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

JASON & LAURIE MOE, and BRUCE MOE,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

ELLENSBURG CEMENT PRODUCTS, INC.,

Intervenors.

Case No. 08-1-0010

ORDER ON COMPLIANCE

**I. SYNOPSIS**

After conducting a Compliance Hearing on February 17, 2009, the Eastern Washington Growth Management Hearings Board determines that Kittitas County's *Mineral Resource Lands* designation of an 80-acre parcel of land, which was adopted on December 16, 2008, is supported by substantial evidence in the record and is in compliance with the Growth Management Act.

**II. INVALIDITY**

There is no finding of invalidity.

**III. PROCEDURAL HISTORY**

On February 28, 2008, JASON & LAURIE MOE, and BRUCE MOE, by and through their representative, Allan Bakalian, filed a Petition for Review.

On March 21, 2008, Respondent Kittitas County filed the Index of Record.

On March 21, 2008, the Board received ELLENSBURG CEMENT PRODUCTS, INC., Motion to Intervene.

1 On March 28, 2008, the Board heard Ellensburg Cement Products, Inc.'s Motion to  
2 Intervene. There were no objections, and the Board granted intervention status to  
3 Ellensburg Cement Products, Inc.

4 On March 28, 2008, the Board held the telephonic Prehearing conference. Present  
5 were Dennis Dellwo, Presiding Officer, and Board Members, John Roskelley and Joyce  
6 Mulliken. Present for the Petitioners were Allan Bakalian. Present for the Respondent was  
7 Neil Caulkins. Present for Intervenors was Gregory McElroy.

8 On April 2, 2008, Respondent transmitted a copy of the Index of Record to  
9 Intervenor.

10 On April 4, 2008, the Board issued its Prehearing Order.

11 On April 17, 2008, the Board received Kittitas County's Motion to Dismiss and for  
12 Summary Judgment, Ellensburg Cement Products' Joinder in Kittitas County's Motion to  
13 Dismiss and for Summary Judgment.

14 On April 18, 2008, the Board received Petitioners' Motion to Supplement Record and  
15 Petitioners' Dispositive Motion to Invalidate Docket No. 07-01 of Ordinance No. 2007-38  
16 Amending the Kittitas County Comprehensive Plan.

17 On April 30, 2008, the Board received Kittitas County's Response to Petitioners'  
18 Dispositive Motion.

19 On May 1, 2008, the Board received Petitioners' Response to Kittitas County's Motion  
20 to Dismiss and for Summary Judgment. The Board also received Ellensburg Cement  
21 Products' Motion to Extend Time and to Correct the Record, Memorandum in Support of  
22 Motion to Extend Time and Correct the Record, Memorandum in Opposition to Petitioners'  
23 Motion to Supplement Record, and Memorandum in Opposition to Petitioners' Dispositive  
24 Motion to Invalidate Docket No. 07-01 of Ordinance No. 2007-38 Amending Kittitas County  
25 Comprehensive Plan.

26 On May 8, 2008, the Board received Ellensburg Cement Products' Rebuttal in Support  
of Summary Judgment.

1 On May 8, 2008, the Board received Petitioners' Response to Ellensburg Cement  
2 Products' Motion to Extend Time and to Correct the Record, Reply in Support of Petitioners'  
3 Motion to Supplement, and Reply to Kittitas County's and Ellensburg Cement Products'  
4 Response to Petitioner's Dispositive Motion to Invalidate the Ordinance.

5 On May 9, 2008, the Board received Kittitas County's Rebuttal in Motion to Dismiss  
6 and for Summary Judgment and County's Motion to Strike.

7 On May 12, 2008, the Board held the telephonic motion hearing. Present were  
8 Dennis Dellwo, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken.  
9 Present for the Petitioners were Allan Bakalian. Present for the Respondent was Zera Lowe.  
10 Present for Intervenors was Gregory McElroy.

11 On May 16, 2008, the Board issued its Order on Motions.

12 On July 21, 2008, the Board held the hearing on the merits. Present were Raymond  
13 Paoella, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken.<sup>1</sup> Present  
14 for the Petitioners were Allan Bakalian. Present for the Respondent was Zera Lowe. Present  
15 for Intervenors was Gregory McElroy. At the hearing, Intervenor moved to admit two  
16 documents from the Washington Department of Natural Resources into the record which  
17 relate to surface mining. The Board took this motion under advisement.

18 On August 26, 2008, the Board issued its Final Decision and Order (FDO).

19 On February 17, 2009, the Board held its compliance hearing. Present were Raymond  
20 Paoella, Presiding Officer, and Board Members, John Roskelley and Joyce Mulliken. Present  
21 for the Petitioners were Allan Bakalian. Present for the Respondent was Zera Lowe. Present  
22 for Intervenors was Gregory McElroy.

#### 23 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF** 24 **REVIEW**

25 Comprehensive plans and development regulations (and amendments thereto)  
26 adopted pursuant to the Growth Management Act ("GMA" or "Act") are presumed valid

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<sup>1</sup> Board Member Dennis Dellwo was the Presiding Officer in this case until his term expired on June 30, 2008. He was succeeded by newly-appointed Board Member Raymond Paoella on July 1, 2008.

1 upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners  
2 to demonstrate that any action taken by the respondent jurisdiction is not in compliance  
3 with the Act. The Board “. . . shall find compliance unless it determines that the action by  
4 the . . . County. . . is clearly erroneous in view of the entire record before the Board and in  
5 light of the goals and requirements of the [Growth Management Act].” RCW 36.70A.320.  
6 To find an action clearly erroneous, the Board must be “. . . left with the firm and definite  
7 conviction that a mistake has been committed.” *Department of Ecology v. Central Puget*  
8 *Sound Growth Management Hearings Board*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

9 The Hearings Board will grant deference to counties and cities in how they plan  
10 under the Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated,  
11 “local discretion is bounded, however, by the goals and requirements of the GMA.” *King*  
12 *County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561,  
13 14 P.2d 133 (2000). It has been further recognized that “[c]onsistent with *King County*, and  
14 notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly  
15 when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and  
16 goals of the GMA.” *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31  
17 P.3d 28 (2001).

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

## 20 V. PRELIMINARY MATTERS

21 In Petitioners’ Compliance Brief and Reply Brief, Petitioners raised several new  
22 issues. Petitioners’ first new issue alleges GMA noncompliance when Kittitas County adopted  
23 a November 6, 2008, Comprehensive Plan Amendment (CPA) without any public notice or  
24 opportunity for public comment.<sup>2</sup> This November 6, CPA apparently made changes to  
25 Kittitas County’s local criteria for designation of Mineral Resource Lands. However, the  
26 November 6, ordinance has not been appealed and has not been presented by the County

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<sup>2</sup> Petitioners’ Compliance Brief, p. 3.

1 in its Statement of Actions Taken to Comply (SATC) as legislation adopted to bring the  
2 County into compliance with the Board's August 26, 2008, FDO.<sup>3</sup> Therefore, this November  
3 6, 2008, Ordinance is not before the Board in this case and cannot be reviewed.

4 Petitioners' second new issue in their Compliance Brief is that the Amended  
5 Ordinance is "clearly erroneous" because Kittitas County has failed to adopt mineral lands  
6 development regulations pursuant to RCW 36.70A.040(3).<sup>4</sup> The Board notes that this  
7 assertion is not part of any issue presented by Petitioners in their Petition for Review (PFR),  
8 was not briefed or presented at the Hearing on the Merits, and therefore cannot be  
9 considered by the Board at this time. The Board is precluded from considering issues that  
10 have not been raised in the PFR. RCW 36.70A.290.

11 Petitioner's third new argument in their Reply Brief is that there was no disclosure of  
12 the concurrent DNR surface mining permit and State Environmental Policy Act (SEPA)  
13 proceeding in 2007 and that Kittitas County's failure to coordinate its 2007 CP Amendment  
14 process with a separate DNR SEPA process violates SEPA and WAC 197-11-240(1)[sic]<sup>5</sup>.  
15 This SEPA issue was not presented by Petitioners in their PFR, was not briefed or presented  
16 at the Hearing on the Merits, and therefore cannot be considered by the Board. The Board  
17 cannot consider issues that have not been raised in a PFR. RCW 36.70A.290.

## 18 VI. DISCUSSION

### 19 The Parties' Positions:

#### 20 Petitioners:

21 Petitioners assert that Kittitas County is in continuing noncompliance and that the  
22 Amended Ordinance is procedurally and substantively invalid. Petitioners argue that they did  
23 not receive proper notice of the Kittitas County public hearing on compliance and did not

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24 <sup>3</sup> The FDO noted that Kittitas County's previously adopted Mineral Resource Land (MRL) local designation  
25 criteria did not contain all of the MRL designation factors listed in the CTED Rules in WAC 365-190-070.  
26 However, that was not a specific basis for this Board's FDO finding of non-compliance since no appeal was  
filed of the County's **local** MRL designation criteria. Rather the issue in this case was whether Kittitas County  
considered all of the **CTED** MRL designation criteria.

<sup>4</sup> Petitioners' Compliance Brief, p. 7.

<sup>5</sup> Petitioners' Reply Brief, p. 5.

1 have an opportunity to provide comment on the Amended Ordinance. They also argue that  
2 there is an absence of a study by a geologist or other expert on mineral resources, an  
3 absence of evidence of an adequate water supply for this site, and the absence of  
4 information regarding "resource availability in the region."

5 **Respondent:**

6 At the compliance hearing, Kittitas County asserted that it had come into compliance  
7 with the GMA by holding an open record public hearing on November 25, 2008, and by  
8 adopting an Amended Ordinance on December 16, 2008, with specific findings and  
9 conclusions to support the *Mineral Resource Lands* designation sought by Ellensburg  
10 Cement Products, Inc. The County argues that the subject 80-acre parcel has long term  
11 significance for the extraction of minerals and that designating this land satisfies the 13  
12 CTED criteria for *Mineral Resource Lands* designation.

13 **Intervenor:**

14 Intervenor Ellensburg Cement Products, Inc. fully supported and adopted Kittitas  
15 County's Statement of Actions to Comply with FDO and Kittitas County's Brief in Response  
16 to Petitioners' Compliance Brief.

17 **Board Discussion and Analysis:**

18 At the Compliance Hearing, a Comprehensive Plan Amendment (CPA) adopted by the  
19 County in an attempt to come into compliance with the Board's Order is presumed valid  
20 upon adoption, and the burden of proof shall be on the Petitioner to show that the  
21 Comprehensive Plan Amendment is not in compliance with the requirements of the GMA.<sup>6</sup>  
22 In an effort to come into compliance, Kittitas County adopted an Amended Ordinance 2007-  
23 38 on December 16, 2008, ("Amended Ordinance").<sup>7</sup>

24 Petitioners argued in their briefing that the Amended Ordinance was adopted without  
25 proper notice and without an opportunity for public comment and was therefore

26 <sup>6</sup> RCW 36.70A.320; WAC 242-02-630; WAC 242-02-632.

<sup>7</sup> Compliance Index No. 1.

1 procedurally invalid. Petitioners' argument here is not supported by citations to statutes or  
2 local laws which set forth how public participation will be satisfied for CP Amendments in  
3 Kittitas County. The GMA clearly requires public participation, including public notice and  
4 opportunity for public comment, but the GMA leaves it up to local jurisdictions to determine  
5 how to fulfill GMA's public participation requirements. See RCW 36.70A.035, RCW  
6 36.70A.130, and RCW 36.70A.140. Petitioners' brief does not cite specific statutes or code  
7 provisions that were allegedly not complied with in the adoption of the Amended Ordinance.  
8 Furthermore, Petitioners acknowledge in their briefing that they received written notice of  
9 the November 25, 2008, public hearing on this compliance matter, and Petitioners also  
10 acknowledge that they attended and participated in this public hearing.<sup>8</sup> After considering  
11 the evidence in the record and the arguments of the parties, the Board concludes that  
12 Petitioners have not carried their burden of proof to demonstrate that Kittitas County did  
13 not comply with GMA's public participation requirements.

14 Petitioners further argue that the Amended Ordinance is substantively invalid and  
15 that the ordinance was not supported with adequate information and evidence in the  
16 record. In particular, Petitioners allege that there is an absence of a study by a geologist or  
17 other expert on mineral resources, an absence of evidence of an adequate water supply for  
18 this site, and the absence of information regarding "resource availability in the region."  
19 Petitioners also assert that the evidence in the record was developed by the Applicant and  
20 was self-serving. The County responds that it may accept and consider information from the  
21 Applicant at the public hearing.

22 The Board's Final Decision and Order (FDO) in this case was issued on August 26,  
23 2008. The FDO's Conclusions of Law 8 and 9 were as follows:

24 <sup>8</sup> Petitioners also suggest in their brief that they were denied an opportunity to review documents and submit  
25 written comments addressing the substance of documents. However, the Board has not been provided with  
26 any specific evidence in the record showing that the public was denied an opportunity to comment contrary to  
a statute or code provision. Petitioners' Compliance Brief at page 4.

1 8. There is no substantial evidence in the record to support a determination  
2 that the land has long-term significance for the extraction of minerals, as  
3 required by RCW 36.70A.170(1)(c).

4 9. Kittitas County failed to consider all of the Mineral Resource Lands  
5 designation factors in WAC 365-190-070, as required by RCW 36.70A.170(2).<sup>9</sup>

6 On November 25, 2008, the Kittitas County Commissioners conducted a public  
7 hearing relating to compliance, during which Kittitas County accepted public comment,  
8 received evidence, discussed and deliberated, and made specific findings to support a  
9 determination that the 80-acre parcel has long-term significance for the extraction of  
10 minerals.<sup>10</sup> On December 16, 2008, the Commissioners adopted an Amended Ordinance No.  
11 2007-38 intended to address the areas of noncompliance found in the August 26, 2008  
12 FDO.<sup>11</sup>

13 The Amended Ordinance contains a number specific factual findings relating to  
14 "Lands of long-term commercial significance":

- 15 i. There is evidence in the record to show that the aggregate is  
16 characterized by the following:
- 17 1. This is a significant basalt resource approximately 365 feet in depth, at  
18 approximately 2200 feet above sea level, with a depth of overburden  
19 between one and four feet.
  - 20 2. The type of basalt available here is of sufficiently high quality as to be  
21 in high demand, which would produce an approximate amount of 7  
22 million cubic yards of raw material lasting over twenty years.
  - 23 3. Depth of the resource appears to be sufficient in that ECP is investing  
24 significant time and money in a lease of property, in equipment, and in  
25 other infrastructure necessary to extract the resource.
  - 26 4. Depth of the overburden is minimal or fairly insignificant, which finding  
is supported by comments from DNR during the permit process.

<sup>9</sup> Final Decision and Order (August 26, 2008) at p. 19.

<sup>10</sup> Compliance Index Nos. 1 and 9.

<sup>11</sup> Compliance Index No. 1.

- 1
- 2 5. The physical properties of the resource including quality and type are
- 3 of sufficient quality as to be in high demand, especially since such
- 4 quality is not readily available in Kittitas County.
- 5
- 6 ii. There is evidence in the record to show that the aggregate in this area
- 7 should support mining activity for at least twenty (20) years.
- 8
- 9 iii. Twenty years is a significant life of the resource and merits protection
- 10 through designation of these lands as Mineral Lands of Long Term
- 11 Commercial Significance.
- 12
- 13 iv. In determining whether this parcel has long term viability, the BOCC
- 14 has specifically considered the area, type and grade of mineral
- 15 available, the length of time the mineral would be available for
- 16 extraction, and location to highway access which renders it more
- 17 commercially viable than if, for example, the site were twenty miles
- 18 away from the highway.<sup>12</sup>

19 Based upon these factual findings, the County Commissioners concluded that "the subject

20 parcel meets the requirements of mineral lands of long-term commercial significance as

21 identified in chapter 36.70A RCW."<sup>13</sup> After reviewing the Amended Ordinance and

22 compliance record before the Kittitas County Commissioners, the Board determines that

23 there is substantial evidence in the record to support the Amended Ordinance findings and

24 conclusion that the land has long-term significance for the extraction of minerals under

25 RCW 36.70A.170(1)(c).<sup>14</sup>

26 In the FDO, the Board had specifically determined that there was no evidence in the

record that Kittitas County considered the CTED designation factors pertaining to

availability/adequacy of utilities, water, or public services (other than roads) for the 80-acre

site.<sup>15</sup> There also was no evidence in the record showing any consideration of resource

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<sup>12</sup> Compliance Index No. 1, Amended Ordinance, pages 10-11.

<sup>13</sup> Id., Amended Ordinance, pages 10-11.

<sup>14</sup> Compliance Index Nos. 2 and 9 (Hearing Exhibits and Audio Record of Open Public Record Hearing, Nov. 25, 2008).

<sup>15</sup> See WAC 365-190-070.

1 availability in the region or even elsewhere in Kittitas County.<sup>16</sup> The Board must now  
2 determine whether, on remand, Kittitas Co. considered the CTED designation factors in  
3 adopting the Amended Ordinance on December 16, 2008.

4 At the November 25, 2008 public hearing relating to compliance, Kittitas County  
5 accepted public comment, received evidence, discussed and deliberated, and made specific  
6 findings to support a determination that the CTED *Mineral Resource Lands* designation  
7 criteria were met.<sup>17</sup> The Amended Ordinance contains a number of specific factual findings  
8 relating to the availability/adequacy of utilities, water supply, public services, and resource  
9 availability in the region; there were also factual findings relating to information from the  
10 Department of Natural Resources and the possibility of more intense uses of the land.<sup>18</sup> For  
11 example, the County Commissioners made the following findings relating to the CTED  
12 criterion "Resource availability in the region":

- 12 i. Resource (aggregate) availability in the region is minimal.
- 13 ii. The aggregate resource continues to be in high demand.
- 14 iii. There is a state-wide aggregate shortage.
- 15 iv. There is insufficient aggregate availability, and an ongoing shortage, in  
16 Kittitas  
17 County to maintain the level of development the County has seen in  
18 recent times.
- 19 v. It is difficult to find mining locations within the County, and very few  
20 locations within the County are suitable for mining with the quantity  
21 and quality of aggregate available at this site.
- 22 vi. Further protection of these mineral lands is valuable to the County as it  
23 continues to develop more intense land uses in appropriate areas.<sup>19</sup>

24 <sup>16</sup> Id. at 16.

25 <sup>17</sup> Compliance Index Nos. 1 and 9.

26 <sup>18</sup> Compliance Index No. 1, Amended Ordinance pages 9-10.

<sup>19</sup> Compliance Index No. 1, Amended Ordinance, page 10.

1 Based on a number of factual findings, the County Commissioners concluded that "all CTED  
2 criteria for designation of the subject parcel as Mineral Lands of Long Term Commercial  
3 Significance have been met."<sup>20</sup> After reviewing the Amended Ordinance and compliance  
4 record before the Kittitas County Commissioners, the Board determines that there is  
5 substantial evidence in the record to support a conclusion that Kittitas County considered all  
6 of the *Mineral Resource Lands* designation factors in WAC 365-190-070, as required by  
7 RCW 36.70A.170(2).<sup>21</sup>

8 **Conclusion:**

9 Petitioners have not carried their burden of proof to demonstrate that Kittitas County  
10 did not comply with GMA's public participation requirements. There is substantial evidence  
11 in the record to support the Amended Ordinance findings and conclusion that the subject  
12 land has long-term significance for the extraction of minerals under RCW 36.70A.170(1)(c).  
13 There is substantial evidence in the record to support a conclusion that Kittitas County  
14 considered all of the *Mineral Resource Lands* designation factors in WAC 365-190-070, as  
15 required by RCW 36.70A.170(2).

16 **VIII. FINDINGS AND CONCLUSIONS**

- 17 1. Kittitas County is a county located east of the crest of the Cascade  
18 Mountains and opted to plan under the GMA and is therefore required  
19 to plan pursuant to RCW 36.70A.040.
- 20 2. The Growth Management Act requires Cities and Counties to designate  
21 and conserve natural resource lands that have long-term commercial  
22 significance.
- 23 3. On December 31, 2007, Kittitas County adopted Ordinance No. 2007-38  
24 designating an 80-acre parcel as Mineral Resources Lands of Long-  
25 Term Commercial Significance.

26 <sup>20</sup> Id. at page 11.

<sup>21</sup> Compliance Index Nos. 2 and 9 (Hearing Exhibits and Audio Record of Open Public Record Hearing, Nov. 25, 2008).

- 1           4.     On August 26, 2008, the Eastern Washington Growth Management  
2           Hearings Board decided that Ordinance No. 2007-38 was not in  
3           compliance with the Growth Management Act, RCW Chapter 36.70A.  
4           5.     On November 25, 2008, Kittitas County held a public hearing on  
5           compliance with the August 26, 2008, Final decision and Order.  
6           6.     On December 16, 2008, the Kittitas County Commissioners adopted an  
7           Amended Ordinance designating the 80-acre parcel of land as Mineral  
8           Lands of Long Term Commercial Significance.  
9           7.     There is substantial evidence in the record to support Kittitas County's  
10           determination that the land has long-term significance for the  
11           extraction of minerals under RCW 36.70A.170(1)(c)  
12           8.     There is substantial evidence in the record to support a conclusion that Kittitas  
13           County considered all of the *Mineral Resource Lands* designation factors in  
14           WAC 365-190-070, as required by RCW 36.70A.170(2).  
15           9.     Kittitas County is in compliance with the Growth Management Act in  
16           designating the subject 80-acre parcel of land as *Mineral Resource*  
17           *Lands* of long term-significance.

## IX. ORDER

18           Based upon the Board's review of the GMA, prior decisions of the Hearings Boards,  
19           briefing and presentation by the parties at the February 17, 2009 Compliance Hearing, and  
20           having discussed and deliberated on this matter, the Board enters a Finding of Compliance  
21           as to this *Mineral Resource Lands* designation, and this case is now closed.

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

### **Reconsideration:**

23           **Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this**  
24           **Order to file a petition for reconsideration. Petitions for reconsideration shall**  
25           **follow the format set out in WAC 242-02-832. The original and four (4) copies of**  
26           **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),**

1 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite  
2 for filing a petition for judicial review.

3 **Judicial Review:**

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

7 **Enforcement:**

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

13 **Service:**

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

16 SO ORDERED this 23<sup>rd</sup> day of March 2009.

17 EASTERN WASHINGTON GROWTH MANAGEMENT  
18 HEARINGS BOARD

19 \_\_\_\_\_  
20 Raymond L. Paoella, Presiding Board Member

21 \_\_\_\_\_  
22 John Roskelley, Board Member

23 \_\_\_\_\_  
24 Joyce Mulliken, Board Member