

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

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

JACK and DELAPHINE FEIL, husband and wife; JOHN TONTZ and WANDA TONTZ, husband and wife; and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,

Petitioners,

v.

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, (WSDOT); WASHINGTON STATE PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, (PUD),

Respondents.

Case No. 08-1-0011

ORDER ON RESPONDENT'S MOTION TO DISMISS; ORDER ON PETITIONERS' MOTION TO SUPPLEMENT THE RECORD AND MOTION TO PRODUCE THE RECORD

22  
23  
24  
25  
26

**I. PROCEDURAL HISTORY**

On April 14, 2008, JACK and DELAPHINE FEIL et al., by and through their representative, Jim Klauser, filed a Petition for Review (PFR). With this PFR, Petitioners challenge Douglas County's adoption of Resolution No. TLS 08-09B.

1 On April 18, 2008, the Board received Respondent's (County) Motion to Dismiss  
2 Petition for Lack of Subject Matter Jurisdiction.

3 On May 1, 2008, the Board received Respondent's (State's) Washington State Parks  
4 and Recreation Commission's (WSP&R) and Washington State Department of  
5 Transportation's (WSDOT) Joint Response to Douglas County's Motion to Dismiss.

6 On May 5, 2008, the Board received Petitioners' Response/Objection to Douglas  
7 County's Dismissal Motion; Motion to Supplement the Record; and Declaration of James  
8 Klauser in Support of Petitioners' Response/Objection to Douglas County's Dismissal Motion;  
9 and Motion to Supplement the Record; Petitioners' Objection and Motion to Strike the  
10 "Response" of WSP&R and WSDOT. The Board also received Douglas County's Respondents  
11 Memorandum.

12 On May 6, 2008, the Board received Respondents WSP&R and WSDOT's Joint  
13 Response to Petitioner's Motion to Strike.

14 On May 7, 2008, the Board received Respondent's Index of Record.

15 On May 8, 2008, the Board received Petitioners' Objection to, Motion to Strike, and  
16 Response to WSDOT & WSP&R "Response" to Petitioners' Motion to Strike and Petitioners'  
17 Objections to and Motion to Strike the Douglas County May 1, 2008, "Respondent's  
18 Memorandum".

19 On May 13, 2008, the Board held the telephonic Prehearing conference. Present  
20 were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce  
21 Mulliken. Present for the Petitioners were Robert Rowley and James Klauser. Present for the  
22 Respondents were Steve Clem, Douglas County, Steve Klasinski, WSDOT, Jim Swartz,  
23 WSP&R, and Matt Kernutt, WSP&R. During the Prehearing conference the Board heard  
24 arguments from the parties concerning the Respondents' Motion to Dismiss and Petitioners'  
25 Objections and Motion to Strike. The Board provided a briefing schedule for responses to  
26 the Respondent's Motion to Dismiss in the prehearing order.

1 On May 27, 2008, the Board received Petitioners' Supplemental Response to Douglas  
2 County/State Dismissal Motion; Motion to Supplement the Record; and Motion to Produce  
3 the Record.

4 On May 29, 2008, the Board received Respondent's Reply Memorandum on Motion to  
5 Dismiss and Controverting Petitioners' Motion to Produce Record and WSP&R and WSDOT's  
6 Reply Regarding Subject Matter Jurisdiction.

7 On June 9, 2008, the Board received Petitioners' Objections to Reply Briefs and  
8 Motion to Supplement the Record.

## 9 II. FACTS

10 On March 27, 2006, the Washington State Parks and Recreation Commission  
11 (WSP&R) filed a combined Land Development Permit Application for a recreational overlay  
12 district and site plan development to construct a public multi-modal trail facility that will be  
13 located on a Washington State Department of Transportation (WSDOT) right-of-way and  
14 lands owned by the Chelan County PUD. This application was made after the Douglas  
15 County Superior Court ordered WSP&R to apply for and obtain land use permits as may be  
16 required by the Douglas County Code.

17 The recreational overlay district, as issued by Douglas County, does not change the  
18 underlying zoning. It permits an activity to take place within a zoning district that does not  
19 expressly authorize or only conditionally allows such activity. No changes were made to the  
20 Douglas County Comprehensive Plan or its development regulations.

21 On November 3, 2006, Douglas County Hearing Examiner, Andrew L. Kottkamp,  
22 issued a final decision on the combined application and approved Permit Nos. RO-06-01 and  
23 SPD 06-02. The Douglas County Code authorizes the Hearing Examiner to do so. (Chapter  
24 2.13.070).

25 On November 20, 2006, the Petitioners filed a Land Use Petition Act (LUPA), RCW  
26 36.70C, petition in Douglas County Superior Court appealing the decision of the Hearing  
Examiner and requesting a Declaratory Judgment that the Hearing Examiner was without

1 jurisdiction to approve a recreational overlay.<sup>1</sup> Seven days later, the Petitioners filed a  
2 Petition for Review (PFR) with the Eastern Washington Growth Management Hearings Board  
3 (Board), which the Board dismissed on February 16, 2007, holding that the recreational  
4 overlay was a site specific project permit application and the Board did not have jurisdiction  
5 over the Hearing Examiner's decision.<sup>2</sup> The Board's decision was affirmed by the Douglas  
6 County Superior Court on July 31, 2007.<sup>3</sup>

7 Also on July 31, 2007, the Douglas County Superior Court entered an order in the  
8 LUPA case holding that the recreational overlay granted for the Rocky Reach Trail  
9 constituted a rezone and that the Hearing Examiner did not have the authority to grant a  
10 rezone.

11 On March 25, 2008, in response to the Court's decision, the Douglas County Board of  
12 County Commissioners adopted Resolution No. TLS 08-09B and approved the application of  
13 WSP&R and affirmed the Hearing Examiner's decision with two additional Conditions of  
14 Approval.

### 15 **III. DISCUSSION**

#### 16 **Preliminary Matters:**

17 At the Pre-hearing conference on May 13, 2008, the following objections and motions  
18 were discussed by the parties and Board, and action was taken during the Pre-hearing  
19 conference or will be addressed in this Order:

20 (1) The Petitioners' May 5, 2008, Response/Objection to Douglas County's Dismissal  
21 Motion was discussed and noted. The Petitioners' Motion to Supplement the Record was  
22 GRANTED and attachments reviewed by the Board pursuant to WAC 242-02-650.  
23

24 <sup>1</sup> *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

25 <sup>2</sup> *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

26 <sup>3</sup> *Feil, et al. v. EWGMHB, et al.*, Cause No. 07-2-00100-7.

1 (2) The Petitioners' May 8, 2008, Objections to (and Motion to Strike) the Douglas  
2 County May 1, 2008 "Respondent's Memorandum" were noted, and the Petitioners' Motion  
3 to Strike portion DENIED pursuant to WAC 242-02-030(3) and WAC 242-02-522.

4 (3) Petitioners' May 8, 2008, Objection to, Motion to Strike, and Response to  
5 Washington Department of Transportation and State Parks and Recreation Commission  
6 "Response" to Petitioners' Motion to Strike was noted, and Petitioners' Motion to Strike  
7 portion DENIED pursuant to WAC 242-02-030(3) and WAC 242-02-522.

8 **Motions and Supplement Briefs Filed Subsequent to Pre-hearing Order:**

9 On June 9, 2008, the Petitioners filed their Objection to "Reply" Briefs. With this  
10 objection, the Petitioners move to strike the County and the State's reply briefs as being  
11 unresponsive to arguments asserted by the Petitioners' in their Supplemental Response  
12 brief. The Board notes this objection, but finds it is the duty and responsibility of the Board  
13 to weigh the arguments presented by the parties and determine whether or not the party  
14 carrying the burden of proof has adequately presented its case. The Board gives every brief  
15 and every argument the weight it is entitled to. In that regard, the Petitioners' objection is  
16 noted.

17 Included with the Objection to Reply Briefs was a Motion to Supplement the Record,  
18 Declaration of James Klauser, and attachments, with the stated purpose being to refute  
19 statements made by the County in its reply brief. The Board finds that this declaration and  
20 its attachments are not necessary or of substantial assistance to the Board in making its  
21 determination. Therefore, pursuant to WAC 242-02-540, the Petitioners' June 9, 2008  
22 Motion to Supplement is DENIED.

23 **Current Matters:**

24 **Motion to Supplement the Record (May 29, 2008):**

25 The Respondents<sup>4</sup> did not reply to this motion. The Petitioners' <sup>5</sup> move to supplement  
26 the Record with four documents: (1) Attachment A is a copy of an e-mail exchange

<sup>4</sup> Douglas County, WSDOT, WSP&R Commission, and Public Utility District No. 1 of Chelan County.

1 between the Board and the Petitioners; (2) Attachment B is a copy of the Index to the  
2 Record for Case No. 06-1-0012; (3) Attachment C is the Greater East Wenatchee Zoning  
3 Map; and (4) Attachment D is excerpts from the Greater East Wenatchee Comprehensive  
4 Plan. The Board, pursuant to WAC 242-02-660, shall take official notice of Attachments C  
5 and D, as these are legislative enactments of the County. As for Attachments A and B, the  
6 Board, pursuant to WAC 242-02-540, does not find these to be necessary or of substantial  
7 assistance to the Board in reaching its decision. Therefore, the Board GRANTS, in part, and  
8 DENIES, in part, the Petitioners' Motion to Supplement. Attachment C and D shall become  
9 part of the Record of this proceeding.

**Motion to Produce a Legible/Audible Record (May 29, 2008):**

**Position of the Parties:**

**Petitioners:**

12 According to the Petitioners, RCW 36.70A.290(4) requires the Board to base its  
13 decision on the record by the County. The Petitioners claim the Record provided to the  
14 Board has not been provided to the Petitioners and requests that no further action should  
15 be taken in this case until a legible/audible copy has been provided. The Petitioners move  
16 the Board to: (1) order the County to provide the Petitioners with a legible/audible copy of  
17 the CD/DVD provided to the Board and other parties; or (2) for the Board to copy its own  
18 legible/audible copy and provide it to the Petitioners.<sup>6</sup>

**Respondents Douglas County:**

19 The County contends it has no affirmative obligation to provide a copy of the entire  
20 record to the Petitioners. The County has a duty to make the record available to the  
21 Petitioners for inspection. The County notes, if Petitioners request copies of the record  
22 and/or portions of the record and pay for such copies, the County will provide these

---

23 <sup>5</sup> Jack and Delaphine Feil, John and WandaTontz, and The Right To Farm Association of Baker Flats.

24 <sup>6</sup> Petitioners' Supplemental Response to Douglas County/State Dismissal Motion at 3.

1 documents. The County served the Index of Record on the Petitioners and mailed copies of  
2 the Record and audio recordings to the Board and counsel of record in digital format (DVD)  
3 as a courtesy. The County further contends it has no affirmative obligation to provide a  
4 copy of the entire Record to the Petitioners, but rather it has a duty to make the Record  
5 available to the Petitioners for inspection and will provide copies at the Petitioners expense.  
6 The County claims it has not received any communication from the Petitioners regarding  
7 any problems with the courtesy copies and learned of the problem through an e-mail  
8 authored by the Presiding Officer.

**Board Discussion:**

9 WAC 242-02-520 requires the County to file with the Board and serve a copy on the  
10 parties an *index of all material* used in taking the action which is the subject of the petition  
11 for review within thirty days of service of the petition. The written or tape-recorded record  
12 of the legislative proceedings where action was taken shall also be *available to the parties*  
13 *for inspection*.

14 The County sent legible/audible recordings in CD/DVD format to the Board and a  
15 courtesy copy to the parties of record. The County has made the record available to the  
16 parties for inspection as required by WAC 242-02-520. Therefore, the Petitioners' motion is  
17 DENIED.

**Motion to Dismiss:**

**Position of the Parties:**

**Respondent Douglas County:**

20 With its Motion to Dismiss, the County claims: (1) the Board does not have subject  
21 matter jurisdiction because the decision challenged by the Petitioners constitutes a site-  
22 specific development permit or, in the alternative, a site-specific rezone, and is not within  
23 the jurisdiction conferred by RCW 36.70A.280(1); and (2) the Board lacks subject matter  
24 jurisdiction pursuant to RCW 36.70A.280(1) under principles of *res judicata* and collateral  
25  
26

1 estoppel based upon the Board's prior decision in *Feil, et al. v. Douglas County, et al.*<sup>7</sup> The  
2 County listed numerous facts supporting its argument, including Douglas County Resolution  
3 No. TLS-08-09B; the Superior Court LUPA decision in *Feil, et al. v. Douglas County*,<sup>8</sup> and  
4 the Board's decision in *Feil, et al. v. Douglas County, et al.*, Case No. 06-1-00012.<sup>9</sup>

5 The County's request for dismissal of the Petition for lack of subject matter  
6 jurisdiction is pursuant to the following authorities: (1) RCW 36.70A.280(1), RCW  
7 36.70A.030(7), and RCW 36.70B.020(4); (2) WAC 242-02-020(2); (3) *Wenatchee*  
8 *Sportsmen Assoc. v. Chelan County*<sup>10</sup>; (4) *Feil, et al. v. Douglas County, et al.*<sup>11</sup>; (5)  
9 *Chipman v. Chelan County*<sup>12</sup>; and (6) *Wilma, et al. v. City of Colville*<sup>13</sup>.

10 **Washington State Parks and Recreation Commission and Washington State  
11 Department of Transportation's (State) Joint Response:**

12 The State, which includes both the WSP&R and WSDOT, concurs with and joins in  
13 the County's motion to dismiss and contends a LUPA action in Superior Court is the proper  
14 forum to challenge the issuance of this site-specific permit. According to the State, the  
15 Board granted the State of Washington's motion to dismiss a similar challenge in *Feil, et al.,*  
16 *v. Douglas County, et al.*<sup>14</sup>, holding that the Recreational Overlay (R/O) permit at issue was  
17 a project permit application as defined in RCW 36.70B.020. In a subsequent action by the  
18 Douglas County Superior Court, the Court held that the R/O permit constituted a rezone  
19 which required legislative approval and only the Board of County Commissioners (BOCC)

---

20 <sup>7</sup> *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

21 <sup>8</sup> *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

22 <sup>9</sup> *Feil, et al.*, footnote 2.

23 <sup>10</sup> *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

24 <sup>11</sup> *Feil, et al.*, footnote 2.

25 <sup>12</sup> *Chipman v. Chelan County*, EWGMHB Case No. 05-1-0002, Order of Dismissal (Jan. 31, 2006).

26 <sup>13</sup> *Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO on Amended Petition for Review (Dec. 5, 2002).

<sup>14</sup> *Feil, et al.*, footnote 2.

1 had the power to approve such an application. The BOCC unanimously approved the project  
2 permit.

3 The State contends an administrative agency, such as the Board, has only that  
4 authority expressly granted or necessarily implied by RCW 36.70A.280(1). As such, the  
5 Board does not have the jurisdiction to decide challenges to site-specific land use decisions  
6 because site-specific land use decisions do not qualify as CP's or development regulations.  
7 Citing *Woods*<sup>15</sup>, the State argues such a challenge must be brought under LUPA in Superior  
8 Court.

9 The State argues the R/O permit issued by the County is a site-specific land use  
10 decision and claims the Superior Court has already ruled this application is a site-specific  
11 proposal.<sup>16</sup> According to the State, the number of acres involved, which total 29 acres, is  
12 not relevant as argued by the Petitioners because the courts and the Board have found  
13 much larger projects to be site-specific land use decisions.<sup>17</sup>

14 The State claims the Petitioners cannot create subject matter jurisdiction by alleging  
15 violations of the GMA by implication. The County's resolution, according to the State, is not  
16 an amendment adopted under the GMA process. The State contends RCW 36.70A.280(1)  
17 does not convey jurisdiction over implied amendments, but over adopted amendments to  
18 the CP or development regulations.

19 The State also claims the Petitioners failed to challenge the CP and development  
20 regulations in a timely manner, which is 60 days after publication of the ordinance that  
21 adopts the CP or development regulations or amendments thereto. The time has passed to  
22 appeal the CP or development regulations.

23 **Petitioners:**

24 <sup>15</sup> *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) at 612 (citing *Wenatchee Sportsmen*).

25 <sup>16</sup> *Feil, et al.*, footnote 1.

26 <sup>17</sup> WSP&R, et al. Joint Response to Douglas County's Motion to Dismiss at 4.

1 As requested by the Board's Pre-hearing Order, the Petitioners filed a timely  
2 response brief to the Respondents Motion to Dismiss. In their May 27, Response, the  
3 Petitioners: (1) rely upon their previously submitted April 30, 2008, Response and  
4 the declaration of James J. Klauser, together with their May 6, 2008, objections  
5 to the Douglas County brief and the State brief; (2) ask that the documents they  
6 rely upon be admitted as "supplements to the record" in accordance with RCW  
7 36.70A.290(4) in a Motion to Supplement the Record; (3) move the Board for  
8 alternative relief relative to the "record" in a Motion to Produce a  
9 Legible/Audible Record; and (4) respond to the County's argument for  
dismissal.<sup>18</sup>

10 With their response, the Petitioners argue the following: (1) the burden of  
11 proof is on the moving party, Douglas County<sup>19</sup>; (2) the doctrines of collateral  
12 estoppel and *res judicata* do not apply<sup>20</sup>; and (3) *Wenatchee Sportsmen Association v.*  
13 *Chelan County*<sup>21</sup> and *Woods v. Kittitas County*<sup>22</sup> do not support the motions to dismiss.

14 Under sub-section (1) above, the Petitioners claim the petition facially complies with  
15 the requirements of RCW 36.70A.280 and RCW 36.70A.290. According to the Petitioners,  
16 the moving parties (County and State) have the burden to establish lack of jurisdiction and  
17 contend the County and State have failed to do so.<sup>23</sup>

18 Under sub-section (2) above, the Petitioners contend the County fails to provide  
19 briefing to support collateral estoppel or *res judicata*. According to the Petitioners, the  
20 County fails to provide legal authority to support its claim an earlier ruling of the Board,  
where the Board found it lacked jurisdiction to review a hearing examiner decision,

21 \_\_\_\_\_  
<sup>18</sup> Petitioners' Supplemental at 2-8.

22 <sup>19</sup> Petitioners' Supplemental at 3.

23 <sup>20</sup> Ibid at 3-4.

24 <sup>21</sup> *Wenatchee Sportsmen Association*, footnote 10.

25 <sup>22</sup> *Woods v Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007).

26 <sup>23</sup> Petitioners' Supplemental Response to Douglas County/State Dismissal Motion at 3.

1 precludes the Board from reviewing the most recent decision by the Douglas County BOCC.  
2 The Petitioners claim the County cannot now provide the legal authority in a reply brief that  
3 it was required to provide in its opening brief. The Petitioners argue the County might have  
4 appealed the adverse decision from the Superior Court in the Court's July 31, 2007 decision  
5 in *Feil, et al., v. Douglas County, et al.*,<sup>24</sup> but chose to comply with the Court's decision.<sup>25</sup>

6 Under sub-section (3) above, the Petitioners argue the Court was applying a  
7 legislatively created jurisdictional rule in the *Wenatchee Sportsmen* and the *Woods* cases,  
8 not as the County would wish the Board to believe that the Court was enunciating a judicial  
9 common law principal. The Petitioners claim, in both cases cited above, the courts found  
10 express authorization in the CP for the site-specific rezones involved in those cases, but  
11 "[S]uch is not so in this case."<sup>26</sup>

12 The Petitioners contend the County's action constitutes an amendment by the County  
13 to its development regulations that are required to enhance, preserve and protect the  
14 agricultural lands of long-term commercial significance. The Petitioners cite *King County v.*  
15 *Central Puget Sound Growth Management Hearings Board*<sup>27</sup> which the Supreme Court made  
16 it clear all other uses in protected agricultural lands "must take a back seat" and that  
17 "recreational projects, whether on public land or not, cannot be authorized."<sup>28</sup>

18 The Petitioners claim the CP must authorize a site-specific rezone to a recreational  
19 overlay zone, if this action is to be treated as a development permit rather than an  
20 amendment to development regulations. The Petitioners argue that nowhere in the County's  
21 CP is there a mention of a Recreational Overlay Zone and nowhere is there an expression of  
22 any authority to rezone.<sup>29</sup>

23 <sup>24</sup> *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

24 <sup>25</sup> Petitioners' Supplemental at 4.

25 <sup>26</sup> Ibid at 6.

26 <sup>27</sup> *King Co. v. CPSGMHB*, 142 Wn.2d 543, 560, 14 P.3d 133, 142 (2000).

27 <sup>28</sup> Petitioners' Supplemental at 7.

28 <sup>29</sup> Ibid.

1 The Petitioners do agree that the Greater East Wenatchee Area CP identifies a  
2 project, but is silent about zoning or rezoning. According to the Petitioners, the CP does not  
3 authorize any site-specific rezones as required for a decision to qualify as a development  
4 permit.

5 **Respondent Douglas County's Reply:**

6 Douglas County claims: (1) it has no affirmative obligation to provide a copy of the  
7 record to the Petitioners, but it did mail courtesy copies of the Index of Record and audio  
8 recordings to the parties<sup>30</sup> (decided above); (2) it filed and served its Motion to Dismiss in  
9 compliance with WAC 242-02-570(2)<sup>31</sup>; (3) the action taken by Douglas County is a "project  
10 permit application" as referenced in RCW 36.70A.030(7) and defined at RCW 36.70B.020(4)  
11 that *Wenatchee Sportsmen and Woods* support the County's and States' position when  
12 important language is not omitted<sup>32</sup>; and (4) these same issues were considered by this  
Board in *Feil et al., v. Douglas County*.<sup>33</sup>

13 **Washington State Parks and Recreation Commission and Washington State  
14 Department of Transportation's Reply:**

15 The State claims the project meets the definition of a site-specific project under RCW  
16 36.70B.020 and both *Woods v. Kittitas County*<sup>34</sup> and *Wenatchee Sportsmen Assoc.*<sup>35</sup> held  
17 the rezones involved in those cases need only be consistent with the CP to meet the  
18 definition of a project permit. Citing *Woods*, the State argues once a CP and zoning  
19 regulations are approved, subsequent site-specific land use decisions by a local jurisdiction  
20 must be generally consistent with the CP.

21 \_\_\_\_\_  
22 <sup>30</sup> Respondent's Reply Memorandum on Motion to Dismiss, etc. at 2.

23 <sup>31</sup> Ibid at 3.

24 <sup>32</sup> Ibid at 4-7

25 <sup>33</sup> *Feil, et. al., v. Douglas County*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

26 <sup>34</sup> *Woods*, footnote 22.

<sup>35</sup> *Wenatchee Sportsmen Association*, footnote 10.

1 The State contends, absent an express provision in the zoning ordinances that would  
2 require specific compliance with a CP, as was the case in *Woods*, a CP legally sets out only  
3 the generalized coordinated policy statements of the governing body. According to the  
4 State, a site-specific application of existing zoning laws, as is the case here, would qualify  
5 as a site-specific rezone authorized by the CP, if the action is consistent with the general  
6 policies of the CP. Contrary to the Petitioners' claim, neither the *Woods* Court or the  
7 *Wenatchee Sportsmen* Court found express authorization in the CP's for the specific actions  
8 at issue in those cases. According to the State, the Courts focused on whether the action  
9 was approved pursuant to existing zoning laws, which placed the action within the exclusive  
jurisdiction of the Superior Court under LUPA.

10 **Board Discussion:**

11 This petition is strikingly similar to *Feil, et al. v. Douglas County*, Case No. 06-1-0012,  
12 where the Board dismissed the Petitioners' petition because it determined it did not have  
13 jurisdiction.

14 Again, as in Case No. 06-1-0012, the Board must look to the Growth Management  
15 Act (GMA) to determine if it has subject matter jurisdiction to hear this petition. RCW  
16 36.70A.280(1) authorizes the Board to hear and determine only those petitions alleging  
either:

17 1)(a) That a state agency, county, or city planning under this chapter is not in  
18 compliance with the requirements of this chapter, ..., or chapter 43.21C RCW  
19 as it relates to plans, development regulations, or amendments, adopted  
under RCW 36.70A.040 ...

20  
21 In other words, the Board has jurisdiction to decide challenges to comprehensive  
22 plans, development regulations or amendments thereto. RCW 36.70A.030(4) defines  
comprehensive land use plan as:

23 (4) "Comprehensive land use plan," "comprehensive plan," or "plan" means a  
24 generalized coordinated land use policy statement of the governing body of a  
25 county or city that is adopted pursuant to this chapter.

1 RCW 36.70A.030(7) defines development regulations as:

2 (7) "Development regulations" or "regulation" means the controls placed on  
3 development or land use activities by a county or city, including, but not  
4 limited to, zoning ordinances, critical areas ordinances, shoreline master  
5 programs, official controls, planned unit development ordinances, subdivision  
6 ordinances, and binding site plan ordinances together with any amendments  
7 thereto. A development regulation does not include a decision to approve a  
project permit application, as defined in RCW 36.70B.020, even though the  
8 decision may be expressed in a resolution or ordinance of the legislative body  
9 of the county or city.

10 This definition is specific in that the Board's jurisdiction does not include project  
11 permit applications as defined under RCW 36.70B.020 which provides:

12 (4) "Project permit" or "project permit application" means any land use or  
13 environmental permit or license required from a local government for a project  
14 action, including but not limited to building permits, subdivisions, binding site  
15 plans, planned unit developments, conditional uses, shoreline substantial  
16 development permits, site plan review, permits or approvals required by  
17 critical area ordinances, site-specific rezones authorized by a comprehensive  
18 plan or subarea plan, but excluding the adoption or amendment of a  
19 comprehensive plan, subarea plan, or development regulations except as  
20 otherwise specifically included in this subsection.

21 According to the County and State agencies, this appeal challenges a "site-specific  
22 land development permit for a Recreational Overlay District (R/O permit) issued by Douglas  
23 County to State Parks for a public, multi-modal transportation facility."<sup>36</sup> The County and  
24 State have consistently maintained that whether the action taken by the County is a permit,  
25 binding site plan or rezone is immaterial, as all three are included within the definition of a  
26 "project permit application."<sup>37</sup>

---

24 <sup>36</sup> WSP&R, et al. Joint Response at 2.

25 <sup>37</sup> RCW 36.70B.020.

1 This Board held in *Feil, et al. v. Douglas County, et al.*,<sup>38</sup> that "[T]he application for a  
2 R/O permit is a project permit application as defined in RCW 36.70B.020." The Board's  
3 decision was affirmed by the Douglas County Superior Court on July 31, 2007, in *Feil, et al.*  
4 *v. EWGMHB, et al.*<sup>39</sup> In a parallel case, the Douglas County Superior Court held that the R/O  
5 permit constituted a rezone that required legislative approval. The Court's order read, in  
6 part:

7 This recreational overlay is clearly a specific party requesting that a specific  
8 piece of real property be treated in a particular manner.<sup>40</sup>

9 The parties in this case disagree whether the R/O permit is a site-specific rezone, as  
10 alleged by the County and State, or an amendment to the County's development  
11 regulations, as alleged by the Petitioners. The parties do agree the Board does not have  
12 jurisdiction to decide challenges to site-specific land use decisions because site-specific land  
13 use decisions do not qualify as comprehensive plans or development regulations under the  
14 Board's authority authorized by RCW 36.70A.280.<sup>41</sup> A challenge to a site-specific land use  
15 decision must be brought under LUPA in Superior Court.<sup>42</sup>

16 Under *Woods v. Kittitas County* and *Wenatchee Sportsmen Assoc. v. Chelan County*,  
17 a site-specific rezone not subject to the Board's jurisdiction must be authorized by a  
18 jurisdiction's comprehensive plan. The CP is a guiding document or blueprint, not subject to  
19 the specifics the Petitioners' seem to suggest by their comment, "express authorization in  
20 the Comprehensive Plan."<sup>43</sup> In this case, the Rocky Reach permit application is authorized  
21 by the Greater East Wenatchee Area Comprehensive Plan in the Plan's goals and policies.

22 <sup>38</sup> *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

23 <sup>39</sup> *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

24 <sup>40</sup> *Feil, et al. v. EWGMHB, et al.*, Cause No. 07-2-00100-7.

25 <sup>41</sup> *Woods*, footnote 22.

26 <sup>42</sup> *Woods*, footnote 22, citing *Wenatchee Sportsmen Assoc.*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000).

<sup>43</sup> Petitioners' Supplemental at 6.

1 The Greater East Wenatchee Area Comprehensive Plan is a sub-area plan adopted by  
2 Douglas County.<sup>44</sup>

3 The CP encourages and addresses the County's intent to develop trail systems to  
4 provide for multi-modal transportation routes, as well as recreational opportunities.<sup>45</sup> The  
5 proposal is located in an area designated as Agricultural Resource, Critical Areas and  
6 Essential Public Facilities by the Greater East Wenatchee Area CP. The subject property is  
7 located in the Tourist Recreation Commercial (C-TR), Residential Low (R-L), Commercial  
8 Agriculture 5 acres (AC-5), and Commercial Agriculture 10 acres (AC-10) zoning districts.  
9 Importantly, trail systems are an outright permitted use in the Tourist Recreation  
10 Commercial district, while recreational trail systems are allowed in the other three zones  
11 mentioned above by the issuance of a Recreational Overlay District permit.<sup>46</sup>

12 The Petitioners' time to challenge the CP and development regulations concerning  
13 recreational overlays was within 60 days of publication of these documents. The Board does  
14 not have jurisdiction to review the CP, its regulations or actions performed pursuant to  
15 these documents unless they are challenged within 60 days of the publication of their  
16 adoption. That time has long since passed as required by RCW 36.70A.290(2).

17 The Petitioners argue that in *King County v. CPSGMHB*, the Supreme Court "made it  
18 abundantly clear that, within such protected areas (agricultural land of long-term  
19 commercial significance), all other uses must take a back seat to agricultural uses, and that  
20 recreational projects, whether on public land or not, cannot be authorized."<sup>47</sup> The Court in  
21 *King County* decided this case based on development regulations adopted pursuant to RCW

---

21 <sup>44</sup> Respondent's Memorandum at 9.

22 <sup>45</sup> Douglas County Regional Policy Plan, Policy E and E-1; Douglas County Countywide CP, 3.4.1 (G-14), 6.1  
23 Transportation, 6.1.1 (T-7, T-8, T-10 through T-13); GEWACP Goals and Policies 8-8, 8-9, 5-3, 5-4; SMP goals and  
24 policies; Douglas County development regulations, DCC 14.98.861, DCC 19.18.035.

24 <sup>46</sup> Douglas County Hearing Examiner's Findings of Fact, Conclusions of Law, Decision and Conditions of Approval,  
25 Nov. 3, 2006; Findings of Fact Nos. 3.6 – 3.7.

25 <sup>47</sup> Petitioners' Supplemental at 7.

1 36.70A.177, specifically "innovative techniques", not on whether a site-specific rezone, such  
2 as an recreational overlay zone, is allowed in designated agricultural lands of long-term  
3 commercial significance. This argument is not relative to this case.

4 **Conclusion:**

5 The Board agrees with the County and State agencies that "neither the *Woods* Court  
6 nor the *Wenatchee Sportsmen* Court found express authorization in the comprehensive  
7 plans for the specific actions at issue in those cases."<sup>48</sup> In order to qualify as a site-specific  
8 rezone, not subject to the Board's jurisdiction, the rezone must be authorized by the CP.  
9 The County and State agencies have shown that both the zoning laws and CP authorized  
10 this action, placing it squarely in the exclusive jurisdiction of the Superior Court.

11 The application for a R/O permit is a project permit application as defined in RCW  
12 36.70B.020. The land use permit was required by Douglas County and ordered to be  
13 sought by the Douglas County Superior Court. This Board does not have jurisdiction to hear  
14 this petition. The County's Motion to Dismiss this matter is GRANTED.

14 **III. ORDER**

15 Based upon the Board's review of the GMA, prior decisions of the Boards, the Pre-  
16 hearing Motion to Dismiss discussion, and briefings of the Parties, and having discussed and  
17 deliberated on the matter, the Board finds:

- 18 1. The Board does not have jurisdiction over the subject matter of this  
19 petition and, therefore, the County's Motion to Dismiss is GRANTED.  
20 The Board enters an Order of Dismissal for Case No. 08-1-0011. RCW  
21 36.70A.280.
- 22 2. The Petitioners' May 5, 2008, Objection to Douglas County's Dismissal  
23 Motion was discussed and noted at the Pre-hearing conference and  
24 Motion to Supplement the Record was GRANTED and attachments  
25 reviewed by the Board. WAC 242-02-540.

25 <sup>48</sup> WSP&R Reply at 3.

- 1           3.     The Petitioners' May 8, 2008, Objections to and Motion to Strike the  
2           Douglas County May 1, 2008, "Respondent's Memorandum" were  
3           noted. The Motion to Strike "Respondent's Memorandum" is DENIED.  
4           4.     The Petitioners' Objection to, Motion to Strike, And Response To States'  
5           "Response" to Petitioners' Motion to Strike is noted and Motion to Strike  
6           the States' Response is DENIED. WAC 242-02-522.  
7           5.     The Petitioners' May 29, 2008, Motion to Supplement the Record is  
8           GRANTED in part, DENIED in part. The Board will take official notice  
9           of Attachments C and D to the Declaration; supplementation of the  
10          Record with Attachments A and B will not be permitted. WAC 242-02-  
11          660. The Petitioners' Motion to Produce the Record is DENIED. WAC  
12          242-02-520.  
13          6.     The Petitioners' June 9, 2008, Objection to "Reply" Briefs is noted, but  
14          the correlating Motion to Strike is DENIED. The Petitioners' Motion to  
15          Supplement the Record is DENIED. WAC 242-02-522 and WAC 242-02-  
16          540.

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

18           **Reconsideration:**

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

**Judicial Review:**

**Any party aggrieved by a final decision of the Board may appeal the decision to**  
          **superior court as provided by RCW 36.70A.300(5). Proceedings for judicial**

1 review may be instituted by filing a petition in superior court according to the  
2 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

3  
4 **Enforcement:**

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

9 **Service:**

10 This Order was served on you the day it was deposited in the United States  
11 mail. RCW 34.05.010(19)

12  
13 **SO ORDERED** this 17<sup>th</sup> day of June 2008.

14 EASTERN WASHINGTON GROWTH MANAGEMENT  
15 HEARINGS BOARD

16 \_\_\_\_\_  
17 John Roskelley, Board Member

18 \_\_\_\_\_  
19 Dennis Dellwo, Board Member

20 \_\_\_\_\_  
21 Joyce Mulliken, Board Member