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

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CONCERNED FRIENDS OF FERRY COUNTY and FUTUREWISE,  
  
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF COMMERCE,  
FERRY COUNTY, and the GROWTH MANAGEMENT HEARINGS  
BOARD,  
  
Respondents.

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**BRIEF OF RESPONDENT,  
STATE OF WASHINGTON DEPARTMENT OF COMMERCE**

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ROBERT W. FERGUSON  
Attorney General

HEATHER CARTER  
Assistant Attorney General  
WSBA No. 30477  
OID No. 91030  
7141 Cleanwater Drive SW  
PO Box 40109  
Olympia, WA 98504-0109  
(360) 586-6474

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## I. INTRODUCTION

Appellants characterize this case as another wholesale review of Ferry County's compliance with the Growth Management Act (GMA) of the type that applies to counties that must fully plan under the GMA. This is not the case. Ferry County withdrew from the full planning requirements of the GMA by following the statutory procedure to become a partial-planning county.

For a window of time, the GMA allowed certain small counties to withdraw from full planning requirements. To qualify, counties were required to, among other things, designate agricultural resource lands (ARL), and adopt a resolution of partial planning. RCW 36.70A.040(2). Ferry County took advantage of this "opt out" provision and adopted a resolution of partial planning in 2014. Prior to adoption of the partial planning ordinance, in a separate case Appellants appealed two ordinances from 2013, first to Growth Management Hearings Board (Board), and then to this Court. In 2015, this Court accepted Ferry County's criteria for ARL and application of such criteria except with respect to designation of agricultural lands of long-term commercial significance. This Court determined that the designation of ARL was not in compliance with the GMA. The Department of Commerce (Department) did not review Ferry County's 2013 ordinances in that initial case.

After this Court's 2015 decision, Ferry County was required to remedy the outstanding issue of noncompliance identified by this Court in order to comply with the opt-out statute. This required the county to then seek a determination of compliance from the Department regarding its designation of 502,013 acres as agricultural lands of long-term commercial significance. Upon review of Ferry County's efforts, the Department determined, and the Board affirmed, that Ferry County's 2016 designation of ARL complied with the GMA.

In this action, Appellants attempt to re-litigate many of the same complicated issues that this Court resolved in 2015. This case, however, is limited to the review of the Board's Final Decision and Order which itself was limited in scope by the "opt out" provision of the GMA, and this Court's prior rejection of most of Appellant's challenges to Ferry County's ordinance, except for the sole outstanding issue of the County's designation of ARL. That sole remaining issue has now been cured, as found by both the Department and the Board, whose determinations are entitled to deference. The Department requests that this Court affirm the Board's Final Decision and Order.

## **II. ISSUES**

1. Did the Board err in affirming the Department's Determination of Compliance that concluded Ferry County had complied

with the GMA by designating 2,939.98 acres of private land as agricultural lands of long-term commercial significance according to a set of criteria previously upheld by this Court as compliant?

2. Were the findings of fact in the Final Decision and Order that Ferry County's primary agricultural product is livestock; that 2,939.98 acres of private land were designated in compliance with the GMA; that there are 25,215 acres privately held as land in farms outside the Colville Indian Reservation to which the County has no jurisdiction; and that the designated agricultural lands protect the long-term viability of the County's commercially significant agricultural industry, supported by substantial evidence?

3. Did the Board err in determining it did not have jurisdiction to address issues beyond the sole issue of noncompliance identified in this Court's 2015 decision relating to designation of ARL?

### **III. STATEMENT OF THE CASE**

#### **A. Factual History**

Ferry County is a rural county located in eastern Washington. Cattle ranching is the major agricultural industry in the County. *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 808, 365 P.3d 207 (2015). Its population was 7,400 in 2005 and is projected to grow to 10,250 by 2030. *Id.* Ferry County largely consists of the Colville Indian Reservation and

lands under jurisdiction of the United States Forest Service and the Washington State Department of Natural Resources. *Id.*

In 2013, Ferry County adopted Ordinances 2013-03 and 2013-05. These ordinances established the County's planning policies for agricultural resource lands and adopted criteria, including a point system, for identifying and designating ARL. *Id.* at 808-09. The ordinances designated over 479,000 acres of ARL including, (1) 459,545 acres of federal grazing allotments, (2) 19,423 acres of state owned lands leased for grazing, and (3) 405 acres of privately held land subject to long-term conservation easements. *Concerned Friends* at 810. Appellants challenged the ordinance, which was upheld by the Board.<sup>1</sup>

In *Concerned Friends* at 803, this court partially reversed the Board's decision. Attached as Appendix A. As discussed in detail below, this Court found that the County's criteria for identification of ARL lands complied with the GMA and WAC 365-190. *Concerned Friends* at 811. However, this Court found that the County's failure to designate an additional 2,816 acres of privately owned land that qualified as ARL under the County's criteria for designating ARL conflicted with the GMA, its

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<sup>1</sup> *Concerned Friends of Ferry Cty. et al. v. Ferry Cty.*, GMHB Case No. 01-1-0019, Order Finding Compliance (Feb. 14, 2014).

implementing regulations and the County's comprehensive plan. *Concerned Friends* at 834.<sup>2</sup>

This appeal involves Ferry County's ongoing efforts to remedy this noncompliance.

**B. Ferry County's Transition To Partial Planning Status**

Until 2014, Ferry County voluntarily opted to fully comply with the GMA pursuant to RCW 36.70A.040(2). In 2014, the Washington State Legislature passed Engrossed House Bill 1224, Laws of 2014 chapter 147 (EHB 1224). It amended the GMA to provide a process for counties who had voluntarily chosen to plan under the GMA to "opt out" of the full planning requirements set forth in RCW 36.70A.040, and pursue partial planning instead.<sup>3</sup> RCW 36.70A.040(2)(b) was amended to allow certain small counties to adopt a "withdrawal resolution for partial planning." For any county that was in compliance with the requirements of the GMA listed in RCW 36.70A.060(1)(d)(i), the adoption of the partial planning resolution would end continuing obligations to plan under RCW 36.70A.040. RCW 36.70A.040(2)(b)(ii)(A).

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<sup>2</sup> The County's designation of 459,545 acres of federal grazing land, 19,423 acres of state owned grazing lands, and 405 acres of private land under conservation easements remains in effect and is not in question in this appeal. Administrative Record (AR) 9-61, Ferry County Ordinance 2016-04, p. 29.

<sup>3</sup> The opt out process was available until December 31, 2015. RCW 36.70A.040(2)(b)(i).

Counties that were not in compliance with the requirements of the GMA at the time they adopted partial planning resolution were required to complete additional procedural steps to opt-out of full planning under the GMA. Under RCW 36.70A.060(1)(d)(i), a county not in compliance with enumerated sections of the GMA, was required to correct the issue of noncompliance and apply for a determination of compliance from the Department. If the Department denied the application, the county was required to resume full planning under RCW 36.70A.040 and could no longer opt for partial planning. RCW 36.70A.060(1)(d)(ii). If the Department granted the application, the County had no further obligation to plan under RCW 36.70A.040.

Ferry County adopted a resolution to withdraw from voluntary planning on September 22, 2014. AR 62-68, Determination of Compliance, p. 1. Because it was out of compliance with the GMA's requirements for designations of critical areas at the time it adopted the partial-planning resolution, Ferry County was required to make an application to the Department for a determination of compliance. RCW 36.70A.060(1)(d)(i), *Concerned Friends of Ferry Cty. et al. v. Ferry Cty.*, GMHB Case No. 97-1-0018c, Order Finding Continuing Noncompliance (Feb. 5, 2014). RCW 36.70A.060(1)(d)(i) provides that a county must apply to the Department for a determination of compliance if it is out of compliance with

the planning requirements of RCW 36.70A.060, RCW 36.70A.040(4), RCW 36.70A.070(5), RCW 36.70A.170, and RCW 36.70A.172 at the time of its partial planning resolution. Specifically, WAC 365-199-040(2) provides that, on application for a determination of compliance, “[t]he scope of the department’s review is limited to outstanding findings of noncompliance established in an order from the growth management hearings board or court.” The noncompliance issues subject to the county application to the Department under RCW 36.70A.060(1)(d)(i) are determined by Board order or court opinion. *See also* WAC 365-199-040(2).

At the time of the partial planning resolution, the Board had found the County in compliance with the GMA on its designations of ARL. *Concerned Friends of Ferry Cty. et al. v. Ferry Cty.*, GMHB Case No. 01-1-0019, Order Finding Compliance (Feb. 14, 2014). Following the adoption of the partial planning resolution, however, this Court issued an opinion on Dec. 15, 2015, in *Concerned Friends* at 835. This Court affirmed the County’s criteria, but overturned the Board’s order and found the County out of compliance with the GMA’s planning requirements for failure to adequately designate ARL.

**C. Ferry County’s Efforts to Cure the Noncompliance Issues Identified in this Court’s 2015 Decision**

The application process for issuing a determination of compliance is governed by rules in chapter 365-199 WAC. After this Court’s 2015 decision,

Ferry County addressed the issues raised in the 2015 decision and filed a notice of intent to apply for a determination of compliance to the Department on February 22, 2016 pursuant to WAC 365-199-030(2)(b)(i). AR 1419-1420. The public was given notice of the issue list and opportunity to comment.<sup>4</sup> Ferry County's list included three issues of noncompliance under the GMA: 1) the failure to designate and protect certain species, Bull Trout and the Common Loon, and their associated habitats, 2) the failure to consider Best Available Science when making decisions on species and habitats of local importance, and 3) the failure to designate a critical mass of commercially significant ARL. AR 1419-1420. After submitting the notice of intent, Ferry County took legislative action to address each of the identified issues of noncompliance. Ferry County adopted amendments to its ordinances on March 28, 2016, and August 8, 2016, and completed submission of the required components of an application for a determination of compliance to the Department on November 3, 2016. AR 61-68, Determination of Compliance, p. 3.

After an application to the Department is submitted, RCW 36.70A.060(1)(d)(i) provides that the Department may issue a determination of compliance if it finds "that the county's development regulations, including

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<sup>4</sup> AR 189-190, Notice of Joint Public Hearing; AR 188, Washington State Register 15-23-080, Notice of Joint Public Hearing; AR 1539-1540, Letter from Futurewise dated Dec 15, 2015; AR 1542-1548, Letter from Futurewise dated March 23, 2016.

development regulations adopted to protect critical areas, and comprehensive plans are in compliance with the requirements of this section, RCW 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172.”

On February 28, 2017, the Department issued its Determination of Compliance. *Id.* The Department determined that “Ferry County has addressed the outstanding issues of noncompliance and Ferry County’s Comprehensive Plan and development regulations are in compliance with the planning requirements of RCW 36.70A.060, RCW 36.70A.040(4), RCW 36.70A.070(5), RCW 36.70A.170, and RCW 36.70A.172 as a result of legislative actions taken on March 28, 2016 and August 8, 2016.” *Id.* The Department found, among other things, that Ferry County Ordinance 2016-04, adopted on August 8, 2016, had addressed the County’s noncompliance in the area of ARL by designating a critical mass of commercially significant ARL. *Id.* at p. 5. The Appellants timely filed a Petition for Review with the Board on April 27, 2017.

The Board issued a Final Decision and Order (FDO) affirming the Department’s Determination of Compliance on October 17, 2017. AR 1808-1820, attached as Appendix B. Appellants filed for judicial review of the Board’s FDO to the Thurston County Superior Court on November 14, 2017. Thurston County Superior Court affirmed the Board’s FDO on December 21, 2018. Appellants have now filed for judicial review with this Court.

#### IV. STANDARD OF REVIEW

Review of agency orders under the Administrative Procedures Act (APA) is limited to the provisions of RCW 34.05.570(3). Appellants invoke two subsections of RCW 34.05.570(3), which provides in relevant part:

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; . . .

RCW 34.05.570(3).

In *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011) (en banc), the Court succinctly stated the standard of review for appeals of Board decisions:

“Courts apply the standards of the Administrative Procedure Act [APA], chapter 34.05 RCW, and look directly to the record before the board. Specifically, courts review errors of law alleged under RCW 34.05.570(3)(b), (c), and (d) de novo. Courts review challenges under RCW 34.05.570(3)(e) that an order is not supported by substantial evidence by determining whether there is ‘a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.’”

*Id.* at 155 (citations omitted).

“Under the judicial review provision of the APA, the ‘burden of demonstrating the invalidity of [the Board’s decision] is on the party asserting the invalidity.’” *Thurston Cty. v. Cooper Point Ass’n*, 148 Wn.2d 1, 7-8, 57 P.3d 1156 (2002) (en banc) (citing RCW 34.05.570(1)(a)). In this case, Appellants bear that burden. The court may affirm the Board’s Order on any ground supported by the record, even if the Board did not consider it. *Whidbey Envtl. Action Network (“WEAN”) v. Island Cty.*, 122 Wn. App. 156, 168, 93 P.3d 885 (2004).

Additionally, “[i]n appeals from a decision of the Board, this straightforward APA standard of review is compounded with standards governing the Board’s review of local government actions.” For example, RCW 36.70A.320(3) states that in reviewing challenges under the GMA, the Board “shall find compliance” with the GMA unless it finds the action “clearly erroneous in view of the entire record before the board and in light of the [GMA’s] goals and requirements.” *Concerned Friends* at 812. Finally, “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.” *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005) (en banc).

**A. The Substantial Evidence Standard Under RCW 34.05.570(3)(e)**

Findings of fact are subject to review under the “substantial evidence” standard. RCW 34.05.570(3)(e); *Terry v. Emp’t Sec. Dep’t*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). Under the “substantial evidence” standard, an agency finding of fact will be upheld if supported by “evidence that is substantial when viewed in light of the whole record before the court . . .” RCW 34.05.570(3)(e). “Substantial evidence” has been defined as evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994) (en banc). In addition, uncontested findings are verities on appeal. *In re Interest of Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002) (en banc).

**B. The Error of Law Standard Under RCW 34.05.570(3)(d)**

Alleged errors of law are reviewed de novo. *Kittitas Cty.* at 155. “Substantial weight is accorded to a board’s interpretation of the GMA, but the court is not bound by the board’s interpretations.” *Thurston Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38 (2008) (en banc). On mixed questions of law and fact, the court determines the law independently, and then applies it to the facts as found by the Board. *Cooper Point Ass’n* at 8. The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Board. *Callecod v. Wash.*

*State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997), review denied, 132 Wn.2d 1004 (1997).

## V. ARGUMENT

### A. **The Board did not Err in Affirming Commerce's Conclusion that Ferry County Complied With the GMA in its Designation of Agricultural Lands of Long-Term Commercial Significance**

Appellants continue to argue, as they did in the underlying case before this Court, that Ferry County's criteria for evaluating and identifying ARL are erroneous. Appellants' Brief at 19-23. However, this Court previously determined that the criteria were compliant with the GMA. The Board's FDO correctly affirmed the Department's Determination of Compliance that found the designation of ARL under Ferry County Ordinance 2016-04 met the requirements of the GMA by designating a "critical mass" of ARL of long-term commercial significance.

#### 1. **The Criteria for Designating Agricultural Resource Lands Was Upheld by This Court And Is Not Subject to Review**

The Appellants argue that the criteria for designating ARL is erroneous and was implemented incorrectly by the County. However, they have already litigated these claims before the Board, and this Court has determined that the County's criteria are not clearly erroneous. *Concerned Friends* at 819-26.

The Board correctly determined that the only issue before it in relation to ARL was the failure to adequately designate ARL. AR 61-68, Determination of Compliance, p. 3, 5. In *Concerned Friends*, this Court found that Ferry County's criteria<sup>5</sup> for designating ARL "are consistent with its comprehensive plan, the GMA, and regulations implementing the GMA." *Concerned Friends* at 811. The finding of compliance by this Court is the law of the case. "The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation." *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 556, 309 P.3d 673 (2013) (citing *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) (en banc)). The Board had no jurisdiction to consider the Appellants' various challenges to the County criteria or the application of those criteria in individual circumstances, except with respect to the only issue of noncompliance open from this Court's 2015 decision.

Appellants challenge the County's criteria to argue that the designation of ARL should not be limited to the cattle industry and should include other agricultural products. Appellant's Brief at 20. However, this

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<sup>5</sup> The seven criteria adopted by the County are: (1) Soil Classification, (2) Tax Status, (3) Availability of Public Services, (4) Proximity to an Urban Growth Area, (5) Predominate Parcel/Farm (ownership) Size, (6) Proximity to Market/Services, and (7) History of Nearby Land Uses. AR 1713-1719.

Court *only* faulted the County specifically for failure to designate lands suitable for *hay production*, which the Court noted was critical to supporting the local livestock industry. *Concerned Friends* at 831, 833. This Court otherwise accepted Ferry County's application of its criteria. The Court held: "the County's major agricultural industry is cattle ranching, which depends on federal and state grazing leases for the six-month summer grazing season and the production of hay on private lands to sustain livestock through the rest of the year." *Id.* at 831. This Court concluded that the County's criteria "were the tool most suited to identifying lands suitable for hay production." *Id.* at 833. The problem this Court found was that "the County designated none of the over 2,816 acres qualifying under its criteria and instead designated land more than 99 percent of which is not suitable for hay production." *Id.* That limited issue of noncompliance has now been cured. As explained above, Ferry County has designated more than the 2,816 acres identified in this Court's 2015 decision.

Even if the county's criteria were subject to review in this case, which it is not, the county's criteria should be upheld. Counties' may choose how to best designate ARL based on the counties' unique characteristics and needs. *Lewis Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 507, 139 P.3d 1096 (2006) (en banc). Courts have consistently held that a county can base criteria on its unique characteristics. In *Lewis Cty. v. W.*

*Wash. Growth Mgmt. Hearings Bd.*, the Washington State Supreme Court held that Lewis County had the discretion to assign different weights to the various factors in WAC 365-190-050 for classification and designation of ARL based on local needs. *Lewis Cty.* At 488. In that case, Lewis County was permitted to designate agricultural lands based on the local agricultural industry's anticipated needs. *Id.* Thus, counties may choose how best to conserve designated lands as long as their methods are "designed to conserve agricultural lands and encourage the agricultural economy." *Id.* at 507; *see also Futurewise v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 141 Wn. App. 202, 211, 169 P.3d 499, 500 (2007). In doing so, counties may set a minimum or maximum parcel size. *Futurewise* at 202, *see also Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 807-08, 959 P.2d 1173, 1181 (1998).

Indeed, the applicable rules in WAC 365-190-050, which set out the minimum guidelines to classify and designate ARL, envision that counties will evaluate the land based on non-exclusive factors to determine which lands among all those identified are "sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term." WAC 365-190-050(5). Ferry County's stated goal was to identify and designate the most productive and suitable farmland to ensure hay production was available to support the cattle industry.

Neither the Board nor any court have required a county to designate all agricultural lands or all lands involved in a certain type of agricultural production to meet the GMA requirement of designation of agricultural lands of long-term commercial significance. *See Lewis Cty. AT 503*. Instead, the County's criteria properly identified the lands most suitable for hay production and critical to sustaining the County's livestock industry. *Concerned Friends* at 833. This Court found that the County's criteria in this regard were proper. *Id.* The Court only faulted the County for failing to designate lands according to its criteria. *Id.* That determination is now law of the case and the Appellants may not now argue that the County should expand the criteria for identification of lands used for other crop production as that is not an area where the County was out of compliance.

Further, Appellants raise the concerns regarding the application of certain criteria. But they previously raised these same concerns in the prior appeal, which were not accepted by this Court then and are not more persuasive now. First, Appellants once more argue that the soil classification criteria are incorrect or misapplied. Appellants' Brief at 24-33. "Criteria One: Soil Classification" is *unchanged* in Ordinance 2016-04 from 2013-05. *See* draft Ordinance No. 2016-04 with tracked changes, AR 1652, 1659. This Court expressly considered the manner in which the County assigned points based on soil classifications under the scoring

criteria in its previous decision. “The assignment of points depends on soil productivity, which is one of the key constituents of long-term commercial significance under RCW 36.70A.030. Criterion one is not clearly erroneous.” *Concerned Friends* at 821. Therefore, this issue was already resolved by this Court and cannot be challenged now.

Appellants also claim that the County did not properly score Class III and Class IV soils that are not also prime soils. Appellants’ Brief at 24-27. However, the County’s inventory of prime soil acreage of 21,360 acres in Ordinance 2016-04 is the same as the number of acres considered in Ordinance 2013-05. AR 1694-1743. Therefore, application of the soil classification is also unchanged and was upheld by this Court. *Concerned Friends* at 819-821. Appellants argument that the County has changed how it applied the criteria under the new ordinance is factually without merit.

In the same way, Appellants allege that the county used incomplete or inaccurate data to rate farm and ranch land. Appellants’ Brief at 34. They cite to one parcel in Danville, Washington. Appellants argue that this specific parcel in Danville was improperly scored and should have been designated as ARL. *Id.* at 34-39. Instead, it is the Appellants’ scoring that is incorrect. They misused the County’s criteria in including two points, one relating to parcel size (criterion 5) and one relating to proximity to market/services (criterion 6). Criterion 5 assigns points based on the number

of acres in the parcel. AR 1718. The parcel size calculation by Appellants gave one point to the parcel for 197.96 acres. However, Appellants did not account for the timbered acres on the parcel. AR 1476. When the timbered acres are subtracted, the parcel size falls below the 180 acre threshold and therefore receives zero points. Thus, the point should not be included. The Appellants' point given for Criterion 6, proximity to market/services, was also in error. They cite as available services a farm and garden store, meat cutting business, and farmer's market in Republic. Appellants Brief at 38, *See* AR 489, 494, 503. The County determined that it would award points under this criterion for commercial slaughterhouse proximity. The services Appellants' cite are not commercial slaughterhouses nor constitute the level of service needed for commercial cattle operations. These facts have been repeatedly pointed out to Appellants. Letter from Peter Scott dated August 8, 2016, AR 1476-1477. This parcel did not meet the threshold point value for designation as ARL.

Not only have Appellants raised these same issues repeatedly to this Court, the Appellants raised them with Ferry County during the legislative process<sup>6</sup> and in their Prehearing Brief before the Board. The County responded to these comments and noted that the Appellants were

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<sup>6</sup> Prehearing Brief, p. 8-24; AR 1439, Letter from Futurewise dated June 30, 2016; AR 1434, Letter from Futurewise dated July 5, 2016; AR 1465, Letter from Futurewise dated July 27, 2016.

misinterpreting soils data and had misused County criteria in scoring the Danville parcel. Letters from Peter Scott dated July 16, 2016, AR 1460-1463 and August 8, 2016, AR 1476-1477. The Department considered this correspondence and found that Ferry County had consistently and correctly applied its criteria and was not in error for failing to implement the Appellants' suggestions. AR 61-68, Determination of Compliance, p. 5. The Board agreed. Accordingly, the Board properly found that the issues raised by the Appellants relating to Ferry County's criteria for designating ARL were beyond the scope of the determination of compliance process and beyond the Board's jurisdiction and that the application of the criteria was not in error. AR 1808-1820.

**2. The Board did not Err in Finding Ferry County's Designation of Agricultural Resource Lands Complied with the GMA**

The Board correctly concluded that the County has now fulfilled the requirement to designate ARL under the GMA. AR 61-68, Determination of Compliance, p. 5. In issuing its Determination of Compliance, which the Board affirmed, the Department was guided by the ruling of this Court in *Concerned Friends* and considered whether Ferry County's legislative action in adopting Ordinance 2016-04 had addressed the findings of noncompliance identified in this Court's 2015 decision. This Court required that Ferry County not merely designate the acres identified in the prior process, but review the

designation to ensure compliance with the GMA requirements and the County planning policies and comprehensive plan.

As required by WAC 365-199-040(3), the Department carefully and thoughtfully reviewed the entire record compiled by the County during its legislative process to adopt Ordinance 2016-04. AR 62-68, Determination of Compliance, p. 3. The Department considered public comments and the County's responses in formulating the finding and conclusions of the Determination of Compliance. AR 62-68, Determination of Compliance, p. 3, 5. During Ferry County's legislative process, the County held public hearings, solicited input and comments from the public, and responded to the comments and requests for information.<sup>7</sup> The Appellants submitted comments on the County's proposal.<sup>8</sup>

Ferry County conducted a lengthy and thorough legislative process. The record compiled in the case and reviewed by the Department showed that the County engaged with the local agricultural community and fully reassessed the County's criteria and point system. AR 62-68. Determination of Compliance, p. 5. The County maintained the focus on protection of land used for hay and forage production, which supported the cattle industry as

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<sup>7</sup> AR 1425-1427, Email correspondence between Peter Scott and Tim Trohimovich dated May 10, 2016; AR 1460-1463, Letter from Peter Scott dated July 16, 2016; AR 1476-1477, Letter from Peter Scott dated August 8, 2016.

<sup>8</sup> AR 1439, Letter from Futurewise dated June 30, 2016; AR 1434, Letter from Futurewise dated July 5, 2016; AR 1465, Letter from Futurewise dated July 27, 2016.

required by the Court of Appeals decision.<sup>9</sup> As recognized by this Court, Ferry County's criteria were based on the unique characteristics of the County and served to identify the most productive land for designation. AR 62-68, Determination of Compliance, p. 3, 5.

The County determined the "critical mass" of ARL it needed to designate through a survey process and calculations on cattle and hay production. They looked at how much hay production is needed to sustain the population of cattle that are overwintered in the County. A survey of cattle ranchers was used to help determine how many cattle are overwintered in the County. AR 1618. The County also determined how much hay a cow requires to maintain its weight. AR 1631-1640. Finally, the County calculated the acreage needed to produce enough hay to meet the needs of overwintered cattle. This "critical mass" was calculated to be 2,959 acres. AR 1691-1693.

In its 2013 ordinance, the County had only considered 500-acre blocks for designation. In the 2016 ordinance, Ferry County considered conditions such as topography and geography and decreased the threshold block size so that 100 acre blocks scoring 4 points or more would be identified for designation. AR 9-61, Ferry County Ordinance 2016-04, p. 26; AR 61-68,

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<sup>9</sup> See, e.g., AR 9-60, Ferry County Ordinance 2016-04, p. 19; AR 1422-1423, Email from Peter Scott dated April 28, 2016; AR 1460-1463, Letter from Peter Scott dated July 16, 2016; AR 1476-1477, Letter from Peter Scott dated August 8, 2016.

Determination of Compliance, p. 4-5. This change expanded the acres that would qualify for designation and complied with this Court's direction to not merely designate prior identified lands, but to do a thorough review of the ordinance to ensure compliance with the goals of the GMA in the designation of ARL.<sup>10</sup> The County's attorney described this change in block size to Appellants as:

"The scoring system applied by the County is unchanged. In other words, the same lands were considered. The County went through the land that score +4 and eliminated approximately 527 that is not being used for agricultural purposes. The County then applied a block group requirement of 100 acres because that equated best to the critical mass of acreage being used or capable of being used for hay production that was calculated necessary to maintain or enhance hay production as an accessory to the cattle industry. The County looked at larger block sizes but that reduced the total below the critical mass. The County also looked at small block groups including none, but that captured small and widely scattered parcels that would be difficult to conserve over the long term."

AR 1675.

Ferry County had already designated over 479,000 acres of ARL. The County has now designated an additional 2,939.98 acres of privately owned ARL (more than the 2,816 acres that the County identified but declined to designate in 2013). AR 9-61, Ferry County Ordinance 2016-04, p. 29. The

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<sup>10</sup> AR 62-68, Determination of Compliance, p. 5. *See also* AR 1422-1423, email from Peter Scott dated April 28, 2016; AR 1460-1463, Letter from Peter Scott dated July 16, 2016; AR 1476-1477, Letter from Peter Scott dated August 8, 2016.

following table shows the ARL that was designated by Ferry County under the 2013 and 2016 ordinances. AR 1815.

	Ord. 2013-05	Ord. 2016-04
Federal/State Grazing Allotments	478,968	498,668
Private Conservation Easements	405	405
ARL Designated Under Point System	0	2939.98
TOTAL	479,373	502,013

As pointed out by the Appellants, Ferry County has now designated additional acres, which represent approximately 41% of the land in hay and forage production. Appellants' Brief at 14.

The Appellants seek to expand review beyond what was permissibly before the Board. They continue to argue that other agricultural products were not considered, that not all public grazing land is always available, that Ferry County omitted certain lands from its scoring, and that the land designated is not enough to accommodate existing and future agriculture. However, the Board and this Court have repeatedly rejected all of these arguments. *Concerned Friends* at 819-826.

Appellants also assert and argue statistics that are not supported in the record to bolster their claim that more ARL must be designated. For instance, they claim that only 0.42 percent of 792,250 acres of land in farms were designated. This calculation, however, is misleading and inaccurate.

Appellants fail to include in their calculation the 478,968 acres of public grazing land already designated as ARL by Ferry County. *Concerned Friends* at 818, 830. In addition, this Court heard this same argument from Appellants previously. This Court declined to address it because it did “not play a role in our analysis.” *Concerned Friends* at 818.

The GMA does not require designation of all land in agricultural production and this Court has already determined that a focus on lands used for hay and forage production was compliant with the GMA. Recognizing this, Ferry County has indeed met the requirement of this Court to designate a critical mass of ARL in hay and forage production, sufficient to maintain and enhance the economic viability of the local agricultural industry and support the livestock industry. *Concerned Friends* at 831, 833. The Board did not err in affirming that Ferry County’s designations “protect the long-term viability of the County’s commercially significant agricultural industry.” AR 61-68, Determination of Compliance, p. 5.

**B. The Final Decision and Order is Supported by Substantial Evidence**

Appellants assign error to four of the findings of fact in the FDO and argue that they are not supported by substantial evidence. The first finding of fact that Appellants challenge, is that “Ferry County’s primary agricultural product is livestock (cattle).” FDO at 9, AR 1816. Appellants argue in their Brief that livestock and cattle are a minority of the

agricultural industry in Ferry County and therefore not “primary.” Appellants’ Brief at 20. However, in its decision, this Court stated that cattle ranching was Ferry County’s “major agricultural industry” and “principal agricultural industry.” *Concerned Friends* at 808, 833. These findings are undisturbed. The use of the word “primary” is synonymous with “principal.” Meriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/primary>, April 25, 2019.

In addition, even Appendix A-2 of Appellants’ Brief shows that in Ferry County, the sale of cattle and calves constitute the largest agricultural commodity group by value. Likewise, the overwhelming number of crop acres in Ferry County is in forage land used for hay and haylage, grass silage and greenchop, and the largest livestock inventory are in cattle. Appendix A-2 of Appellants’ Brief, AR 447. This is substantial evidence to support the finding.

Second, Appellants’ contest the finding that Ferry County “designated 2,939.98 acres of private land used for agricultural purposes that is part of a block of 100 acres or more and scored 4 points or higher based on the County’s accurate implementation of the GMA-compliant criteria and point system.” Appellant’s Brief at 33, FDO at 9, AR 1816. Appellants do not contest that Ferry County designated 2,939.98 acres of private land for agricultural purposes. In fact, they state in their brief

multiple times that Ferry County designated 3,344.98 acres of agricultural land of long-term commercial significance. Appellant's Brief at 9, 13, 17. The figure of 3,344.98 acres is the sum of 2,939.98 acres of private land and 405 acres of private conservation easements designated as ARL. FDO at 8, AR 1815. It has also been established that the criteria and point system are GMA-compliant. *Concerned Friends* at 811. The part of the statement the Appellants appear to dispute is the "accurate implementation" of the criteria. Those arguments were addressed earlier in this brief in the discussion about application of the soils classification criteria and a particular parcel. The application of the criteria by the County was not in error and the statement is supported by substantial evidence.

Similarly, Appellants argue that the finding "using the U.S. Agricultural Census report for Ferry County, there are 25,215 acres as privately held "land in farms" under non-timber agricultural use located outside the Colville Indian Reservation – the County lacks regulatory authority on the Indian Reservation" is not supported by substantial evidence. Appellant's Brief at 18.

Again, Appellants attempt to dispute facts that were considered and not disturbed by this Court's prior decision in the matter. This Court held the finding that there is an estimated 25,215 acres of privately owned farmland in the County was an unnecessary fact that did not play a role in

their analysis for determining compliance. *Concerned Friends* at 818. Likewise, this Court stated that although the County asserts jurisdiction over some reservation fee lands within its borders, whether the County has authority to designate reservation land had “no apparent effect on the designation of ARL challenged in this appeal.” *Concerned Friends* at 825. Again, Appellants’ attempts to reargue the facts do not change the fact that this Court has already ruled on the issue. The Board’s findings and conclusions are not in error and are supported by substantial evidence.

Finally, Appellants challenge the finding that Ferry County “designated Agricultural Resource Lands based on revised criteria to protect the long-term viability of the County’s commercially significant agriculture industry.” FDO at 9, AR 1816. This challenged statement and the previously discussed statement regarding the 2,939.98 acres go to the ultimate issue of whether the designation of ARL complied with the GMA. It is a legal conclusion and not a finding of fact. Appellants dispute and argue that the designation was not compliant with the GMA in various ways. For example, Appellant argues that the criteria do not address alfalfa hay production (Appellants’ Brief at 14); the criteria improperly considered soil ratings (Appellants’ Brief at 25); that only 0.42 percent of 792,250 acres of land in farms were designated (Appellants’ Brief at 15); and that all agricultural lands of long-term commercial significance must be designated

(Appellants' Brief at 16). These same arguments of errors of law were addressed earlier in this Brief. Neither the Courts nor the Board has ever held that a county must designate all of the agricultural lands of long-term significance and this Court upheld the criteria. As stated above, the Board did not err by affirming Ferry County's designation of ARL.

**C. The Board Did Not Err in Limiting the Scope of the FDO To Review of the Department's Determination of Compliance and the Narrow Finding of Noncompliance Determined by the Court of Appeals**

**1. The FDO Was Properly Limited to Review of the Determination of Compliance**

The Board did not err when it correctly confined the FDO to the review of the Determination of Compliance as it related to the designation of ARL. Appellants attempt to argue that there is no authority for this limitation and this Court should again directly review the County's legislative actions. Appellants' Brief at 44. However, the Board's FDO was statutorily limited by RCW 36.70A.060(1)(d) to the issues addressed in the Department's Determination of Compliance. AR 223-229, Order Denying Motion to Dismiss.

The scope of the Department's process and the Board's jurisdiction in this case is defined by RCW 36.70A.060(1)(d)(i). The section states:

A county that adopts a resolution of partial planning under RCW 36.70A.040(2)(b) and that is not in compliance with the planning requirements of this section, RCW 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172 at the time the

resolution is adopted must, by January 30, 2017, apply for a determination of compliance from the department finding that the county's development regulations, including development regulations adopted to protect critical areas, and comprehensive plans are in compliance with the requirements of this section, RCW 36.70A.040(4), 36.70A.070(5), 36.70A.170, and 36.70A.172.

RCW 36.70A.060(1)(d)(i).

The Board recognized in its July 10, 2017 Order Denying Motion to Dismiss that the Board's subject matter jurisdiction in the appeal was limited because Ferry County adopted a resolution of partial planning as provided in EHB 1224. *Id.*, AR 223-229. "Upon adoption of a resolution of partial planning," a County is no longer obligated to plan under RCW 36.70A.040. RCW 36.70A.040(2)(b)(ii), AR 225. The Board recognized that by operation of law, Ferry County's "removal from full planning under RCW 36.70A.040 changed the Board's ability to hear and decide appeals of Ferry County's legislative actions." *Id.* The Board could no longer hear direct challenges on whether Ferry County's ordinances were compliant with the GMA. On the other hand, the Board correctly concluded that it did have jurisdiction over petitions for review of determinations of compliance issued by the Department under RCW 36.70A.280(1)(f) and RCW 36.70A.060(1)(d)(iii). AR 225-226. It concluded, therefore, that it did not have jurisdiction to directly review Ferry County Ordinance 2016-04 as seemingly sought by the Appellants, but could only review the Department's Determination of Compliance.

Additionally, the Board had no jurisdiction to determine Ferry County's compliance with sections of the GMA that are not listed in RCW 36.70A.060(1)(d)(i). That section limits the determination of compliance process to the following sections and subsections of the GMA: RCW 36.70A.060 (Natural Resource Lands and Critical Areas Development Regulations), RCW 36.70A.040(4), RCW 36.70A.070(5) (Rural Element), RCW 36.70A.170 (Natural Resource Lands and Critical Areas Designations), and RCW 36.70A.172 (Critical Areas and use of best available science). The Appellants' arguments related to compliance with other sections of the GMA were beyond the scope of the Board's review and the Board's subject matter jurisdiction.

The Appellants also argue that Ferry County has failed to protect the ARL that it designated in Ordinance 2016-04 through its zoning maps. Appellants' Brief at 24-25. This assertion is both untrue and beyond the jurisdiction of the Board in this appeal. The only issue of noncompliance before the Department was whether the County had designated a critical mass of ARL, not a challenge to the zoning regulations. A direct challenge now to the County's zoning maps is untimely.

However, lands designated as agricultural lands of long-term commercial significance by Ferry County are subject to Section 9.02 of the County's development regulations. AR 9-61, Ferry County Ordinance 2016-

04, p. 30-31. Section 9.02 states that designated ARL “shall not be divided into parcels less than 20 acres.” *Id.* The Ordinance also restricts residential development, accessory uses, and access inconsistent with the designation. AR 9-61, Ferry County Ordinance 2016-04, p. 30-31. Thus, the lands are protected to the degree that the Appellants contend is required. Overall, the Appellants continued argument regarding the criteria for designation and its application fail because they were previously found to be compliant by this Court. *Concerned Friends* at 818.

Finally, the relief sought by the Appellants is also beyond the petition for judicial review of the Determination of Compliance. The Board could only grant relief directly against the Department by upholding or rejecting the Determination of Compliance and judicial review is likewise limited.

**2. The Board Properly Limited Its FDO to Whether the County Had Remedied the Issue of Noncompliance Found by the Court of Appeals**

The Board did not err in limiting its review to the only outstanding issue of noncompliance with the GMA. The Board had no jurisdiction to review anything else. Consistent with RCW 36.70A.060(1)(d)(i), WAC 365-199-040(2) provides that:

“The scope of the department’s review is limited to outstanding findings of noncompliance established in an order from the Growth Management Hearings Board or court. Issues or provisions of the ordinance that were found in

compliance, or were not timely challenged at the time of adoption, are not subject to review by the department.”

WAC 365-199-040(2).

The amendments to the GMA and the Department’s rules creating the determination of compliance process provide no ability for parties to re-litigate or “second guess” Board or court findings—of either compliance or noncompliance. Instead, EHB 1224 and the resulting administrative rules provide that the Department may only issue a determination of compliance in order to evaluate efforts of a county to remedy a Board or court finding of noncompliance and review by the Board was limited to the determination of compliance. *Id.*, RCW 36.70A.060(1)(d)(i). The determination of compliance may be appealed to the Board, as was done in this case. RCW 36.70A.060(1)(d)(iii).

The plain language of the statute and rule regarding determinations of compliance is clear as to the limitations of review. When the plain language is clear and unambiguous, the Courts give effect to that plain meaning. *Overlake Hospital Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 51, 239 P.3d 1095 (2010) (en banc) (citing *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002)). “Rules of statutory construction apply to administrative rules and regulations.” *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002). “Plain language that is not ambiguous does not require construction.” *State*

v. *Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (en banc). Since there is no ambiguity here, this Court does not need to conduct an analysis of statutory construction and legislative intent. Therefore, Appellants reference to statutory interpretation of the authority to limit review is unnecessary in this case.

In the Determination of Compliance, the Department focused on whether Ferry County had addressed the issue of noncompliance identified by this Court in *Concerned Friends* at 803. This Court found that the County was out of compliance with the GMA for the failure to designate a critical mass of the ARL identified by the County. *Concerned Friends* at 833. However, this Court also found that the County's methods and criteria for identifying ARL were not erroneous and were compliant with the GMA, WAC 365-190-050, and the county's comprehensive plan. *Concerned Friends* at 811, 815-817. Thus, the only finding of noncompliance was the County's failure to designate any of the 2,816 acres qualifying under the County's point system. *Id.* at 830.

Therefore, the Board did not err and properly limited its FDO to whether Ferry County designated a "critical mass" of ARL to support the cattle industry in compliance with the GMA as directed in this Court's prior ruling.

## VI. CONCLUSION

The Department respectfully requests that the Court affirm the Board's FDO. The Board did not err in concluding that Ferry County has corrected the inadequate designation of ARL found by this Court. The FDO is supported by substantial evidence in the record. Finally, the Board has complied with the requirements of RCW 36.70A.060(1)(d) and WAC 365-199-055(2) in limiting its review to review of the Department's determination of compliance regarding designation of agricultural resource lands.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of May, 2019.

ROBERT W. FERGUSON  
Attorney General

*Heather Carter*, WSBA # 22273

For HEATHER CARTER  
Assistant Attorney General  
WSBA No. 30477  
Office Id. No. 91030  
7141 Cleanwater Drive SW  
PO Box 40109  
Olympia, WA 98504-0109  
(360) 586-6474

**PROOF OF SERVICE**

I, Jennifer Wagner, certify that I caused a copy of this document,  
**Brief of Respondent State of Washington Department of Commerce**, to  
be served on all parties or counsel of record by E-mail and Consolidated  
Mail Services to:

Tim Trohimovich  
Futurewise  
816 Second Ave, Ste. 200  
Seattle, WA 98104  
tim@futurewise.org

Peter Scott  
Scott Law  
682 S Ferguson Ave, Ste. 4  
Bozeman, MT 59718  
peter@scott-law.com

**Courtesy copy via E-mail**

Lisa.petersen@atg.wa.gov

**Electronically filed with Court of Appeals II**

I certify under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 6<sup>th</sup> day of May, 2019, at Olympia, Washington.

  
JENNIFER A. WAGNER  
Legal Assistant

191 Wash.App. 803  
Court of Appeals of Washington,  
Division 2.

CONCERNED FRIENDS OF FERRY  
COUNTY and Futurewise, Petitioners,

v.

FERRY COUNTY and the Growth  
Management Hearings Board, Respondents.

No. 46305-9-II.

Dec. 15, 2015.

**Synopsis**

**Background:** Citizens and public interest groups filed petition in the Superior Court, Thurston County, Erik D. Price, J., for review of Management Hearings Board order finding county in compliance with Growth Management Act (GMA) for designation of agricultural lands of long-term commercial significance. The Board then granted certificate of appealability allowing direct review which was granted.

**Holdings:** The Court of Appeals, Bjorgen, J. held that:

[1] county's point system for designating agricultural resource lands was consistent with GMA;

[2] ordinance assigning point values to parcels from least to most suitable soils was consistent with GMA and comprehensive plan;

[3] ordinance could assign one point to parcels more than five miles from urban growth area and zero points to parcels within five miles;

[4] ordinance could calculate farm size based only on ownership of contiguous parcels;

[5] setting contiguous block of 500 acres or more for designation as agricultural land was reasonable attempt to find the smallest minimum size that would prevent scatter; but

[6] failure to designate as agricultural resource land over 2,816 acres qualifying under county ordinance failed to comply with comprehensive plan and GMA.

Reversed.

West Headnotes (19)

[1] **Zoning and Planning**

⇌ Decisions of boards or officers in general Court of Appeals reviews the Growth Management Hearings Board decisions under the Administrative Procedure Act (APA) based on the record created before the Board. West's RCWA 34.05.570(3).

Cases that cite this headnote

[2] **Zoning and Planning**

⇌ Decisions of boards or officers in general Growth Management Hearings Board may not invalidate a plan or regulation unless its review of the record leaves it with a firm and definite conviction that a mistake has been committed, since statute requires Board to find compliance with the Growth Management Act (GMA) unless Board finds the action clearly erroneous in view of the Act's goals and requirements. West's RCWA 36.70A.320(3).

Cases that cite this headnote

[3] **Zoning and Planning**

⇌ Decisions of boards or officers in general Court of Appeals on appeal challenging county compliance with Growth Management Act (GMA) reviews correctness of Growth Management Hearings Board's determination that the county's actions were not clearly erroneous. West's RCWA 36.70A.320(3).

Cases that cite this headnote

[4] **Zoning and Planning**

↔ Construction by board or agency

**Zoning and Planning**

↔ De novo review in general

Court of Appeals on appeal challenging county compliance with Growth Management Act (GMA) reviews issues of law de novo, but gives substantial weight to Growth Management Hearings Board's interpretations of the GMA. West's RCWA 34.05.570(3), 36.70A.320(3).

Cases that cite this headnote

[5] **Zoning and Planning**

↔ Substantial evidence in general

Court of Appeals on appeal challenging county compliance with Growth Management Act (GMA) reviews disputed findings of fact by determining whether they are supported by substantial evidence in the record. West's RCWA 34.05.570(3).

Cases that cite this headnote

[6] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

Land is "devoted to" agricultural use and is thus "agricultural land" protected by Growth Management Act (GMA) if it is in an area where the land is actually used or capable of being used for agricultural production. West's RCWA 36.70A.030(2).

Cases that cite this headnote

[7] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

Evidence regarding county designation of agricultural resource lands failed to support Growth Management Hearings Board's statement that hay was not commercially significant in county with cattle ranches as major agricultural industry; even though annual sales amounted to \$327,000, county pointed to no evidence in record that the level of commercial hay production was so

small as not to contribute in any significant way to the needed winter supply of hay, and the possibility of providing hay from outside county did not somehow make it commercially insignificant under the Act. West's RCWA 36.70A.170(1); WAC 365-190-050(3)(c).

Cases that cite this headnote

[8] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County's point system to assess whether land had long-term commercial significance for agricultural uses was consistent with Growth Management Act (GMA); the system closely tracked regulatory criteria for determining long-term commercial significance for agricultural uses, and principled and consistent point system could give needed rigor to the determination and nourish compliance with statutory obligation to be consistent with and implement the comprehensive plan. West's RCWA 36.70A.130(1)(d), 36.70A.170(1); WAC 365-190-050(3)(c).

Cases that cite this headnote

[9] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

Growth Management Hearings Board's approval of county's point system that declined to assign points to Class I soils not present in the county was not clearly erroneous with regard to whether the land had long-term commercial significance for designation as agricultural resource land. WAC 365-190-050(3)(c)(i).

Cases that cite this headnote

[10] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

Citizens and public interest groups failed to show that county ordinance assigning zero points to Class IV ret silt loam soils unless irrigated had any effect on whether those soils were agricultural resource lands protected by Growth Management Act (GMA), even though county did not explain how irrigation would address limitations on agricultural use or point to evidence supporting its decision to award points for irrigating soil type that was already poorly drained and possibly in need of protection from flooding; groups pointed to no evidence that any parcels containing that soil were drained and protected from flooding or were not frequently flooded. WAC 365-190-050(3)(c)(i).

Cases that cite this headnote

[11] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County ordinance assigning point values to parcels from two for least suitable soils to six for most suitable soils was consistent with Growth Management Act (GMA) and comprehensive plan for agricultural resource lands since assignment of points based on soil productivity was key constituent of long-term commercial significance. West's RCWA 36.70A.030; WAC 365-190-050(3)(c)(i).

Cases that cite this headnote

[12] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County ordinance awarding zero points to potential agricultural land within one-quarter mile of limited areas of more intense rural development could be treated by Growth Management Hearings Board as consistent with comprehensive plan and Growth Management Act (GMA); the criterion did not increase or decrease likelihood of designation as agricultural resource land, and county reasonably considered availability of public services in determination of long-

term commercial significance. WAC 365-190-050(3)(c)(iv).

Cases that cite this headnote

[13] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County ordinance on determining long-term commercial significance of property for designation as agricultural resource lands could assign one point to parcels more than five miles from urban growth area and zero points to parcels within five miles to minimize potential adverse impacts of agricultural and nonagricultural uses on each other, even though the urban growth area was not expected to fill the entire five-mile radius; the ordinance recognized that harmful effects from spraying of pesticides and odors from fertilizing and cattle raising reached much further than immediately adjacent lands. WAC 365-190-050(3)(c)(v).

Cases that cite this headnote

[14] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County ordinance calculating farm size based only on ownership of contiguous parcels for determination of long-term commercial significance and designation as agricultural resource land was consistent with comprehensive plan and Growth Management Act (GMA) regulation requiring consideration of predominant parcel size. West's RCWA 36.70A.130(1)(d); WAC 365-190-050(3)(c)(vi).

Cases that cite this headnote

[15] **Evidence**

↔ Geographical Facts

Court of Appeals ruling on county ordinance for determining long-term commercial significance of property within 50 road miles of market/services for agricultural use could

take judicial notice of maps showing that the only land in county within 50 miles of City of Davenport was within Indian reservation. WAC 365-190-050(3)(c)(xi); ER 201.

Cases that cite this headnote

[16] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County ordinance assigning one point to parcels within 50 road miles of market/ services was not clearly erroneous with regard to determination of long-term commercial significance and designation as agricultural resource land, even though hay and most cattle in the region could be shipped more than 50 miles to market; since cattle ranching was county's main agricultural industry, parcels within 50 miles of nearest livestock market could logically have higher probability of being commercially significant in the long term. WAC 365-190-050(3)(c)(xi).

Cases that cite this headnote

[17] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

Citizens and public interest groups challenging county ordinance subtracting one point from agricultural parcels adjacent to residential uses failed to show that county applied the criterion to agricultural land with adjacent farm or ranch residences when determining long-term commercial significance and designation as agricultural resource land. WAC 365-190-050(3)(c)(ix).

Cases that cite this headnote

[18] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County ordinance setting contiguous block of 500 acres or more for designation as agricultural land was reasonable attempt to find the smallest minimum

size that would prevent scatter, while taking into consideration circumstances of agriculture in county and was consistent with comprehensive plan and Growth Management Act (GMA). West's RCWA 36.70A.030(10), 36.70A.130(1)(d).

Cases that cite this headnote

[19] **Zoning and Planning**

↔ Agricultural uses, woodlands and rural zoning

County's failure to designate as agricultural resource land over 2,816 acres qualifying under county ordinance failed to comply with comprehensive plan and Growth Management Act (GMA); over 99 percent of designated agricultural resource lands were grazing lands not suitable for hay production, county overlooked critical component of principal agricultural industry of ranching, its decision did not meet Act's goal of maintaining and enhancing productive agricultural industries or minimum guideline of maintaining and enhancing economic viability of agricultural industry, and county acted contrary to plan's goal of maintaining and enhancing agricultural resource-based industries and its policy of designating sufficient commercially significant agricultural land to ensure critical mass for present and future use. West's RCWA 36.70A.020, 36.70A.030(10); WAC 365-190-050(5).

Cases that cite this headnote

**Attorneys and Law Firms**

**\*\*209** Tim Trohimovich, Futurewise, Seattle, WA, for Appellants.

Liam Michael Golden, Golden Law Office, Colville, WA, for Respondents.

**\*\*210** Dionne Maren Padilla-Huddleston, Office of the Attorney General, Seattle, WA, for Other Parties.

Opinion

BJORGEN, J.

\*807 ¶ 1 Concerned Friends of Ferry County and Futurewise (collectively Futurewise) challenge an order of the Growth Management Hearings Board finding Ferry County (County) in compliance with the requirements of the Growth Management Act (GMA), chapter 36.70A RCW, for the designation of “Agricultural Lands of Long-Term Commercial Significance” (ARL or agricultural resource lands). Futurewise claims that the County violated the GMA by adopting designation criteria inconsistent with its comprehensive plan and the minimum guidelines promulgated pursuant to the GMA and by improperly applying those criteria, resulting in the designation of too little land to comply with the goals and purposes of the comprehensive plan and GMA. Futurewise further contends that the County's differing treatment of federal, Indian reservation, and privately owned land is inconsistent with its comprehensive plan and violated the GMA. Finally, Futurewise challenges a number of factual statements in the Growth Management Hearings Board's compliance order on appeal.

¶ 2 We hold that the challenged county criteria for the designation of ARL are not clearly erroneous, but that the County's designation of ARL itself is contrary to the GMA, \*808 implementing Washington Administrative Code (WAC) rules, and the County's own comprehensive plan. Therefore, we reverse.

FACTS

¶ 3 Ferry County lies in Eastern Washington and largely consists of the Colville Indian Reservation and forest lands under the jurisdiction of the Washington State Department of Natural Resources or the United States Forest Service. According to the Office of Financial Management, the County had an estimated population of 7,400 in 2005, projected to increase to 10,250 by 2030. Cattle ranching is Ferry County's major agricultural industry.

¶ 4 The County's designation of ARL under the GMA was challenged before the Growth Management Hearings Board (Board) in 2001. The Board issued a series of orders, culminating in 2013, finding the County's designation

of ARL not in compliance with the GMA. Ninth Compliance Order, *Concerned Friends of Ferry County, et. al. v. Ferry County*, Nos. 01-1-0019, 97-1-0018c, 11-1-0003, 2013 WL 1179348, at \*3 (W. Wash. Growth Mgmt. Hr'gs Bd. March 04, 2013). The County responded to the Board's 2013 order by adopting Ordinance No. 2013-03, which amended its comprehensive plan and designated ARL, as well as Ordinance No. 2013-05, which adopted criteria and standards for the designation of ARL.

¶ 5 As amended by Ordinance No. 2013-03, the comprehensive plan sets forth a “Natural Resource Goal” and 13 “Natural Resource Policies.” Admin. Record (AR) at 6341-43. The Natural Resource Goal is to “[m]aintain and enhance natural resource-based industries in the county and provide for the stewardship and productive use of agricultural, forest and mineral resource lands of long-term commercial significance.” AR at 6341. Of particular relevance, Natural Resource Policy 2 states that

\*809 it is the Natural Resources Policy of Ferry County to ... [d]esignate sufficient commercially significant agricultural ... land to ensure the County maintains a critical mass of such lands for present and future use.

AR at 6341. As amended, the comprehensive plan generally describes the standards for designating ARL in the following terms:

Designated agricultural lands are lands that include the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the lands [sic] proximity to population areas, and the possibility of more intense uses of the land. To be included in this designation, lands also must not be already characterized by urban growth and must be primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2). Long-term commercial significance \*\*211 means the land is capable of producing the specified natural resources at commercially

sustainable levels for at least the twenty year planning period, if adequately conserved.

AR at 6343.

¶ 6 Ordinance 2013–05, in turn, establishes the detailed process for the identification and designation of ARL. The process enumerates certain criteria that disqualify a parcel from consideration and others that earn or lose parcel points, ultimately designating qualifying parcels scoring five points or more as ARL. The point criteria at issue in this appeal concern soil classification, availability of public services, proximity to an urban growth area (UGA), predominant parcel/farm ownership size, proximity to markets and services, and history of nearby land uses. These criteria are described in more detail in the Analysis, below.

¶ 7 Once points are assigned, the process set forth in Ordinance No. 2013–05 removes from consideration parcels that are not part of “a contiguous block of 500 acres or more.” AR at 6372. The contiguous blocks “may include multiple ownerships.” AR at 6372.

\*810 ¶ 8 Ordinance No. 2013–05 determined that parcels scoring five points or more qualified for designation as ARL, as long as the 500–acre block group minimum was met. The ordinance also provided that land subject to long-term grazing allotments or leases through the United States Forest Service or the Washington State Department of Natural Resources and land subject to long-term conservation easements were prescriptively subject to designation as ARL, apart from the point system.

¶ 9 After navigating the process set out in Ordinance No. 2013–05, the County designated 479,373 acres as ARL. Of this, 459,545 acres consisted of federal grazing allotments and 19,423 acres comprised state land similarly leased for grazing. The remaining 405 acres consisted of privately held land prescriptively designated as ARL because it was subject to long-term conservation easements.

¶ 10 After a hearing, the Board determined that these measures brought the County into compliance with the GMA. Futurewise then petitioned Thurston County Superior Court for review, and the parties sought a certificate of appealability allowing direct review by our

court, which the Board granted. A commissioner of our court granted review. Ruling Granting Direct Review, *Concerned Friends of Ferry County, et al. v. Ferry County & State, Growth Mgmt. Hr'gs Bd.*, No. 46305–9–II (Aug. 15, 2014).

## ANALYSIS

¶ 11 Futurewise contends that the County's criteria for designating ARL violate the GMA because the criteria (1) are inconsistent with and fail to implement the County's comprehensive plan and (2) disregard or misapply the GMA's minimum guidelines for designating such lands. Futurewise also contends that the County violated the GMA by (3) improperly applying the designation criteria in an inconsistent manner and (4) weighting the criteria in a manner inconsistent with the GMA and the minimum \*811 guidelines. Futurewise claims that these errors resulted in the designation of insufficient land to meet the long-term requirements of the County's farmers and ranchers, contrary to the GMA and the comprehensive plan. Finally, Futurewise contends that the Board erroneously interpreted the GMA in finding the County in compliance by relying on “certain facts and opinions about [the] County's agriculture rather than the GMA criteria and minimum guidelines.” Br. of Pet'rs at 47.

¶ 12 The County maintains that the Board did not err in ruling the ARL designation criteria consistent with the comprehensive plan and the GMA. The County further counters that its application of the criteria complies with the GMA and implementing regulations, that its weighting of the criteria is not clearly erroneous, and that it designated sufficient ARL to sustain agriculture in the County. Finally, it contends that the Board properly considered the unique characteristics of the County in reviewing the ordinances.

¶ 13 We conclude in sum that the County's criteria are consistent with its comprehensive plan, the GMA, and regulations implementing the GMA; but that its designation of ARL is not consistent with those criteria and \*\*212 does not designate adequate ARL to comply with the GMA.

I. Standard of Review

[1] ¶ 14 We review the Board's decisions under the Administrative Procedure Act (APA), chapter 34.05 RCW, based on the record created before the Board. *Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wash.2d 488, 497, 139 P.3d 1096 (2006). We may grant relief from an agency order in an adjudicative proceeding only if we determine that at least one of nine specified grounds is present. RCW 34.05.570(3)(a)–(i). The grounds relevant to this appeal are:

(d) The agency has erroneously interpreted or applied the law;

\*812 (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review;

...

(f) The agency has not decided all issues requiring resolution by the agency;

...

(i) The order is arbitrary or capricious.

RCW 34.05.570(3). Under the APA, the party challenging an agency's action bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a).

[2] ¶ 15 In appeals from a decision of the Board, this straightforward APA standard of review is compounded with standards governing the Board's review of local government actions. For example, RCW 36.70A.320(3) states that in reviewing challenges under the GMA, the Board "shall find compliance" with the GMA unless it finds the action "clearly erroneous in view of the entire record before the board and in light of the [GMA's] goals and requirements." That is, the Board may not invalidate a plan or regulation unless its review of the record leaves it with a "firm and definite conviction that a mistake has been committed." See *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wash.2d 179, 201, 849 P.2d 646 (1993). In addition, our Supreme Court has specified 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[, and] ... 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 [the] court[s].

*Quadrant Corp. v. State, Growth Mgmt. Hr'gs Bd.*, 154 Wash.2d 224, 238, 110 P.3d 1132 (2005).

¶ 16 The *Quadrant* court also specified that

[w]hile we are mindful that this deference ends when it is shown that a county's actions are in fact a "clearly erroneous" \*813 application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions.

*Quadrant Corp.*, 154 Wash.2d at 238, 110 P.3d 1132. The court again touched on the "clearly erroneous" standard in *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wash.2d 144, 156, 256 P.3d 1193 (2011), stating that

[w]hile county actions are presumed compliant unless and until a petitioner brings forth evidence that persuades a board that the action is clearly erroneous, RCW 36.70A.320(3), deference to counties remains "bounded ... by the goals and requirements of the GMA," [*King County [v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.]*, 142 Wash.2d 543, 561, 14 P.3d 133 (2000).] The deference boards must give "is neither unlimited nor does it approximate a rubber stamp." *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wash.2d 415, 435 n. 8, 166 P.3d 1198 (2007).

(Second alteration in original.)

[3] [4] [5] ¶ 17 Thus, we review the correctness of the Board's determination that the County's actions were not clearly erroneous, which requires our examination of the County's actions under that standard. We continue to review issues of law de novo, but give "[s]ubstantial weight" to the Board's interpretations of the GMA. *Thurston County v. \*\*213 W. Wash. Growth Mgmt. Hr'gs Bd.*, 164 Wash.2d 329, 341, 190 P.3d 38 (2008). We review disputed findings of fact by determining whether they are supported by substantial evidence in the record. *Brinnon Grp. v. Jefferson County*, 159 Wash.App. 446, 465, 245 P.3d 789 (2011).

## II. Governing Law

### A. The Growth Management Act, Chapter 36.70A RCW

[6] ¶ 18 The GMA requires that jurisdictions within its scope "designate where appropriate ... [a]gricultural lands \*814 that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products." RCW 36.70A.170(1). The County brought itself within the scope of the GMA by opting into it. The GMA defines "agricultural land" as "land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products," including crops, hay, and livestock, "that has long-term commercial significance for agricultural production." RCW 36.70A.030(2). Land is "devoted to" agricultural use under RCW 36.70A.030 "if it is in an area where the land is actually used or capable of being used for agricultural production." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wash.2d 38, 53, 959 P.2d 1091 (1998). Long-term commercial significance "includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030(10).

¶ 19 The GMA sets various goals to "guide the development ... of comprehensive plans and development regulations." RCW 36.70A.020. The principal GMA goal served by designating and conserving ARL is that of RCW 36.70A.020(8), which states, "Maintain

and enhance natural resource-based industries, including productive ... agricultural ... industries. Encourage the conservation of ... productive agricultural lands, and discourage incompatible uses."

¶ 20 Jurisdictions subject to the GMA "shall adopt development regulations ... to assure the conservation of" these ARL. RCW 36.70A.060(1). Our Supreme Court has held that "[w]hen read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land." *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wash.2d 543, 562, 14 P.3d 133 (2000).

### \*815 B. Department of Commerce Regulations (Minimum Guidelines)

¶ 21 In designating ARL, the GMA requires counties to consider the guidelines promulgated by the Department of Commerce. RCW 36.70A.030(6), .050, .170(1). These guidelines "shall be minimum guidelines that apply to all jurisdictions, but also shall allow for regional differences that exist in Washington state." RCW 36.70A.050(3).

¶ 22 Of these, one of the principal guidelines covering ARL is that stated in WAC 365-190-050(3), which provides that "[l]ands should be considered for designation as agricultural resource lands based on three factors," namely land that (1) "is not already characterized by urban growth," (2) "is used or capable of being used for agricultural production," and (3) "has long-term commercial significance for agriculture."

¶ 23 The first factor is not at issue in this appeal. The second factor is illuminated by WAC 365-190-050(3)(b), which states:

(i) Lands that are currently used for agricultural production and lands that are capable of such use must be evaluated for designation.

...

(ii) In determining whether lands are used or capable of being used for agricultural production, counties and cities 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.

¶ 24 Turning to the third factor, whether the land has long-term commercial significance, WAC 365-190-050(3)(c) sets forth 11 \*\*214 “nonexclusive criteria” that counties “should consider”:

- (i) The classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service;
- (ii) The availability of public facilities, including roads used in transporting agricultural products;
- \*816 (iii) Tax status;
- (iv) The availability of public services;
- (v) Relationship or proximity to urban growth areas;
- (vi) Predominant parcel size;
- (vii) Land use settlement patterns and their compatibility with agricultural practices;
- (viii) Intensity of nearby land uses;
- (ix) History of land development permits issued nearby;
- (x) Land values under alternative uses; and
- (xi) Proximity to markets.

The application of these criteria “should result in designating an amount of agricultural resource lands sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term.” WAC 365-190-050(5).

¶ 25 Finally, the minimum guidelines specify that “comprehensive plans must be internally consistent,” meaning “differing parts of the comprehensive plan must fit together so that no one feature precludes the achievement of any other.” WAC 365-196-500(1). Consistency, according to WAC 365-196-210(8), means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation.

### III. The Challenged Findings of Fact

¶ 26 Before turning to the validity of the County's designation criteria and its designation of ARL under

those criteria, we address the findings of fact challenged by Futurewise.

#### A. *The Finding on the Commercial Significance of Hay Production*

[7] ¶ 27 In assignment of error 5, Futurewise asserts that the finding of fact in the Board's compliance order that states that “hay is not commercially significant but is accessory \*817 to the livestock industry” is not supported by substantial evidence. Br. of Pet'rs at 5. This statement is not designated as a finding, but appears in a discussion of the County's agricultural limitations in the Board's compliance order. Clerk's Papers (CP) at 32. Treating it nevertheless as a finding, we agree with Futurewise that it is not supported by substantial evidence.

¶ 28 The comprehensive plan defines long-term commercial significance as meaning the land is capable of producing the resource at commercially sustainable levels for at least the 20-year planning period, if adequately conserved. Cattle ranches are the County's major agricultural industry. This industry

is dependent upon federal and state grazing leases for summer grazing. The grazing leases allow grazing on Federal and State forest lands for only six months each year. During the six-month grazing season, hay is produced on private lands to sustain livestock through the balance of the year.

AR at 6343 (Comprehensive Plan § 7.4.31). Thus, whatever its significance considered in isolation, hay production is an essential element of the County's major agricultural industry. Unless the County's livestock industry itself is deemed not to be commercially significant, the production of hay needed to sustain it must also be deemed commercially significant.

¶ 29 The Board apparently based its opinion of lack of commercial significance on its assumption that \$327,000 in annual sales was not significant. The County, however, points to no evidence in the record that this level of

commercial hay production in the County is so small as not to contribute in any significant way to the needed winter supply of hay. Nor can we conclude that the possibility of providing this essential feed from outside the County somehow makes it commercially insignificant under the GMA. Such a reading would enervate the GMA's goal of maintaining and enhancing productive agricultural industries and \*818 conserving productive agricultural lands in the jurisdiction. The Board's statement that "hay is not commercially \*\*215 significant," treated as a finding of fact, is not supported by substantial evidence in the record.

*B. The Remaining Challenged Findings*

¶ 30 Futurewise also assigns error to statements in the Board's compliance order that the federal grazing allotments are included in the total figure of 749,452 acres in farms, that there are an estimated 25,215 acres of privately owned farmland in the County, and that the County is ranked last in market value of crop and livestock products.

¶ 31 Assuming that these propositions serve as findings of fact, they do not play a role in our analysis. Therefore, we do not address them further.

*IV. Consistency of the ARL Designation Criteria with the GMA and the County's Comprehensive Plan*

¶ 32 Futurewise contends that certain of the County's ARL designation criteria adopted in Ordinance 2013-05 are inconsistent with the GMA and fail to implement the comprehensive plan, contrary to RCW 36.70A.130(1)(d). We disagree and hold that the ARL designation criteria are not clearly erroneous.

*A. The County's Use of a Point System*

[8] ¶ 33 Futurewise first takes issue with the County's use of a point system, pointing out that nothing in the plan calls for such a system. Futurewise argues that the point system is thus inconsistent with and fails to implement the plan, contrary to RCW 36.70A.130(1)(d).

¶ 34 Through Ordinance 2013-05, the County adopted criteria to assess whether land has long-term commercial significance for agricultural uses. These criteria closely track the criteria of WAC 365-190-050(3)(c) for the same

purpose. As part of that assessment, Ordinance No. 2013-05 \*819 assigned or subtracted points to measure how well individual parcels complied with certain criteria.

¶ 35 RCW 36.70A.130(1)(d) states:

Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

Nothing in this sort of point system violates or is inconsistent with these requirements, as Futurewise urges. To the contrary, a principled and consistent point system can give needed rigor to the determination of compliance with more generally phrased criteria. This, if anything, nourishes compliance with RCW 36.70A.130(1)(d). Futurewise's contention that a point system is inconsistent with the GMA borders on the frivolous.

*B. Consistency of Individual Designation Criteria<sup>1</sup> with the GMA and the Comprehensive Plan*

*1. Criterion One: Soil Classification*

¶ 36 This criterion assigns points to parcels based on the particular classes of soils they contain under the United States Department of Agriculture's soil classification system. Parcels consisting entirely of "Class II" soils receive six points, and those consisting of "Class III" soils receive four points. Parcels consisting of "Class IV" soils, including soils that qualify as Class III only if irrigated, qualify for two points if the parcels have irrigation. Parcels consisting of different classes of soils receive points in proportion to the relative area of each class.

[9] ¶ 37 Futurewise contends that this criterion misinterprets and misapplies WAC 365-190-050(3)(c)(i), which specifies that counties should consider "[t]he classification of prime and unique farmland soils as mapped by the \*820 Natural Resources Conservation Service." Br. of Pet'rs at 19-21. First, Futurewise takes issue with the County's failure to assign points for "Class I" soils, those with the fewest limitations for agriculture.

Futurewise points to nothing in the record, however, casting doubt on the County's assertion that Ferry County contains no Class I soils. The Board's approval of a point system that declines to assign **\*\*216** points to soils not present in the county is not clearly erroneous.

[10] ¶ 38 Futurewise also takes issue with the County's failure to assign points to Class III and IV soils unless they are irrigated. Futurewise points out that the County contains 1,293 acres of "Ret silt loam, heavy variant," a "[p]oorly drained" Class IV soil, which the United States Department of Agriculture considers "[p]rime farmland" as long as it is "drained and either protected from flooding or not frequently flooded." AR at 6505-06, 6510, 6709. Futurewise argues that it makes no sense to deny points to nonirrigated parcels with this soil because irrigation does not address the soil's limitations and may even make it less suitable to agriculture. The County responds by pointing out that Class IV soils "have severe limitations on their use as agricultural land," but does not explain how irrigation would address these limitations or point to evidence in the record supporting its decision to award points for irrigating a soil type that is already poorly drained and possibly in need of protection from flooding. Br. of Resp't at 17.

¶ 39 Futurewise is correct that awarding points for irrigating Class III and IV soils that are overly wet contradicts the purposes of the GMA in designating ARL. However, the only example it gives of any land improperly excluded is the Ret Silt loam, which would qualify as prime farm land only if drained and not frequently flooded. Futurewise does not point to any evidence that any parcels containing this soil have been drained and are protected from flooding or are not frequently flooded. With that, it has not shown that this criterion, although flawed in general, has had any effect on the designation at issue.

**\*821** [11] ¶ 40 Finally, Futurewise takes issue with the County's assignment of particular point values to parcels with particular soil classifications on the ground that the County does not explain its basis. Ordinance 2013-05, however, states that "soil types are assigned a numeric score from 2 (least suitable) to 6 (suitable), depending on their relative suitability as productive agricultural soil." AR at 6364. Thus, the assignment of points depends on soil productivity, which is one of the key constituents of long-term commercial significance

under RCW 36.70A.030, noted above. Criterion one is not clearly erroneous.

### 2. Criterion Three: Availability of Public Services

[12] ¶ 41 In this criterion, the County "determined that potential agricultural land within close proximity to LAMIRDs [limited areas of more intense rural development] should be protected." AR at 6369. The ordinance deems "close proximity" to be one-quarter mile or less, but assigns no points for this feature.

¶ 42 Futurewise argues that awarding zero points to parcels one quarter mile or less from a LAMIRD,<sup>2</sup> is inconsistent with and fails to implement the plan. Futurewise further argues that this criterion amounts to a misinterpretation and misapplication of WAC 365-190-050(3)(c)(iv), which specifies that counties should consider the availability of public services in designating ARL.

¶ 43 The first argument appears to follow from the mistaken premise that, under the designation process, parcels within a quarter mile of a LAMIRD cannot qualify as ARL. This criterion, however, awards no points to any parcel, whether or not within a quarter mile of a LAMIRD. Thus, it does not increase or decrease the likelihood that any parcel will be designated. Futurewise fails to show that the Board erred in ruling this criterion to be consistent with the plan.

**\*822** ¶ 44 Futurewise's argument based on WAC 365-190-050(3)(c)(iv) also fails to persuade. Ordinance 2013-05, at 23, noted that the County has only one UGA and focused its discussion of public services on land near LAMIRDs. The discussion concluded that potential agricultural land near LAMIRDs should be protected, but assigned no points to do so. Even if some may disagree with this, the Ordinance makes clear that the County reasonably considered the **\*\*217** availability of public services in designating ARL. Criterion three is not clearly erroneous.

### 3. Criterion Four: Proximity to the Republic Urban Growth Area

[13] ¶ 45 This criterion assigns one point to parcels more than five miles from the city of Republic UGA and zero points to parcels within five miles of that UGA to minimize the potential adverse impacts of agricultural and nonagricultural uses on each other. Ordinance 2013-

05 gives two reasons why this is a significant factor in designating ARL:

[F]irst[,] land in close proximity to an urban growth area is subject to population expansion and is influenced by the spatial advances of that growth of an urban nature, including more intense uses and higher urban densities.

....

The second reason ... relates to the suitability of lands for agricultural use and the recognition that there are potential adverse [e]ffects caused by the spraying of insecticides and herbicides in current farming practices and the odorous effects in fertilizing planted crops and raising of animals.

AR at 6370.

¶ 46 Futurewise contends this criterion is not supported by substantial evidence. It points out that, assuming a density of four housing units per acre and 1.72 persons per unit, a single square mile would more than suffice to accommodate the County's entire projected population \*823 growth until the year 2030. Thus, Futurewise argues, "Land three and four miles from the [UGA] does not have a relationship with the [UGA] that would in any way impact the lands [sic] ability to be used for agriculture long-term." Br. of Pet'rs at 24.

¶ 47 Ordinance 2013-05 acknowledges that the city of Republic is not expected to fill this entire five-mile radius, but recognizes that harmful effects from spraying of pesticides and odors from fertilizing and cattle raising reach much further than immediately adjacent lands. Also important is the fact that cities and UGAs do not expand evenly at all points. For these reasons, the awarding of one point under this criterion to parcels more than five miles from the Republic UGA, but none to parcels within five miles of the UGA, is not clearly erroneous and is supported by substantial evidence.

#### 4. Criterion Five: Predominant Farm Size

[14] ¶ 48 This criterion assigns points to farms of different sizes based on contiguous land in the same ownership, ranging from negative three points for farms less than 10 acres to positive three points for farms of 1,000 acres or more. Only farms of 180 acres or more score points. This point assignment is proper, according to Ordinance 2013-05, because "larger farms are more suitable to the

typical agricultural activities historically represented in Ferry County, such as grazing and hay production." AR at 6370.

¶ 49 Futurewise argues that this criterion is inconsistent with and fails to implement the comprehensive plan and amounts to an erroneous interpretation of WAC 365-190-050(3)(c)(vi), which specifies that counties should consider "[p]redominant parcel size" in designating ARL.<sup>3</sup> Br. of \*824 Pet'rs at 25-30. Futurewise also argues that substantial evidence does not support the Board's ruling that the criterion complies with the GMA.

¶ 50 Futurewise points out that, although the County used the farm size categories from the United States Department of Agriculture's Census of Agriculture to assign point values, it apparently considered only land owned by the farm operator, not land that the operator leases or rents, while the census counted such lands in its farm size calculations. Similarly, the County considered only contiguous parcels in calculating \*\*218 farm size, while the census apparently did not impose such a limitation.

¶ 51 Depending on the terms of the lease, an operator's right to farm leased land is typically less secure than the ability to farm land owned in fee. Similarly, a farm consisting of scattered, discontinuous segments, although in the same ownership, may face challenges to long-term viability not faced by contiguous farms of the same size. Ordinance 2013-05, at 24, states that it considered economies of scale, among other matters, in devising the allocation of points to implement this criterion. Given this, we cannot say that the County's method of calculating farm size in its determination of long-term commercial significance was clearly erroneous or that it was not supported by substantial evidence. Under the applicable standards, it is consistent with both WAC 365-190-050(3)(c)(vi) and the comprehensive plan.

#### 5. Criterion Six: Proximity to Markets/Services

¶ 52 This criterion assigns one point to parcels within 50 road miles of "Market/Services," apparently referring to a cattle market in Davenport. This criterion recognizes, according to Ordinance 2013-05, the geographical isolation of the county's population centers and the difficulties farmers and ranchers face in getting

agricultural products to market and obtaining support services.

**\*825** [15] ¶ 53 According to maps subject to judicial notice under ER 201, the only land in the county within 50 road miles of Davenport lies in the Colville Indian Reservation. Although the County asserts jurisdiction over reservation fee lands within its borders, it declined to designate any reservation lands as ARL because it “cannot ... set policy in any way that would interfere with the sovereignty of the Tribe.” AR at 6374. Whether the County in fact has authority to designate reservation land as ARL under *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 432, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), need not detain this analysis. Because the County designated no reservation land, this criterion assigned no points to any parcel in the County. Thus, this criterion has no apparent effect on the designation of ARL challenged in this appeal.

[16] ¶ 54 Futurewise argues, though, that livestock is typically transported to feedlots from points more than 50 miles distant and that the County is linked to several livestock markets in the city of Spokane. Futurewise also points out that this criterion does not account for the transportation of hay. The fact, however, that most cattle in the region may be shipped more than 50 miles to market does not necessarily make the County's criterion clearly erroneous. Cattle ranching is the County's main agricultural industry, and parcels within 50 miles of the nearest livestock market could logically have a higher probability of being commercially significant in the long term. Further, the significance of hay production to Ferry County, as discussed in this opinion, lies in its support of the local livestock industry. Thus, proximity to ports or markets serving the sale of hay to more distant locales would have little to do with the commercial significance of hay grown in Ferry County. Futurewise has not shown that the adopted 50-mile criterion is clearly erroneous.

#### 6. Criterion Seven: History of Nearby Land Uses

[17] ¶ 55 Under this criterion, one point is subtracted from parcels adjacent to residential uses. This criterion is **\*826** justified, according to Ordinance 2013-05, because “[t]he most common nearby land use which has an effect on lands' long-term commercial significance is adjacent residential use.” AR at 6371.

¶ 56 Futurewise contends that subtracting one point for parcels adjacent to residential uses is inconsistent with the comprehensive plan and GMA and amounts to an erroneous interpretation of WAC 365-190-050(3)(c)(ix), which specifies that counties should consider the “[h]istory of land development permits issued nearby” in designating ARL. Br. of Pet'rs at 33-34. Futurewise points to an aerial photograph of a farm, taxed as “Resource—Agriculture Current Use” but not designated ARL, that shows some residential **\*\*219** buildings adjacent to the fields. From this, Futurewise argues that the criterion “does not distinguish between farm houses and other houses,” but instead subtracts one point “regardless of whether the [adjacent] residence is a farm or ranch house.” Br. of Pet'rs at 33-34.

¶ 57 Futurewise, however, points to no evidence that the County applied this criterion to agricultural land with adjacent farm or ranch residences. Futurewise thus failed to bring forth evidence to show that the action is clearly erroneous, as its burden required. *Kittitas County*, 172 Wash.2d at 156, 256 P.3d 1193. Accordingly, Futurewise's challenge to this criterion fails.

#### 7. The 500-Acre Block Group Minimum

[18] ¶ 58 After setting out the criteria implemented by allocating points, Ordinance 2013-05 turns to a discussion of “Other Factors Considered.” AR at 6372. Among these is one entitled “Block Group,” which states, “To be considered long-term commercially significant, agricultural lands should be in a contiguous block of 500 acres or more. This may include multiple ownerships.” AR at 6372. Although phrased in terms of “should,” the County applies this as a required minimum.

**\*827** ¶ 59 Futurewise argues that the Board erred in finding this 500-acre minimum to be consistent with the plan.<sup>4</sup> While acknowledging that Natural Resource Policy 9 states that “whenever possible” the County should avoid “designating very small areas,” Futurewise maintains that an area just under 500 acres is not very small and points out that this criterion *always* excludes such parcels, not just whenever it is possible to do so consistently with the plan. Br. of Pet'rs at 14.

¶ 60 In upholding the ordinances here at issue, the Board relied in part on the County's unique features as an agricultural area of Washington State. The Board noted

the substantial evidence in the record indicating that the County's viable crop land is quite limited due to poor soils, severe winters, short growing season, and sparse rainfall.

¶ 61 The Board's decision on appeal also noted that in adopting the 500-acre minimum block size, the Board of County Commissioners made the following findings of fact:

*Block Size:* This criterion is reduced from 1000 acres to 500 acres as a result of continued consultation with Department of Commerce, at whose recommendation the County engaged in a scatter analysis. For purpose of scatter analysis, leaving all other factors unchanged, the block size is reduced and the effect on contiguous lands subject to potential designation is reconsidered. This is repeated until the lands begin to appear in a scattered fashion across the map. The block size is then increased until the scatter is gone. Department of Commerce has previously indicated in writing that scatter was to be avoided, and meetings after the Ninth Compliance Order was issued confirm that Department of Commerce would support a block size sufficient to eliminate scatter. The particular block size of 500 acres is recommended because calculations below that level result in scatter.

CP at 31 (footnote omitted).

\*828 ¶ 62 The Department of Commerce (Department) is the principal state agency implementing the GMA. As the record shows, the Department informed the County that it would support a block size sufficient to eliminate scatter and recommended a scatter analysis to find the smallest block size that would do so. The County carried out the analysis and found that block sizes less than 500 acres would result in scatter. The County then halved its prior 1,000-acre block size to conform to the Department's recommendation. Futurewise does not argue that the scatter analysis was flawed or insufficient.

¶ 63 The 500-acre minimum block size, therefore, is a reasonable attempt to find the smallest minimum size that would prevent scatter, while taking into consideration the straitened circumstances of agriculture in the County. As such, Futurewise has not shown \*\*220 that the Board's upholding of this standard was clearly erroneous or that it was inconsistent with the comprehensive plan or the GMA.

#### V. Consistency of the ARL Designation with the County's Criteria and the GMA

[19] ¶ 64 Apart from its challenge to certain individual designation criteria, Futurewise contends that the County designated too little land as ARL to comply with the goals and purposes of the comprehensive plan and GMA.<sup>5</sup> We agree that the County's designation does not comply with applicable law.

#### \*829 A. *The County Designated None of the over 2,816 Acres That Its Designation Criteria and Point System Indicated Should Be Designated as ARL*

¶ 65 The best evidence in the record as to how the County applied its criteria and point system to reach its ARL designation is table B of Ordinance 2013-05. AR at 6374-76. As explained by the County's supplemental brief, the columns of that table show the County's application of new criteria as a result of a series of rulings by the Board finding it out of compliance. This is consistent with the introductory statement to table B specifying that it "shows the total acreage of land designated ... under several alternative weighting criteria." AR at 6374.

¶ 66 Each column in table B shows changes to ARL designations in specified years. The entries in each column show the number and acreage of parcels removed from consideration as ARL because they do "not meet threshold." AR at 6374-76 (Ordinance 2013-05, tbl.B). The County's supplemental brief at page 2 states that the phrase "[d]oes not meet threshold" refers to whether the land under consideration "meets all the criteria for designation." (Emphasis omitted.) Thus, the parcels noted as not meeting the threshold were removed because they did not meet at least one of the County's criteria, including those point criteria discussed above and the 500-acre block minimum.

¶ 67 The "Total Acreage" bottom line of table B begins with the figure of 3,719 acres designated in the 2009 iteration and then shows in each column the number of acres added or subtracted in each subsequent iteration. The last two columns are for the 2013 designation here at issue and, according to the County's supplemental brief at pages 3-4, show the results of different variations in criteria and points. The final calculation at the bottom of the last column shows "-2657.06 = 2816.85." CP at 6374.

¶ 68 As noted, Ordinance 2013–05 itself states that table B “shows the total acreage of land designated” under different \*830 alternatives. CP at 6374. Thus, the 2,816.00-acre figure is what the process in table B indicates should be designated under the criteria by the most recent alternative given. The County states, though, that the 2,816.00-acre figure represents the acreage eliminated because it does not meet the block group minimum. This, however, contradicts the actual figures in table B. Adding up all the acreage in the last column noted as removed because it did not “meet [the] threshold” gives the sum of 2,656.96 acres, almost identical to the 2,657.06 shown as removed at the bottom of the last column. CP at 6374. As noted, the phrase “[d]oes not meet threshold” includes all the criteria for designation. The 500-acre minimum block size is one of these criteria. Thus, the 2,816.00-acre figure does not represent acreage eliminated in the last iteration, but the remaining qualifying acreage under the County’s criteria after the removal of 2,657.06 acres in the final iteration.

¶ 69 In addition, the County acknowledges that the final two columns in table B use the prior 1,000-acre minimum block size. The \*\*221 larger the minimum, the more land will be excluded. Therefore, the 500-acre minimum, which was ultimately adopted, will result in more than 2,816 acres qualifying for designation as ARL under the County’s own criteria. How much more cannot be divined from this record.

¶ 70 As noted, the County designated a total of 479,373 acres of ARL. Ordinance No. 2013–05 prescriptively designated as ARL 459,545 acres of federal grazing allotments and 19,423 acres of state land also leased for grazing, for a total of 478,968 acres. The remaining 405 acres consisted of privately held land prescriptively designated as ARL because it was subject to long-term conservation easements. These 405 acres, even if contiguous, could not meet the 500-acre block size minimum in the County’s designation criteria discussed above. Therefore, the County designated zero acres as ARL as the result of its designation criteria and point system.

*\*831 B. The County’s Designation of ARL Failed To Comply with Governing Law*

¶ 71 The County offers no justification for failing to designate any of the over 2,816 acres that its own

criteria showed qualified as ARL. More to the point, this failure contradicted the policies of the GMA and the County’s comprehensive plan. As set out in the facts, the County’s major agricultural industry is cattle ranching, which depends on federal and state grazing leases for the six-month summer grazing season and the production of hay on private lands to sustain livestock through the rest of the year. According to maps and other evidence in the record, the federal land designated has little prime agricultural soil and includes mountainous areas with soils unsuited to cultivation. AR at 1712–15, 6505–11, 6549–746; *compare also* AR at 1712–15, 6356 (the County’s ARL designation maps) with U.S. Dep’t of Agric., Forest Service Topographical Maps, Nos. 482211807–482211845, 483011807–483011845, 484511807–484511845, 485211807–485211845, [http://data.fs.usda.gov/geodata/rastergateway/states-regions/grid\\_zoom.php?regionID=r6&gridSrc=48118](http://data.fs.usda.gov/geodata/rastergateway/states-regions/grid_zoom.php?regionID=r6&gridSrc=48118).

¶ 72 In addition, the record shows that the United States Forest Service permits only seasonal grazing, not hay cultivation, on federal forest lands. The County does not argue or point to evidence that hay may be grown on the state grazing lands. Thus, we must conclude from this record that the 478,968 acres of state and federal grazing leases designated as ARL play little, if any, role in the production of hay. At most, only the remaining 405 acres prescriptively designated as ARL may help provide the hay critical to Ferry County’s main agricultural industry.

¶ 73 The principal GMA goal served by designating and conserving ARL is that of RCW 36.70A.020(8): to “[m]aintain and enhance natural resource-based industries, including productive ... agricultural ... industries.” This \*832 and related provisions evidence “a legislative mandate for the conservation of agricultural land.” *King County*, 142 Wash.2d at 562, 14 P.3d 133. The purpose of ARL designation is further focused by WAC 365–190–050(5), which states that in the application of ARL designation criteria, “the process should result in designating an amount of [ARL] sufficient to maintain and enhance the economic viability of the agricultural industry in the county over the long term.”

¶ 74 The County’s comprehensive plan goals and policies are consistent with these state goals. One of the plan’s two goals specifically relating to agricultural lands is to “[m]aintain and enhance natural resource-based industries in the county and provide for the stewardship

and productive use of [ARL].” AR at 6341. Even more to the point, the plan’s Natural Resource Policy 2 states:

In furtherance of the Natural Resources Goal and the overall goals of the GMA, it is the Natural Resources Policy of Ferry County to ... [d]esignate sufficient commercially significant agricultural ... land to ensure the County maintains a critical mass of such lands for present and future use.

AR at 6341.

¶ 75 The County attempted to comply with these goals and policies by designating a **\*\*222** large amount of land, 479,373 acres, as ARL. Ninety six percent of this total, however, consists of federal grazing lands, which the record shows are not suitable to hay production. In addition, Ordinance 2013–05 states that the County does not have regulatory jurisdiction on federal lands. AR at 6372. The ultimate purpose of designating ARL under the GMA is to conserve these lands. RCW 36.70A.020, .060(1). Thus, although not itself in violation of the GMA, the designation of federal grazing lands is of no effect in determining whether the County’s designation of ARL complied with the GMA.

¶ 76 The County also designated 19,423 acres of state grazing land as ARL. Assuming the County does have regulatory authority over these grazing lands, it does not **\*833** argue or point to evidence that hay may be grown on them. Thus, we conclude on this record that 478,968 of the total 479,373 acres designated, over 99 percent, are not suitable for hay production, a critical component of sustaining the County’s livestock industry.

¶ 77 The County’s designation criteria examined long-term commercial significance for agriculture, which according to RCW 36.70A.030(10), depends on growing capacity, productivity, soil composition, proximity to population areas, and the possibility of more intense uses of the land. The criteria themselves covered soil type, tax status, availability of public services, proximity to a UGA, parcel

size and other matters, all going to the likelihood of sustained agricultural production.

¶ 78 The criteria, in other words, were the tools most suited to identifying lands suitable for hay production. For unknown reasons, the County designated none of the over 2,816 acres qualifying under its criteria and instead designated land more than 99 percent of which is not suitable for hay production, as far as the record shows. The 405 acres prescriptively designated as containing conservation easements may or may not be suitable for hay production, but those lands did not qualify under the measure most suited to determine long-term productivity, the County’s own criteria.

¶ 79 Declining to designate any of the land that qualifies under the criteria, especially when that overlooks a critical component of the County’s principal agricultural industry, does not meet the GMA’s goal of maintaining and enhancing productive agricultural industries or the minimum guideline of maintaining and enhancing the economic viability of the agricultural industry, set out in WAC 365–190–050(5). These actions are also contrary to the comprehensive plan’s goal of maintaining and enhancing the agricultural resource-based industries in the County and the plan’s policy of designating sufficient commercially significant agricultural land to ensure the County maintains a critical mass of such **\*834** lands for present and future use. In fact, the text immediately before table B in Ordinance 2013–05 states that “[a] weighting of criteria that is calculated to assure that no lands are designated does not provide sufficient ‘critical mass’ to assure the viability of the agricultural industry over the long term.” AR at 6374. That, however, is precisely what the County did in not designating any of the land qualifying under its criteria.

¶ 80 RCW 36.70A.020 states that the goals it lists “shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.” The comprehensive plan’s goal of maintaining and enhancing agricultural industries in the County and its policy of maintaining a critical mass of commercially significant agricultural land are consistent with and implement the GMA goal. Thus, they supply the frame for judging whether a designation of ARL is consistent with the GMA, as well as with the comprehensive plan. The minimum guideline of WAC 365–190–050(5) also supplies guidance for determining

GMA compliance. At the least, those goals, guidelines, and policies mean that a local government cannot decline to designate the land that its criteria show should be designated, when that potentially jeopardizes a critical component of the jurisdiction's principal agricultural industry. For that reason, the County's designation of ARL conflicted with \*\*223 the GMA, implementing WAC rules, and the County's comprehensive plan and was clearly erroneous. The Board erred in upholding it.<sup>6</sup>

¶ 81 We add as guidance to the County that simply designating the 2,816 or more acres indicated by its criteria does not necessarily assure compliance with the GMA. Even though we have concluded that the individual challenged criteria are not clearly erroneous, a designation of ARL under them would still violate the GMA if it failed to meet \*835 the minimum guideline of WAC 365-190-050(5), the comprehensive plan goals of maintaining and enhancing productive agricultural industries, or the "critical mass" Natural Resource Policy of the comprehensive plan, each discussed above. We

recognize the necessary imprecision in those goals and policies and the deference due local decisions in how to meet them. Nonetheless, these goals and policies must be honored in the designation of ARL.

#### CONCLUSION

¶ 82 The County's designation of ARL was clearly erroneous because it conflicted with the GMA, implementing WAC rules, and the County's comprehensive plan. The Board, therefore, erred in upholding it. For these reasons, we reverse the Board's decision.

Johanson, C.J., and Melnick, J., concur.

#### All Citations

191 Wash.App. 803, 365 P.3d 207

#### Footnotes

- 1 The designation criteria are found in Ordinance No. 2013-05, at 20.
- 2 LAMIRDs are areas outside of UGAs in which development more intensive than that otherwise allowed in rural areas may be permitted subject to the restrictions of RCW 36.70A.070(5)(d).
- 3 Futurewise also appears to take issue with the criterion's exclusion of platted parcels smaller than 20 acres. The parties apparently have different understandings of what this provision means: the County's brief asserts that it only excludes lots already platted for development. Regardless, Futurewise presents no argument in its brief why this exclusion violates the GMA. Thus, we need not address the issue. RAP 10.3(a)(6).
- 4 Futurewise initially points out that nothing in the plan expressly calls for limiting designation of ARL to blocks of at least 500 acres, arguing that this makes the criterion inconsistent with the plan. This argument fails for the same reasons discussed in subpart A, above.
- 5 Futurewise points out that the County asserts regulatory authority over fee lands on the Colville Indian Reservation, but "has failed to designate any of these lands through the application of criteria that violate the GMA." Br. of Futurewise at 47. To the extent this challenges the County's action not to designate any ARL on the reservation, it is not adequately briefed for our consideration. See *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 416, 120 P.3d 56 (2005); *Pub. Util. Dist. No. 1 of Pend Orielle County v. State, Dep't of Ecology*, 146 Wash.2d 778, 821 n. 13, 51 P.3d 744 (2002).
- 6 With this conclusion, it is unnecessary to address Futurewise's contention that the County's differing treatment of federal, Indian reservation, and privately owned land is inconsistent with its comprehensive plan and the GMA.

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION  
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY  
COUNTY AND FUTUREWISE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF COMMERCE, AND FERRY COUNTY,

Respondents.

Case No. 17-1-0003

**FINAL DECISION AND ORDER**

**SYNOPSIS**

*Concerned Friends of Ferry County and Futurewise (Petitioners) challenged the "Determination of Compliance – Ferry County" issued by the Washington State Department of Commerce (Commerce) on February 28, 2017, regarding the designation of a critical mass of commercially significant agricultural resource lands. The Board concluded that Commerce's Determination of Compliance was not clearly erroneous and should be upheld and affirmed.*

**I. BOARD JURISDICTION**

Under the Washington State Growth Management Act (GMA), the geographic jurisdiction of the Eastern Washington Region of the Growth Management Hearings Board (EWGMHB) is prescribed by RCW 36.70A.260(1)(b):

Eastern Washington region. A three-member eastern Washington panel shall be selected to hear matters pertaining to cities and counties that are required or choose to plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains.

1 Pursuant to legislative authorization in RCW 36.70A.040(2)(b), on September 22, 2014,  
2 Ferry County adopted a resolution removing the County from the requirements to plan under  
3 RCW 36.70A.040. Under RCW 36.70A.040(2)(b)(ii), Ferry County no longer plans under  
4 RCW 36.70A.040. So as of September 22, 2014, Ferry County became a "partial planning"  
5 county, still required to plan for, designate, and protect Natural Resource lands, Rural  
6 Areas, and Critical Areas, but Ferry County is no longer obligated to plan under RCW  
7 36.70A.040 with the full range of GMA comprehensive planning requirements imposed on  
8 most other Washington State counties and cities.  
9

10 By operation of law, Ferry County's 2014 removal from full planning under RCW  
11 36.70A.040 changed the GMHB's ability to hear and decide appeals of Ferry County's  
12 legislative actions. In *Victor Moore v. Whitman County*, 143 Wn.2d 96, 100 (2001), the  
13 Supreme Court held that the EWGMHB's subject matter jurisdiction is "limited to those  
14 counties that are required or choose to plan under RCW 36.70A.040."  
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16 RCW 36.70A.260(1)(b) and RCW 36.70A.060(1) use the same words "required or  
17 choose to plan under RCW 36.70A.040." According to Supreme Court mandatory authority,  
18 the GMHB only has jurisdiction over legislative actions by counties that fully plan under  
19 RCW 36.70A.040. Ferry County does not fully plan under RCW 36.70A.040. Thus, the  
20 GMHB lacks jurisdiction to hear and decide appeals of Ferry County's legislative actions.  
21

22 However, in 2014 the State Legislature created a new process for partial planning  
23 counties<sup>1</sup> to apply to Commerce for a "Determination of Compliance" with GMA's partial  
24 planning requirements (i.e., Resource Lands, Rural Areas, and Critical Areas). RCW  
25 36.70A.060(1)(d)(iii) provides for an appeal of this Commerce determination:

26 A petition for review of a determination of compliance under (d)(i) of this  
27 subsection may only be appealed to the growth management hearings board  
28 within sixty days of the issuance of the decision by the department.  
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<sup>1</sup> Apparently, Ferry County is the only "partial planning" county in the State of Washington.

1 RCW 36.70A.280(1) was amended in 2014 to direct the GMHB to hear and  
2 determine petitions alleging that a Commerce determination under RCW 36.70A.060(1)(d) is  
3 erroneous.

4 Therefore, although the GMHB no longer has jurisdiction to hear and decide direct  
5 appeals of Ferry County's legislative actions, the GMHB does have jurisdiction to hear and  
6 decide appeals of a Commerce Determination of Compliance so long as the petition for  
7 review (PFR) is appealed to the GMHB within 60 days of the issuance of Commerce's  
8 Determination of Compliance.  
9

10 In the present case, Commerce issued its "Determination of Compliance – Ferry  
11 County" on February 28, 2017. On April 27, 2017, Petitioners Concerned Friends of Ferry  
12 County and Futurewise filed their PFR with the GMHB, less than 60 days after the  
13 Commerce Determination of Compliance. The petition requests that the Board determine  
14 that the Commerce Determination of Compliance is erroneous. Thus, the Board finds that  
15 Petitioners have complied with the jurisdictional requirements of RCW 36.70A.060(1)(d)(iii)  
16 and RCW 36.70A.280(1)(f), and Petitioners have successfully invoked the Board's  
17 jurisdiction to review the "Determination of Compliance – Ferry County". The PFR presents  
18 one issue for review:  
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20 Did Ordinance 2016-04's designation of agricultural lands of long-term commercial  
21 significance, the failure to properly zone and conserve these lands, and the  
22 Department of Commerce's Determination of Compliance comply with RCW  
23 36.70A.020(8); RCW 36.70A.030(2), (10); RCW 36.70A.040(2), (4); RCW  
24 36.70A.050(3); RCW 36.70A.060(1); RCW 36.70A.070; RCW 36.70A.103; RCW  
25 36.70A.130(1)(d); RCW 36.70A.170(1); WAC 365-190-040(8)(d); or WAC 365-190-  
26 050 or is the designation or zoning consistent with the Ferry County Comprehensive  
27 Plan?

28 A Hearing on the Merits of the PFR was conducted on September 7, 2017.

## 29 II. STANDARD OF REVIEW

30 The Board's jurisdiction and scope of review is limited to determining whether a  
31 Commerce Determination of Compliance issued under RCW 36.70A.060(1)(d) is  
32

1 erroneous.<sup>2</sup> The burden is on the Petitioners to demonstrate that any action taken by a state  
2 agency under the GMA is not in compliance with the requirements of the GMA.<sup>3</sup> The Board  
3 shall find compliance unless it determines that the action by the state agency is clearly  
4 erroneous in view of the entire record before the Board and in light of the goals and  
5 requirements of the GMA.<sup>4</sup> In order to find the Commerce Determination of Compliance  
6 clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake  
7 has been made."<sup>5</sup>  
8

### 9 III. AGRICULTURAL LANDS OF LONG-TERM COMMERCIAL SIGNIFICANCE

#### 10 A. Prior Compliance Order and Court of Appeals Decision

11 In prior EWGMHB No. 01-1-0019 (Order Finding Compliance, February 14, 2014),  
12 the Board found Ferry County was in compliance with the requirements of the GMA relating  
13 to the designation and conservation of Agricultural Lands of Long-Term Commercial  
14 Significance under RCW 36.70A.170, RCW 36.70A.030, RCW 36.70A.060(1)(b), and RCW  
15 36.70A.020.  
16

17 In *Concerned Friends of Ferry County v. Ferry County*, 191 Wn. App. 803 (2015), the  
18 Court of Appeals held that Ferry County's designation of Agricultural Lands of Long-Term  
19 Commercial Significance or Agricultural Resource Lands (ARL) was clearly erroneous  
20 because it conflicted with the GMA, implementing WAC rules, and the County's  
21 comprehensive plan. In particular, the Court found: (1) "the County designated zero acres as  
22 ARL as the result of its designation criteria and point system" and (2) the designations did  
23 not meet the County's "critical mass" Natural Resource Policy in the comprehensive plan.<sup>6</sup>  
24 The Court concluded that the Board erred in upholding Ferry County's ARL designations.<sup>7</sup>  
25 However, the Court approved the Board's decision upholding Ferry County's point system  
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29 <sup>2</sup> RCW 36.70A.280(1)(f).

30 <sup>3</sup> RCW 36.70A.320(2).

31 <sup>4</sup> RCW 36.70A.320(3).

32 <sup>5</sup> *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

<sup>6</sup> *Concerned Friends of Ferry Cty. v. Ferry Cty.* 191 Wn. App. 803, 830 (2015), review denied, 185 Wn.2d 1030 (2016).

<sup>7</sup> *Id.* at 835.

1 for designating ARL, rejecting Futurewise's contention that a point system is inconsistent  
2 with the GMA.<sup>8</sup>

### 3 4 **B. Determination of Compliance by Washington Department of Commerce**

5 In response to the Court of Appeals decision in *Concerned Friends of Ferry County v.*  
6 *Ferry County*, 191 Wn. App. 803 (2015), Ferry County adopted Ordinance 2016-04 on  
7 August 8, 2016, designating commercially significant ARL, comprised of 478,968 acres of  
8 federal and state lands, 405 acres of land subject to long-term conservation easements, and  
9 2,939.98 acres of privately-owned farmland.<sup>9</sup> Pursuant to RCW 36.70A.060(1)(d)(i) and  
10 WAC 365-199-030, Ferry County then applied to Commerce for a Determination of  
11 Compliance. Under WAC 365-199-040(2), the scope of Commerce's review is limited to  
12 outstanding findings of noncompliance established in an order from the Board or court. On  
13 February 28, 2017, Commerce issued its Determination of Compliance and concluded that  
14 Ferry County had addressed all outstanding issues of noncompliance.  
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### 17 **C. Scope of Review by the Growth Management Hearings Board**

18 RCW 36.70A.060(1)(d)(iii) authorizes the GMHB to review, in an appellate capacity,  
19 Commerce's Determination of Compliance issued under RCW 36.70A.060(1)(d)(i). The  
20 Board, however, lacks statutory authority to directly review the underlying Ferry County  
21 Ordinance 2016-04.  
22

23 Thus, on appeal, the GMHB cannot review any issues falling outside of Commerce's  
24 scope of review and determination. The "scope of review" of Commerce's Ferry County  
25 compliance determination as to agricultural land was limited to: "***Failure to designate a***  
26 ***critical mass of commercially significant agricultural resource lands.***"<sup>10</sup>  
27

### 28 **D. Applicable Law**

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30 <sup>8</sup> *Id.* at 819.

31 <sup>9</sup> Ferry County Ordinance 2016-04 (August 8, 2016) at 29.

32 <sup>10</sup> Commerce's Determination of Compliance also concluded that Ferry County's actions to designate and protect Fish and Wildlife Habitat Conservation Areas were in compliance with the GMA's requirements in RCW 36.70A.060, 36.70A.170, and 36.70A.172 to designate and protect critical area ecosystems. These critical area issues were not challenged and are not the subject of this appeal.

1 Each county shall designate where appropriate: "Agricultural lands that are not  
2 already characterized by urban growth and that have long-term significance for the  
3 commercial production of food or other agricultural products."<sup>11</sup> The GMA requires counties  
4 to designate Agricultural Lands of Long-Term Commercial Significance (Agricultural  
5 Resource Lands) based on the following three statutory factors:

6 Factor 1: The land is not already characterized by urban growth,

7  
8 Factor 2: The land is primarily devoted to the commercial production of  
9 agricultural products enumerated in RCW 36.70A.030(2), including land in  
10 areas used or capable of being used for agricultural production based on land  
11 characteristics, and

12 Factor 3: The land has long-term commercial significance for agricultural  
13 production, as indicated by soil, growing capacity, productivity, and whether it  
14 is near population areas or vulnerable to more intense uses.<sup>12</sup>

15 The term "Long-term commercial significance" is defined by statute as follows:

16 "Long-term commercial significance" includes the growing capacity,  
17 productivity, and soil composition of the land for long-term commercial  
18 production, in consideration with the land's proximity to population areas, and  
19 the possibility of more intense uses of the land.<sup>13</sup>

20 The "Minimum Guidelines" in WAC 365-190-050(3)(c) provide 11 non-exclusive criteria that  
21 counties should consider in determining whether the land has long-term commercial  
22 significance for agriculture, including *inter alia*: (i) The classification of prime and unique  
23 farmland soils as mapped by the Natural Resources Conservation Service.

24 When applying the criteria for long-term commercial significance, "the process should  
25 result in designating an amount of agricultural resource lands sufficient to maintain and  
26 enhance the economic viability of the agricultural industry in the county over the long term;  
27 and to retain supporting agricultural businesses, such as processors, farm suppliers, and  
28 equipment maintenance and repair facilities."<sup>14</sup>

31 <sup>11</sup> RCW 36.70A.170(1).

32 <sup>12</sup> *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 502 (2006).

<sup>13</sup> RCW 36.70A.030(10).

<sup>14</sup> RCW 36.70A.050(5).

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**F. Board Analysis, Findings, and Conclusions**

The challenged Determination of Compliance by Commerce will now be reviewed to determine whether Petitioners have satisfied their burden of proof to show that Commerce's Determination is clearly erroneous.

**Designation of Agricultural Lands of Long-Term Commercial Significance**

Petitioners allege a violation of RCW 36.70A.170(1), which states as follows:

On or before September 1, 1991, each county, and each city, shall designate where appropriate: (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products.

In essence, Petitioners claim Commerce violated this section of the GMA by approving Ferry County's ARL designations, asserting that those ARL designations excluded certain land areas having long-term significance for the commercial production of food or other agricultural products.

Petitioners specifically claim the Commerce Determination of Compliance was clearly erroneous because Ferry County (1) omitted much of the land currently farmed in the County, (2) did not designate all 6,000 acres of alfalfa hay land harvested in 2013, (3) did not designate all 104 farms in Ferry County that have cattle, (4) omitted most of the 63,778 acres in the farm and agricultural land current use taxation program, and (5) failed to comply with the 2015 Court of Appeals decision on designating a "critical mass" of ARL.<sup>15</sup>

In 2015, the Court of Appeals held that "a local government cannot decline to designate land which its criteria show should be designated, when that potentially jeopardizes a critical component of the jurisdiction's principal agricultural industry."<sup>16</sup> In 2016, Ferry County reassessed their designation criteria and point system to address the Court's ruling, and the County added additional acreage to its ALR designations.

<sup>15</sup> Petitioners' Prehearing Brief (July 24, 2017) at 7-16.  
<sup>16</sup> *Concerned Friends of Ferry Cty. v. Ferry Cty.*, 191 Wn. App. 803, 834 (2015).

1 The following table shows ARL acres designated by Ferry County first under prior  
2 Ordinance 2013-05 (found by the Court of Appeals to be "clearly erroneous") alongside  
3 acres designated by Ferry County under Ordinance 2016-04 (found by Commerce to be in  
4 compliance with the GMA):  
5

	Ord. 2013-05	Ord. 2016-04
Federal/State Grazing Allotments	478,968	498,668
Private Conservation Easements	405	405
ARL Designated under Point System	-0-	2,939.98
TOTAL	479,373	502,013

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13 Commerce determined that "Ferry County has addressed the outstanding issues of  
14 noncompliance and Ferry County's Comprehensive Plan and development regulations are in  
15 compliance with the planning requirements of RCW 36.70A.060, RCW 36.70A.040(4),  
16 RCW 36.70A.070(5), RCW 36.70A.170, and RCW 36.70A.172 as a result of legislative  
17 actions taken on March 28, 2016, and August 8, 2016."<sup>17</sup>

18  
19 Although Petitioners disagree with Commerce's legal determination that Ferry County  
20 complied with the GMA's ARL designation requirements, Petitioners did not challenge any of  
21 Commerce's underlying factual findings as to the actions taken by Ferry County. Rather,  
22 Petitioners did their own analysis of commercially significant agricultural lands and  
23 submitted their analysis to the County for recommended ARL designations. According to the  
24 factual findings made by Commerce, Ferry County considered Petitioners' comments but  
25 chose not to implement Petitioners' recommendations for defensible reasons. Instead, the  
26 County relied on its revised criteria and point system to determine which lands met the  
27 definition of long-term commercially significant agricultural lands.<sup>18</sup>

28  
29 As to designating a "critical mass" of commercially significant agricultural resource  
30 lands using an ARL criteria and point system, Commerce found that Ferry County:  
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<sup>17</sup> IR 68, Department of Commerce Determination of Compliance (February 28, 2017) at 3.

<sup>18</sup> *Id.* at 4-5.

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- designated 2,939.98 acres of private land used for agricultural purposes that is part of a block group of 100 acres or more and scored 4 points or higher based on the County's accurate implementation of the GMA-compliant criteria and point system,
- designated Agricultural Resource Lands based on revised criteria to protect the long-term viability of the County's commercially significant agricultural industry,
- designated the most productive farmland in Ferry County, and developed a process for analyzing land based on the unique characteristics of the County,
- engaged in a defensible process to ensure that sufficient privately-owned land is designated to protect the County's primary agricultural industry.<sup>19</sup>

While the Board's scope of review is limited to Commerce's Determination of Compliance, the record contains Ferry County's factual findings, relied on by Commerce, and excerpted in pertinent part as follows:

- Ferry County's primary agricultural product is livestock (cattle) and is entirely dependent upon public rangeland for grazing.
- Using the U.S. Agricultural Census report for Ferry County, there are 25,215 acres as privately held "land in farms" under non-timber agricultural use located outside of the Colville Indian Reservation -- the County lacks regulatory authority on the Indian Reservation.
- Responses from over 60% of cattle producers surveyed combined with Ag census data, productivity data, and industry standards for daily winter hay demand to maintain cattle weight, assisted the County in designating a critical mass of resource land for hay production to support the cattle industry.
- Soils in Class III have severe limitations that reduce the choice of plans or require special conservation practices, or both.
- Soils in Class IV have very severe limitations that restrict the choices of plants, require very careful management, or both.
- Using a block group of 100 acres or greater with parcels that scored 4 or higher under the existing point system and are being used for agricultural purposes, resulted in the designation of a critical mass of ARL sufficient to maintain and

<sup>19</sup> Department of Commerce Determination of Compliance (February 28, 2017) at 5.

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enhance the economic viability of hay production and the cattle industry that supports, without requiring the designation of small scattered parcels that would be more difficult to conserve over the long term.

- Natural Resources Conservation Service soil surveys report 18 prime soil types in Northern Ferry County and 49 prime soil types on the Colville Reservation located within Ferry County.
- The 21,360 acres of prime soils found in Northern Ferry County include lands in the Urban Growth Area as well as platted lots, timber lands, and isolated pockets; it is clear that this figure of prime soil acreage is not useful in substantiating acres used for agricultural activity.<sup>20</sup>

As to soils, in determining whether land has Long-Term Commercial Significance for agricultural production, counties must consider *inter alia* the "classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service."<sup>21</sup> Here, Petitioners argue that Commerce approved the ARL designations based on an incomplete process that only rated prime farmland soils, which are also land capability II through IV.<sup>22</sup> However, while Petitioners disagree with Ferry County's methodology on allocating numerical points for different soil types, the record plainly shows that Commerce reviewed the County's actions in light of specific consideration of the classification of prime and unique farmland soils as mapped by the Natural Resources Conservation Service, in accordance with WAC 365-190-050(3)(c). Petitioners failed to satisfy their burden of proof to show that Commerce's Determination of Compliance was clearly erroneous.

The Board has reviewed Commerce's factual findings regarding agricultural lands of long-term commercial significance, and the Board finds and concludes that Commerce's factual findings are supported by substantial evidence in the record.

<sup>20</sup> Ferry County Ordinance # 2016-04 (August 8, 2016); Findings of fact and conclusions of the ferry County Board of commissioners regarding adoption of amendments to the comprehensive plan and development regulations (August 8, 2016).

<sup>21</sup> WAC 365-190-050(3)(c).

<sup>22</sup> Petitioners' Prehearing Brief (July 24, 2017) at 16-18.

1 The Board has reviewed Commerce's legal conclusions regarding agricultural lands  
2 of long-term commercial significance, and the Board finds and concludes that Commerce's  
3 Determination of Compliance was not clearly erroneous and should be upheld and affirmed.  
4

5 **Conservation of Designated Agricultural Resource Lands**

6 Petitioners allege a "failure to properly zone and conserve" designated Agricultural  
7 Resource Lands in Ferry County.<sup>23</sup> According to Petitioners, "[b]y approving Ferry County's  
8 failure to zone the newly designated agricultural lands Agricultural Lands of Long-Term  
9 Commercial Significance, Commerce violated RCW 36.70A.040(4) and RCW 36.70A.060."<sup>24</sup>  
10 However, the scope of review of Commerce's compliance determination was limited to:  
11 "*Failure to designate a critical mass of commercially significant agricultural resource*  
12 *lands.*"<sup>25</sup> Commerce evaluated Ferry County's agricultural land designations (under RCW  
13 36.70A.170) but Commerce did not evaluate Ferry County's separate zoning regulations  
14 (under RCW 36.70A.060). Thus, the Board cannot consider those zoning arguments in the  
15 present case since zoning and conservation of Agricultural Resource Lands fall outside of  
16 the scope of the issues determined by Commerce and therefore outside the scope of review  
17 in this GMHB appeal.  
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30 <sup>23</sup> Petitioners' Prehearing Brief (July 24, 2017) at 24-25.

31 <sup>24</sup> *Id.* at 25.

32 <sup>25</sup> Commerce's Determination of Compliance also concluded that Ferry County's actions to designate and protect Fish and Wildlife Habitat Conservation Areas were in compliance with the GMA's requirements in RCW 36.70A.060, 36.70A.170, and 36.70A.172 to designate and protect critical area ecosystems. These critical area issues were not challenged and are not the subject of this appeal.

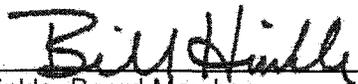
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IV. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board upholds and affirms the Determination of Compliance issued by the Department of Commerce on February 28, 2017.

SO ORDERED this 17th day of October, 2017.

  
Raymond L. Paoletta, Board Member

  
Bill Hinkle, Board Member

  
William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>26</sup>

<sup>26</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970.

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**BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION**

Case No. 17-1-0003

Concerned Friends of Ferry County and Futurewise v. Commerce and Ferry County

**DECLARATION OF SERVICE**

I, DESIREE ORTIZ, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant for the Growth Management Hearings Board. On the date indicated below a copy of the FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

Tim Trohimovich  
Futurewise  
816 2<sup>nd</sup> Ave Ste 200  
Seattle WA 98104-1535

Kristen K. Mitchell  
Assistant Attorney General  
PO Box 40109  
Olympia WA 98504-0109

Peter G. Scott  
Peter G. Scott Law Offices, PLLC  
682 S. Ferguson Ste 4  
Bozeman MT 59718

DATED this 17th day of October, 2017.

  
\_\_\_\_\_  
Desiree Ortiz, Office Assistant

**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE AGRICULTURE & HEALTH  
DIVISION**

**May 06, 2019 - 2:22 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53038-4  
**Appellate Court Case Title:** Concerned Friends of Ferry County and Futurewise, Appellants v. Dept. of  
Commerce, Resp.  
**Superior Court Case Number:** 17-2-06109-1

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- office@scott-law.com
- peter@scott-law.com
- tim@futurewise.org

**Comments:**

Brief of Respondent State of Washington Department of Commerce

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**Filing on Behalf of:** Heather Ann Carter - Email: heather.carter@atg.wa.gov (Alternate Email:  
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Phone: (360) 586-6500

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