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

SCOTT SIMMONS, RIPARIAN OWNERS OF
FERRY COUNTY, and GARY HOWDEN

Petitioner(s),

Case No. 09-1-0002c

v.

ORDER ON CONSOLIDATION

FERRY COUNTY,

Respondent(s).

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I. PROCEDURAL HISTORY

On January 28, 2009, SCOTT SIMMONS filed a Petition for Review (PFR) challenging Ferry County's adoption of Ordinance No. 2008-02. This matter was assigned Case No. 09-1-0001, with Board member Ray Paoella serving as Presiding Officer.

On January 30, 2009, RIPARIAN OWNERS OF FERRY COUNTY and GARY F. HOWDEN filed a PFR challenging Ferry County's adoption of Ordinance No. 2008-02. This matter was assigned Case No. 09-1-0002, with Board member John Roskelley serving as Presiding Officer.

On March 5, 2009, the Board held telephonic Prehearing Conferences in these matters with the Board issuing its Prehearing Order for both cases on March 10, 2009.

Since issuance of the Board's March 10 Prehearing Orders, Ferry County filed a Motion to Dismiss both of the above-referenced cases based on, among other things, lack

1 of subject matter jurisdiction.¹ In two separate orders concerning these motions, the
2 Board denied in part and granted in part the County's request.²

3 **II. DISCUSSION and ORDER**

4 RCW 36.70A.290(5) requires that "the board shall consolidate, where appropriate,
5 all petitions involving review of the same ... development regulation or regulations." Now,
6 after the benefit of the Prehearing Conferences and briefing on the dispositive motions filed
7 by the County, the Board finds the PFRs filed by Petitioner Simmons (Case No. 09-1-0001)
8 and Petitioners Riparian Owners of Ferry County/Howden (Case No. 09-1-0002) pertain to
9 the same legislative action (Ordinance No. 2008-02), are premised on the same legal issue
10 (compliance with RCW 36.70A.172) and, therefore, it is appropriate to consolidate the two
11 matters into one consolidated proceeding.

12 **Hereafter, this matter is consolidated as Consolidated Case No. 09-1-**
13 **0002c and captioned as *Simmons, et al. v. Ferry County*. Board member John**
14 **Roskelley shall serve as Presiding Officer in this consolidated case.**

15 Based on the Board's April 22 Order on Motion and April 23 Order on Motion,³ the
16 following issues shall be addressed by the parties in their briefing:

17 Petitioner Simmons shall address the following:

18 Issue 3. Did Ferry County fail to comply with the requirements of RCW
19 36.70A.172(1) when it adopted Sec. 9.04 of Ordinance #2008-02 designating
20 Mapped Priority Habitat Areas and Species Observation Points without

21 ¹ March 25, 2009 Respondent's Motion to Dismiss – Case No. 09-1-0001; March 25, 2009 Respondent's Motion
22 to Dismiss – Case No. 09-1-0002.

23 ² April 22, 2009 Order on Motion to Dismiss – Case No. 09-1-0002; April 23, 2009 Order on Motion to Dismiss
24 – Case No. 09-1-0001. In regards to Case No. 09-1-0001, Petitioner set forth five issues for the Board to
25 address. Of these five issues, with the Board's April 23 Order, Issues 1, 2, 4, and 5 were dismissed in their
26 entirety leaving only Issue 3 to advance to the Hearing on the Merits. However, in regards to Issue 3, the
Board struck language from that issue related to nexus and proportionality. *See April 23 Order, at 3-4.* In
regards to Case No. 09-1-0002, Petitioners set forth four issues for the Board to address. Of these four
issues, with the Board's April 22 Order, Issues 1, 2, and 4 are dismissed in their entirety. As for Issue 3, the
Board the Board dismissed that portion of the issue related to RCW 36.70A.020(6), leaving argument related
to RCW 36.70A.172(1) for the Hearing on the Merits. *See April 22 Order, at 10-12.*

³ See Appendix A

1 determining BAS for said areas and or without considering data supporting the
2 generation of said maps used to designate said areas?

3 Petitioners Riparian Owners of Ferry County/Howden shall address the following:

4 Issue 3. Did Ferry County fail to comply with RCW 36.70A.172(1) when
5 they adjusted buffers from those recommended in the version of the CAO
6 presented to the public in December 2007 to those incorporated in the
7 adopted version?

8 The briefing and hearing schedule shall remain as set forth in the Board's previously
9 issued Prehearing Orders. The remaining briefing schedule is as follows:

- 10 May 18, 2009 Deadline for Petitioner's Hearing on the Merits Brief with exhibits (40
11 page limit)
- 12 June 8, 2009 Deadline for Respondent's Hearing on the Merits Brief with exhibits (40
13 page limit)
- 14 June 15, 2009 Deadline for Petitioner's Hearing on the Merits Optional Reply Brief (30
15 page limit)

16 The Hearing on the Merits for this consolidated case shall be held as follows:

17 June 22, 2009 Hearing on the Merits - 10:00 AM – 12:00 P.M. at 686 S. Clark, PUD
18 Bldg., Republic, WA.

19 The Final Decision and Order in the consolidated case of *Simmons, et al v. Ferry County*,
20 Case No. 09-1-0002c, will be issued by July 28, 2009.

21 **SO ORDERED** this 7th day of May 2009.

22 EASTERN WASHINGTON GROWTH MANAGEMENT
23 HEARINGS BOARD

24 _____
25 John Roskelley, Board Member

26 _____
Joyce Mulliken, Board Member

1 APPENDIX A

2 REVISED ISSUES STATEMENTS BASED ON
3 BOARD'S APRIL 22 and APRIL 23 ORDERS ON DISPOSITIVE MOTIONS
4 [Strikethrough denotes issues dismissed in their entirety or dismissed in part]

5 Simmons v. Ferry County – Case No. 09-1-0001

6 1. ~~Did Ferry County fail to comply with the requirements of RCW 36.70A.020(6)~~
7 ~~when it adopted Sec. 9.03.3 of Ordinance #2008-02 without first establishing the required~~
8 ~~nexus and proportionality of the regulations regarding regulated activities?~~

9 2. ~~Did Ferry County fail to comply with the requirements of RCW 36.70A.020(6)~~
10 ~~when it adopted Sec. 9.03.8 of Ordinance #2008-02 without first establishing the required~~
11 ~~nexus and proportionality of the regulations regarding subject structures and improved~~
12 ~~areas?~~

13 3. Did Ferry County fail to comply with the requirements of RCW 36.70A.172(1)
14 when it adopted Sec. 9.04 of Ordinance #2008-02 designating Mapped Priority Habitat
15 Areas and Species Observation Points without determining BAS for said areas and or
16 without considering data supporting the generation of said maps used to designate said
17 areas and without first establishing the required nexus and proportionality of regulations
18 regarding such areas?

19 4. ~~Did Ferry County fail to comply with the requirements of RCW 36.70A.020(6)~~
20 ~~when it adopted Sec. 9.04 of Ordinance #2008-02 regulating and conditioning the~~
21 ~~development of private properties within described areas without first establishing the~~
22 ~~required nexus and proportionality of the regulations regarding the development of private~~
23 ~~property?~~

24 5. ~~Did Ferry County fail to comply with the requirements of RCW 36.70A.020(6)~~
25 ~~when it adopted Sec. 9.04 of Ordinance #2008-02 where it subjected the development of~~
26 ~~private property to future findings of the Washington State Department of Fish and Wildlife~~

1 first establishing the required nexus and proportionality of the regulation regarding said
2 development of private property?

3 Riparian Owners of Ferry County/Howden v. Ferry County – Case No. 09-1-0002

4 1. ~~Did Ferry County fail to comply with RCW 36.70A.170(1) when it designated~~
5 ~~all streams, rivers, lakes and ponds as critical areas in Sec. 9.01.3, 9.01.04, and 9.01.05~~
6 ~~without first establishing that a threat to the functions and values of the designated~~
7 ~~streams, rivers, lakes and ponds actually existed?~~

8 2. ~~Did Ferry County fail to comply with the RCW 36.70A.020(6), RCW 36.70A.050~~
9 ~~and RCW 36.70A.170 by establishing streamside buffers in areas where no identified threat~~
10 ~~to water quality and fish and wildlife exist?~~

11 3. Did Ferry County fail to comply with RCW 36.70A.020(6) and RCW
12 36.70A.172(1) when they adjusted buffers from those recommended in the version of the
13 CAO presented to the public in December 2007 to those incorporated in the adopted
14 version?

15 4. ~~Did Ferry County fail to comply with the requirements of RCW 36.70A.020(6)~~
16 ~~when they failed establish a time limit in Section 9.04 of Ordinance #2008-02 for validation~~
17 ~~of point observations and/or polygon observations by the Washington State Department of~~
18 ~~Fish and Wildlife?~~