

Case No. 46305-9-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

CONCERNED FRIENDS OF FERRY COUNTY AND FUTUREWISE,

Petitioners,

v.

FERRY COUNTY AND
THE GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

**CONCERNED FRIENDS OF FERRY COUNTY'S AND
FUTUREWISE'S PETITIONER'S REPLY BRIEF**

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TABLE OF CONTENTS

<u>Topic</u>	<u>Page Number</u>
Table of Authorities	iii
I. Introduction	1
II. Facts	1
III. Standard of Review	3
IV. Argument	5
A. Ferry County has failed to properly designate agricultural lands of long-term commercial significance because the County’s criteria violate the GMA.	5
1. Ferry County has failed to properly designate agricultural lands of long-term commercial significance by failing to apply the criteria for designating agricultural lands in the Ferry County Comprehensive Plan and by adopting development regulations with criteria that are not consistent with and fail to implementing the comprehensive plan violating RCW 36.70A.130. (Assignment of Error 1, Issue 1.).....	5
2. The “Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington” violate RCW 36.70A.170, RCW 36.70A.030(2) and (10), and RCW 36.70A.020(8) and the Minimum Guidelines to Classify Agricultural Lands. (Assignment of Error 2, Issue 2.)	7
B. Ferry County has failed to properly apply the County’s designation criteria, and comply with the GMA and the Minimum Guidelines in designating agricultural lands of long-term commercial significance...18	
1. The Application of Designation Criteria to Federal Grazing Allotments, also known as grazing leases, violates RCW 36.70A.070 and RCW 36.70A.130(1)(d). (Assignment of Error 3, Issue 3, Issue 4.)	19
2. The Weighting of Criteria for Assessing Long-Term Commercial Significance is clearly erroneous because it misinterprets WAC 365-190-050(5) violating RCW 36.70A.020(8) and RCW 36.70A.050. (Assignment of Error 3, Issue 3, Issue 4.)	20
3. Ferry County’s failure to properly designate working farms and ranches is inconsistent with the designation of the federal grazing allotments and the GMA. (Assignment of Error 3, Issue 3, Issue 4.).....	22

<u>Topic</u>	<u>Page Number</u>
4. The Board’s focus on certain facts and opinions about Ferry County’s agriculture rather than the GMA criteria and minimum guidelines was an erroneous interpretation of the GMA. (Assignment of Error 3, Issue 4; Assignment of Error 5, Issue 6).....	23
V. Conclusion	25
Certificate of Service	1

TABLE OF AUTHORITIES

<u>Authority</u>	<u>Page Number</u>
Cases	
<i>Bainbridge Citizens United v. Washington State Dept. of Natural Resources</i> , 147 Wn. App. 365, 198 P.3d 1033 (2008)	4
<i>Clark County v. Western Washington Growth Management Hearings Review Bd.</i> , 177 Wn.2d 136, 298 P.3d 704 (2013).....	8
<i>Clark County Washington v. Western Washington Growth Management Hearings Review Bd.</i> , 161 Wn. App. 204, 254 P.3d 862 (2011)	7
<i>King County v. Central Puget Sound Growth Management Hearings Bd.</i> , 142 Wn.2d 543, 14 P.3d 133 (2000).....	1
<i>Kittitas County v. Eastern Washington Growth Management Hearings Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011)	5
<i>Lewis County v. Western Washington Growth Management Hearings Bd.</i> , 157 Wn.2d 488, 139 P.3d 1096 (2006).....	7, 14
<i>Lilygren v. Rogers</i> , 1 Wn. App. 6, 459 P.2d 44 (1969)	13
<i>Quadrant Corp. v. State Growth Management Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	4
<i>Sherman v. State</i> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	4
Statutes	
RCW 36.70A.020.....	7, 23
RCW 36.70A.130.....	6
RCW 36.70A.170.....	1, 7
Regulations	
36 CFR § 222	23
WAC 365-190-050.....	passim
WAC 365-196-210.....	18

I. INTRODUCTION

The Washington State Supreme Court has held that the Growth Management Act (GMA) contains “a legislative mandate for the conservation of agricultural land.”¹ Ferry County has failed to carry out this mandate, only designating 405 acres of privately owned land as agricultural lands of long-term commercial significance.² And this designation came 23 years after the GMA’s September 1, 1991 deadline.³

This Reply Brief will address the arguments raised by the Brief of Respondent Ferry County. As this reply will show, these arguments fail.

II. FACTS

The Brief of Petitioners Concerned Friends of Ferry County and Futurewise (Concerned Friends’ Petitioner’s Brief) identified the key facts applicable to this appeal on pages five through eight. This section of the reply will address the factual issues raised by Ferry County.

¹ *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 562, 14 P.3d 133, 143 (2000).

² Administrative Record (AR) 6376 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 30 – 31. Ferry County designated 479,373 acres as “Agricultural Lands of Long-Term Commercial Significance.” This consists of 405 acres “subject to long-term conservation easement[s]” and 478,968 acres owned by the U.S. Forest Service and the Washington State Department of Natural Resources and “subject to long-term grazing allotments.” AR 6376, *Id.* at p. 30. In citing to the Administrative Record we omit the preceding zeros from the “Bates” numbers placed on the record by the Board.

³ RCW 36.70A.170(1)(a).

The Brief of Respondent Ferry County on page 12 argues that land in farms does not represent land in production or even land capable of production. Land in farms is a broad category, but the “acreage designated as ‘land in farms’ consists primarily of agricultural land used for crops, pasture, or grazing.”⁴ This can be seen in the breakdown of land in farms in Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use.⁵ In Ferry County total cropland was 14,842 acres in 2007.⁶ While the 2007 number was suppressed to maintain the confidentiality of individual data, “pastureland, all types” was probably the largest category of land in farms in Ferry County having totaled 773,572 acres in 2002.⁷ “Wasteland” and other uncultivated areas are included with land in farmsteads, buildings, livestock facilities, ponds, and roads and only made up 3,840 acres of the land in farms in Ferry County in 2007.⁸ Contrary to the County’s intimation on page 6 of the Brief of Respondent Ferry County, the Census of Agriculture did not treat the Colville Reservation as one

⁴ AR 6415, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, Washington State and County Data Volume 1 Geographic Area Series* • Part 47 pp. B-14 (Feb. 2009).

⁵ AR 2992 – 3001, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, Washington State and County Data Volume 1 Geographic Area Series* • Part 47 Chapter 2: County Level Data, Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2007 and 2002 pp. 290 – 99 (Feb. 2009).

⁶ AR 2993, *Id.* at p. 291.

⁷ AR 2998, *Id.* at p. 296.

⁸ AR 2998, *Id.* at p. 296.

farm. The 2007 Census of Agriculture identified 227 farms on the reservation which is in both Ferry and Okanogan counties, 87 of which were operated by Native Americans.⁹ It is also puzzling that if Ferry County thinks the “land in farms” data is so problematic why did the County use the “size of farm” categories as a substitute for WAC 365-190-050(3)(c)(vi)’s predominant parcel size?¹⁰

III. STANDARD OF REVIEW

The Concerned Friends’ Petitioner’s Brief identified the applicable standard of review on pages eight through ten. On pages 7 through 11, the Brief of Respondent Ferry County argues that the Court owes deference to the Ferry County’s planning decision not the Board’s decision. While this question is of little moment in this case given that the Board upheld the County’s decision, it is a misreading of the law.

The *Bainbridge Citizens United* and *Sherman v. State* decisions cited by the County did not address the deference due the Growth

⁹ AR 4911, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, American Indian Reservations Volume 2 Subject Series* • Part 5 AC-07-S-5 Table 1. Farm Characteristics of All Farms on Selected Reservations and of All Farms Operated by American Indians or Alaska Natives on Selected Reservations: 2007 p. 13 (June 2009).

¹⁰ AR 6370 – 71, Ferry County Development Regulations Ordinance No. 2013-05 pp. 24 – 25; AR 2993, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, Washington State and County Data Volume 1 Geographic Area Series* • Part 47 Chapter 2: County Level Data, Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2007 and 2002 p. 291 (Feb. 2009).

Management Hearings Board (Board).¹¹ In the *Quadrant Corp.* decision the Supreme Court wrote:

¶ 23 In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general.^{FN7} See, e.g., *State v. Bradshaw*, 152 Wn.2d 528, 535, 98 P.3d 1190 (2004) (general desire of legislature to promote uniformity must give way to legislature’s specific direction), *cert. denied*, 544 U.S. 922, 125 S.Ct. 1662, 161 L.Ed.2d 480 (2005); *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 24, 978 P.2d 481 (1999) (holding specific provisions must prevail over more general statutes). While we are mindful that this deference ends when it is shown that a county’s actions are in fact a “clearly erroneous” application of the GMA, we should give effect to the legislature’s explicitly stated intent to grant deference to county planning decisions. Thus a board’s ruling that fails to apply this “more deferential standard of review” to a county’s action is not entitled to deference from this court.¹²

In the *Quadrant Corp.* decision the Board did not correctly apply the standard of review in construing part of the GMA.¹³ Here, the Board gave appropriate deference to the County,¹⁴ so *Quadrant Corp.* does not apply.

¹¹ *Bainbridge Citizens United v. Washington State Dept. of Natural Resources*, 147 Wn. App. 365, 367 – 76, 198 P.3d 1033, 1034 – 38 (2008); *Sherman v. State*, 128 Wn.2d 164, 168 – 207, 905 P.2d 355, 360 – 79 (1995).

¹² *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132, 1139 (2005).

¹³ *Quadrant Corp.*, 154 Wn.2d at 236, 110 P.3d at 1138.

¹⁴ AR 7491, *Concerned Friends of Ferry County v. Ferry County*, GMHB Case No. 01-1-0019, Order Finding Compliance [Agricultural Resource Lands] (Feb. 14, 2014), at 2 of 16. Hereinafter referred to as the Order Finding Compliance.

In the *Kittitas County* decision the Washington State Supreme Court again affirmed that the court's owe deference to the Board writing:

¶ 13 In reviewing growth management hearings board (board) decisions, courts give “substantial weight” to a board’s interpretation of the GMA. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006) (quoting *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000)). Courts’ deference to boards is superseded by the GMA’s statutory requirement that boards give deference to county planning processes. *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (“a board’s ruling that fails to apply this ‘more deferential standard of review’ to a county’s action is not entitled to deference from this court”).¹⁵

But none of these decisions say the courts give deference to the County’s planning decisions.

IV. ARGUMENT

- A. **Ferry County has failed to properly designate agricultural lands of long-term commercial significance because the County’s criteria violate the GMA.**
 - 1. **Ferry County has failed to properly designate agricultural lands of long-term commercial significance by failing to apply the criteria for designating agricultural lands in the Ferry County Comprehensive Plan and by adopting development regulations with criteria that are not consistent with and fail to implementing the comprehensive plan violating RCW 36.70A.130. (Assignment of Error 1, Issue 1.)**

The Concerned Friends’ Petitioner’s Brief on pages 10 through 17 documented that the “Criteria for Designating Agricultural Lands of Long-

¹⁵ *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 154, 256 P.3d 1193, 1198 (2011).

Term Commercial Significance in Ferry County, Washington”¹⁶ are not “consistent with” and fail to implement comprehensive plan Policies “7.4.30 7” and “7.4.30 9” and provision “7.4.31” as RCW 36.70A.130(1)(d) requires. This is because the “criteria,” a development regulation, has criteria that are inconsistent with the criteria in the comprehensive plan.¹⁷

The Brief of Respondent Ferry County on page 12 argues that nothing in Policies “7.4.30 7” and “7.4.30 9” and provision “7.4.31” prohibit a point system. But as the Concerned Friends’ Petitioner’s Brief documented on pages 13 and 14 the “Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington” includes criteria related to land near LAMIRDs and “block groups” that are not included in the comprehensive plan policies.¹⁸ This results in the exclusion of land that meets the comprehensive plan policies.¹⁹

The Brief of Respondent Ferry County on page 13 argues that the analysis for the land that was not designated as agricultural lands of long-

¹⁶ AR 6364 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 18 – 31.

¹⁷ AR 6342 – 43, Ferry County Ordinance No. 2013-03 *Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan* p. *3 – 4; AR 6364 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 18 – 31.

¹⁸ AR 6372 – 77, Ferry County Development Regulations Ordinance No. 2013-05 pp. 26 – 31.

¹⁹ Concerned Friends’ Brief of Petitioners p. 12.

term commercial significance “is conclusory and is not the sort of analysis require to overcome the presumption of validity.” But as the Concerned Friend’s Petitioner’s Brief documented on page 12, this area meets the comprehensive plan criteria for agricultural land based on the evidence in the record.

2. The “Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington” violate RCW 36.70A.170, RCW 36.70A.030(2) and (10), and RCW 36.70A.020(8) and the Minimum Guidelines to Classify Agricultural Lands. (Assignment of Error 2, Issue 2.)

The Concerned Friends’ Brief of Petitioners on pages 17 through 36 described how the “Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington” violate RCW 36.70A.170, RCW 36.70A.030(2) and (10), RCW 36.70A.020(8), and WAC 365-190-050(3)(c). If a county choses to use the factors in WAC 365-190-050(3) the county must comply with the factors.²⁰ “Additionally, our Supreme Court has suggested that counties cannot consider additional other factors to the detriment of the GMA’s stated goals and requirements.”²¹ However, as the Concerned Friends’

²⁰ *Lewis County*, 157 Wn.2d at 504, 139 P.3d at 1104 “Thus, upon remand, when the Board reviews whether Lewis County properly designated agricultural lands, the inquiry should include whether the county’s decisions were “clearly erroneous” in light of the considerations outlined in RCW 36.70A.030 or WAC 365–190–050.”

²¹ *Clark County Washington v. Western Washington Growth Management Hearings Review Bd.*, 161 Wn. App. 204, 233, 254 P.3d 862, 875 (2011) *vacated in part on other*

Brief of Petitioners showed, the County did not comply with those factors in the “Criteria for Designating Agricultural Lands of Long-Term Commercial Significance in Ferry County, Washington.” This Reply will address the County’s general argument and then the County’s specific arguments for each criterion.

The Brief of Respondent Ferry County argues, on page 15, that its point system “allows for a verifiable, repeatable and objective method of applying defined criteria to parcels of land.” But Table B of Ferry County Ordinance 2013-05 seems to show that 2,816.85 acres meet the requirements of the County’s point system.²² Ferry County Ordinance 2013-05 states that “[t]he last column was used as the final criteria in determining Agricultural Lands of Long-Term Commercial Significance.”²³ Only 405 acres of privately owned land, the land analyzed in Table B, were designated.²⁴ The publically owned lands designated as agricultural lands of long-term commercial significance were analyzed using another method.²⁵ So the point system is not “a verifiable, repeatable and objective method.” There is a significant difference between the point

grounds by Clark County v. Western Washington Growth Management Hearings Review Bd., 177 Wn.2d 136, 298 P.3d 704 (2013). This part of the decision was not vacated.

²² AR 6374 – 76, Ferry County Development Regulations Ordinance No. 2013-05 pp. 28 – 30.

²³ AR 6376, *Id.* at p. 30.

²⁴ AR 6376 – 77, *Id.* at pp. 30 – 31. The 405 acres are “subject to long-term conservation easement[s]” AR 6376, *Id.* at p. 30.

²⁵ AR 6372 – 74, *Id.* at pp. 26 – 28.

system results and the designated agricultural lands of long-term commercial significance.

(i) Criterion One, Soil Classification, is a misinterpretation and misapplication of WAC 365-190-050.

The Concerned Friends' Petitioner's Brief on pages 19 through 21 documented GMA violations such as only giving points to certain land-capability Class III soils and all land-capability Class IV soils only if they were irrigated even when the soil is prone to being water logged²⁶ or failing to document why the different land-capability class soils get such different point scores. There is no evidence, for example, that a Class II soil is three times as productive as a Class III or Class IV if irrigated soil but it gets three times the points.²⁷

The Brief of Respondent Ferry County on page 17 argues that land-capability Class IV soils have “very severe limitations on their use as agricultural land, including steep slopes, severe susceptibility to wind or water erosion, severe past erosion, shallowness, low moisture-holding capability, waterlogging, flooding, high salinity or moderately adverse climate.” While land-capability Class IV have limitations for agriculture,

²⁶ For such a Class IV soil, see the “Ret silt loam, heavy variant” description at AR 6708, USDA Natural Resources Conservation Service, *Map Unit Description North Ferry Area, Washington* p. 160 of 198 (6/25/2012).

²⁷ AR 6368, Ferry County Development Regulations Ordinance No. 2013-05 p. 22.

requiring that the soils be irrigated will not overcome most of the limitations the County has identified and may even make them worse. Requiring that waterlogged soils or soils with erosion hazards be irrigated will make those conditions worse. This is not a situation where irrigated is needed to make Class IV soils suitable for farming, so requiring them to be irrigated is not supported by substantial evidence. It is also a misinterpretation of WAC 365-190-050(3)(b)(ii) which provides that “counties ... shall use the land-capability classification system of the United States Department of Agriculture Natural Resources Conservation Service as defined in relevant Field Office Technical Guides.” This provision does not call for using the land-capability system with additional requirements that do not address the limitations of the particular soil.

(ii) Criterion Three, Availability of Public Services, is a misinterpretation and misapplication of WAC 365-190-050(3)(c)(iv).

The Concerned Friends’ Petitioner’s Brief on pages 21 through 23 documented that this criterion was inconsistent with WAC 365-190-050(3)(c)(iv) which requires consideration of the “availability of public services” because it does not consider facilities and services, but rather proximity to limited areas of more intense rural developments (LAMIRDs.) Public facilities and services in LAMIRDs cannot be

extended outside of the LAMIRD²⁸ and the LAMIRDs themselves cannot expand.²⁹

The County argues that since the county gives no points for this criterion, what is the harm. The harm is that the County may change the points in a later iteration of its point system. The County should repeal the noncompliant provision.

(iii) Criterion Four, Proximity to an Urban Growth Area, is not supported by substantial evidence.

The Concerned Friends' Petitioner's Brief on pages 23 through 25 argued that since it was not necessary to expand Ferry County's urban growth areas by five miles and the expansion should not occur in flood plains where the farming is taking place near Republic, this criterion was inconsistent with WAC 365-190-050(3)(c)(v) which requires consideration of the "[r]elationship or proximity to urban growth areas[.]"

The Brief of Respondent Ferry County on page 18 argues that Ferry County Ordinance No. 2013-05, apparently at AR 6369 – 70, contains substantial evidence supporting the Board's decision. But Ferry County Ordinance No. 2013-05 does not contain any evidence that a five mile expansion area is needed. Indeed, the ordinance concedes, in part, that "[i]t is not expected that the city of Republic will expand to fill this

²⁸ RCW 36.70A.070(5)(d).

²⁹ RCW 36.70A.070(5)(d)(i); (5)(d)(ii); (5)(d)(iii); (5)(d)(v).

five mile distance, but taking into consideration topography, the service area for the city water district, the proximity to industrial sites, the consideration of pressures for conversions and potential use conflicts, a five mile buffering areas is reasonable.”³⁰ But as Concerned Friends’ Petitioner’s Brief documented would be better for the Republic urban growth area to expand outside the flood plain where much of the farmland is located.³¹ In fact, most of Ferry County’s urban growth area is outside the valley.³² As is nearly all of the Republic, which is located on a bench and hill outside the valley.³³ Neither the Brief of Respondent Ferry County nor Ferry County Ordinance No. 2013-05 cites to any evidence that a five mile buffer is needed to maintain compatibility between the agricultural activities in the valley and the Republic urban growth area.

(iv) Criterion Five, Predominate Parcel/Farm (Ownership) Size, is a misinterpretation or misapplication of WAC 365-190-050 and not supported by substantial evidence.

The Concerned Friends’ Petitioner’s Brief on pages 25 to 31 argued that Ferry County’s predominate parcel size criteria was

³⁰ AR 6370, Ferry County Development Regulations Ordinance No. 2013-05 p. 24.

³¹ AR 6467, FEMA Flood Map Viewer for the area south of the City of Republic. AR 6469, a Google Earth Image documents that the valley south and northeast of Republic is used for agriculture.

³² AR 6812, County Comprehensive Plan Future Land Use Map NW ¼ page 1; AR 6820, Republic Urban Growth Area (attached to Ferry County Development Regulations Ordinance No. 2013-05 after the “maps” page).

³³ AR 6467, FEMA Flood Map Viewer for the area south of the City of Republic. AR 6469, a Google Earth Image of the Republic vicinity.

inconsistent with WAC 365-190-050(3)(c)(vi). This subsection requires consideration of the “[p]redominant parcel size[.]” But Ferry County used farm size categories from the Census of Agriculture which are not parcel sizes and then did not even count farm size in the same way as the Census of Agriculture, excluding rented land and land that was not contiguous.³⁴ Further, no parcel in Ferry County is larger than 640 acres, but Ferry County’s criterion gives the highest points to parcel/farm (ownership) 1,000 acres or more in size.³⁵

The Brief of Respondent Ferry County on page 19 argues that we must show how Ferry County’s criterion conflicts with WAC 365-190-050. But as the Court can see from the summary above, WAC 365-190-050(3)(c)(vi) requires consideration of predominate parcel size and Ferry County’s criterion is based on farm size.³⁶

³⁴ AR 6370 – 71, Ferry County Development Regulations Ordinance No. 2013-05 pp. 24 – 25; AR 6415, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture Washington State and County Data Volume 1 • Geographic Area Series • Part 47* p. B-14.

³⁵ AR 6371, Ferry County Development Regulations Ordinance No. 2013-05 p. 25; AR 6812 – 15, Ferry County Comprehensive Land Use Map pp. 1 –4 (attached to Ferry County Development Regulations Ordinance No. 2013-05 after the “maps” page); *Lilygren v. Rogers*, 1 Wn. App. 6, 9, 459 P.2d 44, 46 (1969).

³⁶ AR 6390, United States Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture, Washington State and County Data Volume 1 Geographic Area Series • Part 47 Chapter 2: County Level Data, Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2007 and 2002* p. 291 (Feb. 2009). Hereinafter *2007 Census of Agriculture Table 8.*

The Brief of Respondent Ferry County on page 19 argues that every county in this State differs from every other county and for this reason the local government is responsible for determining how the GMA and its enacting regulations are to be applied in each county. So then why did Ferry County use national farm size categories as a substitute for predominate parcel sizes tailored to agriculture in Ferry County? This is especially puzzling given that the fastest growing farm size in Ferry County, on a percentage basis, are farms in the 260 to 499 acre category.³⁷ For farms in this size category, Ferry County gives only one point, assuming all of the land in these farms is continuous and these farmers do not rent or lease too much of their farmland.³⁸

A second problem with this argument is that while using the long-term commercial significance factors in WAC 365-190-050(3) is optional, if a county chooses to use those factors the county must comply with them.³⁹

The Brief of Respondent Ferry County on pages 19 and 20 argues that the Board concluded that Ferry County is limited by geography,

³⁷ AR 6390, *Id.* at 291.

³⁸ AR 6370 – 71, Ferry County Development Regulations Ordinance No. 2013-05 pp. 24 – 25.

³⁹ *Lewis County*, 157 Wn.2d at 504, 139 P.3d at 1104 “Thus, upon remand, when the Board reviews whether Lewis County properly designated agricultural lands, the inquiry should include whether the county’s decisions were “clearly erroneous” in light of the considerations outlined in RCW 36.70A.030 or WAC 365–190–050.”

dependence on federal and state grazing lands, and distance to sources of inputs and markets. While the Board made those excuses for the County, none of those excuses address whether the County properly applied WAC 365-190-050(3)(c)(vi) or whether substantial evidence supports the County's substitution of farm sizes for predominate parcel sizes.⁴⁰ Most telling is that Ferry County has failed to designate and conserve a single one of the 1,000 acre farms it purports to value so much.⁴¹ As The Concerned Friends' Petitioner's Brief showed on pages 25 to 31 the County misapplied WAC 365-190-050(3)(c)(vi) as did the Board and substantial evidence does not support the Board's decision on this criterion.

(v) Criteria Six, proximity to Markets/Services, is not support by substantial evidence.

The Concerned Friends' Petitioner's Brief on pages 31 to 33 showed that Washington processors receive over 60 percent of their livestock from a distance of 50 miles or more.⁴² Hay is shipped throughout Washington State, to other states, and to foreign markets in Asia.⁴³ Ferry

⁴⁰ AR 7502, Order Finding Compliance p. 13 of 16.

⁴¹ AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

⁴² AR 6473, Stephanie Meenach, Eric L. Jessup, & Kenneth L. Casavant, *Transportation and Marketing Needs for the Washington State Livestock Industry* p. 6 (Washington State University, School of Economic Sciences, Strategic Freight Transportation Analysis (SFTA) Research Report #12: November 2004).

⁴³ AR 3813, Stephanie Meenach, Eric L. Jessup, & Kenneth L. Casavant, *Transportation Characteristics and Needs of the Washington Hay Industry: Producers and Processors* p.

County's point system penalizes farms and ranches located more than 50 road miles from "market/services," actually a single livestock market.⁴⁴ Ferry County provided no evidence in support of the 50 mile penalty.⁴⁵

The Brief of Respondent Ferry County on page 20 first argues that Ferry County is isolated. But U.S. 395, which runs through Ferry County from the Canadian border to Stevens County and then on to the Spokane livestock markets is one of the state's major livestock transport routes.⁴⁶

The Brief of Respondent Ferry County on page 20 then argues that costs are greater the farther one is from a market. But the statistics on haul distances for livestock and hay cited above show that haul distances greater than 50 miles are not material to the agricultural industry and Ferry County does not cite to any evidence that they are.

The Brief of Respondent Ferry County on pages 20 and 21 argues that the penalty for being more than 50 miles from a market is only that the land did not get one point and we have not shown that this disadvantaged a single parcel from consideration for an ARL designation. But it has disadvantaged hundreds of thousands of acres of farmland. After

10 (Washington State University, School of Economic Sciences, SFTA Research Report #11: November 2004).

⁴⁴ AR 6371, Ferry County Development Regulations Ordinance No. 2013-05 p. 25.

⁴⁵ AR 7502, Order Finding Compliance p. 13 of 16.

⁴⁶ AR 6474, Stephanie Meenach, Eric L. Jessup, & Kenneth L. Casavant, *Transportation and Marketing Needs for the Washington State Livestock Industry* p. 12 (Washington State University, School of Economic Sciences, Strategic Freight Transportation Analysis (SFTA) Research Report #12: November 2004).

all, Ferry County only designated 405 acres of privately owned farmland and only because they had conservation easements on the land.⁴⁷

In short, the evidence shows that the 50 mile penalty has no basis in fact. Substantial evidence does not support the Board's decision.

(vi) Criterion Seven, History of Nearby Land Uses, is not support by substantial evidence and is a misapplication of the GMA.

The Concerned Friends' Petitioner's Brief on pages 25 to 31 argued that Ferry County's history of nearby land uses was inconsistent with WAC 365-190-050(3)(c)(ix) because it penalizes "land which is adjacent to residential uses of land"⁴⁸ The County argues that this is not true and we did not show a signal parcel penalized. But we did identify fields near Malo showing that several of houses near the fields are part of the farm with agricultural outbuildings which were not designated as agricultural lands of long-term commercial significance.⁴⁹ WAC 365-190-050(3)(c)(ix) calls on counties to consider the "history of land development permits issued nearby[.]" It does not permit counties to

⁴⁷ AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

⁴⁸ AR 6371, Ferry County Development Regulations Ordinance No. 2013-05 p. 25.

⁴⁹ AR 6439, USDA Natural Resources Conservation Service, Soil Map—North Ferry Area, Washington (Agricultural Fields North of Malo) p. 1 of 3 (7/9/2013); AR 6356, Ferry County Comprehensive Plan Future Land Use Map Page 6 Agricultural Land of Long-Term Commercial Significance.

exclude all fields adjacent to a residential use, especially farm and ranch residences.

(vii) Other Factors Considered: *Block Group*.

The Concerned Friends' Petitioner's Brief on pages 34 to 36 showed that the block group criterion does not implement the Ferry County Comprehensive Plan. Ferry County, on page 22 argues that WAC 365-196-210(7) defines inconsistency as incompatibility with another provision. The block group criterion is an exclusionary factor, if the land is not in a 500 acre block; it is not designated as agricultural lands of long-term commercial significance.⁵⁰ This criterion is inconsistent with *Ferry County Comprehensive Plan* Policy "7.4.30 7" and provision "7.4.31" which say nothing about "block groups" and do not authorize block groups to override the criteria in those policies.⁵¹ Under Ferry County's point system, land can meet all of the comprehensive plan policies and still not be designated as agricultural land of long-term commercial significance because of the Block Group criterion. This is incompatibility.

B. Ferry County has failed to properly apply the County's designation criteria, and comply with the GMA and the Minimum Guidelines in designating agricultural lands of long-term commercial significance.

⁵⁰ AR 6372, 6374 – 77, Ferry County Development Regulations Ordinance No. 2013-05 p. 26 & pp. 28 – 31.

⁵¹ AR 6342 – 43, Ferry County Ordinance No. 2013-03 *Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan* pp. *3 – 4.

1. The Application of Designation Criteria to Federal Grazing Allotments, also known as grazing leases, violates RCW 36.70A.070 and RCW 36.70A.130(1)(d). (Assignment of Error 3, Issue 3, Issue 4.)

The Concerned Friends' Petitioner's Brief on pages 36 through 38 described how the designation criterion were applied differently to the privately owned land than the Federal Grazing Allotments documenting how the designated federal lands had much poorer agricultural soils and were farther from markets than privately owned farm and ranch land. The Brief of Respondent Ferry County states on page 15 that private ownership is not one of the criteria. Why then are the criteria more strictly applied to private land than public land? Why did Ferry County only designate 405 acres of privately owned land "subject to long-term conservation easement[s]" and 478,968 acres owned by the U.S. Forest Service and the Washington State Department of Natural Resources subject to long-term grazing allotments?⁵²

The Brief of Respondent Ferry County states on page 23 that the Concerned Friends of Ferry County and Futurewise (Concerned Friends) are arguing that federal grazing lands should not be designated as agricultural lands of long-term commercial significance. That is not the case, the Concerned Friends only object to the inconsistent application of

⁵² AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

the point system. Also on page 23, the County argues that it would have been improper to not designate the single largest source of agriculture in the County. But the County has done exactly that by failing to designate the farm and ranch on which the cattle graze most of the year on which their hay and feed are grown, the private farm and ranch land. And there is more privately owned land in farms in Ferry County than state and federal grazing leases.⁵³

2. The Weighting of Criteria for Assessing Long-Term Commercial Significance is clearly erroneous because it misinterprets WAC 365-190-050(5) violating RCW 36.70A.020(8) and RCW 36.70A.050. (Assignment of Error 3, Issue 3, Issue 4.)

The Concerned Friends' Petitioner's Brief on pages 38 through 41 argues that rather than complying with WAC 365-190-050(5) and the Ferry County Comprehensive Plan to designate a critical mass of land to support the agriculture industry,⁵⁴ the County created "[a] weighting of criteria that is calculated to assure that no lands are designated does [sic] not provide significant 'critical mass' to assure the viability of the agricultural industry over the long-term."⁵⁵ The Concerned Friends interpret this to say that the County excludes land where that land itself

⁵³ AR 6390, 2007 Census of Agriculture Table 8 p. 291.

⁵⁴ AR 6341, Ferry County Ordinance No. 2013-03 *Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan* p. *2.

⁵⁵ AR 6374, Ferry County Development Regulations Ord. No. 2013-05 p. 28.

does not provide significant critical mass rather than looking to critical mass countywide.

The Brief of Respondent Ferry County on pages 24 and 25 states that is not what the material quoted above means, that “[t]his sentence simply means that the County must designate ARL in order to assure the viability of ARL in the long run. This is what the GMA requires, what the WAC requires”

The Concerned Friends agree this is what the GMA and the WACs require, but it is not what Ferry County has done. The inconsistency with the GMA and WACs can be most clearly seen in the small number of cattle that can be supported by the County’s 405 acres of privately owned agricultural lands of long-term commercial significance.⁵⁶ In 2007, Ferry County farms and ranches had 4,126 cattle and calves.⁵⁷ Ferry County has chosen to designate as agricultural lands of long-term commercial significance 405 acres of land that could grow hay for the six months that the cattle cannot graze the federal or state lands.⁵⁸ Using the hay yields of Mires gravely loam, a land-capability category III soil, the 405 acres will support 170 cattle and calves for the six months they cannot graze the

⁵⁶ AR 6376, Ferry County Development Regulations Ord. No. 2013-05 p. 30.

⁵⁷ AR 680, U.S. Department of Agriculture, 2007 Census of Agriculture County Profile Ferry County Washington p. *2.

⁵⁸ AR 6342, Ferry County Ordinance No. 2013-03 Ferry County Comprehensive Plan and the Curlew Lake Sub Area Plan Section 7.4.31 p. *7.

federal and state grazing allotments if the land is not irrigated.⁵⁹ If irrigated, it would support 935 cattle and calves.⁶⁰ That is not even a quarter of the cattle and calves in Ferry County. And where will the 4,126 cattle and calves⁶¹ spend the six months they cannot graze on federal land, the 405 acres? Ferry County is not maintaining the necessary critical mass of agricultural land.

The Brief of Respondent Ferry County on page 26 argues that the County cannot discriminate between classes of landowners. But because of the County's inconsistent application of its criteria to private and public land, that is exactly what the County has done.

3. Ferry County's failure to properly designate working farms and ranches is inconsistent with the designation of the federal grazing allotments and the GMA. (Assignment of Error 3, Issue 3, Issue 4.)

The Concerned Friends' Petitioner's Brief on pages 44 and 47 argued that the County's failure to designate and conserve private land violated the GMA because there is insufficient private land to grow winter

⁵⁹ AR 6451, USDA Natural Resources Conservation Service, *Yields of Non-Irrigated Crops (Component): Annual hay crop (Tons)—North Ferry Area, Washington (Fields South of Malo Hay Yields Non-Irrigated)* p. 3 of 4 (7/10/2013).

⁶⁰ AR 6447, USDA Natural Resources Conservation Service, *Yields of Irrigated Crops (Component): Grass-legume hay (Tons)—North Ferry Area, Washington (Fields South of Malo Hay Yields Irrigated)* p. 3 of 4 (7/10/2013).

⁶¹ AR 680, U.S. Department of Agriculture, 2007 Census of Agriculture County Profile Ferry County Washington p. *2.

feed since hay and grain cannot be grown on the federal grazing land⁶² and Ferry County has failed to protect the base properties needed to obtain a federal grazing permit.⁶³

On page 27, the Brief of Respondent Ferry County asserts that a base property can be “a mailing address” or be in the middle of town. This is not correct, a “[b]ase property is land and improvements owned and used by the permittee for a farm or ranch operation and specifically designated by him to qualify for a term grazing permit.”⁶⁴ Ferry County on page 27 also argues that the base property does not have to be in the same county as the grazing land and that is true, but if it is only farmers and ranchers from outside Ferry County who are able to use the state and federal grazing Ferry County is failing to maintain and enhance agricultural industry in the county as RCW 36.70A.020(8) directs the County to do.

4. The Board’s focus on certain facts and opinions about Ferry County’s agriculture rather than the GMA criteria and minimum guidelines was an erroneous interpretation of the GMA. (Assignment of Error 3, Issue 4; Assignment of Error 5, Issue 6).

⁶² AR 6779, *Forest Plan Revision, Colville & Okanogan-Wenatchee National Forests May 2009 Briefing: Rangelands and Forest Plan Revision* p. 2 of 2.

⁶³ 36 CFR § 222.1(b)(3) (2012).

⁶⁴ *Id.*

The Concerned Friends' Brief of Petitioners on pages 47 through 50 documented that rather than basing its decision on Ferry County's designation of agricultural land of long-term commercial significance on the GMA, the Board relied on facts and opinions about agriculture in Ferry County to justify upholding the County's decision to only designate designated 405 acres of its privately owned working farms and ranches as agricultural lands of long-term commercial significance⁶⁵ and that two of those facts cited by the Board were wrong.

On page 28, the Brief of Respondent Ferry County is unable to find any evidence for the Board's assertion that Ferry County ranks last in the state for the value of agricultural products sold. In fact, in 2007 Ferry County ranked 37th out of 39 counties.⁶⁶ But also on page 28, Ferry County argues that it does not matter if Ferry County ranked 37th or 39th. But that is unclear. The Board though it was approving a "unique" circumstance where designating only 405 acres of privately owned farmland would do little harm to the agricultural industry.⁶⁷ If two other Washington counties can get the same deal, the Board may have thought again. The Washington State Department of Agriculture wrote "[t]he future of farming in

⁶⁵ AR 7504, Order Finding Compliance p. 15 of 16. AR 6376, Ferry County Development Regulations Ordinance No. 2013-05 p. 30.

⁶⁶ AR 680, U.S. Department of Agriculture, 2007 Census of Agriculture County Profile Ferry County Washington p. *2.

⁶⁷ AR 7504, Order Finding Compliance p. 15 of 16.

Washington is heavily dependent on agriculture's ability to maintain the land resource that is currently available to it."⁶⁸ And Ferry County has the eighth largest amount of land in farms of all the counties in Washington State including lands within that portion of Colville Indian Reservation, so it is a significant factor in the industry's future.⁶⁹ If the Board knew that the ranking of agricultural sales would allow two other counties to also designate less than 500 acres of privately owned agricultural lands of long-term commercial significance it may have made a better decision.

V. CONCLUSION

As this brief has shown, the Board failed to correctly interpret and apply the law and the Board's order is not supported by substantial evidence. We respectfully request that this Court reverse the Board's Order Finding Compliance.

Respectfully submitted this 7th day of January 2015.



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⁶⁸ AR 6429 – 30, Washington State Department of Agriculture, *Washington Agriculture Strategic Plan 2020 and Beyond* pp. 50 – 51 (2009).

⁶⁹ AR 6389 – 92, *2007 Census of Agriculture* Table 8 pp. 290 – 94; AR 6359, Ferry County Critical Areas Ordinance 2013-04 p. 55.

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on January 7, 2015, I caused a PDF file of the original and true and correct copies of the following document to be served on the persons listed below in the manner shown: **Concerned**

Friends of Ferry County's and Futurewise's Reply Brief.

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Dated this 7th day of January 2015.



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FUTUREWISE

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