STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
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May 23, 2014

Julie Kjorsvik
Clerk of the Board
205 West 5th Avenue, Suite 108
Ellensburg, WA 98926

RE: Settlement Agreement

Dear Ms. Kjorsvik:

Enclosed is the original Settlement Agreement between Futurewise, the Kittitas County Conservation Coalition, RIDGE Association, the Washington State Department of Ecology and Kittitas County. Director Bellon has signed the agreement.

If you need anything else, let me know. My direct phone number is 360-407-7009 and my email is teri.north@ecy.wa.gov

Sincerely,

Teri North
Assistant to the Director

cc: Tom Tebb, Central Regional Office, Ecology

ORIGINAL

Settlement Agreement

This Settlement Agreement is made between Futurewise, the Kittitas County Conservation Coalition, RIDGE Association, the Washington State Department of Ecology (Ecology), and Kittitas County (County), collectively referred to as the "Parties" as defined herein.

WHEREAS, Futurewise, the Kittitas Conservation Coalition, and RIDGE Association (Futurewise) filed a petition for review with the Growth Management Hearings Board (GMHB) alleging violations of the Growth Management Act (GMA) by Kittitas County;

WHEREAS, Futurewise's petition for review requests that the GMHB issue a declaration of invalidity for development regulations which do not protect ground and surface water resources in Kittitas County;

WHEREAS, Ecology has moved to intervene on the water issues, GMHB Case No.07-1-004c Issue 1 as to measures to protect surface and ground water and Case No. 07-1-0015 Issue 4;

WHEREAS, as the state's designated manager of water resources, Ecology's interest in this issue is to provide technical and legal input and support regarding the County's GMA obligations related to protecting area water supplies and ensuring that development occurs where water is available to support development, and to protect senior water rights and stream flows in the Yakima River basin;

WHEREAS, Kittitas County is centrally interested in (1) eliminating the risk of curtailment of water use to the County's existing exempt well users during a drought, and (2) keeping water rights within Kittitas County and not sold downstream;

WHEREAS, Kittitas County is under an obligation to enact a Comprehensive Plan and Development regulations that meet the requirements of the GMA. These requirements include the adoption of measures to protect surface and ground water quality and quantity. As described in more detail below and in the draft ordinance attached, the County intends to consider for enactment an Ordinance that will amend the County's Comprehensive Plan and Development regulations to comply with the GMA such that:

1) Interim Mitigation Requirements will be made immediately applicable to certain new uses of ground water in lower Kittitas County as defined by a site map in Attachment 2;
2) Such Interim Mitigation Requirements will be in effect for eighteen (18) months;

3) Such Interim Mitigation Requirements will be followed by Long-Term Mitigation Requirements that will be applicable to the entire County eighteen (18) months after the date the ordinance is enacted; and,

4) Applicants for subdivisions in all parts of the County, under both the Interim and Long Term Mitigation Requirements, will be required to submit information on "proximate parcels" held in "common ownership" in order to facilitate County review for compliance with RCW 90.44.050 group domestic use.

WHEREAS, the County, with the support of Futurewise and Ecology, also intends to secure mitigation for currently unmitigated [domestic] uses of ground water within Kittitas County;

WHEREAS, the County also may make the water rights placed into the Domestic Ground Water Mitigation Program available, on a cost-recovery basis, for domestic users of ground water who make land-use application;

WHEREAS, the County's development of a Domestic Ground Water Mitigation Program is one of the measures that the County may pursue as a means of implementing its commitments in this agreement;

WHEREAS, once the County has enacted an Ordinance with the components described above and based on the County's commitment to secure mitigation for currently unmitigated domestic users of ground water in the county, Futurewise and Ecology intend to support the County's ordinance before the GMHB as compliant with the GMA; and,

WHEREAS, Futurewise, Ecology and Kittitas County have conferred and have determined to conclude this matter by means of this Settlement Agreement, the terms of which are set forth below; and,

WHEREAS, all parties are committed to provide the necessary resources to facilitate successful implementation of this Settlement Agreement.

NOW, THEREFORE, THE PARTIES AGREE THAT:

1. **<u>The County will consider for enactment, no later than December 14, 2013, an Ordinance or Ordinances that will amend the County's Comprehensive Plan and development regulations such that</u>**:

   a) Interim Mitigation Requirements will be made immediately applicable to new domestic and commercial uses of ground water in the lower County;

b) Such Interim Mitigation Requirements will be in effect for eighteen (18) months from the date of the ordinance enactment;
c) Such Interim Mitigation Requirements will require that all new domestic, commercial, irrigation and industrial uses of ground water in the rural areas of Kittitas County not regulated by Chapter 173-539A Washington Administrative Code (WAC) will be water budget neutral with respect to the Total Water Supply Available (TWSA) as measured at the Parker gage on the main stem of the Yakima River;
d) The Interim Mitigation Requirements will be replaced by Long-Term Mitigation Requirements that will be applicable to the entire county eighteen (18) months from the date of the ordinance enactment;
e) Long Term Mitigation Requirements will require that all new uses of ground water in Kittitas County be fully mitigated with regard to local impacts in tributary streams and creeks and to be water budget neutral with respect to the TWSA as measured at the Parker gage on the main stem of the Yakima River. The Long Term Mitigation Requirements will require all new users to provide evidence of local (stream or creek tributaries) mitigation as a condition of final plat and building permit approval and development in yellow and red zone areas as defined by the County's mitigation water suitability map (generalized for demonstration purposes in Attachment 2) will not be approved without such evidence. It is the intent of the parties to continue to refine the yellow areas with the goal of converting them to either green or red based on sound technical information to better identify the need for local mitigation in red areas;
f) All new domestic uses of ground water initiated after the Long Term Mitigation Requirements are in effect will require metering and reporting as described in Section 5 of this agreement; and,
g) Applicants for subdivisions in all parts of the County, under both the Interim and Long-Term Mitigation Requirements, will be required to submit information on "proximate parcels" held in "common ownership" in order to facilitate County review for compliance with RCW 90.44.050 group domestic use. This will involve requiring applicants for building permits and subdivisions, in all parts of the county, to submit information on "proximate parcels" held in "common ownership" as those terms are defined in Chapter 173-539A-030 WAC and otherwise demonstrate how the proposed provision for potable water will not violate RCW 90.44.050. Such submission and successful demonstration shall be necessary before the sought subdivision application may be approved.

2. **Mitigation for Historic Use**. The County also commits to acquire, with all due diligence, sufficient senior water rights suitable for mitigation (with a priority date of May 10, 1905 or before) to provide TWSA mitigation for existing domestic ground water users within the entire county which is presently assumed to involve the acquisition of 800 ac-ft of consumptive use

water. The parties may agree to modify this amount based on new information. The County will complete acquisition of this mitigation water within ten (10) years of the effective date of this Agreement except that the timeframe may be revised upon mutual agreement of the parties. The County further agrees to maintain ownership of the water rights in perpetuity, or convey the acquired water rights to the State's Trust Water Right Program so that they remain available for use for the purpose stated above. The County is released from this obligation only if it is determined, with agreement from the parties, that current users of ground water for domestic purposes are no longer at risk of curtailment in the Yakima River basin.

3. **Domestic Ground Water Mitigation Program**. The County, in consultation with Ecology and other stakeholders in the Yakima River basin, may elect to develop a Domestic Ground Water Mitigation Program that would be designed to:

a) Provide a reliable supply of water for new uses within Kittitas County;
b) Provide a reliable supply of water to off-set the consumptive use of existing indoor domestic ground water users during low flow periods; and,
c) Allow for efficient management of water resources in the County.

3.1 Consideration of Options and Strategies. The County may consider a variety of options or strategies for use as part of the Domestic Ground Water Mitigation Program so long as each option by itself or in combination with other options results in fully mitigating the consumptive use impact of new ground water uses and avoids adverse impacts to local streams and senior water rights.

The County is considering developing a Domestic Ground Water Mitigation Program that meets the following criteria:

a) Senior (pre-May 10, 1905) water rights to provide mitigation for new uses of ground water for domestic purposes are transferred to Kittitas County in the form of lease or ownership from existing senior water right holders within the Yakima River basin in an amount sufficient to meet projected demand for new uses in rural areas of the county for the next five (5) years;
b) The projected demand is estimated to be 50 ac-ft of consumptive use water for the first (5) years of this agreement subject to revision as agreed to by the parties;
c) The senior water rights acquired by the County have met Ecology's "extent and validity" requirements and have been successfully transferred into the State's Trust Water Right Program or shall have secured such senior water through a lease with a long term option satisfactory to Ecology;
d) The senior water rights acquired by the County are eligible to be utilized downstream of the Keechelus, Kachess or Cle Elum reservoirs or in locations as appropriate, as determined by the Water Transfer Work Group (WTWG), utilizing

Ecology's contract with the U.S. Bureau of Reclamation for trust water rights storage, and are determined to be eligible for mitigation for any new ground water uses within the "green" zones currently generalized in Attachment 2; and,

e) The County and Ecology have created with the assistance and review of the WTWG, a system which provides an "over-the-counter" solution for eligible land owners seeking to purchase mitigation for new uses of ground water in rural areas of Kittitas County. This system may be incorporated into the County's current system for determining valid water availability prior to issuing development permits and decisions approving or denying mitigation shall be made automatically by the County subject to available water rights and predetermined eligible locations of new ground water withdrawals.

3.2 Leased Water. As one part of the Domestic Ground Water Mitigation Program, the County intends to pursue leased mitigation water for up to 5 years from the effective date of the new county ordinance and make this leased water available to new users of ground water to satisfy their TWSA mitigation requirement. New users may elect to obtain mitigation water from the County or from an independent source. If the County provides leased water to new users as mitigation, the County commits to replace such leased water prior to the expiration of such lease with other permanent water with senior water rights so that there is no period of time during which such new user is without mitigation water.

3.3 Allocation of Mitigation Water Acquired. If the County elects to develop a Domestic Ground Water Mitigation Program to provide mitigation opportunities for ground water users, the County will purchase or otherwise acquire, pre-May 10, 1905 senior water rights sufficient to mitigate for current users within the county with regard to TWSA only. In applying the mitigation obtained, mitigation will be designated as follows:

a) Should the County decide to make available mitigation water for new users, water acquired in its Domestic Ground Water Mitigation Program sufficient for twenty (20) years of projected growth may be its first priority; and,
b) Should the County not make such election, or fulfill it, then the mitigation water acquired shall first be credited for those users, who leased mitigation water during the first 5 years of this agreement, and then the water shall be credited for mitigation for the oldest current users first and work forward in time as the County acquires more water.

3.4 Other Mitigation Strategies. Ecology and the County will work with the U.S. Department of Interior Bureau of Reclamation, the Yakama Nation, and other senior water right holders, and others as appropriate to develop strategies which may lead to development of an alternative or complementary mitigation program. The intent of the alternative or complementary program is to

fund projects and programs that generate mitigation "*credits*" to be sold to prospective water users to mitigate for their impacts to surface water resources in the Yakima River basin. Such projects may include but are not limited to habitat and floodplain restoration, in-stream flow purchases, aquifer recharge, storage, operational changes, and water leasing. If an alternative strategy is developed and is proposed to be used in lieu of a requirement of this agreement, the parties shall meet and confer to determine whether implementation of the alternative strategy necessitates an amendment to this agreement and/or an amendment to the county ordinance. If the parties are unable to agree, they may pursue dispute resolution.

4. **Monitoring and Reporting**. During the eighteen months when the Interim Mitigation Requirements are in effect, the County will report to Futurewise and Ecology, every six months, all new building permits issued and subdivisions approved which rely upon a mitigated "permit-exempt" well for adequate water supply as required herein.

4.1 Performance Reporting. Once the Long-Term Mitigation Requirements are in effect, Kittitas County shall, on an annual basis, report to Futurewise and Ecology as to:

a) The number of permits/projects issued/approved;
b) The amount of water acquired by the County for projected new users;
c) The cost to new users for such mitigation;
d) The amount of mitigation water for mitigating existing users;
e) How many (and back to what date) of these users have been mitigated, and how many remain unmitigated;
f) How much money the County spent on back mitigation;
g) The current location of red, yellow, and green zones and the amount of development therein;
h) Enforcement actions and their results, and,
i) Current good faith efforts to obtain additional senior (pre-May 10, 1905) water rights.

5. **Meters and Electronic Reading Devices**. Domestic users applying for land use permits (building permit and subdivisions) after the effective date of the Long-term Mitigation Requirements who obtain mitigation from a county-operated mitigation program will be required to install meters and electronic reading devices that meet county specification. Violations of the limitations on use of ground water will be enforced through Title 18 Kittitas County Code (KCC) as a matter of code enforcement.

5.1 The Parties acknowledge that after the Long Term Mitigation Requirements are in effect, any mitigation water acquired from other source or water purveyor other than a county-operated

program shall also be required to meter and report their use on an annual basis in accordance with the provisions of a Water Budget Neutrality determination from Ecology.

6. **Assessing Compliance of New Ground Water Uses**. The County will periodically assess compliance of new uses of ground water and report to Futurewise and Ecology as part of the reporting provided for in 4.1 above. To do this assessment, the County will utilize the following strategies:

a) Review land use permits prior to issuance and apply appropriate conditions;
b) Prior to issuing building permits notify applicants of water use restrictions and ensure the restrictions are recorded on the deed to provide notice to subsequent purchasers of the property;
c) Conduct site visits if necessary when the County receives information of possible violations to verify compliance with water use restrictions, particularly with regard to the outdoor irrigation restriction;
d) Report egregious violations to Ecology for technical assistance in enforcement action taken by the County; and,
e) Provide a summary of the number of permits processed, site visits, and any enforcement actions taken.

7. **Rural Area Drought Management Program**. During periods of declared drought in the Yakima River basin, the County will implement a prepared water conservation program for those new and existing rural domestic ground water users such that minimal uses of ground water are consumed. This will include notification to mitigated pre-existing exempt well users that they are at risk of being curtailed except for indoor domestic uses and irrigation of 500 sq. ft. of exterior yard.

8. **Due Diligence and Good Faith**. All parties to this agreement shall exercise due diligence and good faith in carrying out the commitments made herein.

9. **Definitions**.

"**Acquisition of water suitable for mitigation**" means that the County must acquire and/or lease water rights that must have priority earlier than May 10, 1905, and be eligible to be used for in-stream flow protection and mitigation of out-of-priority uses. As provided in 3.2 above, if the County provides leased water as mitigation for new uses, the leased water will be replaced with permanent water prior to the expiration of the lease.

"**Indoor domestic use**" for the purposes of this agreement, indoor domestic use is estimated to use approximately 350 gallons per day and irrigation of up to 500 sq. ft. of exterior yard per parcel.

"**Total Water Supply Available**" means the amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various government reservoirs on the Yakima watershed and from other sources to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

"**Water Budget Neutral**" means an appropriation or project where withdrawals of public ground water are proposed in exchange for placement of other water rights into the trust water right program that are at least equivalent to the amount of consumptive use. This trust water right must have priority earlier than May 10, 1905, and be eligible to be used for in-stream flow protection and mitigation of out-of-priority uses.

"**Water Transfer Work Group**" is a voluntary team of agencies and water users that meet to provide technical review of proposed water right transfers in the Yakima River basin.

10. **Joint Request to the Growth Management Hearings Board to Find Compliance with GMA on Water Issue**. Within sixty (60) days after Kittitas County's publication of the notice of adoption by the Kittitas County Board of Commissioners of an Ordinance(s) providing terms substantially equivalent to those set out in this Settlement Agreement, the Parties shall, by and through counsel, execute and file a joint request to the GMHB Case No. 07-1-0004c Issue 1 for measures to protect surface and ground water from exempt well withdrawals and Case No. 07-1-0015 Issue 4 for a finding of compliance. Futurewise and Ecology agree to make argument to the EWGMHB in support of the County's Ordinance(s), indicating that each believes such ordinance(s) together with the terms of this Settlement Agreement satisfies the requirements of the GMA as to these issues. Similarly, Futurewise and Ecology commit to aid in the defense of Kittitas County's regulation that is the subject of this Settlement Agreement should some other legal challenge be mounted apart from the above two causes of action.

11. **Repeal of Chapter 173-539A WAC.** No later than 180 days after the effective date of the Long-Term Management Measures such that these measures and or mitigation program are essentially equivalent in form and function across the entire County subject to this Settlement Agreement to the Upper Kittitas County Ground Water Rule (Chapter 173-539A WAC), Ecology shall commit to take steps to initiate rulemaking proceedings that will propose the repeal of Chapter 173-539A WAC, Upper Kittitas Ground Water Rule.

12. **Notice to Prospective Buyers and Existing Well Owners**. Kittitas County will continue to place language on the face of plats that discloses risks to current and future land owners associated with reliability of water supply. The Parties agree to the following standard plat language:

The approval of this division of land provides no guarantee that use of water under the ground water exemption (RCW 90.44.050) for this plat or any portion thereof will not be subject to curtailment by the Department of Ecology or a court of law.

Further, the County will collaborate with Futurewise and Ecology in preparation of standard language to include in the application for water availability permits

13. **Enforcement of the Terms of this Agreement.** Should the County repeal or amend to the point of obviating the regulations contemplated herein as the Interim or Long-Term Mitigation Requirements, the other parties to this agreement may bring an action before the GMHB claiming violation of the GMA's provisions for protection of surface and ground water. Should any party fail to perform any other commitment in this agreement, any other party to this agreement may bring an action in Kittitas County Superior Court for specific performance.

14. **Formal Dispute Resolution Process.** In case of any disagreement arising from the implementation of this Settlement Agreement, any party may initiate the formal dispute resolution process after the parties have attempted to resolve the disagreement informally.

To initiate the formal dispute resolution process, a requesting party shall provide written notice to the other party that describes the issue in dispute. Upon receiving a notice of formal dispute, the parties signatories or their designated representatives shall convene a meeting within 30 days to consider the dispute and may resolve any or all issues or refer any or all issues in dispute back to the originating parties with specific instructions and a deadline for reporting back to the designated executives. The parties by mutual agreement may employ any other alternative dispute resolution procedures they deem useful under the circumstances.

If the parties' signatories or designated representatives fail to resolve the dispute within 30 days upon meeting convened to resolve the dispute, or a dispute is not resolved within the timeframe established by the designated executives, the dispute resolution process shall then be deemed complete and any party may seek any and all remedies within their authority and rights to so.

Upon completing the dispute resolution process, the designated executives or their representatives shall prepare a joint statement of the remaining issues in dispute, which may also include a discussion of how to resolve such issues consistent with this Settlement Agreement.

15. **Entire Agreement and Successors in Interest.** This Settlement Agreement contains the entire agreement between the parties and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each. No other understandings, oral or otherwise, shall be deemed to bind any of the parties hereto.

16. **Amendment of the Agreement.** This Agreement may not be modified or amended except by the written agreement of the parties.

17. **Reservation of Authority**. Nothing in this Settlement Agreement affects any authority Ecology may have to enforce the State of Washington's water resources and water quality laws including but not limited to RCW chapters 90.03., 90.14.,90.44., 90.48, 90.54., or other appropriate requirements of state law. All Parties reserve their respective authority to themselves and grant none to the other by virtue of entering into this Settlement Agreement.

18. **Governing Law.** This Agreement shall be construed and interpreted according to the laws of the State of Washington.

19. **Authorization.** Each person signing this Agreement represents and warrants that he or she has the authority to sign this Agreement on behalf of and to bind the party represented, and that any necessary conditions precedent to the execution of this Agreement on behalf of the party represented have been satisfied.

20. **Counterparts.** This Agreement may be executed in counterparts and each executed counterpart shall have the same force and effect as the original instrument and as if all of the parties to the counterparts had signed the same instrument. Electronic facsimile signatures and/or electronically scanned signatures shall be sufficient to demonstrate a party's assent to this Agreement.

21. **Venue**. Venue to enforce this Settlement Agreement shall be in Kittitas County Superior Court.

22. **Severability**. If any term or condition of this agreement or the application thereof to any person(s) or circumstances is held invalid by a court of competent jurisdiction, such invalidity shall not affect other terms, conditions or applications which can be given effect without the invalid term, or condition or application. To this end, the terms and conditions of this agreement are declared severable.

23. **Third-Party Beneficiaries or Rights.** This agreement inures to the benefit of the parties and their successors hereto and does not create any third-party beneficiaries or rights.

24. **Life of the Agreement**. For the purposes of performance of obligations in this agreement, the life of the agreement shall be ten years from the date of execution. For the purpose of enforcement of the agreement, the life shall be 13 years from the date of execution. The County's obligations under Section 2 of this agreement to maintain ownership of the water

right in perpetuity or convey them to the State's Trust Water Right Program shall remain in place subject to the terms of Section 2 of this agreement.

25. **Signatures.**

Adopted this 15th day of May, 2014.

BOARD OF COUNTY COMMISSIONERS
KITTITAS COUNTY, WASHINGTON

Paul Jewell, Chairman

Obie O'Brien, Commissioner

Gary Berndt, Vice Chairman

COUNTY COMMISSIONERS SEAL KITTITAS COUNTY WASHINGTON

ATTEST:

KITTITAS COUNTY, WASHINGTON

Julie A. Kjorsvik, Clerk of Board

APPROVED AS TO FORM:

KITTITAS COUNTY, WASHINGTON

Gregory L. Zempel, Prosecuting Attorney

WASHINGTON STATE DEPARTMENT
OF ECOLOGY

Maia D. Bellon, Director

FUTUREWISE

Tim Trohimovich, Director of Planning & Law

KITTITAS COUNTY CONSERVATION
COALITION

Marge Brandsrud, President

RIDGE ASSOCIATION

Doug Kilgore, President