTAL DATUM IS NAD 83


 INDUSTRIAL CONTRACTORS



 KATREND ENGINEERING, LLC
 102 2nd Street, Popoee Springs, CO 81147
 Tel: 970.294.1182 FAX: 970.294.1186
www.katrend.com

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Scale: 1" = 2400 ft	11-18-2011	

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 1912 SURVEY ALIGNMENT AND STATION VALUES
 11-4-2011 WATER SURFACE



 SCALE IS 1" = 1200' ON 11x17 SIZE SHEET
 ALL OTHER SHEETS USE SCALE BAR
 HORIZONTAL DATUM IS NAD 83

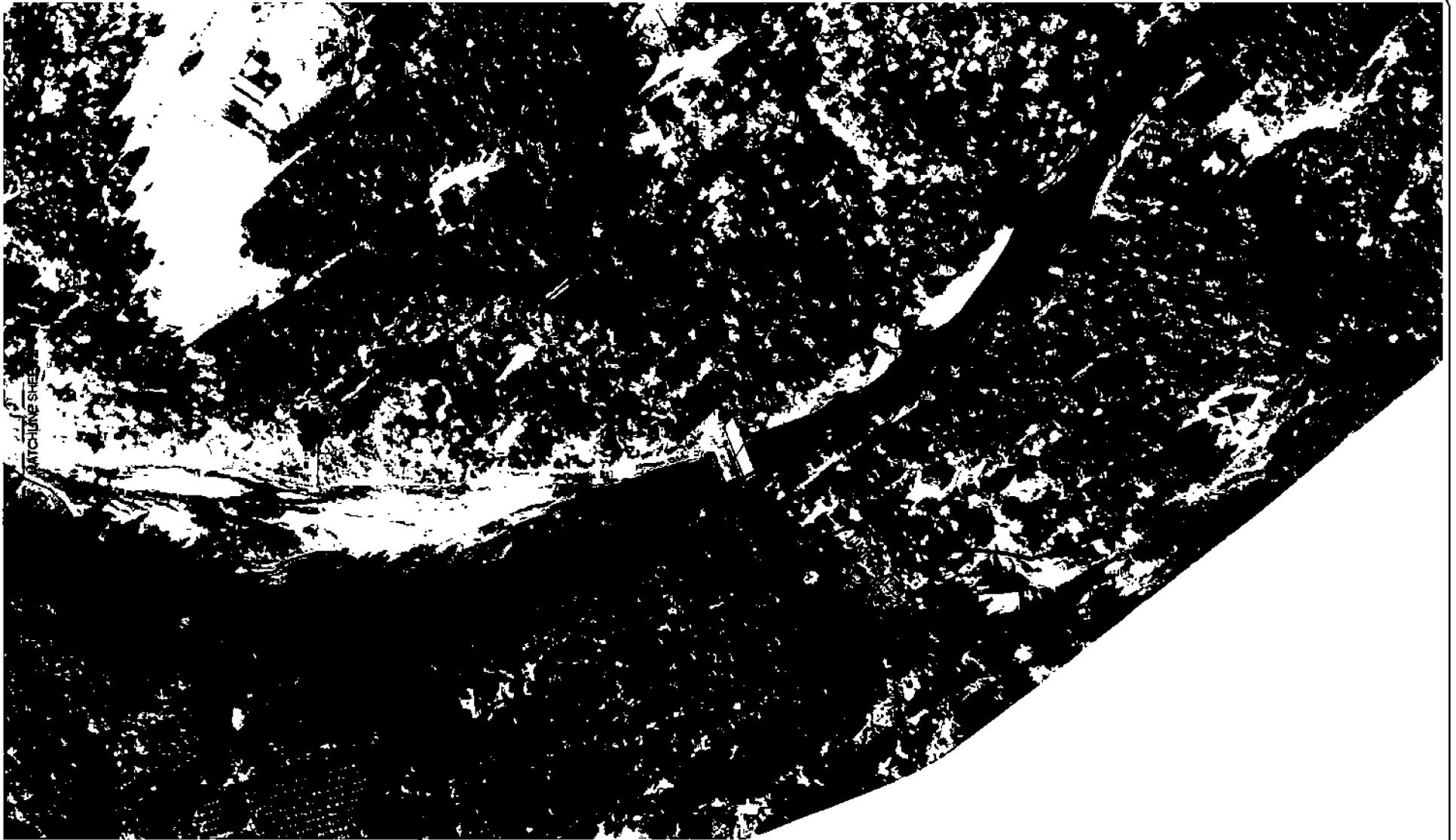

 INDUSTRIAL CONSTRUCTION



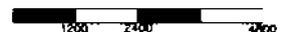
 RIVERBEND ENGINEERING, LLC
 102 3rd Street Pagosa Springs, CO 81447
 Tel: 970.264.1185 FAX: 970.264.1186
www.riverbendllc.com

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 1912 SURVEY ALIGNMENT
AND STATION VALUES
 11-4-2011 WATER SURFACE



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 INDUSTRIAL CONSULTING



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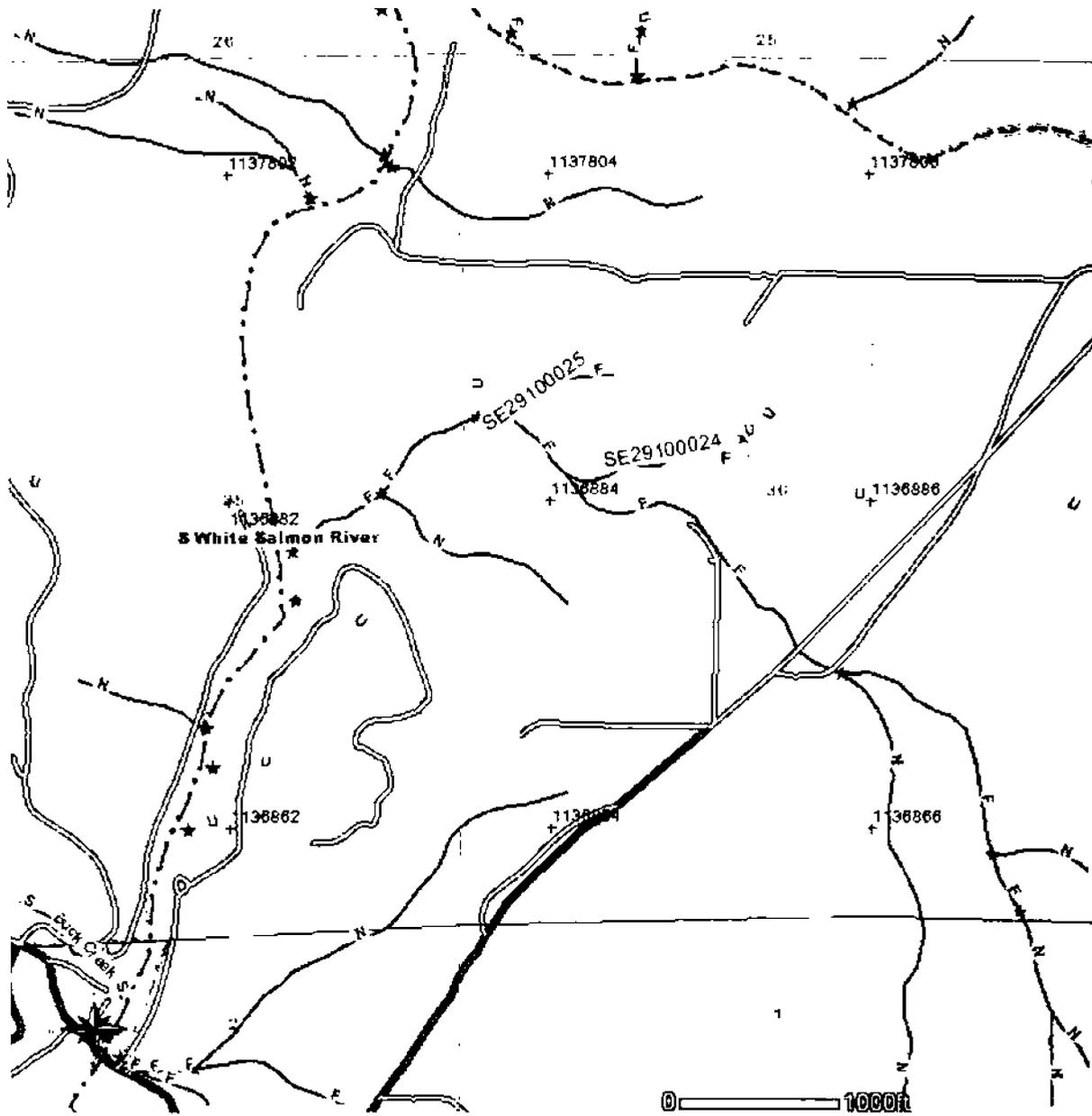
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		3
Scale: 1" = 2400 ft	11-18-2011	

216277

FOREST PRACTICE WATER TYPE MAP

TOWNSHIP 0 NORTH HALF undefined, RANGE 0 (W M) HALF undefined, SECTION 0

Application # _____



Monday, February 25, 2013 1:05:50 AM
 NAD 83
 Contour Interval: 40 Feet

Fordyce Water Association
Box 288
Husum WA 98623

December 15, 2011

For: Mark Yinger
Mark Yinger Associates

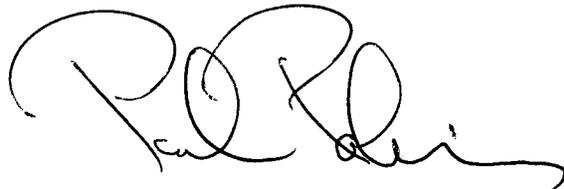
I have answers to your questions from our recent conversation:

1) Does Fordyce have the physical capacity to take on new customers?

The answer is no. We are at our physical capacity now of 125 hook-ups.

2) Does Fordyce have the ability to expand?

The answer is no and I see no change in the foreseeable future. It is a question of obtaining water rights, which can be a long process in the state of Washington. And there is the question of cost. Our bylaws prevent us from charging our existing customers for improvements done for 'development' purposes. We took on the town of Husum with the condition it would not adversely affect our membership. Husum came with water rights and money to cover the costs of the project. The same would apply to anyone else.

A handwritten signature in black ink, appearing to read "Paul Poknis". The signature is fluid and cursive, with large loops for the letters 'P' and 'K'.

Paul Poknis
President - Fordyce Water Association

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I served the foregoing
APPENDIX TO RESPONDENTS/CROSS APPELLANTS' OPENING
BRIEF on the parties listed below by e-mail and regular mail:

Susan Elizabeth Drummond, WSBA #30689
Law Offices of Susan Elizabeth Drummond, PLLC
5400 Carillon Point, Bldg. 5000, Ste. 476
Kirkland, WA 98033
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susan@susandrummond.com

Lori Lynn Hocter, WSBA # 39009
Klickitat County Prosecutor
205 S Columbus Ave MS-CH 18, Room 106
Goldendale, WA 98620
(509) 773-5838
lorih@klickitat.wa.us

Dated this 24th day of April 2014.



Ralph O. Bloemers, WSBA #30216

CRAG LAW CENTER

April 24, 2014 - 3:17 PM

Transmittal Letter

Document Uploaded: 452693-Klickitat County v. Friends of White Salmon River et al - Appendix - No. 45269-3-II.pdf

Case Name: Klickitat County v. Friends of the White Salmon River and Friends of the Columbia Gorge

Court of Appeals Case Number: 45269-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Appendix to Respondents/Cross-Appellants' Opening Brief

Comments:

Due to size limitations, the Appendix is being filed separately from the Respondents/Cross-Appellants' Opening brief. Further, given that the content is high resolution, color, this information is being submitted electronically for the convenience of the Court. Please advise if Respondents/Cross-Appellants should provide hard copies of the Appendix to the Court of Appeals, and if so, how many should be provided.

Sender Name: Ralph O Bloemers - Email: ralph@crag.org

A copy of this document has been emailed to the following addresses:

susan@susandrummond.com

nathan@gorgefriends.org

lorih@co.klickitat.wa.us

oliver@crag.org

ralph@crag.org