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3 **State of Washington**
4 **GROWTH MANAGEMENT HEARINGS BOARD**
5 **FOR EASTERN WASHINGTON**
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8 SCOTT SIMMONS,

Petitioner(s),

Case No. 09-1-0001

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11 v.

ORDER ON MOTION TO DISMISS

12 FERRY COUNTY,

13 Respondent(s).
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17 **I. PROCEDURAL HISTORY**

18 On January 28, 2009, SCOTT SIMMONS, by and through himself, filed a Petition for
19 Review.

20 On March 5, 2009, the Board held the telephonic Prehearing Conference. Present
21 were, Raymond Paoella, Presiding Officer, and Board Members John Roskelley and Joyce
22 Mulliken. Present for the Petitioner was Scott Simmons. Present for the Respondent was
23 Steve Graham.

24 On March 10, 2009, the Board issued its Prehearing Order.

25 On March 25, 2009, the Board received Respondent's Motion to Dismiss.

26 On April 8, 2009, the Board received Petitioner's Response to Motion to Dismiss.

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3 **II. DISCUSSION**

4 Dispositive motions are authorized by WAC 242-02-530(4). Respondent Ferry
5 County moves to dismiss the Petition For Review filed by Scott Simmons due to a lack of
6 jurisdiction on the part of the Hearings Board. Respondent argues that the phrase "nexus
7 and proportionality" does not appear in the GMA but instead comes from constitutional
8 takings jurisprudence, and the County alleges that the Board does not have jurisdiction to
analyze the constitutionality of the County's ordinance.

9 Petitioner responds that he has not asked the Board to analyze the constitutionality
10 of the County's ordinance, that he has challenged the procedures utilized to adopt the
11 ordinance, and that he has the right to challenge the County's action on the basis of it being
12 an arbitrary decision, which violates RCW 36.70A .020(6). Petitioner further asserts that
13 there is a question of whether the science used by the County meets the standards required
14 to be considered as Best Available Science.

15 In reviewing Petitioner's Statement of Issues, the Board notes that all five of
16 Petitioner's issues state a common allegation that Ferry County failed to comply with the
17 GMA when it adopted Ordinance No. 2008-02 "without first establishing the required nexus
18 and proportionality of the regulations." The phrase "nexus and proportionality of the
19 regulations" refers to U.S. Supreme Court case law concerning constitutional takings claims
20 under provisions of the U.S. Constitution protecting private property from being taken for
public use without just compensation.¹

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24 ¹See *Nollan v. California Coastal Comm.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677(1987) (considering
25 constitutional takings claims and establishing the nexus requirement); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct.
26 2309, 129 L. Ed. 2d 304 (1994) (considering constitutional takings claims and establishing the reasonable
relationship/rough proportionality requirement).

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3. That portion of Issue 3 reading “and without first establishing the required nexus and proportionality of regulations regarding such areas” is stricken and dismissed; the remainder of Issue 3 is not dismissed.

SO ORDERED this 23rd day of April 2009.

EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD

Raymond L. Paolella, Board Member

John Roskelley, Board Member

Joyce Mulliken, Board Member