

## **EXHIBIT A TO COMMENT RESPONSE MATRIX RE THORP LANDING**

### **Response to March 1, 2023 Washington State Department of Health Comment:**

All domestic water to serve the property which is the subject of this plat application will be withdrawn from two wells. One well has already been classified as a Group B system, and it serves lots not involved with the plat, but which are described as Kittitas County Tax Parcel Nos. 19588, 19589, 19590, 19591, 19592, and 19593. Two of these lots are owned by third parties and they had building permits issued after the current landowner bought a Kittitas County Mitigation Package. The plat will add 10 lots to the above six lots, for a total of 16 lots. Each lot may withdraw 275 gallons per day, so the combined withdrawal of ground water from the property is under 5,000 gallons per day. Because all of the property has irrigation water from the West Side Irrigation Company, there is no need for any outdoor irrigation to occur using ground water. The applicant, through covenants, conditions and restrictions, will restrict individuals acquiring lots within the plat to 275 gallons of water per day with no outdoor use of water. Additionally, *see* responses related to outdoor irrigation below in response to the West Side Irrigation Company's comments.

### **Response to February 28, 2023 West Side Irrigation Company's Comment:**

The applicant is aware of Kittitas County Code §16.18 which sets forth the County requirements and the applicant is aware of the West Side Irrigation Company's rules and regulations regarding delivery of water. The applicant intends to provide two points for all lots within the plat to access water from the West Side Canal. The water will be delivered to each lot in a piped system, with each lot having an irrigation riser which will be metered. Further, through the use of covenants, conditions and restrictions, the applicant will require that the application of all West Side Irrigation Company water to lots within the plat for purposes of irrigation will be required to be through a sprinkler system. No flood irrigation of these lots will be allowed.

### **Response to March 7, 2023 Comments by the Washington State Department of Ecology:**

*See* response to Washington State Department of Health comments above.

### **Response to Comments made by the Fudacz Family:**

The comment by Mr. Fudacz regarding "numerous natural springs and historical wooden and cement tile drains across many sections of the proposed plat . . ." is an overstatement of Mr. Fudacz and his family's rights to convey irrigation water across this property.

The Fudacz family were claimants in *Ecology v. Acquavella*, Yakima County Superior Court Cause No. 77-2-01484-5. Acquavella was a general water rights adjudication that was commenced to adjudicate the rights of all claimants of surface water (including springs) within the Yakima River Basin. The action was filed in Yakima County, but it covered water rights in Kittitas, Yakima, and Benton Counties. In that case, the Court divided the area within the adjudication into different "subbasins". In each subbasin the water right claimants presented their evidence to a referee appointed by the Court to take evidence and then render a recommendation to the Court on the water rights claims that were filed by each claimant. The Referee's decisions were then presented

to the superior court judge. The individual claimants then had an opportunity to object to the Referee's findings and in most cases the court remanded the objections back to the Referee for the taking of additional evidence or for the processing of additional argument. Then the Referee would issue a second report, often referred to as a "Supplemental Report of the Referee". The Court then typically entered a Conditional Final Order which adopted the Report of the Referee and the Supplemental Report of the Referee.

The Fudacz family were claimants in Acquavella, and annexed hereto as Exhibit A-1, is a true and correct copy of the Report of the Referee for Subbasin 8 (Thorp) and related materials. The Exhibit, which attaches a copy of the Report of the Referee, identifies the background information that the Referee relied upon in making decisions on the Fudacz's water rights.

Of special note in that background section is Section 7 "Special Issues Specifically Return Flows" (Exhibit A-1, page 5) that provides that while a party can obtain a right in return flows, it must meet the general qualifications of a water right, including having a Chapter 90.14 claim form supporting the use of the water rights. Chapter 90.14 claim forms were forms that landowners were required to file under Chapter 90.14 RCW prior to 1974. If a water right claimant failed to file a 90.14 claim form, then in Acquavella they did not receive a water right.

The Report of the Referee at page 74 discusses the Fudacz's water rights. It specifically says that the claimants make use of return flow waters or tail waters which are defined as return flows. However, the Referee concludes that no rights can be acquired in those return flows because the Fudaczes did not file 90.14 claim forms. Instead, the Fudaczes were awarded three water rights which ultimately became certificates at the conclusion of Acquavella, specifically, Certificate S4-83993-J, Certificate S4-83971-J, and Certificate S4-83948-J, (attached as Exhibit A-2). That is the sum total of the water rights that the Fudaczes have which flow across the applicant's property. The points of diversion of those three water rights are identified on the attached Exhibit A-3.

In addition, the Fudaczes have three easements which burden the property. One which is identified on the face of the proposed plat which runs across the Northeast corner of Lot 6, the Northeasterly portion of Lot 7 (within the flood zone), and across the Northeasterly corner of Lot 8. The other easements relate to a pipeline or drain that appears to gather the water collected from the four diversion points and distribute the water underground to a riser at the northeasterly intersection of Lots 8 and 9. The Fudaczes have no other rights to use any water that crosses or originates on the applicant's property. The diversion points of the Fudacz's water rights will be identified on the face of the plat and through restrictive covenants, the applicant will prevent soil disturbance and development in the vicinity of these diversion points.

Portions of the Fudacz's comments are not comments on the plat, and one is intended to denigrate the applicant and will not be responded to. The applicant has provided accurate information to both the County and to the Hearings Examiner in support of its plat application.

The applicant understands the rules and regulations relating to wetland and stream critical areas. The applicant submitted a report from a critical areas expert and intends to adhere to that report and County law. The applicant has no obligation to highlight "perennial springs" throughout the

property dating back to 1913. In fact, the Fudaczes have no rights to utilize any spring on the property other than the rights identified above and referenced at Exhibit A-2.

The Fudaczes also assert that the critical areas report was “sub par”. If the Fudaczes think the critical areas report is “sub par”, they fail to identify why the critical areas report was “sub par” and they fail to produce their own critical areas report. The photographs the Fudaczes produced are useless to the applicant, the County, and the Hearing’s Examiner because they are taken out of context and fail to demonstrate anything. The Fudaczes as a neighbor have historically been opposed to any activity which results in additional individuals moving to the area and/or houses being built in the vicinity of their property.

The Fudacz’s assert “an adequate and/or proper Eastern Washington Wetland Rating was not given, thus not identifying proper setback and buffer zones associated with wetland areas”. They then reference a wetland within the Goodwin Road County Right-of-Way. This is basically the road side ditch. The applicant commissioned a Critical Area Report (See Exhibit 12 of the application submittal) which identifies this wetland within the county right-of-way. Even though this wetland is within the county right-of-way, the Critical Area consultant reviewed this wetland in accordance with Kittitas County Code and established the appropriate buffers consistent with the county code. At the same time on the GIS mapping system of the county you will see a wetland identified within the old Railroad right-of-way and Thorp Depot Road. This wetland is off the property but there is a tail water ditch that travels along and crosses Parcel 19591 (not part of this proposed plat application) and crosses Thorp Landing Road and crossing other existing parcels eventually crossing the Thorp Hwy. Per Exhibit 12 of the plat submittal (Critical Area Report), Section 4.4 Irrigation regime Pg. 7 identifies this tail water section as a tail water ditch. Therefore, wetlands were identified off-site and not on the proposed Plat.

The Fudaczes also reference an additional spring, but it appears that this spring is no longer used and is therefore no longer an issue.

The Fudaczes allude to the applicant’s potential or intended interference or potential interference with their water rights. The applicant does not assert that it has a right to use any spring that forms the basis of the Fudacz’s water rights and the applicant does not intend to interfere with Fudacz’s water rights. The Fudacz’s rights are limited as discussed above, and all of the irrigation water that will be used on the applicant’s property will be delivered underground through a pipe system and be obtained from the West Side Irrigation Company. The Fudaczes cite to RCW 90.03.410, which is a provision of the water code that rarely is, if ever, used by any jurisdiction. It provides that willful, meaning intentional, interference to a dam, dike, headgate, weir, canal or reservoir, flume, or other structure or appliance for the diversion, carriage, storage, apportionment, or measurement of water for irrigation, is guilty of a misdemeanor. As stated above, the applicant does not claim the right to use any of the springs that feed the Fudacz’s water rights. Irrigation water will be delivered to the lots from the West Side Irrigation Company, and will be delivered through a piped system. Through the use of restrictive covenants, no lot will have the ability to apply irrigation water to the property except West Side Irrigation Company water that the lot is entitled to through the West Side Irrigation Company and the system the applicant will construct,

which complies with Kittitas County Code and the West Side Irrigation Company's rules and regulations.

**Response to Comments Received by Ms. Thompson:**

Ms. Thompson raises an issue with the 2022 Comprehensive Plan SEPA checklist that she alleges was inadequate. Ms. Thompson is referring to the applicant's 2022 request to Kittitas County to change the comprehensive plan designation of the property which is subject to this plat and to rezone the property to 5 acre density. Ms. Thompson was opposed to that request but did not file a challenge to the SEPA checklist or to the SEPA determination issued by Kittitas County as a result of that application. The County approved the comprehensive plan change and the rezone of the property. Ms. Thompson has now filed a petition to the Eastern Washington Growth Management Hearings Board challenging the County's decision. The outcome of that decision does not affect this plat application because under clear and unambiguous Washington law, this application is vested to the 5 acre zoning.

The vested rights doctrine started as a common law doctrine under which a land use application, under proper conditions, would be considered only under the land use statutes and ordinances in effect at the time of the application's submission. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). Common law vesting no longer exists in Washington and the vested rights doctrine is now only statutory. In *Potala Village Kirkland LLC v. Kirkland*, 183 Wn.App. 191, 334 P.3d. 1143 (2014) the Washington Court of Appeals held that the statutory vested rights doctrine, which applies only to building permits and plat applications, did not supplement common law vesting. *Id.* at 203. Instead, the court found statutory vesting replaced common law vesting. *Id.* at 203; see also, *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014). In addition to statutory vesting in RCW 58.17.033 and RCW 19.27.095, local governments may also enact vesting ordinances. *Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 872-73, 872 P.2d 1090 (1994).

Kittitas County has adopted Chapter 15A of the Kittitas County Code, which defines how all land use development applications filed in the County are processed. Title 15A.02.080 defines a project permit application. Chapter 15A.03 establishes the process the County follows in processing applications. KCC 15A.03.030 defines what must be in an application for it to be processed. KCC 15A.03.040 defines the process for determining when an application is complete so that it can be processed. In Kittitas County plat (short or long) applications vest as of the date the application is complete. That application was deemed complete on February 7, 2023, and is therefore vested as of February 7, 2023.

Consistent with the above vesting law, the Washington State Legislature (within the Growth Management Act) adopted RCW 36.70A.302. This statute specifies what the Eastern Washington Growth Management Hearings Board can do if it determines that part or all of the Comprehensive Planned Development Regulations subject to the appeal are invalid. RCW 36.70A.302(2) provides as follows:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt

of the board's order by the county or city or to related construction permits for that project.

Thus, because this application vested when the County deemed the plat application complete, the Eastern Washington Growth Management Hearings Board's decision in the underlying Growth Management Act appeal filed by Ms. Thompson, Mr. Fudacz, and Mr. Boitano does not affect this plat application.

**Supplemental Response to Comments by the Kittitas County Health Department:**

The applicant contacted Holly Erdman at the Kittitas County Health Department regarding the public health comment. In discussions with Ms. Erdman, it is clear that the heading of her comment referencing the Conner Short Plat and the date of the comment are incorrect; however, the applicant was able to confirm that the substance of Ms. Erdman's comments on behalf of Kittitas County Public Health did in fact relate to this plat application. The applicant understands and agrees to her comments. Specifically, the applicant understands that prior to final plat approval, the applicant will have to comply with KCC 13.35.027, by providing a certificate of water budget neutrality or other adequate interest in water rights from a water bank.