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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

NO. 271846

NEIGHBORHOOD ALLIANCE
OF SPOKANE COUNTY
a nonprofit corporation

Petitioner,

v.

COUNTY OF SPOKANE,
a political subdivision of the State of Washington,

Respondent.

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RESPONDENT'S RESPONSE TO PETITION FOR REVIEW
AND CROSS-PETITION FOR REVIEW

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1. Identity of Responding and Cross-Petitioning Party.

Respondent County of Spokane.

2. Argument In Response To Petition For Review By NASC.

A. The NASC Was Properly Allowed CR 26 Discovery.

The first Issue Presented For Review by NASC states:

1. Whether a plaintiff in a PRA action is entitled to the same scope of discovery allowed other civil plaintiffs under Washington's civil discovery rules, . . .

Respondent County of Spokane (hereinafter "Spokane County") has never argued that the NASC should be prevented from relevant discovery. The Court of Appeals and the Superior Court did *not* prevent the NASC from pursuing appropriate discovery. There is nothing in this record that supports any inference (let alone a bold statement) that the NASC "[did] not have the same access to the state's civil rules governing discovery." *Petition*, p. 1. Under these facts a significant public interest is not presented, and the Court of Appeals decision certainly does not conflict with any decision of the Supreme Court.

A trial court is granted broad discretion under CR 26 to manage the discovery process, and a trial court's decision to limit discovery will be overturned only for an abuse of discretion. *Nakata vs. Blue Bird, Inc.*, 146

Wn.App. 267, 278, 191 P.2d 900 (2008), citing *Rhinehart vs. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S.Ct. 21299, 81 L.Ed.2d 17 (1984). The NASC issued discovery in June 2006, including Requests for Admission. CP 150-173. The discovery explored not only the May 16, 2005, request but also a request made on October 31, 2005, and additionally made a number of verification requests. *Id.* At the same time the NASC propounded Interrogatories and Requests for Production of Documents (CP 175-188), which prompted Spokane County to move for a Protective Order (CP 133-134) because the discovery inquired of hiring practices, information about meetings, the identity of those who made hiring decisions, people who applied for a certain job, Ms. Knutsen's promotion date and the hiring of three people who have nothing to do with the seating chart or this case.

The Requests for Production (CP 185-188) involved much of the same, including records for Department of Building and Planning's Pam Knutsen's job promotion (No. 9) the hiring of three people unrelated to the seating chart (Nos. 10-12) and administrative interpretations "provided by the Building and Planning Department between April 1, 2003 through the present." No. 15. Spokane County moved for summary judgment on November 17, 2006. CP 39-40, 41-47, 66-70. On November 20, 2005,

Spokane County explained its position regarding irrelevant discovery to the NASC in detail. CP 354-355.

The NASC moved to compel discovery and continue Spokane County's summary judgment. CP 71-73. At the hearing on December 5, 2006, Spokane County offered to participate in a CR 31 deposition upon written questions in order to participate in discovery while eliminating the far-ranging nature of the previous discovery. TR 12/05/06, p. 20. The NASC stipulated to a deposition upon written questions on two issues (TR 12/05/06, p. 24) and served that discovery on Spokane County in September 2007. CP 386-420. Many of the objectionable questions were posed again (*Id.*, Nos. 14-24, 27-37, 42-52) and Spokane County again objected. CP 422-423, 477-485. In April 2008 the NASC filed its own summary judgment motion and *waived* further argument of the discovery issue when the motions were heard on May 13, 2008. TR 05/13/08, p 9.

It is factually dispositive that the NASC filed its motion for summary judgment *after* taking its stipulated discovery. Counsel for the NASC told the Trial Court "*I think they answered enough that we can go to our Motion for Summary Judgment.*" TR 05/13/08, p. 9. In other words, the NASC was confident that it had a winning hand after completing its discovery. It cannot complain that it was denied discovery after it lost.

There is nothing in the Court of Appeals decision that limits the use of the Court Rules or prohibits discovery in PRA cases. What the Court of Appeals did recognize are the issues presented in such a specialized case and the limits of relevance, noting how far-ranging the NASC's discovery really was, agreeing that the Superior Court was under no obligation to allow such bottom-trawling tactics. *Neighborhood Alliance of Spokane County vs. County of Spokane*, 2009 WL 4800090 (Wn.App. Div. 3) p. 13 ¶ 67 (hereinafter "*NASC vs. County of Spokane*"). The NASC cannot demonstrate that the trial court abused its discretion since the NASC *stipulated* to the scope of discovery. The NASC's argument regarding the scope of the civil rules and *Spokane Research & Defense Fund vs. City of Spokane*, 155 Wn.2d 89, 117 P.2d 1117 (2005) ignores that stipulation.

Spokane Research Defense involved an argument (in part) that since specific procedures are not stated in the PRA, the normal civil rules applied. In that case a journalist failed to secure a show cause order and the Court of Appeals found that to be fatal to the journalist's PRA claim. Yet, as this Court pointed out, a show cause proceeding is discretionary. *Spokane Research & Defense*, 155 Wn.2d at 104. Since there was no statutorily defined cause of action, the civil rules applied. *Id.* That case had nothing to do with discovery as recognized by the Court of Appeals:

The Washington cases cited by the Alliance, however, contain only passing references to discovery and are generally not helpful. But there is substantial federal law on the issue.

Neighborhood Alliance vs. County of Spokane, p. 12 ¶ 64. The NASC's argues that it should be freed from the relevance limitations of CR 26.

In this case the NASC's sought unbridled discovery into every possible corner of Spokane County hiring practices, whether relevant to the document request or not. The central purpose of the public records act is the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability of public officials and institutions. *King County vs. Sheehan*, 114 Wn.App. 325, 57.P.3d 307 (2002). Respondent County of Spokane respectfully submits that the purpose of the PRA does not include ensnaring public agencies in the manner in which the NASC promotes. NASC seeks to create a "gateway" into the workings of government from the most innocuous document request. The potential for abuse is astounding.

There simply was no error or abuse of discretion by the Trial Court or Court of Appeals with regard to the discovery issues presented.

B. Records Already In The Possession Of The Requesting Party Cannot Be The Basis Of A PRA Claim.

The second issue raised by the NASC involves records that it received in response to a different, later PRA request, which it argued

“might” have been responsive to Item #2 of the May 16, 2005, request. It is noteworthy that the NASC’s argument now is that “the (three) e-mails *would have been* responsive to Item 2 of the May 2005 request. *Petition*, p. 6. When all of this was before the trial court the NASC was not so sure. CP 239, 650-651. Regardless, the NASC has failed to demonstrate a viable issue for review by this Court.

The fact is that the documents that the NASC argued “may have” been responsive to Item 2 of the May 16, 2005, request were provided by Spokane County long before the present lawsuit was filed. The purpose of the PRA, as noted by the NASC, is “to keep public officials and institutions accountable to the people.” *Petition*, p. 11, citing *O’Connor vs. DSHS*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001). Disclosure at any time prior to the filing of suit assists in fulfilling that intent. The NASC’s argument seems to limit a response to one point in time without allowance for supplementation.

The NASC’s argument fails on its own. It recognizes that Washington cases *Coalition on Government Spying vs. King County*, 59 Wn.App. 856, 801 P.2d 1009 (1990) and *Daines vs. Spokane County*, 111 Wn.App. 342, 44 P.3d 909 (2002) are consistent: each recognizes that “the plaintiff must prove his action was reasonably necessary to obtain the information and that the action had a causative effect on the release.”

Petition, p. 14. In *Spokane Research & Defense Fund vs. City of Spokane* 155 Wn.2d 89, 117 P.3d 1117 (2005), the requesting party filed more than one lawsuit seeking documents. When the City of Spokane was court ordered to produce documents in a second suit which were responsive to requests at issue in the first suit, this Court deemed the requesting party to be “prevailing” even though the first suit did not result in their production.

The distinguishing fact is that here, Spokane County produced documents in response to a second PRA request in November 2005 which the NASC then argued should have been produced in response to the May 16, 2005 request. The Court of Appeals held:

Here, as in *Daines*, the Alliance sought to establish a public records violation as the result of the County’s failure to produce certain e-mails and documents in response to the May 16, 2005 request. Like the plaintiff in *Daines*, the Alliance effectively sought to penalize the County for failing to disclose those records, yet again. And while the Alliance also argues that other documents must surely exist, such an argument is entirely speculative and, therefore, insufficient to defeat this part of the County’s motion for summary judgment.

NASC vs. County of Spokane, p. 12 ¶ 60. The Court of Appeals recognized that it was not whether a lawsuit compelled disclosure, but rather the ultimate fact that the documents were in the plaintiff’s possession in response to a PRA request before suit was filed. There is no

conflict between this case and Supreme Court precedent. For these reasons the NASC's *Petition* should be denied.

CROSS PETITION FOR REVIEW

1. Issues Presented For Review.

1. May a court declare a government agency's search for requested documents "inadequate" merely because it is possible that responsive documents may have existed in another location?
2. Is a governmental agency required to search in any conceivable place for responsive documents, rather than in those places where responsive documents are routinely located?
3. Does Washington law allow PRA penalties to accrue in the absence of evidence that the requesting party was actually denied access to a responsive document?

2. Statement of Additional Facts.

Ms. Knutsen's computer hard drive was changed as part of routine maintenance in April 2005. CP 61-62. When those documents were transferred, nothing was left on the "old" hard drive. CP 58. The NASC did not request the "seating chart" information until May 16, 2005. CP 51-52. In a deposition Ms. Knutsen explained that her computer was probably the only place where the seating chart would have existed (CP 431) and that she was the only one who would have worked with the seating chart. CP 432. Ms. Malzahn and Ms. Knutsen explained exactly what they did to search for responsive documents. CP 48-56, 60-65.

Ms. Knutsen's "old" PC hard drive had been wiped clean and every document that existed on that computer was transferred to the new computer in April 2005. CP 57-59. With regard to Item #1, all of the information requested by the NASC had been stored on Ms. Knutsen's computer. CP 61. With regard to Item #2, there were no documents on her computer, exempt or non-exempt. CP 62. The NASC has never presented any contrary evidence.

The NASC did not raise any issues regarding the June 6, 2005, until it issued another PRA request regarding computer maintenance on October 31, 2005, to which the County responded (CP 493-494) indicating there were no records showing when the computer hard drive was wiped clean or who did the work. CP 610-611. It explained "once a PC is 'wiped' there is no reason to check to see if that process was completed or successful." *Id.*

3. Argument Why Review Should Be Granted.

The Court of Appeals decision herein creates an entirely new cause of action under the PRA. The plaintiff need not produce evidence of overlooked or wrongfully withheld documents but rather must only convince the court that there were other places where documents *might* have existed, whether in the routine chain of storage or not. Under that scenario penalty damages would run until the date of judgment (including

after all appeals) since there would be no document to produce. The potential for abuse under this decision is quite obvious.

Reasonableness is the guiding principal for a court faced with a public records act summary judgment motion. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59 (D.C.C. 2003)(in that case the FOIA). It is not the result of the search that is the court's focus, but its adequacy. *Id.* Adequacy "is judged by a standard of reasonableness and depends, not surprisingly, on the facts of each case." *Id.*, at 62. A public records request pertains only to documents in the possession of the agency at the time of the request. *Landmark Legal Foundation vs. EPA*, 272 F.Supp.2d 59, 66 (D.C.C. 2003)(in that case the FOIA). That means documents which existed on May 16, 2005.

While "Courts must liberally construe the PRA's disclosure provisions to promote full access to public records and narrowly construe exceptions" (*NASC vs. County of Spokane*, p. 7 ¶ 36), such liberal construction must not be an invitation to unlimited liability or an avenue for purely subjective analysis of the reasonable extent of a search for records. The NASC never provided any evidence which would have demonstrated that there were in fact any responsive documents on Ms. Knutsen's old PC *at any time after* the May 16, 2005, records request.

Here the Court is left to guess that there were, or might have been, and that the governmental entity must be punished merely for “not looking hard enough.” In each case in which liability has been established under the PRA there was eventually an actual demonstration that responsive documents existed. Here, there is no such evidence. The basis of liability in this case is a mere possibility, and yet with that possibility it is arguable that penalties continue to run to this day. Spokane County is held to a standard of the “perfect search.”

By this “did not look far enough” standard under the PRA, it is unnecessary to show that a responsive document actually existed. A requesting party will be allowed to sue the governmental entity regardless of whether responsive documents were withheld. Under this basis of liability the requesting party can merely conjure an argument of “well, they should have looked in [fill in the blank]” and liability attaches.

Spokane County never claimed an exemption under the Act; it never refused to provide documents that it found in response to the May 16, 2005, request. It provided what it had under the request made and months passed before anyone asked them to look again and specifically to explain the discrepancies on the “date created” and “date modified” fields of the original response. See CP 488-489. It is fortuitous to the NASC that the PC had by then been wiped clean. The Court found that Spokane

County violated the PRA because there was a *possibility* of documents that were missed. No proof of actual documents, just a possibility.

Citing federal cases regarding the “reasonableness” of the search, it once again must be noted that the NASC has never provided any evidence showing that there were responsive documents on the PC after May 16, 2005, and that the County would have found them had it looked. There is no evidence that a recycled computer is a recognized document storage location. We are all left merely to guess, and the Court of Appeals determined that guesswork alone is sufficient as a basis of liability. That runs afoul of the notion of some objective standard against which to judge “reasonableness.” That is, if a document existed and was later found, that old PC's in the recycle bin are recognized as file storage, or if the NASC demonstrated through credible evidence that the old PC would have contained documents after the May 16, 2005, request, then the Court of Appeals decision on “reasonableness” might stand. Without an end-result against which to measure the County’s conduct we are all left merely to speculate. That alone is the basis of the Court of Appeals decision that the County’s failure to scour a recycled computer hard drive was unreasonable, utilizing select citations to federal FOIA cases.

The Court of Appeals failed to fully explain the analysis for a “reasonable search” in federal cases. The Court cited *Valencia-Lucerna*

vs. U.S. Coast Guard, 180 F.3d 321 (D.C. Cir. 1999) for the proposition that "the adequacy of an agency's search is separate from the question of whether the requested documents are found." *NASC vs. County of Spokane*, p. 8 ¶ 42. *Valencia-Lucerna* involved a requester's right to challenge the reasonableness of an agency search when the agency *denied* an FOIA request on the ground that no responsive documents could be found. Here, Spokane County provided the document which the NASC requested, from its usual storage facility. Whether other records containing the information existed remains a matter of speculation and yet Spokane County is being punished for *failing to exclude the possibility*.

In *Valencia-Lucerna* the government admitted that there might be responsive documents located in a federal records center in Georgia – a place that records were *routinely* stored – and that it had declined to search that facility. Here, Ms. Knutsen's PC had been recycled out of her office weeks before the subject request was delivered, and she answered the request from the PC that stored the information requested. The decision would require every agency to search its trash before any request is answered, as a "positive indication of overlooked materials."

Citing *Weisberg vs. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984), the Court of Appeals wrote:

. . . the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*. . . The adequacy of the search, in turn, is judged by a standard of reasonableness and depends upon the particular facts of each case.

NASC vs. County of Spokane, p. 8. (emphasis original). *Weisberg* also states that the agency must show "that it conducted a search *reasonably calculated* to uncover all relevant documents." 745 F.2d at 1485. Ms. Knutsen's PC had been removed from her office weeks *before* this particular request for documents was even received. The record fails to show that old, recycled computers are routinely used to store documents.

There is no requirement that an agency search every record system (see *Truitt vs. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) or that a search be perfect. *Meeropol vs. Meese*, 790 F.2d 942, 955-956 (D.C. Cir. 1986). Rather the search must be conducted in good faith using methods reasonably expected to produce the information requested if it exists. *Valencia-Lucena vs. U.S. Coast Guard*, 180 F.3d 321, 325-326 (D.C. Cir. 1999), and *Campbell vs. U.S. Department of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). Ms. Knutsen's computer was the only place the seating chart was stored. CP 431.

The "complete information log" was provided to the NASC. The description of the information log" in Item 1 including the "date created"

field for the document and the computer operating system(s) data record indicating the date of the creation and dates of modification for the referenced seating chart. CP 51. All of those features were provided in the document that was produced. Item 1 did *not* request every iteration of the seating chart computer log and now the County is being punished for failing to look in the trash can for versions of the same record. Ms. Knutsen's search *was* reasonably expected to produce responsive records, as her *Affidavit* explained. CP 60-65. Her *Affidavit* was certainly detailed and not conclusory.

A search is not unreasonable simply because it fails to produce all relevant material; no search will be free from error.

Meeropol vs. Meese, 790 F.2d 942, 952-953 (D.C. Cir. 1986).

. . . it is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate. *See Nation Magazine v. United States Customs Serv.*, 71 F. 3d 885, 892 n. 7 (D.C.Cir. 1995); *Meeropol*, 790 F.2d at 952-54; *see also Maynard v. CIA*, 986 F.2d 547, 564 (1st Cir. 1993); *Miller v. United States Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1986). Rather, the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search. *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C.Cir. 1994). After all, particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them. *Miller*, 779 F.2d at 1384-85; *see also Goland v. CIA*, 607 F.2d 339, 353 (D.C.Cir. 1978).

Iturralde vs. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003). The complaint here is that Spokane County did not look in every possible place for the same document in other iterations.

. . . there is no requirement under FOIA that an agency's search be exhaustive for "the issue is *not* whether any further documents exist but rather whether the government's search for responsive documents was adequate."

Physicians for Human Rights vs. U.S. Dept. of Defense, 2009 WL 5125893, p. 3 (D.D.C 2009). In that case the Physicians complained that the Department's search was inadequate because it had failed to contact DOD officials "who may have known where responsive documents were located. The Physicians relied upon an article from *Newsweek* and its reference to one officer. The Court held:

The fact that Lt. Col. Lapan was not contacted does not undermine the legitimacy of the Defendant's searches because there is no "positive indication" in the record that he had possession or knowledge of any responsive documents.

Physicians for Human Rights, 2009 WL 5125893, p. 7. That is precisely the NASC's case. There is no "positive indication" that Ms. Knutsen's old PC contained any responsive documents when the NASC made its request on May 16, 2005, but rather only a possibility that alone does not render Spokane County's search "inadequate."

The Court of Appeals warns “if a review of the record raises *substantial doubt*, particularly where the requests are *well defined* and there are *positive indications of overlooked materials*, summary judgment in favor of the agency is inappropriate” citing *Valencia-Lucerna vs. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999). *NASC vs. County of Spokane*, p. 9. There is substantial debate regarding whether either Item No. 1 or Item No. 2 in the May 16, 2005, records request were “well defined” (See CP 614-615) and there is certainly no “positive indication” – *affirmative showing* - of overlooked materials but rather only speculation.

The Court of Appeals dispenses with that when it points with great enthusiasm to the fact that Spokane County could not state with any certainty that Ms. Knutsen’s PC had been wiped clean in April 2005, before the records request was made by the NASC. *NASC vs. County of Spokane*, p. 9. It also points out with gusto that Ms. Knutsen’s PC was rebuilt and put back into service “almost three months after the Alliance’s request.” *Id.* It wraps all of that up with a citation to *Campbell vs. United States Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998), that a “search was inadequate when it was *evident* from the agency’s disclosed records that a search of another of its records systems might uncover the document sought.” *NASC vs. County of Spokane*, p. 9. This again all supposes that the PC was wiped clean at some point *after* the May 16, 2005, records

request was received. The NASC never presented any credible evidence that responsive records existed on Ms. Knutsen's old PC at the time of the request; we can merely speculate that there were. However, because Spokane County cannot demonstrate that the computer hard drive had been wiped clean *before* the request was made, it must have violated the Act. The burden of proof shifted to the defendant to disprove the claim.

These two positions are irreconcilable. In *Canning vs. U.S. Department of Defense*, 499 F.Supp.2d 14, 23-24 (D.D.C. 2007) the government was faced with a similar argument, being "if documents once existed they remain." The Court rejected that argument, holding that an agency must provide access only to those documents that it has chosen to retain. In *O'Neill vs. United States Department of Justice*, 2007 WL 3223303 (E.D. Wis. 2007) the Court rejected a similar argument where it was unclear whether the requested documents had ever existed. Here, Ms. Knutsen's hard drive was recycled and no one knows when. Spokane County cannot be held liable for failing to check a weeks-out-of-service hard drive when a PRA request was received.

Finally, under the Court of Appeals decision there is no cut-off date for penalties other than the end-date hearing on the penalties itself. Under existing Washington cases, penalties cease when a document is produced. *Yousoufian vs. Office of Simms*, 165 Wn.2d 439, 452, 200 P.3d

232 (2009) ["the amount of days the party was denied access."] Under *NASC vs. County of Spokane* the penalties run from the date of the request seemingly without end, creating conflict with existing Washington law. Any appeal in a PRA case with debatable issues would further penalize an agency, including an appeal by the requesting party. The Court of Appeals has fashioned a new basis of liability which juxtaposed the burden of proof while effectively imposing virtually unlimited penalty on an agency merely for pursuing its appeal rights, also allowing the requesting party an opportunity to increase the daily penalty by filing its own appeal.

4. Conclusion.

Based upon the facts of this case and the controlling Washington law and guiding federal FOIA cases, Respondent County of Spokane respectfully submits that with regard to the NASC's *Petition* and Issues therein, there is neither conflict with controlling cases nor is there significant public interest in the NASC's arguments. It was afforded CR 26 discovery within recognized relevance limitations, and agreed to those limitations. Furthermore, since the NASC had documents in hand an agency cannot be held liable for failure to re-disclose the same documents.

Respondent also respectfully submits that the decision of liability imposed upon Spokane County is significantly flawed. With the guidance

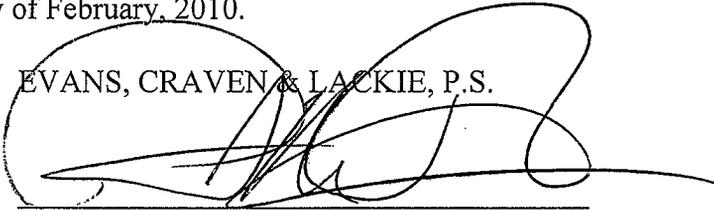
of federal FOIA cases the Court of Appeals expanded the “reasonableness” of a search into an absurd result. Liability is based upon the fact that Spokane County did not look into its recycling weeks after a computer hard drive was placed out-of-service. Under this decision the requesting party must merely present an argument that an agency could have looked in some place and did not and liability attaches, regardless of the lack of any evidence that the search would have been fruitful.

Additionally, under the decision of the Court of Appeals a governmental agency can be penalized merely for pursuing an appeal. Under the *NASC vs. County of Spokane* decision there is no cut-off date for the assessment of penalties, in clear conflict with Washington Supreme Court case law. The chilling effect on the appeal of otherwise significant issues is apparent. This is an issue of significant public interest.

For those reasons, Respondent and Cross Petitioner County of Spokane requests that the Cross Petition for Review be granted.

DATED this 12th day of February, 2010.

EVANS, CRAVEN & LACKIE, P.S.



PATRICK M. RISKEN, WSBA #14632
Attorneys for Respondent and
Cross Petitioner County of Spokane

DECLARATION OF SERVICE:

On the 12th day of February, 2010, I caused the foregoing document described as **Respondent's Response to Petition for Review and Cross-Petition for Review** to be personally served on all interested parties to this action as follows:

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