

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

MIKE WILLIAMS and)	
PAULINE DIEFENBACH)	Case No. 95-1-0009
)	
Petitioners)	ORDER OF
)	NONCOMPLIANCE
vs.)	
)	
KITTITAS COUNTY,)	
)	
Respondent)	
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I. PROCEDURAL HISTORY

On November 9, 1995, the City of Ellensburg filed a Petition for Review regarding agricultural lands of long-term commercial significance. (Petitioner No. 95-1-0008).

On November 9, 1995, Mike Williams and Pauline Diefenbach filed a Petition for Review regarding agricultural lands of long term commercial significance. (Petition No. 95-1-0009). The petitions were subsequently consolidated.

On April 9, 1997, the City of Ellensburg's petition was dismissed upon their motion.

In a Stipulated Order dated June 22, 1994, Case No. 94-1-0019-City of Ellensburg, Mike Williams and Pauline Diefenbach v. Kittitas County) Kittitas County agreed it was not in compliance with the requirements of the Growth Management Act. The Board, in that order, directed Kittitas County to adopt an ordinance designating agricultural lands of long term commercial significance and development regulations to conserve those lands.

On October 4, 1994, the Kittitas County Board of Commissioners approved Ordinance 94-123 which failed to designate a single acre of agricultural land of long term commercial significance and adopt required development regulations.

On October 21, 1994, the Board, with one member dissenting, held that Resolution 94-123 complied procedurally with the Board's Order of June 22, 1994.

On September 15, 1995, the County adopted Ordinance 95-13 designating agricultural resource lands. Kittitas County designated 12,790 acres of agricultural resource land in a "Commercial Agricultural Zone" ("CAZ").

On July 25, 1996, Kittitas County adopted Ordinance 96-10, the Kittitas County Comprehensive Plan pursuant to RCW 36.70A.

On May 7, 1996 the Eastern Washington Growth Management Hearings Board issued its Final Decision and Order (FDO) in the above entitled matter.

The pertinent conclusions in that Order are as follows:

5. ..that (Kittitas County) Ordinance 95-13 failed to comply with the requirements of RCW 36.70A.020(8), because it failed to meet both of the planning goals' minimum requirements to discourage incompatible uses on designated lands and to maintain and enhance natural resource industries.

8. ..that Ordinance No. 95-13 fails to designate agricultural lands of long-term commercial significance as required by RCW 36.70A.170(1).

9. ..that Ordinance 95-13 fails to assure the conservation of agricultural lands as required by RCW 36.70A.060(1).

On May 17, 1996 Petitioners Williams and Diefenbach filed a motion for reconsideration and a determination of invalidity. The Board thereafter issued an order amending its final decision, partially denying the motion for reconsideration and setting a hearing on determination of invalidity. On June 18, 1996 the Board hearing the motion and found Section 17A.55.030 of Kittitas County Ordinance 95-13, regarding "opt-out", invalid.

On September 10, 1996, Kittitas County adopted Ordinance 96-15, Development Regulations. Kittitas County designated an additional 6,000 acres of agricultural resource land in a commercial agricultural zone (CAZ) when it adopted Ordinance 96-15.

On May 27, 1997, the Eastern Washington Growth Management Hearings Board found Ordinance 96-15, adopted in response to the Board's Order of May 7, 1996, continued to be in noncompliance.

On July 2, 1998, the Board of Kittitas County Commissioners adopted Ordinance No. 98-13 with changes to Ordinance 96-15.

The Board held a compliance hearing on October 1, 1998 in Ellensburg, Washington. After hearing arguments from both parties on the issue of invalidity, the Board issued an order removing the declaration of invalidity of the “opt-out” provisions on agricultural lands.

At the October 1, 1998 compliance hearing, the parties presented oral argument and submitted written briefs concerning the question of the Respondent’s compliance with the GMA regarding designation and protection of agricultural lands of long-term commercial significance.

Between the time of the My 7, 1996 finding of non-compliance and the passage of Ordinance No. 98-13, two new County Commissioners were elected to the Kittitas County Board of Commissioners and a new standard of review was adopted by the legislature. The Board of County Commissioners reviewed the agricultural land of long-term commercial significance and found no reason to include additional acreage in the designation.

II. FINDINGS OF FACT

1. According to the 1992 Census of Agriculture, there are 355,360 acres of land in farms in Kittitas County, with an average farm size of 469 acres.
2. Net cash returns from agricultural sales in Kittitas County in 1994 was \$9,077,000.00 with an average net cash return per farm of \$11,959.00.
3. Data for 1994 shows that the one year in the past 25 years where the available irrigation water supply fell below 55%, the total “farm gate value” of agricultural products was \$59,107,280.00
4. Data for 1995, a year in which there was no water shortage, shows the total “farm gate value” of agricultural products to be \$71,802,597.00, an increase of more than \$12,000,000.00 over 1994.
5. Data for lower Kittitas County (the CleElum/Roslyn/Teaaway/Swauk areas excluded) shows there are 34,50 acres of croplands classified as prime soils by the Soil Conservation Services; 33,200 acres classified as soil of statewide importance; 49,040 acres classified

as soil of local importance; and 7,080 acres classified as unique soils. These lands total 83,880 acres.

6. Soils that do not receive an adequate water supply in at least 7 out of 10 years are reclassified to a less desirable classification. Agricultural lands in Kittitas County have not experienced the kind of prolonged drought conditions that would necessitate reclassification of Kittitas County soils.
7. According to Don Schram, Hydrology Manager, Bureau of Reclamation, only once every 25 years will there be significant hardship and crop loss from an inadequate water supply.
8. The only year since 1972 in which the available water supply was bellowed 55% was 1994. [Petitioner's Hearing Memorandum P4 and 5.]
9. In their effort to comply with the GMA and EQGMHB Order, the Respondent established a process to review lands not already included in the Commercial Agricultural Land Use. The method began with Prime or Unique soils classification as defined in ASCS Handbook 2-10 USDA and unique lands as defined in the 430-VI-Nationa Soils Handbook. In a sep by step basis, this acreage was reduced by the application of the following criteria:
 1. Parcel must be wholly located with either prime or unique soils classification (the parcel must be 100% prime or unique soils).
 2. Parcel must be a minimum of twenty acres in size.
 3. Parcel cannot be located in a designated UGA or UGN.
4. Current zoning of parcel (i.e. parcel must be located in the Agricultural-20 zoning classification).
5. Areas for consideration must have a minimum of four contiguous 20-acre parcels (not separated by road or other lands).
6. Current use of the land in question must be considered.
7. Adjacent land use (areas adjacent to rural development i.e. four lots or more, less than eight acres in size, should not be designated.)
8. Review of remaining criteria outline under WAC 365-190-050.
9. Parcel must be located within an irrigation district with senior water rights.

The lands being considered for inclusion in the agricultural Lands of Long-term Commercial Significance were reduced with each step until only small parcels existed. These were declared by the County Commissioners to be too small for their inclusion and were not added. The County readopted the boundaries of the agricultural lands of long-term commercial significance as they existed when this Board previously heard this matter and found them to not be in compliance. (Ordinance No. 98-13)

III. LEGAL ISSUES AND DISCUSSION

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ISSUE NO. 5: HAS KITTITAS COUNTY FAILED TO DISCOURAGE INCOMPATIBLE USES OF THE DESIGNATED AGRICULTURAL RESOURCE LANDS, OR TO MAINTAIN AND ENHANCE NAURAL RESOURCE INDUSRIES, AS IS REQUIRED BY RCW 36.70A.020(8)?

Petitioners' position: The Petitioners are not contesting uses permitted on agricultural resource lands but maintain the County has failed to maintain and enhance natural resource industries.

Respondent's position: The Respondent maintains this issue was not briefed by petitioners and believes it is no longer in dispute by the parties.

Discussion: The Petitioners have failed to carry their burden of proof.

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Conclusion: Issue No. 5 is abandoned.

ISSUE NO. 9: HAS KITTITAS COUNTY ASSURED THE CONSERVATION OF AGRICULTURAL LANDS, AS REQUIRED BY RCW 36.70A.060(1)?

Petitioners' position: The Petitioners maintain the failure to designate additional agricultural resource lands does not assure the conservation of such lands.

Respondent's position: The Respondent believes because of the lack of briefing by the Petitioners on this issue, it is no longer in dispute.

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Discussion: The portion of this issue resulting in a declaration of invalidity has been dealt with by separate order rescinding invalidity. The remaining issues will be address in Issue #8.

ISSUE NO. 8: HAS KITTITAS COUNTY FAILED TO DESIGNATE AGRICULTURAL LANDS OF LONG-TERM COMMERCIAL SIGNIFICANCE AS REQUIRED BY RCW 36.70A.170(1)?

Petitioners' contend as follows:

1) The Petitioners believe the evidence presented in this hearing and in the previous hearings, shows the County has failed to meet the minimal requirements of the GMA to designate agricultural resource lands.

Petitioners claim the Respondent has failed to comply with the GMA by their failure to include thousands of acres of agricultural resource lands in Ordinance 98-13, Section III.

The Petitioners maintain Kittitas County has designated insufficient agricultural lands able to sustain a viable agricultural industry. Petitioners believe the "Critical Mass" designation of agricultural resource lands is vital to the local agriculture based resource industries. Petitioners cite Chapter 307 SSB #6228 Sec. (1)(1994 in part: "...Successful achievement of the natural resource industries goal set forth in RCW 36.70A.020 requires the conservation of a land base sufficient in size and quality to maintain and enhance those industries and the development and use of land use techniques that discourage uses incompatible to the management of designated lands..."

Petitioners also state without a "critical mass", businesses that sell or repair farm equipment, businesses that sell feed for livestock or seed for crops, businesses that sell and apply fertilizers and pesticides will disappear. Petitioners contend there is no evidence in the record from any agricultural supplier, processor or marketer to show that their business does not depend on a healthy agricultural industry to survive.

2) The Petitioners believe the County's method to review other lands for inclusion in the agricultural resource lands, was flawed. The process adopted by the County was exclusionary, aiming only to reduce the acres considered. The Petitioners believe the county's denial of the use of an exclusionary process is misleading at best. The record amply demonstrates that with each successive map introduced by the Commissioners' staff, more land was removed from consideration for designation until nothing additional was left to designated. (Exs. 64, 65, 66, 67). At no time did the Commissioners ever question this approach or suggest some other method for analyzing the factors in the GMA or WAC. (Ex 69, p.8-9).

3) The County's Criteria 1 requires for any parcel to be considered for designation it must be 100% prime or unique soils. (Ex. 64, p.33). Petitioners believe starting the review process

by consideration of only prime and unique soils for designation, in light of the evidence in the record regarding the productivity of soils of state wide and local importance, does not comply with the requirements of the GMA. For instance, if a parcel had 95% prime or unique lands, it was excluded from designation. If any portion of the parcel is not classified as prime or unique, the entire parcel is rejected from consideration. (Ex. 64 p.33). By his own admission, the County's employee could only guess at which parcels were entirely prime or unique. (Ex. P.34).

The Petitioners object to Criteria 2 which requires each parcel considered be a minimum of twenty acres in size. This merely eliminated from consideration any parcel that was not at least twenty acres. There is no twenty-acre minimum lot size in any of the county's agricultural zones. Even in the Commercial Agricultural Zone, the purported twenty-acre minimum permits every twenty acre parcel to be split into two smaller parcels, the smallest of which must be ten acres. (K.C.C. sec. 17.31.040A).

Under Criteria 4, the Petitioners contend it is appropriate to look at current zoning, it is not appropriate to exclude lands merely because they are not currently in Agriculture 20 zone. (K.C.C. ¶ 17.29).

The Petitioners have two problems with Criteria 5 which requires that lands will not be considered unless they have a minimum of four contiguous twenty acre parcels. First, the County permits twenty-acre parcels to be divided into parcels as small as ten acres. This creates a situation where four contiguous twenty-acre parcels would be hard to find. Second, by County definition, if a road divided a parcel or parcels, they would not be considered contiguous. (Ex. 67, P.3)

Criterion 6 focuses on current use of the parcel and excludes a parcel from designation solely because it is not currently being used for agriculture. The Petitioner contend this is

clearly prohibited by the recent Supreme Court decision in City of Raymond v. CPSGMHB. __ Wn.2nd __, __ P2nd __, No. 65863-3(8/6/98).

The County, in considering Criteria 7, automatically rejected from consideration any land bordered by 4 lots or more, less than eight acres in size (Ex 65,p.6). The Petitioners believe the County, by rejecting those lands as incompatible with commercial agriculture and designating them as rural lands in the comprehensive plan makes the County inconsistent with its comprehensive plan. Presumably, these bordering lots would be designated as rural in the comprehensive plan (2.3 D Rural Lands). These are the very lands expected to be adjacent to farmland.

Criteria 7 is claimed to be inconsistent with the County's ordinance permitting cluster subdivision in the commercial agricultural zone and the Agriculture 20 Zone. The Petitioner go on to say the legislature has recognized such cluster development may conserve agricultural lands. RCW 36.70A.177(2)(b). They contend this criterion is contrary to the legislative intent.

4) The County failed to show in the record why land, which produces hay, was excluded from being designated agricultural resource lands. The Petitioners demonstrated the record shows a significant hay industry in the County and contend these lands should be preserved.

Petitioners state the County did consider proximity to UGAs as required by WAC 365-190-050(1)(d), but failed to explain to the Board how the County determined "proximity" to a UGA or UGN.

5) Petitioners maintain the County insists on using only senior water rights as a criterion for "tertiary criteria" despite the Hearing's Board's Final Decision and Order of May 7, 1996. The Petitioners contend the issue was decided and was not appealed. Senior water rights are not to be used as a measure of the predictability of the lands in question. Secondary water rights are often sufficient to have productive lands. Petitioners maintain the County failed to present anything demonstrating soils having "junior" water rights are, in fact, less productive than those having "senior" water rights. The Petitioners also argue only lands with "senior" water rights were considered, leaving all lands with "junior" water rights excluded.

Respondent's position: The Respondent asserts they have established a list of criteria for designating agricultural resource lands and held public hearings to receive public input. The Respondent also contends they followed the criteria in designating agricultural resource lands and balanced multiple factors set forth in the GMA and the regulations developed for this designation.

The County contends the criterion used was not a mechanical process that would automatically exclude certain lands from even being considered for designation. The purpose of establishing

the review criteria was for staff to provide the Board of County Commissioners with enough reliable information to base a decision on. The purpose was not to establish a positive "in or out" model for use by the Board. The County Commissioners made the final decision based upon the information present by staff and public hearings.

The Respondent further asserts the Petitioners only complaint is “the County hasn’t done enough”. The Petitioners have failed in any way to demonstrate that any lands that are not designated, are required by law to be designated as agricultural lands. The Respondent contends this is not enough to carry their burden required by the GMA. They have failed to demonstrate which lands were improperly omitted.

The County contends their decision is a reasoned and considered decision, which takes into consideration the many, and often conflicting goals of the GMA. The non-designation of additional lands is claimed to be within the broad range of discretion given to local jurisdictions implementation of the GMA and is not a clearly erroneous decision.

Discussion: The burden of proof is upon the Petitioners Williams and Diefenbach to demonstrate to the Board that the county’s agricultural lands designation as set forth in Ordinance 98-13 is not in compliance with the requirements of the GMA. The Board is further directed to find compliance unless it determines the action by the county is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the GMA. (RCW 36.70A.320 and.3201)

The Statutory direction to the County is clear:

(1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:...

(a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of good or other agricultural products;... (RCW 36.70A.170(1))

RCW 36.70A.030(2) and (11) defines the terms “agricultural land” and “Long-term commercial significance” as follows:

(2) “Agricultural land” means land primarily devoted to the commercial production of horticultural, viticulture, floriculture, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees not subject to the excise tax imposed by RCW 84.33.100 through 84.33.140, fin fish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.

...(11) “Long-term commercial significance” includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land’s proximity to population areas, and the possibility of more intense uses of the land.

The Act further directed the Department of Commerce, Trade and Economic Development to

produce minimum guidelines to classify agricultural, forest, and mineral resource lands and critical areas. RCW 36.70A.050.

The minimum guidelines for classifying agricultural lands, WAC 365-190-050, provide:

(1) In classifying agricultural lands of long-term significance for the production of food or other agricultural products, counties and cities shall use the land-capability classification system of the United State Department of Agriculture Soil Conservation Service as defined in Agriculture Handbook No. 210. These eight classes are incorporated by the United States Department of Agriculture into map units described in published soil surveys. These categories incorporate consideration of the growing capacity, productivity and soil composition of the land. Counties and cities shall also consider the combined effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of pubic services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.

(2) In defining categories of agricultural lands of long-tem commercial significance for agricultural production, counties and cities should consider using the classification of prime and unique farmland soils as mapped by the Soil Conservation Service. If a County or city chooses to not use these categories, the rational for that decision must by included in it next annual report to department of community development.

(3) Counties and cities may further classify additional agricultural lands of local importance. Classifying additional agricultural lands of local importance should include consultation with the board of the local conservation service district and the local agriculture stabilization service committee...

The GMA through these definitions and guidelines creates a standard for analysis, classification and designation of agricultural lands of long-term commercial significance.

Even more telling is the legislative history found in Section 1 of Chapter 307 of S.S.B. 6228 of the 1994 session. This is found in the notes after RCW 36.70A.030 and the pertinent parts read as follows:

The legislature finds that it is in the public interest to identify and provide long-term conservation of those productive natural resource lands that are critical to and can be managed economically and practically for long-term commercial production of good, fiber, and minerals. Successful achievement of the natural resource industries' goal set forth in RCW 36.70A.020 requires the conservation of a land base sufficient in size and quality to maintain and enhance those industries and the development and use of land use techniques that discourage uses incompatible to the management of designated lands...

By these and the following Supreme Court decision, the County is directed to designate a critical mass of lands to preserve the agricultural industry in Kittitas County, not just a few acres of land in token compliance.

The Supreme Court in Redmond v. Central Puget Sound Growth Management Hearings Board, (Id.), has provided a great deal of guidance for local government and the Hearings Boards since our earlier finding of non-compliance in this case. The Court discussed the issue of agricultural lands designation as follows

A. GMA Policy on Agricultural Land

In seeking to address the problem of growth management in our state, the Legislature paid particular attention to agricultural lands. One of the 13 planning goals of the GMA addressed natural resource industries: "Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8). The purpose is to "assure the conservation" of these lands. RCW 36.70A.060(1). A more recent indication of the Legislature's concern for preserving agricultural lands is a new section the Legislature added in its 1997 amendments to the GMA, RCW 36.70A.177, which urges employment of "innovative zoning techniques" to conserve agricultural lands.

The GMA set aside special land it refers to as "natural resource land", which include agricultural, forest, and mineral resource lands. "Natural resource lands are protected

not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry.” Richard L. Settle & Charles G. Gavigan, *The*

Growth Management Revolution in Washington: Past, Present, and Future, 16 U. Puget Sound L. Rev. 867,907 (1993).

The significance of agricultural land preservation in the GMA can be seen in the very timing of key actions mandated in the statute. RCW 36.70A.170(1)(a) requires designation of agricultural lands:

- (1) On or before September 1, 1991, each County, and each city, shall designate where appropriate:
 - (a) Agricultural lands that are not already characterized by urban growth and that have long-term commercial significance for the commercial production of food or other agricultural products{.}

Thus GMA required municipalities to designate agricultural lands for preservation even before those municipalities were obliged to declare their UGAs and adopt comprehensive plans in compliance with the GMA. The “designation and interim protection of such areas {are} the first formal step in growth management implementation...to preclude the urban growth area status for areas unsuited to urban development.” *Id.* Also, requiring designation of natural resource lands at the outset of the GMA planning process prevents the irreversible loss of those lands to development, and preserves land management options until completion of the comprehensive planning process. Gary Pivo, *Is the Growth Management Act Working? A survey of Resource Lands and Critical Areas Development Regulations*, 16 U. Puget Sound L. Rev. 1141, 1145 (1993) P.4

The primary question previously before the Board was “Has Kittitas County complied with the Growth Management Act in designating and conserving agricultural lands of long-term commercial significance?” Our Final Decision and Order dated May 7, 1996 concluded they had not. We must now review the failure of Kittitas County to designate any additional agricultural resource lands in light of the above-cited Supreme Court case and legislative changes in the Act.

In making our decision we must look at the criteria used by Kittitas County in their designation of agricultural Resource lands and how it was used. The County used the following criteria in the following order:

1. Parcel must be wholly located with either prime or unique soils classification as defined in ASCS Handbook 2-10 USDA or “unique lands” as defined in the 430-VI National Soils Handbook. (The parcel must be 100% prime or unique soils).
2. Parcel must be a minimum of twenty acres in size.

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On the surface, this criterion seems reasonable, as a farm smaller than twenty acres is arguably not commercially significant. However, the criterion needs closer examination. As Petitioners point out, this criterion excludes many commercially viable farms. For example, a forty acre farm may actually consist of four contiguous ten-acre parcels, or a road, resulting in exclusion from further consideration in either case may divide a twenty-acre farm. A more appropriate acreage criterion would consider ownership and management patterns, not simply assessor’s parcel size, as has been done by Kittitas County.

This criterion was used to exclude, not include. While the guidelines provided by Community Trade and Economic Development allow for consideration of predominant parcel size, nowhere is there authority to require a minimum twenty-acre size or four contiguous twenty acre parcels, for inclusion.

Kittitas County need only look to neighboring Yakima County for examples of designations of isolated small parcels. A designation of agricultural lands of long-term commercial significance is not necessarily a zoning decision. Kittitas County’s argument that such a designation would amount to spot zoning is without merit.

3. Parcel cannot be located within a designated UGA or UGN.

A parcel of land cannot be designated as Agricultural Resource Lands within a UGA or UGN unless there is a program authorizing transfer or purchase of development rights. RCW 36.70A.060(4). The use of this criterion as exclusionary is appropriate.

4. Current zoning of parcel. (The parcel must be located in the Agriltural-20 zoning classification).

5. Areas for consideration must have a minimum of four contiguous 20-acre parcels. (Not separated by a road or land).

6. Current use of the land in question.

The Supreme Court in City of Redmond, (id) at P.6, clearly states that current use is not controlling:

First, if current use were a criterion, GMA comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual land owner's current use of the land. The Legislature intended the land use planning process of GMA to be area-wide in scope when it required development of specific plans for natural resource lands, late, comprehensive plans.

Second, if land owner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financing more lucrative to develop such land for uses more intense than agriculture. Although some owners of agricultural land may wish to preserve it as such for personal reason, most, like Benaroya and Cosmos, will seek to develop their land to maximize their return. If the designation of such land as agricultural depends on the intent of the land owner as to how he or she wishes to use it, the GMA is powerless to prevent the loss of natural resource land. All a land speculator would have to do is buy agricultural land, take it out of production, and ask the controlling jurisdiction to amend its comprehensive plan to remove the "agricultural land" designation. Under the Board's interpretation, the controlling jurisdiction would have no choice but to do so, because the land is no longer being used for agricultural purposes.

A cardinal rule of statutory construction is to give effect to legislative intent. *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.* 125 Wn 2nd 305, 3122, 884 P.2n 920 (1994).” *City of Redmond v. Central Puget Sound Growth Management et al* appeal from Superior Court, King County Case #96-2-15468-7.

In Ordinance 98-13, the Board of Kittitas County Commissioners' findings on June 25, 1996, on page 3, found "1. Upon review of the interim classification and designation criteria from Agricultural Lands of Long-term Commercial Significance it was noted that: ...E. There is a declining catty industry; ...H. there has been an elimination of the meat packing industry in the

County; I. There has been a decline in dairy farmers from 35 in the 1985 to 3; J. there has been a decline in mink ranchers from 36 to 3; Further, on P 12 of Ordinance 98-13, the County found in ...G. In the last year, the total number of operating dairies in Kittitas County has decreased from 3 to 1; and H. Since 1996, the percent of hay grown in Kittitas County utilized by local hay brokers has decreased by 12%.”

When a County sees the decline of industry to their area, the question is what do we do to save or protect the specific industry, not what do we do to eliminate or exclude that industry. Once that industry is gone, it is difficult to bring it back, in the case of agricultural land, it never will come back.

Respondent County cites *City of Redmond v. Central Puget Sound Growth Management et al* appeal from Superior Court, King County Case #96-2-15468-7, “In designating agricultural land, the County shall consider a multitude of factors and not decided solely on one element.” The Board agrees. The County cannot use one element on the list of criteria to exclude but must consider all elements. The Respondent County in their oral argument shared maps with this Board showing a different criterion for each map. Each map had less agriculture lands indicated

until very little was left. The County Commissioners then declared these parcels as being too small and designated no more agricultural resource lands. This process was clearly an exclusionary process. The legislative intent for the GMA is to maintain an enhance agricultural land. CW 36.70A.020(8).

7. Adjacent land use. (areas adjacent to rural development, i.e., four lots or more with less than eight acres in size, should be removed).

This criteria removes many lots from consideration in rural areas or areas the County has or expects clustering to take place. The State Legislature authorized clustering to aid in the preservation of agricultural lands. This removes that option.

8. Remaining criteria outlined under WAC 365-190-050(1).

There was little discussion concerning this criterion, The lands remaining when this criterion was used was minimal and had little impact.

9. Parcel located in an irrigation district with senior water rights.

The Board has already found senior water rights were not a valid criterion where the evidence did not show a significant difference in productivity. (FDO May 7, 1996 in this matter). This order was not appealed nor was the law changed by the State Legislature.

The Board, in its May 27, 1997 Order on Compliance in this matter dealt with agricultural lands

of long-term commercial significance Designation and Criteria, P.7) We said “While this Board agrees that the Respondent has some discretion over which lands are to be designated for long-term commercial significance, the GMA required the County to demonstrate why those lands are excluded. This means that, with limited exceptions, agricultural lands must be designated and protected.” The County has not done this.

Kittitas County Hearing Memorandum on Remand notes “The Supreme Court in *Redmond v. Central Puget Sound Hearings Board* recently reaffirmed that designation of agricultural lands is a consideration of multitude of factors and not a decision to be decided solely on one element.” P.7 However, the County utilized the criteria for designation in a manner that clearly excluded lands as each criterion was applied. At no point did Kittitas County use their criteria in a manner to ensure the viability of the resource-based industries...” as referred in the above Supreme Court ruling.

At issue is the viability of the agricultural industry in Kittitas County. The legislative intent, as clarified by the Supreme Court in Redmond, asks Kittitas County to “designate and conserve” the agricultural lands to maintain the agricultural industry. By designation only 18,000 acres of the currently 355,560 acres devoted primarily to agriculture, Kittitas County fails in that responsibility. By not designating, and thus allowing future non-commercial agricultural uses on the remaining 337,560 acres, the agricultural industry in Kittitas County is in jeopardy of disappearing.

The Petitioners have carried their burden of proof. They have shown, by the evidence in the record and argument of counsel, the County has failed to designate agricultural lands of long-term commercial significance as required by the GMA. The criteria used in Ordinance No. 98-13 excludes lands that should be included rather than identifies lands that should be included. They are not in compliance with the Act.

Conclusion: The Petitioners have carried their burden and have shown the County’s actions are clearly erroneous. The Board finds Kittitas County has failed to designate and conserve agricultural lands of long-term commercial significance, and to insure the viability of the agriculture resource based industry in Kittitas County.

ORDER

1. Issue No. 5 has been abandoned.
2. The Board finds Kittitas County has not complied with the Growth Management Act and our previous order regarding Issues No. 8 and Issue No. 9.

3. Kittitas County Ordinance NO. 98-13 is remanded with direction to designate and conserve agricultural land of long-term commercial significance and insure the viability of the agriculture resource based industry as provided in RCW 36.70A.020(8), RCW 36.70A.060(1), and RCW 36.70A.170(1).

4. Kittitas County shall comply with this order within 90 days from the date of this order.

This Order constitutes a final order as specified by RCW 36.70A.300, unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

SO ORDERED this 6th day of November, 1998.

EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD

Judy Wall, Presiding Officer

D. E. "Skip" Chilberg, Board Member

Dennis A. Dellwo, Board Member

EWGMHB Case No. 95-1-0009, Mike Williams3c DECLARATION OF SERVICE

I am an employee of the Eastern Washington Growth Management Hearings Board, over the age of 18 years and hereby certify that I mailed a copy of the Order on Compliance in the above entitled matter to the persons and addressed listed below hereon, postage prepaid, in a receptacle for United State mail at Yakima, Washington on November 6, 1998.

Barbara A. Hill

Mr. James D. Maloney III
Weeks & Scala
3910 Summitview, Suite 210
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Board of Kittitas County Commissioners
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