72132-1

72132-1

No. 91475-3

No. 72132-1-I

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WHATCOM COUNTY,

Petitioner,

v.

ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, FUTUREWISE, AND WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

RESPONDENTS' BRIEF OF ERIC HIRST, LAURA LEIGH BRAKKE, WENDY HARRIS and DAVID STALHEIM, and FUTUREWISE

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I. INTRODUCTION

Whatcom County's appeal in this case addresses a serious problem: How should Whatcom County address its water quality and water quality problems? This issues affect property owners, farmers, residents, and salmon.

The Growth Management Act ("GMA")[1] requires Whatcom County's ("County's") planning for its "Rural" area to protect rural character, which includes the protection of water quality and quantity and fish and wildlife habitat. When the County amended the Rural Element of its Comprehensive Plan in 2014, however, the County failed to protect water quality. It did not even consider the availability of water. Both of these failures harm imperiled salmon runs.

Consequently, the Growth Management Hearings Board ("Board") found that the County's Comprehensive Plan violates the GMA.[2] The Board's decision is firmly grounded in the GMA, is supported by substantial evidence, and should be upheld by this Court.

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[1] RCW Ch.36.70A.

[2] Administrative Record (AR) 1951-52, *Hirst v. Whatcom County*, GMHB Case No. 12-2-0013, Second Order on Compliance (April 15, 2014), at 1-2. Hereinafter Second Order on Compliance. The AR references are to the "Bates" numbers added by the Board to the Administrative Record. We omit the preceding zeros in the number.

II. STATEMENT OF THE CASE

Whatcom County adopted the comprehensive plan amendments at issue in this appeal in Ordinance No. 2014-002 ("Ordinance No. 2014-002").[3] The order that decided that the amendments in Ordinance No. 2014-002 violated the GMA is the is third order issued in this case, *Hirst v. Whatcom County*, Growth Management Hearings Board (GMHB) Case No. 12-2-0013.[4] The Final Decision and Order in GMHB Case No. 12-2-0013 was appealed to the Court of Appeals in Case No. 70796-5-I and Case No. 70796-5-I has been coordinated with this case.

While not the subject of this appeal, a summary of the Final Decision and Order may be helpful to the Court. The Board addressed the questions of "whether Whatcom County has adopted measures that apply the GMA requirements about water under the local circumstances here. Further, the question is whether the *Kittitas* decision requires the County to change its other long-range planning (including residential density, LAMIRD designations, and other regulations such as lot coverage governing intensity of allowed usage) commensurate with water availability and water quality."[5]

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[3] AR 1635-1646.
[4] AR 1951-52, Second Order on Compliance at 1-2.
[5] AR 1385, *Hirst v. Whatcom County*, GMHB Case No. 12-2-0013, Final Decision and Order (June 7, 2013), at 23 of 51. Hereinafter FDO. The *Kittitas* decision refers to

The Board made a finding that there is "substantial evidence in the record about water availability limits and water pollution in rural Whatcom County,"[6] citing eleven Whatcom County-specific sources.[7] The Board then found that "the link between land development and water resources is well established,"[8] basing this finding on a discussion of the County-specific *2010 WRIA 1 State of the Watershed Report*[9] and two government reports.[10]

Based on "the evidence in the record about the extent and persistence of water pollution and lack of water availability in Whatcom County, and the need to integrate land use and water resource planning," the Board found that "the County has not employed effective land use planning that contains measures to protect water supply and water quality as required by the GMA."[11]

The Board found that these provisions demonstrate that the County requires no consideration of the legal availability of water prior to issuing subdivision approvals and building permits for projects that rely on

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Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd., 172 Wn.2d 144, 256 P.3d 1193 (2011).

[6] *Id.*

[7] AR 1385-90, *Id.* at 23-28 of 51.

[8] AR 1392, *Id.* at 30 of 51.

[9] AR 1392-93, *Id.* at 30-31 of 51. WRIA means "Water Resource Inventory Area" geographical areas which were established by Ecology following basin boundaries.

[10] AR 1393-96, *Id.* at 31-34 of 51.

[11] AR 1396-97, *Id.* at 34-35 of 51.

permit-exempt wells, even in closed sub-basins that do not meet instream flows. The Board found that the County's policies do not govern development in a way that protects rural character.[12] This conclusion is supported by the record. Between 1986 and 2011, permit-exempt wells in WRIA 1 increased 270 percent from an estimated 3,294 wells to an estimated 12,195 wells.[13] Approximately 77 percent of the increase was in the parts of WRIA 1 closed to the appropriation of water part or all of the year.[14] From 1986 to 2009, the Nooksack River failed to meet instream flows 72 percent of the time during the July-September flow period.[15] Not meeting the instream flows results in a loss of habitat connectivity, reduces habitat, strands juvenile salmon, increases instream temperatures, and decreases water quality.[16] Continued well water withdrawals "is in direct conflict with the guidance of the Salmonid Recovery Plan, which recommends reducing out of stream uses in sub-basins impacted by low stream flows."[17]

In addressing Policy 2DD-2.D.7, the Board found that "the record contains a letter provided by Ecology explaining the effect of closed

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[12] AR 1403-04, FDO at 41-42 of 51.
[13] AR 1803, Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

basins and instream flows on rural residential development."[18] Following a discussion of the letter and of GMA provisions, the Board found that, "according to Ecology, the County must deny a new permit for a new building or subdivision unless the applicant can demonstrate factually that a proposed new withdrawal from a groundwater body hydraulically connected to an impaired surface water body will not cause further adverse impact on flows."[19]

The Board's findings on water quality issues include determinations that protective policies are limited to specific areas of the County and do not apply throughout the Rural Area[20] and that regulations fail to protect water quality from faulty septic tanks.[21]

The Board remanded the Ordinance to the County to take the necessary action to achieve GMA compliance.[22] As stated in the Order, "the County has many options for adopting measures to reverse water resource degradation in its Rural Area through land use controls."[23]

In the Second Order on Compliance, the Board addressed whether Ordinance No. 2014-002 complied with the GMA, although the dearth of

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[18] AR 1403, FDO at 41 of 51.
[19] AR 1404, *Id.* at 42 (emphasis added).
[20] AR 1398, FDO at 36 of 51 (addressing Policy 2DD-2.C.1); AR 1400, *id.* at 38 of 51 (addressing Policy 2DD-2.C.3); AR 1400-01, *id.* at 38-39 of 51 (addressing Policy 2DD-2.C.4); AR 11404-05, *id.* at 42-43 of 51 (addressing policies 2DD-2.C.8 and 2DD-2.C.9).
[21] AR 1398-1400, FDO at 36-38 of 51 (addressing Policy 2DD-2.C.2).
[22] AR 1412, *Id.* at 50 of 51.
[23] AR 1405, *Id.* at 43 of 51.

briefing and argument by the County on the substance of its position resulted in a brief analysis in the Second Order on Compliance:[24]

> During the compliance hearing, the County stated that while it did take legislative action, it is not claiming it is or is not in compliance with GMA. The County appealed the Board's June 7, 2013, FDO to the Court of Appeals and seeks the Court's decision on the County's status regarding GMA compliance. Thus, the County requested a stay or an extended compliance schedule. Petitioners raised numerous objections to the County's legislative action, objected to the request to stay compliance proceedings, and asked the Board to impose invalidity on certain County policies.
>
> The Board reviewed the County's legislative action and found it in continuing non-compliance for several reasons. Amendments in Ordinance 2014-002 did not change existing regulations found non-compliant by the Board's June 7, 2013, FDO. The existing regulations continue to apply water quality or quantity controls in **limited areas** of the County and do not apply measures to protect water quality or quantity throughout the Rural Area of the County. Further, the County made minor changes to Whatcom County policies such as changing "ground" water to water "rights" in reference to a Department of Ecology publication, referencing an existing development code requiring evidence of adequate water supply, and cross-referencing to a development code regarding land clearing activity in Water Resource Special Management Areas.[17] None of these actions meet the GMA requirement to impose measures governing land use and development to protect rural character by protecting water quality and quantity throughout Whatcom County's Rural Area. The Board finds the County **in continuing non-compliance**.
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> [17] County Compliance Report (February 28, 2014) Ex. R-165; Ex. A, Chapter 2 Land Use at 1-4.[25]

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[24] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); *Hirst v. Whatcom County* GMHB Case No, 12-2-0013 Transcript of Telephonic Compliance Hearing held April 1, 2014 pp. 5-15 & pp. 34-38. Hereinafter Compliance Hearing Transcript.

[25] AR 1956, Second Order on Compliance at 6 of 8 emphasis in the original.

These two paragraphs contain the entire legal reasoning on the merits of the order that Whatcom County appealed. As will be documented below, because the County failed to raise any of the issues in this case before the Board, this court must uphold the Board. If the Court decides to reach the merits, this the Court must uphold the Board on the merits.

III. ARGUMENT

A. Standard of Review

The Administrative Procedure Act (APA) governs judicial review of challenges to decisions by the Board.[26] "Courts apply the standards of the Administrative Procedure Act, chapter 34.05 RCW, and look directly to the record before the board."[27] The party challenging the Board decision (here Whatcom County) bears the burden of proving that the decision is invalid.[28] A court "shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of."[29]

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[26] *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005).
[27] *Kittitas County v. Eastern Washington Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011) ("*Kittitas*").
[28] *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002) *citing* RCW 34.05.570(1)(a); *Spokane County v. EWGMHB*, 176 Wn. App. 555, 564, 309 P.3d 673, 678 (2013).
[29] RCW 34.05.570(1)(d).

While the County's actions are presumed compliant unless and until a petitioner brings forth evidence that persuades a Board that the action is clearly erroneous, "deference to counties remains 'bounded … by the goals and requirements of the GMA.' The deference boards must give 'is neither unlimited nor does it approximate a rubber stamp.'"[30] Furthermore, "when it comes to interpreting the GMA, the same deference to counties does not adhere, and [courts] give substantial weight to a board's interpretation."[31]

Relief from a Board decision may be granted on nine different grounds under the APA. The County cites RCW 34.05.570(3)(b) and RCW 34.05.570(3)(e) as the basis for its arguments.[32]

Under the *de novo* review standard for questions of law in RCW 34.05.570(3)(d), "[s]ubstantial weight is accorded to a board's interpretation of the GMA, but the court is not bound by the board's interpretations."[33] Under RCW 34.05.570(3)(e) the court reviews the Board's order to determine if it 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

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[30] *Kittitas,* 172 Wn.2d at 156, 256 P.3d at 1199 (2011) (internal citations omitted).
[31] *Id.* (emphasis added).
[32] Opening Brief of Whatcom County at 9.
[33] *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008).

any additional evidence received by the court under this chapter[.]" Substantial evidence means "'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'"[34] The court "view[s] the evidence 'in the light most favorable to … "the party who prevailed in the highest forum that exercised fact-finding authority"' (in this case, Hirst and Futurewise). Doing so "'necessarily entails accept[ing] the factfinder's views regarding … the weight to be given reasonable but competing inferences.'"[35] 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.[36] The reviewing court does not weigh the evidence or substitute its view of the facts for that of the Board.[37]

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[34] *Id.* (internal quotation marks omitted), quoting *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091, 1094 (1998).

[35] *Spokane County v. EWGMHB*, 176 Wn. App. 555, 565, 309 P.3d 673, 678 (2013), *quoting City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 179 Wn.2d 1015, 318 P.3d 279 (2014).

[36] *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156, 1160 (2002).

[37] *Callecod v. Wash. State Patrol,* 84 Wn. App. 663, 676, 929 P.2d 510, 516 n. 9 (1997) *review denied Callecod v. Wash. State Patrol*, 132 Wn.2d 1004, 939 P.2d 215 (1997).

B. The County's Failure to Assign Error to Findings of Fact in Case No. 70796-5-I Made Them Verities on Appeal in That Case.

The County did not assign error to any of the Board's findings of fact in No. 70796-5-I.[38] Consequently, the Board's findings of fact are verities in that appeal.[39]

Astoundingly, the County attempts to assign error to the Board's Final Decision and Order which is the subject of case No. 70796-5-I in footnote 3 of its Opening Brief this case, Case No. 72132-1-I ("Opening Brief").[40] But RAP 10.3(a)(4) and (g) provides that the brief of the appellant or petitioner should include "[a] separate assignment of error for each finding of fact a party contends was improperly made ..." Whatcom County made no assignments of error in its Brief of Petitioner in case No. 70796-5-I. It cannot do so now, retroactively, for another case.

The County's Opening Brief then argues that *King County v. Central Puget Sound Growth Management Hearings Board*[41] allows a

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[38] App. Brief in Case No. 70796-5-I at 4-5.

[39] *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.* 113 Wn. App. 615, 628, 53 P.3d 1011, 1018 (2002), review denied *Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board,* 148 Wn.2d 1017, 64 P.3d 649 (2003)

[40] Opening Brief of Whatcom County at 3.

[41] *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wn. App. 1, 951 P.2d 1151, 1162 (1998) *aff'd in part, re'd in part on other grounds King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999).

party "to preserve a factual challenge" even of that party fails to comply with the RAPs.[42] This Court, in the *King County* decision, did conclude that King County had preserved an "issue" because even though "the County did not make any assignments of error in its brief, it included the challenge in its issues section."[43] Hirst and Futurewise did not argue that the County was precluded from raising an "issue" (a legal or factual question for the court to decide); we simply, and correctly, asserted that the Board's factual determinations are verities because the County did not assign error to them. Nothing in the *King County* decision undercuts this argument.

C. The County is Barred From Raising And Arguing The Issues It Raises in this Case Because It Did Not Argue Them Before the Board, as RCW 34.05.554 Requires.

Before the Board, the only briefing that Whatcom County filed was a three page Compliance Report or in the Alternative, Request for Stay of Compliance Schedule.[44] The County did not make any substantive argument in that report.[45] Nor did the County make any substantive arguments on the merits at the compliance hearing, although the issue of

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[42] *Id.* at 3, fn. 3

[43] *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wn. App. 1, 20-21, 951 P.2d 1151, 1162 (1998) *aff'd in part, re'd in part on other grounds King County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999).

[44] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014).

[45] *Id.*

whether the Board could and should grant a stay was vigorously argued by the County.[46] The County chose not to appeal this issue, which is not before the Court in this case.

The County did not argue either Issue 1 or Issue 2 identified in the County's Opening Brief on page 4.[47] The County did not present to the Board any arguments from its briefing in Case No. 70796-5-I, which the County now urges this Court to consider.[48] The County did not argue that the Board erred in concluding that Ecology has historically taken a more restrictive approach towards permit-exempt wells in Water Resource Area (WRIA) 1 than the approach taken by the County.[49] And, of course, the County did not discuss or rely on the Ecology Amicus Brief filed in Case No. 70796-5-I, because Ecology did not file this brief until after the Second Compliance Order was issued.[50]

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[46] Compliance Hearing Transcript pp. 5-15 & pp. 34-38.
[47] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.
[48] Opening Brief of Whatcom County at 4, 9, and 10; AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.
[49] Opening Brief of Whatcom County at 11; AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.
[50] The County concedes this point. Opening Brief of Whatcom County at 12. We also note that the Ecology amicus brief has not been filed in <u>this</u> case (72132-1-I) and is therefore not properly before this Court.

The County complains that "the Board did not discuss or even mention" the evidence attached to the County's Compliance Report in the Board's Second Compliance Order.[51] The reason is that the County never used this evidence in argument during its appearance before the Board.[52] The Second Compliance Order sums up the County's position and arguments as to compliance with the GMA: "During the compliance hearing, the County stated that while it did take legislative action, it is not claiming it is or is not in compliance with GMA."[53] At the very least, it would have been appropriate for the County to have claimed that it was in compliance, in order to provide a basis for an appeal.

RCW 34.05.554 provides in full that:

> (1) Issues not raised before the agency may not be raised on appeal, except to the extent that:
>
> (a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;
>
> (b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;
>
> (c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

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[51] Opening Brief of Whatcom County at 11.

[52] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.

[53] AR 1956, Second Order on Compliance at 6 of 8. This statement is supported by substantial evidence, and the County's Opening Brief does not argue to the contrary. Compliance Hearing Transcript pp. 5-15 & pp. 34-38.

> (d) The interests of justice would be served by resolution of an issue arising from:
>
> (i) A change in controlling law occurring after the agency action; or
>
> (ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.
>
> (2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

None of these factors applies in this case. Since the County's issues on appeal were not raised before the Board as part of the Second Compliance Order proceedings, they cannot be raised in this judicial review. None of the exceptions to RCW 34.05.554 apply here.

The County's attorney filed its Compliance Report or in the Alternative, Request for Stay of Compliance Schedule with the Board.[54] The County's attorney telephonically attended the compliance hearing.[55] The County could have raised these arguments before the Board, but chose not to.[56] Therefore, the County could have reasonably discovered the facts giving rise to the issues in this appeal and, in fact, had discovered those facts. This case is not a rule challenge so RCW 34.05.554(1)(b) does not apply. The County's attorney was notified of the adjudicative proceeding

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[54] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014).
[55] Compliance Hearing Transcript pp. 5-15 & pp. 34-38.
[56] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.

on behalf of the county, so RCW 34.05.554(1)(c) does not apply.[57] There has been no change in controlling law related to these issues and the County has not cited any in its Opening Brief.[58] The Board did not issue its Second Compliance Order after the County exhausted its opportunity for relief.

In short, the County had the opportunity to brief and argue for the relief it wanted; it simply failed to do so. [59] So RCW 34.05.554(1)(d) does not apply.

Under RCW 34.05.554, this Court cannot consider the issues identified above. This disposes of the County's issues in the case. Even if the County were allowed to present the two issues for the first time in this appeal, its arguments would fail for all of the reasons described below.

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[57] AR 1614-15, *Hirst v. Whatcom County*, GMHB Case No. 12-2-0013, Compliance Order: Finding Continuing Noncompliance, Extending Compliance Schedule, Supplementing the Record and Denying Invalidity (Jan. 10, 2014) at 9 of 9 and Declaration of Service at 1 of 1; AR 1948-50, *Hirst v. Whatcom County*, GMHB Case No. 12-2-0013, Compliance Hearing Agenda and Declaration of Service at 1 of 1.
[58] Opening Brief of Whatcom County at 8-12.
[59] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.

D. County's Issue 1: "Did the Board err by ruling that the GMA requires the County, when making water availability determinations, to adopt a legal interpretation of the controlling water resources regulations that is independent of and inconsistent with Ecology's interpretation?"[60]

Whatcom County does not cite to any text in the Second Compliance Order requiring Whatcom County to adopt an interpretation of the Water Resource Inventory Area (WRIA) 1 instream flow rule inconsistent with Ecology's interpretation of the rule.[61] In fact, the County never cited to the instream flow rule in its brief or argument before the Board.[62] And the Board did not order the County to take an action inconsistent with Ecology's instream flow rule in the Second Compliance Order.[63] So substantial evidence supports the Board's decision on this issue.

Whatcom County also failed to cite the WRIA 1 instream flow rule, Chapter 173-501 WAC, in its briefing before this Court.[64] Whatcom County has not explained how the Second Order on Compliance is inconsistent with that rule.[65] Whatcom County has utterly failed to meet its burden on this issue.

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[60] Opening Brief of Whatcom County at 4.
[61] Opening Brief of Whatcom County at 1-12.
[62] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.
[63] AR 1956, Second Order on Compliance at 6 of 8.
[64] Opening Brief of Whatcom County at 10-12.
[65] *Id.*

The County then turns to "additional evidence" – evidence which, significantly, the County did not bother to raise before the Board.[66] What does it actually say? Do the letters say that water is physically and legally available to the proposed developments? No, none of the letters says that.[67] Do the letters say that the proposed developments are consistent with the WRIA 1 instream flow rule, Chapter 173-501 WAC? No, none of the letters says that.[68] In fact, five of the letters state that the developments may not qualify for permit-exempt well systems and a water right may be required.[69]

The County may be attempting to extrapolate from what the letters do not say. The County may want this Court to deduce that, because the letters do not say that permit-exempt wells have to comply with the

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[66] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.

[67] AR 1652-53, Ecology Letter to Whatcom County Re: Woodfern Cluster Long Plat pp. 1-2 (Nov. 21, 2007); AR 1654-55, Ecology Letter to Whatcom County Re: Portal Way Industrial Park Short Plat and Shen Industrial Park Short Plan pp. 1-2 (Feb. 19, 2009); AR 1656-57, Ecology Letter to Whatcom County RE: LA File # SEPA 2008-00087 pp. 1-2 (July 15, 2010); AR 1658-59, Ecology Letter to Marvin Van Mersberden, et al. pp. 1-2 (Sept. 23, 2010); AR 1660-61, Ecology Letter to Whatcom County RE: LA File # SEPA 2011-00082 pp. 1-2 (Dec. 14, 2011); AR 1662-63, Ecology Letter to Whatcom County RE: LA File # SEPA 2009-00034 p. 1-2 (March 8, 2011).

[68] *Id.*

[69] AR 1652-53, Ecology Letter to Whatcom County Re: Woodfern Cluster Long Plat pp. 1-2 (Nov. 21, 2007); AR 1654-55, Ecology Letter to Whatcom County Re: Portal Way Industrial Park Short Plat and Shen Industrial Park Short Plan pp. 1-2 (Feb. 19, 2009); AR 1656-57, Ecology Letter to Whatcom County RE: LA File # SEPA 2008-00087 pp. 1-2 (July 15, 2010); AR 1658-59, Ecology Letter to Marvin Van Mersberden, et al. pp. 1-2 (Sept. 23, 2010); AR 1660-61, Ecology Letter to Whatcom County RE: LA File # SEPA 2011-00082 pp. 1-2 (Dec. 14, 2011).

instream flow rule, the County does not need to address the impacts of permit-exempt wells. But the letters also do not say that required water rights have to comply with instream flow rules, either.[70] The instream flow rule does apply to water right permits, this is uncontested.[71] The letters do not mention that if the five developments that Ecology believes may need a water right apply for a water right and Ecology grants the permit, then the instream flows will apply to the approved water right permits. Furthermore, and more to the point, the letters say nothing about the County's duties under the GMA.[72] The bottom line is that these six letters do not provide evidence of the applicability of the instream flow rule, or of the GMA, to the issues in this case.[73] The County's silence before the Board accurately reflected the evidentiary value of the letters that it failed to address.[74]

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[70] *Id.*
[71] WAC 173-501-030(4);(5).
[72] AR 1652-53, Ecology Letter to Whatcom County Re: Woodfern Cluster Long Plat pp. 1-2 (Nov. 21, 2007); AR 1654-55, Ecology Letter to Whatcom County Re: Portal Way Industrial Park Short Plat and Shen Industrial Park Short Plan pp. 1-2 (Feb. 19, 2009); AR 1656-57, Ecology Letter to Whatcom County RE: LA File # SEPA 2008-00087 pp. 1-2 (July 15, 2010); AR 1658-59, Ecology Letter to Marvin Van Mersberden, et al. pp. 1-2 (Sept. 23, 2010); AR 1660-61, Ecology Letter to Whatcom County RE: LA File # SEPA 2011-00082 pp. 1-2 (Dec. 14, 2011); AR 1662-63, Ecology Letter to Whatcom County RE: LA File # SEPA 2009-00034 p. 1-2 (March 8, 2011).
[73] *Id.*
[74] AR 1631-33, Whatcom County Compliance Report or in the Alternative, Request for Stay of Compliance Schedule (Feb. 28, 2014); Compliance Hearing Transcript pp. 5-15 & pp. 34-38.

There is no mystery to the fact that Hirst and Futurewise disagree with Whatcom County and Ecology over the proper legal interpretation of Chapter 173-501 WAC and over whether compliance with that regulation is sufficient to comply with RCW 36.70A.070(5)(c). This Court will likely decide that dispute in Case No. 70796-5-I.

But what matters for the purposes of this case is that these letters in no way establish that Ecology believes that applications dependent on permit-exempt wells in the basins closed by Chapter 173-501 WAC comply with that regulation when they use water inconsistent with the instream flow rules. It is important to bear in mind that the Board had not received Ecology's *amicus* brief.[75]

There is no question that permit-exempt wells are adversely affecting water resources. Between 1986 and 2011, permit-exempt wells in WRIA 1 increased 270 percent from an estimated 3,294 wells to an estimated 12,195 wells.[76] Approximately 77 percent of the increase was in the parts of WRIA 1 closed to the appropriation of water part or all of the year.[77] From 1986 to 2009, the Nooksack River failed to meet instream

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[75] The Hirst and Futurewise Petitioners strongly disagree with the legal reasoning in that brief and will be filing a timely answer.
[76] AR 1803, Northwest Indian Fisheries Commission, *2012 State of Our Watersheds* at 80.
[77] *Id.*

flows 72 percent of the time during the July-September flow period.[78] Continued well water withdrawals "is in direct conflict with the guidance of the Salmonid Recovery Plan, which recommends reducing out of stream uses in sub-basins impacted by low stream flows."[79]

In short, for Issue 1, substantial evidence supports the Board's Second Order on Compliance and the Board did not misinterpret or misapply the GMA. The Court should uphold the Board.

E. County's Issue 2: "Did the Board err by ruling that the County's measures to protect surface and ground water quality do not comply with the GMA on the basis of evidence of pre-existing water quality problems whose causes are multi-faceted and beyond the rural development that is the subject of the County's measures?"[80]

The Washington State Supreme Court's *Kittitas* decision addressed the mandate that "[t]he GMA includes requirements that counties consider and address water resource issues in land use planning."[81] The court determined that "[i]n fact, several relevant statutes indicate that the County *must* regulate to some extent to assure that land use is not inconsistent with available water resources."[82] The Supreme Court

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[78] *Id.*
[79] *Id.*
[80] Opening Brief of Whatcom County at 4.
[81] *Kittitas,* 172 Wn.2d at 175 ("*See, e.g.,* RCW 36.70A.020(10) (GMA goal to protect the environment, including "water quality [ ] and the availability of water"), .070(1) (requiring that land use elements "shall provide for protection of the quality and quantity of groundwater used for public water supplies"), (5)(c)(iv) (requiring that rural elements include measures "[p]rotecting ... surface water and groundwater resources")).
[82] *Kittitas*, 172 Wn.2d at 178 (emphasis in original).

concluded that "the County is not precluded and, in fact, is required to plan for the protection of water resources in its land use planning."[83]

These requirements include RCW 36.70A.070(5)(c)(iv)'s requirement that the "rural elements include measures '[p]rotecting ... surface water and groundwater resources[.]'"[84] The Washington State Supreme Court also concluded that "the GMA is clear that protective measures shall be included in the Plan. RCW 36.70A.070(5)(c)."[85]

Instead of comprehensively addressing the County's serious water quantity and quality issues on remand, Whatcom County adopted Ordinance No. 2014-002, making five minor amendments to its rural element.[86] We will address each amendment in turn.

1. The amendment to Policy 2DD-2.C.4 referencing Whatcom County Code (WCC) 20.80.631 through 20.80.636

Whatcom County Comprehensive Plan Policy 2DD-2.C.4 was amended to reference all of the storm water regulations in WCC 20.80.630 through WCC 20.80.636. Adequate protection for surface water, groundwater, and rural character only exist in the "storm water special

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[83] *Id.* at 179 underling added.
[84] *Id.* at 175.
[85] *Id.* at 164.
[86] AR 1405, FDO at 43 of 51; AR 1643-46, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments pp. 1 to 4 of 4.

districts" listed in WCC 20.80.635.[87] They are not available outside these areas.

Hirst and Futurewise presented additional evidence to the Board that the County's regulations do not adequately protect surface water, groundwater, and rural character. There is a map showing the (very limited) boundaries in which the NPDES Phase II stormwater requirements apply.[88] The map shows that stormwater protection does not address most of the rural area. A second map shows the relationship between the NPDES Phase II stormwater limits and the polluted Sumas-Blaine aquifer, again establishing that the County's water quality protections do not extend to the whole rural area.[89]

As the FDO noted,[90] the Washington State Department of Fish and Wildlife's report *Land Use Planning for Salmon, Steelhead and Trout*[91] identifies problems and options to address those problems, and the County has not addressed those options. The Puget Sound Partnership 2012-2013

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[87] AR 1644-46, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 2 of 4; AR 1400-01, FDO at 38 – 39 of 51. WCC 20.80.630 through WCC 20.80.636 are at AR 1696-99.
[88] AR 1747, Whatcom County NPDES Phase II Area – September 2012.
[89] AR 1748, NPDES & Sumas-Blaine Aquifer.
[90] AR 1393-94, FDO at 31 – 33 of 51.
[91] AR 1904, 1915-16, 1928, 1947, Washington State Department of Fish and Wildlife, *Land Use Planning For Salmon, Steelhead And Trout: A land use planner's guide to salmonid habitat protection and recovery* at 22, 39-40, 77, 132 (stakeholder review process) (October 2009).

Action Agenda [92] further describes specific activities that Whatcom County should (but has not) undertaken.

Ample evidence establishes that the County's existing regulations do not protect surface and ground water. Revised Policy 2DD-2.C.4 fails to comply with the GMA.

2. The amendment to Policy 2DD-2.C.7 changing "Washington State Department of Ecology Ground Water Requirements" to "Washington State Department of Ecology Water Right Requirements"

Ordinance No. 2014-002 amended Policy 2DD-2.C.7 changing "Washington State Department of Ecology Ground Water Requirements" to "Washington State Department of Ecology Water Right Requirements."[93] Despite this name change, Policy 2DD-2.D.7 still only applies to "purveyors of public water systems and private water system applicants," not permit-exempt well users.[94] Therefore, this amendment does not address the noncompliance identified by the Board in the Final Decision and Order.

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[92] AR 1395-96, FDO at 33-34 of 51; AR 1841, 1844-45, 1854-67, Puget Sound Partnership, *The 2012/2013 Action Agenda for Puget Sound* at 28, 37-38, 343-56 (Aug. 28, 2012).

[93] AR 1645, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 3 of 4.

[94] AR 1645, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 3 of 4; AR 1403, FDO 41 of 51.

Permit-exempt wells continue to violate the GMA's Rural Element provisions, as demonstrated by these excerpts from the evidence of permit-exempt well adverse impacts relied upon by the Board:

> In its 1999 Water Resource Plan, the County reported a proliferation of rural residential exempt wells already created —difficulties for effective water resource management[79] by drawing down underlying aquifers and reducing groundwater recharge of streams. Petitioners document 1,652 wells have been drilled within closed basins since 1997 and argue that despite basin closures, 637 water right applications were pending as of March 2011.[80]
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> ...
>
> A 2012 Northwest Indian Fisheries Commission report[82] shows that 77% of the increase in exempt wells in WRIA 1 has taken place in basins closed year round or seasonally to water withdrawal.
>
> [79] *Ex. C-671-D*, Whatcom County Water Resource Plan, at 49.
> [80] See Petitioners' Prehearing Brief at 13-14 and extensive documentation from well logs and other data.
> [82] *Ex. R-152.*[95]

The County's own planning document for agriculture states: "With the existing water allocations, plus the requirement to maintain minimum instream flows, an additional 26,000 dwelling units (with wells – or needing water from water districts) placed in unincorporated Whatcom County would be detrimental to agricultural operations, the environment,

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[95] AR 1403, FDO at 41 of 51. The cited 2012 Northwest Indian Fisheries Commission report *2012 State of Our Watersheds Report* Chapter 5: The Lummi Nation – WRIA 1 (Mountains to the Sea) pp. 75-86 is at AR 1798-1809.

and wildlife including salmon that require the minimum stream flows to survive."[96] The County's own evidence shows that 3,101 single family residential permits have been issued between 2000 and 2012, many in closed watersheds.[97]

By failing to address water demands in closed watersheds, Policy 2DD-2.D.7 remains out of compliance with RCW 36.70A.070(5)(c)(iv).

3. The amendment adopting new Policy 2DD-2.C.9 requiring evidence of an adequate water supply for building permits

Ordinance No. 2014-002 amended Policy 2DD-2.C by adding a new section ".8." The new section references existing WCC 24.11.060.[98]

WCC 24.11.060 requires a building permit applicant to provide the County with "evidence of an adequate water supply." It is critical to note, however, that the standards for an adequate water supply are in WCC 24.11.090(B)(3), WCC 24.11.100(D)(3), WCC 24.11.110(D)(3), and WCC 24.11.120(D)(3). These provisions all use the same standard: the water source "proposed by the applicant does not fall within the

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[96] AR 1824-25, Whatcom County, *Summary of the Impediments and Opportunities Related to Agricultural Planning in Whatcom County* pp. 2 – 3 of 15.
[97] AR 1813-14, Mark Personius, Long Range Planning Manager Whatcom County, *How Does Water Figure into Land Use Planning?* at 3-4.
[98] AR 1645, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 3 of 4.

boundaries of an area where DOE has determined by rule that water for development does not exist."[99]

The Board had already found that this standard is the wrong standard. As the Board reasoned in the FDO:

> In *Postema v. Pollution Control Hearings Board*,[148] the Supreme Court made clear that where Ecology has administratively by adoption of rules closed a surface water body as in much of Whatcom County, and an applicant intends to rely on a new withdrawal from a hydraulically connected groundwater body, new water is no longer legally available for appropriation and the application must be denied. Likewise where Ecology has set minimum instream flow by rule, as in Nooksack WRIA 1, subsequent groundwater withdrawals may not contribute to the impairment of the flows.[149]
>
> Whatcom County's regulations only allow approval of a subdivision or building permit that relies on a private well when the proposed well site "does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[150] This restriction falls short of the *Postema* standard, as it does not protect instream flows from impairment by groundwater withdrawals.
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> [148] 142 Wn.2d 68, 90, 95, 11 P.3d 726 (2000).
>
> [149] 142 Wn.2d at 81, 93. While a ground water withdrawal must be denied or otherwise not allowed if the groundwater is in continuity with a —closed surface water, a ground water withdrawal in continuity with a surface water that has minimum instream flows must be denied or otherwise not allowed if other pertinent factors show that the continuity would cause impairment, such as number of days the instream flows are not met and whether it is upstream or downstream from or higher or lower than the surface water flow or level.
>
> [150] WCC 24.11.090(B)(3); WCC 24.11.160(D)(3); WCC 24.11.170(E)([3]).[100]

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[99] AR 1708, WCC 24.11.090(B)(3); AR 1711, WCC 24.11.100(D)(3); AR 1714, WCC 24.11.110(D)(3); and AR 1716, WCC 24.11.120(D)(3).

[100] AR 1402, FDO at 40 of 51.

The County's "Water Availability Notifications" for "1 Home Well,"[101] "2 Home Well,"[102] and "Group B Packet"[103] do not require any determination of the legal availability of water. Furthermore, the County has no way to address the fact that, "[f]rom the review of compiled public water system information, it appears that 326 public water systems do not have water rights."[104]

There is substantial evidence of the adverse effects of groundwater withdrawals on streamflows, including evidence that "[g]roundwater withdrawals can affect streamflows within the Lower Nooksack Subbasin even when those withdrawals occur outside the subbasin boundary"[105] and evidence that the County's failure to address water quality has adversely affected water quantity, because "[c]hanges in land cover and land use have resulted in increased impervious surfaces and increased drainage which contribute to decreased infiltration, increased surface runoff and decreased baseflow."[106] Because Policy 2DD-2.C.8 relies on a noncompliant standard, it fails to comply with RCW 36.70A.070(5)(c)(iv).

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[101] AR 1750-60, Whatcom County Hearing Department, Water Availability Notification to Obtain Building Permit Private – 1 Home Well.
[102] AR 1762-73, Whatcom County Hearing Department, Water Availability Notification to Obtain Building Permit Non-Group B – 2 Home Well.
[103] AR 1778, Whatcom County Health Department Procedure for Application of Group B Water System p. *4 (only requires a water right permit for 7 homes or more).
[104] AR 1794, WRIA 1 Groundwater Data Assessment p. 91 (June 2013).
[105] AR 1789, Lower Nooksack Water Budget p. 19 (June 2013).
[106] AR 1784, *Id.* at p. 14.

The Board correctly found that this amendment failed to comply with the GMA.

4. The amendment adopting new Policy 2DD-2.C.9 requiring evidence of an adequate water supply for proposals using a well, spring, or surface water

Ordinance No. 2014-002 amended Policy 2DD-2.C, adding a new section ".9" which purports to address the water supply for proposals using a well, spring, or surface water for potable water.[107] Unfortunately, this policy uses the same clearly erroneously standard described in the previous section, only applying when the water source "proposed by the applicant does not fall within the boundaries of an area where DOE has determined by rule that water for development does not exist."[108] For the reasons documented in Section III E.3 above, this standard violates RCW 36.70A.070(5)(c)(iv).

5. The amendment adopting new Policy 2DD-2.C.12 calling on the county to maintain standards for clearing activity in limited parts of the rural area and adopting WCC 20.80.735 by reference

Ordinance No. 2014-002 amended Policy 2DD-2.C, adding a new section ".12", which directs the County to maintain standards for clearing activity in limited parts of the rural area and adopting WCC 20.80.735 by

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[107] AR 1645, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 3 of 4.
[108] AR 1708, WCC 24.11.090(B)(3); AR 1711, WCC 24.11.100(D)(3); AR 1714, WCC 24.11.110(D)(3); and AR 1716, WCC 24.11.120(D)(3).

reference.[109] While we recognize the value of the tree retention requirements and clearing limits in WCC 20.80.735, these provisions only apply to part of the rural area. The rest of the rural area is unprotected.[110]

Policy 2DD-2.C.12 only applies to "highly valued water resource areas, environmentally sensitive areas, or areas where natural conditions are so unstable" clearing can result in hazardous conditions.[111] It excludes areas where tree cover will "slow the rate of water entering streams and buffer peak stream flow conditions[.]"[112] Those areas, which are essential to water quality, remain unprotected. This is important because most of the vegetation in rural Whatcom County is rated "poor," and this poor quality vegetation affects the quality of the water and water storage capabilities.[113] Furthermore, a recent peer-reviewed journal article in *Freshwater Biology* specifically examined lowland streams in Whatcom County, adding additional evidence showing that the County's riparian

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[109] AR 1645, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 3 of 4.
[110] AR 1400, FDO at 38 of 51.
[111] AR 1645, Whatcom County Ordinance No. 2014-002 Exhibit A: Comprehensive Plan Amendments p. 3 of 4.
[112] AR 1893, Carol J. Smith, Ph.D., *Salmon and Steelhead Habitat Limiting Factors in WRIA 1, The Nooksack Basin* p. 185 (Washington State Conservation Commission: July, 2002).
[113] AR 1881 & 1883, *Id.* at p. 173 & p. 175.

buffers are not sufficient to restore stream conditions in catchment areas subject to intensive land use.[114]

Like other protective measures that only apply to part of the County's rural area, new Policy 2DD-2.C.12 does not bring the county into compliance with RCW 36.70A.070(5)(c)(iv).

Given that "[d]uring the compliance hearing, the County stated that while it did take legislative action, it is not claiming it is or is not in compliance with GMA[,]"[115] and the argument and evidence cited above, the Board's conclusion that the amendments adopted by Ordinance No. 2014-002 continue to violate the GMA is supported by substantial evidence and properly interpreted and applied the GMA. The Court should uphold the Board's Second Order on Compliance.

Finally, if the Court takes up the County's invitation to rely on the County's briefing in Case No. 70796-5-I on either or both of the issues in addition to its Opening Brief, Hirst and Futurewise respectfully request that the Court also rely on the Appellants' Brief & Brief of Respondents Eric Hirst, Laura Leigh Brakke, Wendy Harris and David Stalheim, and Futurewise pages 5-11 and pages 14-44 in addition to this brief.

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[114] AR 1736-43, Wahl *et al.*, *Impacts of land use at the catchment scale constrain the habitat benefits of stream riparian buffers* 58 FRESHWATER BIOLOGY 2310 pp. 2314-21 (2013).
[115] AR 1956, Second Order on Compliance at 6 of 8.

IV. CONCLUSION

Respondents respectfully request that the Court of Appeals uphold the Growth Management Hearings Board's Second Compliance Order. As this brief has shown, the issues in this appeal were not raised by the County to the Board and so cannot be raised in this Court. If they could be raised, as this brief has shown, substantial evidence supports the Second Compliance Order and the Board properly interpreted and applied the GMA.

Respectfully submitted on this 17th day of October, 2014.

NOSSAMAN LLP	FUTUREWISE
/s/ Jean O. Melious Authorized by email	
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CERTIFICATE OF SERVICE

I, Tim Trohimovich, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on October 17, 2014, I caused the following documents to be served on the following parties in the manner indicated: Respondents' Brief of Hirst, *et al.* and Futurewise in Case No. 72132-1-I.

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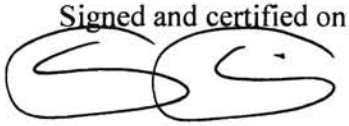
Signed and certified on this 17th day of October, 2014,



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