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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

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CONCERNED FRIENDS OF FERRY COUNTY
and DAVID ROBINSON

Petitioners,

v.

FERRY COUNTY,

Respondent.

Case No. 01-1-0019

FIFTH ORDER ON COMPLIANCE

I. SYNOPSIS

On December 1, 2008, Ferry County (County) enacted Ordinance Nos. 08-01, entitled "An Ordinance to Adopt the Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan"; Ordinance No. 08-02, entitled "Ferry County Critical Areas Ordinance"; and Ordinance No. 08-03, entitled "Ferry County Development Regulations Ordinance," and claims to have come into compliance with the Eastern Washington Growth Management Board's (Board) orders. The County claims it addressed each of the three non-compliant issues in this case and took action to bring the County into compliance in all issues except for the issue of designating Agricultural Lands of Long-term Commercial Significance.

Petitioners, David Robinson and Concerned Friends of Ferry County, agree that with the enactment of the above mentioned ordinances, the County complied with the Board's Orders in two of the issues, but agrees the County failed to designate Agricultural Lands of Long-term Commercial Significance and, therefore, is still out of compliance in this issue.

1 After thorough study of the submitted briefs and exhibits, consideration of testimony
2 provided by the parties at the fifth compliance hearing on February 2, 2009, investigation of
3 past Hearings Boards cases, case law, and in light of the Growth Management Act (GMA),
4 the Board: (1) finds the County in compliance and has resolved Issue No. 1 concerning the
5 use of a Pre-Growth Management Act (GMA) Shorelines Management Program (SMP); (2)
6 finds the County in continuing non-compliance with RCW 36.70A.040 and 36.70A.170 in
7 Issue No. 2 for failure to designate Agricultural Lands of Long-term Commercial
8 Significance; and (3) finds the County in compliance **in this case only** having resolved
9 Issue No. 3 concerning variances.

10 In addition the Board was asked by the Petitioners to enter a determination of
11 invalidity for the County's failure to designate Agricultural Lands of Long-term Commercial
12 Significance, which, according to the Petitioners, may lead to the vesting of building permits
13 on potential agricultural lands. The Board will not enter a finding of invalidity at this time in
14 order to prevent elimination of the agricultural lands designation criteria enacted in
15 Ordinance 08-03, but will recommend the Governor impose sanctions on Ferry County
16 pursuant to RCW 36.70A.340.

17 **II. PROCEDURAL BACKGROUND**

18 On December 21, 2001, CONCERNED FRIENDS OF FERRY COUNTY and DAVID L.
19 ROBINSON, by and through David L. Robinson, filed a Petition for Review.

20 On February 13, 2002, Respondent, Ferry County filed its Motion to Dismiss.

21 On February 26, 2002, Petitioners filed a Motion to Supplement the Record.

22 On April 5, 2002, an Order on Motions was entered allowing the Petitioners' request
23 for additions to the Record and denying the County's motion to dismiss.

24 On April 11, 2002, the Board received from Ferry County Prosecuting Attorney,
25 Stephen Graham, a letter objecting to the Board's previously issued Motions Order. The
26 Motions Order was modified to correct the inadvertent errors.

1 On June 14, 2002, the Board issued its Final Decision and Order directing Ferry
2 County to come into compliance within 120-days from the date of the Order. Ferry County
3 appealed the Board's Order to Superior Court. September 29, 2003, the Board received the
4 Order of Dismissal of the Superior Court case.

5 On September 30, 2003, the Board issued its Order Setting Compliance Hearing and
6 Briefing Schedule.

7 On October 31, 2003, the Board received a Motion for Continuance from
8 Respondent's attorney Steve Graham, asking the Board to move the compliance hearing
9 due to a scheduling conflict.

10 On December 16, 2003, the Board issued its First Order on Compliance.

11 On April 8, 2004, the Board received Petitioner's Memo to the Board with Regards to
12 a 2nd Compliance Hearing and Motion for Sanctions from David L. Robinson.

13 On August 27, 2004, the Board issued its Second Order on Compliance.

14 On March 13, 2006, the Board issued an Order Setting Compliance Hearing and
15 Briefing Schedule.

16 On March 28, 2006, the Board received Respondent's Statement of Action Taken and
17 Compliance Brief for 3rd Compliance Hearing.

18 On April 4, 2006, the Board received Petitioner's Reply Brief on Ferry County
19 Resolution No. 2005-04 for 3rd Compliance Hearing.

20 On April 25, 2006, the Board received Respondent's Second Brief for 3rd Compliance
21 Hearing.

22 On May 2, 2006, the Board received Petitioner's 2nd Reply Brief on Ferry County
23 Resolution No. 2005-04 for 3rd Compliance Hearing.

24 On June 14, 2006, the Board issued its Third Order on Compliance.

25 On September 14, 2006, the Board issued its Order Extending the briefing and
26 compliance schedule.

1 On November 20, 2006, the Board issued its Order Setting Compliance Hearing and
2 Briefing dates for all four Ferry County cases: 97-1-0018, 01-1-0019, 04-1-0007c, and 06-1-
3 0003.

4 On June 9, 2008, the Board issued its Fourth Order on Compliance.

5 On December 18, 2008, the Board received Respondent's Statement of Action Taken
6 to Comply.

7 On February 2, 2009, the Board held the compliance hearing. Present were John
8 Roskelley, Presiding Officer, and Board Members Joyce Mulliken and Raymond Paoella.
9 Present for Petitioners was David Robinson. Present for Respondent was Steve Graham.

10 **III. STANDARD OF REVIEW**

11 Comprehensive plans and development regulations (and amendments thereto)
12 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
13 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioner to
14 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
15 the Act. RCW 36.70A.320.

16 The Washington Supreme Court has summarized the standards for Board review of
17 local government actions under Growth Management Act. It was stated:

18 The Board is charged with adjudicating GMA compliance, and,
19 when necessary, with invalidating noncompliant comprehensive
20 plans and development regulations. RCW 36.70A.280, .302. The
21 Board "shall find compliance unless it determines that the action
22 by the state agency, county or city is clearly erroneous in view of
23 the entire record before the county, or city is clearly erroneous
24 in view of the entire record before the Board and in light of the
25 goals and requirements of [the GMA]." RCW 36.70A.320(3). To
26 find an action "clearly erroneous" the Board must be "left with
the firm and definite conviction that a mistake has been
committed." *Dep't of Ecology v. Pub. Util. Dist. No. 1*, 121 Wn.2d
179, 201, 849 P.2d 646 (1993).

1 The Board will grant deference to counties and cities in how they plan under Growth
2 Management Act. RCW 36.70A.3201. But, as the Court has stated, "local discretion is
3 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
4 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
5 (2000). It has been further recognized that "[c]onsistent with *King County*, and
6 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
7 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
8 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
P.3d 28 (2001).

9 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
10 36.70A.280(1)(a).

11 IV. DISCUSSION

12 Parties Positions:

13 Respondent's Statement of Action to Comply:

14 According to Ferry County (County), three issues remain out-of-compliance in Case
15 No. 01-1-0019:

16 Issue No. 1: Reliance on Pre-GMA Shorelines Master Program.

17 The County's Shorelines Master Program (SMP) pre-dated the critical areas
18 requirements of the Growth Management Act (GMA) and requires a setback of 50 feet.
19 Under the Shoreline Management Act (SMA), the County is required to update the SMP by
the year 2014.

20 The County contends the SMP and the Critical Areas Ordinance (CAO) apply to critical
21 areas "and the more restrictive provisions as to buffers apply."¹ The County claims the
22 Board stated the County could come into compliance in this issue by removing three
23 ambiguous paragraphs found in the following documents: 1.) Development Regulations,

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25 ¹ Ferry County's Statement of Action to Comply at 4, Dec. 18, 2008.

1 Section 1.00; 2.) RLCAO, Section 11.02, sub-section 4, in defining Type I Water; and 3.)
2 RLCAO, Section 11.03.

3 According to the County, the cited ambiguous sections have all been deleted.

4 **Issue No. 2: Agricultural Lands of Long-term Commercial Significance.**

5 The County argues that the Board found the County out of compliance by failing to
6 prevent subdivision of agricultural lands at a density of 2.5 acres per lot. The County gives
7 three components to compliance on this issue: 1.) Establish development regulations to
8 restrict subdivision, development density, and allowable land uses on designated
9 agricultural lands; 2.) Establishing the criteria and process by which agricultural lands will
be designated; and 3.) Executing the designation process.²

10 The County claims the first two components above were resolved with the adoption
11 of Ordinance 08-03, which changed the County's Development Regulations, Sections 9.04
12 and 9.05, to conform to WAC 365-190-050 and the GMA.³ The County argues that it can
13 now proceed to the designation of Agricultural Lands of Long-term Commercial Significance
14 through an area-wide process, which has been initiated by a mapping of soils defined as
15 prime agricultural soils by the Natural Conservation Service of the U.S. Department of
16 Agriculture.⁴

17 **Issue No. 3: Variance for Critical Areas Not Based on Best Available Science
(BAS).**

18 The County contends it was found out of compliance because it did not mention BAS
19 in criteria for considering a request for a variance from CAO regulations and leaving out
20 Model Ordinance variance criteria No. 6, which states: "The decision to grant the variance
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24 ² Id. at 5.

25 ³ Id. at 6.

26 ⁴ Id.

1 includes the best available science and gives special consideration to conservation or
2 protection measures necessary to preserve or enhance anadromous fish habitat.”⁵

3 The County contends it has complied with the Board’s order by adopting Ordinance
4 08-02, which under Section 10.01: Variances, provides criteria No. 1 through 9 and added
5 criteria No. 10, which states: “The decision to grant the variance includes consideration of
6 Best Available Science.”⁶ The County notes it does not have anadromous fish.

7 **Petitioners:**

8 **Issue No. 1: Pre-GMA SMP.**

9 Petitioners contend Ordinance 08-03 removed references to the pre-GMA SMP and
10 the County is therefore in compliance with Issue No. 1, if adopted as worded.

11 **Issue No. 2: Agricultural Lands of Long-Term Commercial Significance.**

12 Petitioners contend the County has still failed to designate and protect agricultural
13 lands of long-term significance and has also failed to consider “unique” farmland soils.
14 Petitioners claim the County’s failure to protect these agricultural lands leaves these lands
15 subject to conversion to rural residential uses and puts neighboring farms at risk from
16 incompatible residential uses and higher taxes.⁷ Petitioners also argue that the County’s de-
17 designation criteria further violates the GMA, since the same criteria must be used to
18 designate and de-designate agricultural lands. Petitioners outline the County’s requirements
19 for designation and de-designation using Supreme Court law, the GMA, WAC 365-190-050,
20 and Federal Regulation 657.5(a)(1).⁸ Petitioners claim the County’s designation decisions
21 must be made in the context of the GMA’s conservation mandate. Petitioners ask the Board
22 to find the County out of compliance and enter a finding of invalidity on the agricultural de-

23 ⁵ Id. at 7.

24 ⁶ Id.

25 ⁷ Petitioner’s Brief for 5th Compliance Hearing at 2 (Jan. 5, 2009).

26 ⁸ Id. at 3-4.

1 designation issue to prevent vesting of subdivision permits of prime agricultural land until
2 the County formally designates agricultural lands of long-term commercial significance.⁹

3 **Issue No. 3:**

4 Petitioners contend the County has moved the issue of variances in the critical areas
5 to the CAO and removed them from the development regulations. As such, Petitioners claim
6 this issue is "moot as far as the DRO" and "drop this issue in 01-1-0019 and argue this issue
7 under 04-1-0007c.

8 **Respondent's Brief:**

9 The County contends Petitioners agree that Issue Nos. 1 and 3 above should be
10 dismissed because Issue No. 1, the County's reliance on a pre-GMA Shorelines Master
11 Program, has been corrected by the County, and Issue No. 3, variances, has been moved to
12 the CAO and removed from the development regulations. Therefore, according to the
13 County, the Petitioners claim Issue No. 3 is dropped from this case and will be argued
14 under Case No. 04-1-0007c.

15 The County claims only Issue No. 2, designation of Agricultural Lands of Long-term
16 Commercial Significance, remains unresolved. The County contends Petitioners make two
17 statements that are in error: (1) that the County refuses to consider "unique" farmland soils
18 as well as prime farmland soils; and (2) the de-designation criteria violates the GMA.

19 Under (1), the County argues that there are no farmland soils classified as "unique"
20 in Ferry County, according to the Natural Resources Conservation Service (NRCS) and as
21 stated in the Development Regulations in Section 9.03.¹⁰ The County claims "[I]t is well-
22 established that a county need not designate "unique farmland soils" if they do not exist,"¹¹
23 and cite to *Diehl v. Mason County*.¹²

24 ⁹ Id. at 6.

25 ¹⁰ Respondent's Memo for Fifth Compliance Hearing at 3 (Jan. 21, 2009).

26 ¹¹ Id. at 3.

¹² *Diehl v. Mason County*, WWGMHB Case No. 95-2-0073, 8th Compliance Order (August 19, 1999).

1 Under (2), the County claims the de-designation criteria in the County's Development
2 Regulations is found in Section 9.04 and is criteria directly taken from WAC 365-190-
3 040(2)(g), which sets forth the process for amending a previous designation of resource
4 lands. The County argues Ordinance 08-03 calls for designation by amendment of the
5 Comprehensive Plan (CP) and that's when the Petitioners can file an appeal on this issue.
6 The County, after claiming its de-designation criteria is similar to that of Grant County's,
7 which was approved by this Board, acknowledges that Ferry County has not yet completed
8 actual designation (of Agricultural Lands of Long-term Commercial Significance.)¹³ The
9 County claims the issues of designation and commercial significance will be approached in
the next few months.

10 As to the issue of invalidity brought forth by the Petitioner concerning designation of
11 Agricultural Lands of Long-term Commercial Significance, the County argues invalidity
12 cannot be imposed on something that has not been done yet and cites several Western
13 Board cases, which state that a finding of invalidity should only be made in the most
14 extreme or egregious circumstances. The County claims it has made significant progress
15 toward compliance and invalidity is not warranted.

16 **Petitioners Reply Brief:**

17 **Issue No. 1: Pre-GMA SMP.**

Petitioners drop this issue from Case No. 01-1-0019.

18 **Issue No. 2: Agricultural Lands of Long-term Commercial Significance.**

19 Petitioners contend that the County must "consult and consider" the guidelines
20 provided in WAC 365-190-050 in determining whether land has long-term commercial
21 significance.¹⁴ Petitioners provide the WAC and the 10 criteria counties and cities shall also
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24 ¹³ Respondent's Memo at 7.

25 ¹⁴ Petitioner's Reply Brief for Fifth Compliance Hearing at 3 (Jan. 27, 2009).

1 consider as indicated by “the combined effects of proximity to population areas and the
2 possibility of more intense uses of the land.”¹⁵

3 Petitioners request a finding of invalidity to prevent vested development while the
4 County is out of compliance. Petitioners contend the continued validity of the development
5 regulations (Exhibit #3), with regards to designation of agricultural lands, will substantially
6 interfere with the fulfillment of the goals of the GMA, including RCW 36.70A.020(2),
7 .020(6), .020(8) and .020(9).

8 **Issue No. 3: Variances.**

9 Petitioners drop this issue from this case.

10 **Board’s Discussion and Analysis:**

11 **Issue No. 1: Pre-GMA SMP.**

12 Both parties agree the County is in compliance. Therefore, the Board has determined
13 the County has resolved this issue.

14 **Issue No. 2: Agricultural Lands of Long-term Commercial Significance.**

15 There are three components to Issue No. 2: (1) designation of agricultural lands of
16 long-term commercial significance (ALOLTCS); (2) farmland soils classified as “unique”; and
17 (3) the County’s designation and de-designation criteria.

18 As to the first component, designation of ALOLTCS, the County acknowledges it has
19 failed to designate any agricultural land in Ferry County as ALOLTCS. Therefore, the Board
20 finds the County out of compliance in this issue.

21 In regards to the second component, “unique” farmland soils, the Board agrees with
22 the County. According to a January 15, 2009, “Memo for the Record”¹⁶, which was not
23 available to the Board of County Commissioners prior to their enactment of Ordinance 08-
24 03, Ms. Sweetland claims she spoke with Chandra Neils of the Natural Resources
25 Conservation Service concerning “unique” soils in Ferry County. In her memo to Ferry

26 ¹⁵ Id.

¹⁶ Memo for the Record to Irene Whipple from Virginia Sweetland; Exhibit 28.

1 County Planning Director, Irene Whipple, Ms. Sweetland contends Ms. Neils “re-iterated a
2 statement which, she said, she had provided previously to the Ferry County Planning
3 Director, quote, “Ferry County does not have any ‘unique’ soils.” This statement by Ms.
4 Neils is corroborated in another hand-written note penned by Ms. Wipple and dated
5 September 19, 2008.¹⁷

6 The Board has no reason to doubt the integrity of the hand written note or the
7 memo written by Ms. Sweetland, although the memo is clearly outside the record used by
8 the decision makers to enact the three ordinances on December 1, 2008. It is incumbent
9 upon the Petitioners, who bear the burden of proof, to cite to the record for information to
10 refute Exhibit 28 or the information provided to the County by the NRCS.

11 In *Diehl v. Mason County*,¹⁸ the Western Board in a similar case opined:

12 Petitioner has failed to show that the County was clearly erroneous in its
13 reliance upon the NRCS statement and its earlier IRO review of ARLs as a
14 basis for its decision as to the lack of unique farmland soils in Mason County.

15 Therefore, the County is not required to consider “unique” farmland soils, if this
16 category of soils does not exist in Ferry County.

17 The third component, the County’s designation and de-designation criteria for
18 ALOLTCS, requires the Board to analyze the County’s newly enacted Ordinance No. 08-03,
19 Ferry County Development Regulations, to determine if the County is in compliance.

20 According to the adopted Development Regulations, Section 9.03 – Natural
21 Resources Conservation Service Land-Capability Classes (Classes I-VIII), the County “will
22 employ the United States Department of Agriculture – Natural Resources Conservation
23 Service’s Land-Capability Classification System (Agricultural Handbook No. 210).”¹⁹ The

24 ¹⁷ Hand written note written by Irene Whipple from phone conversation with Chandra Neils; Exhibit 28.

25 ¹⁸ *John Diehl v. Mason County*, WWGMHB Case No. 95-2-0073; 8th Compliance Hearing (Aug. 19, 1999).

26 ¹⁹ Ferry County Development Regulations, Exhibit 3, pg. 15.

1 eight classes as defined by the County are the same as those recommended in WAC 365-
2 190-050 and defined in Agricultural Handbook No. 210.

3 Under Section 9.04, the County has listed 10 criteria to consider when designating
4 agricultural lands of long-term commercial significance. These criteria are identical to those
5 listed in WAC 365-190-050(1)(a-j).

6 To de-designate, the County lists four criteria, all but one being identical to those
7 listed in WAC 365-190-040(2)(g), which are used to designate agricultural lands of long-
8 term commercial significance. Under WAC 365-190-040(2)(g)(iv), the WAC recommends the
9 language: (iv) New information on natural resource land **or critical area status**.²⁰ The
10 County, deliberately eliminated "or critical area status". The Respondent's brief is quite clear
11 in that "[D]evelopment Regulations Section 9.04, on page 18 (Exh. 3) incorporates de-
12 designation criteria **directly** from the governing regulation, WAC 365-190-040(2)(g), which
13 sets forth the process for amending a previous designation of resource lands." As noted
14 above, this is obviously incorrect, but it does not rise to non-compliance. In fact, WAC 365-
15 190-040(2)(g) is permissive in that "[D]esignation changes should be based on consistency
16 with one or more of the following criteria."²¹ The County's removal of "**critical area**
17 **status**" from (iv) is unfortunate considering the GMA is a forward-looking document, but
18 there is no requirement to incorporate all or part of the criteria. The criteria are in place to
19 be **considered** when de-designating agricultural lands of long-term commercial
20 significance.

21 **Issue No. 3: Variances.**

22 The Petitioners have agreed to drop this issue from Case No. 01-1-0019. Therefore,
23 the Board finds the County has resolved this issue.
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25 ²⁰ WAC 365-190-040(2)(g)(iv).

26 ²¹ Id.

1 **Request for Invalidity:**

2 The Board will not enter a determination of invalidity at this time. The Board believes
3 the County has made progress toward compliance by adopting Sections 9.03 and 9.04 in its
4 Development Regulations, albeit akin to a baby taking its first steps. A determination of
5 invalidity would remove the criteria now available to the County to designate agricultural
6 lands of long-term commercial significance. But if the County continues to delay the
7 designation of Agricultural Lands of Long-term Commercial Significance, a determination of
8 invalidity will be considered at a later date.

9 The Board will, however, recommend to the Governor that sanctions authorized by
10 the act be imposed on Ferry County pursuant to RCW 36.70A.340 for continuing non-
11 compliance in its failure to designate Agricultural Lands of Long-term Commercial
12 Significance. RCW 36.70A.345 allows the Governor to impose a sanction or sanctions
13 specified under RCW 36.70A.340 on: (1) a county or city that fails to designate
14 ...agricultural lands... under RCW 36.70A.170 by the date such action was required to have
15 been taken.

16 Ferry County opted to plan under the GMA in 1990²² and adopted its Interim Critical
17 Areas Ordinance #93-02 on March 8, 1993. The County adopted its Comprehensive Plan by
18 Ordinance #95-06 on September 18, 1995. Agricultural lands of long-term commercial
19 significance were not designated as required by RCW 36.70A.170(a) after the County opted
20 to plan under GMA and the County has yet to do so after 19 years. Ferry County was found
21 in non-compliance for failure to designate agricultural lands of long-term commercial
22 significance in the Board's Final Decision and Order for this case on June 14, 2002, and has
23 been in continuing non-compliance as determined by the Board in five compliance
24 proceedings.

25 The Petitioners have been diligent, yet patient with the County and the Board
26 throughout these long years, but the time has come for the County to take state law and its

25 ²² CTED Issue Paper #8: Flexible Application of the GMA.

1 responsibility to its present and future citizens seriously. The County continues to use delay
2 tactics, and a variety of arguments and excuses to avoid designating agricultural lands. With
3 this Fifth Compliance Order and a continuing finding of non-compliance, the majority of the
4 Board feels it is its duty to recommend to the Governor that sanctions be imposed and will
5 do so upon issuance of this Order.

6 **V. FINDINGS AND CONCLUSIONS**

- 7 1. Ferry County is a county located east of the crest of the Cascade
8 Mountains and has chosen to plan under Chapter 36.70A.
- 9 2. Petitioners are citizens of Ferry County and participated in the adoption
10 of Ordinance Nos. 08-01, 08-02, and 08-03 in writing and through
11 testimony.
- 12 3. The Board issued its Final Decision and Order (FDO) in this matter on
13 June 14, 2002.
- 14 4. After four compliance hearings, three issues still remain out of
15 compliance from the original FDO: (1) FDO Issue No. 1, the County's
16 use of a pre-GMA SMP; (2) FDO Issue No. 7, the County's failure to
17 designate agricultural lands of long-term commercial significance; and
18 (3) FDO Issue Nos. 3-6, the County's variance procedures.
- 19 5. The Board finds and concludes the County has come into compliance
20 with FDO Issue No. 1, the County's use of a pre-GMA SMP. This issue is
21 resolved.
- 22 6. The Board finds and concludes the County has failed to designate
23 agricultural lands of long-term commercial significance and is,
24 therefore, in continuing non-compliance with RCW 36.70A.040 and
25 36.70A.170 (FDO Issue No. 7).
- 26

- 1 7. The Board finds and concludes the County has adopted language and
2 criteria in its Ordinance 08-03 for the designation and de-designation of
3 agricultural lands that fulfills its obligation under the GMA.
- 4 8. The Board finds and concludes the County has no obligation to
5 recognize "unique" farmland soils if there are no "unique" farmland
6 soils in Ferry County as determined by the NRCS.
- 7 9. The Board finds and concludes the County has come into compliance
8 with FDO Issue Nos. 3-6, the County's variance procedures for Case
9 No. 01-1-0019. This issue is resolved.
- 10 10. The Board finds and concludes the County's failure to designate
11 agricultural lands of long-term commercial significance is significant,
12 but will not enter a determination of invalidity at this time. Invalidity
13 would postpone the requirements stipulated in Ordinance 08-03, thus
14 eliminating the designation and de-designation criteria the County will
15 use to designate agricultural lands of long-term commercial
16 significance.
- 17 11. Pursuant to RCW 36.70A.340, the Board will recommend to the
18 Governor that a sanction or sanctions be imposed on Ferry County for
19 egregious delay in designating agricultural lands of long-term
20 commercial significance as required by RCW 36.70A.170(a).

VI. ORDER

21 Based upon the Board's review of the GMA, prior decisions of the Hearings Boards,
22 briefing and presentation by the parties at the February 2, 2009, compliance hearing, and
23 having discussed and deliberated on the matter, the Board enters a **Finding of**
24 **Compliance in Issue No. 1 and 3**, and a **Finding of Non-compliance in Issue No. 2**,
25 failure to designate agricultural lands of long-term commercial significance, and directs the

1 County to bring itself into compliance with the Board's Order and the GMA by **June 22,**
2 **2009, 120 days**, from the date of this Order.

- 3
- 4 • The Board establishes **June 22, 2009**, as the deadline for the County
5 to take appropriate legislative action to comply with the GMA and this
6 Order. The following schedule for compliance, briefing and hearing shall
7 apply:
- 8 • The County shall file with the Board by **June 29, 2009, an original**
9 **and four copies** of a **Statement of Actions Taken to Comply**
10 (SATC) with the GMA, as interpreted and set forth in this Order. The
11 SATC shall attach copies of legislation enacted in order to comply. The
12 County shall simultaneously serve a copy of the SATC, with
13 attachments, on the parties. **By this same date, the County shall**
14 **file a "Remanded Index," listing the procedures and materials**
15 **considered in taking the remand action.**
- 16 • By no later than **July 13, 2009²³**, Petitioners shall file with the Board
17 an **original and four copies** of Comments and legal arguments on
18 the County's SATC. Petitioners shall simultaneously serve a copy of
19 their Comments and legal arguments on the parties. In addition, the
20 Board requests the parties send their briefing electronically in Microsoft
21 Word format to: aandreas@ew.gmhb.wa.gov. The parties are
22 requested to use Times New Roman or a similar font with the type size
23 of 12 or larger, and line spacing shall be 1.5 or more.
- 24 • By no later than **July 27, 2009**, the County shall file with the Board an
25 **original and four copies** of their Response to Comments and legal
26 arguments. The County shall simultaneously serve a copy of such on
the parties. In addition, the Board requests the parties send their
briefing electronically in Microsoft Word format to:
aandreas@ew.gmhb.wa.gov. The parties are requested to use Times
New Roman or a similar font with the type size of 12 or larger, and line
spacing shall be 1.5 or more.

²³ July 13, 2009, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2).

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- By no later than **August 3, 2009**, Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. Petitioners shall serve a copy of their brief on the parties. In addition, the Board requests the parties send their briefing electronically in Microsoft Word format to: aandreas@ew.gmhb.wa.gov. The parties are requested to use Times New Roman or a similar font with the type size of 12 or larger, and line spacing shall be 1.5 or more.
- Pursuant to RCW 36.70A.330(1) and WAC 242-02-891²⁴ the Board hereby schedules a telephonic Compliance Hearing for **August 10, 2009, at 10:00 – 11:30 a.m. The compliance hearing shall be limited to consideration of the Legal Issues found noncompliant and remanded in this Order.** The parties will call **360-407-3780 followed by 442545 and the # sign.** Ports are reserved for: **Mr. Robinson and Mr. Graham.** If additional ports are needed please contact the Board to make arrangements.

If the County takes legislative compliance actions prior to the date set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

²⁴ The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and additional procedures for the compliance hearing.

1 **Judicial Review:**

2 Any party aggrieved by a final decision of the Board may appeal the decision to
3 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
4 review may be instituted by filing a petition in superior court according to the
5 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

5 **Enforcement:**

6 The petition for judicial review of this Order shall be filed with the appropriate
7 court and served on the Board, the Office of the Attorney General, and all parties
8 within thirty days after service of the final order, as provided in RCW 34.05.542.
9 Service on the Board may be accomplished in person or by mail. Service on the
10 Board means actual receipt of the document at the Board office within thirty
11 days after service of the final order.

11 **Service:**

12 This Order was served on you the day it was deposited in the United States mail.

13 RCW 34.05.010(19)

14 SO ORDERED this 20th day of February 2009.

15 EASTERN WASHINGTON GROWTH MANAGEMENT
16 HEARINGS BOARD

17 _____
18 John Roskelley, Board Member

19 _____
20 Raymond Paoella, Board Member

21 **BOARD MEMBER MULLIKEN'S CONCURRENCE IN PART AND DISSENT IN PART:**

22 While Board Member Mulliken supports the majority decision in that Ferry County
23 remains in continuing non-compliance and the County has failed to designate Agriculture
24 Lands of Long Term Commercial Significance (ALOLTCS); and the Board recognizes the
25

1 County is progressing very slowly to bring itself into compliance with the GMA; **the remedy**
2 **of requesting immediate sanctions does not seem to be appropriate at this time.**

3 However, Board Member Mulliken wants to make it very clear, if Ferry County fails to
4 bring itself into compliance in regards to designating ALOLTCS by the compliance deadline
5 set forth in this FIFTH ORDER ON COMPLIANCE by the Eastern Board majority, she will
6 unequivocally support the majority's request of the governor to issue sanctions on Ferry
7 County.

8 The County has stated in RESPONDENT'S MEMO FOR FIFTH COMPLIANCE HEARING,
9 at page 9, "Note that the results of the 2007 Census of Agriculture are scheduled to be
10 published during February 2009. When this more-recent data becomes available, the
11 Planning Commission, in conjunction with its designation of agricultural lands, will verify
12 and/or revise findings derived from the Census data." The county has failed in this issue
13 for twelve years (since 1997), and this Board Member agrees it is time for the County to
14 bring itself into compliance in this issue.

15 _____
16 Joyce Mulliken, Board Member